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PRIVATE SECTOR WHISTLEBLOWERS: ARE THERE SUFFICIENT LEGAL PROTECTIONS?

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON

EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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PRIVATE SECTOR WHISTLEBLOWERS: ARE THERE SUFFICIENT LEGAL PROTECTIONS?

Tuesday, May 15, 2007
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and Labor
Washington, DC

The subcommittee met, pursuant to call, at 2 p.m., in Room 2175, Rayburn House Office Building, Hon. Lynn Woolsey [chairwoman of the subcommittee] Presiding.

Present: Representatives Woolsey, Payne, Bishop of New York, Shea-Porter, Wilson, Price, and Kline.

Staff Present: Aaron Albright, Press Secretary; Tylease Alli, Hearing Clerk; Lynn Dondis, Senior Labor Policy Advisor for Subcommittee on Workforce Protections; Michael Gaffin, Staff Assistant, Labor; Peter Galvin, Senior Labor Policy Advisor; Jeffrey Hancuff, Staff Assistant, Labor; Thomas Kiley, Communications Director; Joe Novotny, Chief Clerk; Robert Borden, Minority General Counsel; Steve Forde, Minority Communications Director; Ed Gilroy, Minority Director of Workforce Policy; Rob Gregg, Minority Legislative Assistant; Richard Hoar, Minority Professional Staff Member; Victor Klatt, Minority Staff Director; Jim Paretti, Minority Workforce Policy Counsel; Molly McLaughlin Salmi, Minority Deputy Director of Workforce Policy; Linda Stevens, Minority Chief Clerk/Assistant to the General Counsel; and Loren Sweatt, Minority Professional Staff Member.

Chairwoman WOOLSEY. A quorum is present. The hearing of the Workforce Protection Subcommittee on Private Sector Whistleblowers: Are There Sufficient Legal Protections, will now come to order. Pursuant to committee rule 12(a), any Member may submit an opening statement in writing, which will be made part of the permanent record.

I now recognize myself, followed by Ranking Member Joe Wilson, for an opening statement.

I want to thank all the witnesses for coming today, to testify on whether current legal protections are sufficient to protect whistleblowers, especially those laws that are administered by the Department of Labor. And I want to especially thank both Dr. Wigand and Mr. Simon for appearing here today. You are going to tell your stories. Being a whistleblower is very difficult, and I know that your lives have changed in ways you can never have imagined when you first made your decision to come forward.

Today you are among friends. This week is Whistleblowers Week. We want to celebrate your actions and praise the substantial public service that you have provided, all at a considerable sacrifice to yourselves and your families.

We also want to learn from you because you know far better than we do what additional protections are needed so that people like yourselves will be encouraged to report illegalities, safety and health violations, and fraud and abuse when the situation makes it necessary.

The idea for this hearing was generated by a full committee hearing held on the Sago mine disaster on March 28th, 2007, just a couple of months ago. At that hearing we heard testimony about the blacklisting faced by miners who speak up about safety and health risks in the mines. This is true even though they should be protected by MSHA, and they find that their very jobs are threatened if they come forward.

But as our witnesses today will illustrate, miners are not alone in having to deal with such problems. Over the years Congress has indicated its clear intent to protect whistleblowers by passing over 30 statutes prohibiting retaliation against employees who report a myriad of problems, from environmental spills to health and safety violations, to corporate fraud.

However, while the laws may have made some things better, they have not eliminated intimidation, harassment, blacklisting and other forms of retaliation. Often the laws themselves are inconsistent and certainly not always user friendly.

Let me give you one example. Mr. Fairfax's office at OSHA administers 14 whistleblower provisions. Under these laws complainants have either 30, 60, 90 or 180 days to file their claim, depending on the statute that they are filing under. These statutes of limitation are very short, sometimes creating insurmountable hurdles, especially for someone who has just been demoted or fired from a job not for performance, but because he or she may have complained about an unsafe condition at work.

It is as though in legislating we have created protections or the expectation of protection without ensuring that these protections are accessible.

Today we will explore the issues and at least begin to answer some important questions: Do we need to expand the laws to cover employees currently not covered. Are there procedural and other hurdles in the law that we need to change so complainants can successfully bring their claims forward? Do we need to look more closely at how these laws are being administered, including OSHA's Department of Enforcement? And what is the need for resources in order to process whistleblower claims in a timely manner?

I am looking forward to all of your testimony, and with that I defer to Ranking member Joe Wilson for his opening statement.

[The statement of Ms. Woolsey follows:]

Prepared Statement of Hon. Lynn C. Woolsey, Chairwoman, Subcommittee on Workforce Protections

I want to thank all our witnesses for coming today to testify on whether current legal protections are sufficient to protect whistleblowers, especially those laws that are administered by the Department of Labor.

And I want to especially thank both Dr. Wigand and Mr. Simon for appearing here today to tell their stories. Being a whistleblower is very difficult, and I know your lives have changed in ways you could never have imagined when you first made your decision to come forward.

Today, you are among friends. This week is Whistleblowers' Week.

We want to celebrate your actions and praise the substantial public service you have provided—all at considerable sacrifice to yourselves and your families.

We also want to learn from you because you know far better than we do what additional protections are needed so that people like yourselves will be encouraged to report illegalities, safety and health violations; and fraud and abuse when necessary.

The idea for this hearing was generated by a Full Committee hearing held on the Sago Mine Disaster on March 28, 2007.

At that hearing, we heard testimony about the blacklisting faced by miners who speak up about safety or health risks in the mines. This is true even though they should be protected by MSHA (the Mine Safety and Health Act) if they came forward.

But as our witnesses today will illustrate, miners are not alone in having to deal with such problems.

Over the years, Congress has indicated its clear intent to protect whistleblowers by passing over 30 statutes prohibiting retaliation against employees who report on a myriad of problems, from environmental spills to health and safety violations to corporate fraud.

However, while the laws may have made some things better, they have not eliminated intimidation, harassment, blacklisting and other forms of retaliation.

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Today, we will explore the issues and at least begin to answer some important questions.

Do we need to expand the laws to cover employees currently not covered?

Are there procedural and other hurdles in the law that we need to change so complainants can successfully bring their claims forward?

And do we need to look more closely at how these laws are being administered, including OSHA's Department of Enforcement need for more resources in order to process whistleblower claims in a timely manner?

I am looking forward to everyone's testimony,

With that, I defer to Ranking Member Joe Wilson for his opening statement.

Mr. WILSON. Good afternoon. I would like to thank Chairman Woolsey for convening this hearing and welcome our witnesses to the subcommittee. At the outset I would also like to thank Chairman Woolsey for restoring a sense of fairness to these hearings with the witness ratio.

I believe this hearing to explore the Occupational Safety and Health Administration's work will be very informative for our panel, and I thank you, the witnesses, for being here today. I look forward to your testimony on the whistleblower programs for which OSHA is responsible.

OSHA administers 14 statutes in the whistleblower program. The range of issues covered under the programs stem from the Occupational Safety and Health Act, OSHA's core competency, if you will, to the newly passed AIR 21 legislation. In addition, several environmental laws are covered under this program.

With the addition of the relatively new and far-reaching Sarbanes-Oxley Act, I am sure that some have questioned the wisdom of housing all of these programs at OSHA. That said, I am encouraged by the statistics demonstrating OSHA's performance in investigating whistleblower-related claims. On average OSHA is dispensing 2,000 whistleblower claims annually, mainly in the OSHA and Sarbanes-Oxley arena. At the heart of these programs is the issue of whether or not an employer retaliated against a whistleblower.

For example, if an employee correctly brought to light a concern about safety, environmental hazards, or financial irregularities and then was fired, received a demotion, or had his or her pay cut, this is a clear example of retaliation that the law seeks to protect against.

However, it is not always crystal clear. I know this firsthand from my National Guard service of 31 years as a staff judge advocate to assist Guard members in reemployment rights and reducing discrimination and retaliation against Guard member service.

In the work of the investigators at OSHA to determine if action taken by management is retribution or if the employee simply is disgruntled, for example, there are two sides to every story, and each side has a right to be heard. The testimony we will hear today will highlight how these actions are reviewed and how a determination is made about the true motivation between the actions of employers and employees alike.

I look forward to hearing from our witnesses about this very important program.

Chairwoman WOOLSEY. Thank you, Congressman.

[The statement of Mr. Wilson follows:]

Prepared Statement of Hon. Joe Wilson, Ranking Minority Member, Subcommittee on Workforce Protections

Good afternoon. I'd like to thank Chairwoman Woolsey for convening this hearing and welcome our witnesses to the subcommittee. At the outset, I would also like to thank Chairwoman Woolsey for restoring some sense of fairness to these hearings with the witness ratio. I believe this hearing to explore the Occupational Safety and Health Administration's work will be very informative for our panel, and I look forward to your testimony on the whistleblower programs for which OSHA is responsible.

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we'll hear today will highlight how these actions are reviewed and how a determination is made about the true motivation behind the actions of employers and employees alike.

I look forward to hearing from our witnesses about this important program.

Chairwoman WOOLSEY. Without objection, all Members will have 14 days to submit additional materials or questions for the hearing record.

I would now like to introduce our very distinguished panel of witnesses that are here with us this afternoon. I will introduce you all in the order that you are seated and in the order that you will speak.

Jeffrey Wigand has a distinguished background, and his honors and activities are too numerous to name. Dr. Wigand may be best known for his courageous activities in exposing Big Tobacco. But in 1998, he founded Smoke-Free Kids, Inc., and has spent the better part of a decade speaking out on the dangers of tobacco consumption, especially for children.

Dr. Wigand received his B.A., master's and Ph.D. From the State University of New York at Buffalo and also received a master's in teaching from the University of Louisville. He also received honorary degrees from Worcester Polytech, the Medical Society of Nova Scotia, and Connecticut College.

John Simon is from Lake Villa, Illinois, and a former trucker. He also acted courageously in exposing his former employer's illegal transportation practices. Mr. Simon is a graduate of Gray Lakes High School in Illinois.

Richard Fairfax is the Director of Enforcement Programs at OSHA at the Department of Labor. He is a certified industrial hygienist and has been at OSHA for 30 years. Mr. Fairfax received his B.A. From California Polytech University and his masters from Humboldt State University.

Lloyd Chinn is a partner at Proskauer Rose in New York practicing in the areas of labor and employment law. Mr. Chinn received his B.S. From Georgetown University and his law degree from New York University.

Richard Moberly is an assistant professor and the Cline Research Chair at the University of Nebraska College of Law where he teaches employment law and evidence. Professor Moberly is the author of a study on OSHA's handling of whistleblowers' claims under the Sarbanes-Oxley Act. He received his B.A. from Emory University and his law degree from Harvard Law School.

Tom Devine is the legislative director of the Government Accountability Project, a leading organization representing the rights of whistleblowers. Mr. Devine has written extensively about whistleblower laws and has worked with whistleblowers for over two decades. Mr. Devine received a B.A. From Georgetown University, and his law degree from Antioch School of Law.

Now, many of you don't know how we do this, so just before you get started, I want to talk to you about the lights and how this all works. We have a lighting system. They are in front of you right there. We have a 5-minute rule, and everyone, including the Members up here, are limited to 5 minutes of presentation and questioning.

The green light is illuminated when you begin to speak. When you see the yellow light, it means you have 1 minute remaining. When you see the red light, it means your time has expired and you need to conclude your testimony. We will not cut you off in midsentence, midthought, but we may cut you off in the middle of a long paragraph.

Please be certain as you testify to turn on the speaker on the microphone and speak into it, because it is right in front of you, and we will be acting weird up here if you haven't. So we want to hear you.

Now we will hear from our first witness Dr. Wigand.

STATEMENT OF JEFFREY WIGAND

Mr. WIGAND. Good afternoon. First of all, I have to say it is unusual for me to read something. I generally speak extemporaneously, so in order to maintain the 5-minute time limit, I am going to read my testimony.

Chairman Woolsey and distinguished members of the subcommittee, thank you for providing me with the opportunity to appear before you as you seek to strengthen the protections of whistleblowers. I am here today at your invitation to describe a rather extreme version of what can happen to a worker in the private sector who tries to serve public interests and his moral conscience, but instead runs afoul of corporate retaliation of the most vicious and pervasive kind.

My name is Jeffrey Wigand, and you may know me as the central character of the Hollywood movie The Insider, which documented for millions of American viewers the unremitting, inhumane, cruel and soul-wrenching daily pressure that can be brought to bear against a whistleblower and whose truth-telling comes at the highest possible personal price.

Nineteen years ago I began living the American dream. After a quarter of a century as a senior executive at medical and health care industry companies, working mostly for Fortune 50 firms, I secured a senior executive position, and I regarded as the apex of my ambitions the post of a research executive vice president of one of the world's largest tobacco companies.

My employer, Brown & Williamson, recruited me with the promise that they intended to use my scientific expertise in biochemistry to engineer a so-called safer cigarette. Naively, I believed the cover story and accepted an executive job, which at one point paid over $300,000 in salary and afforded a first-class lifestyle in Kentucky for me, my wife, and two young children.

However, I soon came to discover that my trust had been badly misplaced, and B&W did not want to have a safer cigarette. Instead, I lived in a bizarre upside-down world where lawyers interpreted science, and where the first and foremost corporate goal, besides increasing profits, was to hide any scientific or clinical evidence linking tobacco to any of its negative pervasive effects, and in a longstanding shadow corporate world nicotine was not addictive, cigarettes were not health-threatening, black was not white, and I was living a lie.

As my long written testimony outlines, when the company's top executives began deliberately editing minutes of scientific meet-

ings, I had reached a personal crossroads and a moment of truth. I privately started investigating health issues relating to the use of tobacco products, the role of cigarette design and nicotine delivery, and the insidious marketing of tobacco to children. The more I learned, the more I had difficulty looking at myself in the mirror every morning and answering the questions of my two young children.

Nevertheless, despite my growing disillusionment I was living handsomely, and initially I did not want to disrupt the comfortable lifestyle I had built for my family. Finally, however, a confrontation with the ranking B&W executive of the continued use of Coumarin, an additive in pipe tobacco, brought all my longstanding internal conflicts to a head. I wrote an internal memo about the toxicological data concerning Coumarin, the pressing need for the company to assume its moral responsibility by removing a dangerous chemical agent from its products.

When the ranking executive with whom I had clashed over this issue was promoted to chief executive officer and chairman of the company, I was summarily fired.

Alone in a State where no lawyer wanted to challenge the political and economic muscle of B&W, I had to negotiate my own severance package; I had to retain the health care benefits due to the serious health problems experienced by one of my little girls.

But it wasn't the end of the story, not by a long shot. In 1993, B&W sued me for allegedly violating my secrecy agreement by telling another employee the amount of my salary and severance package. The company immediately dropped my health care coverage, stopped paying my severance. They would reinstate my health coverage I so desperately needed only if I agreed to a Draconian, all-encompassing secrecy agreement which would preclude me from ever revealing anything that I knew, learned or observed about the inner workings of the company. They used my daughter's health against me. But I reluctantly signed the agreement.

About that time I received a Federal subpoena from the Department of Justice to relate to them what I knew about the so-called fire safe cigarettes or reduced ignition propensity cigarettes that have a value of saving between 800 and 1,000 lives a year.

Shortly after that the Food and Drug Administration began a historic probe into the tobacco industry. Congress, too, under the leadership of Mr. Waxman, now Senator Wyden and the late Congressman Mike Synar also started their own congressional investigations. I informed congressional staff who contacted me that I could only respond to them and provide them advice under subpoena.

What came next changed the course of my life and that of my family. Two anonymous phone calls were received after I reported my congressional contacts to B&W, as I was required to do by the contract I just executed. My daughters were threatened with physical harm if I cooperated with any outside inquiry.

Increasingly isolated professionally, frightened as anyone could be, I contacted the local FBI office, which installed a trap and trace line on my phone, and despite the attempted intimidation, I became disgusted after watching the April 1994 testimony of the seven tobacco executives who all testified that nicotine wasn't ad-

dictive and that smoking was no more dangerous than eating Twinkies, in the words of one of the smug tobacco CEOs. I realized the issue was at a critical juncture and that I had to act.

After being contacted by the FDA official, I secretly visited their headquarters in Rockville, Maryland, going through unmarked entrances. My code name for these visits was "Research." Only a small handful of people including the then Commissioner David Kessler were aware of my presence.

I also consulted secretly with ABC News on a much-publicized hour-long special over the role of nicotine and cigarette manufacturers, over which Phillip Morris later sued the network. ABC caved and settled the suit. And finally in August of 1995, I agreed to an interview with CBS 60 Minutes to reveal what I knew and understood about the workings of the tobacco industry.

As is common knowledge now, the transcript of that interview was leaked in advance of its broadcast. B&W filed suit against me for alleged theft of trade secrets in violation of my confidentiality agreement. I started routinely receiving threats, and CBS provided armed security, opening my mail, starting my car in the morning, and escorting my daughters to school. I was living the unenviable lifestyle of a federally protected witness, but the government was not helping safeguard my life or that of my family.

Later when I was subpoenaed to give State-related depositions in the class action brought by the State of Mississippi, B&W pushed the Kentucky court to order me to be held in contempt if I testified in another State. I testified anyway. When I returned to Kentucky, I was met by Federal marshals, and thankfully that night I did not end up in jail.

When will this Kafkaesque nightmare end, I kept asking myself. My health was affected, my moods darkened. Meanwhile, the horrendously long years were taking a toll on both me and my family. I had become a professional pariah. My once distinguished scientific and corporate career lay in ruins. I was teaching high school at one-tenth of what I earned at B&W in previous years.

The constant pressure and ostracism was too great and too much for my wife, who divorced me after 10 years,

remarried, and took my daughters to live in another State. Nevertheless, B&W continued its lawsuit against me——

Chairwoman WOOLSEY. Dr. Wigand, I am going to give you half a minute. You have got to sum it up. Nobody else gets that kind of time.

Mr. WIGAND. I was intent on reading and not paying attention. I am sorry. Please excuse me.

During the 4-year ordeal I was not protected by any whistleblower statute, and I had no recourse except the truth. You are in a position to change that situation, which is from one form or another for literally hundreds of corporate and Federal whistleblowers around the country, many who have gone through the hellish life-changing experience like mine. Many of them have been ruined professionally, emotionally or financially. Please change this gaping hole in the whistleblower laws.

Thank you for your attention. I am pleased to answer any questions you might have, and please excuse my overuse of time.

[The statement of Mr. Wigand follows:]

Prepared Statement of Dr. Jeffrey Wigand

Thank you for giving me this opportunity to testify before this Subcommittee on my experience with breaking ranks with the tobacco industry—and more specifically with my former employer Brown & Williamson (B&W). I speak as an insider who spent more than four years as a high level senior executive in the industry and as one who has seen the inner most secrets of the industry. In this testimony, I provide a detailed chronology the events that led up to my decision to come forward with what I knew. As you will see, the road was neither easy nor short, and the decision to come forward transpired after a considerable amount of time witnessing immoral and illegal actions. For me, the decision to come forward was not an immediate response—an "epiphany." Rather, the decision to come forward was a process. I do believe that if laws were put in place to protect persons who likewise decide to come forward, their road would be an easier, shorter one. And obviously, if we can make it quicker and easier for someone to come forward, then we can help to mitigate and forestall the harm caused by the wrongdoing.

I want to make very clear that I am able to be here today—not because I was protected by any whistleblower statute—but because of the tremendous courage of so many people. There is a debt of gratitude that I will never be able to repay: to my own daughters, to my students, to the lawyers who risked their reputations, assets and own personal safety for the search for truth and justice, and to all of those who held an unwavering belief in me and the truth.

Essentially, I was hired by B&W to manage the development of a safer cigarette. I came from the medical/health care industry, working for 25 years as a senior executive for such companies as Pfizer, Merck and Johnson & Johnson. I was accordingly steeped in the mindset of using science to search for the truth, to make products better and to improve the quality of life and to save lives. I found the position at B&W attractive because it enabled me to use my expertise to develop a "safer" cigarette, and hence to use my skills and experience to address a product that, when used as intended, kills. Thus the consequences of my research were profound. The position at B&W was also attractive to me because my wife and two young daughters, ages 2 and 2 months, had family in Louisville and we felt we could have a good life there.

I accepted B&W's offer in November 1988. I began working for B&W in January 1989, as its Vice-President of Research and Development in its corporate headquarter offices in Louisville, Kentucky. At this time, B&W was a subsidiary of BATUS, the US holding company but, for all intents and purposes, a direct subsidiary of BAT Industries, formerly British-American Tobacco Company, the second largest tobacco company in the world. At B&W, I focused on learning all aspects of tobacco science and chemistry and directed the development of a product, codenamed "Airbus" that was a non-traditional nicotine-delivery device that could cause less disease.

My first discomforting experience with B&W was early on. As part of my corporate orientation, I was sent to one of B&W's outside corporate counsels, Shook, Hardy & Bacon, located in Kansas City, Missouri. For 3 days, I was told that the research from numerous Surgeon General Reports and other eminent public health scientific publications on the human hazards of tobacco was based on flawed science, and that there were no studies linking tobacco use to negative health consequences. The attorneys at Shook, Hardy & Bacon also argued that nicotine was not addictive, and therefore that tobacco use was an autonomous act. This was the first time in my career that I had lawyers interpret the science for me. In fact, during my initial hiring interviews with B&W's executives, they unequivocally expressed that nicotine was highly addictive and that tobacco use caused a myriad of debilitating and fatal diseases. Indeed, it was at these interviews where I first heard the mantra "we are in the nicotine delivery business and tar is the negative baggage." However, the lawyers were asking me to effectively ignore these comments, not to mention the scientific research that is replete with findings about the adverse health consequences caused by tobacco. Although I returned to corporate headquarters after this part of my orientation confused, I was not deterred from developing a safer product.

In September of 1989, I was part of a Research Policy Group meeting held in Vancouver, British Columbia, where all the high level senior managers of research and development from BAT and BAT-affiliated companies had gathered to develop strategic research priorities and tactical programs. Over the course of several days, we discussed how to make a safer product, how to test a safer product, how to address the passive smoke issue, the feasibility of a reduced ignition propensity or "fire safe" cigarette, and many other scientific topics. We all knew and articulated that nicotine was addictive and that tobacco use was responsible for a myriad of adverse

health consequences. We also expressed the belief that, although we might be able to develop a "safer" product, we could never deliver one that was completely unsafe. The meeting generated twelve pages of detailed minutes memorializing the summary of scientific discussions, as well as follow-up programs to achieve key projects.

I circulated a copy of the meeting minutes to my immediate supervisor, T. Sandefeur, Jr., the COO/President as a "FYI." When the minutes of the Vancouver meeting reached the other senior executives of the company, they were clearly distressed. Then, in a move that shocked me, Thomas Sandefeur, with the agreement of the Chairman/CEO Ray Pritchard and General Counsel Mick McGraw, ordered in-house product liability counsel, J. Kendrick Wells, III to rewrite the minutes, even though he had not attended the meeting. Wells completely altered the minutes removing any reference to the discussions that had taken place and included only an abbreviated follow-up program. He reduced 12 pages of meeting minutes into 2 and one half pages of vanilla. The intent of attorney Wells was to destroy any content in the document that would aid an adversary in litigation and undermine the five decades of legal, technical and PR obfuscation.

In January 1990, the Chairman of BAT, Sir Patrick Sheehy, summoned all the scientists who had been at the Vancouver meeting, along with the product litigation attorneys from each of the companies, to a meeting in New York. At that meeting, we were informed by the BAT Solicitor General, Stuart Chalfen and attorney Nick Cannar, that a lawyer would be placed at every sequence of scientific communication and research. This meant that any communications, discussions, reports or notes would be subject to attorney review prior to becoming a permanent document with limited distribution. An elaborate system of mandated lawyer vetting, sequestering and altering scientific documents was instituted as a result of this meeting. In addition, all safer-cigarette work was transferred and all further work on that project was transferred overseas to the Southampton R&D facility in the UK.

As I continued to work at B&W, I realized that the company was not interested in making safer products, but only in new finding new adolescent consumers and maximizing profits. Disturbingly, I learned that the culture of the tobacco industry was one in which great importance was placed on keeping the public ignorant about the addictive and lethal nature of tobacco products. The industry most wanted to protect its fundamental legal and PR platform that tobacco use was not addictive, that tobacco use was a free, consumer choice, and that tobacco use was not the source of the scientifically linked morbidity and mortality.

So, even after only a year at B&W, I was in a quandary as to what to do with what I knew. But I stayed for three more years. Indeed, I did not make the decision to come forward even after witnessing how lawyers helped B&W to obfuscate the truth to the public. Why? I had a wife, two young daughters, one of whom had a serious medical condition requiring good medical insurance coverage, and a mortgage. And there were perks with my $300,000 a year job, including a car, and all of the usual amenities of a successful executive's position. I was also keenly aware by now of how the industry intimidated defectors, paying legions of lawyers to attack their credibility in an effort to stop their behavior. I wanted no part of that and wanted to protect my family. My intent was to transition back to the healthcare industry for I had realized I had made a major error in my career. The truth is, had I been assured that my family and I would be adequately protected, I probably would have come forward at this point. But as you will learn, my decision to come forward came much later, after witnessing more disturbing events, and experiencing further turmoil.

So, I continued to work at B&W, knowing full well about the fraud that they were perpetrating on the public. I began to investigate health issues relating to the use of tobacco products, including the role played by additives and cigarette design on nicotine deliveries, the premature deaths caused by tobacco use, and the marketing of tobacco to children. The more I learned, the more I had difficulty looking in the mirror. But there was no obvious outlet to which I could turn, I had a duty to my family. All things considered, I decided that it was best not to rock the boat.

But something significant happened in August 1992. I received a draft copy of a National Toxicology Program (NTP) report on Coumarin. The report classified Coumarin as a carcinogen.

In 1954, the FDA banned the use and importation of Coumarin and deleted it from the GRAS list because of its demonstrated animal toxicity. Although the industry finally removed Coumarin during the 1986-1988 time period, they have a long history of using Coumarin in their products. Importantly, when the industry removed Coumarin during the 1986-1988 time period, they only removed this ingredient from cigarettes. Coumarin, in other words, was still used in other tobacco products such as pipe tobacco. Why did the industry continue to use Coumarin in other products, even though they removed it from cigarettes? The answer is simple.

They did not have to. An FDA regulation requires tobacco companies to disclose a list of all additives used in the manufacturing of cigarettes, and cigarettes alone, to the Department of Health and Human Services (US Code: Title 15, Chapter 36, 1965, Cigarette Labeling and Advertising Act). Thus, tobacco companies do not have to disclose additives in pipe tobacco, chew or other any other form. So, B&W continued to use Coumarin in pipe tobacco. Their rationale was simple but disturbing. They reasoned that since the law did not require the disclosure of ingredients in non-cigarette products, then they could use any ingredient in these products, including known carcinogens, with impunity. They felt no moral obligation to make their product "safer" by removing known carcinogens.

After the 1992 NTP report came out, I went to my supervisor, Mr. Sandefeur, the COO/President of B&W. I had been to Mr. Sandefuer many times before on issues of health and safety. We had many disagreements including the use of the company's mantra "hook 'em young, hook 'em for life," and the impropriety of lawyer interference in science, among many others. When I urged Mr. Sandefeur that Coumarin should be removed from all of B&W's products, he instructed me to go back to the lab and find a substitute for Coumarin. But he also told me that despite evidence that Courmarin was a carcinogen, it would not be removed from pipe tobacco because it would affect the taste of the product and negatively impact sales and profits.

It was at this time that I constructed a memorandum that included the NTP's findings, a recital of the 1954 FDA ruling, and the validated toxicological data. Also included in the memo, was the argument that the company was bound by a moral imperative that, when possible and feasible, products should be designed so that their potential to create harm is mitigated. This final issue caused me to be fired in March of 1993 when Mr. Sandefuer was promoted to Chairman/CEO of the company.

When I was terminated, being a "whistleblower" was the last thing on my mind. All I wanted was to forget my experiences at B&W. Albeit, I expected the company to adhere to the termination provisions in my employment agreement, which included severance benefits, continued health care benefits and retirement benefits among other provisions. Much to my dismay, the company did not honor the totality of the agreement. Consequently, I searched for a lawyer in the state of Kentucky to represent me in a contract law matter but could not find one who would oppose B&W. So I was forced to negotiate my own severance package. I ended up with two years of salary and health coverage. The company also voluntarily agreed to void the non-compete clause in my 1988 employment contract, provide out-placement services, and eliminate any off-set against future earnings.

Then in September 1993, B&W sued me in a Kentucky court for allegedly violating the boiler-plate provisions of the secrecy provision of my employment agreement by telling another employee my annual salary. With the filing of the lawsuit, the company immediately stopped my health coverage and severance pay. B&W agreed to drop the law suit and reinstate my benefits and salary if and only if I agreed to a new, draconian secrecy agreement without any further consideration. This new agreement prevented me from discussing anything I knew about the internal workings of the company without the presence of a B&W lawyer or without the prior vetting of my statements by some such lawyer. I felt I had no choice and signed the agreement as my daughter's health care was at risk.

The decision to sign the new agreement was made at the same time I received a DOJ CID (Civil Investigative Demand)—a kind of federal subpoena—from the Justice Department on the issue of fire-safe cigarettes. Pursuant to the new secrecy agreement, I provided testimony in the CID in the presence of a B&W lawyer from the firm of Kirkland and Ellis.

In January 1994, I began working with CBS/60 Minutes on a "fire safe cigarette" investigative report. Mr. Lowell Bergman, a producer for CBS, received a box of some 2400 R&D documents from an anonymous source. These documents encompassed the period of 1954 through June 1976 on the "reduced ignition propensity physics of a natural incendiary device." Mr. Bergman asked me to interpret the substance of these documents for 60 Minutes. I agreed. I was paid $ 12,000.00 for this work that spanned two weeks of sorting, ordering and interpreting the R&D documents. The documents demonstrated that, in June 1976, Philip Morris (PM) had developed and tested in a CPT (Consumer Product Test) at a 95 % confidence level, a reduced ignition propensity cigarette equal in taste, cost, and aesthetics of their leading brand, Marlboro. PM called the project "Hamlet * * * to burn or not to burn."

Disturbingly, but not surprisingly, PM decided against manufacturing these "fire safe" cigarettes. In fact, because there was no law mandating them to manufacture these "safer" cigarettes, PM decided to shelve project Hamlet. This decision to shelve

the project was made notwithstanding the fact that a "fire safe" cigarette could prevent approximately 800-1,000 deaths each year, as well as the economic losses due to cigarette-created fires (cigarettes are the single largest contributor to fire losses). Clearly, the morally responsible course of action would have been to manufacture this product. But PM refrained from this course of action because there was do legal compulsion to do. This was deja vu. PM's tactic was the same one used by my former employer, B&W, when confronted with the decision not to use Coumarin. Just as PM did not make their cigarettes "fire safe" because they did not have to, B&W did not remove Coumarin from its pipe tobacco because it did not have to. Each company felt no moral imperative to reduce harm.

As I read these documents, I became aware of the culture of deception within the industry. I recognized names on these documents as persons that I had heard speak when I was attending scientific meetings in 1989-1991. At these meetings, these individuals were adamant that it was not feasible to make fire safe cigarettes, and that the responsibility for cigarette-caused fires rests with the furniture, clothing and fabric industries. The CBS/60 Minutes aired the program in April 1995 entitled "Up in Smoke." I continued to keep my story to myself.

In February 1994, the FDA began to explore the establishment of a regulatory authority over tobacco products. In addition, the U.S. Congress, under the leadership of Representatives Henry Waxman, Mike Synar (now deceased) and Ron Wyden (now a Senator), initiated its own tobacco inquiry. I was contacted by numerous Congressional staff members seeking my help in this investigation. Ultimately, they wanted me to testify. Because of my secrecy agreement, I told the Congressional staff that I would need to be served with a subpoena. Nevertheless, I began to help Congress to understand tobacco science. After numerous contacts with members of the Congress, I contacted B&W to apprise them of these conversations, pursuant to the terms of the new contract that I recently signed to re-instate my severance package.

What came next changed the course of all future actions and changed my family. Two anonymous phone calls were received after I reported the Congressional contacts to the Company that threatened the safety of my young daughters with physical harm if I cooperated with anyone about the internal workings of B & W. As a result, I went to the local FBI who installed a "trap and trace" on my phone line. Two threats made to my phone were isolated, and from that day forward, I never made further contact with the company, except in a Court of Law.

In April 1994, I watched the 7 heads of major U.S. tobacco companies, including Mr. Sandfeur, testify before Congress under oath that nicotine was not addictive and smoking was no more dangerous than eating Twinkies. This was really the "last straw" as they say. I realized that if I remained silent, I was a bystander to harm and I was no different from the industry executives. It was at this time that I felt I had to take action. So, in May 1994, I began to secretly share my knowledge with the FDA. Because I was concerned of a repeat retaliation and was convinced that the tobacco industry would try to derail any FDA investigation, I insisted that my cooperation with the FDA would need to be confidential and secret, limited in number of participants and directly with the then Commissioner, Dr. David Kessler. I traveled to the FDA offices in Rockville, Maryland under assumed names and going through unmarked entrances. My code name was "Research." I taught the FDA all aspects of cigarette design, tobacco chemistry, high-nicotine genetically engineered tobacco (Y-1) and numerous other subjects. I served as a navigator to documents the FDA had acquired. For some time, I "covertly" disclosed what I knew. However, two subsequent events transpired that compelled me to publicly disclose what I knew. Both of these events put me in contact with more internal documents which, once again, revealed a pattern of immoral and illegal actions by the industry.

In early 1995, I became a non-testifying technical expert for ABC, which was being sued for libel by Phillip Morris ($10 Billion). ABC, on its newsmagazine program, Day One, aired a segment that stated that nicotine was addictive and that the industry "spiked" nicotine in its tobacco products in order to maintain an adequate delivery of addictive nicotine. I was one of the limited experts who were allowed to see all the PM produced documents in the discovery process. I am still bound by a TRO from this action. The lawsuit was settled in August, 1995, with ABC's unusual apology to PM, just a month after Disney announced it was acquiring ABC/Capital Cities.

In June 1995, a professor of cardiology at the University of California San Francisco, Dr. Stanton Glantz, contacted me. Dr. Glantz was a recipient of a cache of tobacco documents smuggled out of B&W by Merrill Williams, a paralegal filing clerk who had worked at a highly secure section of the R&D facility during the time that I was employed by B&W. Dr. Glantz was publishing 7 scientific papers on the contents of the documents in the peer reviewed JAMA publication. He shared with

me the documents that spanned 1950 through the 1980s for technical review and authentication purposes. They mirrored my exact experiences while I was at B&W and provided me with the first opportunity to see reports and documents that I had never seen while at B&W although I had asked to do so repeatedly. There it was in black and white: how the tobacco industry knew that tobacco was lethal but totally disregarded public health and safety; how it had used additives to boost nicotine's addictiveness; how lawyers controlled the flow of technical documents and how they manipulated the science and hid the truth.

After these experiences I decided to rid my conscience of the burden that I carried and decided to share the internal workings of B&W with the American public via CBS/60 Minutes and reset my moral compass. So, on August 5, 1995, my family I and agreed to an interview with 60 Minutes at CBS. We agreed that I would maintain custody and control of the taped interview until I had arranged for competent legal counsel, had my affairs in order until they arranged for physical security for my family, upon the airing of the show.

However, CBS began to question whether my interview should be aired. Somehow, B&W found out about the interview. In October, someone with access to my interview transcript leaked it to the media. After learning about the interview, B&W threatened to sue CBS for billions, under the legal principle of "tortuous interference," if CBS decided to air the interview. During this time, Lawrence and Robert Tisch were the principal owners of CBS via Loews Corporation, which also owned Lorillard Tobacco Company. The Chairman at Lorillard was Andrew Tisch, the son of Lawrence Tisch. Tisch the junior was one of the seven CEOs who had testified before Congress in 1994. He was also under investigation by the DOJ for perjury at the April 1994 Congressional hearings. To further complicate matters, Lorillard was conducting a multi-million dollar product transfer from B&W. Additionally, Westinghouse tendered an offer to acquire CBS.

The interview was cancelled in October 1995, and the retaliation from B&W began shortly thereafter.

B & W filed suit against me in Kentucky for theft of trade secrets for violating my confidentiality agreement. I started receiving threats and armed security was provided. A security detail lived with us every minute—opening the daily mail, starting the car in the morning, escorting my daughters to school and me to work. Ultimately, the school where I was teaching was forced to place a sheriff's deputy at my classroom door due to recurrent daily threats.

In November 1995, I was served with my second CID subpoena from the U.S. Department of Justice, and I was also subpoenaed by the State of Mississippi to testify in the State's civil suit against the tobacco industry. When I traveled to Mississippi for depositions in both hearings, I stayed with my attorney, Dickie Scruggs. His home had to be swept for electronic eavesdropping devices and armed Mississippi State Police patrolled the home all night.

B&W continued its campaign of legal intimidation to stop me from giving the Mississippi deposition, by going to both the Mississippi Supreme Court and Kentucky District Court to stop the testimony. The Mississippi Supreme Court allowed the deposition to go forward. The four hour deposition was laden with threats, and the Mississippi Court ordered it to be sealed. In contrast, the Kentucky court ordered me to be held in contempt if I testified. I testified anyway. When I returned to Kentucky after giving my depositions, I was met by Federal Marshals and thankfully did not have to go to jail. I went back to teaching.

In January 1996, my sealed Mississippi deposition found its way to the Wall Street Journal, which despite a threatened lawsuit by B&W, published the deposition on its front page and put it on its internet site. In addition, B&W, using private investigators, a prominent publicist, and some of the largest law firms spent millions to smear my reputation with a 500 page dossier marketed to all the major media outlets. The local Louisville paper published these smears, and despite continued security, I still managed to receive death threats with a live Israeli armor piercing bullet that was placed in my mail box in January 1996 with another threat directed at my daughters. The pressure was too much for my wife who notified me she would be filing for divorce after 10 years of marriage.

Meanwhile, B&W continued its lawsuit against me in the Kentucky court. Legions of the company's lawyers deposed me for 11 days, and the local Kentucky Court threatened to hold my attorneys in contempt for protecting my rights.

B&W's lawsuit against me finally ended on June 20, 1997. Thirty nine state Attorneys General sued Big Tobacco, and were in the final stages of $368 billion settlement with the industry. The Attorneys General threatened to walk away from settlement discussions and sue in each state unless B&W dropped their suit against me. So, B&W reluctantly dropped their lawsuit against me at the eleventh hour. Since that date, I have been free to speak the truth about the hazards of tobacco

to children in a classroom setting, to governmental officials, to Ministers of Health throughout the world addressing the "denormalization" of tobacco, and to agencies such as the WHO and CDC. I have also testified in select tobacco litigation cases such as the 1998 DOJ RICO case, the Dutch litigation on additive regulations and various state tort cases.

However, even though B&W promised to drop their suit against me as a condition of the Master Settlement Agreement, I continue to suffer the repercussions of my decision. For example, when I became a public figure for the coordinated move to make Charleston, SC smoke-free, my car and front door of my condo were marked with a black indelible marker with slurs and threats. When I testified against the legal misdeeds of the Kansas City law firm Shook, Hardy and Bacon, a member of the firm used "pretexting" while I was a visiting scholar in ethics at Auburn University seeking transcripts and information about my lectures to the students after I testified under oath about how Shook et. al. committed a fraud on the public. And although B&W agreed to give me a positive performance evaluation when I was terminated, it was very difficult for me to earn gainful employment after I decided to speak to CBS 60 Minutes. This was the first time in my career that I had difficulty finding a job.

During this four-year ordeal, I was not protected by any whistleblower statute and had no recourse against the Company, except for the truth. And as you have learned, my decision to come forward did not happen at the instant I witnessed wrongdoing, but rather was the result of a long and painful process. This process began with experiencing how corporate attorneys vetted and destroyed documents, and with witnessing how a corporate executive refused to remove a known carcinogen from a product merely because doing so would "impact sales." Yet, even though these two events should have compelled me to speak out, they did not. I endured further discomfort, realizing that I had been lied to as I read the company's documents, and witnessing my former boss lie under oath to Congress. To be sure, I spoke out when I did, because, at this point, I had to. Quite literally, I could no longer look in the mirror. But I do think that had there been protection for me and my family, my decision would have come sooner than it did. I have delineated in this testimony, my concern for my family and my fear of retaliation were the principal driving forces of why my decision to come forward was "delayed."

This is why the Paul Revere Freedom to Warn Act is needed. The Act would provide potential whistleblowers with a psychologically comforting counterweight to the fear of retaliation that naturally accompanies the decision to come forward.

Thank you for allowing me to testify today.

Chairwoman WOOLSEY. Mr. Simon. Thank you.

STATEMENT OF JOHN SIMON

Mr. SIMON. Hello. Good afternoon. My name is John Simon. I am a single father, a homeowner, and I live in Illinois. I began working as a commercial truck driver in 1986. In November of 2004, I was hired to drive for a fuel-hauling company called Sancken Trucking. I was to haul jet fuel to four States and regional, national and international airports.

My employer told me that I should not keep a daily driver's log the DOT required. I was supposed to keep such a log to keep myself from getting in trouble regarding my on-duty time, my break time.

I told my employer, Sancken Trucking, that it was wrong to keep me from filling out the DOT log. I could not get them to change their company policy. I called the Federal Motor Carrier Safety Administration in Springfield, Illinois. I was told that if I did not fill out these documents properly, that I would be held responsible.

Sancken still refused to change their policy. I was told I needed to do things the way they wanted it done, how they wanted it done, and when they wanted it done. A few weeks later I filed a written complaint with FMCSA and with OSHA after being demoted to a 40 percent less-pay job, and I was told by my boss that I was going

to be put in a position that was the most dangerous job in the company. In January 2005 I was injured at work, received workers' compensation benefits. I was off work for about 6 weeks.

In March 2005, the FMCSA audited my employer for compliance with DOT safety regulations. I tried to return to work when my doctor cleared me to return after my injuries healed. I reported back to work just as the DOT audit of my employer was being completed. I was fired the next day.

On April 8th I filed a complaint with OSHA because I believe I was fired for filing complaints with FMCSA and OSHA. OSHA dismissed my claim, and about 2 months later I hired an attorney who requested a hearing before an administrative law judge from the Department of Labor.

A hearing took place before Judge Leland of the Department of Labor in September 2005. On January 11th, 2006, Judge Leland issued a recommended order ordering me back pay, other damages and attorneys' fees. He also ordered Sancken Trucking to immediately reinstate me. The law requires that the reinstatement is immediate, even if an appeal is taken to the Department of Labor Administrative Review Board.

I informed Sancken Trucking that I received the order of reinstatement to my previous position at my previous rate of pay. I tried to return to work. They refused my reinstatement. Instead, they told me that I was going—I am sorry, I skipped ahead. I am a little nervous, if you can tell.

They refused to reinstate me; instead told me I was going to be treated like a new employee at less pay and no benefits, and my schedule was going to be changed, in violation of Judge Leland's order.

My attorney asked the Office of the Solicitor of Labor to bring a civil suit to enforce Judge Leland's order reinstating me. On May 24th, 2006, the Solicitor's Office filed a suit for an injunction forcing Sancken Trucking to reinstate me. During this process I was without health insurance benefits that I received when I was with Sancken.

On August 17th the judge issued an injunction order to order Sancken Trucking to comply with Judge Leland's order reinstating me to my former position at my former rate of pay. When I reported back to work, it appeared that Sancken Trucking was going to make it difficult as possible for me to work there.

I chose to leave the trucking industry. I was tired of fighting. I already had another employment position which now offered me health insurance.

The periods of unemployment since my discharge have imposed a terrible financial burden on me and my family. The periods when I was without health insurance, the long periods of unemployment, and loss of my job, the stress of the legal proceedings and waiting for the final decision for such a long time have caused me great emotional distress. I was recently released from my last employment position because of my experience with Sancken Trucking. My boss told me that he could not get past what had happened between Sancken Trucking and I, so he had to let me go. I was the hardest worker he had ever met, never missed a day, but I still had to leave.

Chairwoman WOOLSEY. Would you sum up? Thank you.

Mr. SIMON. In the law there is a part, the immediate reinstatement needs to be enforced. It took 9 months for that to be enforced, and that is just too long.

[The statement of Mr. Simon follows:]

Prepared Statement of John Simon

My name is John Simon and I reside in Lake Villa, Illinois. I am a single father of a teenage daughter, a homeowner and a whistleblower. I began working as a commercial truck driver in 1986. In November of 2004, I was hired to drive for a small fuel hauler called Sancken Trucking.

My employer told me that I should not keep a daily driver's log. DOT regulations required that I keep such a log, recording my on-duty time, driving time and break time. I told my employer that it was wrong not to keep the DOT log. I notified the Federal Motor Carrier Safety Administration's office in Springfield, Illinois that my employer told me not to keep a daily log. A few weeks later I filed a written complaint with FMCSA and a written complaint with OSHA.

In January 2005, I was injured at work and received workers compensation benefits. I was off work for about 6 weeks. In March 2005, the FMCSA audited my employer for compliance with DOT Safety Regulations. I tried to return to work when my doctor cleared me to return after my injuries healed. I reported back to work just as the DOT audit of my employer was being completed. I was fired on the next day, March 11, 2005.

On April 8, 2005, I filed a complaint with OSHA because I believed I was fired for filing complaints with the FMCSA and OSHA. OSHA dismissed my claim about 2 months later. I hired an attorney who requested a hearing before an administrative law judge from the Department of Labor. A hearing took place before Judge Leland of the Department of Labor in September 2005.

On January 11, 2006, Judge Leland issued a recommended order awarding me back pay, other damages, and attorney fees. He also ordered Sancken Trucking to immediately reinstate me. The law requires that the reinstatement is immediate, even if an appeal is taken to the Department of Labor's Administrative Review Board.

On January 16, 2006, I informed Sancken Trucking that I had received the order reinstating me to previous position and my provision rate of pay and that I wanted to return to work. They refused to reinstate me. Instead they told me that I was going to be treated like a new employee with less pay and a different schedule in violation of Judge Leland's order that I be reinstated to my previous position.

My attorney asked the Office of the Solicitor of Labor to bring a civil suit to enforce Judge Leland's order reinstating me. On May 24 2006, the Solicitor's Office filed suit for an injunction forcing Sancken Trucking to reinstate me. During this process I was without the health insurance benefits I had received when I worked for Sancken Trucking. On August 17, 2006, a Judge issued an injunction ordering Sancken Trucking to comply with Judge Leland's order reinstating me to my former position at my former rate of pay. When I reported back to work it appeared that Sancken Trucking was going to make it as difficult as possible for me to work there. I chose to leave the trucking industry. I was tired of fighting. I already had other employment with health insurance but at lesser rate of pay than Sancken Trucking had promised me.

The periods of unemployment since my discharge have imposed a terrible financial burden on my family and me. The periods when I was without health insurance, the long periods of unemployment, the loss of my job, the stress of the legal process and waiting for a final decision for such long time have caused me great emotional distress.

I was recently released from my last employment position because of my past experiences with Sancken Trucking. My boss told me that he could not get past what had happened between Sancken Trucking and myself.

Although I won a recommended decision from the administrative law judge in January 2006, no final decision has yet been issued. The law requires the Secretary of Labor to issue a final decision in trucking whistleblower cases within 120 days after the hearing. I understand that the Department of Labor's Review Board is taking 2½ to 3 years to decide cases after the administrative law judges issue decisions in cases that have had full hearings. This means that I will have to wait another year or more for a final order. If Sancken Trucking appeals further, or if the ARB sends the case back to the ALJ, it may be 3 or years more before my case is over and I can put this behind me.

Employees who discharged for refusing to break the law or filing complaints cannot afford to wait for the Administrative Review Board to take two and a half to three years to decide cases. They have bills to pay and families to support. I lost thousands of dollars due to Sancken Trucking firing me. I have run up large balances on my credit cards and tapped all of my savings just to survive. I have recently spoken with several realtors because I may need to sell my home in order to avoid bankruptcy. I cannot explain to my 15-year old daughter why we may have to sell our home.

Had I known then what I know now, I may not have blown the whistle on my employer. I just don't know what I would have done. I may have just quit and moved on. But Sancken Trucking would likely still be violating the federal truck safety regulations.

The process needs to be reformed so that the Department of Labor's Review Board decides cases promptly and within the 120-day period prescribed in the law. Procedures need to put in place so that when an employer disobeys an order for reinstatement an enforcement action is brought promptly so the employee is guaranteed wages during the appeal process. Finally, employers who violate the truck driver whistleblower law should be subject to punitive damages, which will work as incentive for them to obey the law.

Chairwoman WOOLSEY. Mr. Fairfax.

STATEMENT OF RICHARD FAIRFAX, DIRECTOR OF ENFORCEMENT, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

Mr. FAIRFAX. Good afternoon, Chairman Woolsey, Ranking Member Wilson, distinguished members of the committee, ladies and gentlemen. Thank you for the opportunity to appear before you today to speak about OSHA's administration of the whistleblower provisions of 14 statutes, as you have mentioned previously.

My name is Richard Fairfax. I am the Director of Enforcement Programs for the Occupational Safety and Health Administration, and I have served with OSHA since 1978.

When the OSHA Act became law in 1970, OSHA's authority was limited to investigating whistleblower complaints under a single statute, that being the OSHA Act's whistleblower provision section 11(c).

Currently our program employs 72 full-time investigators, and we enforce the provisions of 14 separate statutes. Also under OSHA there are 26 State plan states that operate their own programs pursuant to section 18 of the OSHA Act. In these State plan states, the States enforce their equivalent of section 11(c) of the OSHA Act. Federal OSHA enforces the 13 other whistleblower statutes covered by Federal OSHA.

As a little history, in the 1980s responsibility for the Surface Transportation Act of 1982, the International Safe Container Act of 1977, and the Asbestos Hazard Emergency Response Act of 1986 were delegated to OSHA. In 1997, under a memorandum of understanding with the Department's Wage and Hour Division, six environmental statutes in the Energy Reorganization Act were delegated to OSHA also. In 2001, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century was added; and finally in 2002, both the Sarbanes-Oxley Act and the Pipeline Safety Improvement Act were added.

The general provisions of each statute are administered and enforced by the primary agency responsible for the substantive re-

quirements of those acts, while OSHA administers only the whistleblower provisions.

A whistleblower complaint under any of the 14 statutes is based on the belief by an employee that he or she has been retaliated against through an unfavorable personnel action for that employee's engagement in an activity protected by law. In some cases complainants can file under more than one statute.

To establish a violation for any of 14 statutes, our investigators must find four elements of a prima facie case have been met. The four elements include protected activity: OSHA must establish that the complainant engaged in an activity protected by the statute; employer knowledge: OSHA must establish that a person involved in a decision to take adverse action was aware of or suspected that the complainant was engaged in a protected activity; adverse action: OSHA must establish that the complainant suffered some form of adverse employment action initiated by that employer. Finally, OSHA must establish a causal link or nexus between the protected activity and the adverse action.

In investigating a whistleblower complaint under these statutes, the Department of Labor does not represent the complainant nor the respondent, but, in fact, is a neutral factfinder. Investigators must evaluate both the complainant's allegation and the respondent's nonretaliatory reason for the alleged adverse action.

Consequently, our investigations can become quite complicated and lengthy and time-consuming as multiple interviews are often required, and evidence along with statements must be verified at each step of the way. If an investigator is unable to conclude that all the elements of a prima facie allegation have been established by the preponderance of the evidence, the case is dismissed.

From the beginning of an investigation, the case can be settled at any time the parties are amenable to it. I will say OSHA makes every effort to settle these cases early on. An investigation consists of gathering the evidence by two principal means, interviewing the complainant and respondent as well as all their witnesses and then collecting whatever documentary evidence is offered.

Once the investigative report is written, the Secretary's findings can be issued. The statutes require that the Secretary through OSHA either dismiss the case, find reasonable cause that a violation of the relevant statute has occurred—we call this a merit case—or approve a settlement. If reasonable cause is found before issuing findings, the investigator where appropriate broaches the subject again of settlement with the respondent. If the respondent is agreeable, settlement negotiations are initiated.

In a merit case the remedies available vary according to the statute. Remedies not only involve relief for the individual who filed the complaint, but also address the impact of a violation on the entire workforce.

Both complainants and respondents have the right to seek an administrative hearing under 11 of the 14 statutes where these cases are heard before a Department of Labor administrative law judge. After a decision is issued by an administrative law judge, either or both parties may appeal it to the Administrative Review Board, which is authorized to issue final orders for the Secretary of Labor.

I would like to take just a few moments and talk about the program. Presently we average about 1,900 cases annually, and we only have 72 investigators. While the statutes I have described have prescribed time frames for completion of the investigation and the issuance of findings, we are seldom able to meet these time frames due the complexities of the investigative process.

Despite the increased number of statutes and increasing number of complaints filed under the new statutes, the total number of complaints filed annually remains relatively steady at between 1,800 and 2,100 cases. The outcomes of OSHA's investigations in fiscal year 2006 are consistent with the past. Sixty-five percent were dismissed, 14 percent were withdrawn, 2 percent were merit cases. Of those, 66 were settled by OSHA, 28 percent we had settlements approved, and 6 percent issued findings in favor of the complainant.

In conclusion, I hope that my testimony has shed some light on the complex process by which whistleblower complaints are resolved, and I appreciate the opportunity to speak for you and will answer any questions you have.

Chairwoman WOOLSEY. Thank you.

[The statement of Mr. Fairfax follows:]

STATEMENT OF RICHARD E. FAIRFAX, DIRECTOR
DIRECTORATE OF ENFORCEMENT PROGRAMS
OCCUPATIONAL SAFETY AND HEALTH ADMINSTRATION
U.S. DEPARTMENT OF LABOR
BEFORE THE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
COMMITTEE ON EDUCATION AND LABOR
UNITED STATES HOUSE OF REPRESENTATIVES

May 15, 2007

Good morning Chairwoman Woolsey, Ranking Member Wilson, distinguished Members of the Subcommittee, ladies and gentlemen. My name is Richard Fairfax. I have worked for OSHA for 29 years. Currently I am the Director of Enforcement Programs, for which I coordinate the agency's Federal inspection efforts. I have served in this position since 1998. Thank you for the opportunity to appear before you today to speak to you about OSHA's administration of the whistleblower provisions of fourteen statutes.

Organization and Responsibilities

When the Occupational Safety and Health Act became law in 1970, Section 11(c) complaints were investigated by Compliance Safety and Health Officers in the field. By 1974, it had become apparent that specialized skills were needed to conduct retaliation investigations, and in 1975, a central whistleblower investigation office was established. This office consisted of two supervisors and ten investigators, all located in the ten regional offices around the country. By 1980, there were over 70 investigators and supervisors. In 1981, the whistleblower program was further decentralized, with responsibility delegated to each of the ten Regional Administrators. Currently, the whistleblower program employs 72 full-time field investigators, nine supervisors, and one program manager in the field.

Under my direction, the Office of Investigative Assistance (OIA) develops policies and procedures for all 14 whistleblower statutes administered by OSHA, administers appeals of cases dismissed under 11(c), the Asbestos Hazard Emergency Response Act of 1986 (AHERA), and the International Safe Container Act (ISCA), develops and presents formal training for Federal and State field staff, and provides technical assistance and legal interpretations to field investigative staff. OIA employs six staff.

Twenty-three of the twenty-six states that operate state plans pursuant to Section 18 of the Occupational Safety and Health Act of 1970 provide whistleblower protection that is as effective as that under Section 11(c) of the Occupational Safety and Health Act of 1970. Section 18 provides that any state that desires to assume responsibility for development and enforcement of occupational safety and health standards may do so. To establish a state plan, a state must submit to the Secretary of Labor a state plan for the development of such standards and their enforcement. Private-sector employees in state plan states may file occupational safety and health retaliation complaints with either federal OSHA or the state or both. Complaints under any of the other thirteen whistleblower statutes administered by OSHA fall under the jurisdiction of Federal OSHA.

History of Delegation of Statutes to OSHA

In the 1980s and 1990s, because of the expertise of the OSHA retaliation investigators, whistleblower investigative and administrative responsibilities under the Surface Transportation Assistance Act of 1982 (STAA), ISCA, and AHERA were delegated to OSHA to administer. For similar reasons, in 1997, under an agreement with the Department's Wage & Hour Division, the enforcement of the whistleblower provisions of six environmental statutes and the nuclear safety statute, the Energy Reorganization Act (ERA), was delegated to OSHA.

In 2001, the enforcement of the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) was added, and in 2002, the enforcement of the whistleblower provisions of the Sarbanes-Oxley Act (SOX) and the Pipeline Safety Improvement Act of 2002 (PSIA) was also added.

The Fourteen Whistleblower Statutes Administered by OSHA

OSHA administers the whistleblower provisions of fourteen statutes. The general provisions of these statutes are administered and enforced by the primary agency. For example, OSHA enforcement officers investigate the safety or health complaints which could underlie a whistleblower complaint, the FAA investigates airline safety complaints, the Federal Motor Carrier Safety Administration investigates commercial motor carrier safety complaints, and the SEC investigates allegations of corporate fraud. (A chart containing the statutes and their coverage and filing and appeal deadlines is appended to this document.)

- Section 11(c) of the Occupational Safety & Health Act of 1970 (OSH Act), 29 USC §660(c), provides protection for employees who exercise a variety of rights guaranteed under the Act, such as filing a safety or health complaint with OSHA, participating in an inspection, etc. Covered employees have 30 days to file complaints.
- Section 211 of the Asbestos Hazard Emergency Response Act of 1986 (AHERA), 15 USC §2651, provides protection for individuals who report violations of environmental laws relating to asbestos in elementary and secondary school systems, whether public or non-profit private. Covered employees have 90 days to file complaints.
- Section 322 of the Clean Air Act, Amendments of 1977 (CAA), 42 USC §7622, provides protection for employees who report potential violations regarding air emissions from area, stationary, and mobile sources. Covered employees have 30 days to file complaints.
- Section 10 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 USC §9610, also known as the "Superfund" Act, provides protection for employees who report potential violations regarding clean up of uncontrolled or abandoned hazardous-waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment. Covered employees have 30 days to file complaints.
- Section 211 of the Energy Reorganization Act of 1974 (ERA), as amended, 42 USC §5851, provides protection for employees who report potential violations of the ERA or of the Atomic Energy Act of 1954. Covered employees have 180 days to file complaints.
- Section 507 of the Federal Water Pollution Control Act, Amendments of 1972 (FWPCA), 33 USC §1367, also called the Clean Water Act, provides protection for employees who report potential violations regarding discharges of pollutants into the waters of the United States. Covered employees have 30 days to file complaints.
- Section 7 of the International Safe Container Act of 1977 (ISCA), 46 USC §80507, provides protection for employees who report an unsafe intermodal cargo container. Covered employees

have 60 days to file complaints.

- Section 6 of the Pipeline Safety Improvement Act of 2002 (PSIA), 49 USC §60129, provides protection for employees who report violations of federal law regarding pipeline safety and security or who refuse to violate such provisions. Covered employees have 180 days to file complaints.
- Section 405 of the Surface Transportation Assistance Act of 1982 (STAA), 49 USC §31105, provides protections for drivers and other employees relating to the safety of commercial motor vehicles. Commercial motor vehicles are all vehicles designed to carry more than 10 passengers, including the driver; vehicles placarded for hazardous material; and freight trucks with a gross vehicle weight or gross vehicle weight rating of 10,001 or more pounds. Covered employees have 180 days to file complaints.
- Section 1450 of the Safe Drinking Water Act of 1974 (SDWA), 42 USC §300j-9(i), provides protection for employees who report potential violations regarding all waters actually or potentially designed for drinking use, whether from above ground or underground sources. Covered employees have 30 days to file complaints.
- Section 7001 of the Solid Waste Disposal Act of 1976 (SWDA), 42 USC §6971, also called the Resource Conservation and Recovery Act (RCRA), provides protection for employees who report potential violations regarding the disposal of solid and hazardous waste at active and future facilities, see CERCLA for abandoned or historical sites. Covered employees have 30 days to file complaints.
- Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), 18 USC §1514A, provides protection for employees who report potential violations of mail, wire, bank, or securities fraud, any Securities and Exchange Commission regulation, or any other federal law relating to fraud against shareholders. Covered employees have 90 days to file complaints.
- Section 23(a)(1-3) of the Toxic Substances Control Act (TSCA), 15 USC 2622, provides protection for employees who report potential violations regarding 75,000 industrial chemicals currently produced or imported into the United States. Covered employees have 30 days to file complaints.
- Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 USC §42121, provides protection for employees who report potential violations of air carrier safety. Covered employees have 90 days to file complaints.

Jurisdiction

Investigators must confirm that complaints fall under a whistleblower statute administered by OSHA. Investigators review every new case upon assignment to ensure the complaint was timely filed, that a *prima facie* allegation is present under one of the statutes, and that the case has been properly docketed and all parties notified. The investigator also checks on prior or current retaliation, safety and health, or other regulatory cases related to either the complainant or the employer. This enables the investigator to coordinate related investigations and obtain additional background information pertinent to the case at hand. If the complaint fails to meet any of the

elements of a *prima facie* allegation, or if coverage issues preclude the continuation of the investigation, the complaint must be dismissed, unless it is withdrawn.

The Elements of a Violation

Under the whistleblower statutes, employers are not permitted to retaliate against an employee for engaging in activities protected by statute. To prove a violation, each of the four elements of a *prima facie* allegation must be established. The elements are:

Protected Activity
It must be established that the complainant engaged in activity protected by the specific statute(s) under which the complaint was filed. Protected activity generally falls into four broad categories: providing information or reporting an alleged violation of the law to a government agency (e.g., OSHA, FMCSA, EPA, NRC, DOE, FAA, SEC, DOT), a supervisor (the employer), a union, health department, fire department, Congress, or the President; filing a complaint or instituting a proceeding provided for by law, for example, a formal occupational safety and health complaint to OSHA under Section 8(f); testifying in proceedings; and, under some of the statutes, refusing to perform an assigned task on the basis of a reasonable apprehension of death or serious injury or refusing to perform a task that is deemed illegal under the substantive statute.

Employer Knowledge
The investigation must show that a person involved in the decision to take the adverse action was aware, or suspected, that the complainant engaged in protected activity. For example, a respondent manager need not have specific knowledge that the complainant contacted a regulatory agency if the complainant's previous internal complaints would cause the respondent to suspect a regulatory action was initiated by the complainant.

Adverse Action
The evidence must demonstrate that the complainant suffered some form of *adverse employment action* initiated by the employer. Although the language of the statutes may differ, they frequently use the terms "discharge or otherwise discriminate." The phrase *adverse employment action* has been defined in the decisions of many courts, including the Supreme Court. This is an area of the law that is currently in flux, and investigators and supervisors regularly review decisions to keep up-to-date on case law. Examples of retaliatory employment actions include, but are not limited to, discharge, demotion, reprimand, harassment, lay-off, failure to hire or recall, failure to promote, blacklisting, transfer to a different job, change in duties or responsibilities, denial of overtime, reduction in pay, denial of benefits, and constructive discharge, wherein the employer *deliberately* creates working conditions that are so difficult or unpleasant that a reasonable person in the employee's situation would feel compelled to resign.

Nexus
A causal link—nexus—between the protected activity and the adverse action must be established. Nexus cannot always be demonstrated by direct evidence, such as animus (exhibited animosity)

toward the protected activity. It may also be shown by indirect or circumstantial evidence, such as the proximity in time between the protected activity and the adverse action or the disparate treatment of the complainant in comparison to other similarly situated employees.

Under ten of the statutes administered by OSHA, a complainant must establish by a preponderance of the evidence that the alleged adverse action was motivated by the alleged protected activity in order to establish that the law was violated. Under four of the statutes, a complainant must establish by a preponderance of the evidence that the alleged protected activity was a contributing factor to the alleged adverse action. Once a complainant establishes a prima facie case that his or her protected activity was either a motivating or contributing factor in the adverse action, the burden of production shifts to the respondent to articulate a non-retaliatory reason for the adverse action. If this is done, the burden then shifts back to the complainant to establish that the respondent's articulated reason was a pretext for discrimination or that the respondent's reason, while true, is only one of the reasons for its conduct, and that another reason was complainant's protected activity. To avoid liability in a "mixed motive" case, the respondent must demonstrate, depending on the statute, either by a preponderance of the evidence or by clear and convincing evidence, that it would have taken the same adverse action notwithstanding the complainant's protected activity.

Investigating Complaints

DOL investigators are not advocates for either the complainant or the respondent; rather, as neutral fact-finders, they must assess both the complainant's allegation and the respondent's non-retaliatory reason for the alleged adverse action. It is on this basis that relevant and sufficient evidence is identified and collected in order to reach the appropriate disposition of the case. If the complainant is unable to demonstrate by preponderance of the evidence the elements of a *prima facie* allegation, the case is dismissed.

Early Resolution

OSHA makes every effort to accommodate situations in which both parties seek resolution prior to the completion of the investigation. An early resolution is often beneficial to both parties, since potential losses are at their minimum when the complaint is first filed. Consequently, the investigator is encouraged to contact the respondent immediately after completing the evaluation interview if he or she believes an early resolution may be possible. Thereafter, at any point the investigator can explore how an appropriate settlement may be negotiated and the case concluded.

On-site Investigation

Personal interviews and collection of documentary evidence are conducted on-site whenever practicable. Generally, investigators personally interview all appropriate witnesses during a single site visit. The respondent's designated representative has the right to be present for all management interviews, but interviews of employees are to be conducted in private. In limited circumstances, testimony and evidence may be obtained by telephone, mail, or electronically.

Interviewing the Complainant
The investigator generally arranges to interview the complainant as soon as possible to obtain a statement detailing the complainant's allegations. In some circumstances, and at the request of the complainant, the investigator may meet with the complainant at the latter's home.

The complainant is asked to provide a list of witnesses and all documentation in his or her possession relevant to the case. The investigator also ascertains the restitution sought by the complainant and advises the complainant of his or her obligation to seek interim employment in order to mitigate any possible damages, and to maintain records of interim earnings.

Contact with the Respondent
Following receipt of OSHA's letter notifying the respondent of the complaint, the respondent may submit a written position statement, which may or may not include supporting evidence. In some instances, the material submitted may be sufficient to adequately document the company's official position. However, in most cases, the investigator needs to visit the respondent's worksite to interview witnesses, review records and obtain documentary evidence, or to further test the respondent's stated defense.

The investigator generally interviews all company officials who had direct involvement in the alleged protected activity or retaliation, and attempts to identify other persons (witnesses) at the employer's facility who may have knowledge of the situation. While at the respondent's establishment, the investigator makes every effort to obtain copies of, or at least review and document in a memorandum to file, all pertinent data and documentary evidence that the respondent offers and that the investigator determines is relevant to the case.

If necessary, subpoenas may be obtained for testimony or records when conducting an investigation under §11(c) or AHERA. The other whistleblower provisions do not authorize subpoenas. If the respondent fails to cooperate or refuses to respond, the investigator makes a determination based on the available evidence.

Analysis
After having gathered all relevant evidence available and resolved any discrepancies in testimony, the investigator evaluates the evidence and draws conclusions based on the evidence and the law, according to the requirements of the statute(s) under which the complaint was filed.

Upon completion of the field investigation and after discussion of a non-meritorious case with his or her supervisor, the investigator again contacts the complainant in order to provide him or her the opportunity to present any rebuttal or additional evidence the complainant deems to be relevant. If the complainant offers any new evidence or witnesses, the investigator then ascertains whether such information is relevant, and if so, what further investigation might be necessary prior to final closing of the case.

Documenting the Investigation
Investigators document any and all activities associated with the investigation of a case, developing a substantial case file that contains the original complaint; the respondent's response(s); all of the documentary evidence; memoranda to the file about every contact with any party or witness that is otherwise not documented, such as in a witness statement; all correspondence to or from the parties, other government agencies, or others; results of any research conducted; the Final Investigative Report; and a copy of the Secretary's Findings or other correspondence closing the case.

Issuance of Secretary's Findings and Orders, if Appropriate
Once the Final Investigative Report is written, the investigator forwards it, together with the case file, to the supervisor for review and concurrence, so that Secretary's Findings can be issued. This allows either dismissal of the case or a finding of a violation of the relevant statute. If there is a violation, the investigator, where appropriate, broaches the subject of settlement with the respondent. If the respondent is amenable, settlement negotiations may be initiated. The appropriate remedy in each individual case will already have been carefully explored and documented by the investigator.

Remedies
The remedies available and permitted vary according to statute, and are subject to legal interpretations and decisions. Remedies not only involve corrective actions for the individual who filed the complaint, but also address the impact of the violation on the entire work force. Thus, to prevent a chilling effect or to ensure that a similar violation does not recur, orders may include requirements for posting a notice of the whistleblower statute violation, management training, and informational speeches to workers and their representatives.

Full relief of the complainant's loss is generally sought during settlement negotiations, but compromises may be considered in appropriate cases to accomplish a mutually acceptable resolution of the matter. If settlement is reached, an agreement is signed and the case is closed. If it is not possible to reach an equitable settlement, OSHA issues to the respondent, in cases heard by DOL ALJs, Secretary's Findings and an Order, by way of which the complainant is made whole. In OSHA section 11(c), AHERA, and ISCA cases, OSHA notifies respondent of its determination of a violation. Relief in those cases is requested by a complaint filed by the Secretary in federal district court. Relief may encompass any or all of the following, and it is not necessarily limited to these:

- Reinstatement or preliminary reinstatement—depending on the statute under which the complaint was filed—to the same or equivalent job, including restoration of seniority and benefits that the complainant would have earned but for the retaliation.
- Wages lost due to the adverse action, offset by interim earnings.
- "Front pay," which encompasses future wage losses, calculated from the end-date of back-wages, and projected to an agreed-upon future date in cases where reinstatement is not feasible.
- Expungement of all warnings, reprimands, or derogatory references resulting from the protected activity that have been placed in the complainant's personnel file or other records.
- Respondent's agreement to provide a neutral reference to potential employers of the complainant.
- Posting of a notice to employees stating that the respondent agreed to comply with the relevant whistleblower statute and that the complainant has been awarded appropriate relief.
- Compensatory damages, including out-of-pocket expenses such as medical costs, expenses stemming from cancellation of a company insurance policy, expenses incurred in searching for another job, vested pension fund or profit-sharing losses, or property loss resulting from missed payments, and non-pecuniary losses including mental anguish, loss of reputation, etc.
- Punitive damages, under certain statutes.

The Surface Transportation Assistance Act of 1982, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), the Sarbanes-Oxley Act of 2002 (SOX), and the Pipeline

Safety Improvement Act of 2002 (PSIA) authorize the Secretary to order preliminary reinstatement based on her investigative findings. However, in the last few years, the Secretary and complainants have experienced some difficulty in compelling recalcitrant employers to comply with preliminary reinstatement orders issued by either OSHA or the Office of Administrative Law Judges under AIR21 and SOX. Although AIR21 (as well as SOX, by incorporating AIR21) expressly provides that the filing of objections does not stay the Secretary's preliminary order reinstating the employee, the jurisdictional provisions of the statute reference only a section entitled "final orders." Accordingly, a number of judges have held that they lack authority under the statute to enforce preliminary reinstatement orders even though the statute explicitly states that those orders are not to be stayed during the administrative adjudication. Those judges have interpreted the statute as providing the Secretary and whistleblowers with a cause of action to enforce only *final* orders of the Secretary, i.e. decisions of the DOL Administrative Review Board.

Hearings and Appeals

Many of OSHA's findings are not challenged. Complainants or respondents who object to OSHA's findings under the Energy Reorganization Act of 1974, as amended, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, the Sarbanes-Oxley Act of 2002, the Pipeline Safety Improvement Act of 2002, the Surface Transportation Assistance Act of 1982, and the environmental statutes may request a *de novo* hearing before a Department of Labor Administrative Law Judge (ALJ). After a decision is issued by an ALJ, review may be sought from the Administrative Review Board (ARB), which is authorized to issue final orders of the Secretary of Labor. Depending on the whistleblower law involved, the ARB either reviews the entire ALJ decision under a *de novo* standard of review, or *de novo* on matters of law and a "substantial evidence" standard of review on the ALJ's findings of fact. Judicial review of final agency decisions is in the U.S. Courts of Appeals.

Actions under OSHA, AHERA, and ISCA are enforced by the Secretary in district court. There is no statutory right to appeal OSHA, AHERA, and ISCA determinations by OSHA. The agency-level decision is the final decision of the Secretary of Labor. However, if a complaint is dismissed by the OSHA Regional Office, the complainant may request from the Director of the Directorate of Enforcement Programs (DEP) a review of the case file. This review is not *de novo*. Rather, a committee consisting of staff of the Office of Investigative Assistance and the Office of the Solicitor's Occupational Safety and Health Division (the Appeals Committee) reviews the case file and the field's findings. If the committee agrees with the field's dismissal, the dismissal is upheld. If the investigation is found to be deficient, the case is remanded to the field to be reopened for further investigation. If the committee believes that suit should be filed, it recommends this course of action to the Regional Solicitor's Office.

Program Performance

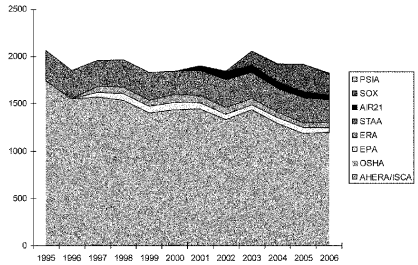
The complexity of complaints filed under the more recently enacted statutes, such as Air 21 or SOX, has resulted in lengthier OSHA investigations that can exceed the statutory timeframes.

Statute	Statutory Timeframe	Total Cases Completed	Average Days to Complete	Percent Completed within Statutory Timeframe
OSHA	90	1233	89	70%
AHERA		1	211	0
ISCA		n/a	n/a	n/a
STAA	60	245	84	47%
AIR21		54	121	20%
SOX		249	150	27%
PSIA		7	84	29%
ERA	30	53	143	6%
CAA, CERCLA, FWPCA, SDWA, SWDA, TSCA		57	102	18%

Average Days to Complete Investigations, Compared to Statutory Timeframes

This discrepancy between the timeframes prescribed in the statutes and agency practice is not limited to the investigative stage. The Office of Administrative Law Judges and the Administrative Review Board face the same challenges. Indeed, two years ago, when Congress amended the Energy Reorganization Act of 1974 (ERA), it added, among other things, a "kick-out" provision allowing complainants to remove a case to U.S. District Court if the Department of Labor failed to issue a final decision within a year, so long as the delay is not due to the bad faith of the complainant. Although the ERA amendments in 2005 did not change the statutory 90-day timeframe for issuing final decisions, we believe that in setting a one-year timeframe for removal to district court, Congress recognized that it is often necessary for the Department to take up to one year to complete the investigatory and adjudicative processing of a whistleblower complaint under the ERA.

Despite the increased numbers of statutes and increasing numbers of complaints filed under the newer statutes, the total number of complaints filed annually remains relatively steady at 1,800 to 2,100 complaints per year. However, the proportion of the more complex cases has grown in relation to the simpler cases under the other statutes (see graph below).



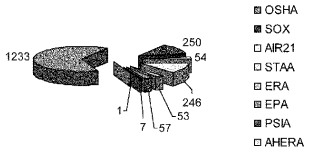
Cases Received from Fiscal Year 1995 through 2006

The outcomes of complaints received under all of the statutes for the past ten years are summarized in the table below.

	Cases		Outcomes					
Calendar Year	Cases Received	Complaints Completed	Withdrawn	Dismissed	Merit Findings Issued	Settled by OSHA	Settlement approved by OSHA	Average Days to Complete
1998	1928	2072	375	1165	66	413	53	84
1999	1845	1782	255	1032	78	367	50	100
2000	1853	1951	231	1184	69	415	52	108
2001	1869	2076	316	1277	107	325	51	110
2002	1913	1886	246	1204	78	293	65	95
2003	2059	2164	280	1391	86	260	147	106
2004	1869	2028	228	1385	52	253	110	103
2005	1936	1911	245	1276	37	262	91	107
2006	1865	1936	261	1240	29	294	112	102
Jan-March 2007	464	417	54	289	7	64	19	101

Fiscal Year 2006 Performance

OSHA received 1,825 cases in fiscal year 2006. The chart below represents cases completed in fiscal year 2006, broken out by statute.



Complaints Completed in Fiscal Year 2006

The outcomes of OSHA's investigations for fiscal year 2006 are consistent with those of the past five or more years. The results do not vary more than five percentage points from year to year. Twenty-two percent of the investigations resulted in a disposition favorable to the complainant ("merit" cases). Of these, 66% were settled by OSHA, 28% were settled by the parties themselves, and in the remainder—7%—OSHA issued findings or preliminary orders in favor of complainants. In addition, 65% were dismissed, and 14% were withdrawn. Generally, investigations leading to dismissal of claims entail as much work and last as long as those leading to findings of violations. OSHA does not track the length of investigations broken out by findings of merit or non-merit.

The State Plan States had similar results with their 11(c)-type complaints in fiscal year 2006—60% were dismissed; 20% withdrawn; and 20% were meritorious, of which 75% were settled.

Fiscal Year 2007 Performance

In the first half of fiscal year 2007, we have received 916 cases and completed 856 investigations, with an average of 107 days in length per investigation. Sixty-six percent of those complaints were dismissed, 12% were withdrawn, 2% were found to be meritorious (that is, merit findings were issued), 15% were settled by OSHA, and 5% were settled by the parties and approved by OSHA.

Conclusion

I hope that my testimony has shed some light on the complex process by which whistleblower complaints are resolved. Not only do our investigators juggle the competing demands of numerous open cases at any one time, they must have knowledge and expertise in applying numerous related statutes and implementing regulations (beyond the 14 whistleblower statutes and their particular implementing regulations). Investigators must know the parlance of, for example, federal criminal fraud statutes, federal securities laws and regulations, Federal Aviation Administration regulations, other Department of Transportation regulations, Nuclear Regulatory Commission regulations and many others.

I look forward to answering any questions you might have.

Occupational Safety and Health Administration
Office of Investigative Assistance
Whistleblower Statutes

Acts	Days to file	Form of filing	Employees covered	Days to appeal
Section 11(c) of the Occupational Safety & Health Act of 1970 (OSHA). [29 USC §660(c)] Section 11(c) protection for employees who exercise a variety of rights guaranteed under the Act, such as filing a S&H complaint with OSHA, participating in an inspection, etc.	30	Any	Private sector U.S. Postal Service	15
Section 211 of the Asbestos Hazard Emergency Response Act of 1986 (AHERA). [15 USC §2651] protection for individuals who report violations of environmental laws relating to asbestos in elementary and secondary school systems, whether public or private.	90	Any	Public and private sector	30
Section 7 of the International Safe Container Act of 1977 (ISCA). [46 App USC §1506] protection for employees who report an unsafe intermodal cargo container.	60	Any	Private sector	30
Section 405 of the Surface Transportation Assistance Act of 1982 (STAA). [49 USC §31105] protections for drivers and other employee relating to the safety of commercial motor vehicles. Coverage includes all buses (for hire), hazardous material vehicle placarded, and freight trucks with a gross vehicle weight of 10,001 pounds.	180	Any	Private sector performing duties related to transporting hazardous material, freight, or people over the road	30
Section 1450 of the Safe Drinking Water Act of 1974 (SDWA). [42 USC §300j-9(i)] protection for employees who report potential violations regarding all waters actually or potentially designed for drinking use, whether from above ground or underground sources.	30	Written	Private sector City, county, state, municipal and federal	30
Section 507 of the Federal Water Pollution Control Act, Amendments of 1972 (FWPCA). [33 USC §1367] Also called the Clean Water Act, protection for employees who report potential violations regarding discharges of pollutants into the waters of the United States.	30	Written	Private sector City, county, state, municipal and federal	30
Section 23(a)(1-3) of the Toxic Substances Control Act (TSCA), [15 USC 2622] protection for employees who report potential violations regarding 75,000 industrial chemicals currently produced or imported into the United States.	30	Written	Private sector City, county, state, municipal and federal	30
Section 23 of the Toxic Substances Control Act of 1976 (TSCA). [15 USC §2622] protection for employees who report potential violations regarding industrial chemicals currently produced or imported into the United States and supplements the Clean Air Act (CAA) and the Toxic Release Inventory under Emergency Planning & Community Right to Know Act (EPCRA).	30	Written	Private sector, city, county, state, municipal and federal	5

Acts	Days to file	Form of filing	Employees covered	Days to appeal
Section 7001 of the Solid Waste Disposal Act of 1976 (SWDA). [42 USC §6971] Also called the Resource Conservation and Recovery Act (RCRA). protection for employees who report potential violations regarding the disposal of solid and hazardous waste at active and future facilities, see CERCLA for abandoned or historical sites.	30	Written	Private sector City, county, state, municipal and federal	30
Section 322 of the Clean Air Act, Amendments of 1977 (CAA). [42 USC §7622] protection for employees who report potential violations regarding air emissions from area, stationary, and mobile sources.	30	Written	Private sector City, county, state, municipal and federal	30
Section 10 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). [42 USC §9610] a.k.a. "Superfund," protection for employees who report potential violations regarding clean up of uncontrolled or abandoned hazardous-waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment.	30	Written	Private sector City, county, state, municipal and federal	30
Section 211 of the Energy Reorganization Act of 1974 (ERA), as amended, [42 USC §5851] protection for employees who report potential violations of the ERA or the Atomic Energy Act of 1954.	180	Written	Employees of nuclear licensees, Nuclear Regulatory Commission, Department of Energy and their contractors and subcontractors	30
Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). [49 USC §42121] protection for employees who report potential violations of air carrier safety.	90	Written	Private sector employees of a commercial air carriers and its contractors and subcontractors	30
Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX). [18 USC §1514A] protection for employees who report potential violations of mail, wire, or bank fraud, or the Securities Exchange Act or any other federal law relating to fraud against shareholders.	90 days	Written	Private sector employees of companies registered under §12 or required to report under §15(d) of the SEA and their contractors and subcontractors	30
Section 6 of the Pipeline Safety Improvement Act of 2002 (PSIA). [49 USC §60129] protection for employees who report violations of federal law regarding pipeline safety and security or who refuse to violate such provisions. It includes a provision for levying up to $1,000 civil penalties against the employer.	180 days	Written	Private sector employees of a pipeline facility, their contractors and subcontractors, and city, county, state, and municipal employees	60

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Chairwoman WOOLSEY. Professor Moberly.

STATEMENT OF RICHARD MOBERLY, ASSISTANT PROFESSOR, UNIVERSITY OF NEBRASKA COLLEGE OF LAW

Mr. MOBERLY. Good afternoon. My name is Richard Moberly. I am assistant professor of law in the Cline Williams Research Chair at the University of Nebraska. I teach and write about whistleblower protection.

In response to the question this hearing presents, my research indicates that whistleblowers have some legal protection, but the protection is likely insufficient. Over 30 Federal statutes protect whistleblowers and relate to a variety of topics, including workplace safety, the environment, public health, and corporate fraud. However, these statutes provide only a relatively limited amount of

protection because of their ad hoc and narrow approaches. Rather than protect any employee who reports any illegal activity, Federal statutes only protect whistleblowing related to a specific topic or statute, and then only if the whistleblower works for an employer covered by the statute.

Even if the right type of illegal activity is reported, the whistleblower may or may not be protected, depending on how the employee blew the whistle. Some statutes only protect employees who formally participate in enforcement proceedings, while others protect employees who affirmatively report illegal activity or who refuse to engage in misconduct. Some statutes require reports to be made externally to the government, while others protect whistleblowers who report misconduct to their supervisors.

The procedural requirements for a whistleblower to file a claim are varied as well. Some laws permit whistleblowers to file claims directly in Federal court, while others require whistleblowers to file claims with an administrative agency like OSHA. Some of these statutes permit only the agency to prosecute claims on an employee's behalf, while others permit employees to pursue their own claims.

As Chairwoman Woolsey suggested, the statute of limitation for these laws vary from 30 to 300 days, which only compounds the confusion created by these multiple protections and procedures. Suffice it to say, one would never create this system from scratch.

Whether a whistleblower is protected depends on the employer for which the employee works, the industry in which the employee works, the type of misconduct reported, the way in which an employee blew the whistle, and, under some statutes, the willingness of an administrative agency to enforce the law.

Because of these nuances it is simply too easy for good-faith whistleblowers to fall through the gaps created by these varied requirements, a situation that fails to encourage employees to blow the whistle and fails to protect them when they do.

The problems with the current system are illustrated by the Sarbanes-Oxley Act of 2002, which applies to employees of publicly traded companies who report fraud. At the time it was passed, many expected that Sarbanes-Oxley would provide the broadest most comprehensive coverage of any whistleblower provision in the world. These expectations have not been realized. Employees rarely win Sarbanes-Oxley cases.

In the act's first 3 years, only 3.6 percent of Sarbanes-Oxley whistleblowers won relief after an OSHA investigation. Only 6.5 percent of whistleblowers won appeals in front of an administrative law judge. Subsequent statistics from OSHA indicate that not a single Sarbanes-Oxley whistleblower won a claim before OSHA in fiscal year 2006 out of 159 decisions made by the Agency during that year.

My empirical study of Sarbanes-Oxley outcomes highlights more general problems. First, the legal and procedural nuances I detailed earlier don't have real bite. Employees who don't fall squarely within the law's narrow legal boundaries do not get protected. Under Sarbanes-Oxley, for example, ALJ determined that 95 percent of whistleblower cases failed to satisfy these boundary issues as a matter of law and dismissed those cases. Judges almost never

hear the factual merits of whether retaliation occurred because an employee blew the whistle.

Second, ALJs dismissed one-third of Sarbanes-Oxley cases because whistleblowers failed to satisfy the act's 90-day statute of limitations, demonstrating that such short statute of limitation periods can have drastic consequences.

Third, retaliation cases are highly fact-intensive cases that require resources, time and expertise. Requiring an administrative investigation may not efficiently utilize government resources and may unduly delay justice under that act. As an example I detailed some of the problems with OSHA's enforcement of Sarbanes-Oxley in my written statement.

As a result of these problems, rank-and-file employees likely cannot determine the protection available to them before blowing the whistle, which means that Federal law is not doing its job of encouraging employees to come forward with information about misconduct.

Society cannot gain the enormous public benefits from whistleblowers who disclose health and safety issues and other corporate misconduct. To address these issues Congress should comprehensively examine the manner in which Federal law protects whistleblowers, and I have detailed specific recommendations in my written testimony. Thank you.

Chairwoman WOOLSEY. Thank you.

[The statement of Mr. Moberly follows:]

Prepared Statement of Richard E. Moberly, Assistant Professor of Law, Cline Williams Research Chair, University of Nebraska College of Law

Madam Chair and Members of the Subcommittee: Thank you for the invitation to appear before you to talk about whether there are sufficient legal protections for private-sector whistleblowers. I teach and write about whistleblower protection and I am honored to talk with you about this topic.

The short answer to the question this hearing presents is that there are many protections for whistleblowers, but it is doubtful whether there are sufficient protections. In this testimony, I hope to explain the ways in which current protections fall short by focusing on four primary areas:

1. The importance of encouraging and protecting whistleblowers in the private sector;
2. A general description of private-sector whistleblower protection, particularly under federal law;
3. Examples of whistleblower protection issues under the Sarbanes-Oxley Act of 2002, to illustrate problems with the federal protection of whistleblowers; and
4. Areas in which federal whistleblower protection should be more closely examined.

1. Whistleblowers Provide a Public Benefit

A rationale often provided for protecting whistleblowers is one of "fairness," whistleblowers take a great risk by disclosing information about corporate misconduct, and it is unfair that they should be retaliated against because of their actions. While this justification has resonance, I want to focus on another rationale: whistleblowers provide a substantial public benefit.

Private sector whistleblowers enhance corporate monitoring and improve corporate law enforcement. We need whistleblowers to report corporate misconduct in order to supplement the traditional methods of monitoring corporations. Employees know more than others who might discover corporate wrongdoing (such as the government or even an independent board of directors) because they are on-the-ground inside the corporation and, collectively, know everything about its inner workings.[1] In fact, even with few corporate or legal incentives provided to whistleblowing employees, roughly one-third of fraud and other economic crimes against businesses are reported by whistleblowers.[2]

Furthermore, almost all the benefits of a whistleblower's disclosure go to people other than the whistleblower: society as a whole benefits from increased safety, better health, and more efficient law enforcement. However, most of the costs fall on the whistleblower. There is an enormous public gain if whistleblowers can be encouraged to come forward by reducing the costs they must endure. An obvious, but important, part of reducing whistleblowers' costs involves protecting them from retaliation after they disclose misconduct.

2. Federal Whistleblower Protection for the Private Sector

Despite the importance of protecting whistleblowers from retaliation, no uniform whistleblower law exists. Rather, protections for private sector whistleblowers consist of a combination of federal and state statutory protections, as well as state common law protections under the tort of wrongful discharge in violation of public policy. These uneven protections are often rightly labeled a "patchwork," because of the wide variance in the scope of protections each provides.

a. Narrow Substantive Protections for a Broad Range of Industries

Federal protections for whistleblowers take an ad-hoc, "rifle-shot" approach. Rather than protect any employee who reports any illegal activity, federal statutes only protect whistleblowing related to a specific topic or statute, and then only if the whistleblower works for an employer covered by the statute.

For example, the Surface Transportation Assistance Act of 1982 only protects whistleblowing related to the safety of commercial motor vehicles.[3] The only employees who are protected are drivers of commercial motor vehicles, mechanics, or freight handlers who directly affect commercial motor vehicle safety in the course of their employment.[4]

Even if the whistleblower reports the right type of illegal activity, statutes vary on whether the whistleblower will be protected depending upon how the employee blew the whistle. Some statutes appear to only protect employees who participate in proceedings related to violations of particular statutes,[5] while others also protect employees who affirmatively report illegal conduct[6] or who refuse to engage in illegal activity.[7] Moreover, some statutes require reports to be made externally to the government,[8] while others will protect whistleblowers who report misconduct to their supervisors.[9]

These types of nuanced protections exist for a broad range of industries. More than 30 separate federal statutes provide anti-retaliation protection for private-sector employees who engage in protected activities in a variety of areas, including workplace safety, the environment, and public health. Statutes protect employees who disclose specific violations in certain safety-sensitive industries, such as the mining,[10] nuclear energy,[11] and airline industries.[12] Private sector employees may be protected if they disclose corporate fraud on the government[13] or on shareholders.[14] The list of protected employees ranges from the expected—employees who make claims under anti-discrimination statutes such as Title VII[15]—to the surprising—employees who participate in a proceeding regarding drinking water or who report an unsafe international shipping container.[16]

b. A Wide Variety of Procedural Requirements

The procedural requirements for whistleblowers to file a claim are as varied as the activities protected by the statute. Some statutes permit whistleblowers to file claims directly in federal court.[17] Others require whistleblowers to file claims with administrative agencies, such as the Department of Labor. In fact, 14 statutes require whistleblowers to file with the Occupational Safety and Health Administration within the Department of Labor. Even among these OSHA statutes, the procedures vary depending on the type of claim. Some statutes, like the Occupational Safety and Health Act, permit only the agency to investigate and prosecute claims of retaliation on an employee's behalf. Others permit employees to pursue their own claims by requesting an administrative investigation, from which appeals can be made to an administrative law judge, then an administrative review board, and ultimately to a federal court of appeals. The Sarbanes-Oxley Act of 2002 has the additional procedural nuance of requiring whistleblowers to first file a claim with OSHA, but then permitting whistleblowers to withdraw their claim and file in federal district court if the agency does not complete its review within 180 days.

Depending on the statute invoked by the whistleblower, the statute of limitations for claims can be 30 days,[18] 60 days,[19] 90 days,[20] or 180 days.[21] The statute of limitations for retaliation under employee discrimination statutes can reach 300 days.[22]

The burdens of proof differ as well. Some retaliation cases require proof that the adverse employment action taken against the employee would not have occurred "but for" the employee's protected conduct. Others require only that the protected activity play a "motivating," or even less onerously, a "contributing" factor in the

adverse employment action. Statutes vary on the level of proof required for employers to rebut a prima facie case of retaliation, from preponderance of the evidence to clear and convincing evidence that the employer would have made the same decision absent any protected activity.

c. Many, but not Sufficient, Protections

Suffice it to say, one would never create this system from scratch. Instead, this network of protections has evolved on an ad hoc basis in order to support specific statutory schemes. Whether a whistleblower is protected depends upon the employer for whom the employee works, the industry in which the employee works, the type of misconduct reported, the way in which the employee blew the whistle, and, under some statutes, the willingness of administrative agencies to enforce the law.

Indeed, given this grab bag of statutes, rank-and-file employees likely cannot determine the protection available to them without consulting an attorney before blowing the whistle. Not surprisingly, surveys demonstrate that most employees are unaware of the protections they may (or may not) receive should they report wrongdoing.[23] If employees are not aware of or do not understand their protections, then these anti-retaliation provisions are not doing their job of encouraging employees to come forward with information about misconduct. Society cannot gain the enormous public benefits from whistleblowing. Thus, while there may be many legal protections for whistleblowers, it is doubtful whether there are sufficient protections.

3. The Sarbanes-Oxley Example

One statute that might have fixed some of these problems was the Sarbanes-Oxley Act of 2002, which Congress passed in response to corporate scandals involving Enron, WorldCom, and others. Under Sarbanes-Oxley, employees of publicly-traded companies who report fraudulent activity may bring claims against any person who retaliates against them as a result of their disclosure. By protecting employees at publicly-traded companies, the hope was to provide protections to a much broader range of employees than had previously been protected by statutes focusing primarily on particular industries. At the time it was passed, many whistleblower advocates and legal commentators expected that Sarbanes-Oxley would provide the broadest, most comprehensive coverage of any whistleblower provision in the world.

a. Whistleblowers Rarely Win

These expectations have not been realized: employees rarely win Sarbanes-Oxley cases. I recently completed an empirical study of all Department of Labor Sarbanes-Oxley determinations during the first three years of the statute, consisting of over 700 separate decisions from administrative investigations and hearings.[24] Only 3.6% of Sarbanes-Oxley whistleblowers won relief through the initial administrative process at OSHA that adjudicates such claims, and only 6.5% of whistleblowers won appeals in front of a Department of Labor Administrative Law Judge. That's 13 whistleblowers at the OSHA level, and 6 at the ALJ level. Moreover, more recent statistics from OSHA indicate that not a single Sarbanes-Oxley whistleblower won a claim before OSHA in Fiscal Year 2006—out of 159 decisions made by the agency during that year.

This low win rate for whistleblowers has two primary causes. First, administrative decision-makers focus an extraordinary amount of attention on whether the whistleblower is the "right" type of whistleblower. Did the whistleblower disclose the "right" type of misconduct, to the "right" type of person? Did the whistleblower work for the "right" type of company? Did the whistleblower provide a complaint precisely within the 90-day statute of limitations? ALJs determined that over 95% of Sarbanes-Oxley whistleblower cases failed to satisfy one or more of these questions as a matter of law. Thus, very few whistleblowers were actually provided the opportunity to demonstrate that they were the subject of retaliation.

Second, at the initial OSHA investigative level, when OSHA found that an employee's claim actually satisfied all of Sarbanes-Oxley's legal requirements, OSHA still found for the employee only 10% of the time. This low win rate seems surprising, because Sarbanes-Oxley purposefully presents a very low burden of proof for employees once their prima facie case is met.

By themselves, these statistics should give us pause, given the high expectations regarding the potential of Sarbanes-Oxley to provide relief to whistleblowers whose employers retaliate against them. But, as important, Sarbanes-Oxley's implementation illustrates broader problems with the federal ad hoc approach to whistleblower protection.

b. Problems with Whistleblower Protection

Boundary Problems. First, by only protecting certain types of disclosures and certain types of employees, federal law puts enormous pressure on whether the whistle-

blower's disclosure was the "right" kind of disclosure or the employee is the "right" type of employee. Not only is this difficult for employees to predict ahead of time, but it also requires line-drawing by decision-makers that can narrow the scope of the protections more restrictively than intended by Congress.

Sarbanes-Oxley demonstrates this problem. The Act protects disclosures related to certain federal criminal fraud provisions as well as rules and regulations related to securities requirements. Also, the Act only protects employees of publicly-traded companies. My study revealed that administrative decision-makers frequently focused on these two legal requirements to dismiss cases, and often by reading the statute's boundaries very narrowly. For example, Sarbanes-Oxley protects any disclosure related to mail or wire fraud, without qualification. However, the DOL's Administrative Review Board has ruled that the disclosure of mail or wire fraud in general is not sufficient; the fraud disclosed by a whistleblower must be "of a type that would be adverse to investors' interests."[25] Similarly, ALJs have ruled that Sarbanes-Oxley does not protect employees of privately-held subsidiaries of publicly-traded companies unless the employee can pierce the corporate veil between the companies or demonstrate that the publicly-traded company actively participated in the retaliation.[26] In this and other instances, such narrow interpretations leave good faith whistleblowers without protection if they report the wrong type of fraud or work for the wrong type of company.

Procedural Hurdles. Procedural hurdles loom large for whistleblowers. For example, ALJs dismissed one-third of Sarbanes-Oxley cases because the whistleblower failed to satisfy Sarbanes-Oxley's relatively short 90-day statute of limitations. As I noted earlier, the limitations period of other federal whistleblower protection statutes ranges from 30 to 300 days. Short filing periods can have drastic consequences. Because most employees who file whistleblower claims allege that they lost their jobs,[27] additional time to file claims would provide whistleblowers the ability to first take care of pressing responsibilities, such as finding another job and dealing with the upheaval of losing a primary source of income, before ultimately locating a competent attorney to file a claim.

Investigating Claims. Third, retaliation cases are highly fact-intensive cases that require resources, time, and expertise. Requiring an administrative investigation prior to an adjudicatory hearing may not efficiently utilize government resources. For example, when Sarbanes-Oxley was added to OSHA's responsibilities, OSHA did not receive any additional funding for cases that now consist of approximately 13% of OSHA's caseload. This lack of resources has led to lengthy delays to resolve cases: although the Act's regulations mandate that OSHA complete its investigation within 60 days, the average length of a Sarbanes-Oxley investigation in Fiscal Year 2005 was 127 days. Also, OSHA had primarily dealt with environmental and health and safety statutes prior to Sarbanes-Oxley. Asking the agency to discern the nuances of securities fraud seems well beyond its traditional scope. Moreover, OSHA investigators who must examine cases involving 14 different laws may not adequately differentiate among provisions that often provide for different burdens of proof and substantive protections. Add to that internal OSHA procedures that did not give the whistleblower a full and fair opportunity to rebut an employer's allegations, and it should not be surprising that few Sarbanes-Oxley whistleblowers have been successful at the OSHA investigative stage of their claim. In short, the Sarbanes-Oxley results call into question OSHA's utility as an investigative body for whistleblower claims.

4. Areas to Examine

There are two main types of questions to consider going forward. First, if you are satisfied with the current "rifle-shot" approach to whistleblower protection, are there ways in which it can be improved? Second, if the current model is not satisfactory, what would a different model look like?

a. Improving the Current System

Clarifying Broad Protections. In areas such as Sarbanes-Oxley, in which it can be demonstrated that administrative decision-makers or courts have narrowly read the protections that Congress already has granted, Congress could clarify the statute's broad reach. Passing legislation that clearly repudiates decisions narrowing an act's scope could alleviate the tendency of decision-makers to draw restrictive legal boundaries in whistleblower cases. Congress has repeatedly taken such an approach for federal employee whistleblowers when administrative and judicial rulings undermined the broad protections of the Civil Service Reform Act and, more recently, the Whistleblower Protection Act.[28] Congress should similarly examine federal statutory protections for private sector whistleblowers.

Lengthening the Statute of Limitations. The short statutes of limitations that currently exist are unrelated to the goals of whistleblower statutes and serve no real purpose other than to trip up unsuspecting whistleblowers after they have already taken the serious risk of coming forward with information about misconduct. Increasing statutes of limitations to at least 180 days would be an easy, but nonetheless extremely helpful, solution.

Improving Transparency. The adjudication of whistleblower claims should be more transparent. For example, OSHA does not publish any of its statistics or decision-letters. I received them by asking OSHA directly and by submitting a Freedom of Information Act (FOIA) request. No information about monetary awards or settlements are publicly available and OSHA denied my FOIA request for this information. The Office of Administrative Law Judges puts its decisions on the internet, but does not compile any statistics about its results. Statutory requirements that employers post notices about the available whistleblower protections are inconsistent: some statutes have them, others do not. The lack of meaningful, public information about whistleblower provisions and cases interpreting them fails to provide employees sufficient guidance regarding whether they will be protected if they blow the whistle, and also undermines the public discourse about whether these protections are effective. The decisions, and the decision-making process, of administrative agencies need more public oversight.

b. Implementing New Protections

The Importance of Defining Legal Boundaries. The problems with the current system can inform decisions on the areas on which one should focus when implementing new protections. Given the problems with the current narrow boundaries of many whistleblower provisions, a new whistleblower law should protect whistleblowers for disclosing a broad range of illegal activities. But, as with everything, the devil is in the details. Should whistleblowers who report any illegal activity be protected? Or only activity that is illegal under federal law or some subset of federal laws? Should we require whistleblowers to be correct that the activity they report is, in fact, illegal, or should we protect whistleblowers who reasonably disclose misconduct in good faith, even if the misconduct is not actually illegal? Should we require whistleblowers to report illegal activity externally to a law enforcement officer, or should we protect whistleblowers who report misconduct internally to their supervisor?

I am quite confident you understand that legal definitions and boundaries matter—it is what you debate everyday. My point is that for whistleblower protections in particular, the evidence demonstrates that the boundaries you draw will have real bite, for two reasons. The first relates to the nature of whistleblowing: whistleblowers take real risks, and the current topic-by-topic, ad hoc approach to protecting whistleblowers does not provide employees sufficient certainty regarding their protections as they decide whether to blow the whistle. Second, statutory boundaries particularly matter for whistleblower protections because of the manner in which whistleblower laws currently are administered: narrow protections only encourage, or in some instances, require administrative and judicial decision-makers to define whistleblowers out of protected categories. Agencies and courts currently spend too much time debating whether this is the "right" type of employee, the "right" type of report, or the "right" type of illegal activity, and not enough effort determining whether retaliation occurred. Broadly defining the legal boundaries of any new protection may enable decision-makers to focus on the important factual question of causation: was this employee retaliated against for reporting something illegal?

Providing Structural Disclosure Channels. Finally, I urge you to examine other types of encouragement for whistleblowers. For example, in the Sarbanes-Oxley Act of 2002, Congress required publicly-traded companies to implement a whistleblower disclosure channel directly to the company's board of directors. This internal reporting mechanism can supplement anti-retaliation protections because it encourages reporting directly to individuals with the authority and responsibility to respond to information about wrongdoing. Procedural and structural modifications that encourage effective employee whistleblowing should be considered along with any reform of anti-retaliation protections.[29]

5. Conclusion

From one perspective, whistleblowers demonstrate that employees can be effective as corporate monitors. At great risk to their careers, a few employee whistleblowers bravely attempt to expose wrongdoing at corporations involved in misconduct, such as Enron, WorldCom, Global Crossing, and others.

Viewed differently, however, such isolated scandals also illustrate the difficulty of relying upon employees to function as effective corporate monitors. The financial

misconduct at Enron and other companies lasted for years before being revealed publicly. Countless lower-level employees necessarily knew about, were exposed to, or were involved in the wrongdoing and its concealment—but few disclosed it, either to company officials or to the public. Thus, while whistleblowers who reveal corporate misconduct demonstrate employees' potential to monitor corporations, the fact that so few have come forward also confirm that this potential often is not fully realized.

The challenge for policy-makers is to provide sufficient encouragement and protection for employees so that they can fulfill their essential role of corporate monitoring. Without employees willing to blow the whistle on corporate misconduct, we lose one key aspect of society's ability to monitor corporations effectively. Thorough and comprehensive statutory whistleblower protections will encourage private-sector whistleblowers and should be an integral part of our corporate law enforcement effort.

ENDNOTES

[1] For a more complete discussion of the importance of employees as corporate monitors, see Richard E. Moberly, Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers, 2006 BYU L. REV. 1107, 1116-25.

[2] See Kathleen F. Brickey, From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley, 81 Wash. U. L.Q. 357, 365 n.37 (2003) (citing study reported in Jonathan D. Glater, Survey Finds Fraud's Reach in Big Business, N.Y. Times, July 8, 2003, at C3).

[3] See Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105(a).

[4] See id.

[5] See, e.g., Clean Air Act of 1977, 42 U.S.C. § 7622(a); Solid Waste Disposal Act of 1976, 42 U.S.C. § 6971(a).

[6] See International Safe Container Act, 46 U.S.C. § 1506(a).

[7] See, e.g., Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105(a); Energy Reorganization Act, 42 U.S.C. § 5851(a)(1)(B).

[8] See Records and Reports on Monetary Instruments Transactions, 31 U.S.C. § 5328.

[9] See Federal Mine Safety and Health Act, 30 U.S.C. § 815(c).

[10] See Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c).

[11] See Energy Reorganization Act, 42 U.S.C. § 5851.

[12] See Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121.

[13] See False Claims Act, 31 U.S.C. § 3730(h).

[14] See Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A.

[15] See Equal Employment Opportunity Act (Title VII), 42 U.S.C. § 2000e-3(a).

[16] See Safe Drinking Water Act, 42 U.S.C. § 300j-9; International Safe Container Act, 46 U.S.C. § 1506.

[17] See, e.g., Federal Deposit Insurance Act, 12 U.S.C. § 1831j.

[18] See, e.g., Solid Waste Disposal Act, 42 U.S.C. § 6971.

[19] See, e.g., International Safe Container Act, 46 U.S.C. § 1506.

[20] See, e.g., Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A.

[21] See, e.g., Energy Reorganization Act of 1974, 42 U.S.C. § 5851.

[22] See, e.g., Age Discrimination in Employment Act, 29 U.S.C. § 626.

[23] TERANCE D. MIETHE, WHISTLEBLOWING AT WORK: TOUGH CHOICES IN EXPOSING FRAUD, WASTE, AND ABUSE ON THE JOB 54 (1999).

[24] See Richard E. Moberly, Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win, 49 Wm. & Mary L. Rev. _____ (forthcoming 2007), available at *http://ssrn.com/abstract=977802.*

[25] See Platone v. FLYi, Inc., No. 04-154, at 15 (ARB Sept. 29, 2006).

[26] See Bothwell v. Am. Income Life, No. 2005-SOX-57, at 8 (Dep't of Labor Sept. 19, 2005); Hughart v. Raymond James & Assoc., Inc., 2004-SOX-9, at 44 (Dep't of Labor Dec. 17, 2004).

[27] The study found that 81.8% (378/462) of Sarbanes-Oxley Complainants whose allegation regarding retaliation was discernable alleged that they were fired from their jobs as retaliation.

[28] See Whistleblower Protection Enhancement Act of 2007, H.R. 985, 110th Cong. (2007).

[29] See Moberly, supra note 1, at 1141-78 (discussing the importance of implementing effective whistleblower disclosure channels).

[Internet address to "Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win," by Richard E. Moberly, 49 William and Mary Law Review (abstract), follows:]

http://ssrn.com/abstract=977802

Chairwoman WOOLSEY. Mr. Chinn.

STATEMENT OF LLOYD CHINN, PARTNER, PROSKAUER ROSE

Mr. CHINN. Madam Chairwoman, Ranking Member Wilson——

Chairwoman WOOLSEY. Your microphone isn't on.

Mr. CHINN. Madam Chairwoman, Ranking Member Wilson, members of this subcommittee, I am pleased to appear and testify before you today about the legal protections afforded to whistleblowers. I counsel and defend employers in employment matters. Often this representation focuses on the avoidance of whistleblower claims, or, failing the avoidance of those claims, litigation.

The question before you today, whether there are sufficient legal protections for whistleblowers, and I would suggest that question might ought to be modified in the following fashion: Are there sufficient legal protections for whistleblowers consistent with employers' competitive and potentially profitable operations? And I would also add consistent with fairness and due process to employers.

I am going to focus my remarks on the antiretaliation provisions in Sarbanes-Oxley. The antiretaliation provisions in Sarbanes-Oxley which were supported at the time of their enactment, I believe, by the Government Accountability Project, reflect a tried-and-true approach to whistleblowing in this country on a Federal level.

Congress has chosen over the years when regulating a substantive legal area, if it feels that it is necessary to do so, it protects employees of employers in that regulated area by providing some sort of whistleblower action. Those whistleblower actions are designed to meet the goals, the overarching goals, of the substantive legislation at issue. They are not generalized whistleblower protections, nor are they meant to be.

I should say as an aside, to the extent there are proposals before the committee to enact a general whistleblower statute, that is any employee who complains about anything and suffers anything harmful, as a result has a cause of action, a Federal cause of action. I would suggest that that would be legislation of a monumental scope, one that would provide a recipe for chaos and unintended consequences and would be far, far too broad to meet any particular legislative goals faced by the Congress.

Such an act also would ignore the Federal protections that already exist and have been crafted to meet specific legislative goals. It would be a massive—provide a massive potential to overwhelm existing agencies and the Federal courts, would ignore State regulation where States have chosen to enact that sort of regulation, and ultimately it would result in extraordinary litigation costs for employers.

Does that beeping mean I should stop talking?

With respect to Sarbanes-Oxley, I think a few words are appropriate since Sarbanes-Oxley is one of our more recent federally enacted whistleblower statutes. I think it is very important for the committee to recognize and understand that the Sarbanes-Oxley antiretaliation provisions are very favorable as they are written today for employees. The burden of proof at the prima facie stage for establishing a causal connection between the protected activity and an adverse action is very low. An employee need only show a contributing factor; that is, that the protected activity was a contributing factor in the resulting adverse action. This is a very low burden.

By contrast, in other employment litigation contexts, a plaintiff employee might need to show a determining factor, a significant factor, or at least a motivating factor.

Contributing factor is a very low standard. Once an employee makes that showing, essentially an employer can only win if it can prove that it would have taken the same action anyway, notwithstanding the protected activity. And the regulations governing Sarbanes-Oxley require that that showing be by clear and convincing evidence. And for those who litigate, those words have meaning. That is a far higher burden than the preponderance of the evidence, the normal burden in civil cases.

Another very favorable component of Sarbanes-Oxley for employees is that Sarbanes-Oxley in essence provides a choice of forum to the employee. Yes, the employee must start off with a complaint to OSHA, but if that complaint has not been fully adjudicated through all three levels of OSHA's review within 180 days, the employee has the right to go to Federal court. The employer does not have that right; the employee does. As a practical matter the employee will always have this right because it will always take 180 days to exhaust all of those processes.

Now, apart from the burdens of proof itself and the way in which a Sarbanes-Oxley plaintiff goes about proving his or her case, in our experience, in my firm's experience, OSHA performs thorough and competent investigations, particularly when compared to those investigations conducted by other Federal, State and local agencies with whom we deal on a regular basis representing employers.

Chairwoman WOOLSEY. Mr. Chinn, could you wrap up? We are going to have Mr. Devine, and then we all have to go vote.

Mr. CHINN. I will do so.

In summing up I would just urge the committee that in addressing either a broad whistleblower protection or looking specifically at Sarbanes-Oxley, that it take into account the costs attendant to any such protections. While it is important—while whistleblowers serve an important role in society, as all the witnesses here agree, there are costs associated with these claims.

Professor Moberly's paper makes clear under any regulatory regime regulating employment, the rate of failure of employees who bring claims is extraordinarily high. Those are meritless claims, and they are very expensive to litigate. I would ask that the committee keep those costs, the cost to litigate those claims, in mind in evaluating this subject. Thank you very much.

Chairwoman WOOLSEY. Thank you. We can go further on that with questions.

[The statement of Mr. Chinn follows:]

Prepared Statement of Lloyd B. Chinn, Partner, Proskauer Rose LLP

Madame Chairwoman and members of the Sub-Committee, I am pleased and honored to be here today to testify about the legal protections that are offered to private sector whistleblowers.

By way of introduction, I am a Partner in the Labor and Employment Section of the law firm Proskauer Rose LLP. Although I practice out of my firm's New York City office, I have handled employment matters in federal and state courts and administrative agencies around the country. My fifteen year legal career has been almost exclusively devoted to the representation of employers in employment matters, whether engaged in counseling for the purpose of avoiding employee disputes or litigating those disputes as they arise. Throughout, I have advised and represented cli-

ents in connection with litigating or avoiding retaliation and whistleblower claims. In recent years, my practice, at least in the for-profit sector, has focused on the representation of financial services firms.

The issue before you today is whether there are sufficient legal protections for private sector whistleblowers, balanced, against, of course, the need for employers to run their businesses in a competitive and potentially profitable manner. I am going to focus my prepared remarks on the anti-retaliation provisions contained in the Sarbanes-Oxley Act of 2002.

Before discussing the Sarbanes-Oxley anti-retaliation provision as such, it is important to place that provision in context. Congress enacted Sarbanes-Oxley against the backdrop of the Enron debacle, a disaster born out of, among other things, fraudulent financial reporting which grossly overstated earnings and understated obligations. Given the breadth with which Enron stock had been held by pension and 401k funds as well as individual investors, Enron's fall was felt widely throughout the economy.

Unlike Title VII of the 1964 Civil Rights Act, the Fair Labor Standards Act or Occupational Safety and Health Act, Sarbanes-Oxley is not a statute intended in the first instance to govern employee/employer relations. As the preamble to Sarbanes-Oxley states, it is an Act "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes." To that end, Sarbanes-Oxley contained eleven titles, ranging from Title I, which established the Public Company Accounting Oversight Board to Title IV, which requires enhanced financial disclosures to enhancing various relevant criminal provisions in Titles IX and XI. As part of Sarbanes-Oxley's overall effort to protect investors in public companies from fraud, Congress enacted Section 806 of the Act, titled, "Protection for employees of publicly traded companies who provide evidence of fraud". This anti-retaliation provision must not be mistaken for, or compared against, some sort of generalized whistleblower protection act. Indeed, the approach adopted in Sarbanes-Oxley is consistent with the federal government's oft-used approach of enacting targeted anti-retaliation protections that fit within the specific aims of the substantive legislation.

The Sarbanes-Oxley Anti-Retaliation Provisions Are Favorable To Employees

The anti-retaliation provisions contained in Sarbanes Oxley are unquestionably very favorable to employees. First and foremost, the burden of proof for a Sarbanes-Oxley whistleblower claim is extremely favorable to the claimant. To establish a prima facie case of retaliation, the employee need only establish that: (i) he "engaged in a protected activity or conduct"; (ii) the respondent "knew or suspected, actually or constructively, that the employee engaged in protected activity"; (iii) he "suffered an unfavorable personnel action"; and (iv) the circumstances were sufficient to give rise to the inference that the protected activity was a contributing factor in the unfavorable action." [1] According to at least one district court, "The words 'a contributing factor' mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." [2] By contrast, in other employment litigation contexts, a plaintiff-employee must establish that the impermissible consideration was a "determining" or a "significant" factor in the employer's decision, a unquestionably higher burden of proof.[3]

According to the regulations promulgated under Sarbanes-Oxley, once an employee proves a prima facie case of retaliation, an employer can avoid liability only if it "demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct." [4] By contrast, in a mixed motive retaliation case under Title VII, an employer need only prove by a preponderance of the evidence that it would have taken the same action in the absence of the employee's protected conduct.[5]

To engage in activity protected by the statute, a Sarbanes-Oxley complainant need only "reasonably believe" that his report describes a violation of the laws, rules and regulations set forth in the statute.[6] By contrast, certain whistleblower statutes require an "actual violation" of the statute, rule or regulation at issue.[7]

In addition, as a practical matter, employees (unlike employers) have a choice of forum for their Sarbanes-Oxley retaliation claims—they may choose whether to pursue a Sarbanes-Oxley whistleblower claim before OSHA or in federal court. A Sarbanes-Oxley complainant may:

if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bring[ ] an action at law or equity for de novo review in the appropriate district court of the United States * * *[8]

Given the time frames allotted for the various proceedings before OSHA, it would not be surprising to learn that many, if not most, claimants will have this option.

OSHA has sixty (60) days from filing to issue a reasonable cause determination; the parties then have thirty (30) days to request review by an Administrative Law Judge; appeals from an ALJ's decision must be made to the Department of Labor's Administrative Review Board ("ARB") within ten (10) days, and the ARB has 120 days to issue a final decision (which itself may be appealed to a Federal circuit court of appeals).[9] As Professor Moberly has noted, the option to seek de novo review in federal court "almost certainly will be available for employees, because it is unlikely that the entire process will be completed in that period of time."[10]

OSHA Performs Thorough Investigations

Apart from the statute itself, based upon my law firm's experience with OSHA investigations of Sarbanes-Oxley retaliation claims, we believe that OSHA has generally conducted thorough investigations, and has certainly done so when compared to investigations conducted by other federal, state and local agencies with whom we routinely interact.[11] Transferring jurisdiction over Sarbanes-Oxley retaliation claims from OSHA to another agency at this point would waste the experience and knowledge that OSHA has accumulated in handling these matters. And doing away with the requirement that Sarbanes-Oxley complainants first file with OSHA before going to federal court would leave to the already-overburdened federal courts the task of weeding out, in the first instance, the many Sarbanes-Oxley retaliation claims that are procedurally flawed.

Sarbanes-Oxley's Salutary Effects On The Workplace

Apart from victories obtained by Sarbanes-Oxley plaintiffs, whether through OSHA or in federal court, Sarbanes-Oxley has had a salutary effect on the workplace. Section 301 of Sarbanes-Oxley mandates that public company audit committees:

establish procedures for—(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.[12]

In other words, Sarbanes-Oxley mandated the creation of an avenue by which employees can raise certain issues without having to go through the company's executives. Moreover, apart from Sarbanes-Oxley's specific requirements in this regard, companies have adopted proactive policies requiring the investigation and resolution of complaints made pursuant to corporate codes of ethics. While it would be impossible to quantify, Sarbanes-Oxley has undoubtedly promoted a culture more open to and welcoming of internal complaints by employees.

Whistleblower Statutes Must Reflect A Balance Between Employee Protections and Costs

While the enactment of Sarbanes-Oxley has undoubtedly positively impacted investors in and employees of public companies alike, as with any statute regulating the workplace, Sarbanes-Oxley has also had costs. It is beyond dispute that for every meritorious case filed under any employment statute, there are far more cases that are not.[13] The costs incurred by employers to defend such actions are staggering; the defense of a meritless case can range from five to seven figures. Moreover, there are certain employees who will abuse statutes such as Sarbanes-Oxley, viewing a complaint protected thereunder as providing guaranteed immunity from management or scrutiny. And because of the very favorable burdens of proof to employees under Sarbanes-Oxley, employers must be extraordinarily careful in managing employees who have engaged in protected activity, even those whose complaints are specious or in bad faith. Therefore, before considering any proposals to make Sarbanes Oxley even more favorable to employees, the attendant costs to employers must be considered.

A Brief Comment On Professor Moberly's Forthcoming Article

In a forthcoming article entitled "An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win" Professor Moberly asserts that Sarbanes-Oxley has "failed to protect the vast majority of employees who filed a Sarbanes-Oxley retaliation claim" because, in his view, they do not win often enough.[14] He comes to this conclusion by comparing Sarbanes-Oxley "win" rates (before OSHA only, not in federal court) with the "win" rates of claimants under other employment statutes.[15] The unstated premise necessary to this argument is that employers are, in fact, retaliating against employees in violation of Sarbanes-Oxley at the same (or greater) rate that employers violate other employment statutes. But Professor Moberly offers no support for any such hypothesis. (He, in fact, expressly disavows possessing any evidence to support such a claim).[16]

In addition, much of Professor Moberly's criticism of the claimant "win" rate with OSHA reflects a disdain for the statute's limited coverage in terms of employer types and protected activity. But that limited scope flows naturally from the statute's original purposes, discussed above. Indeed, by Professor Moberly's own analysis, if the employee losses accounted for by such issues are excluded, employees win at much higher rates (10.6 percent before OSHA and 55.6 percent before ALJ's).[17]

Professor Moberly is also highly critical of the statute's 90 day statute of limitations, and claims that it is contrary to Sarbanes-Oxley's purpose.[18] In fact, a short limitations period is entirely consistent with the Act's purpose of protecting investors in public companies. If a company is engaged in securities fraud, and it is retaliating against putative whistleblowers who are trying to bring that conduct to light, it is indeed in the interests of investors that the fraud and retaliation be brought to light in an expeditious manner. Moreover, of the fourteen anti-retaliation statutes administered by OSHA, seven have a thirty (30) day limitations period, one has a sixty (60) day limitations period, three (including Sarbanes-Oxley) have ninety (90) day limitations periods; only three have periods greater than ninety (90) days.[19] Thus, it can hardly be said that the Sarbanes-Oxley limitations period is "restrictive" (as asserted by Professor Moberly), relative to other similar statutes.

Conclusion

The anti-retaliation provisions of Sarbanes-Oxley were enacted against a particular backdrop with a specific purpose, to protect investors in public companies. The statute, in its current form, is very favorable to employees who present valid claims. Based on the experience of Proskauer Rose, OSHA has done a relatively thorough job in investigating and handling these claims. And American corporations are taking actions internally to protect whistleblowers from retaliation. Notwithstanding these positives, significant costs are undoubtedly associated with Sarbanes-Oxley. Under these circumstances, there is no basis for Congress to amend the anti-retaliation provisions of Sarbanes-Oxley or otherwise alter its enforcement mechanisms.

ENDNOTES

[1] 29 C.F.R. §§ 1980.104 (b)(1), 1980.109(a) (emphasis added).

[2] Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1379 (N.D. Ga 2004).

[3] See, e.g., Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)(to succeed on an age discrimination claim, a plaintiff must show that age was a determinative factor in adverse action); Woodson v. Scott Paper Co., 109 F.3d 913 (3d Cir. 1997) (jury must be instructed that improper motive must have had a determinative effect on the decision to fire in order for plaintiff to prevail on Title VII retaliation claim).

[4] 29 C.F.R. §§ 1980.104 (b)(2) (emphasis added); 1980.109(a); Platone v. Atl. Coast Airlines Holdings, Inc., 2003-SOX-27 (ALJ Apr. 30, 2004), at 28, rev'd on other grounds, Platone v. FLYi, Inc., Case No. 04-154 (ARB Sept. 29, 2006).

[5] See, e.g., Kubicko v. Ogden Logistics Services, 181 F.3d 544 (4th Cir. 1999) (if employer establishes by a preponderance of the evidence that it would have taken the same act adverse act in the absence of protected activity, Title VII retaliation claim fails).

[6] 18 U.S.C. § 1514A(a)(1).

[7] See, e.g., Pail v. Precise Imps. Corp., 681 N.Y.S.2d 498, 500 (1st Dep't 1998) (applying New York State's private employer whistle-blower statute).

[8] 18 U.S.C. § 1514A(b)(1)(B).

[9] 29 C.F.R. §§ 1980.105(a),(c); 1980.109(c), 1980.110(c).

[10] Richard E. Moberly, Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win, 49 Wm. & Mary L. Rev. (forthcoming Fall 2007) (manuscript at 12, on file with SSRN: *http://ssrn.com/abstract=977802).*

[11] Any suggestion that more thorough investigations by OSHA would necessarily favor complainants is nothing but pure speculation. Indeed, one could hypothesize various sets of facts in which a more thorough investigation would favor the employer. For example, while the timing of an adverse action as related to a complainant's protected activity might, on the surface, suggest a connection between the two, a more in-depth analysis might reveal that the employer had planned the adverse action prior to learning of the protected activity, thus undermining any inference of retaliation.

[12] 15 U.S.C. § 78j (m)(4).

[13] See, e.g., Moberly, Unfulfilled Expectations (manuscript at 20).

[14] Moberly, Unfulfilled Expectations (manuscript at 2).

[15] Some of the comparisons offered by Professor Moberly are highly suspect. For example, comparing the rate at which the United States Equal Employment Opportunity commission finds "reasonable cause" to the rate at which OSHA finds "reasonable cause" is like comparing apples to oranges. A "reasonable cause" finding by OSHA, if not appealed, is a final determination on the merits. A "reasonable cause" finding by the EEOC has no such effect.

[16] Moberly, Unfulfilled Expectations (manuscript at 24) ("Thus, we do not know, and cannot determine, whether employees filed "good" or "bad" Sarbanes-Oxley cases."); (see also manuscript 24 n. 128).

[17] Moberly, Unfulfilled Expectations (manuscript at 41)
[18] Id. at 49-51.
[19] The statutes other than Sarbanes-Oxley are the Occupational Safety and Health Act of 1970 § 11(c), 29 U.S.C. § 660 (30 days); the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (180 days); the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2651 (90 days); the International Safe Container Act of 1977, 46 U.S.C. app. § 1506 (60 days); the Safe Drinking Water Act of 1974, 42 U.S.C. § 300j-9(i) (30 days); the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1367 (30 days); the Toxic Substances Control Act of 1976, 15 U.S.C. § 2622 (30 days); the Solid Waste Disposal Act of 1976, 42 U.S.C. § 7001 (30 days); the Clean Air Act of 1977, 42 U.S.C. § 7622 (30 days); the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9610 (30 days); the Energy Reorganization Act, 42 U.S.C. § 5851 (180 days); the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121 (90 days); and the Pipeline Safety Improvement of 2002 § 6, 49 U.S.C. § 60129 (180 days).

Chairwoman WOOLSEY. Mr. Devine.

STATEMENT OF TOM DEVINE, LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT

Mr. DEVINE. Thank you.

I would like to begin by responding to a few of the previous speaker's points. He said that as a general view whistleblower laws that protect complaints about anything would cause chaos. Of course, that is true; whistleblower laws protect those who exercise free speech rights to challenge abuses of power that betray the public trust. Let us be clear who we are talking about.

Second, the gentleman said the SOX law is very favorable on paper. It is on paper. That is the problem. The Achilles heel is administration and due process rights to enforce those paper rights.

Let me give you a few examples of the Achilles heels. The first one is the Occupational Safety and Health Administration. Just to illustrate the quality of work there, due to the volume of complaints, GAP has had to develop a manual on how whistleblowers can find their cases when OSHA loses them.

During the investigation the Agency regularly engages in double standards on the right to counsel, access to evidence and the opportunity to rebut the other side's arguments. Then there is the other end of the administrative process, the Appeals Review Board. That reflects the legal system's lowest common denominator for appellate review. The members are minor league political appointees with 1-year terms, frequently without any subject matter expertise, who don't even move to Washington because they view their jobs as part time. They haven't returned any corporate whistleblower to the job since Sarbanes-Oxley was passed in 2002.

GAP has helped about 4,000 people since I came there in 1979. Every day we are called on by whistleblowers to answer questions about the facts of life with their rights. My testimony has a baker's dozen examples of those questions and the answers we must give if we are going to be honest. They are based on the three-part Department of Labor process highlighted today.

Let me give you a few examples. First, who do these laws protect? Well, in any given industry, potentially any employee or almost no one. It is like a road with more potholes than pavement. The laws are generally tucked into specific laws such as environmental or occupational safety statutes. Any corporation potentially could violate those laws. So any corporate employee potentially has rights about some things, but about other more significant problems, they have none.

For example, at a meatpacking plant a whistleblower can be protected for disclosing the runoff of fecally contaminated water into the river, but not for selling fecally contaminated meat or poultry that arrives on our families' dinner tables. Or a pharmaceutical company, you have rights if you challenge false statements to the shareholders, but not false statements to the government or the public for potentially lethal drugs like Vioxx, which killed 50,000 Americans from unnecessary heart attacks.

Second, what am I protected from blowing the whistle against? Most law protects exposure of illegality or other actions to carry out the purposes of the statute. The Sarbanes-Oxley eliminated that catch-all. So now the game is how illegal is illegal enough. Some of the early decisions have made a few factors to answer that. You must first prove that, one, the fraud itself is material or about sometimes 1 percent of the annual revenues; second, that the government actually will act to punish the misconduct; third, that the punishment will have a direct and specific impact on shareholders that lowers stock value. There is no protection for, quote speculation, also known as warnings. So much for knowing where you stand.

Third, if I speak out, when will I be become a legally recognized whistleblower? That is a good question. It used to be that challenging corporate misconduct internally triggered rights as an essential preliminary step for responsible government disclosures, but under some recent decisions that coverage has been disqualified, which forces employees to ignore their employers and contact the government behind the company's back or else risk waiving their rights. That is not a healthy system.

Well, how long do I have to act on my rights? Generally 30 to 90 days. There is a doctrine called equitable tolling, but don't count on it. In one case DOL extended the deadline to a year; in another Mr. Henry Emanuel they threw out his case for being 43 days late.

How long is this going to take? On paper, 30 to 90 days, but in our experience 2 to 3 years commonly, up to 14 years, 6 years not uncommon. To illustrate, it took Labor 4½ years to tell Mr. Emanuel he was too late for his rights by filing 43 days after a 30-day deadline.

Madam Chair, again, we say that whistleblower laws can be divided into those that create a free speech cardboard shield or a metal shield. Anyone going into battle with a cardboard shield, no matter how impressively it is painted, is going to die. While conflict is always dangerous, with a metal shield you have a fighting chance to win.

The current system is broken. It is a cardboard shield. It is time to get this right, and thank you for starting that process.

Chairwoman WOOLSEY. Thank you.

[The statement of Mr. Devine follows:]

Prepared Statement of Thomas Devine, Legal Director, Government Accountability ProjectPrepared Statement of Thomas Devine, Legal Director, Government Accountability Project

Madam Chair: Thank you for inviting my testimony. My name is Tom Devine, and since January 1979 I have served as legal director of the Government Accountability Project, a nonprofit, nonpartisan, public interest law firm dedicated to helping whistleblowers—those employees who exercise free speech rights to challenge illegality

or other abuses of power that betray the public trust. Since we began 30 years ago, GAP has assisted over 4,000 whistleblowers. GAP has led outside campaigns that led to passage of numerous government, military, and corporate whistleblower protection laws. We represent whistleblowers in test cases of those statutes, and to investigate their dissent against alleged misconduct threatening the public. We steadily monitor implementation of whistleblower statutes and share our results through books, law review and popular articles, as well as congressional testimony. See, e.g., The Whistleblower's Survival Guide: Courage Without Martyrdom, and "The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Dissent," 51 Administrative Law Review 531 (1999).

Since 2000 GAP has worked hard for whistleblower protection on the international level as a transparency cornerstone for globalization. For example, we teamed up with American University Law School to draft a model whistleblower protection law implementing the Organization of American States (OAS) Inter-American Convention Against Corruption. Over the last two years we have worked closely with officials at the United Nations and the African Development Bank to issue new whistleblower policies that for the first time protect public freedom of expression by employees at Intergovernmental Organizations. Currently we are completing work with the Tanzanian government's Prevention and Combating Corruption Bureau for a national whistleblower law to be introduced in that nation's Parliament this summer.

Unfortunately, in all too many instances we cannot point to U.S. laws as the baseline for global best practices in whistleblower protection. While well intentioned, their roads have led to a professional hell on earth for whistleblowers who rely on legal rights. The system of corporate whistleblower laws has been dysfunctional at best, and frequently a trap that rubber stamps retaliation for all naive enough to assert their rights.

Word spreads like wildfire in the employment grapevine at any institution when that occurs, and the lesson learned is unfortunate: don't work within the system. When corporate abuses of power betray the public trust, there are three choices other than professional suicide: look the other way, remain a silent observer, or go behind the company's institutional back to out-Machiavelli the Machiavelli's with an anonymous campaign. Blowing the whistle through established structural checks and balances is like "committing the truth." One of America's most effective whistleblowers, Ernie Fitzgerald, coined that phrase, because you will be treated like you committed a crime. Corporate whistleblower law is a crazy-quilt of hit or (usually) miss protections generally tucked into specific public health and safety laws. With scattered exceptions, the lucky ones covered by the law generally are unemployed, while serving open-ended sentences as prisoners of an administrative law system with rigid, unforgiving deadlines to act on rights, despite unrealistically short deadlines and a convoluted maze of inconsistent bureaucratic procedures with decisions seldom less than two to three years. and most statutes without any chance for interim relief. This is professionally akin to patients who die while waiting for an operation or organ donor.

The ultimate losers are the public. Two long-accepted truths are that secrecy is the breeding ground for corruption, and sunlight is the best disinfectant. Hand in hand with accountability, whistleblowing as the freedom to warn is at least as significant. Otherwise even the best leaders are ignorant of misdeeds, and those who fly blind are liable to crash. When whistleblowers have the freedom to warn, both corporate and government institutions can prevent avoidable disasters, before there is nothing left but damage control and finger pointing.

In GAP's experience, since the 1980's whistleblowers have proved their importance to society again and again. To illustrate, investors believed whistleblowers over Nuclear Regulatory Commission rubber-stamps and pulled the plug on plants that were accidents waiting to happen. At the Hanford nuclear waste site, after a contractor publicly announced the loss of 5,000 gallons of radioactive waste but reassured there was no danger of it reaching the public, whistleblowers exposed the truth: The real volume was 440 billion gallons. There already are trace readings of the wrong kind of radioactive "hot" water in the Columbia River water basin for the Pacific Northwest. Corporate whistleblowers at meat and poultry plants repeatedly exposed attempts to profit from fecally-contaminated products if the government deregulated. Their disclosures helped keep public health disasters such as the deadly Jack in the Box food poisoning tragedy from becoming the norm. Dr. Jeffrey Wigand's rock of the truth turned into a landslide that destroyed the tobacco industry's credibility and helped spark a global cultural sea change about cigarettes.

Whistleblowers are the life blood for effective law enforcement. It is difficult to win criminal convictions without testimony from those who bear witness against corruption. Without protection for witnesses, anti-corruption campaigns are empty

and lifeless. Whistleblowing disclosures to the SEC doubled normal rates during congressional Enron hearings. As SEC enforcement chief Stephen Cutler commented, "Because of this phenomenon, among other reasons, we are learning of potential securities law violations earlier than ever before. Keep those cards and letters, not to mention emails, coming." This committee has serious work to do, or government officials like Mr. Cutler will be waiting for Godot. Profiles in Courage are the exception, not the rule.

Every day at GAP we are called by whistleblowers asking us the facts of life if they rely on legal rights. Below are a baker's dozen examples of the questions we receive, and the answers we are forced to give if we want to be honest.

While there are 32 federal laws offering scattered protection for corporate whistleblowers, the answers are for the most common scenarios—witness protection provisions through a three step Department of Labor process in enforcement clauses of 14 public health and safety laws.1 For simplicity, they will be referred to as the DOL-administered laws. Although even these statutes are not consistent, as a rule their common features are an initial investigation by the Occupational Safety and Health Administration (OSHA), an opportunity to start with a clean slate at a due process hearing before an Administrative Law Judge (ALJ), and appellate review for the Secretary of Labor by an Administrative Appeals Board (ARB) which issues the final agency decision. In most cases employees can seek limited review by the relevant U.S. Court of Appeals. As seen below, even within the DOL- administered whistleblower model, there are numerous, significant variations, generally due to nothing more than when the particular statute was passed.

1. Who do the corporate whistleblower laws protect? In any given industry, potentially any employee or almost no one. The limited subjects eligible for protection are like a road with more potholes than pavement. The 14 whistleblower statutes are part of the enforcement provisions for laws covering specific issues, most frequently public health and safety laws such as the Clean Air, Water or Superfund Acts. The list also includes truck (Surface Transportation Act, or STA) and airlines safety (AIR21), occupational safety generally and mine safety, and scattered narrow areas like safe cargo container and. Pipelines. Any corporation may violate environmental or occupational safety laws, so all employees have rights to challenge those particular types of misconduct. But for other potentially greater abuses of power, they may have none. No one can be sure without a lawyer to navigate.

For example, an employee at a meat packing plant has free speech rights when challenging release of fecally contaminated water flowing into the river. But the same employee has no rights when challenging fecally contaminated meat and poultry that shows up on our families' dinner table. A truck driver is protected for challenging bad tires, but not illegal cargo. An employee of a pharmaceutical company has protection for disclosing false statements in financial reports to the shareholders. But there is none for challenging false statements to the government and the public about potentially lethal drug safety hazards, like the threat of unnecessary heart attacks from killer pain killers such as Vioxx that killed 50,000 Americans.

2. What am I protected for blowing the whistle against? Most whistleblower statutes protect those who challenge illegality or take any other action to "assist in carrying out the purposes" of that particular law. The Sarbanes Oxley (SOX) law's early track record illustrates the risk of omitting the catchall phrase. In theory, SOX sweeps through industry distinctions by protecting those who challenge fraud, or any illegality that materially affects the shareholders' interest. But employees at privately-held subsidiaries of public corporations cannot count on having rights, and those working at a large corporation's international offices have none.

Most frustrating under Sarbanes Oxley, it is not enough to blow the whistle on illegality. The question still has not been clearly answered, "How illegal is illegal enough for free speech rights?" Under some early decisions it also is necessary to prove that—1) the fraud itself is material (such as one percent of annual revenues); 2) the government would take action to punish the misconduct; and 3) the punishment would have a direct and specific impact on shareholders that lowers stock value. There is no protection for challenging any misconduct with "speculative" consequences. So much for knowing where you stand. And it's doubtful whether the law applies at all if the company requires submission of all disputes to a company-controlled system of arbitration as an employment condition.

None of the laws have the well-established protected speech boundaries of the Whistleblower Protection Act for federal government workers that also are included in many state laws: illegality, gross waste, gross mismanagement, abuse of authority or a substantial and specific danger to public health or safety.

3. If I speak out, when will I become a legally-recognized whistleblower? That's a good question. It used to be that challenging corporate misconduct triggered rights

as an "essential preliminary step" for responsible disclosures to the government. But recent Surface Transportation Act decisions have disqualified protection for internal disclosures, forcing employees to contact the government behind their employer's back or else risk waiving their rights. To illustrate the consequences, the ARB recently canceled protection for a trucking employee who "red tagged" (required repairs before use) vehicles for safety violations. This adds significant, potentially unnecessary burdens for government enforcement units, where a corporation would have acted in good faith if employees had the freedom to warn of problems that may well have been honest mistakes.

It also can have lethal consequences for the public. Examples of red tags are broken doors, inoperable lights, and defective brakes. (On a personal note, the latter is the same violation that caused my brother's death at 30 years old while waiting at a stop light—depriving his wife, six month and three year old children of a father.)

4. Am I protected for refusing to violate the law? Rarely. Unlike the Whistleblower Protection Act for government workers and an increasing number of state laws, in most DOL administered laws, you're only protected for making noise. If you try to walk the talk, you are walking the plank.

5. How long do I have to act on my rights? It ranges from 30-90 days in most DOL-administered statutes. In theory, the law could provide flexibility through a doctrine called "equitable tolling." But don't count on it. In one case, DOL extended the deadline to a year. But in another dispute involving organic market employee Henry Immanuel, DOL threw out his case for being 43 days late.

Mr. Immanuel's surreal ordeal is illustrative. Ironically, he was fired for blowing the whistle when an organic market threw five gallons of toxic industrial cleaner in a trash dumpster. Within 13 days he filed a reprisal complaint with the Maryland Occupational Safety and Health (MOSH) agency. After six months, they informed him that they were the wrong agency to handle the dispute. He then began a campaign asking government offices where he was supposed to defend his rights. Despite a series of false leads, he found out about OSHA and filed a complaint 73 days later. That was 43 days after the normal 30 day deadline. According to DOL, it was too late and there were no excuses. In order to avoid Mr. Immanuel, without explanation the ARB disregarded a series of prior rulings extending deadlines up to a year due to similar circumstances. Despite a legal doctrine that asserted the same rights in the wrong forum qualifies for deadline purposes, the ARB somehow asserted that he hadn't made the same "precise" complaint before the Maryland and federal OSHA's, again without explanation.

In another recent decision, the ARB abandoned the longstanding doctrine of continuing violations. This means employees must file new lawsuits against each act of additional harassment within 30 days.

6. How long will this case take? In theory, most statutes give the Department of Labor 90 days for a decision. In reality, expect to be twisting in the wind for at least two to three years. One vindicated Department of Energy whistleblower on radioactive releases at nuclear weapons facilities twisted for 14 years before the current political appointees reversed a series of preliminary victories that had kept getting sent back to perfect technicalities. Six years is not uncommon. To illustrate the double standard between deadlines for whistleblowers and deadlines for the government, it took the Labor Department 4.5 years to tell Mr. Immanuel that he was too late to keep his rights by filing 43 days after the 30 day deadline.

7. Can I get any interim relief while I'm waiting? In a few recent DOL-administered laws such as AIR21 and SOX, you can get a ruling for interim relief. But even then don't count on enforcing it. A recent court decision held that since employers cannot immediately appeal interim rulings, it would violate the company's due process rights for courts to enforce a DOL ruling that the employer defies.

8. When it's all over, what are my chances of winning? Around one in twenty. This is the bottom line for whistleblowers. If there is no realistic chance of success, the law is a trap that offers legal wrongs, not rights. If there is not a fair chance to win, asserting your rights costs tens of thousands of dollars and drags out painful disputes for years—all to officially endorse the retaliation you are challenging by rubberstamping it. GAP regularly must ground whistleblowers in this reality.

Professor Moberly's statistics on SOX results are representative for the DOL legal system generally, so they are worth emphasizing: 3.6% win rate at the OSHA level, 6.5% with Administrative Law Judges, and not a single case where the ARB has ordered retaliation to stop in over four and a half years.

9. Will the government respect my rights on paper? The ARB seems to have a blind spot for congressional language. For example, the Board functionally has erased the common catchall provision providing protection for any action to assist the government "to carry out the purposes" of the relevant statute. Recent rulings

on the STA truck safety law are illustrative. In one case, the ARB disregarded a driver's refusal to drive while impaired due to sleep deprivation—specifically protected activity in that statute. Instead, it created a loophole with the explanation that the employee shouldn't have been hired in the first place.

Despite unqualified statutory language banning any discrimination because of legally-protected activity, discrimination no longer counts until there is a victim. For example, companies can issue retaliatory warning letters, even though their effect is to mean the person can be fired for the next offense. That is the employment equivalent to saying nothing can be done when someone points a gun, until the bullet enters flesh and draws blood. The SOX language outlawing "threats" of retaliation apparently has vanished, although that type of harassment can have the worst chilling effect—de facto prior restraint.

There is no way to predict how DOL will read the law in any particular case. Recent trucking decisions canceling protection for "essential preliminary steps" to a disclosure reverse over two decades of case law, without explanation. This means those with jobs like safety inspectors, auditors or truck drivers proceed at their own risk when issuing reports or notices of violation that are the foundation for government disclosures.

GAP has been frustrated by Kramer vs. Kramer type scenarios in the same case. In one instance the Secretary of Labor reversed an Administrative Law Judge and sent the case back to properly interpret the law in a scathing ruling. The ALJ issued a nearly identical opinion, and the next time up the decision was approved.

10. What do I have to prove to win; what tests will I have to pass? It all depends on which law. Ten of the laws are governed by antiquated burdens of proof from 1974: an employee must prove that protected activity is the "primary, motivating factor" in order to establish a basic prima facie case. Then the burden of proof shifts, and the employer can still prevail if it proves by a preponderance of the evidence" that it would have taken the same action for independent reasons. Under four recent DOL-administered whistleblower statutes, the more modern standards of the Whistleblower Protection Act apply: the employee only has to prove protected activity was a "contributing [or relevant] factor" for a prima facie case, and the employer must prove its independent justification with "clear and convincing" evidence.

11. Will I be able to go to court for my day in court? For two of the 14 laws, yes. Under SOX an employee can go to court and start fresh, if the DOL administrative process has not produced a final ruling in 180 days and the delays are not due to the whistleblower's bad faith. Under the Energy Reorganization Act, nuclear energy and weapons workers have that same option if it takes DOL more than 360 days. Under all the other DOL-administered statutes: no. Most of the DOL-administered laws provided limited review in U.S. Courts of Appeals, but not all. For example, for mine safety or OSHA violations, there is only review to internal commissions where an employee can ask the agency to change its mind.

12. If I go to court, will a jury decide whether my rights were violated? In theory, that is possible under SOX, but no one has made it to a jury since the law's 2002 passage. The same is true for nuclear whistleblowers, although their access was not established until the 2005 Energy Policy Act. The courts have warned they may not accept jury trials despite clear congressional intent, because of a technical error in drafting the law.

13. When it's over, will I understand why I won or lost? Get serious. While there are exceptions, increasingly the rule is not to supply an answer or even hints about "why" any given conclusion was reached. The Board regularly keeps secret both the evidence and reasoning for its conclusions.

No solution can be reliable unless it addresses a problem's causes. At the Department of Labor, there are two Achilles' heels are at the beginning and end of the process—the Occupational Safety and Health Administration (OSHA), and the Appeals Review Board (ARB). To put whistleblowers' frustrations at OSHA in perspective, due to the volume of complaints GAP had to develop a manual for how whistleblowers can find their cases when OSHA loses them. During the investigation, the agency regularly engages in double standards on the right to counsel, access to evidence and the opportunity to rebut the other side's arguments.

The ARB has the final word for the Secretary of Labor after an administrative hearing. It reflects the legal system's lowest common denominator for appellate review. The members are political appointees selected by the Secretary of Labor for one year terms—effectively minor league patronage appointments without enough time to accumulate expertise even if they were qualified. They view their jobs as part time, frequently living in their home states except when they fly in for meetings and tell the career staff how to rule, without consistently first reading the staff's memoranda analyzing the record and the law. While the Office of Administra-

tive Law Judges (OALJ) is well-respected, realistically it cannot overcome the legitimacy breakdown that surrounds it.

In piecemeal fashion, Congress has been acting in good faith, if inconsistently, to protect corporate whistleblowers for over 30 years. The piecemeal inconsistencies reflect scattershot lessons learned, and demonstrate Congress' good faith in trying to improve whistleblower rights. But the system is broken. In the process, there has been an opportunity to learn many lessons.

Our organization is available and pleased to assist staff to develop solutions, based on 28 years of frequently painful experience learning the reality behind free speech rights on paper. At GAP we divide whistleblower laws into cardboard and metal shields. Anyone going into battle with a cardboard shield, no matter how impressively it is painted, is doomed. While conflict is always dangerous, a person with a metal shield has a fighting chance to survive. The current system of corporate whistleblower laws is a cardboard shield.

The result? The current corporate laws have created more victims than they have helped. The net impact of free speech laws has been to punish those who exercise that right, while creating a chilling effect in the process. Your leadership is long overdue. It is long past time to get it right, with a composite law that is coherent, consistent, comprehensive, and actually works.

Chairwoman WOOLSEY. We have a series of votes. We will be back in about a half hour. So get up and stretch your legs, but we will be back.

[Recess.]

Chairwoman WOOLSEY. We are back in order. And as long as I am the first person to ask questions anyway, I will get started so you guys can get on with your lives. There will be other Members coming back, but once the day is over for voting, people just sort of disappear. So don't be disappointed if we don't have the full committee back here.

So I am going to begin with you, Mr. Devine, because we ended with you. So I am going to start with you. I mean, how do you respond to critics who claim that most whistleblower cases are without merit, and that profitability should trump freedom of speech? What is your response to that?

Mr. DEVINE. In our experience, about a third of the—I should preface it, Madam Chair, that we are a small organization that doesn't have the funds to regularly meet payroll, so we have to be very careful who we represent. The only thing we really have going for us is credibility. And if a whistleblower is a phony, camouflaging their own hidden agendas or misconduct, and we champion them, no one would take seriously the other people we help. That is the key question for us. And in our experience, about a third of the people who contact us have valid whistleblower claims out of the totals.

And it is not that everyone else is in bad faith; they may have another dispute that is really more discrimination, race and sex, or a personality conflict where they were treated unfairly, but not a whistleblower case. The whistleblower statutes that have worked have generally had between a 25 and 33 percent success rate for decisions on the merits, and that is pretty much consistent with our experience. That is why Professor Moberly's statistics are so disappointing, where anywhere from an eighth to a fourth of really the bottom—the bottom level for a statute that is functional in terms of results.

Chairwoman WOOLSEY. That leads me right into asking you, Mr. Chinn, how do you consider a program successful if there is a 5 percent favorable decision towards employees, and then that means

95 percent favorable towards the employer? How does that turn into success?

Mr. CHINN. Well, Madam Chairperson, I would say that the first question really is to what degree was there unlawful conduct, in this context retaliation?

Chairwoman WOOLSEY. You have said that, but the statistics have to say that 95 percent of the people that come before and used Sarbanes-Oxley, they are not—95 percent of them are not doing it for the wrong reasons and are not out of step. I mean, what is missing in this picture that the other good cases are being thrown out?

Mr. CHINN. Um-hmm. Well, I don't know that that proposition is correct, Madam Chairperson, with all due respect, that is that good cases are being thrown out. Sarbanes-Oxley was enacted for a very specific reason, and it does have very specific requirements with respect to protected activity.

Chairwoman WOOLSEY. Would anybody else up here like to respond to that? Because I think you—you are supporting something that is not working. How does that work, Mr. Fairfax, with you? I mean, if you have an agency that is—your workload has increased considerably, you have got only what, two more employees, and how can you possibly be effective?

Mr. FAIRFAX. I actually think we are very effective. Our merit rate—we count our merit rate as any case where we issue a finding of merit or that we settle on behalf of the complainant. Remember, as I said in my testimony, we are working all the time with the complainant and the respondent, and throughout the phase of the investigation we are meeting with them. And if we think we are going forward with a merit case, we encourage them to try to settle the case. That saves people time and money across the board. More times than not these cases are settled. So when you add up where we issue a merit finding, and then you add up where we settle the case, right now we are right at around 22 percent as what we would include as a merit case.

Chairwoman WOOLSEY. So, Professor Moberly?

Mr. MOBERLY. One of the concerns I have with including settlements as merit rates is that we have no idea what these cases are settled for. So the settlement rate, I think, is kind of a red herring when you look at it. I have asked for that information from OSHA. OSHA has a regulatory—under their own regulations a responsibility to oversee settlements to make sure they are fair and adequate and reasonable. And they have denied my Freedom of Information Act request for that settlement information, which I think would let us look more deeply at whether these cases are successfully resolved with settlement.

Chairwoman WOOLSEY. Okay. We will be back.

Mr. Kline?

Mr. KLINE. Thank you, Madam Chair. Thank the witnesses for being here today.

I know that my colleagues and I had discussed a number of these questions, and they haven't come back from votes yet, so I am going to skip around just a little bit. I am looking at this chart. Do you folks have this thing?

Mr. Fairfax, this is percentage of meritorious cases by year.

Mr. FAIRFAX. Yes, I have a copy of it.

Mr. KLINE. It looks to be—in your testimony you mentioned something like 23 percent were considered meritorious. As I am looking at this across the years from 2000 to 2006, it looks like they are always in the twenties.

Mr. FAIRFAX. Yep.

Mr. KLINE. Regardless of administration, regardless of party, we are running somewhere in the twenties of cases that are considered meritorious; is that right?

Mr. FAIRFAX. That is correct. And that actually goes back 30 years we have been consistent in that range.

Mr. KLINE. Okay. That is good. I was going to ask, because my chart stops here at 2000, which would have been the last year of the Clinton administration. So interesting to see that we have stayed pretty much consistent administration to administration. And this is, I think your testimony was, something like 1,800 to 2,100 cases?

Mr. FAIRFAX. Correct.

Mr. KLINE. Is that——

Mr. FAIRFAX. Yeah. We average probably around 1,900, but 1,800 to 2,100 cases per year. And that has been consistent for the last 5 or more years.

Mr. KLINE. Okay. We have gone through this issue of sometimes they are settled, you reach a settlement; sometimes they are withdrawn to go to court; is that correct?

Mr. FAIRFAX. In some statutes, sir, the complainant can take them directly to court.

Mr. KLINE. Okay. Let us talk about that aspect of it, where the complainant, in order to seek a remedy by Federal court, withdraws the complaint.

Mr. FAIRFAX. They don't actually withdraw the complaint. They withdraw it essentially from us. Under the Sarbanes-Oxley and the Environmental Energy Resource Act, the complainants can—if we haven't resolved it within a certain time period, they can pull the case back and take it back to Federal court.

Mr. KLINE. Do you continue to track these cases?

Mr. FAIRFAX. Yes, we do.

Mr. KLINE. And do you have any information on how those cases have come out?

Mr. FAIRFAX. The last data I looked at it was not very successful. I don't have the actual numbers, but I didn't feel it was very successful. I thought our success rate of settling these case or finding merit was better.

Mr. KLINE. Thank you.

Professor Moberly, have you got some sort of sense of what the appropriate win rate should be? I mean, you have been somewhat critical of what seems to be a low win rate, I think the Chairwoman said 5 percent or something. What should it be?

Mr. MOBERLY. Well, under EEOC investigations it is closer to 10 percent. It depends on if you look at under claims that are filed in Federal court, those claims usually resolve at about 13 or 14 percent. So, you know, these are—Sarbanes-Oxley cases tend to be resolved at a rate three or four times less than what we see in comparable other employment statutes.

Mr. KLINE. So 15 percent or something like that is what you——

Mr. MOBERLY. I think Mr. Devine already made a statement that he thought, you know, 25 to 30 percent we see under other claims. I think the False Claims Act is somewhere in that range as well.

Mr. KLINE. Okay. So we are sort of groping for a number here. In your studies, again staying with you, Professor Moberly, you don't count cases which settle. Do I understand that right?

Mr. MOBERLY. That is correct. I just count cases that have gone all the way through the administrative process.

Mr. KLINE. Why don't you count those? It looks like we are getting an incomplete picture if you don't count those.

Mr. MOBERLY. Sure. And I am pretty clear in my paper why I don't count those. And the reason is—the reason, I explained to Chairwoman Woolsey, is I don't have any information. You know, employers and employees settle cases for all sorts of reasons, some of which are unrelated to merit. Nuisance value. And unless we know the amounts for which those cases are settled, it doesn't make sense to include them as automatically meritorious for employees. Employees may be out of work. It may be 6 months into their——

Mr. KLINE. Or not meritorious would be the other side of that; is that right?

Mr. MOBERLY. That is very true. Yes.

Mr. KLINE. So if you are looking at a total number of cases, 1,800, 1900 cases, if we were looking at the OSHA example of Mr. Fairfax, some percentage of those get settled, you are just disregarding those completely, but you are taking the percentage of the total number; is that correct?

Mr. MOBERLY. No, sir, that is not.

Mr. KLINE. You are dropping those out?

Mr. MOBERLY. The settlements and withdrawals are dropped out of the numerator or denominator. These are cases that have just been resolved completely by OSHA or ALJ and the win rate for those cases.

Mr. KLINE. Got you.

Thank you, Madam Chair.

Chairwoman WOOLSEY. Thank you.

Mr. Bishop.

Mr. BISHOP. Thank you, Madam Chair.

Witnesses, thank you very much for all your testimony.

Professor Moberly, you said—I think I am going to paraphrase you—that this is not the system we would create if we were creating a system from scratch. Briefly, can you outline the system we would create if we were creating one from scratch?

Mr. MOBERLY. I think what the current system demonstrates is that these narrow ad hoc protections serve to define whistleblowers out of protection; that agencies at least and courts also focus on these kind of boundary issues so that we never get to the claim of whether someone was retaliated against. The courts and agencies spend a lot of time focusing on is this the right type of employee? Did they make the right type of disclosure? Did they do it in the right way? Did they tell the right person? So the first thing you would have to do is, I think, broaden those definitions so that they

don't become land mines for whistleblowers, and they actually provide true encouragement. So broader overall protections.

I think an easy and very helpful solution would be to increase the statute of limitations for these provisions across the board. The various numbers from 30 days to 300 days, I think, are potentially disastrous for employees. And a longer statute of limitations purposes, I think—longer statute of limitations period would serve the purposes a little better.

And I think there could be more transparency in the process. I had to file a Freedom of Information Act request just to get decision letters from OSHA to find out what happened on these cases, and those could be made more available.

Mr. BISHOP. Thank you very much.

Mr. Chinn, I know you were taking notes, but could you comment on Professor Moberly's very brief outline of a system that we would create from scratch, what your assessment of it would be?

Mr. CHINN. I would be happy to do that, Congressman Bishop. With respect to—well, first of all, I am not exactly sure what is being proposed. Definitions should be broadened. I am not sure on a statute-by-statute basis or as Professor Moberly is proposing, some sort of Unified Whistleblower Protection Act.

Mr. BISHOP. Let us assume he is proposing a unified whistleblower protection.

Mr. CHINN. Okay. With that assumption in mind, I think that that is a very radical proposal and would be something akin to, in terms of scope, to the enactment of Title 7. And if you are going to make that sort of step, it seems to me that there would be some sort of findings necessary before you would go to that, as opposed to anecdotal horrors, which can be matched, I assure you, Congressman, with anecdotal horrors of meritless cases taking up tremendous sums of money, or people misusing the statutes for protection, even in the two-thirds of the times seen by Mr. Devine.

If we are going to now federalize and nationalize a whistleblower protection program that would protect everyone who in any job who complains about anything, I think that would be a recipe for chaos, and it would ignore the carefully targeted, drafted legislation that exists today. And it would also ignore the State protections that exist on a State-by-State basis throughout the country.

Mr. BISHOP. I am sure you don't agree with this, but the carefully targeted legislation that you described is legislation that has failed to protect people. So either there is something wrong with the way it has been crafted, or there is something wrong with the way it is administered.

Mr. CHINN. Well, Dr. Wigand described his case as an extreme example, and I would suggest that concluding that a national Uniform Whistleblower Protection Act—the enactment of such an act based on extreme examples would be bad policy.

Mr. BISHOP. What about Mr. Simon's example? Would you find that to be an extreme?

Mr. CHINN. No. But I think Mr. Simon fits within a current statute. Mr. Simon's complaint is the way in which he has been dealt with, and there may well be answers to that, but those answers fall far short, in my humble opinion, of requiring a national Whistleblower Protection Act.

Mr. BISHOP. Okay. I am going to run out of time, and I want to ask Mr. Fairfax a question. You say you have 1,900 cases annually, with 72 investigators. Professor Moberly's testimony included a statistic that now 13 percent of your caseload is Sarbanes-Oxley issues, which prior to 2002 was not a factor for you, and yet there has been no increase in staff. And so my question to you is the unit that handles this within OSHA, is it adequately staffed? Would you benefit, would the system benefit, from additional investigators?

Mr. FAIRFAX. Thank you. Actually, I think we do a good job with what we have. I mean, while the number of Sarbanes-Oxley cases has gone up a little bit since it was enacted, the number of cases under section 11(c) of the OSHA statute have decreased. So the balance has been there. We are really only averaging 25, maybe 30 cases per year per investigator, which is considerably less than what we averaged for our compliance officers that do our inspections. So, you know, I look at the data, and I evaluate it, and I look at the number of cases, and I look at our workload spread across the country, and I think we are pretty well balanced out and have the resources to do it.

Mr. BISHOP. Thank you.

Would the Chairman indulge me for one additional question?

Chairwoman WOOLSEY. Yes.

Mr. BISHOP. Why do you think your non-Sarbanes-Oxley cases have declined?

Mr. FAIRFAX. We have been looking at that for years, because they have steadily been going down since probably the late 1990s. I don't have an answer why they have been going down. You know, maybe we are out there enough, and enough people know about the provision under section 11(c) of the OSHA Act. But I don't have an answer off the top of my head for that.

Mr. BISHOP. Thank you very much. Thank you all.

Chairwoman WOOLSEY. While we are waiting for the Ranking Member to come, I will give him a little bit more time by asking a question. I would like to ask Dr. Wigand and Mr. Simon, you know, most people aren't as brave as the two of you. I mean, they just aren't made that way. And so what I would like to know from you is what actions—what actions should be taken that would encourage workers to speak out from your perspective, starting with Dr. Wigand?

Mr. WIGAND. I think if there was some legal framework that provides a psychological comforting counterweight to the fear and the retaliation. To tell the truth, you need bodyguards is an extreme, I agree, but when you take on the tobacco industry, you take on a $45 billion industry that has unlimited resources and had five decades of fraud. Would I have liked to have had some entity that would have provided for me legal, psychological, marital and other types of support? One, it probably would have made it a little bit easier. Number two, it may have made it a lot earlier. And if it was earlier, there may have been a lot more lives that were saved. I did not have that available.

As they characterized, my case may be extreme, but I think it is extreme for all people who find that what their actions get back is extreme retaliation. The retaliation of Mr. Simon was no dif-

ferent than the retaliation of me. It is retaliation for telling the truth, and we need protection to tell the truth.

Chairwoman WOOLSEY. Mr. Simon?

Mr. SIMON. I think through my experience, and that is all I can base any of this on is my experience in all of this, that the companies were not in any way, even after the hearing at Federal AL—the ALJ, they sided on my behalf after the hearing, and there was no financial responsibility on the employer's part. They weren't held to any type of, I guess, reason to try to settle the case or to want to settle the case. If there could be a way that they are immediately responsible once it gets to a certain point, like after a hearing, that they are going to either put the employee back to work at a profitable position for them and the employee, or some other way they are held financially responsible, they are not going to do anything, in my opinion. They are going to just basically laugh at you, like they did to me, and throw you out of their office.

Chairwoman WOOLSEY. Sorry. Mr. Devine?

Mr. DEVINE. Madam Chair, I would say there are four cornerstones for an effective solution. The first is no loopholes coverage for all who disclose evidence challenging abuses of power that betray the public trust. The second is consistent procedures that incorporate modern burdens of proof so everybody has the same rules to prevail. The third is first-class due process rights so you get a genuine day in court. And the fourth is if you win, that it matters; results that will eliminate the prejudice when you win, both on the interim or the final levels.

And I feel that it is necessary to respond to a few of Mr. Chinn's comments, because he said this will be a very radical proposal. Well, you know, I thought freedom of speech is what defined our country. This is freedom of speech where it counts. Radical to whom?

Second, he said that having a national law with a consistent, coherent set of rights would be bad policy. Quite frankly, coherence replacing chaos, I think, is good policy. I think that objection flunks the laugh test.

And third, he said that, well, we shouldn't do this because some people might abuse their rights. Well, in that case I guess we should cancel all the our rights, because they can all be abused.

And if we are talking about the costs, let us weigh the costs of frivolous lawsuits to the costs for society when a corporation abuses its power. And if the view of the corporate sector is we need to make a record of the full extent of the price that society has paid for corporate abuses of power, I say let us get started.

Chairwoman WOOLSEY. Thank you.

Mr. Wilson?

Mr. WILSON. Thank you, Madam Chairman.

Mr. Chinn, there has been testimony that OSHA is interpreting Sarbanes-Oxley as a statute incorrectly or too narrowly. What would be your opinion as an analysis of Sarbanes-Oxley?

Mr. CHINN. Well, I think, first of all, there are a number of decisions out there from OSHA; there are now court decisions as well. Some of the decisions that are cited by Professor Moberly or by Mr. Devine are not any way controlling. They are just part of the body

of case law that is developing. I think in general, though, the decisions are consistent with the overall purposes of the act.

What is complained about here, for example, the statute of limitations, which—by the way, the statute of limitations for a retaliation claim under Sarbanes-Oxley is not at all out of line with the other 13 statutes or 14 total statutes administered by OSHA. The complaint that there are decisions dismissing cases for being untimely, well, that is what a statute of limitations is for. The complaint that there are decisions dismissing claims brought by employees of private employers, well, that is what the statute says. So I don't think—those are complaints about the legislation. Those are complaints that don't recognize that the legislation was enacted with a particular purpose in mind, the purpose to protect investors. It was not, as is being discussed today among some of the panelists, a general whistleblower protection statute.

So I think that the interpretations, I mean, some of them conflict, and that is normal, just like district court opinions around the country will conflict until they simmer up and create decisions in circuits, and ultimately the Supreme Court rules. But I think that they are generally consistent with the text of the act, the text of the regulations promulgated under the act, and the intent of the act.

Mr. WILSON. And, Director Fairfax, thank you for your service. And I indeed have represented workers in regard to retaliation, and it has always been a terrific experience when people get a job back. But how does OSHA define a win?

Mr. FAIRFAX. We define it as we do an investigation. If we think we have a merit case that we are developing, we approach the respondent after talking with the complainant about settling the case. We look at a win as a case that we settle, a case that we issue findings of merit on, or in some cases the parties get together themselves, through a union or whatever, and they settle a case that comes back to us to approve. We count that as a win also. So those three areas we count as successful outcomes for the complainant, or a win for us.

Mr. WILSON. And we appreciate that very much.

Additionally, there is several areas of unsettled law that OSHA is attempting to address. Can you explain what those are and when you think they will be settled by the courts?

Mr. FAIRFAX. I am not sure what you are asking, unsettled.

Mr. WILSON. This is in Sarbanes-Oxley specifically.

Mr. FAIRFAX. One of the ones I am most familiar with is dealing with employees of U.S. corporations that are overseas. We have some, I guess, lawsuits, I guess, if you will, on those cases, and we are pursuing them through. We haven't settled those cases yet. That is the one I am most familiar with of the two or three.

Mr. WILSON. And do you have any anticipation when this may be resolved, or is there a role of Congress to clean up——

Mr. FAIRFAX. No, it is working its way through the courts. I would think sometime this year I would hope.

Mr. WILSON. And, Mr. Chinn, as a practicing attorney with Sarbanes-Oxley whistleblower cases, it is my understanding you also practice in other areas. Can you outline some of the differences

that a complainant would experience with Sarbanes-Oxley as, say, an EEOC complaint alleging discrimination?

Mr. CHINN. Sure. Be happy to. A Sarbanes-Oxley complainant faces a very different, much more favorable burden of proof than does a Title 7 discrimination plaintiff. As I mentioned in my opening remarks, a Title 7—well, a Sarbanes-Oxley plaintiff, to satisfy a prima facie case, need only demonstrate that the protected activity was a contributing factor. Under Title 7, for example, if you are pursuing the burden-shifting, pretext-type analysis under Title 7, an employee will have to show that the prohibited factor, let us say one's age or—well, Title 7, I am sorry, one's gender, one's sex, one's race was a determinative factor in the outcome. That is a much higher burden than the burden placed on a Sarbanes-Oxley plaintiff.

Sarbanes-Oxley plaintiff, in effect, as I mentioned earlier, has a choice of forum. Because 180 days is such a brief period of time, once 180 days elapses, Sarbanes-Oxley plaintiff can remain before OSHA. If the Sarbanes-Oxley plaintiff thinks that that is a good place to be, that is where the plaintiff can stay, the complainant can stay. If the complainant wants to change venue at that point and go to Federal court—and the employer doesn't have that right; only the employee does. And that, too, is different in the sense from Title 7 litigation. One must obtain a right to sue before one can go to court. Now, as a practical matter, on a statistical basis those are typically granted, but they must be granted in order to go to Federal court. You don't have an automatic right to go at the expiration of a period of time.

Mr. WILSON. Thank you.

Chairwoman WOOLSEY. Well, I thank you all for coming. I particularly thank you, Dr. Wigand and Mr. Simon. You have shared your stories with us. Your courage is amazing. What you did and what you continue to do is vitally important. Your testimony today actually could encourage others to come forward to report instances of illegality in the workplace. And at the same time, your testimony could encourage OSHA to redouble its efforts to administer the laws that are in effect and under their jurisdiction on a timely, fair basis.

This week is Whistleblowers Week in Washington. There are many events taking place designed to highlight and promote good government and protection for whistleblowers who choose to speak out. I am sure all of us—well, I am sure certainly most of the witnesses will all celebrate the important role that the whistleblower community played earlier this year in securing the passage of H.R. 985, the Whistleblower Enhancement Act, which extends whistleblower protections to Federal employees who work on national securities matters, and very importantly provides explicit protection to Federal employees who report instances of Federal research being suppressed or distorted for political reasons.

It is with regard to private employment that many laws have been enacted to protect whistleblowers. They were passed with the best of intentions. But this hearing today has illustrated to me that we have a distance to go with regard to whistleblowers in the private sector. The laws differ one from another in substantial respects. Deadlines for filing complaints are extremely short. Com-

plaints get dismissed at a high rate. Cases are taking too long to be resolved. And too many whistleblowers are still suffering severe consequences for telling the truth.

It is clear that we all need to change things, and today's hearing to me is a new beginning. Laws to protect whistleblowers have always received bipartisan support here in the Congress. No matter what side of the aisle we are on, we recognize that it benefits everyone in this country, and particularly workers, when they are able to report illegalities.

I hope all the members of this subcommittee can work together to explore legislative and other options to ensure that when workers come forward, we have meaningful protections and procedures in place for them. I thank you for coming, and this hearing is adjourned.

[Whereupon, at 4:18 p.m., the subcommittee was adjourned.]

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