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Comment on *Whistling Loud and Clear: Applying Chevron to Subsection 21F of Dodd–Frank*

Sarah C. Haan*

I. Introduction

On February 21, 2018, the Supreme Court decided *Digital Realty Trust, Inc. v. Somers*,¹ resolving the circuit split at the heart of Shaun M. Bennett’s student Note, *Whistling Loud and Clear: Applying Chevron to Subsection 21F of Dodd–Frank*. In a unanimous decision, the Court concluded that the Dodd–Frank Wall Street Reform and Consumer Protection Act’s² (Dodd–Frank) definition of “whistleblower” applied to the anti-retaliation provision in question in the case.³ Because Mr. Somers did not report his employer’s securities law violations to the U.S. Securities and Exchange Commission (SEC) before the company fired him, the Court decided, he lost his bid for retaliation protection under the Dodd–Frank Act.⁴ *Somers* is the second of two recent cases in which the Court has reviewed federal whistleblower retaliation protections. The first, *Lawson v. FMR LLC*,⁵ was decided in 2014 and interpreted whistleblower retaliation protections in the Sarbanes–Oxley Act of 2002⁶

* Assistant Professor of Law, Washington and Lee University School of Law. I am grateful to Mr. Bennett and the Editorial Board of the *Washington and Lee Law Review* for inviting me to participate in the 2017 Washington and Lee Law Review Notes Colloquium. I would also like to thank Paul G. Mahoney for his contributions to an engaging exchange of ideas.

1. No. 16-1276 (U.S. Feb. 21, 2018).

2. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S.C.).

3. Two concurrences were filed. One, by Justice Sotomayor, was joined by Justice Breyer. *Somers*, slip op. at 14. A second, by Justice Thomas, was joined by Justices Alito and Gorsuch. *Id.* at 15. They are discussed *infra*.

4. *Id.* at 8–9.

5. 134 S. Ct. 1158 (2014).

6. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified

(Sarbanes–Oxley). *Somers* concerned a second set of whistleblower retaliation protections enacted as part of Dodd–Frank.⁷

Together, *Lawson* and *Somers* reveal some important truths. First, as evidenced by the Court’s willingness to resolve two similar cases in four years, whistleblowing is a tremendously important subject. It has implications for systemic risk as well as for risk-monitoring and governance of firms. As I explain in Part VI, future cases may address the unique vulnerabilities of lawyers in whistleblowing situations, and tensions between lawyers’ professional responsibilities and employer/employee incentives under federal whistleblowing law.

Second, Congress’s drafting of whistleblower protection provisions has been entirely inadequate to achieve the sort of clear incentives that facilitate whistleblowing as an activity. There has been a significant amount of confusion about who is covered by which protection, and under what circumstances. *Somers* clarifies one ambiguity, but there remain serious unanswered questions about how whistleblower incentives and protections work on the ground. Third, there is fundamental and sustained disagreement on the Court about how Sarbanes–Oxley and Dodd–Frank should be interpreted. The justices disagree about whether it is appropriate to take into account Congress’s “intent” to protect investors, restore trust in capital markets, and “root out corporate fraud,”⁸ and about the specific value of Senate Reports as legislative history.

II. Whistleblowing and the Economy

As companies increasingly operate across borders, and technological and financial innovations create new, unregulated risks, whistleblowers offer unique protections to companies and shareholders. Scholars are only now recognizing the role that whistleblowers can play in preventing or reducing corporate wrongdoing, improving efficient capital allocation, and forcing private information into the public domain.⁹ In recognition of

as amended in scattered sections of the U.S.C.).

7. See generally Dodd–Frank, 124 Stat. at 1376.

8. *Somers*, slip op. at 4.

9. An excellent post-crisis summary of the promise of whistleblowing is

whistleblowers' microprudential and macroprudential potential, Congress has passed two major pieces of legislation over the last fifteen years to encourage and protect whistleblowers. Sarbanes–Oxley,¹⁰ enacted in 2002 after the Enron catastrophe, and Dodd–Frank,¹¹ passed after the 2008 financial crisis, both create whistleblower incentives and protections.

There are differing views about the “structure” of our federal whistleblower protection regime, as evidenced by *Somers*. In his Note, Mr. Bennett offers a “structural” comparison of the Sarbanes–Oxley scheme and the Dodd–Frank scheme, and finds the two schemes independent and significantly different. This is not how the SEC viewed them; it interpreted the later Dodd–Frank Act to have built upon and borrowed from the Sarbanes–Oxley whistleblower provisions, and thus viewed the regulatory schemes holistically. In *Somers*, the Supreme Court chose neither side, and focused on differences between the whistleblower protection schemes.¹²

In its briefs to the Supreme Court, the SEC argued that the Dodd–Frank Act whistleblower provisions should be understood as presenting a dual structure, with one set of provisions addressing the potentially million-dollar awards the SEC gives to whistleblowers, and the other set of provisions protecting whistleblowers from retaliation.¹³ Most of the provision—subsections (b) to (g), plus subsection (i)—concerns rewards.¹⁴ Only subsection (h) is about protection from retaliation.¹⁵ The SEC argued that the statutory definition of “whistleblower” in subsection 21F(a) was meant to limit the category of individuals or groups who can claim a cash award. According to the SEC,

provided by Christine P. Skinner in *Whistleblowers and Financial Innovation*, 94 N.C. L. REV. 861, 867–85 (2016).

10. See generally Sarbanes–Oxley Act, 116 Stat. at 745.

11. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S.C.).

12. Dig. Realty Tr., Inc. v. Somers, No. 16-1276, slip op. at 4–7 (U.S. Feb. 21, 2018).

13. The SEC argued that this dual structure is supported by the title of the statutory provision, “Securities whistleblower incentives and protection.” 15 U.S.C. § 78u-6 (2012).

14. *Id.* §§ 78u-6(b)–(g), (i).

15. *Id.* § 78u-6(h).

subsection (h), which offers retaliation protection, uses the word “whistleblower,” not in this narrow sense, but in its commonly understood meaning, to signify anyone who blows the whistle. The SEC contended that the law used the definition of “whistleblower” to narrowly cabin the group of individuals who could claim a reward, but the late-added section on retaliation protection did not need to be so narrowed, and in fact it expressly cross-referenced whistleblowing activity covered by Sarbanes–Oxley. The Supreme Court unanimously rejected this “structural” argument in *Somers*, and implicitly rejected the SEC’s holistic approach to the two statutes as well.

The Enron debacle was, in many ways, the predictable result of a system with inadequate whistleblower protections. Sherron Watkins, an Enron executive, had attempted to blow the whistle on wrongdoing at the company and was treated savagely by Enron’s management, who forced her out. In acknowledgment of the role she *could* have played to prevent catastrophe, Time magazine named Ms. Watkins and two other whistleblowers “Persons of the Year” in 2002.¹⁶ Ms. Watkins’s late vindication was no comfort to Enron’s shareholders and employees, who suffered enormous losses when the company experienced a wave of accounting scandals, exactly as Ms. Watkins had forewarned.

Unfortunately, Sarbanes–Oxley’s whistleblower protection regime proved faulty just a few years later. In the lead-up to the 2008 financial crisis, whistleblowers at Lehman Brothers raised concerns internally and were fired as a result.¹⁷ Yet excessive risk-taking and outright fraud continued unabated, resulting in the 2008 financial crisis and another round of lawmaking. In 2010, Congress passed the Dodd-Frank Act,¹⁸ which included a set of provisions designed to further enhance and protect whistleblowers.

16. Richard Lacayo & Amanda Ripley, *Persons of the Year 2002: The Whistleblowers*, TIME (Dec. 30, 2002), <http://content.time.com/time/magazine/article/0,9171,1003998,00.html> (last visited Mar. 4, 2018) (on file with the Washington and Lee Law Review).

17. Brief for the United States as Amicus Curiae Supporting Respondent at 2, *Somers*, No. 16-1276 (U.S. Oct. 17, 2017).

18. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S.C.).

Dodd–Frank built on the Sarbanes–Oxley whistleblower protection regime with something new: an award system of cash bounties.¹⁹ The cash awards reflect the high value of whistleblowing activity to our economy and were designed to incentivize *more whistleblowing*. The SEC has run with its authority to hand out cash awards to whistleblowers. In 2016, it awarded \$57 million to a small group of whistleblowers, underscoring the scope of the economic harm these whistleblowers averted.²⁰ The next year, awards totaling \$50 million were divided among twelve whistleblowers.²¹

As the years go by, the whistleblower provisions of Sarbanes–Oxley and Dodd–Frank are reshaping the way whistleblowing works in corporate America, and incentivizing ethical conduct that also protects shareholder wealth. Thus, the Supreme Court’s interpretation of the scope of federal whistleblower retaliation protections is critical to the nation’s economic health and to the health of individual corporations and banks in which Americans invest.

III. Mr. Bennett’s Prizewinning Note

In his prizewinning note, *Whistling Loud and Clear: Applying Chevron to Subsection 21F of Dodd–Frank*, Mr. Bennett attempts to resolve a circuit split between the Fifth Circuit Court of Appeals, and the Second and Ninth Circuit Courts of Appeals concerning our federal whistleblower protection regime.²² Unfortunately, in

19. See *id.* § 922, 124 Stat. at 1841–43 (codified at 15 U.S.C. § 76u-6 (2012)) (providing the guidelines for awards to whistleblowers following a covered judicial or administrative action).

20. U.S. SEC. & EXCH. COMM’N, SUMMARY OF PERFORMANCE AND FINANCIAL INFORMATION FISCAL YEAR 2016, at 5 (2017) [hereinafter SEC, FISCAL YEAR 2016].

21. U.S. SEC. & EXCH. COMM’N, 2017 ANNUAL REPORT TO CONGRESS: WHISTLEBLOWER PROGRAM 1 (2017) [hereinafter SEC, 2017 ANNUAL REPORT].

22. See also Leonardo Labriola, Note, *Paying Too Dearly for a Whistle: Properly Protecting Internal Whistleblowers*, 85 *FORDHAM L. REV.* 2839, 2877 (2017) (favoring a burden-shifting solution to the issues raised in *Somers*); Daniel Gilpin, Note, *Hiding Behind the Veil of Ambiguity: Why Courts Should Apply the Plain Meaning of the Dodd–Frank Whistleblower Provisions*, 90 *ST. JOHN’S L. REV.* 851, 852 (2016) (arguing that the Fifth Circuit’s resolution of the circuit split is correct); Janna Mouret, Comment, *Shelter from the Retaliation Storm*, 52 *HOUS. L. REV.* 1529, 1532 (2015) (arguing that whistleblower protection under Dodd–

Somers, the Court did not reach the *Chevron* issue discussed by Mr. Bennett because it determined that the Dodd–Frank provision was unambiguous. Although some of Mr. Bennett’s core points were not discussed by the Court in *Somers*, his Note provides important analysis on issues raised by the case. Mr. Bennett’s Note does a strong job of exploring the textual issues at play, and he identifies *Chevron* issues likely to arise in a future case. He also grapples with the policy implications of his conclusions, noting that a real-world consequence of the outcome he advocates may be that whistleblowers are discouraged from reporting internally first or perhaps even at all.²³ Since the Supreme Court ultimately reached the result that Mr. Bennett advocated, his discussion of the policy implications takes on new importance. I very much appreciate the invitation to engage in a scholarly discussion about Mr. Bennett’s Note and our federal whistleblowing regime.

IV. Digital Realty Trust, Inc. v. Somers

Like virtually all of the cases in which this issue has arisen, the whistleblower in *Somers* stumbled upon fraud at his company and, rather than calling the SEC, he reported it to his supervisors. Then, of course, rather than fixing the problem, the company fired him. He sued under Dodd–Frank, seeking to be reinstated to his job and compensated for his losses. There are *a lot* of these cases. The SEC handled over 4,200 reports from whistleblowers in 2016.²⁴ In 2017, that number increased to over 4,400.²⁵ Although we lack data confirming the number of these whistleblowers who experienced retaliation from their employers, the number is probably not *de minimus*.

Mr. Bennett argued—and the Supreme Court agreed—that in order to get any retaliation protection under the Dodd–Frank

Frank “should extend to employees regardless of whether they report to the SEC or to their employer”).

23. *But see* Claire Sylvia & Emily Stabile, *Rethinking Compliance: The Role of Whistleblowers*, 84 U. CIN. L. REV. 451, 452 (2016) (arguing that the view that a whistleblower reward program undermines internal reporting by whistleblowers is not supported by evidence).

24. U.S. SEC. & EXCH. COMM’N, 2016 ANNUAL REPORT TO CONGRESS ON THE DODD–FRANK WHISTLEBLOWER PROGRAM 1 (2016).

25. SEC, 2017 ANNUAL REPORT, *supra* note 21, at 1.

statute, a whistleblower must report directly to the SEC. This is undesirable from the whistleblower's point-of-view because whistleblowers generally feel allegiance to the company and do not want it to go down in the flames of public scandal. It is also undesirable from the corporation's point-of-view. Companies do not want employees to take evidence of wrongdoing directly to regulators, circumventing the company's internal controls. So *Somers* presented the rare case where the interests of whistleblowers and the interests of companies were more or less aligned in favor of incentivizing internal reporting. However, as Mr. Bennett skillfully points out, the fact that companies' and whistleblowers' interests would probably both best be served by incentivizing internal whistleblowing does not necessarily mean that Congress wrote a law that does that. The Supreme Court concluded that it did not.

V. *Lawson v. FMR LLC*

Questions about whistleblower retaliation are so significant, and arise so frequently, that the Supreme Court resolved a case about whistleblower retaliation under Sarbanes–Oxley just a few years ago, in 2014. Like *Somers*, that case, *Lawson v. FMR LLC*,²⁶ was authored by Justice Ginsburg. In both *Lawson* and *Somers*, Justice Ginsburg emphasized the purpose of the federal whistleblower laws that the Court was interpreting—Sarbanes–Oxley in *Lawson*, and Dodd–Frank in *Somers*. Congress enacted Sarbanes–Oxley “[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation,” Justice Ginsburg wrote in *Lawson*.²⁷ The Court's resolution of the interpretation question in *Lawson* was based in part on “the mischief to which Congress was responding.”²⁸ In *Somers*, Justice Ginsburg explained that Congress's purpose in enacting both Sarbanes–Oxley and Dodd–Frank was “to root out corporate fraud,”²⁹ and she pointed out that

26. 134 S. Ct. 1158 (2014).

27. *Id.* at 1161.

28. *Id.*

29. *Dig. Realty Tr., Inc. v. Somers*, No. 16-1276, slip op. at 1 (U.S. Feb. 21, 2018); see also *id.* at 5 (“Dodd–Frank responded to numerous perceived

Congress had authorized the SEC to issue rules “consistent with the purposes of this section.”³⁰

In *Lawson*, a divided court concluded that whistleblower retaliation protection under Sarbanes–Oxley extended not only to whistleblowers employed by a public company, but also to whistleblowers employed by the company’s contractors and subcontractors.³¹ Justice Ginsburg’s plurality opinion in *Lawson* was particularly attentive to the damage shareholders would sustain if the statute was given a crabbed interpretation.³²

In contrast, in *Somers*, the court unanimously held that whistleblower retaliation protection did *not* extend to a whistleblower who failed to disclose wrongdoing to the SEC. As Mr. Bennett urged it to do, the Court relied on the plain language of the definition of “whistleblower” in the definition section of the statute, subsection 21F(a). This defines the word to mean “any individual who provides . . . information relating to a violation of the securities laws to the Commission.”³³ Mr. Bennett anticipated many of the arguments that the Supreme Court found persuasive. He considered the statutory definition in the context of Dodd–Frank’s anti-retaliation provisions. He noted that the word “whistleblower” is used in subsection 21F(h)(1)(A), the anti-retaliation provision, which proceeds as follows:

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower in making disclosures that are required or protected under the Sarbanes–Oxley Act³⁴

Mr. Bennett argued that it is appropriate to substitute every instance of the term “whistleblower” in Subsection 21F with the statutory definition of the term. To support the argument, he

shortcomings in financial regulation. Among them was the SEC’s need for additional ‘power, assistance and money at its disposal’ to regulate securities markets.” (quoting S. REP. NO. 111-176, at 36–37 (2010)).

30. *Id.* at 6 (quoting 15 U.S.C. § 78u-6(j) (2012)).

31. *Lawson*, 134 S. Ct. at 1161.

32. *Id.* at 1173.

33. 15 U.S.C. § 78u-6(a)(6) (2012).

34. *Id.* § 78u-6(h)(1)(A)(iii).

quoted a dissenting judge in the Second Circuit case, who protested that “[t]he thing about a definition is that it is, well, definitional.”³⁵

Mr. Bennett’s argument is straightforward: when a term is defined in a statute, every use of the word must embody that definition. The Supreme Court did not adopt such a broad rule in *Somers*, but it reached Mr. Bennett’s suggested outcome, concluding that the statutory definition applied here.

In his book *Reading Law: The Interpretation of Legal Texts*, Justice Scalia and his co-author, Bryan Garner, wrote that statutory “[d]efinitions are, after all, just one indication of meaning—a very strong indication, to be sure, but nonetheless one that can be contradicted by other indications.”³⁶ Justice Scalia wrote separately in *Lawson* to object to the majority’s “excursion[]” into the legislative history of Sarbanes–Oxley³⁷—he was joined only by Justice Thomas. Justice Scalia specifically challenged the majority’s use of a committee report as evidence of legislative intent, opining that “[m]any” of the members of one House of Congress “almost certainly did not read the report or hear the statement, much less agree with it—not to mention the Members of the other House and the President who signed the bill.”³⁸

In *Somers*, Justice Thomas made substantially similar arguments and was joined by Justices Alito and Gorsuch.³⁹ Thus, the band of justices who doubt the reliability of Senate Reports as evidence of Congress’s intent has grown, in four years, from two to three.

VI. Lawyers and Whistleblowing

The Supreme Court’s resolution of *Somers* raises at least one serious concern for the future. The Court’s narrow interpretation of “whistleblower” incentivizes companies to fire auditors and

35. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 158 (2d Cir. 2015) (Jacobs, J., dissenting).

36. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 228 (2012).

37. *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1176 (2014) (Scalia, J., concurring in principal part and concurring in the judgment).

38. *Id.* at 1177.

39. *Dig. Realty Tr., Inc., v. Somers*, No. 16-1276, slip op. at 1 (U.S. Feb. 21, 2018) (Thomas, J. concurring in part and concurring in the judgment).

lawyers who report wrongdoing internally, and to fire them quickly, before they can report to the SEC. Lawyers are under a professional obligation to protect a client's confidential information, and can only report to the SEC as a last resort. Thus, a lawyer is uniquely vulnerable to retaliation in the period between her discovery of wrongdoing and her conclusion that she must reveal confidential information to "prevent substantial injury to the organization."⁴⁰ Throughout this period, the company can fire the lawyer with the knowledge that Dodd–Frank whistleblower retaliation protections have not kicked in. After the lawyer is fired, the lawyer likely cannot report wrongdoing to the SEC without violating the duty of confidentiality.⁴¹

Practically, this means that *Somers* interprets Dodd–Frank in a way that creates serious tension between a lawyer's professional obligations, his access to whistleblower protections under that law, and his employer's power to make the problem go away by firing him. Although this may be an unfortunate consequence of a poorly written statute, it is hard to believe that employers will not take advantage of the *Somers* loophole. Because lawyers are some of the main actors we would expect to gain knowledge of potential wrongdoing, the Dodd–Frank whistleblower retaliation protection provisions create a cascade of thorny ethical questions for lawyers who learn of wrongdoing at their employers. These ethical dilemmas may effectively neutralize lawyers as advocates for internal change. If this is an outcome of *Somers*, Congress should act swiftly to fix it.

VII. Conclusion

Whistleblowers play a critical role in our economy. After *Somers*, our economy would benefit from better-written laws that encourage whistleblowing through both cash awards and

40. MODEL RULES OF PROF'L CONDUCT r. 1.13(c)(1)–(2) (AM. BAR ASS'N 1983).

41. *See id.* r. 1.9(c)

A lawyer who has formerly represented a client in a matter . . . shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client . . . or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

retaliation protection. However, a lawyer who learns of corporate wrongdoing may struggle to reconcile his duties to clients with his personal interest in obtaining whistleblower retaliation protection. For some whistleblowers, *Somers* created as many questions as it resolved.

Mr. Bennett's prizewinning Note ably wrestled with the complex issues raised by this case, and anticipated the Court's unanimous holding. The *Chevron* issues that Mr. Bennett analyzed must await future cases. I congratulate Mr. Bennett for his excellent work.