Testimony of Professor Robert Vaughn before the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia

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My name is Robert Vaughn and I am Professor of Law and A. Allen King Scholar at American University's Washington College of Law. At the Washington College of Law I teach Torts, Civil Procedure, Introduction to Administrative Law and Regulation: Whistleblowing, the Role of the Jury in Civil Litigation, and seminars on Public Information Law and on Public Employment Law. I have written several articles on whistleblower protection and books on civil service law, on civil service reform, on the Merit Systems Protection Board, and on civil procedure. I have consulted on whistleblower protection with the Office of Legal Cooperation of the Organization of American States and with the World Bank.

I appreciate the opportunity to speak with the committee about whistleblower legislation now pending before this committee. Protection of federal employees who disclose information regarding government misconduct and mismanagement secures openness in government, imposes accountability, supports the rule of law, and protects the First Amendment and Due Process rights of federal employees. I commend the committee for consideration of important improvements in these whistleblower protections and the continuation of bipartisan Congressional efforts over the last thirty years.

My testimony addresses one of the differences between the House and Senate versions of the Whistleblower Protection Enhancement Act of 2009—trial in a federal district court in which a right to trial by jury would apply. The House version in Section 9 permits employees alleging certain claims of retaliation, including ones for "whistleblowing disclosures" under 5 U.S.C. § 2603(b)(8) to bring in certain circumstances an action *de novo* in a federal district court. In such an action, an employee would be entitled to a trial by jury. Such an alternative procedure applies if the Merit Systems Protection Board (Board) has not issued a final decision within 180 days of the filing of a request for corrective action. In addition, an employee within 90 days of a final decision by Board could also pursue recourse in a federal district court.

First, I examine the values underlying trial by jury, including the important role that trial by jury may play in the resolution of whistleblower claims. In doing so, I summarize research suggesting that juries are more diligent, fair-minded and competent than often reflected in popular culture and in attacks on the jury. I briefly consider some of the specific concerns about the use of juries in whistleblower cases, including possible bias against the government and sympathy for individual claimants, a "deep pockets" perspective toward large defendants, and juries' inability to resolve whistleblower cases because of the "complexity" of these cases. I focus on the right to trial by jury because it would be possible to have an alternative recourse to federal district courts without the trial by jury.

Second, I describe how a jury trial might be conducted in a whistleblowing case, including the division of functions between the judge and jury. This division considers the

distinction between determinations of law and fact and the character of judicial controls incorporated in the rules of civil procedure.

Third, I consider the implications of recourse to federal district courts. These implications follow from *de novo* review in federal district courts whether or not a trial by jury is provided. In particular, I evaluate a number of concerns regarding effects of alternative judicial trials on the procedures and practices of the Board. Many of these concerns suggest reexamination of Board practices rather than rejection of the alternative recourse provision.

In assessing these issues, the burden must now rest on those supporting the proposition that this alternative recourse involving the right to trial by jury will encumber the federal courts or disable the administrative process for redress of retaliation claims. Such alternative procedures have operated for decades in the context of Title VII retaliation claims and have become a part of redress procedures for analogous whistleblower retaliation claims. Many federal whistleblower statutes covering millions of employees contain similar provisions. Nothing in the testimony that I have read regarding the Whistleblower Protection Enhancement Act of 2009(Enhancement Act) establishes these propositions regarding obstruction of the federal courts or the Equal Employment Opportunity Commission or the Department of Labor. Instead, the evidence in the relevant testimony supports the conclusion that implementation of similar and analogous alternative methods of recourse have functioned without impeding either judicial or administrative remedies. The alternative recourse provision in the House version is not a novel, untried or dangerous procedure.

My examination of these three topics leads to several conclusions about the value and effects of the alternative recourse provision. Let me first summarize my principal conclusions and then present the support for them.

Summary

Trial by Jury

•Trial by jury represents a fundamental aspect of our democracy. The jury trial protects the rights of the community because jury service educates citizens in democratic responsibilities, represents the values of the community and bestows an important "badge of citizenship." Juries check the other branches of government, including the power of unelected judges. Whistleblower protection represents similar values. Such protection ensures democratic accountability, protects the rule of law, permits political oversight of the executive branch and informs others of the derelictions and misconduct of government officials.

•Trial by jury recognizes the importance of fair adjudication of whistleblower claims. It allows citizens to participate in the adjudications that help to secure legal control of bureaucracy

•Juries can fairly and effectively decide the retaliation claims of whistleblowers. Decades of social science research on the behavior and competence of jurors present a more favorable view of jurors than many of the stereotypes found in popular culture. Jurors deal with complex cases much better than popularly believed and judges have similar difficulties in these cases.

Jurors are competent and attempt to follow the law. Jurors are diligent and skeptical in evaluating expert testimony.

•With corporate defendants, jurors do not automatically find for the "little guy" but do expect businesses to exhibit a higher degree of care than individuals for workers and consumers. Studies also question the traditional wisdom that the financial resources of corporate defendants encourage jurors to adopt a "deep pockets" approach to liability. These studies apply to similar concerns about the government as a defendant in these cases.

•Jury trials in federal court take place under procedural rules allowing judges to influence, control, and, in some circumstances, to replace jury fact finding. The distinction between questions of fact, decided by the jury, and questions of law, decided by the judge, is unclear. The decision as to whether an issue is a question of law or fact can be viewed as another way in which courts decide how much supervisory authority judges should exercise of juries.

•The motions for summary judgment, judgment as a matter of law and the renewed motion for judgment as a matter of law permit judges to direct a verdict for the government if the whistleblower lacks substantial evidence to support her claim. The motion for a new trial allows federal judges to order a new trial when a verdict in favor of a whistleblower is against the weight of the evidence. Using the power to grant a new trial, judges may reduce excessive verdicts in favor of a whistleblower.

•Federal judges instruct jurors on the applicable law, can require juries to return special verdicts and may determine the order of issues at trial.

•Less than two percent of the civil actions filed in federal district courts reach trial.

Implications of the Alternative Recourse Provision

In my testimony, I present arguments that lead to the following four propositions and conclusions necessarily following from them. These propositions should ameliorate anxieties regarding the effects of the alternative recourse provision on the administrative process administered by the Board.

Proposition One: Use of Alternative Recourse to Federal District Courts by Whistleblowers Claiming Retaliation Will Be the Unusual Not the Common Occurrence

Many characteristics of Board adjudication and of federal litigation support this proposition. Even if *all* of the eligible cases followed the alternative recourse provision, it is unclear how these cases would harm the Board's procedures.

Proposition Two: A Rational Decision Maker at the Board Would Not "Rush" the Resolution of Whistleblower Cases In Order to Meet the 180-day Deadline

Proposition Three: The Effects of the Alternative Recourse Procedure on the Board Does Not Counsel Against Adoption of the Provision

For example, I roughly estimate that between one-tenth and two-tenths of one percent of the Board's 2006 revenue would have been devoted to the whistleblower cases that likely would have followed the alternative recourse provision had it be available in that year.

Proposition Four: The Alternative Recourse Provision Can Benefit Judicial and Administrative Adjudication

The alternative recourse provision can encourage settlement of cases.

The Importance of Trial by Jury

Trial by Jury in Whistleblower Retaliation Cases Implements Values of Democracy

Trial by jury is not an archaic vestige of our English common law past but a fundamental aspect of our democracy. The Seventh Amendment to the Constitution preserved the right to trial by jury and was one of the amendments seen as necessary to address omissions in the Constitution. The amendment reflected not only the role of the jury in English common law but also provided a foundation for the American Revolution. The 1735 trial of Peter Zenger in New York, in which a jury refused to convict him for seditious libel, influenced English practice and helped to develop the theories of democratic accountability which fueled the revolution. Scholars, Neil Vidmar and Valarie Hans believe that the trial "helped to generate the First, Fifth and Sixth Amendments to the Constitution."

According to constitutional law scholar, Akil Amar, the Seventh Amendment was crucial. At least five of the thirteen ratifying conventions declared that more safeguards of juries were required. The justifications of the right to trial by jury emphasized at the beginning of the Republic articulate many of the values of jury trial in our democratic society.

According to Professor Amar, Americans at the time of the enactment of the Seventh Amendment saw the jury as protecting the rights of the community as well as the rights of the parties. Citizens have a right to serve on juries and through that service to help to govern. Juries as an aspect of citizenship explains why the expansion of the rights of citizenship to women and then to minorities included the right to serve on juries as an important part of the recognition of full citizenship. The Supreme Court has based its restrictions on the rejection of jurors because of race or gender on the Equal Protection rights of excluded jurors.

In the system of checks and balances incorporated into the Constitution, the right to trial by jury allowed citizen-jurors to check and balance the influence of federal judges who enjoyed life tenure as officials of the government. Professor Amar describes the jury and the judge as a judicial analogy to the bicameralism of the legislative branch.

This check on the power of unelected judges served not only to ensure democratic accountability but also to protect against corruption both in terms of bribery and in terms of the preference that judges acting alone might show to other government officials. Juries became then a way of preserving the authority of the courts by ensuring that citizens who served only in a single case represented the community in ways that a professional unelected judge could not.

The Supreme Court's jurisprudence on the right to trial by jury under the Seventh Amendment has broadly interpreted the scope of that Amendment. First, the Court has applied the Seventh Amendment in the context of changes and reforms in civil procedure. The combination of law and equity in a single civil action allowed the Court to abandon doctrines that otherwise limited the right to trial by jury.

Second, and more importantly for our purposes, the Court has permitted Congress to provide for the right to trial by jury in actions created by statute. Indeed, specific authorization of jury trial may not be necessary because under the Supreme Court's decisions regarding the right to trial by jury in statutory actions, the right to a trial by jury may attach in a *de novo* action before a federal district court because the provision provides for compensatory remedies.

An expert on the American jury, Professor Nancy Marder, describes the current political role of the jury in similar ways. It operates as a coordinate branch of government checking the power of unelected judges, providing feedback to the other branches of government on weaknesses in the law, creating political awareness in citizens, and providing an important "badge of citizenship."

The application of trial by jury to whistleblower claims of retaliation appropriately vindicates the democratic values underlying the right to jury trial. Whistleblower protection ensures democratic accountability and the rule of law by providing reliable protections to those federal employees who report misconduct by unelected federal officials. This information allows evaluation of the conduct of these officials, assures us that government actions follow the legal standards and regulations that guide their official conduct, and deters misconduct. In addition, this information permits citizens and their elected representatives to seek political redress through new laws or effective oversight of executive actions. The disclosures of federal employees may address the mundane but important derelictions of administrators or the significant, wide-ranging misconduct of high-level government officials that broadly threaten public health and safety, the rule of law, or constitutional restrictions on the powers of government officials. This second category of disclosures is often crucial but politically charged and involves situations where powerful officials are prepared to bring pressure to bear on decision makers.

The connections of both the right to trial by jury and whistleblower protection to theories of accountability in a democratic government suggest the aptness of allowing jury trials in whistleblower claims by federal employees. Provision of the right to trial by jury reassures whistleblowers that citizens will participate in the adjudication of claims of retaliation. It alerts whistleblowers and others to the importance of fair adjudication of these claims; it recognizes that some cases may be politically sensitive and it provides an avenue of redress where political pressures are less easily brought to bear. It reassures whistleblowers of more than one avenue of redress. It allows citizens as representatives of communities throughout the country to participate in these adjudications that help secure legal control of bureaucracy. These reassurances and alternatives are significant in whistleblower retaliation claims when an individual employee is often pitted against a large and powerful government

agency regarding the conduct of leaders of that agency who seek to justify or hide their own misconduct—misconduct that may violate their obligations to the law, to their agency or to the United States government or to its citizens.

Juries Can Fairly and Effectively Decide the Retaliation Claims of Whistleblowers

Regarding civil litigation, the words "trial by jury" likely conjure a variety of troubling stereotypes: jurors befuddled by complex evidence, confused by science, and mislead by statistics; jurors uninterested in or unconcerned about the proceedings; jurors driven by bias against large organizations or who at public expense ignore the law to indulge personal prejudices. Tales are commons about absurd or outrageous jury verdicts. These stereotypes reflect ones found in popular culture. To some, the stereotypes reflect popular culture's preoccupation with the bizarre and the entertaining; to others, these images result from a carefully orchestrated campaign to limit access to the courts and to discredit litigation as a means of bringing large bureaucracies to account.

The social science research on the behavior of jurors presents more favorable stereotypes. This social science research spans over fifty years with similar impressions of jury performance. An influential book, *American Juries*, in a new edition published in 2007, reviews and evaluates studies of the performance of juries. My examination draws upon this work. The authors of this book, Professors Valarie Hans and Neil Vidmar summarize the findings of the "most important single study of juries" conducted over fifty years ago. "The central findings from Kalven and Ziesel's research, then, are that agreement between judge and jury was substantial and that most instances of disagreement could not be ascribed to jury incompetence or unwillingness to follow the law." More recent studies have shown a similar agreement between judges and juries. These more recent studies also do not find that disagreement is related to the complexity of the case. Thus, the complexity of the case does not seem to cause juror's opinions to vary from those of legal experts suggesting that jurors are as capable as legal experts in deciding such cases.

One study of the appellate review of factual findings by judges and juries in patent cases "which can contain highly technical and complex testimony and legal rules" concluded that judges and juries were equally accurate. This study suggests that jurors are as competent as judges in resolving "highly technical and complex testimony."

Moreover, surveys of judges and lawyers familiar with juries produced positive evaluations of the performance of juries. After reviewing the more recent literature, the authors of *American Juries* believe that Kalven and Zeisel's conclusions about jury competence apply as well today .

Regarding the ability of jurors to evaluate the testimony of expert witnesses, Professors Hans and Vidmar state: "Contradicting the anecdotal evidence, we now have systematic findings from a series of research studies that show jurors to be diligent and skeptical in evaluating expert testimony." Moreover, judges also confront difficulties in interpreting expert opinions regarding complex subjects; for example, testimony regarding statistical evaluations.

The reality of jury performance is complex and scholars note instances of jury weaknesses, such as confusion about scientific evidence, cognitive biases in complex procedural cases involving multiple parties, and biases against different groups, such as foreign plaintiffs. In many of these instances, however, courts can ameliorate these weaknesses through common reforms, such as instruction of the jury prior to the trial, evidence checklists, note taking, the ability of jurors to submit questions to witnesses, deliberation of jurors prior to the end of the trial and the ability of jurors to review evidence, testimony and instructions.

In an important article, a leading scholar explored jury bias against corporations. Examination of jury bias against corporations is relevant to concerns regarding such bias against the government as a defendant. In both types of litigation, individuals are suing large bureaucratic organizations presumed to have large resources from which to pay any judgment.

In her article, Professor Valarie Hans concluded regarding jury treatment of corporate defendants: "Reflecting the citizenry from which they are drawn, civil jurors are largely supportive of the aims of American business and extremely concerned about the potential negative effects on business corporations of excessive litigation. At the same time, they hold corporate defendants to more exacting standards compared to individual litigants, and expect businesses to exhibit a high degree of care for workers and consumers. The application of this distinctive standard appears to be consistent with the political function of the American jury." She also concluded "several studies question the conventional wisdom that the financial resources of the corporate defendant encourage a deep pockets approach."

Of particular import are studies that judges confront the same types of cognitive biases in complex procedural cases, also have difficulties in evaluating the testimony of experts, and can be confused by complex statistic proof. These weaknesses of judges as fact finders have led to proposals for the use of experts as judges or for the creation of science or technology courts. Based on these studies of the performance of judges and juries, if whistleblower cases are "too complex" for juries, they may also be too complex for judges. If so, we would need to rethink administrative adjudication of whistleblower claims altogether; for, if we had to chose decision makers on other criteria we might direct this important and politically sensitive body of cases solely to federal judges, who are likely to be more experienced members of the profession and who enjoy life tenure rather than to administrative judges who lack the protections accorded to administrative law judges, much less to Article III judges.

The Practical Implementation of Jury Trials in Whistleblower Retaliation Claims

A number or rules of civil procedure and practice surround a trial by jury. Used conscientiously these rules and practices permit a judge to aid the jury and to correct its errors without intruding into the role of the jury. In fact, some jury experts refer to a trial by jury as a trial by a jury and a judge. Among the most important rules and practices are those relating to summary judgment, selection of the jury, the order of trial, motions for judgment as a matter of law, instructions, the form of judgments, motions for a new trial, reductions in the amount of a verdict, and a renewed motion for judgment as a matter of law.

In addition, a number of judicial practices, often involving judicial discretion, surround these rules and address questions such as whether an issue is a factual one to be decided by the jury or an issue of law to be decided by the judge, review of the admissibility of evidence, the qualification of expert witnesses and control of trial preparation, including pretrial discovery. This body of rules and practices influences how jury will address and decide whistleblower retaliation claims.

In this section, I conclude that practical application of jury trials should eliminate fears of the jury as an irrational element in the determination of these claims. Thus, the fear of trial by jury is not a basis for rejecting the jury in the adjudication of a whistleblower retaliation claim.

The Fact Finding Function of the Jury

The rule for the distribution of functions between the judge and jury asserts that juries determine questions of fact while judges decide questions of law. The reality of fact finding by the jury is more complex reflecting the uncertainty of the division between law and fact and the variety of judicial procedures that regulate fact finding by the jury.

The uncertainty of the division between law and fact not only follows from the imprecision of the definition of fact and law but also reflects the difficulties of using two categories, law and fact, to describe three functions in adjudication--determination of the relevant law, determination of the facts and application of the law to the facts. In distinguishing findings of fact and law courts often consider whether the decision requires the type of legal expertise possessed by judges and whether the decision should be one that establishes standards of conduct in other circumstances; in these instances courts are more likely to characterize a determination as one of law.

An example from the whistleblower protection provision allows us to explore the application of the law/fact distinction. The whistleblower provision addresses the standard for a protected disclosure--whether an employee reasonably believes that disclosure evidences one of the types conduct listed in the provision. For example, did an employee have a reasonable belief that the information related to conduct creating a gross waste of funds.

The standard for reasonable belief and for gross waste of funds is one of law. Evaluation of the particular disclosure requires the jury to determine the circumstances in which the employee acted as well as the character of the disclosed information. Both of these determinations are likely to be called questions of fact. The conclusion, however, that the disclosure is a protected one involves the application of the articulated legal standard to the facts. Often this application of law to fact is seen as part of the jury's evaluation of the character of the particular disclosure and within its fact finding function. In particular, determinations of the reasonableness of conduct or belief, even though they involve the application of law to fact, are normally seen as within the fact finding function of the jury. In a case in which a whistleblower prevails, the determination of damages would ordinarily require findings of fact by the jury under the applicable legal standards for such damages.

These conclusions regarding fact finding in a whistleblower retaliation claim might be affected by the application of procedures that regulate fact finding by the jury discussed below. Another way of thinking about the problem is to see the law/fact distinction as another way of deciding how much supervisory authority should be exercised by judges.

Regulation of the Jury's Fact Finding

Several motions permitted by the Federal Rules of Civil Procedure—the motion for summary judgment, the motion for judgment as a matter of law and the renewed motion for judgment as a matter of law--prevent the jury from deciding a case when a jury using reason and logic could not resolve evidence in favor of one of the parties. If one of these motions is granted the court enters a judgment by applying the applicable legal standards. In these instances, when one of these motions is granted, a jury's finding for one party would be based on passion, bias or mistake. For example, a whistleblower retaliation claim must be supported by sufficient evidence to permit a jury using reason and logic to find for the whistleblower.

On the other hand, the standard for such judicial intervention must be limited to prevent a judge from substituting her judgment regarding the facts for the jury's. In federal court, the standard for these three motions require the judge to assume that the jury will evaluate the evidence in the following ways: the jury will draw all permissible inferences in favor of the party against whom a judicially imposed judgment is sought (in our example, the whistleblower), the jury will find that all of the whistleblower's witnesses are more credible than any opposing witnesses but the jury must consider any clear, uncontradicted, and consistent evidence to the contrary.

This standard is applied to all three motions. The principal difference between these motions is their timing. The motion for summary judgment is made before trial and is based on a prediction of the trial record and whether a motion for judgment as a matter of law based on that record would have to be granted at trial. A motion for judgment as a matter of law and the renewed motion vary as to the time at which they are made during the trial. The motion for judgment as a matter of law can be made any time during the presentation of evidence; the renewed motion for judgment as a matter of law must be made after the jury returns a verdict.

These motions result in a judgment in favor of the moving party, in our example, the government who argued that the whistleblower could not obtain a verdict from the jury under these standards. A judge, however, may after a jury's verdict grant a motion for a new trial. If a judge grants this motion, the judge does not issue a judgment for either party but requires that case to be retried. Because grant of the motion permits another jury to assess the evidence, the standard for this motion is whether the jury's verdict is against the weight of the evidence. In this motion the court is able to weigh the evidence in a way prohibited in the three motions discussed above. Using the power to grant a new trial, a trial judge may also reduce the size of an excessive verdict which provides inappropriately high damages to a whistleblower. Judges also may a grant a new trial to address errors at trial, including erroneous and prejudicial jury instructions and misconduct by jurors during jury deliberations.

These procedural rules, in the words of one scholar, allow the judge to "back stop" the jury. Under these procedural rules failures in jury decision making leading to unsupported verdicts are commonly overturned or excessive judgments are reduced. Such procedures do not provide the same "back stops" to errors in fact finding made by judges.

A second set of procedural rules control fact finding by the jury. These procedural rules address instructions to the jury, the form of a verdict that a jury must return and the order of the trial. The judge's instructions to the jury inform it of the legal standards to be applied by the jury in its deliberations. The language used in these instructions may require the jury to resolve facts in a particular way in order to render a verdict for a whistleblower. In federal courts, judges also have the authority to require juries to return special verdicts. Instead, of returning a general verdict for a whistleblower with a determination of damages, the jury is required to answer questions or interrogatories; on the basis of these answers, the judge enters a verdict for one of the parties. The jury is limited to answering questions that structure its fact finding and limits the discretion that a general verdict gives to the jury.

A judge may also determine the order of trial; for example, in a whistleblower retaliation case, a judge might separate the question of liability from the issue of damages. A judge might also subdivide the elements of liability by requiring the jury to decide one element of liability prior to the consideration of others.

A third set of procedural rules influence the fact finding role of the jury by affecting what evidence is presented to the jury. The judge can determine what evidence is admissible. In cases involving experts, the judge has considerable discretion in deciding whether a witness is qualified as an expert. The judge has discretion regarding the type and amount of discovery. These rules may expand or limit the evidence available to a whistleblower to present to the jury.

Apart from these rules, federal judges have considerable influence on the composition of the jury. The judge decides whether to excuse qualified jurors from service. The judge evaluates each challenge for cause made by the representatives of the parties. These challenges seek to remove a potential juror from the jury because the juror is unable to render a fair and unbiased verdict. A number of informal practices also influence the composition of the jury; for example, judges have considerable discretion in directing the process in which attorneys assert peremptory challenges and in some judges appoint the foreperson of the jury. Judges also enjoy the right to dismiss jurors who have been selected to serve on the jury for misconduct during the trial.

A jury trial in federal court takes place under procedural rules and standards that permit judges to influence, control, and, in some circumstances, replace jury fact finding. The rules give judges ample powers to supervise jurors.

Perhaps the most significant aspect of federal practice limiting jury trials is the disappearance of the trial itself. Although statistics vary, the percentage of cases filed in federal court that reach trial has declined over the last decades. Today, a small percentage of civil cases reach trial, perhaps less than two percent. Jury trials comprise only a portion of

these cases. Scholars differ as to the reasons for the decline in the percentage of trials and whether or not such a decline is a good or bad development.

Settlements remove a significant percentage of cases from federal courts prior to trial. The effect of alternative recourse for whistleblower retaliation claims on the administrative process will enable us to consider the implications of this procedure for settlement.

Implications of Alternative Recourse

Because of the strong reasons for providing alternative recourse, I turn to its implications. I examine these implications to determine whether this provision has unintended consequences that would give us pause in providing it. In this section, I conclude that based on past experience with similar provisions and in light of the characteristics of Board procedures, the provision will not undermine or damage Board adjudication.

The alternative recourse provision affects both the federal courts and the administrative process. I principally address the implications for the administrative process of the Board. I do so, because testimony in the House examining experience under other whistleblower laws makes a strong case that the number of cases reaching the federal courts will likely not be large. First, there are simply not that many whistleblower retaliation claims brought annually to the Board. Even if all these were appealed to federal district courts, a highly unlikely assumption for a number of reasons that I will discuss regarding the implications for the Board, the number of cases is less than 150.

Second, experience with the Sarbanes-Oxley (SOX) shows that most claimants before the Department of Labor (DOL), who could do so, do not seek alternative recourse. Professor Richard Moberly's study of the adjudication of claims under SOX by the DOL demonstrated that DOL is unable to resolve most SOX claims within the required 180-day period. For example, in fiscal year 2005, an average investigation of a claim, the first step in the adjudication of a claim, took well over 120 days, which meant that because of the additional time required in adjudication of the case, nearly 100% of the cases were subject to alternative recourse in federal district courts. Still many employees who could have left stuck with the administrative process even though under SOX, unlike the provision in the Enhancement Act, waiting for a final decision of DOL would lead to appellate not *de novo* review.

The alternative recourse provision affects the parties not simply in terms of delay but more generally regarding litigation strategy. Particularly, the alternative recourse provision may alter settlement practices in whistleblower claims. These implications for settlement practice could reduce both administrative and judicial burdens.

Finally, my examination of the effects of the alternative recourse provision on the Board suggests a number of changes in the administrative process. These changes may go beyond the scope of this legislation but indicate that the appropriate response to the implications of the provision for the Board may be administrative changes not rejection of the alternative recourse provision.

Implications of the Alternative Recourse Provision for the Board and the Administrative Process

Traditionally, the advantages of administrative adjudication have been economy, expedition, and expertise. These advantages flow from a number of factors, including less formal procedures, routine processing of many similar cases, and less costly staff and facilities. In some instances, these advantages can also been seen as disadvantages. Economy becomes second-class, assembly-line treatment of important issues. Expedition becomes perfunctory consideration and the denial of detailed development of cases. Expertise becomes bias where ingrained attitudes and approaches deny an impartial evaluation of claims. The same conditions that create benefits engender costs. Thus, any analysis should be specific to the Board.

This dual nature of administrative adjudication may also explain why a good deal of literature in the last decades regarding the future of the federal courts expresses fear about the "bureaucratization" of the federal courts. These fears rest on the assumption that litigation in a federal district court provides a different and superior form of litigation.

Several aspects of Board practice influence an assessment of the implications of the alternative recourse provision. These specific aspects of the Board will be useful in examining concerns about the effect of alternative recourse on Board practice. In particular, they will help in deciding whether the alternative recourse provision will be commonly invoked or a less common escape clause.

First, the Board has adopted a formal approach to adjudication. This conclusion rests on my study of all of the Board's opinions in its first two years; a conclusion supported by my observations of the Board over the last three decades. The Board's rules of procedure and evidence, however, are less formal than those applied in a federal district court. Although the Board uses the Federal Rules of Civil Procedure and often refers to federal court interpretations of them, the Board states that these rules are not binding but looked to for guidance. The Board's rules of evidence are less demanding than those applied in a federal district court. For example, a number of Board decisions discuss how hearsay evidence that would be excluded in federal court may be used in Board adjudications.

Despite this formal model, all adjudicatory authority rests with the Board and is delegated to its administrative judges (AJs). Thus, these AJs are not like federal trial judges in that the Board can review their decisions on its own motion and substitute its judgment for that of AJs. These AJs do not enjoy the independent status of Administrative Law Judges. The Federal Circuit, however, has severely limited the ability of the Board to overturn determinations of AJs based on evaluations of the credibility of witnesses.

Second, with some variance over time, most persons appearing before the Board are not represented or are represented by persons who are not attorneys. The Board has accommodated its formal procedurals relying on adversary presentation to this aspect of its caseload. To do so, the Board has moved toward an inquisitorial rather than adversary model with *pro se* appellants. Administrative judges have obligations to ensure a proper consideration of the issues and to alert unrepresented appellants of their burdens and the evidence required

to satisfy them. On some issues, these appellants are given benefits unavailable to represented parties.

Third, in most classes of cases before the Board and in the vast percentage of cases, the employee appealing an action to the Board is entitled to a hearing. Although the Board has a procedure analogous to summary judgment regarding a few classes of cases, it has an obligation to conduct a hearing in many circumstances where a federal judge could grant summary judgment prior to trial.

Fourth, the resources of the Board are limited and its costs of processing a case have remained stable. At the same time, the character of the classes of cases that it reviews has changed. Statutes, such as the Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunities Act, as well as the IRA claims under the Whistleblower Protection Act have added new groups of cases to the Board's jurisdiction. Regarding the USERRA and an IRA, the Board must hold a hearing. In addition, the Board anticipates an increasing number of retirement related adjudications.

Fifth, The Board has a goal that fifty percent of initial decisions and petitions for review each be decided within 110 days. The Board's Performance and Accountability Report for Fiscal Year 2008 reports an average case processing time in initial decisions of administrative judges of 87 days and an average case processing time for petitions for review to the Board of 112 days. Seventy-two percent of initial appeals were decided with 110 days and sixty percent of petitions for review were decided within 110 days. These processing times do not record the length of time required for cases in which hearings are held because these times include approximately half of the cases those that are settled as well as those that are dismissed for untimely filing or on jurisdictional grounds. It is also fair to assume that more complicated cases take longer to adjudicate because of time required in discovery, in development of the issues and in hearings and evaluation of evidence and law. Thus, it is fair to assume that in adjudicated, complex cases, the Board is less likely to satisfy the 180 day requirement in the alternative recourse provision.

Sixth, the employee has no automatic right to review by the Board and can choose whether to seek Board review. If the employee does not seek review, the opinion of the administrative judge becomes the final decision of the Board. The process of seeking, much less obtaining such review, may prevent the issuance of a final decision by the Board within the 180 day period. The cases least likely to be resolved are presumably the more complex and difficult ones.

Seventh, the Board has considerable authority to require other agencies to take corrective action or provide relief ordered by it. Thus, neither the Board nor the prevailing employee needs to seek judicial action in order to enforce the decisions of the Board.

Eighth, with few exceptions, employees who lose before the Board may seek appellate review but only before the United States Court of Appeals for the Federal Circuit. Under the alternative recourse provision, these employees who have received a final decision of the Board

may choose between appellate review, which might or might not be in the Federal Circuit, or *de novo* review in an appropriate federal district court.

These aspects of Board adjudication permit evaluation of the following propositions. Acceptance of these propositions ameliorates concerns about the effects of the alternative recourse provision on administrative adjudication.

• Proposition One: Use of Alternative Recourse to Federal District Court by Whistleblowers Claiming Retaliation Will Be the Unusual Not the Common Occurrence.

Some aspects of Board practice suggest that the alternative recourse could be attractive to many whistleblowers. The whistleblower has the advantage of adjudication by a federal judge with the possible use of a jury if the whistleblower or the government demands one. A whistleblower would not have the incentive that federal employees obtaining redress from the EEOC have to abandon the administrative process for federal district court. Because a federal employee who is successful before the EEOC may need to go to federal court to ensure that an agency follows the EEOC's order, the employee may have an incentive to abandon the administrative process.

Whistleblowers prevailing before the Board do not have the same incentive. Even with this additional incentive for federal employees appearing before the EEOC, testimony in the House asserted that EEOC "Administrative Judges review 8,000 claims" brought annually by federal employees. In 2007 "The United States was a defendant in 857 civil rights employment cases." Assuming that all of these cases emerged from the EEOC, only about ten percent of claimants sought the alternative recourse in Title VII similar to alternative recourse in the House version of the Enhancement Act.

Many aspects, however, of the Board practice may incline a whistleblower to remain with the administrative process. An employee successful in an initial appeal is entitled to interim relief and is no longer without income, in the case of a removal, during the remainder of the adjudication. Such preliminary relief is unlikely in a federal district court. The rules of evidence and procedure are less formal than a litigant would confront in federal court.

The costs of mounting a "federal case" are substantial and will likely discourage many employees from doing so. An employee who has already expended time and resources in an administrative adjudication confronts another, more expensive litigation that will require considerable additional resources.

An employee will likely face extensive delay in a federal district court. Because statistics are not available specifically addressing the length of time it takes to resolve SOX and other alternative recourse provisions in recent whistleblower statutes in federal courts, a Washington College of Law student, Dania Douglas, drew comparisons to other employment and labor law case statistics for the twelve-month period prior to June 2008. I rely on her data, data provided by the Administrative Office of the U.S. Courts. The data describes "U.S. cases" in which the United States is a party and "federal question cases" in which it is not but jurisdiction rests on the presence of a claim arising under constitution, laws or treaties of the United States.

Resolution of a case at trial may take months or a year or more. The cases in which the United States was a party include the following categories of cases. Of 1, 265 civil rights employment cases brought in federal district court, 68 of those cases reached trial. The median time from filing to a determination at trial was more than two years (26.2 months). Of 145 cases brought under the Fair Labor Standards Act, 19 reached trial; the median time from filing to determination at trial was 17 months. Of 270 characterized as "other labor litigation," only 4 reached trial; the median time from filing to a trial determination for these cases was not available.

Federal question cases in which the United States was not a party include the following categories of cases. Of 12, 786 civil rights employment cases brought during this period, 412 reached trial; the median time from filing to a determination at trial was slightly over two years (24.1 months). Of 4, 621 cases brought under the Fair Labor Standards Act, 53 of these reached trial; the median time from filing to a determination at trial was 16.5 months. Of 1,032 cases brought under the Labor Management Relations Act nine reached trial; the median time from filing to a trial determination was unavailable. Finally, of 10, 135 cases categorized as "other labor legislation," 83 reached trial; the median time from filing to a trial determination was over two years (24.8 months).

As discussed above in regard to judicial supervision of jury trials, an employee is not guaranteed a trial-type hearing in federal court; the whistleblower confronts summary judgment not available before the Board. The guarantee of a hearing at the Board may be an important advantage for claimants, such as whistleblowers. A study by Professors Samuel Issacharoff and George Loewenstein of the effect of changes in Supreme Court precedent making summary jury easier for defendants in federal court found that these cases made summary judgment a more valuable tool for defendants.

A whistleblower should also be alert to the small percentage of cases filed in district court that ever reach trial. In addition to the small overall percentage of all civil cases reaching trial, the data from the Administrative Office of the U.S. Courts regarding employment-based actions also supports the conclusion that a whistleblower should carefully consider whether the whistleblower would obtain a trial in a federal district court. This data shows that a small percentage of each category of these employment-based cases reaches trial.

This analysis suggests that most employees asserting whistleblower claims before the Board are unlikely to seek recourse in a federal district court. Whistleblowers representing themselves are less likely to do so than whistleblowers as a whole. These *pro se* whistleblowers lack the resources and the legal support required to make litigation in a federal district court an attractive alternative.

In addition, many federal district courts may not depart from the adversarial model to aid *pro se* litigants in the ways that Board has adopted. Perhaps not all *pro se* whistleblowers could be presumed to reject *de novo* review in a federal district court; after all, some appellants before the Board appear *pro se* before the Federal Circuit. Although challenging, preparation of an appeal may not be as daunting as the preparation and conduct of trial. In any event, the

substantial percentage of *pro se* litigants before the Board is another reason to conclude that whistleblowers claiming retaliation will not routinely use the alternative recourse contained in the Enhancement Act.

The previous discussion of the behavior of whistleblowers under SOX also supports Proposition One. Most of these litigants stuck with the administrative process even though doing so allowed DOL to issue a final decision that denied them any recourse to a federal district court. Under the Enhancement Act, whistleblowers would not lose the right to go to a federal district court by continuing with the administrative process. They would still have the choice to use the alternative recourse provision. Thus, if SOX whistleblowers generally remained with the administrative process within DOL when they could have left, it is more likely that federal employee whistleblowers will continue with administrative adjudication before the Board.

The alternative recourse provision discourages whistleblowers from using it in order to obtain a more favorable law. A whistleblower who wants the law of a circuit other than the Federal Circuit need not seek alternative redress in a federal district court to do so. The employee can appeal to an appropriate court of appeals, which is either the Federal Circuit or any circuit which would have had jurisdiction over an appeal from the district court in which the employee could have sought alternative recourse. This provision eliminates the alternative recourse provision as an incentive for choosing to use the alternative recourse provision.

Board decisions regarding the applicable law, however, might create some, but not compelling, reasons for using the alternative recourse provision to avoid unfavorable law. Under the Enhancement Act, several circuits will begin to develop a body of whistleblower law that will vary from that articulated by the Federal Circuit. Federal Circuit precedent, however, will remain the largest and most comprehensive body of applicable law. The Federal Circuit will retain exclusive jurisdiction over other areas within the Board's jurisdiction; it will also continue to evaluate Board procedures and practices. What precedent will the Board apply in whistleblower cases in which circuits are in conflict? How will it treat the decisions of other circuits regarding more general Board practices and procedures over which the Federal Circuit has traditionally exercised exclusive jurisdiction?

If the Board applies to a determinative issue the precedent of the Federal Circuit different from and less favorable to the whistleblower than the law of the circuit to which the whistleblower may appeal, the whistleblower has incentives to avoid a predetermined outcome and to seek alternative recourse in a federal district court. In these instances, a whistleblower might see little benefit in expending resources in a losing cause when those resources could be better deployed in a forum where success is more likely. How the Board will address this question is difficult to predict because there are justifications for either approach. Even if the Board elects to follow precedent of the Federal Circuit, it is difficult to estimate, however, the number of cases that would be affected. That number, however, is not likely to be large enough to undermine Proposition One.

Other circuits in the course of a whistleblower case will likely have to address other issues of federal employment law and Board practice. Circuits may well in these instances follow the precedent of the Federal Circuit; however, in some circumstances they may find the whistleblower claim and these issues so closely intertwined that they will create precedent inconsistent with that of the Federal Circuit. In these instances, the Board may be more likely to follow the precedent of the Federal Circuit. The application of the federal circuit precedent to related issues, particularly procedural ones, may provide less incentive for an employee to seek review in a federal district court.

There is little tension between the policies supporting alternative recourse to a federal district court and the analysis demonstrating that it will not be commonly used. The policies supporting alternative recourse focus on the importance of allowing the most contentious and complex cases an alternative forum for adjudication. The cases most likely to need an alternative forum are those most likely to satisfy the criteria set out in the Enhancement Act.

The analysis that alternative recourse will not be commonly used reminds us that the Board will remain an important adjudicator of whistleblower claims. As such, a future task for Congress is to improve the Board. These hearings are not the occasion to discuss proposals for improvement but the discussion thus far suggests upgrading the Board by providing increased funding, by considering the status of the Board's AJs, and by seeking ways to improve its reputation and influence.

Even if the above analysis is incorrect, whistleblower cases form a small percentage of the Board's case load. If *all* of these cases used the alternative recourse to federal district courts, an improbable occurrence, it is unclear how departure of these cases would harm the Board's procedure. If all or most of these cases had received a complete hearing at the time of use of the alternative procedure, the "loss" of administrative resources might be greater than contained in the rough estimate in the analysis of Proposition Three. The routine use of the alternative recourse procedure would focus on the policy supporting the adoption of such a procedure but that examination would be independent of whether alternative recourse would harm the Board.

We can only speculate on the effect on the Enhancement Act on the analysis. Conceivably the Enhancement Act by improving the Whistleblower Protection Act and by providing credible protection would encourage more federal whistleblowers to seek redress from the Board. Effective protection, however, might also encourage agencies to open internal channels for disclosure and redress that would avoid the necessity of adjudicating retaliation claims. The Enhancement Act may also increase settlement of claims.

•Proposition Two: A Rational Decision Maker at the Board Would Not Rush the Resolution of Whistleblower Cases in Order to Meet the 180-day Deadline

Assuming good faith and a conception of the Board's mission as fairly and expeditiously adjudicating appeals with its available resources, a rational decision maker would not "rush" whistleblower cases to meet the 180-day deadline. To "rush" the adjudication of these cases could mean a number of things but there are two possible and interrelated likely responses.

One processes these whistleblower cases with expedition as the sole or principal value in their adjudication. The other diverts resources from other appeals to insure that appeals subject to the alternative recourse provision are resolved within the 180-day limit.

Both of these responses are inconsistent with the mission of the Board. The first risks sacrificing a full and fair hearing in order to meet the deadline. The second, in some ways more extreme, threatens the mission of the Board in many other classes of appeals as well. The severity of the threat depends on the amount of resources that will have to be redirected. Moreover, these responses do not necessarily insure that the employee will not seek the alternative recourse after the Board reaches a final decision.

Assuming that Proposition One is valid, a rational decision maker would conclude that these responses would be unnecessary because most employees would remain in the administrative process. If so, the injury to the Board's mission would be unjustified even if keeping these cases in the administrative process was a valid goal. A decision maker would ask why should the goal of meeting this 180-day period in every case justify the actions that would be required?

A rational response would continue to accomplish the goals that Board has articulated regarding the treatment of appeals and petitions for review. In 2008, these goals were resolution of 50% of initial appeals within 110 days and within 150 days for petitions for review. In 2008, 72% of initial appeals were decided within 110 day, the average processing time for an initial appeal was 87 days; 60% of petitions for review were decided within 110 days ; the average processing time for a petition for review was 112 days. Given this performance, the Board would proceed to treat each appeal on its merits. It is probable that more complex and contentious cases could exceed the 180-day period but meeting that deadline in all cases is inconsistent with the way in which the Board now evaluates its efficiency in case processing (a method that does not measure success by having every case meet goals and targets) and would come at potentially high cost to little effect.

In his study of DOL's adjudication of SOX claims, Professor Richard Moberly found that processing time for SOX cases *increased* over time. He attributed this increase in processing time to a lack of adequate resources, a reason that would be considered by a rational decision maker, perhaps leading to the same result.

A decision maker might consider personal or agency reputational interests in meeting the 180-day deadline but against such reputational interests a decision maker would balance the loss to reputation and standing that the accomplishment of this goal could incur. Emotional responses such as pique or anger would be irrational ways to make such a decision. Other reasons might be rational but perverse because they assume other goals for "rushing" such adjudications unconnected with the mission of the Board.

•Proposition Three: The Effects of the Alternative Recourse Procedure on the Board Does Not Counsel Against Adoption of the Provision

A critic argued that the alternative recourse provisions of SOX "wasted" administrative resources. In this view, any time spent in the adjudication of a claim is lost if the claim is subsequently adjudicated in an alternative forum. The more administrative resources that have been devoted to a claim, the greater the loss. Thus, an employee who leaves the process at or near its end imposes a greater loss than one who leaves earlier. The 180-day requirement ensures that a good deal of resources will be expended before an employee decides to leave. Likewise, the level of this loss rises with the number of employee who use the alternative recourse provision. (The argument paradoxically supports a different policy in which a claimant would be able initially to choose between administrative adjudication and litigation in a federal district court.)

Proposition One assures us that the percentage of employees who use the alternative recourse provision is small. The amount of the loss then is controlled by the size of the pool of persons who pursue administrative adjudication. In testimony in the House, one witness asserted that in 2006, 146 new whistleblower cases were brought to the Board; eighty nine of those cases were considered on the merits. In the first three year of SOX, 491 cases were brought to DOL; one hundred and thirty of them were considered in adjudication. These statistics suggest that many cases consume limited adjudicatory resources.

It is possible to estimate the administrative costs of the alternative recourse provision if all of the persons using it are employees who receive a hearing. The estimate is a rough one and can do little more than give a "ball park" figure of what administrative resources are likely devoted to these cases. I begin with the 89 whistleblower cases adjudicated in 2006 at the Board; I assume 10% of these will have used that alternative recourse mechanism if it had been available. This percentage comes from the large EEOC sample of 8,000 cases and involves an alternative recourse provision like the one in the Enhancement Act. Thus, approximately nine whistleblower would be assumed to use the alternative recourse procedure.

I also assume that all of these cases have completed an initial consideration. (this is a generous assumption because 72 percent of the initial decisions were reached within 110 days in 2008 suggesting that some of these nine cases would not have completed the initial decision process—I use the 2008 percentage because no comparable figure is available for 2006). I assume that some of them have proceeded to but not completed the process of a Petition for Review by the Board before the 180-day period runs. These assumptions mean that a hearing had been completed and an initial decision reached in each case. Thus, all nine whistleblowers using the alternative recourse provision would be assumed to leave after a full hearing.

In its 2008 Performance and Accountability Report, the Board states that the average case processing cost for 2006 was $2, 830. This average processing cost includes cases that were dismissed or settled and thus the cost of a case that completed adjudication would be larger than the average. If that cost were doubled or even tripled, the processing costs for these cases would be respectively $5,660 and $8,490. If these processing costs are multiplied by nine (the number of whistleblowers assumed to use the alternative recourse provision) the resulting products are respectively $50, 940 and $76, 410.

I stress that this is only the roughest of estimates but one that gives a sense of the magnitude of the loss incurred by the Board as a result of the alternative recourse provision. These figures are respectively .1 percent (one tenth of one percent) and .2 percent (two tenths of one percent) of the revenues of the Board for that year. First, it is not clear that these figures represent a loss. The Board carried out its function in each of these cases, adjudicating the whistleblower claims brought before it. The parties did gain some benefits from the adjudication, benefits that may make subsequent adjudication more efficient or eliminate the need for it if the parties settle the claim. Second, even if we were to treat these costs as losses and a "waste" of resources, we can conceive of them as a cost of achieving the goals of providing relief to whistleblowers and encouraging the disclosures that assure democratic accountability, that deter misconduct, that prevent waste and corruption, and that secure the First Amendment rights of federal employees.

•Proposition Four: The Alternative Recourse Procedure Can Benefit Judicial and Administrative Processes

The Alternative Recourse Provision Can Benefit the Judicial Process

The example above suggests that the each of the parties, the whistleblower and the agency, affected by the alternative recourse provision acquire considerable information in the administrative process about the positions, evidence and arguments of the other party. This information can benefit the judicial process in two ways.

First, this information may lead to more focused and efficient adjudication in a federal district court. For example, discovery in federal court may be less extensive than would otherwise be the case without the preparation of the administrative process. The issues and positions of the parties, as well as their legal positions, may be more fully developed thereby reducing the need for pretrial hearings.

Second, the information acquired in the administrative process may increase the likelihood of settlement eliminating the need for further litigation. Settlement occurs when the parties can agree to an outcome, usually monetary damages, that put each in a better position than if they litigated the case. Thus, the settlement offers of the two parties must overlap and such overlap requires a similar assessment of the likelihood that a whistleblower will prevail and of the amount of damages or monetary value attached to other relief that the whistleblower is likely to receive if successful. Thus, more similar assessments of these factors by the parties, increase the likelihood that the settlement offers of the parties will overlap.

The litigation costs of the parties also influence what each party will offer. The whistleblower will subtract anticipated litigation costs from her demand because those costs will not be incurred if the whistleblower's settlement demand is satisfied. On the other hand, the whistleblower will add already incurred litigation costs to her demand because the whistleblower seeks to recoup these costs as part of the settlement. In contrast, the government will add anticipated litigation costs to the settlement offer because the settlement offer will allow the government to forego these costs. On the other hand, the government will subtract the incurred litigation costs from the offer because this subtraction is a way for the

government to recoup these costs. Assuming that the incurred and anticipated litigation costs of the parties are similar, the anticipated litigation costs of each party are likely to be greater than the incurred costs because judicial litigation is more expensive than administrative adjudication (and this is probably true even if the administrative process reduces the litigation costs that otherwise might be anticipated in federal court). Thus, this factor also increases the likelihood of settlement.

The alternative recourse provision encourages settlement that will reduce the likelihood of litigation in a federal district court. In this way, this provision benefits the judicial process.

The Alternative Recourse Provision Can Benefit the Administrative Process

The Board relies on settlement in administrative adjudication. One of the goals of the Board is to "[m]aintain a settlement rate of initial appeals that are not dismissed at 50% or higher." The Board has successfully met this goal over the last four year; the settlement rates of initial appeals not dismissed for fiscal years 2005, 2006, 2007, 2008 are respectively 55%, 58%, 57% and 54%. In addition, some group of petitions for review are targeted for settlement with a goal of settling 25% of them. In the fiscal years above the settlement rate for this group are respectively 47%, 38%, 23% and 34%.

Undoubtedly, AJs are aware of the goals for initial appeals and appreciate that this goal is one standard used to evaluate their performance. Some have criticized the Board arguing that this emphasis on settlement pressures AJs to "encourage" aggressively such settlements and emphasizes a case processing approach to adjudication.

The analysis above regarding the judicial process is useful in considering how the alternative recourse provision might influence settlement in whistleblower retaliation cases filed with the Board. For example, an agency might be inclined to settle a case earlier in the process, appreciating that the whistleblower can seek *de novo* review in a federal district court. Such early settlement reduces both the incurred litigation costs and increases the saving from settlement.

Two aspects of the Enhancement Act counsel for settlement. First, the Act increases the likelihood of success of a whistleblower by changes in the law and the provision of an alternative forum. Second, this alternative forum increases the total anticipated litigation cost that the government may confront at the beginning of an administrative adjudication. Because the choice to use the alternative recourse procedure rests with the whistleblower, an agency must assume that in most relevant cases the whistleblower will seek such recourse. Even if the agency makes the analysis leading to Proposition One above, the agency may know that most whistleblowers may not use the alternative recourse provision, but at the time that it considers settlement, it cannot know *which whistleblowers* will do so. (The analysis in this paragraph is complicated by the separation of authority in administrative adjudication and federal litigation. Agencies control the administrative adjudication; the Department of Justice will in most instances control the federal litigation. These complications, however, do not undermine the analysis above.)

An example mentioned earlier illustrates the interaction of these two aspects of the Enhancement Act. That example involved the Board's application of a determinative precedent of the Federal Circuit less favorable to the whistleblower than the law of the circuit containing the appropriate federal district under the alternative recourse provision. In this instance, settlement becomes possible only because of the alternative recourse provision. This possibility rests on both the applicable law available under the alternative recourse provision and the litigation costs of *de novo* review in a federal district court.

Agencies may also be more willing to settle whistleblower claims prior to administrative adjudication. The analysis above is also applicable to settlement at the agency level. The substantive changes in the law and the alternative recourse provision may have a similar effect on settlement. This is particularly true with whistleblower claims because whistleblowers now essentially lose all cases before the Board and before the Federal Circuit.

To the extent that the alternative recourse provision encourages settlement (and it seems likely that it does), it benefits the judicial and administrative processes. Thus, the alternative recourse procedure can create benefits as well as costs.