



## **Snowden, Surveillance and Whistleblowing: Unlearned Lessons and Unfinished Business**

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It's been the better part of a decade since NSA contractor-turned-whistleblower Edward Snowden first revealed massive U.S. government surveillance of our phone communications. The additional disclosures that followed led to no meaningful public Congressional hearings into Snowden's revelations; a cynical, totally ineffectual law that didn't actually stop much, if any, of the mass telephone surveillance; and lots of attacks on the whistleblower himself—not just from his former government employers, but from multiple House and Senate members, as well as some in the press.

Long time *Washington Post* reporter and occasional columnist Walter Pincus averred that “A real whistleblower would have selected the documents to be published, made certain that they didn't harm security and remained in the country to face the consequences of his actions.” Interestingly, Pincus left out any mention of the high-profile attacks mounted by the federal government against an earlier group of NSA whistleblowers who did “follow the rules”. Then-House Intelligence Committee Chairman Mike Rogers (R-MI) claimed to ABC News that Snowden “contacted a foreign country and said, ‘I will sell you classified information for something of value.’” The Department of Justice indictment of Snowden made no such claim, but DoJ's case was essentially summed up by then-Senator Mark Udall (D-CO) who, also talking to ABC, said of Snowden “he broke his oath. He broke the law.” The bipartisan duo were never asked, and did not offer on their own, how much they knew about the illegal surveillance Snowden exposed. In the years since, many have asked why Snowden didn't take his concerns about illegal domestic spying up the NSA chain of command. In his memoir, *Permanent Record*, he gave the perfect answer (p. 235): “My superiors were not only aware of what the agency was doing, they were actively directing it—they were complicit.”

Snowden understood—as every prospective national security whistleblower should—that going through existing channels is more likely to lead to career retaliation and silencing without the public ever learning of the misdeeds the whistleblower witnessed and wanted to expose in the hope of correcting the problem or ending the illegal activity. It was a lesson de facto whistleblower and then-Lieutenant Colonel Alexander Vindman learned the hard way in the “Ukrainegate” affair during the Trump administration.

In a system where power almost always triumphs over the law and basic morality, it’s fair to ask whether it’s even possible to construct a mechanism whereby a whistleblower can make a disclosure without either violating an existing statute, losing their job, going into exile, or all three. I believe there is a way, but it requires a complete paradigm shift in the prevailing toxic power-over-principle structure existing in the federal government and current federal law.

I’ve drafted model legislation that would (hopefully) accomplish this goal.

The first major change it would make is to criminalize classifying any government record to conceal waste, fraud, abuse, mismanagement or criminal conduct. While there is an executive order that contains such language, it’s never enforced. In fact, I’m not aware of single instance in which an executive branch official has ever been investigated for classifying a document to hide misconduct, much less having been fired or prosecuted for it.

The perversity of the current system is that a Chelsea Manning or Edward Snowden can be prosecuted for exposing war crimes or mass surveillance previously concealed by the active, affirmative misuse of the existing government classification system. My proposal would not only make it a crime to misuse the classification system in this way, it would automatically redesignate such fraudulently classified documents as unclassified and require their release to the public.

My second proposed change would dramatically expand the number of lawful pathways for a whistleblower to make a disclosure—including to their own House member or Senator.

This change would shatter the current paradigm, in which, for example, CIA whistleblowers are initially forced to go to their parent agency or department’s inspector general office, as the current Intelligence Community Whistleblower Protection Act requires. The current system is the real-life whistleblower equivalent of the fox guarding the hen house—a completely untenable situation that is designed to discourage whistleblowing in the first place.

The third major change my proposal would make is to require a public report, with a classified annex where necessary, for every whistleblower complaint made under the new system.

If the entity receiving the complaint does not publicly announce within 72 hours of receiving the complaint that it has opened an investigation, the whistleblower would be free to publicly disclose the complaint and underlying information with complete immunity from prosecution. If the receiving entity does announce an investigation, it has 180 days to make its findings public, otherwise the whistleblower is free to do so themselves after the 180-day mark, again with complete prosecutorial immunity. The idea here is two-fold: force the receiving entity to act on the complaint in a timely way and give the whistleblower the ability to safely make the information public if the government fails to act on the complaint.

Finally, my proposal would make it a federal felony, with a mandatory minimum sentence of 10 years and a \$1,000,000 fine, for any act of retaliation against a whistleblower by any federal official or federal government contractor—including the President of the United States. Had this provision been law during the Trump administration, Mr. Trump himself could have been prosecuted while still in office for his retaliation against Vindman.

Washington Establishment types will call this proposal “radical” or “unworkable”. What’s radical and unworkable is the status quo: a system that protects federal officials who commit criminal acts under a cloak of secrecy while using the legal system to prosecute and persecute those seeking to expose their crimes. If we are to actually be a nation of laws where principle triumphs over power, the existing corrupt, anti-whistleblower system we have now must go.

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