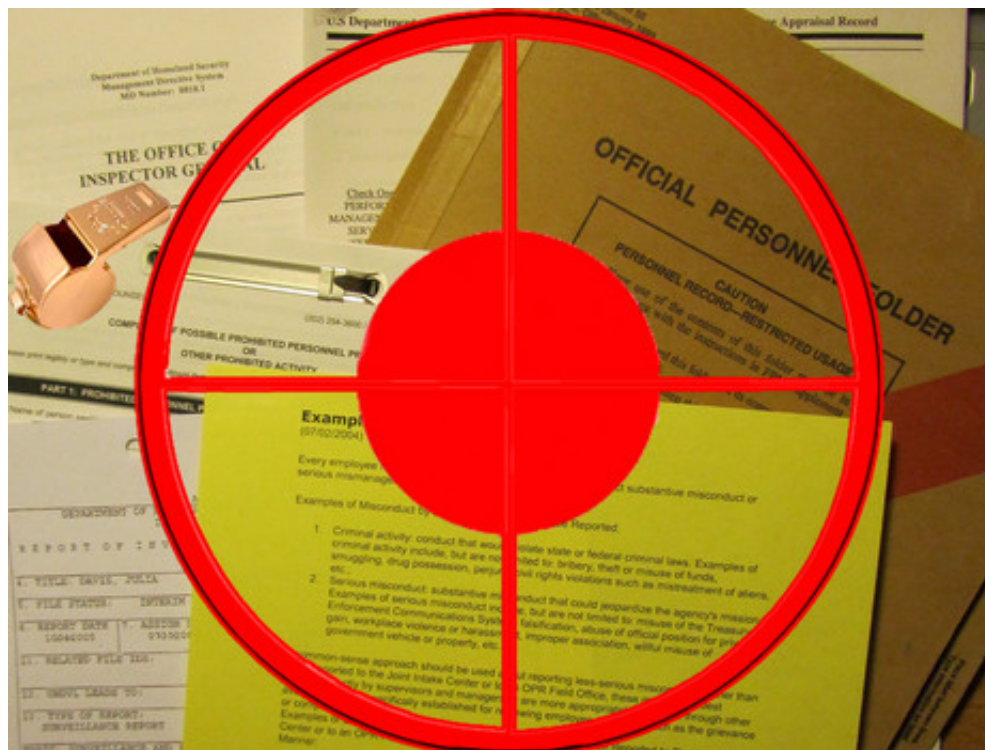


NEWS / POLITICS / GOVERNMENT

## Everybody hates whistleblowers

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Whistleblowers are routinely targeted by prominent law firms, multinational corporations and the government.

*Julia Davis Photography*

In March of 2012, the State of Hawaii agreed to pay \$15.4 million dollars to settle the lawsuit arising out of the deaths of two female hikers. Lawyers connected to the case have called this **“the largest personal injury settlement in state history”**. The state argued that the sign the women saw, which read, "Danger—Keep Out—Hazardous Conditions," was intended to steer them away from risky areas. Instead, the hikers took an unmarked path that led them to a steep cliff covered in heavy vegetation. Both women plummeted 300 feet to their deaths.

The law firm of **Gibson, Dunn & Crutcher** is the type of a firm that would normally be brought in to fight or appeal such a case. However, that won't happen in this instance, because one of the hikers, Elizabeth Warke Brem, is a former partner in Gibson, Dunn & Crutcher. About \$15

million of the settlement value will go to Brem's estate, with only \$425,000 allocated for the other woman's family. Death is the ultimate equalizer – that is, unless one of the deceased was expected to earn tens of millions of dollars, as per the financial documents provided by Gibson, Dunn & Crutcher (described in the [opening statement](#) as a “huge firm” that “[pays its partners very well](#)”).

## The firm

While you may not be immediately familiar with this firm, you've undoubtedly come across media coverage for their cases. Gibson Dunn fights on behalf of big commerce and the establishment against the consumers, victims of discrimination, whistleblowers, documentary filmmakers and their attorneys. Here are some examples of the matters they've handled:

- [Gibson Dunn represented Wal-Mart](#) in blocking a lawsuit by more than 1.5 million female workers, reversing certification for the largest class ever for a gender-bias case. Employment law experts said that the finding in this case will have a substantial negative impact on future employment discrimination litigation.
- The firm represented Dole Food Company, Inc. in a lawsuit filed by Nicaraguan workers, who claimed that exposure to DBCP pesticides made them sterile. Gibson Dunn accused the plaintiffs of “fraud” and attempted to silence negative media coverage by filing a defamation lawsuit against the filmmakers of a controversial documentary, “Bananas!” (both of these dubious strategies have become synonymous with Gibson Dunn's *modus operandi*). A Los Angeles Judge Ralph Dau [slapped Dole with a ruling](#) that awarded \$200,000 in attorneys' fees and costs to the filmmakers under California's anti-SLAPP law, designed as a safeguard against lawsuits that seek to silence debate on topics of public importance.
- [Gibson Dunn represents Chevron](#), faced with the imminent possibility of a \$27 billion judgment against it in an Ecuadorian court for oil pollution in the Amazon jungle. The firm went on a rampage in its attempts to discredit the plaintiffs and exonerate their client. Amidst the protests of First Amendment advocates, Gibson Dunn filed and won a motion to secure 600 hours of outtakes from the documentary “Crude”, which [chronicled the Ecuadorian litigation](#). They've also managed to compel the production of privileged attorney-client communications, which turned out to be a “treasure trove” for Chevron and led to the filing of a civil racketeering suit against the Ecuadorian plaintiffs and their

lawyers. The plaintiffs called the RICO action “corporate bullying.” The filmmakers of “Crude” estimated to have paid \$1.3 million dollars in legal fees (more than the entire budget of the documentary). **The film’s director commented** that this experience left him feeling like he had been “whacked over the head with a two-by-four, financially, emotionally, philosophically,” which in many respects sounds like a whistleblower’s experience.

- Gibson Dunn represented UPS in a massive employment discrimination case, **obtaining a reversal of a district court’s certification** of the largest class in the history of Americans with Disabilities Act.
- The firm represented Solyndra – a **“green” company that went belly up** and filed for bankruptcy after receiving nearly \$500 million in stimulus Obamabucks and over \$1 billion dollars from private investors. John Gaffney, who served as **Solyndra’s general counsel has joined Gibson, Dunn & Crutcher** as a partner.
- Gibson Dunn **represented Hewlett-Packard**, obtaining the dismissal of all claims related to alleged defects in more than 12 million HP computers that made them prone to overheating and catching fire. The firm argued that HP had no duty to disclose this safety risk to consumers. Gibson Dunn obtained a ruling from the 9th Circuit court of appeals that stated that the fact that HP received complaints from consumers was not sufficient to establish the company’s knowledge of a defect.
- The firm is representing Toyota in its defense against consumer litigation related to sudden acceleration claims.
- **Gibson Dunn represented Facebook** against the Federal Trade Commission’s charges that it deceived its users and failed to keep their information private.
- The firm is representing Viacom in its billion-dollar copyright infringement lawsuit against Google and YouTube.
- Gibson Dunn represented NBC Universal in its contract dispute with Conan O’Brien.
- The firm obtained a dismissal of a multi-billion dollar global warming lawsuit filed by the State of California against a conglomerate of domestic and international auto manufacturers, including Honda, Toyota, General Motors, Chrysler, Ford, and Nissan.

- Gibson Dunn convinced the Supreme Court to legalize corporate political contributions, which used to be a felony under federal law.
- The firm **persuaded the California Court of Appeal** to uphold a special state law allowing counties to continue providing supplemental benefits to State Court judges, rejecting claims that such payments violated the California Constitution.
- The firm managed to overturn a \$20 million jury verdict against Lexington Insurance Co. that was initially awarded to the victims of Hurricane Katrina.
- Gibson Dunn boasts of having persuaded various state and federal courts to overturn some of the largest jury verdicts in history, including product liability to consumers, personal injury, malpractice, defamation and discrimination.

## The net

Gibson Dunn touts itself as a “recognized leader” in representing multinational corporations, banks and government entities, having recruited an impressive collection of former judges, prosecutors and government officials who have left their positions to join the firm (in some instances, **under highly suspicious circumstances**). The firm prides itself for taking an “affirmative approach” to litigation. Gibson Dunn takes the principle of blaming the victim to new lows. They hire scores of private investigators to dig up the dirt on their opponents, obtain privileged attorney/client communications and ruthlessly attack documentary filmmakers who expose the misdeeds of the firm’s **high-paying** clientele.

In naming Gibson Dunn the “Litigation Department of the Year,” The American Lawyer dubbed the firm’s lawyers the “game changers,” stating that “**clients in deep trouble turn to Gibson Dunn** for fresh, aggressive thinking and innovative rescues.” Indeed, they do. Clients, such as Joseph Cassano (former AIG executive who was named as one of the creators of the financial crisis), rely on Gibson Dunn to persuade government agencies **to drop investigations and prosecutions against them**. At the same time, the firm is quick to accuse their opponents of fraud, waging battles that extend far beyond the courtroom.

Gibson Dunn proactively strives to shift the public opinion by utilizing their extensive media connections. “American Lawyer” writes, “The most important battles can't be won solely with legal filings or courtroom arguments. Gibson, Dunn partners strongly believe that public perception can shape the outcome of a case. So its litigators aren't shy when it comes to engaging the media.”

“It's a very special skill set [that Gibson, Dunn has],” says Robin Conrad, Executive Vice President at the litigation center of the Chamber of Commerce. “They've got the complete game,” says Theodore Ulyot, the general counsel of Facebook, Inc.

## The game

Skillful manipulation of the firm's extensive media connections allows Gibson Dunn to promote their causes, while simultaneously smearing their opponents and silencing embarrassing news coverage. One example of such influence relates to the case of Gibson Dunn's former attorney, Moshe Gerstein - a Harvard graduate who was **indicted for possessing over 5,000 images of babies and toddlers being brutally raped and sexually abused**. Gerstein's profile was removed from the firm's website as soon as the charges against him were announced. Two days after he was freed on bail, **Gerstein turned up dead in Mexico**. To date, the cause of his death has not been made public. Gibson Dunn refused to comment about the case, stating that they “don't comment on personal matters.” The firm would most likely have a field day with such a story, as long as it concerned one of its opponents.

The firm prides itself for offering crisis management to high level executives and multinational corporations that find themselves in hot water due to “a whistleblower's surprise allegation, a significant and unexpected accounting problem, a product recall, or a government investigation”. Gibson Dunn's Crisis Management Group is composed of former prosecutors, judges, and government officials.

Close connections to the top tiers of the legal system and the government allow Gibson Dunn to carve out an escape route for their clients. The firm is **widely known** for the “deferred prosecution agreements” that let corporate wrongdoers off the hook for their crimes. Young prosecutors choose not to pursue high level corporate executives, so as not to jeopardize the possibility of a looming partnership in the big corporate defense law firms (such as Gibson Dunn) after they leave public service and start earning multimillion dollar salaries to represent the same offenders they were supposed to prosecute. Thus, the crooks manage to avoid prosecution, while the government creates a façade of “accountability”.

The firm's leading lawyers refer to deferred prosecution as **“the new normal for handling corporate misconduct.”** Mega corporations that have settled charges without a public trial include AIG, Bank of America, Boeing, AOL, Halliburton, BP, Health South, Daimler Chrysler, Wachovia, Merrill Lynch, Pfizer, UBS, Barclays Bank and others. Gibson Dunn proudly boasts of its representation of Goldman Sachs and other companies facing the scrutiny of the Financial Crisis Inquiry Commission. Notably, K. Susan Grafton, former Vice President and Associate General Counsel of Goldman Sachs, now works for Gibson Dunn.

All of this maneuvering in and out of the courtroom explains why not a single executive has gone to jail for the financial crisis the U.S. is currently facing. The same is true with regard to the lack of accountability for the violations of constitutional rights and freedoms by our floundering government agencies. The establishment treats serious crimes with the attitude that “Nothing will be gained by spending our time and energy laying blame for the past,” while its approach to the whistleblowers is “Off with their heads!” While corporate thieves go forth and prosper, [prosecutions against truth-tellers are on the rise](#).

## The target

Gibson Dunn is determined to help its clients to fight against their common enemy - whistleblowers. Multinational corporations and governmental entities can't stand the exposure from within. They're panicked by the recent legal developments, related to the possibility of whistleblowers obtaining a percentage of the recovery based on their reports of fraud, waste and abuse.

In catering to their clientele, Gibson Dunn went so far as to [form the “Whistleblower Team”](#) (which could be more aptly entitled the “Whistleblower Wipeout Team”). Gibson Dunn describes its purpose as “defending against allegations of accounting irregularities, retaliation, or discrimination leading to a wrongful termination lawsuits brought by the whistleblower.” This nuclear anti-whistleblower arsenal is comprised of former prosecutors, judges and government officials, including but not limited to the following participants:

- Debra Wong Yang (former U.S. Attorney for the Central District of California);
- F. Joseph Warin (former Assistant U.S. Attorney in Washington, D.C.);
- Jim Walden (former federal prosecutor with the U.S. Attorney's Office for the Eastern District of New York);
- Robert C. Blume (former Assistant U.S. Attorney for the District of Columbia);
- Michael M. Farhang (former prosecutor with the United States Department of Justice);
- Douglas M. Fuchs (former Assistant U.S. Attorney for the Central District of California, former Deputy Chief of the Major Frauds Section);
- Nicola T. Hanna (former Assistant U.S. Attorney for the Central District of California);

- Lee G. Dunst (former Assistant U.S. Attorney in the Eastern District of New York );
- George B. Curtis (former Deputy Director of Enforcement with the Securities and Exchange Commission);
- Barry R. Goldsmith (former Chief Litigation Counsel at the Securities and Exchange Commission);
- William J. Kilberg (former Solicitor for the U.S. Department of Labor);
- Amy L. Goodman (formerly held several positions with the SEC's Division of Corporation Finance);
- K. Susan Grafton (former Vice President and Associate General Counsel at Goldman Sachs);
- Brian Lane (former Director of the Division of Corporate Finance with the SEC);
- Marcellus Antonio McRae (former Assistant U.S. Attorney with the Criminal Division, Major Frauds Section in Los Angeles);
- James J. Moloney (former Special Counsel in the Office of Mergers & Acquisitions within the SEC's Division of Corporation Finance);
- Ronald Mueller (former legal counsel to the SEC Commissioner);
- Eugene Scalia (former Solicitor of the U.S. Department of Labor);
- George Schieren (former Senior Vice President and General Counsel of Merrill Lynch);
- Mark K. Schonfeld (former Director of the SEC's New York Office);
- Alexander H. Southwell (former Assistant U.S. Attorney for the Southern District of New York );
- John H. Sturc (former Assistant U.S. Attorney in Washington, D.C., former Associate Director for the SEC's Division of Enforcement);
- Jim Walden (former federal prosecutor with the U.S. Attorney's Office for the Eastern District of New York);

I asked legal luminaries and renown truth tellers of this generation to share their general impressions as to the existence of such a “Whistleblower Team”.

Bruce Fein, Esq. (a prominent constitutional and international law attorney, whom Ron Paul calls “one of the most important legal minds of our time; author of **"Constitutional Peril: The Life and Death Struggle for Our Constitution and Democracy"**, a columnist for The Washington Times and a former Associate Deputy Attorney General) said that “To assemble a nuclear weapon of legal resources to counter truth-tellers is an earmark of weakness or insecurity.”

Mark S. Zaid, Esq. (a **renown Washington, DC attorney**, who specializes in whistleblower litigation and handles cases related to national security and security clearances) stated, “I would be shocked to learn something of that nature existed. It would go against the very grain of our legal system.”

Nada Prouty (national security whistleblower, **author of the book “Uncompromised: The Rise, Fall, and Redemption of an Arab-American Patriot in the CIA”**) commented, “The resources spent on combating whistleblowers these days are astounding. To me this is a clear indication of how desperate big government and big corporations are to crush anyone who oppose them in any way, shape, or manner. Publicly trying or going after whistleblowers (the Drake case) sends a warning message for anyone thinking about exposing the waste or fraud of these powerful corporations.”

David K. Colapinto, Esq. (General Counsel for the **Forensic Justice Project**, General Counsel for the **National Whistleblower Center** and one of the authors of the book **"Whistleblower Law: A Guide to Legal Protections for Corporate Employees"**) remarked, “The corporate establishment views whistleblowers as the enemy in the United States because whistleblowers are the most effective in detecting and reporting corporate fraud against the taxpayers, stockholders and consumers. There is big money to be made by squelching whistleblower disclosures and covering up corporate crime. The Chamber of Commerce has made weakening the strong corporate whistleblower reforms enacted in the Dodd-Frank Act a legislative top priority despite that whistleblowers have flooded the SEC with high quality disclosures since the law was enacted. The taxpayers are the big losers. Creating such a high profile legal team also reflects an effort to persuade the courts to weaken or limit the reach of these new corporate whistleblower law reforms.

In the federal government whistleblowers are crushed by those officials who run these agencies to maintain power and cover-up misconduct and government waste. It is no wonder



that meaningful whistleblower law reform goes nowhere in Congress when the entire hierarchy of the federal bureaucracy likes the status quo. Under the current system these federal officials can rule with an iron fist to deter any whistleblower disclosures of serious misconduct by federal agencies.

In the area of intelligence agencies and national security, blowing the whistle means risking criminal prosecution and jail time. The increased use of the Espionage Act to prosecute whistleblowers is part of the general war on whistleblowers by the establishment.

In fact, the criminal prosecution of whistleblowers extends beyond the national security context and demonstrates government hostility towards whistleblowers who effectively expose corporate fraud. The government's prosecution of Bradley Birkenfeld, who reported the largest tax fraud scheme in history by a Swiss bank and helped the government recover billions from high wealth US taxpayers who were evading taxes, is a perfect example of how the government acts to crush and criminally punish those who report massive wrongdoing.

Creating such a high paid legal team is part of this disturbing trend and mind-set in the government and corporate establishments to destroy whistleblowers. It is taking the "shoot the messenger" mentality to new extremes," Colapinto concluded.

The Whistleblower Team helps corporate violators with a **variety of underhanded tactics**, such as attempting to red-flag potential whistleblowers during pre-employment interviews, consulting attorneys before taking action against a whistleblower and **having an attorney conduct or participate in interviews** with the whistleblower, thereby subjecting the content of their report to attorney-client privilege, which would in turn negate the whistleblower's eligibility for a financial award.

True to form, Gibson Dunn released waves of **hysterical Chicken Little propaganda**, claiming that the new SEC whistleblower rules would cause "great mischief" to be "unleashed on Corporate America". In these publications, Gibson Dunn does its best to portray whistleblowers as a bunch of greedy, disgruntled low-level employees, who use lunchroom gossip and outright lies to smear their beneficent and magnanimous employers, unable to resist the siren call of the "tantalizing" financial "bounty". The firm is especially upset that the new rules would protect the whistleblowers from being "outed" to their employers, therefore denying the company an opportunity to promptly investigate, discredit and fire the inconvenient truth teller. Gibson Dunn claims that if only these pesky "tipsters" could be "unmasked", they could be easily "impeached", proven to be "unreliable", lacking credibility, having no "basic knowledge of any actual misconduct" or altogether lying in bringing forth their allegations of fraud because of "past employment-related issues".

Notably, Gibson Dunn places emphasis on the need to identify and discredit the source of the whistleblowing disclosure, instead of correcting the issues they've reported. Companies and government entities tend to implement such an approach of "deny, discredit and destroy" in real life.

Gibson Dunn's process for vetting new clients includes both conflict and background checks. The firm is **admittedly keen to avoid matters that could be perceived as adverse to the interests of current clients** – therefore, it's safe to assume that the firm has no interest in representing whistleblowers. Gibson Dunn did not respond to requests for comments.

## Who hates whistleblowers?

Those who expose fraud, waste and abuse often selflessly sacrifice their careers and reputations in the process. Why does it seem like everybody in positions of power hates whistleblowers? I asked prominent truth tellers and attorneys whether the term "whistleblower" has negative connotations to employers, government agencies, the media and general public.

Coleen Rowley (**FBI whistleblower**, 2002 Time magazine Person of the Year, author of "**Moral Dilemma in the Intelligence Community and Lack of Constructive Option**") said, "I think if we were to conduct a poll and ask the question fairly, we'd find that the term "whistleblower" still has a bad connotation for a majority of people."

Lt. Col. Anthony Shaffer (**national security whistleblower, author of the NY Times bestseller "Operation Dark Heart"**) stated, "I do believe the term "whistleblower" has a pejorative shading to it - but only because of the wrongdoers exposed by whistleblowers are normally very powerful and able to smear the whistleblower. Any blemish or shortcoming of a "whistleblower" is examined and amplified by the "wrongdoers" in an attempt to devalue or dismiss the message of the "whistleblower"...so this common cycle of disclosure, smear, debate, investigation, resolution always takes a toll - mostly on the "whistleblower" - and the momentum of the baggage associated with the moniker of "whistleblower" is constant."

National security whistleblower Nada Prouty remarked, "The term "whistleblower" is synonymous with the term "snitch" nowadays. The term has negative connotations as if the whistleblower has betrayed a trust the employing organization (or government) has placed in him or her; when in fact that trust belongs to the public. "

Bruce Fein, Esq. commented that the term "whistleblower" "evokes images of disgruntled employees. The term should be "truth-tellers."

Mark S. Zaid, Esq. replied, "Personally speaking, I don't believe the term has negative

connotations but I do believe in the public arena the term has become one that has a dual connotation of negative or positive depending upon the context of the reference. There is no doubt it can be used pejoratively in a manner to describe an individual as a "trouble-maker". But I would like to think it references someone who has brought to light some type of wrongdoing or misconduct of their employer."

David K. Colapinto, Esq. responded, "It depends on who you are speaking with. Government and corporate employers almost universally despise whistleblowers. However, whistleblowers have strong support from the general public and they are generally viewed favorably in the media. For example, in a 2007 poll by Democracy Corps approximately 79% of respondents favored the enactment of strong whistleblower protections for federal employees. Despite strong support from the public, individuals who blow the whistle find themselves isolated and targets of reprisal and most often lose their careers and suffer devastating personal losses."

National security whistleblower Lt. Col. Anthony Shaffer said, "My protected disclosure - and the initial reaction - regarding my Operation ABLE DANGER - a pre-9/11 effort to target and destroy Al Qaeda, is contained in my book - Operation DARK HEART: Spycraft and Special Ops on the Frontline of Afghanistan - and the Path to Victory. My disclosure to Phillip Zelikow, the Staff Director of the 9/11 Commission, while I was undercover in Afghanistan in October 2003 is noted in detail - as is the almost instant reaction of the DoD bureaucracy of "taking me out" for the disclosure of key and critical information the 9/11 Commission needed to know - but was very embarrassing to DoD and the intelligence community. As an operative of over 20 years of front line experience, I became instantly "expendable" because I dared cross the line to tell the truth... minor administrative issues were used to justify my termination from Defense Intelligence Agency - issues which the Army dismissed and promoted me to lieutenant colonel (yes - the reaction of the two organization was THAT different). My story is but one of more than a dozen whistleblower cases that illustrate the problems that demand action by Congress to fix."

David Colapinto, Esq. commented, "We are at a critical point in the struggle to protect individuals who become whistleblowers. There have been some gains in recent years in the area of corporate whistleblower reform, but at the same time there is tremendous push-back to roll back hard fought rights to prevent the change in corporate culture that was intended by these reforms. The major challenges ahead are to prevent roll backs in corporate whistleblower reforms and to enact truly strong whistleblower protections for all federal employees, including intelligence agency and national security employees, which provide effective rights such as court access and jury trials and full compensation for damages suffered by whistleblowers. Any effective whistleblower law should truly encourage reporting of wrongdoing by fully protecting and rewarding whistleblowers. With strong public support

whistleblowers can prevail in this struggle.”

Mark Zaid, Esq. said, “Most of my work involves handling national security whistleblower cases. These are some of the most difficult types of cases because virtually no meaningful legal protections exist at all to protect the individual. Any protection that seemingly is said to exist is one on paper only. It is bad enough that the system operates against whistleblowers but in many ways whistleblowers are their own worst enemies as well. For one thing, it is very difficult for a national security whistleblower to be sure that their concerns are valid given the compartmentalization of national security. There may be explanations or reasons for the perceived wrongdoing/misconduct that the whistleblower is not aware of. Because of this it is crucial that the whistleblower not become a victim of their own activities, i.e., to avoid the well-meaning effort to expose the truth from turning into a "crusade" from which their life cannot be separated. In part, this is why some negative connotations have been attached to whistleblowers. Oftentimes, generally speaking of course, they may become a "disruptive" presence in the workplace as they fight the system from darkness to light. It can be a long a difficult path and a whistleblower may need to choose between the greater principle or their own sanity.”

Bruce Fein concluded, “Truth-tellers are the post-revolutionary version of Paul Revere. The culture and law should encourage, not punish or sanction, truth-tellers. Truth is the coin of any democratic realm. When truth is chronically tarnished by government officials, the nation’s democracy and the rule of law are at risk. Truth-tellers are the cornerstones of all enlightened Republics.”

When commerce continually prevails over justice, whistleblowers are perceived as a threat that must be eradicated. In the timeless words of Charles Dickens, “If the law supposes that... the law is a ass—a idiot. If that’s the eye of the law, the law is a bachelor; and the worst I wish the law is that his eye may be opened by experience.” The same could be said for everyone who hates whistleblowers.

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