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S. 1358—THE FEDERAL EMPLOYEE PROTECTION OF DISCLOSURES ACT: AMENDMENTS TO THE WHISTLEBLOWER PROTECTION ACT

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

S. 1358

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

NOVEMBER 12, 2003

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CONTENTS

	Page
Opening statements:	
Senator Fitzgerald	1
Senator Akaka	2
Senator Levin	4

WITNESSES

WEDNESDAY, NOVEMBER 12, 2003

Peter Keisler, Assistant Attorney General, Civil Division, U.S. Department of Justice	5
Elaine Kaplan, Attorney, Bernabei and Katz, PLLC	14
Thomas Devine, Legal Director, Government Accountability Project	16
Stephen M. Kohn, Chairman, Board of Directors, National Whistleblower Center	18
William Bransford, Partner, Shaw, Bransford, Veilleux & Roth, P.C., on behalf of the Senior Executives Association	20
Hon. Charles E. Grassley, a U.S. Senator from the State of Iowa	27

ALPHABETICAL LIST OF WITNESSES

Bransford, William:	
Testimony	20
Prepared statement	160
Devine, Thomas:	
Testimony	16
Prepared statement with attachments	72
Grassley, Hon. Charles E.:	
Testimony	27
Prepared statement	167
Kaplan, Elaine:	
Testimony	14
Prepared statement with an attachment	63
Keisler, Peter:	
Testimony	5
Prepared statement with an attachment	31
Kohn, Stephen M.:	
Testimony	18
Prepared statement with attachments	132

APPENDIX

Susanne T. Marshall, Chairman, U.S. Merit Systems Protection Board, prepared statement	175
Questions and responses for the Record from:	
Ms. Marshall	182
Mr. Keisler	185
Ms. Kaplan with an attachment	193
Mr. Devine	199
Mr. Kohn	203
Mr. Bransford	215
Copy of S. 1358	218

S. 1358—THE FEDERAL EMPLOYEE PROTECTION OF DISCLOSURES ACT: AMENDMENTS TO THE WHISTLEBLOWER PROTECTION ACT

WEDNESDAY, NOVEMBER 12, 2003

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 3:37 p.m., in room SD–342, Dirksen Senate Office Building, Hon. Peter G. Fitzgerald presiding.

Present: Senators Fitzgerald, Levin, and Akaka.

OPENING STATEMENT OF SENATOR FITZGERALD

Senator FITZGERALD. The Committee will now come to order. Having completed the hearing on the nomination of Scott Bloch for the position of Special Counsel, we move now to a related hearing to consider legislation, S. 1358, the Federal Employee Protection of Disclosures Act. I am chairing this hearing because the bill was referred to and polled out by the Subcommittee on Financial Management, the Budget, and International Security which I Chair. I am pleased to recognize the Ranking Member, Senator Akaka, who is not only the Ranking Member of the Subcommittee on Financial Management but also the lead sponsor of S. 1358 which we will consider today.

The Federal Employee Protection of Disclosures Act was introduced on June 26, 2003, by Senators Akaka, Grassley, Levin, Leahy, and Durbin. Senator Dayton joined as a co-sponsor of the bill on July 9, 2003. On October 8, 2003, the Subcommittee on Financial Management polled this bill out to the full Governmental Affairs Committee for consideration.

To put this bill in historical context, 1989 was a landmark year for whistleblower protection. By a vote of 97 to 0, the Senate passed Senator Levin's Whistleblower Protection Act, which subsequently was signed into law. Among other innovations, the Whistleblower Protection Act introduced a burden of proof allocation that was unprecedented, but has since become the benchmark for whistleblower protection laws. In essence, the 1989 law eases the burden for employees to establish a prima facie case of retaliation for whistleblowing activity. And once the employee establishes that prima facie case, the burden then shifts to the agency to prove by clear and convincing evidence, which is one of the highest evidentiary burdens in civil law, that the agency would have taken the same action in the absence of the employee's whistleblowing.

In 1994, Congress further strengthened whistleblower protections. In 2001, Congress considered legislation similar to the bill we consider today but did not take final action before adjournment, sine die. S. 1358 would amend Federal whistleblower laws to, among other things, clarify the scope of protected disclosures, specifically to address certain court decisions that limit that scope; include actions with respect to security clearances within the scope of prohibited personnel practices; include investigations within the scope of prohibited personnel practices; require an informative statement in non-disclosure policies and agreements; provide independent litigating authority for the Office of Special Counsel; and open appeals to all Federal Circuits rather than the current exclusive jurisdiction of the U.S. Court of Appeals for the Federal Circuit.

We owe much to the many Federal employees who have had the courage and fortitude to reveal government waste, fraud, abuse and gross fiscal mismanagement. Over the years these whistleblowers have saved the taxpayers hundreds of millions of dollars and disclosed endangerment of public safety by officials in the Federal Government. It behooves us in Congress to encourage this bravery in the Federal workforce. We compliment Senator Grassley, Senator Levin, and Senator Akaka for their consistent and forceful advocacy of efforts to strengthen protections for whistleblowers.

On the other side of the ledger, we want to remain mindful of the challenges in managing the vast Federal workforce. Many whistleblowers are heroes. But some who claim that mantle in fact dishonor those who are. And for many Federal supervisors who are unfairly accused of retaliation, the experience can be damaging. Whistleblower challenges and the ensuing litigation can be expensive and time-consuming, diverting valuable agency resources to protracted defense.

Moreover, the easier it becomes to establish a prima facie case of whistleblower retaliation, the more likely it becomes that Federal managers will hesitate to take steps to eliminate unproductive or counterproductive appointees, impose reasonable disciplinary measures, or insist on efficiencies that some workers might challenge as retaliatory. Therefore, in revisiting this important area of law, I look forward to hearing specifically from the witnesses how their views best promote this delicate balance between encouraging good faith whistleblowing on the one hand, and on the other, encouraging proactive and non-risk averse management of the Federal workforce.

Before I introduce our first witness I would like to turn to our Ranking Member, Senator Akaka, for his opening statement.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. Thank you, Mr. Chairman. Thank you very much for having this hearing today on S. 1358, the Federal Employee Protection of Disclosures Act, which makes needed changes to the Whistleblower Protection Act. I want to add my welcome to the Hon. Peter Keisler to our hearing.

Our legislation would enhance the Federal Government's efforts to eliminate waste, fraud and abuse by strengthening the rights and protections available to whistleblowers. This bill is essentially

the same as S. 3070 which the Committee on Governmental Affairs favorably reported to the Senate on October 9, 2002. Whistleblowers play a crucial role in alerting Congress and the public to serious cases of government wrongdoing and mismanagement.

Following the events of September 11, courageous Federal employees stepped forward to blow the whistle on significant lapses in our efforts to protect this country and its people from terrorism. FBI agent Colleen Rowley alerted Congress to serious institutional problems at the FBI which impacted the agency's ability to investigate terrorist activities and prevent terrorism. Border Patrol agents Mark Hall and Bob Lindemann alerted us to serious security lapses at our northern border.

The importance of whistleblowing was highlighted when *Time* magazine named Ms. Rowley and two other whistleblowers as its Persons of the Year. These brave Americans captured the Nation's attention and earned our respect for risking their careers for the public good.

Although nearly a year has passed since whistleblowers gained national attention, we should not forget the contributions they make to our everyday lives. Just last week, Senator Fitzgerald and I held a hearing on abuses in the mutual funds industry where witnesses testified that it was a whistleblower who first brought attention to this problem. Specifically, Stephen Cutler, Director of Enforcement at the Securities and Exchange Commission said, "tips from whistleblowers are critical to our program."

Through passage of the Whistleblower Protection Act in 1989 and the subsequent strengthening amendments in 1994, Congress has encouraged Federal employees to come forward with information of threats to public safety, government waste, fraud, and mismanagement. Congress has passed strong laws to encourage the disclosure of critical information, but we also need the courts to interpret the law consistent with Congressional intent. Without judicial decisions consistent with the intent and spirit of the Whistleblower Protection Act Federal employees will continue to fear reprisal for blowing the whistle. As a result, we fail to protect not only the whistleblower but we fail to protect taxpayers and national security as well.

Our bill is intended to close loopholes which have made it impossible for whistleblowers to come forward without the threat of retaliation. Based on the repeated misinterpretation of Congressional intent and the track record of the Federal Circuit, Court of Appeals, it is clear why Federal employees would fear making disclosures evidencing government wrongdoing. Since the 1994 amendments to the WPA, the Federal Circuit, which has sole jurisdiction over appeals, has issued only 75 decisions on the merits of the whistleblower cases, and in 74 of those cases the whistleblowers lost.

A free society should not fear the truth. Public servants should report government mismanagement, threats to national security, or specific dangers to public health. People will not speak out if they do not feel protected from retaliation. That is why the Whistleblower Protection Act must be strengthened.

I look forward to hearing from our witnesses and working with you, Mr. Chairman, to protect the American public and our Federal

whistleblowers. I also want to add to the list of those Governmental Affairs Committee colleagues who are co-sponsors to our bill the name of Senator Pryor. Thank you, Mr. Chairman.

Senator FITZGERALD. Thank you very much, Senator Akaka. Senator Levin, do you wish to proceed?

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Mr. Chairman, thank you, I do have an opening statement. First let me begin by thanking you for chairing this hearing on a very important bill. I know you are fitting this into an incredibly difficult schedule and we are very much in your debt, those of us who have spent a lot of time on this subject. I know the Chairman himself is very much interested in whistleblowing and protecting whistleblowers and doing a lot of other important things to make this government work better.

I do not know if Senator Grassley was here a moment ago or not, but I also want to thank him, and obviously Senator Akaka for their efforts on behalf of whistleblowers. I hope that we can mark up this bill next year. But today's hearing is essential to that markup.

The Office of Special Counsel who was before us today, at least the nominee for that office, is an independent agency. We have got to defend that independence. Whistleblowers often reveal embarrassing, sometimes damaging information about people whom they work for, or the government agencies where they are employed. There can be significant pressures on the Special Counsel to ignore retaliation that may have occurred or to pursue cases less vigorously than they ought to be pursued. But the OSC is our first line of defense, and it is important that we give the OSC those powers.

It is also important that we strengthen the whistleblower in a number of other ways. That includes the power of the OSC to appeal decisions, and participate in those appeals. There is no reason why the OSC should not be allowed to appeal the decision when a decision is contrary to the needs of whistleblower protection.

We have also got to address some of the holdings of the U.S. Court of Appeals for the Federal Circuit. Some of these decisions have been totally inconsistent with Congressional intent. In the case of *Lachance vs. White,*—and I know our witness from the Justice Department will address this case today—we have an example of where the Congress has adopted a reasonable standard of proof and the Court of Appeals has taken that standard and turned it into an impossible hurdle. In that case, the *Lachance* case, the court imposed an unattainable standard on Federal employee whistleblowers to prove their cases.

The Federal court ruled in that case that in order for a whistleblower to demonstrate reasonable belief that his disclosure was evidence of gross mismanagement he has to demonstrate with irrefragable proof that the government had acted in violation of the law. Now that is an impossible standard. That is undeniable, incontestable, incontrovertible, incapable of being overthrown proof. That proof does not exist in any case unless there is a plea of guilty. Yet that is the kind of decision that we have gotten from the Federal Circuit.

So our bill is intended to address the powers of the Office of Special Counsel. I had hoped to be here earlier and I could not be because of the Defense bill being on the floor and I had to manage that bill, to ask our nominee for that position; whether or not there would be support for the bill that Senator Akaka, Senator Grassley, I and others have introduced. But in the absence of being able to address those issues directly with our nominee we look forward to raising those questions with the Justice Department and our other witnesses today, and getting answers to those questions from the nominee in written form.

Again, I just want to thank you, Mr. Chairman, for your commitment to so many good government causes.

Senator FITZGERALD. Thank you, Senator Levin. I would now like to introduce our witness on our first panel. The Hon. Peter Keisler serves as Assistant Attorney General for the Civil Division in the U.S. Department of Justice. He has also served as Principal Deputy Associate Attorney General and Acting Associate Attorney General. Prior to his appointments at the Justice Department, Mr. Keisler was a partner at Sidley, Austin, Brown and Wood in their Washington, DC office. I would note that esteemed law firm is headquartered in Chicago. He also served in the Reagan Administration as Associate Counsel to the President and as a law clerk to U.S. Supreme Court Justice Anthony Kennedy, as well as Judge Robert H. Bork of the U.S. Court of Appeals for the District of Columbia Circuit.

In the interest of time your full statement will be included in the record and we ask that you limit your summary statement to 5 minutes. Mr. Keisler, you may proceed with your opening statement.

TESTIMONY OF PETER KEISLER,[1] ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. KEISLER. Thank you very much, Mr. Chairman and Members of the Committee. I very much appreciate the opportunity to appear before you today and to include my full statement in the record. I will just briefly summarize our principal concerns with S. 1358.

But let me first begin by emphasizing that the Department is strongly committed to the protection of whistleblowers who bring to light evidence of fraud, abuse, mismanagement, and violations of the law in the government. The current law though, we believe, adequately protects the interest of whistleblowers and we think the costs associated with this bill, both in terms of its impact on important national security interests and the inefficiencies it could create in the management of the Federal workforce outweigh the incremental increase in protections that the bill might afford.

We are particularly concerned about the provisions of the bill that relate to security clearances and classified information. For example, the bill would permit the Merit Systems Protection Board and the Federal Circuit to review security clearance determinations. Review by those non-expert bodies would, we believe, have a substantial chilling effect upon the decisionmaking process of se-

[1] The prepared statement of Mr. Keisler appears in the Appendix on page 31.

curity professionals. If a security professional knows that his or her decision will be second-guessed by the MSPB and that any reverse decision may subject his agency to substantial damages, that possibility will inevitably be considered in the security clearance decision, even though the only appropriate and permissible standard that should be considered is whether the clearance is clearly consistent with national security.

Beyond that objection, we do not believe the amendment in that respect is necessary. Currently, Executive Order 12968 requires all agencies to establish an internal review board to consider appeals of security revocations.

We have one at the Department of Justice which is fairly typical. Background investigations are reviewed by career adjudicators on the Department's security staff and any recommendation to deny or revoke a security clearance is reviewed personally by the director of that staff, also a career employee of the Department. If the director's decision is to deny or revoke a clearance, then a comprehensive written statement of reasons must be provided to the employee or the applicant, who may also request access to any documents relied upon, including the investigative file. The employee may then request reconsideration by the director and is given a statement of reasons and the result of that reconsideration as well.

If the employee continues to object, he may then be given an opportunity to appeal to a high-level panel appointed by the Attorney General and comprised of three members, two of whom are from outside the security field. The members of the Department's panel are all high-ranking career employees. The employee may be represented by counsel, there is a transcript of the hearing, and the final decision is in writing and final.

We believe that by providing the employee with a written explanation of the reasons for a clearance denial and with an appeal to a high-level panel that had no role in the initial decision we have provided a process that is fundamentally fair to the employee and that provides sufficient procedures to ensure that a security clearance decision is not based upon unlawful reprisal.

The bill would also allow individuals to make unauthorized disclosures of classified information to members of Congress and their staff who possess security clearances. We oppose these provisions because we believe they would interfere with the Executive Branch's constitutional responsibility to control and protect information relating to national security. And more specifically, the determination which individuals have a need to know specific types of classified information.

Executive Branch agencies frequently provide classified information to the Congressional Intelligence Committees in fulfilling our obligations to keep them fully informed about intelligence matters within their purview. We also provide classified information from time to time to other committees in response to requests from their chairmen in the context of Congressional oversight regarding Executive Branch operations. The decisions about the provision of such information are made within the Executive Branch based upon assessments about whether the particular Congressional entity has a need to know the classified information, which remains an impor-

tant standard in avoiding unnecessary disclosures that would not be consistent with our national security interests.

We believe the Executive Branch should retain the responsibility to determine the dissemination of classified information, both within the branch and to the Legislative Branch. This bill would encourage the disclosure of classified information outside of that carefully considered process.

We also object to the provision which would prohibit the consideration of time, place, form, motive, context, or prior disclosure in considering whether an individual made a protected disclosure under the law. The context in which an alleged disclosure is made is essential to determining whether the statement made by an employee is the type of statement that falls within a common sense definition of disclosure.

By prohibiting the consideration of context, the bill transforms any statement that potentially suggests a disagreement about law or policy into a protected disclosure. Thus, because employees make those types of statements on a regular basis, the bill would potentially allow almost any Federal employee to claim whistleblower status in the face of legitimate personnel actions. This protection, which would then require management to justify its action by the much higher clear and convincing standard, would create costly inefficiencies in the operation of the Federal workforce and also would detrimentally impact the morale of good workers.

The bill would provide the Special Counsel independent litigating authority and authorize him to appeal decisions of the MSPB and whistleblower cases, and represent himself before the Federal Circuit. We object to this provision, as we generally do to any extension of independent litigating authority beyond the Department of Justice for two primary reasons. First, it could result in the undesirable situation of two different parts of the government litigating against each other and taking different positions in court. The government, we believe, should speak with one voice.

Second, it undermines the centralized control the Department maintains over litigation involving the government in the Federal courts. 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 inimicable to the interest of the government as a whole, and the facilitation of presidential supervision over Executive Branch policies implicated in government litigation.

Finally, we object to the proposal to permit review of MSPB decisions by the regional Circuit Courts of Appeals rather than the currently exclusive review by the Federal Circuit. Review by the regional circuits would result in a fractured personnel system causing confusion among both the employing agencies and the employees about their respective rights and responsibilities. And it would inevitably require the Supreme Court to intervene more in Federal personnel matters to resolve inconsistencies among the circuits.

I thank the Committee for the opportunity to testify and I am pleased to answer any questions you might have.

Senator FITZGERALD. Thank you, Mr. Keisler. I want to ask you right off the bat what you think about what Senator Levin said in

his opening statement. He noted, I think it was the *Lachance vs. White* case, that imposed the irrefragable proof standard. Is that not pretty much an impossible level of proof for the whistleblower?

Mr. KEISLER. Pretty much, Mr. Chairman. I am not here to defend that. My understanding is that discussion in *Lachance* was dicta. That the MSPB when it next considered the issue said essentially, the Federal Circuit cannot have meant what it said. And no case that I am aware of, either before the MSPB or the Federal Circuit since then has actually applied the irrefragable proof standard.

I would certainly agree that it would not be appropriate. We think the standard should be what it normally is in a case like this, which is proof by a preponderance of the evidence.

Senator FITZGERALD. Are there any aspects of the current whistleblower law that you think should be improved, or is it your contention that the current law adequately protects whistleblowers?

Mr. KEISLER. Our feeling is that the current law provides adequate protection. We are always open to considering proposals that this Committee or others in Congress might have about ways in which it could be improved, but we generally think the current law strikes a sufficient balance.

Senator FITZGERALD. Is it your understanding that an employee who discloses information that is already known is not a protected whistleblower?

Mr. KEISLER. That is the holding of the Federal Circuit, I think in the *Wissen* case, that a disclosure is something that was not previously laid bare, something that is being revealed for the first time. So that one of the tests that has been applied to determine whether a disclosure provides protection under the statute is whether the individual making the disclosure is informing of something new or instead reporting about something that is already known. Only in the former case, I think, does it get that protection under existing law.

Senator FITZGERALD. Could you describe for this Committee more precisely what you mean by the burden you fear will be imposed on management of the Federal workforce? What are some of the financial, managerial, and human costs involved in participating in these whistleblower applications and adjudications?

Mr. KEISLER. Of course, any time someone is accused of acting improperly, that imposes a personal cost on that person and a financial cost on either that person or the government in litigating it. That does not mean that there should not be an opportunity to bring these charges. There are very important interests that are implicated, as each Member of the Committee has said. But we think it is important that the law strike a balance between the needs of managers in the workplace to take appropriate personnel actions when adverse decisions need to be made, and the important need to protect legitimate whistleblowers who are bringing to light information about fraud, abuse, mismanagement, or violations of the law.

Senator FITZGERALD. I listened with great interest to your concerns about imposing the machinery of whistleblower protection into the sensitive arena of security clearances. But I wonder if I could ask you, on the other side of the ledger, what meaningful re-

course is there for Federal employees who are subject to retaliation by revocation of their security clearance?

Mr. KEISLER. Every department and agency under the executive order is required to have its own independent, internal review process. When I say independent, I mean independent of the initial decisionmaker who will first decide to revoke or deny a security clearance.

We have one in the Department of Justice. The three members of that board are at the deputy assistant attorney general level. I can tell you, it is a robust process. It is not a rubber stamp. It frequently results in decisions being reversed. That panel is empowered to consider all evidence, to look at the entire totality of the case that the employee or applicant presents. In that respect, it functions much more broadly than any court or administrative agency would be able to do because their general practice would be to give deference to the administrative decision in the first instance. This board gives no deference to the initial decision to deny or revoke a security when it is asked to review it. It looks at it afresh, and as I said, frequently makes a decision to reverse the decision.

The employee or applicant has all aspects of due process before that board: The right to be represented by counsel, the right to present testimony, a written record is created, and a statement of reasons is created. So that has been our effort to make sure that, while we have not supported outside review of clearance decisions, that there is a measure of due process and second look given to those decisions because we recognize they are important. They are important not only for the government but they are important for the employee or applicant, in many cases whose job may require a security clearance.

Senator FITZGERALD. Senator Akaka.

Senator AKAKA. Thank you very much, Mr. Chairman.

Mr. Keisler, the Department opposes the provision in S. 1358 granting MSPB the right to review secret clearances relating to retaliation for a protected activity. I understand this opposition is in part to the current internal review process for security clearance matters. What is the track record for the internal security clearance review process in restoring clearances to whistleblowers?

Mr. KEISLER. I can only speak generally. I do not have statistics on that, and even my general knowledge is limited to what we have done in the Department of Justice. But I have been told by the security officials there that this is a process which quite frequently results in reversals of initial decisions to deny or revoke clearances. That it is a meaningful process and one in which the look is genuinely a fresh one.

Senator AKAKA. Thank you. The Department objects to the provision clarifying that employees may make disclosures of classified information to Congress because DOJ believes an employee would have the unilateral authority to decide who should receive classified information and when.

However, the WPA already provides that employees can make classified disclosures to the Special Counsel and an agency's inspector general. Furthermore, the law states that nothing in the WPA

shall be construed to authorize the taking of any personnel actions against any employee who discloses information to Congress.

In light of these existing statutory provisions on the disclosure of classified information, can you elaborate on the Department's objection to this provision?

Mr. KEISLER. Certainly, Senator, and thank you for giving me that opportunity. First of all, I would like to be clear about what our position is and is not. We do believe that as a general matter, government employees have the right to go to Members of Congress and their staff with information about misconduct or legal violations without getting prior approval from the Executive Branch. The exceptions, we believe, to that general principle are in those instances in which that kind of action would undermine the President's constitutionally-based authority to carry out his particular responsibilities.

Congress' oversight is constitutionally based. The President has some constitutionally-based powers and sometimes there is tension between the two. The category in which this most often arises, of course, is the President's constitutionally-based power that the Supreme Court recognized, to control access to national security information.

Our belief is that when there is a tension between the President's constitutional powers and Congress' constitutional need and power to conduct oversight, that is something that should be worked out through the committees, through the oversight process, but not that each individual employee with access to classified information should be able to make the determination for himself or herself that a disclosure should be made.

Senator AKAKA. The Department of Justice has expressed extremely strong opposition to this legislation. The Department also opposed the 1989 Whistleblower Protection Act and the 1994 amendments. What changes would you recommend in order to gain the Department's support?

Mr. KEISLER. I have not come here, Senator, with proposals to change the law. As I said, I think we do believe that the current law strikes a good balance, but that is always subject to further proposals and consultations. I do not want anything I just said to suggest that we would not be happy to work with the Committee to further develop ideas and consult.

Senator AKAKA. Thank you very much for your responses.

Thank you, Mr. Chairman.

Senator FITZGERALD. Senator Levin.

Senator LEVIN. Thank you. In answer to Senator Akaka's question you indicated that the internal appeal process relative to the loss of security clearance has produced reversals.

Mr. KEISLER. That is what I am told, Senator.

Senator LEVIN. But you did not know what percentage of cases or how often. Could you do that bit of research for us and give the Committee those numbers?

Mr. KEISLER. I will see what I can find out.

Senator LEVIN. The question of whether or not Members of Congress ought to be able to receive classified information from whistleblowers you say should not be the unilateral decision of a whistleblower. Should Members of Congress be allowed to make a deci-

sion—if a whistleblower comes to us and we have clearance obviously, a whistleblower has clearance and they say, this information is classified and I cannot give it to you under the current law, but if you request it, that would be different I gather then in your eyes, would it?

Mr. KEISLER. I think that would be a protected disclosure by the employee.

Senator LEVIN. So what the employees need to do then, and we ought to make it clear in the law, is that if the Member of Congress, after being informed that the employee has classified information but has not disclosed what it is, then says, yes, I would like to receive that information, there should be protection for the whistleblower?

Mr. KEISLER. Yes, and I think that is protected under the law as it is written now because any disclosure to anyone, as long as it is not a disclosure of the information that is required by law or executive order to be secret, is a protected disclosure. So if an employee went to you, Senator, or your staff and said, I know something very important. I cannot tell you the contents of it because it is classified, but you should pursue this; someone yesterday gave you misleading testimony or whatever, that would not——

Senator LEVIN. No, not quite that. Not, you should pursue this. But if you ask me what that information is, than I can respond to your request. Is that protected?

Mr. KEISLER. I am sorry, I did not fully understand your question. My conception was they would come to you and say, there is something you need to pursue and you would come demand it from us. No, I do not think it is currently protected under the law.

Senator LEVIN. My question is, should we not have the right, as cleared, elected officials to seek classified information from anybody who has received that information properly?

Mr. KEISLER. I think that would trench upon the President's authority to make the need-to-know determination. Because, as you know, the decision about whether information can be disclosed to any particular individual inside the Executive Branch or anywhere is a combination of, is the person cleared and is there a need to know. We regard the President's authority in this regard to encompass both categories of decision, so under our view of his constitutional role we would think that should proceed through other channels.

Senator LEVIN. You want to give the President that exclusive right to decide whether or not a Member of Congress should be allowed to seek classified information from a member of the Executive Branch? That is really an extreme position, I will tell you, because we ask questions all the time on our committees of members of the Executive Branch which require them to give us classified information, and obviously in a setting which is cleared. We do that all the time.

The position that you are taking is that the President ought to have a right to say, sorry, that person is in the Executive Branch. We are not going to respond to the question from the Member of Congress, or in my hypothetical, from the member of Congress who asked the whistleblower, what is that information. It is a very extreme position.

Mr. KEISLER. I think when you use the word exclusive, Senator, I think in some——

Senator LEVIN. I think you used the word exclusive.

Mr. KEISLER. Then when I use the word exclusive, I may not have fully captured the reality of the way things would work. I would presume in that circumstance there would be a back and forth between this branch and the Executive Branch, and there would be a need for negotiation and accommodation. But our position is that when the Executive Branch is engaged in that kind of process it should be the President or his delegees who do the negotiating, who set the terms on that side of the divide and that lead to the accommodation, not that each employee is authorized to make the disclosure.

Senator LEVIN. Upon request.

Mr. KEISLER. Upon request, yes.

Senator LEVIN. So that when someone comes in front of us from the Department of Defense over at the Armed Services Committee and we ask that person for information which is classified, you are saying that person does not have the responsibility and does not have the obligation to respond to the question until they clear that with whoever these powers are in the Executive Branch that you want all information that is classified cleared with before it is shared with Congress. That seems to be what you are saying.

Mr. KEISLER. You are obviously so much more familiar with the way these interchanges work than I am, Senator, but my assumption would be that when someone comes before you they have a sense in advance of the parameters of what they are permitted to disclose.

Senator LEVIN. No, frequently that is not the case. They do not always know the questions that we are going to ask in advance.

Mr. KEISLER. If a witness were in genuine doubt as to whether a piece of—whether his or her higher-ups, the ones with authority, would approve the disclosure of the information and that witness did not know whether that would be approved, I would take the position that the prudent thing would be for them to go back and find out whether that is appropriate.

Senator LEVIN. That is a very extreme position. When Congress asks questions, in a proper setting that is cleared, from someone who has that information, whether it is classified or not, we have a right to that information. We do not expect to, nor should we be put in a position where that person says, gee, I do not know whether I want to answer that question because I did not expect you to ask that question, and I have to go back to my superiors to see whether or not I can answer the question. That is not acceptable, and I do not think any Executive Branch has taken that position to date that I know of, and I do not believe any court would sustain that.

Congress has a right to information from the Executive Branch unless there is a privilege, an executive privilege, for instance, which is exercised. But the fact that it is classified, when we are cleared to receive classified information, is not a reason that can be sustained. So I think your position on this is really an extreme position. The red light is on. I only had one more question but I do not want to——

Senator FITZGERALD. You can go ahead, continue if you wish.

Senator LEVIN. On the irrefragable proof, and I was glad to hear your answer on that question, I take it then that the Justice Department would support that part of the bill which would eliminate that from anyone's mind as being the proper standard.

The reason it is important is because when it comes to settling these cases, if the whistleblower has to face the prospect of an appeal if he pursues his claim, to a court which has adopted that standard, it is going to make settlement much more—it is not going to be as good a settlement, obviously, for the whistleblower if they think that is the standard which will be applied at the end of the line.

My question though specifically is, will the Justice Department support at least that portion of the bill which puts into law that standard which you adopted, the preponderance of the evidence standard?

Mr. KEISLER. I am not certain that the portion of the bill that seeks to reverse the irrefragable proof standard actually installs a preponderance of the evidence standard. I think it may say something more like, the individual need only have substantial evidence, which would be a weaker standard than preponderance of the evidence. But in terms of our position about what it should be, we think it should be preponderance of the evidence. We do not think it should be irrefragable proof.

Senator LEVIN. In any event, we can agree it should not be irrefragable.

Mr. KEISLER. It should not be irrefragable proof. I did not even know what the word irrefragable meant before I read that decision.

Senator LEVIN. I looked it up and it is quite an extraordinary word.

Thank you, Mr. Chairman.

Senator FITZGERALD. Thank you, Senator Levin.

Mr. Keisler, thank you very much for appearing before us. We appreciate you coming over to the Hill to testify. If there are no further questions we will proceed to panel two.

I would like to introduce our panelists on the second panel. Elaine Kaplan currently is practicing law in the firm of Bernabei & Katz in Washington, DC. Ms. Kaplan was nominated by President Clinton in 1997 and confirmed by the Senate in April 1998 to be Special Counsel of the Office of Special Counsel. During her tenure she was credited for implementing many new programs to improve the operations of the Office of Special Counsel and the interagency process regarding personnel practices. Prior to her role as Special Counsel Ms. Kaplan served as Deputy General Counsel of the National Treasury Employees Union where she represented the interests of union members in the areas of labor and administrative law as well as racial and sexual discrimination.

Thomas Devine serves as legal director of the Government Accountability Project, a non-profit organization dedicated to promoting government and corporate accountability by advancing free speech and ethical conduct in the workplace and defending the rights of whistleblowers. Mr. Devine has published a number of articles regarding whistleblower protections and has worked for over

20 years to develop and promote policies and laws pertaining to whistleblowers.

Stephen M. Kohn serves as Chairman at the National Whistleblower Center, a non-profit advocacy center dedicated to working with whistleblowers. Mr. Kohn has litigated whistleblower cases for a number of years, including the successful lawsuit against the Department of Justice, the FBI, and the Clinton Administration that compelled implementation of regulations to enforce whistleblower protections for FBI employees.

William Bransford is General Counsel to the Senior Executives Association and a partner in the law firm of Shaw, Bransford, Veilleux & Roth where he has practiced since 1983. The Senior Executives Association was founded in 1980 as a non-profit corporation and it represents more than 7,000 career Federal executives. In his practice, Mr. Bransford represents Federal executives, managers and employees in cases regarding personnel and employment practices before the U.S. District Courts, the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Office of Special Counsel, and with offices that adjudicate security clearances.

Thank you all for being here. In the interest of time, your full statements will be included in the record, and we ask that you limit your summary statement to 5 minutes. We are going to strictly enforce the 5-minute limit. Thank you. Ms. Kaplan.

TESTIMONY OF ELAINE KAPLAN,[1] ATTORNEY, BERNABEI AND KATZ, PLLC

Ms. KAPLAN. Thank you, Mr. Chairman. Good afternoon. I appreciate being invited by the Committee to offer my perspectives on S. 1358. My testimony is based on my experience as the head of the Office of Special Counsel as well as an attorney in private practice who represents whistleblowers in both the private and public sector.

In July 2001, as Special Counsel I testified in favor of S. 995, which was an earlier effort to strengthen and improve the Whistleblower Protection Act. There have been two significant developments since the Committee considered S. 995 which I think are worth mentioning. First, after the terrorist attacks of September 11, our national focus shifted dramatically. We all have heightened concerns and a greater sensitivity to issues of national security.

Second, since the Committee considered S. 995, the Nation's markets have been rocked by a series of corporate scandals and in the aftermath of these scandals Congress enacted the Sarbanes-Oxley Act which extends whistleblower protection to employees of publicly traded corporations.

I mentioned the terrorist attacks of September 11 and the corporate scandals that led to the passage of Sarbanes-Oxley to make a point about DOJ's opposition to S. 1358. Both as Special Counsel and for many years before as an attorney practicing in the area of Federal sector employment it has been my experience that whenever amendments are proposed to strengthen the Whistleblower

[1] The prepared statement of Ms. Kaplan with an attachment appears in the Appendix on page 63.

Protection Act, the Department of Justice opposes them. It usually uses the same objection, similar to the ones that we heard today, which are that strengthening the law will inhibit managers from taking legitimate actions against poor performers or bad employees. It also says that making changes to the act's enforcement scheme, giving the Special Counsel greater authority will undermine what it calls uniform application of the law and interfere with DOJ's control over litigation in the Federal courts.

I think that this reflexive opposition to this bill is really bad public policy, especially in a post-September 11 world. Today more than ever our emphasis should be not only on protecting whistleblowers but on encouraging them to come forward. That was certainly what Congress concluded when it extended whistleblower protection to corporate employees. It certainly is no less important that Federal employees who are sometimes on the front lines of the war against terror feel safe reporting security risks as it is that employees of Fortune 500 companies are protected when disclosing account scandals.

Now DOJ is frequently fixated on the notion that enhancing protection for Federal employees and closing loopholes in the act will protect bad employees. As the head of OSC I frequently heard this trotted out and it is sort of an old canard, that the law protects bad employees, or that employees cynically invoke the act's protection in order to make themselves immune from legitimate personnel actions. This is like an urban legend in my opinion. The fact is that weak claims, most of the them are closed—all weak claims are closed in the administrative process. The majority of cases filed with the Office of Special Counsel because the law is clear and nothing in this law changes the fact that it is not illegal to take appropriate action against bad employees even if they are whistleblowers.

Now let me give you a couple of examples of why this law is important and why existing law has these common sense lapses in it. I think it makes good sense to prevent agency officials from retaliating against an employee who is making a protected disclosure, even if they are doing it as part of their duties and through their chain of command. In fact I think it is counterintuitive to protect people only when they go outside their chain of command. One would think that it would be in management's interest to encourage people to stay inside the chain of command rather than going, for example, to the *Washington Post* or the *New York Times.*

So let me give you an example of how this would work. Let us say there is a security screener at National Airport who works for the Transportation Security Administration and they notice that the x-ray machines are malfunctioning on a regular basis. The screener suspects that because of these malfunctions a number of passengers may be permitted to board airlines without being screened. It is part of his job to report these malfunctions to his supervisor.

So he goes to his supervisor and he tells them about the malfunctioning machines and his supervisor says to him, do not write up a report. Just go back to work. It is a lot of extra paperwork. And the supervisor does not want it to get out that the screening ma-

chines at National Airport are not working. He says, do not worry about it. I will take care of it. We will get the problem fixed.

One week later the employee comes back again, the problem has not been fixed. This time he tells his supervisor, if nothing is done, he is going to report the supervisor, his inaction, up the chain of command or maybe to the IG, and the supervisor fires the employee.

Now under current law this employee has no recourse. Because he has made his disclosure as part of his regular job duties he is not protected by the anti-retaliation provisions of the Whistleblower Protection Act. In fact a security screener at TSA, this employee does not even have normal adverse action protections that other employees have.

The same scenario could play out in any number of contexts: An inspector at the Nuclear Regulatory Commission who suffers retaliation when he recommends that a power plant's license be revoked for violating safety regulations; an auditor who is denied a promotion because he found improprieties in a Federal grant program; or an investigator in an IG's office who is geographically reassigned because he has reported misconduct by a high-level agency official.

I see that my time is up and I will refer you back to my written statement. But I do think that it is really important for the Committee to consider this balance between broadening the rights for whistleblowers and management prerogatives to understand that is really in management's interest to have broad protection for whistleblowers because it is in management's interest to understand what is going on in the work site and to created an open environment. Thank you.

Senator FITZGERALD. Thank you, Ms. Kaplan. Mr. Devine.

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

Mr. DEVINE. Thank you for requesting this testimony. GAP and a bipartisan, trans-ideological coalition of over 100 citizens and good government organizations strongly support this Committee's efforts to put the protection back in the Whistleblower Protection Act. S. 1358 is a modest good government bill that restores legitimacy for a public policy mandate that Congress has passed unanimously three times. It does not expand the intended scope of any prior Congressional actions. Most accurately, this bill could be called the Whistleblower Protection Restoration Act.

I serve as the Legal Director of the Government Accountability Project and for 25 years we have been helping whistleblowers. I would like to begin by seconding Ms. Kaplan's closing remark, that this law will help managers as much as it will help anyone else. Whistleblower protection within an organization, if we close the loopholes that are barring it currently, serves management's right to know. The way the current law has been skewed there is only a potential to serve Congress or the public's right to know, and managers are liable to be the last ones to learn about problems because of the way the statute has been twisted.

[1] The prepared statement of Mr. Devine with attachments appears in the Appendix on page 72.

In 25 years we could not avoid learning some lessons about which reforms work in practice and which are illusory. S. 1358 is the real thing. If enacted, the Whistleblower Protection Act will again be a genuine metal shield that gives a fighting chance for those who rely on it to defend themselves. If we keep the status quo, it is going to be a cardboard shield behind which anyone relying on it is sure to die professionally. It also will continue to be a magnet for cynicism.

This bill does basically two things. It restores the boundaries that Congress has already set, and second, it gives structural reform so that Congress will not have to pass this law a fifth time, or more. Enough is enough.

I think we should briefly review why Congress keeps reaffirming a unanimous mandate for whistleblower rights. It is because they are the human factor which is the Achilles heel of bureaucratic corruption. They warn us of preventable disasters before we are limited to damage control, or picking up the pieces. They are society's modern Paul Reveres. Since the September 11 tragedy, increasingly they have been playing an invaluable role.

As the news media increasingly has recognized, whistleblowers on national security breakdowns have been the only reliable, trustworthy lifeline for Congress and the public to learn about terrorist threats which were caused by bureaucratic negligence and sustained by abuses of secrecy. Their message has been consistent: Too often the bureaucracy has been satisfied to maintain the appearance of security rather than implementing well-known solutions to long-confirmed and festering problems. We cannot have those voices silenced if we are going to prevent another tragedy in our Nation.

My testimony gives numerous examples of whistleblowers whose warnings have been vindicated in retrospect but who are still isolated from their areas of expertise, relegated to updating the telephone books at their agencies, or serving as travel agents for people on foreign assignments, despite the fact that they have gone to the mat and risked their careers disclosing still unsolved problems that sustain our vulnerability to terrorism. Our Nation does not have the luxury to waste these talents.

Let me give a brief rebuttal of the Justice Department's specific arguments. On security clearances, they stated that since the Merit Board is not an expert body this would chill the professionals. The Merit Board would not be acting on anything outside of their expertise, which is determining whether there have been merit system violations like retaliation. They would not be touching the technical issues that they do not have expertise for.

The gentleman from the Justice Department said, we have these review boards and they work great at Justice. Justice is not any institutional guarantee of due process for the rest of the Executive Branch. Let me share with you some of the results from the other agencies. There is everywhere an institutional conflict of interest. The body that is acting as judge and jury normally would be the adverse party in the case. That is not a healthy premise. There are no timeframes for these decisions. Whistleblowers are routinely forced to wait over 3 years before they are told what they have been accused of. The gentleman did not talk about timeframes at

Justice. One of their DOJ whistleblowers was waiting 2 years to get any explanation for the loss of his clearance.

They are not allowed to confront their accusers when they have a hearing. They are not allowed to present witnesses themselves, or present their own evidence. While there may be exceptions, as a rule, security clearance hearings at internal review boards are frequently analogized to Kafka's, *The Trial.* Only unlike that book, they are not a 19th Century nightmare novel. They are the 21st Century reality.

Justice's other arguments are similarly specious. On it being unconstitutional to give classified information to Congress for whistleblowing disclosures, that issue was decided in 1998 with the Intelligence Whistleblower Protection Act. This is just housecleaning to extend it to the merit system. Further, Federal employees every day have to make that decision to almost 3 million people who have clearances but are not in Congress. Why should Congress be the only group that does not have the right to make a judgment call about whether a cleared individual has a need to know? You folks deserve it more than the other outlets.

On loopholes, the gentleman said that this bill would make any potential disagreement potential protected whistleblowing. This bill does not change the substance at all for what qualifies for whistleblowing except in the irrefragable proof area. It just means you cannot be disqualified because of cosmetics like formality or context. Thank you, Mr. Chairman.

Senator FITZGERALD. Thank you, Mr. Devine. Mr. Kohn.

TESTIMONY OF STEPHEN M. KOHN,[1] CHAIRMAN, BOARD OF DIRECTORS, NATIONAL WHISTLEBLOWER CENTER

Mr. KOHN. Thank you, Chairman Fitzgerald and Senator Levin, for holding this hearing.

I come with a different perspective than other witnesses. I have litigated whistleblower cases for almost 20 years and I use all of the laws, not just the Whistleblower Protection Act. I have come to avoid the WPA at all costs. I have won cases in reinstatements for Federal employees by avoiding the WPA. I will give you an example why.

I put together Table No. 1 which is in the testimony and on the overheads. These are laws, whistleblower laws that are apples to apples to the WPA. They are administrative laws. They are investigated by administrative agencies. They are litigated before an administrative judge. Their final decisions are rendered in Washington, DC by a centralized board, yet look at the differences. In every other law there is all-circuit review. Only the WPA does not happen. That single difference has fundamentally undermined whistleblower protection, because all-circuit review is in practice the peer review procedure utilized by judges on a daily basis for their own oversight and accountability.

When a judge under the Pipeline Act or the Superfund Act or the Energy Reorganization Act writes a decision in the Fourth Circuit, they know when that issue comes up in the Second Circuit or the Third Circuit or the Tenth Circuit, other judges will look at it and

[1] The prepared statement of Mr. Kohn with attachments appears in the Appendix on page 132.

perhaps criticize them. That is the fundamental way that the whole appellate system works. By segregating the WPA out and only having one circuit review, you have taken away the key oversight mechanism for the Federal appellate judiciary, and that alone has rendered the WPA totally inefficient and ineffective.

If you look at the other issues that are also raised by this legislation you will also see the WPA standing out. Critical is the administrative agency right to file an appeal. I know now they want OSC to be able to come in and file an appeal. Under all these laws, the administrative agency with the authority over these laws goes into the Courts of Appeals regularly and argues for the whistleblower if they have determined the whistleblower had merit. That is an outcome determinative factor.

When a government lawyer comes into a Court of Appeals and says, this whistleblower had merit, the judges listen a lot harder than as, in the testimony of the government, a pro se. They brag that the Federal Circuit has nice procedures for pro se appellants. Anyone who has clerked at a Court of Appeals knows, they may have nice procedures for pro se, but are they going to listen and what is the outcome issue?

Also on the critical issue of report to supervisors, the Federal Circuit stands alone—every other court, and there were many decisions on this, and this was fought out in the circuits over a period of years. The Supreme Court denied cert. They did need to take cert because it all worked out. In every other law they protect those reports to supervisors.

So let us now go to Table No. 5. That one issue alone, do you support the whistleblower who has the courtesy and the respect and the common sense to follow the chain of command is outcome determinative. I went through the last 20 reported decisions of the U.S. Court of Appeals under the laws set forth in Table 1 and I was actually shocked to find that in all 20 cases where the employee won it was an internal report. If those same whistleblowers who beat the higher standards, who showed the pretext, who showed the retaliation, who served the public interest had their cases heard in the Federal Circuit the outcome would have been zero.

That is what the common sense practitioner sees every day. I spend hours figuring out how to keep my clients out of the Federal Circuit.

I know my time is up. One last chart, Table No. 6, which just shows—I went through the last ten decisions issued by the Department of Labor in support of a whistleblower this year, 60 percent of those valid whistleblowers would have automatically lost their cases in the Federal Circuit. The critical piece of your legislation is the all-circuit review. I support all the other aspects of it, but without all-circuit review, Federal whistleblowers will never obtain legitimate protection. Thank you very much.

Senator FITZGERALD. Thank you Mr. Kohn. Mr. Bransford.

TESTIMONY OF WILLIAM BRANSFORD,[1] PARTNER, SHAW, BRANSFORD, VEILLEUX & ROTH, P.C., ON BEHALF OF THE SENIOR EXECUTIVES ASSOCIATION

Mr. BRANSFORD. Thank you, Mr. Chairman. On behalf of the Senior Executives Association, we appreciate the invitation to testify this afternoon on our views related to S. 1358. SEA is grateful to the Members of the Committee for their interest in improving the law protecting whistleblowers as well as protecting the process by which it is determined whether a whistleblower has been subjected to prohibited reprisal.

In general, SEA is supportive of this legislation, but in several instances we think the bill has gone too far. The first sections of the bill greatly expand the definition of what constitutes a protected disclosure and in our opinion these provisions seem designed to overturn precedent from the Federal Circuit. While SEA is generally supportive of these changes and believes the precedent from the Federal Circuit should be clarified, we do have concerns related to the current Whistleblower Protection Act and what we think will be an over-reaction to the changes in S. 1358 if the following concerns are not also addressed.

SEA's primary concerns are that these changes to S. 1358 do not protect the right of a manager to continue to manage an employee who has made a bad faith disclosure. As a result, managers potentially face a claim of whistleblower reprisal for making virtually any adverse personnel decision that touches upon the whistleblower no matter how justified the action may be. SEA believes that a provision in the act providing for some sort of penalty for filing bad faith whistleblower claims would serve to discourage those non-legitimate claims.

In the alternative, the bill should be changed to deny protection for disclosures made by an employee solely to avoid accountability for the employee's misconduct or poor performance. In other words, we are addressing that provision in the law that talks about making motive irrelevant to the case.

Additionally, SEA is concerned that S. 1358 could be interpreted to expand the scope of protected disclosures to cover the policy decisions of a manager, particularly if a policy disagreement by the employee is voiced only to the manager but is couched in terms of legality. We believe it should not be the intent of S. 1358 to protect the disclosures of employees whose disagreement with the administration's policy objectives being carried about by their supervisor is made only to the supervisor and then is followed by a recalcitrant attitude being demonstrated by the employee. We are suggesting changes that allow the MSPB to deny protection for disclosures that relate only to agency policy decisions which a reasonable employee should follow.

SEA supports the new fourteenth prohibited personnel practice which prohibits referring a matter for investigation because of any activity protected under 5 U.S.C. § 2302. However, we are concerned that managers have adequate protection if they refer a matter for investigation for other legitimate reasons. To correct this we propose the language in Section 1(h) of the bill which allows a

[1] The prepared statement of Mr. Bransford appears in the Appendix on page 160.

manager to avoid liability for reprisal by proving the personnel action at issue would have occurred anyway also be made applicable to the new prohibitions of retaliatory investigations.

Section 1(e) of the bill establishes a new Section 7702a in Title 5 setting forth a new process if a security clearance decision appears motivated by whistleblower reprisal. We think the bill may go too far by requiring this new procedure for agency review of security clearances for all violations of Section 2302. We propose that the new process be limited to whistleblower reprisals in violation of 5 U.S.C. § 2302(b)(8), specifically only whistleblower reprisals cases.

SEA supports the provisions in Section 1(g) of S. 1358 concerning attorneys fees. The current law allowing such fees has been interpreted to require the fees for managers who successfully defend charges be paid by the Office of Special Counsel. Such a change in the law would allow the Office of Special Counsel to make prosecutorial decisions without concern for the impact of the decision on the office's budget.

SEA opposes granting an appeal directly to other Circuit Courts of Appeals other than the Federal Circuit. SEA has consistently supported a Federal employee's right to appeal to the MSPB during recent debates concerning homeland security and DOD. And where we assert our position, one of the criticisms of the MSPB that we are given in response is that the MSPB appeal process is too complex. The level of complexity will only increase with the availability of multiple Circuit Courts of Appeals being put into the new law.

Also it appears that the only reason to allow appeals to multiple circuits is a dissatisfaction with the Federal Circuit. If this is the case, Congress can always legislatively overrule the Federal Circuit, as it did in 1994 and as it appears ready to do in S. 1358. SEA contends this is preferable to the confusing complexity that will be caused by the varying decisions that will be issued by different Courts of Appeals.

On behalf of SEA, we thank you for your willingness to introduce these amendments to the Whistleblower Protection Act. Thank you.

Senator FITZGERALD. Thank you, Mr. Bransford.

Mr. Devine and Mr. Kohn, you are certainly to be commended for your dedicated and forceful advocacy on behalf of whistleblowers, and you have worked hard at calling attention to this important aspect of the law. But I am wondering whether you have ever had the opportunity to defend Federal managers or supervisors, and whether in that way or some other way you have ever had the opportunity to see whistleblower adjudications through the eyes of a Federal manager accused of retaliation.

Mr. KOHN. I have only represented whistleblowers, but mark my word, in representing whistleblowers you come to learn supervisor's motives and what they go through extremely well, through the depositions, through the trials, through the settlement process. I have also represented many Federal managers, including Senior Executive Service employees, people with significant and large-scale managerial responsibility who have themselves become whistleblowers and have talked to me about issues related to management of employees.

So I understand that there is a management side, but what I want to state is that for an employee to actually win a whistleblower case, it is very difficult. Most lose. When you look at the statistics between the other circuits and the Federal Circuit and how the outcome is, it is clear that valid whistleblowers are continuously losing in and under the WPA. One valid whistleblower losing a case is something that is known to many managers and many other employees.

Senator FITZGERALD. Mr. Devine.

Mr. DEVINE. I represent Federal managers regularly because they blow the whistle as well, and one of the lessons we have learned is that the higher up in the chain of command that a whistleblower occupies, the more intensive the dissent is liable to be because their disclosure is more threatening. We are very sensitive to the pressures that they face. One of our organization's first priorities is always to try to work with the manager who is on the other side of a reprisal case to see if we can change the dynamic from accusations and conflict to problem solving about the disclosure. To see if they can work together to make a difference, and then if we can mediate a settlement. Because if there is any lesson we have learned, there are not any winners in a win-lose scenario. But unless we have a credible, legitimate system of rights there will not be any disclosures either.

Senator FITZGERALD. Senator Akaka.

Senator AKAKA. Thank you, Mr. Chairman. My first question is to Mr. Bransford. Some say that clarifying the scope of protection for whistleblowers would fuel the perception that Federal managers cannot fire poor performers. However, I am curious of the training managers receive for handling poor performing employees. Can you comment on that as well as what additional training managers would need should S. 1358 be enacted as currently drafted?

Mr. BRANSFORD. Senator, that is a problem that has been repeatedly pointed to within the Federal Government, that managers do not receive this training. This training is available. It is offered. However, not every manager receives it. There used to be a 40-hour or 80-hour training course for new managers that OPM required. But there are training opportunities available and I agree that managers should receive training on such things as how to handle poor performers, how to avoid retaliation claims, what the Whistleblower Protection Act means and what a manager's obligations are under those laws. I know Senator Voinovich has proposed legislation specifically, I think it was in the last Congress, requiring such training, but that has not been enacted. But I do agree that would help.

Senator AKAKA. Thank you.

Ms. Kaplan, as the former Special Counsel for 5 years you are in a unique position to comment on how the provisions in S. 1358 would impact the Office of Special Counsel. Although many agencies have independent litigating authority, would you please elaborate on the need for this authority as a result of any conflicts of interest with the Justice Department?

Ms. KAPLAN. That is one of my favorite topics, or it used to be. I felt very strongly when I was Special Counsel that it was important for the office to have independent litigating authority because

the office was created as an independent entity to promote the merit system and to protect whistleblowers.

The Justice Department is the government's lawyer, but frequently, in fact always, the Justice Department appears in court defending the agencies accused of retaliation. So they are really the management lawyer. My view always was that it would have helped the development of the law for the Federal Circuit to have been able to hear from the Office of Special Counsel when the cases were in the Court of Appeals where most of the law is developed. A lot of what is being complained about today's Federal Circuit, narrowing of the law by the Federal Circuit, in my opinion, as Mr. Kohn pointed out, if you have a government entity in there that is arguing for a broader interpretation of the law, the court is likely to pay greater attention than it does when, for example, you have a pro se petitioner, which you frequently do in the Federal Circuit.

So I think it is quite important, and I know that frequently the Justice Department takes the position that it is an odd situation because you might have one government agency in the court, and then the Justice Department in the court taking different positions. But actually that is very common in these Federal sector cases. You have a Federal Labor Relations Authority and a Merit Systems Protection Board that appears in court against the Justice Department. So I think it is a really important authority for the office to have and I would certainly urge the Committee to carefully consider it.

Senator AKAKA. Thank you. My next question is for both Mr. Devine and Mr. Kohn. Mr. Bransford suggests that there should be some form of penalty for bad faith whistleblowers due to the impact on Federal managers. What is your opinion on this proposal? Mr. Devine.

Mr. DEVINE. Senator, there is a penalty now for filing a frivolous lawsuit. You spend tens of thousands of dollars at a minimum, you have the cloud of this conflict hanging over your head for years, and then you end up with a formal legal ruling endorsing what you are complaining about. That is quite a penalty. And probably the most significant answer to Mr. Bransford's suggestion is that his idea is premature, because right now almost all employees, or the overwhelming majority of employees who file their cases and if they are not resolved by settlement, end up suffering the penalty I described.

If we had a problem where there was a surge of whistleblower rights cases that was flooding the board, or there was a rash of questionable decisions backing whistleblowers, then we would have a real problem. But we do not right now. The bottom line for this statute is more than enough deterrence for any bad faith lawsuits.

Since Congress significantly strengthened this law in 1994 the track record for whistleblowers in decisions on the merits at the Federal Circuit is 1 in 84. Since the 1999 *Lachance* decision, the track record at the full board for whistleblower decisions is 2 in 27. Even the board's written testimony about administrative judge decisions shows at that early level there is only 10 percent who prevail in decisions on the merits. That is between two and three times less than all the other whistleblower statutes that Mr. Kohn was describing to you.

We just do not have a problem with people filing too many suits because they think that they have got too easy a chance to win. Our problem is they do not have a fighting chance at all.

Senator AKAKA. Mr. Kohn.

Mr. KOHN. Thank you, Senator. This issue again—and I like the word urban legend—is an urban legend. There is another body of law just to look at, which are the Department of Labor whistleblower decisions and cases that are very similar to the MSPB structurally. This issue has come up 100 times theoretically. When you go down and read those decisions what you find is there are very few cases—and I have read every one of them. I have written five books on it. I have sat and read every one of the cases. Just one or two or three that would come to the frivolous cases.

So when it has gone up to the Secretary of Labor, be it a Republican or a Democrat, they have consistently said, you know what, there is no need to have any sanction and we will not even allow it. So even though they would have had the discretion to impose it, they decided by case law it was against the public policy and there is really no need. So it is just a theory.

I do want to correct my testimony, Senator Fitzgerald, one way. Although I do not directly represent managers against employees, since I do represent managers, often they have problems with employees, and I do give counsel to them on how to deal with employees, but not in court. So I just wanted to clarify that answer. Thank you.

Senator AKAKA. Thank you. My time is up.

Senator FITZGERALD. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman. Thank you all for your testimony. It is invaluable.

On the question of independent litigating authority, Ms. Kaplan, I think you testified relative to the importance of that existing. I am wondering whether or not our other witnesses think that the Office of Special Counsel ought to have that authority to appeal to the circuit?

Mr. DEVINE. Senator Levin, we believe this is a no-brainer. There simply is no rational basis to gag the institutional defender of the merit system from the final decisive stages of litigation that control the evolution of the merit system. It is an inherent structural imbalance in the input to the courts. We do not think this is a tough one.

Senator LEVIN. Mr. Kohn.

Mr. KOHN. I think it is not only not tough, it is critical. I have been on both sides. I have been in court where the government has been on my side at the Appeals Court. I see it much easier. I have been against the government and I see the skepticism. It is much harder.

But if you look at some of the decisions like *Chevron,* the Supreme Court decisions where they discuss the type of deference a Court of Appeals by law must give a responsible administrative agency, then it becomes absolutely critical because when you go before the Court of Appeals who is speaking for the government and for the Whistleblower Protection Act? If it is the Department of Justice, they are going to give *Chevron* deference to interpretation to DOJ. They will naturally do that, even if they do not write it

in their decision. If the Office of Special Counsel were permitted to go before the Court of Appeals they would then give *Chevron* deference to their interpretation. That is outcome determinative in many cases. That is the way the courts are used to dealing with reviews of administrative orders. Thank you.

Mr. BRANSFORD. I have recently been party to cases where the MSPB and the Department of Justice were on opposite sides of the same issue in the Federal Circuit and it works just fine. I see no reason why the Special Counsel cannot also be given that type of authority. I personally have benefited by the fact that the Special Counsel did not have—or at least my clients benefited by the fact that the Special Counsel did not have that authority because OPM made decisions not go forward to the Federal Circuit. I agree with Ms. Kaplan completely that if the Federal Circuit could have the benefit of the Special Counsel's input in decisions some of these cases would be different. I am in support of independent litigating authority.

Senator LEVIN. Thank you. On this irrefragable proof standard, it was good to hear from the Department of Justice that they do not support it. I am wondering if each of you would comment on whether or not then it is relevant? Because MSPB says it does not follow that so-called dicta. I am not sure it is dicta, by the way, but it says it is not going to follow it. Does that mean that it does not have an impact, that opinion of the Court of Appeals in *Lachance*? Does it mean there is no impact to it because MSPB says it is not going to be followed by them? Let us start with you, Ms. Kaplan.

Ms. KAPLAN. No, I do not think it means that at all. Obviously, when you have a decision from the Court of Appeals and there is only one Court of Appeals that hears these cases, even if you could call it dicta—and I used to like to call it dicta as well because I did not want to follow it—but you still have to pay attention to even that which is called dicta by a Court of Appeals. I think if the Justice Department agrees, and I think this is a new position for them, that it is inappropriate, then I think the legislation should clarify that so we will not have the problem in the future.

Senator LEVIN. Mr. Devine.

Mr. DEVINE. I think the primary significance of the MSPB's recent views on this is that it should make the amendment non-controversial. As far as the Department of Justice dismissing it as dicta, they have not quite been able to keep their position straight. In their September letter to the Committee this year they said that the irrefragable proof standard had been helpful for them in winning cases. Now they are saying it is not relevant. I think they were right the first time around. Administrative judges have been influenced by this precedent. It has had a significant impact on the quality of settlements. And the decision is being quoted in other forums. It has been contagious at the State and local level. This is an indefensible doctrine which has to be eliminated.

We are very appreciative of the board's support for recognizing the obvious about this standard. Unfortunately, the Merit Board cannot overturn a Federal Circuit decision. Only Congress can do that.

Senator LEVIN. Thank you. Mr. Kohn.

Mr. KOHN. Senator Levin, I would want to second the questions and points made by Senator Akaka on this very issue. I personally have sat in settlement negotiations in Federal cases in which that case comes out and they say, you had better take what we are putting out. You will lose. Don't you see this decision here? Not just by the opposition but by good-faith administrative judges of the MSPB saying, don't you want to do what is best for your client? Look what is going to happen. As long as that case is out there, it is and will be used to the detriment of valid whistleblowers.

Senator LEVIN. Thank you. Mr. Bransford.

Mr. BRANSFORD. I never thought the decision meant that the degree of proof was overwhelming. In fact, I support the idea that that language is dicta. I viewed *Lachance vs. White* as being primarily a case about whether policy disagreements rise to the level of whistleblowing.

Having said that, SEA would support legislation that clarifies that, and I think either the substantial evidence or preponderance of the evidence standard as suggested by Justice would be appropriate. Something to make it clear that the presumption could be overcome with some level of reasonable evidence.

Senator LEVIN. My time is up. I just have one more question if there is another round, Mr. Chairman.

Senator FITZGERALD. I have been told that we have a vote on now and there are 12 minutes and 30 seconds left. What I would like to do now is to thank this panel. I could give Senator Levin—Senator Grassley has now arrived and he wishes to make a statement.

Senator LEVIN. I would just ask my question for the record.

Senator FITZGERALD. Sure, go ahead and ask your question for the record.

Senator LEVIN. Just for the record, I will just ask a question about the *Willis vs. Department of Agriculture* case which, as I understand it, decided if a person blows the whistle on wrongdoing but did it within the agency chain of command then the whistleblowing does not constitute a protected disclosure under the law. We have addressed that a little bit here this afternoon.

But my question is what your reaction is to that decision and the language in our bill that is set forth, whether or not that is the best way to address the problem raised by that decision, if you find or if you believe that there is a problem raised by the decision. If you could just give us that—not here, because we are out of time, but just for the record in a written response, I would appreciate it.

Senator FITZGERALD. Thank you very much, Senator Levin. And thank you to all members of the panel. We appreciate your being here. Your testimony was great. Thank you very much.

At this point I would like to call on our distinguished colleague, Senator Grassley. Senator Grassley has been busy with the Medicare hearings and he wanted to make sure he had a chance to come over here and make a statement. We appreciate his willingness to be here. I think we can allow Senator Grassley to proceed and then we can all make our vote.

Senator Grassley is, of course, from Iowa. He is the chairman of the Senate Committee on Finance. Senator Grassley was elected in 1980 and he has been a leader for many years in protecting the

rights of whistleblowers. Senator Grassley was a co-author of the Whistleblower Protection Act of 1989 as well as the author of the whistleblower amendments to the False Claims Act in 1986. Senator Grassley has worked tirelessly through the legislative process to promote government accountability by ensuring that Federal employees have the opportunity to make whistleblower disclosers without retaliation.

Senator Grassley, the Committee welcomes your statement at this time, and we thank you for being here.

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

Senator GRASSLEY. Thank you very much. Obviously, as you mentioned, those very important bills we have been involved with in the past that also included Senator Levin and Senator Akaka on those, and I am glad to be joining you on this very important piece of legislation at all.

The two bills that you have referred to, already law, largely passed to overturn a series of hostile decisions by administrative agencies in the Federal Circuit Court of Appeals monopoly on the statute's judicial review. I think we have come to the conclusion that enough is enough. The Whistleblower Protection Act has become a Trojan horse that may well be creating more reprisal victims than it protects. The impact for taxpayers could be to increase the number of silent observers who passively conceal fraud, waste and abuse. That is why the legislation that we are discussing today is so very vital to the American taxpayer.

Our bill has five cornerstones: Providing protection for national security whistleblowers; closing loopholes in the scope of the whistleblower protection; restoring a realistic test for when reprisal protection is warranted; restoring the normal structure for judicial review; and codifying the anti-gag statute passed as an appropriation rider for the last 14 years.

While all the provisions in this bill are critical to proper functioning of whistleblower rights, the provisions that protect national security whistleblowers is particularly so. The provisions prohibit a manager from suspending, revoking, or taking any other retaliatory action with respect to an employee's security clearance in retaliation for whistleblowing.

Since September 11, government agencies seemed to have placed a greater emphasis upon secrecy and restricted information for security reasons. There might be some reasons why that is understandable, but with these restrictions come a greater danger for stopping the legitimate disclosure of wrongdoing and mismanagement, especially in public safety and security.

Although the entire bill is important, I am having to confine my comments today to national security. In their views' letter dated November 10, 2003, the Department argued that these whistleblower protections constitute "an unconstitutional interference with the presidential constitutional responsibilities respecting national security and foreign affairs." We have an Iowa expression that fits that and that would be hogwash.

[1] The prepared statement of Senator Grassley appears in the Appendix on page 167.

During the 105th Congress, the Select Committee on Intelligence thoroughly addressed the issue in our hearing entitled Disclosure of Classified Information to Congress. The Senate heard testimony from Dr. Louis Fisher, a Congressional Research Service senior specialist and also from a law professor, Peter Raven-Hansen of George Washington. These two highly respected scholars disagreed with the Department of Justice's opinion when it was offered then. Professor Raven-Hansen explained that "the President and Congress have both historically and as a matter of constitutional text, shared authority over classified information from the very beginning."

The Department argued then as it does now, that the President's power to regulate classified information is implied in his command authority as Commander-in-Chief. While this may be correct, the Justice Department fails to recognize that the Congress has equal, and some might argue, greater authority with regard to classified information. Nine times the Constitution explicitly gives the Congress responsibility for national security and foreign affairs. Additionally, according to Professor Raven-Hansen the Congress' power over this subject is implicit in Congress' residual authority to make all laws necessary and proper to carry out not only their vast national security powers but also the President's.

The Department of Justice relies heavily on the case of *Department of Navy vs. Egan.* Their reliance on this case is misguided. According to Professor Raven-Hansen, the *Egan* case "stands simply for the proposition that the President has inherent authority to regulate classified information and does not need a statute to do so. It does not mean that he could violate the statute if Congress passed one regulating such matters."

Consequently, Congress has the authority to prohibit the retaliatory taking of a security clearance. I do not want anyone to think that Congress is trying to force something down the administration's throat. Last year my staff and the staffs of Senator Levin, Akaka, and Gramm sat down with the Department of Justice and White House to work out this provision. We even agreed to make a number of suggested changes. But unfortunately, at the end of the day we are not going to agree.

Nonetheless, this provision is critical to the proper oversight of the Federal Government. In the 14 years since Congress unanimously passed the Whistleblower Protection Act it has been the taxpayers protection act as well. My office has been privileged to work with public servants who exposed indefensible waste and mismanagement at the Pentagon as well as indefensible abuses of power at the Department of Justice. Unfortunately, these courageous whistleblowers proceed at their own risk when defending the public.

It has been confirmed repeatedly that whistleblowers must prove their commitment to stamina and persistence in order to make a difference against ingrained fraud, waste and abuse. There should be no question about Congress' or this Senator's commitment, as long as whistleblowers are defending the public, we must defend credible free speech rights for genuine whistleblowers. Congress cannot watch passively as a gaping hole expands in the shield pro-

tecting public servants. The taxpayers are on the other side of the shield with the whistleblower.

Thank you very much.

Senator FITZGERALD. Senator Grassley, thank you for that very powerful statement. Thank you for making it over here. I know you are very busy. I would like to thank my colleagues for being here.

We will keep the record open until Tuesday, November 18 at 5 p.m. This meeting is now adjourned. Thank you.

[Whereupon, at 5:13, p.m., the Committee was adjourned.]

APPENDIX

Department of Justice

STATEMENT

OF

PETER KEISLER
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

CONCERNING

S. 1358
THE FEDERAL EMPLOYEE PROTECTION OF DISCLOSURES ACT

PRESENTED ON

NOVEMBER 12, 2003

Mr. Chairman and Members of the Committee, I am pleased to appear before you today on behalf of the Department of Justice to advise you of our strong objections to S. 1358, a bill to amend Chapter 23 of Title 5, United States Code ("the bill").

The Department is strongly committed to the protection of whistleblowers who bring to light significant information about waste, fraud, or abuse in Federal agencies. We support the protections against retaliation that are afforded to them by current law. We are not aware of any specific evidence, nor have we been provided any, indicating that current law has not served those important purposes. In litigating and settling hundreds of these cases, we have found that not every individual who claims to be a whistleblower meets the statutory definition and not every agency action against such an individual is improper retaliation. This bill must be judged not simply on whether it would provide maximum protection to any and all allegations of whistleblower reprisal, but whether the additional protection afforded by this bill is worth the costs. In seeking to strike the appropriate balance, the Committee should make no mistake that the costs would be substantial, both in terms of the bill's impact on vital national security interests, and the inefficiencies the bill would create in the management of the Federal workforce.

S. 1358 would make a number of significant and extremely undesirable changes to the Whistleblower Protection Act ("WPA") and the Civil Service Reform Act ("CSRA"). It would, for the first time, encourage the disclosure without supervisory approval of classified information and then insulate the individuals who committed the unauthorized disclosure from adverse action. It also would allow the Merit Systems Protection Board ("MSPB") and the Federal courts to review decisions regarding Federal employee security clearances. In this time of heightened national security concerns, these changes pose an unacceptable danger to our national security interests.

Although we strongly support protections for Federal employees who disclose fraud, waste, and abuse, the changes proposed in this bill do nothing to strengthen the protection for legitimate whistleblowers, but instead would provide a legal shield for unsatisfactory employees. 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. These changes would permit almost any employee against whom an unfavorable personnel action is taken to claim whistleblower status. In the long run, these changes would lead to costly inefficiencies in the Federal workplace and would impair the effectiveness of Federal agencies.

The bill also would alter the scheme for judicial review of decisions of the MSPB. The Federal Courts Improvement Act of 1982, established 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. By investing other circuits with concurrent review authority, the bill 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 him 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 himself in all Federal courts other than the Supreme Court. These provisions are undesirable as a matter of policy, and undermine the Department's central role in coordinating the Government's litigation positions.

I. Constitutional Objections

The Department has serious objections to the bill's proposals to allow for review of security clearance decisions and to protect the unauthorized disclosure of classified information to certain members of Congress and Executive Branch or

congressional employees with appropriate clearance. The constitutional concerns raised by these provisions are set forth in our previous letter regarding this bill, a copy of which is attached to this testimony. If the Committee has questions regarding our constitutional objections, we will be pleased to supply additional information or respond to further questions in writing. Our remarks today focus on some of the many reasons why this bill is bad policy.

II. Expanded Definition of Protected Disclosure

We begin from a central and shared premise: it is important to protect employees who disclose fraud, waste, and abuse. The amendments in this bill do little to aid those who are actual whistleblowers. There already are a number of existing systems in place to detect such fraud, waste, and abuse, including agency Inspectors General and the existing Whistleblower Protection Act framework. This bill, however, would make it far too easy for unsatisfactory employees to use the whistleblower laws as a shield against legitimate agency actions. Ultimately, it would discourage Government managers from making the decisions necessary to running an efficient and effective Federal workplace. In the long run, the changes proposed by this bill would be far more costly and would certainly outweigh any minor increase in protection for legitimate whistleblowers this bill contains.

The WPA, as currently enacted, already provides extensive protections for legitimate whistleblowers. Employees can seek assistance from the Office of Special Counsel, the independent agency charged, in part, with protecting whistleblowers, or bring their own claims to the MSPB. This bill does not enhance these existing protections but, 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 would simply increase the number of frivolous claims of whistleblower reprisal. Such an increase in the number of frivolous claims would be 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) (new language emphasized).

Current law properly recognizes that, in determining whether an employee's statement constitutes a "disclosure," place, time, context, and motive are important factors to consider. They further the statutory purpose of protecting legitimate whistleblowers. The bill's proposed amendment would do 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 would convert every Federal employee into a potential whistleblower and every minor workplace dispute with a supervisor into a potential whistleblower case. Nearly every Federal employee would, 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 would 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 would 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 existing 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 S. 1358 and the relatively light burden of establishing a prima facie case of whistleblower reprisal, due to the knowledge/timing test, it would become extremely easy for employees to use whistleblowing as a defense for every adverse action taken by an agency. In contrast, the agency would be required to meet the much higher burden of demonstrating that it would have taken the adverse action, regardless of the disclosure, by clear and convincing evidence. Thus, for all practical purposes, this bill would 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 knew 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 inevitably would be deterred from taking any such action. This chilling effect would impede not only the effectiveness of Federal managers, but also have a serious detrimental impact upon the morale of good employees. Studies demonstrate that one of the most important factors impacting upon employee morale is the existence of poorly performing employees and the difficulty that managers face in addressing those problems. This bill would exacerbate those problems.

Perhaps most importantly, the very low standards that would be required under this bill to make a whistleblower claim would vastly increase the number of such claims and create costly inefficiencies. The flood of new whistleblowers would obscure the claims of legitimate whistleblowers, burdening the Office of Special Counsel, and the MSPB, and ultimately delaying relief to

those who may be entitled to it. This would not be an improvement upon the Civil Service Reform Act and the Whistleblower Protection Act, but a step backwards.

III. Security Clearances

S. 1358 contains three significant provisions regarding security clearances. First, subsection 1(e)(1) of the bill would amend 5 U.S.C. § 2302(a)(2)(A) to add "a suspension, revocation, or other determination relating to a security clearance," to the definition of a personnel practice. Second, section 1(e)(2) (adding a new subparagraph (14) to 5 U.S.C. § 2302(b)) would amend the definition of prohibited personnel practices to include "conduct[ing] or caus[ing] to be conducted, an investigation of an employee or applicant for employment because of any activity protected under this section." Third, subsection 1(e)(3) of the bill would authorize the MSPB and the courts to review these security clearance decisions to determine whether a violation of 5 U.S.C. § 2302 (prohibited personnel practices) had occurred and, if so, to order certain relief.

We strongly oppose these amendments because they would authorize the MSPB and the courts to review any determination relating to a security clearance - a prerogative left firmly within the Executive branch's discretion. In *Egan v. Department of the Navy*, 484 U.S. 518 (1988), the Supreme Court explicitly rejected the proposition that the MSPB and the Federal Circuit

could review the decision to revoke a security clearance. In doing so, the Court relied upon a number of premises, including: 1) that decisions regarding security clearances are inherently discretionary and are best left to the security specialists rather than non-expert bodies such as the MSPB and the courts; 2) that review under the CSRA, which provides for a preponderance of the evidence standard, conflicts with the requirement that a security clearance should be given only when clearly consistent with the interests of the national security; and 3) that the President's exclusive power to make security clearance determinations is based on his constitutional role as Commander-in-Chief.

An example demonstrates one of the many fundamental problems with this bill's security clearance provisions. As noted above, the burden of proof in CSRA cases is fundamentally incompatible with the standard for granting security clearances. This conflict is even more apparent in whistleblower cases. Under the WPA, a putative whistleblower establishes a *prima facie* case of whistleblower retaliation by establishing a protected disclosure and, under the knowledge/timing test, a personnel action taken within a certain period of time following the disclosure. Once the employee meets that minimal burden, the burden shifts to the agency to establish *by clear and convincing evidence* that it would have taken the action absent the protected disclosure.

Therefore, the bill would require in the security clearance context, that when individuals make protected disclosures (which, as explained above, would include virtually every Federal employee under other provisions of this bill), the agency must justify its security clearance decision by the stringent standard of clear and convincing evidence. Thus, rather than awarding security clearances only when clearly consistent with the interests of national security, agencies would be penalized for denying or revoking them unless they could affirmatively justify their decision upon the basis of clear and convincing evidence. This standard would be shockingly inconsistent with national security, especially in these times of heightened security concerns.

Section 1(e)(3) of the bill contains language stating that the MSPB or any reviewing court "may not order the President to restore a security clearance." While this language may be intended to alleviate concerns about the Executive Branch prerogative with regard to security clearance determinations, it does not. The vague language of section 1(e)(3) is troublesome because it states only that the MSPB cannot order the "President" to "restore" a security clearance. Thus, the provision could be read to permit the MSPB to order an agency head or lower ranking agency official to restore the security official. Likewise, because the prohibition only prohibits restoration of a security

clearance, it could be read to permit the MSPB to award an initial clearance, to order an upgrade, or to stop an investigation.

More importantly, even if this interpretation were obviated by clarifying language, the MSPB still could order back pay, damages, or even reinstatement to a position not requiring a security clearance. These types of remedies and the burden they would place upon the agencies likely would impose a substantial chilling effect upon decisions regarding security clearances. If the agency official knows that the agency might be required to pay damages or place an employee in a new position if the security decision is judged to be incorrect by the MSPB, that possibiliy inevitably would be considered in making the security clearance decision, even though the only appropriate and permissible basis for the decision is whether the award of the security clearance is clearly consistent with the interests of national security. The chilling effect that would result from this provision is flatly inconsistent with national security concerns.

The bill also would allow individuals to make unauthorized disclosures of classified information to Members of Congress and their staff who possess security clearance. We strongly oppose these provisions because it interferes with the Executive Branch's constitutional responsibility to control and protect

information relating to national security. We are concerned not only with the Executive Branch's prerogative to determine which individuals are authorized to receive classified information, but, just as importantly, whether those individuals have a "need to know" specific types of classified information. As the Committee is aware, there are different types of classified information, requiring different levels of security clearances. Moreover, even individuals with the appropriate clearances do not automatically have access to all information classified at that level. Rather, the appropriate authorities within the Executive Branch make determinations upon a case by case basis about which individuals have a need to know certain classified information. It cannot be overemphasized that every high ranking Government official who has a security clearance and works in the national security field is granted access to only a tiny fraction of our Nation's classified information and, even then, only on a need-to-know basis. This bill would encourage the disclosure of classified information outside of those specifically compartmentalized channels. Such disclosures, even when made to trustworthy individuals, cause serious national security concerns.

Beyond these objections, the amendments are simply unnecessary. Currently, Executive Order 12968 requires all agencies to establish an internal review board to consider

appeals of security clearance revocations. These internal boards provide sufficient protections for the subjects of the revocations, while, at the same time, preserving the authority of the Executive branch to make the necessary decisions. The members of such an employee appeal panel do not include the direct supervisor so it is unlikely that retaliation would be encountered at this stage.

The bill's proposed reform in the area of security clearances is a solution in search of a problem. We are not aware of any pattern of abusing security clearance decisions to retaliate against whistleblowers that should prompt Congress to seek to enact subsections 1(e)(1) and 1(e)(3), which are potentially unconstitutional and are certainly bad policy.

IV. Judicial Review

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. Moreover, it would add substantially to the Federal Government's cost of complying with the law.

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. The change also could prompt confusion for employees transferred to duty stations in different circuits. 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.

V. Litigating Authority for the Special Counsel

The Department also 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.

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 the bill would place upon this right is to require the Special Counsel to petition the MSPB for reconsideration of its decision if he was not a party or intervenor in the matter before the MSPB.

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 contrary to the Department of Justice's longstanding role as the centralized coordinator of the Government's litigation positions. 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.

Conclusion

The WPA already provides the necessary protections for legitimate whistleblowers. This bill would not enhance those protections in any useful way but, rather, it would simply increase the number of frivolous claims and place a tremendous strain upon the entire Federal personnel system. The processing of those frivolous claims would adversely affect Federal managers, the MSPB, the Federal Circuit and, ultimately, those

legitimate whistleblowers whose claims would take longer to be heard.

The proposed protection for unauthorized disclosure of classified information is also troubling because it intrudes upon the President's constitutional power to control the flow of classified information. As a practical matter, it also would vitiate well-established safeguards for limiting the dissemination of sensitive information, even among those who hold security clearances.

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

To repeat, the Department is strongly committed to the protection of whistleblowers. We believe that the current law strikes the appropriate balance by affording protection to legitimate whistleblowers while preserving a process within which the agencies can respond effectively to poorly performing employees. This proposal would turn that system upside down and, in addition to its constitutional flaws, significantly impair the ability of agencies to effectively manage the Federal work force. We oppose this as a fundamentally flawed proposal, which is unnecessary, burdensome, and, in part, potentially unconstitutional.

Thank you for your consideration of our views. I would be happy to respond to your questions.

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

November 10, 2003

The Honorable Peter G. Fitzgerald
Chairman
Subcommittee on Financial Management, the Budget,
and International Security
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on S. 1358, the "Federal Employee Protection of Disclosures Act." We very strongly oppose this legislation.

S. 1358 would make a number of significant and extremely undesirable changes to the Whistleblower Protection Act ("WPA") and the Civil Service Reform Act ("CSRA"). Among other things, the bill would permit, for the first time, the Merit Systems Protection Board ("MSPB") and the courts to review the Executive branch's decisions regarding security clearances. It would provide new protections for the unauthorized disclosure of classified information. It would make sweeping changes to the WPA, including a vast expansion of the definition of a "protected disclosure." It would alter the carefully crafted scheme for judicial review of decisions of the MSPB, which is set forth in the CSRA. It would grant the Office of Special Counsel independent litigating authority. S. 1358 is burdensome, unnecessary, and unconstitutional. Rather than promote and protect genuine disclosures of matters of real public concern, it would provide a legal shield for unsatisfactory employees. *See, e.g.*, S. Rep No. 100-413, at 15 (1988) ("The Committee does not intend that employees who are poor performers escape sanction by manufacturing a claim of whistleblowing"); S. Rep. No. 95-969, at 8, *reprinted in* 1978 U.S.S.C.A.N. 2723, 2730-31 ("Nor would the bill protect employees who claim to be whistle blowers in order to avoid adverse action based on inadequate performance").

Constitutional Concerns

Section 1(b) of the bill would create 5 U.S.C. § 2302(b)(8)(C). This new section would protect the unauthorized disclosure of classified information to certain members of Congress and to Executive branch or to congressional employees with appropriate clearance. Under the new section, 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 of 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. We believe that this new provision would be unconstitutional.

This new section would authorize any Federal employee to determine unilaterally how, when, and under what circumstances classified information will be shared with others, regardless of Presidential determinations that access be limited. Thus, it would interfere with the President's constitutional authority to protect national security information and therefore would violate 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).

Although the new section would limit 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. Although the designated individuals might have appropriate clearances to receive the classified information, it is the President's prerogative to determine who has the need to know this information. Moreover, the President will have to base this determination upon particular – and perhaps currently unforeseeable – circumstances, dictating 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 upon 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 pursuant to the official authority of the President and who ultimately is 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.

We note that the prior Administration took this same position in 1998, strongly opposing, 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).

Other Concerns

1. Expanded Definition Of Protected Disclosure

Subsection 1(b)(1)(A) of the bill would broaden the definition of "protected disclosure" by amending 5 U.S.C. § 2302(b)(8)(A) to state:

> 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. [emphasis added]

This amendment appears intended to override or supersede a series of decisions by the United States Court of Appeals for the Federal Circuit that defined the scope of disclosures covered by section 2302(b)(8). *See, e.g., Horton v. Dep't of Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995) (*Horton*) (complaints to wrongdoers are not protected whistleblowing); *Willis v. Dep't of Agriculture*, 141 F.3d 1139, 1143-44 (Fed. Cir. 1998) (ordinary work disagreements not protected disclosures, nor are disclosures made during the course of performing ordinary job duties); *Meuwissen v. Dep't of the Interior*, 234 F.3d 9, 12-14 (Fed. Cir. 2000) (discussion of matters already known does not constitute a covered disclosure); *LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (*White*) (in determining whether a disclosure is covered, the Board should consider the motives of the employee making the disclosure). The Federal Circuit

precedent was useful to Federal agencies because it insulated them from having to defend against potentially burdensome whistleblower litigation involving no more than workplace disagreements, complaints by disgruntled employees, or matters that never were, in any real sense, "disclosed" to any individuals or organizations having any authority to address the disclosures.

The expanded definition in subsection 1(b)(1)(A) would upset the delicate balance between whistleblower protection and the ability of Federal managers to manage the workforce. The WPA already provides adequate protection for legitimate whistleblowers. The proposed expansive definition 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 not provide further protection to those with legitimate claims, who are covered by the existing law. It simply will increase the number of frivolous claims of whistleblower reprisal. Such an increase in the number of frivolous claims would impose an unwarranted burden upon Federal managers and, ultimately, the MSPB and the Federal Judiciary.

The Federal Circuit appropriately has 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. 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 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 during the course of performing his or her everyday responsibilities, report 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 would 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 provision would undermine the effectiveness of the WPA.

The danger of this expanded definition is even more apparent when understood in the context of the statutory scheme of the WPA. Under current law, 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 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 establishes 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.

Given the expanded definition of disclosure and the relatively light burden of establishing a *prima facie* case of reprisal under the knowledge/timing test, it would be exceedingly easy for employees to use whistleblowing as a defense to every adverse personnel action. Then the statutory structure of the WPA would require the agency to meet the much higher burden of demonstrating by clear and convincing evidence that it would have taken the adverse action, regardless of the disclosure. Thus, for all practical purposes, section 1(b)(1)(A) would 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, would seriously impair the ability of Federal managers to effectively and efficiently manage the workforce. If Federal managers knew that it was likely that they would be subject to a charge of whistleblower reprisal every time that they took an adverse personnel action, they might hesitate to take any such action. Likewise, the very low standards that would be required to advance a whistleblower claim would vastly increase the number of such claims, obscure the claims of legitimate whistleblowers, and unduly burden the MSPB and the Federal Circuit.

Currently, the WPA does not cover disclosures that specifically are prohibited by law or disclosures of information that specifically are required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs. Subsection 1(b)(1)(B) would add 5 U.S.C. § 2302(b)(8)(C) to include this category of covered disclosures if the disclosure evidenced a reasonable belief of violation of law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; substantial and specific danger to public health or safety; *or* a false statement to Congress on an issue of material fact. The disclosure also would have to be made to a Member of Congress authorized to receive information of the type disclosed or to any employee of Congress having an appropriate security clearance and authorized to receive information of the type disclosed. The amendment would expand the scope of covered disclosures significantly and therefore substantially increase the potential exposure to litigation for Federal agencies as well as the staffing costs and other burdens associated with this issue.

2. Security Clearances

There are three significant provisions regarding security clearances. First, subsection 1(e)(1) of the bill would amend 5 U.S.C. § 2302(a)(2)(A) to add "a suspension, revocation, or other determination relating to a security clearance," to the definition of a personnel practice. Second, section 1(e)(2) (adding a new subparagraph (14) to 5 U.S.C. § 2302(b)) would amend the definition of prohibited personnel practices to include "conduct[ing] or caus[ing] to be conducted, an investigation of an employee or applicant for employment because of any activity protected under this section." Third, subsection 1(e)(3) of the bill would authorize the MSPB and the courts to review these security clearance decisions to determine whether a violation of 5 U.S.C. § 2302 (prohibited personnel practices) had occurred and, if so, to order certain relief. We have both general and technical objections to these provisions.

We strongly oppose these amendments because they would authorize the MSPB and the courts to review any determination relating to a security clearance – a prerogative left firmly within the Executive branch's discretion. In *Egan*, 484 U.S. 518 (1988), the Supreme Court explicitly rejected the proposition that the MSPB and the Federal Circuit could review the decision to revoke a security clearance. In doing so, the Court relied upon a number of premises, including: 1) decisions regarding security clearances are an inherently discretionary decision best left to the particular agency involved, not to be reviewed by non-expert bodies such as the MSPB and the courts; 2) review under the CSRA, which provides for a preponderance of the evidence standard, conflicts with the requirement that a security clearance should be given only when clearly consistent with the interests of the national security; and 3) that the President's power to make security clearance determinations is based in his constitutional role as Commander-in-Chief. *See* our constitutional objections at page 1, *supra*.

An example demonstrates one of the many fundamental problems with this bill's security clearance provisions. As we noted above, the burden of proof in CSRA cases is fundamentally incompatible with the standard for granting security clearances. This conflict is even more apparent in whistleblower cases. Under the WPA, a putative whistleblower establishes a *prima facie* case of whistleblower retaliation by establishing a protected disclosure and, under the knowledge/timing test, a personnel action taken within a certain period of time following the disclosure. Once the employee meets that minimal burden, the burden shifts to the agency to establish *by clear and convincing evidence* that it would have taken the action absent the protected disclosure.

Therefore, the bill would require in the security clearance context, that where individuals make protected disclosures (which, as we explain above, would include virtually every Federal employee under other amendments in this bill), the agency must justify its security clearance decision by the stringent standard of clear and convincing evidence. Thus, rather than awarding security clearances only where clearly consistent with the interests of national security, agencies would be permitted to deny or revoke them only upon the basis of clear and convincing evidence.

This standard would be shockingly inconsistent with national security, especially in these times of heightened security concerns.

Beyond these objections, the amendments are simply unnecessary. Currently, Executive Order 12968 requires all agencies to establish an internal review board to consider appeals of security clearance revocations. These internal boards provide sufficient protections for the subjects of the revocations, while, at the same time, preserving the authority of the Executive branch to make the necessary decisions. In any event, we are not aware of any pattern of abusing security clearance decisions to retaliate against whistleblowers. Thus, the drastic and potentially unconstitutional amendments subsections 1(e)(1) and 1(e)(3) would make are unwarranted.

We have other, more specific, objections to the bill. In defining the category of security clearance decisions that fall within a personnel action and, therefore, would be subject to review, subsection 1(e)(1) of the bill uses the phrase "suspension, revocation, or *other determination* relating to a security clearance" [emphasis added]. The phrase "other determination" is vague and conceivably could encompass such things as an initial investigation into whether a security clearance is warranted, the decision to upgrade or downgrade a clearance, or any other decision connected in any way with a security clearance. This broad language would convert nearly every action an agency takes with regard to a security clearance into a possible basis for a whistleblower charge.

In addition, section 1(e)(2), amending the definition of prohibited personnel practices to include "conduct[ing] or caus[ing] to be conducted, an investigation of an employee or applicant for employment because of any activity protected under this section," is overly broad. As drafted, the provision could be construed to restrict the scope of routine employment inquiries to prior employers, where the Government was a prior employer. This might be the case, for example, where an employee left government service after a whistleblower situation and several years later applied for employment with a different Government agency, necessitating a new background investigation. Section 1(e)(2) would lead to disputes over the scope and permissibility of such inquiries. Moreover, the bar seems to apply whether the claim of whistleblower status was upheld or not.

Finally, section 1(e)(3) of the bill contains language stating that the MSPB or any reviewing court "may not order the President to restore a security clearance." We presume this language was intended to alleviate concerns about the Executive branch prerogative with regard to security clearance determinations. However, the language, on its face, only prohibits the MSPB and reviewing court from ordering "the President" to "restore" a clearance. Conceivably, this language could be interpreted to allow the MSPB to order an agency head or lower official to restore the clearance. Likewise, it does not appear to limit the MSPB's authority to order other actions with regard to security clearances, for instance, to award an initial clearance, to order an upgrade, or to stop an investigation. It also is unclear to us why a narrow class of whistleblower reprisal cases merits the "expedited review" section 1(3)(e) would require and what that would mean in this context.

3. Confidential Advice on Making Disclosures to Congress

Subsection 1(j) would amend 5 U.S.C. § 2302(f) to require each agency to establish a procedure for providing confidential advice to employees on making lawful disclosures to Congress of information specifically required by law or Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs. This provision would place agencies in the odd and anomalous position of effectively encouraging their employees to disclose matters otherwise required by law to be kept secret. We oppose this provision.

4. Judicial Review

We object to section 1(k)(2) of the bill, which would grant the Office of Special Counsel the option to seek review of MSPB decisions by the regional courts of appeal rather than by 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 further burden 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 a non-uniform system undesirable, it could contribute to a loss of morale, as Federal employees would be treated differently depending upon where they lived. Inevitably, it would 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 simply is no good reason to revert to the old system. We have similar concerns about section 1(l) (amending 5 U.S.C. § 7703(b) and (d)).

5. Litigating Authority For The Special Counsel

Section 1(k) of the bill would expand the authority of the Special Counsel by authorizing her to seek review unilaterally in the United States Court of Appeals for the Federal Circuit in any case to which she was a party, *see* section 1(k)(2) (adding new 5 U.S.C. § 7703(e)(1)), and by granting her the authority to designate attorneys to appear upon her behalf in all courts except the Supreme Court, *see* section 1(k)(1) (adding new 5 U.S.C. § 1212(h)). Current law authorizes the Special Counsel to appear only before the MSPB. We oppose both of these changes.

Under current law, employees who are adversely affected by a decision of the MSPB have the right to appeal to the Court of Appeals for the Federal Circuit. *See* 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 adverse to them. OPM is the only Government agency that may appeal an MSPB decision and it may do so only after it has intervened in the MSPB proceeding to present its position and its director has determined 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 a determination, OPM must seek authorization from the Justice Department's Solicitor General to file a petition for review. The Federal Circuit has discretion to grant or deny this petition. OPM is represented in the Federal Circuit by the Department of Justice.

Section 1(k)(2) of the bill would disrupt this carefully crafted scheme by authorizing the Special Counsel, without the 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 would be the requirement that the Special Counsel, if not a party to or intervenor in the matter before the MSPB, petition the MSPB for reconsideration of its decision before seeking review in the Federal Circuit.

Section 1(k)(1) 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 and could result in the Special Counsel litigating against other Executive branch agencies. This would usurp the Justice Department's traditional unifying role as the Executive branch's representative in court. We are unaware of any justification for eroding the Department's ability to fulfill its well-settled representative role.

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 the parochial concerns of a single agency that might 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.

6. Investigations

Subparagraph 1(e)(1)(B) of the bill would amend 5 U.S.C. § 2302(a)(2)(A) to include within WPA-covered personnel actions "an investigation of an employee or applicant for employment because of any activity protected under this section." Additionally, subparagraph 1(e)(2)(C) would amend 5 U.S.C. § 2302(b) to forbid Federal employees to "conduct, or cause to be conducted, an investigation of an employee or applicant for employment because of any activity protected under this section."

We are very troubled by the breadth of these provisions and the effect they could have on the ability of agencies to function. The amendments do not define an "investigation." Accordingly, it would appear that any type of inquiry by any agency, ranging from criminal investigation to routine background investigation for initial employment to investigation for determining eligibility for a security clearance to Inspector General investigation to management inquiries of potential wrongdoing in the workplace, all could be subject to challenge and litigation.

Conceivably, any time a supervisor suspected wrongdoing by an employee and determined to look into the matter, the "investigation" could be subject to challenge. Certainly, any time an Office of Inspector General, an Office of Professional Responsibility, or similar agency component began an investigation, the investigation immediately could become the subject of litigation. Through such litigation, employees would be able to delay or thwart any investigation into their own or others' wrongdoing. This result could adversely affect the ability and perhaps even the willingness of supervisors to examine wrongdoing – which clearly is not a beneficial outcome for the efficient and effective operation of agencies. Indeed, this provision could allow an employee to litigate an action that has not been proposed. Thus, even before any discipline had been proposed or any charges brought, the employee could attempt to short circuit any inquiry into the situation. In this connection, we note that the Equal Employment Opportunity Commission has prohibited the filing of a formal complaint on a "proposal to take a personnel action, or other preliminary step to taking a personnel action." *See* 29 C.F.R. § 1614.107(a)(5).

The CSRA is a careful balance between providing remedies for personnel actions that have been taken against Federal employees and permitting agencies to manage their workforces effectively. Subparagraphs 1(e)(1)(B) and 1(e)(2)(C) would upset that balance seriously, since an investigation is not an action against the employee but is a necessary government function for gathering facts about a wide range of matters so that informed decisions can be subsequently made.

Further, including conducting investigations and "causing them to be conducted" among the prohibited practices could decrease the willingness of any employee to report allegations of misconduct to an Office of Inspector General ("OIG"), which is generally responsible for conducting such investigations. Even the reporting of wrongdoing could be viewed as causing an investigation to be conducted and could subject not just investigators and managers but any employee who "causes" an investigation to be conducted to charges of committing a prohibited personnel practice.

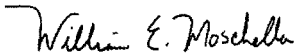
Moreover, the allegation of a prohibited personnel practice in the form of an investigation could result in an investigation by the Office of Special Counsel into an open criminal or administrative investigation and into open investigatory files, and then, pursuant to the OSC's statutory obligations, the reporting of that investigatory information to the complainant. Except in limited circumstances, open investigative files are not shared with other agencies or persons for several reasons, including the privacy interests of the subject and witnesses, and the protection of investigative techniques. Additionally, the Inspector General Act of 1978, as amended, 5 U.S.C. app. § 7(a), requires that the confidentiality of a Federal employee complainant be maintained "unless disclosure is unavoidable during the course of an investigation." Our concerns are amplified because of OSC's reporting of the progress of its investigation and its findings to the complainant. This reporting could compromise and undermine a legitimate law enforcement investigation.

7. Attorneys Fees

Section 1(g) of the bill would amend 5 U.S.C. § 1204(m)(1) to provide that, in disciplinary action cases, a prevailing employee could obtain attorney fees from the agency at which the prevailing party was employed rather than, as currently exists, from the agency proposing the disciplinary action against the employee. Essentially, this provision would shift the burden for attorney fees from the Office of Special Counsel, the agency responsible for pursuing disciplinary actions, to the prevailing party's employing agency. We object to this change for at least two reasons. First, one of the general policies underlying fee-shifting provisions against the Government is ensuring that the Government acts responsibly. By shifting the burden from the agency responsible for taking disciplinary actions – the Special Counsel – to the employing agency, this amendment would eliminate this important check on the Special Counsel in considering which actions to pursue because even if the Special Counsel took an unjustified action, it will not have to bear the attorney fees. Second, this amendment is patently unfair to the employing agencies, which might disagree with the action the Special Counsel was pursuing but nevertheless would be responsible for any fees. Indeed, it is not uncommon that an agency will refuse to take a disciplinary action that is proposed by the Special Counsel, agreeing with a particular employee that no wrongdoing had been committed. If the employee hired an attorney and successfully defended himself against the Special Counsel before the MSPB or the Federal Circuit, the employing agency – who disagreed with the Special Counsel's actions – would be required to pay the fees.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this report.

Sincerely,



William E. Moschella
Assistant Attorney General

cc: The Honorable Daniel K. Akaka
Ranking Minority Member

HEARING BEFORE THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS TO CONSIDER S. 1358, THE FEDERAL EMPLOYEE PROTECTION OF DISCLOSURES ACT--NOVEMBER 12, 2003

STATEMENT OF ELAINE KAPLAN, ATTORNEY, BERNABEI AND KATZ, PLLC

Good afternoon. I appreciate being invited by the Committee to offer my perspectives on S. 1358. My testimony today is based on my experience as head of the U.S. Office of Special Counsel, as an attorney in private practice who represents whistleblowers in both the public and private sectors, and as someone who has given the issue of whistleblower protection a fair amount of thought.

In July of 2001, as Special Counsel, I testified in favor of S. 995, which was an earlier effort to strengthen and improve the Whistleblower Protection Act. That bill included a number of the improvements which are contained in S. 1358 to reverse narrow judicial interpretations of the Act, and to provide the Office of Special Counsel with enhanced authority to enforce the Act's provisions. I stand by my earlier testimony and would ask that the Committee incorporate into the record my written testimony, including the testimony submitted at the earlier hearing.

There have been two significant developments since this Committee considered S. 995 which are worth mentioning. First, after the terrorist attacks of September 11th, our national focus shifted dramatically. We all have heightened concerns and a greater sensitivity to issues of national security. Second, since this Committee considered S. 995, the nation's markets have been rocked by a series of corporate scandals. In the aftermath of these scandals, Congress took fairly radical action--it enacted the Sarbanes-Oxley Act, which extended whistleblower protection to employees of publicly traded corporations. Congress extended these protections because it recognized that there is a relationship between protecting whistleblowers, enhancing public confidence, and preventing wrongdoing.

I mention the terrorist attacks of September 11th, and the corporate scandals that led to the passage of Sarbanes-Oxley, to make a point about the Department of Justice's opposition to S. 1358. Both as Special Counsel, and for many years before as an attorney practicing in the area of federal sector employment law, it has been my experience that whenever amendments are proposed to strengthen the Whistleblower Protection Act, the Department of Justice opposes them. It usually

trots out the same objections. It says that strengthening the law will inhibit managers from taking legitimate actions against poor performers or bad employees. It also says that making changes to the Act's enforcement scheme or giving the Special Counsel greater authority will undermine the uniform application of the law and interfere with DOJ's control over the personnel-related litigation in the federal courts.

I believe that DOJ's reflexive opposition to this bill is bad public policy, especially in the post-9/11 world. Today, more than ever, our emphasis should be, not only on protecting whistleblowers but on encouraging them to come forward. That was certainly what Congress concluded when it extended whistleblower protection to corporate employees. In fact, Congress criminalized certain forms of whistleblower reprisal when it enacted the Sarbanes Oxley Act. Clearly, it is at least as important that federal employees--who are sometimes on the frontlines of the war against terror--feel safe reporting security risks, as it is that employees of Fortune 500 companies are protected when disclosing accounting scandals.

DOJ is fixated on the notion that enhancing protection for federal employee whistleblowers, and closing loopholes in the Act, will protect bad employees. As the head of OSC I frequently heard this old canard trotted out--that the law protects bad employees or that employees cynically invoke the law's protection in order to make themselves immune from legitimate personnel actions. This is pure urban legend. The fact is, weak claims pressed by bad employees are weeded out through the administrative process. The majority of the cases filed with OSC get closed because the law is clear that it is not illegal to take appropriate action against bad employees, even if they are whistleblowers.

Nothing in this bill would change that. Instead, this bill would make adjustments in the law that make common sense, and that advance the public interest on many fronts--including national security..

For example, it makes good sense to prevent agency officials from retaliating against an employee who is making a protected disclosure, whether the employee is doing it as part of their duties, and through their chain of command, or doing it by going outside the chain of command to the IG, the Special Counsel, or Congress. Indeed, I think it is counterintuitive to protect people only when they go outside their chain of command--one would think that it is in management's

interest to encourage people to stay in their chain of command, rather than going, for example, to the Washington Post or the New York Times.

Let me give you an example. Suppose that a security screener at National Airport who works for the Transportation Security Administration notices that the X-ray machines are malfunctioning on a regular basis. He suspects that, because of these malfunctions, a number of passengers may have been permitted to board airlines without being screened. It is part of his job to report such malfunctions to his supervisor. The screener goes to his supervisor and tells him about the malfunctioning machines. The supervisor tells the employee not to write up a report but to go back to work--he does not want to do the paperwork and does not want it to get out that the X-ray machines at National Airport don't work properly. He tells him, don't worry, we will get the problem fixed.

One week later, the employee returns and the problem has not been fixed. This time, he tells his supervisor, if nothing is done, he will report the supervisor's inaction up the chain of command, or perhaps to the IG. The supervisor fires the employee.

Under current law, this employee has no recourse. Because he made his disclosure as part of his regular job duties, he is not protected by the anti-retaliation provisions of the Whistleblower Protection Act. In fact, as a security screener at TSA, this employee does not even have the normal adverse action protections any other employee would have.

This same scenario could play out in any number of contexts: an inspector at the Nuclear Regulatory Commission who suffers retaliation when he recommends that a nuclear power plant's license be revoked for violating safety regulations, an auditor who is denied promotions because he found improprieties in a federal grant program, or an investigator in the Inspector General's office who is geographically reassigned because he has reported misconduct by a high level agency official.

As I said, it makes good sense to reverse this narrow interpretation of the law, under which employee who blow the whistle within the course of performing their jobs have no protection. It also makes good sense not to require employees to overcome an "irrefragable presumption" in order to secure the Act's protection.

While we do not want to protect employees who make malicious unfounded disclosures, neither do we want to require employees to be able to "irrefragably" prove themselves correct, before they feel safe to disclose misconduct or danger to the public health and safety.

In addition, this bill closes some important loopholes--without in any way mandating that the President grant anyone access to classified information, it provides an additional check against the retaliatory revocation or suspension of a security clearance. For employees who must have a security clearance to do their jobs, the revocation of the clearance is tantamount to being fired. When I was at OSC, we could do nothing for employees claiming that their security clearances had been yanked in retaliation for blowing the whistle. I would argue that--especially in the post 9/11 world--we need to close this loophole; the whistleblowers who could contribute to our national security by appropriately disclosing security risks, are the most vulnerable, because they hold clearances and need them to keep their jobs.

A similar loophole exists with respect to the retaliatory investigation. It was fairly common for employees to file complaints with OSC because they were being harassed by a retaliatory investigation. An IG or other investigation is a fearsome thing to an individual employee. It may require them to hire legal counsel; it almost certainly will be deeply upsetting and intrusive. Common sense and experience tells us that federal employees will be discouraged from blowing the whistle if they know that they will then be subject to such harassment. Indeed, a retaliatory investigation can be a much more effective tool of retaliation than some of the other actions that the WPA covers--such as a negative performance evaluation or letter of reprimand.

The bottom line is this: endorsing broad protections for whistleblowers is not just about creating a remedy for people who suffer retaliation--it is also about creating an environment in which employees feel safe and, indeed, are encouraged to voice their reasonable concerns. There is nothing good managers have to fear in this bill; in fact, they should support it. They should support it because encouraging an open environment facilitates the correction of latent problems by management, and without having them erupt into a public scandal. As FBI Director Mueller said in the wake of Agent Coleen Rowley's whistleblowing: it's easy for top management to get the good news, but what management really needs

to hear is the bad news. Narrowing whistleblower protections frustrates this management goal.

Finally, let me take this opportunity to reiterate the importance of some of the other changes the bill would make in the way WPA cases are processed. In particular, I will voice my strong endorsement of the provisions of the bill which would grant the Office of Special Counsel independent litigating authority and the right to request judicial review of decisions of the Merit Systems Protection Board. I would refer the Committee back to the written statement that we submitted in connection with my testimony on S. 995, which covers this issue comprehensively and which I have asked be incorporated into the record.

The opposition to litigating authority that has been articulated by the Justice Department to date is highly unpersuasive. It does not explain why the Office of Personnel Management (which generally represents the interests of management) is authorized to request reconsideration of decisions of the MSPB, even in cases in which it is not a party, but the Special Counsel (who represents the merit system) cannot. It also fails to recognize, in any way, the incongruity of having the Special Counsel (whose job is to protect whistleblowers against retaliation) be represented in court by DOJ--the agency that is otherwise responsible for representing other federal agencies that have been charged with retaliation. I found this profoundly frustrating when I was Special Counsel; I am sure that my successor will as well.

In closing, I thank the Committee again for giving me this opportunity to express my views about the Act, and I would be glad to answer any questions the Committee might have.

June 3, 2002

STATEMENT OF SPECIAL COUNSEL ELAINE KAPLAN, U.S. OFFICE OF SPECIAL COUNSEL, ANNOUNCING MEMORANDUM OF UNDERSTANDING GRANTING WHISTLEBLOWER PROTECTION RIGHTS TO AIRPORT SECURITY SCREENERS

I am Elaine Kaplan, the Special Counsel, head of the U.S. Office of Special Counsel. I am pleased to be joined here today by the Under Secretary of Transportation for Security, John Magaw, and by Ken Mead, the Inspector General for the Department of Transportation. We are here to announce that OSC and TSA, with the support of the Inspector General, have entered into an agreement that will provide important whistleblower protections to airport security screeners. I have an opening statement to make, as do Under Secretary Magaw, and Inspector General Mead.

Let me begin with a little background. OSC is an independent agency within the executive branch, whose statutory mission includes, among other things, receiving and transmitting for investigation whistleblower disclosures by federal employees and applicants for employment, and enforcing the Whistleblower Protection Act (WPA). That Act makes it unlawful for an agency manager to retaliate against a federal employee because they have disclosed information that they reasonably believe evidences a violation of law, rule or regulation, gross mismanagement, gross waste of funds, an abuse of authority, or a specific and substantial danger to the public health or safety.

Under the WPA, OSC has the authority to investigate complaints alleging whistleblower reprisal that are filed by federal employees. Where we conclude that there exist reasonable grounds to believe that whistleblower retaliation has occurred, we report our findings to the head of the agency involved. Along with those findings, we make a recommendation for appropriate corrective action for the whistleblower and/or disciplinary action to be taken against the retaliating manager.

In practice, in the vast majority of the cases in which OSC finds retaliation, agencies agree to voluntarily provide corrective and/or disciplinary action. In those unusual cases where the agency head rejects our recommendations, OSC can and will file a petition for corrective and/or disciplinary action before the Merit Systems Protection Board (MSPB). The MSPB has the authority to order that an agency provide a remedy to a whistleblower or discipline a retaliating manager. If you check our website, at www.osc.gov, you will find a number of press releases, describing actual cases in which OSC secured a remedy for an employee we concluded had suffered retaliation.

Today, we are brought together to discuss how the new airport security screeners fit into this picture. Last fall, in the wake of the September 11th terrorist attacks on the World Trade Center and the Pentagon, Congress passed, and the President signed, the Aviation and Transportation Security Act. That Act created the Transportation Security Administration, and gave it the authority, among other things, to hire a new federalized workforce to screen passengers and luggage at our nation's airports. The Act also gave the Under Secretary the authority to determine the screeners' terms and conditions of employment, thereby exempting them from the usual civil service protections enjoyed by other federal employees, including those set forth in the WPA.

After the Act was passed, I wrote to Secretary of Transportation Norman Mineta. I offered OSC's assistance to the Department of Transportation in any efforts it might undertake to ensure that the new employees hired under the aviation security act would enjoy whistleblower protection. As I advised Secretary Mineta in that letter, providing protection to employees who make disclosures of wrongdoing or malfeasance in connection with the aviation security program is necessary to promote the strong national interests that underlie the act.

Thereafter, we were contacted by TSA, and we began working on the Memorandum of Understanding which is the subject of this press conference. As part of

that process, we received input from the Inspector General's office, which obviously has a crucial stake in the issues covered by the agreement.

Pursuant to the Memorandum of Understanding, the new screener personnel will be afforded many (although not all) of the rights that other federal employees enjoy under the WPA. First, and most important, they will be afforded the right to an independent investigation of their complaints by OSC. Further, in cases in which OSC finds retaliation it will advise the employee as well as the Under Secretary of Transportation of its findings and make recommendations for corrective action. Finally, although there is no right to third party review, the agreement provides that OSC will prepare a quarterly report that discusses all activity under the Memorandum. Pursuant to standard OSC policy, these reports will be publicly available.

Under our agreement:

- Security screeners may file a complaint with OSC alleging that a personnel action was threatened or taken against them because they disclosed information which they reasonably believed evidenced a violation of law, rule or regulation, gross mismanagement, gross waste of funds, an abuse of authority, or a specific and substantial danger to the public health or safety.

- OSC will conduct an investigation of the complaint to determine whether there exist reasonable grounds to believe that retaliation has occurred.

- In appropriate cases, OSC may recommend that TSA stay a personnel action pending completion of its investigation.

- If OSC concludes that it does not appear that retaliation occurred, then it will advise the complainant of its preliminary conclusions and give the complainant an opportunity to respond.

- If OSC concludes that there exist reasonable grounds to believe that retaliation has occurred, and if the matter cannot be settled informally, then OSC will send a formal Report on its Findings to the Under Secretary recommending corrective and/or disciplinary action. The Under Secretary will then have 30 days to advise OSC of what action if any, he will take.

In addition, the agreement provides that:

- OSC will follow its standard policies regarding the protection of complainant and witness confidentiality, as well as public disclosure of its findings. Of course, in disclosing its findings, OSC will not reveal any information that has been designated Sensitive Security information under TSA regulations.

- TSA will make witnesses and documents available to OSC, at its request.

Now that the agreement has been signed, TSA and OSC will work together to promptly draft a Directive for its implementation. Although the Memorandum of Understanding states that the directive will be completed within the next six months, we hope to complete it even sooner. Once that directive is finalized we will begin accepting complaints.

Copies of the Memorandum of Understanding have been made available to you and we will take any questions that you have shortly. Before I turn the microphone over to Under Secretary Magaw, and Inspector General Mead, let me say that I appreciate their cooperation and interest in crafting this agreement and I look forward to working cooperatively with them to implement it. I think the agreement reflects our joint recognition of the importance of encouraging and protecting whistleblowers, especially in these times of heightened national security. After all, who better to identify and bring about the correction of security risks than the federal employees, like the new security screeners, who are at the front lines every day, performing this important work. They need and deserve whistleblower protection; this Memorandum will give it to them.

Now, I will turn the microphone over to Under Secretary Magaw.

TESTIMONY OF THOMAS DEVINE, GOVERNMENT ACCOUNTABILITY PROJECT

before the

SENATE GOVERNMENTAL AFFAIRS COMMITTEE

on S. 1358,

the Federal Employee Protection of Disclsoures Act

November 12, 2003

MISTER CHAIRMAN AND COMMITTEE MEMBERS:

Thank you for requesting testimony by the Government Accountability Project (GAP) on S. 1358, the "Federal Employee Protection of Disclosures Act." My written remarks today incorporate and will not reiterate analysis in the attached July 25, 2001 testimony on S. 995, the original version of this legislation. GAP and a bipartisan, trans-ideological coalition of good government organizations strongly support your effort to put genuine "Protection" back in the "Whistleblower Protection Act." S. 1358 is a modest good government bill that restores legitimacy for a public policy mandate that Congress has thrice made or reaffirmed unanimously. It does not expand the intended scope of that mandate. Most accurately the bill could be called the Whistleblower Protection Restoration Act.

My name is Tom Devine, and I serve as legal director of the Government Accountability Project, a nonprofit, nonpartisan, public interest law firm that assists whistleblowers, those employees who exercise free speech rights to challenge abuses of power that betray the public trust. GAP has led campaigns to enact or defend nearly all modern whistleblower laws enacted by Congress, including the Whistleblower Protection Act of 1989 and 1994 amendments. We teamed up with professors from American University Law School to author a model whistleblower law approved by the Organization of American States (OAS) to implement its Inter American Convention Against Corruption. We have published numerous books, such as The Whistleblower's Survival Guide: Courage Without Martyrdom, and law review articles analyzing and monitoring the track records of whistleblower rights legislation. See "Devine, "The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment

Dissent," 51 Administrative Law Review, 531 (1999); and an upcoming issue of the George Washington University International Human Rights Journal for an article surveying whistleblower laws internationally.

We could not avoid gaining practical insight into which whistleblower systems are genuine reforms that work in practice, and which are illusory. It is an honor and relief to share the lessons learned from GAP's 25 years experience helping whistleblowers, because Congress is at a crossroads with this legislation. If S.1358 is enacted the Whistleblower Protection Act again will be a genuine "metal shield," giving a fighting chance to those who defend themselves with it. If the status quo persists, the WPA will be a cardboard shield, behind which anyone relying on it is sure to die professionally. The law will be a magnet for cynicism, meaning more silent observers when our nation needs whistleblowers the most.

This alarming conclusion is not just from whistleblower support groups such as GAP and the National Whistleblower Center. Since 2000 we have been joined in the effort to restore a credible Whistleblower Protection Act by over 100 citizen organizations of nearly every perspective. Those who have contributed from their Washington offices include the American Library Association, Accuracy in Media, Blacks in Congress, Common Cause, Federation of American Scientists, Judicial Watch, NAACP, National Taxpayers Union, No Fear Coalition, OMB Watch, Patrick Henry Center, Public Employees for Environmental Responsibility (PEER), Project on Government Oversight (POGO) and Taxpayers Against Fraud. (TAF)

The legislation makes an impact in two ways:

1) S. 1358 restores boundaries for whistleblower rights that Congress unanimously reaffirmed in 1994 amendments to strengthen the WPA. Congress has unanimously enacted those boundaries thrice before, in 1978, 1989 and 1994. All three times they have been eroded, erased and rewritten through hostile judicial activism by the Federal Circuit Court of Appeals, which has a monopoly on appellate review. The court also rejected Congress' policy choice in 1994 amendments to cover security clearance retaliation under the WPA. Overall, the result has turned the law into a Trojan horse, creating more victims than are helped. In a very real sense, S. 1358 represents a test of wills between Congress and the Federal Circuit on whether -- 1) an oft-repeated, unanimous legislative mandate will be respected in practice; and 2) whether Congress or the Federal Circuit will set the boundaries for protected whistleblowing.

2) S. 1358 experiments with restoration of the normal judicial review structure, so that Congress will not have to pass this law a fifth time, or more. S. 1358 accomplishes this goal through a five year experiment to remove the Federal Circuit's monopoly, also offering employees the normal appellate option available under the Administrative Procedures Act to appeal in the judicial circuit where they live. This was the structure for judicial review in the Civil Service Reform Act of 1978, until creation of the Federal Circuit in 1982 in a Federal Courts Improvement Act. [Public Law L. No. 97-764, sec. 144 (April 2, 1982)]

The basis for this law is summarized below from two perspectives: 1) the increasing public policy necessity to protect those warning of national security threats caused by U.S. government breakdowns and sustained by abuses of secrecy; and 2) the utter, overwhelming empirical failure of the status quo to protect whistleblowers in

practice. Since 1994 when Congress unanimously strengthened the WPA, through September 30, 2003 whistleblowers' won-loss record for decisions on the merits is 1-84. Since the Federal Circuit's pivotal decision in *Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999), the Merit Systems Protection Board (MSPB) has ruled against whistleblowers in 25 out of 27 decisions on the merits.

The public policy mandate for whistleblowing is summarized through illustrative examples below of how they have made a difference. The ongoing need for the law is summarized through calling the bluffs of a September 30 Justice Department letter to this Committee that denies any need for S.1358.

PROTECTING THE FREEDOM TO WARN FOR OUR MODERN PAUL REVERES

It is worth reviewing why Congress keeps reaffirming a unanimous mandate for whistleblower protection. A necessary premise is to understand their role in any society. There is nothing magical about the term "whistleblower." In the Netherlands, these same individuals are called "bell ringers," after those who warn their communities of danger. Other nations refer to whistleblowers as "lighthouse keepers," after those who save ships from sinking by shining the light on areas where rocks are both invisible and deadly.

As seen by these examples, whistleblowers do not just exercise the freedom to protest or make accusations. They also act as modern Paul Reveres, exercising the freedom to warn about threats to the public's well-being, before avoidable crimes or disasters occur and we are limited to damage control.

Whistleblowers are the living histories who refuse to be rewritten. By challenging conventional wisdom, they keep society from being stagnant and act as the pioneers of change. Consider examples how they have made a difference.

* increasing the government's civil recoveries of fraud in government contracts by over ten times, from $27 million in 1985 to an average of $300 million annually the next ten years after reviving the False Claims Act. For the last two years, the figure has skyrocketed to more than one billion dollars annually, or some forty times what the government could recover for taxpayers without deputizing the whistleblowers. That law allows whistleblowers to file lawsuits challenging fraud in government contracts. There is little question that the False Claims Act is the most effective single law in history for individual whistleblowers to have an impact against corruption.

* overhauling the FBI's crime laboratory, after exposing consistently unreliable results which compromised major prosecutions including the World Trade Center and Oklahoma bombings.

* sparking a top-down removal of top management at the U.S. Department of Justice (DOJ), after revealing systematic corruption in DOJ's program to train police forces of other nations how to investigate and prosecute government corruption. Examples included leaks of classified documents as political patronage; overpriced "sweetheart" contracts to unqualified political supporters; cost overruns of up to ten times to obtain research already available for an anti-corruption law enforcement training conference; and use of the government's visa power to bring highly suspect Russian women, such as one previously arrested for prostitution during dinner with a top DOJ official in Moscow, to work for Justice Department management.

* convincing Congress to cancel "Brilliant Pebbles," the trillion dollar plan for a next generation of America's Star Wars anti-ballistic missile defense system, after proving that contractors were being paid six-seven times for the same research cosmetically camouflaged by new titles and cover pages; that tests results claiming success had been a fraud; and that the future space-based interceptors would burn up in the earth's atmosphere hundreds of miles above peak height for targeted nuclear missiles.

* reducing from four days to two hours the amount of time racially-profiled minority women going through U.S. Customs could be stopped on suspicion of drug smuggling, strip-searched and held incommunicado for hospital laboratory tests, without access to a lawyer or even permission to contact family, in the absence of any evidence that they had engaged in wrongdoing.

* exposing accurate data about possible public exposure to radiation around the Hanford, Washington nuclear waste reservation, where Department of Energy contractors had admitted an inability to account for 5,000 gallons of radioactive wastes but the true figure was 440 billion gallons.

* inspiring a public, political and investor backlash that forced conversion from nuclear to coal energy for a power plant that was 97% complete but had been constructed in systematic violation of nuclear safety laws, such as fraudulent substitution of junkyard scrap metal for top-priced, state of the art quality nuclear grade steel, which endangered citizens while charging them for the safest materials money could buy.

* imposing a new cleanup after the Three Mile Island nuclear power accident, after exposure how systematic illegality risked triggering a complete meltdown that could have forced long-term evacuation of Philadelphia, New York City and Washington, D.C. To illustrate, the corporation planned to remove the reactor vessel head with a polar crane whose breaks and electrical system had been totally destroyed in the partial meltdown but had not been tested after repairs to see if it would hold weight. The reactor vessel head was 170 tons of radioactive rubble left from the core after the first accident.

* bearing witness with testimony that led to cancellation of toxic incinerators dumping poisons like dioxin, arsenic, mercury and heavy metals into public areas such as church and school yards. This practice of making a profit by poisoning the public had been sustained through falsified records that fraudulently reported all pollution was within legal limits.

* forcing abandonment of plans to replace government meat inspection with corporate "honor systems" for products with the federal seal of approval as wholesome – plans that could have made food poisoning outbreaks the rule rather than the exception.

Since 9/11, there has been a surge of national security whistleblowers whose disclosures are warnings so that tragedies will not recur. Dissent from highly knowledgeable, responsible professionals keeps reaffirming a consistent pattern of government misconduct that has significantly increased unnecessary vulnerability to terrorism: The bureaucracy has been satisfied to maintain the false appearance of security, rather than implementing well-known solutions to long confirmed, festering problems. Recent examples are highlighted in the attached copy of an investigative journalism profile in this month's Vanity Fair.

Unfortunately, these modern Paul Reveres have been silenced or professionally terminated by friendly fire from within a defensive government bureaucracy. The public is the loser. The experience of Bogdan Dzakovic, one of the whistleblowers profiled, is

illustrative. Mr. Dzakovic was a senior leader on the Federal Aviation Administration's Red Team, which checked airport security through covert tests. For years the Red Team had been breaching security with alarming ease, at over a 90% rate. Mr. Dzakovic and others warned that a disastrous hijacking was inevitable without a fundamental overhaul. In response the FAA ordered the Red Team not to write up its findings, or to retest airports that flunked to see if problems had been fixed. The agency also started providing advance warnings of the secret Red Team tests. After 9/11 Mr. Dzakovic felt compelled to break ranks and filed a whistleblowing disclosure with the U.S. Office of Special Counsel, which found a substantial likelihood his concerns were well-taken and ordered an investigation. The Transportation Safety Administration was forced to confirm Mr. Dzakovic's charges that gross mismanagement created a substantial and specific danger to public health or safety in connection with the 9/11 airplane hijackings.

In order to strengthen national security, TSA should be taking advantage of Mr. Dzakovic's expertise and allowing him to follow through on his confirmed insights. He has a significant contribution to make in preventing another terrorist hijacking. Instead, the agency has sentenced him to irrelevance. TSA reacted to national debate on Mr. Dzakovic's charges by stripping all his professional duties. When he asked to help train his successors, he was allowed to punch holes and staple documents for their classes. After the Special Counsel protested the example being set, TSA promised to stop wasting Mr. Dzakovic's talents. But his new assignment was to answer a local hotline phone on the graveyard shift, where he had to wake up a supervisor to act on any problems. A frequent activity was taking calls from self-described aliens. After further protests, the agency moved him to TSA's offices in the new Department of Homeland Security (DHS)

headquarters. His current duties are updating the old FAA telephone book so it is current for DHS.

The most surreal harassment against national security whistleblowers also is the most frequent: yank their security clearances. Security clearance actions routinely are used to remove whistleblowers from their jobs when they dissent against lax security, by branding them as untrustworthy. They do not have any independent due process rights to challenge retaliation. As a result, employees regularly are not informed of their alleged misconduct for three years. An illustrative recent example involved national security whistleblower Linda Lewis, a USDA employee protesting the lack of planning for biochemical terrorist attacks on the food supply. She was assigned to work at her home for over 2 1/2 years without duties while waiting for the hearing, which lasted 90 minutes. Afterwards, she still had not been told the specific charges against her. She was not allowed to confront her accusers, or call witnesses of her own. The "Presiding Official" of the proceeding might as well have been a delivery boy. He had no authority to make findings of fact, conclusions of law, or even recommendations on the case. He could only forward the transcript to a three person panel who upheld revocation of Ms. Lewis' clearance without comment, and without ever seeing her. Ms. Lewis experienced a system akin to Kafka's The Trial, only it is 21st century reality, not 19th century fiction.

Ms. Lewis' experience is not unique. Senior Department of Justice policy analyst Martin (Mick) Andersen blew the whistle on leaks of classified documents that were being used as political patronage. Within days, he was told that the Top Secret security clearance he had been using for over a year had never existed. Without access to classified information, he could not do any work. Instead, he was reassigned without

duties to a storage area *for classified documents*, where he spent his days reading the biography of George Washington and the history of America's Civil War.

Two Department of Energy (DOE) whistleblowers in the Vanity Fair article illustrate how security clearance reprisals are used to suppress dissent against inexcusable negligence. Chris Steele is in charge of nuclear safety at the Los Alamos nuclear weapons complex. He blew the whistle on problems such as the government's failure even to have a plan against suicide airplane attacks into nuclear weapons research and production facilities at the Los Alamos Laboratory, a year after the 9/11 World Trade Center tragedy. His clearance, too, was yanked without explanation. This occurred at the climax of a showdown with Los Alamos contractors -- the same officials forced out a few months later in connection with credit card fraud. Mr. Steele was going to the mat on this and equally serious nuclear safety breakdowns, such a secret plutonium waste site without any security or environmental protection. But without warning or specific explanation, he was gagged and exiled -- sidelined by using the clearance action to strip all his duties and reassign him to his home for five months.

Richard Levernier, the Department of Energy's top expert on security and safeguards, got the same treatment when he dissented against failure to act on repeated findings of systematic security breakdowns for nuclear weapons facilities and transportation. For example, he challenged the adequacy of plans to fight terrorists attacking nuclear facilities that were limited to catching them on the way out, with no contingency for suicide squads not planning to leave a nuclear plant they came to blow up. Mr. Levernier did not have to guess why his clearance was suspended. DOE formally charged him with blowing the whistle without advance permission. It also suspended his

salary. Although an OSC investigation found the harassment against Levernier was illegal retaliation under the Whistleblower Protection Act, it could not act to protect his clearance due to the loophole in current law.

REBUTTAL OF JUSTICE DEPARTMENT POSITION

Three overviews are necessary to put the Justice Department objections in perspective. First, they are not a Statement of Administration Policy, but the views of an agency whose institutional mission is to defeat whistleblowers in WPA cases. DOJ has an institutional conflict of interest with protection of whistleblowers in litigation, and the point of S. 1358 is to even the playing field for reprisal lawsuits.

Second, in assessing whether the crippled WPA is a fair balance, DOJ's shotgun objections omit one factor: reality. There is no longer a track record even of token protection in the case law. As described above, whistleblowers do not have a fighting chance to defend their paper rights in practice.

Finally, the debate surrounding DOJ's objections should not be considered in isolation. In almost every instance this Committee's thoroughly researched report on S. 3070, S. Rep. 107-349 107th Cong., 2d Sess. November 19, 2002), already rebuts in detail the Justice Department's assertions, which do not purport to respond. Indeed, DOJ does not reference or otherwise recognize the Committee Report's existence. Less than a year ago, this Committee issued the report without dissent. This testimony largely tracks the analysis in S. Rep. 107-349. Point by point responses to the DOJ letter follow, referenced to relevant page numbers of the September 30 letter for Department positions, and to the Committee Report to credit the staff's research on these same issues.

Overview

DOJ asserts, at 1, that S. 1229 [sic -- the current bill number is S. 1358] "would permit, for the first time, the Merit Systems Protection Board and the courts to review the Executive branch's decisions regarding security clearances." This is a fundamentally, conceptually inaccurate premise. Under the controlling Supreme Court precedent, *Department of the Navy v. Egan*, 484 U.S. 518 (1988), it is elementary that the Board and the courts retain appellate authority to review whether agencies comply with their own rules, and order relief accordingly.

DOJ's second inaccurate premise is that the bill "would alter the carefully crafted scheme for judicial review of decisions of the MSPB, which is set out in the CSRA [Civil Service Reform Act of 1978]." To the contrary, S. 1358 basically restores the original structure of CSRA appellate review in the courts, through a five-year experiment with all circuits review. (Sec. 1.k) Until 1982, the Civil Service Reform Act of 1978 had all circuits review of all MSPB decisions. [See Public Law No. 95-454, sec. 205; 92 Stat. 1143 (Oct. 13, 1978)]. The only distinction for S. 1358 is in deference to the Federal Circuit structure, with that court replacing the D. C. Circuit Court of Appeals as the forum with generic jurisdiction. S. 1358's experiment also would restore consistency with the structure of appellate judicial review for every other whistleblower statute on the books, and with the Administrative Procedures Act generically. 5 USC 555 et seq.,. Committee Report, at 16-17.

National security whistleblowers

1. Disclosures of classified information to Congress. Section 1(b) clarifies that classified information can be included in protected whistleblowing disclosures to

congressional audiences with appropriate clearances. DOJ, at 2-3, protests the provision is unconstitutional, because it would give federal employees the extraordinary authority to "determine unilaterally how, when and under what circumstances classified information will be shared with others...."

DOJ is rebutting a straw man, while rehashing unsuccessful 1998 policy and constitutional protests. In section 501 of the FY 1999 Intelligence authorization, the Intelligence Community Whistleblower Protection Act, Pub. L. No. 105-272, title 7, Congress rejected identical objections. The conferees permitted several options for carefully circumscribed congressional whistleblowing disclosures with classified information. H.R. Rep. No. 105-760 (1998). There have been no successful constitutional challenges. In short, this is a public policy choice that already has been made, without incident.

DOJ severely mischaracterize S. 1358. Employees only have the right to disclose classified information to Congress if it is already covered by the Whistleblower Protection Act, and then only if the disclosure passes a tougher than usual test for protected speech. Other disclosures protected by 5 USC 2302(b)(8) only require that the employee reasonably believes the information "is evidence of" illegality or other listed misconduct. Section 1(b) requires that the employee reasonably believes the information *is "direct and specific* evidence of" listed misconduct. (emphasis added)

Most fundamentally, DOJ's constitutional challenge is much ado about nothing. That was the case when first made in 1998, which is why it was rejected at the time and has not been challenged in a constitutional test of the intelligence whistleblower law. Federal employees with clearances every day "have the extraordinary authority" and duty

to make "unilateral" decisions whether to disclose classified information to others with clearances authorizing them to receive it. The judgment call whether every recipient has a need to know its contents is a normal part of the job. S. 1358 does not change preexisting standards for them to make those judgment calls at their own risk about who is authorized to receive what, and when. None of the cases cited by DOJ specifically ban congressional audiences with appropriate clearances and a need to know from receiving classified disclosures, and in 1998 Congress declined to impose that restriction.

Current law also recognizes that all federal workers already have the right to blow the whistle with classified information, if legal prerequisites are met. The WPA explicitly protects classified disclosures to the Office of Special Counsel, agency Office of Inspector General, and agency heads or designees. 5 USC 2302(b)(8)(B)

In practical terms, S. 1358 merely clarifies that a national security whistleblower may apply preexisting rules on when it is authorized to disclose classified whistleblowing information to a cleared congressional audience with a need to know, the same as for anyone else. This should not be controversial. It is beyond debate that congressional audiences routinely have a need to know classified information in order to carry out oversight duties, and they receive it routinely on the institutional level. S. 1358 establishes boundaries for when the merit system will protect corresponding whistleblowing disclosures -- if the congressional audience has a valid need to know the information in an otherwise valid whistleblowing disclosure, in order to fulfill legislative oversight responsibilities.

Public policy demands a clearly defined, safe channel for classified whistleblowing disclosures to Congress. Whistleblowers at the Department of Energy,

Transportation Security Administration, Customs Service, Border Patrol, Nuclear Regulatory Commission and other agencies have proven a basic lesson to be learned from the tragedy of 9/11. Abuses of secrecy sustain government breakdowns that create vulnerability to terrorism. These national security whistleblowers repeatedly have given classified briefings on their disclosures to cleared staff of committees with oversight duties for one reason: the national security requires it. As a result, the merit system needs a corresponding structure providing rules for when these disclosures can be made responsibly. S. 1358 provides it.[1]

2. Security clearance prohibited personnel practice. Section 1(e)(1) formally lists security clearance related determinations as personnel actions under 5 USC 2302(a)(2)(A). Section 1(e)(3) provides merit system relief for security clearance actions. While not challenging the President's authority to take final action on clearances, S. 1358 permits Board and court relief for any ancillary actions, such as termination or failure to reassign meaningful duties, that are normally available when a personnel action is a prohibited personnel practice barred under 5 USC 2302. The bill also provides for deferential agency review of any clearance action that the Board finds is a prohibited personnel practice, and a report to Congress on resolution of the matter.

DOJ, at 6-8, protests that the provision is unworkable and unconstitutional through scattershot objections, specifically discussed below. Three overviews provide context, however. First, DOJ's arguments merely reiterate, without advancing, objections that this Committee already considered and rejected without dissent in S.R. 107-349. Committee Report, at 22-4. Indeed, the structure of S. 3070 reflects extensive,

[1] The Department's arbitrary rigidity is highlighted by its objection to agency offices to guide whistleblowers on how to disclose classified information responsibly, on grounds

constructive negotiations in which the Committee adopted numerous administration proposals that modified the bill's original text, without undermining its intent to end security clearance whistleblower reprisals

More fundamentally, since 1994 this Committee and Congress has made the public policy choice to close the merit system's security clearance loophole. The decision was not made lightly. The House held four joint Judiciary-Post Office and Civil Service Committee hearings before voting unanimously to close the security clearance loophole in the WPA. The Senate Report for 1994 amendments clearly highlighted security clearances as the primary example of the reasons for what in conference became a new category of personnel action -- "any other significant change in duties responsibilities or working conditions." 5 USC 2302(a)(2)(A)(11) As this Committee's report explained after specifically rejecting the security clearance loophole,

> The intent of the Whistleblower Protection Act was to create a clear remedy for all cases of retaliation or discrimination against whistleblowers. The Committee believes that such retaliation must be prohibited, regardless what form it may take. For this reason, [S. 622, the Senate bill for the 1994 amendments] would amend the Act to cover any action taken to discriminate or retaliate against a whistleblower, because of his or her protected conduct, regardless of the form that discrimination or retaliation may take.

S. Rep. No. 103-358, at 9-10. The consensus amendments for the 1994 amendments explained that the new personnel action includes "any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system," again specifying security clearance actions as the primary illustration of the provision's scope. 140 Cong. Rec. 29,353 (1994).[2]

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that classified secrets may not be disclosed *per se*. DOJ, at 8. .

[2] In 1994 Congress also codified the legislative requirement for agencies to respect due process rights in clearance actions. 50 USC 435(a)(5)

In *Hesse v. Department of State*, 217 F.3d 1372, (Fed. Cir. 2000), however, the Federal Circuit rejected legislative history for a broad anti-harassment provision, finding it insufficient to meet the Supreme Court's requirement that Congress must act "specifically" to assert authority over clearance actions beyond review whether an agency follows its own rules. *Egan*, 484 U.S. at 530. In a real sense, S. 1358 is merely a technical fix to meet Supreme Court requirements for how Congress must implement a decision it already has made to assert merit system authority over clearance actions.[3]

Third, the public policy basis for the mandate is far stronger than in 1994. As seen above, since 9/11 a long ingrained, dangerous pattern that sustains national security breakdowns has become more visible: the most common harassment technique against national security whistleblowers is to yank their security clearances. The popularity is because the agency both can arbitrarily brand employees as untrustworthy, and de facto fire those whose jobs require classified access, all without having to defend its reasoning before outside review. When their clearances are yanked, employees cannot defend themselves against retaliation in scenarios where protected disclosures are needed most -- to responsibly facilitate solutions and accountability for long term security weaknesses due to the government's own misconduct.

DOJ's cornerstone objection is that under *Egan*, *supra*, the "Supreme Court explicitly rejected the proposition that the MSPB and the Federal Circuit could review the decision to revoke a security clearance." DOJ, at 6. That premise is so conceptually inaccurate that it raises serious credibility concerns. In *Egan* the Court did not touch

[3] The Court's problem in *Egan* with independent Board appeals on the merits for security clearance decisions could not have been more simple."The Act by its terms does not confer broad authority on the Board to review a security-clearance determination." Id.

MSPB and Federal Circuit review and relief for oversight whether agencies comply with their own rules in clearance action. The only issue in question was judgment calls. The Court added that Congress may act constitutionally to enforce merit system principles in clearance actions, if it explicitly makes its intention clear to assert that authority. In *Hesse* the Federal Circuit interpreted that standard to mean statutory language. DOJ's generic objection that all statutory rights or third party reviews of security clearance retaliation are unconstitutional is its own creation. It simply does not exist within *Egan*.[4]

DOJ continues, at 7, by falsely asserting S. 1358 would create a new burden for agencies to prove clearance actions by clear and convincing evidence, replacing the current standard that access to classified information only may be provided "when clearly consistent with the interests of national security" -- a "shockingly inconsistent" change.

The attack is shockingly misplaced. S. 1358 is inherently irrelevant to the merits of a clearance decision. Just as with an adverse action, review for a decision on the merits is independent from the affirmative defense of prohibited personnel practice. The Board will not receive any authority to make national security judgment calls. Rather, its authority is limited to review of clearance actions based on civil service violations within its expertise that threaten the merit system. Committee Report, at 22.

DOJ adds, at 7, that the provision is unnecessary, because it is not aware of any abusive patterns, and agency internal review boards can enforce fair play. If the Committee thinks this perspective may be credible, it should expeditiously call hearings

[4] In the FY 2001 National Defense Authorization Act, P.L. 106-398, Congress legislatively imposed its judgment call from the flip side, by banning the Executive from granting clearances to certain classes of employees, such as ex-felons, those certified as drug addicts, or those who have been dishonorably discharged from military service. 10 USC 986.

where reprisal victims such as those summarized above can bear witness. They will testify on patterns of abuse so crude that they are clear attempts to silence and make an example that intimidates employees from challenging any government misconduct, even that which endangers our nation's security.

Far from being an effective means of redress, agency internal boards have become objects of dark cynicism. All of the security clearance examples for "Kafka law" occurred at the internal boards that DOJ finds trustworthy. That is not surprising. Inherently they have a structural conflict of interest, with the board judging the dispute while working for what also is the adverse party. That is why Congress rejected internal review boards as an acceptable enforcement mechanism for whistleblower rights in legislation creating the Department of Homeland Security. Particularly in the national security area, objective fact-finding and credible enforcement of the reprisal ban in section 2302(b)(8) both require third party review.

The Department asserts that jurisdiction for an "other determination relating to a security clearance" is too vague. To a degree, the concern is well taken. The statutory language should be tightened to specify jurisdiction for any actions "affecting access to classified information." Access determinations are an independent, but parallel technique to security clearances as a virtually identical way to harass whistleblowers without redress. As seen in the recommendations, the bill should make clear that security clearance reform cannot be circumvented through back door access barriers.

DOJ somehow argues that banning retaliatory investigations, section 1(c)(2), also restricts routine inquiries relevant for security. The objection flunks the oxymoron test. Routine investigations and retaliatory investigations inherently are contradictory

concepts. If the inquiry is routine, by definition it is not because of protected activity and would be permissible under S. 1358.

On balance, by failing to concede any legitimate role for Congress under *Egan*, DOJ by default fails to rebut that S. 1358 properly carries out the *Egan* court's specific instructions how Congress may act constitutionally. The Department has provided no basis to disrupt Congress' 1994 policy choice to outlaw security clearance reprisals. This provision meets head on the expanded repression against post 9/11 national security whistleblowers who have proved an intensified need to enforce the mandate in practice.

Loopholes

Sections 1(b) and (c) of S. 1358 put the "any" back in protection for "any" lawful disclosure evidencing serious misconduct, the explicit language of 5 USC 2302(b)(8) and a cornerstone of the Whistleblower Protection Act of 1989. It removes all barriers for protection based on time, place, context, formality, motive or prior disclosure that are irrelevant for public policy, if the contents of the disclosure qualify for whistleblower protection. DOJ protests, at 4, that by overturning Federal Circuit precedents creating those exceptions to "any," this "expanded definition ... would upset the delicate balance between whistleblower protection and the ability of Federal managers to defend against the workforce." It complains that oral disclosures of trivial matters could be protected, making anyone a whistleblower.[5]

In reality, as explained in the Committee Report, at 14-15, the amendment restores the balance Congress repeatedly has made. All employees protected by the merit

[5] DOJ also makes gratuitous attacks on the "contributing factor" standard in WPA burdens of proof, arguing they are so lenient it is impossible for a whistleblower not to prevail. S.1358 does not address the burdens of proof in current law, and the track record for decisions on the merits denotes an empirical imbalance against whistleblowers.

system should be eligible for whistleblower protection if their evidence discloses serious misconduct. Triviality and significance are determined by substance, not cosmetics. As this Committee instructed in 1988, "the OSC, the Board, and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing." (quoted in Committee Report, at 14)

If anything, Congress' wise intention since 1978 has been that the whistleblower law will empower agency checks and balances to operate routinely, without employees having to "ignit[e] the glare of publicity" to effectively challenge problems. As stated in an August 24, 1978 Dear Colleague letter, the idea for this right was so that employees can routinely honor their duties to the Code of Ethics and the Constitution by acting on problems "wherever discovered.... Under our amendment, an employee can fulfill those obligations without putting his or her job and career on the line." *Reprinted in* 124 Cong. Rec. S14302-03 (daily ed. Aug. 24, 1978). In short, the law's first priority is to shield disclosures that solve problems early and prevent the need for scandals, not to start public controversy. The Federal Circuit and DOJ simply do not, and never have, accepted that premise.

In 1994 when Congress last addressed this issue, the House Report reaffirmed that precedents creating loopholes violate the Act's statutory language and a basic premise of the law. "Perhaps the most troubling precedents involve the ... inability to understand that 'any' means 'any.'" H.R. Rep. No. 103-769, at 18. As the late Representative Frank McCloskey emphasized in the only legislative history summarizing the composite House Senate compromise,

> 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.

145 Cong. Rec. 29,353 (1994).

The loophole for making disclosures within the chain of command while performing job duties illustrates just how drastically the Federal Circuit has deviated from long-established norms of constitutional and whistleblower law. As the Supreme Court unanimously held in *Givhan v. Western Line Consolidated School District,* 99 S. Ct. 693, 697 (1979), "The First Amendment forbids abridgment of the 'freedom of speech.' Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."

A review of decisions interpreting environmental and public safety whistleblower laws is instructive. Since *Phillips v. Interior Board of Mine Operators*, 500 F. 2d 772, 778-79, (D.C. Cir. 1974), the courts and Department of Labor consistently have held that the "practicalities" of government law enforcement make it a necessity to protect the free flow of information on the job to achieve the purposes of whistleblower laws.[6]

This doctrine has been followed consistently. In *Mackowiak v. University Legal Systems,* 735 F. 2d 1159 (9th Cir. 1984), and *Kansas Gas and Electric v. Brock*, 780 F.2d 1505 (10th Cir. 1985), the courts cemented it as a cornerstone of all whistleblower laws

[6] The *Phillips* court's reasoning, 500 F. 2d at 778, is highly relevant for the analogous choice in S. 1358. "The miners are both the most interested in health and safety protection, and in the best position to observe the compliance or noncompliance with safety laws. Sporadic federal inspections can never be frequent or thorough enough to insure compliance. Miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with mine foreman or mine top management. Only if the miners are given a realistically effective channel of communication re health and safety, and protection from reprisal after making complaints, can the Mine Safety Act be effectively enforced."

except those covering federal civil service workers. They upheld protection for disclosures within the chain of command to supervisors as necessary first steps to law enforcement and regulatory compliance by properly correcting problems through normal channels. As explained in *Mackowiak*, 735 F. 2d at 1163,

> In a very real sense, every action by [corporate] quality control inspectors occurs 'in an NRC proceeding,' because of their duty to enforce NRC regulations. At times, the inspector may come into conflict with his employer by identifying problems that might cause added expense and delay If the NRC's regulatory system is to function effectively, inspectors must be free from the threat of retaliatory discharge for identifying safety and quality problems....In other words, contractors regulated by the [Energy Reorganization Act] may not discharge quality control inspectors because they do their jobs too well.

In ruling consistently with *Mackowiak*, the 10th Circuit emphasized, "In our view, a narrow, hyper-technical reading of [the Energy Reorganization Act] whistleblower clause will do little to effect the statute's aim of protection." *KG&E,* 780 F. 2d at 1512.

Courts have applied the same theory to the whistleblower clause in the False Claims Act, 31 USC 3730(h). See *U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731, 741-43 (D.C. Cir. 1998). In short, DOJ's arguments abandon the plain language of this statute, the consistent rule for analogous constitutional principles and all other whistleblower statutes on the books, and common sense cornerstones for public policy.

"Irrefragable proof" as a prerequisite for protection

Prior to this hearing, the DOJ has not argued that the Federal Circuit created a new judicial barrier to protection in *Lachance v. White*, 174 F.3d 1378, 1381 (1999). In that decision the court established a prerequisite that the employee first must overcome the "presumption that public officials perform their duties correctly, fairly, in good faith,

and in accordance with the law and governing regulations" by "irrefragable proof." Webster's Fourth New Collegiate Dictionary defines "irrefragable" as "uncontestable, undeniable, incontrovertible or incapable of being overthrown." The statute only requires that the "employee reasonably believe his or her disclosure evidences" listed misconduct. In its letter to his committee, Justice merely stated, at 6, that the standard has been "very helpful to Federal agencies in defending against whistleblower reprisal claims."

That is an understatement. The new barrier makes it virtually impossible for a whistleblower to prevail unless the personal wrongdoer confesses, in which case there is no need for whistleblowing. In the three years prior to *Lachance* the statute was working reasonably well, with a 36% success rate for decisions on the merits at the MSPB. Since that decision, whistleblowers only have prevailed in two out of 27 cases, in both of which protected conduct was uncontested. DOJ does not defend that this barrier is incompatible with the merit system, and it even has been emphatically rejected by the Board in a September 11 *Lachance* decision on remand:

> [U]se of the term 'irrefragable' would impose what amounts to an impossible evidentiary burden on whistleblowers to prove that agencies in fact engaged in [misconduct listed by statute]. We located nothing either in the language of the WPA or its legislative history that even remotely suggests a congressional intent to impose such a standard under the WPA.

Slip op., at 9. Unfortunately in this instance, the Board cannot reverse the Federal Circuit. That takes Congress.

In short, for all practical purposes it has become noncontroversial to replace "irrefragable proof" with the normal "substantial evidence" test to overcome the presumption of government regularity.

All Circuits Review

DOJ argues, at 7, that there "simply is no good reason to revert to the old system" of all circuits judicial review in the Civil Service Reform Act, because the Federal Circuit Court of Appeals has provided certainty for whistleblower law. Unfortunately, this court's stability has been the certainty of death for whistleblower claims, as opposed to the uncertainty of life.

The good reason is clear, as explained by the Committee Report, at 7. "This bill is the third time that Congress has had to clarify the language of the WPA to overturn {Federal Circuit] misinterpretations." Nearly all major provisions of S. 1358 are in response to Federal Circuit rulings that contradicted statutory language or prior legislative history. Unless there is structural reform, this pattern could go on indefinitely.

Overall, with a 1-84 track record since passage of the 1994 until September 1, 2003 for decisions on the merits, whistleblowers do not have a fighting chance in this forum. The court has not ruled in favor of a whistleblower on the merits throughout the time Congress has considered numerous generations of this legislation. The court's utter disrespect for Congress' role in drafting the law has been extreme.

The court does not even reference to explicitly contrary legislative history in decisions creating arbitrary loopholes to statutory language. In its December 2000 *Meuwissen v. Interior* decision, 234 F. 3d at 9, the Federal Circuit instituted an exception to protected speech -- anyone after the first person to raise an issue -- that it earlier raised in a 1986 case, *Fiorillo v. Department of Justice*, 795 F.2d 1544 (Fed. Cir. 1986). In 1988

this Committee -- 1) specifically rejected *Fiorillo* ["For example, it is inappropriate for disclosures to be protected only if ... the employee is the first to raise the issue." S. Rep. No. 100-413 at 13 (1988)]; 2) used it as a basis for to warn the court against arbitrarily constructing barriers to disclosure (Id., at 14, supra at 20-1), and 3) cited it as a reason for replacing "a" with "any" to establish all-inclusive coverage in 5 USC 2302(b)(8). The Federal Circuit ignored the existence of extensive legislative history outlawing this doctrine[7] while resurrecting it. Enough is enough.

DOJ's alarms about uncertainty are a theory that has been proven groundless. As comprehensively researched in the Senate Report, at 17, nearly all other whistleblower statutes have all circuits review. There has been neither judicial chaos nor excessive Supreme Court review. The Whistleblower Protection Act needs balanced judicial review, not the stability of hostile judicial activism.

To be sure, stability is needed -- for the legislative intent to be consistently respected in appellate judicial review. The case has been made beyond credible debate that structural reversion to normal all circuits appellate review is a prerequisite for this statute to meet its promise as a stable good government law.

Retaliatory investigations

DOJ makes a series of objections, at 8-11, with a unifying theme. Investigations are an important part of government, so they should be beyond accountability to the merit

[7] Curiously, there is a reference to 1978 legislative history, 234 F. 3d at 13, but none to the 1988 Senate Report rejecting *Fiorillo*. Similarly, in *Willis v. Department of Interior*, 141 F.3d 1139 (Fed. Cir. 1998), the court ignored all relevant 1988, 1989 and 1994 legislative history in canceling protection for those who retaliated against because of disclosures they make on the job carrying out their duties .

system. Whistleblower Protection Act liability could paralyze this essential function, Justice warns.

The problem with this theory is that Section 1(e) of S.1358 merely codifies the status quo -- from 1994 legislative history, H.R.Rep. No. 103-769 at 15, to MSPB case law. *Russell v. Dept. of Justice*, 76 MSPR 317 (1997). The predicted problems simply have not happened. Retaliatory investigations have never been in a legal immunity bubble, because they are so subject to abuse. They can create liability in tort, statutes like the Privacy Act, and the constitution, both for damages and injunctive relief. It should not be intimidating to institutionalize normal accountability for witch hunts threatening the merit system.

Indeed, whistleblower rights are irrelevant for "routine" and normal government functions. The provision in Section 1(e) only creates a personnel action for investigations taken "because of any activity under this section [2302]." The point of the provision is to outlaw retaliation in the investigative context, not investigations. This is no different than outlawing retaliatory terminations.[8]

By contrast, the need for this provision is fundamental. The first law of retaliation is the "smokescreen syndrome," -- shifting the spotlight to the whistleblower through an investigation that finds a scandalous distraction. Retaliatory investigations are the foundation for reprisal as the primary tool for "record building." This provision of S.

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[8] Other scattershot objections, DOJ at 11-12, are worth brief mention. While EEOC law does not permit challenges to proposed actions, there is no issue that proposed actions are covered by statutory language for section 2302. Employees could not be liable for blowing the whistle to an Inspector General, because they have no authoritative role in any action on their disclosure. The OIG decides whether to investigate. There is little to fear from the OSC disclosing open investigative files from another agency. It fiercely defends the confidentiality of its own investigative files from complainants, let alone those from other agencies.

1358 empowers whistleblowers to nip retaliation in the bud, rather than have to live indefinitely with that cloud when used to intimidate or harass. One food safety whistleblower helped by GAP was under a series of nearly uninterrupted series of investigations for over 25 years. Codifying protection is necessary to achieve the WPA's goal of protection for actions with a "chilling effect on merit system duties and responsibilities." 140 Cong. Rec. 29,353 (1994)(statement of Rep. McCloskey). Investigations are a basic activity with a severe capacity to chill or intimidate employees. Retaliatory investigations constitute a common activity with the potential to severely threaten the merit system. Current law has proven that a sound doctrine should be codified.

Strengthening OSC authority

S. 1358 reinforces the Office of Special Counsel's capacity to be functional in pursuing its mission to protect the merit system from prohibited personnel practices. The bill extends OSC litigating authority to court (Section 1k), restores realistic burdens of proof for disciplinary prosecutions and relieves the OSC from liability out of its fixed annual budget to pay defendant attorney fees for unsuccessful disciplinary cases. Section 1(g). DOJ objects, at 9-10, that the OSC should not be enfranchised, because it could take an inconsistent position with its own views on behalf of the Office of Personnel Management. It warns, at 12-13, that the barriers against OSC disciplinary prosecutions should be maintained or strengthened, to keep the Office from abusing its power.

While it would be presumptuous to speak for the OSC, DOJ's objections are an an injustice to the merit system. The OSC currently can litigate in federal court in appropriate cases to defend the merit system, with Justice Department approval. It's just that DOJ never has agreed OSC participation would be appropriate. The result is hardly surprising, since DOJ always is counsel for the adverse party. That is an institutional conflict of interest, and it sustains an inherent structural imbalance against the merit system in court. The Office of Personnel Management (OPM) is enfranchised to advocate the views of management. But there is no government agency in court whose mission is to speak for the merit system. There is simply no rational basis to gag the merit system's institutional defender from participating in the final, decisive stage of litigation that controls the merit system.

With respect to discipline, DOJ advocates a legal standard where the existence of any innocent motive in a reprisal should eliminate eligibility for discipline. That balance would concede the concept of deterrence for merit system violations. On payment of attorney fees, DOJ offers no empirical basis to support its fears of OSC abusing its authority during some two decades when it didn't have to pay private counsel if the prosecution were unsuccessful. This liability could have a severe chilling effect on OSC actions to seek accountability. With the Office operating on a fixed budget, the practical impact is that any OSC prosecution could threaten funding for ongoing remedial actions.

RECOMMENDATIONS

The trustworthiness of this bill is that it does not try to make any new policy choices beyond those already adopted unanimously, twice in some instances. S.1358 is a

solid proposal that needs little fine tuning. It is a model of rights that Congress has developed before, and mainly needs a chance to prove itself operating within a balanced implementing structure.

Three further steps are necessary to reach the potential of S.1358's good government goals. Two are statutory language fixes. As mentioned before, the statute must be clear that it protects against any reprisal that would block access to classified information necessary for a national security security whistleblower to do his or her job.

Second, the definition of "gross mismanagement" needs to be established by statute. In the recent remand of *Lachance*, captioned *White v. Department of Air Force*, MSPB No. DE-1221-92-0491-M-4 (slip op. Sept. 11, 2003), the Board did to "gross mismanagement" -- functionally eliminated the concept -- what the Federal Circuit did previously to "reasonable belief." To qualify now as gross mismanagement, the Board now requires misconduct so blatant in misconduct so severe that experts can't disagree about its propriety. Id., slip op. at 16-17. Anything else is an unprotected policy disagreement. In essence, the Board canceled "irrefragable proof" as a prerequisite for "reasonable belief," but created a "son of irrefragable" proof to qualify for "gross mismanagement." This standard replaces the longstanding test that the misconduct must be arbitrary and capricious action or inaction that creates a substantial risk of interfering with the efficient accomplishment of the agency mission. *D'Elia v. Department of Treasury*, 60 MSPR 514 (1994); *Harvey v. Department of Navy*, 92 MSPR 51 (2002). In light of the new precedent, that longstanding definition needs to be codified.

Second, Congress needs to extend the Sarbanes Oxley corporate whistleblower and EEO procedure to federal employees -- permit them to file a civil action in U.S.

district court if they do not receive an administrative ruling within 180 days. An analogous provision was passed unanimously by the House of Representatives prior to the 1994 amendments. While few choose that option due to expense, for whistleblowers with high stakes dissent involving national consequences, court may be the only chance for justice under the Act. The MSPB was not designed for major scandals with a national impact involving high-level government officials; it adjudicates employment disputes. On the personal level, the professionalism and dedication of individual Administrative Judges has inspired GAP lawyers. But as a rule and institutionally, the Board has neither the resources nor the judicial independence to provide a reliable forum for the cases where the Whistleblower Protection Act is needed most.

CONCLUSION

The Whistleblower Protection Act is at a crossroads. For the third time Congress must reaffirm a unanimous mandate erased by judicial activism, or else the law's impact will range from irrelevant to counterproductive. For four to be the charm and institutionalize the statutory mandate, this time it must be reinforced with structural reform as well.

There should not be any delusion about the reason for congressional action on S.1358. It is unrealistic to expect would-be whistleblowers to defend the public, if they can't defend themselves. Profiles in Courage are the exception, not the rule.

ATTACHMENT 1

TESTIMONY OF THOMAS DEVINE,
GOVERNMENT ACCOUNTABILITY PROJECT,

before the

SENATE GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON INTERNATIONAL SECURITY, PROLIFERATION AND
FEDERAL SERVICES

on S. 995,

AMENDMENTS TO THE
WHISTLEBLOWER PROTECTION ACT OF 1989

July 25, 2001

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.

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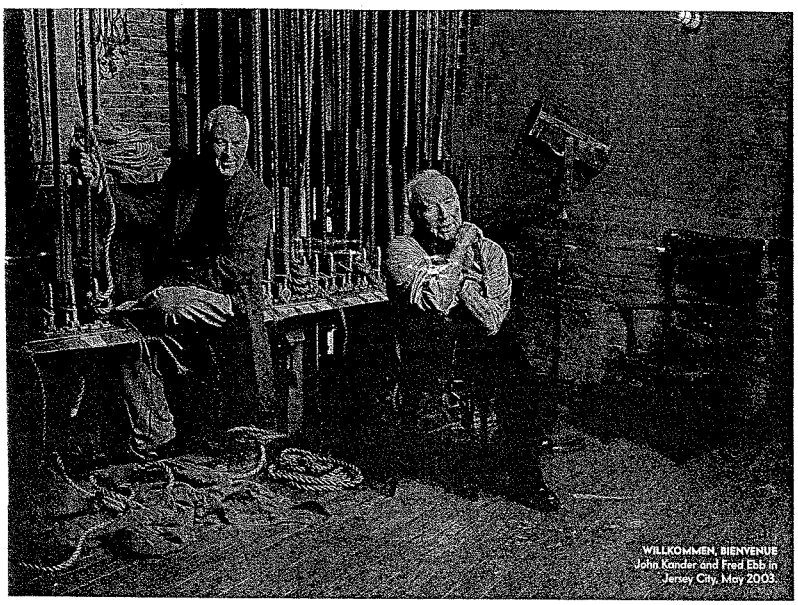
THE MUSIC ISSUE



WILLKOMMEN, BIENVENUE
John Kander and Fred Ebb in Jersey City, May 2003.

CONTINUED FROM PAGE 29

COLUMNS

175 NUCLEAR INSECURITY The security looks impressive at Los Alamos and other nuclear-weapons sites, but two reluctant Department of Energy whistle-blowers warn it's an illusion: their war games and internal reports have revealed how easily terrorists could steal or ignite tons of plutonium and enriched uranium. In an exclusive report, Mark Hertsgaard probes this shocking blind spot in Washington's approach to homeland defense. Portraits by Jonas Karlsson.

196 JUDGING ANDY As the value of Andy Warhol's work skyrocketed, the Warhol authentication board got increasingly powerful. And its apparently arbitrary decisions are infuriating dealers and collectors, whose documented Warhols—some certified by the estate, others signed by the artist—have received a fatal "Not by Andy" verdict. Michael Shnayerson reports on the controversy.

224 ANOTHER HAMPTONS WHODUNIT This spring a rain-swollen Georgica Pond threatened some of East Hampton's wealthiest mansion owners with flooded cellars and lawns. Then, on July 2, it turned into the summer's richest mystery: under cover of darkness, someone had drained the 290-acre inlet. While residents such as Martha Stewart, Steven Spielberg, and Priscilla Rattazzi wonder who breached the barrier between pond and ocean, Michael Shnayerson listens in. Photographs by Doug Kuntz.

238 THE DISCOMFORT OF STRANGERS Through Diane Arbus's lens, sideshow freaks and middle-class matrons were equally strange and equally familiar. Marking the first Arbus retrospective since the one that followed the photographer's 1971 suicide, Vicki Goldberg examines Arbus's struggle to reach beyond her own sense of otherness.

248 AN AFFAIR OF THE ART Multi-millionaire entrepreneur Louise MacBain became C.E.O. of Phillips, de Pury & Luxembourg auction house, hoping to help her former boyfriend Simon de Pury and his partner, Daniella Luxembourg, compete with Sotheby's and Christie's. Both job

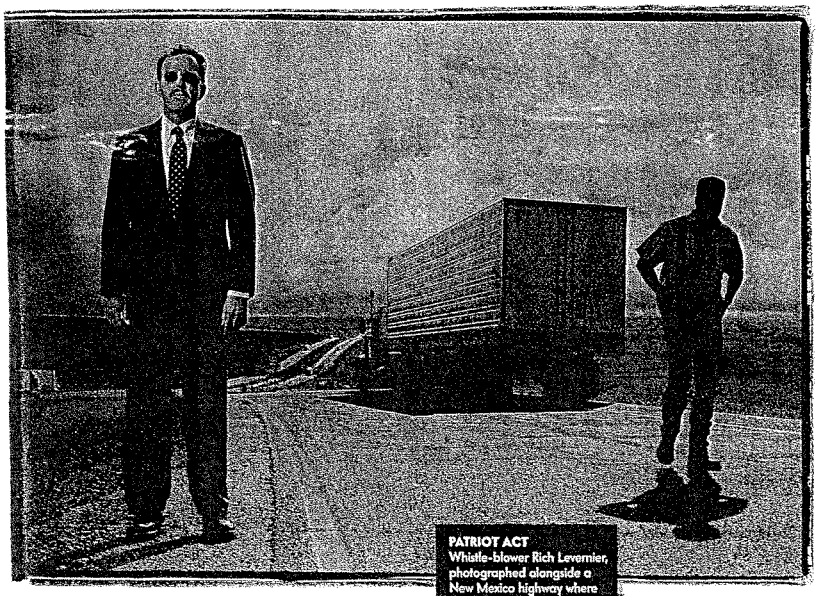
CONTINUED ON PAGE 38

THE WAR AT HOME

NUCLEAR INSECURITY

Even as the president pushes for new anti-terrorism powers, Washington continues to ignore warnings that its nuclear-weapons facilities—high on any terrorist target list—are frighteningly vulnerable. So Rich Levernier, who spent six years war-gaming defenses at Los Alamos and other sites, and veteran safety official Chris Steele are blowing the whistle

BY MARK HERTSGAARD



PATRIOT ACT Whistle-blower Rich Levernier, photographed alongside a New Mexico highway where trucks routinely transport nuclear weapons.

Insiders like to call it "the four most closely guarded acres on earth." Certainly the contents of Technical Area 55 deserve that level of protection. This cluster of metal, warehouse-like buildings inside the Los Alamos National Laboratory is the United States government's main facility for processing plutonium, a decisive ingredient in the approximately 70,000 nuclear weapons built in the United States since World War II. Now that the Cold War is over, many of these weapons and their plutonium are being stored back where they were produced—making the nation's nuclear-weapons facilities some of the most tempting terrorist targets in existence.

J. Robert Oppenheimer and his Manhattan Project colleagues chose Los Alamos as their headquarters during World War II because its remote location, a barren mesa in the mountains of New Mexico, seemed ideal for deterring infiltrators. But nowadays Los Alamos, which is managed by the University of California, is about as hard to get to as the Grand Canyon. I recently found myself cruising around the 40-square-mile facility less than two hours after my arrival at the Albuquerque airport. I drove past streets named after early nuclear-weapons test sites: Trinity, Bikini, and Eniwetok. I saw the lodge where Edward Teller played piano on Saturday nights to amuse his entertainment-starved colleagues while they raced to beat Nazi Germany to the bomb.

Approaching sensitive sites such as Technical Area 55 was not so simple, however. A pre-visit security check was required, and on the day in question I had to be accompanied by Los Alamos officials. Jim Danneskiold, a press officer, and Eric Ernst, the facility manager of Technical Area 55, escorted me to the site in Danneskiold's S.U.V. When we got within a quarter-mile of T.A. 55, we were stopped at a checkpoint, where armed guards examined our identification to make sure we

were approved for entry, Danneskiold had called ahead, so we were waved forward, the high mesa offering a fine view of the Rio Grande valley below.

We soon pulled to a stop in a dusty lot in front of a tall fence topped by swirls of razor wire. Ten yards beyond stood a second, identical fence. Together, they stretch in parallel around the entire TA. 55 area.

My escorts and I got out and walked to the fence so I could have a closer look. We had been standing there barely 20 seconds when an armed guard approached and demanded to know what we were doing. Though our visit had been cleared in advance, he politely but firmly told us to leave, and stood there waiting until we did. To a layman's eyes, it was an impressive display of vigilance.

But Rich Levernier has a different perspective. Levernier spent the six years leading up to September 2001 running war games for the U.S. government. It was his job to test the preparedness of America's nuclear-weapons facilities against terrorist attacks. Once a year, his "black hats"—mock-terrorist squads made up of U.S. military commandos—would assault Los Alamos and nine other major facilities, as well as the system for transporting nuclear weapons around the country by truck. Neither side in these engagements shot real ammunition—harmless laser weapons were used—but in other respects the exercises were deadly serious. Levernier's black hats were ordered to penetrate a given weapons facility, capture its plutonium or highly enriched uranium, and escape; the facility's security forces were expected to repel the mock attackers.

The results of these tests, which Levernier reveals publicly here for the first time, are nothing short of alarming. "Some of the facilities would fail year after year," he says. "In more than 50 percent of our tests of the Los Alamos facility, we got in, captured the plutonium, got out again, and in some cases didn't fire a shot, because we didn't encounter any guards."

This, despite the fact the security forces were told months in advance exactly what day the "terrorists" were coming.

Rich Levernier has never spoken to the press or to Congress about his findings. He is going public now only because he believes the Bush administration has left him no choice. Working through normal bureaucratic channels, Levernier says, he tried for years to get his superiors at the Department of Energy (D.O.E.), which manages the nation's nuclear-weapons complex, to address these shortcomings. But the problems did not get fixed; indeed, Levernier says, most of his superiors declined to acknowledge that the problems even existed. Finally, when he refused to stop pushing for reform, Levernier was stripped of his security clearance after a relatively minor infraction and was removed from his job, effectively ending his career two years before he was due to retire with a full pension.

So Levernier has become—involuntarily, he stresses—a whistle-blower. The role does not come easily. A 22-year veteran of D.O.E., Levernier has devoted virtually his entire adult life to military and nuclear security. When he learned that he was about to be drafted in 1972, he instead enlisted in the army, where he was assigned to intelligence. In 1981 he joined D.O.E. and began working his way up the system. By his own admission, he was never the type to question authority. But now, in an attempt to salvage his career, he has filed suit against D.O.E., accusing the agency of illegally gagging him and removing him from his duties without just cause. Levernier also decided to speak out publicly in hopes of saving his country from a catastrophic, and preventable, terrorist attack.

Security problems at the nation's nuclear-weapons facilities have made news before. Beginning with the Wen Ho Lee case in 1999, Los Alamos in particular has been plagued by a steady flow of scandals. The implications of Levernier's revelations, however, dwarf all that have come before.

The mock attacks Levernier conducted targeted nuclear-*weapons* facilities, not nuclear power stations; the consequences of a breach at a weapons facility could be orders of magnitude worse. According to declassified D.O.E. reports released in 1994 and 1996, the nation's nuclear-weapons facilities house more than 60 metric tons of plutonium and hundreds of metric tons of highly enriched uranium. Since a mere 11 pounds of plutonium or 45 pounds of uranium is enough to make a crude nuclear device, the weapons complex as a whole contains the equivalent of tens of thousands of Hiroshima-strength weapons, all located in the heartland of the United States. Los Alamos alone holds 2.7 metric tons of plutonium and 3.2 metric tons of highly enriched uranium, according to the D.O.E. reports cited above, the last ever released on the matter.

"The most dangerous problem exposed by Levernier and his team is that terrorists could infiltrate Los Alamos and get away with substantial amounts of plutonium," says Arjun Makhijani, president of the Institute for Energy and Environmental Research in Takoma Park, Maryland, and an expert on nuclear-weapons issues. "The stolen plutonium then might show up as a nuclear-bomb explosion that would devastate an American city, possibly killing hundreds of thousands of people. A second danger is that a terrorist attack could cause deadly plutonium fires, which could result in hundreds of cancer deaths and leave hundreds of square miles uninhabitable."

"Any implication that there is a 50 percent failure rate on security tests at our nuclear-weapons sites cannot be supported by the facts and is not true," says Anson Franklin, a spokesman for the National Nuclear Security Administration (N.N.S.A.), a semi-autonomous agency set up within D.O.E. to oversee the nuclear-weapons complex. "The impression has

PLAYING WITH FIRE
Below, J. Robert Oppenheimer and General Leslie Groves at the Trinity atomic test site, 1945; bottom, a canyon fire behind Los Alamos, May 2000.

LOS ALAMOS SEEMED IDEAL
FOR DETERRING INFILTRATORS, BUT NOW IT'S ABOUT AS HARD TO GET TO AS THE GRAND CANYON.

FILM BY JAKE SCHOLLMOYER

been given that these tests are staged like football games, with winners and losers. But the whole idea of these exercises is to test for weaknesses—we want to find them before any adversaries could—and then make adjustments.... Our facilities are not vulnerable."

Levernier relates his information poker-faced, in an urgent monotone. Warm and fuzzy he is not. His lawyer, Tom Devine, says it took six months of working together before he got Levernier to crack a smile. "Rich reminds me of Joe Friday in *Dragnet*," Devine says. "Actually, he makes Joe seem animated."

But if Levernier's story is true, history is repeating itself in a most disquieting way. The Senate and House intelligence committees' joint inquiry on September 11 showed that if the Bush administration had heeded the warnings of government truth-tellers, it might have prevented the attacks. Now the administration appears to be making the same mistake again, but with much higher stakes and much less excuse.

HISTORY LESSON F.B.I. agent Coleen Rowley tells the Senate Judiciary Committee about the blocked investigation of Zacarias Moussaoui.

The most famous of the earlier whistleblowers is Coleen Rowley, the F.B.I. agent from Minnesota who condemned the bureau's failure to pursue Zacarias Moussaoui, the so-called 20th hijacker, who is now on trial for allegedly planning to take part in the 9/11 attacks.

Bogdan Dzakovic, a former security specialist with the Federal Aviation Administration, sounded a less publicized warning. What Rich Levernier was to nuclear-weapons facilities, Dzakovic (pronounced *Jah*-ko-vich) was to airports. As a member of the F.A.A.'s Red Team, an elite squad of security experts who travel incognito to many American and foreign airports, Dzakovic spent the years from 1995 to 2001 testing how difficult it was to get fake bombs or weapons onto planes. His conclusion: not very. For example, in 1996 in Frankfurt, a major hub for travel to the United States, the Red Team smuggled bombs onto planes 31 times in 31 attempts, according to Dzakovic. In 1998 the Red Team breached security at New York City airports about 85 percent of the time.

"It was easy. You didn't need *Mission: Impossible* tactics and black clothes at three in the morning," says Dzakovic. "We would arrive at a given airport, see a plane on the runway, and say, 'Let's try to get inside that plane.' We'd walk right up to the plane, and usually we could walk right in."

To get from the terminal to the runway, the Red Team had to pass through locked doors. "But if you surveilled the door a few minutes and watched authorized personnel go through, you could see what combination they were punching in to unlock it," says Dzakovic. "We'd wait until the coast was clear, punch in the same combination, and slip through the door. As long as you acted like you belonged, you could pretty much do what you wanted."

Some of the most disturbing failures occurred at Ronald Reagan Washington National Airport, where security was breached roughly 85 percent of the time during inspections in 1998. One inspection was particularly revealing. "Instead of sneaking through a door by picking up the punch code," recalls Dzakovic, "we decided to push through an alarmed door and then wait around to get caught so we could see how the security system reacted."

At the agreed hour, the Red Team agents took their positions. Dzakovic pushed the door open, the alarm started ringing, and the agents checked their watches. Thirty seconds passed, then a full minute. No airport security arrived. The alarm kept blaring as passengers strolled past. After 15 minutes, the Red Team agents gave up in disgust. No one from airport security ever did show up.

"You'd think that with all the congressmen who fly out of Reagan National those kinds of failures would be seen as an important problem," says Dzakovic. "But we never went back there to check on whether corrective actions were taken, just as we never returned to Frankfurt or any other European airport that had failed inspection." According to Dzakovic, his superiors would not authorize the follow-up trips.

Like Levernier, Dzakovic says that he—and other Red Team members—repeatedly warned superiors that the United States was a sitting duck for terrorist attacks. But F.A.A. officials buried the Red Team's reports, because, Dzakovic charges, the F.A.A. was concerned more about keeping airplanes flying and the airlines profitable than about ensuring real security for the flying public.

"Nothing ever improved in F.A.A. security, because this ridiculous concept of being fair to the air carriers took precedence over everything F.A.A. did," Dzakovic charges. F.A.A. regulations even instructed field agents trying to smuggle fake guns and bombs onto planes that "no attempt should be made to hide objects."

"STOLEN PLUTONIUM MIGHT SHOW UP AS A NUCLEAR-BOMB EXPLOSION THAT WOULD DEVASTATE AN AMERICAN CITY."

"The only thing that surprised me about September 11 was that it didn't happen sooner," says Dzakovic, who was removed from the Red Team and reassigned to a series of menial jobs after going public with his charges. "The civilian-aviation security system was and remains basically an expensive façade. It makes the flying public think it's being protected—you know, all the theater of standing in line at airports and taking off your shoes—but it doesn't do much to deter serious terrorists."

"Air security in the United States is significantly better now than it's ever been," counters Brian Turmail, a spokesman for the Transportation Security Administration, the federal agency created in November 2001 to replace the F.A.A. as overseer of civilian-aviation security. "On September 11, there were 33 federal air marshals; now we have thousands. Only 5 percent of checked baggage was screened for explosives; now 100 percent is.... We've worked with airports to increase perimeter security to reduce the threat of shoulder-fired rockets. We would never tell you that each of these layers works perfectly, but overlap among them makes it certain that security is much better today than on September 11."

Levernier, however, echoes Dzakovic's argument, saying of security at nuclear-weapons facilities: "It's all smoke and mirrors. On paper it looks good, but in reali-

ty, it's not. There are lots of shiny gates and guards and razor wire out front. But go around back and there are gaping holes in the system, the sensors don't work, the cameras don't work, and it just ain't as impressive as it appears."

Over the past two years, the Bush administration has talked tough about defending the United States against terrorism, pointing to the September 11 tragedy to justify much of its domestic and international political agenda, from invading Iraq to limiting civil liberties to relaxing environmental regulations. But if Levernier and other nuclear experts and official documents consulted for this story are correct, the Bush administration is in fact failing disastrously at the practical job of keeping the American homeland safe from terrorist attacks. In particular, the administration is doing worse than nothing to protect the nation's nuclear-weapons facilities. Not only is it leaving serious flaws in the nuclear-security system unrepaired, it is silencing the very public servants who are trying to fix the problem before it is too late.

Chris Steele is another Los Alamos insider who is speaking out here for the first time. Like Rich Levernier, he says he is a reluctant whistle-blower; during his seven years at Los Alamos, Steele has preferred to work through official channels. But that changed last November, when his D.O.E. superiors took him off the job after he rejected what he considered to be laughably inept preparations against terrorist attack.

As D.O.E.'s senior safety official at Los Alamos, Steele was responsible for making sure that the lab's operations did not put workers, the public, or the environment at undue risk. His signature was required before any potentially dangerous procedure could go forward at Los Alamos. According to colleagues both friendly and not, he took his responsibilities very seriously.

"I don't particularly love nuclear weapons," Steele says, "and I don't think we need tens of thousands of them, but I think we need some of them. And if you admit that, it's important to maintain them safely."

In October 2002, Steele was presented with a safety-analysis report for the Radioactive Liquid Waste Treatment Facility at Los Alamos. Lab officials had analyzed various accident scenarios, including that of an airplane crashing into the waste facility. The report did not distinguish between the accidental crash of a commercial airliner and a deliberate terrorist attack, which may explain why it estimated the odds of such an incident at one million to one—rather optimistic, given that al-Qaeda had crashed three planes into targets on a single day barely one year earlier. The report projected that an airplane that crashed into the Radioactive Liquid Waste Treatment Facility would cause hundreds of thousands of gallons of nuclear waste to catch fire.

PLANE TRUTH F.A.A. whistle-blower Bogdan Dzakovic, photographed outside a major national airport, says planes are still vulnerable to terrorists.

But the authors of the report saw no cause for alarm. According to them, the fire would be extinguished by the waste facility's roof-sprinkler system.

"That must be a magical sprinkler system," Steele says, "since it's apparently able to rise up from the rubble, turn itself on, and put out the flames. We should buy one of those for every nuclear plant in the country."

Steele had picked the improbable sprinkler-system claim out of a long, dense report written in opaque techno-speak. A table on page 36 of Chapter 3 listed the accident scenario as No. 13.8 and cited "Fire Suppression System" and "Actuate in the event of a fire" as the proper steps to handle the emergency. "Reading this kind of analysis," Steele recalled at the time, "you don't know whether to laugh or cry, but you have an urge to do both."

"THE CIVILIAN-AVIATION SECURITY SYSTEM WAS AND REMAINS BASICALLY AN EXPENSIVE FAÇADE," SAYS DZAKOVIC.

On November 22, 2002, a month after he rejected the report, Steele was summoned to his boss's office and stripped of his security clearance, effectively removing him from his post.

Anson Franklin, a spokesman for the National Nuclear Security Administration of D.O.E., confirmed in an interview at the

time that Steele had become the subject of a D.O.E. security investigation. Franklin insisted, however, that the investigation was "in no way a retaliation" against Steele, and he now praises Steele for "doing his job" in the sprinkler episode. Nevertheless, although Franklin described the D.O.E. investigation as ongoing, it sounded as if a verdict had already been reached. "Mr. Steele committed a serious security violation," he said.

Chris Steele is a confessed nerd and workaholic with thinning blond hair and a bit of a weight problem. When asked what he does for fun, the 45-year-old is stumped. "I'm kind of boring, I guess," he says with a shrug. He spent his last vacation recalculating radiation releases from a hypothetical accident at Los Alamos.

Steele grew up working-class in Louisiana and New Jersey. Armed with a high I.Q. and fierce determination, he won armfuls of math and physics awards, but he violated the geek stereotype in one respect. Taught by his mother that "the only way someone can walk over you is if you lie down," Steele was suspended from high school 12 times for fighting. "I was a skinny kid, but I wouldn't back down when kids harassed me."

He brought the same fearlessness to his career in the nuclear industry. Since arriving at Los Alamos in 1996, Steele says, he has vetoed numerous dangerous, illegal, or just plain wacky ideas. For example, there was the time in 1998 he overruled a scientist who had offered to drive a bulldozer into a reactor if it overheated during an experiment. "I told him that was maybe the bravest thing I'd ever heard," Steele says dryly, "because he'd certainly be killed by the radiation. But it wasn't much of a plan." Eventually the experiment was safely redesigned and approved.

It did not take Steele long to conclude that "violation of nuclear-safety rules was systemic" at Los Alamos. Plans for controlling accidents were "window dressing" put forth by the University of California and rubber-stamped by U.C.'s overseers at D.O.E. so that nuclear research and production "could continue without disruption." Fearing a disaster was waiting to happen, Steele briefed senior management on the problem, using the bulldozer story as Exhibit A. John L. Browne, who directed the lab for U.C. at the time, responded by commenting, according to Steele, "We have to work on it." (Browne, who resigned in December 2002, declined to be interviewed.) The N.N.S.A.'s Franklin denies that D.O.E. rubber-stamps contractors' reports, noting, "Mr. Steele is a safety analyst, and it's clear he's not a rubber stamp."

When lab practices were not changed, Steele says, he went over his superiors' heads and requested a meeting with the Defense Nuclear Facilities Safety Board, a watchdog agency Congress established in 1988 to reform D.O.E.'s nuclear program. He also ordered a study of safety procedures at Los Alamos. The result, the so-called McClure Report, warned of "serious, systemic problems" at Los Alamos and recommended that the safety analyses for all of its major nuclear facilities be re-done, a step subsequently demanded by Congress as well.

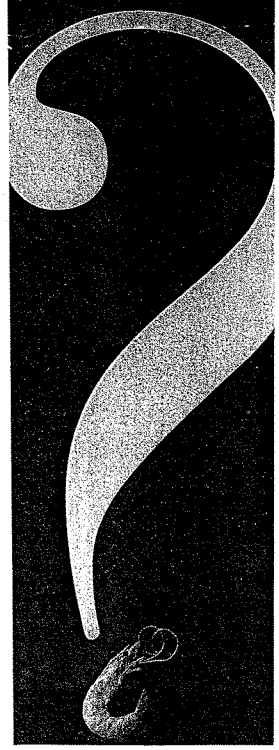
This safety overhaul gave rise to the most extraordinary of Steele's crusades: his discovery and closure of a secret nuclear-waste dump. On July 18, 2001, a seemingly routine memo reached Steele's office from managers at the T.A. 55 facility—"the four most closely guarded acres on earth." The memo's turgid bureaucratic language obscured a shocking disclosure: without the knowledge, much less the approval, of the secretary of energy, nuclear waste was being stored inside T.A. 55, in a plain steel building known as P.F. 185. Although waste had apparently been stored there since 1996, T.A. 55's safety analyst, Derek Gordon, did not know it was there. As a result, P.F. 185 had not been subjected to a proper nuclear-safety analysis.

According to Gordon, the waste dump contained the equivalent of 33 pounds of plutonium-239, mainly in the form of contaminated gloves, rags, tools, and similar items. The danger, according to Steele, was that this waste could be dispersed by fire—such as the wildfires that blackened canyons and caused evacuations at Los Alamos during two weeks in May 2000.

Steele shut down the dump as soon as he found out about it, and the waste was soon removed from P.F. 185 and stored elsewhere inside the Los Alamos complex. The very existence of a secret nuclear-waste dump was illegal, Steele says: "The amount of waste inside P.F. 185 qualified it

"IN MORE THAN 50 PERCENT OF OUR TESTS OF LOS ALAMOS, WE GOT IN, CAPTURED THE PLUTONIUM, AND GOT OUT AGAIN."

Gulf Shrimp From Nebraska?



as a Category 2 nuclear facility, and only the secretary of energy can authorize a Category 2 facility." Worse, he argues, was the threat that the unauthorized dump had been posing to workers, the public, and the environment.

"This was more than a procedural issue," says Steele. "The lack of a valid safety analysis meant that P.F. 185 had been operated for five years without any nuclear-safety controls—none. Waste was stored in an ordinary steel building that was not designed to withstand strong winds, earthquakes, or fire. During the May 2000 wildfires, the flames were six feet tall across [the road] from P.F. 185. I know, because I drove by on my way to the Emergency Operations Center. We're lucky the fire didn't jump the road."

"The lab screwed up on handling the safety-analysis documentation [for the dump]," admits W. Scott Gibbs, the lab's deputy associate director. Like other Los Alamos officials, Gibbs portrays the failure as a paperwork error. He specifically denies any intent to mislead D.O.E. Pointing to an environmental approval that the D.O.E. regional office in Albuquerque issued for P.F. 185 in 1996, Gibbs says, "Our guys mistakenly said, 'We're good to go.'" Furthermore, says Derek Gordon, the dump never posed a meaningful threat to worker or public health.

Officials at D.O.E. headquarters in Washington took a sterner view, however, effectively endorsing Steele's rejoinder that environmental endorsement has nothing to do with safety. The N.N.S.A. ruled in December 2002 that the lab had broken the law. In a letter of rebuke, N.N.S.A. acting administrator Linton Brooks wrote that he was "personally concerned about the seriousness of . . . this matter," adding that only U.C.'s nonprofit status had saved it from paying a $220,000 fine.

"CHRIS WAS SET UP ON THE SECURITY ISSUE. MANAGEMENT WANTED TO TAKE HIM DOWN, AND THEY HAD MADE IT CLEAR PUBLICLY."

STOCKPILE PROTECTOR Senior safety officer turned whistle-blower Chris Steele, photographed at Los Alamos, called nuclear-safety violations there "systemic."

James Ford is retired now, living in what he calls "a lovely gated community" in western Virginia. But during the late 1990s, Ford was Rich Levernier's direct supervisor at D.O.E. Although he praises Levernier as a man of "enormous talent," Ford also complains that he was not a team player. "No one could work with him. . . . He had a track record of dishonesty and self-promotion. If he could make himself look good at the expense of others, he'd do it.

"It's probably true that our security was not as good as it should have been," Ford adds, "but it's also true that it was better than Levernier says it was. Our nuclear facilities are safe. There have been no thefts or sabotage of our nuclear materials, and I'm confident there will be none." Ford does not dispute that the security forces at Los Alamos, Rocky Flats, and other weapons facilities posted high failure rates against Levernier's mock terrorists. But he blames these dismal results more on Levernier's strict approach to grading than on the security forces' actual performance.

"Rich was a stickler who insisted on testing the worst-case scenario, which the security forces would have no real chance of passing," Ford complains. "He's like the cop who gives you a ticket if your car is stopped at a red light one inch over the white line. Never mind if the intersection is clear and your car stopped safely—you flunk in Rich Levernier's book. That kind of cop is never going to be liked by the other police officers he works with, and he's never going to make police chief."

"Did he have a pleasing personality?" asks Ronald Timm, who helped design war games under Levernier's supervision. "I didn't have to marry the guy, so that wasn't my problem. But to say he wasn't a team player is a bum rap. What that meant was, 'Don't bring us any bad news, because we don't want to deal with the problems.' . . . I found that Rich's information was always accurate, and he was an honest guy."

By all accounts, Levernier was indeed a demanding, hands-on kind of boss. One year, he gave up his Super Bowl Sunday to run a surprise spot check on the security force at the Rocky Flats nuclear facility, near Denver. He and a colleague

PHOTOGRAPH BY JONAS KARLSSON

discovered that "patrols that were required three times per hour were not seen for more than six hours." They went looking for the absentees and found the entire squad inside, watching the ball game.

Ford complains that one scenario Levernier "would harp on" concerned the Technical Area 18 facility at Los Alamos, which, Ford concedes, "is essentially indefensible.... There are lots of other targets at Los Alamos, but Levernier would want to attack T.A. 18 every time."

I saw what Ford meant when I drove past the T.A. 18 facility, alone, during my Los Alamos visit. Although many of the lab's sensitive facilities are located on the high mesa of Los Alamos, T.A. 18 sits at the bottom of a canyon on the edge of the complex. The canyon is surrounded on three sides by steep wooded ridges. Attackers would therefore have the advantage of cover as well as the high ground. "Our guys were licking their chops when they saw that terrain, first on a computer simulation and then in real life," says Ronald Timm.

Timm is the president of RETA Security, Inc., a consulting firm that has participated in many D.O.E. war games and designed the National Park Service's security plan for Mount Rushmore. He laughs when asked about James Ford's complaint that Rich Levernier "harped" on T.A. 18. "To say it's unfair to go after the weak link is so perverse, it's ridiculous," Timm says. "Of course the bad guys are going to go after the weakest link. That's why [D.O.E.] isn't supposed to *have* weak links at those facilities."

During one mock attack against T.A. 18, the black hats added insult to injury: after capturing weapons-grade nuclear material, they hauled it away in a Home Depot garden cart. Lab officials complained that the attack should not count, since the Home Depot cart was not on D.O.E.'s approved list of weapons for war games. Bill Richardson, the secretary of energy at the time, took a different view. Concluding that T.A. 18 was indeed indefensible, Richardson ordered in April 2000 that all weapons-grade materials be removed from T.A. 18 and delivered to the Nevada Test Site by 2003. But none of T.A. 18's weapons-grade material has yet been moved, and no action is expected until at least 2006.

The failure rates of D.O.E.'s security forces are all the more remarkable considering that many war games are fought under rules of engagement that, according to Levernier, overwhelmingly favor the defense. Although surprise is a terrorist's most important tactical advantage, the date of the war games is scheduled months in advance, so defenders know, within a window of eight hours, when the black hats are coming. Levernier concedes that logistical realities make completely surprise attacks impractical—panicked civilian employees could get injured during such operations—so the rules of engagement are adjusted to compensate. "We may cut the number of defenders allowed," he says, "or delay their reaction time according to what we've timed them doing on a normal day." But then weapons-facility managers complain that the black hats are cheating. The black hats even have to obey 25-mile-per-hour speed limits.

Conducting war games via computer simulations can help approximate surprise, but the results of such conflicts have been distressingly similar, according to Timm. "We beat them like a drum," he says of computerized battles his black hats fought. "In one of the [computerized] tests, we killed all their guys within 60 seconds."

"LEVERNIER HAD RUBBED SO MANY PEOPLE THE WRONG WAY THAT WHEN HE GAVE THEM THE OPENING THEY THREW THE BOOK AT HIM."

Another handicap: attackers aren't allowed to use certain types of equipment readily available to terrorists, including grenades, body armor, and armed helicopters. "You can walk into a Radio Shack and for $400 buy a device that will jam all radio transmissions in a six-block area," Levernier says. "For $40,000, you can shut down everything within a mile. But D.O.E. wouldn't let me use that stuff, because it doesn't have a defense against it."

Despite the lopsided playing field, it is the defenders who have been caught cheating. In a 1999 exercise, an army Special Forces team was deployed to "attack" a truck convoy that was supposedly transporting nuclear materials at Fort Hood, Texas. The stakes were high: political luminaries from Washington, including the deputy secretary and undersecretary of D.O.E., had flown in to observe the exercise. The luminaries flew home thinking the defenders had won, but it turned out they had had help. After "shooting" one defender, a Special Forces black hat noticed that the defender was holding a piece of paper that looked familiar: it was the black hats' battle plan. The cheating was proved to D.O.E. managers by Peter Stockton, a special assistant to Secretary Richardson, but no disciplinary action was taken.

The N.N.S.A.'s Franklin said he couldn't comment on incidents that occurred during the Clinton administration.

The biggest artificiality in D.O.E.'s war games, says Levernier, is that they don't test for suicide attacks. To win, attackers must penetrate the facility, capture the plutonium, and then escape. In the real world, though, terrorists might choose to bring their own explosives and ignite the plutonium, and themselves, on-site.

D.O.E.'s nuclear-security planning, notes Levernier, is formulated according to a "design-basis threat" document that specifies what kinds of attacks weapons facilities must be defended against. Levernier, Timm, and other experts argue that the attacks of September 11 tragically validated their previous recommendations that the design-basis threat be upgraded to incorporate suicide attacks. But D.O.E. did not issue this upgrade until May 2003, and it is not scheduled to take full effect until 2009.

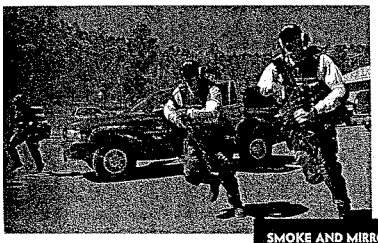
Chris Steele and Rich Levernier have never met, but they have much in common. Combined, their allegations suggest that the Los Alamos National Laboratory is even less secure than previously realized. What's more, each man emphasizes that the problems at Los Alamos are, in greater or lesser degrees, found throughout the D.O.E. nuclear system.

"Safety analysis is actually better at Los Alamos than anywhere else within the D.O.E. nuclear complex," Steele says. "We're the only facility that has a team of safety and engineering analysts who can independently check what the contractors are telling us. At the other facilities, the D.O.E. oversight guys ... just rubber-stamp the safety analyses made by the contractors ... with no independent confirming analysis." The result, Steele argues, is a regulatory regime in which D.O.E. essentially trusts contractors—corporations such as Westinghouse and Lockheed Martin—to do the right thing.

For his part, Levernier says that security preparedness at Colorado's Rocky Flats nuclear facility and within the program for transporting nuclear materials throughout the U.S. is as poor as at Los Alamos. D.O.E.'s black hats defeated the Rocky Flats security force between 80 and 100 percent of the time in the late 1990s, according to Edward McCallum, the then director of safeguards and security for all of D.O.E. McCallum became so worried that, in a May 1997 phone call, he told another colleague that the people of Colorado faced an "extremely high risk" of "a little mushroom-shaped cloud over [Denver]." McCallum

had already shared that assessment with bureaucrats in Washington but gotten no reaction. Only when his colorful turn of phrase became public knowledge during an April 1999 court case did Washington respond, and not in the way McCallum had hoped: Secretary of Energy Bill Richardson placed him on administrative leave and forbade him to speak further on the matter, explaining, "I won't tolerate ... improper disclosures of any kind." McCallum soon resigned in disgust.

Fortunately for the people of Colorado, in August 2003, D.O.E. announced that the last weapons-grade plutonium had been removed from Rocky Flats and sent to the Savannah River Site, in South Carolina. But problems persist at other facilities.



SMOKE AND MIRRORS? Los Alamos security officers Tim Casias, center, and Scott Rice, right, take part in a training exercise, May 30, 2003.

"My concerns about Los Alamos ... pale in comparison to the Y-12 [nuclear-weapons] facility at Oak Ridge, Tennessee," says Representative Christopher Shays (Republican, Connecticut), chairman of the House Subcommittee on National Security, Emerging Threats and International Relations. "That is a very vulnerable site. [It has] too many structures and not enough buffer zone [around it]. By the time the defenders knew that a security threat existed, it would be too late to respond. I know that they're working on it, but it has to be fixed today, not years from now."

Not all of America's nuclear facilities are poorly defended. Three have scored relatively well against mock terrorists: the Argonne National Laboratory–West, in Idaho, the Pantex Plant, in Texas, and the Savannah River Site.

So why doesn't the Bush administration insist on similar vigilance throughout the entire nuclear complex? "[They] just don't think [a catastrophic attack] will happen," Levernier says. "And nobody wants to say we can't protect these nuclear weapons, because the political fallout would be so great that there would be no chance to keep the system running." (The White House press office declined to reply to repeated requests for comment.)

Levernier and Steele have one more thing in common: each lost his security clearance, and therefore his job, after coming forward with his claim—and sticking to it in the face of hostility from higher-ups.

As the year 2000 unfolded, Levernier says, he was growing more and more frustrated by D.O.E.'s failure to address what he regarded as a catastrophe in the making. He finally decided he had to go outside normal channels to effect change. Although "99.99 percent of what I handled was classified," says Levernier, one day there came across his desk an unclassified document that hinted at some of the problems worrying him. The document was a report from D.O.E.'s inspector general that described how D.O.E. officials in the field had altered security reports on Los Alamos: although visiting inspectors had judged it "unsatisfactory," D.O.E. field managers had changed that to "marginal" before forwarding the document to Washington. Levernier faxed the inspector general's document to *The Washington Post*, which ran a story shortly after.

It took Levernier's superiors about two weeks to identify him as the source of the leak. "When he released that information to the media, he didn't put his own name on the fax," James Ford says. "He used the name of a co-worker. He was trying to cover his tracks.... A government clearance is granted on the basis of a person being honest, trustworthy, and dependable, and that kind of behavior isn't honest, trustworthy, and dependable."

"It was stupid and wrong, and I regret doing it," Levernier says of using a false name. But he argues that his transgression was trivial compared with the scale of his punishment. He was not fired outright, for that would have given him due-process rights and perhaps provoked him to speak out publicly. Instead, his security clearance was revoked, even though federal law explicitly allows government employees to share such unclassified information with the public and the press. The effect of the disciplinary action was to remove Levernier from his post, which required a security clearance, and into an administrative job.

"Levernier had rubbed so many people the wrong way over the years," Ford says, "that when he gave them the opening by leaking that information they threw the book at him and didn't give him the second chance someone else might have gotten."

At age 53, Levernier's career prospects were dim. "There's not much demand in the private sector for a nuclear-security specialist without a security clearance," he notes, especially one whose professional reputation had been ruined by a whisper campaign charging that he had leaked classified information. "When I walk down the halls now," he says, "people I have known for 25 years turn and walk away. The stink they put on me is so strong that no one with any career aspirations wants to get close to me."

DURING ONE MOCK ATTACK, THE BLACK HATS HAULED AWAY WEAPONS-GRADE NUCLEAR MATERIAL IN A HOME DEPOT CART.

In Steele's case, too, it appears that what triggered D.O.E.'s alleged retaliation was a fear that his candor might encourage informed outside scrutiny of D.O.E.'s actions—not so much by the press as by Congress. The specific controversy that led to Steele's suspension centered on T.A. 18, the "indefensible" facility at Los Alamos. Steele and some colleagues were developing a safety analysis for T.A. 18 when a colleague whose calculations Steele had repeatedly rejected as inadequate sent him an e-mail containing certain technical specifications. Steele shared those specifications with others on the project. "The information wasn't marked classified when it was sent to me," says Steele. "It was only classified afterwards, when they decided to go after me."

It didn't help that Steele had all the diplomatic sensitivity of an Abrams tank. "Retarded" and "moron" were but two of the words he used for colleagues whose work did not measure up to his exacting standards. "He's technically outstanding," admits Eric Ernst, the facility manager of T.A. 55. "[But] Chris has an extremely strong personality, and that can lead sometimes to being abrasive."

After Steele was first suspected of passing classified information to colleagues, he passed a polygraph test. However, his office was closed for three months while the

investigation continued. He then returned to work, but the episode would come back to haunt him.

Steele went on to shut down the secret waste dump and then reject the "magical sprinkler" plan, actions which brought him into conflict with Joseph Salgado, the lab's principal deputy director. It was now 2002, and the University of California was facing growing criticism in Washington of its management of Los Alamos; there was talk on Capitol Hill that U.C.'s contract might be revoked. For Steele to be alleging further questionable conduct was exactly what U.C. management didn't want.

After the waste dump was shut down, recalls Steele, "there was a meeting where Salgado complained, while holding up a memo I'd written, that the memo had been c.c.'d to a cast of thousands and now we'd have to explain this stuff to the world instead of handling it quietly among ourselves." After the sprinkler veto, Steele says, Salgado accused him in a meeting of once again holding up operations at Los Alamos and airing the lab's dirty laundry and angrily complained about having to spend four hours during testimony before Congress explaining single sentences in Steele's memos. After this meeting, a lab employee warned Steele that he'd heard Steele had better watch his back. (Through a spokesman, Salgado declined to comment.)

One month later, Steele was taken off the job, on the grounds that he was considered a security risk.

"Chris was set up on the security issue because he'd gotten some of those guys reassigned," says a source with direct knowledge of the situation. "Management wanted to take him down, and they had made it clear publicly.... I was briefed [on it] by D.O.E. headquarters.... They set him up by sending him a classified memo about a black project, but Chris wasn't aware it was classified, and they used that to take him out."

Steele and Levernier might have disappeared into the maw of the D.O.E. bureaucracy, never to be heard from again, had they not found the Government Accountability Project (GAP). A public-interest law firm in Washington, D.C., GAP is the premier whistle-blower-protection group in America. Since its founding in 1977, GAP has worked with thousands of government and corporate whistle-blowers and, in the process, has developed a sophisticated strategy for combining legal advocacy with media and political pressure. It has also helped to formulate the body of laws and administrative procedures that a whistle-blower has at his or her disposal once he or she makes the fateful decision to "commit the truth," as Pentagon whistle-blower Ernest Fitzgerald once put it.

"We expose the secrets that the government doesn't want anyone to know about," says GAP's Tom Devine, "and we try to make sure that everyone who needs to know about them, from workers onsite to citizen groups—politicians and the media—is made aware. The whistle-blower is the first rock in the avalanche we try to create of public revulsion against the indefensible."

Steele's avalanche began on February 27, 2003. The Project on Government Oversight (POGO), a public-interest group in Washington whose report "U.S. Nuclear Weapons Complex: Security at Risk" is an indispensible guide to problems within the complex, had recruited GAP to represent Steele. In a whistle-blower retaliation complaint, Devine charged that Steele had been taken off the job and stripped of his security clearance simply for doing his job—for having made "legally protected disclosures" of information about dangerous or illegal activities at Los Alamos. Three weeks later, Steele's case came to the attention of members of Congress when he was invited to Washington to receive an award from the Alliance for Nuclear Accountability.

In any case, D.O.E. retreated. On March 28, Tyler Przybylek, the N.N.S.A.'s general counsel, recommended that Steele's clearance be restored and that he return to work. Przybylek's official statement declared that Steele had put classified information at risk but had not done so deliberately.

"I'm glad to be back," says Steele from his office at Los Alamos. But his adventures aren't over. In his first month back on the job, he says, he discovered approximately a dozen additional unlicensed nuclear sites, and he's girding for another fight.

IN HIS FIRST MONTH BACK

ON THE JOB, STEELE SAYS, HE DISCOVERED SEVERAL ADDITIONAL UNLICENSED NUCLEAR SITES.

Levernier has traveled a longer, rockier road. He filed a Whistleblower Protection Act lawsuit against D.O.E. on September 26, 2001. Levernier remained in bureaucratic limbo for the next 17 months while the Office of Special Counsel, the federal agency that handles whistle-blower cases, considered the suit. In February 2003, the O.S.C. ruled that there was "a substantial likelihood" that Levernier's charges were correct and ordered Secretary of Energy Spencer Abraham to investigate them. The O.S.C. also held that Levernier had been improperly gagged by D.O.E. The N.N.S.A's Franklin says, "These issues are still under litigation, so we're not in a position to comment."

The O.S.C.'s rulings bode well for Levernier's individual fate; a final decision is expected shortly. But Devine charges that D.O.E. is still doing nothing to fix the larger security problems his client identified. "D.O.E. did one 40-minute interview with Rich in March 2003, and as far as we can tell, that's been the extent of their investigation [of his substantive claims]," Devine says. "There has been no follow-up, no requests for additional names or information. It's been a completely cover-your-ass approach."

It is unclear whether Levernier's warnings reached the White House, or even the secretary of energy's office. Levernier says he informed Joseph Mahaley, then D.O.E.'s head of security, more than once about his findings, but adds that Mahaley did not share his sense of urgency. Whether Mahaley forwarded Levernier's information to the secretary of energy and the National Security Council is not known. (Mahaley declined to respond to repeated requests for comment.)

But the weapons complex's security problems were described to Secretary Abraham by Ronald Timm in a February 2001 letter. Timm outlined the security vulnerabilities at the nuclear-weapons facilities and warned Abraham not to expect to hear the truth from his own bureaucracy, whose history of obfuscation about security Timm related in detail. Abraham did not reply to Timm, instead delegating the task to Glenn Podonsky, the director of D.O.E.'s Office of Independent Oversight and Performance Assurance. "The Department's protection program may not be perfect," Podonsky wrote to Timm, "[but] we firmly believe it is effective."

In June 2003, two vials of plutonium were reported lost at Los Alamos. Shortly thereafter, Secretary Abraham announced that a new security review of the nation's nuclear-weapons facilities would be conducted posthaste. Whether this review will lead to real reform seems doubt-

ful; in the past, similar reviews have gone nowhere. In the wake of the Wen Ho Lee scandal, for example, the Clinton administration commissioned a report from the august President's Foreign Intelligence Advisory Board. Released in 1999, "Science at Its Best, Security at Its Worst" painted "an abysmal picture" of D.O.E., calling it "a large organization saturated with cynicism, an arrogant disregard for authority, and a staggering pattern of denial." Noting that D.O.E. had "been the subject of a nearly unbroken history of dire warnings and attempted but aborted reforms," the board concluded that D.O.E. was "incapable of reforming itself."

A case in point, again from June 2003: D.O.E. was caught instructing its employees not to "spill your guts" when questioned in internal investigations. Glenn Podonsky seems to have taken this advice to heart while testifying to the subcommittee headed by Congressman Shays. Asked how often security forces at the nation's nuclear-weapons facilities are defeated in war-game exercises, Podonsky replied, according to a source who was present, "I don't know." The source says that Shays shot back, "You do realize, Mr. Podonsky, that you are under oath?" Podonsky then allegedly amended his answer to "More often than we would like." (Podonsky referred a request for comment to D.O.E.'s press office, which declined to respond. "I wouldn't confirm anything said behind closed doors," says Representative Shays.)

"The bureaucracy is more interested in the appearance of proper oversight than the reality," explains Tom Devine, who represents Bogdan Dzakovic as well as Steele and Levernier. "Partly that's about saving face. To admit that a whistle-blower's charges are right would reflect poorly on the bureaucracy's competence. And fixing the problems that whistle-blowers identify would often mean diverting funds that bureaucrats would rather use for other purposes, like empire building. But the main reason officials have no tolerance for dissent is that taking whistle-blowers' charges seriously would require them to stand up to the regulated industry, and that's not in most bureaucrats' nature, whether the industry is the nuclear-weapons complex or the airlines."

Noting that all three whistle-blowers' troubles began under the Clinton administration and then continued under Bush, Devine argues that bureaucratic antipathy to whistle-blowers transcends partisan differences. Yet the Bush administration is particularly unsympathetic to whistle-blowers' warnings, Devine adds, because it is ideologically opposed to government regulation in general.

"I don't think President Bush or other senior officials in this administration want another September 11," says Devine, "but their anti-government ideology gets in the way of fixing the problems.... The security failures in the nuclear-weapons complex and the civil-aviation system are failures of government regulation. The Bush people don't believe in government regulation in the first place, so they're not inclined to expend the time and energy needed to take these problems seriously. And then they go around boasting that they're winning the war on terrorism. The hypocrisy is pretty outrageous." (The White House declined to comment.)

THE INSIDER
In February 2003, the Office of Special Counsel, the federal agency that handles whistle-blower cases, ruled that Levernier had been improperly gagged by D.O.E.

Devine calls whistle-blowers "modern-day Paul Reveres." Just as the Massachusetts silversmith rode through the night in 1775 to warn of the impending British attack, he says, today's whistle-blowers risk their lives and honor to urge action while tragedy can still be averted. Especially after 9/11, argues Elaine Kaplan, whose term as lead counsel of the O.S.C. expired in June, "if we are truly concerned about national security, we have to protect whistle-blower rights. It seems crazy to have people in a position to know about potential problems but afraid to speak out."

But Rich Levernier will have none of this noble talk. "If I had to do this over again, I wouldn't," he says. "I would have been more aggressive about keeping a record of the shortcomings I witnessed, and I'd have laid it on my bosses' doorsteps, and then if they didn't do anything, that failure would be on their backs. But that's all. Because now I recognize that the power your superiors have over you is broad and deep, and they don't hesitate to use it. When they took my security clearance, it was like a scarlet letter was painted on my forehead. It's ruined my life."

LEVERNIER WILL HAVE NONE OF THIS NOBLE TALK. "IF I HAD TO DO THIS OVER AGAIN, I WOULDN'T," HE SAYS. "IT'S RUINED MY LIFE."

Meanwhile, George W. Bush is preparing to run for re-election in November 2004 as the September 11 candidate. That image has helped Bush politically in the two years since the attacks, but the revelations of whistle-blowers like Rich Levernier, Chris Steele, and Bogdan Dzakovic suggest that the label could cut both ways. Americans don't seem to blame Bush for the 9/11 attacks' taking place on his watch, perhaps because few of them know how many warnings Bush-administration officials ignored beforehand from these and other federal whistle-blowers. But if Bush ignores whistle-blowers again, and their warnings are tragically validated in a second devastating attack, Americans may not be so forgiving. □

PHOTOGRAPH BY JONAS KARLSSON

UNITED STATES SENATE
COMMITTEE ON GOVERNMENTAL AFFAIRS

CONSIDERATION OF THE FEDERAL EMPLOYEE PROTECTION OF DISCLOSURES ACT, S. 1358

TESTIMONY OF STEPHEN M. KOHN
CHAIRMAN OF THE BOARD OF DIRECTORS OF THE
NATIONAL WHISTLEBLOWER CENTER

November 12, 2003

Chairman Susan M. Collins, Ranking Member Joseph I. Lieberman and Honorable Members of the Committee on Governmental Affairs:

My name is Stephen M. Kohn and I am Chairperson of the Board of Directors of the National Whistleblower Center, a non-profit, non-partisan, tax-exempt organization in Washington, D.C. specializing in the support of employee whistleblowers. Over the past 19 years I have specialized in representing employee whistleblowers, many of whom are loyal federal public servants. In 1985 I wrote the first legal text evaluating the legal protections afforded to whistleblowers. Since then, I have testified before Congress, argued cases in court and authored five additional books on whistleblower law. In the past I have represented federal whistleblowers, including employees of the Department of Defense, Veterans Affairs, the Federal Reserve Bank, the Federal Bureau of Investigation, the Department of Justice, the Social Security Administration and NASA.

I am deeply honored by your invitation to testify before the Committee.

In enacting the Civil Service Reform Act of 1978, the Whistleblower Protection Act of 1989, the Whistleblower Protection Act Amendments of 1994, and the No Fear Act of 2002, Congress has consistently, and often unanimously, recognized the vital role federal whistleblowers play in protecting the American people.

Congress has not been alone. On October 17, 1990 President George H.W. Bush signed Executive Order 12731 which required, as a condition of federal employment, that every federal employee disclose waste, fraud and abuse of authority within their agencies. President Bush ordered the following:

> ***"Public service is a trust requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain. . . .***
>
> ***" Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities."***

Before the ink was even dry on this Order, five federal agencies attempted to water down these requirements. Some agencies went on-the-record and attempted to change the requirement that federal employees "shall" report wrongdoing to a mere recommendation that they "should" report misconduct, thus eliminating the requirement that employees blow the whistle. Others wanted to incorporate into the ethical standard a complex legal definition of "fraud and corruption." Other agencies wanted to limit the "appropriate authorities" to whom employees could blow the whistle.

The United States Office of Government Ethics rejected these "suggestions." The reason was simple: "The Government's interest in curbing waste, fraud, abuse and corruption is better served by over reporting . . . Adoption of [these suggestions] might be viewed as limiting an employee's reporting options . . . ." 57 *Federal Register* 35006 (August 7, 1992).

What these agencies could not obtain before the Office of Government Ethics, they obtained from the United States Court of Appeals for the Federal Circuit. Today, Executive Order 12731 is completely ignored throughout the federal workforce. The legal interpretations, given the Whistleblower Protection Act, are inconsistent with the requirements of the Executive Order. Employees who agree that "public service is a trust" and take their obligation to

"disclose waste, fraud, abuse and corruption" seriously are without any meaningful protection. Bluntly stated, the overwhelming majority of valid whistleblowers cannot obtain any protection whatsoever under the Whistleblower Protection Act of 1989, as amended ("WPA").

COMPARISON OF THE WPA AND OTHER FEDERAL WHISTLEBLOWER LAWS

The WPA has established a centralized administrative approach to protecting federal employee whistleblowers. Under the WPA whistleblowers are required to file administrative claims, which generally are filed with the Office of Special Counsel. Decisions of the Special Counsel are reviewable, de novo before the Merit Systems Protection Board. Decisions of the MSPB are subject to judicial review. However, review is limited to the U.S. Court of Appeals for the Federal Circuit.

As set forth in Table 1, the WPA is the only federal whistleblower law which does not provide for review in all judicial circuits. Table 1 compares apples with apples. The chart only compares the WPA with similar whistleblower protection laws. Specifically, the eleven laws set forth in Table 1 all establish a centralized federal administrative process for adjudicating whisleblower cases. They all require a complaint be filed, not in Court, but with an administrative agency (i.e. the U.S. Department of Labor). Under each law, an agency conducts an investigation which can be reviewed, de novo. Just as in the WPA, the hearings are not conducted in federal court, but are assigned to administrative law judges for non-jury trials. Again, similar to the WPA, the decisions of the administrative law judges are reviewed in Washington, D.C. by a federal agency appointed by the President of the United States. Under the WPA, that agency is the Merit Systems Protection Board. Under the eleven other federal laws, that agency is the Administrative Review Board.

Here the similarity ends. All of the DOL-administered whistleblower laws provide for compensatory damages, permit the Department of Labor to file and defend appeals on behalf of employees

in the Courts of Appeal and protect employees whose disclosures are purely internal. Most significantly, all of the other 11 DOL-administered laws provide for all-circuit appellate review. Only the WPA restricts appeals to one recently created judicial circuit.

A review of the 16 laws analyzed by the Congressional Research Service also demonstrates this point. As set forth in Table 2, all of the whistleblower laws reviewed by CRS are subject to all circuit judicial review. Moreover, under every law in which the issue arises, courts protect internal whistleblowers. All or most of the laws permit special or compensatory damages and permit the relevant federal agency to defend the claims in federal court. Some of the laws permit whistleblowers to have their cases heard directly in federal court, while a handful of others permit whistleblowers to have their cases heard by juries and permit the whistleblowers to obtain punitive damages.

In addition to the laws referenced in Tables 1 and 2, a number of other federal whistleblower laws exist which provide even more protection to employees. The False Claims Act permits the Department of Justice to litigate claims on behalf of the employees, permits the employees to share a percentage of any recovery obtained by the federal government, permits wrongfully discharged whistleblowers to obtain special damages (which includes emotional distress damages) and double back pay, and protects whistleblowers who engage in purely internal disclosures to management from retaliation. *U.S. ex rel Yesudian v. Howard University*, 153 F.3d 731, 739-40 (D.C. Cir. 1998).

The Civil Rights Act of 1871 protects municipal and state employee whistleblowers. Under the Civil Rights Act, employee whistleblowers are entitled to direct federal court relief, punitive damages, compensatory damages, and jury trials. The U.S. Supreme Court has explicitly protected purely internal disclosures, and has held that whistleblowing directly to a supervisor is protected under the First Amendment free speech clause. *Givhan v. Western Line*, 439 U.S. 410 (1979).

On the whole the WPA, primarily as a result of narrow and hyper technical judicial interpretations, is the weakest and least protective of all major whistleblower laws. This was not Congress' intent when the WPA was passed.

RESTRICTED APPELLATE REVIEW: THE PRIMARY CAUSE FOR THE WEAKNESSES IN THE WPA

After carefully evaluating the statutory language of the WPA and the numerous judicial interpretations of that statute, unquestionably, the primary reason that the WPA is ineffective rests with the exclusive jurisdiction of the Federal Circuit over all appellate decisions. This experiment in exclusivity of appellate review, which is unique in federal employment law, has been a colossal failure.

No other employment law or whistleblower protection law restricts appeals courts from hearing cases. The only whistleblower law in the United States that is heard exclusively by one judicial circuit is the WPA. Unless this provision of the WPA is repealed and WPA appeals are adjudicated throughout the United States in a manner identical to all other whistleblower laws, the WPA will never properly protect whistleblowers.

Restricting appeals to one judicial circuit undermines the basic principle of appellate review applicable to all other whistleblower laws. That principle is based on an informed peer review process which holds all circuit judges accountable. Our appellate system of justice initially hears cases in three judge panels. The legal reasoning employed in these decisions are regularly analyzed by three other judge hearing panels when a similar issue is presented to another court. Specifically, if a Court of Appeals issues a decision on, for example, the scope of protected activity under a whistleblower law, whenever that issue comes up in another jurisdiction, a different Court of Appeals reviews and analyzes the prior precedent. This forces the attorneys to argue whether the decision of the sister circuit is good law. Often, appeals courts disagree with each other. Based on these

disagreements, courts either reconsider prior decisions and/or the case is heard by the Supreme Court, which resolves the dispute.

By segregating federal employee whistleblowers into one judicial circuit, the WPA avoids this peer review process. In the Federal Circuit no other judges critically review the decisions of the Court, no "split in the circuits" can ever occur, and thus federal employees are denied the most important single procedure which holds appeals court judges reviewable and accountable. A "split in the circuits" is the primary method in which the U.S. Supreme Court reviews wrongly decided appeals court decisions. By creating a system in which such "splits" cannot exist, the Federal Circuit need not worry about a terribly decided anti-whistleblower decision being reversed.

Employees cannot obtain meaningful Supreme Court review of cases decided against whistleblowers, but the government-employers can. The second method for which an appeals court decision is subject to Supreme Court review, is when the Solicitor of the United States asserts that the case raises a significant question of law. In the case of the WPA, the Solicitor represents the employer-agency. That authority has never (and most likely can never) been exercised in support of an employee-whistleblower.

There is no justification whatsoever for restricting appeals to the Federal Circuit. The following justifications traditionally used to justify the Federal Circuit monopoly are not supported in law or fact:

The Federal Circuit Developed Expertise in Whistleblower Law: This is simply not the case. The Federal Circuit hears numerous cases outside of the context of employee-employer relations. The Circuit has an international reputation for trademark and copyright law, and almost all of the judges on the Circuit have backgrounds in corporate law unrelated to labor relations. On the other hand, the other U.S. Courts of Appeal have jurisdiction to hear cases under the approximately 20 other federal whistleblower laws, the retaliation cases filed under Title VII of the Civil Rights Act, and other retaliation cases filed under numerous employee protection

laws, such as the Age Discrimination Act, the Fair Labor Standards Act and the Americans with Disabilities Act. Many of the Appeals Court judges sat as District Court judges and adjudicated numerous employee-employer disputes. Although some of the procedures under the WPA are unique, the heart of a WPA case, like the heart of any employment case, concerns evaluating management motives and justifications for adverse action. The Federal Circuit has no special expertise in evaluating these types of issues. Given the fact that the Federal Circuit is not an appeals court of general jurisdiction, does not hear constitutional claims, and does not hear employment cases arising under scores of other similar whistleblower laws, a strong argument can be made that the Federal Circuit is the least qualified court in the United States to hear whistleblower appeals.

Eliminating the Federal Circuit Monopoly Would Create Inconsistencies in the Law: As explained above, inconsistences in appellate decisions is a good thing. It is the mechanism used on a day-to-day basis for the informal and formal review of the reasoning applied to a case by any one panel of judges. In no other area of whistleblower law does a desire for uniformity trump a desire for sound appellate decision making. On a practical level, this argument is also a red herring. A review of the rulings in whistleblower cases of all of the other twelve circuits demonstrates that the vast majority of Courts of Appeal consistently interpret the law.

All Circuit Review would provide a Choice of Forums: This is not the case. The appellate jurisdiction of the U.S. Courts of Appeals is determined primarily on the jurisdiction in which the underlying cause of action arose. Thus, an employee fired in Virginia could not pick and choose which of the twelve Courts of Appeals in which to file his or her appeal; he or she must file it in the appeals court with jurisdiction over Virginia. Under proper all-circuit review, there is no choice of forum.

Additional Costs: Testimony was presented before a subcommittee of the U.S. Senate Governmental Affairs Committee that all-circuit review would increase the litigation costs of the MSPB. This

is not the case. Regional attorneys of the MSPB and the U.S Department of Justice could argue any case before various Courts of Appeals. However, forcing all whistleblowers to argue their appeals court cases in Washington, D.C. can create a hardship on the employees. Federal employees who reside throughout the United States, such as in California, Minnesota, and Alabama, face a hardship when forced to retain attorneys in Washington, D.C. and/or travel to Washington to have their case heard.

Both the initial Senate and House reports (House Report No. 100-274 and Senate Report No. 100-413) recommended the passage of the Whistleblower Protection Act of 1989 and included all-circuit review as one of the primary reforms. The House Report correctly noted that the Federal Circuit was "created" by judges who worked in the Court of Customs and Patent Appeals and the Court of Claims. Given the origin of the Court, the judges were "inexperienc(ed) with federal employee" law. The House Report also noted that the decisions of the Federal Circuit were "generally" "adverse to employees." House Report, p. 26.

In 1994 the House of Representatives Committee on Post Office and Civil Service again recommended that Congress adopt all-circuit review. House Report No. 103-769. That Committee's findings ring even more true today:

> [The] Federal Circuit Court of Appeals have not been favorable to Federal whistleblowers. . . The committee received extensive testimony at hearings that the MSPB and Federal Circuit have lost credibility with the practicing bar for civil service cases . . . .The body of case law, developed by the Board and Federal Circuit, has represented a steady attack on achieving the legislative mandate for effective whistleblower protection . . . .The committee recognizes that realistically it is impossible to overturn destructive precedents as fast as they are issued . . . .

House Report, pp. 17-18.

Unfortunately, the recommendations regarding all-circuit review was not adopted. This is not surprising. The federal employer managers, represented by the U.S. Department of Justice, fully understood that without strong judicial oversight, and a judicial commitment to uphold the legislative intent behind the WPA, most of the other reforms enacted by Congress would, over time, ring hollow. The Justice Department's assessment was correct.

Today, the need for all-circuit review is even more pronounced than in 1989 or 1994. The decisions "adverse to employees" have multiplied. Worse, because the Federal Circuit case law is binding precedent on the Merit Systems Protection Board (MSPB) and Office of Special Counsel (OSC), those administrative agencies have not been fully protective of employees. The litigation procedures of the MSPB are very hostile to whistleblowers. This hostility reflects the numerous "adverse" decisions regularly issued by the Federal Circuit, which have prevented the overwhelming majority of valid whistleblowers from obtaining any legal protection.

THE MERITS OF THE FEDERAL CIRCUIT DECISION MAKING PROCESS

Procedurally, there is no valid justification or precedent for the monopoly the Federal Circuit currently exercises over WPA cases. All other federal whistleblower statutes are subject to all-circuit review. *See* Tables 1 and 2.

Substantively, the protection of federal employee whistleblowers has been devastated by Federal Circuit decisions. *See* Statement of Special Counsel Elaine Kaplan before the Subcommittee on Internal Security, Proliferation and Federal Services (July 25, 2001) (various "Federal Circuit decisions establish unduly narrow and restrictive tests for determining whether employees qualify for the protection of the WPA").

Statistically, federal employee whistleblowers often point to the terrible win-loss ratio whistleblowers face at the Federal Circuit. This

poses a valid question: Do federal employees lose their WPA claims because their cases lack merit or do they lose their cases because of the precedents established by the Federal Circuit?

To evaluate the impact of the Federal Circuit case law on the win-loss ratio for WPA whistleblowers, it is important to determine whether the Federal Circuit's statistics regarding whistleblower cases is significantly different from that of other Courts of Appeals. By a review of cases published in West Law, and cases identified in the Federal Circuit's web page, the National Whistleblower Center identified the 25 most recent merit-based WPA cases decided by the Federal Circuit. All 25 cases were substantively reviewed to determine whether a judgment was rendered for or against the employee. Whistleblower employees were found to have lost 91.67% of their cases. In the 8.33% of the cases in which the employees were victorious, the only issue resolved at the Federal Circuit level was the scope of damages. Thus, whether the Federal Circuit would have reversed the ruling of the MSPB on the merits is not known. In any event, based on our findings, the chances of winning a WPA case before the Federal Circuit was less then 10%.

The National Whistleblower Center then reviewed the most recent 25 cases issued by the Courts of Appeals under the Commercial Motor Vehicle Safety Act. This law was chosen because it is administered in a manner similar to the WPA and had the most number of appeals court decisions of all DOL-administered whistleblower laws.

Under the Commercial Motor Vehicle whistleblower law claims are filed before an administrative agency (the U.S. Department of Labor) and are adjudicated before an administrative law judge (not a jury). Likewise, in each case a presidentially appointed board located in Washington, D.C. issues the final and enforceable administrative ruling. Thus, the only distinguishing procedural difference between the WPA and the Commercial Motor Vehicle whistleblower law is that the MSPB orders are reviewable only by the Federal Circuit and the DOL orders are subject to all-circuit review.

Under the Commercial Motor Vehicle Safety Act, employees prevailed in 60% of the appeals court decisions. Thus, truck driver whistleblowers won at the court of appeals 60% of the time, while federal employee whistleblowers only prevailed in 8.33% of the cases presented to the Federal Circuit.

Thus, the anecdotal belief that it is far more difficult to prevail in a whistleblower case before the Federal Circuit than other Courts of Appeals is supported by the evidence.

In addition, our studies have lead us to conclude that substantive Federal Circuit case law hostile to employee-whistleblowers was the cause for this dramatic difference in the win-loss ratio.

Under the Federal Circuit's decisions in *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998) and *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. 2001), most "internal" whistleblowing is not protected. Specifically, disclosures to an employee's supervisor are generally not protected. Additionally reports made by an employee in the course of his duty were stripped of protection. Thus, under the Federal Circuit case law whistleblowers must make so-called "external" reports, i.e. a disclosure to an Inspector General or similar persons. Unlike the Federal Circuit's interpretation of the WPA, **all** of the laws administered by the DOL protect internal whistleblowers. Specifically, under these laws, employees are fully protected if they raise their concern to their immediate supervisor. The DOL statues and case law protect the types of disclosures unprotected under *Willis* and *Hoffman*. Table 1. *Accord.,* Table 2.

By focusing on the *Willis/Hoffman* decisions, the direct impact of the Federal Circuit's jurisdiction over a whistleblower case could be objectively evaluated.

The analysis was very simple. Through a review of the U.S. Department of Labor's web site and a computer search on West Law, the Whistleblower Center was able to identify the twenty most recent

decisions issued by the Courts of Appeals in which the Court found that the employee's claim had merit. These twenty most recent decisions all concerned reviews of final decisions issued by the U.S. Department of Labor's Administrative Review Board.

The decisions of the Administrative Review Board and the MSPB are comparable. In both circumstances the Courts of Appeals do not hear cases *de novo*. Instead, the cases are initially tried before administrative law judges and the Court only reviews final agency decisions. Under the DOL-whistleblower cases, the ARB issues the final agency order. Under WPA cases, the MSPB issues final agency orders. The standard of review applied by the Courts of Appeals under a WPA case or a DOL-whistleblower case is identical.

In order to evaluate whether or not the Courts of Appeals in which the case was heard would have impacted the actual merits-determination, the substance of each reported decision was analyzed. This evaluation consisted of a review of to whom the employee reported his or her whistleblower concern. By evaluating to whom each report was made, it was possible to determine that the exclusivity of the Federal Circuit's appellate jurisdiction was the outcome-determination. According to our findings the Federal Circuit would not support internal whistleblowers, while all of the other circuits did.

The results of this evaluation were stunning. In all twenty cases favorably decided under the DOL-administered whistleblower laws, the employee had only engaged in internal whistleblowing. Thus, in the Federal Circuit, all twenty employees would have lost their cases. *See* Table 5.

The destructive nature of Federal Circuit precedent is not limited to the decisions of the Federal Circuit; the administrative agencies that adjudicate the WPA (i.e. the MSPB and OSC) are required to follow Federal Circuit precedent. Thus, a bad decision of the Federal Circuit has a ripple effect on all federal employee cases.

In order to quantify this effect, the National Whistleblower Center reviewed the ten most recent favorable decisions issued by the Department of Labor under the DOL-administered whistleblower laws. These decisions, all decided in 2003, all evaluate whether the whistleblower engaged in internal protected activity not protected under *Willis/Huffman*.

Again, the results are dramatic. Sixty percent of the whistleblowers who prevailed before the DOL would have lost automatically under a *Willis/Huffman* analysis if the case had been heard before the MSPB. Table 6 reflects this evaluation.

THE *WILLIS/HUFFMAN* CASES WERE WRONGLY DECIDED

As set forth above, the Federal Circuit's decisions concerning internal protected activity, set forth in cases such as *Willis* and *Huffman*, are inconsistent with the interpretation provided other whistleblower laws. This raises one final issue: Is the Federal Circuit correct and everyone else wrong?

The issue of whether to protect internal disclosures has been adjudicated for years. Over time, the vast majority of courts have firmly and broadly protected internal disclosures. These judicial interpretations have been "endorsed" by Congress on numerous occasions. The two most recent whistleblower laws passed by Congress, the Sarbanes-Oxley corporate whistleblower law and the airline safety whistleblower law, both contain specific Congressional endorsements of internal whistleblowing.

Some of the decisions which discuss the need to protect internal whistleblowing are: *Lambert v. Ackerley*, 180 F.3d 997, 1002-1008 (9th Cir. 1999) (*en banc*) (collecting cases and discussing protected activity under various antiretaliation laws); *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12 (1st Cir. 1998); *Baker v. Board of Mine Operations Appeals*, 595 F.2d 746 (D.C. Cir. 1978); *Munsey v. Morton*, 507 F.2d 1202 (D.C. Cir.

1974); *Phillips v. Board of Mine Operations Appeals*, 500 P.2d 772, 781-782 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 938 (1974); *Donovan v. Peter Zimmer America, Inc.*, 557 F. Supp. 642 (D. S.C. 1982); *Dunlop v. Hanover Shoe Farms Inc.*, 441 F. Supp. 385 (M.D. Pa. 1976); *NLRB v. Retail Store Employees' Union*, 570 F.2d 586, 591 (6th Cir. 1978), *cert. denied*, 439 U.S. 819 (1978); *U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731 (D.C. Cir. 1998); and, *Bechtel Construction v. SOL*, 50 F.3d 926, 931-933 (11th Cir. 1995).

In *Passaic Valley Sewerage Commissioners v. United States Department of Labor,* 992 F.2d 474, 478-479 (3rd Cir. 1993), the U.S. Court of Appeals for the 3rd Circuit explained why internal whistleblowing was protected:

> We believe that the statute's purpose and legislative history allow, and even necessitate, extension of the term "proceeding" to intra-corporate complaints. The whistleblower provision was enacted for the broad remedial purpose of shielding employees from retaliatory actions taken against them by management to discourage or to punish employee efforts to bring the corporation into compliance with the Clean Water Act's safety and quality standards. If the regulatory scheme is to effectuate its substantive goals, employees must be free from threats to their job security in retaliation for their good faith assertions of corporate violations of the statute. Section 507(a)'s protection would be largely hollow if it were restricted to the point of filing a formal complaint with the appropriate external law enforcement agency. Employees should not be discouraged from the normal route of pursuing internal remedies before going public with their good faith allegations. Indeed, it is most appropriate, both in terms of efficiency and economics, as well as congenial with inherent corporate structure, that employees notify management of their observations as to the corporation's failures before formal investigations and litigation are initiated, so as to facilitate prompt voluntary remediation and compliance with the Clean Water Act. Where perceived corporate oversights are a matter of employee

misunderstanding, this would afford management the opportunity to justify or clarify its policies.

The court's holding in Passaic Valley reflects basic "common sense." Discouraging employees from discussing concerns with their immediate supervisors undermines the "prompt and voluntary remediation" of most problems.

FAILURE TO REFORM THE WPA WILL RESULT IN NUMEROUS CONFLICTS IN THE LEVEL OF PROTECTION AFFORDED TO FEDERAL EMPLOYEES

Today there is a crisis in federal employee whistleblower protection. Federal employees cannot obtain a fair and reasonable review of their decisions in the Federal Circuit.

The Federal Circuits' emasculation of the WPA has created a vacuum. Whistleblowers still need protection, but the law designed to afford that protection is broken. Consequently, experts in whistleblower protection are increasingly abandoning the WPA and attempting to carve out other legal protections for federal employees. Table 7 sets forth some of the laws that now provide protection for federal employee whistleblowers outside of the WPA/MSPB/Federal Circuit system.

For example, when Congress amended its banking laws it protected federal employee whistleblowers. However, instead of forcing those employees into the WPA system, Congress created a new cause of action in federal court, and specifically permitted employees in the federal banking system to file their whistleblower claims directly in federal court.

In the area of environmental protection federal employees have successfully litigated and obtained protection from the U.S. Department of Labor. Again, the case law now permits all federal employees to

avoid the MSPB and seek environmental whistleblower protection from the DOL. Employees of the Department of the Navy, Department of the Army, the Coast Guard, the Environmental Protection Agency and the Department of Interior have all obtained protection in DOL proceedings. These employees all avoided the WPA.

Title VII of the Civil Rights Act of 1964 permits federal employees who allege discrimination on the basis of sex, race, religion, and national origin to file claims in federal court. Employee whistleblowers who are protected under both the WPA and Title VII are regularly filing claims under Title VII, and ignoring the WPA. Similarly, federal employees are using, with increasing frequency, the Privacy Act to have their retaliation cases heard. The Privacy Act is applicable to employee whistleblowers when management violates the Privacy Act as part of retaliatory conduct.

The WPA is ineffective. Thus, federal employees have no option but to seek protection outside of the MSPB and Federal Circuit. Additionally, as happened under the federal banking laws, until the WPA is properly fixed, whistleblower advocates will request Congress to carve out exceptions to the WPA and permit federal employees, on a case by case basis, to file claims in federal court or before other administrative agencies.

The end result will be a system in which a small group of federal whistleblowers, by luck and circumstance, are able to escape the traps set by a broken WPA-system and gain protection under other laws. However, the majority of federal employees simply have no realistic remedy whatsoever. Clearly, this was not the intent of Congress.

THE WPA MUST BE AMENDED TO INCLUDE "SPECIAL DAMAGES"

Currently, the WPA is silent on the entitlement of federal employees to special damages. Based on this silence, the Federal Circuit has narrowly construed the scope of relief available to

meritorious whistleblowers under the WPA, and has denied claims for compensatory damages, such as compensation for emotional distress.

The basic remedy in all employment cases is "make whole" relief. The theory behind "make whole" remedies is that an employee who suffers illegal retaliation should be restored to the same position he or she would occupy had the retaliation not occurred. Make whole relief is sound public policy. Whistleblowers who fulfill their public service mandates should not be penalized without a full "make whole" remedy. Instead, whistleblowers face severe sanctions even if they win their case.

Under the current law, most whistleblowers cannot be made "whole." As interpreted by the Federal Circuit, the current law provides for actual and consequential economic damages. However, without the statutory authority to award special damages, it is simply not possible to make most whistleblowers "whole." Special or compensatory damages are specifically permitted under most whistleblower laws (see Table 1), including the False Claims Act and the Sarbanes-Oxley corporate whistleblower law. The reason why special damages are an essential component of "make whole" relief was explained by the U.S. Court of Appeals for the 7th Circuit in a False Claims Act retaliation case. *Neal v. Honeywell, Inc.* 191 F.3d 827 (7th Cir. 1999).

Simply stated, special damages are damages which result from "consequences" directly attributable to the wrongdoing. *Neal* 191 F.3d at 831-32. "Special damages" are damages which "naturally, but not necessarily, flow from the wrongful conduct." *Id.* In *Neal* the court held that emotional distress could very well be a "natural" result stemming from a wrongful discharge.

Only by permitting the MSPB to award special damages in cases when an employee-victim demonstrates that such damages were the "natural" result of the retaliation, can an employee be made fully "whole." This fact was made clear in another False Claims Act case decided by the Eight Circuit:

> "The FCA whistleblower provision explicitly mandates 'compensation for any special damages sustained as a result of the discrimination.' Damages for emotional distress caused by an employer's retaliatory conduct plainly fall within this category . . . Providing compensation for such harms comports with the statute's requirement that a whistleblowing employee 'be entitled to all relief necessary to make the employee whole."

Hammond v. Northland Counseling Center, 218 F.3d 886, 892-93 ((8th Cir. 2000).

If an employee can prove that a damage "naturally" flowed from illegal retaliation, that employee must be able to obtain compensation for that damage. To hold otherwise would deny federal employee whistleblowers the full "make whole" relief necessary to correct the adverse impact of the illegal conduct.

CONCLUSION

Today federal employee whistleblowers are not protected. While other agencies have recognized that whistleblowers are a "vital part of American society" and constitute "conscientious public-spirited citizens,"(*Knox v. U.S. Department of Interior*, 2001-CAA-7, Department of Labor Administrative Law Judge decision in federal whistleblower case filed under Clean Air Act), the Federal Circuit and MSPB are stuck in the mud. The regulations and case law governing the WPA all but guarantee that the overwhelming majority of valid whistleblowers will lose their cases. The few lucky enough to prevail will not be made fully "whole." Congress must reform the WPA.

In 1989 and 1994 the Federal Circuit was given the benefit of the doubt. Congress hoped that its strong messages would provide the Federal Circuit with the guidance it needed to properly protect federal whistleblowers. Unfortunately, the Federal Circuit did not adjust its narrow and hostile approach to whistleblower protection. All circuit review is clearly the keystone for any successful reform of the WPA;

every institution in government needs oversight. All circuit review rests at the center of appellate judicial accountability.

Congress should enact S. 1358, with two changes. First, all circuit review should be made permanent and the jurisdiction of the Federal Circuit over WPA cases should be terminated. Second, the WPA should be amended to authorize "special damages."

Respectfully submitted by:

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Mr. Kohn is a recognized expert on whistleblower law. Prior to being named to the Board of Directors of the Center he was the Director for Corporate Litigation and Clinical Director of the Government Accountability Project, and a

former Clinical Supervisor at the Antioch School of Law in Washington, D.C. Mr. Kohn was also a student law clerk to the Honorable A. Leon Higginbotham, Jr., U.S. Court of Appeals for the Third Circuit.

The National Whistleblower Center is a non-profit, tax-exempt organization specializing in the support of employee whistleblowers. Created in 1988, one of the major goals of the Center is to protect the taxpayers by educating the public about the need to protect employees to disclose government abuse, misconduct and corruption. The Center publishes an educational web page, *www.whistleblowers.org*, supports precedent-setting litigation on behalf of employee whistleblowers, and provides counsel and attorney referrals to whistleblowers.

The National Whistleblower Center acknowledges the invaluable contributions to this testimony by the following legal interns: Lauren Regan, Mia Munro, Eric Murrell, Phil Marr, Abigail Serna, Donna Lee, and Lisa Yigit.

SOURCES FOR TABLES 1-7

Table 1: 18 U.S.C. § 1514A; 42 U.S.C. § 7622; 42 U.S.C. § 9610; 49 U.S.C. § 60129; 42 U.S.C. §300j-9(I); 42 U.S.C. § 6971; 15 U.S.C. § 2622; 33 U.S.C. § 1367; 42 U.S.C. § 5851; 49 U.S.C. § 42121; 49 U.S.C. § 31105; 5 U.S.C. § 1221, 7703.

Table 2: 49 U.S.C. § 31105; 42 U.S.C. § 7621; 42 U.S.C. § 9610; 10 U.S.C. § 2409; 42 U.S.C. § 5851; 29 U.S.C. § 215; 30 U.S.C. § 815; 33 U.S.C. § 1251; 33 U.S.C. § 948; 29 U.S.C. § 1855; 29 U.S.C. § 660; 42 U.S.C. § 300j-9; 18 U.S.C. § 1514A; 42 U.S.C. § 6971; 15 U.S.C. § 2622; 5 U.S.C. 1221, 7703.

Table 3: *Heckman v. Dept. of Agriculture,* 73 Fed.Appx. 409 (Fed. Cir.); *Cruise v. Dept. of Homeland Security,* 70 Fed.Appx. 555 (Fed. Cir.); *Spencer v. Dept. of the Navy,* 327 Fed.3d 1354 (Fed. Cir.); *Carson v. Dept. of Energy,* 64 Fed.Appx. 234 (Fed. Cir.); *Sabersky v. Dept of Justice,* 61 Fed.Appx. 676 (Fed. Cir.); *Chakravorty v. Dept of the Air Force,* 58 Fed.Appx 507 (Fed. Cir.); *Kraushaar v. Dept of Agriculture,* 60 Fed.Appx. 295 (Fed. Cir.); *Ward v. Federal Communications Commission,* 58 Fed.Appx. 517 (Fed. Cir.); *Crockett v. Dept. of the Army,* 54 Fed.Appx. 938 (Fed. Cir.); *Guzman v. Office of Personnel Management,* 53 Fed.Appx. 927 (Fed. Cir.); *Roach v. Dept of the Army,* 53 Fed. Appx. 922 (Fed. Cir.); *Ablestein v. Dept of Agriculture,* 53 Fed.Appx. 84 (Fed. Cir.); i 48 Fed.Appx. 778 (Fed. Cir.); *Francisco v. Office of Personnel Management,* 295 Fed.3d 1310 (Fed. Cir.); *Gernert v. Dept. of the Army,* 34 Fed.Appx. 759 (Fed. Cir.); *Meyers v. Dept. of Veterans Affairs,* 33 Fed. Appx. 523 (Fed. Cir.); *Wainwright v. Dept. of Health and Human Services,* 28 Fed.Appx. 952 (Fed. Cir.); *Raiszadeh v. Dept. of Veterans Affairs,* 25 Fed.Appx. 959 (Fed. Cir.); *Langer v. Dept of the Treasury,*

265 Fed.3d 1259 (Fed. Cir.); *Steele v. Merit Systems Protection Board,* 20 Fed.Appx. 863 (Fed. Cir.); *Flores v. Dept. of the Treasury,* 25 Fed.Appx. 868 (Fed. Cir.); *Egan-Byron v. Dept. of Health and Human Services,* 28 Fed.Appx. 923 (Fed. Cir.); *Amarille v. Office of Personnel Management,* 28 Fed.Appx. 931 (Fed. Cir.); *Camastro v. Dept. of Justice,* 25 Fed.Appx. 930 (Fed. Cir.); *Huffman v. Office of Personnel Management,* 263 F.3d 1341 (Fed. Cir.).

Table 4: *Dalton v. DOL,* 58 Fed.Appx.442 (10th Cir.); *Zurenda v. DOL,* 182 F.3d 902 (2nd Cir.); *Shannon v. Consolidated Freightways Corporation,* 181 F.3d 10 (6th Cir.); *Goggin Truck Line Company, Inc. v. ARB, DOL,* 172 F.3d 872 (6th Cir.); *UPS, Inc. v. ARB, DOL,* 166 F.3d 1215 (6th Cir.); *BSP Trans, Inc. v. DOL,* 160 F.3d 38 (1st Cir.); *Brink's v. Herman,* 148 F.3d 175 (2nd Cir.); *Clean Harbors Environmental Services, Inc. v. Herman,* 146 F3d 12 (1st Cir.); *Intermodal Cartage Co., Ltd. v. Reich, SOL,* 113 F.3d 1235 (6th Cir);
Yellow Freight System, Inc. v. Reich, SOL, 103 F.3d 132 (6th Cir.); *J.L.C. Industries, Inc. v. Reich, SOL,* 89 F.3d 826 (2nd Cir.); *Toland v. Burlington Motor Carriers, Inc.,* 72 F.3d 130 (6th Cir.); *Reemsnyder v. OSHA,* 56 F.3d 65 (6th Cir.); *Castle Coal & Oil Co., Inc. v. Reich, SOL,* 55 F.3d 41 (2nd Cir.), *Yellow Freight Systems, Inc. v. Reich, SOL,* 38 F.3d 76 (2nd Cir.); *Roadway Express, Inc. v. Reich, SOL,* 34 F.3d 1068 (6th Cir.); *Yellow Freight Systems, Inc. v. Reich, SOL,* 27 F.3d 1133 (6th Cir.); *Western Truck Manpower, Inc. v. DOL,* 12 F.3d 151 (9th Cir.); *Yellow Freight Systems, Inc. v. Reich, SOL,* 8 F.3d 980 (4th Cir.); *Trans Fleet Enerprises, Inc. v. Boone,* 987 F.2d 1000 (4th Cir.); *Yellow Freight System, Inc. v. Martin, SOL,* 983 F.2d 1195 (2nd Cir.); *Roadway Express, Inc. v. Dole, SOL,* 929 F.2d 1060 (5th Cir.); *The Lewis Grocer Company v. Holloway,* 874 F.2d 1008 (5th Cir.); *Duff Truck Line, Inc. v. Brock, SOL,* 848 F.2d 189 (6th Cir.); *Moon v. Transport Drivers, Inc.,* 836 F.2d 226 (6th Cir.).

Table 5: *Tennessee Valley Authority v. United States Secretary of Labor,* 59 Fed.Appx. 732 (6th Cir. 2003); Georgia Power Company v. DOL, Case No. 01-10916 (11th Cir. 2002); *Goggin Truck Line Co, Inc., v. ARB,* 172 F.3d 872 (6th Cir. 1999); *Dalton v. United States Department of Labor,* 58 Fed.Appx. 442 (10th Cir. 1999); *Clean Harbors Environmental Services, Inc., v. Herman,* 146 F.3d. 12 (1st Cir. 1998); *Intermodal Cartage Co., Ltd., v. Reich,* 113 F.3d 1235 (6th Cir., 1997); Stone & Webster Engineering Corporation *v. Herman, United States Secretary of Labor,* 115 F.3d 1568 (11th Cir. 1997); *Fluor Constructors, Inc., v. Reich, United States Secretary of Labor,* 111 F.3d 94 (11th Cir. 1997)*; Blackburn v. Reich, United States Secretary of* Labor, 79 F.3d 1375 (4th Cir. 1996); Connecticut *Light & Power Co. v. United States Secretary of Labor,* 85 F.3d 89, (2nd Cir. 1996); *Bechtel Construction Co. v. United States Secretary of Labor,* 50 F.3d 926 (11th Cir. 1995); *J.L.C. Industries, Inc., v. United States Secretary of Labor,* 89 F.3d 826 (2nd Cir. 1995); *Yellow Freight Systems, Inc., v. Reich,* 38 F.3d 76 (2nd Cir. 1994); *Roadway Express, Inc., v. Reich,* 34 F.3d 1068 (6th Cir. 1994); *Yellow Freight System, Inc., v. Reich,* 27 F.3d 1133 (6th Cir. 1994); *Yellow Freight System, Inc., v. SOL,* 983 F.2d 1195 (2nd Cir. 1993)*; Western Truck Manpower, Inc. v. United States Department of Labor,* 12 F.3d 151 (9th Cir. 1993); *Yellow Freight Systems, Inc., v. Reich,* 8 F.3d 980 (4th Cir. 1993); *Passaic Valley Sewerage*

Commissioners v. United States Department of Labor, 992 F.2d 474 (3rd Cir. 1993) *Trans Fleet Enterprises, Inc., v. Boone*, 987 F.2d 1000 (4th Cir. 1992).

Table 6: *Kester v. Carolina Power & Light Co.*, No. 2000-ERA-31 (ARB Sept. 30, 2003); *Jackson v. Butler & Co.*, No. 2003-STA-26 (ALJ June 24, 2003); *Palmer v. Triple R Trucking*, No. 2003-STA-28 (ALJ June 19, 2003); *Dourherty v. Hayward Tyler, Inc.*, No. 2001-ERA-43 (ALJ Sept. 23, 2003); *Hillis v. Knochel Brothers, Inc.*, No. 2002-STA-50 (ALJ July 21, 2003); *Moder v. Village of Jackson, Wisconsin*, No. 2000-WPC-5 (ARB June 30, 2003); *Trueblood v. Von Roll America*, No. 2000-WPC-3 (ALJ Mar. 26, 2003); *Griffith v. Atlantic Inland Carrier*, No. 2002-STA-34 (ALJ Oct. 21, 2003); *Negron v. Vieques Air Link*, No. 2003-AIR-10 (ALJ Oct. 21, 2003); *Roberts v. Marshall Durbin Co.*, No. 2002-STA-35 (ALJ Mar. 6, 2003).

Table 7: 12 U.S.C. § 1831, 42 U.S.C. § 7622, 42 U.S.C. § 300j-9(I), 42 U.S.C. § 6971, 42 U.S.C. § 9610, 33 U.S.C. § 1367, 42 U.S.C. § 2000e-3.

Comparison Between DOL and MSPB Administered Whistleblower Protection Laws

Employee Whistleblower Protection Statutes	Hearing Before Administrative Judge and Final Agency Order issued in Washington, D.C.	Appeals: All Circuit Review	Compensatory or Special Damages	Administrative Agency Right to File Appeal	Report to Supervisor Protected
Sarbanes-Oxley Act 18 U.S.C. § 1514A	Yes	Yes	Yes	Yes	Yes
Clean Air Act 42 U.S.C. § 7622	Yes	Yes	Yes	Yes	Yes
Superfund Act 42 U.S.C. § 9610	Yes	Yes	Yes	Yes	Yes
Pipeline Safety Act 49 U.S.C. § 60129	Yes	Yes	Yes	Yes	Yes
Safe Drinking Water Act 42 U.S.C. § 300j-9(I)	Yes	Yes	Yes	Yes	Yes
Solid Waste Disposal Act 42 U.S.C. § 6971	Yes	Yes	Yes	Yes	Yes
Toxic Substances Act 15 U.S.C. § 2622	Yes	Yes	Yes	Yes	Yes
Water Pollution Control Act 33 U.S.C. § 1367	Yes	Yes	Yes	Yes	Yes
Energy Reorganization Act 42 U.S.C. § 5851	Yes	Yes	Yes	Yes	Yes
Aviation Reform Act 49 U.S.C. § 42121	Yes	Yes	Yes	Yes	Yes
Commercial Motor Vehicle Safety Act 49 U.S.C. § 31105	Yes	Yes	Yes	Yes	Yes
Whistleblower Protection Act 5 U.S.C. 1221, 7703	Yes	**No**	**No**	**No**	**No**

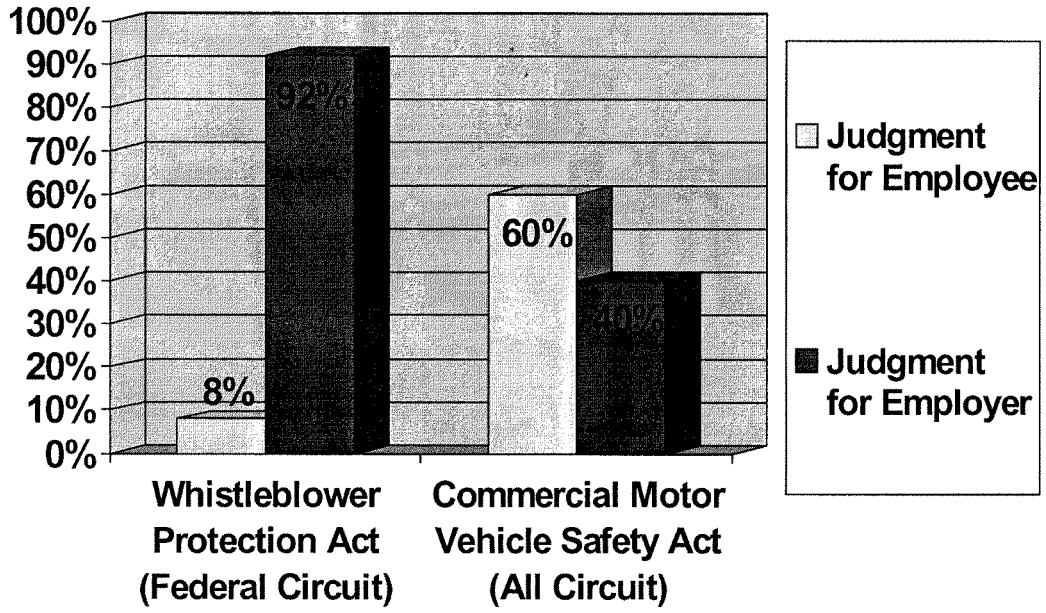
Table #1

Comparison Between WPA Congressional Research Service Whistleblower Protection Statutes

Employee Whistleblower Protection Statutes	Appeals: All Circuit Review	Report to Supervisor Protected
Commercial Motor Vehicle Safety Act 49 U.S.C. § 31105	Yes	Yes
Clean Air Act 42 U.S.C. § 7621	Yes	Yes
Superfund Act 42 U.S.C. § 9610	Yes	Yes
DOD Authorization Act of 1987 10 U.S.C. § 2409	Yes	Yes
Energy Reorganization Act of 1974 42 U.S.C. § 5851	Yes	Yes
Fair Labor Standards Act of 1938 29 U.S.C. § 215	Yes	Yes
Federal Mines Safety and Health Act 30 U.S.C. § 815	Yes	Yes
Water Pollution Control Act of 1972 33 U.S.C. §§ 1251	Yes	Yes
The Longshore and Harbor Workers Compensation Act 33 U.S.C. § 948	Yes	No Decision
Migrant and Seasonal Agricultural Worker Protection Act 29 U.S.C. § 1855	Yes	Yes
Occupational Safety and Health Act of 1970 29 U.S.C. § 660	Yes	Yes
Surface Mining Control and Reclaimation Act 30 U.S.C. § 1293	Yes	No Decision
Safe Drinking Water Act 42 U.S.C. § 300j-9	Yes	Yes
Sarbanes-Oxley Act of 2002 18 U.S.C. § 1514A	Yes	Yes
Solid Waste Disposal Act 42 U.S.C. § 6971	Yes	Yes
Toxic Substances Control Act 15 U.S.C. § 2622	Yes	Yes
Whistleblower Protection Act 5 U.S.C. 1221, 7703	**No**	**No**

Table #2

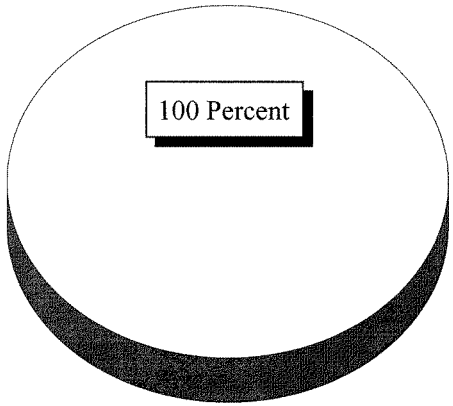
25 Most Recent Courts of Appeals Decisions



Tables 3/4

Evaluation of Twenty Most Recent Court of Appeals Decisions Under the DOL-Administered Whistleblower Laws in Which the Employee Prevailed

Percentage Engaged in Purely Internal Whistleblowing



Percentage of Employees Which Would Have Been Protected in the Federal Circuit Under *Willis/Huffman*

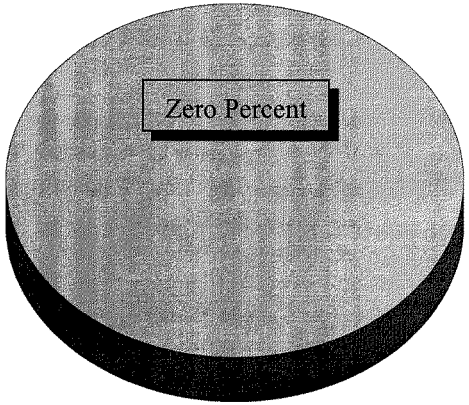


Table #5

Evaluation of the Ten Most Recent Administrative Decisions By the DOL in 2003 in which the Employee Prevailed

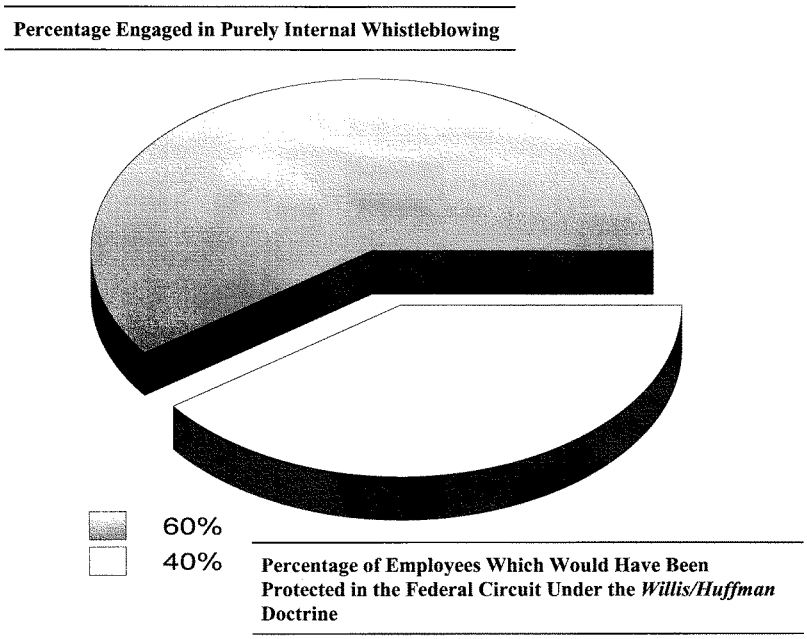


Table #6

Exceptions to the WPA: Other Statutes Which Protect Federal Employee Whistleblowers

Employee Whistleblower Protection Statutes	Federal Employees Protected	Appeals: All Circuit Review	Compensatory or Special Damages	Report to Supervisor Protected
Banking Institution 12 U.S.C. § 1831	Employees of Federal Banking Agencies, Fed Reserve Bank	Yes	Yes	Yes
Clean Air Act 42 U.S.C. § 7622	All	Yes	Yes	Yes
Safe Drinking Water Act 42 U.S.C. § 300j-9(I)	All	Yes	Yes	Yes
Solid Waste Disposal Act 42 U.S.C. § 6971	All	Yes	Yes	Yes
Superfund Act 42 U.S.C. § 9610	All	Yes	Yes	Yes
Water Pollution Control Act 33 U.S.C. § 1367	All	Yes	Yes	Yes
Title VII of Civil Rights Act 1964 42 U.S.C. § 2000e-3	All	Yes	Yes	Yes

Table #7

Senior
Executives
Association

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TESTIMONY
of

William L. Bransford

General Counsel
Senior Executives Association

Before the

SENATE GOVERNMENTAL AFFAIRS COMMITTEE

On

S. 1358, The Federal Employee Protection of Disclosures Act

November 12, 2003

The Senior Executives Association (SEA) is appreciative of the opportunity to present testimony before the Committee on its views related to S. 1358, the Federal Employee Protection of Disclosure Act. SEA is also grateful to the Chairman and the members of the Committee for their interest in improving the laws protecting whistleblowers from reprisal, and of improving administration of the process by which it is determined whether a protected whistleblower has been subjected to prohibited reprisal.

In general, SEA is supportive of the legislation, but in several instances, we believe the bill has gone too far. As explained below in greater detail, we believe the bill should be amended to provide defenses to agencies and to managers accused of reprisal that would allow a defense related to: (1) the bad faith motivation of an employee and (2) disclosures that are only policy disagreements with agency management. SEA also proposes that the new procedure related to security clearances be limited only to whistleblower reprisal cases in violation of 5 U.S.C. § 2302(b)(8). Finally, SEA opposes those portions of the bill that would allow the Office of Special Counsel or an employee to appeal a determination related to section 2302(b)(8) to any Circuit Court of Appeals, as opposed to current law, which limits such appeals to the U.S. Court of Appeals for the Federal Circuit.

The first sections of the bill greatly expand the definition of what constitutes a protected disclosure. These provisions seem designed to overturn precedent from the Federal Circuit that (1) limits protected disclosures to statements made to someone other than the immediate supervisor (by requiring that the disclosure be made to someone who is in a position to correct the illegality or mismanagement that is being disclosed), and (2) excludes from protection a

federal employee who discloses illegalities or mismanagement in the course of his or her job. While SEA is generally supportive of these changes and believes that the precedent from the Federal Circuit should be clarified, we do have concerns related to the current Whistleblower Protection Act and what we think will be an over-reaction to the changes in S. 1358 if the following concerns are not also addressed.

SEA's primary concern is that the bill's amendments to the 1989 Whistleblower Protection Act do not protect the right of a manager or supervisor to continue to manage an employee who has made either a protected disclosure (a whistleblower) or a bad-faith disclosure (a "bad-faith" whistleblower). As a result, managers potentially face a claim of whistleblower reprisal for making virtually <u>any</u> adverse personnel decision that touches upon the whistleblower, no matter how justified the action may be.

A bad-faith whistleblower might make a claim because of an unpopular decision by the manager. Under these circumstances, the employee gains the protection of the Act, potentially insulating that employee from any sort of negative personnel action during the pendency of the case or even beyond. Although the agencies charged with investigating WPA claims may be able to weed out these bad-faith charges during the administrative process, that process is long and drawn out. In the meantime, the manager's hands are tied from making personnel decisions against the bad-faith whistleblower, without regard to whether such action is warranted. At the same time, the manager could be unfairly branded as a retaliator and also must bear the burden of being the subject of an investigation. SEA believes that a provision in the Act providing for some sort of penalty for filing bad-faith whistleblower claims would serve to discourage non-

legitimate whistleblower claims, lessen the agencies' workload by eliminating most bad-faith claims, and also serve the interest of genuine whistleblowers whose disclosures deserve the protection of the Act. In the alternative, the bill should be changed to deny protection for disclosures made by an employee solely to avoid accountability for the employee's misconduct or poor performance.

Additionally, SEA is concerned that S. 1358 could be interpreted to expand the scope of protected disclosures to cover the policy decisions of a supervisor or manager, particularly if the policy disagreement is made only to the supervisor, but is couched in terms of legality. S. 1358 might protect such statements when they are only policy disagreements that should not be protected, particularly if the employee making the statement also exhibits conduct showing a refusal or reluctance to carry out the supervisor's policy decisions. This becomes critical when viewed from the perspective that executives and managers have a duty to carry out the policy direction of the Administration they serve. We believe it is not the intent of S. 1358 or the original intent of the WPA to protect the disclosures of employees whose disagreement with the Administration's policy objectives being carried out by their supervisor is made only to the supervisor and then is followed by a recalcitrant attitude by the employee. We suggest changes that allow the MSPB to deny protection for disclosures that relate only to agency policy decisions which a reasonable employee should follow.

SEA supports the new fourteenth prohibited personnel practice, which prohibits referring a matter for investigation because of any activity protected under 5 U.S.C. § 2302. This is a reform that we believe is necessary to prevent unreasonable and retaliatory investigations.

However, we are concerned that managers have adequate protection if they refer a matter for investigation for other legitimate reasons, especially since investigations often occur when an employee is reasonably suspected of wrongdoing; indeed, the result of the investigation may clear the employee. To correct this, we propose that the language in section 1(h) of the bill, which allows a supervisor or manager to avoid liability for reprisal by proving the personnel action at issue would have occurred anyway, also be made applicable to any new prohibitions of retaliatory investigations.

Section 1(e) of the bill establishes a new section 7702a in Title 5 setting forth a new process if a security clearance decision appears motivated by whistleblower reprisal. In our opinion, the bill appears to be consistent with the Supreme Court's decision in Department of the Navy v. Egan, 484 U.S. 518 (1988), because it does not require or allow the MSPB or a court to actually grant a security clearance. But we do think the bill may go too far by requiring this new procedure for agency review of security clearances for any violation of section 2302. We propose that this new process be limited to whistleblower reprisal in violation of 5 U.S.C. §2302(b)(8).

SEA supports the provisions in section 1(g) of S. 1358 concerning attorney fees. Current law allowing such fees has been interpreted to require that fees for managers who successfully defend reprisal charges be paid by the Office of Special Counsel. SEA believes that the appropriate policy determination in awarding fees to managers who are found to be substantially innocent of whistleblower reprisal is one of employer indemnification for expenses to an employee who is found to have been doing his or her job. Often, this job includes continuing to

manage a whistleblower after a disclosure is made. A manager who does so risks a charge of reprisal. A manager who successfully defends against a reprisal charge should not be required to pay fees him or herself, and we submit that the employing agency should indemnify its employees in these circumstances. Such a change in the law will also allow the Office of Special Counsel to make prosecutorial decisions without concern for the impact of the decision on the Office's budget.

SEA supports section 1(h) of S. 1358 allowing combinations of disciplinary action to be imposed (as opposed to current precedent that allows only one of the actions) and to clarify that a manager accused of reprisal can avoid liability by proving that the personnel action in question would have happened in the absence of protected activity. Clarification of this latter point is especially significant since a manager or supervisor should be able to avoid liability if the evidence of whistleblowing reprisal was of no consequence to the personnel action in question.

SEA supports the grant of independent litigating authority to the Office of Special Counsel. SEA believes that OSC has acted responsibly and should have this authority. Under current law OSC may only appeal to Federal Circuit if OPM agrees and must accept representation from the Department of Justice. OPM's reasons for seeking review and DOJ's broader government-wide litigating viewpoint should not control appellate decisions under the WPA. Instead this should be entrusted to the Special Counsel who will appeal based on reasons that promote protection of whistleblowers and the legislative intent of the whistleblower protection laws.

SEA does oppose the granting of an appeal right to other Circuit Courts of Appeal other than the Federal Circuit. The reason for our opposition is grounded in strong congressional criticism of the MSPB in the Homeland Security Act and 2004 DoD Authorization Act. Both of these statutes have provisions allowing their respective secretaries to set up their own appeals boards. SEA has consistently supported a federal employee's right to appeal to the MSPB; when we assert that position, one of the criticisms of the MSPB that we are given in response is that the MSPB appeal process is too complex. By allowing appeals to multiple circuits, the level of complexity will only increase because circuit court opinions will differ from each other. Also, it appears that the only reason to allow appeals to multiple circuits is dissatisfaction with the Federal Circuit's decisions. If this is the case, Congress can always legislatively overrule the Federal Circuit as it did in 1994 and as it appears ready to do in S. 1358. SEA contends that this is preferable to the confusing complexity that will be caused by the varying decisions that will be issued by different Courts of Appeal.

On behalf of the Senior Executives Association, we thank you for your willingness to introduce the amendments to the Whistleblower Protection Act, and ask that you consider additional revisions to S. 1358 that would make the Act better serve the needs of all federal employees. We look forward to further discussion of these issues.

STATEMENT OF SENATOR CHARLES GRASSLEY
GOVERNMENTAL AFFAIRS HEARING
ON S.1358

Mr. Chairman, thank you for holding today's hearing on the proposed reforms to the Whistleblower Protection Act of 1989 (WPA). I'm proud to be co-sponsoring S.1358 with Senators Akaka and Levin, because this bill is desperately needed to restore some integrity to the WPA.

I'm proud to have been an original co-sponsor of the Whistleblower Protection Act of 1989. I'm equally proud of the unanimously passed amendments to strengthen it in 1994. These two bills were largely passed to overturn a series of hostile decisions by administrative agencies and the Federal Circuit Court of Appeals' monopoly on the statute's judicial review. The U.S. Office of Special Counsel and the Merit Systems Protection Board appear to have gotten the point and are operating largely within statutory boundaries - despite its 600 case backlog, which I'm looking into. However, the Federal Circuit has stepped up its attacks on the WPA.

Enough is enough. The WPA has now become a Trojan horse that may well be creating more reprisal victims than it protects. The impact for taxpayers could be to increase the number of silent observers who passively conceal fraud, waste and abuse to the detriment of American taxpayers.

That is why the legislation we're discussing today is so vital to the American taxpayer. Our bill has five cornerstones: providing protection for national security whistleblowers; closing loopholes in the scope of WPA protection; restoring a realistic test for when reprisal protection is warranted; restoring the normal structure for judicial review; and codifying the anti-gag statute passed as an appropriations rider for the last 14 years or so.

While all of the provisions in S.1358 are critical to the proper functioning of whistleblower rights, the provision that protects national security whistleblowers is particularly so. The provision prohibits a manager from suspending, revoking, or taking any other retaliatory action with respect to an employee's security clearance in retaliation for

whistleblowing. Since September 11th, government agencies have placed a greater emphasis on secrecy and restricted information for security reasons. This is understandably so in some cases. But, with these restrictions come a greater danger of stopping the legitimate disclosure of wrongdoing and mismanagement, especially about public safety and security. Bureaucracies have an instinct to cover up their misdeeds and mistakes, and that temptation is even greater when a potential security issue can be used as an excuse. Whistleblowers serve as a check against this instinct and temptation.

Although the entire bill is important, I'm having to confine my comments today to these national security whistleblower protections. I'm having to do this because of the Department of Justice's vigorous opposition to this provision. Frankly, the Department opposes all the provisions of the bill - one would think that they don't appreciate the value that whistleblowers provide, which is peculiar in light of the fact that whistleblowers helped them recover billions of dollars from wrongdoers. In any event, I believe the Justice

Department has this one wrong.

In their views letter dated November 10, 2003 the Department argued that even though the national security whistleblower protections limit protected disclosures to those made to oversight committees or to staff with appropriate clearances, they constitute "an unconstitutional interference with Presidential constitutional responsibilities respecting national security and foreign affairs." They also claim that "a compromise of the President's authority in this area is an impermissible encroachment upon the President's ability to carry out one of his core executive functions."

We have an Iowa expression that fits this analysis – Hogwash! The Department of Justice's reasoning and analysis are incorrect.

During the 105th Congress the Select Committee on Intelligence thoroughly addressed this issue in a hearing entitled "Disclosure of Classified Information to Congress." In that hearing the Senate heard testimony from Dr. Louis

Fisher, a Congressional Research Service Senior Specialist on Separation of Powers issues and also from law Professor Peter Raven-Hansen of George Washington University School of Law. These two highly respected scholars disagreed with the Department of Justice's position, when it was offered then.

Professor Raven-Hansen explained in his testimony that "The President and Congress have both historically and as a matter of constitutional text shared authority over classified information from the beginning."

The Department argued then, as it does now, that the President's power to regulate classified information is implied in his command authority as Commander-in-Chief. While this is correct, the Justice Department fails to recognize that the Congress has equal and some might argue greater authority with regard to classified information. Nine times the Constitution explicitly gives the Congress responsibilities for national security and foreign affairs. Additionally, according to Prof. Raven-Hansen, the Congress' power over this subject is "implicit in the Congress' residual authority to make all

laws necessary and proper to carry out not only their own vast national security powers, but also the President's."

The DOJ's testimony relies heavily on the case of *Department of Navy v. Egan* as a justification for why Congress cannot prohibit the retaliatory stripping of a whistleblower's security clearance. Their reliance on this case is misguided. Once again, according to Prof. Raven-Hansen, the *Egan* case "stands simply for the proposition that the President has inherent authority to regulate classified information and doesn't need a statute to do so. It does not mean that he could violate a statute if Congress passed one regulating such matters."

Consequently, Congress has the authority to prohibit the retaliatory taking of a security clearance. I don't want anyone to think that the Congress is trying to force something down the Administration's throat. Last year my staff and the staff of Senators Levin, Akaka, and Phil Gramm sat down with the Department of Justice and White House to work out this provision. We even agreed to make a number of their

suggested changes to accommodate their concerns. But unfortunately, at the end of the day, we aren't going to agree.

Nonetheless, this provision is critical to the proper oversight of the federal government. In the 14 years since Congress unanimously passed the WPA, it has been a Taxpayer Protection Act. My office has been privileged to work with public servants who exposed indefensible waste and mismanagement at the Pentagon, as well as indefensible abuses of power at the Department of Justice. I keep learning that whistleblowers proceed at their own risk when defending the public. In case after case I have seen the proof of Admiral Rickover's insight that unlike God, the bureaucracy does not forgive. Nor does it forget.

That is one reason why we should pass the Civil Rights Tax Act of 2003. I realize that S.557 isn't the subject of today's hearing, but I believe it would make a big difference for whistleblowers. They shouldn't be taxed twice on the awards they receive for blowing the whistle.

It has been confirmed repeatedly that whistleblowers must prove their commitment to stamina and persistence in order to make a difference against ingrained fraud, waste and abuse. There should be no question about Congress', or this Senator's commitment. Congress was serious when it passed the Whistleblower Protection Act unanimously. It's not mere window dressing. As long as whistleblowers are defending the public, we must defend credible free speech rights for genuine whistleblowers. Those who have something to hide, the champions of secrecy, cannot outlast or defeat the right to know both for Congress, law enforcement agencies, and the taxpayers. Every time judicial or bureaucratic activists attempt to kill this law, we must revive it in stronger terms. Congress can not watch passively as a gaping hole expands in the shield protecting public servants. The taxpayers are on the other side of the shield, with the whistleblowers.

STATEMENT OF

SUSANNE T. MARSHALL, CHAIRMAN

U.S. MERIT SYSTEMS PROTECTION BOARD

BEFORE THE

SENATE GOVERNMENTAL AFFAIRS

ON

S. 1358

THE FEDERAL EMPLOYEE PROTECTION OF DISCLOSURES ACT

NOVEMBER 12, 2003

Dear Mr. Chairman,

Thank you for the opportunity to submit this statement for the hearing record to describe the Board's role in the adjudication of cases brought under the Whistleblower Protection Act (WPA). Your consideration of the amendments to the Act, as contained in S. 1358, provides the Board a great opportunity to share with you and the committee recent developments in the Board's case law in this area. As one of the venues where a putative whistleblower can seek redress, the Board takes seriously its adjudicatory mission to enforce whistleblower protections.

Concern about the adequacy of protection afforded to Federal whistleblowers appears to stem in part from a perception that there is a low success rate for whistleblower claims brought before the Board. This perception is not supported by the facts. Generally, two-thirds of the cases that are not dismissed result in some degree of relief for the whistleblower claimant, either through settlement, mitigation or reversal of the agency action.

It is instructive to note that the requirement that claimants first file with the Office of Special Counsel (OSC) greatly reduces the number of truly meritorious whistleblower claims that are brought before the Board. The Office of Special Counsel pursues the most meritorious cases and obtains relief in a significant number of these cases. According to the OSC Report to Congress for Fiscal Year 2002, relief was obtained in about 100 out of 550 whistleblower cases received by OSC that year.

Dismissals without reaching the merits are another factor affecting the relief rate for whistleblower cases adjudicated by the Board. Many whistleblower cases are dismissed for various reasons including untimeliness, failure to exhaust administrative remedies or lack of jurisdiction. In FY 2003, Board judges dismissed 296 out of 480 cases.

Decisions on the merits were issued in 83 of the remaining 184 cases. Rulings in favor of whistleblower claimants were made in 10 percent of those cases while settlements were reached in 100 cases. (One case was resolved by mitigation.) Given the relief already obtained by OSC in many of the cases where whistleblower reprisal is the main claim, this result is not out of line with the general rate of reversal in Board cases, which is about 20 percent.

We believe that many of the concerns reflected in this legislation have been effectively addressed by the Board's most recent decisions. For example, in September 2002, the Board issued a decision that simplifies the adjudication of individual right of action (IRA) appeals without changing the elements of an IRA or the ultimate burdens of proof. That decision is *Rusin v. Department of the*

Treasury, 92 M.S.P.R. 298 (2002). In *Rusin*, the Board stated that an appellant establishes Board jurisdiction over an IRA appeal by simply exhausting proceedings before the Office of Special Counsel and making non-frivolous allegations that he had made a protected disclosure that was a contributing factor in a covered personnel action. The earlier jurisdictional test, as set forth in *Geyer v. Department of Justice*, 63 M.S.P.R. 13 (1994), stated that the Board did not have jurisdiction over an IRA appeal until the appellant actually proved by preponderant evidence that he made a protected disclosure, that the agency had taken a personnel action, and that he had exhausted Special Counsel proceedings as to those matters. In requiring only a nonfrivolous allegation that a protected disclosure contributed to a covered personnel action, the *Rusin* standard allows the Board to take jurisdiction over a greater number of IRA appeals and, consequently, decide those cases on the merits rather than dismissing them for lack of jurisdiction.

In FY 2003, the Board issued four additional decisions of particular significance to the development of case law under the Whistleblower Protection Act. In *White v. Department of the Air Force*, 95 M.S.P.R. 1 (Sept. 11, 2003), the Board looked at the plain meaning of the statute to determine the legal standard for ascertaining whether an appellant had a reasonable belief that he made a protected disclosure. The Board found that the statute does not include a requirement that an appellant provide "irrefragable proof" to rebut a presumption that agency officials perform their duties correctly, fairly, in good faith, and in accordance with law and regulations. The Board found further that any statement to the contrary in the opinion issued by the United States Court of Appeals for the Federal Circuit in *Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999), was dictum.

The Board went on in *White* to state that the test for determining reasonable belief is an objective one. The test is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably have concluded that the agency's actions constituted gross mismanagement.

In *Greenspan v. Department of Veterans Affairs*, 94 M.S.P.R. 247 (Sept. 15, 2003), the Board further clarified its decision in *Rusin*. The Board held in *Greenspan* that an appellant establishes the Board's jurisdiction over an IRA appeal if the appellant shows exhaustion of the Special Counsel remedy and asserts a nonfrivolous allegation that he/she made at least one protected disclosure which was a contributing factor in at least one personnel action.

The Board in *Berkowitz v. Department of the Treasury*, 94 M.S.P.R. 658 (Sept. 30, 2003), reversed the administrative judge's finding of lack of jurisdiction over an IRA appeal. The Board found that the appellant made a nonfrivolous allegation

that he had a reasonable belief of a violation of law when he reported that the agency was improperly spending appropriated funds and misleading Congress.

In light of my belief that more persons who file IRA appeals after *Rusin* will receive decisions on the merits, I would like to discuss a pair of Board decisions that applied *Rusin* and provided the appellants with merits determinations. Those two decisions also illustrate that, while the Board may find that many appellants in IRA appeals are whistleblowers or have at least made nonfrivolous allegations of protected disclosures, their requests for corrective action have to be denied because agencies meet their statutory burden of proving by clear and convincing evidence that they would have taken the personnel actions despite the whistleblowing. The cases are *Poster v. Department of Veterans Affairs*, 92 M.S.P.R. 501 (Sept. 27, 2002), and *Johns v. Department of Veterans Affairs*, MSPB Docket No. CH-1221-98-0525-B-1 (Aug. 14, 2003), which will be published in the West Reporter at a future date.

The appellant in *Poster* was a part-time physician whose hours were reduced. He claimed to be a whistleblower because he disclosed to agency officials and members of Congress that there were deficiencies in patient care and staffing levels at the hospital where he worked, and that these shortcomings resulted in patient deaths. The administrative judge found that the appellant made nonfrivolous allegations that he was a whistleblower, and that his disclosures contributed to his reduction in hours. The administrative judge, however, denied corrective action on finding that the agency proved by clear and convincing evidence that it would have taken the same action absent the whistleblowing.

The Board agreed that Dr. Poster had made nonfrivolous allegations of disclosures protected under the WPA. The two-member Board split, however, on the issue of whether the agency proved by clear and convincing evidence that it would have reduced the appellant's hours anyway or whether the case should be remanded for additional factual findings on that issue. My separate opinion explains why I agreed with the administrative judge that the agency showed that it would have reduced Dr. Poster's hours in any event. My separate opinion details the undisputed evidence showing that the agency had to reduce the hours of a number of part-time medical staff in anticipation of an $11 million budget shortfall at Dr. Poster's facility, and that it did in fact reduce the hours of other doctors who were not whistleblowers, in some instances more than Dr. Poster's hours were reduced. The unrebutted evidence also showed that the appellant could maintain the same caseload with his reduced hours, that the care of his patients would not suffer, and that the motive to retaliate on the part of agency officials was slight. Thus, the agency proved by clear and convincing evidence that it would have taken the action despite any whistleblower activity. Because the Board members split on the outcome, the initial decision denying corrective action, with which

I agreed, became the Board's final decision. The Federal Circuit has affirmed the Board's final decision in *Poster v. Department of Veterans Affairs*, No. 03-3062, 71 Fed. Appx. 851 (Aug. 11, 2003).

The appellant in *Johns* was a Criminal Investigator. As part of his job, he carried a firearm. The agency temporarily suspended his law enforcement authority pending a medical clearance. This included temporarily taking away his gun and his authority to make arrests. The Board found that the appellant made nonfrivolous allegations that he made protected disclosures, including reports of unauthorized preferences regarding promotions, obstruction of criminal and civil investigations, and falsification of rating factors used in firearms testing scores. The Board also found that the appellant made nonfrivolous allegations of the other jurisdictional factors set forth in *Rusin*. The Board, however, denied the appellant's request for corrective action because the agency proved by clear and convincing evidence that it would have taken the action despite the alleged whistleblowing.

On the merits, the Board found that the agency temporarily suspended the appellant's law enforcement authority only after finding out that he was receiving psychiatric treatment and was on anti-depressant and psychotropic medications. The evidence showed that the agency would have been concerned if any Criminal Investigator who carried a weapon and made arrests was under a psychiatrist's care and taking the kind of medications that the appellant was taking. The evidence showed that it was the agency's policy to temporarily suspend law enforcement authority in any case such as the appellant's to give it time to gather more information. The appellant even filed and received a disability benefit based on his mental condition and agreed with his psychiatrist's assessment that he was unable to work in a law enforcement job. Although the Board gave the appellant the benefit of the doubt in finding that he was a whistleblower, it could not grant his request for corrective action because the agency proved by clear and convincing evidence that it would have temporarily suspended his arrest authority and permission to carry a firearm in any event under the circumstances.

In short, I am proud of the Board's record of adjudicating whistleblower cases. Our commitment to the fulfillment of our statutory mission is unwavering. 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.

I would like to briefly address the provisions of the bill which deal with security clearances. The Supreme Court has stated that the authority to withhold security clearances rests solely with the employing agency, which has been delegated that authority by the President. *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

The Federal Circuit has in turn held that the Board may not review the merits of the agency clearance decision, but is authorized to determine whether the employee was given notice of the reasons why his access to classified information has been denied and a meaningful opportunity to respond. *King v. Alston*, 75 F.3d 657, 661-62 (Fed. Cir. 1996). Thus, in an appeal of either a removal or an indefinite suspension brought under Chapter 75, the Board has the authority to decide whether the appellant was afforded due process in the revocation or suspension of a security clearance.

The Board, therefore, already has a meaningful role to play in cases involving revocations or suspensions of security clearances. S. 1358, however, would have the Board also determine whether the revocation or suspension of a security clearance was based on retaliation for whistleblowing. The proposed law provides that the Board cannot order the restoration of a security clearance, but can order declaratory or other appropriate relief. It seems unclear how meaningful such relief would be since the Board is not allowed to undo the action that led to the removal or suspension in the first place. Rather, the proposed legislation provides that if the Board "declares" that a revocation or suspension of a security clearance violates the WPA, the affected agency shall review the action and give "great weight" to the Board's decision. This suggests that the Board's decision would be advisory only. If so, the proposed law apparently would conflict with 5 U.S.C. § 1204(h), which states that "[t]he Board shall not issue advisory opinions." This would be one impact on the Board's adjudicatory function if S. 1358 were enacted.

S. 1358 requires the Board to take evidence showing whether the agency would have suspended or revoked the security clearance absent the alleged protected disclosure. It can be expected that, in a fair number of appeals, administrative judges and Board members would be required to examine classified or sensitive documents before determining whether an agency violated 5 U.S.C. § 2302(b)(8). Delving into national security matters would certainly have an impact on how the Board conducts its normal business.

Under 5 U.S.C. § 2302(a)(2)(C)(ii), individuals are not covered under the WPA if, "as determined by the President," they work in a "unit [of an Executive agency] the principal function of which is the conduct of foreign intelligence or counterintelligence activities." Many, if not most, of those individuals probably have a security clearance. Congress provided whistleblower protection to employees who are not covered by the WPA in the Intelligence Community Whistleblower Protection Act of 1998, Title VII of Pub. L. 105-272, 112 Stat. 2413, generally codified at 50 U.S.C. § 403q and 5 U.S.C. Appendix 3. Rather than involve the Board in cases that likely will require review of classified and sensitive material, the perceived "gap" in the WPA could be dealt with by

extending the Intelligence Community Whistleblower Protection Act, or some variation thereof, to all Federal employees who claim that actions on their security clearances constituted retaliation for whistleblowing.

If these particular provisions of S. 1358 become law, the Board would need to establish procedures and a separate process for handling and reviewing security clearance matters, as well as classified and/or sensitive material, through either regulation or case law. I anticipate that the Board would set up such procedures as soon as practicable after the enactment of any legislation so as to carry out the intent of Congress that security clearance cases be reviewed and expedited under the WPA.

Mr. Chairman, it has been my pleasure to inform this committee of the Board's efforts to enforce the Whistleblower Protection Act and to share thoughts about the provisions of S. 1358 dealing with security clearances. I hope that this information will be helpful to you and your committee members.

U.S. MERIT SYSTEMS PROTECTION BOARD

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Chairman

December 9, 2003

The Honorable Susan M. Collins, Chairman
Committee on Governmental Affairs
United States Senate
304 Dirksen Senate Office Building
Washington, DC 20510-6250

Dear Chairman Collins:

Thank you for the opportunity to provide additional information to the Committee regarding the Board's procedures for processing complaints under the Whistleblower Protection Act. Below are my responses to the two specific questions that were submitted to you by Senator Akaka for my reply.

Question #1: In your testimony submitted for the record, you noted that the Board's administrative judges rule in favor of whistleblowers on the merits in about 10 percent of cases. That is significantly below the 25 percent average record for Department of Labor administrative law judges adjudicating corporate and federal cases under the environmental and transportation whistleblower laws.

How do you explain the comparatively unfavorable track record for whistleblowers at the Board compared to the Department of Labor?

Response: The fact that most whistleblower complaints filed at MSPB must be first filed with the Office of Special Counsel is significant. The requirement that claimants first file with the Office of Special Counsel (OSC) greatly reduces the number of truly meritorious whistleblower claims that are brought before the Board. The Office of Special Counsel, which has primary responsibility for investigating these claims, pursues many of those cases first and obtains relief in a significant number of them. According to the OSC Report to Congress for Fiscal Year 2002, relief was obtained in 98 out of 597 whistleblower cases processed by OSC that year (approximately 16 percent).

By contrast, complaints filed with the Department of Labor are both investigated and adjudicated by that agency. In light of the dual role of the Department of Labor in whistleblower cases, a more accurate comparison of the relief rate for claims brought

under the Whistleblower Protection Act and those achieved under the whistleblower statutes enforced by the Department of Labor is obtained by taking into account the rates of relief achieved by the Office of Special Counsel (OSC) and the Board and comparing those numbers to the relief rate achieved by the Department of Labor. The number of whistleblower cases processed by OSC during fiscal year 2002 was 597; the number of cases decided by the Board that were initially filed with the Board (as opposed to being initially filed with OSC) was 164 for a total of 761 cases. Relief was obtained from OSC in 98 of the cases that began at OSC and from the Board through an IRA appeal in 42 of the cases that began at OSC. In addition, relief was obtained in 46 cases that began at the Board. Thus, of the total 761 cases, relief was obtained by whistleblower complainants in 186 cases or 24% of those processed or decided in 2002. This relief rate is almost identical to the relief rate cited for the Department of Labor.

Question #2: Your testimony states that generally two-thirds of the cases not dismissed[1] result in some degree of relief for the whistleblower claimant, either through settlement, mitigation or reversal of the agency action. However, it is my understanding that the settlements reached are less advantageous to the whistleblower than they would be if not for decisions of the Federal Circuit which are inconsistent with congressional intent.

How do you respond to this concern?

Response: Although the Board's administrative judges encourage the parties to consider settlement discussions, the final settlement decisions are within the absolute control of the parties. I do not have sufficient information to address your concern that whistleblower claimants accept less favorable resolutions through settlements rather than risk an adverse judicial decision by pursuing their claims in Federal court. There is no empirical data on the relative benefits to each party in settlements. Certainly, the risk of an adverse decision is a factor that is traditionally considered in settlement decisions along with other factors such as the time and cost of litigation.

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[1] This is the term that was used in a corrected version of my statement that was submitted to your office by email on November 17, 2003.

The Board is committed to protecting the statutory rights of federal employee whistleblowers. This statutory duty is an integral component of our overall responsibility for safeguarding the merit principles of the Federal civil service system. I hope that this information is helpful to the Committee.

Sincerely,

Susanne T. Marshall

Susanne T. Marshall

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

April 12, 2004

The Honorable Susan M. Collins
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Madam Chairman:

Enclosed please find enclosed responses to questions arising from the November 12, 2003, hearing before the Committee concerning S. 1358, the "Federal Employee Protection of Disclosures Act." We apologize for the amount of time that has been necessary to respond to your request and we appreciate your patience.

Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

William E. Moschella
Assistant Attorney General

cc: The Honorable Joseph I. Lieberman
Ranking Minority Member

The Honorable Daniel K. Akaka

The Honorable Carl Levin

Response to Questions Arising From the November 12, 2003, Hearing
Before
The Senate Committee on Governmental Affairs
Concerning
S. 1358, Federal Employee Protection of Disclosures Act

Responses To Questions From Senator Levin

1. S. 1358 provides that appeals of MSPB decisions in whistleblowing cases may be brought in the Federal Circuit or a court of competent jurisdiction. The Department opposes this provision. The Department states that the period during which the Federal Circuit has exercised exclusive jurisdiction over MSPB appeals has allowed the court to gain substantial expertise in this area of the law. Isn't it true that the regional courts already have jurisdiction over some whistleblower cases and that they also have substantial expertise with whistleblower laws, including some that relate to certain federal employee whistleblowers?

ANSWER: Although the regional circuit courts of appeals may have some jurisdiction to consider whistleblower cases arising under statutes other than the Whistleblower Protection Act ("WPA"), we disagree that those courts have "substantial expertise" in whistleblower cases involving Federal employees. The vast majority of whistleblower cases involving Federal employees are brought pursuant to the WPA, and those cases fall within the exclusive jurisdiction of the Merit Systems Protection Board ("MSPB") and the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). Moreover, WPA cases frequently require interpretation and application of other portions of Federal personnel law which are within the exclusive jurisdiction of the Federal Circuit.

In addition, as we explained in our previously submitted testimony, the lack of expertise on the part of the regional circuits is not our only concern with such review. Rather, 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 if Federal employees are treated differently depending upon where they live. It also would likely require the Supreme Court to intervene more often in Federal personnel matters to resolve inconsistencies among the circuits. The Civil Service Reform Act 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.

2. S. 1358 clarifies Congressional intent in the whistleblower law by stating that a determination of whether or not an employee's disclosure is protected by the law does not

depend on the 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. The Department's November 10th letter states that this clarification in the law will "vastly increase the number of such (whistleblower) claims..." Does the Department have any evidence or has the Department conducted any studies to support these claims?

ANSWER: In evaluating the potential effects of S. 1358, we have not been able to conduct any specific studies to confirm that the proposed changes to current law will increase the number of whistleblower reprisal claims. Unless and until S. 1358 is enacted, it would be difficult to conduct such studies. However, the statement in our letter of November 10, 2003, letter is based upon the substantial expertise of experienced Department attorneys who are responsible for representing both the Department and other Federal agencies in much of the WPA litigation that occurs before the Federal Circuit and, with regard to Department employees, the MSPB. In our view, the current requirements for establishing a *prima facie* test of whistleblower reprisal fully protect legitimate whistleblowers against reprisal. The changes made by S. 1358 will, as we explained in detail in our previously submitted testimony, make the initial requirements for establishing a *prima facie* case so minimal that nearly any Federal employee could make a whistleblower reprisal charge in response to a threatened adverse action. This lower threshold inevitably will lead to an increase in the number of whistleblower reprisal claims.

3. The Department opposes providing OSC the authority to independently seek court review of MSPB decisions and represent itself in cases that could undermine the whistleblower law. One of the reasons why the Department opposes this authority is that it "could result in the Special Counsel litigating against other executive branch agencies." Aren't there many instances where one executive branch agency litigates against another executive branch agency?

ANSWER: We do not believe that there are "many instances" in which an Executive branch agency litigates against another Executive branch agency. We are aware of certain circumstances in which this occurs, most notably in cases involving the Federal Labor Relations Authority ("FLRA") and, in limited circumstances, the MSPB, but these are unique situations involving quasi-judicial entities defending their decisions in court. The Office of Special Counsel ("OSC") is not in a similar situation. Moreover, as a general policy, it is undesirable to increase the number of situations in which Executive branch agencies could litigate against each other. Although we understand that the OSC has taken the position that such litigating authority is necessary to its mission, we disagree. In our experience with the OSC, we believe the Department has capably represented the OSC before the Federal Circuit and we have not had any feedback from the OSC to indicate otherwise.

4. All agencies are required to establish internal boards to consider appeals of security clearance revocations. For each executive branch agency, please provide statistics on the number of appeals, filed by employees to have their security clearance reinstated when

the revocation of that clearance was alleged to have occurred in retaliation for whistleblowing, that have been decided in favor of and against whistleblowers, respectively.

ANSWER: Because the Department does not have statistics concerning appeals of security clearance revocations for other Executive branch agencies, we are unable to provide that information. Instead, we suggest that other agencies be contacted directly. With respect to the appeals process within the Department, no employee has appealed a denial or revocation of a security clearance on the grounds that it occurred in retaliation for whistleblowing. However, our statistics illustrate the rigorous review that the Access Review Committee applies to appeals of security clearance denials and revocations as a general matter. That Committee is a non-political body made up exclusively of career employees tasked with adjudicating security clearance denials and revocations. Since the Access Review Committee was established in 1998, we have identified 27 instances in which an employee has appealed from a denial or revocation of a security clearance. Of those 27 appeals, the Committee has reinstated the security clearance 9 times, meaning that in one-third of all appeals the employee has been successful. The Committee has upheld the denial or revocation 17 times, and the remaining case was settled. As these statistics demonstrate, the Department's internal appeals process serves as a responsible back-stop to ensure that whistleblowers are treated fairly, and thus renders judicial intrusion into the Executive branch's security determinations unnecessary.

Responses To Questions From Senator Akaka

1. The Department has expressed its concern with the provision in S. 1358 which makes retaliatory investigations a prohibited personnel action. However, the intent of the provision is to clarify that such investigations are included pursuant to the 1991 case *Russell v. Department of Justice*.[1] In that case, the court found that when an investigation is closely related to the personnel action it could have been a pretext for gathering evidence to retaliate.

   Please clarify the Department's opposition to this provision. Is the objection due to the fact that a retaliatory investigation is prohibited by this legislation or the wording of the provision in S. 1358?

ANSWER: While the MSPB in *Russell v. DOJ*, 76 M.S.P.R. 317 (1997), did find that when an investigation is so closely related to the personnel action it could be a pretext for gathering evidence to retaliate, the addition of "investigations" as a prohibited personnel action in S. 1358 goes far beyond the decision in *Russell*. The addition of investigations as a prohibited personnel action in its own right would mean that there would not need to be any other personnel action to which the investigation was closely related. In other words, unlike the employee in *Russell*, who

[1] 76 M.S.P.R. 317 (1997)

was demoted following allegations of his misconduct and subsequent investigations, under the proposed provision in S. 1358 an employee could suffer absolutely no adverse personnel action and yet still challenge the mere existence of an investigation. Thus, even if the investigation did not lead to a removal, demotion, suspension, transfer, poor performance appraisal, or any other tangible personnel action against the employee, an employee could allege that the investigation in and of itself was retaliatory. Such an approach simply does not follow from the legitimate concerns expressed by the MSPB in *Russell*. And, for the reasons we have previously stated, permitting employees to delay or thwart all kinds of criminal and administrative investigations and management inquiries, even when the employee suffers no adverse personnel action, plainly upsets the careful balance of providing remedies for actual personnel actions that are improperly taken against Federal employees and allowing agencies to perform the essential government function of gathering facts so that informed decisions can be made.

2. On average, how many whistleblower cases are brought against the Department of Justice each year? Please note the percentage of these cases that are settled, brought before the Merit Systems Protection Board (MSPB) and dismissed, won by the whistleblower at the MSPB, brought before the Federal Circuit, or was otherwise disposed of.

ANSWER: Given the fact that numerous components of the Department of Justice handle their own cases before the MSPB, the Department has not regularly tracked statistics regarding the number of whistleblower cases brought each year. In the future, however, the Department, along with other Federal agencies, will be providing annual reports to Congress pursuant to the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), P.L. 107-147. Nevertheless, the MSPB currently does keep annual statistics on cases before it. It provided the following statistics in individual right of action ("IRA") cases involving the Department of Justice for fiscal years ("FY") 2001 through 2003. In FY 2003, the MSPB processed 33 requests for corrective action, of which 27 were dismissed, 2 were settled, 3 were denied and 1 was granted. In FY 2002, 17 requests for corrective action were processed, of which 12 were dismissed, 3 were settled, and 2 were denied. In FY 2001, 17 requests for corrective action were processed, of which 8 were dismissed, 3 were settled, 5 were denied and 1 was granted. These statistics only capture appeals filed at the regional level; they do not provide statistics on the number of petitions for review to the full MSPB on these IRAs, if any. We would note that there have been approximately 5 IRAs involving the Department of Justice in the Federal Circuit from the beginning of FY 2000 to the present. Statistics alone, without regard to facts and circumstances, of course may provide little, if any, insights into the process.

3. The Office of Special Counsel (OSC) has implemented a certification program showing that agencies have informed their employees of their rights and protections under the whistleblower protection and prohibited personnel provisions of title 5. However, DOJ is not listed. What is your agency doing to educate its workforce of their rights and protections under title 5?

ANSWER: The Department is in fact participating in the OSC's certification program. In addition, information regarding whistleblower protection and prohibited personnel provisions of Title 5 is available to all employees on line through the Department's Justice Management Division, Personnel Staff website, which may be accessed on the Inter- and intranet. Furthermore, all Department supervisors undergo mandatory training regarding the role of the OSC, prohibited personnel practices, and the Whistleblower Protection Act of 1994.

4. Your testimony is that the Justice Department represents respondent federal agencies in appeals to the Federal Circuit. However, in arguing that OSC should not have independent litigating authority you claim that it would be inappropriate since, under S. 1358, OSC could go before the Federal Circuit without approval of the Justice Department. As the Special Counsel is representing the interests of the aggrieved whistleblower and the Justice Department represents the interest of the respondent agency, how do you respond to critics who claim that there is an inherent conflict of interest for the Justice Department to have the authority to grant or deny OSC requests to petition the Federal Circuit for review of a MSPB decision?

ANSWER: As an initial matter, we note that the OSC is not authorized by statute to petition the Federal Circuit for review of a MSPB decision in any circumstance, with or without the Justice Department's approval. Rather, the only avenue for the Government to appeal final decisions of the MSPB is pursuant to 5 U.S.C. § 7703(d), which permits the Office of Personnel Management to seek review of a MSPB decision when it would have a substantial impact on a civil service law, rule, regulation, or policy. This limited authority of the Government to appeal ensures that Government employees receive an expeditious and, in almost all cases, final decision from the administrative body. This ensures that employees will not be subjected to a lengthy and costly litigation process. Employees themselves, on the other hand, remain free to appeal any adverse MSPB decision to the Federal Circuit.

In any event, there is no inherent conflict of interest in having the Department represent both employing agencies and the OSC. The Department routinely represents Federal agencies that have competing or conflicting interests and we have procedures in place to resolve disputes between Executive branch agencies. In particular, the Attorney General is authorized by Executive Order to resolve interagency legal disputes. Exec. Order 12146 (1979). Further, the Solicitor General is statutorily empowered to make certain decisions regarding appeals. For instance, in cases in which the Federal Labor Relations Authority ("FLRA") wishes to seek a petition for a writ of *certiorari* from an adverse court of appeals decision, the Solicitor General retains the statutory authority to decide whether such a petition should be filed. This is true even if the Solicitor General had previously authorized a Federal agency to appeal the FLRA's decision to the court of appeals. In those instances, where the Solicitor General authorizes a petition, the FLRA is generally delegated the authority to handle the case in the Supreme Court. There is no reason to suggest that the Solicitor General cannot perform his role in a fair and neutral manner with regard to any conflicts between the OSC and other Federal agencies.

5. What is the average length of time for security clearance cases to be resolved at the Justice Department and at other agencies such as the Department of Defense, the Department of Energy, the Nuclear Regulatory Commission, and the Department of Agriculture?

ANSWER: At the Department of Justice, security clearance cases normally take approximately 90 to 120 days to be resolved by the Access Review Committee. An employee has 30 days in which to file an appeal from a denial or revocation of security clearance. A hearing before the Access Review Committee is then typically scheduled within 30 days and a decision is rendered within 60 days of the hearing date. We do not have information regarding the length of time that other Departments and agencies may take in handling security clearance cases.

6. You testified that Executive Order 12968 requires all agencies to establish an internal review board to consider appeals of security clearance revocations. However, it is my understanding that this process is not the same at each agency. As such, please list the specific procedures at each agency that conducts security clearance adjudication, discussing similarities and differences, for the following factors: right to know the specific charges for which an action is taken and when that information must be provided; right to see the evidence of alleged misconduct and when; right to a hearing; right to confront accusers at the hearing; right to present witnesses at the hearing; right to present evidence under procedures equivalent to the Federal Rules of Evidence; right to a written decision with findings of fact and conclusions of law; right to seek and have interim relief ordered; and time deadlines for the process.

ANSWER: The general review proceedings that all agencies must follow are set forth in section 5.2 of Executive Order 12968, "Access to Classified Information." Under those requirements, all agencies must provide applicants and employees, who are determined not to meet the standards of access to classified information, with as "comprehensive and detailed a written explanation of the basis for that conclusion as the national security interests of the United States and other applicable law permits." Applicants and employees must also be provided within 30 days with any requested documents and records upon which the conclusion is based, to the extent such documents and records would be provided under the Freedom of Information Act and the Privacy Act. Applicants and employees must be informed of their right to request documents and to be represented by counsel or another representative, and must be provided with a reasonable opportunity to request a review of the determination and to reply in writing. At some point in the process, they must be permitted to appear personally and to present relevant documents and information. They must be afforded the opportunity to appeal in writing to at least a three-member high level panel appointed by the agency head, two members of which must be from outside the security field. The panel's final decision must be in writing.

Each agency is required to promulgate regulations to implement these procedures and may provide additional review proceedings as well. For example, at the Department of Justice, at the time of a security clearance revocation, the employee is provided with a written statement

of reasons for the revocation or denial and an opportunity to reply in writing and request reconsideration. In addition, within 30 days of a request, and consistent with the Freedom of Information and Privacy Acts, the employee is provided with any documents, records, and reports upon which a denial or revocation was based. The employee may submit in his/her request for reconsideration materials that explain, refute, mitigate, or deny the reasons for the denial or revocation. Unless the Department Security Officer reinstates the clearance upon reconsideration, the employee is again provided written notice of, and the reasons for, the decision to revoke, and the employee is informed of the Department's appellate procedures, specifically the right to appeal to the Access Review Committee. That Committee is composed of three members: the Deputy Assistant Attorney General for Human Resources/Administration, an Associate Deputy Attorney General, and the Deputy Counsel for Intelligence Policy. The employee may submit an appeal to that Committee in writing and may also, if he or she wishes, appear in person before the Committee. The hearings are informal and are attended by the Committee members, the employee, and the Security Program Manager involved in the denial or revocation, who may also orally explain or summarize the reasons for the denial or revocation. The employee may be represented by counsel or another representative at his or her own expense, and the employee's travel expenses are paid by the Department of Justice. During the hearing, the employee is not bound by the limitations of the Federal Rules of Evidence and may present any relevant documents, materials, and information to the Committee. Although employees have not asked to present witnesses on their behalf before the Committee, such a request would be considered. A reporter is present and transcribes the hearing. The Committee's decisions are final and issued in writing. Appeals to the Committee are to be filed within 30 days of the denial or revocation, or an extension must be requested. The Committee has a self-imposed deadline of 60 days from the hearing within which to issue its decisions, and decisions are typically issued within a couple of weeks after the completion of the hearing. The Department of Justice cannot speak to the exact practices of other agencies, but their proceedings must similarly be in line with Executive Order 12968.

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March 2, 2004

Honorable Susan M. Collins, Chairman
Senate Committee on Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Post Hearing Questions Regarding S. 1358, The Federal Employee Protection of Disclosures Act: Amendments to the Whistleblower Protection Act

Dear Senator Collins:

The following is in response to the post-hearing questions for the record submitted to me by Senator Daniel Akaka:

1. Opponents of S. 1358 say that the bill would turn every employee into a whistleblower. How do you respond to this criticism? In your opinion, did the 1994 amendments increase the number of whistleblower complaints?

The Justice Department has stated that the bill would turn every disagreement over management policy or contrary interpretation of law (no matter how frivolous), into a protected disclosure, especially because the bill protects employees when they make disclosures in the course of doing their jobs. This statement ignores the fact that the bill only protects employees who make disclosures that they reasonably believe fall into several specific and fairly narrow categories. For example, employees are not protected when they express a simple disagreement over a management policy or expenditure of funds. The law has always required, and will continue to require that the employees be exposing gross mismanagement, or a gross waste of funds. As interpreted by the MSPB and the courts, mere disagreements with management policy or complaints about debatable expenditures do not fall within these categories or receive the protection of the Whistleblower Protection Act. S. 1358 does not change that at all. Nor does it undermine the requirement that an employee "reasonably believe" that his disclosures are accurate, thus eliminating the concern that frivolous allegations will receive the Act's protection.

I no longer have access to information regarding whether the 1994 Amendments increased the number of whistleblower complaints. That information is available in OSC's Annual Reports.

2. Through letters to this Committee, you have stated the need to correct the law pertaining to the awarding of attorney's fees to the federal manager by the Office of Special (OSC) when the manager wins in disciplinary cases. Specifically, you noted that it has a chilling effect on the ability of OSC to bring these disciplinary cases. Last year, Congress passed the Notification and Federal Employee Anti-Discrimination and Retaliation Act of 2001, the No FEAR Act, to ensure that agencies are held financially accountable for their retaliatory actions.

   Do you see any similarities with the fee shifting provision in S. 1358 and the goals of the No FEAR Act?

There is a similarity in the sense that S. 1358 also holds agencies financially responsible for the costs a manager incurs in defending himself against a disciplinary action brought by the Special Counsel. Federal agencies are in a better position to absorb this cost, as part of their cost of doing business, than is OSC. Moreover, the shifting of the responsibility from OSC to the agency involved will ensure that OSC is not chilled in exercising its enforcement authority; it may also result in few acts of retaliation, as it will increase the incentives for agencies to better train their managers not to violate the law. The latter is consistent with the purposes of the No FEAR Act.

3. S. 1358 lowers the burden OSC must meet in order to bring disciplinary actions against managers who retaliated against whistleblowers. Can you comment on the history of this provision and compare it to the burden to bring disciplinary action for other prohibited personnel practices, such as civil rights actions and the others listed in 5 U.S.C. 2302(b)?

I addressed the history of this provision in a letter that I wrote to Senator Levin in 2002, when I was serving as Special Counsel. A copy of that letter is attached.

4. You testified that the problem with retaliatory investigations is that such investigations occur frequently and that a retaliatory investigation may be a much more effective tool of retaliation than some of the other actions covered by the WPA. However, the Department of Justice claims that the provision in S. 1358 is too broad and could encompass any inquiry including routine background checks for employment.

   How do you respond to the concerns raised by the Justice Department on this issue?

DOJ has grossly overstated the breadth of this provision of S. 1358. A "routine" background check could not be the subject of a retaliation complaint because an employee could not credibly claim that an investigation which is routinely conducted on all employees was based on retaliation. Nor is it accurate to state that an employee could

"thwart" or "delay" an investigation into their wrongdoing through litigation. Such investigations would go forward unless OSC sought a stay—an extraordinary step which the agency rarely takes and generally reserves for clear violations. It is also inaccurate to state that this provision could subject "any employee" who reports wrongdoing to a charge of committing a prohibited personnel practice. The law only covers personnel actions taken by individuals with "personnel action authority"—generally managers and supervisors. Finally, there is no merit to DOJ's suggestion that this provision would require OSC to report investigatory information, from either a criminal or administrative investigation to the investigation's subject. Where OSC finds no reasonable grounds to believe reprisal has occurred it is required to advise complainants of the reasons why it has decided to close their cases. But this does not mean that OSC must open up its investigative files. Indeed, OSC routinely protects the confidentiality of witnesses and documents and does not reveal them to complainants.

I hope these responses are useful to the Committee. Thank you for giving me the opportunity to testify on this important bill.

Sincerely,

Elaine Kaplan

Enclosure

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September 11, 2002

The Special Counsel

The Honorable Carl Levin
United States Senate
SR-459, Russell Senate Office Building
Washington, D.C. 20510-2202

Dear Senator Levin:

Thank you for giving me the opportunity to comment on the proposed Title VI of H.R. 5005, concerning the protection of federal employee whistleblowers.

As the head of the U.S. Office of Special Counsel (OSC), the independent federal agency that is responsible for investigating and prosecuting federal employees' complaints of whistleblower retaliation, I share your recognition that it is crucial to ensure that the laws protecting whistleblowers are strong and effective. Federal employees are often in the best position to observe and identify official misconduct or malfeasance as well as dangers to the public health and safety, and the national security.

Now, perhaps more than ever before, our national interest demands that federal workers feel safe to come forward to bring appropriate attention to these conditions so that they may be corrected. Further, and again more than ever, the public now needs assurance that the workforce which is carrying out crucial operations is alert, and that its leaders welcome and encourage their constructive participation in making the government a highly efficient and effective steward of the public interest.

To these ends, Title VI contains a number of provisions that will strengthen the Whistleblower Protection Act (WPA) and close loopholes in the Act's coverage. The amendment would reverse the effects of several judicial decisions that have imposed unduly narrow and restrictive tests for determining whether employees qualify for the protection of the WPA. These decisions, among other things, have held that employees are not protected against retaliation when they make their disclosures in the line of duty or when they confront subject officials with their suspicions of wrongdoing. They have also made it more difficult for whistleblowers to secure the Act's protection by interposing what the Court of Appeals for the Federal Circuit has called an "irrefragable" presumption that government officials perform their duties lawfully and in good faith.

In addition to reversing these rulings, Title VI would grant the Special Counsel independent litigating authority and the right to request judicial review of decisions of the Merit Systems Protection Board (MSPB) in cases that will have a substantial impact upon the enforcement of the WPA. I firmly believe that these changes are necessary, not only to ensure

OSC's effectiveness, but to address continuing concerns about the whittling away of the WPA's protections by narrow judicial interpretations of the law. The changes would ensure that, OSC, the government agency charged with protecting whistleblowers, will have a meaningful opportunity to participate in the shaping of the law.

Further, Title VI would strengthen OSC's capacity to use its disciplinary action authority to deter agency supervisors, managers, and other officials from engaging in retaliation, and to punish those who do so. The amendment does this in two ways. First, it clarifies the burden of proof in disciplinary action cases that OSC brings by employing the test first set forth by the Supreme Court in Mt. Healthy School District v. Board of Education. Under this test, in order to secure discipline of an agency official accused of engaging in whistleblower retaliation, OSC would have to show that protected whistleblowing was a "significant, motivating factor" in the decision to take or threaten to take a personnel action. If OSC made such a showing, the MSPB would order appropriate discipline unless the official showed, by preponderant evidence, that he or she would have taken or threatened to take the same action even had there been no protected activity.

This change is necessary in order to ensure that the burden of proof in these cases is not so onerous as to make it virtually impossible to secure discipline against retaliators. Under current law, OSC bears the unprecedented burden of demonstrating that protected activity was the but-for cause of an adverse personnel action against a whistleblower. The amendment would correct the imbalance by imposing the well-established Mt. Healthy test in these cases.

In addition, the bill would relieve OSC of attorney fee liability in disciplinary action cases in which it ultimately does not prevail. The amendment would shift liability for fees to the manager's employing agency, where an award of fees would be in the interest of justice. The employing agency would indemnify the manager for these costs which would have been incurred by him in the course of performing his official duties.

Under current law, if OSC ultimately does not prevail in a case it brings against a manager whom our investigation shows has engaged in retaliation, then we must pay attorney fees, even if our prosecution decision was an entirely reasonable one. For a small agency like OSC, with a limited budget, the specter of having to pay large attorney fee awards simply because we do not ultimately prevail in a case, is a significant obstacle to our ability to use this important authority to hold managers accountable. It is, moreover, an unprecedented burden; virtually all fee shifting provisions which could result in an award of fees against a government agency, depend upon a showing that the government agency has acted unreasonably or in bad faith.

In addition to these provisions, the bill would also provide that for a period of five years, beginning on February 1, 2003, there would be multi-circuit review of decisions of the

MSPB, just as there is now multi-circuit review of decisions of the MSPB's sister agency, the Federal Labor Relations Authority. This experiment will give Congress the opportunity to judge whether providing broader perspectives of all of the nation's courts of appeals will enhance the development of the law under the WPA.

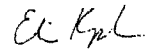
There are several other provisions of the amendments that would strengthen the Act's coverage and remedies. The amendments, for example, would extend coverage of the WPA to circumstances in which an agency initiated an investigation of an employee or applicant in reprisal for whistleblowing or where an agency implemented an illegal non-disclosure form or policy. The amendments also would authorize an award of compensatory damages in federal employee whistleblower cases. Such awards are authorized for federal employees under the civil rights acts, and for environmental and nuclear whistleblowers, among others, under other federal statutes. Given the important public policies underlying the WPA, it seems appropriate that the same sort of make whole relief should be available to federal employee whistleblowers.

Finally, Title VI contains a provision that would provide relief to employees who allege that their security clearances were denied or revoked because of protected whistleblowing, without interfering with the longstanding authority of the President to make security clearance determinations. The amendment would allow employees to file OSC complaints alleging they suffered a retaliatory adverse security clearance determination. OSC would be given the authority to investigate such complaints and the MSPB would have the authority to issue declaratory and appropriate relief other than ordering the restoration of the clearance. Further, where the Board found retaliation, the employing agency would be required to conduct its own investigation of the revocation and report back to Congress.

This amendment provides a balanced resolution of the tension between protecting national security whistleblowers against retaliation and maintaining the President's traditional prerogative to decide who will have access to classified information. Especially in light of the current heightened concerns about issues of national security, this change in the law is clearly warranted.

Thank you again for providing me with an opportunity to comment on these amendments, and for your continuing interest in the work of the Office of Special Counsel.

Sincerely,



Elaine Kaplan

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Response to Post-Hearing Questions for the Record from Senator Daniel Akaka
Submitted by Tom Devine

"S. 1358, The Federal Employee Protection of Disclosures Act: Amendments to the Whistleblower Protection Act"

1. There is concern that by clarifying what disclosures are covered, the number of frivolous cases will increase, and make it harder for managers to fire problem employees. How do you respond to this concern?

Since S. 1358 merely restores the 1989 and 1994 boundaries of the Whistleblower Protection Act (WPA), there is an empirical track record to test this speculation. Opponents also predicted that result when Congress unanimously enacted those boundaries and unanimously strengthened them in 1989 and 1994, respectively. Empirically, it simply did not happen.. Opponents have not cited either statistical or conceptual problems with removal of problem employees resulting from the law when those boundaries were in effect. The reason is no mystery. The typical five figure costs of litigation and are too high, and the chances of success too remote (25-33% average for decisions on the merits under laws with protected speech boundaries equivalent to S. 1358) for frivolous lawsuits to be a rational choice.

More fundamental, this argument begs the question: what are the proper boundaries for sound, just public policy? The objection applies to every provision of the constitution, starting with the Bill of Rights, and to every law protecting the merit system. All rights can be abused. The criteria for responsibly enacting them is whether there is a strong public policy mandate. As discussed in my testimony, our nation needs a realistic scope of protected speech for whistleblowers now more than ever, to protect the taxpayers against fraud, waste, abuse and unnecessary vulnerability to national security threats.

2. The Justice Department has testified that their main concern with the security clearance review provision in S. 1358 is that the standard used in making a security clearance determination is lower than the clear and convincing standard agencies would be held to under the WPA. How do you respond to that argument?

As discussed in my testimony, it is embarrassing that the Justice Department made this argument, because it is inherently irrelevant. S. 1358 merely introduces one new relevant factor for review of clearance decisions -- whether the decision to deny a

clearance is taken because of protected activity, not whether the decision is right or wrong. The clear and convincing standard only applies in that context, and then only after an employee makes a prima facie case that the clearance decision was retaliatory. The burden has nothing to do with an agency's professional judgment call whether an employee merits a clearance. Indeed, the agency decision can be hopelessly wrong on the merits but beyond the reach of the WPA, if it is not retaliatory.

3. In responding to concerns expressed by the Justice Department over the breadth of investigations that could be considered a prohibited personnel action, you said that if the investigation is routine, it is not taken because of protected activity. Please discuss the nexus test to determine whether agency action is considered to be in response to blowing the whistle.

The cornerstone premise to pass the nexus test that whistleblowing is a contributing factor to a challenged personnel action has been reaffirmed repeatedly, by authorities ranging from bipartisan WPA sponsors, to then Attorney General Thornburgh in 1989 when President Bush signed the WPA into law, to the Merit Systems Protection Board's regulations: did protected disclosures affect whether the challenged personnel action occurred? The Explanatory Statement on S. 20, representing the final consensus legislative history for the WPA as enacted, clearly stated the public policy principle behind this standard before Congress unanimously enacted the law: "Whistleblowing should never be a factor that contributes in any way to an adverse personnel action." 135 *Cong. Rec.* 5033 (1989).

Again, the Justice Department's argument inherently constitutes sophistry. If a personnel action is routine and taken universally for all affected employees, by definition it could not possibly be taken against an individual because of protected activity. Indeed, that nondiscriminatory context would constitute irrefragable proof that the merit system had not been violated.

Again, Justice's objection also cannot survive empirical scrutiny. Retaliatory investigations have been illegal under WPA legislative history since 1994, and under MSPB case law since 1997. *Russell v. Department of Justice*, 76 MSPR 317 (1997). S. 1358 merely codifies existing law. There is a basic reason Justice has not cited any impact where current law has obstructed routine investigations necessary for the normal functions of government: there hasn't been any.

Retaliatory investigations are the first, most common tactic of whistleblower harassment. The Justice Department's arguments to legalize this chilling reprisal tactic cannot withstand scrutiny.

4. The Merit Systems Protection Board (MSPB) submitted testimony agreeing that the perception that there is a low success rate for whistleblowers is not supported by the facts. In addition, the MSPB goes into detail of several Board

decisions which, in its view, addresses many of the concerns reflected in S. 1358. In light of your testimony in support of S. 1358, what is your response to the points raised by the MSPB?

In overview, the Board's assertion raises a significant issue. Since 1979 it has failed to publish data revealing its track record for decisions on the merits under 5 USC 2302(b)(8), the whistleblower prohibited personnel practice. Under the No Fear law unanimously enacted by Congress last year, it must put this information on the public record. If the Board complies with the law, it will be unable to make disingenuous, false assertions such as in its testimony on S. 1358.

As discussed in my testimony, the Board's statistics only reflect Administrative Judge (AJ) decisions. It failed to present data for final Board decisions, the relevant index. Based on review of every published Board decision, the facts are that the Board's track record was 2-25 against whistleblowers on the merits after the *Lachance v. White* decision. The facts are that through the hearings on S. 1358, the current Board had never issued a final decision on the merits finding a violation of 5 USC 2302(b)(8). Even the Board's data based on rigged boundaries for AJ decisions rebut its conclusion. In its testimony the Board took credit for a 10% success rate in favor of whistleblowers. That is far below the 25-33% average success rate for environmental whistleblower statutes adjudicated at the Department of Labor, and whistleblower laws such as the False Claims Act adjudicated in court.

If the Board continues to maintain this position, it is acting in bad faith. After the hearings on S. 1358, I discussed the points summarized above with a Board representative who contacted me, and asked to be corrected if my research was inaccurate. No such communication has been received.

The Board's desolate record applies with an exclamation point to decisions the Board cited in its written testimony. What the Board omitted was that none of these decisions reflects a decision where the whistleblower won. In fact, on balance they were severe setbacks for whistleblowers.

While the *Rusin* case created some improvements, it disenfranchises whistleblowers from the right to a public hearing on the alleged government misconduct which they disclosed. As implemented, it flip flops proceedings so that agencies can defeat a whistleblower claim through independent justification, without any day in court to establish whether the whistleblower's dissent was reasonable, or whether there is a prima facie case of retaliation. Ironically, in practice *Rusin* has contributed to secrecy. It erases normal Board oversight to assess whether retaliation has tainted the merit system. This defeats the WPA's cornerstone as explained unequivocally in S. 20 – preventing retaliation from contributing in any way to challenged personnel actions. Since *Rusin*, there is not even a guaranteed day in administrative court to air the issue.

The Board displayed chutzpah to highlight the fifth, and latest, decision in *Lachance v. White*. After four victories over the last decade by prior Boards finding that

Mr. White was a valid whistleblower who lost his job through retaliation, this Board ruled against Mr. White. It did so by incorporating an analogous standard to "irrefragable proof" into the definition of "gross mismanagement," functionally canceling the concept as a valid target of legally protected whistleblowing. The Board's recent track record is the most powerful argument to date why Congress should extend the cornerstone of the Sarbanes Oxley law for corporate whistleblowers to federal employees – access to jury trials in district court. There is no longer a reasonable basis to conclude they will receive justice at the MSPB.

UNITED STATES SENATE
COMMITTEE ON GOVERNMENTAL AFFAIRS

CONSIDERATION OF THE FEDERAL EMPLOYEE PROTECTION OF DISCLOSURES ACT, S. 1358

SUPPLEMENTAL TESTIMONY OF STEPHEN M. KOHN,
CHAIRMAN OF THE BOARD OF DIRECTORS OF THE
NATIONAL WHISTLEBLOWER CENTER

December 12, 2003

To the Honorable Senator Susan Collins, Chairman, Senator Joseph I. Liberman, Ranking Member and the Honorable Members of the Committee on Governmental Affairs:

Thank you again for the opportunity to present my position on the proposed amendment to the Whistleblower Protection Act. This supplemental testimony responds to the follow-up questions submitted to me from Senator Daniel Akaka and in response to the question Senator Levin asked the members of my panel to answer in writing at the close of the November 12, 2003 hearing.

1. **In testimony submitted by the Merit Systems Protection Board, Chairwoman Susanne Marshall said, "Concern about the adequacy of protection afforded to federal whistleblowers appears to stem in part from a perception that there is a low success rate for whistleblower claims brought before the Board. This perception is not supported by the facts."**

   How do you respond to this statement and the rest of Ms. Marshall's testimony?

In Ms. Marshall's testimony before the Senate, she references the Office of Special Counsel ("OSC") Annual Report to Congress for the Fiscal Year 2002 and 2003 as the source for her statistics regarding the "success rate for whistleblower claims." I have carefully reviewed these documents and they simply do not support Ms. Marshall's conclusions regarding the adequacy of the current statutory scheme. In fact the OSC document, upon which she relied,

confirms beyond any doubt that there *is* a low success rate for federal employees under the current interpretations of the Whistleblower Protection Act of 1989, as amended ("WPA").

In her testimony, Ms. Marshall stated, "Decisions on the merits were issued in 83 of the remaining 184 cases. Rulings in favor of whistleblower claimants were made in 10 percent of those cases..." Based on Ms. Marshall's own interpretation of the statistics, in the year in question the MSPB, in regard to every WPA claim filed in the entire United States, there were only eight favorable rulings. If these numbers are indeed accurate, Ms. Marshall has made our point - under the current law it is extremely difficult for a whistleblower to ever win a case.

However, a review of the OSC reports relied upon by Ms. Marshall actually indicates that the true state of affairs is far more dismal. As set forth in Table 2 of the OSC Report to Congress for Fiscal Year 2002, "Summary of Whistleblower Reprisal Matters," in the years FY 2000, FY 2001 and FY 2002, OSC "processed" a total of 1764 whistleblower reprisal "matters" for which the "OSC had jurisdiction." Of these 1764 cases, the "enforcement actions" were only taken in 3 cases. The OSC negotiated a "stay" in support of the whistleblower in only 21 cases. The fact that in over a three year period of time the OSC reviewed 1764 cases and enforcement actions were only taken in 3 cases reinforces the urgent need for Congress to amend the WPA. These statistics demonstrate that the current system does not work.

As set forth above, the "fact" that whistleblowers have a very low success rate in WPA proceedings cannot be denied. However, a further review of the WPA statistics published by the OSC demonstrate how difficult it is for a whistleblower to obtain any form of relief whatsoever from the MSPB, regardless of how small that relief may be. The OSC report defines "favorable action" in a manner which incorporates not only the very few cases upon which an employee

actually prevails in a claim, but also incorporates cases which are resolved by settlement. When "favorable action" is defined in this manner, the record reveals that 90% of all WPA cases result in an "unfavorable" conclusion. According to the OSC report, of the 1764 whistleblower cases filed with OSC in 2000, 2001 and 2002, only 188 obtained any form of "favorable" outcome. That means nearly 90% of all whistleblowers not only could not win their case before the MSPB, they could not even obtain a modest settlement.

These statistics, standing alone, demonstrate the dismal state of affairs federal employees currently face under the WPA. However, when compared to similar laws adjudicated before an administrative agency similar to the MSPB, the horrendous state of affairs is ever clearer. As set forth in my prior testimony, the closest model to the WPA/MSPB model are the environmental and nuclear whistleblower laws administered by the U.S. Department of Labor ("DOL"). These cases are investigated by an OSC-type body, are adjudicated before administrative judges and are reviewed by a centralized administrative appellate board. However, as explained in my prior testimony, the decisions of the DOL are subject to all circuit review, and the Federal Circuit has no jurisdiction whatsoever over these cases.

I reviewed all of the decisions published by the DOL Office of Administrative Law Judges (OALJ) which were docketed in 2000, 2001 and 2002 under the employee protection provisions of the Toxic Substances Control Act, the Surface Transportation Act, the Clean Air Act, the Safe Drinking Water Act, the Water Pollution Control Act, the Solid Waste Disposal Act and the Energy Reorganization Act. Of the 343 cases docketed by the OALJ in which any form of merits decision or settlement agreement was indicated, employees obtained "favorable action" in 176 cases. Instead of a mere 10% success rate, employees under these laws had a 51%

success rate.

Moreover, the MSPB "success" cases do not indicate the level of success obtained by an employee. Although it is not possible to compare the monetary results of DOL-whistleblower cases compared with MSPB cases, the antidotal evidence demonstrates that DOL cases settle for amounts radically greater then MSPB cases.

The testimony submitted by the MSPB also ignored the results of a survey conducted by the OSC in 2002 regarding employee satisfaction with the WPA process. The results of this survey confirm what the statistics set forth above make perfectly clear: The current law is not working.

Question number "7" of the OSC survey asked the employees whether they were "satisfied" or "dissatisfied" with the "results" they obtained after participating in the OSC/MSPB process. Of the 496 persons who provided a substantive response to this question, only 41 federal employees claimed to be satisfied/very satisfied with the results obtained.[1] In contrast, 455 federal employees were "dissatisfied" or "very dissatisfied" with the results they obtained. Thus, 92% of the federal employees who filed claims with OSC reported that they were not satisfied with the results obtained in their respective cases. This statistic is completely consistent with the overall success rate statistics set forth above.

The "success rate" statistics, whether viewed objectively (i.e. the number of cases "successfully resolved"), comparatively (i.e. comparing the success rate in MSPB cases to that of similarly constituted DOL cases) or subjectively (the federal employee survey results), the WPA does not work.

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[1] 45 people had no opinion or the survey question was not applicable to their case.

2. **The Department of Justice made several statements criticizing S. 1358. Specifically, the Department claimed that there is no evidence supporting the need for this legislation, that the bill would do nothing to protect whistleblowers, and that S. 1358 would turn every federal employee into a whistleblower.**

What is your response to these claims?

We respectfully disagree with the Department of Justice's (DOJ) testimony.

First, DOJ's concern that S-1358 would "turn every federal employee into a whistleblower" is extremely troubling. As a matter of federal law, *every federal employee has a duty to become a whistleblower*. On October 17, 1990 President George H.W. Bush signed Executive Order 12731 into law. The Executive Order, which is binding legal authority on the DOJ and every person employed by the federal government, mandated that *every* federal employee must blow the whistle. The Executive Order states as follows: **"Employees *shall* disclose waste, fraud, abuse and corruption to appropriate authorities."** As set forth in my prior testimony, when the Executive Order was first published a number of federal agencies wanted to change the word "shall" to "should." These proposals were completely rejected. Thus, as of October 17, 1990, every federal employee was under a mandatory duty to "disclose" misconduct to "appropriate authorities" as a condition of federal employment. As explained in the Executive Order, this duty was mandated due to the "trust" placed in every federal employee to "place loyalty to the Constitution, the laws, and ethical principles above private gain."

S-1358 does not change the legal duty imposed by Executive Order upon employees to "blow the whistle" on misconduct. It simply ensures that federal employees, who complied with the requirements set forth in the Order, were protected from retaliation. Under the precedent

created by the Federal Circuit, most employees who comply with Executive Order 12731 are not protected from retaliation under the WPA.

Second, the DOJ stated that there was "no evidence supporting the need for this legislation, that the bill would do nothing to protect whistleblowers." Again, this position of the DOJ is not supported by law or fact.

As set forth in my prior testimony, an objective review of the Federal Circuit's decision narrowly defining whistleblowing has resulted in undermining the WPA's intent. For example, by defending the Federal Circuit's precedent of excluding most "internal" whistleblowers from coverage under the WPA (i.e. the *Willis* line of cases referenced in the prior testimony), the DOJ departs from a long and honored line of reasoning established by every Secretary of Labor appointed by Presidents Reagan, Bush and Clinton.

In order to demonstrate the need to overturn the *Willis* decision, I need go no further than the words of William Brock, Secretary of Labor in the Reagan Administration:[2]

> Employees who have the courtesy to take their concerns first to their employers, *see Goldberg,* 43 Lab. Cas. At 40,986, to allow the employer a chance to correct any Clean Air Act violations without the need for governmental intervention, have as much need for protection as do employees who first go to the government with their concerns...Employers gain from being given an early opportunity to correct problems without government intervention, and the government is relieved from the need to commit its limited resources investigating and resolving problems that could be informally corrected.
>
> Because the scope of employee protection turns on the need for protection, rather than on vagaries of a selection process that brings some but not other complaints into formal, legal proceedings,...I find no principled basis for denying protection to internal employee complaints...Employees who have the courtesy to take their concerns first to their employers...to allow the employer a chance to correct any

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[2] *Poulos v. Ambassador Fuel Oil Co., 86-CAA-1 (Sec'y Apr. 27, 1987).*

> Clean Air Act violations without the need for governmental intervention, have as much need for protection as do employees who first go to the government with their concerns.

Every subsequent Secretary of Labor (or their designees) have continuously and unanimously agreed with Secretary Brock's views of appropriate whistleblower protection in a series of well-reasoned and uniform decisions. This includes the following Secretaries of Labor: The Reagan Administration's Ann D. McLaughlin, Bush Administration's Elizabeth H. Dole and Lynn Martin, Clinton Administration's Robert B. Reich and Alexis Herman, and George W. Bush's current Secretary of Labor Elaine L. Chao.

On November 13, 2002 an Administrative Review Board appointed by Secretary of Labor Chao discussed the DOL's position on internal whistleblowing. In its decision, the DOL explained how Congress has "ratified" the prior decisions of the DOL finding internal whistleblowing being fully protected:

> Congress amended the ERA in 1992 to explicitly cover complaints raised to an employer, in addition to complaints voiced publicly or to a regulatory agency. *See* §2902(a) of the Comprehensive National Energy Policy Act, Pub. L. No. 102-486, 106 Stat. 2776, 3123, Oct. 24, 1992 (codified at 42 U.S.C. §5851(a)(1)(A), (B) (1994)). By expressly extending coverage to internal complaints, Congress effectively ratified the decisions of several United States Courts of Appeals that agreed with the Secretary that the employee protection provision as originally enacted should be interpreted to protect informal complaints raised to an employer. *See Bechtel Const. Co. v. Sec'y of Labor,* 50 F.3d 926, 931-33 (11th Cir. 1995) and cases there cited (construing §210(a) of the Energy Reorganization Act of 1974, as amended, Pub. L. No. 95-601, §10, 92 Stat. 2949, 2951 (Nov. 6, 1978), codified at 42 U.S.C. §5851(a)(3) (1988)). As the court in *Bechtel Const.* explained, coverage of internal complaints "encourages safety concerns to be raised and resolved promptly at the lowest possible level . . . facilitating voluntary compliance with the ERA and avoiding the unnecessary expense and delay of formal investigations and litigation." 50 F.3d at 933. Stated differently, ERA protection is most effective when it encourages employees to aid their employers in complying with nuclear safety guidelines

by raising concerns initially within the workplace.[3]

As set forth in my prior testimony, the Federal Circuit's failure to follow the long established precedent protecting and encouraging internal whistleblowing not only demonstrated a basic lack of understanding of the reasons why other courts and every Secretary of Labor under Presidents Reagan, Bush and Clinton supported internal whistleblowing, but also that the *Willis* decision was outcome determinative in numerous cases. Employees lose their cases because of misguided Federal Circuit precedent. The DOJ's testimony that the WPA protects whistleblowers is simply not accurate.

The vast majority of whistleblowers initially are typical federal employees trying to do the right thing. The average person does not immediately report problems to an Inspector General. They have the courtesy and common sense to question their manager about the issues they have identified. The Federal Circuit's vision of a "whistleblower" as an employee who lacks the courtesy to discuss a problem with a supervisor before initiating an expensive and time-consuming "federal case" is misplaced and destructive to the goal of the WPA.

When the Federal Circuit issued rulings stripping most internal whistleblowers from protection under the WPA, they stripped the majority of federal employees from protection under the law. Significantly, when Congress recently passed the historic Sarbanes-Oxley Act of 2002, it recognized the need to protect internal whistleblowers. Congress rejected any reference to the current WPA definition of protected activity and/or to the Federal Circuit's line of cases narrowly interpreting protected activity and restricting internal whistleblowing. The Sarbanes-Oxley Act

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[3] *Williams v. Mason & Hanger Corp.*, 97-ERA-14/18-22 (DOL ARB November 13, 2002).

included specific protections for employees who reported misconduct to a " person with supervisory authority over the employee" (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct). (18 U.S.C. 1514 A (a)(1)C)). This definition should be incorporated into any amended version of the WPA.

Thus, a review of only one of the many needed reforms to the WPA proposed in S-1358 demonstrates conclusively that the WPA is not currently protective of employees and that there is a compelling need for the law to be changed.

3. **The Department of Justice claims that providing review of whistleblower claims at regional courts of appeal would substantially add to the federal government's cost of complying with the law.**

What is your response to this claim?

The WPA stands alone as the only federal whistleblower law that does not have all-circuit review. A long line of discredited or Congressionally overturned precedent demonstrate the inherent problem with giving any judicial circuit a monopoly over decisions impacting whistleblowers nation-wide. There is simply no justification whatsoever for the Federal Circuit's monopoly over WPA judicial review.

The DOJ's testimony that all-circuit review would "substantially add to the federal government's cost of complying with the law" is not well taken. This explanation is disingenuous and harmful to whistleblowers. Cost is not the issue and never has been the issue. The only issue is the quality of the appellate judicial decision making process. All-Circuit review, with its informal Circuit-to-Circuit peer review, an oversight process, is a fundamental tool for ensuring the quality of the appellate decision making process. This formal and informal

circuit-to-circuit review process is so significant in American jurisprudence that the U.S. Supreme Court utilizes that process as the single most important indicator of cases it should resolve.

If "costs" were an issue (which they are not), the federal government could easily insure that *no additional costs whatsoever* were incurred if all-circuit review were permitted. First, the government could permit its regional attorneys for the Department of Justice and/or the MSPB to argue cases. The government has highly trained attorneys employed in every federal circuit in the United States. Many of these attorneys have offices in (or very near) the very buildings in which the Courts of Appeal hear arguments. Moreover, the MSPB itself adjudicates WPA cases in its local and regional offices. The MSPB has offices in the following areas:

Atlanta, Georgia

Alexandria, Virginia

Chicago, Illinois

Philadelphia, Pennsylvania

San Francisco, California

Dallas, Texas

Seattle, Washington

New York, New York

Boston, Massachusetts

Denver, Colorado

In fact, the MSPB hears cases on a regional basis, and divides the jurisdiction of its regional and local offices much like the U.S. Courts of Appeal.

On the other hand, whistleblowers, do not have hundreds of attorneys located in every state of the United States and/or employed in regional or local offices throughout the United States. Consequently, under the current law, employee whistleblowers are forced to hire attorneys that can come into the District of Columbia, at considerable expense, to argue cases. Many of these employees cannot afford this option, and either go unrepresented before the Federal Circuit and/or never file the appeal. Regardless, the quality of decision-making is negatively impacted.

Because of all-circuit review, whistleblowers often are not properly represented before the Court of Appeals, and are at a significant disadvantage in presenting the merits of their cases. A review of published decisions of the Federal Circuit demonstrate that significant numbers of out-of-state employees were compelled to have their cases heard without the benefit of counsel, including whistleblowers from Greenville, MS,[4] Fort Worth, Texas,[5] and El Toro, California.[6] All of these *pro se* out-of-state litigants lost before the Federal Circuit. I am not aware of any *pro se* litigant prevailing on the merits of a WPA case before the Federal Circuit.

The published decisions of the Federal Circuit also demonstrate that numerous employees have been compelled to spend thousands of dollars on fees and costs associated with having their local attorneys travel into Washington, D.C. to argue appeals at the Federal Circuit. These include the following federal employees: Franca Monasteri of Memphis, Tenn., William Shoaf of Seattle, Washington, William Willis of Des Moines, Iowa, Salvatore Giove of Denver,

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[4] *Prewitt v. MSPB*, 133 F.3d 885.

[5] *King v. HHS*, 133 F.3d 1450.

[6] *Horton v. Navy*, No. 94-3332.

Colorado, Mohammed Yunus of Gainesville, Florida and Carol Briley of Kansas City, Missouri.

Finally, the government's argument on this issue is disingenuous. When it has served the employer/government agency's interest, the government has not hesitated in having local attorneys work on the appellate briefs filed in WPA case. For example, in *Larson v. Department of the Army*, 260 F.3d 1350, a government attorney from Dugway, Utah was assigned to the appeals case. Mr. Stanley Larson's local Salt Lake City, Utah attorney had to travel into Washington, D.C. to argue the case. Likewise, in *Schmittling v. Department of the Army*, 219 F.3d 1332, the government/employer used the services of a local Army attorney from Waren, Michigan to assist on the appeal. Mr. Gregory Schmittling's attorney was to travel from Troy, Michigan to Washington, D.C. to argue the case.

All-circuit review creates a financial hardship and disincentive on whistleblowers. No other federal whistleblower protection law includes this feature. The government, which often defends or prosecutes cases under these other whistleblower laws, has *never* argued that all-Circuit review has had a material impact on the costs incurred by the government.

Thank you again for the opportunity to present the views of the National Whistleblower Center to this Committee.

Respectfully submitted by:

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Answers to Post-Hearing Questions for the Record
Submitted by William Bransford
Posed by Senator Akaka

"S. 1358, The Federal Employee Protection of Disclosures Act: Amendments to the Whistleblower Protection Act."

1. You testified of your concern with the provision in S. 1358, which provides all-circuit review for federal employee whistleblower laws and is also used when cases come before the Federal Labor Relations Authority (FLRA) and the Equal Employment Opportunity Commission (EEOC).
    a. Given the apparent routine nature of all-circuit review under various whistleblower statutes and for EEOC and FLRA cases, why do you believe WPA cases should be treated any differently?
    b. Please elaborate on your statement that all-circuit review would complicate the existing appeals process unnecessarily.

The primary reason for my concern is that the Merit System Protection Board (MSPB) is the best forum to protect whistleblowers who are federal employees. If the existence of this MSPB right is threatened, whistleblowers would be far more vulnerable. The danger in making all-circuit review available is that it would increase the complexity of federal personal law and strengthen the argument for those who would propose the elimination of MSPB rights for federal employees, as we have seen recently at the Department of Homeland Security and the Department of Defense.

The original basis for the creation of the Federal Circuit was to provide uniformity in specified areas. A policy decision was made more that 20 years ago that the federal workplace, in particular, should have clearly defined rules and regulations, and uniformity. This is the reason for the Federal Circuit's designation as the sole place for obtaining judicial review of MSPB decisions.

While it is true that federal employees may obtain review in other circuits for EEO claims or for whistleblower claims using statutes other than the Whistleblower Protection Act (WPA), it is also true that both the EEO process and other whistleblower statutes are available to those who are not federal employees. The WPA on the other hand is unique and only available to federal employees. The multiple circuits available to review of Federal Labor Relations Authority decisions also does not serve as precedent to extend multiple circuit review to MSPB whistleblower decisions since FLRA decisions are almost always related to disputes between institutional unions and federal agencies.

In my opinion, appeals of MSPB whistleblower decisions to multiple circuits, and the conflicting opinions that would result, would so complicate federal personnel law that it would become even more mysterious to those who already think that the MSPB is complex and ridden with delays. The reality is that the MSPB is efficient and supportive of managers who take actions that are based on evidence. But there are those is Congress who argue the opposite and the result of those arguments is flexibility to both DHS and DoD to eliminate MSPB appeal rights. If I were a whistleblower and a federal employee, I would much rather have my basic MSPB appeal right intact and the current Federal Circuit review process, than no MSPB appeal and a right to appeal to some other circuit. The diminution of MSPB appeals makes it easier to fire federal employees without cause and for improper reasons.

2. You testified that clarifying the meaning of 'any disclosure,' the scope of protection for whistleblowers would be expanded to policy disagreements.
    a. Please explain to the Committee how a policy disagreement can be a protected disclosure in light of the fact that the employee must have a reasonable belief that the disclosure evidences a violation of law, rule, or regulation; gross mismanagement; or a substantial or specific danger to public health.

The change in the statute that you are referring to makes the policy too all encompassing. It allows no common sense for specific cases. The "striking of 'which the employee or applicant reasonably believes evidences' and inserting 'without restriction to time, place, form, motive, context, or prior disclosure made to any person…'" opens the possibility to proposed mere disagreements with interpretations of law.

For example, what would happen if a Department of Justice attorney disagrees with the Attorney General regarding the incarceration of 9/11 suspects and publicly discloses to the media an opinion that the incarceration violates law? The attorney would actually be disagreeing with policy, but would couch it as a violation of law. The proposed changes in the Whistleblower law would make the consideration of context, form and motive irrelevant in concluding that protection is not warranted for what, in this example, is a mere policy disagreement, not a disclosure of wrongdoing that is a clear violation of law.

108TH CONGRESS
1ST SESSION

S. 1358

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 26, 2003

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

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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,*

★(Star Print)

SECTION 1. PROTECTION OF CERTAIN DISCLOSURES OF INFORMATION BY FEDERAL EMPLOYEES.

(a) SHORT TITLE.—This Act may be cited as the "Federal Employee Protection of Disclosures Act".

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

(1) in subparagraph (A)—

(A) by striking "which the employee or applicant reasonably believes evidences" and inserting ", 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 is evidence of"; and

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

(2) in subparagraph (B)—

(A) by striking "which the employee or applicant reasonably believes evidences" and inserting ", 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

1 course of an employee's duties, to the Special
2 Counsel, or to the Inspector General of an
3 agency or another employee designated by the
4 head of the agency to receive such disclosures,
5 of information that the employee or applicant
6 reasonably believes is evidence of"; and
7 (B) in clause (i), by striking "a violation"
8 and inserting "any violation (other than a viola-
9 tion of this section)"; and
10 (3) by adding at the end the following:
11 "(C) a disclosure that—
12 "(i) is made by an employee or appli-
13 cant of information required by law or Ex-
14 ecutive order to be kept secret in the inter-
15 est of national defense or the conduct of
16 foreign affairs that the employee or appli-
17 cant reasonably believes is direct and spe-
18 cific evidence of—
19 "(I) any violation of any law,
20 rule, or regulation;
21 "(II) gross mismanagement, a
22 gross waste of funds, an abuse of au-
23 thority, or a substantial and specific
24 danger to public health or safety; or

"(III) a false statement to Congress on an issue of material fact; and

"(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 and who is authorized to receive information of the type disclosed;

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

"(III) an employee of Congress who has the appropriate security clearance and is authorized to receive information of the type disclosed.".

(c) 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:

1 "In this subsection, the term 'disclosure' means a for-
2 mal or informal communication or transmission.".
3 (d) REBUTTABLE PRESUMPTION.—Section 2302(b)
4 of title 5, United States Code, is amended by adding after
5 the matter following paragraph (12) (as amended by sub-
6 section (c) of this section) the following:
7 "For purposes of paragraph (8), any presumption re-
8 lating to the performance of a duty by an employee who
9 has authority to take, direct others to take, recommend,
10 or approve any personnel action may be rebutted by sub-
11 stantial evidence.".
12 (e) NONDISCLOSURE POLICIES, FORMS, AND AGREE-
13 MENTS; SECURITY CLEARANCES; AND RETALIATORY IN-
14 VESTIGATIONS.—
15 (1) PERSONNEL ACTION.—Section
16 2302(a)(2)(A) of title 5, United States Code, is
17 amended—
18 (A) in clause (x), by striking "and" after
19 the semicolon; and
20 (B) by redesignating clause (xi) as clause
21 (xiv) and inserting after clause (x) the fol-
22 lowing:
23 "(xi) the implementation or enforce-
24 ment of any nondisclosure policy, form, or
25 agreement;

"(xii) a suspension, revocation, or other determination relating to a security clearance;

"(xiii) an investigation of an employee or applicant for employment because of any activity protected under this section; and".

(2) PROHIBITED PERSONNEL PRACTICE.—Section 2302(b) of title 5, United States Code, is amended—

(A) in paragraph (11), by striking "or" at the end;

(B) in paragraph (12), by striking the period and inserting a semicolon; and

(C) by inserting after paragraph (12) the following:

"(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement:

" 'These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section

1034 of title 10, United States Code (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Code (governing disclosures of illegality, waste, fraud, abuse, or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosures that could compromise national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by such Executive order and such statutory provisions are incorporated into this agreement and are controlling.'; or

"(14) conduct, or cause to be conducted, an investigation of an employee or applicant for employment because of any activity protected under this section.".

(3) BOARD AND COURT REVIEW OF ACTIONS RELATING TO SECURITY CLEARANCES.—

1 (A) IN GENERAL.—Chapter 77 of title 5,
2 United States Code, is amended by inserting
3 after section 7702 the following:

4 **"§ 7702a. Actions relating to security clearances**

5 "(a) In any appeal relating to the suspension, revoca-
6 tion, or other determination relating to a security clear-
7 ance, the Merit Systems Protection Board or any review-
8 ing court—

9 "(1) shall determine whether section 2302 was
10 violated;

11 "(2) may not order the President to restore a
12 security clearance; and

13 "(3) subject to paragraph (2), may issue declar-
14 atory relief and any other appropriate relief.

15 "(b)(1) If, in any final judgment, the Board or court
16 declares that any suspension, revocation, or other deter-
17 mination with regards to a security clearance was made
18 in violation of section 2302, the affected agency shall con-
19 duct a review of that suspension, revocation, or other de-
20 termination, giving great weight to the Board or court
21 judgment.

22 "(2) Not later than 30 days after any Board or court
23 judgment declaring that a security clearance suspension,
24 revocation, or other determination was made in violation
25 of section 2302, the affected agency shall issue an unclas-

1 sified report to the congressional committees of jurisdic-
2 tion (with a classified annex if necessary), detailing the
3 circumstances of the agency's security clearance suspen-
4 sion, revocation, or other determination. A report under
5 this paragraph shall include any proposed agency action
6 with regards to the security clearance.

7 "(c) An allegation that a security clearance was re-
8 voked or suspended in retaliation for a protected disclo-
9 sure shall receive expedited review by the Office of Special
10 Counsel, the Merit Systems Protection Board, and any re-
11 viewing court.".

12 (B) TECHNICAL AND CONFORMING
13 AMENDMENT.—The table of sections for chap-
14 ter 77 of title 5, United States Code, is amend-
15 ed by inserting after the item relating to section
16 7702 the following:

"7702a. Actions relating to security clearances.".

17 (f) EXCLUSION OF AGENCIES BY THE PRESIDENT.—
18 Section 2302(a)(2)(C) of title 5, United States Code, is
19 amended by striking clause (ii) and inserting the following:

20 "(ii)(I) the Federal Bureau of Inves-
21 tigation, the Central Intelligence Agency,
22 the Defense Intelligence Agency, the Na-
23 tional Imagery and Mapping Agency, the
24 National Security Agency; and

"(II) 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, if the determination (as that determination relates to a personnel action) is made before that personnel action; or".

(g) ATTORNEY FEES.—Section 1204(m)(1) of title 5, United States Code, is amended by striking "agency involved" and inserting "agency where the prevailing party is employed or has applied for employment".

(h) DISCIPLINARY ACTION.—Section 1215 of title 5, United States Code, is amended in subsection (a), by striking paragraph (3) and inserting the following:

"(3)(A) A final order of the Board may impose—

"(i) disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, or reprimand;

"(ii) an assessment of a civil penalty not to exceed $1,000; or

1 "(iii) any combination of disciplinary ac-
2 tions described under clause (i) and an assess-
3 ment described under clause (ii).
4 "(B) In any case in which the Board finds that
5 an employee has committed a prohibited personnel
6 practice under section 2302(b) (8) or (9), the Board
7 shall impose disciplinary action if the Board finds
8 that the activity protected under section 2302(b) (8)
9 or (9) was a significant motivating factor, even if
10 other factors also motivated the decision, for the em-
11 ployee's decision to take, fail to take, or threaten to
12 take or fail to take a personnel action, unless that
13 employee demonstrates, by preponderance of evi-
14 dence, that the employee would have taken, failed to
15 take, or threatened to take or fail to take the same
16 personnel action, in the absence of such protected
17 activity."
18 (i) DISCLOSURES TO CONGRESS.—Section 2302 of
19 title 5, United States Code, is amended by adding at the
20 end the following:
21 "(f) Each agency shall establish a process that pro-
22 vides confidential advice to employees on making a lawful
23 disclosure to Congress of information that is specifically
24 required by law or Executive order to be kept secret in

1 the interest of national defense or the conduct of foreign
2 affairs.".

3 (j) AUTHORITY OF SPECIAL COUNSEL RELATING TO
4 CIVIL ACTIONS.—

5 (1) REPRESENTATION OF SPECIAL COUNSEL.—
6 Section 1212 of title 5, United States Code, is
7 amended by adding at the end the following:

8 "(h) Except as provided in section 518 of title 28,
9 relating to litigation before the Supreme Court, attorneys
10 designated by the Special Counsel may appear for the Spe-
11 cial Counsel and represent the Special Counsel in any civil
12 action brought in connection with section 2302(b)(8) or
13 subchapter III of chapter 73, or as otherwise authorized
14 by law.".

15 (2) JUDICIAL REVIEW OF MERIT SYSTEMS PRO-
16 TECTION BOARD DECISIONS.—Section 7703 of title
17 5, United States Code, is amended by adding at the
18 end the following:

19 "(e)(1) Except as provided under paragraph (2), this
20 paragraph shall apply to any review obtained by the Spe-
21 cial Counsel. The Special Counsel may obtain review of
22 any final order or decision of the Board by filing a petition
23 for judicial review in the United States Court of Appeals
24 for the Federal Circuit if the Special Counsel determines,
25 in the discretion of the Special Counsel, that the Board

1 erred in deciding a case arising under section 2302(b)(8)
2 or subchapter III of chapter 73 and that the Board's deci-
3 sion will have a substantial impact on the enforcement of
4 section 2302(b)(8) or subchapter III of chapter 73. If the
5 Special Counsel was not a party or did not intervene in
6 a matter before the Board, the Special Counsel may not
7 petition for review of a Board decision under this section
8 unless the Special Counsel first petitions the Board for
9 reconsideration of its decision, and such petition is denied.
10 In addition to the named respondent, the Board and all
11 other parties to the proceedings before the Board shall
12 have the right to appear in the proceedings before the
13 Court of Appeals. The granting of the petition for judicial
14 review shall be at the discretion of the Court of Appeals.
15 "(2) During the 5-year period beginning on the effec-
16 tive date of the Federal Employee Protection of Disclo-
17 sures Act, this paragraph shall apply to any review ob-
18 tained by the Special Counsel. The Special Counsel may
19 obtain review of any final order or decision of the Board
20 by filing a petition for judicial review in the United States
21 Court of Appeals for the Federal Circuit or any court of
22 appeals of competent jurisdiction as provided under sub-
23 section (b)(2) if the Special Counsel determines, in the dis-
24 cretion of the Special Counsel, that the Board erred in
25 deciding a case arising under section 2302(b)(8) or sub-

1 chapter III of chapter 73 and that the Board's decision
2 will have a substantial impact on the enforcement of sec-
3 tion 2302(b)(8) or subchapter III of chapter 73. If the
4 Special Counsel was not a party or did not intervene in
5 a matter before the Board, the Special Counsel may not
6 petition for review of a Board decision under this section
7 unless the Special Counsel first petitions the Board for
8 reconsideration of its decision, and such petition is denied.
9 In addition to the named respondent, the Board and all
10 other parties to the proceedings before the Board shall
11 have the right to appear in the proceedings before the
12 court of appeals. The granting of the petition for judicial
13 review shall be at the discretion of the court of appeals.".
14 (k) JUDICIAL REVIEW.—
15 (1) IN GENERAL.—Section 7703(b) of title 5,
16 United States Code, is amended by striking para-
17 graph (1) and inserting the following:
18 "(b)(1)(A) Except as provided in subparagraph (B)
19 and paragraph (2) of this subsection, a petition to review
20 a final order or final decision of the Board shall be filed
21 in the United States Court of Appeals for the Federal Cir-
22 cuit. Notwithstanding any other provision of law, any peti-
23 tion for review must be filed within 60 days after the date
24 the petitioner received notice of the final order or decision
25 of the Board.

1 "(B) During the 5-year period beginning on the effec-
2 tive date of the Federal Employee Protection of Disclo-
3 sures Act, a petition to review a final order or final deci-
4 sion of the Board shall be filed in the United States Court
5 of Appeals for the Federal Circuit or any court of appeals
6 of competent jurisdiction as provided under subsection
7 (b)(2). Notwithstanding any other provision of law, any
8 petition for review must be filed within 60 days after the
9 date the petitioner received notice of the final order or
10 decision of the Board.".

11 (2) REVIEW OBTAINED BY OFFICE OF PER-
12 SONNEL MANAGEMENT.—Section 7703 of title 5,
13 United States Code, is amended by striking sub-
14 section (d) and inserting the following:

15 "(d)(1) Except as provided under paragraph (2), this
16 paragraph shall apply to any review obtained by the Direc-
17 tor of the Office of Personnel Management. The Director
18 of the Office of Personnel Management may obtain review
19 of any final order or decision of the Board by filing, within
20 60 days after the date the Director received notice of the
21 final order or decision of the Board, a petition for judicial
22 review in the United States Court of Appeals for the Fed-
23 eral Circuit if the Director determines, in his discretion,
24 that the Board erred in interpreting a civil service law,
25 rule, or regulation affecting personnel management and

1 that the Board's decision will have a substantial impact
2 on a civil service law, rule, regulation, or policy directive.
3 If the Director did not intervene in a matter before the
4 Board, the Director may not petition for review of a Board
5 decision under this section unless the Director first peti-
6 tions the Board for a reconsideration of its decision, and
7 such petition is denied. In addition to the named respond-
8 ent, the Board and all other parties to the proceedings
9 before the Board shall have the right to appear in the pro-
10 ceeding before the Court of Appeals. The granting of the
11 petition for judicial review shall be at the discretion of the
12 Court of Appeals.

13 "(2) During the 5-year period beginning on the effec-
14 tive date of the Federal Employee Protection of Disclo-
15 sures Act, this paragraph shall apply to any review ob-
16 tained by the Director of the Office of Personnel Manage-
17 ment. The Director of the Office of Personnel Manage-
18 ment may obtain review of any final order or decision of
19 the Board by filing, within 60 days after the date the Di-
20 rector received notice of the final order or decision of the
21 Board, a petition for judicial review in the United States
22 Court of Appeals for the Federal Circuit or any court of
23 appeals of competent jurisdiction as provided under sub-
24 section (b)(2) if the Director determines, in his discretion,
25 that the Board erred in interpreting a civil service law,

1 rule, or regulation affecting personnel management and
2 that the Board's decision will have a substantial impact
3 on a civil service law, rule, regulation, or policy directive.
4 If the Director did not intervene in a matter before the
5 Board, the Director may not petition for review of a Board
6 decision under this section unless the Director first peti-
7 tions the Board for a reconsideration of its decision, and
8 such petition is denied. In addition to the named respond-
9 ent, the Board and all other parties to the proceedings
10 before the Board shall have the right to appear in the pro-
11 ceeding before the court of appeals. The granting of the
12 petition for judicial review shall be at the discretion of the
13 Court of Appeals.".

14 (l) NONDISCLOSURE POLICIES, FORMS, AND AGREE-
15 MENTS.—

16 (1) IN GENERAL.—

17 (A) REQUIREMENT.—Each agreement in
18 Standard Forms 312 and 4414 of the Govern-
19 ment and any other nondisclosure policy, form,
20 or agreement of the Government shall contain
21 the following statement: "These restrictions are
22 consistent with and do not supersede, conflict
23 with, or otherwise alter the employee obliga-
24 tions, rights, or liabilities created by Executive
25 Order No. 12958; section 7211 of title 5,

1 United States Code (governing disclosures to
2 Congress); section 1034 of title 10, United
3 States Code (governing disclosure to Congress
4 by members of the military); section 2302(b)(8)
5 of title 5, United States Code (governing disclo-
6 sures of illegality, waste, fraud, abuse or public
7 health or safety threats); the Intelligence Iden-
8 tities Protection Act of 1982 (50 U.S.C. 421 et
9 seq.) (governing disclosures that could expose
10 confidential Government agents); and the stat-
11 utes which protect against disclosure that may
12 compromise the national security, including sec-
13 tions 641, 793, 794, 798, and 952 of title 18,
14 United States Code, and section 4(b) of the
15 Subversive Activities Act of 1950 (50 U.S.C.
16 783(b)). The definitions, requirements, obliga-
17 tions, rights, sanctions, and liabilities created
18 by such Executive order and such statutory
19 provisions are incorporated into this agreement
20 and are controlling."
21 (B) ENFORCEABILITY.—Any nondisclosure
22 policy, form, or agreement described under sub-
23 paragraph (A) that does not contain the state-
24 ment required under subparagraph (A) may not
25 be implemented or enforced to the extent such

1 policy, form, or agreement is inconsistent with
2 that statement.
3 (2) PERSONS OTHER THAN GOVERNMENT EM-
4 PLOYEES.—Notwithstanding paragraph (1), a non-
5 disclosure policy, form, or agreement that is to be
6 executed by a person connected with the conduct of
7 an intelligence or intelligence-related activity, other
8 than an employee or officer of the United States
9 Government, may contain provisions appropriate to
10 the particular activity for which such document is to
11 be used. Such form or agreement shall, at a min-
12 imum, require that the person will not disclose any
13 classified information received in the course of such
14 activity unless specifically authorized to do so by the
15 United States Government. Such nondisclosure
16 forms shall also make it clear that such forms do
17 not bar disclosures to Congress or to an authorized
18 official of an executive agency or the Department of
19 Justice that are essential to reporting a substantial
20 violation of law.
21 (m) CLARIFICATION OF WHISTLEBLOWER RIGHTS
22 FOR CRITICAL INFRASTRUCTURE INFORMATION.—Section
23 214(c) of the Homeland Security Act of 2002 (Public Law
24 107–296) is amended by adding at the end the following:
25 "For purposes of this section a permissible use of inde-

1 pendently obtained information includes the disclosure of
2 such information under section 2302(b)(8) of title 5,
3 United States Code.".

4 (n) EFFECTIVE DATE.—This Act shall take effect 30
5 days after the date of enactment of this Act.

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