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S. 995—WHISTLEBLOWER PROTECTION ACT AMENDMENTS

HEARING

BEFORE THE

INTERNATIONAL SECURITY, PROLIFERATION AND FEDERAL SERVICES SUBCOMMITTEE

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

JULY 25, 2001

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S. 995—WHISTLEBLOWER PROTECTION ACT AMENDMENTS

WEDNESDAY, JULY 25, 2001

U.S. SENATE,
SUBCOMMITTEE ON INTERNATIONAL SECURITY,
PROLIFERATION AND FEDERAL SERVICES,
OF THE COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:30 p.m., in room SD–342, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Subcommittee, presiding.

Present: Senators Akaka, Cochran, Levin, and Carper.

OPENING STATEMENT OF CHAIRMAN AKAKA

Senator AKAKA. This meeting will come to order. Today's hearing will examine S. 995, legislation to strengthen protections for Federal employees who exercise one of the basic obligations of public service, that is disclosing waste, fraud, abuse or substantial and specific danger to public health or safety. Unfortunately, the right of Federal employees to be free from workplace retaliation after such disclosures has been diminished by a pattern of court rulings that have narrowly defined who qualifies as a whistleblower. These rulings are inconsistent with clear, congressional intent and have had a chilling effect on whistleblowers coming forward with significant disclosures.

We are pleased to have with us today forceful advocates for Federal whistleblowers and defenders of the merit system. I wish to thank Senator Grassley for taking time out of his busy schedule to be here with us today. We are pleased to welcome the Hon. Elaine Kaplan, Special Counsel of the Office of Special Counsel; the Hon. Beth Slavet, Chair of the Merit Systems Protection Board; and Thomas Devine, Legal Director of the Government Accountability Project. A representative of the Department of Justice was invited to testify but was unable to attend. I ask that the Department's written statement be submitted for the record,[1] as well as a statement from the National Treasury Employees Union,[2] in support of the bill.

S. 995 seeks to restore congressional intent regarding who is entitled to relief under the Whistleblower Protection Act and what constitutes a protected disclosure. It codifies certain anti-gag stat-

[1] The prepared statement of Stuart E. Schiffer, Acting Attorney General, Civil Division, Department of Justice, appears in the Appendix on page 74.

[2] The prepared statement of Colleen M. Kelley, National President, National Treasury Employees Union, appears in the Appendix on page 97.

utes that have been added yearly to the Treasury Postal Appropriations bill for the past 13 years. The bill also extends independent litigating authority to the Office of Special Counsel and ends the sole jurisdiction of the U.S. Court of Appeals for the Federal Circuit over whistleblower cases. It was hoped that the Federal Circuit would develop an expertise in whistleblower law, instead they developed a pattern of hostility. As the Chairman of the International Security, Proliferation and Federal Services Subcommittee, I will work to guarantee that any disclosure within the boundaries of the statutory language are protected. We cannot afford to let this lobby weaken further.

The exceptions resulting from the Federal Circuit's rulings have removed protection where it counts the most, for the Federal employees who are acting as public servants or carrying out their responsibilities to the public as employees of their agencies. Protection of Federal employees from whistleblower retaliation has been a bipartisan effort and enjoyed bicameral, unanimous support in passage of the 1989 law and the Act's 1994 amendments. I am pleased to note that Representatives Morella and Gilman introduced H.R. 2588, a companion bill to S. 995 on Monday. Codifying congressional intent to protect Federal employees who disclose wrongdoing should be a critical part of our efforts to have an efficient and effective government.

I would like to point out that Senator Grassley and Senator Levin, two of the Senate's most passionate leaders in protecting Federal employees from retaliation, joined me in introducing S. 995 last month. I also wish to thank my good friend, Senator Cochran, for his keen interest in the welfare of our public servants. At this time, I would like to thank Senator Grassley for coming and I look forward to your statement to the Subcommittee.

TESTIMONY OF HON. CHARLES E. GRASSLEY,[1] A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Well, I have heard your statement and it has outlined very much some problems we have to deal with, and obviously, the legislation that you have introduced advances the ball a long ways. And to some extent, I sometimes wonder the extent to which we can do enough to encourage the protection because of the fact that it is such a good source of information. So you are demonstrating your outstanding leadership by advancing this legislation to make important changes in the Whistleblower Protection Act.

I think you have made some reference to my championing the rights of Federal whistleblowers. I think I have been doing this since 1983. This is because of my strong belief that disclosures of wrongdoing by whistleblowers are an integral part of our system of checks and balances of government. It really helps make our democracy work and work in a responsible way. In other words, our government must be responsible and must be responsive, and I think whistleblowers, knowing where there are problems, help us along that process. It may not be, obviously, the only source of in-

[1] The prepared statement of Senator Grassley appears in the Appendix on page 37.

formation or the only checks and balances, but it is an important part of them.

When Congress, for instance, performs its oversight function, and if we do it effectively, it is usually because of information provided to us by insiders and whistleblowers. Recently, the U.S. Senate has performed extensive oversight work of the IRS and now the FBI. We have begun to tackle rather difficult issues of how to change the divergent cultures of these two agencies. This was not possible without the insight of insiders and whistleblowers from the agencies. Those are the people, who come forward and perform such a public service, I think deserve to be well protected and even rewarded.

I have had the opportunity—I think it was before he became President—I have not followed up with it since President Bush has been sworn in, but during the opportunities that I had on numerous occasions to be with him in the State of Iowa during the caucus, I spoke about whistleblowers quite often and I said—you always make the joke if I were President, what I would do. I am never going to be President, but I said that I would have a Rose Garden ceremony once a month to honor whistleblowers, because I think that instead of being seen as a skunk at a Sunday afternoon picnic, as too often they are, they ought to be seen as patriotic Americans doing what they think is right to make our government work effectively.

Now that is not saying that everybody who comes to blow a whistle is always right and needs to be protected, but we ought to give the opportunity to look at and consider very sincerely what people come forth. Some has basis and some does not. But where it does have basis, it ought to be respected in our system of government, not as it sometimes is, where there is such peer pressure to go along and to get along, that we sometimes honor those that cover up more than we honor those that bring things out into the sunshine. Obviously, the old saying of the sunshine, there is not going to be any moss or mold there. Or as another person said on the Supreme Court, I think, where the sun shines in, that is going to keep our system of government working better.

Now in addition to my support in the past, we have had celebrated whistleblower cases like Ernie Fitzgerald, Chuck Spinney, and Fred Whitehurst who are also joined with many of my colleagues to sponsor legislation to protect whistleblowers. Included in these laws are the False Claims Act Amendments of 1986; the Whistleblower Protection Act of 1989; the 1994 Amendments to the Whistleblower Protection Act; Whistleblower protection laws for airline safety, and the anti-gag rider that we have passed yearly on the appropriation bills. In many of these, if not all of these efforts, I was joined by my good friend, Senator Levin, who over the years has shown great leadership in advancing the cause of whistleblowers.

Senator Levin is a prime co-sponsor of the bill that you are considering and I likewise commend him, as I did you, Senator Akaka, for your dedication to this cause. Congress has demonstrated again and again its commitment to protecting whistleblowers, yet all too often the intent of Congress is undermined by a hostile bureaucracy. Presidential demonstration of support for whistleblowers, as

I indicated to you, may be somewhat tongue-in-cheek through a Rose Garden ceremony. At the top level of government, if there is support for this process, it means that we are going to have more responsive government, because when people know that wrongdoing is going to be made public, there is obviously going to be less wrongdoing.

It seems that the amendments that are before us and that are already on the books, some passed and some hopefully will be passed, met with efforts to undermine the will of Congress, and at each time whistleblowers are put more and more behind the eight ball. In my view, this bill is a minimum, yet important step toward giving whistleblowers a fair shot against retaliation. Bureaucracy has become a growth industry of creative ways to get whistleblowers. So Congress is obliged to respond with equally creative protection against reprisals. That is how we are able to preserve our prerogative to obtain meaningful information from the Executive Branch.

There are several very good sections of S. 995, but I would like to address just a couple of the most important ones. The current requirement of undeniable proof as a standard for whistleblowers to meet is not at all helpful, to put it mildly. This bill would overturn that. It would also end the Federal Circuit's monopoly on appeals for whistleblower cases by allowing reviews by other circuits. And finally, this bill would codify the anti-gag rider we have included in our yearly appropriation bills every year since 1988.

Inasmuch as whistleblower protections are constantly fluid propositions, I would like to raise some additional concerns that go beyond this bill that I believe you should consider. First, I am concerned about the issue of security clearances. I am aware of several instances where a whistleblower's security clearance has been pulled as a means of retaliation. The pulling of a security clearance effectively fires employees. A whistleblower does not have rights to a third-party proceeding in these instances. I think this matter needs to be reviewed and it should be possible to find a balance between the legitimate security concerns of the government and ensuring that pulling a security clearance is not used as a back door to get whistleblowers.

Second is the issue of accountability. The Office of Special Counsel has the authority to investigate and prosecute managers who retaliate against whistleblowers, but in any disciplinary litigation, the Office of Special Counsel has two strikes against it. First, OSC is faced with higher standards of proof that predate the more reasonable standards contained in the Whistleblower Protection Act. And second, if the Office of Special Counsel loses, it must pay the manager's attorney's fees from its own operating budget. Both of these create a disincentive to the Office of Special Counsel carrying out its disciplinary authority in holding management accountable.

Finally is the issue of remedies. In 1994 amendments to the Whistleblower Protection Act—that Act created a remedy of consequential damages for reprisals. Prior to that, damages were compensatory. Sequential damages were intended to be interpreted as greater than compensatory damages. Instead they have been interpreted as being less than compensatory damages. This should be

reviewed to help ensure that whistleblowers are adequately compensated.

Mr. Chairman, again, I commend you and Senator Levin for your continued leadership advancing any legislation, but most importantly this one, and maybe even hopefully before this is through, beyond this legislation to protect whistleblowers. It is my hope, and I know my colleagues share my view, that we can write legislation to encourage whistleblowers to disclose information about wrongdoing and to protect them against reprisals for doing so. So I look forward to working with you, Senator Akaka.

Thank you very much.

Senator AKAKA. Thank you very much, Senator Grassley. I look forward to working with you on this, too, and with Senator Levin. I want to invite you, if your schedule permits, to join me at the dais.

Senator GRASSLEY. I knew a long time ago that you had invited me, but I just will not be able to do it. I was hoping I could. Thank you very much.

Senator AKAKA. Thank you. Those of you who are present at this hearing now realize why I called Senator Grassley a passionate leader.

Senator GRASSLEY. Thank you.

Senator AKAKA. At this time I welcome back to the Subcommittee our next witnesses. Special Counsel Kaplan and MSPB Chair Slavet, please come to the witness table and be seated. We appreciate your being here with us today. While neither one of you needs an introduction, let me thank you both for your efforts on behalf of Federal employees.

Ms. Kaplan, you may proceed with your statement and I want to ask all witnesses that you limit your oral presentation to 5 minutes and we will place your full statement in the record.

Thank you very much.

TESTIMONY OF HON. ELAINE KAPLAN,[1] SPECIAL COUNSEL, OFFICE OF SPECIAL COUNSEL

Ms. KAPLAN. Good afternoon. I would like to thank the Subcommittee for giving me the opportunity to participate in today's hearing concerning S. 995, a bill that would strengthen the effectiveness and enforcement of the Whistleblower Protection Act. I would also like to publicly thank you, Senator Akaka, as well as Senators Levin and Grassley, for your leadership on this issue and your commitment to ensuring that the Whistleblower Protection Act fulfills its original promise, to protect Federal employee whistleblowers against retaliation. Finally, let me also express my public appreciation for the efforts of the Government Accountability Project to ensure that the protection of Federal employee whistleblowers remains a front-burner issue for Congress and the public at-large.

As you know, the primary mission of the Office of Special Counsel, the agency I head, is to protect Federal employee whistleblowers against retaliation. We do our job by investigating employees' complaints by pursuing remedies on behalf of whistleblowers

[1] The prepared statement of Ms. Kaplan appears in the Appendix on page 39.

and by seeking the discipline of agency officials who engage in retaliation. In addition, we also educate other Federal agencies and the public about whistleblower protection and the important contribution whistleblowers make to the public interest.

The bill before the Subcommittee today, S. 995, has been conceived in the wake of several decisions issued by the Court of Appeals for the Federal Circuit, which have narrowed the scope of the protection provided to whistleblowers under the Whistleblower Protection Act. As you know, this is not the first time that Congress has been confronted with concerns about the Federal Circuit's approach to this particular law. Thus, Congress harshly criticized that court's decisionmaking in 1989 when the Whistleblower Protection Act was enacted and did so 5 years later in 1994 during the consideration of the Office of Special Counsel Reauthorization Act.

At that time, the House Committee considering the law observed that the case law developed by the Federal Circuit, "represented a steady attack on achieving a legislative mandate for effective whistleblower protection," and that, "realistically, it is impossible to overturn destructive precedents as fast as they are issued."

Notwithstanding the strong criticism, the Federal Circuit continues to routinely read the Whistleblower Protection Act's protections narrowly. For example, in *LaChance v. White,* the court raised the bar for whistleblowers seeking to establish that their disclosures qualify them for protection by endorsing what it called an irrefragable presumption that government officials discharged their duties properly and lawfully. Moreover, in that case, the court suggested it was appropriate to examine a whistleblower's personal motivations in deciding whether the whistleblower should receive the Act's protection.

We agree with the sponsors of S. 995 that *LaChance* and other Federal Circuit decisions, such as the *Whorton* and *Willis* opinions, establish unduly narrow and restrictive tests for determining whether employees qualify for the protection of the law. We also agree it is time for Congress to consider ending the Federal Circuit's monopoly on review of these cases by providing for all circuits review.

Today, I would like to briefly address and express our strong support for the provisions of the Act that would grant the Office of Special Counsel independent litigating authority and the right to request judicial review of MSPB decisions in cases that will have a substantial impact on enforcement of the law. I firmly believe that both of these changes are necessary not only to ensure our effectiveness as an agency, but also to address the continuing concerns that motivate S. 995, that is, the whittling away of the WPA's protections by narrow judicial interpretations of the law.

The basis for my belief is set forth in some detail in my accompanying statement, which I would ask to be included in the record. Let me just summarize quickly. While the current statutory scheme gives OSC a central role as public prosecutor in cases in front of the Merit Systems Protection Board, we have no authority right now to seek judicial review of an erroneous MSPB decision. Moreover, our ability to influence even the MSPB's interpretation of the law is limited because the majority of the MSPB's decisions arise in cases of individual rights of action cases to which OSC is

not a party. As a practical matter, until the Board issues its final decisions in particular cases, there is really no way for us to know that they will resolve important legal questions. Under existing law, OSC has no procedural device that would permit us to ask the Board to reconsider its decision, much less a right to ask a court to review them.

Ironically, the Office of Personnel Management has the authority to seek judicial review of MSPB decisions in any case where the Board's decision will have a substantial impact on the interpretation of civil service laws, rules and regulations, including the Whistleblower Protection Act. Further, OPM has the authority to ask the MSPB to reconsider a decision after it has been issued, again, even if OPM was not originally a party to the case. OPM, of course, does not have the protection of whistleblowers as its primary mission. That is our job. In fact, it was OPM that brought the *LaChance v. White* case to the Federal Circuit and OPM, represented by the Justice Department, that urged the court to adopt a narrow interpretation of the Act.

This bill would provide the Special Counsel with similar authority to ask the Board for reconsideration and seek judicial review in important cases. It would ensure that the government agency charged with protecting whistleblowers will have an equal opportunity to participate in the shaping of the law. OSC would serve as a counterweight to the Justice Department, whose client is most often the Federal agency defending itself against retaliation charges. Moreover, by granting OSC independent litigating authority, the bill also ensures that OSC will be able to craft its own positions and advocate on its own behalf when Whistleblower Protection Act cases reach the Court of Appeals.

Under existing law, the Special Counsel must be represented by the Justice Department in all court proceedings. This has effectively led to OSC being shut out of the vast majority of cases which involved interpretation of the Act. The Justice Department's position is that because we lack independent litigating authority, we cannot participate, even as an amicus, where another party has invoked the jurisdiction of the Court of Appeals in a whistleblower retaliation case.

The Justice Department has agreed that we can participate in a limited category of cases where we are defending an MSPB order of discipline against a retaliating agency manager. But even in those cases, we must be represented by Justice Department attorneys. While the attorneys at the Justice Department are highly professional and competent, it is completely unacceptable for the Justice Department to make final decisions about how OSC cases should be briefed and argued. Not only do we routinely investigate and prosecute cases of retaliation against the Justice Department and its component agencies, the attorneys at the Justice Department routinely represent agencies in the Federal Circuit against charges of retaliation. Its institutional interests are directly in conflict with those of the Office of Special Counsel.

If we are going to be a truly independent watchdog, then the Special Counsel, and not the Justice Department's Civil Division, has to have the authority to decide what arguments to make and what positions to take in the Court of Appeals.

Finally, let me summarize in short. Under current law, the Special Counsel, whom Congress intended would be a vigorous, independent advocate for the protection of whistleblowers, can scarcely participate at all in the arena in which the law is largely shaped, the Court of Appeals for the Federal Circuit. Further, when we do appear in court, we must be represented by an agency that we routinely investigate through attorneys whose exposure to the Whistleblower Protection Act otherwise occurs only when they argue cases on behalf of agencies accused of engaging in retaliation.

Need I say more? Congress has consistently expressed its intention that we take an aggressive role in protecting whistleblowers against retaliation. In the 3 years since I became Special Counsel, the staff and I attempted to do whatever was possible within our limited resources to achieve that goal. I believe that we have made a lot of progress in the last 3 years towards increasing our effectiveness, and that we have reassured some of our staunchest former critics that OSC is deeply committed to its mission. We would ask, therefore, that we be provided the tools that we need to do the job right by affording us both the authority to request judicial review and independent litigating authority.

Thank you.

Senator AKAKA. Thank you very much, Ms. Kaplan.

Ms. Slavet, you may give your statement at this time. And again, I want to remind you about the 5-minute limit. Go ahead.

TESTIMONY OF HON. BETH S. SLAVET,[1] CHAIRMAN, U.S. MERIT SYSTEMS PROTECTION BOARD

Ms. SLAVET. I will do my best, Senator. Good afternoon, Chairman Akaka. Ranking Member Cochran is not here, but other distinguished Members of the Subcommittee, thank you for the opportunity to appear before you on behalf of the MSPB to discuss S. 995, the Whistleblower Protection Act Amendments of 2001. I would also like to acknowledge the presence of my distinguished colleagues, Vice Chair Barbara Sapin, and Member Suzanne Marshall, and extend my appreciation to them for their contribution to the work of the Board.

Chairman Akaka, I want to recognize the important work that you, the Subcommittee, and the full Governmental Affairs Committee, as well as Senator Grassley and Senator Levin specifically, have done to benefit Federal workers. Your efforts on behalf of Federal whistleblowers is a further demonstration of your commitment to ensure the efficiency of government operations and oversight of the public interest to the protection of rights accorded government employees.

Today, I would like to briefly share some of the observations we at the Board have made about the proposed amendments to the Whistleblower Protection Act, their impact on current law, Federal employees and agencies, and their impact on the Board itself. Due to time constraints, I will not address the issues I raise today in any great detail, and have submitted in the written statement that you have kindly accepted into the record. In addition, because the Board is a quasi-judicial agency and adjudicates cases under the

[1] The prepared statement of Ms. Slavet appears in the Appendix on page 44.

WPA, we take no position on the substantive or procedural provisions of the proposed amendments, in order to avoid any appearance of prejudgment.

The three substantive areas I would like to address concerning the amendments are basically the credible evidence standard in section 1(a), the need to reconcile the implications of these amendments on retaliation claims under sections 2302(b)(8) and (b)(9) of the WPA, and the apparent absence of an effective remedy for Federal employees or applicants for Federal employment due to a violation of the anti-gag provisions of the legislation.

Currently, secton 2302(b)(8) of the WPA requires that a whistleblower have a reasonable belief that the matter disclosed evidences one of the conditions described in that section. It appears that section 1(a) of the bill, the proposed amendments, would eliminate the reasonable belief standard for all whistleblowers, except those who make disclosures in the course of their duties. This latter category of employees would need to have a reasonable belief supported by "credible evidence." If enacted, this provision of the bill could have the unintended consequence of actually making it more difficult for some employees to show that their disclosures were protected, because they would need to meet a higher standard and show that their reasonable belief is supported by credible evidence.

The language in section 1(a) of the bill that eliminates restrictions and disclosures based on their form or context also raises a serious question of whether Congress intends to include as part of whistleblower disclosures covered section 2302(b)(8), which is limited to whistleblowing itself, actions that are covered by another prohibited personnel practice, codified at 5 U.S.C. § 2302(b)(9). The section (b)(9) provision protects employees who file a complaint, appeal or grievance from reprisal. If this is the case, the proposal needs to be reconciled with the distinction between reprisal for whistleblowing, prohibited by section 2302(b)(8), and reprisal for filing a complaint, appeal or grievance, which is prohibited by section 2302(b)(9).

The Board has generally held that an employee's discrimination complaint does not by itself constitute a prohibited whistleblowing disclosure under section 2302(b)(8) even though the complaint alleges retaliatory discrimination in violation of law. In addition, permitting Federal employees to file whistleblowing complaints alleging reprisal for filing a complaint, appeal or grievance, as these new sections would permit, would impact the remedies currently available under other statutory complaint, appeal and grievance schemes. Extending whistleblowing protection to employee discrimination complaints could result in serious deficiencies in the enforcement programs administered by the OSC and the EEOC. The EEOC has been recognized as the lead agency for enforcing the prohibitions against discrimination in Federal employment. For this and other reasons, the Subcommittee may wish to clarify the implications of the provisions and the interplay between sections (b)(8) and (b)(9) and sections 1(a) and 1(b) of the proposed legislation.

Another important area I would like to bring to the attention of the Subcommittee concerns the anti-gag provisions. Section 1(c) of the bill mandates that those Federal agencies that implement or

enforce nondisclosure policies, forms or agreements include notice in such policies, forms or agreements of the applicable protection under the WPA. It would become a new personnel act—prohibited personnel practice. Cases involving this new prohibited personnel practice would reach the Board in one of two ways; either through the Special Counsel, seeking corrective or disciplinary action—corrective action for the employee harmed or disciplinary action against the employee who took the action.

The specific corrective action will vary with the circumstances of each case and would generally involve overturning or, at least, modifying the personnel action that was the basis for the prohibited personnel practice. The problem this creates is that while ordering disciplinary action might prove an effective deterrent to agency managers contemplating the implementation or enforcement of defective nondisclosure policies, it appears that the most likely corrective action the Board could order is that the agency ceases implementation or enforcement of the particularly defective document.

The question then becomes: What are the results that the Subcommittee wishes to achieve, or whether it wishes to address other adverse impacts of employees of these defective forms? That is, if an employee comes before us and is heard and is, for example, fired because of their refusal to sign a defective disclosure form, one would presumably think that one remedy you might want us to have would be to put that employee back in place, to not have the failure to sign that defective disclosure agreement be the reason for their termination. However, because of certain Supreme Court decisions, as well as Federal Circuit decisions, we would not be able to reach that. So I would ask the Subcommittee to clarify as to what exactly you want our authority to be.

There are two other issues that I would like to address, and I see that my time is really up, but with your permission—the first is, and I am probably the only one here speaking on this, but it concerns the elimination of the Federal Circuit's exclusive jurisdiction over MSPB matters. This can be expected. A uniform body of MSPB case law has actually evolved from decisions of the Federal Court, as well as decisions of the MSPB itself. We are concerned that the disturbance of this uniformity may have a significant impact on the treatment of Federal workers throughout the country. I would invite you and your colleagues to read our prepared statement for our thoughts on this issue.

Finally, in my remaining time, I would bring the Subcommittee's attention to the impact the legislation would actually have on the Board's operations. The expansive definitions of protected disclosures, which substantially broadens our jurisdiction, would result in the increase of cases that we hear on the merits, as opposed to jurisdiction. These cases are also very complex and they require a lot of hours devoted to adjudication, much more than the normal adverse actions that we adjudicate. They take significantly more time to process than other parts of our Board's jurisdiction. Section 1(d) of the bill seeks to amend other sections of Title V to provide OSC with independent litigating authority in certain circumstances. But again, even if OSC seeks reconsideration in a minimum number of cases, we can expect a significant impact on

Board resources, because the records are usually voluminous in this case, they frequently involve novel legal issues, and they require extensive research.

Finally, section 1(e) of the bill seeks to permit review of any decision of the MSPB in any appellate court of competent jurisdiction, thereby eliminating the exclusive jurisdiction of the Court of Appeals over MSPB cases. Again, this would have significant results in our travel costs and our litigation expenses for the Board. In the past few years the Congress has showed your confidence in our ability to adjudicate cases by giving us increasing amounts of jurisdiction over different statutes; the Uniform Services Employees and Re-employment Act, VEOA, and jurisdiction over employees involving the Federal Aviation Administration.

Again, these new laws involve novel and complex issues. We appreciate the confidence that Congress has shown in us, but with these added responsibilities, we have also had to undergo a one-third cut in personnel over the past 8 years, yet we have still maintained what we think is a very high level of quality service to our constituents. In order for the Board, however, to continue to meet GPRA goals, the Government Performance and Results Act plan, and fulfill the increased responsibilities imposed on the agency by this new legislation, we are going to require additional resources.

I appreciate the opportunity to comment here on these proposals. I hope our analysis is helpful to the Subcommittee's deliberations, and we certainly hope that the Subcommittee will permit the Board to continue the important work that we do by giving favorable consideration to our request for authorization that is now pending before the full Committee.

Thank you. I would be pleased to respond to any questions at this time.

Senator AKAKA. Thank you very much for your testimony. We have been joined by my friend and colleague, Senator Carper from Delaware, and I want to give him the opportunity to make any statement he would like to make at this point.

OPENING STATEMENT OF SENATOR CARPER

Senator CARPER. Thank you very much for the opportunity. I am not going to interrupt the testimony and, unless I get called out of here, I look forward to asking a question or two, but we thank our witnesses for being here.

Thank you, sir.

Senator AKAKA. Thank you. Again, I want you to know that all your statements and your full testimony will be included in the record.

Before I begin, I would like to note and I think you should know this, that due to time constraints, we were unable to do a reasonable review of your written testimony, Ms. Slavet, and I appreciate the in-depth and the complex legal analysis you provided, and also your suggestions of clarifying and amending parts of that. I appreciate that.

Ms. SLAVET. Thank you, sir. I am sorry. I know we got the statement to you later than we were required to and I appreciate your forbearance with us.

Senator AKAKA. Before we proceed with questions, I am delighted to have my friend and colleague, Senator Levin, here. As I used the word passionate for Senator Grassley, I want to use the same word with Senator Levin, that he is a passionate leader on whistleblowers. I invite him to give any statement he may have.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Thank you, Senator Akaka. That is quite a compliment coming from you and I appreciate it a great deal. I am sorry that I am late. First, let me thank Chairman Akaka for calling this hearing, for being so dedicated in his efforts to fix the Federal employee protection system that so many have worked so long to strengthen, and that of course is the Whistleblower Protection Act.

Recent decisions by the U.S. Court of Appeals for the Federal Circuit have violated the intent of Congress with the result that clarifying language is very badly needed. Congress has long recognized the obligation we have to protect a Federal employee when he or she discloses evidence of wrongdoing in a Federal program. If an employee reasonably believes that fraud or mismanagement is occurring, and that employee has the courage and the sense of responsibility to make that fraud or mismanagement known, it is our duty to protect that employee from any reprisal. We want Federal employees to identify problems in our programs so that we can fix them. And if they fear reprisal for doing so, then we are not only failing to protect the whistleblower, but we are also failing to protect the taxpayer.

We need to encourage, not discourage, disclosures of fraud, waste and abuse. Today, however, the effect of the Federal Circuit decisions is to discourage the Federal employee whistleblower and ignore congressional intent to achieve that result. Tom Devine of the Government Accountability Project notes in his testimony today that since 1994 whistleblowers seeking relief have lost all 69 decisions on the merits before the Federal Circuit. Nothing that I can think of is much more discouraging than a zero batting average.

The Federal Circuit has misinterpreted the plain language of the law on what constitutes protected disclosure under the Whistleblower Protection Act. Most notably, in the case *LaChance v. White,* decided in May of 1999, the Federal Circuit imposed an unfounded and virtually unattainable standard on Federal employee whistleblowers improving their cases. In that case, the Federal Circuit said that review of the conduct of an agency alleged to have retaliated against the whistleblower would start out with, "a presumption that public officers perform their duties correctly, fairly, in good faith and in accordance with the law in governing regulations," but then proceeded to announce that, "this presumption stands unless there is irrefragable proof to the contrary."

The Federal Circuit imposed a clearly erroneous and excessive standard on the employee to provide irrefragable proof that there was waste, fraud or abuse. Irrefragable means undeniable, incontestable, incontrovertible, incapable of being overthrown. That is the dictionary definition. How can a Federal employee meet a standard of irrefragable in proving waste, fraud and abuse? I think that is a much tougher standard than the one that exists in a

criminal case. There is nothing in the law—there is nothing in the legislative history that even suggests such a standard with respect to the Whistleblower Protection Act. The intent of the law is not for the employee to act as investigator and compile incontrovertible proof that there is fraud, waste or abuse. Again, this is a standard tougher than "beyond a reasonable doubt." Under the clear language of the statute, the employee need only have a reasonable belief—those are the words we wrote—reasonable belief that there is waste, fraud or abuse occurring before making this protected disclosure.

Now that is but one area of the law that Senator Akaka's bill, which has been supported by a number of us, attempts to address. There are numerous other areas that we will be discussing today, and I am looking forward to discussing these with our witnesses who are so familiar with the current law and who work day in and day out to enforce it and to protect Federal employees.

Again, I want to learn how recent court cases have affected whistleblower rights and the ability of those involved in carrying out the law to protect those rights and whether or not those decisions implement the clear intent of Congress. I want to again thank our Chairman for calling these hearings. It is a very important subject. Whistleblower protection is something that we must pay attention to if we are going to protect the taxpayer as well as the whistleblower.

Senator AKAKA. Thank you very much, Senator Levin, for your statement.

Now we will begin questions to our witnesses. I have questions, first for Ms. Kaplan. The Office of Special Counsel, as chief protector of Federal employees in the area of whistleblower activities, receives, without question, many complaints. As I understand it, all complaints are screened by your office to determine if future action is warranted. This screening process also includes a review of the evidence and law to determine whether Special Counsel can prove a case. My question has two parts. Can you describe how the decisions made by the Federal Circuit have affected this screening? And second, in particular, how has what was mentioned by Senator Levin—how has the irrefragable proof standard for whistleblowers changed your screening process?

Ms. KAPLAN. Those are good questions, Senator Akaka. What we have done is that we have attempted to read those decisions as narrowly as possible consistent with our obligation, obviously, to follow the Federal Circuit's mandates. I am very hesitant to close cases, in general, because a disclosure is not protected on one of these bases. So we try to bend over backward, I would say, to look at the cases, such as *LaChance v. White* and some of other decisions we have discussed today, *Willis*, and read them as narrowly as possible.

But that being said, there is no question that we are, on occasion, presented with cases where there is no way around it, whether we agree with the Federal Circuit's reasoning, whether we think it is consistent with the legislative history of the Act or not, we may have to close a case. This has occurred, for example, with the Willis Doctrine, which provides that when an employee makes a disclosure in the course of performing their duties, the disclosure

may not be protected. The Board recently read this decision in a way that will try to make it consistent with the legislative history of the Act and we have applied, now, the Board's narrower interpretation. Nonetheless, every time we get one of these kind of decisions, we have to re-examine again how we are going to treat the cases that come before our office.

Senator AKAKA. Chairwoman Slavet has suggested that providing for multi-circuit review of Board decisions could result in a lack of uniform treatment of Federal employees. Would you comment on that?

Ms. KAPLAN. I do not necessarily think that that is true. I think, actually, under the Administrative Procedure Act, the standard is that agency decisions can be reviewed in any circuit in the country. Really, the system of review that is set up under this statute is the exception rather than the rule for administrative agency decisions. Indeed, the current law provides for multi-circuit reviews of decisions of our sister agency, the Federal Labor Relations Authority. EEO cases involving Federal employee issues are heard in district courts and courts of appeals all over the country, and I am really not sure why whistleblower protection cases should be treated any differently or why it would create a big problem of lack of uniformity.

Whistleblower cases often involve legal issues that are very similar to those that are raised in employment discrimination cases. They are very similar to issues raised in unfair labor practices cases that are before the Federal Labor Relations Authority. These cases are appealed to every circuit court in the land. So I would respectfully disagree with Chairman Slavet on that point. I do not think that—I do not see it as a problem, and I see good reasons for it.

Senator AKAKA. In 1988, President Reagan vetoed the Whistleblower Protection Act amid concerns that such protection would be used by inefficient employees to delay adverse actions of their employers. Is there any evidence of this type of abuse occurring? Do you feel that by clarifying the intent of Congress, that any disclosure of government wrongdoing deserves protection, and by removing the Federal Circuit's bar of protection for secondary sources, that there will be an escalation of fraudulent whistleblower cases? And finally, would S. 995 affect OSC's ability to curb such fraudulent actions?

Ms. KAPLAN. Frankly, since I became Special Counsel 3 years ago—actually, this question, a similar question was asked at my confirmation hearing, because there is an old canard that goes around that people are using the system in some way to prevent legitimate personnel actions being taken against them. People can try whatever they want. There are people who would try to abuse the system, but they invariably will not succeed, because we are going to look at the cases to see if there is at least enough evidence to move a case forward for investigation. People cannot stop a personnel action simply by filing a complaint with the Office of Special Counsel. So I think this is a bit, as I say, of an old canard and I do not see how enhancing the laws that protect people who really deserve protection is going to result in people taking advantage of the system.

Senator AKAKA. The Office of Special Counsel is sometimes characterized as a watchdog of the Civil Service, yet, in the majority of whistleblower cases, your office may not be a party. These cases may result in decisions that are detrimental to the interest that your office represents. Under current law, how can your office make sure that important legal issues are properly raised and litigated when your office is not a party? And second, how would S. 995 affect your ability in this area?

Ms. KAPLAN. Well, under current law, it is very difficult for us to participate in cases where we are not a party. Now, there are occasions where the Merit System Protection Board, for example, has solicited in advance the views of interested parties about legal issues. This came up a few years ago. There was a question about whether revocation of a security clearance should be covered under the Whistleblower Protection Act. The Board solicited briefs, and we were able in that case to file a brief and argue that security clearance revocation should be covered, unsuccessfully, unfortunately.

In general, unless the Board flags the case ahead of time, it is very hard for us to know which cases are going to involve important issues. That is why we are seeking the kind of authority that OPM has after the Board issues a decision for us to be able to come in and provide the Board with our perspective as the independent watchdog on the legal issues raised in the case. Currently, it is very difficult and it has been quite frustrating to me, because I have had the staff sort of trying to predict ahead of time when the Board's decisions will be resolving important issues, when they will simply be deciding the cases on alternative grounds that are not so important, very difficult and I think that is why we need S. 995.

Senator AKAKA. I now have questions for Ms. Slavet. But before I ask my questions, I would like to thank you for drawing attention to the apparent inconsistency with reasonable belief standards among various classes of whistleblowers. The intent of S. 995 was not to eliminate the reasonable belief standard for certain whistleblowers, rather the bill was designed to make this standard applicable for all whistleblowers, regardless of the nature of the disclosure. The inadvertent omission of a comma after the word duties in section 1(a) of the bill does appear to change the reasonable belief standard and that it is not our intention.

On behalf of the sponsors of the bill, I would like to thank you for bringing the oversight to our attention and I would like to assure you that this situation will be rectified. We welcome any other technical corrections to the bill. Thank you very much.

Ms. SLAVET. Senator, with regard to the credible evidence sections, specifically, the Court of Appeals, actually both in *LaChance v. White* and in another decision, I believe called *Herman,* also tended to talk about evidence. Usually, the court should be looking to adopt and defer to the Board's decisions, but sometimes they decide to review the evidence themselves. So I do have some concerns about the use of the words credible evidence in the bill itself with regard to it expressing congressional intent, and whether that term itself may need to be relooked at, because I understand that the sponsors are not trying to make it more difficult for whistleblowers.

Senator AKAKA. Thank you. Ms. Slavet, does the MSPB agree that the irrefragable proof standard established by the Circuit Court in *LaChance v. White* to overcome the presumption of government regularity, is congruent with the spirit of congressional intent to protect whistleblowers?

Ms. SLAVET. Well, sir, I think it is ultimately Congress' decision to decide whether it is congruent with your intent or not. I will point out in a recent decision called *Keenan v. Department of Defense,* the Board distinguished *LaChance v. White,* and the only time I have ever seen the irrefragable proof expression actually used has to do with contract cases involving the government. So it is not a term that we used or certainly have ever seen in the legislative language or the legislative history of the Act.

Senator AKAKA. Does the MSPB believe that the congressional mandate of protecting any disclosure, as outlined in the legislative history of 1994 amendments, is being heeded by the circuit court?

Ms. SLAVET. Has been heeded?

Senator AKAKA. Heeded, yes.

Ms. SLAVET. I would say there has been an attempt. There have been a number of cases, again, and I am somewhat loathe to criticize our previewing in court in public, and I am sure you understand that. You mentioned and I think Tom Devine's testimony talked about the 1994—no wins for whistleblowers since 1994. The only case that I am aware of in which the Court of Appeals has recognized and found on behalf of whistleblowers was a 1993 case called *Morano v. Department of Justice,* in which the Justice Department had actually itself done an internal investigation and found that there was a serious problem.

So the track record, certainly, has not been one, in terms of statistics or in terms of language, that appears to be as protective to whistleblowers as either OSC or the Merit System Protection Board has. There have been a number of cases where we have clearly, in unanimous decisions—we find or refer to certain expressions in Court of Appeals decisions as dicta because we did not see that they were necessary to the holding. We are bound by the holding of the cases, but not the dicta of the cases, and we have examined that carefully to make sure that we make the distinction to be responsible to the language that Congress has provided us with.

Senator AKAKA. I know that the Board has conducted studies on whistleblowing and whistleblower protections. What has been the results of these studies, especially your most recent merit principles survey?

Ms. SLAVET. The most recent survey, which actually has not even—we have not even published the results yet, because it is going to be part of our draft report, indicates that 44 percent of those who said that they had made a formal disclosure of fraud, waste or abuse had felt that they had experienced retaliation as a result. The survey did not ask for detailed information on the nature of the disclosures, the form of the perceived retaliation, and obviously, there may be a disconnect between the legal term and what people perceived, but it was 44 percent.

I would also point out that an earlier study—it is sort of interesting, because an earlier 1993 study indicated that while fear of reprisal was a reason given by at least 33 percent of employees

who chose not to report illegality because of concerns about retaliation, an actual higher percentage, 59 percent of the respondents chose not to report, an observed activity that they thought needed to be corrected because they thought nothing would be done. So, actually, more people do not report, not because of the potential chilling effect, but because they are discouraged and frustrated and they think: Why bother? Nothing is going to be done.

I thought that was a very interesting statistic and response, and certainly, something that I would not necessarily have expected. But I think it does go to the good government policy of not just protection for whistleblowers in terms of retaliation, but actual encouragement of whistleblowers and whether the government is responding to their concerns.

Senator AKAKA. My last question is more of a statement than a question. In your testimony you note that a possible negative consequence of this bill could be an increase in your agency's workload by substantially broadening your jurisdiction. You note that 34 percent of cases are dismissed on jurisdictional grounds. Your statement provides the example of one case that was dismissed based on the *Willis* case. Ironically, *Willis* is one of the very cases that we are trying to overturn with this bill. I hope that an increase in workload, whether through more cases being filed or through more cases being heard on the merits, will not be a reason to deny justice and basic employment rights to the men and women who come forward, often at personal risk, to disclose agency wrongdoing.

Ms. SLAVET. I totally agree with you, sir, and in that particular case that we talked about, we actually initially reversed the AJ's finding, but one of the things we need to understand in these cases is, one, if we are denying on jurisdiction and they go to the merits, we are going to get more loser cases on the merits. I personally have no problem with that. I think a lot of these are evidentiary and very fact-based, and the evidence needs to be heard. So there will be more losing decisions on the merits, as opposed to on jurisdictional grounds, and that is no problem. But it will take, because they are on the merits, much longer hearings and much more process, more cross-examination of witnesses, direct examination of witnesses. All that will be involved. Longer decisions will be involved.

So, I totally agree with you, but it is better for those cases, perhaps; that is Congress' determination to see whether they should be dismissed on the merits because the agency has had its burden and met its burden to show by clear and convincing evidence that it would have taken the action anyway, than on jurisdictional grounds.

Senator AKAKA. I would like to call on my colleague, Mr. Levin, for any questions he may have for this panel.

Senator LEVIN. Thank you, Mr. Chairman. Before I turn to questions, let me commend your office, Ms. Kaplan, on the way in which you have operated. The Government Accountability Project does not usually pull its punches when it gives its opinion about whistleblower protection matters, and in today's testimony, Tom Devine, the legal director of the accountability project, says that you have won the respect, in his words, "of even the most disillusioned critics." So that is a pretty big compliment.

Ms. KAPLAN. I take it as a compliment. Now let us hope it last past this hearing.

Senator LEVIN. All right. I would share that hope of yours, but at any rate, it is quite a compliment.

Ms. KAPLAN. I appreciate that.

Senator LEVIN. Congratulations. As you heard in my opening statement, I am particularly troubled by the Federal Circuit's decision in *LaChance,* which set out an impossible standard of proof: "Irrefragable proof." It is not only an impossible standard, it is darn near unpronounceable, by the way. For a whistleblower to have to show uncontrovertible evidence, it seems to me, is way beyond any plaintiff's worst nightmare. I do not know of any situation, and perhaps there is one with Federal contracts, that one of you said that the word came from. Was that you?

Ms. SLAVET. Involving Federal contracts, yes, that is where I first learned the standard in doing some contract law. But it is—the burden is on the contractor. It has to do with a very narrow provision vis-a-vis the particular agency involved. It is a real term of art, involving a very particular and narrow area of the law. That is the only time I have ever seen it.

Senator LEVIN. Was that in the statute or was that in a court decision?

Ms. SLAVET. I believe it was in court of claims decisions. For example, the Department of Defense is saying that the contractor did not produce what they needed to produce and they are saying that they—but I would have to check the exact situation.

Senator LEVIN. Did this come out of the blue, as far as both of you were concerned?

Ms. SLAVET. Yes.

Ms. KAPLAN. Well, I ran to my dictionary, because I had been practicing law for a long time, and I had never even seen the word before, in the context of an employment case. So, yes, it was odd.

Senator LEVIN. Well, as somebody who has been involved in whistleblower protection, I have got to tell you that this standard came totally out of the blue, as far as I am concerned. I do not know where a court could possibly have dug up that kind of a standard, and I know you are reluctant to be critical, but I am not.

Ms. SLAVET. I think, sir, it had to do with when the contractor was trying to claim a particular kind of damages against the government.

Senator LEVIN. I am not going back to that. I am being critical of the court for figuring out——

Ms. SLAVET. Where they got this term.

Senator LEVIN. I cannot imagine what law clerk dug that up somewhere.

Ms. KAPLAN. Well, if you look at the decision I was just——

Senator LEVIN. I do not mean to demean law clerks, by the way. It may have been a very politically correct statement. It may have been the judges themselves that dug it up.

Ms. SLAVET. I want to make it clear, I am not defending that.

Senator LEVIN. Keep going. You are doing well.

Ms. SLAVET. That decision.

Senator LEVIN. Good. What has been the effect of that, as a practical matter? I have heard testimony that you have tried to narrow

its impact, but has it had a real effect on the real world of real whistleblowers?

Ms. KAPLAN. I imagine that my friend, Tom Devine, would probably be able to address that more than I would, but as I said initially—first, I did not know what the word meant, so I decided we did not have to follow it anyway. No, we looked at it and, in our opinion, and I think this has been the Board's view of it, as well, we viewed that and have viewed it as dicta in the decision. It is certainly dicta that is very hostile to, I think, the underlying notion of protecting whistleblowers.

So we have tried, and I think still being true to our obligation to follow court decisions, to view it as dicta, and it does not affect the way that we treat cases, but I would say if we were to bring a case before the Board or before the Federal Circuit that was on the margins, that we might have a hard time with that standard, because I am sure that would be thrown in our faces.

Senator LEVIN. You, as the Special Counsel, were not able to participate in the *LaChance* case; is that correct?

Ms. KAPLAN. That is correct.

Senator LEVIN. And that is because——

Ms. KAPLAN. According to the Justice Department, our lawyer.

Senator LEVIN. That is because you do not, according to them, have independent litigation authority?

Ms. KAPLAN. That is correct.

Senator LEVIN. This bill would correct that?

Ms. KAPLAN. Yes, it would.

Senator LEVIN. Do you know if the Justice Department has taken a position on our bill in that regard?

Ms. KAPLAN. I know that they submitted some testimony today. I do not know. I do know that they very jealously guard their authority to represent Federal agencies in court, but I also know that it would not be surprising to me if they opposed it. But it is not inconsistent with the kind of authority that other agencies, like the Federal Labor Relations Authority, the Merit Systems Protection Board, and other independent agencies that deal with Federal employee issues possess.

Ms. SLAVET. Just make sure the record is clear, we have litigating authority with regard to our jurisdiction and timeliness, and that is all, because when these cases come up—and Special Counsel cases. That is, we defend, in particular, parts of whistleblower cases, but generally most of the cases in front of us come up between an appellant and an agency, and if OPM is defending—if OPM or the agency defends, it is between those parties and we are not a party to that litigation.

Senator LEVIN. Now, where you find for the agency and the employee wants to appeal, the employee is on his own; is that correct? He has to get his own private counsel?

Ms. SLAVET. Yes, sir.

Senator LEVIN. He does not have the Office of Special Counsel there to support him, even though the Office of Special Counsel supported the employee's position before the Board; is that true?

Ms. SLAVET. Well, usually what happens in those cases, in individual right of action cases—that is, most of the cases that we deal with involving this area of law, what is called IRAs, individual

rights of action, which Congress passed before. These are the cases that have come through Special Counsel. Special Counsel has determined that there is not merit in the case. They then come to us, and they have the right to appeal directly to us, and then we issue a decision.

Senator LEVIN. If the decision is against the employee, the employee does not have the benefit of the Office of Special Counsel on the appeal; is that correct?

Ms. SLAVET. Yes, unless the Office of Special Counsel may decide—and this happened that there are—I mean, every decision that we do issue——

Senator LEVIN. Unless they decide what? If you could finish that——

Ms. SLAVET. There has been one particular case where the Special Counsel—they cannot represent the employee, but they have gone in and dealt with the Justice Department and OPM, indicating what they thought the position of the government should be.

Senator LEVIN. But they cannot represent the employee.

Ms. SLAVET. Not as far as I know.

Senator LEVIN. If the agency loses the case before you and he appeal, however, he is represented by the Justice Department; is that correct, or by his own counsel?

Ms. SLAVET. They would be represented by the Justice Department, but the case would have to come to us a second time, because the Office of Personnel Management would have to decide that the decision that we issued had a substantial impact on civil service law. So we act as a second gate. So not every case where they lose can they go to the Court of Appeals, but, yes, they can go to the Court of Appeals, and that is what happened in *LaChance v. White.*

Senator LEVIN. Every case that they lose——

Ms. SLAVET. Every case——

Senator LEVIN. Not that they win—I am talking about every case that they lose.

Ms. SLAVET. Every case that they lose, they could appeal, but only by going first to the Office of Personnel Management, having the Office of Personnel Management asking us for reconsideration, and then passing the test that it would have a substantial impact on civil service law.

Senator LEVIN. And if they do not pass that test, can they still appeal?

Ms. SLAVET. No, the court would say you are out.

Senator LEVIN. But they can appeal, but then the court could say you are out, but they have a right to appeal?

Ms. SLAVET. Yes, they have a right to appeal, but it is a high test for them to meet.

Senator LEVIN. And they have counsel when they appeal?

Ms. SLAVET. Yes, sir, the Justice Department.

Senator LEVIN. Have you looked at the comma question which Chairman Akaka made reference to?

Ms. SLAVET. Yes, sir.

Senator LEVIN. Does that solve the problem?

Ms. SLAVET. I do not think it solves the whole problem, because it still has the credible evidence standard, and I will say the attorney who was looking at this for me had said to me we should have

a comma in there, and I said to him, "I really cannot go to the Hill and tell them they need to add a comma."

Senator LEVIN. Well, I think we caught it, and now that we have caught it, you would agree we ought to add a comma.

Ms. SLAVET. I have no problem with your having caught it, sir.

Senator LEVIN. The bigger problem is the words "credible evidence of," which presumably you believe should not be necessary?

Ms. SLAVET. My concern is——

Senator LEVIN. Let me rephrase my question. If the court had read to words "reasonably believes" the way every other court has always read the words "reasonably believes," we would not be here on this issue, on that particular issue. In order to reinforce our point, we have had to write words such as "reasonably believes there is credible evidence of," to tell the court we really mean what we are saying. As far as I know, that is the only reason to put the words in there. I do not know how else to do it, except perhaps to tell the court, if the employer/applicant reasonable believes (and we really mean that). I do not know any other way to do it, except with these words.

Now, I think that is what is driving us towards those words. Now, what you are saying is basically you should not need those words. They do not add anything as far as you are concerned. In fact, they may unintentionally complicate life for the employee; is that a fair statement?

Ms. SLAVET. Yes. May I add something?

Senator LEVIN. Now you can get a word in edgewise.

Ms. SLAVET. There has been a lot of talk about *LaChance v. White* and the words "irrefragable proof." Assuming for the moment that that is dicta, there are other parts of *LaChance v. White* and some other Court of Appeals decisions that talk and go into the evidence also. That is, in terms of deference, it is not like the court is indicating that, with regard to evidence, we, of course, defer to whatever the MSPB found. Frequently, moreover in some of these cases, there are not published Board decisions. It comes from an individual initial decision from an AJ. So it seems to me whenever you start talking in statutory language about evidence, you are telling the reviewing authority that they can examine the evidence. And as soon as you have a Court of Appeals examining evidence, as opposed to clear issues of law, they are going to mess around with it.

Senator LEVIN. Any worse than they already have?

Ms. SLAVET. I cannot predict the future, Senator.

Senator LEVIN. Well, let me see if I can figure out another way to go at this problem. Should we eliminate the presumption that the government agency acted appropriately? Would that send a clearer message to the court? There is no presumption anymore. We could do that, I presume.

Ms. KAPLAN. I believe that the language may need to be tinkered with a little bit, because there are some aspects of it that are vague and could be interpreted to do what we do not want to do, which is to raise the bar for whistleblowers, and I think it would be worth considering, as we go through the legislative process, ways to accomplish what we all, I think, agree is necessary. And the problem is, as you pointed out, the language was already clear. It is the

same thing with the any-disclosure portion of this debate. Any disclosure should mean any disclosure, but now we have to put in all these complicated qualifiers because it has not been interpreted that way. So I think we are going to have to be very careful about the language that we choose, and there may be a way of just throwing in the words irrefragable proof in there—no irrefragable burden of proof applies—and then at least every lawyer in town would find out what irrefragable means, every employment lawyer.

Senator LEVIN. Let me pursue a question with you that the Chairman raised, and that has to do with the *Willis* case and the *Langer* case.

Ms. SLAVET. The *Willis* case and the——

Senator LEVIN. *Langer.* In your statement, you indicated that, in fiscal year 2000, 34 percent of the individual right-of-action appeals filed at the MSPB were dismissed for lack of jurisdiction because the whistleblower did not make a protected disclosure. You referred to the *Langer* case, where the Board dismissed the case because the employee failed to show that he made a protected disclosure under the Whistleblower Protection Act, and you state that the Board relied on *Willis* in reaching the decision. In the *Willis* case, the court did not find there to be a protected disclosure, because the disclosure was to the employee's supervisor, and it was made in the normal course of his duties. Now, were either of those a reason for the court's decision in the *Langer* case, first of all?

Ms. SLAVET. You are really catching me here, Senator.

Senator LEVIN. OK, well, let me keep going. I have a problem with the court's holding in the *Willis* case, and I would like to know if you can tell us how many other Board cases were dismissed that primarily relied on those same holdings in *Willis*? Are you able to tell us that?

Ms. SLAVET. We would not have those statistics, and there are two kinds of decisions the Board issues, one a precedential decision, which is the full Board, and that there are non-precedential decisions, which are either the initial decisions or the administrative judge's, which right now an appellant can take directly to the Federal Circuit Court of Appeals, or what we call short-term decisions, where the appellant has appealed to us and for some reason which may have nothing to do with the whistleblowing complaint, which may have nothing to do with what happened in the AJ's decision, we decide there is some other reason that we would dismiss the case without discussion of why. Then those cases can go up further to the Federal Circuit, and the Federal Circuit has not had the expertise of the full Board looking at those particular cases.

Senator LEVIN. If you can give us any additional statistics for the record, would you do that?

Ms. SLAVET. The only statistic I can give you——

Senator LEVIN. No, I am saying for the record.

Ms. SLAVET. OK.

Senator LEVIN. Now, there is another comment in your statement that I would like to press you on. It says, "Under the proposed legislation, appeals that the Board previously dismissed, such as *Langer*, would likely be heard on the merits and would have a substantial impact on the Board's resources. Similarly, expansion of disclosures protected under the Act, to include those

that are made to an employee's supervisor in the normal course of his or her duties, as well as those that are made to the alleged wrongdoer, would result in a significant increase in the Board's overall workload, in both of those cases."

Now, if the court was incorrect in interpreting the intent of Congress, and decisions—your decisions—were based and are being based on an erroneous holding, if that is true, should not we correct the process? Should not we welcome the increase in the workload?

Ms. SLAVET. Well, let me make two points.

Senator LEVIN. If your workload is reduced because of erroneous decisions by a court which deny whistleblowers access, it seems to me you would be the first to say, "Hey, we want justice to be done. We want congressional intent to be carried out, and we want whistleblowers to be protected and not to have their cases dismissed based on court decisions which Congress determines are not what the congressional intent is."

Ms. SLAVET. I am speaking here as the chairman of the Board, which is different than my position as an adjudicator, and I have to tread that line carefully, and particular decisions, in terms of my particular opinion, is what you are asking, there have been a number of cases where I have dissented or concurred and let the court know very explicitly that I disagree with its interpretation of the WPA amendments of 1994. For example, with the words, giving a comparison, "any disclosure." So I feel that I personally have been very true to the congressional language and the congressional intent.

Senator LEVIN. Even though that might increase the workload.

Ms. SLAVET. Yes, absolutely. I have no problems with the increase in the workload. But that is for you to decide, not for me to decide.

Senator LEVIN. Final question, if I can, Mr. Chairman—this goes to you, Ms. Kaplan. The bill contains a provision that will allow the whistleblower to appeal a Board decision either to the U.S. Court of Appeals for the Federal Circuit or to the U.S. Appeals Court for the circuit in which the petitioner resides. Previously, the law, as you know, required all appeals to go to the U.S. Court of Appeals for the Federal Circuit. Do you agree with the bill's provision which would allow the option?

Ms. KAPLAN. Yes, I do.

Senator LEVIN. Now, our bill allows the Special Counsel to seek review in the U.S. Court of Appeals for the Federal Circuit, but not in any of the U.S. Circuit Courts of Appeals. Do you think that we should include the Special Counsel in the expansion of appellate authority and let the Special Counsel have the same option of seeking appeal in the Federal Circuit or one of the Circuit Courts of Appeals?

Ms. KAPLAN. Yes, I think we should have the same right of appeal outside of the Federal Circuit. If I might offer an explanation for why there is this curious anomaly in the way the bill, as it is currently drafted—we were asked to draft language that would give us the authority to ask the Board for reconsideration or appeal the cases. This was before there was a provision in the bill for multi-circuit review. So we provided this—basically the same as

the current authority for OPM, and that is how it happened. But, of course, in the final drafting of the bill, it would have to be consistent.

Senator LEVIN. Mr. Chairman, could I just take 1 more minute? I said that was my last question, but I have been reminded that there is a particular area of interest that I would like to clarify with you, Ms. Kaplan. Under the current law, the revocation or denial of a security clearance in retaliation for whistleblowing is not considered a prohibited personnel action. This leads to a situation where a Federal employee can blow the whistle on waste, fraud or abuse, and then, in retaliation for so doing, have his or her security clearance withdrawn and then be fired because he or she no longer has a security clearance.

The employee can only challenge the firing under the Whistleblower Protection Act, not the withdrawal of the security clearance, which makes the challenge significantly harder, because now the agency has a strong reason for the firing, since the employee no longer has a security clearance, which may be a requirement of the job. Do you think the revocation or denial of a security clearance should be a prohibited personnel action, and if you do believe that, should we add that provision to the bill?

Ms. KAPLAN. Well, we just took the position in a matter before the Board a couple of years ago that the law already—that when the law was amended, I guess in 1994, that the law already covers security clearance revocations. We explained in front of the Board why we thought there were good policy reasons for doing that. It is sort of Kafkaesque. If you are complaining about being fired, and then one can go back and say, "Well, you are fired because you do not have your security clearance and we cannot look at why you do not have your security clearance," it can be a basis for camouflaging retaliation. So I do think it is something that should be considered, and it would close a significant loophole in the law.

Senator LEVIN. Do you have any comments on that, Ms. Slavet?

Ms. SLAVET. Only to say that the Supreme Court has been very clear on this, and the Congress would need to be absolutely explicit, and when the issue was addressed previously in 1994, Congress clearly was not explicit. There was a disconnect between what the House and what the Senate did, and while again it is Congress' right and Congress should look at that potential—at that loophole—I have no problem defending the Board's decision that determines that Congress did not provide for the revocation of a security clearance being a prohibited personnel practice. The language just did not do it.

Senator LEVIN. Under existing law.

Ms. SLAVET. Under existing law, correct, sir.

Senator LEVIN. Thank you. Mr. Chairman, thank you again for your leadership in this area.

Senator AKAKA. Thank you very much, Senator Levin. In the interest of time, I have additional questions that I will submit in writing to our witnesses, and I would like to thank you for your testimony and responses to our questions. We look forward to working with you in developing the best possible legislation to protect Federal employees from work place retaliation. Thank you very much, and you may be excused. We now ask Mr. Devine to come

to the witness table. Please remain standing. Raise your right hand. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. DEVINE. Yes.

Senator AKAKA. Thank you. You may be seated. Mr. Devine, as a well-known advocate for whistleblowers, not only in the United States, but throughout the world, we are certainly glad that you have been able to join us. We invite you to give your oral statement, which is limited to 5 minutes. Be assured that your entire statement will be included in the record. You may begin.

TESTIMONY OF THOMAS DEVINE,[1] LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT

Mr. DEVINE. Thank you. GAP commends your leadership to revise the primary civil service law applying merit system rights to Congress and the public's right to know. S. 995 is responsible good-government legislation, and it is essential to restore legitimacy for this law's unanimous congressional mandate, both in 1989, when it was passed originally, and in 1994, when it was unanimously strengthened, and it is fitting that Senators Levin and Grassley are original co-sponsors, because they were pioneers in both campaigns that are in this mandate.

In 1994, the WPA was the state-of-the-art for whistleblower rights. Despite pride in helping win its passage, GAP must now warn those seeking help that the law is more likely to undermine than to reinforce their rights, and this is because the Federal Circuit Court of Appeals, which has a monopoly in appellate judicial review, has set the pace for hostile judicial activism, functionally overturning the law by rewriting basic statutory language. The repeated unanimous congressional mandates for the Whistleblower Protection Act should not be surprising. Whistleblowers are the Achilles heel of bureaucratic corruption. Bipartisan legislative champions of this law have called it the Taxpayer Protection Act, and voters from all backgrounds agree with that. Nearly 100 citizens organizations have signed a petition in support of this bill.

In the working group for the amendments on your legislation, it includes organizations such as the NAACP and Common Cause, to the Patrick Henry Society and the National Taxpayers Union, scientific organizations such as the Union of Concerned Scientists, good-government watchdogs, such as the Project on Government Oversight and OMB Watch. Whatever our political views, we all recognize that without viable rights, Federal employees will be bureaucrats as the rule and public service as the exception. We can count on Federal workers to defend the public if they cannot defend themselves.

Before going into the track record of the law today, I would like to first give credit where it is due. Chairman Beth Slavet has been a faithful defender of congressional language in attempting to limit damage from Federal Circuit threats to the statute's legitimacy. And at the Office of Special Counsel, based on our experience during Special Counsel Elaine Kaplan's administration, we have come

[1] The prepared statement of Mr. Devine, with attachments, appears in the Appendix on page 54.

to expect that the staff will handle reprisal cases with persistence, poise, professionalism, and most of all, hard work.

That is not to say we do not deeply disagree with numerous judgment calls made by these agencies, but they should be put in perspective. This leader's commitment to the merit system is beyond credible debate. At the level of administrative leadership, the law is in good hands, and it is also beyond credible debate that the OSC's voice in court would strengthen our merit system. While you are waiting for your bill to get passed, I would urge them to file more amicus briefs before the Merit System Protection Board and show their stuff in that forum that is available.

Without the effort of this administrative leader, however, reprisal rights would be skyrocketing. The Federal Circuit Court of Appeals has intensified a relentless pattern of hostile judicial activism since 1994 amendments strengthened this law by reversing a lower Federal Circuit precedent. We have studied every published decision through June 29 of this year. I would like to break down the 0–69 track record a little bit for cases on the merits where whistleblowers sought relief. In 1998, it was 0–17; 1999, 0–14; year 2000, 0–15; through June 29 of this year, 0–12. These facts speak for themselves. Whistleblowers do not have a fighting chance.

In reviewing the provisions of S. 995, I do not want to review the points that have been made earlier. The first cornerstone is closing the loopholes by putting the "any" back in "any," and I will not reiterate the loopholes that have been covered in the discussion, but do want to highlight a few other ones that are worth your note. One is that whistleblowers are no longer protected when they challenge policies rather than specific events. This is also contrary to the legislative history. But these are the scenarios that count the most for the taxpayers, where we are institutionalizing waste or illegality or substantial threats to public health and safety. It shrinks the law's relevance to personal eccentricity.

You are not a whistleblower anymore if you disclose non-government illegality, which could doom Federal workers who reveal misconduct by special interests. Supposedly, that is the point of Federal regulation. You are not covered if you expose, "minor," illegality, which the Federal Circuit illustrated through a case involving records falsification through backdating. I thought that was a crime. Another one that is not covered anymore are disclosures that are, "unnecessary," to solve a problem. Boy, that is a subjective blank check to punish those who had been vindicated.

Perhaps the most surreal is no one is protected from making any disclosure after initial exposure of given misconduct, which revised a discredited doctrine—ingrained, long-term corruption that was specifically overruled in 1999 when this law was passed. It means only the Christopher Columbus of a scandal is eligible for protection. This is an accelerating pattern of loopholes. In the aftermath, seeking Whistleblower Protection Act coverage is like driving on a road with more potholes than pavement.

To go to the second cornerstone of this law, restoring rationality to the reasonable belief test, I will not repeat the debate that has happened, that has been summarized so far, except to note that the circumstances of this particular decision are very startling, because in this case, where the court said the employee did not have a rea-

sonable belief of evidence, the agency, the Air Force, actually ended up agreeing with the whistleblower's concerns, and as Eric Fitzgerald, who is in the audience today, will confirm, the Air Force does not agree with whistleblowers very often, but this was a case where they said the person's belief was not reasonable.

The irrefragable standard, of course, is the magic word here. And far be it for me to urge that they should be given any more weight than the leaders of the administrative agency have given it, but the court did say it is the first step in deciding whether there is a reasonable belief, and with irrefragable meaning undeniable and incapable of being overthrown, some say there is no such thing as a whistleblower unless the individual wrongdoer confesses, and then who needs a whistleblower? The irrefragable proof standard means a coverup overturns a Federal employee's rights under the Whistleblower Protection Act, and it is because of that that we must know, first, all who inquire that if they spend thousands of dollars and years of struggle to pursue their rights and they survived the gauntlet of loopholes, they inevitably will earn a formal legal ruling endorsing the harassment they received.

The court could not have created a stronger incentive for Federal workers to be silent observers and look the other way. The decision clearly conflicts with President Bush's first act on January 20, when he signed an executive order requiring Federal employees to disclose fraud, waste, abuse, and corruption. Well, what a Catch 22. If they obey the President, Federal employees waive their rights. I think, listening to Senator Grassley's idea about a Rose Garden, if we do not get some genuine rights for these workers, that Rose Garden ceremony is going to have to be a closed-casket one, in terms of being able to survive in the Executive Branch.

The third cornerstone is structural reform, restoring all-circuits review. We had this in the law from 1978 to 1982. It is not a new concept which is untested. This will now be the third time that Congress has had to pass the Whistleblower Protection Act, because the same court has functionally overturned a merit system right first created in 1978. It is time for structural change to stop the broken record syndrome. Enough is enough. S. 995 restores normal judicial review in the circuit courts, which has been functional for the EEOC, or the FLRA, and which is available to all other Americans who are aggrieved by administrative law decisions. We cannot expect whistleblowers, Federal employers, to give first-class service to the public when they only have second-class rights.

The fourth cornerstone of the anti-gag statute at this point is almost a housekeeping measure. It has passed unanimously 13 times in appropriations law, but it does not have a remedy, and rights without remedies do not help much. It is time to institutionalized this success story. I will not go into the specific recommendations out of respect for the time limits of the hearing, but we commend you for your leadership in putting this proposal on the table. It sends a clear message that Congress was seriously when it passed this law in 1989 and strengthened it, and as every whistleblower will tell you, persistence is a prerequisite for those who defend the public, to have a decent chance of defending themselves.

Senator AKAKA. Thank you very much for sharing your descriptive insights with us today, and again I commend you and the Government Accountability Project for all of the work you have done with Federal whistleblowers. I have one question for you. The MSPB has taken steps to limit the application of some of the Federal Circuit decisions that led to the drafting of S. 995. For example, in applying two Federal Circuit decisions that established case law in conflict with the congressional intent, the Board has stated that, "Isolated statements from Federal Circuit opinions should not be cited for broad rules." However, limiting the scope and meaning of Federal Circuit opinions in an effort to make these rulings consistent with congressional intent should not be the job of the MSPB.

The Federal Circuit's opinions should be in accordance with the will of Congress, and provide guidance to the Board, rather than being a hindrance to them in carrying out their duties. Can you discuss the scope of the impact of these restrictive Federal Circuit rulings? That is, who, other than MSPB, bound by or adversely influenced by these decisions?

Mr. DEVINE. Well, they certainly influence our organization. We do not like having to tell people who want to challenge fraud, waste or abuse, that there are liable to be engaging in an act of professional suicide. It is very painful for our organization, and they also have a real spillover affect throughout the legal system. The Federal Circuit is the highest court in the land that hears cases under the premier statute protecting whistleblowers—other forums, such as State courts considering, wrongful discharge cases, the administrative judges who hear these cases every day at the Merit Systems Protection Board—the spillover effect of the Federal Circuit doctrines is very, very severe.

It has been contagious throughout the legal system, and, of course, the Board's statement is well-taken, that it cannot overgeneralize from a particular phrase or passage in an opinion. That would be more meaningful, though, if those particular phrases or passages were in isolation. When it has happened 69 times in a row since 1995, and when these passages get expanded upon and solidified after the Board makes careful decisions distinguishing the limits of them, we have gotten beyond the point where it is realistic to hope that damage control through careful reading and detailed, cautious interpretation of the boundaries of Federal Circuit decisions is going to be a solution. We have to have structural reform at this point.

Senator AKAKA. Well, I thank you very much for your response, Mr. Devine. I have no further questions at this time. I will submit any further questions I have for the record. I want to thank you today, and also the other witnesses. You have been part of the discussion of this important legislation. There is no question your comments and those of the other witnesses are very important to us, and I look forward to working with all of you.

If there are no further questions, this meeting stands adjourned.

[Whereupon, at 4:19 p.m., the Subcommittee was adjourned.]

APPENDIX

II

107TH CONGRESS
1ST SESSION

S. 995

To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 7, 2001

Mr. AKAKA (for himself, Mr. LEVIN, and Mr. GRASSLEY) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. PROTECTION OF CERTAIN DISCLOSURES OF IN-**
2 **FORMATION BY FEDERAL EMPLOYEES.**

3 (a) CLARIFICATION OF DISCLOSURES COVERED.—
4 Section 2302(b)(8) of title 5, United States Code, is
5 amended—

6 (1) in subparagraph (A)—

7 (A) by striking "which the employee or ap-
8 plicant reasonably believes evidences" and in-
9 serting ", without restriction to time, place,
10 form, motive, context, or prior disclosure made
11 to any person by an employee or applicant, in-
12 cluding a disclosure made in the ordinary
13 course of an employee's duties that the em-
14 ployee or applicant reasonably believes is cred-
15 ible evidence of"; and

16 (B) in clause (i), by striking "a violation"
17 and inserting "any violation";

18 (2) in subparagraph (B)—

19 (A) by striking "which the employee or ap-
20 plicant reasonably believes evidences" and in-
21 serting ", without restriction to time, place,
22 form, motive, context, or prior disclosure made
23 to any person by an employee or applicant, in-
24 cluding a disclosure made in the ordinary
25 course of an employee's duties to the Special
26 Counsel, or to the Inspector General of an

1 agency or another employee designated by the
2 head of the agency to receive such disclosures,
3 of information that the employee or applicant
4 reasonably believes is credible evidence of"; and
5 (B) in clause (i), by striking "a violation"
6 and inserting "any violation"; and
7 (3) by adding at the end the following:
8 "(C) a disclosure that—
9 "(i) is made by an employee or appli-
10 cant of information required by law or Ex-
11 ecutive order to be kept secret in the inter-
12 est of national defense or the conduct of
13 foreign affairs that the employee or appli-
14 cant reasonably believes is credible evi-
15 dence of—
16 "(I) any violation of any law,
17 rule, or regulation;
18 "(II) gross mismanagement, a
19 gross waste of funds, an abuse of au-
20 thority, or a substantial and specific
21 danger to public health or safety; or
22 "(III) a false statement to Con-
23 gress on an issue of material fact; and
24 "(ii) is made to—

"(I) a member of a committee of Congress having a primary responsibility for oversight of a department, agency, or element of the Federal Government to which the disclosed information relates;

"(II) any other Member of Congress who is authorized to receive information of the type disclosed; or

"(III) an employee of the executive branch or Congress who has the appropriate security clearance for access to the information disclosed.".

(b) COVERED DISCLOSURES.—Section 2302(b) of title 5, United States Code, is amended—

(1) in the matter following paragraph (12), by striking "This subsection" and inserting the following:

"This subsection"; and

(2) by adding at the end the following:

"In this subsection, the term 'disclosure' means a formal or informal communication or transmission.".

(c) NONDISCLOSURE POLICIES, FORMS, AND AGREEMENTS.—

1 (1) PERSONNEL ACTION.—Section
2 2302(a)(2)(A) of title 5, United States Code, is
3 amended—
4 (A) in clause (x), by striking "and" after
5 the semicolon; and
6 (B) by redesignating clause (xi) as clause
7 (xii) and inserting after clause (x) the following:
8 "(xi) the implementation or enforcement of
9 any nondisclosure policy, form, or agreement;
10 and".
11 (2) PROHIBITED PERSONNEL PRACTICE.—Sec-
12 tion 2302(b) of title 5, United States Code, is
13 amended—
14 (A) in paragraph (11), by striking "or" at
15 the end;
16 (B) in paragraph (12), by striking the pe-
17 riod and inserting "; or"; and
18 (C) by inserting after paragraph (12) the
19 following:
20 "(13) implement or enforce any nondisclosure
21 policy, form, or agreement, if such policy, form, or
22 agreement does not contain the following statement:
23 " 'These provisions are consistent with and
24 do not supersede, conflict with, or otherwise
25 alter the employee obligations, rights, or liabil-

1 ities created by Executive Order No. 12958;
2 section 7211 of title 5, United States Code
3 (governing disclosures to Congress); section
4 1034 of title 10, United States Code (governing
5 disclosure to Congress by members of the mili-
6 tary); section 2302(b)(8) of title 5, United
7 States Code (governing disclosures of illegality,
8 waste, fraud, abuse, or public health or safety
9 threats); the Intelligence Identities Protection
10 Act of 1982 (50 U.S.C. 421 et seq.) (governing
11 disclosures that could expose confidential Gov-
12 ernment agents); and the statutes which protect
13 against disclosures that could compromise na-
14 tional security, including sections 641, 793,
15 794, 798, and 952 of title 18, United States
16 Code, and section 4(b) of the Subversive Activi-
17 ties Control Act of 1950 (50 U.S.C. 783(b)).
18 The definitions, requirements, obligations,
19 rights, sanctions, and liabilities created by such
20 Executive order and such statutory provisions
21 are incorporated into this agreement and are
22 controlling.' ".
23 (d) AUTHORITY OF SPECIAL COUNSEL RELATING TO
24 CIVIL ACTIONS.—

1 (1) REPRESENTATION OF SPECIAL COUNSEL.—
2 Section 1212 of title 5, United States Code, is
3 amended by adding at the end the following:
4 "(h) Except as provided in section 518 of title 28,
5 relating to litigation before the Supreme Court, attorneys
6 designated by the Special Counsel may appear for the Spe-
7 cial Counsel and represent the Special Counsel in any civil
8 action brought in connection with section 2302(b)(8) or
9 subchapter III of chapter 73, or as otherwise authorized
10 by law.".
11 (2) JUDICIAL REVIEW OF MERIT SYSTEMS PRO-
12 TECTION BOARD DECISIONS.—Section 7703 of title
13 5, United States Code, is amended by adding at the
14 end the following:
15 "(e) The Special Counsel may obtain review of any
16 final order or decision of the Board by filing a petition
17 for judicial review in the United States Court of Appeals
18 for the Federal Circuit if the Special Counsel determines,
19 in the discretion of the Special Counsel, that the Board
20 erred in deciding a case arising under section 2302(b)(8)
21 or subchapter III of chapter 73 and that the Board's deci-
22 sion will have a substantial impact on the enforcement of
23 section 2302(b)(8) or subchapter III of chapter 73. If the
24 Special Counsel was not a party or did not intervene in
25 a matter before the Board, the Special Counsel may not

1 petition for review of a Board decision under this section
2 unless the Special Counsel first petitions the Board for
3 reconsideration of its decision, and such petition is denied.
4 In addition to the named respondent, the Board and all
5 other parties to the proceedings before the Board shall
6 have the right to appear in the proceedings before the
7 Court of Appeals. The granting of the petition for judicial
8 review shall be at the discretion of the Court of Appeals.".
9 (e) JUDICIAL REVIEW.—Section 7703 of title 5,
10 United States Code, is amended—
11 (1) in the first sentence of subsection (b)(1) by
12 inserting before the period "or the United States
13 court of appeals for the circuit in which the peti-
14 tioner resides"; and
15 (2) in subsection (d)—
16 (A) in the first sentence by striking "the
17 United States Court of Appeals for the Federal
18 Circuit" and inserting "any appellate court of
19 competent jurisdiction as provided under sub-
20 section (b)(2)"; and
21 (B) in the third and fourth sentences by
22 striking "Court of Appeals" each place it ap-
23 pears and inserting "court of appeals" in each
24 such place.

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Testimony of Senator Charles E. Grassley

before the

Subcommittee on International Security, Proliferation, and Federal Services

on S. 995 Whistleblower legislation

July 25, 2001

Mr. Chairman, I would like to commend you for holding this hearing, and for your outstanding leadership in advancing this legislation to make important changes to the Whistleblower Protection Act.

I have been an active champion of the rights of federal whistleblowers since 1983. This is because of my strong belief that disclosures of wrongdoing by whistleblowers are an integral part of our system of checks and balances. It's what helps make our democracy work. When Congress performs its oversight function effectively, it is usually because of information provided to us by insiders and whistleblowers.

Recently, the United States Senate has performed extensive oversight of the IRS and now the FBI. We have begun to tackle the rather difficult issue of how to change the divergent cultures of these two agencies. This was not possible without the insights of insiders and whistleblowers from the agencies. Those who come forward and perform such a public service deserve to be well protected and even rewarded.

In addition to my support in the past of celebrated whistleblower cases like those of Ernie Fitzgerald, Chuck Spinney and Fred Whitehurst, I also joined with many of my colleagues to sponsor legislation to help protect whistleblowers. Included in these laws are the False Claims Act Amendments of 1986, the Whistleblower Protection Act of 1989, the 1994 amendments to the WPA, Whistleblower protection laws for airline safety, and the anti-gag rider that we have passed yearly on appropriations bills.

In many, if not all of these efforts, I was joined by my good colleague from Michigan, Senator Levin, who over the years has shown great leadership in advancing the cause of whistleblowers. Senator Levin is the prime co-sponsor of this bill, and I commend him for his continued dedication to this cause.

Congress has demonstrated again and again its commitment to protecting whistleblowers. Yet all too often, the intent of Congress is undermined by a hostile bureaucracy. It seems that each amendment that we pass is met with an effort to undermine the will of Congress. And each time, whistleblowers are put more and more behind the eight-ball.

In my view, this bill is a minimum yet important step toward giving whistleblowers a fair shot against retaliation. The bureaucracy has become a growth industry of creative ways to "get" a whistleblower. So Congress is obliged to respond with equally creative protections against reprisal. That is how we are able to preserve our prerogative to obtain meaningful information from the executive branch.

There are several very good sections in S. 995, but I would like to address just a couple of the most important ones. The current requirement of "undeniable proof" as a standard for a whistleblower to meet is not at all helpful, to put it mildly. This bill would overturn that. It would also end the Federal Circuit's monopoly on appeals for whistleblower cases by allowing reviews by other circuits. And finally, this bill would codify the anti-gag rider we have included in our yearly appropriations bills since 1988.

Inasmuch as whistleblower protections are a constantly fluid proposition, I would like to raise some additional concerns that go beyond this bill that I believe should be considered.

First, I am concerned about the issue of security clearances. I am aware of several instances where a whistleblower's security clearance has been pulled as a means of retaliation. The pulling of the security clearance effectively fires the employee. A whistleblower does not have rights to a third party proceeding in this instance. I think this matter needs to be reviewed and that it should be possible to find a balance between the legitimate security concerns of the government and ensuring that pulling security clearances is not used as a backdoor to go after whistleblowers.

Second is an issue of accountability. The Office of Special Counsel (OSC) has the authority to investigate and prosecute managers who retaliate against whistleblowers. But in any disciplinary litigation, OSC has two strikes against it. First, OSC is faced with higher standards of proof that pre-date the more reasonable standard contained in the WPA. And second, if OSC loses, it must pay the manager's attorneys fees from its own operating budget. Both of these create a disincentive to OSC carrying out its disciplinary authority in holding management accountable.

Finally, there is the issue of remedies. The 1994 amendments to the WPA created a remedy of consequential damages for reprisals. Prior to that, damages were compensatory. Consequential damages were intended to be interpreted as ***greater*** than compensatory damages. Instead, they have been interpreted as being ***less*** than compensatory damages. This should be reviewed to help ensure that whistleblowers are adequately compensated.

Mr. Chairman, again, I wish to commend you and Senator Levin for your continued leadership in advancing legislation to help protect whistleblowers. It is my hope, and I know my colleagues share my view, that we can write responsible legislation to encourage whistleblowers to disclose information about wrongdoing, and to protect them against reprisals for doing so.

Thank you for the invitation to address you this afternoon, and I look forward to working with you to make this bill an effective law.

STATEMENT OF SPECIAL COUNSEL ELAINE KAPLAN

BEFORE SUBCOMMITTEE ON INTERNATIONAL SECURITY, PROLIFERATION AND FEDERAL SERVICES

JULY 25, 2001

Good afternoon. I would like to thank the Committee for giving me the opportunity to participate in today's hearing concerning S. 995, a bill that would strengthen the effectiveness and enforcement of the Whistleblower Protection Act (WPA). I would also like to publicly thank you Senator Akaka, as well as Senators Levin and Grassley, for your leadership on this issue and your commitment to ensuring that the WPA fulfills its original promise to protect federal employee whistleblowers.

As you know, a primary mission of the Office of Special Counsel (OSC)—the agency I head—is to protect federal employee whistleblowers against retaliation. We do our job by investigating employees' complaints, by pursuing remedies on behalf of whistleblowers, and by seeking the discipline of agency officials who engage in retaliation. In addition, we also educate other federal agencies and the public about whistleblower protection and the important contribution whistleblowers make to the public interest.

The bill before the Committee today, S. 995, has been conceived in the wake of several decisions issued by the Court of Appeals for the Federal Circuit which have narrowed the scope of the protection provided to whistleblowers under the WPA. This is not the first time that Congress has been confronted with concerns about the Federal Circuit's approach to this particular law.

Thus, Congress harshly criticized that Court's decisionmaking in 1989 when the WPA was enacted, and did so again five years later, in 1994, during consideration of the Office of Special Counsel Reauthorization Act. At that time, the House Committee observed that the case law developed by the Federal Circuit "represented a steady attack on achieving the legislative mandate for effective whistleblower protection;" and that, "realistically it is impossible to overturn destructive precedents as fast as they are issued . . ."

Notwithstanding this strong criticism, the Federal Circuit continues to routinely read the WPA's protections narrowly. For example, in Lachance v. White, 174 F.3d 1378 (Fed. Cir. 1999), the Court raised the bar for whistleblowers seeking to establish that their disclosures qualify them for protection, by endorsing what it called an "irrefragable presumption," that government officials discharge their duties properly and lawfully. Moreover, in that case, the Court suggested that it is appropriate to examine a whistleblower's personal motivations in deciding whether he should receive the Act's protection. 174 F.3d at 1381. We agree with the sponsors of S. 995 that Lachance and other Federal Circuit decisions establish unduly narrow and restrictive tests for determining whether employees qualify for the protection of the WPA.

In addition, I would like to express our strong support for the provisions of the Act that would grant the Special Counsel independent litigating authority and the right to request judicial review of Merit Systems Protection Board (MSPB or Board) decisions in cases that will have a substantial impact upon the enforcement of the WPA. I firmly believe that both of these changes are necessary, not only to ensure OSC's effectiveness, but to address the continuing concerns that motivate S. 995: the whittling

away of the WPA's protections by narrow judicial interpretations of the law. The basis for my belief is set forth in some detail in OSC's accompanying statement in support of S. 995, which I would ask be included in the record.

To summarize briefly, while the current statutory scheme gives OSC a central role as public prosecutor in cases before the MSPB, OSC has no authority to seek judicial review of an erroneous MSPB decision. Further, OSC's ability to influence even the MSPB's interpretation of the law is limited because the majority of MSPB cases that involve important interpretations of the WPA arise out of individual right of action cases to which OSC is not a party. Under existing law, OSC has no right to ask the Board to reconsider its decision in such cases, much less a right to ask a court to review them.

Ironically, the Office of Personnel Management (OPM) has the authority to seek judicial review of MSPB decisions in any case where the Board's decision will have a substantial impact upon the interpretation of civil service laws, rules, and regulations, including the WPA. Further, OPM has the authority to ask the MSPB to reconsider a decision after it has been issued, again even if OPM was not originally a party to the case. OPM's primary concern is not the protection of whistleblowers. Indeed, it was OPM that brought the Lachance v. White case to the Federal Circuit, and it was OPM, represented by the Justice Department, that urged the Court to adopt a narrow interpretation of the Act.

S. 995 provides the Special Counsel with authority similar to OPM's to ask the Board for reconsideration and to seek judicial review in important cases. It would ensure that the government agency charged with protecting whistleblowers will have an

equal opportunity to participate in the shaping of the law. OSC would serve as a counterweight to the Justice Department, whose client is most often the federal agency defending itself against retaliation charges. In a case like Lachance v. White, it would have meant that the Court could have had the benefit of OSC's perspective as the agency charged with enforcing the WPA. We would have told the Court that imposing an "irrefragable" presumption against whistleblowers who seek the Act's protection undermines Congressional intent and our ability to do our job.

Moreover, by granting OSC independent litigating authority, the bill also ensures that OSC will be able to craft its own positions and advocate on its own behalf when WPA cases reach the court of appeals. Under existing law, the Special Counsel must be represented by the Justice Department in all court proceedings. This has effectively led to OSC being shut out of the vast majority of appellate court cases which involve the interpretation of the WPA. DOJ's position is that because OSC lacks independent litigating authority, it cannot participate as an intervenor or amicus curiae, where another party has invoked the jurisdiction of the court of appeals in a whistleblower retaliation case.

DOJ has agreed that OSC can participate as a party in a limited category of cases—where it is defending an MSPB order of discipline against a retaliating agency manager. But even in such cases, OSC must be represented by DOJ attorneys.

While the attorneys at DOJ are highly professional and competent, it is entirely unacceptable for DOJ to make final decisions about how OSC cases should be briefed and argued. Not only does OSC routinely investigate and prosecute cases of retaliation against DOJ and its component agencies, DOJ attorneys routinely represent agencies in

the Federal Circuit against charges of retaliation. Its institutional interests are directly in conflict with those of OSC. If OSC is to be a truly independent watchdog, then the Special Counsel (and not DOJ's Civil Division) must have the authority to decide what arguments to make, and what positions to take, in the court of appeals.

In short, under current law, the Special Counsel—whom Congress intended would be a vigorous, independent, advocate for the protection of whistleblowers—can scarcely participate at all in the arena in which the law is largely shaped--the Court of Appeals for the Federal Circuit. Further, when OSC does appear in that Court, it must be represented by an agency OSC routinely investigates, through attorneys whose exposure to the WPA otherwise occurs only when they argue cases on behalf of agencies accused of engaging in retaliation.

Need I say more? Congress has consistently expressed its intention that OSC take an aggressive role in protecting whistleblowers against retaliation. In the three years since I became Special Counsel, the staff and I have attempted to do whatever was possible, within very limited resources, to achieve that goal. I believe that we have made great progress in the last three years toward increasing OSC's effectiveness and that we have reassured many of our staunchest former critics that OSC is deeply committed to its mission. We would urge the Committee, therefore, to provide us with the tools we need to do the job right, by affording OSC both the authority to request judicial review and independent litigating authority.

STATEMENT OF
BETH S. SLAVET, CHAIRMAN
U.S. MERIT SYSTEMS PROTECTION BOARD
Before the
UNITED STATES SENATE GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
INTERNATIONAL SECURITY, PROLIFERATION AND FEDERAL SERVICES
on
S. 995
THE WHISTLEBLOWER PROTECTION ACT AMENDMENTS OF 2001
JULY 24, 2001

Mr. Chairman, Senator Cochran and members of the Subcommittee, I am pleased to appear before the Subcommittee on behalf of the Merit Systems Protection Board (MSPB) to assist the Congress in its consideration of S. 995, the Whistleblower Protection Act (WPA) Amendments of 2001. As the lead Federal agency charged with the responsibility of protecting the merit principles governing Federal employment, the MSPB supports the protections afforded to whistleblowers from reprisal and the provision of remedies for prohibited personnel practices. However, because the Board is a quasi-judicial agency and adjudicates cases under the Act, we take no position on the substantive or procedural provisions of the proposed amendments in order to avoid any appearance of prejudgment. Rather, the following remarks are directed toward the: 1) development of case law under the WPA; 2) questions raised by these proposed amendments; and 3) the practical impact of the bill on Board operations.

Background

First, I want to touch upon our understanding of the purpose of this bill in light of the most recent statutes addressing whistleblower protection for Federal employees. In the Whistleblower Protection Act amendments of 1989 and the 1994, Congress sought to strengthen whistleblower protections for federal employees. The WPA significantly expanded the Board's jurisdiction by creating a new type of appeal, the Individual Right of Action (IRA), which allows individual employees to challenge many types of personnel actions (*e.g.*, reassignments or performance appraisals) that were not previously appealable to the Board. *See* 5 U.S.C. § 1221; Pub. L. 101-12 , 103 Stat. 16. In the 1994 amendments, Congress sought to overturn Board and Federal Circuit decisions which it viewed as too restrictive and make it easier for employees to show that protected whistleblowing disclosures were a contributing factor in the challenged personnel action. The Senate report emphasized that the WPA amendment changing the language in section 2302(b)(8) from "a disclosure" to "any disclosure" was intended to protect "'any' disclosure regardless of the setting of the disclosure, the form of the disclosure or the person to whom the disclosure is made...." S. Rpt. 103-358, (August 23, 1994), p.11. The only restrictions are for classified information or material the release of which is specifically prohibited by statute. Our understanding of the purpose of S. 995 is that it, among other objectives, again seeks to achieve this goal by clarifying the definition of a protected disclosure to eliminate restrictions

which are inconsistent with the congressional intent that "any disclosure," really means "any disclosure."

Our review of the proposed legislation has convinced us that this legislation will likely result in a significant increase in the Board's workload. The Board is a small, very efficient agency. The majority of cases before us are issued in less than three months. Where cases are appealed to the three Member Board, the average total case processing time is under 10 months. However, that does not hold true for the distinct category of cases such as IRAs and other appealable matters raising whistleblower claims. They take considerably more time and resources to process both at the administrative judge and the Board level.

In recent years, Congress has added to the Board's jurisdiction by passing laws such as the Uniformed Services Employment and Reemployment Rights Act of 1994, (USERRA), as amended in 1998, and the Veterans Employment Opportunities Act of 1998 (VEOA). This past year, Congress conferred upon the Board jurisdiction over appeals involving employees of the Federal Aviation Administration. These newer laws often involve novel and complex issues. We appreciate the confidence Congress has in the Board's record of deciding cases fairly and we willingly accept any new statutory responsibilities that Congress chooses to confer upon us. Even with the added responsibilities and despite a one-third cut in our resources over the past eight years, we have maintained a high level of quality service. In order for the Board to continue to meet the goals contained in our Government Performance and Results Act Plan and to fulfill the increased responsibilities imposed on the agency by this new legislation, the Board will require additional resources.

I. Expansion of Disclosures Protected under the Whistleblower Protection Act

A. Current Status of Whistleblower Protection Act Law

Sections 1(a) and 1(b) of S.995 would codify one Board holding on the scope of section 2302(b)(8), and bring other types of disclosures that the Federal Circuit has held are not within the scope of that section under the statute's coverage. Before discussing the proposed changes and their impact, it would be helpful to review the current state of the law.

The current version of 5 U.S.C. § 2302(b)(8)(A) prohibits retaliation because of –

> any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences -- (i) a violation of any law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs.

In three decisions, the U.S. Court of Appeals for the Federal Circuit has concluded that certain disclosures that fall within the plain language of the statute are nonetheless not protected whistleblowing. In *Horton v. Department of the Navy*, 66 F.3d 279 (Fed. Cir. 1995), the court held that a disclosure of alleged wrongdoing is not protected under section 2302(b)(8) if it is directed to the alleged wrongdoer. In *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998), the court held that an employee's disclosure of alleged violations of law is not protected under section 2302(b)(8) if it is made to his supervisor as part of the routine performance of his job duties. The court also held in *Willis* that a disclosure of wrongdoing by a private party is not protected whistleblowing. In *Meuwissen v. Department of the Interior*, 234 F.3d 9 (Fed. Cir. 2000), the court states that a disclosure of information that is "publicly known" is not protected under section 2302(b)(8).

Apart from these decisions covering specific factual situations, the court issued a fourth decision concerning the standard it apparently believes should be employed for evaluating all disclosures. In *LaChance v. White*, 174 F.3d 1378 (Fed. Cir. 1999), *cert. denied,* 120 S. Ct. 1157 (2000), the court held that the "proper test" for determining whether a putative whistleblower met the statutory "reasonable belief" criterion is whether "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [could] reasonably conclude that the actions of the government evidence" the type of wrongdoing described in section 2302(b)(8). The court went on to remark that a public official who is the subject of a disclosure by a would-be whistleblower is presumed to perform his duties in good faith, and that it takes "irrefragable [*i.e.*, irrefutable] proof" to overcome that presumption. The court also stated in *White* that "personal bias or self-interestedness" on the part of the individual making a disclosure cuts against a finding that the disclosure was protected.

The Board is bound to follow these precedential decisions of the Federal Circuit. In certain cases, the Board has distinguished these Federal Circuit precedents. One such distinction is found in *Askew v. Department of the Army,* MSPB Docket Nos. CH-1221-99-0555-W-1, CH-1221-99-0717-W-1 (June 28, 2001), where the Board held that a Supply Technician was protected against retaliation for disclosing agency violations of accounting rules to the Inspector General (IG), and that her disclosure was not like the mere disagreement with supervisory decisions during performance of routine duties discussed in *Willis*. The Board further held that Ms. Askew's disclosure, although covering matters known to the IG, differed from the "publicly known" matters disclosed by Mr. Meuwissen that the court found were not protected.

There are additional examples of the Board providing fact-based analyses to support holdings that disclosures were (or could be shown to be after a hearing) protected, notwithstanding Federal Circuit precedent. *See Sood v. Department of Veterans Affairs*, 88 M.S.P.R. 214 (2001) (the Federal Circuit's *Willis* decision should not be interpreted to mean that a disclosure is never protected if it is made in the course of an employee's duties); *Johnson v. Department of Defense*, 87 M.S.P.R. 454 (2000) (same); *Czarkowski v. Department of the Navy*, 87 M.S.P.R. 107 (2000) (same); *Price v. National Aeronautics & Space Administration*, 83 M.S.P.R. 661 (1999) (Board majority explains that *Willis* and *Horton* did not apply to the particular facts presented.) As with all cases we adjudicate, where the court's decisions are clearly dispositive on a particular issue, the Board's administrative judges and the full Board must apply those decisions.

B. Additional Impact of the Proposed Changes on the Law and Board Operations

Sections 1(a) and 1(b) of S.995 would codify the Board's holding in *Ganski v. Department of the Interior*, 86 M.S.P.R. 32 (2000)(*Ganski* II), that any disclosure of a violation of law, rule, or regulation is protected whistleblowing, without regard to the subject matter of the law, rule, or regulation. These sections would also protect an employee's disclosure of alleged violations of law made to his or her supervisor as part of the routine performance of his or her job duties, negating the Federal Circuit's holding in *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998). They would also protect an employee's disclosure directed to the alleged wrongdoer, negating the Federal Circuit's holding in *Horton v. Department of the Navy*, 66 F.3d 279 (Fed. Cir. 1995).

Currently, Section 2302(b)(8) requires that a whistleblower have a reasonable belief that the matter disclosed evidences one of the conditions described in that section. It appears that section 1(a) of the bill would eliminate the "reasonable belief" standard for all whistleblowers except those who make disclosures in the ordinary course of their duties. This latter category of employees would need to have a "reasonable belief" supported by "credible evidence." Indeed, the bill appears to provide that, with the exception of employees who make disclosures in the course of their duties, there is no requirement that a whistleblowing disclosure pertain to a violation of law, rule, or regulation, or gross mismanagement or other circumstances specified in Section 2302(b)(8).

The bill's language is unclear. Perhaps the intent is to bring additional disclosures within the scope of section 2302(b)(8) (*i.e.*, disclosures made in the ordinary course of an employee's duties), without eliminating existing statutory requirements for the protection of other types of disclosures. If so, it would be helpful if the language were changed to more clearly express this intent. Even then, it is unclear why the "credible evidence" language was added.

Perhaps the intent is to undo the effect of the Federal Circuit's holding in *LaChance v. White* (the "proper test" for determining whether a putative whistleblower met the statutory "reasonable belief" criterion is whether "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [could] reasonably conclude that the actions of the government evidence' the type of wrongdoing described in section 2302(b)(8))." If this is the case, the bill could have the unintended consequence of making it harder for some employees to show that their disclosures were protected because they must now show that their reasonable belief is supported by credible evidence.

The expansive definition of "protected disclosure" set forth in sections 1(a) and (b) of the bill would have the effect of substantially broadening the Board's jurisdiction and increasing the number of whistleblower cases that must be decided on the merits. Currently, the Board and the Federal Circuit agree that an appellant's burden of proving that he made a "protected disclosure" constitutes a jurisdictional element of the appellant's case.[1] In effect, this means that in a

[1] A conflict now exists between the Board and the U.S. Court of Appeals for the Federal Circuit concerning whether the "contributing factor" issue constitutes a jurisdictional element of the appellant's burden of proof, or whether this issue is part of the merits of the case. The Federal Circuit holds that the "contributing factor" issue is properly understood as a jurisdictional element, while the Board has found

significant number of cases, the Board has been able to resolve whistleblower disputes through jurisdictional determinations on the record or through jurisdictional hearings, rather than through more involved and longer hearings on the merits. In Fiscal Year 2000, 34 percent of the individual right of action appeals filed at the Board were dismissed for lack of jurisdiction. The Board dismissed a substantial number of those appeals because it found, as a jurisdictional matter, that the appellants did not make protected disclosures. For example, in *Langer v. Department of the Treasury*, No. 00-3388 (Fed. Cir. 2001) (Unpublished) 2001 WL 694555; MSPB Docket No. CH1221-99-0540-W-1 (Initial decision, Oct. 12, 1999), the appellant alleged he made 7 protected disclosures, and the agency retaliated against him by taking 3 retaliatory personnel actions. The Board, however, dismissed the appellant's appeal for lack of jurisdiction, finding that he had failed to show that he had made any "protected disclosures" under the Whistleblower Protection Act. In reaching this finding, the Board relied primarily on the Court's *Willis* holding. Under the proposed legislation, however, appeals that the Board previously dismissed, such as *Langer*, would likely be heard on the merits, and would have a substantial impact on the Board's resources. Similarly, the expansion of disclosures protected under the Act to include those that are made to an employee's supervisor in the normal course of his or her duties as well as those that are made to the alleged wrongdoer would result in a significant increase in the Board's overall workload.

WPA appeals that are adjudicated on the merits are also involve some of the most complex appeals within the Board's jurisdiction. These cases often involve multiple "protected disclosures," and claims that an agency effected several retaliatory actions against an appellant. In terms of complexity and the number of hours devoted to adjudication, WPA appeals take significantly more time to process than appeals that come under other parts of the Board's jurisdiction. For example, in *Briley v. National Archives & Records Administration*, 236 F.3d 1373 (Fed. Cir. 2001), the appellant alleged she made 42 protected disclosures and that the agency retaliated against her by taking 3 improper personnel actions. The hearing in *Briley* lasted 10 days, and the Administrative Judge wrote a 157-page initial decision in that appeal.

The language in Section 1(a) of the bill that eliminates restrictions on disclosures based on their "form" or "context" raises a serious question of whether Congress intends to include, as part of whistleblower disclosures covered by section 2302(b)(8), actions that are covered by another prohibited personnel practice which is codified at 5 U.S.C. § 2302(b)(9). That provision protects employees who file a complaint, appeal, or grievance from reprisal. If this is the case, the proposal should be reconciled with the distinction between reprisal for whistleblowing, which is prohibited by section 2302(b)(8), and reprisal for filing a complaint, appeal, or grievance, which is prohibited by section 2302(b)(9). Because an employee's right to file a complaint, appeal, or grievance is specifically protected by section 2302(b)(9), the Board has generally held that an employee's discrimination complaint does not constitute a protected whistleblowing disclosure under section 2302(b)(8), even though the complaint alleges discrimination in violation of law. *Kelsch v. Department of Labor*, 59 M.S.P.R. 503, 509 (1993); *Williams v. Department of*

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that it comprises part of the merits determination. *See Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1372 n.1 (Fed. Cir. 2001) ("contributing factor" issue is a jurisdictional element of an appeal); *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994)(contributing factor issue is part of the merits phase of an appeal). This conflict adds to the complexity of adjudicating whistleblower cases.

Defense, 46 M.S.P.R. 549, 554 (1991). The Court of Appeals for the Federal Circuit adopted this position in *Spruill v. Merit Systems Protection Board*, 978 F.2d 679, 691-92 (Fed. Cir. 1992), stating that to hold that a discrimination complaint constitutes protected whistleblowing would blur the statutory distinction between whistleblowing and the exercise of a protected complaint, appeal, or grievance right, and would render section 2302(b)(9) largely irrelevant, if not superfluous.

In addition, permitting employees to file whistleblowing complaints alleging reprisal for filing a complaint, appeal, or grievance as Sections 1(a) and (b) permit, would impact the remedies currently available under other statutory complaint, appeal, and grievance schemes. Those statutory schemes currently provide mechanisms for employees to challenge an adverse agency action as retaliation for filing a complaint, appeal, or grievance.

Extending whistleblowing protection to employee discrimination complaints could result in serious inefficiencies in the enforcement programs administered by the Office of Special Counsel and the Equal Employment Opportunity Commission. EEOC has been recognized as the lead agency responsible for enforcing the prohibitions against discrimination in Federal employment. The ability to file employment discrimination complaints with either the Office of Special Counsel or the EEOC would encourage forum-shopping. In fact, the MSPB would likely become the most attractive forum because of the lower standard of proof required in WPA cases and because of the Board's authority to issue stays of adverse actions. Additionally, the development of a uniform enforcement standard for protecting the civil rights of Federal employees that currently apply throughout the Federal government could be jeopardized. Accordingly, the Subcommittee may wish to clarify the interplay in Sections 1(a) and (b) between retaliation for whistleblowing under (b)(8) and retaliation under (b)(9) of the WPA.

II. Anti-Gag Amendments

Section 1(c) of the bill mandates that those Federal agencies that implement or enforce nondisclosure policies, forms or agreements include notice in such policies, forms or agreements of applicable protections under the Whistleblower Protection Act and similar statutes. If enacted, the implementation or enforcement of such a policy, form, or agreement would become a new personnel action and the failure to include the required notice would constitute a prohibited personnel practice.

The amendment that would create a new prohibited personnel practice is substantially the same as a general provision that has been included in each Treasury and General Government Appropriations Act since the mid-1980s. That provision has prohibited the use of appropriated funds by Federal agencies to implement or enforce any non-disclosure policy, form, or agreement that does not contain the required statement. The provision included in each Treasury and General Government Appropriations Act, however, has not included any specific enforcement mechanism—other than Congress' power over the purse.

Enacting this provision on a permanent basis may eliminate the need to reenact it each year as part of the appropriations process. Enacting it as a part of the prohibited personnel practices

statute, however, raises other concerns. As a general provision in the Treasury and General Government Appropriations Act, it applied to Federal agencies generally. As a part of the prohibited personnel practices statute, certain agencies would be excluded. The definition of "agency" at 5 U.S.C. 2302(a)(2)(C) excludes "the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities." This would appear to remove from the coverage of the prohibition many of the agencies that would be expected to implement or enforce non-disclosure policies, forms, or agreements.

However, the posture of anti-gag cases before the Board raises certain concerns. Cases involving this new prohibited personnel practice would reach the Board in one of two ways. First, the Special Counsel is authorized to bring prohibited personnel practice complaints to the Board, seeking corrective action for the individual who was the subject of the prohibited personnel practice and/or disciplinary action against the employee who committed the prohibited personnel practice. If the Special Counsel proves that corrective action is warranted, the Board is authorized to order such corrective action as it considers appropriate. The specific corrective action ordered will vary with the circumstances of each case, but generally involves overturning or at least modifying the personnel action that was the basis for the prohibited personnel practice complaint. If the Special Counsel proves that disciplinary action is warranted, the Board is authorized to order that the employee who committed the prohibited personnel practice be removed, reduced in grade, debarred from Federal employment for a period not to exceed five years, suspended, reprimanded, or assessed a civil penalty not to exceed the current limit of $1,000.

The Board's newly proposed authority to order disciplinary action might prove an effective deterrent to agency managers contemplating the implementation or enforcement of non-disclosure policies, forms, or agreements that do not contain the required notice. However, it appears that the most likely corrective action the Board might order is that the agency cease its implementation or enforcement of the particular non-compliant document. The question, then, becomes whether these are the results of the anti-gag amendments that the Committee wishes to achieve.

More important, perhaps, than the expansion of the Board's jurisdiction by the addition of a new prohibited personnel practice, is the question of what meaningful remedy the Board could give an employee for a violation of this practice within the context of an agency taking a personnel action. The bill does not address the extent of the Board's remedial authority to overturn an action taken against the employee whose security clearance was revoked or suspended because he refused to sign a defective disclosure agreement and his position required a security clearance. Under Section 1(c) of the bill and existing law, such an employee could seek corrective action from OSC or file an adverse action appeal with the Board. However, the bill does not address the extent of the Board's remedial authority vis a vis the action taken against the employee. In *Department of the Navy v. Egan*, 484 U.S. 518 (1988), the Supreme Court held that "a denial of a security clearance is not an 'adverse action' and . . . is not subject to Board review." *Egan* at 530. In *Hesse v. Department of State*, the Board determined that the 1994 amendments to the

WPA did not permit it to review the denial or revocation of a security clearance and the Federal Circuit affirmed that decision. (*See Hesse v. Department of State*, 82 MSPR 489 (1999), *aff'd*, 217 Fed. 3d 1372 (Fed. Cir. 2000), *cert. denied*, 121 S. Ct. 1103 (2001)). If the intent is to grant the Board authority to review security clearance determinations in these very limited circumstances, such grant of authority must be clear and explicit. "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Egan* at 530.

III. Independent Litigating Authority for the Office of Special Counsel

Section 1(d) of the bill seeks to amend 5 U.S.C. §§ 1212 and 7703 to provide the Office of the Special Counsel (OSC) with independent litigating authority in certain circumstances. The language of the amendment is modeled after the language in 5 U.S.C. § 7703(d), which provides the Office of Personnel Management a limited right to seek judicial review of Board decisions. As is the case with OPM, the Special Counsel would have to first seek reconsideration by the Board if the Special Counsel was not a party or intervenor in the proceeding before the Board.

Under Section 1(d) of the bill, OSC may only seek review in the U.S. Court of Appeals for the Federal Circuit, but under Section 1(e), either the appellant or the Office of Personnel Management (OPM) may seek review in any of the U.S. Circuit courts of appeal. The rationale for this distinction is unclear. We would also point out that the bill does not provide OSC a right to intervene in regional circuit cases brought by appellants or OPM.

The Board expects that the Special Counsel will be likely to use its new authority in section 1(d) to seek reconsideration by the Board, and subsequent judicial review under section 1(e) if reconsideration is denied, in non-IRA whistleblower appeals. We would also expect the Special Counsel to seek reconsideration of some decisions in IRA appeals where although the Special Counsel has already reviewed the complaint and has declined to seek corrective action for the appellant, the Board's decision raises legal issues. That is essentially what happened between *Ganski* I and *Ganski* II. OSC declined to seek corrective action on Ms. Ganski's behalf. After Ms. Ganski appealed the Board's decision in *Ganski I* to the Federal Circuit, OSC, and the Department of Justice, in consultation with the agency and OPM, raised serious concerns. These agencies' concerns resulted in our General Counsel's recommendation that the Board reconsider its decision. *Ganski II* then issued.

During the last ten years, the Board has adjudicated 69 disciplinary and corrective actions filed by OSC. In the 12 years since the Whistleblower Protection Act took effect, the Special Counsel generally has not sought to intervene in non-IRA or IRA appeals at the Board level, with the exception of *Ganski v. Department of the Interior*, 86 M.S.P.R. 32 (2000), and *Hillen v. Department of the Army*, 29 M.S.P.R. 690 (1986). The number of non-IRA whistleblower appeals decided since the Whistleblower Protection Act was enacted has ranged from a low of 163 in 1990 to a high of 320 in 1996, and the number of IRA appeals decided has ranged from a low of 89 in 1990 to a high of 325 in 1998. The right to seek judicial review on its own accord, however, may well prompt OSC to use its intervention authority more often. Even if OSC seeks reconsideration in only a few cases, we can expect a significant impact on Board resources.

These cases have typically consumed large amounts of Board resources because the records are usually voluminous and the legal issues are frequently novel and require extensive research. We anticipate that OSC requests for reconsideration of IRA and non-IRA cases would require resources for the administrative and judicial processes comparable to those now expended on OPM petitions for reconsideration or OSC corrective and disciplinary actions. These requirements would be significant for an agency our size.

IV. Judicial Review of Merit Systems Protection Board Decisions

Section 1(e) of the bill seeks to permit review of any decision of the Merit Systems Protection Board in any appellate court of competent jurisdiction, thereby virtually eliminating the exclusive jurisdiction of the Court of Appeals for the Federal Circuit over MSPB cases. The only situation in which the Court of Appeals for the Federal Circuit would retain exclusive jurisdiction over MSPB cases would be where the Special Counsel sought review of a Board decision pursuant to its independent litigating authority as provided by this legislation. The Board addressed this issue during testimony presented in connection with consideration of a comparable provision in the Whistleblower Protection Act of 1987. At that time, the Board's former General Counsel testified:

> While it will not increase the Board's caseload directly, the provision of the bill dealing with judicial review may further complicate the already complex civil service laws . . . Allowing civil service law that regulates the Federal workplace to be fashioned by twelve different circuits courts does not promote uniform treatment of federal employees. A single reviewing court, however, is an important ingredient in providing uniform rules for all federal workers.[2]

I believe that these comments are applicable to the present proposal. As a former litigator, I know that attorneys cherish the intellectual challenge afforded by a choice of forums. However, I have some concerns about the apparent premise of the bill that permitting employees to seek judicial review in the regional circuits will result in judicial decisions that Congress believes are more consistent with the congressional purpose of protecting federal whistleblowers. Between 1979 and 1982, when judicial review of the Board's decisions was available only in the regional circuits, those courts issued only a handful of decisions in whistleblower cases. Two of these decisions, *Starrett v. Special Counsel*, 792 F.2d 1246 (4th Cir. 1986) and *Harvey v. MSPB*, 802 F.2d 537 (D.C. Cir. 1986), were sharply criticized by Congress in the legislative history of the WPA as undercutting whistleblower protections. S. Rep. No. 413, 100th Cong., 2d Sess. 15-16 (1988). In fact, that Senate report made clear that a specific purpose of the WPA was to overturn those two regional circuit court decisions. While a choice of forum offers advantages to appellants in convenience and cost, exclusive jurisdiction presumably offers the parties a court knowledgeable and well-informed about the legal issues. It is also more likely to provide uniform treatment of a worldwide Federal workforce. Finally, however, I would like to note that

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[2] S. Hrg. 100-422, HEARINGS BEFORE THE SUBCOMMITTEE ON FEDERAL SERVICES, POST OFFICE, AND CIVIL SERVICE OF THE COMMITTEE ON GOVERNMENTAL AFFAIRS, UNITED STATES SENATE, ONE HUNDREDTH CONGRESS, FIRST SESSION ON S. 508 (July 20 and 31, 1987), pp. 428-429

this provision also carries costs for the Board resulting from both travel and litigation expenses in connection with oral arguments.

V. Conclusion

In sum, Mr. Chairman, the Board appreciates the leadership of this Committee over the years which has focused on helping to protect the rights of Federal whistleblowers. The Board takes seriously its responsibility to achieve the same purpose.

If this legislation were enacted, we anticipate that the Board would require a substantial increase in its annual appropriations to both implement the provisions of this bill and maintain and improve our performance and commitment to adjudicating all cases within our jurisdiction. We appreciate the opportunity to comment on these legislative initiatives and hope that this analysis is helpful to the Subcommittee's deliberations. We also hope that this Committee will permit the Board to continue this important work by giving favorable consideration to our request for reauthorization. I would be pleased to respond to any questions you or other members of the panel might have at this time.

TESTIMONY OF THOMAS DEVINE,
GOVERNMENT ACCOUNTABILITY PROJECT,

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for inviting testimony from the Government Accountability Project ("GAP") on S. 995, amendments to the Whistleblower Protection Act ("WPA") of 1989. My name is Tom Devine, and I serve as GAP's legal director. Our organization commends your leadership in sponsoring this bill to revive and strengthen the WPA, the primary civil service law applying merit system rights for Congress and the public's right to know. S. 995 is responsible good-government legislation. Your initiative is essential to restore legitimacy for the law's unanimous congressional mandate, both in 1989 when it was passed originally and in 1994 when it was unanimously strengthened. We similarly appreciate the partnership of original co-sponsors Senators Levin and Grassley. They remain visible leaders from the pioneer campaigns that earned this legislative mandate.

GAP is a non-partisan, non-profit public interest organization whose mission is supporting whistleblowers, those employees who exercise free speech rights to challenge betrayals of the public trust about which they learn on the job. We advocated initial passage of whistleblower rights as part of the Civil Service Reform Act of 1978, and have led outside campaigns for passage of the WPA, as well as analogous laws for military service members, state, municipal and corporate employees in industries ranging from airlines to nuclear energy. In 1999 our organization prepared an article detailing the WPA's provisions for the American Bar Association's Spring 1999 Administrative Law Review. Last year GAP drafted a model whistleblower law approved by the Organization of American States (OAS) for implementation of the Inter-American Convention Against Corruption.

Unfortunately, your leadership is a necessity for the Act to regain legitimacy. On paper in 1994, the WPA was state of the art for whistleblower rights. Despite pride in helping to win its passage, GAP now must warn those seeking help that the law is more likely to undermine than reinforce their rights. This is because the Federal Circuit Court of Appeals, which has a monopoly on appellate judicial review, has functionally rewritten basic statutory language and implicitly added new provisions that threaten those seeking help. Your legislation both solves these specific problems, and includes structural reform to prevent their recurrence by restoring normal judicial review. Congress had to approve both the 1989 and 1994 legislation to cancel previous instances of judicial activism by this same court. This pattern must end for the law to become functional.

The repeated, unanimous congressional mandates for the WPA should not be surprising. Whistleblowers are the Achilles heel of bureaucratic corruption and thus are indispensable for Congress and the public's right to know. Legislative champions of the WPA from both parties have called it the Taxpayer Protection Act, and voters from all backgrounds agree. Nearly 100 citizen organizations, ranging from the NAACP and Common Cause, to the Patrick Henry Society and the National Taxpayers Union, have joined a petition in support of this legislation. We all recognize that without viable rights, federal employees will be bureaucrats as the rule, and public servants as the exception. We cannot count on federal workers to defend the public if they do not have a realistic chance to defend themselves.

TRACK RECORD FOR THE ACT

A just-completed study by the Merit Systems Protection Board's ("MSPB") Office of Policy and Evaluation concluded that despite congressional action, rates of retaliation for making or assisting in whistleblowing disclosures, and for refusing to violate the law have remained stable during the last decade. This bottom line camouflages both good and bad news. The good news is that leadership at the Merit Systems Protection Board and Office of Special Counsel, which implement the law within the Executive branch, have respected the Act's mandate. MSPB Chair Beth Slavet has made the extra effort to base Board holdings on congressional intent as expressed in legislative history. She has been a faithful defender of statutory language in attempting to limit damage from Federal Circuit threats to the statute's legitimacy. The Board also has repeatedly attempted to upgrade standards used by Administrative Judges in Individual Right of Action ("IRA") hearings.

Through her leadership Special Counsel Elaine Kaplan has won the respect of even the most disillusioned critics, such as GAP. For example, she has opened channels of communication with OSC leadership, developed a genuine docket of ongoing litigation, made serious efforts to stretch Office resources with Alternative Disputes Resolution and created a Public Servant award program to recognize those who make a difference. Perhaps most significant, the OSC is treating complainants with personal respect and sensitivity. Based on our experiences over the last three years, we have come to expect that OSC staff will handle reprisal cases with persistence, poise, professionalism, and most of all, hard work.

This is not to say our organization does not deeply disagree with numerous judgment calls made by these administrative agencies. For example, we think the Board

was mistaken when it declined to implement this committee's 1994 instructions that the WPA covers security clearance actions. Similarly, we were dismayed by a Board decision requiring the Office of Special Counsel to pay attorney fees if it does not win disciplinary litigation seeking accountability for attacks on the merit system. We have vehemently disagreed with Special Counsel policies that exclude the Act's coverage for those disclosing false statements by the federal government to the public; their failure to adopt the EEO practice of sharing reports of investigation with those who file reprisal complaints; and premature, unnecessary adverse findings in cases closed by the Office without a field investigation.

These disagreements must be placed in perspective. Those who believe in and defend the merit system both from within and outside the government owe a debt of gratitude to the leadership of these two institutions, who have reversed patterns stretching back nearly two decades. Because of their extra effort, reported rates of retaliation have declined slightly since the Act was passed.

Without their effort, reprisal rates would be skyrocketing. That is because the Federal Circuit Court of Appeals has intensified a relentless pattern of hostile judicial activism since 1994 congressional amendments strengthened the law, in large part by reversing earlier Federal Circuit precedents. An overview of the court's track record is helpful. Since Congress strengthened the WPA in 1994, we have studied every published and unpublished decision issued by the Federal Circuit on this law through June 29, 2001. Whistleblowers seeking relief have lost all 69 decisions on the merits, although there has been one favorable ruling in a disciplinary case. To illustrate, in 1998 the track record was 0-17 against whistleblowers. In 1999 it was 0-14. In 2000 it was 0-15, and through

June 29 this year the record is 0-12. The facts speak for themselves. The Federal Circuit is close-minded against whistleblowers defending their jobs through exercise of legal rights. Since by definition there cannot be a split in the circuits when one court has a monopoly, as a practical matter the Federal Circuit has the last word on the law. The Supreme Court has not taken a Whistleblower Protection Act case.

PROVISIONS OF S. 995

The legislation has effective solutions, both to solve individual problems and to create structural reform. The four cornerstones -- 1) close judicially-created loopholes canceling statutory language that protects "any" disclosure evidencing listed misconduct; 2) overturn a "killer presumption" making it unrealistic to demonstrate the "reasonable belief" necessary to earn legal protection against harassment; 3) eliminate the Federal Circuit's monopoly on the law by restoring normal judicial review; and 4) make permanent the "anti-gag statute" passed annually the last 13 years in appropriations law, which bars agency nondisclosure rules from canceling rights created by the WPA and related statutes.

A separate nuts and bolts reform in the legislation could have a significant impact by giving the Office of Special Counsel the right to defend the merit system in court. Currently the OSC must obtain permission from the Department of Justice before appearing in court. Unfortunately, this institutionalizes a conflict of interest, because the Justice Department serves as adverse counsel seeking to defeat employees in Civil Service Reform Act court appeals. It is not surprising that DOJ has never granted permission. Lawyers do not like to reduce their odds of winning by approving additional opponents. S. 995 properly lifts the gag order on the Special Counsel, whose voice on

behalf of the merit system is badly needed in court. A summary of the bill's conceptual reforms follows:

1. Closing the loopholes: putting the "any" back in "any." The legislation effectively codifies legislative history definitions, repeatedly instructing that the law does not have any exceptions besides those listed by Congress. In 1989 Congress changed the language of 5 USC 2302(b)(8) from protecting "a" lawful disclosure evidencing a reasonable belief of listed misconduct, to protecting "any" disclosure meeting those standards. This was necessary, because the Federal Circuit, MSPB and Special Counsel created loopholes gutting the Act's coverage. The Senate Governmental Affairs Committee Report illustrated this unacceptable pattern through the Federal Circuit's Fiorillo decision, which held that only the first person to raise an issue qualifies as a whistleblower, and that employees seeking protection must prove their primary motive was public, rather than self-interest.

Unfortunately, all three bodies continued to carve their own exceptions to the Act, so in 1994 the House and Senate Committee reports, and related floor statements, defined "any." As the House Report summarized,

> It also is not possible to further clarify the clear statutory language in section 2302(b)(8)(a) that protection for 'any' whistleblowing disclosure evidencing a reasonable belief of specified misconduct truly means 'any.' A protected disclosure may be made as part of an employee's job duties, may concern policy or individual misconduct, and may be oral or written and to any audience inside or outside the agency, without restriction to time, place, motive or context.

While administrative agencies have respected this congressional guidance, the Federal Circuit has not. It appears there is a test of wills between the legislative and judicial branches. In a series of decisions from 1995-2001, the court has intensified the pace of creating loopholes. The rulings have erased protection for disclosures --

- to possible wrongdoers, which precludes quality control and constructive attempts at problem solving, and maximizes the chance for conflict and retaliation;
- to co-workers, which sabotages the capacity to obtain supporting witnesses to prove allegations, and increases the risk of reprisal by maximizing isolation;
- to supervisors or others in the chain of command without institutional authority to overturn alleged misconduct, which frustrates the system of institutional checks and balances and prevents the "agency self-cleaning" that whistleblower protection was designed to enhance;
- made in connection with performing an employee's job duties, which disqualifies employees from protection when applying their professional expertise in assignments such as audits of government contracts, criminal investigations, inspections designed to catch contaminated meat and poultry or evaluations of foreign food safety safeguards under free trade agreements;
- made in the context of a personnel grievance, when the adversary process is designed to uncover the truth, including misconduct that could motivate retaliation;
- challenging policies rather than specific events. This limits the law's coverage to government officials' personal eccentricities, and cancels out the scenarios that matter most for taxpayers -- when agencies institutionalize illegality, abuse of power or public health threats;
- disclosing non-government illegality, which again could doom federal workers who reveal misconduct by special interests;

- exposing "minor" illegality, such as records falsification through backdating;
- making disclosures "unnecessary" to solve a problem, a subjective blank check to punish whistleblowers who have been vindicated; and
- making any disclosure after initial exposure of given misconduct, which revives the discredited Fiorillo doctrine shielding ingrained corruption and means only the Christopher Columbus of a scandal is eligible for protection.

These ten examples illustrate an accelerating pattern. In the aftermath, seeking WPA coverage is akin to driving on a road with more potholes than pavement.

Perhaps most frustrating, the court consistently has trivialized the law without mentioning unequivocal legislative history guidance that it defied. The MSPB has conscientiously traced the contradictions between Federal Circuit holdings and congressional guidance. The Board also has made admirable attempts to limit the scope of Court doctrines to fact patterns of the original precedents, such as with the loophole for performing job duties, created by the 1998 Willis decision.

Unfortunately, the Federal Circuit has the last word, and routinely has interpreted its precedents to create expansive, sweeping doctrines. For example, in its unpublished Langer decision last month, the Federal Circuit applied Willis by explaining that the Whistleblower Protection Act was not available to an employee "who was merely carrying out his required, everyday job responsibilities." In theory that scenario is the time frame and context when reprisal protection counts the most, to create a workplace where federal workers can honestly serve taxpayers as the norm.

S. 995 neatly solves this problem by codifying the legislative history definition for "any" disclosure. Further, it clarifies that the WPA protects disclosures of "any"

violation of law, which closes the loopholes for illegal policies and "minor" lawlessness. The bill also specifies that employees can make non-public whistleblowing disclosures with classified information to relevant members of Congress and staff with clearances. This clarifies a long-assumed but officially ambiguous cornerstone for Congress' capacity to oversee national security spending.

2. Restoring rationality to "reasonable belief": removing an "irrefragable" barrier

One provision in the Civil Service Reform Act of 1978 that Congress did not modify was the threshold requirement for protection against retaliation -- disclosing information that the employee "reasonably believes evidences" listed misconduct. The reason was simple: the standard worked, because it was functional and fair. To summarize some 20 years of case law, until 1999, whistleblowers could be confident of eligibility for protection if their information would qualify as evidence in the congressional record. Similarly, eyewitness conclusions by a qualified expert, or a professional consensus of similarly situated experts could pass muster.

In the 1999 Lachance v. White case, the Federal Circuit eliminated all realistic prospects that anyone qualifies for whistleblower protection unless the specifically targeted wrongdoer confesses. The circumstances are startling, because the agency ended up agreeing with the whistleblower's concerns. John White made allegations concerning the misuse of funds in a duplicative education project. An independent management review validated his claims, resulting in the Air Force Secretary's decision to cancel the program. Unfortunately, the local official held a grudge, stripped Mr. White of his duties and exiled him to a metal office outside the military base in Nevada. Mr. White filed a claim against this official's retaliation and won his case multiple times before the MSPB.

However, the Federal Circuit ruled he had not demonstrated that his disclosure evidenced a reasonable belief.

Since the Air Force conceded the validity of Mr. White's concerns, the Court's conclusion flunks the laugh test. The Federal Circuit circumvented previous interpretations of "reasonable belief" by ruling that an employee must first overcome of government regularity. This presumption states, "public officers perform their duties correctly, fairly, in good faith and in accordance with the law and governing regulation...And this presumption stands unless there is "irrefragable proof to the contrary'" (citations omitted). While this standard may have merit, the magic word is "irrefragable." Webster's Fourth New Collegiate Dictionary defines the term as "undeniable, incontestable, incontrovertible, incapable of being overthrown." This creates a tougher standard to qualify for protection than to put a criminal in jail. An irrefragable proof standard allows for any conflicting story of events, no matter how irrational, to overturn a federal employee's rights under the WPA.

GAP joined this case as an amicus because of the implications this case had for all subsequent whistleblower cases. If the Court could rule that John White's disclosures did not qualify him for whistleblower protection, no one could plausibly qualify for whistleblower protection. It appears that was the court's objective. In the aftermath of this decision, our organization must warn all who inquire that if they spend thousands of dollars and years of struggle to pursue their rights, and if they survive the gauntlet of loopholes, they inevitably will earn a formal legal ruling endorsing the harassment they received. The court could not have created a stronger incentive for federal workers to be silent observers. This decision is clearly in direct conflict with the administration's

mandate to support whisleblowers through the January 20th Executive Order signed by the then newly-inaugurated President Bush stating that federal employees have a mandatory ethical duty to disclose fraud, waste, abuse and corruption.

S. 995 solves the problem of the irrefragable proof standard by clarifying that "reasonable belief" is based on "credible evidence," the standard for admission to a legal record. This definition should end any confusion that "reasonably believes evidences" is equivalent to irrefragable. The legislative history should specify that no presumptions outside the statutory language are relevant.

3. Structural reform: restoring "all circuits" judicial review. This will be the third time Congress has had to pass the Whistleblower Protection Act, because the same court has functionally overturned a merit system right first created in 1978. It is time for structural change to stop the broken record syndrome: enough is enough.

Based on the Federal Circuit's accelerating attacks on the Act, there are no grounds to think it will respect new legislation any more than it did the last three times Congress passed this law. If the court's track record alone were not enough, its subjective leadership makes that conclusion inevitable. The Federal Circuit's chief judge is Robert Mayer, who was Deputy Special Counsel during the 1980's under Alex Kozinski. They transformed the Office of Special Counsel into what one Senate staff member called a legalized plumbers unit. During the Kozinski-Mayer administration, the agency was caught lecturing and tutoring federal managers how to fire whistleblowers without OSC interference. Thanks to Senator Levin's leadership, 43 members voted against Mr. Kozinski's nomination to the Ninth Circuit Court of Appeals.

The Whistleblower Protection Act was passed in response to OSC abuses of power, and previous Federal Circuit judicial activism that undermined the 1978 statute. Under Mr. Mayer's leadership, those threats became a double whammy. If Congress reaffirms its commitment to whistleblower rights, it should create a structure that will respect the law as written.

S. 995 accomplishes that goal by restoring normal judicial review in the circuit court of appeals where an employee resides, as available under the Administrative Procedures Act. This is the structure that existed in the Civil Service Reform Act of 1978, until the Federal Circuit's creation in 1982. S. 995 does not disqualify Federal Circuit jurisdiction if an employee chooses to appeal in that forum, but instead frees reprisal victims from being prisoners of a court obsessively hostile to the Act's mandate.

4. Institutionalizing reform against prior restraint: codifying the "anti-gag statute" S. 995 also incorporates an appropriations rider that has been approved for the last 13 years, known as the "anti-gag statute." This provision requires agencies to notify employees that any restrictions on disclosures do not override their rights under the WPA or other open government laws such as the Lloyd Lafollette Act protecting communications with Congress. Another law in the supremacy addendum requires specific markings or notices designating information as secret, for it to be classified.

Originally the anti-gag statute was used to end an unconstitutional language in a nondisclosure agreement, Standard Form 189, which employees had to sign as a prerequisite for security clearances. SF 189 outlawed disclosures of "classifiable" information. That included after-the-fact decisions creating liability for information that should or could have been classified but wasn't, or "virtually anything," as described by

the Information Security Oversight Office head. The rider has worked. It has proved effective and practical against agency attempts to impose secrecy through orders and nondisclosure agreements that cancel Congress and the public's right to know. It is time to institutionalize this success story. A GAP op-ed article advocating this reform is enclosed.

It is also time to create a remedy for this fundamental right. In the absence of corrective action by the Office of Special Counsel under 5 USC 2302(b)(12), whistleblowers cannot initiate action to challenge the blanket prior restraint imposed by gag orders such as SF 189 or its successor, SF 312.

We should not be deluded. National security secrecy abuses continue to exist, and they present a clear and present danger to national defense. Agencies such as the Department of Energy still maintain policies requiring prior approval for disclosures of unclassified information. This policy is aggressively enforced against employees who make unclassified disclosures to challenge safeguard breakdowns threatening national security at nuclear laboratories. DOE negligence and misspending has created vulnerability to terrorists and agents, despite increased congressional appropriations after highly publicized scandals and hearings. Rather than cracking down on national security violations, the agency has cracked down on whistleblowers who violate its gag orders.

RECOMMENDATIONS

Even if implemented as intended, the 1989 and 1994 legislation was a beginning rather than a panacea. More work is necessary to disrupt the deeply ingrained tradition of

harassing whistleblowers. Based on our experience, issues such as the following must be addressed for the law to fulfill its promise.

The most significant problem that needs to be corrected is the "security clearance loophole" that permits merit system rights to be circumvented through removing clearances required as a condition for employment. This loophole shields the most cynical harassment, such as telling an employee who routinely works with top secret documents that he never had a clearance, and consequently reassigning him, without duties, to a storage closet used for storing classified documents. Typically, it is used to indirectly fire employees who blow the whistle on threats to national security, such as vulnerability to drug smuggling through diplomatic pouches, leaks of classified information, or previously referenced safeguard breakdowns at nuclear weapons facilities or laboratories.

This reform should not be subject to further delay. After extensive hearings in 1994, the House and Senate both voted to close the loophole. The House acted through an explicit amendment, but deferred to Senate language that created a broader umbrella personnel action with Committee report instructions emphasizing security clearances as the primary example of newly banned harassment. The Board and Federal Circuit rejected this approach as insufficiently precise. This technical drafting error should be corrected in S. 995. There is no reason to further delay protecting national security whistleblowers.

Other issues that must be addressed for the law to fulfill its promise include --

- public disclosure of the Act's track record, a reform included in the "No Fear" bill sponsored by Senator Warner and Representative Sensebrenner.

- annual reports to Congress on each agency's efforts to comply with merit system outreach and education requirements in 1994 amendments; duties which have been grossly neglected.
- clarification that the WPA permits employees to challenge and protect their dissent against government agencies that lie or otherwise communicate false information to the public.
- releasing to complainants OSC reports of investigation on their cases, as routinely provided after EEO investigations.
- provision for jury trials in U.S. District Court, which would give whistleblowers access to a legitimate day in court before a jury of the citizens whom they purport to defend, permitting more genuine closure than available in hearings before administrative judges who are unreliable, due to drastically varying qualifications and biases.
- efforts to strengthen the quality of MSPB administrative judges through upgrading their positions to Administrative Law Judges with corresponding credentials, and to establish meaningful accountability for failure to comply with Board procedures or precedent.
- strengthened remedies for those who win, by adding compensatory and punitive damages to already reimbursing consequential damages, which under 1994 amendments were supposed to be broader than compensatory relief.
- significant reinforcement of 5 USC 1213, which could provide whistleblowers a regular chance to make a difference through agency investigations and reports, on which the whistleblower can comment for the public record.

Section 1213 has become dormant as the rule rather than the exception. The OSC disclosure unit in 1998 ordered full investigations for less than one percent of whistleblowing disclosures, and in 1999 for less than 5%. In 1996 full agency investigations had been ordered for close to 10% of disclosures. Two suggestions could help the OSC to have an impact: writing into the law a mandatory referral for agency investigation under 5 USC 1213c when there is a finding of whistleblower reprisal, and creating an OSC-sponsored policy arbitration panel consisting of mutually-selected, independent experts to act on whistleblowing disclosures as an alternative to agency self-investigation.

- expansion of WPA legal burdens of proof and jurisdiction for IRA hearings to 5 USC 2302(b)(9); the prohibited personnel practice against reprisal for refusing to violate the law, providing testimony in an OSC or Inspector General investigation, or exercising appeal rights. The public policy stakes in this provision are equivalent to, and sometimes greater than, whistleblowing protected under subsection (b)(8). The case law has shuffled the same alleged harassment between the two prohibited personnel practices.
- prevention of prohibited personnel practices through credible disciplinary liability by extending legal burdens of proof for WPA remedial actions to disciplinary cases, freeing the OSC from attorney fee liability and allowing whistleblowers to counterclaim for corresponding discipline if there is a prohibited personnel practice finding when they are forced to assert legal rights against a performance-based or adverse action.

- coverage for government contractors to maintain accountability when taxpayer funds are spent for outside agencies to perform the duties of federal employees. If this amendment is not adopted generically, S. 995 should clarify that the anti-gag provision applies to government contractors as well as civil service employees.

On balance, S. 995 is a reasonable and essential first step on the road to recovery for whistleblower rights in the merit system. It sends a clear message that Congress was serious when it passed this law in 1989 and strengthened it in 1994. Congressional persistence is a prerequisite in order for those who defend the public to have a decent chance of defending themselves. We look forward to working with you and your co-sponsors to strengthen and pass this legislation.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release January 20, 2001

January 20, 2001

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Standards of Official Conduct

Everyone who enters into public service for the United States has a duty to the American people to maintain the highest standards of integrity in Government. I ask you to ensure that all personnel within your departments and agencies are familiar with, and faithfully observe, applicable ethics laws and regulations, including the following general principles from the Standards of Ethical Conduct for Employees of the Executive Branch:

(1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.

(2) Employees shall not hold financial interests that conflict with the conscientious performance of duty.

(3) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.

(4) An employee shall not, except as permitted by applicable law or regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

(5) Employees shall put forth honest effort in the performance of their duties.

(6) Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.

(7) Employees shall not use public office for private gain.

(8) Employees shall act impartially and not give preferential treatment to any private organization or individual.

(9) Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.

(10) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.

more

(11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

(12) Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those -- such as Federal, State, or local taxes -- that are imposed by law.

(13) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

(14) Employees shall endeavor to avoid any actions creating the appearance that they are violating applicable law or the ethical standards in applicable regulations.

Executive branch employees should also be fully aware that their post-employment activities with respect to lobbying and other forms of representation will be bound by the restrictions of 18 U.S.C. 207.

Please thank the personnel of your departments and agencies for their commitment to maintain the highest standards of integrity in Government as we serve the American people.

GEORGE W. BUSH

# # #

MAR-08-01 10:00AM FROM-WISC. STATE JOURNAL NEWSROOM

OPINION
Wisconsin State Journal

Coming Thursday
Columnist Maureen Dowd

Associate Editor: Thomas W. Still, (608) 252-6110
Editorial writers: Chuck Martin, Sunny Schubert, (608) 252-6107

GUEST COLUMN

Time to put teeth in anti-gag legislation

By Tom Devine and
Martin Edwin Andersen

As the new Congress gets down to business, calls for bipartisanship and for greater government accountability are potent political buzzwords. Wisconsin's congressional delegation is in a unique position, as inheritors of the tradition of "Fighting Bob" La Follette, to make a small down payment on both concepts by helping to protect from reprisal federal whistleblowers — workers who dare to "commit the truth" on behalf of better and more ethical government.

In 1912, the U.S. Congress, caught up in public zeal for the reform of a corrupted and antiquated federal system, passed the Lloyd-La Follette Act. The measure protected federal employees' rights to communicate about their workplace concerns with Congress.

Federal whistleblowers in recent years have made important contributions. They have exposed unhealthy food at supermarket chains; pushed for independent safety reviews of the Alaska oil pipeline; stopped nuclear power plants that were accidents waiting to happen, and exposed government cover-ups of radiation and toxic substances poisoning our communities.

In making these disclosures — often at risk to reputation and of current and future employment — whistleblowers have been able to posture that the Lloyd-La Follette statute bans discrimination against them for helping to ensure that Congress fully understands public policy issues. Unfortunately, the posturing generally is a bluff. Workers cannot go to court under this law because recent decisions require Congress to spell out judicial access to enforce any right it passes.

In other words, it is a right without a remedy.

For the past 13 years, Congress has supported, on a year-by-year basis, an "anti-gag statute" that is a natural outgrowth of the Lloyd-La Follette Act. The law puts employees on notice of their rights and allows them to "call the bluff" of bureaucratic managers who try to intimidate them through gag orders. It also prevents employees from being pressured to sign away their rights.

The need for the first annual "anti-gag statute," became clear in the wake of a federal decree that pressured federal employees to sign "gag orders" as a prerequisite for receiving or keeping security clearance.

The Catch 22 of this flagrant violation of First Amendment rights was that it allowed government managers to classify almost anything after the fact. This meant that those who were most likely for transgression not only had the power to silence those who raised their voice against wrongdoing. They were also able allege what the whistleblower said constituted a risk to national security.

The rights protected by the "anti-gag statute" are so fundamental they must be institutionalized.

Wisconsin's congressional delegation should take the lead in making permanent this noncontroversial but crucial underpinning of whistleblower protection. It should make sure that any new legislation contains an up-to-now missing remedy of district court jury trials that put teeth into the anti-gag statute. Whistleblowers should have their day in court if their free speech rights are violated, and they should be judged by the citizens whose public interest is the point of open government.

Devine is legal director of the Government Accountability Project, based in Washington, D.C. Andersen, a whistleblower at the U.S. Department of Justice, was raised in Kenosha.

Department of Justice

STATEMENT

OF

STUART E. SCHIFFER
ACTING ATTORNEY GENERAL
CIVIL DIVISION

BEFORE THE

SUBCOMMITTEE ON
INTERNATIONAL SECURITY, PROLIFERATION, AND FEDERAL SERVICES

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

CONCERNING

S. 995, WHISTLEBLOWER PROTECTION AMENDMENTS

JULY 25, 2001

Mr. Chairman and members of the subcommittee, thank you for the opportunity to submit this statement on behalf of the Department of Justice regarding S. 995: To Amend Chapter 23 of Title 5, United States Code ("the Bill").

The Bill would make sweeping changes to the definition of a protected disclosure by including within the definition certain disclosures of information regardless of time, place, form, motive or context. If enacted, this proposal would disrupt in an undesirable manner the balance between the protection of important employee rights and the ability to effectively and efficiently manage the Federal workforce.

The Bill would also provide new protection for the unauthorized disclosure of classified information if the disclosure is made to certain members of Congress or employees of the Executive branch with appropriate security clearances. This proposed change would unconstitutionally infringe on the President's constitutional authority to protect national security information.

The Bill would also alter the scheme for judicial review of decisions of the Merit Systems Protection Board ("MSPB") established by the Federal Courts Improvement Act of 1982, pursuant to which exclusive jurisdiction to entertain appeals by employees from MSPB decisions (not involving discrimination) in

actions initiated by their employing agencies lies in the United States Court of Appeals for the Federal Circuit. This would destroy the uniform interpretation of Federal personnel law and inevitably result in the grant of different rights to different Federal employees depending upon their geographic location.

Finally, the Bill would expand the authority of the Special Counsel by permitting her independently to decide to seek review of the decisions of the MSPB in the United States Court of Appeals for the Federal Circuit, and it would vest the Special Counsel with the authority to represent herself in all Federal courts other than the Supreme Court. These provisions are undesirable as a matter of policy.

Since we believe the Bill, if enacted, would disrupt the appropriate balance struck by the Whistleblower Protection Act ("WPA") between the protection of whistleblowers and the ability of the Federal Government to manage its workforce in an effective and efficient way, the Department of Justice strongly opposes the enactment of this Bill.

I.

The Bill's expansion of the definition of protected disclosure upsets the delicate balance between whistleblower protection and the ability of Federal managers to manage the

workforce. Although we share the Committee's concerns to afford legitimate whistleblowers protection from reprisal, the amendment in this Bill does little to aid those whistleblowers. The WPA, as currently enacted, already provides adequate protections for legitimate whistleblowers. This Bill, with its expansive definition of disclosure, has the potential to convert any disagreement or contrary interpretation of a law, no matter how trivial or frivolous, into a whistleblower disclosure. It will do nothing futher to protect those with legitimate claims, who are covered by the existing law, but, instead, will simply increase the number of frivolous claims of whistleblower reprisal. Such an increase in the number of frivolous claims is an unwarranted burden upon Federal managers and, ultimately, the MSPB and the Federal Judiciary.

The Bill would broaden the definition of protected disclosure by amending section 2302(b)(8)(A) to read:

> any disclosure of information by an employee or applicant, <u>without restriction to time, place, form, motive, context, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties that</u> the employee or applicant reasonably believes evidences
>
> (i) <u>any violation</u> of any law, rule, or, regulation, or

> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Proposed 5 U.S.C. § 2302(b)(8)(A) (proposed amendment emphasized).

This expansive definition of disclosure would seem to encompass almost any type of statement made by a Federal employee that arguably could be interpreted to state a violation of law, rule, or regulation, gross mismanagement or the like. Such a definition has the potential to convert all Federal employees into whistleblowers just by the nature of their jobs. For example, if an employee had a disagreement with his or her supervisor about the proper way to implement a regulation, that stated disagreement would appear to constitute a disclosure under the Bill's definition, no matter the intent of the employee or the context in which the disclosure was made. Considering the nature of many Federal employees' positions and that most, if not all, Government activities are governed by laws, rules, and regulations, conversations similar to this one probably occur on a daily basis. Thus, just by performing their jobs, Federal employees, under the Bill's definition, would make protected disclosures. That form of extreme protection was not the intent of the WPA nor is it a useful one.

In contrast, the Federal Circuit has appropriately recognized that the purposes of the WPA must be taken into account in determining whether a disclosure is one protected by the WPA. Willis v. Department of Agriculture, 141 F.3d 1139, 1143 (Fed. Cir. 1998) (observing that "[t]he purpose of the WPA is to encourage government personnel to disclose government wrongdoing to persons who may be in a position to remedy the problem without fearing retaliatory action by their supervisors or those who might be harmed by the disclosures."). Accordingly, the court in Willis recognized that expressing disagreement with a supervisor's decision to that supervisor was not the type of disclosure protected by the WPA because it was not reporting the supervisor's wrongdoing to anyone in a position to take action. Id. Moreover, the court found that the WPA was not intended to protect reports of violations of laws, rules, or regulations that an employee made as a part of his everyday job responsibilities. Id. at 1143-44.

These limitations are reasonable and serve to further the purpose of the WPA to protect legitimate whistleblowers. The Bill's proposed amendment does nothing to enhance the protections for actual whistleblowers. Rather, by prohibiting the consideration of "time, place, form, motive, context" and

including the performance of one's job duties in the definition of "disclosures," the bill simply converts every Federal employee into a whistleblower. Nearly every Federal employee will, sometime during the course of his or her career, disagree with a statement or interpretation made by a supervisor, or report, during the course of performing his or her everyday responsibilities, an error that may demonstrate a violation of a law, rule, or regulation. Without the ability to take the context - the time, the place, the motive - of the alleged disclosure into account, even trivial or de minimis matters will become elevated to the status of protected disclosures. Cf. Herman v. Department of Justice, 193 F.3d 1375, 1378-79 (Fed. Cir. 1999) (concluding that the WPA was not intended to apply to trivial matters). This Bill will undermine the effectiveness of the WPA, not enhance its protections.

The danger of this broad definition of disclosure is even more apparent when it is understood in the context of the statutory scheme of the WPA. Once an individual has made a qualifying disclosure pursuant to 5 U.S.C. § 2302(b)(8), a prima facie case of whistleblower reprisal can be made by showing that a deciding agency official (a) knew of the disclosure and, that (b) an adverse action was taken within a reasonable time of the

disclosure. Kewley v. Department of Health & Human Serv., 153 F.3d 1357, 1362-62 (Fed. Cir. 1998) (citing 5 U.S.C. § 1221(e)(1)). Once the employee makes this prima facie case, the burden shifts to the employing agency to show, by clear and convincing evidence, that it would have taken the adverse action, regardless of the protected disclosure. Kewley, 153 F.3d at 1363.

With the expansive definition of disclosure proposed by this Bill and the relatively light burden of establishing a prima facie case of whistleblower reprisal, due to the knowledge/timing test, it will become extremely easy for employees to use whistleblowing as a defense for every adverse action taken by an agency. Due to the statutory structure of the WPA, however, the agency will still be required to meet the much higher burden of demonstrating that it would have taken the adverse action anyway, regardless of the disclosure, by clear and convincing evidence. Thus, for all practical purposes, this Bill will transform the statutory standard that an agency must meet in sustaining almost every adverse action from a preponderance of the evidence, 5 U.S.C. § 7701(c)(1)(B), to the clear and convincing standard required by 5 U.S.C. § 1221(e)(2).

The ease with which a Federal employee would be able to establish a prima facie case of whistleblower reprisal, no matter how frivolous, under this Bill would seriously impair the ability of Federal managers to effectively and efficiently manage the workforce. If Federal managers know that it is likely that they will be subject to a charge of whistleblower reprisal every time that they take an adverse personnel action, they may hesitate to take any such action. Likewise, the very low standards that would be required under this Bill to make a whistleblower claim would vastly increase the number of such claims, obscure the claims of legitimate whistleblower, and unduly burden the MSPB and the Federal Circuit. This is not an improvement upon the Civil Service Reform Act and the Whistleblower Protection Act, but a step backwards.

II.

The Department also has serious objections to the Bill's proposal to protect the unauthorized disclosure of classified information to certain members of Congress and executive branch or congressional employees with appropriate clearance. Under this Bill, any Federal employee with access to classified information that - in the employee's sole opinion - indicated misconduct could share that information with certain members of

Congress or the executive branch. The disclosure of that information could be made regardless of any restrictions or executive branch authorization procedures established by the President and the employee could not be disciplined for such an unauthorized disclosure. Proposed 5 U.S.C. § 2302(b)(8)(C). This proposal interferes with the President's constitutional authority to protect national security information, and therefore violates the constitutional separation of powers.

The constitutional authority of the President to take actions as Chief Executive and Commander-in-Chief of the armed forces of the United States grants the Executive Branch the authority to

> classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information . . . [This authority] flows primarily from this constitutional investment of power and exists quite apart from any explicit congressional grant.

Department of the Navy v. Egan, 484 U.S. 518, 524 (1988); see also United States v. Nixon, 418 U.S. 683, 706, 710, 712 n.19 (1974) (emphasizing heightened status of the President's constitutional privilege in the context of military, diplomatic or sensitive national security secrets); New York Times Co. v. United States, 403 U.S. 713, 729-30 (1971) (Stewart, J.,

concurring)("it is the constitutional duty of the Executive . . . to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense"); United States v. Reynolds, 345 U.S. 1, 7-8 (1953) (recognizing privilege in judicial proceedings for "state secrets" based on determination by senior Executive officials); Guillot v. Garrett, 970 F.2d 1320, 1324 (4th Cir. 1992) (President has "exclusive constitutional authority over access to national security information"); Dorfmont v. Brown, 913 F.2d 1399, 1404 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991)(Kozinksi, J., concurring) (Constitution vests President with unreviewable discretion over security decisions made pursuant to his powers as chief executive and Commander-in-Chief).

This Bill interferes with the President's responsibility by authorizing any Federal employee unilaterally to determine how, when, and under what circumstances classified information will be shared with others regardless of Presidential determinations that access be limited. Although the Bill limits the protected disclosures to congressional oversight committees or individuals with appropriate clearances in Congress or the Executive Branch, it nonetheless constitutes an unconstitutional interference with

the President's constitutional responsibilities respecting national security and foreign affairs. Even though the designated individuals may have appropriate clearances to receive the classified information, it is the President's prerogative to determine who has the need to know this information. The Bill would deprive the President of his authority to decide, based on particular -- and perhaps currently unforseeable -- circumstances, that the security or foreign affairs interests of the Nation dictate a particular treatment of classified information. A compromise of the President's authority in this area is an impermissible encroachment on the President's ability to carry out one of his core executive functions.

Although we understand the important public interest in protecting whistleblowers, the decision whether and under what circumstances to disclose classified information must be made by someone who is acting on the official authority of the President and who is ultimately responsible to the President. The Constitution does not permit Congress to authorize subordinate executive branch employees to bypass these orderly procedures for review and clearance by vesting them with a right to disclose classified information, without fear of discipline for the unauthorized disclosure. This same position was taken in 1998 by

the prior Administration, which strongly opposed, as unconstitutional, legislation that would have vested employees of the Intelligence Community with a unilateral right to disclose classified information to Congress. See Disclosure of Classified Information to Congress: Hearing Before the Senate Select Committee on Intelligence, 105th Cong. 41-61 (1998) (Statement of Randolph D. Moss, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice).

III.

We also object to the Bill's proposal to provide for review of MSPB decisions by the regional courts of appeal, rather than the Federal Circuit. Review by the Federal Circuit promotes conformity in decisions and fosters uniformity in Federal personnel law. Granting the regional circuits jurisdiction to entertain appeals from the MSPB would undo Congress's sensible centralization of those appeals and add more work to those already overburdened regional courts of appeal.

Since the enactment of the Federal Courts Improvement Act of 1982, the Federal Circuit has exercised exclusive jurisdiction to consider appeals from the MSPB in cases not involving discrimination. In those years, the court has developed substantial expertise and a well-defined body of law regarding

Federal personnel matters that inures to the benefit of both the Federal Government and its employees. Moreover, the court's rules, which provide for more expedited and informal briefing in pro se cases provide an added benefit for Federal employees, many of whom choose to appeal the MSPB's decisions without the aid of an attorney.

Replacing the Federal Circuit's exclusive jurisdiction with review by the regional circuits would result in a fractured personnel system. Inevitably, conflicts among the circuits would arise as to the proper interpretation of the Federal personnel laws so that an employee's rights and responsibilities would be determined by the geographic location of his or her place of employment. Not only is such a non-uniform system undesirable, it could contribute to a loss of morale as Federal employees are treated differently depending upon where they live. It also would inevitably require the Supreme Court to intervene more often in Federal personnel matters to resolve inconsistencies among the circuits.

The CSRA and the Federal Courts Improvement Act resolved the problems of regional review. Considering the Federal Circuit's now substantial expertise, there is simply no good reason to revert to the old system.

IV.

Finally, the Department opposes the Bill's proposed changes in the authority of the Office of Special Counsel to prosecute appeals and to represent itself in litigation. The Bill would expand the authority of the Office of Special Counsel, which is currently limited to the right to appear before the MSPB, by authorizing the Special Counsel unilaterally to seek review in the United States Court of Appeals for the Federal Circuit in any case to which she was a party and to grant the Special Counsel the authority to designate attorneys to appear upon her behalf in all courts except the Supreme Court. Proposed 5 U.S.C. § 1212(h) and 7703(e).

Under current law, employees who are adversely affected by a decision of the MSPB possess the right to appeal to the Court of Appeals for the Federal Circuit. 5 U.S.C. 7703(a). The Department of Justice represents the respondent Federal agencies in these appeals.

Federal employing agencies do not possess the same right to appeal MSPB decisions which are adverse to them. The Office of Personnel Management is the only Government agency which may seek to appeal an MSPB decision and it may do so only after it has intervened in the MSPB proceeding to present its position and

only after its Director has made a determination that an MSPB decision rejecting OPM's position will have a "substantial impact" upon the administration of the civil service law. 5 U.S.C. § 7703(d). Moreover, once the Director makes such an determination, OPM must seek authorization from the Solicitor General to file a petition for review which the Federal Circuit possesses discretion to grant or deny. OPM is represented in the Federal Circuit by the Department of Justice.

Currently, the Special Counsel can request that OPM use its statutory authority to seek review of adverse MSPB decisions regarding the whistleblower laws. The Justice Department has consulted with the Special Counsel, in cases where the Special Counsel was a party to the case, and will continue to consult the Special Council regarding whistleblower appeals in the Federal Circuit. In addition, the Justice Department will continue to work with the Special Counsel and other interested agencies to ensure that their analysis and expertise is taken into consideration. Thus, the Office of Special Counsel currently has opportunities to protect its interest in enforcing the whistleblower laws while the Justice Department maintains centralized control over personnel litigation.

The Bill would disrupt this carefully crafted scheme by authorizing the Special Counsel, without approval of the Solicitor General, to petition the Federal Circuit for leave to appeal any adverse MSPB decision. The only limitation placed upon this right is, if the Special Counsel was not a party or intervenor in the matter before the MSPB, she would be required to petition the MSPB for reconsideration of its decision before seeking review in the Federal Circuit.

The Bill would further erode centralized control over personnel litigation by authorizing the office of the Special Counsel to represent itself in all litigation except litigation before the Supreme Court. This authority would be independent of the Department of Justice. Moreover, it could result in the Special Counsel litigating against other Executive Branch agencies.

The disruption of centralized control that would be caused by granting independent litigating authority to the Special Counsel is undesirable. Centralized control furthers a number of important policy goals, including the presentation of uniform positions on significant legal issues, the objective litigation of cases by attorneys unaffected by concerns of a single agency that may be inimical to the interests of the Government as a

whole, and the facilitation of presidential supervision over Executive Branch policies implicated in Government litigation. This policy benefits not only the Government but also the courts and citizens who, in the absence of the policy, might be subjected to uncoordinated and inconsistent positions on the part of the Government.

The WPA already provides the necessary protections for legitimate whistleblowers. This Bill does not enhance those protections in any useful way. Rather, it will simply increase the number of frivolous claims and place a tremendous strain upon the entire Federal personnel system. The processing of those frivolous claims will adversely affect Federal managers, the MSPB, the Federal Circuit and, ultimately, those legitimate whistleblowers whose claims will take longer to be heard.

The proposed protection for unauthorized disclosure of classified information is equally troubling because it intrudes upon the President's constitutional power to control the flow of classified information.

Finally, the proposals to change the system of judicial review of MSPB decisions and to expand the authority of the Office of Special Counsel unnecessarily disturb a system that is working well.

The Department opposes this unnecessary, burdensome, and potentially unconstitutional Bill.

* * *

Response of the Office of Special Counsel to Statement of Stuart E. Schiffer, Concerning S. 995.

We urge the Committee to reject the Justice Department's position regarding S. 995. In general, the key Administration goal of rooting out fraud, waste and abuse in the federal bureaucracy would be better served, OSC believes, by supporting S. 995. The Justice Department's position gives very little weight, however, to that important public policy goal.

1. "Expansion" of Protected Disclosures

The Justice Department has taken the position that S.995 would upset the balance between whistleblower protection and the ability of federal managers to manage the workforce. We disagree. In fact, we do not believe that the bill actually is broadening the definition of "protected disclosure" beyond what was originally intended when the Whistleblower Protection Act was enacted. Instead, it is an attempt to overturn judicial decisions that have narrowed the originally intended meaning, and

created significant improper loopholes in the law. See Huffman v. OPM, 84 M.S.P.R. 569, 571-578 (1999)(Vice Chair Slavet, concurring).

For example, in Willis v. Department of Agriculture, 141 F.3d 1139 (Fed. Cir. 1998), the Court held that the WPA does not prohibit retaliation against an employee who discloses violations of law or other misconduct during the course of his or her duties. Thus, for example, an auditor at the Department of Education, who uncovers massive fraud and waste of funds in the administration of the student loan program is not protected against retaliation under the WPA when he or she reports the fraud up the chain of command. A meat inspector with the Department of Agriculture is not protected against retaliation from his superiors when he reports serious health and safety violations by a meat packing plant.

Similarly, in Horton v. Department of the Navy, 66 F.3d 279 (1995), the Federal Circuit held that the WPA does not protect employees who make their disclosures directly to the person they suspect of wrongdoing. This obviously discourages employees from attempting to raise and resolve their concerns within the chain of command, and encourages them to unnecessarily go public. It is contrary to sound policy to actually force employees to go public when they reasonably suspect wrongdoing, in order to preserve their legal protections.

In short, the Justice Department's reflexive invocation of the importance of preserving management prerogatives is short sighted and inconsistent with the Administration's recognition of the importance of rooting out fraud, waste and abuse. We agree that the proposed language of the portions of the bill defining when

disclosures are protected may need some tightening up as it moves through the legislative process. Nonetheless we believe that the animating principles of the bill -- to restore the protections whistleblowers were originally intended to enjoy and that have been eroded by erroneous judicial interpretations -- deserve strong support.

2. Extending litigating authority to the Special Counsel and authorizing her to request appellate review of MSPB cases that address substantial issues under the Whistleblower Protection Act:

DOJ's objection to this provision is that it would "erode centralized control over personnel litigation" and disrupt the civil service law's "carefully crafted scheme," thereby disturbing a system that is "working well."

In our detailed statement to Congress we addressed in greater detail the basis for our belief that conferring independent litigating authority and a limited right of appeal upon the Special Counsel is necessary for OSC to effectively protect whistleblowers against retaliation. We would only add here that the Justice Department's general pronouncements about "centralized control" and a "carefully crafted scheme" ignores that it is routine in cases involving issues that arise under the civil service laws for there to be more than one "government" party in the court of appeals. Both the MSPB and the FLRA possess the authority to represent themselves in the courts of appeals against other federal agencies that are represented by the Department of Justice and do so often.

OSC, like the Merit Systems Protection Board, and the Federal Relations Authority, occupies a unique role in the executive branch, because part of its job is to

police other federal agencies' compliance with the civil service laws. Even under current law, OSC's mission routinely requires it to take positions adverse to other federal government agencies, albeit before an administrative agency -- the MSPB. Further the Special Counsel is intended to be relatively free of the "presidential supervision" that Justice cites; she is appointed for a term of years and can only be removed for cause.

In short, DOJ's generalized concerns about "centralized control" and uniformity are inapplicable in this context. In fact, denying OSC independent litigating authority in the context of the civil service scheme creates an anomalous exception to what is otherwise the rule -- under which DOJ provides representation to employing agencies defending themselves against the independent agencies (the FLRA, the MSPB) who are represented by their own counsel.[1]

3. Multi-circuit review.

The Justice Department objects to the Bill's proposal to provide for multi-circuit review of MSPB decisions because it believes that such review would result in a "fractured personnel system." We disagree.

Again, the Federal Circuit's monopoly on appellate jurisdiction is an anomaly, both as a general proposition when considering appellate review of agency action, and

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[1] DOJ observes that under current law OSC "has opportunities to protect its interest in enforcing the whistleblower laws. . ." While OSC has, on occasion, been able to influence DOJ and OPM positions (only in cases in which OSC was a party), the larger majority of cases -- involving individual rights of action -- are much less amenable to OSC influence. Moreover, even in the limited number of cases where OSC sought to be heard, its arguments were not always adopted, to the detriment of whistleblower protection. Most important, however, OSC's ability to influence DOJ or OPM is not a sufficient substitute for independent litigating authority. That statutory authority is necessary to remedy the inherent conflict-of-interest in DOJ or OPM purporting to advance whistleblower interests in the face of conflicting management prerogatives, which is those agencies' prime concern.

also specifically under the laws that govern the federal employment relationship. Under the Administrative Procedure Act, of course, agency action is reviewable in any court of competent jurisdiction.

Moreover, in the federal employment sector, the law currently provides for multi-circuit review of decisions the Federal Labor Relations Authority. Moreover, review of EEO cases involving federal employees occurs in district courts and courts of appeals all around the country. It is unclear why whistleblower cases should be treated any differently or why there would be a resulting problem stemming from the lack of uniformity.

In fact, whistleblower cases frequently involve issues of proof similar to the issues raised in employment discrimination cases. They are also similar to many unfair labor practice cases that are heard by the FLRA.

STATEMENT
OF
COLLEEN M. KELLEY
NATIONAL PRESIDENT
NATIONAL TREASURY EMPLOYEES UNION

HEARING ON WHISTLEBLOWER PROTECTION ACT LEGISLATION (S. 995)

July 25, 2001

Chairman Akaka, Ranking Member Cochran and Members of the Subcommittee,

I applaud you for holding a hearing today on this very important issue for federal employees and the American taxpayers. Chairman Akaka, you have always been a champion for the rights of federal employees, and we commend you for introducing S. 995, which seeks protections for those who stand up to expose wrongful and wasteful government actions.

The time is now to restore real whistleblower protections for federal workers that had been guaranteed to them by the Whistleblower Protection Act (WPA) of 1989. As you know, this statute was intended to protect federal workers who make disclosures challenging fraud, waste, and other government abuses that betray the public trust. Congress unanimously passed this law in 1989 and unanimously strengthened it in 1994.

Unfortunately, in a series of decisions since the 1994 amendments, the Federal Circuit has taken aggressive actions to thwart the intent of Congress by overturning unequivocal statutory language and taking free speech rights away from federal workers.

The statute's cornerstone has been its protection for "any" lawful disclosure evidencing significant abuse. In the WPA Congress changed 1978 language protecting "a" disclosure to "any" disclosure, in order to overturn Federal Circuit decisions that created gaping loopholes. Since 1995, however, the Court has created a series of new, even broader loopholes to WPA coverage. Employees no longer are protected for disclosures to co-workers, alleged wrongdoers or supervisors; disclosures made as part of their job duties; or disclosures challenging illegal, wasteful or abusive policies. These Court decisions have gutted the law and are having the effect of institutionalizing secrecy and deception when whistleblowing is needed most.

In *Lachance v. White*, 174 F.3d 1378, the Court dealt a lethal blow to the WPA and to anyone relying on the statute. The Court made it virtually impossible for an employee to establish that he or she had a "reasonable belief" that the conduct complained of evidenced gross mismanagement or some other wasteful or fraudulent activity. As a result of *Lachance v. White*,

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employee disclosures are protected only if "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [could] reasonably conclude that the actions of the government evidence gross mismanagement." The Court, moreover, stressed that evidence that an employee was familiar with the alleged improper activity – even if his or her belief was shared by similarly situated employees – is insufficient to establish the reasonableness of the employee's belief of misconduct. This is contrary to earlier decisions holding that the "reasonable belief" standard only requires an employee to provide "evidence" of misconduct, not "proof." In *White's* aftermath, whistleblowers do not have a realistic chance to defend themselves. The statute has been gutted to the point where employees are all but certain to end up with a formal legal finding that they do not qualify as whistleblowers.

The Court did not stop at that point, however. It ordered the Merit Systems Protection Board to seek evidence of conflict of interest for any whistleblower asserting retaliation, to discover any hidden agendas for making the disclosure in the first place. Retaliatory investigations – those taken "because of" whistleblowing – are tantamount to witch-hunts and were outlawed by Congress in the 1994 amendments. Now they are virtually guaranteed for any employee who files a reprisal complaint.

The Court's decision in *White* effectively eliminates any credible chance that a whistleblower can receive protection under the WPA. The Supreme Court, in part because the Federal Circuit monopoly precludes any split doctrines, has never agreed to hear a WPA case, including *White*. If the WPA is to be restored, and the flow of information to expose government wrongdoing preserved, Congress must act now to save the law.

Again, I thank Chairman Akaka for introducing S. 995 and holding this important hearing today. I urge this subcommittee to work to restore the Whistleblower Protection Act to what Congress had intended it to be when it was strengthened in 1994. We need to ensure that federal employees will be protected when they attempt to expose waste, fraud, and abuse in our government.

Senator Daniel K. Akaka
Follow-up Questions for the
GAC-ISPFS Hearing on July 25, 2001
S. 995, The Whistleblower Protection Act of 2001

Questions for the Honorable Elaine Kaplan
Special Counsel, Office of [the] Special Counsel

1. Does the Office of Special Counsel (OSC) provide access to completed reports of investigations to whistleblowers? Under what circumstances does the Office of Special Counsel deny such access and why?

Under longstanding policy, OSC does not provide either complainants or agencies charged with retaliation with access to its reports of investigation or witness statements. The courts have upheld the lawfulness of this policy. Martin v. OSC, 819 F.2d 1181 (D.C. Cir. 1987). Notwithstanding that fact, I directed a comprehensive re-examination of this policy in 1998 shortly after I became Special Counsel. The re-examination was conducted in response to the request of practitioners and organizations that frequently represent whistleblowers, as well as practitioners who represent agencies.

Upon re-examination, I concluded that OSC's policy of not releasing information from its investigative files was appropriate and necessary for OSC to effectively fulfill its mission of conducting thorough and impartial investigations of complaints of whistleblower retaliation. Specifically, I concluded that—without a general guarantee of confidentiality—witnesses would be chilled from providing OSC with full, complete and truthful testimony. OSC's conclusion in that regard is consistent with the policies of other agencies that conduct similar investigations in the worksite, including the Federal Labor Relations Authority and the National Labor Relations Board.

At the time of the re-examination of this policy, we also considered whether we could provide requesters with redacted copies of investigative material. We concluded that adoption of such a policy would not be feasible. First, redacted documents would be of little use to the recipients. Moreover, the work of redacting documents to protect personal privacy is highly labor intensive. Every year, several hundred complainants whose cases have been before OSC file individual rights of action. It is likely that most of these complainants would request copies of the OSC investigative file as a matter of course. OSC, as a small agency, with a limited budget and staff, simply would not be able to handle the potentially crushing volume of requests for documents that would result if it adopted such a policy.

While OSC does not provide complainants with access to its files, when OSC closes a complaint without further investigation, it is required by law to explain the

basis for its determination. 5 U.S.C. § 1214(a)(2)(A). OSC provides this explanation in detailed letters which outline its findings of fact and legal conclusions. Further, when OSC makes a determination that there exist reasonable grounds to believe a prohibited personnel practice may have been committed, it supplies the agency with a comprehensive prohibited personnel practice report, outlining the basis for its conclusions. Id. at § 1214(b)(ii)(B). Copies of this report are also routinely provided to complainants, upon request. Finally, OSC's "routine use" regulations permit it to divulge information in its files to the extent necessary to conduct an investigation or to disclose to an agency the results of an investigation in which OSC has found reasonable grounds to believe a prohibited personnel practice has been committed.

2. How does the Office of Special Counsel ensure that agencies conduct adequate investigations and give proper consideration of matters referred to the agency by OSC under Title 5 U.S.C. section 1213? How does the Office of Special Counsel follow up with agencies to ensure that any corrective action proposed has, in fact, been completed?

Section 1213 of Title 5 requires an agency head to "conduct an investigation with respect to the information and any related matters transmitted by the Special Counsel..." and "submit a written report setting forth the findings of the agency head...." Section 1213(d) specifies the items required to be included in the agency head's report. Upon receipt, the Special Counsel is required to forward the report to the whistleblower for comments. 5 U.S.C. § 1213(e)(1). The statute then requires the Special Counsel to review the report and determine whether "the findings of the head of the agency appear reasonable;" and whether "the report of the agency contains the information required under subsection (d)...." 5 U.S.C. § 1213(e)(2).

After this review is conducted and the Special Counsel determines whether the report appears reasonable, she transmits the report to the President and the congressional committees with jurisdiction over the agency which the disclosure involves. This transmittal must include the whistleblower's comments, and may include "any appropriate comments or recommendations by the Special Counsel." 5 U.S.C. § 1213(e)(3).

In those cases in which the Special Counsel has determined that the findings of the agency head do not appear reasonable, or where the report is statutorily deficient (fails to include the information required by section 1213(d)), she has noted the deficiencies in her letter to the President and Congress. In most cases, prior to transmitting a deficient report or one whose findings do not appear reasonable, the Special Counsel offers the agency head, both verbally and in writing, an opportunity to correct the deficiencies and issue a revised report.

In most cases in which the Special Counsel has notified the agency that a report is deficient, the Special Counsel has subsequently obtained at least partial compliance. See Harris, Mary; DI-98-1434. In a few cases, the Special Counsel has transmitted the report and the whistleblower's comments, together with her comments regarding the deficiencies. See Graham, Millard; DI-99-0923; Martinson, Marty; DI-99-0722; Beesley, Brook; DI-97-0912; Liao, Winston; DI-99-0748.

Under the statute as currently written, other than noting her comments or recommendations in the transmittal of the matter to the President and/or Congress, the Special Counsel has no enforcement authority or other mechanism to ensure that the agency undertakes the corrective action it has committed to take in its report. The statute apparently contemplates that the President and/or Congress will oversee agency compliance with its commitments.

Nonetheless, in those instances where the Special Counsel has reason to believe that an agency has failed to take the corrective action it has committed to take, OSC has, in the past requested additional documentation even after transmittal of the final report and the whistleblower's comments to the President and Congress. There is, however, no statutory authority which requires an agency to provide such documentation.

3. As you know, the whistleblower protection statute seeks to encourage disclosure of serious governmental misconduct, while deterring frivolous or non-credible claims. Do you believe S. 995 would contribute to an increase in the number of frivolous or non-credible claims?

We have no reason to believe that S. 995 would contribute to an increase in "frivolous" or "non-credible" claims. We believe that S. 995 would simply restore the scope of protection to whistleblowers that Congress intended when it enacted the Whistleblower Protection Act. Individuals seeking the Act's protection would still be required to demonstrate that they disclosed information which they reasonably believed evidenced one of the statutory conditions. OSC's review process would continue to screen out claims that lack merit or credibility.

Notwithstanding our views in this regard, we recognize that there is significant misunderstanding of the whistleblower protection statute in the federal workforce among rank and file employees, as well as management. As a result, employees who believe themselves to have been treated unfairly may file complaints that are not cognizable under the WPA. Conversely, managers may feel unduly constrained from making proper and lawful management decisions by their own confusion about the scope of the Act's protection. This suggests that there should be a greater focus on ensuring agency compliance with 5 U.S.C. § 2302(c) (requiring agencies, in consultation with OSC, to educate their workforce on prohibited personnel practices); it does not suggest narrowing the scope of the legitimate protection that whistleblowers receive in order to screen out "frivolous" complaints.

4. S. 995 attempts to clarify the definition of a covered disclosure to counter decisions by the Court of Appeals for the Federal Circuit which have limited the scope of protection of the WPA. Under current law, a covered disclosure includes any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences specified governmental wrongdoing. As you know, in interpreting this provision, the court held in Lachance v. White that "the proper test is this: could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence gross mismanagement? A purely subjective perspective of an employee is not sufficient even if shared by other employees." The court went further to require that the reasonableness review begin with the "presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations .... And this presumption stands unless there is 'irrefragable proof' to the contrary."

S. 995 adds the word "credible" to the statute. Concerns have been raised that inserting the word "credible" in the statute will increase evidentiary burdens on employees. In your opinion does the inclusion of the word "credible" increase evidentiary burdens on employees? If so, and assuming that it is the specific intent of Congress to overturn the above presumption from Lachance, what language would more effectively accomplish this goal?

OSC agrees that the addition of the word "credible" could be read to increase the burden on whistleblowers when demonstrating the basis for their reasonable belief. Further, addition of the word "credible" may not address the underlying concerns about the presumption imposed against whistleblowers in Lachance. Accordingly, we would suggest that the following language be added, perhaps as a new subsection (C) to 5 U.S.C. § 2302(b)(8):

> "A determination of whether the employee or applicant's disclosure is based upon reasonable belief as set forth in subsections (A) and (B) shall be based upon the totality of the circumstances and there shall be no presumption that agency officials did or did not perform their duties correctly or in accordance with law, rule, or regulation."

Senator Thad Cochran
Follow-up Questions for the
GAC-ISPFS Hearing on July 25, 2001
S. 995, The Whistleblower Protection Act of 2001

Questions for the Honorable Elaine Kaplan
Special Counsel, Office of [the] Special Counsel

1. The Office of Special Counsel (OSC) and Merit System[s] Protection Board (MSPB) are guided in their decisions on complaints and appeals by case law resulting from rulings of the United States Court of Appeals for the Federal Circuit.

In what ways have Federal Circuit Court rulings impacted on how OSC and MSPB process and decide on allegations of whistleblower reprisal?

In what ways have the Court's rulings on whistleblower matters and OSC and MSPB's interpretation of the relevant statutes differed? What has been the effect on the application and enforcement of whistleblower protection statutes?

There have been several recent Federal Circuit Court rulings that have impacted OSC's processing of allegations of whistleblower retaliation and required OSC to alter its prior approach to such cases. In Willis v. Department of Agriculture, 141 F.3d 1139 (Fed. Cir. 1998), for example, the Court held that a disclosure of wrongdoing made in the regular course of one's duties is not protected by the WPA. In Horton v. Department of Navy, 66 F.3d 279 (Fed. Cir. 1995), the Court held that disclosures made directly to the wrongdoer are not protected. Prior to these decisions, OSC would have found such disclosures protected, assuming they were reasonably based and concerned the types of misconduct covered by the statute.

In examining complaints, OSC had attempted to read these rulings narrowly to minimize the number of cases that must be closed before an investigation into the merits of the retaliation claim can even begin. For example, with respect to Willis, OSC read its holding as limited to cases, like Willis itself, where the disclosures an employee made as part of his regular duties concerned the misconduct of private parties. Further, OSC also relied upon an important theme of the Willis decision, that the WPA was intended to protect employees who put themselves "at risk" for the benefit of the public, in order to further investigate and pursue allegations of retaliation that a more literal application of the underlying holding in Willis would not permit.

Similarly, in order to limit the adverse impact of Horton, OSC had relied upon language in the decision that states that such disclosures to a wrongdoer are not "normally" viewable as whistleblowing. In processing cases, OSC has looked for

situations in which the Federal Circuit might find an exception to this general rule, and has tried to avoid closing cases solely on that ground.

Even these approaches, however, are no longer viable given the most recent Federal Circuit Court ruling in Huffman v. Office of Personnel Management, Fed. Cir. No. 00-3184 (Aug. 15, 2001). In Huffman, the Federal Circuit squarely held that reporting wrongdoing in the normal course of duties through normal channels does not constitute a protected disclosure irrespective of whether the employee is disclosing governmental, as opposed to private, wrongdoing. Further, in Huffman, the Federal Circuit eliminated whatever "wiggle room" existed under Horton, holding squarely that confronting a wrongdoer with evidence of his misconduct can never constitute a "disclosure."

Two other Federal Circuit decisions that potentially impact how OSC processes cases are Meuwissen v. Department of Interior, 234 F.3d 9 (Fed. Cir. 2000) and Lachance v. White, 174 F.3d 1378 (Fed. Cir. 1999). In Meuwissen, the Federal Circuit Court stated than a whistleblower is not protected if he discloses information that is already "publicly known." Read literally, the impact of this statement would be that an employee who makes an otherwise protected disclosure may not be protected from retaliation if he/she is not the first to make it.

In Lachance, the Federal Circuit stated that in considering whether an employee's disclosure is supported by the requisite "reasonable belief," the MSPB should consider "an employee's personal bias or self-interestedness in the matter." It also stated that the reasonableness of the whistleblower's belief must be considered against the backgrounds of an "irrefragable" presumption that public officials perform their duties in good faith, correctly, and lawfully.

At least until further explanation by the Federal Circuit, OSC continues to read both Meuwissen and Lachance narrowly. We have concluded that Meuwissen's requirement that the information which is disclosed not be "publicly known" would exclude from protection only those "disclosures" of alleged wrongdoing that are the subject of widespread public attention of which the whistleblower is already aware. We treat the "irrefragable" presumption language of Lachance as dicta, and its "personal bias" language as requiring the consideration of such "bias" as one factor, not dispositive of a whistleblower's reasonable belief. See Kinan v. Department of Defense, 87 M.S.P.R. 561 (2001).

To what extent and in what respects may these amendments change how OSC and MSPB will resolve cases before them vis-à-vis Federal Circuit Court rulings?

First, the amendments will negate the requirement in Horton that an employee cannot be protected if the disclosure is made to a wrongdoer. This will allow OSC to resume its prior practice of actively pursuing cases where the information indicates that

the wrongdoer has retaliated against an employee who has disclosed his misconduct. Second, by reversing the limitations imposed by Willis, employees will no longer be without protection if they disclose violations uncovered in the course of their duties. Third, the bill emphasizes that neither the employee's motive nor the fact that he/she may not be the first to make the disclosure is a bar to finding the disclosure is protected. Again, this removes the added requirement on employees who have legitimate information of government wrongdoing, and frees OSC to pursue complaints of retaliation on their behalf.

Are there areas of the whistleblower laws in which OSC and MSPB interpretation of the statutes differs from Federal Circuit Court rulings that are not addressed in these amendments?

Briefly, aside from Federal Circuit Court rulings discussed above, there are two other important decisions by that Court with which OSC disagrees. In Eidmann v. Merit Systems Protection Board, 976 F.2d 1400 (Fed. Cir. 1992), the Federal Circuit overruled the MSPB's decision that permitted OSC to seek discipline of agency managers when an employee's whistleblowing is a "contributing factor" in a decision to take a personnel action. It held that the applicable standard in disciplinary action cases is a "significant factor" test.

In Special Counsel v. Santella, 65 M.S.P.R. 452 (1994), the Board subsequently held that, under Eidmann, in order to prove that protected activity was the significant motivating factor in taking a personnel action, OSC must demonstrate that the personnel action would not have occurred but for the protected conduct. Later, in Santella and Jech v. OSC and Internal Revenue Service, 86 M.S.P.R. 48 (2000), the MSPB held that OSC is responsible for paying a manager's attorney fees in a disciplinary action case, where it does not prevail, irrespective of whether it prosecuted the case with a reasonable basis and in good faith. The imposition of the heightened burden of proof as well as this financial liability on OSC interferes with OSC's capacity to prosecute government officials who retaliate against whistleblowers.

Second, despite Congress' continuing interest in broadening the protections available to whistleblowers, federal employees are still not protected from an agency's retaliatory decisions regarding security clearances. In Hesse v. State, 217 F.3d 1372 (Fed. Cir. 2000), the Federal Circuit held that the MSPB lacks jurisdiction over an employee's claim that his security clearance was revoked in retaliation for whistleblowing. It held that the MSPB may neither review a security clearance determination nor require the grant or reinstatement of a clearance, and that the denial or revocation of a clearance is not a personnel action.

This decision leaves a large loophole into which fall employees who have had their security clearances revoked in retaliation for making protected disclosures and, as a consequence, have been terminated from their federal government jobs.

2. The impact of the proposed amendments on OSC and MSPB caseloads would be reflected by the number of cases the agencies turned away or dismissed, as well as matters never presented to either agency because of an employee's belief that the reprisal experienced was not for a protected disclosure.

What are the implications on current and future workloads of OSC and MSPB, both in terms of the number of new cases received and the proportion in which a finding is made or favorable outcome obtained?

We do not anticipate that the proposed amendments would significantly increase OSC's workload. First, it is unlikely that a change in the statute would lead to a significant increase in the number of complaints filed. Individuals already file complaints with OSC alleging that they have suffered whistleblower retaliation when they have made disclosures during the course of their employment or directly to the wrongdoer. We do not believe that complainants are generally sophisticated enough to appreciate the legal distinctions that the Federal Circuit has read into the law of protected disclosures. Accordingly, we do not believe that there are a substantial number of additional complaints that would be filed or that would have to be investigated and analyzed if the law were amended to clarify that such disclosures are, indeed, protected.

It is unclear, on the other hand, to what extent the amendments would increase the number of favorable outcomes for whistleblowers. Favorable outcomes are dependent not only upon showing that the employee engaged in protected activity, but also that he or she suffered retaliation as a result of that activity. S. 995 affects the first part of the analysis—by clarifying the scope of protected disclosures. It does not affect the burdens of showing a relationship between such disclosures and the personnel action that followed.

How would this affect case processing timeliness and resources needed?

For the reasons set forth above, we do not anticipate that the amendments would affect case processing times or needed resources in any significant respects.

Although the amendments may encourage greater disclosure of wrongdoing, waste, and mismanagement, to what extent should there be concerns that the expansion and clarification of whistleblower protections could lead to an increase of meritless allegations and leave the system open to abuse, such as by seeking to harass supervisors? What can be done to help mitigate against such situations?

We do not believe that there is any basis for anticipating that the clarification of the law contained in S. 995 would lead to an increase in the number of "meritless" allegations. The amendments would merely clarify the scope of disclosures that would be considered to be protected; they would have no impact at all upon the burdens of

proof that apply when deciding whether retaliation has occurred. Further, OSC's examination and investigative function, as well as independent review by the MSPB provides adequate assurances against theoretical abuses such as the filing of complaints to "harass supervisors."

To the extent that there is perception about abuse of the system or harassment of supervisors, we believe that it stems from the significant misunderstanding of the whistleblower protection statute in the federal workforce among rank and file employees, as well as management. Managers who feel themselves harassed or unduly constrained from making proper and lawful management decisions are often ignorant about the scope of the Act's protection. This suggests that there should be a greater focus on ensuring agency compliance with 5 U.S.C. § 2302(c) (requiring agencies, in consultation with OSC, to educate their workforce on prohibited personnel practices); it does not suggest narrowing the scope of the legitimate protection that whistleblowers receive in order to screen out frivolous or abusive complaints.

3. Senate bill S. 995 would add as a prohibited personnel practice the implementation of nondisclosure policy, form, or agreement not meeting certain conditions. To what extent do agencies have nondisclosure policies, forms, or agreements that do not meet the conditions contained in the proposed amendments?

To what situations do they apply? To what extent has the existence of such nondisclosure policies, forms, or agreements deterred or discouraged disclosure of wrongdoing, waste, or mismanagement?

To what extent have employees been retaliated against for having made disclosures in violation of agency nondisclosure policies, forms, or agreements that would not comply with the proposed amendments? Are the conditions under the amendments for allowable nondisclosure policies, forms, or agreements adequate to protect national security and other government interests?

OSC has had little experience with this issue. Most of the agencies that employ such forms are intelligence agencies which are outside of OSC's jurisdiction. See 5 U.S.C. § 2302(a)(2)(C).

Since 1988, Congress has annually enacted an appropriations rider (known as the "anti-gag" statute) which precludes federal agencies from using appropriated funds to enforce non-disclosure agreements that do not notify employees that any restrictions on disclosures of information that they obtain in the course of their employment do not supersede their rights under the Whistleblower Protection Act and similar laws. Accordingly, it is unlikely that any agencies have been using forms that do not contain the disclaimer. S. 995 would codify the anti-gag statute on a permanent basis and make

it a prohibited personnel practice for an agency to fail to include the required notice in its non-disclosure forms.

We have not received any complaints related to the enforcement of non-disclosure provisions. We are unaware of any national security related objections posed to the disclaimers in these forms.

4. The Whistleblower Protection Act Amendments grant the Special Counsel independent litigating authority.

What other federal agencies possess this authority?

Many federal agencies possess some form of statutory independent litigating authority. A number of those federal agencies have statutory functions similar or related to those of OSC in that they investigate, prosecute, or adjudicate violations of employment related anti-discrimination or anti-retaliation provisions. In fact, OSC itself has the authority to appear in the court of appeals and represent complainants alleging that the MSPB has wrongfully rejected their complaints under the Uniformed Services Employment Restoration Rights Act (USERRA).

Federal agencies that have some form of independent litigating authority include:[1]

Board of Governors of the Federal Reserve System: 12 U.S.C. § 248 (p) (1994 & Supp. IV 1998)

Commodity Futures Trading Commission: 7 U.S.C. §§ 1-25 (1994 & Supp. IV 1998)

Consumer Product Safety Commission: 15 U.S.C. §§ 2061(e), 2076(b)(7) (1994)

Equal Employment Opportunity Commission: 42 U.S.C. §§ 2000e-4, 2000e-5(f)(2) (1994)

Federal Deposit Insurance Corporation: 12 U.S.C. § 1819(a)(fourth) (1994)

Federal Election Commission: 2 U.S.C. § 437d(a)(6)(1994 & Supp. IV 1998). 26 U.S.C. §§ 9010(a), 9040(a) (1994)

Federal Energy Regulatory Commission: 42 U.S.C. § 7171(i) (1994)

Federal Labor Relations Authority: 5 U.S.C. §§ 7104 & 7105(d)-(e) (1994)

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[1] Agencies with statutory responsibilities similar to OSC's are underlined.

Federal Trade Commission: 15 U.S.C. § 56 (1994) et seq.

Merit Systems Protection Board: 5 U.S.C. §§ 1201-1206 (1994)

National Labor Relations Board: 29 U.S.C. §§ 154(a), 160(e)

Securities and Exchange Commission: 15 U.S.C. §§ 78u(d)(1), 78u(c)-(e), 78u-3(c)(1) (1997)

U.S. Office of Special Counsel: 38 U.S.C. § 4324(d)(2) (1998 ed.)(cases arising under Uniformed Services Employment Restoration Rights Act (USERRA))

Doesn't this create the anomalous situation of one federal agency litigating against another federal agency?

There is nothing anomalous about one federal agency litigating against another when the issues involved concern violations of federal labor relations or civil service laws. Of course, OSC routinely investigates and litigates cases against other federal agencies before the Merit Systems Protection Board. More to the point, OSC's sister agencies, the MSPB and the FLRA, have long had independent litigating authority for all civil actions, except cases in the Supreme Court. See 5 U.S.C. § 1204(i)(MSPB); 5 U.S.C. § 7105(h)(FLRA).

Thus, the MSPB and the FLRA routinely appear in the federal courts of appeals in cases in which the opposing party is another federal agency, represented by the Justice Department. Indeed, on several occasions the Solicitor General has granted the FLRA the authority to represent itself in the Supreme Court, where the opposing party was a government agency represented by the Justice Department (through the Solicitor General).

In short, granting OSC independent litigating authority would not create an anomaly, it would eliminate one by bestowing upon OSC the same authority that its sister agencies have been granted. Further, granting OSC independent litigating authority would address a more basic anomaly: under current law, the Special Counsel —whom Congress intended would be a vigorous, independent, advocate for the protection of whistleblowers—can scarcely participate at all in the arena in which the law is largely shaped, namely the Court of Appeals for the Federal Circuit. Further, when OSC does appear in that Court, it must be represented by an agency OSC routinely investigates, through attorneys whose exposure to the WPA otherwise occurs only when they argue cases on behalf of agencies accused of engaging in retaliation.

How has the lack of this authority hampered the ability of OSC to prosecute whistleblower cases?

The lack of independent litigating authority, as noted above, and in my testimony on S. 995, shuts OSC out of the forum in which the law is largely shaped, the Court of Appeals for the Federal Circuit. We believe that if the Federal Circuit had the benefit of OSC's expertise and perspective in whistleblower cases, the Court might have a better understanding of the impact that its rulings in individual cases have upon the Act's administration generally. This is, of course, impossible to prove empirically; nonetheless, it is clear that without OSC's participation the Court has frequently issued rulings that undermine the enforcement of the WPA and that often do not appear to reflect an appreciation of the broader concerns at issue in whistleblower retaliation cases.

Senator Carl Levin
Follow-up Questions for the
GAC-ISPFS Hearing on July 25, 2001
S. 995, The Whistleblower Protection Act of 2001

Questions for the Honorable Elaine Kaplan
Special Counsel, Office of [the] Special Counsel

1. When a whistleblower either directly or through the Special Counsel brings a claim of reprisal to the Merit Systems Protection Board, is there a presumption that the public officers involved in the allegations of reprisal performed their duties properly? If so, what is the scope of and basis for that presumption?

When OSC examines complaints to determine whether an employee's disclosure is supported by a "reasonable belief," as required by 5 U.S.C. § 2302(b)(8), it does not apply any presumptions. Instead, OSC examines the totality of the circumstances to determine whether the employee subjectively believed that he was disclosing evidence of the existence of one of the forms of improper or illegal conduct set forth in the statute, and whether a reasonable person in possession of the same information might have believed that he was disclosing such evidence.

OSC does not assess the reasonableness of a whistleblower's belief by reference to a presumption that government officials perform their duties properly. We believe that the imposition of such a presumption would be contrary to Congress' clearly expressed intent to provide broad protection to whistleblowers. OSC has treated that portion of the Lachance decision which discusses such a presumption as dicta.

2. To address the problems created by the Federal Circuit in Lachance v. White with respect to the dicta on "irrefragable" proof, would it be helpful to affirmatively state in law that there is no presumption of appropriate behavior by federal agencies with respect to the allegations of reprisal in whistleblower cases?

Yes. We would suggest that the following language be added, perhaps as a new subsection (C) to 5 U.S.C. § 2302(b)(8):

> "A determination of whether the employee or applicant's disclosure is based upon reasonable belief as set forth in subsections (A) and (B) shall be based upon the totality of the circumstances and there shall be no presumption that agency officials did or did not perform their duties correctly or in accordance with law, rule, or regulation."

We would also suggest that any accompanying Committee report explain that this language is intended to repudiate the Federal Circuit's dicta in Lachance.

3. The OSC is required by law to conduct an annual survey of the individuals who contacted the OSC for assistance. The survey asks a number of questions about the individual's level of satisfaction with the assistance they received by the agency. According to the FY 2000 results, out of the approximately 516 respondents, over half of them were dissatisfied with OSC's communications with them, the timeliness of the handling [of] their case, and the final results of their case. These results are consistent with FY 1999 results. Could you comment on these results? Has your staff analyzed these results and considered any process improvements to improve the level of satisfaction for the federal employees seeking your assistance?

OSC staff responsible for conducting the surveys, as well as senior managers, routinely analyze the responses received from survey recipients. In fact, OSC revised the FY 1999-2000 survey forms, in part, to capture information about satisfaction with specific *components* of service, rather than just with service generally (as had been the case with prior surveys). Further, senior managers consider survey responses, including those on service issues, in developing and implementing ongoing process improvements. Before discussing some of those improvements, some general observations bear mentioning.

First, since the annual survey requirement became law in 1994, levels of satisfaction reported on the surveys have always varied according to the type of function being performed. Respondents consistently report much higher levels of satisfaction with results obtained and service rendered when OSC issues Hatch Act advisory opinions than they do when OSC performs enforcement or compliance functions (*i.e.,* reviewing, evaluating, investigating, or referring complaints and disclosures).

Second, broad correlations have consistently been observed between survey responses to the question about OSC's disposition of a complaint (*i.e.,* closure with or without corrective or disciplinary action) and the question about satisfaction with OSC service. That is, respondents whose complaints are resolved by OSC with corrective or disciplinary action are, for obvious reasons, far more likely to report that they were satisfied with the service they received from OSC. Conversely, respondents whose complaints are closed by OSC without corrective or disciplinary action are far more likely to report that they were dissatisfied with the service they received from OSC. This suggests, of course, that satisfaction with components of service shown on the complaint surveys is highly result-driven.

Nevertheless, OSC strives to do what it can to improve service received in carrying out its enforcement responsibilities. Timeliness has been a particular concern for years, due to a combination of factors chronicled in OSC's Report to Congress last

year on case processing backlogs. There is a constant tension at OSC between the goals of providing high quality investigations, legal analysis, and effective communication and the goal of reducing case backlogs. We are keenly aware of the need to improve processes to enable us to strike the proper balance between these competing demands.

Among the many measures taken in an effort to reduce case processing times since I became Special Counsel in May of 1998 are: re-deployment of administrative staff into front-line program positions; creation of Accelerated Case procedures to handle targeted case categories involving less serious personnel actions; requesting and receiving additional staff (15 new FTEs) all deployed to do case processing work; development of case handling priorities; and the elimination of unnecessary steps in the case handling process.

I am especially hopeful that a fundamental reorganization of the former Investigation Division and Prosecution Division that we implemented two months ago will improve the timeliness of OSC's case processing (consistent with the quality goals and objectives we have also incorporated in our strategic and annual performance plans). The two divisions have been reorganized into three consolidated Investigation and Prosecution Divisions (IPDs), each with investigative and legal staffs.

Before the reorganization, the Complaints Examining Unit (CEU) referred matters with issues that could not be resolved without further inquiry to the Investigation Division. Reports on completed investigations were reviewed by a supervisory team leader and by the head of the division, after which the matter went to the Prosecution Division for review and analysis by an attorney. Upon completion of the attorney's review, his or her analysis of, and recommendation about, the disposition of the matter would be reviewed by the head of the division, and sometimes by his deputy as well.

Since the reorganization, CEU refers matters with issues that cannot be resolved without further inquiry to one of the three IPDs. Investigative and attorney team leaders facilitate planning, analysis and case management activities. Investigators and attorneys work together in planning and conducting investigations, and in reviewing investigative results. The division head reviews final investigative results and prosecution recommendations.

In addition to encouraging more teamwork between investigators and attorneys in planning, developing, and resolving cases (by closure, settlement, or litigation), the reorganization has reduced levels of supervisory review from as many as four levels to one. We hope and expect that timeliness in many cases will be improved as a result.

Ongoing process improvements have also been directed at communications with complainants. Preliminary determination letters now offer complainants the opportunity to discuss OSC's findings and proposed disposition of a complaint with a

staff member on the phone, as well as to comment in writing. Further, we have instituted a practice at each stage in the investigation process of providing complainants with written guidance concerning how their complaints will be handled. We included a training session on clear writing in our agency-wide conference last year, we have increased supervisory oversight of the quality of communications and we circulate particularly well-written letters to appropriate staff as models. OSC also now posts statements of agency policy on matters related to case processing (*e.g.*, stays and disclosures of information) on its web site and the complaint form has been revised to provide more information to complainants. Further, I have repeatedly emphasized to the staff the importance of being responsive to complainants' concerns, even in the face of a challenging caseload.

While OSC will continue to strive to improve the perceptions of complainants and others about the service received, there are built-in limitations. Obviously, as noted previously, OSC has a relatively limited staff which is facing competing demands to process cases more quickly on the one hand, and to be more customer friendly, on the other. But more fundamentally, case outcomes are determined by the application of the law to the facts of each case. While we emphasize that the quality of our decision-making is as important as any other component of service, OSC cannot determine case outcomes in such a way that satisfaction with the ultimate result (especially closures without further action) will be assured and reflected in survey responses.

4. The public law requires that the head of each agency (in consultation with the OSC) ensure that federal employees are informed of the rights and remedies available to them relating to the Whistleblower Protection Act and prohibited personnel practices. The 2000 survey concluded that federal employees are not being informed of these rights. Out of the 516 respondents, 73 percent (376) stated that they were never informed about their rights regarding prohibited personnel practices. The 1999 survey results were consistent with the 2000 results. Has your office provided any guidance to the executive agencies in ensuring that all federal employees are properly informed of their rights?

OSC has made increasing federal employees' and managers' awareness of their rights and responsibilities under title 5 of the U.S. Code a very high priority. Thus, in early 1999, I created an Outreach Specialist position, and formally established an Outreach Program within OSC, in order to give more meaning to OSC's 'consultation' role under 5 U.S.C. § 2302(c).

Since the establishment of the outreach program, OSC has worked intensively with several large agencies—the Department of Energy, the Department of Veterans Affairs, the Customs Service, the Internal Revenue Service and the Small Business Administration—to provide broad-based training, which included satellite-linked training, and agency-wide distribution of information both in hard copy and through e-mail. Additionally, in 1999 and 2000, OSC provided 156 speakers at 126 training

conferences, forums or other public events. Among these were six town meetings co-sponsored by OSC and the Federal Labor Relations Authority and attended by federal managers, employees and labor relations specialists nationwide. OSC has also posted Power Point training programs on its web site, which can be downloaded for use by other federal agencies.

Beyond these efforts, during the previous Administration, OSC drafted and submitted for OMB's review, an Executive Order that would have reiterated agencies' obligations to educate their workforces and provided specific guidance to agencies about how to comply with § 2302(c). The proposed Order was not approved by the previous Administration.

Nonetheless, OSC has begun the process of designing a program under which agencies can certify that they have provided employees with information about their rights and responsibilities under § 2302(c). To gather background information to design the program, in July 2000, OSC issued a memorandum to heads of title 5 executive agencies asking them to identify any education and training programs that they had conducted in the last two years on prohibited personnel practices and whistleblower protection. Although most of the agencies that responded to the memorandum were engaged in some kind of education effort to a segment of their employees, only a handful of agencies indicated that they had a comprehensive training and information program directed to both managers and employees.

Based on the agency responses, we have begun to develop the mechanism under which agencies' efforts to fulfill their statutory requirement will be certified by OSC. A significant goal for the Outreach Program during FY 2002 under OSC's Government Performance and Results Act Plan is to complete design of the program, seek input from interested parties (including agency representatives, OMB, OPM, and employee groups), and begin implementation.

Senator Thad Cochran
Responses to Follow-up Questions for the
GAC-ISPFS Hearing on July 25,2001
S. 995, The Whistleblower Protection Act of 2001

The Honorable Beth S. Slavet, Chairman
U.S. Merit Systems Protection Board

Introduction

1. The Office of Special Counsel (OSC) and Merit System Protection Board (MSPB) are guided in their decisions on complaints and appeals by case law resulting from rulings of the United States Court of Appeals for the Federal Circuit.

   A. In what ways have Federal Circuit Court rulings impacted on how OSC and MSPB process and decide on allegations of whistleblower reprisal?

   Response: Decisions of the Federal Circuit are controlling authority for the Board. *Perry v. United States Postal Service*, 78 M.S.P.R. 272, 278 (1997). Thus, we are bound by the court's decisions regardless of whether we believe they correctly interpret the Whistleblower Protection Act (WPA). In this sense, therefore, the decisions of the court have a profound impact upon the Board's processing and adjudication of whistleblower reprisal claims.

   The court has issued several decisions that have limited the definition of protected disclosure that, by the WPA's terms, serves to trigger the protection of the Act. For example, the court has found that the complaint of alleged wrongdoing is not a protected disclosure under section 2302(b)(8) if it is directed toward the alleged wrongdoer. *Horton v. Department of the Navy*, 66 F.3d 279 (Fed. Cir. 1995). The court affirmed the Board's decision in *Horton v. Department of the Navy*, 60 MSPR 397 (1994), that the appellant's communications to his supervisor, the alleged wrongdoer, did not reveal any wrongdoing and were therefore not "disclosures." The court reaffirmed this holding in *Huffman v. Office of Personnel Management*, No. 00-3184, 2001 WL 914869 (Fed. Cir. Aug. 15, 2001), in which it reasoned that the plain meaning of the term "disclosure" means to reveal something that was unknown, and one cannot make a "disclosure" of misconduct to the wrongdoer who necessarily knows of the conduct in which he or she engages. The court found that, because Congress chose the word "disclosure" rather than words with broader connotations such as "report" or "state," the WPA could not be extended to cover an employee's complaints or statements to a supervisor of the supervisor's own misconduct. The court has further found an employee's disclosure of alleged violations of law is not protected under section 2302(b)(8) if it is made to his supervisor through normal channels as part of the routine performance of his job duties where there is no risk to personal job security for making such a disclosure. *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998). The court has also found that the disclosure of information that is publicly known is not protected under section 2302(b)(8). *Meuwissen v. Department of the Interior*, 234 F.3d 9 (Fed. Cir. 2000). All of these cases have limited the Board's authority to find that an appellant has made a protected disclosure.

   B. In what ways have the Court's rulings on whistleblower matters and OSC and MSPB's interpretation of the relevant statutes differed? What has been the effect on the application and enforcement of whistleblower protection statutes?

Response: For the reasons discussed above, the Board is not at liberty to actually "differ" with the court regarding the correct interpretation of the WPA. Nonetheless, there have been areas where the Board distinguished some of the court's holdings with respect to the WPA. *See Ganski v. Interior*, 86 M.S.P.R. 32 (2000) (distinguishing *Ellison v. MSPB*, 7 F.3d 1031 (Fed. Cir. 1993), and overturning in part *Thomas v. Dept. of Treasury*, 77 MSPR 224, 233 (1988), the Board held that disclosure of information that is reasonably believed to evidence a violation of a law, rule or regulation is protected without regard to the kind of law, rule or regulation involved and without any need to inquire further as to the type of fraud, waste or abuse the violation involved); *Johnson v. DHHS*, 87 M.S.P.R. 204 (2000) (the Board and the Federal Circuit have recognized that disclosures made by employees in performing their duties are protected from retaliation, and *Willis* should be limited to excluding reports of violations by private parties such as those at issue in that case); *Price v. NASA*, 83 M.S.P.R. 661 (1999) (disclosure of illegal accounting practices was protected because, although related to the appellant's duties, he could perform them without making the disclosure and he made it to a supervisor who could be expected to forward it to an authority able to provide a remedy); *Sood v. DVA*, 88 M.S.P.R. 214 (2001) (a protected disclosure may be made in the course of carrying out required job duties – here a supervisory medical technologist reported a design defect in a medical device that she believed violated OSHA regulations); *Arauz v. Dept. of Justice*, MSPB Docket No. SF-1221-99-0465-W-2, slip op. at 3 (Sept. 4, 2001)(the appellant's allegation that the INS looked the other way while a private organization violated state voter registration laws was a protected whistleblowing disclosure because the government's interests and good name were implicated in the alleged wrongdoing).

Also, a conflict now exists between the Board and the court regarding the "contributing factor" issue. To convince the Board to order corrective action, an appellant must prove by preponderant evidence that a disclosure described in 5 U.S.C. § 2302(b)(8) was a "contributing factor" in the agency's decision to take or fail to take a personnel action. Thus, the Board has found that the "contributing factor" issue comprises part of the merits determination. *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994). The Federal Circuit holds that the "contributing factor" issue is properly understood as a jurisdictional element. The court has stated that to establish Board jurisdiction over an IRA appeal, an appellant must allege that his protected disclosure was a "contributing factor" in the agency's decision regarding its action. *See Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1372 n.1 (Fed. Cir. March 22, 2001).

This conflict adds to the complexity of adjudicating whistleblower cases. However, although making an employee address the contributing factor element as part of the jurisdictional test would make it harder for the employee to prove whistleblower cases before the Board, another part of the court's decision in *Yunus* actually makes the employee's initial burden in the case easier. That is, *Yunus* holds that the Board has jurisdiction when the employee makes nonfrivolous allegations that he made a protected disclosure that was a contributing factor in the agency's decision to take or fail to take a personnel action. 242 F3d. at 1371. In contrast, the Board follows an earlier decision of the full court that requires Board jurisdiction to be proved, not just alleged. *See Cruz v. Department of the Navy*, 934 F.2d 1240 (Fed. Cir. 1991) (*en banc*). Thus, the Board requires an employee to prove the Board has jurisdiction over his whistleblower case by establishing, among other things, that he made a protected disclosure. The Board is currently in the process of determining what practical implications these differing approaches might have on the procedural and substantive aspects of our WPA jurisprudence. It has so far, in a number of cases, analyzed the fact pattern presented under both analyses.

C. To what extent and in what respects may these amendments change how OSC and MSPB will resolve cases before them vis-a-vis Federal Circuit Court rulings?

Response: As I stated in my written testimony prepared for the Subcommittee last July, it appears that the proposed amendments would have the effect of overruling the court's precedent in *Horton*, *Willis*, and *Meuwissen*. By expanding the definition of "protected disclosure" and overruling the precedent set forth in these cases, sections 1(a) and 1(b) of the bill would have the effect of substantially broadening the Board's jurisdiction and increasing the number of whistleblower cases that must be decided on the merits. Currently, the Board dismisses a substantial number of appeals because it finds, as a jurisdictional matter, that the appellants did not make protected disclosures. These dismissals, many of which occur at the regional level and are not appealed to the full Board, are often based on the Federal Circuit precedent that the proposed amendments would appear to overrule. Therefore, appeals that were previously dismissed would more likely be heard on the merits, and would have a substantial impact on the Board's resources.

D. Are there areas of the whistleblower laws in which OSC and MSPB interpretation of the statute differs from Federal Circuit Court rulings that are not addressed in these amendments?

Response: A portion of my response to Question 1.B., above, applies here. As previously stated, a conflict now exists between the Board and the court regarding the "contributing factor" issue. To convince the Board to order corrective action, an appellant must prove by preponderant evidence that a disclosure described in 5 U.S.C. § 2302(b)(8) was a "contributing factor" in the agency's decision to take or fail to take a personnel action. Thus, the Board has found that the "contributing factor" issue comprises part of the merits determination. *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994). The Federal Circuit holds that the "contributing factor" issue is properly understood as a jurisdictional element. The court has stated that to establish Board jurisdiction over an IRA appeal, an appellant must allege that his protected disclosure was a "contributing factor" in the agency's decision regarding its action. *See Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1372 n.1 (Fed. Cir. March 22, 2001).

This conflict adds to the complexity of adjudicating whistleblower cases. However, although making an employee address the contributing factor element as part of the jurisdictional test would make it harder for the employee to prove whistleblower cases before the Board, another part of the court's decision in *Yunus* actually makes the employee's initial burden in the case easier. That is, *Yunus* holds that the Board has jurisdiction when the employee makes nonfrivolous allegations that he made a protected disclosure that was a contributing factor in the agency's decision to take or fail to take a personnel action. 242 F3d. at 1371. In contrast, the Board follows an earlier decision of the full court that requires Board jurisdiction to be proved, not just alleged. *See Cruz v. Department of the Navy*, 934 F.2d 1240 (Fed. Cir. 1991) (*en banc*). Thus, the Board requires an employee to prove the Board has jurisdiction over his whistleblower case by establishing among other things, that he made a protected disclosure. The Board is currently in the process of determining what practical implications these differing approaches might have on the procedural and substantive aspects of our WPA jurisprudence. It has so far, in a number of cases, analyzed the fact pattern presented under both analyses.

2. The impact of the proposed amendments on OSC and MSPB caseloads would be reflected by the number of cases the agencies turned away or dismissed, as well as matters never presented to either agency because of an employee's belief that the reprisal experienced was not for a protected disclosure.

   A. What are the implications on current and future workloads of OSC and MSPB, both in terms of the number of new cases received and the proportion in which a finding is made or favorable outcome obtained?

Response: The MSPB did not attempt to develop an estimate of the number of new whistleblower appeals that would be filed if the S. 995 amendments regarding protected disclosures are enacted. Because we have no way of knowing how many individuals are not filing whistleblower appeals with MSPB because they believe their disclosures are not protected by the WPA, we have no basis for an estimate of the impact of these amendments on the number of new cases that would be filed. It is reasonable to expect that the amendments would result in some new cases being filed, but we cannot provide an estimated number.

Our estimate of the impact of these amendments on MSPB resources is based on our most recent statistical data for IRA appeals that were filed with the Board. In FY 2000, 34 percent of the IRA appeals decided (93 of 276) were dismissed for lack of jurisdiction. Our case processing database does not contain data on the reason a case was dismissed for lack of jurisdiction, so we cannot tell precisely how many IRAs were dismissed because the judge ruled that the appellant had not made a protected disclosure. Because we know that the issue of whether a disclosure is protected arises with some frequency, however, we estimate that the percentage of IRAs dismissed for lack of jurisdiction would fall from 34 percent to about 20 percent if the amendments are enacted. This translates to about 38 cases per year that previously would have been dismissed on jurisdictional grounds going on to a full adjudication on the merits.

With respect to outcomes obtained, we have no way of predicting what the impact of the amendments might be on the outcome of these cases , i.e., the rate at which decisions will be rendered in favor of the appellants. The outcome of a case will depend on the specific facts of the case, the evidence submitted, whether the appellant meets his or her burden of proof, and so forth.

In our estimate, we have not attempted to include non-IRA whistleblower appeals, that is, cases involving an agency personnel action that is directly appealable to the Board, in which the appellant raises a claim that the personnel action was taken because of whistleblowing. In such cases, the Board's jurisdiction is based on the personnel action—not the whistleblower claim, so the S. 995 amendments regarding protected disclosures would have no effect on the jurisdictional determination. The amendments would have some impact, of course, because they would generally allow more whistleblower claims to be considered (i.e., claims involving disclosures that would not previously have been protected). This would result in some non-IRA whistleblower appeals taking longer to process and requiring additional legal hours than they would have previously taken, but we do not have sufficient data on which to base an estimate of this impact.

B. How would this affect case processing timeliness and resources needed?

Response The MSPB's average cost to process a case is $3,500, which includes the cost of processing all appeals in the regional and field offices and the cost of second-level processing of approximately 20 percent of those cases at headquarters on petition for review (PFR). Regional case processing accounts for about 70 percent of the average cost ($2,450), and headquarters processing accounts for the remaining 30 percent ($1,050). Based on the experience of our administrative judges, we estimate that an IRA appeal that is adjudicated on the merits takes about 2.5 times more in processing hours than an average appeal does, resulting in an average regional processing cost of $6,125. Based on the experience of the Board members and our headquarters attorneys, we estimate that a PFR on an IRA appeal that is considered on the merits will take approximately 9 times as many processing hours as an average PFR, resulting in an average headquarters processing cost of $9,450. This produces a total average processing cost for an adjudicated IRA of approximately $15,575. The average processing cost

for an IRA appeal that is dismissed is $4,278. Therefore, the average processing cost for an IRA appeal that is adjudicated on the merits is about $11,297 more than the average processing cost for an IRA appeal that is dismissed. Applying that additional cost to the estimated 38 additional cases that would go on to a full adjudication on the merits if the S. 995 amendments regarding protected disclosures are enacted produces a total additional cost to MSPB of approximately $429,000 annually.

C. Although the amendments may encourage greater disclosure of wrongdoing, waste, and mismanagement, to what extent should there be concerns that the expansion and clarification of whistleblower protections could lead to an increase of meritless allegations and leave the system open to abuse, such as by seeking to harass supervisors? What can be done to help militate against such situations?

Response: The Board does not take the position that enactment of this legislation will result in an increase of meritless allegations of whistleblowing. Under current law, most of these cases are dealt with and resolved on jurisdictional grounds, usually without a hearing. The proposed legislation would likely require the board to conduct additional hearings and adjudicate additional cases on the merits.

3. Senate bill S. 995 would add, as a prohibited personnel practice, the implementation of a nondisclosure policy, form, or agreement not meeting certain conditions. To what extent do agencies have nondisclosure policies, forms, or agreements that do not meet the conditions contained in the proposed amendments?

Response: The Board has no way of knowing the extent to which agencies have and use nondisclosure policies, forms, or agreements. Consequently, the Board does not know the extent to which these nondisclosure policies, forms, or agreements do not meet the conditions contained in the proposed amendments. The Office of Personnel Management and/or the Office of Management and Budget may be in a better position to obtain this information from Federal agencies.

A. To what situations do they apply? To what extent has the existence of such nondisclosure policies, forms, or agreements deterred or discouraged disclosure of wrongdoing, waste, or mismanagement?

Response: Each federal agency that implements nondisclosure policies, forms, or agreements does so in a manner that meets the specific needs of that agency. There is no clearinghouse or central repository of nondisclosure policies, forms, or agreements. Therefore, the Board does not know the situations to which the nondisclosure policies, forms, or agreements apply or the extent to which they have deterred or discouraged disclosure of wrongdoing, waste, or mismanagement.

B. To what extent have employees been retaliated against for having made disclosures in violation of agency nondisclosure policies, forms, or agreements that would not comply with the proposed amendments?

Response: The Board has not issued a decision finding that an agency retaliated against an employee for making such a disclosure. Moreover, our research indicates that allegations of this particular kind have not been raised before the Board at the regional level.

C. Are the conditions under the amendments for allowable nondisclosure policies, forms, or agreements adequate to protect national security and other government interests?

Response: We do not have any information that would enable the Board to determine whether the nondisclosure policies, forms, or agreements are adequate to protect national security or other government interests. Since the protection of national security is not a statutory mission of the U.S. Merit Systems Protection Board, the Board does not have the expertise to make this assessment.

I. The proposed amendments would change jurisdiction for judicial review of *MSPB* decisions from the Court of Appeals for the Federal Circuit to also allow an appeal to a court of appeals for the circuit in which the petitioner resides. *(The reasoning behind the Court of Appeals for the Federal Circuit having sole jurisdiction over federal personnel matters was to have a court with knowledge of federal personnel issues leading to a body of consistent law.)*

A. How do you respond to the concern that this change in court jurisdiction might encourage forum shopping?

Response: Some forum shopping would result from the likely development of divergent case law in the various circuits since appellants would have the choice of filing in the Federal Circuit or the circuit in which they reside. The nature of legal decisionmaking would seem to make some degree of inconsistency among the different courts inevitable. This was the experience prior to creation of the Federal Circuit which was given jurisdiction over MSPB cases to promote greater uniformity in civil service law. For example, the courts disagreed on the agency's burden of proof in appeals from denial of within grade pay increases and concerning the employee's entitlement to back pay on termination of a suspension based on a criminal indictment when the indictment was dismissed and the employee was returned to work.

B. What will happen in case of conflicting rulings by various circuits? Given the remote chance that the Supreme Court will attempt to hear those cases, is it safe to say this expansion in jurisdiction might create conflicting case law? Why are we to believe that the other circuits will rule differently from the Federal Circuit?

Response: The Supreme Court's review of civil service cases to resolve splits in the circuits is likely to be very infrequent judging from the experience prior to establishment of the Federal Circuit and considering the trend towards the Court's issuance of fewer decisions generally. If such conflicts develop and the Board does not tailor its decisions to the case law of the circuit in which the appellant resides, the Board will be reversed if the appellant elects to appeal to that court. The other circuits will not necessarily rule differently from the Federal Circuit very often, but it seems probable that they will do so in some cases.

Senator Carl Levin
Responses to Follow-up Questions for the
GAC-ISPFS Hearing on July 25,2001
S. 995, The Whistleblower Protection Act of 2001

The Honorable Beth S. Slavet, Chairman
U.S. Merit Systems Protection Board

. When a whistleblower either directly or through the Special Counsel brings a claim of reprisal to the Merit Systems Protection Board, is there a presumption that the public officers involved in the allegations of reprisal performed their duties properly? If so, what is the scope of and basis for that presumption?

Response: The Board has not applied a presumption that an official performed his duties properly in evaluating whether an appellant reasonably believed his disclosure of misconduct by that official or in assessing whether the official retaliated because of the disclosure. As interpreted by the Board, the statute requires whistleblowers to prove their claim that a protected disclosure was a contributing factor in an adverse personnel action, but it does not require them to overcome a presumption in favor of the alleged retaliating official.

. To address the problems created by the Federal Circuit in *LaChance v. White* with respect to the dicta on "irrefragable" proof, would it be helpful to affirmatively state in law that there is no presumption of appropriate behavior by federal agencies with respect to the allegations of reprisal in whistleblower cases?

Response: Because the presumption cited in *LaChance v. White* would greatly increase whistleblowers' burden of proving their claims, such legislation would be useful if the presumption is contrary to Congress's intent. (Please refer also to Chairman Slavet's answer to Senator Akaka's Question #2.)

Senator Daniel K. Akaka
Responses to Follow-up Questions for the
GAC-ISPFS Hearing on July 25,2001
S. 995, The Whistleblower Protection Act of 2001

The Honorable Beth S. Slavet, Chairman
U.S. Merit Systems Protection Board

1. In whistleblower cases, the Board has statutory authority to order a stay of a personnel action if the Board determines that a stay would be appropriate. What standard does the Board currently use in determining whether a stay would be appropriate? In FY 2000, how many requests for stays were filed by whistleblowers, and how many of these requests were granted?

   Note: Nanci Langley instructed us that no response was necessary for this question.

2. S. 995 attempts to clarify the definition of a covered disclosure to counter decisions by the Court of Appeals for the Federal Circuit, which have limited the scope of protection under the WPA. Under current law, a covered disclosure includes any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences specified governmental wrongdoing. As you know, in interpreting this provision, the court held in *LaChance v. White* that "the proper test is this: could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence gross mismanagement? A purely subjective perspective of an employee is not sufficient even if shared by other employees." The court went further to require that the reasonableness review begin with the "presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations .... And this presumption stands unless there is "irrefragable proof" to the contrary."

   A. S. 995 adds the word "credible" to the statute. In your testimony, you point out that inserting the word "credible" may increase evidentiary burdens on employees. Assume that it is the specific intent of Congress to overturn the presumption from *LaChance*. What language, in your opinion, would more effectively accomplish this goal?

Response: In *LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied,* 120 S. Ct. 1157 (2000), the court held that the "proper test" for determining whether a putative whistleblower met the statutory "reasonable belief" criterion is whether "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [could] reasonably conclude that the actions of the government evidence" the type of wrongdoing described in section 2302(b)(8). The court went on to remark that a public official who is the subject of a disclosure is presumed to perform his duties in good faith, and that it takes "irrefragable proof" to overcome the presumption. *Id.*

If Congress intends to overturn this presumption, S.995 could be revised to more accurately reflect this intent by eliminating the word "credible" in sections 1(a)(1)(A), 1(a)(2)(A), and 1(a)(3) ("(C)(i)") or by substituting another word for it. We considered recommending the substitution of the word "some" for "credible," but realized that this substitution is likely to create other problems of interpretation. In any event, in order to effectuate the purpose of S. 995 as we understand it, we recommend that the Subcommittee include strong language in its report on the bill indicating that these sections were revised for the express purpose of negating the "irrefragable proof" statement in *LaChance v. White*. The need

for a specific statutory amendment and not merely strong report language indicating the intent of legislators is illustrated by the recent decision in *Huffman v. Office of Personnel Management*, No. 00-3184 (Fed. Cir. Aug. 15, 2001). In that case, an employee argued that a disclosure he had made was protected because the Senate Report on the 1994 Whistleblower Protection Act Amendments indicated that the type of disclosure he had made was covered by the statute. The court disagreed, holding that the remarks in the 1994 committee report were not entitled to any weight because Congress did not actually amend the relevant provisions of the statute in 1994. *Huffman*, slip op. at 11-12. Based on its reasoning in *Huffman*, the court would appear to be disinclined to interpret S. 995 as overturning any aspect of *LaChance v. White* if the intent expressed in your question is not reflected in an actual revision to existing statutory language.

3. In your written testimony, you indicated that S. 995 would significantly increase MSPB's workload. Since the majority of changes proposed in S. 995 simply clarify the law already in place, could you provide specific examples detailing how these clarifications would significantly increase your workload?

Response: The MSPB estimate of the impact of S. 995 on our workload, and thus on our case processing costs, focused on four areas of S. 995: (a) the amendments regarding protected disclosures; (b) the new prohibited personnel practice concerning the use of non-disclosure agreements; (c) the new litigating authority for the Special Counsel; and (c) the expansion of judicial review of MSPB decisions to the regional circuit courts of appeals. While the amendments regarding protected disclosures can be viewed as clarifying existing law, the other three provisions clearly represent changes in existing law. Even where the law on protected disclosures is concerned, our current IRA appeals workload—and the associated case processing costs—is determined by the law as it is currently interpreted and applied. Although the S. 995 amendments regarding protected disclosures may be intended to clarify the intent of Congress in enacting the WPA, the result is still that more disclosures will be protected and, therefore, more IRA appeals will be adjudicated on the merits rather than being dismissed for lack of jurisdiction. Our estimates in each of the four areas of S. 995 that would have an impact on MSPB's workload are as follows:

(a) Amendments regarding protected disclosures – Estimated additional costs: $429,000

Our estimate of the impact of these amendments on MSPB resources is based on our experience to date in adjudicating IRA appeals. These cases, of course, have been processed under the WPA as it is currently interpreted and applied, <u>not</u> as it would be interpreted and applied if the S. 995 amendments are enacted. Therefore, our estimates of the impact of these amendments are conservative and represent the minimum cost we believe that the MSPB would incur.

In FY 2000, 34 percent of the IRA appeals decided (93 of 276) were dismissed for lack of jurisdiction. Our case processing database does not contain data on the <u>reason</u> a case was dismissed for lack of jurisdiction, so we cannot tell precisely how many IRAs were dismissed because the judge ruled that the appellant had not made a protected disclosure. Because we know that the issue of whether a disclosure is protected arises with some frequency, however, we estimate that the percentage of IRAs dismissed for lack of jurisdiction would fall from 34 percent to about 20 percent if the amendments are enacted. This translates to about 38 cases per year going on to a full adjudication on the merits that previously would have been dismissed.

The MSPB's average cost to process a case is $3,500, which includes the cost of processing all appeals in the regional and field offices and the cost of second-level processing of approximately 20 percent of those cases at headquarters on petition for review (PFR). Regional case processing accounts for about

70 percent of the average cost ($2,450), and headquarters processing accounts for the remaining 30 percent ($1,050). Based on the experience of our administrative judges, we estimate that an IRA appeal that is adjudicated on the merits takes about 2.5 times as many hours to process as an average appeal, resulting in an average regional processing cost of $6,125. Based on the experience of the Board members and our headquarters attorneys, we estimate that a PFR on an IRA appeal that is considered on the merits will take approximately 9 times as many hours to process as an average PFR, resulting in an average headquarters processing cost of $9,450. This produces a total average processing cost for an adjudicated IRA of approximately $15,575. The average processing cost for an IRA appeal that is dismissed is $4,278. Therefore, the average processing cost for an IRA appeal that is adjudicated on the merits is about $11,297 more than the average processing cost for an IRA appeal that is dismissed. Applying that additional cost to the estimated 38 additional cases that would go on to a full adjudication on the merits if the S. 995 amendments regarding protected disclosures are enacted produces a total additional cost to MSPB of approximately $429,000 annually.

In our estimate, we have not attempted to include non-IRA whistleblower appeals, that is, cases involving an agency personnel action that is directly appealable to the Board, in which the appellant raises a claim that the personnel action was taken because of whistleblowing. In such cases, the Board's jurisdiction is based on the personnel action—not the whistleblower claim, so the S. 995 amendments regarding protected disclosures would have no effect on the jurisdictional determination. The amendments would have some impact, of course, because they would allow more whistleblower claims to be considered in non-IRA whistleblower appeals (i.e., claims involving disclosures that would not previously have been protected). This would result in some non-IRA whistleblower appeals taking longer to process than they would have previously, but we do not have sufficient data on which to base an estimate of this impact.

The MSPB did not attempt to develop an estimate of the number of new whistleblower appeals that would be filed if the S. 995 amendments regarding protected disclosures are enacted. Because we have no way of knowing how many individuals are not filing whistleblower appeals with MSPB because they believe their disclosures are not protected by the WPA, we have no basis for an estimate of the impact of these amendments on the number of new cases that would be filed. It is reasonable to expect that the amendments would result in some new cases being filed, but we cannot provide an estimated number.

(b) New prohibited personnel practice concerning the use of non-disclosure agreements - Estimated additional costs: $6,000

Our estimate of the impact of this amendment is based on our experience with complaints filed with the MSPB by the Special Counsel. There are currently 12 prohibited personnel practices defined by 5 U.S.C. 2302(b), and the Special Counsel may file complaints with the Board seeking corrective or disciplinary action with respect to these prohibited personnel practices. (In the case of the prohibited personnel practice described at 5 U.S.C. 2302(b)(11)—taking a personnel action that violates a veterans' preference requirement, the Special Counsel may seek disciplinary action only.) A Special Counsel corrective action complaint seeks to have the Board order appropriate corrective action for the individual who was the subject of the prohibited personnel practice. A Special Counsel disciplinary action complaint seeks to have the Board impose discipline on the employee who committed the prohibited personnel practice.

The number of prohibited personnel practice complaints filed by the Special Counsel varies greatly from year to year—from one or two in some years to perhaps a dozen in another year. We do not believe that the addition of one more prohibited personnel practice would have a major impact on this record.

Accordingly, we estimate that the addition of this new prohibited personnel practice would produce one more Special Counsel complaint annually.

Historically, the average cost to process a case by our Office of the Administrative Law Judge—which handles Special Counsel complaints and certain other cases—has been about $6,000. Therefore, our estimate of the cost to MSPB of this provision of S. 995 is approximately $6,000 annually for time spent only by the ALJ staff. Additional costs would be incurred for any appeal of such decisions to the full Board.

Our estimate does not include any allowance for the impact of this new prohibited personnel practice on our appeals workload. An individual who appeals an agency personnel action to the Board may raise a claim that the action was the result of a prohibited personnel practice, e.g., that the action was the result of the individual's refusal to engage in political activity, that the action was taken because the individual exercised a compliant or grievance right, or that the action was taken because the individual made protected disclosures (whistleblowing). Enactment of this provision of S. 995, therefore, would allow one more prohibited personnel practice claim to be raised in an appeal. While any additional claim can lengthen the processing time for an appeal, we do not believe that this prohibited personnel practice would be raised in a significant number of appeals.

(c) New litigating authority for the Special Counsel - Estimated additional costs: $74,000

Our estimate of the impact of this amendment is based on a review of our statistics for whistleblower appeals and Hatch Act cases and on our experience with the exercise of litigating authority by the Director of OPM. The Special Counsel's new litigating authority would encompass only cases decided by the Board that include an allegation of a violation of 5 U.S.C. 2302(b)(8)—IRA appeals, non-IRA whistleblower appeals, and Special Counsel corrective and disciplinary action complaints based on an alleged violation of 5 U.S.C. 2302(b)(8)—and Board decisions in Hatch Act cases involving Federal employees. As is the case with OPM, the Special Counsel would have to seek reconsideration by the Board before filing for judicial review if the Special Counsel was not a party to or intervenor in the case before the Board.

In FY 2000, the Board decided 445 cases that would be subject to the proposed new litigating authority for the Special Counsel—276 IRA appeals, 164 non-IRA whistleblower appeals, 1 OSC corrective action in a whistleblower case, and 4 OSC Hatch Act complaints involving Federal employees. (There were no decisions on OSC disciplinary action complaints in whistleblower cases during FY 2000.) In the majority of IRA appeals, the Special Counsel has already considered the appellant's complaint and declined to seek corrective action before the appellant files with the Board. Therefore, we consider it unlikely that the Special Counsel would seek Board reconsideration and judicial review in these cases, except on particularized issues of law. Other IRA appeals, however, are filed with the Board because more than 120 days have passed since the complaint was filed with the Special Counsel and the Special Counsel has not advised the appellant that the office will seek corrective action. There is a greater likelihood of the Special Counsel seeking Board reconsideration and judicial review in these cases (41 such cases in FY 2000), particularly where the Board dismisses the case or does not order corrective action. As for non-IRA whistleblower appeals, we believe the Special Counsel would be most likely to seek Board reconsideration and judicial review in cases where the Board does not order relief for the appellant (26 such cases in FY 2000). As for OSC corrective and disciplinary action complaints in whistleblower cases, and complaints in Federal Hatch Act cases, these cases are usually concluded with either a settlement or a Board decision favorable to the Special Counsel. Therefore, we would expect only occasional use of the Special Counsel's litigating authority in these cases.

The reasoning outlined above results in a total of 67 cases, out of the universe of 445, in which the litigating authority of the Special Counsel might be used. However, S. 995 grants litigating authority to the Special Counsel only where the Special Counsel determines that the Board's decision "will have a substantial impact on the enforcement of section 2302(b)(8) or subchapter III of chapter 73," which further narrows the field of cases in which the Special Counsel might seek Board reconsideration and judicial review. The OPM Director is subject to a similar "substantial impact" requirement in the use of the Director's litigating authority and generally seeks Board reconsideration of a decision in only 1 or 2 cases each year.

Taking these factors into account, and assuming that the Special Counsel will use this new litigating authority somewhat more aggressively than OPM has used its litigating authority, we estimate that the S. 995 provision granting litigating authority to the Special Counsel would add 5 requests for reconsideration and 2 litigation cases to the Board's workload annually. Given the considerable amount of professional staff time required for both reconsideration requests and litigation, this would require the addition of an attorney to the Office of the General Counsel, at an estimated cost of approximately $74,000 annually.

(d) Expansion of judicial review of MSPB decisions to the regional circuit courts of appeals - Estimated additional costs: $147,000

Our estimate of the impact of these amendments is based on our experience with litigation in the U.S. Court of Appeals for the Federal Circuit, particularly with regard to sending MSPB attorneys for oral argument before the Court. Although the Federal Circuit issues from 400 to 600 decisions on review of final Board decisions annually, the Board is the named respondent in only about 100 of these cases—those that implicate the Board's jurisdiction or procedures. (Where judicial review is sought on the merits of an underlying personnel action or on a request for attorney's fees, the employing agency is the named respondent and is defended by the Department of Justice.)

Currently, virtually all MSPB litigation is in the Federal Circuit. (In the few Hatch Act cases involving employees of State or local governments, judicial review of a Board decision is in the regional circuit courts of appeals. In mixed cases—those including an allegation of discrimination based on race, color, ethnicity, religion, sex, age, or disability—the appellant may seek trial *de novo* in an appropriate United States district court, but the Board does not appear in these cases.) These provisions of S. 995 would allow an appellant to seek judicial review of a Board decision in the court of appeals for the circuit in which the appellant resides and would allow the OPM Director to seek judicial review in any appellate court of competent jurisdiction. (NOTE: The exact phrase used in the bill with respect to the OPM Director seeking judicial review is: "any appellate court of competent jurisdiction as provided under subsection (b)(2)" (emphasis added). Because subsection (b)(2) of 5 U.S.C. 7703 deals only with the right of a mixed case appellant to seek trial *de novo* in an appropriate United States district court, it is unclear what this subsection has to do with OPM seeking judicial review in the appellate courts. In making our cost estimate, we have not taken this phrase into account.)

It is important to note that the provisions of S. 995 that would amend 5 U.S.C. 7703(b)(1) and (d) would affect all Board decisions where judicial review is currently in the Federal Circuit, not just decisions in whistleblower and Federal Hatch Act cases. Our estimate of the impact of this provision assumes that appellants generally will choose to file for judicial review of a Board decision in the court of appeals for the circuit in which the appellant resides. We further assume that the OPM Director will continue to file primarily in the Federal Circuit, despite the new authority to file in the other appellate courts. As

currently drafted, the bill would restrict the Special Counsel to filing for judicial review of a Board decision only in the Federal Circuit. As discussed previously, the Special Counsel's litigating authority would be restricted to Board decisions in whistleblower and Federal Hatch Act cases only.

Based on these assumptions, we estimate that the Board would need to add one attorney and one paralegal to the Office of the General Counsel and would have to send MSPB attorneys to approximately 15 oral arguments in the regional circuit courts of appeals annually. Taking into account salaries and benefits for the new employees, travel and per diem costs for appearances before appellate courts around the country, and other expenses such as long distance phone calls and delivery of briefs to the courts, we estimate the additional cost of this provision to MSPB at approximately $147,000 annually. Although there would be fewer oral arguments before the Federal Circuit as a result of cases being filed in the regional circuit courts of appeals, there would be no cost savings for the Board because our attorneys need only walk a few blocks to the Federal Circuit for appearances before that court.

The total additional cost of S. 995 provisions to MSPB is approximately $656,000. Please see Attachment "A" for a summary of these estimates.

4. As you know, the whistleblower protection statute seeks to encourage disclosure of serious governmental misconduct, while deterring frivolous or non-credible claims. Do you believe S. 995 would contribute to an increase in the number of frivolous or non-credible claims?

   Response: The Board does not take the position that enactment of this legislation will result in an increase in meritless allegations of whistleblowing. However, we do know that because under current law, most of these cases are dealt with and resolved on jurisdictional grounds, usually without a hearing, the proposed legislation would likely require the Board to conduct additional hearings and adjudicate additional cases on the merits.

5. In your statement, you point out that S. 995, which permits employees to file whistleblower complaints alleging reprisal for filing a complaint, appeal, or grievance, would impact the remedies currently available under other statutory appeal and grievance systems. You provided the example of employment discrimination complaints, where extending whistleblower protection to employee discrimination complaints could result in serious inefficiencies in the enforcement of programs administered by the Office of Special Counsel and the Equal Employment Opportunity Commission. S. 995 does not intend to extend whistleblower protections to disclosures alleging illegalities for which statutory appeal rights currently exist for the employee, and such cases should continue to be adjudicated under their respective statutes. What language, in your opinion, should be included to S. 995 to more accurately reflect this intent?

   Response: Since the Office of Special Counsel and the Equal Employment Opportunity Commission have lead responsibility for enforcing whistleblower protections and statutes prohibiting employment discrimination, I believe that these agencies should have the first opportunity to propose such language. It may appear to be presumptuous on the part of the Board to do so at this point. Of course, we would be available to work with the OSC and the EEOC in this effort.

6. In 1994, Congress amended 5 U.S.C. section 1214 (g)(2) by changing the remedies available from "reasonable costs" to "consequential damages." As Senator Grassley stated in his written testimony, "consequential damages were intended to be interpreted as **greater** than compensatory. Instead they have been interpreted as being **less** than compensatory damages." (emphasis in original). The MSPB and the Federal Circuit have held that consequential damages under this section does not include non-

pecuniary damages. Assume that it is the intent of Congress to permit the awarding of all damages necessary to "make a whistleblower whole," including nonpecuniary damages. What language, in your opinion, should be added to S. 995 to more accurately reflect this intent?

Response: As is set forth below, amendments to 5 USC § 1214(g) making clear that compensatory damages are recoverable under that section should address the concerns raised above.[1]

(g) If the Board orders corrective action under this section, such corrective action may include –

(1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; ~~and~~

(2) reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, and other out-of-pocket expenses ~~and any other reasonable and foreseeable consequential damages~~;

3) compensatory damages, including nonpecuniary damages such as compensation for emotional pain and suffering; and

4) reasonable and foreseeable consequential damages.

If these changes are made to 5 USC § 1214(g), Congress might want to consider making corresponding changes to 5 USC § 1221(g)(1)(A), for purposes of consistency.

[1] These recommendations are merely suggestions as requested by the members of the Subcommittee. Other agencies may have recommendations for language that may accomplish the Subcommittee's objectives more effectively. These recommendations are not intended to constitute advisory opinions in contravention of the Board's enabling statute.

Estimated Costs of S.995
The Whistleblower Protection Act of 2001
As of July 24, 2001

Expansion of Disclosures Protected under the Whistleblower Protection Act

		Rounded Total
Average cost per case	3,500	
Cost to Process IRA in Regions(2.5 times as time consuming)	6,125	
Cost to Process IRA at Headquarters(9 times as time consuming)	9,450	
Average Cost to Process an IRA Adjudicated Case	15,575	
Average Cost to Process an Average Dismissed IRA case	4,278	
Average Additional Cost to Process an IRA Adjudicated Case ($15,575-$4,278= $11,297)	11,297	
Cost for 38 additional adjudicated IRA appeals	429,294	**429,000**

FTE: **4**
1 Regional AJ
2 Headquarters Attorneys
1 Paralegal

Anti-Gag Amendments

ALJ Processes 30 actions a year and has a total cost of $180,000 for the ALJ and an assistant.

Will receive one more OSC corrective or disciplinary action	6,000	**6,000 PLUS**

Independent Litigating Authority for the Office of Special Counsel

2 litigations requiring 160 attorney hours and 10 support hours each	19,600	
5 requests for reconsideration requiring 180 attorney hours and 8 support each	54,800	
Total	74,400	**74,000**

FTE: 1 Headquarters Attorney

Judicial Review of Merit Systems Protection Board Decisions

Attorney	98,602	
Paralegal	39,554	
Travel to 10 new and 5 transferred hearing at $500	7,500	
Miscellaneous Expenses at $100 per hearing	1,500	
Total	147,156	**147,000**

FTE: 1 headquarters attorney and 1 paralegal

Total **656,000 PLUS**

Total FTE: 7
1 Regional AJ
4 Headquarters Attorneys
2 Paralegals

Senator Thad Cochran
Follow-up questions for the
GAC-ISPFS Hearing on July 25, 2001
S. 995, The Whistleblower Protection Act of 2001

Questions for Mr. Thomas Devine
Legal Director, Government Accountability Project

1. Have statutes other than the Whistleblower Protection Act provided whistleblowers greater success in bringing their cases? If so, why have whistleblowers had greater success under those laws than under the Whistleblower Protection Act? Are there any lessons learned that have potential application in the context of the Whistleblower Protection Act?

Twenty-nine other federal statutes contain whistleblower protection clauses, nearly all concerning corporate or government contractor employees performing duties of particular sensitivity or public policy significance. The most common model to resolve cases under these laws is administrative hearings adjudicated in the Department of Labor. (DOL) Disputes involving retaliation for challenges to fraud in government contracts can be brought for jury trials in U.S. district courts.

After passage of the 1994 amendments, academic experts and practitioners viewed the WPA as state of the art for federal statutory rights. Now there is an overwhelming consensus that it is the lowest common denominator. Whistleblowers win from 10-33% of decisions on the merits under the other statutes, depending on the year and forum. No whistleblower has won a decision on the merits in federal court since the law was strengthened in 1994, and only twice since the Federal Circuit's 1982 creation. Even worse, practitioners defending whistleblowers under state common law and statutory claims increasingly inform me that Federal Circuit decisions are being cited to threaten long-standing doctrines that previously reflected the boundaries for effective protection.

There are two consistent, fundamental distinctions between these models and the Whistleblower Protection Act. The first is that WPA cases are adjudicated by Administrative Judges, who are among the least qualified decisionmakers in conventional litigation. By contrast, more experienced, qualified Administrative Law Judge preside over cases in Department of Labor whistleblower hearings, and lifetime judges confirmed by the Senate in Article III district court proceedings. The second distinction is that all other whistleblower statutes have normal appellate judicial review by the regional or D.C. circuit courts of appeal. Although it is not even an Article III appellate court, the Federal Circuit has an unprecedented monopoly for appeals involving federal employee civil service disputes.

The lesson learned from drastic inconsistencies in results between statutes with similar language is simple. The reality from paper rights depends on the nature of those responsible to implement them in practice. Currently federal employees have second class forums for their day in court. Until that structural flaw is corrected, the Whistleblower Protection Act's congressional mandate predictably will continue to be frustrated. S. 995 restores normal judicial review. We also recommend that it be similarly strengthened by specifying Administrative Law Judges to replace AJ's as decisionmakers for WPA hearings.

Thank you for considering the Government Accountability Project's views.

Respectfully submitted,

Thomas Devine
Legal Director

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 2, 2001

The Honorable Daniel K. Akaka
Chairman, Subcommittee on
International Security, Proliferation,
and Federal Service
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are the Department's responses to the questions you submitted by letter dated August 10, 2001, to Acting Assistant Attorney General Stuart Schiffer, regarding S. 995, the Whistleblower Protection Act Amendments. Thank you for this opportunity to provide further explanation regarding our opposition to the proposed legislation.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

Enclosure

1. The Department of Justice maintains that the granting of independent litigating authority to the Office of Special Counsel (OSC) is "undesirable as a matter of policy." The Department states that "the Special Counsel currently has opportunities to protect its interest in enforcing the whistleblower laws while the Justice Department maintains centralized control over personnel litigation" and that "[S.995] would disrupt this carefully crafted scheme" and "unnecessarily disrupt a system that is working well." The Special Counsel maintains that the system is not working well and that her office needs independent litigating authority to protect the interests of whistleblowers. Special Counsel also points out that the Merit Systems Protection Board (MSPB) and the Federal Labor Relations Authority (FLRA) have the ability to represent themselves in the court of appeals.

> **Regarding the Justice Department's position on the granting of independent litigating authority to the Special Counsel: given Special Counsel's belief regarding the inadequacy of current law and her statutory role as protector of federal employees from prohibited personnel practices, especially reprisal for whistleblowing, why should OSC be treated differently from MSPB and FLRA? Is it the position of the Justice Department that MSPB and FLRA should not have independent litigating authority?**

The Federal Labor Relations Authority ("FLRA") and the Merit Systems Protection Board ("MSPB") are quasi-judicial entities that have been given the authority, limited in the case of the MSPB, to defend their rulings in court. Their independent litigating authority results from unique statutory schemes. In particular, the FLRA adjudicates unfair labor practices and negotiability disputes between employers (Government agencies) and employee unions. When a party challenges its order, the FLRA is responsible for defending it in court. This type of statutory scheme is very rare. It is not the usual practice to provide that a quasi-adjudicatory body - which is assumed to be disinterested - will defend its own decisions just as it is not the usual practice to provide that district courts will defend their decisions on appeal.

We have consistently opposed the extension of litigating authority to the MSPB. Nonetheless, the MSPB has been given limited authority to defend some of its own rulings in court. 5 U.S.C. § 1205(i). See Costello v. Merit Sys. Protection Bd., 182 F.2d 1372 (Fed. Cir. 1999); Spruill v. Merit Sys. Protection Bd. 978 F.2d 679 (Fed. Cir. 1992). The MSPB's authority, however, is limited to those cases in which it is defending its rulings

regarding its own jurisdiction or procedures, or the decisions it makes under its original jurisdiction pursuant to 5 U.S.C. § 1215. In all other matters, the employing Federal agency, represented by the Department of Justice, is the appropriate respondent.

In any event, the Office of the Special Counsel's ("OSC") role is distinct from both the FLRA and the MSPB. It is not a quasi-judicial entity, nor does it issue any rulings which it might defend in court. Rather, the OSC proposes disciplinary actions against individuals alleged to have committed whistleblower reprisal pursuant to 5 U.S.C. § 1215, or corrective action upon behalf of whistleblowers pursuant to 5 U.S.C. § 1214. It possesses the necessary litigating authority to pursue those actions in the MSPB. However, unlike personnel actions where the employing agency takes the action in the first instance and then must defend its action, if challenged, before the MSPB, it is the MSPB that makes the final determination of whether corrective or disciplinary action is appropriate in a whistleblower case. Congress chose to provide the MSPB with the authority to defend its determination. Moreover, consistent with its treatment of all Federal agencies, Congress chose not to permit the OSC to appeal adverse decisions of the MSPB so that the employees adversely affected by OSC's action were not subjected to lengthy and costly litigation. Additional litigating authority for the OSC is unnecessary because it already possesses adequate authority to protect whistleblowers in its actions before the board. The expansion of the OSC's authority would erode the centralized control the Solicitor General maintains over Federal personnel litigation.

2. The Justice Department opposes the provision in S.995 that would permit appeals to be heard in the United States court of appeals for the circuit in which the petitioner resides. The Department claims this provision would result in a "fractured personnel system" in which the circuits may interpret the law differently. Whistleblower cases, however, appear to be the exception rather than the rule, and in many areas of federal personnel law, appeals are heard in these regional courts. One example would be Equal Employment Opportunity (EEO) cases involving federal employees. Such cases do not appear to have results in the fractured personnel system that you suggest would occur with the review of whistleblower cases. Moreover, cases of improper workplace retaliation, whether because of race or because of protected whistleblowing, typically involve similar facts.

Why should whistleblower cases be treated differently than other areas of federal personnel law such as EEO law? Does the Department believe there currently exists a "fractured personnel system" in EEO cases resulting from a lack of uniformity among the circuits?

With regard to judicial review, whistleblower cases are not the exception to the rule. Rather, they are treated in the same manner as the vast majority of other Federal personnel cases in which all appeals are heard by the United States Court of Appeals for the Federal Circuit. For instance, the Federal Circuit possesses exclusive jurisdiction to consider all appeals from decisions of the MSPB, with the sole exception of cases involving claims of discrimination. 5 U.S.C. § 7703(b). Likewise, for employees covered by collective bargaining agreements who choose to take their disputes to arbitration, the same judicial review provisions apply to the arbitrator's decision. 5 U.S.C. § 7121(f). As we stated in our previously submitted testimony, this statutory scheme fosters uniformity in Federal personnel law.

In fact, it is Equal Employment Opportunity ("EEO") cases which provide the exception to the rule because they are the primary Federal personnel matter in which judicial review occurs not in the Federal Circuit, but, rather, in district courts and subsequently the regional circuits. EEO cases are unique because of the statutory scheme and the manner in which judicial review evolved. As originally enacted, Title VII applied to private employers, and not to the Federal Government. Federal workers were protected from discrimination by a number of other rules and regulations, many of which provided for review by the then-existing Civil Service Commission. See generally Exec. Order No. 12106, 44 F.R. 1053 (1978), reprinted in 42 U.S.C. § 2000e-4, Note 1. With the enactment of the Civil Service Reform Act of 1978, Congress chose to consolidate all matters involving discrimination with the EEOC. Thus, when jurisdiction was given to the EEOC to consider discrimination claims of Federal workers, see Spruill v. Merit Sys. Protection Bd., 978 F.2d 679, 691-92 (Fed. Cir. 1992) (citing Exec. Order No. 12106, 44 F.R. 1053 (1978), reprinted in 42 U.S.C. § 2000e-4, Note 1), the scheme for judicial review that was applicable to private sector cases was simply extended to cases involving Federal employees. In enacting this extension, Congress opted for ease of filing suit and consistent application of the same law to both the private and public sectors over uniformity of decision-making for Federal employees only. To the extent this results in review by the regional circuits, it is possible that Title VII is applied differently to Federal workers depending upon the law of the

regional circuit in which they work just as the same law may be applied differently to private sector employees, although we do believe that the basic tenets of Title VII law generally are uniformly applied. For all other Federal personnel matters, however, which in large part involve statutory schemes unique to the public sector, exclusive judicial review in the Federal Circuit clearly makes sense in that it ensures that all Federal employees are treated equally.

3. S.995 attempts to negate the effects of the following holdings or dicta from the U.S. Court of Appeals for the Federal Circuit:

"A disclosure of information that is publicly known is not a disclosure under the [Whistleblower Protection Act]." Meuwissen v. Dept. of Interior, 234 F.3d 9, 13 (Fed. Cir. 2000).

"The board [should] consider [a whistleblower's] personal bias or self-interestedness. . . ." Lachance v. White, 174 F.3d 1378, 1381 (Fed. Cir. 1999, cert. denied 528 U.S. 1153.)

"Criticism directed to the wrongdoers themselves is not normally viewable as whistlelowing." Horton v. Dept. of Navy, 66 F.3d 279 (Fed. Cir. 1995) and "disclosures to . . . immediate supervisors are not protected disclosures for the purposes of the WPA." Willis v. Dept. of Agriculture, 141 F.3d 1139, 1143 (Fed. Cir. 1998).

Does the Department believe the "form" or "context" language contained in the bill accurately reflects the intent of Congress? If not, how would DOJ amend Title 5 U.S.C. section 2302(b)(8)(A) to reflect the desired changes of negating the above referenced language?

As we stated in our testimony, the language contained in the proposed amendment is expansive and would appear to include disclosures of information regardless of time, place, form, motive or context. Thus, for example, the bill would appear to protect individuals who "disclose" information which is publicly available or which it is part of their job to disclose. We disagree that such an amendment is necessary to protect legitimate whistleblowers. We believe that current law draws the appropriate balance between protection of whistleblowers and the ability to effectively manage the Federal workforce.

4. Does the Department believe there exists a presumption under the WPA that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations? Does the Department agree with this aspect of the court's holding in Lachance v. White?

Yes.

5. Does the Justice Department believe that the presumption of lawful conduct created by the court in Lachance v. White can only be overcome if there is "irrefragable proof" to the contrary? What is your understanding of "irrefragable proof?"

Yes. "Irrefragable proof" of bad faith has been described as "evidence of some specific intent to injure the plaintiff" or "actions which are 'motivated alone by malice.'" Kalvar Corp. v. United States, 543 F.2d 1298, 1302 (Ct. Cl. 1976) (quoting Gadsen v. United States, 78 F. Supp. 126, 127, 111 Ct. Cl. 487, 489-90 (1948). In the past, some whistleblowers have alleged that they made a protected disclosure by alleging that actions have been taken in such bad faith that the actions rise to the level of gross mismanagement, abuse of authority, or the like. We believe that, in this situation, a presumption of regularity does attach and that the alleged whistleblower must establish by "irrefragable proof" that the actions were taken in bad faith.

However, this standard for determining whether bad faith exists is distinct from the statutory standard applicable to proof of whistleblower reprisal, which requires that the alleged whistleblower demonstrate by a preponderance of an evidence that a retaliatory action was taken "because of" a protected disclosure. 5 U.S.C. § 2302(b)(8); Carr v. Social Security Admin., 185 F.3d 1318, 1322 (Fed. Cir. 1999). We do not mean to suggest that a whistleblower must demonstrate a specific intent to injure the employee to demonstrate reprisal.

6. In your written statement, you indicated that S.995 would increase the pressure for Supreme Court review of merit system disputes. What is the disadvantage of the Supreme Court periodically reviewing compliance with statutes governing the merit system for federal employment, the same as other federal law?

The Supreme Court does periodically review cases involving Federal personnel matters. See, e.g. Gregory v. United States

Postal Service, 213 F.3d 1296 (Fed. Cir. 2000), cert. granted, 121 S. Ct. 1076 (Feb. 20, 2001); Lachance v. Erickson, 522 U.S. 262 (1998). However, as the Committee is aware, the Supreme Court only accepts a limited number of cases for review each year. Our concern, as we stated, is that by permitting review in the regional circuits, inevitable conflicts will arise, resulting in a fractured personnel system which would not be corrected by Supreme Court review given the limited number of cases that Court can decide. Currently, it is unnecessary to resort to Supreme Court review, except in rare instances, because the Civil Service Reform Act ensures uniformity by providing for exclusive jurisdiction in the Federal Circuit.

7. You have suggested that a mere disagreement in policy in the ordinary course of business would be considered a protected disclosure under the proposed amendment. The Whistleblower Protection Act and S.995 covers disclosures that evidence: (i) any violation of any law, rule, or regulation, (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or (iii) a substantial and specific danger to public health or safety. Could you provide specific examples in the language of the Act or S.995 that you believe supports the Department's view that a covered disclosure includes a mere disagreement in policy?

The entire language of the proposed amendment to 5 U.S.C. § 2302(b)(8)(A), noted in emphasis below, (proposed amendment emphasized) is so expansive that it could be read to encompass mere policy disagreements about the proper implementation of a law, rule, or regulation.

> any disclosure of information by an employee or applicant, without restriction to time, place, form, motive, context, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties that the employee or applicant reasonably believes evidences
>
> (i) any violation of any law, rule, or, regulation, or
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Pursuant to this language, policy disagreements could form the basis for charges of gross mismanagement, abuse of authority or the like because an employee need only "reasonably believe" that he or she is reporting a violation of law, rule, or regulation. Thus, if the employee reasonably differs, based solely upon policy reasons, regarding the correct interpretation of a law, rule, or regulation, that policy disagreement could form the basis for a protected disclosure. Such policy disagreements occur routinely and to transform them into protected disclosures is burdensome and unnecessary to protect legitimate whistleblowers.

8. In your written statement, you maintain that under S.995 trivial or de minimis matters will now be protected disclosures. However, S.995 does not change the current law which states that only disclosures of a violation of law, rule, or regulation; gross mismanagement or waste of funds; or an action that causes serious harm to public health will be protected. The only new addition to the list of prohibited disclosures would be false statements to Congress on an issue of material fact. Please describe a de minimis violation of law, rule or regulation; de minimis gross mismanagement or waste of funds; a de minimis action that causes serious harm to public health; and a de minimis false statement to Congress on an issue of material fact.

We disagree with the statement that S.995 does not change the current law regarding disclosures. Because of its expansive definition of protected disclosure contained in the proposed amendment to 5 U.S.C. § 2302(b)(8), which prohibits any consideration of context, time, place, or form in considering whether a communication is a protected disclosure, mere disagreements with the applicability, interpretation, or implementation of a law, rule, or regulation could result in a protected disclosure, no matter how minor or trivial the alleged violation. Whether a communication is a "disclosure" must be determined based upon the context in which it is made. See, e.g. Huffman v. Office of Personnel Management, __ F.3d __, 2001 WL 914869 (Fed. Cir. Aug. 15, 2001); Herman v. Justice, 193 F.3d 1375 (Fed. Cir. 1999); Frederick v. Department of Justice, 73 F.3d 349 (Fed. Cir. 1996).