Preface

This book became more personal than I anticipated. As I wrote, I began to see how deeply whistleblowers and whistleblower laws had influenced my life, as well as my career. In retrospect, I understand how the events that I experienced and observed represented profound changes in the perceptions of, and protections for, those individuals we now call whistleblowers. In turn, I see how those changes increasingly influence law and policy.

Like others, when I was younger, I often expected that changes would occur rapidly and that efforts at reform would come to immediate fruition. My earliest involvement with whistleblower laws confirmed this belief in transformation. The magnitude of early successes regarding whistleblower laws encouraged me to define setbacks, rejections, and reconsiderations of these laws as failures. Likewise, the dramatic events surrounding the first whistleblower laws, particularly the whistleblower provision of the Civil Service Reform Act of 1978, obscured the weaknesses or failures in those laws. More than 40 years after my introduction to whistleblowing and whistleblower laws, this book enabled me to see more clearly the path of my involvement and the arc of those laws.

In designing this book, I used a temporal description of whistleblower laws over nearly half a century as one of its organizing themes. That design rested on my belief that history informs both past and current events. As I wrote, I realized that this theme also required me to consider my personal history. The book brought together the history of these events and laws with my own. It educated me regarding the difficulty of unraveling those complementary remembrances. A reader will recognize that this weaving of the two offers perspective and context that gives significance to events and to the laws generated by them. A reader will also recognize that bias is the companion of experience and expertise. This bias arises not from intent or manipulation, but from familiarity. Just as general and personal histories are bound with one another, experience and bias walk together. This book has enabled me better to recognize these ties, a recognition that I believe comes in part from careful analysis.

The personal story evoked by these recollections is a modest one. Like other persons, I have written about whistleblower laws and participated in the development of those laws. My involvement was not greater than many others.
and less than some. For me, however, that personal story has animated my scholarly interests, influenced my perceptions of whistleblower laws, and stimulated my attention to this book. In turn, this book encouraged an examination of that personal story. I have come to see how my life is intertwined with whistleblowing.

In 1970, as a 26-year-old attorney, I began to work with a law firm that Ralph Nader established in Washington, DC. With me were 13 others, most of them, like me, recent graduates of law school. Nader’s reputation had been established by his book, *Unsafe at Any Speed*, and by the works of Nader’s Raiders, students who over summers conducted investigations of federal agencies. Our group was funded by the money that Nader received from General Motors to settle his suit for its surveillance of him following the publication of his book. That surveillance by General Motors led to hearings before the Senate Commerce Committee and established Nader as a national figure. I remember a ‘brown bag’ lunch in our offices at which Nader read excerpts from the reports filed by the private detectives hired to follow him. Subsequently, the attempts of governments and corporations to harass and undermine whistleblowers and citizen activists in ways similar to Nader’s treatment resonated for me. Unwanted surveillance followed disclosures by many whistleblowers.

My own experiences also resonated with those of whistleblowers. One day during the first weeks our offices were open, men in suits stood across the street from the entrance to our office building and openly photographed us as we entered and left it. About a year later, I met a federal employee at a restaurant to discuss information that he had about contracting and political abuses at the General Services Administration. During that dinner, he pointed out the man who had been following him. On a separate and unrelated occasion, I became convinced that I was being followed after I confronted the person I suspected of doing so.

Nader gave each of us a project in a field on which we were to concentrate our activities. Because I arrived later than many, several areas such as tax reform, insurance regulation, consumer protection, citizen and student organizing, and environmental law were already taken. Instead, I agreed to undertake a project on civil service reform. In fulfilling that undertaking, I interviewed many federal employees, some of whom would today be called whistleblowers.

In many instances I concluded that the disciplinary authority of federal agencies was often used not to punish those responsible for misconduct, particularly among higher-ranking employees, but to discipline those who objected to misconduct or who reported it. The civil service system in important instances did not use personnel authority to impose accountability, but to support conformity and engender silence. I choose the word ‘engender’ advisedly because
silence is more than the failure to speak – it marks an atmosphere that discourages criticism and restricts thought. Silence substitutes the license of informal practices and expectations for the restraints of law and ethics; this silence invites misconduct. Later when considering my examination of the practices of the United States Civil Service Commission, I realized that I had received hints of the extensive efforts of the Nixon Administration to undermine the federal civil service.

My project emphasized the failures of the United States Civil Service Commission and the need to hold government officials accountable for their misconduct. This project intersected with whistleblower protection, but it was my colleague, Peter Petkas, who conceived and organized the landmark Nader conference on whistleblowing. My proposal for civil service reform included protection of whistleblowers, and the proposed law that I drafted to do so was included in the book published from that conference.

Harrison Wellford, one of Nader’s Raiders, had written a draft of his book *Sowing the Wind*, a study of the Department of Agriculture that contained a discussion of the failure of the Department to support meat and poultry inspectors and to weaken inspection at processing plants. A poultry inspector sent a confidential letter to Nader regarding unsanitary conditions in the plant he inspected. After inquiry by Wellford to the Department of Agriculture regarding conditions in the plant, the Department, unaware of the source of the information, instructed the inspector to answer his own letter. Later that inspector, then identified as the source of the letter, believed he had suffered as a result of those disclosures. I volunteered to represent him in a grievance proceeding. I also represented another inspector who reported to the Associated Press unsanitary conditions in a different poultry processing plant. The day after the story appeared, the relevant regional office had ‘reviewed’ his personnel record and decided that he should be transferred from the plant at which he worked near his home in North Carolina to one in Puerto Rico. Alan Morrison, who had become the Director of Public Citizen Litigation, sought a preliminary injunction prohibiting the transfer, after which the Department of Agriculture withdrew the transfer order. I later testified before a committee of the House of Representatives regarding weaknesses in personnel practices in the reassignment of meat and poultry inspectors.

John Nestor, an outspoken physician at the Food and Drug Administration (FDA), had criticized the FDA leadership for pressuring reviewers to approve new drugs despite inadequate testing or the serious risks from them. The FDA ordered his transfer to a position where he would no longer review new drug applications. I represented him in a grievance proceeding, the only avenue available to challenge his transfer. My experiences confirmed a suspicion that such proceedings were unlikely to succeed. John Nestor assumed that he had little chance of winning but believed that he had to show the management of
the agency, as well as other reviewers of new drug applications, that he was willing to fight. In my enthusiasm and inexperience I was more optimistic. I also thought that the grievance process would bring to the surface information about how the transfer decision was made. He was right and I was wrong. After President Carter’s election, his transition team for the FDA discovered that the agency had withheld at the time of the hearing many of the documents and memoranda for which requests had been made.

John Nestor became one of the best-known FDA whistleblowers of the time. He testified before Congress regarding reorganization of the FDA and provided insights to Congress and to the public about the influence of the pharmaceutical industry at the agency. Nestor’s experience highlighted the need for independent external review of informal personnel actions used to retaliate against whistleblowers and influenced the proposed legislation that I later advocated. His story was included in Senator Patrick Leahy’s report on whistleblowing that was considered by Congress during the enactment of the whistleblower provision of the Civil Service Reform Act of 1978.

In September 1972, I became an assistant professor of law at American University’s Washington College of Law (WCL). I have remained a faculty member at WCL for 40 years. In my first years, my writing and research principally concerned public employment law more generally. Those years were also marked by the Watergate scandal, the constitutional crisis that accompanied it, and the resignation of President Nixon. In response to that crisis, I participated in congressional consideration of the 1974 amendments to the federal Freedom of Information Act, particularly the sanctions provision that allowed the discipline of agency officials who arbitrarily or capriciously withheld requested information. In 1975, I testified regarding the first whistleblower protection law considered for federal employees, a proposal that linked those protections to the Freedom of Information Act. In 1977, I published an article advocating statutory recognition of the right of public employees to disobey illegal orders, a right included in the Whistleblower Protection Act in 1989 and now incorporated into the law of several states.

The whistleblower provision of the Civil Service Reform Act of 1978 was a tipping point for whistleblower laws. I testified in the House of Representatives on Reorganization Plan No 2 that framed the reform legislation, and with Ralph Nader in the Senate regarding the reform legislation and the whistleblower provision. During this period I also worked with the chief lobbyist for Public Citizen, Andrew Feinstein, on the legislation regarding a number of proposed amendments and changes in the legislation. After its passage, I wrote an article discussing interpretative problems that might arise in the application of the whistleblower provision.

At the time, I did not fully appreciate the implications and effects of the law. I had worked on similar proposed legislation for a number of years and it
seemed like another step in a long process which I measured as much by my involvement as by an understanding of its import. This book has allowed me to examine more analytically and less personally the magnitude of the changes that I observed and the reasons for them. The book has enabled me to reconsider that law, including parts of it that I supported. This assessment has permitted me to understand how choices made then continue to reverberate decades later.

The Washington College of Law has provided opportunities to live and study in other countries. The international aspect to my work is a fortuity of my position at the school. In 1979 and 1980, as Scholar-in-Residence with the law faculty of King’s College of the University of London, I conducted a year-long study of public service ethics in Britain. A fair part of this study considered whistleblowing in Britain. For a number of reasons, I concluded that Britain was unlikely to enact any form of whistleblower law, a prediction that proved true for more than a decade and a half.

In 1990, I looked at the role of public employment law in the transition to democracy in Chile, with some attention to the right to disobey illegal orders. In 2001, as a visiting professor with the law faculty of Ritsuemakian University in Kyoto, Japan, I was able to meet with many lawyers and activists familiar with freedom of information and whistleblower protection in that country. In 2009, while I was a visiting academic with the law faculty of Monash University in Melbourne, Australia, I benefitted from discussions with leading Australian academics working on whistleblower laws and with representatives of a national association of whistleblowers. Such exposures were humbling in that they challenged assumptions with sophisticated analysis. They were also enabling because they taught me as much about whistleblower laws in my country as those in other nations. These opportunities sharpened my assessment of laws in the United States and illuminated aspects of law and practice here.

The fortuity of my position at the Washington College of Law opened possibilities to work with international and regional organizations regarding whistleblower laws. In the last decade, I served as a consultant to the Office of Legal Cooperation of the Organization of American States responsible for drafting a model whistleblower law to implement the whistleblower protections of the Inter-American Convention Against Corruption. During that decade, I also consulted with the World Bank regarding revision of its whistleblower policies.

A good part of my scholarship has addressed whistleblower laws and related issues. So has my teaching. The Washington College of Law has also given me the opportunity to teach a course on whistleblowing; and my seminars on public employment law and public information law include segments on whistleblower laws. Because those are research seminars that rest on the
preparation and defense of research papers, I have benefited from the insights and diligence of many students who have chosen topics relating to whistle-blower laws for their papers.

This book has reminded me how much of my academic life has involved attention to whistleblowing. This book wove together experiences that I had often perceived only as episodes in the passing years. It enabled me to see the whole. Working on this book confirmed for me how whistleblowing was tied to ethics as well as law, how it reflected communities of persons as well as individuals, and how whistleblower laws are more than a subset of employment law.

Writing this book instructed me how whistleblowing had influenced my life, as well as my career. I have not been a whistleblower. I have had the good fortune of working in an institution that follows the principles it articulates. I have also had the good fortune of being surrounded by many colleagues of moral authority, including persons who have faced censure and rejection for defense of their principles, who with grace have survived discrimination and hardship suffered in the service of ideals of equality, who have declined economic benefits that would have required sacrifice of their academic integrity, who have striven for truth rather than recognition, and who have risked their lives for justice.

The stories of whistleblowers have instructed me in courage, in perseverance, in ethics and morality, and in sacrifice for others. These stories cause me to question whether I possess such courage and perseverance. I am not naïve enough to believe that all who claim to be whistleblowers share these attributes, but I am experienced enough to know that many do. I now see that this experience and knowledge has affected my life, as well as my work. My attitudes toward many things are no longer those of the 26-year-old attorney who stepped into an office at 15th and L streets, NW, in Washington, DC, in July of 1970. Many of those changes follow age and experience, but many of them are a consequence of my involvement with whistleblower laws. For me, this is perhaps the greatest lesson of the book that you are about to read.