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Filling the Holes in Whistleblower Protection Systems: Lessons from the Hanford Council Experience

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I. INTRODUCTION

In an effort to understand and assess the factors that help or hinder

* In addition to readily available sources, the observations in this article benefit from more than three decades of research and practice activities by the author in a broad range of workplace and policy disputes. This background includes the author's involvement in the study team assembled at the University of Washington that in 1992 initially recommended the adoption of a new whistleblower dispute resolution system at Hanford, and then his becoming the founding chairperson of the Hanford Joint Council (Hanford Council), where he has overseen several iterations of the system. This initial study and subsequent work has allowed comparison with results of whistleblower cases handled through the Council system versus those handled through other more common processes, including processes sponsored by government contractors and by the Department of Energy (DOE), and cases handled through litigation, or through processes offered through the Occupational Safety and Health Administration (OSHA).

In addition to this direct experience at Hanford, much of the conceptual background for the comparisons in this article comes from experience in assessing as well as assisting in the mediation of workplace and policy disputes and helping establishing systems to do so—in fields ranging from health care, transportation, firefighting to land use, agriculture, and others. Some of this work was done as the founding director of the William D. Ruckelshaus Center, under the guidance of board chair William D. Ruckelshaus. In this and other professorial and research roles, he has examined dozens of significant policy and workplace conflict resolution events and systems in the Pacific Northwest and elsewhere in the country.

Other aspects of the analysis herein benefit from his experience in workplace policy and regulatory issues as a result of serving three US secretaries of labor, and time on the staff of an early OSHA assistant secretary. Several published works by the author have received recognition for their contributions to workplace dispute resolution theory and practice. He was recently appointed by the US Secretary of Labor to the new Whistleblower Protection Advisory Committee.

resolution of whistleblower conflicts, this paper draws lessons from a voluntary whistleblower case resolution system—the Hanford Concerns Council (Hanford Council, or Council) system—that has operated successfully over a sixteen year period. The Hanford Council system supplements existing regulatory and administrative mechanisms for handling whistleblower rights and concerns. It came into being after years of protracted public controversies and related court battles over whistleblower cases at the Hanford Nuclear site in Southwest Washington State stemming from the failure of then existing mechanisms to address these conflicts.[1] The site was part of the production complex for nuclear weapons materials during World War II and the Cold War. By the early 1990s, when the Hanford Council system was established, the site mission had already shifted from production of nuclear fuel to the cleanup of the highly contaminated site near the Columbia River.

In 1992, in response to the controversies over whistleblower issues, and at the request of Christine O. Gregoire, then director of the Washington State Department of Ecology, the University of Washington's (UW) Institute for Public Policy and Management conducted a study of the way whistleblower issues were handled at Hanford. Based on the gaps in process, practice, and tools and using best practices as a reference, the UW study produced the principles that led to the Council system. The Council system that emerged was structured, and has been further refined, to correct for the particular difficulties, barriers, and gaps often found when employees try to exercise whistleblower rights and employers try to respond within the usual structures and assumptions available.[2]

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[1] *E.g.*, Jonathan Brock, *Full and Fair Resolution of Whistleblower Issues: the Hanford Joint Council, A Pilot ADR Approach*, 51 ADMIN. L. REV. 497, 498–501 (1999) [hereinafter Brock, *Full and Fair Resolution*] (summarizing resolution of prior controversies).

[2] *See generally* Inst. Pub. Pol'y and Mgmt., *External Third-Party Review of Significant Employee Concerns: The Joint Cooperative Council for Hanford Disputes* (Univ. of

In accordance with the principles developed, the Hanford Council system is independent of internal systems handled by companies and agencies, but is mindful of those systems and their roles and impact and connects to them in carefully restructured ways that promote resolution of whistleblower issues. This paper recognizes that while many whistleblower cases are handled effectively by the internal systems of some companies and the systems offered by some agencies, many more are not handled effectively—largely because of structural problems and missing features of these systems. While the Council example is specific in its application to Hanford and, perhaps, government nuclear facilities, this assessment is intended to suggest common limitations in the characteristics of many whistleblower protection programs and to identify features and principles that may, in a wider variety of circumstances, be applicable.

These common limitations often preclude the stable resolution of the problem that has been raised and, further, generally lead to a failure to actually protect and encourage the right to blow the whistle. This means that the purposes of national policies—to encourage or protect whistleblowers and to gain the benefit of addressing problems that may need attention in our institutions—often are not met by the systems and practices that typically flow from policies intended to benefit whistleblowing. This article will examine these and other frequently found barriers to the effective handling of whistleblower cases and describe what can be learned from the Hanford Council system to help overcome these barriers, even within the context of existing policies, programs, and processes.

Using the expanded scope, tools and approaches it has available, the Hanford Council system has developed a strong track record of resolving cases that had eluded, or were projected to elude, resolution in the normally available systems. Similar disputes at Hanford that have not gone through

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Wash. Graduate Sch. of Pub. Affairs, Working Paper No. 93–99, 1992), *available at* http://hanfordconcernscouncil.org/download/council_resources_uwpapers.pdf.

the Hanford Council system have more often resulted in six and seven figure settlements, equally large legal costs, and significant disruption to operations and workplace relationships, usually resulting in job loss for affected employees and, often, for some involved managers. Every conflict accepted into the Hanford Council system has resulted in a mediated resolution, usually with minimal disruption.

In most instances, the Hanford Council system not only addresses retaliation against employees who have blown the whistle, but also addresses underlying safety systems issues, policies, management practices, and, often, relationship and cultural issues contributing to the misunderstandings and behaviors in the workplace that spawned the original problem or dispute. Such broader results, particularly where the underlying substantive issue is resolved and the relationship of the employee and the company is repaired, are rare in the more typical application of whistleblower rights. The Council system is also able to help an employee accept a result where the issue turned out to be less significant than the employee may initially have thought or where the employee's own skills at raising issues could be improved, and to smooth the way for a restored workplace relationship.

However, among the lessons to be learned from the Hanford Council model is the fact that much can be improved in the outcome of whistleblower conflicts within existing statutory and regulatory frameworks. An important part of the success of the Hanford Council alternative is that it is structured to supplement, and often relies on rights and responsibilities established by existing programs. The features discussed below are important to the success of such supplemental mechanisms. Many of them could become features of existing company or government programs, though the specific law, industry, and agency jurisdiction and characteristics will affect what is possible and what are to be the most important considerations. Some laws, as well as some agency or company practices or traditions, will restrict the degree of potential

adoption of these features, and, certainly, statutory and regulatory change would be valuable in many areas. But such changes are not essential to gain improvements in existing programs. Of course, reform only comes by the will of leadership and the willingness of authoritative or affected parties to support or cooperate.

The following simple features, if used together and adapted to match the circumstances, are key ingredients to supplement existing whistleblower protection schemes. The result need not look like the Hanford Council, but can take a form that matches up to the needs of the circumstances.

1. Independence of the mechanism handling the dispute.
2. Strict confidentiality of the process.
3. Ability to *"stabilize"* or *"freeze"* the dispute and avoid further escalation while it is being addressed.
4. Ability to protect and support the employee (and protect management from committing or exacerbating potential violations) during the resolution process.
5. Emphasis on resolution in a non-adversarial process, while preserving the rights of the parties to access adversarial channels.
6. Precluding individuals and offices with a vested interest (see below for details) in the outcome from influencing the evaluation and the resolution of the claim by the independent mechanism.
7. Flexibility in tools and processes so that the tools fit the issues.
8. Focus on problem solving rather than on the assignment of blame.
9. Involvement of managers with program knowledge and broad responsibility rather than delegation to specialized offices or functions. Involvement of non-company and non-agency parties, including employee advocates.
10. Mandate for comprehensive solutions (both the substantive and the relationship issues in the situation) and not limiting the inquiry to an exploration of alleged violations of employment rights.

11. Connection of the system to existing authorities for action or policy change, and protection of rights, provision of opportunities for quiet assessment and resolution, and accountability for fair outcomes.
12. Mutual confidence of leaders in the affected employer and of employee communities in the fairness of the system.

The Hanford Council system allows the employer to respond positively within the dispute process. Employer cooperation is much more likely when the employer is not immediately faced with adversarial proceedings and the attendant risks for individual and corporate goals. Resistance is similarly lessened when the employer is given the chance to avoid organizational disruption and to learn useful lessons without a public spanking. In contrast, the adversarial systems within many statutory programs and internal problem solving systems do not, in fact, focus on problem solving, but instead encourage significant effort on avoiding or fixing blame.

By developing a system that steers away from these common but unfortunate incentives, the Council system has side-stepped litigated cases entirely, minimized operational disruption and diversion of management and union leadership resources, saved careers of both managers and workers, and improved safety practices. Comparing cases of employees not eligible for the Hanford system with cases that have gone through the Hanford system shows starkly different results for individuals and companies, different levels of impact on the issues raised by the whistleblowers, and different results in the willingness of employees to bring issues forward and of management to engage in problem solving, not to mention the starkly different financial impacts.[3] The benefits that stem from the avoidance of project and mission disruption and of work group

[3] *See Built on an Established History of Success*, HANFORD CONCERNS COUNCIL, http://hanfordconcernscouncil.org/doc/council_history.htm (last visited Nov. 13, 2012); *see also Council Ensures that Mediation Beats Litigation*, TRI-CITY HERALD, Aug. 12, 2008, http://www.hanfordconcernscouncil.org/download/press_tricityherald20080812.pdf.

relationships should not be overlooked.

Experience with the Hanford Council system suggests that win-win solutions are usually possible and that conflict elements are rarely irreconcilable. If more attention is given to supplementing existing systems and authorities with the important features listed above, gains can be made in worker protections, and opportunities can arise for addressing important organizational and work site problems. By supplementing existing systems to encourage people to come forward and companies to cooperate, while lowering the risks to both parties, national whistleblower policies and derivative systems could more likely serve their goals. Therefore, examination of the Hanford Council system in more detail may have benefits in evaluating important alternative approaches and in identifying useful tools.

II. BACKGROUND OF THE HANFORD COUNCIL SYSTEM

The Hanford Council system[4] has been in operation at the Hanford Nuclear Site near Richland, WA, for sixteen of the last eighteen years. The Council has received approximately 140 cases.[5] Based on internal Council record keeping, the Council has resolved 100 percent of the cases it accepted for resolution through its system (of cases received, approximately half have been accepted).[6] Cases are reviewed through an intake process,[7] during which the Council determines if it has the jurisdiction and tools to be of assistance or if the situation can be handled more effectively by other means. The merits of the cases are not judged until a more complete

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[4] Brock, *Full and Fair Resolution*, *supra* note 1 (describing the basic design features and the means of their development for the Hanford Council system).

[5] First-hand observation of Council case activities and knowledge of case outcomes.

[6] *Id.*

[7] *Council Charter*, HANFORD CONCERNS COUNCIL § 7.3 (June 1, 2008), http://www.hanfordconcernscouncil.org/download/council_charter.pdf [hereinafter *Charter*] (referencing the "triage" of cases at intake).

assessment of the issues is performed. Resolution means that the Council's recommendation is a consensus recommendation and is accepted by the affected employer and by the employee who brought forward the complaint.[8] The Council possesses special authorities granted by the Hanford Concerns Council Charter (Charter)[9] agreement, which defines the Council's responsibilities and authorities for intervention in whistleblower disputes. The Charter, agreed to by participating companies and the major advocacy group at the site, and approved by the US Department of Energy (DOE),[10] restricts the Council's jurisdiction to cases concerning workplace and environmental safety and health issues. Within that scope, however, the Charter provides a great deal of flexibility in the tools applied to resolve each situation.

The Council does not deal with, among other things, whistleblowing on financial issues, classified information, or health benefit claims related to incidents involving nuclear or workplace safety, though many of its cases contain such incidents or issues. The Charter pledges that the Council will not interfere in established collective bargaining rights, though most of its cases involve bargaining unit employees. Worker compensation programs and insurance systems make health benefit determinations, but many of those coming to the Council have, and retain, rights to make such claims.[11]

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[8] First-hand observation of Council case activities and knowledge of case outcomes.

[9] *Charter*, *supra* note 7 (describing the Council's unique grant of authority from the parties and the ways in which it can operate to exercise this authority).

[10] *Presumption Implementation Brings Closure to Disputes*, HANFORD CONCERNS COUNCIL, http://hanfordconcernscouncil.org/doc/work_corporate.htm (last visited Dec. 18, 2012); *A Less Costly and Time Consuming Method of Conflict Resolution*, HANFORD CONCERNS COUNCIL, http://hanfordconcernscouncil.org/doc/work_doeorp.htm (last visited Dec. 18, 2012); *Advocacy Participation Ensures a Fair Hearing*, HANFORD CONCERNS COUNCIL, http://hanfordconcernscouncil.org/doc/work_interestgroup.htm (last visited Dec. 18, 2012).

[11] *Charter*, *supra* note 7, §§ 1.1, 1.2.2.

The Council uses an unusual form of mediation,[12] combining several considerations into its assessment and recommendations: the impacts on the individual's career trajectory as a result of the conflict,[13] any actual safety problems that may require attention,[14] any underlying systems or workplace problems,[15] and the importance of promoting a safety-conscious work environment and a safe and productive cleanup of the Hanford site. To produce a recommendation that is accepted by the employee and implemented by the company, the Council uses a mediation system that begins with its own, independent assessment of the situation. Unlike adversarial proceedings, this assessment is undertaken jointly by specially selected[16] representatives of the company and of whistleblower advocacy groups who are members of the Council. Their joint work product provides a factual basis for addressing the issues, and is not intended to establish blame, but address the problems and the conflict that has resulted.[17]

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[12] *A Membership That Ensures Neutrality*, HANFORD CONCERNS COUNCIL, http://www.hanfordconcernscouncil.org/doc/work_neutrality.htm (last visited Dec. 18, 2012) (summarizing the uniqueness of the mediation system).

[13] HANFORD CONCERNS COUNCIL, 2010 PROGRESS REPORT 8 (2010), *available at* http://www.hanfordconcernscouncil.org/download/report_progressreport2010.pdf [hereinafter HANFORD CONCERNS COUNCIL, PROGRESS REPORT].

[14] HANFORD CONCERNS COUNCIL, http://hanfordconcernscouncil.org (last visited Dec. 18, 2012) (describing how the Hanford Concerns Council can address safety issues); Brock, *Full and Fair Resolution*, *supra* note 1, at 501–02.

[15] *See, e.g.*, PATRICK N. BREYSSE & MARK R. STENZEL, INDEPENDENT REVIEW PANEL REPORT ON CHEMICAL VAPORS INDUSTRIAL HYGIENE STRATEGY, HANFORD CONCERNS COUNCIL (2010), http://hanfordconcernscouncil.org/download/report_irp_20101027.pdf. These recommendations were substantially adopted by Washington River Protection Systems, effectively ending years of conflict and whistleblower cases concerning chemical vapors at the site. *Id.*

[16] *Charter*, *supra* note 7, § 4.5 (describing selection and appointment of members); *see* Brock, *Full and Fair Resolution*, *supra* note 1, at 517–19 (discussing membership roles and dynamics).

[17] Author's observation of the Council system. The assessment phase provides an agreed upon factual basis from which consensus on a resolution can be sought to address the full range of issues, including employment rights, safety and health practices, and systems improvements, as appropriate to the case.

This mediation system is unlike the more common mediation format in a litigated case, or in an arbitrated case, in which each side presents its case or proposal and the mediator or arbitrator makes or helps the parties make a decision, or in which the parties simply try to reach an agreement on a dollar figure. Because the statutes that often spawn these mediated opportunities only guarantee employment rights, mediation sessions under existing statutory mediation programs are not commonly used to address the actual issues about which employees were concerned or to make other changes dictated by underlying circumstances.[18] Instead, these more traditional mediations usually only address the issue of employment status.

Several prominent attorneys that represent whistleblowers, and who have observed the Hanford Council system first hand, have commented on how much more information is gathered—and far more quickly—than in any of the more usual adversarial proceedings.[19] Company representatives are similarly amazed at the value and degree of problem solving, and the improvement in work systems and practices, that can result.[20] Much of the Council system's productivity comes from the mutual approach to blame-free solutions and the related lack of adversarial proceedings. Other factors are also crucial, as will be discussed below.

The Hanford Council handles only highly polarized or complex cases that are not expected to be susceptible to solution through normal in-house, administrative, judicial, or arbitration channels.[21] Assessment of the facts

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[18] *See* Brock, *Full and Fair Resolution*, *supra* note 1, at 500–02 (describing how traditional and statutory programs were largely restricted to employment rights issues or narrower conceptions of the conflict than could resolve the conflict); Energy Reorganization Act of 1974, 42 U.S.C. § 5851(a)(1), (b)(1) (2005) (describing where the right is defined related to employment discrimination, such as discharge or adverse action related to employment).

[19] Brock, *Full and Fair Resolution*, *supra* note 1, at 514.

[20] Discussions with present and former company representatives.

[21] HANFORD CONCERNS COUNCIL, *supra* note 14. The ability to resolve cases not expected to be addressable by other channels is noted on the Council web site home page, as is the point that corporate, advocacy, and neutral perspectives are at the table. *Id.*

and development of a solution is carried on in the Council among its specially appointed representatives and under the Council's rules. Thus, the issues are considered among members that will understand the employee advocacy point of view and the company view, but who are not directly involved in the conflict and who would not be permitted to continue their involvement if the matter ultimately proceeded to litigation. An additional group of "neutral" members, previously unaffiliated with Hanford, are appointed to provide balance to the "seats" in this group.[22]

The assessment process starts with gathering information from the affected employee, the company, witnesses and experts, and collecting and reviewing relevant documents and analyses. The Council can revisit any of these sources for clarification. The information is reviewed, and the Council members seek to reach a consensus regarding what actually gave rise to the conflict and what would be fair, necessary and appropriate to resolve it. With guidance from the full Council, the initial work is usually done in a subcommittee that contains at least one representative from each seat (company, advocate, neutral). As a group, subcommittee members review all of the available information and participate equally in determining what should be examined. The subcommittee distills the information and brings it to the full Council for further assessment and guidance, and later for review of suggested resolution principles or recommendations. At various points in the process, the Council reviews the subcommittee's progress and checks on open questions with the affected company and employee as it moves towards a resolution. Eventually, the subcommittee will bring a framework for resolution or a draft recommendation to the full Council for review,

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These representatives who are uninvolved with the dispute, but affiliated with the perspectives in the dispute, are the ones that have the responsibility to resolve it, rather than those whose emotions have been aroused, often in a lengthy conflict. *Id.*

[22] Inst. Pub. Pol'y and Mgmt., *supra* note 2, at 7–8 (noting use of neutral members), and *See generally* Brock, *Full and Fair Resolution*, *supra* note 1.

development, or any needed refinement.[23]

While the advocacy and company perspectives differ, all members are individually appointed and share a commitment to the Council resolution process and to reaching a consensus on a reasonable resolution. As a result of working together, the group develops trust and working relationships that allow robust examination of the data, and carrying out of interviews and other analysis of the situation with a common goal. This is accomplished without the polarization and suspicion common to whistleblower conflicts and related resolution systems. This work is detailed, painstaking, and often difficult. The quality and value of the resolutions must be seen, first, in comparison to similar cases not handled through the Council system, but, rather, through the other available systems, to which even a poor Council resolution inevitably compares extremely well in terms of direct and indirect costs. The depth and breadth achieved in a particular case will vary depending upon the factors particular to each case and the context in which the case emerges.[24]

The Council has authority to take "stabilization" actions that are used to preclude or reduce the impact of additional or escalated conflict between the involved parties while the case is being processed. Such actions are rarely available in other systems. Whistleblower cases fought through the normal channels usually produce enormous stress for affected employees and often for their supervisors—not to mention their families.[25] Stabilization actions

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[23] Author's observations of Council case processing.

[24] Author's observations of results and of the reactions of employees, company leadership, Council members, government officials and others regarding Council resolutions, and specific cost and impact comparisons regularly made by the Council in examining outcomes of cases outside the system, compared to costs and impacts of similar cases handled inside.

[25] *E.g.*, Contracting Oversight Subcommittee, *Whistleblower Protections for Government Contractors*, HSGAC SUBCOMMITTEE ON CONTRACTING OVERSIGHT (Dec. 6, 2011) (statement by Dr. Walter Tomosaitis), *available at* http://www.hsgac.senate.gov/subcommittees/contracting-oversight/hearings/whistleblower-protections-for-government-contractors. *See also* STEPHEN MARTIN KOHN, THE WHISTLEBLOWER'S

are used to preclude or address any further conflict among the involved parties, which can include temporary transfers or less formal intervention in the day-to-day conflict that otherwise seems to naturally occur when a whistleblower case is being adjudicated through many other systems. By consulting closely with the employee and employer, these stabilization actions are done without disruption to ongoing business or harm to career trajectory.[26] The Council ordinarily has frequent, sometimes daily or weekly, contact with the employee not only to keep him or her informed, but also to help him or her cope with the circumstances and stay focused on his or her work, or if the employee is off work, on his or her family and other things that can help to reduce and manage the stresses that inevitably arise.

The Council tries to convey to both parties that it is handling the situation through a blame-free, problem solving approach and that they will be involved as needed. Thus, ongoing work can be attended to. When a similar case at Hanford takes place outside of the Council, work is regularly disrupted for months for dozens of people, including leadership. At times, on some projects, work has literally been halted. To help prevent disruption, employees with Council cases are encouraged to avoid gossip about their situations with co-workers and others. However, the Council urges employees with cases in the Council system to find sources of support among family, close friends, and, as needed, medical providers.

HANDBOOK: A STEP-BY-STEP GUIDE TO DOING WHAT'S RIGHT AND PROTECTING YOURSELF (2011) (describing twenty-one different strategies for how to cope with these stresses). *See generally* MYRON PERETZ GLAZER & PENINA M. GLAZER, THE WHISTLEBLOWERS: EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY (1989) (describing pressures of coming forward as a whistleblower); *American Whistleblower Tour*, GOV'T ACCOUNTABILITY PROJECT, http://whistleblower.org/action-center/american-whistleblower-tour (last visited Dec. 18, 2012); HANFORD CHALLENGE, http://www.hanfordchallenge.org (last visited Dec. 18, 2012)

[26] *Charter*, *supra* note 7, § 7.5.2 (discussing authority to undertake stabilization actions and the need to balance intervention with the ongoing mission to support site operations).

This approach also allows the company officials involved in the situation to focus on their jobs and reduce the stresses that would come from an ongoing daily conflict and the attendant posturing.[27] Imposing a relative calm around the conflict, resulting from this suspension of the usual hostilities, facilitates effective problem solving. More often than not, rather than being a function of intended wrongdoing or retaliation, a case is a function of misunderstanding, poor practices or tensions, traditions or habits in the workplace, or mistakes or ignorance about how to properly deal with concerns. Most often, the substantive issue raised by the employee is relevant—whether a safety problem, system's flaw, or mishandling of the right to raise issues—but it is not always precisely the issue that the employee or management had thought, and it often has dimensions or causes that neither side saw clearly and that may have been overestimated or underestimated by the involved parties. If any violations of law or regulation are found, they must be reported.[28]

The benefit of the Hanford Council's independent initial assessment is that these additional aspects of the situation are uncovered, usually allowing the fundamental causes to be addressed and the full dimensions of the problem to be solved. The typical result is that the employee returns to regular and productive work largely, if not entirely, free from the tensions and mistrust that led him or her to raise the issues outside the organization. Sometimes the resolution prescribes that the employee resumes work in a different job or location at the site. Often, a "mentor" or "buffer" person is assigned from within the company for a short period of time to aid the transition back to normal working relationships and preclude old tensions or suspicions from returning.

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[27] These actions are seen earlier on in many cases that occur outside Council jurisdiction, before the Council has informed those previously involved, and before fully establishing its role in the case.

[28] *Charter*, *supra* note 7, § 5.7 (describing requirements to report violations)

The usual circumstance is that the Hanford Council, following an assessment and consideration of an appropriate solution, presents its recommendation to the employee and the president of the affected company. According to the Charter, the company, with minor exception, is bound to accept any consensus recommendation of the Council.[29] The employee is not bound to accept, but every employee has done so thus far.[30] The Council does not bargain with the parties, but it can modify implementation details to better ensure the purpose and implementation of the resolution.

Because of the consultation that has taken place throughout the Council process, the proposal for resolution is rarely a surprise to either party. Typically, the result is not precisely what either party might have anticipated or expected at the outset, but the resolution is usually seen as, at least, an acceptable resolution of the issues. With the additional briefings, information, and deeper resolution provided by the Council, the parties (more often than not) understand the reasoning behind the proposed solution,[31] which adds to their acceptance of it and commitment to it. Because the Council gains from its extensive assessment, it is able to develop and integrate information not previously available to or known by

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[29] *Id.* § 2.6.6.

[30] *Id.* § 2.6. While the Charter is specific in Section 2.6 on the obligation of the participating company to implement consensus recommendations except under unusual circumstances, it is purposely silent on any obligation of the employee. *Id.* This is by agreement of the Charter parties. *Id.* The involvement and consensus of employer and employee advocacy representatives is the key channel by which the resolutions are shaped to be palatable to both sides, but based on the Council's assessment. *Id.* Then, they can be presented in a way that demonstrates the benefits and the tradeoffs to each, resulting in acceptance. *Id.* Usually, the president of the company and the employee are consulted along the way so that they are informed of the findings once they emerge. *Id.* This often alters the perspective held by one or both sides and lays the groundwork for development and later acceptance of the Council's proposed resolution, which is effectively mediated inside the Council and provided to the parties. *Id.*

[31] Brock, *Full and Fair Resolution*, *supra* note 1, at 515–16 (describing gaining acceptance of the process for maintaining employee/employer relations).

either of the parties. And because it is able to apply its combined perspectives to find a resolution, the resolution is different, and usually more robust and stable, than either party would likely have achieved through other channels.

Quite often the degree of satisfaction and restoration of work relationships for both parties is substantial. At a minimum, the company has avoided litigation, protracted instability, or other management, mission, or business risks or interruptions, while the employee has been relieved of stresses and uncertainties, and finds some vindication in the exercise of his or her rights, as well as hope for future protection and less stressful working conditions. There have been a few cases where the relationship has soured and further conflict has taken place following the resolution, often due to transitions within the company or other changes related to site responsibilities.

As noted in the Charter agreement, consensus is necessary to ensure company acceptance of a case recommendation.[32] To reach consensus, all Council members who are eligible to participate in the case must be in agreement. The members who are eligible to participate in a case generally include three members from the affected company, three members representing employee advocacy organizations, three neutral representatives with no ties to Hanford companies or interests, and a neutral chairperson.[33]

Consensus comes about partly because of the recognition by the Council's participating advocacy groups and corporate members and DOE leadership that the alternatives are inevitably worse just by their nature. They typically involve extensive depositions, investigations, and other litigation costs, as well as the debilitating indirect impacts and costs on working relationships, reputations, public confidence in the competence of government and contractors, and, often, on the progress of the nuclear

[32] *Charter*, *supra* note 7, § 2.6.
[33] *Id.* §§ 4.2, 3.2.

clean-up work. As noted, these adversarial methods may also create disruptions in the personal lives of managers and employees, such as diversion from work, as well as attendant conflicts, stresses, and tensions.[34]

Because so many factors are usually involved, the employment rights remedy—one of the most common bases for whistleblower statutes[35]—will not likely address the roots of the conflict. Therefore, such remedy does not permit a resolution that can normally lead to stability. Nor can it address the policy goals of fixing an organizational problem and making it safe for employees to raise, and employers to work on, issues that will improve practices or meet some other intended public standard.

In contrast, the absence of assigned blame in the Council system broadens the focus of the process, changes the behavior of the parties, and, therefore, the outcomes.[36] Few Council cases involve monetary settlements, perhaps because of the interest of the parties in addressing the actual issues and the ability of the system to actually do so, particularly in a blame-free manner. Most employees blow the whistle to solve a problem that they see at work. If the resolution solves the problem and gives them a reasonable assurance for a stable future employment relationship, money is not needed to resolve the matter.[37] This pattern of positive outcomes for both parties

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[34] *See generally* TRI-CITY HERALD, *supra* note 3; HANFORD CONCERNS COUNCIL, PROGRESS REPORT, *supra* note 13, at 2, 5 (quoting Christine Gregoire); Brock, *Full and Fair Resolution*, *supra* note 1, at 502–03 (quoting former US DOE secretary, Hazel O'Leary).

[35] Brock, *Full and Fair Resolution*, *supra* note 1, at 501–02 (concerning limitations of common whistleblower protection programs). *See also* Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531 (1999).

[36] HANFORD CONCERNS COUNCIL, PROGRESS REPORT, *supra* note 13, at 4 (stating approaches that avoid blame and seek comprehensive solutions that have both the potential to restore the employment relationship and actually protect employment rights).

[37] One pattern I have observed is that in the early part of a case, before substantive solutions are found, discussions or demands about dollars are in rather high numbers. Those numbers drop or disappear the more complete the resolution is relative to the real concerns and career impacts. Most cases where money is part of the resolution are those

demonstrates the value of dealing substantively and honorably with the concerns that are raised.

A resolution letter or memo of agreement may prove beneficial even where a settlement agreement is unnecessary. Formal legal agreements are typically necessary only if there is payment to the employee, or if a court or regulatory agency requires documentation of withdrawal or related resolution.[38]

III. BARRIERS AND GAPS IN STATUTORY AND ADMINISTRATIVE WHISTLEBLOWER PROTECTION PROGRAMS

The following section describes limitations typically present in systems intended to encourage or protect whistleblowers. These limitations are often present in systems intended to encourage or protect whistleblowers.[39]

As this article argues, these limitations mean that many public policy attempts in the United States to promote whistleblowing and advance potential societal or industrial benefits from whistleblowing activities have failed to meet expectations.[40] Although the individuals working within these systems are dedicated and hardworking, the tools and processes available to them are limited and often interfere with resolutions intended to uphold or encourage the exercise of whistleblower rights.

Observing the programs that run parallel to the Council system in the federal nuclear complex, as well as from less extensive experience observing whistleblowing in other sectors, one can see many of these

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where the conflict has proceeded too far to be resolvable through substantive changes in practices or workplace relationships, or in other exceptional circumstances.

[38] *See* HANFORD CONCERNS COUNCIL, PROGRESS REPORT, *supra* note 13.

[39] Robert Vaughn, *Whistleblower Protections and the Challenge to Public Employment Law, in* PUBLIC SECTOR EMPLOYMENT LAW IN THE TWENTY-FIRST CENTURY 182 (2007) (discussing the challenges whistleblower protections impose on employment law).

[40] *E.g.*, Richard Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65 (2007) [hereinafter Moberly, *Unfulfilled Expectations*].

barriers.[41] The prevalence of the following limiting factors has been found at Hanford as well as at other sites. The factors will be identified in italics, and their possible causes will be denoted in regular type.

A. *Many regulatory systems only protect employment rights to blow the whistle without retaliation, and substantive issues or underlying conflicts that spawned the complaint are either not reachable by the program or not meaningfully addressed.*

   1. The failure to address underlying concerns may be due to limitations on agency or program jurisdiction, agency expertise or resources, or on access to candid and in depth information.[42] It may also be due to the fact that, in a system focused on employment rights, pressure falls on the employee to drop the issue, leave employment, or settle rather than suffer the challenges, stresses, and costs of the administrative processes.

B. *The focus on proving fault through investigation and hearings creates posturing and defensiveness on both sides and precludes the candor necessary to find and address key issues and potential solutions.*

   1. When there is an important necessity of establishing agency jurisdiction, showing intent to enforce, establishing case law, or convincing a company or agency to use mediation alternatives, using a system that requires finding fault may be the only way to address a particular issue. However, it is normally not a useful approach even though parties often see a necessity to place blame or "teach a lesson" through a formal adjudication.

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[41] These conclusions are based on the author's experience and observations centered on close observation and mediation of whistleblower cases at Hanford, as well as mediation, experience, and research in other settings intended to produce alternatives to complex and polarized legal and political disputes.

[42] *See, e.g.*, 42 U.S.C. § 5851(a)(1), (b)(1) (describing where the right is defined related to employment discrimination, such as discharge or adverse action related to employment); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, WHISTLEBLOWER PROTECTION: SUSTAINED MANAGEMENT ATTENTION NEEDED TO ADDRESS LONG-STANDING PROGRAM WEAKNESSES (2010), *available at* http://www.gao.gov/assets/310/308767.pdf (exemplifying issues dealt with by OSHA).

C. Lack of access to support and guidance normally needed for employees to file a claim likely to receive a full and fair examination.

1. Employees understandably find it difficult to manage the pressures and demands of working on a case against one's employer while continuing employment, or to do so if one is unemployed and lacking normal income and support systems.
2. The employee may feel escalating levels of conflict and tension between himself and management, as well as with co-workers.
3. The whistleblower may lack confidence that his issue will be effectively handled if he or she does come forward.
4. Many internal and some agency programs are seen as beholden to employer interests; employees, therefore, perceive that they cannnot get support that they are willing or able to rely upon.

D. Insufficient confidentiality or protection of information contributes to employee and employer reluctance to engage in problem solving.

1. The employee is concerned about exposing himself or herself to retaliation or other consequences from supervisors or peers.
2. The employer fears that candid exploration of the problem could be misinterpreted or misused or used to file other actions.
3. Witnesses may be reluctant due to fear of repercussions.
4. The possibility of posturing increases in non-confidential, unprotected settings, while the likelihood of candor and admission of error leading to solutions decreases.
5. Documentation requirements of some agencies or internal systems may preclude some employees, employers, unions, or others from engaging in a constructive resolution because of what might be required to have on the record.

E. The parties may perceive insufficient independence, balance, and objectivity in the process.[43]

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[43] Observations of the factors in this section (and other observations throughout this section and elsewhere in the paper), come from the author's involvement in processing

1. While many effective internal programs exist, it is also common for employees or factions of employees to not trust these internal employee concerns programs because these programs are controlled by the very employer against whom the employee is raising the concern. This may also be true of agency-sponsored programs when employees do not perceive them as existing independently of the employer or being sufficiently knowledgeable about the issues.
2. People who have limited or no valuable knowledge or standing in the concern, have motivation to, and find ways to, influence the investigation and decisions surrounding the case.
3. Usually, such people's interests are parochial and relate to old rivalries, perceived professional obligations, or concerns about having their own error exposed.

F. Employers are often resistant to investigating whistleblower claims internally and to working with regulatory agencies tasked with investigating whistleblower complaints.

1. Lack of confidence on the part of the employer that the applicable regulatory or administrative agency has the expertise or objectivity to provide a fair adjudication of the claim. Employees often have these doubts as well.[44]
2. Economic or other penalties potentially facing the employer may create an impetus to resist rather than explore the claim.[45]
3. Mistakes in initial responses by inexperienced or unsophisticated supervisors and other employees may lead to violations of employee rights that then expose the company to liability. In such situations, employers often default to defensive

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over a hundred cases through the Hanford Council system, as well as in processing and studying cases and conflicts in the other systems noted.

[44] *See* Richard Moberly, *Sarbanes-Oxley Whistleblower Provisions Ten Years Later*, 64 S. C. L. REV. 1 (2012) (suggesting many difficulties and barriers in fulfilling public policy expectations of whistleblower protections).

[45] This comes from discussions about and observation of the response of many supervisors and managers to their perceptions of corporate or government expectations, or concerns about peer pressures, or failure to follow traditions.

postures, decreasing possibilities for effective resolution.

4. The tendency of offices responsible for defending claims is often to go quickly into "fight" mode, partly due to a lack of flexible tools, structure, or mandate for utilizing alternative approaches. In many existing programs, the threat of a lawsuit or other adversarial actions places these agents automatically on the defensive. This is often executed using traditional methods for preparing for adversarial proceedings, which often has the effect of further polarizing the conflict and moving further away from the actual issues. On the other hand, many professionals in these offices and the advocates who oppose them in court, when involved with the Council system, are able to constructively engage in problem solving. Hence, this is most likely a failure of the systems, tools, and structure of the processes available to them and not necessarily a failure of individual intentions, talent, or willingness to put forth effort.

5. Only rarely is it that the management that can sufficiently affect the underlying causes and relationships fundamentally involved in resolving these issues once the complaint becomes an issue for the legal office or for formal labor relations treatment.

6. Employers sometimes attempt to reach resolutions or prevail in adversarial proceedings through the involvement of subject matter experts.[46] Although expert advice may be successful in some cases, the result is more likely to be polarizing. The employee's lawyer simply finds a competing expert. Besides, most polarized whistleblower cases have dimensions beyond technical disagreements, such as trust issues or traditions or long-unaddressed issues that must be considered in order to address the underlying issues and resolve the conflict.[47]

7. Typically, internal and external whistleblower programs have neither the mandate nor the tools to address a sufficient range of

[46] Inst. Pub. Pol'y and Mgmt., *supra* note 2 (describing attempted resolutions through primary subject matter).
[47] *Id.*

the conflict's aspects.[48] Particularly well-developed employee concerns programs can be exceptions to certain of these role and tool problems, but they are not the norm. Consistent exceptions are found in plants covered by the Nuclear Regulatory Commission[49] and in some other specific contexts, such as in situations where companies have invested in robust programs that address the full range of issues, including technical issues.

G. *Forces within the workforce and workplace discourage employees from blowing the whistle.*

1. Many of these disputes involve peer pressure and ostracizing of employees, neither of which can adequately be addressed in court action, settlements based on employment rights, or through typical internal investigations and solutions. Such conflicts present challenges to unions due to the difficulties presented by internal strife and peer-to-peer resentments.

2. Many of these cases lead employees and management to choose sides and, subsequently, to try to influence outcomes even though they lack access to facts that might later be discovered. The impacts on work relationships can be personally and institutionally devastating.

3. It is also common for a convenient and non-factual "narrative" to develop about the situation, which may preclude upper management from making an objective examination of the situation, despite a sincere desire to do so. Generally, these narratives include a negative depiction of the employee who raised the whistleblower complaint, undermining his or her credibility and motivations. In the Council's experience, these narratives are almost always exaggerated, frequently inaccurate, and based substantially on personality clashes or a defensive posturing rather than on actual work behavior. This narrative may drive decisions that are not buttressed by a closer, de novo

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[48] *See* Brock, *Full and Fair Resolution*, *supra* note 1.
[49] U.S. NUCLEAR REG. COMM'N.

look at the situation.[50]

H. Resolutions reached by administrative and regulatory agencies, courts, and other traditional bodies often lack finality and stability.

1. The availability and common uses of appeals steps often means that first steps in investigations and adjudications in many administrative procedures have become meaningless because of parties' penchant to appeal.[51]

2. A win-lose system encourages the use of appeals. A system that more fully addresses both parties' underlying issues does not as frequently result in a loser that feels the need to appeal, or a company or employee that feels compelled to use other means to achieve key objectives.

3. Ongoing conflict affects not just the employee involved in the issue, but also witnesses, supervisors, management, other employees, union representatives, and staff that may have been involved through ancillary duties. The original issue is frequently still languishing and the interpersonal and other workplace conflicts are left to worsen.

4. If the remedies available are restricted to adjudicating employment rights, many important items will be left unresolved (and, often, to fester) for a future conflict.

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[50] This is a common observation in cases received by the Council, especially the most polarized and complex. I am indebted to attorney Billie Pirner Garde for helping to describe and recognize this and many other phenomena and patterns in whistleblower cases.

[51] Many attorneys who practice in this area, some of whom have interacted with the Council, have described that the appeals processes in some programs are seen as more favorable or at least inevitable. Consequently, their attention to or faith in the initial investigation by the administrative agency has, unfortunately, been reduced. The workload in some of these administrative processes relative to the resources available has also impaired the timeliness and, sometimes, thoroughness of what can be done at those levels, further reducing the confidence that one side or the other has in the initial administrative investigations. The relative finality of the Council process (presumptive implementation) is the factor that makes it attractive to many of the parties, and, in particular, to the employee advocates and senior corporate officials involved.

IV. HOW THE HANFORD COUNCIL SYSTEM WORKS TO ADDRESS THESE COMMON LIMITATIONS[52]

The Council operates within a Charter agreement, which establishes parameters and authorities for the Council, but allows adaptation of methods to the issues and dynamics in each dispute.[53] The Council Charter, with modest exceptions, provides authority to address the full range of issues and guards against other typical limitations to addressing whistleblower case resolution by providing the following:

A. Support and guidance for exercising rights

1. The Council system provides the employee regular contact with staff and selected members of the Council to help the employee understand his rights, alternatives, and approaches to dealing with the stresses of the process.[54] While the Council does not provide legal advice (and while employees are free to seek it) very few employees find the need to seek legal advice because of the respectful, non-mysterious, and comprehensive nature of the process.

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[52] *See generally* JONATHAN BROCK, BARGAINING BEYOND IMPASSE: JOINT RESOLUTION OF PUBLIC SECTOR LABOR DISPUTES 217–54 (2007) [hereinafter BROCK, BARGAINING BEYOND IMPASSE]; Brock, *Full and Fair Resolution*, *supra* note 1.

[53] The concept of having a "Charter" document to capture the authorities and related basic agreements about Council operation was the creation of Gerald Cormick, a distinguished mediator who followed up after the 1992 University of Washington study. He brought the parties together around the concepts in the study to see if a workable mechanism could be built on these concepts. Brock, *Full and Fair Resolution*, *supra* note 1, at 508–09.

[54] HANFORD CONCERNS COUNCIL, PROGRESS REPORT, *supra* note 13, at 5. Usually, an employee advocate representative is assigned to be the primary liaison for employees with a case before the Council. Normally, the employee and the representative will speak regularly, often weekly or more often, to be sure that the Council is updated on the situation and the employee is aware of developments and needs in the assessment and in the development of a resolution. This creates a valuable channel for avoiding surprises, for information exchange, for problem solving as things arise, and for greater trust and clarity when the resolution is available for presentation. Employees may call other members of the Council if they wish, including company representatives, and often do so.

2. The Council examines the situation de novo. It does not rely on prior reports, rumors or assumptions about the situation or the employee. The Council begins by listening to the initial presentations of the employee without judgment or argument, and then commits to an objective assessment, including solicitation of company views. The assessment process contains deliberate steps and check-ins so that the issues of concern, or in contention, are fully explored and the conclusions are unlikely to be a surprise. Part of the mediation agreement that the parties (company and employee) must sign is a promise that the employee and company will cooperate with the process and participate constructively as requested.[55]

B. Protection from retaliation, escalation, and associated stresses

1. The tools used by the Council are tailored to the circumstances and include consistency with applicable law, bargaining agreements, and more. For example, the Council system is able to introduce specific protections, such as removing the employee to a different work area, forestalling an upcoming evaluation, or even a pending termination, or taking other temporary measures to prevent escalation and additional stress.[56]

2. Others in the company that might have a role in the investigation of the concern, or other aspects of the case, are normally required to fully suspend these activities. In addition, supervisory or administrative contacts with the employee are also carefully managed during the case in order to preclude actions that could exacerbate tensions and divert focus from the

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[55] HANFORD CONCERNS COUNCIL, JOINT MEMORANDUM OF UNDERSTANDING (May 2008), *available at* http://www.hanfordconcernscouncil.org/download/joint_mou.pdf [hereinafter HANFORD CONCERNS COUNCIL, MEMORANDUM OF UNDERSTANDING]. The Council requires that a mediation agreement (or Memorandum of Understanding—MOU) be signed by the employee and employer and the Council that outlines mutual requirements and expectations. *Id.* This includes confidentiality, cooperation, and the expectation that other processes will be put on hold while the Council works on the case. *Id.* This provides additional confidentiality protection to all and a reminder of expected behaviors and obligations. *Id.*

[56] *Charter*, *supra* note 7, § 7.5 (discussing stabilization).

problem solving work and the day-to-day jobs of company and employee. In the event of a business need to contact the employee during a case, such contacts are normally coordinated with the Council in order to avoid misunderstandings or prejudicial actions by either party.[57] Usually, a specific protocol is worked out with the employee's chain of command.

3. Neither party may start new proceedings in connection with the issue or work outside the Council system on the case while the Council has jurisdiction. If they do, the Council will normally cease work.[58] This prohibition helps keep everyone focused on the problem solving process and minimizes posturing and other activities that reduce candor and divert energy from resolution.[59]

C. Problem solving focus and blame-free approach keeps the effort on solutions and avoids further polarization and conflict

1. A problem solving focus and the employment of techniques designed to achieve resolution also represents a break from what has usually been, up to that point, an escalating conflict between the parties, typified by defensive statements and related posturing by both parties.

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[57] *Id.* § 7.5.2.

[58] HANFORD CONCERNS COUNCIL, MEMORANDUM OF UNDERSTANDING, *supra* note 55. In my experience, if there is another ongoing process through OSHA, the DOE, the court, or elsewhere, attention is diverted, trust eroded, and sometimes processes are "played" against each other. Thus, the Council has made it a practice not to work on a case if that case is active in another process. A grievance on an unrelated item or adjudication of a health concern—which the Council does not perform—may go on at the same time if the Council determines that this does not interfere with the Council's process. Through the MOU, the Council gets the employer and employee to approach the sponsor of any process that has been started and request a "freeze" in the process without any party giving up rights to restart the process. Often this requires the employee or the company or both to make a formal request to such agencies and agents. *Id.*

[59] Discussions with Council members who have been advocates for whistleblowers in courts, in administrative processes, and with company members produced this insight about their greater willingness to candidly and creatively participate in Council cases. This is also a common occurrence in mediation, and among the reasons for confidentiality being a common element of most mediation practices. Brock, *Full and Fair Resolution*, *supra* note 1, at 516.

2. The purposes of the blame-free, problem solving mandate are to find a reasonable solution to the underlying problem, keep the project on track, improve safety culture, repair the damaged workplace trust and relationships, and to otherwise restore (or minimize damage to) career trajectory.
3. Members of the Council are appointed with this mandate. Council procedures that begin with assessment and proceed to build a blame-free solution reflect this approach.[60]
4. The blame-free approach, combined with confidentiality, usually produces candor, a willingness to solve problems, and a reduction in the need for defensive activities and statements.
5. Consensus resolution creates strong support among the company representatives and CEO, employee advocates, and the affected employee for the resolution; it also protects Council members from fear of being "outvoted." Risks of instability from appeals or effective opposition are, thus, minimized.

D. Presence of Council members from both advocacy and company perspectives, who are familiar with the site, relevant safety practices, and applicable laws and rights, enables balanced and credible resolutions[61]

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[60] Members receive and sign a letter of appointment that specifies their responsibility to seek solutions, to maintain confidentiality, and to follow other practices that contribute to resolving issues. *Charter*, *supra* note 7, § 4.5. They also receive material that describes the function of the members in the various Council positions and the common commitment to creating resolutions. *Id.*

[61] The following outline pertains to the discussion in this section, and elsewhere in the paper, on the membership composition of the Council, which is a specific design feature of the system. This balanced membership feature and other features of the Hanford Council system are premised, in part, on features of a system developed in the 1970s to deal with polarized and contentious issues in police and firefighter bargaining in Massachusetts. BROCK, BARGAINING BEYOND IMPASSE, *supra* note 52, at 217–54. This chapter describes the importance of such features in developing a successful conflict resolution system in circumstances that otherwise tend to fall towards polarization and solutions that do not address the causes of the conflict. *Id.* Similar features can be found in other standing systems, including those referred to above in fisheries, health care and elsewhere, and are the principles that underlie much of private arbitration and mediation

1. Presence of senior, experienced corporate officers in the system

   a) Bypassing supervisory, mid-level, and staff offices in decision making (but not for input or testimony on the issues) precludes those who were parties to the conflict, or who might normally be charged with automatically defending the company from biasing the assessment or recommendations, allows a fresh discussion of the issues without emotion or pride in the way, and avoids influence of the negative narrative that often builds up.

   b) While it seems unusual to some to have employer representatives involved directly and candidly in problem solving, employer involvement provides knowledge of site and company practices, as well as of dynamics within the company common to whistleblower disputes. The presence of these corporate players speeds access to information and helps the Council collect facts, keeping solutions consistent with mission and organizational goals. It also creates advocates within the company for the recommended resolution.

   c) Direct access by the Council via the company representatives and Chair of the Council to the company president for recommendations protects confidentiality and provides authority for policy and practice changes and allocation of resources to the solution. Lower levels do not have the authority to change behaviors and policies, to take exceptional actions, or to authorize most stabilization actions. The ability to take a well-formed conclusion and resolution to the company president precludes the parochial biases in other quarters from influencing the decisions on whistleblower cases. The company president takes the most complete view of corporate and site missions and interests, and normally finds the Council resolution to be far preferable to available alternatives, particularly those framed by the case's initial

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clauses in commercial contracts. *See* Brock, *Full and Fair Resolution*, *supra* note 1, at 517–19.

trajectory into conflict mode prior to Council involvement.[62]

d) The presence of senior company representatives in the Council system gives the company president confidence in the recommendation. Recommendations only go forward if they are a product of consensus.[63]

2. Presence of respected employee advocates in the system[64]

a) The employee advocates on the Council have experience with aggrieved individuals, can help interpret concerns that people often have when raising whistleblower issues, and can better anticipate the value of contemplated solutions.

b) These employee advocates ensure that the matter is fully explored relative to the concerns of the employee and that the matter is appropriately resolved.

c) The advocate members of the Hanford Council ensure that solutions are consistent with the whistleblower's rights under law and that the resolutions will resolve the issues that gave rise to the concern. The advocates also help the others in the Council system to be aware of how an employee will experience the actions taken by the Council to assess and resolve the case. This proves to be very helpful in gaining credibility and in facilitating practical resolutions. Employee advocate members also play a crucial part in providing initial credibility to the system, support to employees during the process, wisdom in seeking practical resolutions and protecting rights, and confidence and substance to the outcomes.

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[62] This has been the ongoing experience in Council interaction with CEO's regarding Council resolutions, as predicted in the University of Washington study. Inst. Pub. Pol'y and Mgmt., *supra* note 2; Brock, *Full and Fair Resolution*, *supra* note 1, at 516. My experience continues to affirm the value seen in this process by CEOs as opposed to alternative methods, though the degree of engagement and interest naturally varies.

[63] *Charter*, *supra* note 7, §§ 2.6, 1.2.

[64] *Id.* § 4.2.3; Inst. Pub. Pol'y and Mgmt., *supra* note 2; Brock, *Full and Fair Resolution*, *supra* note 1, at 517–19; HANFORD CONCERNS COUNCIL, PROGRESS REPORT, *supra* note 13, at 5.

d) As with the exclusion of corporate personnel who had been previously involved in the case or who might represent the case in later proceedings, should the Council process fail, advocacy members of the Council are similarly restricted to those who have not taken a position, and who would not be involved with future representation. This also protects independence and confidentiality of Council system activities.[65]

E. Capacity and mandate to address the full range of issues in the case, which may include safety systems and practices, culture and interpersonal issues, and harm or potential harm to the employees career[66]

1. The Council system increases chances of resolution and lowers odds of lingering issues leading to new conflict by creating solutions that deal with the range of safety, employment, interpersonal, policy, and workplace issues that may be present.

2. A comprehensive resolution also makes it more likely that the precipitating cause is addressed.

3. Because employers, advocacy groups, and the DOE endorse the Council system, Council recommendations are expected to be implemented. When any of that support is in doubt, the resolution is less likely to be stable. Any voluntary system that seeks to supplement existing systems needs the support of the authoritative and influential parties who would otherwise use existing statutory and administrative systems.

F. Confidentiality helps the Council system to preclude forces and considerations that interfere with exploring underlying causes and a creative search for options[67]

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[65] *Charter*, *supra* note 7, § 6.1.2 (requiring that a member recuse himself or herself if an actual or potential conflict of interest arises).
[66] Inst. Pub. Pol'y and Mgmt., *supra* note 2; Brock, *Full and Fair Resolution*, *supra* note 1, at 500–02.
[67] *Charter*, *supra* note 7, § 5.0.

1. Confidentiality keeps out extraneous considerations and pressures on decision-makers and contributes to lowering the stress and pressures on the employee and managers who may have been involved and who may feel as if pride is on the line.
2. Confidentiality, recusal and related process protections contribute to an independent and calm examination of the issues, and allow not only a full examination of what occurred and what did not, but also an exploration (and discarding, as appropriate) of a wide range of alternatives that can include strategic considerations and implications well beyond the mandate of narrower internal or agency systems.
3. Confidentiality, recusal, and related processes help to quickly and thoroughly bring in information and considerations that focus on addressing the problems that gave rise to the initial complaint and led to the subsequent conflict. Confidentiality reduces the defensiveness common to on-the-record and adjudicatory or administrative proceedings, and, therefore, allows greater exploration of problems and alternatives. These features can establish the assurance that the neither party is placed in a disadvantageous position should the mediation fail.[68]
5. Confidentiality keeps these cases out of the newspapers and out of the gossip chain (made the worse by electronic communications) and, thereby, reduces the diversion and other harms that otherwise result from the high level of gossip and rumors that frequently accompany such cases. All gossip cannot be stopped, but confidentiality leads to a noticeable reduction in volume and impact, which is highly beneficial in keeping focus on the issues and saving the energy of those who should not be involved. No case before the Council has been the subject of a news story once the Council took the case, though most similar cases outside the Council's jurisdiction (e.g., in non-participating companies) often are.

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[68] *Id.* § 6.1.2.

G. Flexibility of tools to fit the issues

1. While available tools are not limitless, the Council system is not locked into one set of procedures and can select approaches, tools, and remedies that it believes, by consensus, are likely to be effective. For example, if a case requires outside experts, the Council can bring in experts—chosen by agreement of all seats—and the experts thus engaged are everyone's experts to freshly examine the designated issues. If the case requires involvement of the employee in a reform effort to address an inadequate policy, the Council system can arrange for this to occur. If the situation requires stabilization, or if certain actions need to be frozen while the case is addressed, this can usually be done consistent with ongoing project needs.[69]

2. Limits of resources and authority certainly exist but, in general, the focus on solution rather than process provides more ways to succeed.

H. Agreement on the system by the participating parties, a clear relationship to other existing systems,[70] and rights pertaining to safety and resolution of employment rights conflicts

1. The Council system depends on the Charter agreement to which participating companies and participating advocacy groups agree.[71] This combination of clarity and agreement contributes

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[69] *See, e.g.*, *id.* §§ 1, 1.1.1, 1.1.2, 1.2.1, 1.2.4, 1.3, 2.5, 2.6.3, 2.7, 7.5, 7.7, 9.1.6, 9.2. These provisions illustrate that the Council is not bound to any one process or type of resolution, and may approach cases as it deems necessary within the bounds of the charter.

[70] BROCK, BARGAINING BEYOND IMPASSE, *supra* note 52, at 244. *See also* JONATHAN BROCK ET AL., WILLIAM D. RUCKELSHAUS CTR., RUCKELSHAUS CENTER REPORT: THE SHARED STRATEGY FOR PUGET SOUND: A DESCRIPTION AND INITIAL ASSESSMENT OF COLLABORATIVE SALMON RECOVERY PLANNING IN WASHINGTON STATE AS OF JUNE 2008 (2008), *available at* http://pcc.wsu.edu/projects/documents/SharedStrategyFinalReport-summaryonly.pdf [hereinafter BROCK ET AL., THE SHARED STRATEGY] (discussing a dispute that concerned developing a plan to recover salmon in the Puget Sound, the estuary on which Seattle, Tacoma, and other cities sit).

[71] First-hand experience of the Charter's reviews for improvements and adjustments by joint teams of corporate, advocacy, neutral members, and with the cooperation of the DOE, most prominently in 2004 and 2005.

to flexibility and stability and shows the relationship to existing rights and processes.

2. The Charter specifies the mandate in terms of types of cases (e.g., safety and environmental health cases are included, but classified data, financial, or workers' compensation cases are not) and authorities (e.g., consensus requirement to gain implementation or stabilization authority).[72]

3. Existing rights are protected and not overridden,[73] but the parties can agree to defer exercise of those rights and must do so for the time the Council is working on the case. If a case is taken into the system, the Council has exclusive jurisdiction and engages the cooperation of agencies to put the agency case on hold for a specified time period. However, the employee may leave the Council process at any time.[74]

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[72] *Charter*, *supra* note 7, § 1.2.2 (listing the areas where the Council may not do case work, including areas involving classified information).

[73] During the Charter development process, the principle of preserving the rights of the parties was recognized as important to encouraging employees, but also prospective participating companies. Brock, *Full and Fair Resolution*, *supra* note 1, at 511. If an employee was to give up a right to sue or pursue administrative processes, spending months in the Council's mediation process would seem much less attractive, particularly since aggrieved employees are not trustful of the employer at that point, nor are they familiar with the Council. *Id.* Similarly, employers often are not trustful of an employee's good faith at that stage of the conflict. *Id.* The shared strategy also resulted in a seminal decision to protect tribal rights to fisheries, although many other parties sought to restrict them as a condition of the conflict resolution process, and the rights and authorities of agencies and other players were not altered in statute. *Id.* In practice, new structures for developing consensus recommendations changed how these rights and authorities were exercised and how problems were evaluated prior to taking action. *Id.* The shared strategy system, approved by the federal Government like the Council, is a much larger scale example of a mediation system that supplements, but does not replace existing authorities for oversight, regulation, and managing the tasks. *Id.*

[74] HANFORD CONCERNS COUNCIL, MEMORANDUM OF UNDERSTANDING, *supra* note 55 (containing provisions for putting other processes on hold, as well as the parties' agreement to continue to do so, or leave the Council process, and allowing the employee the option to leave). Mediation is by definition a voluntary process, as opposed to a process like binding arbitration, or a contractual agreement to arbitrate certain kinds of disputes. The MOU also states that the parties will "leave the case to the Council" while it is in the Council's jurisdiction, precluding other actions to affect or process the case. *Id.*

4. The proposed resolution requires consensus, protecting the rights and interests of all, but the method of appointments, process of examination, confidentiality, and other structural features provide the Council with independence and a problem solving focus to ensure the prospects for reaching consensus.
5. Once reached and approved, Council resolutions may be implemented through the employer's normal systems (e.g., changed job assignment or normal systems for revising practices).[75]
6. Also, any violations of law or regulation must be reported.[76] The format for reporting is usually determined by which party or what mechanism is required to make the report.
7. The Council system, while independent of the company, advocacy groups, and government agencies, is largely a supplement to the rest of the safety and personnel apparatus.
   a) The Council exercises independent judgment and proposes action to which other company processes must defer as required by the Charter. The Council resolution is fashioned

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[75] *Charter*, *supra* note 7, § 2.6. While the Council gains a form of temporary authority to handle the issue, the fact that its recommendation goes to the president of the affected company is emblematic of the fact that it is the president's authority over the company that will allow the specifics of the recommendation to proceed. *Id.* This ability is subject to what is legal under the company's contract with the DOE. *Id.* Rights and processes are established through collective bargaining contracts and other applicable laws. *Id.* Because of company representation on the Council, these items are normally anticipated or can be worked through in the implementation. *Id.* The Council chair, for example, has no authority to hire, transfer, expend corporate funds, or to mandate changes in engineering or other safety processes. *Id.* Thus, the charter refers to a "consensus recommendation" made to the president of the affected company that will be "presumptively implemented." *Id.* The latter term was carefully chosen to indicate that the recommendation could be rejected only in rare and relatively specific instances. No recommendation has ever been rejected. *Id.*

[76] *Id.* § 5.7. Particularly because nuclear safety is a very specialized area and heavily regulated, the parties developing the charter recognized the necessity of maintaining the integrity of safety reporting systems and keeping the employees and company in compliance with nuclear safety requirements, while preserving confidentiality of mediation. *Id.*

creatively in response to the overall set of issues: it extends beyond the jurisdiction of any one program, agency, or section of the corporation, but integrates into a single solution package and may include case-specific items as well as system repair aspects.

b) Council-proposed resolutions have to be within applicable law and within existing systems of managing employment and operations on the site. Often, specific coordination, or even sign-off, is required if the matter had previously been before a court or regulatory authority and was deferred or referred to the Council system. If a grievance procedure was suspended in deference to the Council process, the union would have to agree that the matter is resolved and withdraw the grievance. The Council works as needed with union leadership and employee relations representatives to ensure consistency with collectively bargained rights.

c) Partly through these forms of coordination with entities that are protecting rights of the employee or employer, the results of the Council's supplemental system gains legitimacy. This finality contributes to precluding recriminations or appeal.[77]

d) Importantly, statutes, regulations, and related administrative procedures provide employees with standing and require the employer to be attentive (though many company and agency leaders are highly interested in these issues anyway). However, these statutorily established systems may not, by themselves, be sufficiently protective or stabilizing because of the lack the breadth of jurisdiction or resources to fully solve the issues in a particular setting or circumstance.[78]

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[77] Dwight Golan & Eric E. Van Loon, *Legal Issues in Consensus Building*, *in* THE CONSENSUS BUILDING HANDBOOK 495, 506 (1999) (discussing recommendations to the authority of the affected company's president and legal and contractual requirements he or she is required to follow); *Charter*, *supra* note 7, § 2.6.

[78] JOHN T. DUNLOP & ARNOLD M. ZACK, MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES 44–45 (1997) (reference at the Equal Employment Opportunity Commission (EEOC) during the mid-1990s that introduced mediation and other practices

e) Thus, supplementing these statutory systems and derivative practices may be a beneficial response to meeting policy goals of more robust protection and examination and stable resolution of the substantive problems that employees are asked to bring forward, as well as the attendant conflicts.

8. Without being linked to a statutory requirement for whistleblower protection, a supplemental system like the Council system would engender even more opposition, and might be seen as an interloper or a nuisance. Having an agreed upon protocol, like the Charter, that defines the authorities and tools as they relate to existing rights, obligations, and procedures is critical in order to create a trustworthy and effective system in which all parties know what to expect. In design and in practice, mapping the supplemental system carefully in relation to existing authorities, and specifically considering where to place authority for moving a case to the supplemental system and how to gain implementation are of critical importance.

9. Because both employee advocates and employer representatives are involved, resolutions have a level of practicality and acceptability that would be missing if the resolutions had been developed by an outside panel of experts.[79]

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to reduce backlogs and increase effectiveness of the EEOC's employment discrimination mandate).

[79] BROCK, BARGAINING BEYOND IMPASSE, *supra* note 52, at 244; *e.g.*, BROCK ET AL., THE SHARED STRATEGY, *supra* note 70. This study describes, in detail, from more than a hundred interviews and extensive document review, the principle of joint membership from all sides of the issue and involvement of the levels of authority that were involved. *Id.* It also describes how the consensus work of the entities established was mapped into existing state, federal, tribal, county, municipal authorities and regulations. *Id.* The shared strategy structure, the primary conflict over management of salmon to promote recovery of listed species under the Endangered Species Act, is perhaps the largest such policy mediation in recent US history, as well as the first to provide a mediated, local alternative to a federal listing. *Id.*

V. WHY IT WORKS AND HOW THE PRINCIPLES MIGHT BE APPLIED TO SUPPLEMENT EXISTING SYSTEMS

A number of unique but theory-based principles help to explain why the Council system provides a valuable supplement. Among them is the mixed and balanced membership of the Council, which results in a greater capacity to positively affect site practices. Thus, underlying problems can be recognized and addressed during assessment and development of recommendations, and internal company officers can advocate for the solution and its implementation. If a participating company has a commitment to presumptively implement cases resolved with a consensus recommendation, the resolutions will encourage employees and advocates to have faith in the system and will ensure that the Council's time is not wasted. Furthermore, the employer will know that it will not be asked to implement a recommendation that is not supported by the corporate advocate, as well as by the employee advocate and neutral members of the Council.[80]

Resolutions of the Council normally include steps that improve the systems and practices in the workplace from which the complaint came. One result is that companies learn new ways to get ahead of many safety, health, or retaliation issues through the informal interaction and problem solving in the system. This system also improves the problem solving awareness of many senior managers, who have often expressed gratitude for the chance to serve on the Council.[81] At the same time, affected employees have their status and career trajectory restored. And even in the rare instance of an employee leaving employment, it is by a resolution he or she has accepted. This will at least end the argument and allow the employee to go on with his or her life, and allow the employer to go on with the project. Under almost any Council system outcome, appeals, recriminations, and

[80] *Charter*, *supra* note 7, § 2.6 (discussing consensus).
[81] This is a frequent comment from departing and past Council members.

other ways of continuing the conflict are largely precluded.

Thus, this special mediation process at Hanford demonstrates how attention to the nuanced features of whistleblower conflicts and the gaps in the typical channels available can lead to better results for whistleblowers and employers. This is best done by supplemental steps that retain a relationship to existing systems and rights, but which reflect the need for independence and confidentiality. Gaining these benefits does not require the specific system used at Hanford, but successful systems do require dealing with the issues of independence, confidentiality, protection, stabilization, support, flexible tools, in depth and rapid assessment of the underlying issues, use of local authority and knowledge, and means of guaranteeing implementation, among others.

VI. IMPLICATIONS OF THE LESSONS FROM THE COUNCIL SYSTEM

Features of the Hanford Council system could be made a part of many internal complaint resolution systems and some regulatory systems, or could be established as independent and supplemental to those systems. (Issues in structuring and managing existing regulatory programs represent a separate topic, worthy of their own exploration.) Although some cases should be litigated or used to set or alter policy, most of the adversarial-based programs do not contain sufficient channels, protections, tools, and structures to encourage, protect, and ultimately solve whistleblower issues. A system that could produce consistent problem resolution and encourage people to come forward would seem to need more features, breadth, and flexibility, which can lead to real problem solving, than are generally available. The new whistleblower protections in Sarbanes-Oxley and Dodd-Frank appear to have many of these broader features, as well as additional challenges.[82] Perhaps principles in the Council system that

[82] *See generally* Moberly, *Unfulfilled Expectations*, *supra* note 40.

respond to limiting factors in many statutory, judicial, regulatory, and administrative channels are features that can, at least on some scale (perhaps even with some of the newer statutes) be used to supplement what might otherwise be in place, thereby adding to the likelihood of intended results.

Furthermore, other "supplements" to the simple investigatory and adversarial model have also been successfully used. For example, the EEOC, under the leadership of Chairman Paul Miller in the mid-1990s,[83] developed a "tracked" system whereby concerns that seemed to need investigation could be put on a "track" where they would be investigated. Cases that seemed susceptible to mediation went to a newly trained cadre and system that was prepared for this purpose. With these and other reforms, the results showed major reductions in backlog.[84] Where they are not already, triage and "tracking" of cases can be part of agency or corporate systems in order to help set priorities and provide the appropriate treatment to different types of cases, as well as to allocate resources more effectively.

Greater use of interim protection reduces extraneous pressures and posturing while the case is assessed and can also be a part of corporate systems; such interim protection could perhaps be more widely permitted or encouraged in agency practices, though statutory considerations may affect possibilities. In another application, the internal employee complaints or concerns investigation functions can be more fully and consistently independent of other functions. To avoid the inevitable biases, and often more limited mandate and perspective, that seem to come from mid-levels in the organization, the investigatory function can report directly to the CEO and eschew contact or involvement with other parties who have their own opinions or interests in the outcome. For related reasons, such

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[83] DUNLOP & ZACK, *supra* note 78.

[84] *Id.* at 152 (describing how mediation and arbitration can be used in administrative agencies).

programs could have stricter confidentiality practices, as many already do. Without strict confidentiality practices, internal program risks being captured by the negative narrative and pressures that minimize the issues and the employee's credibility. Insufficient confidentiality will reduce opportunities for candor and trust. At times, the employee may be wrong or, in some instances, wrongly motivated, but a truly independent assessment will identify that if it is present. Confidentiality can help to deal with this result in ways that contribute to maintaining a safe environment in which people can come forward. Just as a corporation will more likely cooperate if its pride and dignity can be protected during a process, employees are more likely to accept responsibility, or a different outcome than they hoped for, if they are similarly respected by the process. This is made more difficult when they know that the person before them in the queue has a report in a file that reads "not substantiated." Clearly, there are many typical barriers that we know can be addressed by supplementary mechanisms and that can benefit from the principles in this article.

The following list summarizes key principles identified in this article that could be considered for use in developing, or otherwise supplementing many existing programs and systems for addressing whistleblower concerns:

1. Ensuring that the most appropriate tools are being used for resolving the issues and conflicts in the case; ensuring flexibility and breadth in the tool kit;
2. Using more mediation and other supplemental methods that do not require having a winner and a loser, or otherwise reducing the risks for both parties to engage in real problem solving;
3. Including representatives from both sides of the dispute who are knowledgeable of the issues and sufficiently respected to be able to help persuade the employee and company to accept the resolution and to increase practicality and acceptability of the resolution;
4. Structuring systems to address substantive concerns as well as retaliation and employment impacts that are protected by statute;

5. Providing more independence to whistleblower case assessments;
6. Using strict confidentiality practices to help keep the program and case assessments independent and free from gossip, workplace pressures, biases, and conflicts of interest, and to help promote candor and creativity;
7. Relying on a non-adversarial process focused on problem solving rather than on finding fault;
8. Providing stability and otherwise reducing pressures, stresses, and escalation while the concern is addressed;
9. Including stabilization protections to prevent escalation and provide ongoing guidance to an employee so that he or she can manage the inevitable stresses of working through the resolution;
10. Preserving the rights of all parties in the event the process does not solve the problem and increasing their security to enter the process;
11. Bypassing the levels and functions in the organization that tend to focus only on certain parts of the picture or have reasons to be defensive; precluding those with a vested interest from involvement;
12. Delivering the results to the president or other higher level in the company with the authority to take action and the perspective to see the full set of organizational implications;
13. Establishing the forum and setting to allow a full opportunity for quiet and deliberate assessment and solution development;
14. Creating accountability for fair outcomes and mutual confidence of the employer and employee community; and,
15. Linking the system appropriately to existing recognized and related sources of authority and rights so that the process and solution will have legitimacy; making it a supplement, not a substitute.

VII. CONCLUSION

In the absence of established rights or the threat of enforcement, litigation, or other consequences, these more cooperative methods and supplemental methods would likely not bring people to the table. Although

these supplements are only part of the policy picture and tool kit, they can make existing rights much more effective by eliminating or reducing gaps in tools and tendencies that actually create instability in processes and intended resolutions. Without such supplements to many existing and emerging systems, workers that come forward will be without adequate means to have their concerns fairly and effectively evaluated and resolved, or will not come forward at all because the stakes are too high. Companies will continue to adopt postures that are primarily defensive because of the risks they face. The result will be continued frustration and failure to match policy intent.

By examining the Hanford Council system example, an interested observer can find prospects for allowing and encouraging supplemental systems to be tailored to industry or local circumstances, while remaining related to existing law and rights and systems for carrying the business forward. Because the Hanford Council system successfully addresses limitations common to existing whistleblower programs, these principles for a more effective system have promise in application elsewhere. Without any change in law, most, if not all, of the features discussed in this paper can be used in many settings to get better outcomes if established in relation to specific industries, workplace situations, and other circumstances.[85] The Hanford Council system should not be cloned, but its lessons can provide principles, tools, or techniques that can be applied.

Such supplementary processes can, without new legislation—and particularly with the unsatisfactory default alternative to return to adversarial pathway, be implemented via agreement between union and management, by agency and a company or industry—perhaps as part of settling an enforcement action or legal dispute, or by agreement between whistleblower advocates and a company or industry, or by other means.

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[85] *See, e.g.*, *id.*; BROCK ET AL., THE SHARED STRATEGY, *supra* note 70.

Certainly these principles could be used to inform new legislation and agency reform. In this context, there are opportunities to streamline and otherwise improve the structure of whistleblower legislation and enforcement, which has grown up over decades in response to many different problems and pressures. In the meantime, much can be done.

The Hanford Council system shows how one voluntary (but specifically structured) system, set up to supplement existing systems, employs principles that can work in a wide variety of settings and programs. Only if we can find ways to provide the tools and features necessary to overcome the inherent weaknesses in typical structures for whistleblower protection can we redeem the promise of rights to whistleblowers and hopes for discovering and addressing the issues we wish them to raise.