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H.R. 1507, THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2009

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

H.R. 1507

TO AMEND CHAPTER 23 OF TITLE 5, UNITED STATES CODE, RELATING TO DISCLOSURES OF INFORMATION PROTECTED FROM PROHIBITED PERSONNEL PRACTICES, AND FOR OTHER PURPOSES

MAY 14, 2009

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H.R. 1507, THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2009

THURSDAY, MAY 14, 2009

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m., in room 2154, Rayburn House Office Building, Hon. Edolphus Towns (chairman of the committee) presiding.

Present: Representatives Towns, Cummings, Kucinich, Tierney, Clay, Watson, Connolly, Quigley, Van Hollen, and Issa.

Staff present: Beverly Britton Fraser, counsel; Peter Fise, staff assistant; Linda Good, deputy chief clerk; Adam Hodge, deputy press secretary; Carla Hultberg, chief clerk; Marc Johnson, assistant clerk; Mike McCarthy, deputy staff director; Adam Miles, professional staff member; Jenny Rosenberg, director of communications; Mark Stephenson, senior policy advisor; Shrita Sterlin, deputy director of communications; Ron Stroman, staff director; John Cuaderes, minority deputy staff director; Charles Phillips, minority chief counsel for policy; Dan Blankenburg, minority director of outreach and senior advisor; Adam Fromm, minority chief clerk and Member liaison; Kurt Bardella, minority press secretary; Chapin Fay and Marvin Kaplan, minority counsels; and Alex Cooper, minority professional staff member.

Chairman TOWNS. The committee will come to order.

First of all, I welcome Ranking Member Issa.

Today's hearing is entitled, "The Whistleblower Protection Enhancement Act of 2009."

H.R. 1507 is an important piece of legislation. This committee has reported favorably similar legislation on a bipartisan basis in each of the last two Congresses. The House of Representatives has twice passed similar bills, once in 2007 with 331 votes, and again as a bipartisan amendment to the stimulus legislation earlier this year. Unfortunately, the stimulus amendment was removed in conference with the Senate. However, this provides us with the opportunity to hear from the new administration on this reform, to work and engage them on possible changes to the bill, and to consider the ongoing need for strong whistleblower protections.

I want to thank Representatives Van Hollen and Platts for their efforts to support government whistleblowers. As this committee has long recognized, enhancing whistleblower protection helps us to fulfill our role of bringing about more honest, accountable and effective government for the American people.

Whistleblowers risk their careers to challenge abuses of power and gross waste of government resources. At a time when America needs the best value for every dollar spent, we need these protections now more than ever. This is particularly true now that billions of stimulus dollars and billions more aimed at stabilizing the financial system are at stake.

H.R. 1507 will ensure that the Federal employees responsible for monitoring the financial recovery programs are not deterred from reporting mismanagement of taxpayer dollars. Government employees are often in the best position to call attention to illegality and waste because they witness what is happening inside the government on a day-to-day basis.

Unfortunately, as we will hear today, under the current inadequate system, whistleblowers have too often been left out to dry. Instead of being rewarded for their courage, they are actually being destroyed in some instances. Over the last decade, legal victories for public employees have been almost nonexistent. Employees have been fired and disciplined for disclosing evidence of waste, fraud and abuse simply because an administrative judge determined it was part of their job to do so.

That is contrary to the whole point of the whistleblower law. If passed, H.R. 1507 would take a landmark step in restoring Congress' intent to protect employees from retaliation. Importantly, H.R. 1507 also extends strong whistleblower protection to employees of government contractors. Congress wisely included similar protections for private recipients of stimulus funds; however, no similar safeguard was included when Congress passed the bailout last fall. This bill would extend the right to disclose waste, fraud and abuse without fear of retaliation to employees of all government contractors, including those who accepted bailout funds.

The Oversight Committee has documented the accountability and transparency shortcomings of the TARP program, and we will continue to do so. However, by empowering insiders to disclose any financial misconduct, this legislation provides an immediate accountability fix to that program.

Last, whistleblower protections are important not only in safeguarding America's tax dollars; we need them to better protect our families. Toward this end, we have worked closely with the House Intelligence Committee in drafting strong whistleblower protections for national security personnel.

Since September 11, 2001, it has become more and more evident that national security personnel need to be able to sound the alarm effectively without fear of reprisal and without having to turn to the media in order to do so. We need to provide national security personnel with safe, responsible channels for disclosing evidence of waste, fraud and abuse.

H.R. 1507 also provides these employees with a meaningful remedy if they are retaliated against, something that does not exist under current law. This is an important aspect of the legislation that will strengthen the national security of the country, and I look forward to hearing more from our witnesses on this issue.

We're pleased that the administration is testifying today to express the President's support for the principles of protecting whis-

tleblowers to offer constructive comments on how this bill can be strengthened and implemented.

Although whistleblower legislation often involves disagreement between the executive and the legislative branches—we understand that—I am encouraged by the efforts to resolve these differences and promote greater accountability and transparency in government.

I will close by noting simply that this legislation is long, long, long overdue. And without whistleblowers and the unfiltered information that only insiders can provide, the oversight and investigative functions vested in Congress would be seriously compromised.

I am pleased to have the opportunity today to hear from the administration, employees, and experts about this reform.

Now I yield 5 minutes to the ranking member of the committee, with whom I have worked very hard along with the sponsors of this bill to get us here today. Congressman Issa from the great State of California.

[The prepared statement of Hon. Edolphus Towns and the text of H.R. 1507 follow:]

Opening Statement of Rep. Edolphus Towns, Chairman
Committee on Oversight and Government Reform
Hearing on H.R. 1507 –
The Whistleblower Protection Act of 2009

May 14, 2009

Today's hearing is entitled, "Protecting the Public from Waste, Fraud and Abuse: The Whistleblower Protection Enhancement Act of 2009."

H.R. 1507 is an important piece of legislation. This Committee has reported favorably similar legislation, on a bipartisan basis, in each of the last two Congresses. The House of Representatives has twice passed similar bills, once in 2007 with 331 votes and again as a bipartisan amendment to the stimulus legislation earlier this year.

Unfortunately, the stimulus amendment was removed in conference with the Senate. However, this provides us with the opportunity to hear from the new administration on this reform, to work and engage with them on possible changes to the bill, and to consider the ongoing need for strong whistleblower protections.

I want to thank Representatives Van Hollen and Platts for their efforts to support government whistleblowers. As this Committee has long-recognized, enhancing whistleblower protections helps us to fulfill our role of bringing about more honest, accountable, and effective government for the American people.

Whistleblowers risk their careers to challenge abuses of power and gross waste of government resources. At a time when America needs the best value for every dollar spent, we need these protections now more than ever. This is particularly true now that

billions of stimulus dollars, and billions more aimed at stabilizing the financial system, are at stake.

H.R. 1507 will ensure that the federal employees responsible for monitoring the financial recovery programs are not deterred from reporting mismanagement of taxpayer dollars. Government employees are often in the best position to call attention to illegality or waste because they witness what is happening inside the government on a day-to-day basis.

Unfortunately, as we will hear today, under the current, inadequate system, whistleblowers have too often been left out to dry, instead of being rewarded for their courage.

Over the last decade, legal victories for public employees have been almost non-existent. Employees have been fired and disciplined for disclosing evidence of waste, fraud or abuse simply because an administrative judge determined it was part of their job to do so! That's contrary to the whole point of the whistleblower law.

If passed, H.R. 1507 would take a landmark step in restoring Congress' intent to protect employees from retaliation.

Importantly, H.R. 1507 also extends strong whistleblower protections to employees of government contractors. Congress wisely included similar protections for private recipients of stimulus funds. However, no similar safeguard was included when Congress passed the "bailout" last fall.

This bill would extend the right to disclose waste, fraud and abuse without fear of retaliation to employees of all government contractors, including those which accepted "bailout" funds.

The Oversight Committee has documented the accountability and transparency shortcomings of the TARP program, and we will continue to do so. However, by empowering insiders to disclose any financial misconduct, this legislation provides an immediate accountability fix to that program.

Lastly, whistleblower protections are important not only in safeguarding America's tax dollars; we need them to better protect our families. Toward this end, we have worked closely with the House Intelligence Committee in drafting strong whistleblower protections for national security personnel.

Since September 11, 2001, it has become more and more evident that national security personnel need to be able to sound the alarm effectively, without fear of reprisal, *and* without having to turn to the media in order to do so. We need to provide national security personnel with safe, responsible channels for disclosing evidence of waste, fraud or abuse. H.R. 1507 also provides these employees with a meaningful remedy if they are retaliated against, something that does not exist under current law. This is an important aspect of the legislation that will strengthen the national security of the country, and I look forward to hearing more from our witnesses on this issue.

We are pleased that the Administration is testifying today to express the President's support for the principles of protecting whistleblowers and to offer constructive comments on how this bill can be strengthened and implemented. Although whistleblower legislation often involves disagreements between the executive and legislative branches, I am encouraged by the efforts to resolve these differences and promote greater accountability and transparency in government.

I'll close by noting simply that this legislation is long overdue. Without whistleblowers and the unfiltered information that only

insiders can provide, the oversight and investigative functions vested in Congress would be seriously compromised. I am pleased to have the opportunity today to hear from the administration, employees, and experts about this important reform.

I

111TH CONGRESS
1ST SESSION

H. R. 1507

To amend chapter 23 of title 5, United States Code, relating to disclosures of information protected from prohibited personnel practices, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 12, 2009

Mr. VAN HOLLEN (for himself, Mr. WAXMAN, Mr. TOWNS, Mr. BRALEY of Iowa, and Mr. PLATTS) introduced the following bill; which was referred to the Committee on Oversight and Government Reform, and in addition to the Committee on Homeland Security, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To amend chapter 23 of title 5, United States Code, relating to disclosures of information protected from prohibited personnel practices, and for other purposes.

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

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 "Whistleblower Protection Enhancement Act of 2009".

6 (b) TABLE OF CONTENTS.—The table of contents of
7 this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Clarification of disclosures covered.
Sec. 3. Definitional amendments.
Sec. 4. Rebuttable presumption.
Sec. 5. Nondisclosure policies, forms, and agreements; security clearances; and retaliatory investigations.
Sec. 6. Exclusion of agencies by the president.
Sec. 7. Disciplinary action.
Sec. 8. Government Accountability Office study on revocation of security clearances.
Sec. 9. Alternative recourse.
Sec. 10. National security whistleblower rights.
Sec. 11. Enhancement of contractor employee whistleblower protections.
Sec. 12. Prohibited personnel practices affecting the Transportation Security Administration.
Sec. 13. Disclosure of censorship related to Federal research or technical information.
Sec. 14. Security clearances.
Sec. 15. Scope of due process.
Sec. 16. Clarification of whistleblower rights for critical infrastructure information.
Sec. 17. Advising employees of rights.
Sec. 18. Special counsel amicus curiae appearance.
Sec. 19. Attorney fees.
Sec. 20. Effective date.

1 **SEC. 2. CLARIFICATION OF DISCLOSURES COVERED.**

2 (a) IN GENERAL.—Section 2302(b)(8) of title 5,
3 United States Code, is amended—

4 (1) in subparagraph (A)—

5 (A) by striking "which the employee or ap-
6 plicant reasonably believes evidences" and in-
7 serting ", without restriction as to time, place,
8 form, motive, context, forum, or prior disclosure
9 made to any person by an employee or appli-
10 cant, including a disclosure made in the ordi-
11 nary course of an employee's duties, that the
12 employee or applicant reasonably believes is evi-
13 dence of"; and

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

(2) in subparagraph (B)—

(A) by striking "which the employee or applicant reasonably believes evidences" and inserting ", without restriction as to time, place, form, motive, context, forum, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties, of information that the employee or applicant reasonably believes is evidence of"; and

(B) in clause (i), by striking "a violation" and inserting "any violation (other than a violation of this section)".

(b) PROHIBITED PERSONNEL PRACTICES UNDER SECTION 2302(b)(9).—Title 5, United States Code, is amended in subsections (a)(3), (b)(4)(A), and (b)(4)(B)(i) of section 1214 and in subsections (a) and (e)(1) of section 1221 by inserting "or 2302(b)(9)(B)–(D)" after "section 2302(b)(8)" each place it appears.

SEC. 3. DEFINITIONAL AMENDMENTS.

(a) DISCLOSURE.—Section 2302(a)(2) of title 5, United States Code, is amended—

(1) in subparagraph (B)(ii), by striking "and" at the end;

(2) in subparagraph (C)(iii), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(D) 'disclosure' means a formal or informal communication, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences—

"(i) any violation of any law, rule, or regulation; or

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

(b) CLEAR AND CONVINCING EVIDENCE.—Sections 1214(b)(4)(B)(ii) and 1221(e)(2) of title 5, United States Code, are amended by adding at the end the following: "For purposes of the preceding sentence, 'clear and convincing evidence' means evidence indicating that the matter to be proved is highly probable or reasonably certain.".

SEC. 4. REBUTTABLE PRESUMPTION.

Section 2302(b) of title 5, United States Code, is amended by adding at the end the following: "For purposes of paragraph (8), any presumption relating to the performance of a duty by an employee who has authority to take, direct others to take, recommend, or approve any personnel action may be rebutted by substantial evidence. For purposes of paragraph (8), a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to or readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.".

SEC. 5. NONDISCLOSURE POLICIES, FORMS, AND AGREEMENTS; SECURITY CLEARANCES; AND RETALIATORY INVESTIGATIONS.

(a) PERSONNEL ACTION.—Section 2302(a)(2)(A) of title 5, United States Code, is amended—

(1) in clause (x), by striking "and" at the end;

(2) by redesignating clause (xi) as clause (xiv); and

(3) by inserting after clause (x) the following:

"(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement;

"(xii) a suspension, revocation, or other determination relating to a security clearance or any other access determination by a covered agency;

"(xiii) an investigation, other than any ministerial or nondiscretionary fact-finding activities necessary for the agency to perform its mission, of an employee or applicant for employment because of any activity protected under this section; and".

(b) PROHIBITED PERSONNEL PRACTICE.—Section 2302(b) of title 5, United States Code, is amended—

(1) in paragraph (11), by striking "or" at the end;

(2) by redesignating paragraph (12) as paragraph (14); and

(3) by inserting after paragraph (11) the following:

1 "(12) implement or enforce any nondisclosure
2 policy, form, or agreement, if such policy, form, or
3 agreement does not contain the following statement:
4 'These provisions are consistent with and do not su-
5 persede, conflict with, or otherwise alter the em-
6 ployee obligations, rights, or liabilities created by
7 Executive Order No. 12958; section 7211 of title 5,
8 United States Code (governing disclosures to Con-
9 gress); section 1034 of title 10, United States Code
10 (governing disclosures to Congress by members of
11 the military); section 2302(b)(8) of title 5, United
12 States Code (governing disclosures of illegality,
13 waste, fraud, abuse, or public health or safety
14 threats); title VI of the National Security Act of
15 1947 (50 U.S.C. 421 et seq.) (governing disclosures
16 that could expose confidential Government agents);
17 and the statutes which protect against disclosures
18 that could compromise national security, including
19 sections 641, 793, 794, 798, and 952 of title 18,
20 United States Code, and section 4(b) of the Subver-
21 sive Activities Control Act of 1950 (50 U.S.C.
22 783(b)). The definitions, requirements, obligations,
23 rights, sanctions, and liabilities created by such Ex-
24 ecutive order and such statutory provisions are in-
25 corporated into this agreement and are controlling.'.

"(13) conduct, or cause to be conducted, an investigation, other than any ministerial or nondiscretionary fact-finding activities necessary for the agency to perform its mission, of an employee or applicant for employment because of any activity protected under this section; or".

SEC. 6. EXCLUSION OF AGENCIES BY THE PRESIDENT.

Section 2302(a)(2)(C) of title 5, United States Code, is amended by striking clause (ii) and inserting the following:

"(i)(I) the Federal Bureau of Investigation; or

"(II) an element of the intelligence community (as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))); or".

SEC. 7. DISCIPLINARY ACTION.

Section 1215(a)(3) of title 5, United States Code, is amended to read as follows:

"(3)(A) A final order of the Board may impose—

"(i) disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, or reprimand;

"(ii) an assessment of a civil penalty not to exceed $1,000; or

"(iii) any combination of disciplinary actions described under clause (i) and an assessment described under clause (ii).

"(B) In any case in which the Board finds that an employee has committed a prohibited personnel practice under paragraph (8) or (9) of section 2302(b), the Board shall impose disciplinary action if the Board finds that the activity protected under such paragraph (8) or (9) was a significant motivating factor, even if other factors also motivated the decision, for the employee's decision to take, fail to take, or threaten to take or fail to take a personnel action, unless that employee demonstrates, by preponderance of evidence, that the employee would have taken, failed to take, or threatened to take or fail to take the same personnel action, in the absence of such protected activity.".

SEC. 8. GOVERNMENT ACCOUNTABILITY OFFICE STUDY ON REVOCATION OF SECURITY CLEARANCES.

(a) STUDY.—The Comptroller General shall conduct a study of security clearance revocations of Federal employees at a select sample of executive branch agencies. The study shall consist of an examination of the number of security clearances revoked, the process employed by

1 each agency in revoking a clearance, the pay and employ-
2 ment status of agency employees during the revocation
3 process, how often such revocations result in termination
4 of employment or reassignment, how often such revoca-
5 tions are based on an improper disclosure of information,
6 and such other factors the Comptroller General deems ap-
7 propriate.

8 (b) REPORT.—Not later than 18 months after the
9 date of enactment of this Act, the Comptroller General
10 shall submit to the Committee on Homeland Security and
11 Governmental Affairs of the Senate and the Committee
12 on Oversight and Government Reform of the House of
13 Representatives a report on the results of the study re-
14 quired under this section.

15 **SEC. 9. ALTERNATIVE RECOURSE.**

16 (a) IN GENERAL.—Section 1221 of title 5, United
17 States Code, is amended by adding at the end the fol-
18 lowing:

19 "(k)(1) If, in the case of an employee, former em-
20 ployee, or applicant for employment who seeks corrective
21 action (or on behalf of whom corrective action is sought)
22 from the Merit Systems Protection Board based on an al-
23 leged prohibited personnel practice described in section
24 2302(b)(8) or 2302(b)(9)(B)–(D), no final order or deci-
25 sion is issued by the Board within 180 days after the date

1 on which a request for such corrective action has been duly
2 submitted (or, in the event that a final order or decision
3 is issued by the Board, whether within that 180-day period
4 or thereafter, then, within 90 days after such final order
5 or decision is issued, and so long as such employee, former
6 employee, or applicant has not filed a petition for judicial
7 review of such order or decision under subsection (h))—
8 "(A) such employee, former employee, or appli-
9 cant may, after providing written notice to the
10 Board, bring an action at law or equity for de novo
11 review in the appropriate United States district
12 court, which shall have jurisdiction over such action
13 without regard to the amount in controversy, and
14 which action shall, at the request of either party to
15 such action, be tried by the court with a jury; and
16 "(B) in any such action, the court—
17 "(i) shall apply the standards set forth in
18 subsection (e); and
19 "(ii) may award any relief which the court
20 considers appropriate, including any relief de-
21 scribed in subsection (g).
22 An appeal from a final decision of a district court
23 in an action under this paragraph may, at the elec-
24 tion of the appellant, be taken to the Court of Ap-
25 peals for the Federal Circuit (which shall have juris-

1 diction of such appeal), in lieu of the United States
2 court of appeals for the circuit embracing the dis-
3 trict in which the action was brought.

4 "(2) For purposes of this subsection, the term 'appro-
5 priate United States district court', as used with respect
6 to an alleged prohibited personnel practice, means the
7 United States district court for the district in which the
8 prohibited personnel practice is alleged to have been com-
9 mitted, the judicial district in which the employment
10 records relevant to such practice are maintained and ad-
11 ministered, or the judicial district in which resides the em-
12 ployee, former employee, or applicant for employment al-
13 legedly affected by such practice.

14 "(3) This subsection applies with respect to any ap-
15 peal, petition, or other request for corrective action duly
16 submitted to the Board, whether pursuant to section
17 1214(b)(2), the preceding provisions of this section, sec-
18 tion 7513(d), or any otherwise applicable provisions of
19 law, rule, or regulation.".

20 (b) REVIEW OF MSB DECISIONS.—Section 7703(b)
21 of such title 5 is amended—

22 (1) in the first sentence of paragraph (1), by
23 striking "the United States Court of Appeals for the
24 Federal Circuit" and inserting "the appropriate
25 United States court of appeals"; and

1 (2) by adding at the end the following:

2 "(3) For purposes of this section, the term 'appro-
3 priate United States court of appeals' means the United
4 States Court of Appeals for the Federal Circuit, except
5 that in the case of a prohibited personnel practice de-
6 scribed in section 2302(b)(8) or 2302(b)(9)(B)–(D) (other
7 than a case that, disregarding this paragraph, would oth-
8 erwise be subject to paragraph (2)), such term means the
9 United States Court of Appeals for the Federal Circuit
10 and any United States court of appeals having jurisdiction
11 over appeals from any United States district court which,
12 under section 1221(k)(2), would be an appropriate United
13 States district court for purposes of such prohibited per-
14 sonnel practice.".

15 (c) CHOICE OF FORUM.—Section 7703(d) of such
16 title 5 is amended by inserting after "policy directive." the
17 following: "The petition shall be moved to an appropriate
18 United States Court of Appeals other than the Federal
19 Circuit at the request of the Director or of the employee.".

20 (d) COMPENSATORY DAMAGES.—Sections 1214(g)(2)
21 and 1221(g)(1)(A)(ii) of such title 5 are amended by strik-
22 ing all after "travel expenses," and inserting "any other
23 reasonable and foreseeable consequential damages, and
24 compensatory damages (including attorney's fees, interest,
25 reasonable expert witness fees, and costs).".

1 (e) CONFORMING AMENDMENTS.—

2 (1) Section 1221(h) of such title 5 is amended
3 by adding at the end the following:

4 "(3) Judicial review under this subsection shall
5 not be available with respect to any decision or order
6 as to which the employee, former employee, or appli-
7 cant has filed a petition for judicial review under
8 subsection (k).".

9 (2) Section 7703(c) of such title 5 is amended
10 by striking "the United States Court of Appeals for
11 the Federal Circuit" and inserting "the appropriate
12 United States Court of Appeals" and by striking
13 "court." and inserting "court, and in the case of a
14 prohibited personnel practice described in section
15 2302(b)(8) or 2302(b)(9)(B)–(D) brought under any
16 provision of law, rule, or regulation described in sec-
17 tion 1221(k)(3), the employee or applicant shall
18 have the right to de novo review in accordance with
19 section 1221(k).".

20 **SEC. 10. NATIONAL SECURITY WHISTLEBLOWER RIGHTS.**

21 (a) IN GENERAL.—Chapter 23 of title 5, United
22 States Code, is amended by inserting after section 2303
23 the following:

1 **"SEC. 2303a. NATIONAL SECURITY WHISTLEBLOWER**
2 **RIGHTS.**

3 "(a) PROHIBITION OF REPRISALS.—

4 "(1) IN GENERAL.—In addition to any rights
5 provided under section 2303 of this title, section
6 17(d)(5) of the Central Intelligence Agency Act of
7 1949 (50 U.S.C. 403q(d)(5)), section 8H of the In-
8 spector General Act of 1978 (5 U.S.C. App.), or any
9 other provision of law, an employee or former em-
10 ployee of a covered agency may not be discharged,
11 demoted, or otherwise discriminated against (includ-
12 ing by denying, suspending, or revoking a security
13 clearance, or by otherwise restricting access to clas-
14 sified or sensitive information) as a reprisal for mak-
15 ing a disclosure described in paragraph (2).

16 "(2) DISCLOSURES DESCRIBED.—A disclosure
17 described in this paragraph is a disclosure of covered
18 information that is made—

19 "(A) by an employee or former employee of
20 a covered agency, without restriction as to time,
21 place, form, motive, context, or prior disclosure
22 made to any person by an employee or former
23 employee, including a disclosure made in the
24 course of an employee's duties; and

25 "(B) to an authorized Member of Con-
26 gress, an authorized official of an Executive

1 agency, or the Inspector General of the covered
2 agency of which such employee or former em-
3 ployee is or was employed.

4 "(b) INVESTIGATION OF COMPLAINTS.—An employee
5 or former employee of a covered agency who believes that
6 such employee or former employee has been subjected to
7 a reprisal prohibited by subsection (a) may submit a com-
8 plaint to the Inspector General and the head of the cov-
9 ered agency. The Inspector General shall investigate the
10 complaint and, unless the Inspector General determines
11 that the complaint is frivolous, submit a report of the find-
12 ings of the investigation within 120 days to the employee
13 or former employee (as the case may be) and to the head
14 of the covered agency.

15 "(c) REMEDY.—

16 "(1) Within 180 days of the filing of a com-
17 plaint under subsection (b), the head of the covered
18 agency shall, taking into consideration the report of
19 the Inspector General under such subsection (if
20 any), determine whether the employee or former em-
21 ployee has been subjected to a reprisal prohibited by
22 subsection (a), and shall either issue an order deny-
23 ing relief or shall implement corrective action to re-
24 turn the employee or former employee, as nearly as
25 possible, to the position such employee or former

1 employee would have held had the reprisal not oc-
2 curred, including providing back pay and related
3 benefits, medical costs incurred, travel expenses, any
4 other reasonable and foreseeable consequential dam-
5 ages, and compensatory damages (including attor-
6 ney's fees, interest, reasonable expert witness fees,
7 and costs). If the head of the covered agency issues
8 an order denying relief, such head shall issue a re-
9 port to the employee or former employee detailing
10 the reasons for the denial.

11 "(2)(A) If the head of a covered agency, in the
12 process of implementing corrective action under
13 paragraph (1), voids a directive or order denying,
14 suspending, or revoking a security clearance or oth-
15 erwise restricting access to classified or sensitive in-
16 formation that constituted a reprisal, the head of
17 such covered agency may re-initiate procedures to
18 issue a directive or order denying, suspending, or re-
19 voking a security clearance or otherwise restricting
20 access to classified or sensitive information only if
21 those re-initiated procedures are based exclusively on
22 national security concerns and are unrelated to the
23 actions constituting the original reprisal.

24 "(B) In any case in which the head of a covered
25 agency re-initiates procedures under subparagraph

1 (A), the head of the covered agency shall issue an
2 unclassified report (that may include a classified
3 annex, if necessary) to the Inspector General of such
4 covered agency and to authorized Members of Con-
5 gress, detailing the circumstances of such covered
6 agency's re-initiated procedures and describing the
7 manner in which those procedures are based exclu-
8 sively on national security concerns and are unre-
9 lated to the actions constituting the original reprisal.
10 "(3) If the head of a covered agency has not
11 made a determination under paragraph (1) within
12 180 days of the filing of a complaint under sub-
13 section (b) (or such head has issued an order deny-
14 ing relief, in whole or in part, whether within that
15 180-day period or thereafter, then, within 90 days
16 after such order is issued), the employee or former
17 employee may bring an action at law or equity for
18 de novo review to seek any corrective action referred
19 to in paragraph (1) in the appropriate United States
20 district court (as defined by section 1221(k)(2)),
21 which shall have jurisdiction over such action with-
22 out regard to the amount in controversy.
23 "(4) An employee or former employee adversely
24 affected or aggrieved by an order issued under para-
25 graph (1), or who seeks review of any corrective ac-

1 tion determined under paragraph (1), may obtain ju-
2 dicial review of such order or determination in the
3 United States Court of Appeals for the Federal Cir-
4 cuit or any United States court of appeals having ju-
5 risdiction over appeals from any United States dis-
6 trict court that, under section 1221(k)(2), would be
7 an appropriate United States district court. No peti-
8 tion seeking such review may be filed more than 60
9 days after issuance of the order or the determination
10 to implement corrective action by the head of a cov-
11 ered agency. Review shall conform to chapter 7.
12 "(5)(A) If, in any action for damages or relief
13 under paragraph (3) or (4), an Executive agency
14 moves to withhold information from discovery based
15 on a claim that disclosure would be inimical to na-
16 tional security by asserting the privilege commonly
17 referred to as the 'state secrets privilege', and if the
18 assertion of such privilege prevents the employee or
19 former employee from establishing an element in
20 support of the employee's or former employee's
21 claim, the court shall resolve the disputed issue of
22 fact or law in favor of the employee or former em-
23 ployee, provided that an Inspector General investiga-
24 tion under subsection (b) has resulted in substantial

1 confirmation of that element, or those elements, of
2 the employee's or former employee's claim.
3 "(B) In any case in which an Executive agency
4 asserts the privilege commonly referred to as the
5 'state secrets privilege', whether or not an Inspector
6 General has conducted an investigation under sub-
7 section (b), the head of that agency shall, at the
8 same time it asserts the privilege, issue a report to
9 authorized Members of Congress, accompanied by a
10 classified annex if necessary, describing the reasons
11 for the assertion, explaining why the court hearing
12 the matter does not have the ability to maintain the
13 protection of classified information related to the as-
14 sertion, detailing the steps the agency has taken to
15 arrive at a mutually agreeable settlement with the
16 employee or former employee, setting forth the date
17 on which the classified information at issue will be
18 declassified, and providing all relevant information
19 about the underlying substantive matter.
20 "(d) APPLICABILITY TO NON-COVERED AGENCIES.—
21 An employee or former employee of an Executive agency
22 (or element or unit thereof) that is not a covered agency
23 shall, for purposes of any disclosure of covered information
24 (as described in subsection (a)(2)) that consists in whole
25 or in part of classified or sensitive information, be entitled

1 to the same protections, rights, and remedies under this
2 section as if that Executive agency (or element or unit
3 thereof) were a covered agency.

4 "(e) CONSTRUCTION.—Nothing in this section may
5 be construed—

6 "(1) to authorize the discharge of, demotion of,
7 or discrimination against an employee or former em-
8 ployee for a disclosure other than a disclosure pro-
9 tected by subsection (a) or (d) or to modify or dero-
10 gate from a right or remedy otherwise available to
11 an employee or former employee; or

12 "(2) to preempt, modify, limit, or derogate any
13 rights or remedies available to an employee or
14 former employee under any other provision of law,
15 rule, or regulation (including the Lloyd-La Failed
16 Act).

17 No court or administrative agency may require the ex-
18 haustion of any right or remedy under this section as a
19 condition for pursuing any other right or remedy otherwise
20 available to an employee or former employee under any
21 other provision of law, rule, or regulation (as referred to
22 in paragraph (2)).

23 "(f) DEFINITIONS.—In this section:

24 "(1) The term 'covered information', as used
25 with respect to an employee or former employee,

1 means any information (including classified or sen-
2 sitive information) which the employee or former
3 employee reasonably believes evidences—
4 "(A) any violation of any law, rule, or reg-
5 ulation; or
6 "(B) gross mismanagement, a gross waste
7 of funds, an abuse of authority, or a substantial
8 and specific danger to public health or safety.
9 "(2) The term 'covered agency' means—
10 "(A) the Federal Bureau of Investigation;
11 and
12 "(B) an element of the intelligence commu-
13 nity (as defined in section 3(4) of the National
14 Security Act of 1947 (50 U.S.C. 401a(4))).
15 "(3) The term 'authorized Member of Congress'
16 means—
17 "(A) with respect to covered information
18 about sources, methods, and intelligence activi-
19 ties (as that term is defined in Executive Order
20 12333) of an element of the intelligence com-
21 munity (as defined in section 3(4) of the Na-
22 tional Security Act of 1947 (50 U.S.C.
23 401a(4))), a member of the Permanent Select
24 Committee on Intelligence of the House of Rep-
25 resentatives, the Select Committee on Intel-

1 ligence of the Senate, or any other committees
2 of the House of Representatives or Senate to
3 which this type of information is customarily
4 provided;
5 "(B) with respect to special access pro-
6 grams specified in section 119 of title 10, an
7 appropriate member of the Congressional de-
8 fense committees (as defined in such section);
9 and
10 "(C) with respect to other covered informa-
11 tion, a member of the Permanent Select Com-
12 mittee on Intelligence or the Committee on
13 Oversight and Government Reform of the
14 House of Representatives, the Select Committee
15 on Intelligence or the Committee on Homeland
16 Security and Governmental Affairs of the Sen-
17 ate, or any other committees of the House of
18 Representatives or the Senate that have over-
19 sight over the program which the covered infor-
20 mation concerns.
21 "(4) The term 'authorized official of an Execu-
22 tive agency' shall have such meaning as the Office
23 of Personnel Management shall by regulation pre-
24 scribe, except that such term shall, with respect to
25 any employee or former employee in an agency, in-

1 clude the head, the general counsel, and the ombuds-
2 man of such agency."
3 (b) CLERICAL AMENDMENT.—The table of sections
4 for chapter 23 of title 5, United States Code, is amended
5 by inserting after the item relating to section 2303 the
6 following:

"2303a. National security whistleblower rights.".

7 **SEC. 11. ENHANCEMENT OF CONTRACTOR EMPLOYEE**
8 **WHISTLEBLOWER PROTECTIONS.**

9 (a) INCREASED PROTECTION FROM REPRISAL.—Sec-
10 tion 315(a) of the Federal Property and Administrative
11 Services Act of 1949 (41 U.S.C. 265) is amended by strik-
12 ing "disclosing to a Member of Congress" and all that fol-
13 lows through the end of the subsection and inserting the
14 following: "disclosing, including a disclosure in the ordi-
15 nary course of an employee's duties, to a Member of Con-
16 gress, a representative of a committee of Congress, an In-
17 spector General, the Government Accountability Office, an
18 agency employee responsible for contract oversight or
19 management, an authorized official of an executive agency
20 or the Department of Justice or other Federal regulatory
21 or law enforcement agency, or a person with supervisory
22 authority over the employee (or any other person who has
23 the authority to investigate or act on misconduct, a court,
24 or a grand jury) information that the employee reasonably
25 believes is evidence of gross mismanagement of a contract

1 or grant, gross waste of agency funds, an abuse of author-
2 ity related to the implementation of a contract or grant,
3 a substantial and specific danger to public health or safe-
4 ty, or a violation of a law, rule, or regulation related to
5 a contract (including the competition for or negotiation
6 of a contract) or grant.".

7 (b) CLARIFICATION OF INSPECTOR GENERAL DE-
8 TERMINATION.—Subsection (b) of section 315 of such Act
9 is amended—

10 (1) by inserting "(1)" after "INVESTIGATION
11 OF COMPLAINTS.—";

12 (2) by adding at the end the following new
13 paragraphs:

14 "(2)(A) Except as provided under subparagraph (B),
15 the Inspector General shall make a determination that a
16 complaint is frivolous or submit a report under paragraph
17 (1) within 180 days after receiving the complaint.

18 "(B) If the Inspector General is unable to complete
19 an investigation in time to submit a report within the 180-
20 day period specified in subparagraph (A) and the person
21 submitting the complaint agrees to an extension of time,
22 the Inspector General shall submit a report under para-
23 graph (1) within such additional period of time as shall
24 be agreed upon between the Inspector General and the
25 person submitting the complaint.

1 "(3)(A) A person alleging a reprisal under this sec-
2 tion shall affirmatively establish the occurrence of the re-
3 prisal if the person demonstrates that a disclosure de-
4 scribed in subsection (a) was a contributing factor in the
5 reprisal. A disclosure may be demonstrated as a contrib-
6 uting factor for purposes of this paragraph by circumstan-
7 tial evidence, including evidence as follows:
8 "(i) Evidence that the official undertaking the
9 reprisal knew of the disclosure.
10 "(ii) Evidence that the reprisal occurred within
11 a period of time after the disclosure such that a rea-
12 sonable person could conclude that the disclosure
13 was a contributing factor in the reprisal.
14 "(B) Except as provided in subparagraph (C), if a
15 reprisal is affirmatively established under subparagraph
16 (A), the Inspector General shall recommend in the report
17 under paragraph (1) that corrective action be taken under
18 subsection (c).
19 "(C) The Inspector General may not recommend cor-
20 rective action under subparagraph (B) with respect to a
21 reprisal that is affirmatively established under subpara-
22 graph (A) if the contractor demonstrates by clear and con-
23 vincing evidence that the contractor would have taken the
24 action constituting the reprisal in the absence of the dis-
25 closure.

1 "(4) The person alleging the reprisal shall have ac-
2 cess to the complete investigation file of the Inspector
3 General in accordance with section 552a of title 5, United
4 States Code (popularly referred to as the 'Privacy Act').
5 The investigation of the Inspector General shall be deemed
6 closed for purposes of disclosure under such section when
7 an employee files an appeal to an agency head or a court
8 of competent jurisdiction.".

9 (c) ACCELERATION OF SCHEDULE FOR DENYING RE-
10 LIEF OR PROVIDING REMEDY.—Subsection (c) of such
11 section is amended—

12 (1) in paragraph (1), by striking "If the head
13 of the agency determines that a contractor has sub-
14 jected a person to a reprisal prohibited by subsection
15 (a), the head of the agency may" and inserting the
16 following: "Not later than 30 days after receiving an
17 Inspector General report pursuant to subsection (b),
18 the head of the agency concerned shall determine
19 whether there is sufficient basis to conclude that the
20 contractor concerned has subjected the complainant
21 to a reprisal prohibited by subsection (a) and shall
22 either issue an order denying relief or shall";

23 (2) in paragraph (1)(B), by inserting after "to-
24 gether with" the following: "compensatory damages
25 and";

1 (3) in paragraph (1)(C), by inserting at the end
2 before the period the following: "or a court of com-
3 petent jurisdiction";
4 (4) by redesignating paragraphs (2) and (3) as
5 paragraphs (3) and (4), respectively; and
6 (5) by inserting after paragraph (1) the fol-
7 lowing new paragraph:
8 "(2)(A) If the head of an executive agency issues an
9 order denying relief under paragraph (1) or has not issued
10 an order within 210 days after the submission of a com-
11 plaint under subsection (b), or in the case of an extension
12 of time under paragraph (b)(2)(B), not later than 30 days
13 after the expiration of the extension of time, and there
14 is no showing that such delay is due to the bad faith of
15 the complainant, the complainant shall be deemed to have
16 exhausted all administrative remedies with respect to the
17 complaint, and the complainant may bring a de novo ac-
18 tion at law or equity against the contractor to seek com-
19 pensatory damages and other relief available under this
20 section in the appropriate district court of the United
21 States, which shall have jurisdiction over such an action
22 without regard to the amount in controversy. Such an ac-
23 tion shall, at the request of either party to the action, be
24 tried by the court with a jury.

1 "(B) In any action under subparagraph (A), the es-
2 tablishment of the occurrence of a reprisal shall be gov-
3 erned by the provisions of subsection (b)(3)(A), including
4 the burden of proof in that subsection, and the establish-
5 ment that an action alleged to constitute a reprisal did
6 not constitute a reprisal shall be subject to the burden
7 of proof specified in subsection (b)(3)(C)."; and
8 (6) in paragraph (4), as so redesignated, by in-
9 serting at the end before the period the following:
10 "and attorneys fees and costs".
11 (d) PROHIBITION ON CONDITIONS OF EMPLOY-
12 MENT.—Section 315 of such Act is further amended by
13 redesignating subsection (e) as subsection (f) and insert-
14 ing after subsection (d) the following new subsection (e):
15 "(e) PROHIBITION.—Notwithstanding any other pro-
16 vision of law—
17 "(1) subject to paragraph (3), the rights and
18 remedies provided for in this section may not be
19 waived by any agreement, policy, form, or condition
20 of employment, including by any predispute arbitra-
21 tion agreement;
22 "(2) subject to paragraph (3), no predispute ar-
23 bitration agreement shall be valid or enforceable if
24 it requires arbitration of a dispute arising under this
25 section; and

"(3) an arbitration provision in a collective bargaining agreement shall be enforceable as to disputes arising under the collective bargaining agreement.".

(e) DEFINITIONS.—Subsection (f) of such section, as redesignated by subsection (d), is amended by inserting before the period at the end the following: "and any Inspector General that receives funding from, or has oversight over contracts awarded for or on behalf of, an executive agency".

SEC. 12. PROHIBITED PERSONNEL PRACTICES AFFECTING THE TRANSPORTATION SECURITY ADMINISTRATION.

(a) IN GENERAL.—Chapter 23 of title 5, United States Code, is amended—

(1) by redesignating sections 2304 and 2305 as sections 2305 and 2306, respectively; and

(2) by inserting after section 2303a (as inserted by section 10) the following:

"SEC. 2304. PROHIBITED PERSONNEL PRACTICES AFFECTING THE TRANSPORTATION SECURITY ADMINISTRATION.

"(a) IN GENERAL.—Notwithstanding any other provision of law, any individual holding or applying for a posi-

1 tion within the Transportation Security Administration
2 shall be covered by—
3 "(1) the provisions of paragraphs (1), (8), and
4 (9) of section 2302(b);
5 "(2) any provision of law implementing para-
6 graph (1), (8), or (9) of section 2302(b) by pro-
7 viding any right or remedy available to an employee
8 or applicant for employment in the civil service; and
9 "(3) any rule or regulation prescribed under
10 any provision of law referred to in paragraph (1) or
11 (2).
12 "(b) RULE OF CONSTRUCTION.—Nothing in this sec-
13 tion shall be construed to affect any rights, apart from
14 those described in subsection (a), to which an individual
15 described in subsection (a) might otherwise be entitled
16 under law.
17 "(c) EFFECTIVE DATE.—This section shall take ef-
18 fect as of the date of the enactment of this section.".
19 (b) CLERICAL AMENDMENT.—The table of sections
20 for chapter 23 of title 5, United States Code, is amended
21 by striking the items relating to sections 2304 and 2305,
22 respectively, and by inserting the following:

"2304. Prohibited personnel practices affecting the Transportation Security Administration.
"2305. Responsibility of the Government Accountability Office.
"2306. Coordination with certain other provisions of law.".

1 **SEC. 13. DISCLOSURE OF CENSORSHIP RELATED TO FED-**
2 **ERAL RESEARCH OR TECHNICAL INFORMA-**
3 **TION.**

4 (a) DEFINITIONS.—In this section—

5 (1) the term "applicant" means an applicant
6 for a covered position;

7 (2) the term "censorship related to Federal re-
8 search or technical information" means any effort to
9 alter, misrepresent, or suppress—

10 (A) Federal research; or

11 (B) technical information;

12 (3) the term "covered position" has the mean-
13 ing given under section 2302(a)(2)(B) of title 5,
14 United States Code;

15 (4) the term "employee" means an employee in
16 a covered position; and

17 (5) the term "disclosure" has the meaning
18 given under section 2302(a)(2)(D) of title 5, United
19 States Code.

20 (b) PROTECTED DISCLOSURE.—

21 (1) IN GENERAL.—Any disclosure of informa-
22 tion by an employee or applicant for employment
23 that the employee or applicant reasonably believes is
24 evidence of censorship related to Federal research or
25 technical information—

1 (A) shall come within the protections of
2 section 2302(b)(8)(A) of title 5, United States
3 Code, if—
4 (i) the employee or applicant reason-
5 ably believes that the censorship related to
6 Federal research or technical information
7 is or will cause—
8 (I) any violation of law, rule, or
9 regulation; or
10 (II) gross mismanagement, a
11 gross waste of funds, an abuse of au-
12 thority, or a substantial and specific
13 danger to public health or safety; and
14 (ii) the disclosure and information
15 satisfy the conditions stated in the matter
16 following clause (ii) of section
17 2302(b)(8)(A) of title 5, United States
18 Code; and
19 (B) shall come within the protections of
20 section 2302(b)(8)(B) of title 5, United States
21 Code, if—
22 (i) the conditions under subparagraph
23 (A)(i) are satisfied; and
24 (ii) the disclosure is made to an indi-
25 vidual referred to in the matter preceding

1 clause (i) of section 2302(b)(8)(B) of title
2 5, United States Code, for the receipt of
3 disclosures.
4 (2) APPLICATION.—Paragraph (1) shall apply
5 to any disclosure of information by an employee or
6 applicant without restriction to time, place, form,
7 motive, context, or prior disclosure made to any per-
8 son by an employee or applicant, including a disclo-
9 sure made in the ordinary course of an employee's
10 duties.
11 (3) RULE OF CONSTRUCTION.—Nothing in this
12 section shall be construed to imply any limitation on
13 the protections of employees and applicants afforded
14 by any other provision of law, including protections
15 with respect to any disclosure of information be-
16 lieved to be evidence of censorship related to Federal
17 research or technical information.
18 **SEC. 14. SECURITY CLEARANCES.**
19 (a) IN GENERAL.—Chapter 77 of title 5, United
20 States Code, is amended by inserting after section 7702
21 the following:
22 **"SEC. 7702a. ACTIONS RELATING TO SECURITY CLEAR-**
23 **ANCES.**
24 "(a) In any appeal relating to the suspension, revoca-
25 tion, or other determination relating to a security clear-

1 ance or access determination, the Merit Systems Protec-
2 tion Board or any reviewing court—
3 "(1) shall determine whether paragraph (8) or
4 (9) of section 2302(b) was violated; and
5 "(2) may issue declaratory relief and any other
6 appropriate relief.
7 "(b)(1) If, in any final judgment, the Board or court
8 declares that any suspension, revocation, or other deter-
9 mination with regard to a security clearance or access de-
10 termination was made in violation of paragraph (8) or (9)
11 of section 2302(b), the affected agency shall conduct a re-
12 view of that suspension, revocation, access determination,
13 or other determination, giving great weight to the Board
14 or court judgment.
15 "(2) Not later than 30 days after any Board or court
16 judgment declaring that a security clearance suspension,
17 revocation, access determination, or other determination
18 was made in violation of paragraph (8) or (9) of section
19 2302(b), the affected agency shall issue an unclassified re-
20 port to the congressional committees of jurisdiction (with
21 a classified annex if necessary), detailing the cir-
22 cumstances of the agency's security clearance suspension,
23 revocation, other determination, or access determination.
24 A report under this paragraph shall include any proposed

1 agency action with regard to the security clearance or ac-
2 cess determination.

3 "(c) An allegation that a security clearance or access
4 determination was revoked or suspended in retaliation for
5 a protected disclosure shall receive expedited review by the
6 Office of Special Counsel, the Merit Systems Protection
7 Board, and any reviewing court.

8 "(d) For purposes of this section, corrective action
9 may not be ordered if the agency demonstrates by a pre-
10 ponderance of the evidence that it would have taken the
11 same personnel action in the absence of such disclosure.".

12 (b) TECHNICAL AND CONFORMING AMENDMENT.—
13 The table of sections for chapter 77 of title 5, United
14 States Code, is amended by inserting after the item relat-
15 ing to section 7702 the following:

"7702a. Actions relating to security clearances.".

16 **SEC. 15. SCOPE OF DUE PROCESS.**

17 (a) SPECIAL COUNSEL.—Section 1214(b)(4)(B)(ii) of
18 title 5, United States Code, is amended by inserting ",
19 after a finding that a protected disclosure was a contrib-
20 uting factor," after "ordered if".

21 (b) INDIVIDUAL ACTION.—Section 1221(e)(2) of title
22 5, United States Code, is amended by inserting ", after
23 a finding that a protected disclosure was a contributing
24 factor," after "ordered if".

1 **SEC. 16. CLARIFICATION OF WHISTLEBLOWER RIGHTS FOR**
2 **CRITICAL INFRASTRUCTURE INFORMATION.**

3 Section 214(c) of the Homeland Security Act of 2002
4 (6 U.S.C. 133(c)) is amended by adding at the end the
5 following: "For purposes of this section, a permissible use
6 of independently obtained information includes the disclo-
7 sure of such information under section 2302(b)(8) of title
8 5, United States Code.".

9 **SEC. 17. ADVISING EMPLOYEES OF RIGHTS.**

10 Section 2302(c) of title 5, United States Code, is
11 amended by inserting, ", including how to make a lawful
12 disclosure of information that is specifically required by
13 law or Executive order to be kept secret in the interest
14 of national defense or the conduct of foreign affairs to the
15 Special Counsel, the Inspector General of an agency, Con-
16 gress, or other agency employee designated to receive dis-
17 closures" after "chapter 12 of this title".

18 **SEC. 18. SPECIAL COUNSEL AMICUS CURIAE APPEARANCE.**

19 Section 1212 of title 5, United States Code, is
20 amended by adding at the end the following:

21 "(h) The Special Counsel may appear as amicus cu-
22 riae in any action brought in a court of the United States
23 related to any civil action brought in connection with para-
24 graph (8) or (9) of section 2302(b) or subchapter III of
25 chapter 73, or as otherwise authorized by law. In any such
26 action, the Special Counsel may present the views of the

1 Special Counsel with respect to compliance with paragraph
2 (8) or (9) of section 2302(b) or subchapter III of chapter
3 73 and the impact court decisions would have on the en-
4 forcement of those provisions of law.".

5 **SEC. 19. ATTORNEY FEES.**

6 Section 1204(m)(1) of title 5, United States Code,
7 is amended by striking "agency involved" and inserting
8 "agency where the prevailing party is employed or has ap-
9 plied for employment".

10 **SEC. 20. EFFECTIVE DATE.**

11 This Act shall take effect 30 days after the date of
12 the enactment of this Act, except as provided in the
13 amendment made by section 12(a)(2).

○

Mr. ISSA. Thank you, Mr. Chairman. And thank you for calling this important hearing today and for your bipartisan support of whistleblower protections and this bill.

We are here today to hear from the administration because waste, fraud and abuse is the mandate of this committee. The tools we need in order to undercover waste, fraud and abuse are our own staff we regularly count on, Government Accountability Office, the IGs of the various agencies, and absolutely, without fail, whistleblowers, both in and out of the government. Without these individuals willing to come forward and uncover the most dangerous failures within the government, we would find ourselves exposed from a national security standpoint, we would find ourselves exposed from a financial standpoint, and, in this day of increasing litigious activity, we might often find ourselves the subject as defendants in lawsuits because of our failure to know what we needed to know.

During this hearing, we will be able to examine current law that protects whistleblowers and review the need for strengthening those laws. We will also be able to highlight, discuss, and explore any issues that may be raised by expanding existing whistleblower protections. And I might note that these protections have been contracting because of decisions made by the courts, so many of the expansions today are, in fact, simply restoring what was the original intent of Congress.

The support and protection of whistleblowers in the Federal Government is obviously vital to rooting out the waste, fraud, and abuse and mismanagement. Expansion of these laws may, however, raise some important issues and create unintended real-world consequences when implemented.

We look forward to hearing from the administration any questions, comments or any scenarios that they believe may not have been considered in this legislation thus far.

Like all legislation, it can have unintended consequences. We look forward to active dialog to ensure that we minimize that, but we cannot allow the continued loss or degradation of whistleblower laws that today cause us not to have the full support of both our contractors and our government employees.

Mr. Chairman, I might note that next door in Judiciary, we moved a very expansive piece of legislation that expands the ability to sue or profit the American Government at all levels—Federal, State and local—for Federal protection and recover moneys. Now, that is well-meaning legislation, it has been on the books since Abraham Lincoln, and it's important, but we cannot have just plaintiff trial lawyers doing the work of the people.

And I might particularly note and ask for unanimous consent to be included in the record that issues——

Chairman TOWNS. Without objection, so ordered.

Mr. ISSA. Issues, such as the Jane Harman issue where she was wiretapped, but Congress was unaware that a Member of Congress had, in fact, been picked up on a wiretap of another investigation. That was withheld until a whistleblower made it obvious. So not all whistleblowers involve money or even, per se, mismanagement, but often can result in us getting need-to-know information. We cannot allow ourselves not to have that need-to-know information.

I thank the chairman for his leadership and yield back.

Chairman TOWNS. At this time I yield 5 minutes to the man that is really responsible for us being here, a person who has done a marvelous job on this legislation. The gentleman from Maryland Mr. Van Hollen is recognized for 5 minutes.

Mr. VAN HOLLEN. Thank you very much, Mr. Chairman. I want to thank you and Mr. Issa for holding this hearing today, and I am not going to take my 5 minutes because I want to associate my remarks with both of the gentlemen, the chairman and the ranking member.

I've worked very closely with Mr. Platts on this legislation as well as other members of this committee and other Members of Congress. As both the chairman and the ranking member have said, I think we feel it imperative to move forward and strengthen whistleblower protections. Yesterday the House passed legislation on a bipartisan basis to strengthen the procurement rules and regulations of the Department of Defense so that we could make sure taxpayers were better protected. This is part of that effort, and we welcome any constructive suggestions that the witnesses may have to offer.

I thank the chairman.

Chairman TOWNS. Any other Member seeking recognition?

Mr. Kucinich of Ohio.

Mr. KUCINICH. Thank you very much, Mr. Chairman.

Federal employees who do the right thing and expose wrongdoing that is happening in their job within their sphere of activity deserve to be thanked, not punished, and yet we know that various court decisions do not protect employees when they come forward with information that is vital to the public interest.

Government isn't some insular game. Government isn't a rule unto itself. What makes us a democracy is transparency so we can actually see what's happening, and, if something is going wrong, that we have a chance to make it right.

The secrecy that has surrounded our government has put our Nation's democracy in jeopardy, and this approach toward transparency, which is reflected in the bill that is being discussed and in Congress' approach to try to restore whistleblower protection, is really vital to try to restore trust in government and trust in the Congress' ability not just to provide oversight, but to make sure that those who have information feel free to come forward with that information and not be punished for it.

Thank you, Mr. Chairman. I yield back.

Chairman TOWNS. I recognize the gentlewoman from California Ms. Watson.

Ms. WATSON. Thank you so much, Mr. Chairman, for today's hearing on H.R. 1567, the Whistleblower Enhancement Protection Act of 2009. I am looking forward to hearing about the new administration's plan to enhance whistleblower protection for Federal employees and contractors, and hearing testimony from Federal employees who have faced retaliation for filling their duty to expose evidence of waste, fraud and abuse.

The healthy functioning of our government and the likelihood of this committee to properly oversee its operations depends on the ability of Federal employees and contractors to report instances of corruption and misuse without fear of reprisal. For this reason I

was pleased to vote for similar legislation in each of the last Congresses and look forward to seeing these provisions finally signed into law by our new President.

Federal employees and contractors are often our first and only line of defense against government waste and manipulation, while recent history makes their dual role as civil servants and watchdogs even more crucial. The unprecedented levels of government spending in the American Recovery and Reinvestment Act of 2009 and the current engagements in Iraq and Afghanistan require detailed oversight from Congress, which would be impossible without the honest disclosure from Federal employees and contractors of what is really happening on the ground. It is critical to our economic and our national security that Congress is notified of instances of waste, fraud and abuse, and that these employees are willing and able to share their information and are able to remain a part of our civil infrastructure.

And so I would like to thank each of the witnesses today for their testimony as we seek to strengthen the protections for those with the courage to fulfill their duties and disclose evidence of waste, fraud and abuse.

I yield back my time. Thank you, Mr. Chairman.

[The prepared statement of Hon. Diane E. Waxman follows:]

Opening Statement

Congresswoman Diane E. Watson

"Protecting the Public from Waste, Fraud, and Abuse: The Whistleblower Protection Enhancement Act of 2009"

Full Committee Hearing
Committee on Oversight and Government Reform

Thursday, May 14, 2009
2154 Rayburn HOB
10:00 AM

Thank you Mr. Chairman for holding today's hearing on H.R. 1507, the Whistleblower Protection Enhancement Act of 2009. I look forward to hearing about the new administration's plans to enhance whistleblower protections for federal employees and contractors, and to hearing testimony from federal employees who have faced retaliation for fulfilling their duty to expose evidence of waste, fraud, and abuse.

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disclosure from federal employees and contractors of what is happening on the ground.

It is critical to our economic and national security that Congress is notified of instances of waste, fraud, and abuse, and that those employees able and willing to share this information are able to remain a part of our civil infrastructure.

I would like to thank each of today's witnesses for their testimony as we seek to strengthen the protections for those with the courage to fulfill their duties and disclose evidence of waste, fraud, and abuse.

Thank you Mr. Chairman, and I yield back the remainder of my time.

Chairman TOWNS. I recognize the gentleman from Virginia Mr. Connolly.

Mr. CONNOLLY. Thank you, Mr. Chairman, and thank you for holding this important hearing.

After 8 years of unprecedented secrecy and bizarre claims of Executive privilege, it is essential that this committee act to restore transparency to the Federal Government. The Whistleblower Protection Enhancement Act is a crucial part in that endeavor.

The primary reason we should enhance protection for whistleblowers is because it is in our national interest to do so. A lack of whistleblower protection simply cloaks problems that cannot be solved until we are aware of them. We will hear compelling testimony today from Teresa Chambers, who was fired from the U.S. Park Police for accurately reporting the capacity of her agency. We must know about agency issues, such as this one that she brought to the public's attention if we are to solve the problem. Ms. Chambers seems to have been fired as a result of political interference by the prior administration.

Perhaps greater oversight into the operation of agencies, such as the Federal Emergency Management Agency, could have mitigated the catastrophic impact of Hurricane Katrina. But regrettably, at that time, Congress and the public did not learn about agency shortcomings until after the disaster struck.

In his written testimony today, Louis Fisher states the Presidential authority to keep information secret has been exaggerated. Legislative action such as that outlined in H.R. 1507 could preclude a recurrence of administrative issuance of directives for our military to torture detainees as a standard method of interrogation, for example.

Of course, whistleblower protections are essential for Federal agencies to function efficiency; however, it is even more critical to protect whistleblowers so we may identify and correct shortcomings in our effort to guard against terrorist attack, crime and natural disaster. I applaud this legislation. I particularly applaud the leadership of our colleague Mr. Van Hollen from Maryland. I look forward to supporting the legislation and to these hearings.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Gerald E. Connolly follows:]

Opening Statement of Congressman Gerald E. Connolly

May 14th, 2009

The Whistleblower Protection Enhancement Act of 2009

Committee on Oversight and Government Reform

Thank you, Mr. Chairman for holding this important hearing. After eight years of unprecedented secrecy and bizarre claims of executive privilege, it is essential that this Committee act to restore transparency to the federal government. The Whistleblower Protection Enhancement Act is a crucial part of this endeavor.

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Of course, whistleblower protections are essential for federal agencies to function efficiently. However, it is even more critical to protect whistleblowers so that we may identify and correct shortcomings in our efforts to guard against terrorist attack, crime, and natural disaster.

I applaud my colleagues on this Committee for introducing the bipartisan Whistleblower Protection Enhancement Act, and look forward to its passage in this Committee and the full House.

Chairman TOWNS. I don't see Mr. Platts, but he also had a great role in making certain that he was very involved with this along with Congressman Van Hollen as well.

We will turn now to our first panel, which will consist of one government witness. Mr. De recently joined the Obama administration as a Deputy Assistant Attorney General in the Justice Department's Office of Legal Policy. Before joining the administration, Mr. De was a partner at Mayer Brown. Previously he had served as general counsel to the Commission on the Prevention of WMD Proliferation and Terrorism, counsel to the Senate's Homeland Security and Governmental Affairs Committee, and counsel to the 9/11 Commission.

Before we hear from the witness, I want to note that we have several government agencies in attendance today, all of which, I understand, worked together in preparing the testimony that Mr. De will deliver. I thank all of you for that. Thank you for your involvement and also that you recognize how important this is as well.

Mr. De, it is longstanding committee policy that we swear our witnesses in. So could you please stand and raise your right hand?

[Witness sworn.]

Chairman TOWNS. Let the record reflect the witness answered in the affirmative.

STATEMENT OF RAJESH DE, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE

Mr. DE. Good morning, Mr. Chairman, Mr. Ranking Member, members of the committee. Thank you for the opportunity to appear today to discuss the Whistleblower Protection Enhancement Act.

This administration strongly protects—strongly supports protecting the rights of whistleblowers. We recognize that the best source of information about waste, fraud and abuse in government is often a government employee committed to public integrity and willing to speak out. Empowering whistleblowers is a keystone of the President's firm commitment to ensuring accountability in government.

A government employee who speaks out about waste, fraud and abuse performs a valuable public service. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled. But too often, whistleblowers are afraid to call attention to wrongdoing in their own workplace. We need to empower all Federal employees as stewards of accountability. Put simply, accountability cannot solely be imposed from the top down.

The bottom line is we cannot tolerate waste, fraud and abuse, and we must make sure that Federal employees at all levels are able to do what it takes to eliminate it. At the same time, we must preserve the President's constitutional responsibility with regard to the security of national security information and ensure that agency managers have effective tools to discipline employees who themselves may be engaged in waste, fraud and abuse.

We recognize that the executive branch and Congress have long held differing views regarding the extent of the President's constitutional authority over national security information. Putting aside those constitutional differences to the extent possible, our focus today is achieving common ground and a workable solution toward our shared goal of increasing protections for Federal whistleblowers, including those who work in the national security realm.

Creating a system that sets up the right incentives for Federal employees and managers is not easy, as evidenced by multiple efforts to reform the system in the past three decades. This administration believes that the time has come to amend the system once again.

I would like to discuss some key components of the whistleblower reform legislation both with respect to Civil Service reform and the national security interests that are of interest to this committee.

Turning first to the Civil Service reform issues. This bill would make a number of important changes to the ways in which whistleblower claims are adjudicated. For example, the bill would, for the first time, allow whistleblowers to obtain compensatory damages. That is a matter of both simple fairness and of practicality. A whistleblower who suffers retaliation should be made whole, plain and simple, and we agree with this measure.

This bill also makes several important changes to the definition of what would constitute a protected disclosure. Under current law, a whistleblower is not protected if she informs her boss of wrongdoing, only to later find out that her boss was the very person responsible for the wrongdoing. Thus, under current law, the employee would be protected for going to the Washington Post, but not for going to her own boss. Changing the law to eliminate this disparity would encourage employees to tell their supervisors about problems in the first instance, which is usually the easiest way to resolve them.

This administration also supports modification of what is known as the normal-duty disclosure rule. Under that rule, an employee is not protected when he discloses wrongdoing as part of his normal job duties unless he makes that disclosure outside of normal channels. This administration believes, however, that normal-duty disclosures should be protected, particularly when public health and safety are at stake.

Beyond the Civil Service arena, this administration also believes that whistleblowers in the national security realm must have a safe and effective method of disclosing wrongdoing without fear of retaliation. We are pleased to see that this bill provides full whistleblower protections to Transportation Security Administration screeners who literally stand at the front lines of our Nation's homeland security system. They deserve the same whistleblower protections as all other employees of the Department of Homeland Security.

As this committee knows, the Intelligence Community is generally excluded from the existing Whistleblower Protection Act. The Intelligence Community Whistleblower Protection Act of 1998 represents Congress' most recent attempt to provide a safe and effective channel for national security whistleblowers to report

wrongdoings. That act provides a vehicle for Intelligence Community employees to report matters of urgent concern to Congress. The ICWPA, however, affords the individual employee no avenue for a potential disclosure beyond her specific agency.

This administration believes that no Federal agency should be able to hide its own wrongdoing. For this reason, we proposed the creation of an extra-agency avenue within the executive branch for Federal employees who wish to make classified disclosures to Congress under the ICWPA. This mechanism could be composed of senior Presidentially appointed officials from key agencies within and outside the Intelligence Community, including inspectors general, and would ensure that no individual agency can rely inappropriately on alleged classification concerns to stifle disclosure of waste, fraud and abuse.

If, under the procedures set forth under the ICWPA, an agency head declines to transmit information to Congress or declines to provide instructions to the employees on how he may do so, the employee could appeal to this new entity, which could overrule the agency head. Individual employees, moreover, we believe, should be entitled to alert Congress to the fact that they have raised a potential disclosure in the ICWPA process or with this new executive branch.

We also believe that the extra-agency mechanism could provide a better vehicle to review alleged retaliatory security clearance revocations from the system currently set forth in H.R. 1507. We are aware that this committee has heard testimony in the past from individuals who have claimed that their security clearances were revoked due to whistleblowing activities. This administration has zero tolerance for such actions. An agency mechanism—extra-agency mechanism could recommend full relief to the aggrieved employee, including restoration of the clearance, and could ensure that Congress would be notified if that recommendation is not followed. This mechanism would ensure that no agency would remove a security clearance as a way to retaliate against an employee who speaks truth that the agency does not want to hear.

Of course, retaliation may take many forms, and we are committed to providing more general protections for Intelligence Community whistleblowers. Such whistleblowers expose flaws in programs that are essential for protecting our collective national security. One complication, of course, is that Intelligence Committee whistleblowers may well reveal waste, fraud and abuse in activities that take place within highly classified programs. Due to the sensitive nature of the issues involved, we believe that Federal District Court review may not be the appropriate vehicle for Intelligence Community whistleblowers. Rather, a better vehicle may well be the extra-agency mechanism within the executive branch, which we propose to create.

Of course, we look forward to working with the committee in a constructive dialog to craft a scheme that satisfies all of our shared goals.

Finally, this legislation is merely one step in this administration's plan to assure accountability in government. We appreciate the efforts that this committee has made to devise whistleblower

protections that work. We look forward to working with you to revise and improve this legislation.

With that, I would be pleased to take your questions.

Chairman TOWNS. Thank you very much, Mr. De, for your testimony.

[The prepared statement of Mr. De follows:]

Department of Justice

STATEMENT OF

RAJESH DE
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

ENTITLED

"PROTECTING THE PUBLIC FROM WASTE, FRAUD AND ABUSE: H.R. 1507, THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2009"

PRESENTED

MAY 14, 2009

STATEMENT OF
RAJESH DE
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY
DEPARTMENT OF JUSTICE

BEFORE THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

ENTITLED
"PROTECTING THE PUBLIC FROM WASTE, FRAUD AND ABUSE: H.R. 1507, THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2009"

MAY 14, 2009

Good morning Chairman Towns, Ranking Member Issa, and Members of the Committee. Thank you for the opportunity to appear before you today to discuss the Whistleblower Protection Enhancement Act.

This administration strongly supports protecting the rights of whistleblowers. The administration recognizes that the best source of information about waste, fraud, and abuse in government is often a government employee committed to public integrity and willing to speak out. Empowering whistleblowers is a keystone of the President's firm commitment to ensuring accountability in government.

The administration is pleased that Congress has moved quickly on this front. The American Recovery and Reinvestment Act of 2009, which the President signed into law on February 17, 2009, includes significant new protections for government contractors who blow the whistle on abuse related to the use of stimulus funds. Likewise, the Fraud Enforcement and Recovery Act of 2009, which recently passed both the House and the Senate, will, among other

things strengthen the False Claims Act, which allows private-sector whistleblowers with evidence of fraud by government contractors to file suit on behalf of the government to recover the stolen funds. The President looks forward to signing that legislation.

The administration is grateful that Congress is also examining protections for federal employees who ferret out waste, fraud, and abuse in government. We are committed to making every effort to ensure that federal agencies act in accordance with the great trust placed in them by the President, by Congress, and by the American people.

A government employee who speaks out about waste, fraud or abuse performs a public service. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled. Yet too often whistleblowers are afraid to call attention to wrongdoing in their workplace. Blowing the whistle often means taking great risks. The whistleblower may suffer retaliation from his boss and scorn from his colleagues. Knowing that he is performing a public service is cold comfort if his patriotic duty costs him a promotion, valuable assignments, or even his job.

We need to empower all federal employees as stewards of accountability. Put simply, accountability cannot be imposed solely from the top down. Even the best agency managers may be unaware of certain waste, fraud or abuse that occurs on their watch; and managers of course must be held accountable for their own actions. Therefore, we must make sure that federal employees have safe and effective ways to blow the whistle on waste, fraud and abuse. That means providing clear avenues to report wrongdoing, and ensuring that no one suffers retaliation for making such a report.

The bottom line is that we cannot tolerate waste, fraud, and abuse, and we must make sure that federal employees at all levels are able to do what it takes to eliminate it. At the same time, we must preserve the President's constitutional responsibility with regard to the security of national security information and ensure that agency managers have effective tools to discipline employees who themselves may engage in waste, fraud, and abuse.

We recognize that the Executive Branch and the Congress have long held differing views regarding the extent of the President's constitutional authority over national security information. Putting aside those constitutional differences to the extent possible, our focus today is on achieving common ground and a workable solution toward our common goal of increasing the protections for federal whistleblowers, including those who work in the national security realm.

Creating a system that sets the right incentives for federal employees and managers is not easy, as evidenced by multiple efforts to reform the system. In each of the past three decades, Congress has passed legislation attempting to set the right balance, most notably the Civil Service Reform Act of 1978, the Whistleblower Protection Act of 1989 (WPA), and the Intelligence Community Whistleblower Protection Act of 1998 (ICWPA).

The administration believes the time has come to amend the system once again. The President is eager to sign legislation this year that ensures safe and effective channels for whistleblowers to report and correct wrongdoing without fear of retaliation. I would like to discuss some key components of whistleblower reform as they relate to the legislation currently pending before the House—both with respect to civil service reform and national security aspects of the pending bill.

Turning first to the civil service reform issues, this bill would make changes to the ways in which whistleblower claims are adjudicated. For example, under the WPA, covered employees are limited to pursuing appeals from the Merit Systems Protection Board (MSPB) to the Federal Circuit. While we have found there are advantages to having a single circuit decide these issues, the administration has no objection to the bill's choice to disperse whistleblower appeals to the regional circuits. In addition, this bill would for the first time allow whistleblowers to obtain compensatory damages. That is a matter both of simple fairness and of practicality. A whistleblower who suffers retaliation should be made whole, plain and simple, and we agree with this measure.

The bill also makes several changes to the definition of protected disclosure. Under current law, a whistleblower is not protected if she informs her boss of wrongdoing, only to discover that her boss was the one responsible for the wrongdoing. For example, imagine that a federal employee discovers that her agency is wasting large sums of money by purchasing supplies from a company whose prices are not competitive. She reports this to her boss—a logical first step. Yet it turns out that her boss is the one who authorized the purchases. He is furious that his employee should question his actions, and he takes key assignments away from her as punishment for daring to speak up. If she filed a whistleblower claim, she would lose. The Federal Circuit has held that bringing wrongdoing to the attention of the wrongdoer does not constitute a "disclosure" under the WPA because the wrongdoer already knows about his own misconduct, and thus nothing has been "disclosed." Thus, under current law, the employee would be protected for going to the Washington Post, but not for going to her boss. Changing

the law will encourage employees to tell their supervisors about problems in the first instance, which is usually the easiest way to resolve them.

The administration also supports modification of another Federal Circuit interpretation of the WPA: what is known as the normal-duty disclosure rule. In *Huffman v. Office of Personnel Management,* 263 F.3d 1341 (Fed. Cir. 2001), the court held that an employee is not protected when he discloses wrongdoing as part of his normal job duties, unless he makes his disclosure outside of the normal channels. Imagine, for example, that an inspector's diligent work at documenting safety violations aggravates the company that he is inspecting. The company asks his supervisor to rein him in. If the boss takes action against the inspector because the inspector disclosed these threats to public safety, the inspector has no recourse under the WPA because his disclosure was part of his normal duties. The administration believes that such normal-duty disclosures should be protected when public health and safety is at stake. At the same time, however, we believe that any new rule extending protection to normal-duty disclosures must be tailored to ensure that agency managers are not chilled from taking legitimate personnel actions against poorly performing employees.

As we encourage civil servants to bring to light evidence of agency waste, fraud, and misconduct, we should not inadvertently make it more difficult for civil servants in supervisory roles to discipline employees who themselves engage in such acts or whose job performance is otherwise inadequate. Indeed, federal employees may be forced to blow the whistle on their colleagues if agency managers neglect to take action. Problems are solved more quickly when managers take swift steps to correct misconduct, thereby obviating the need for their employees to make the difficult decision whether to blow the whistle on their peers. Accountability in

government means that we must ensure that managers retain the ability and confidence to remedy wrongdoing and poor performance when they see it.

The administration also believes that whistleblowers in the national-security realm must have a safe and effective method of disclosing wrongdoing without fear of retaliation. We are pleased to see that this bill provides full whistleblower protection to Transportation Security Administration screeners, also known as Transportation Security Officers. Transportation Security Officers stand literally at the front lines of our nation's homeland security system. They deserve the same whistleblower protections afforded to all other employees of the Department of Homeland Security.

As this Committee knows, the intelligence community is generally excluded from the WPA.[1] The historical reason for this exclusion by Congress is that the intelligence community handles classified information, the unauthorized disclosure of which is prohibited and can cause grave harm. Yet it is essential that we root out waste, fraud and abuse in the intelligence community just as elsewhere, and that intelligence community employees have safe channels to report such wrongdoing.

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[1] The FBI is a partial exception: Congress mandated the creation of a system specifically for the Bureau. *See* 5 U.S.C. § 2303. In 1999, the Department of Justice promulgated regulations, designed to protect FBI whistleblowers from retaliation, in large measure based on relevant provisions of the WPA, although with key differences. To prevent the inappropriate dissemination of sensitive information, an FBI whistleblower's disclosure is protected only if made to specified DOJ or FBI offices or individuals listed in the regulations. And instead of contesting reprisals before the MSPB, an FBI whistleblower must first report the alleged reprisal to DOJ's Office of the Inspector General (OIG) or its Office of Professional Responsibility (OPR). Either OIG or OPR will investigate the allegations and transmit their report, along with any recommendation for corrective action, to the Office of Attorney Recruitment and Management (OARM), which adjudicates the claim. OARM may order corrective action if it finds that the employee has proven by a preponderance of the evidence that the employee made a protected disclosure that was a contributing factor in the personnel action at issue, as long as the FBI has failed to prove by clear and convincing evidence that it would have taken the same personnel action against the employee in the absence of the protected disclosure. An employee may appeal OARM's determination to the Deputy Attorney General.

The Intelligence Community Whistleblower Protection Act of 1998 represents Congress's most recent attempt to provide such a channel. That act provides a vehicle for intelligence community employees to report matters of "urgent concern" to Congress.[2] The employee must first inform her Inspector General, who then determines whether the complaint is credible. If so, she must transmit the information to her agency head, who will then transmit the information to the House and Senate Intelligence Committees. If the Inspector General does not deem the complaint to be credible or does not transmit the information to the agency head, the employee may provide the information directly to the House and Senate Intelligence Committees, as long as she notifies her Inspector General and agency head of her intent and obtains and follows instructions on how to do so. By requiring the employee to first contact the agency before going to Congress, the ICWPA provides the Executive Branch with notice of the intended disclosure, the ability to provide the employee with appropriate instructions regarding how to transmit classified information to the Congress, and an opportunity to review and control disclosure of certain classified information, if appropriate, in accordance with the President's constitutional authority.

The ICWPA, however, affords the individual employee no avenue for review of a potential disclosure beyond her specific agency. The administration believes that no federal agency should be able to hide its own wrongdoing. For this reason, we propose the creation of

[2] A matter of "urgent concern" is defined as: (1) a serious or flagrant problem, abuse, violation of law or executive order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information; (2) a false statement to the Congress on, or willful withholding from the Congress of, an issue of material fact relating to the funding, administration, or operation of an intelligence activity; or (3) an action constituting reprisal in response to an employee's reporting of an urgent concern.

an extra-agency avenue within the Executive Branch for federal employees who wish to make classified disclosures to Congress under the ICWPA. This mechanism could be composed of senior presidentially-appointed officials from key agencies within and outside of the intelligence community, including inspectors general, and to ensure that no individual agency can rely inappropriately on alleged classification concerns to stifle disclosures of waste, fraud, and abuse.

If the agency head declines to transmit information to Congress, or declines to provide instructions to the employee on how he may do so, the employee could appeal to this entity, which could overrule the agency head. Individual employees, moreover, would be entitled to alert appropriate members of Congress to the fact that they have made such an appeal so that Congress is aware that a concern has been raised.

We believe that such a mechanism within the Executive Branch would constitute an improvement upon the relevant provisions of H.R. 1507. The current bill would grant federal employees the unilateral right to reveal national security information whenever they reasonably believe the information provides evidence of wrongdoing, even when such information is legitimately classified or would be subject to a valid claim of executive privilege. We believe that this structure would unconstitutionally restrict the ability of the President to protect from disclosure information that would harm national security.

Of course, Congress has significant and legitimate oversight interests in learning about, and remedying, waste, fraud and abuse in the intelligence community, and we recognize that Congress has long held a different view of the relevant constitutional issues. However, as Presidents dating back to President Washington have maintained, the Executive Branch must be able to exercise control over national security information where necessary. *See Whistleblower*

Protections for Classified Disclosures, 22 Op. O.L.C. 92, 94-99 (1998) (statement of Randolph D. Moss, Deputy Assistant Attorney General, Office of Legal Counsel, before the House Permanent Select Committee on Intelligence) (tracing history). As Randolph Moss, Deputy Assistant Attorney General in the Office of Legal Counsel, explained in testimony before the House intelligence committee in 1998:

> In the congressional oversight context, as in all others, the decision whether and under what circumstances to disclose classified information must be made by someone who is acting on the official authority of the President and who is ultimately responsible to the President. The Constitution does not permit Congress to authorize subordinate executive branch employees to bypass these orderly procedures for review and clearance by vesting them with a unilateral right to disclose classified information—even to Members of Congress.

See id. at 100. Putting these differences in constitutional analysis aside, we believe that an extra-agency mechanism within the Executive Branch could offer a way forward to balance the Executive's need to protect classified information with Congress's responsibility to help ferret out waste, fraud and abuse.

We also believe that the extra-agency mechanism could provide a better vehicle to review allegedly retaliatory security clearance revocations than the system currently set forth in H.R. 1507. The current bill provides that an employee who alleges that his security clearance was revoked in retaliation for whistleblowing may challenge that determination in federal court, and in some cases may do so via a jury trial. The bill provides that the court may grant compensatory and injunctive relief except for the restoration of a security clearance. That judgment quite properly recognizes this function to be the prerogative of the Executive Branch. Indeed, under Executive Order 12968, a security clearance may be granted "only where facts and circumstances indicate access to classified information is clearly consistent with the national

security interests of the United States, and any doubt shall be resolved in favor of the national security." Providing a judicial remedy, even one that does not mandate restoration of the clearance, is inconsistent with the traditional deference afforded Executive Branch decision-making in this area. Indeed, in a case where an employee was terminated due to his inability to perform his job without a security clearance, the bill would apparently empower the reviewing court to order the agency to restore him to his former position, even if he cannot do his job properly absent a clearance. The result would be that the agency might well be required to pay an employee to show up to work, and yet not be able to give him any work to do—a result that cannot be desirable from any perspective.

We are aware that this Committee has heard testimony in the past from individuals who have claimed that their security clearances were revoked due to whistleblowing activities. This administration has zero tolerance for such actions. Although current law provides some procedural protections, the administration believes that an employee who is denied a security clearance should be able to seek recourse outside of her agency. Under Executive Order 12968, an employee who is denied a clearance, or whose clearance is revoked, is entitled to a panoply of due process protections, including the right to a lawyer and to submit evidence at a hearing, unless the agency head determines that such procedures cannot be invoked in a manner that is consistent with national security. We believe that an employee who is dissatisfied with the outcome of this process, and alleges their clearance was revoked for retaliatory purposes, should be able to appeal outside her own agency. An extra-agency mechanism could recommend full relief to the aggrieved employee, including restoration of the clearance, and could ensure that Congress would be notified if that recommendation is not followed by the agency head. This

mechanism would ensure that no agency will remove a security clearance as a way to retaliate against an employee who speaks truths that the agency does not want to hear.

Of course, retaliation may take many forms, and we are committed to providing more general protections for intelligence community whistleblowers. Such whistleblowers expose flaws in programs that are essential for protecting our national security. One complication, however, is that intelligence community whistleblowers may reveal waste, fraud or abuse in activities that take place within highly classified programs. Airing the details of such programs may risk the continued viability of the program—and indeed may risk the safety of the individuals who work in the program or who depend on its benefits. For these reasons, the Whistleblower Protection Act did not encompass the intelligence community. We believe it is necessary to craft a scheme carefully in order to protect national security information while ensuring that intelligence community whistleblowers are protected in reality, not only in name. Properly structured, a remedial scheme should actually reduce harmful leaks by ensuring that whistleblowers are protected only when they make disclosures to designated Executive Branch officials or through proper channels to Congress. We are pleased that this bill incorporates that limitation. Nonetheless, due to the sensitive nature of the issues involved, we believe that a federal district court review is not the appropriate vehicle for intelligence community whistleblowers. Rather, a better vehicle may well be the extra-agency mechanism within the Executive Branch that we propose to create, or possibly the MSPB. We look forward to working with the Committee to craft a scheme that satisfies all of these shared goals.

This legislation is merely one step in the adminsitration's plan to ensure accountability in government. The administration looks forward to examining all other parts of the whistleblower

protection system. More broadly, the administration will examine whether agencies can do more to ensure that employees know of their rights. Having the greatest protections in the world is of no help if employees don't know how to use them. The administration is dedicated to make sure that they do.

At the same time, we must make sure that managers know of these rules and follow them. We will have won a Pyrrhic victory if this legislation simply leads to a flood of successful whistleblower claims. Rather, we must strive to reduce the need for such suits in the first place. Our goals are two-fold: to prevent waste, fraud and abuse, and to prevent retaliation against those who bring it to light when it occurs. Accordingly, this administration is dedicated to ensuring that agency managers know two things. First, managers must be vigilant against any waste, fraud and abuse that happens on their watch. And second, managers must not retaliate against whistleblowers who bring to light wrongdoing that managers may have missed.

The administration is pleased by the efforts that this Committee has made to devise whistleblower protections that work. We look forward to working with the Committee to revise and improve the legislation.

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Chairman TOWNS. Let me just announce to the Members that we have five votes on the floor, which means that we need at least an hour. So we will go on a break and be back at 11:30.

So, Mr. De, we do have to vote around here, so why don't we stop at this point, and then we will go vote and come back at 11:30. Thank you very much for your testimony, and we will continue our questioning when we return.

[Recess.]

Chairman TOWNS. The committee will come to order.

Let me begin by first apologizing for the delay. There were some procedural votes that we didn't anticipate. So that delayed us even further.

Mr. De, one of the witnesses on our next panel notes that an intolerance of criticism by the previous administration was one of the reasons she was treated so harshly after disclosing safety concerns.

I believe that the willingness to accept criticism is a sign of strength and something that all leaders should embrace. President Obama seems to recognize the need to tolerate dissent; but I wonder what actions are being taken to send this message to the agency managers, because sometimes you have feelings about these and it is not conveyed to the managers, of course, and the secretaries in terms of the views of the individual that is providing overall leadership.

Mr. DE. Thank you, Mr. Chairman. As you note, the President has clearly expressed and signaled his strong commitment not only to whistleblowers but to broader transparency and accountability initiatives.

I think the general philosophy that we have seen take hold from this administration is, we all want to see—we all want to get to the right answers in the right way. And an as example of the sort of message that has gone to agency heads from the President directly, I would refer you to a March 9th memorandum, Presidential memorandum, that went to all agency heads specifically related to the subject of scientific integrity.

Now, I understand that is one example of the type of tolerance of dissent that you have alluded to, and this is one of particular concern to this committee, given that this subject is addressed in the bill, which we applaud.

For example, in this Presidential memo that went to every agency head, the President directed that each agency shall adopt additional procedures, including any whistleblower protections as are necessary, to ensure the integrity of scientific and technological information and processes on which the agency relies in its decision-making.

So I would put that forward as one example of direct communication from the President to agency heads in order to tolerate dissent and to make sure we all get to the right answer in the right way.

Chairman TOWNS. What do you feel that is not here that should be here?

Mr. DE. With respect to the bill, I think certainly we applaud a lot of what is in the bill. I think some suggestions we have concern how to more carefully tailor some of the amendments to—for exam-

ple, the definition of "protective disclosure" or how national security whistleblowers are dealt with.

And so I think our proposal—one thing that we think isn't here would be the suggestion for a new executive agency board that sits outside of individual agencies. We think that is something that could contribute to the goals of the legislation in a way that accommodates both the executive branch concerns and the congressional concerns. Such a new board would be able to deal with several issues that this committee has identified as issues of concern, whether it is retaliation for security clearance revocations, whether it is predisclosure from executive branch employees to congressional—relevant congressional Members of national security matters, or whether it had to do with retaliation claims generally about national security whistleblowers.

So I think some sort of executive branch entity outside of individual agencies would be something that would contribute to the goals of this legislation.

Chairman TOWNS. Thank you.

In the national security and intelligence area, I think we agree, a good outcome would be to set up a system that encourages employees to work within the system rather than disclosing sensitive information to the newspapers. We want employees to feel comfortable raising problems right away so that any serious misconduct is addressed before it becomes a major problem or a scandal.

Do you believe that the process you outlined in your testimony will encourage employees to disclose information internally rather than to the New York Times, Washington Post and, of course, Amsterdam News? And what other steps do you think are necessary to restore employees' confidence in the system?

Mr. DE. We very much agree that the most effective, efficient way to address the wrongdoing that we all want to address is to ensure that whistleblowers do so in a way that allows us to fix these problems at the earliest possible stage. Some of the suggested fixes in the bill, as well as some of the ideas we have put forward, are certainly meant to address that concern, and we appreciate that philosophy that is clearly reflected in the bill itself already.

I think one example of how we believe our proposal could certainly further that end is, if national security whistleblowers do feel confident that there is a means for redress for concerns over retaliation, if it is addressed, for example, by the new extra-agency panel that we propose, that very comfort and confidence, that there is a means for them for redress, in and of itself, will promote the proper disclosure of waste, fraud, and abuse in a way that we can actually address it and fix it more quickly in the process, rather than making such whistleblowers feel that their only option is to go outside the system to the press, which doesn't help us fix the problem as easily as we could otherwise, and puts everybody in jeopardy potentially.

Chairman TOWNS. Let me ask you this one, and then I am going to yield to my colleague from Massachusetts.

Could you comment on the provisions in the legislation that strengthen protection for employees of Federal contractors? This is similar to the protections we passed for recipients of the stimulus

funds, which the President signed and that you highlighted in your testimony.

Could you comment on that provision?

Mr. DE. Yes, sir.

As you know and as you mentioned, the President was pleased to sign the Recovery Act, which included a provision that extended whistleblower protection to recipients of stimulus funds. We are pleased that this bill extends protection beyond—to Federal contractors, beyond just recipients of Federal stimulus funds, but to all Federal contractors. So we would support extending protection to Federal contractors generally.

Chairman TOWNS. I yield to the gentleman from Massachusetts for 5 minutes.

Mr. TIERNEY. Thank you, Mr. Chairman.

Mr. De, thank you for being here today.

With respect to that part of the bill that deals with whistleblower disclosures in the FBI, do you have a comment to make about the proposal by some that section be amended to explicitly state that disclosures made through the normal chain of command at the FBI do not lose their protective status?

Mr. DE. As a general matter, we certainly believe that normal chain of command disclosures should, in fact, be protected. We want to encourage employees to do what their first instinct normally is to do, which is to go to your boss and say, I think that this is a problem.

And so we certainly agree that applies throughout the government, and we would like to make sure that particular language in the bill is crafted in such a way to ensure that it achieves that goal, but also doesn't unnecessarily chill Federal managers from taking whatever appropriate disciplinary actions there may be in the normal course of employment.

Mr. TIERNEY. Thank you.

I yield back, Mr. Chairman.

Chairman TOWNS. Thank you very much.

You know, if you were able to score on 1 to 10 in terms of this legislation, what number would you give it?

Mr. DE. Well, I am not a numbers person, so I suppose that is the first answer I would have. I think we are——

Chairman TOWNS. We will leave the record open for you to get a number.

Mr. DE. I would say this. We are very, very pleased that the committee and Congress are paying attention to this issue. And the President and this administration want to see a bill, so we are very engaged to make sure that this bill happens to the extent Congress can make it happen this year.

Chairman TOWNS. Thank you very much. And thank you for your testimony. Thank you.

Panel No. 2. We now turn to our second panel.

Our second panel will have three witnesses made up of current and former employees of the Federal Government. These whistleblowers each followed their conscience in disclosing evidence of wrongdoing or threats of public safety. They have taken different paths to arrive here today, and we have asked them to share their experiences with the committee.

We will first hear from Ms. Bunnatine Greenhouse, better known as Bunny, who is a top procurement executive with the Army Corps of Engineers.

Our next witness, Franz Gayl, is employed as a civilian science and technology advisor with the U.S. Marine Corps.

Our third witness, Teresa Chambers, was the chief of the U.S. Park Police and was removed after disclosing her concerns about the safety of the National Parks.

I look forward to hearing each of your testimonies. And, as I said earlier, it is committee policy that all witnesses are sworn in. So if you would stand and raise your right hands.

[Witnesses sworn.]

Chairman TOWNS. Let the record reflect that the witnesses answered in the affirmative.

As with the other panel, what we would like for you to do is to talk for 5 minutes in terms of—and then, of course, allow us an opportunity to raise questions with you.

So why don't we start with you, Ms. Greenhouse, and come right down the line.

Thank you all for being here.

STATEMENTS OF BUNNATINE H. GREENHOUSE, FORMER PROCUREMENT EXECUTIVE AND PRINCIPAL ASSISTANT RESPONSIBLE FOR CONTRACTING [PARC], U.S. ARMY CORPS OF ENGINEERS; FRANZ GAYL, SCIENCE AND TECHNOLOGY ADVISOR TO THE DEPUTY COMMANDANT FOR PLANS, POLICIES AND OPERATIONS/DEPUTY BRANCH HEAD, U.S. MARINE CORPS; AND TERESA CHAMBERS, FORMER CHIEF, U.S. PARK POLICE

STATEMENT OF BUNNATINE H. GREENHOUSE

Ms. GREENHOUSE. Chairman Towns—I believe Ranking Member Issa is not here now——

Chairman TOWNS. He will be here.

Ms. GREENHOUSE [continuing]. And honorable members of the committee, I want to first thank you for holding this hearing. I am required to state that I appear in my personal capacity.

In 1997, I was sworn in as the U.S. Army Corps of Engineers Procurement Executive and Principal Assistant Responsible for Contracting. I was selected for this position following a competitive selection process where I was judged most qualified. I am proud to have been the first black female to become a member of the Corps' senior acquisition service—executive service.

I soon realized that the Corps' contracting practices were dominated by cozy and clubby contracting relationships. Simply stated, improper contracting practices were the norm rather than the exception. I fought to bring accountability and fairness to the Corps' contracting mission, which brought about hostility and was blatantly tied to my race and gender.

During the ramp-up to the Iraq war, the Army Corps was named as the executive agent for a contract effort known as Restore Iraqi Oil [RIO]. RIO was a $7 billion sole-source cost-plus contract awarded to Halliburton subsidiary Kellogg Brown & Root without competition.

A decision at the highest levels was made to exclude me as much as possible from the RIO contracting effort. I was not told that the Corps had been selected as the executive agent for the RIO contract, and I was kept in the dark for as long as possible. But I could not be completely circumvented, because eventually the final justification and approval for the RIO contract had to be provided—had to be provided to me for signature.

It was not until the invasion of Iraq and that was imminent that the curtain was finally lifted, giving me a front row seat to the worst contract abuse I witnessed during the course of my 23-year professional contracting career. Although the Corps had been named the executive agent, in reality that function was controlled out of the Office of the Secretary of Defense.

I raised concerns directly to the Secretary of Defense's representative and to the senior contracting officials from the Department of Army and to my command, outlining the selection of KBR was improper and unlawful, that the process was plagued by conflict of interests, and the scope and the duration of the compelling emergency contract was unconscionable. My concerns were ignored.

Because the invasion of Iraq was imminent and there was little that I could do, after some soul-searching, I was compelled to handwrite directly onto the original copy of the contracting documentation a notation documenting my most pressing concern over the unprecedented duration of the contract. My notation on the contract documents did not sit well with my superiors, and retaliation was sure to follow.

In October 2004, I was called into the commander's office and given written notice that I was to be removed from the senior executive service and from my position. I was told that I could avoid the embarrassment of demotion and could retire with grace.

I did nothing wrong. I was not going to retire, and I could no longer remain silent. I turned to Michael Kohn, a cofounder of the National Whistleblower Center, for help. With his assistance, I was able to bring my concerns to the then Acting Secretary of the Army and key Members of Congress.

A media storm followed. The Acting Secretary of the Army did the right thing by acknowledging the seriousness of my concerns. He ordered a halt to my demotion and removal until my concerns were reviewed by the Department of Defense Office of Inspector General [DOD IG]. But there was no visible action to investigate my concerns. As far as I can tell, the DOD IG never conducted an investigation.

The status quo ended after I agreed to testify before a congressional committee regarding improper contracting. I was approached by the U.S. Senate Democratic Policy Committee and asked to provide testimony about my concerns. I felt obligated to appear, particularly because my concerns were not being looked into as had been promised by the Acting Secretary of the Army.

Word that I was going to appear reached the Corps, which prompted a visit from the Army Corps' Acting General Counsel. He let it be known that it would not be in my best interest to voluntarily appear before the committee. I ignored the message, and that was delivered, and testified on June 27, 2005.

I anticipated swift retaliation for doing so, and I didn't have to wait long. On August 25, 2005, I was removed from the SES and stripped of all contracting responsibilities.

Since then, my Top Secret clearance was withdrawn. I continually receive inappropriately downgraded performance reviews, others are allowed to take credit for my work, and I am kept away from my career field of contracting. I was even denied recognition for having 25 years of Federal service at the annual USACE award ceremony that was afforded to other USACE-eligible employees.

I am not an expert in the law, but I am well versed in how poorly it works when it comes to Federal sector whistleblower protection. The current reality is that the Federal Whistleblower Protection Act offers no protection. How poorly it works is perhaps best exemplified by the advice I received from the National Whistleblowers Center, a not-for-profit organization devoted to helping whistleblowers. When I explained what was happening to me, I was told that filing a claim under the Whistleblower Protection Act would do more harm than good.

I essentially received the same advice from my former commander, Lieutenant General Carl Strock, who was responsible for my removal and demotion. When my whistleblower concerns were made public, he announced in my presence during his weekly staff meeting of his senior staff that the Corps had a whistleblower, but that there was no need for concern because the system would take care of itself.

I am the poster child of what Federal employees can expect if they have the courage to blow the whistle on waste, fraud, or abuse: a lost career, with the inability to wage a meaningful legal challenge.

Federal employees deserve more than that. Thank you for listening.

Chairman TOWNS. Thank you very much, Ms. Greenhouse, for your testimony.

[The prepared statement of Ms. Greenhouse follows:]

TESTIMONY OF BUNNATINE H. GREENHOUSE

Before the United States House of Representatives
Committee on Oversight and Government Reform
Protecting the Public from Waste, Fraud, and Abuse:
H.R. 1507, the Whistleblower Protection Enhancement Act of 2009.
May 14, 2009

My name is Bunnatine Greenhouse. Chairman Towns, Ranking Member Isa, and Honorable Members of the Committee, I thank you for this opportunity to appear before you today in support of H.R. 1507, the Whistleblower Protection Enhancement Act of 2009. Before I proceed any further, I am required to tell you that my testimony is presented in my personal capacity. In 1997 I was sworn in as the United States Army Corps of Engineers ("USACE") Procurement Executive and Principal Assistant Responsible for Contracting (PARC). I was chosen based on a competitive selection process and proudly became the first black female to enter the ranks of the Corps' Senior Executive Service ("SES"). I quickly learned that the Corps' contracting process was dominated by cozy and clubby contracting "relationships." Simply stated, improper contracting practices were the norm rather then the exception. I fought to bring accountability and fairness to the Corps' contracting mission, but the path I followed was laced with hostility, blatantly tied to my race and gender.

During the ramp-up to the Iraq War, the Army Corps was named as the Executive Agent to a contract effort known as Restore Iraqi Oil, or "RIO" for short. RIO was a $7 billion, sole source, cost plus contract awarded to Halliburton subsidiary, Kellogg Brown & Root without competition. My intolerance to "questionable" contracting activity was known and my reaction to the RIO contracting effort would come as no surprise. So the Command structure kept me in the dark so much so that I was not informed that the Corps had been designated as Executive Agent for the RIO contract. But I could not be completely circumvented because as the USACE Competition Advocate, my signature eventually had to appear on the final justification and approval for the RIO contract before it could be implemented.

It was not until the invasion of Iraq was imminent that the curtain was finally lifted giving me a front row seat to the worst contract abuse I witnessed during the course of my 23-year professional career. While the Corps was supposed to be the Executive Agent, the reality was that this function was being controlled out of the office of the Secretary of Defense. I raised concerns directly to the Secretary of Defense's representatives and to the Senior Contracting Officials from the Department of the Army and to my Command, outlining that the selection of KBR was improper and unlawful; that the process was plagued by conflict of interest, and that the scope and duration of the "compelling emergency" contract was unconscionable. But, because the invasion was imminent there was little else I could do. After some soul-searching, I was compelled to hand-write directly onto the original copy of the contracting documentation, a notation documenting my most pressing concern over the unprecedented duration of the contract. My notation on the contract documents did not sit well with my superiors and retaliation was sure to follow.

In October of 2004, I was presented written notice that I was going to be removed from the Senior Executive Service and from my position, but that I could, instead, retire with grace. I did nothing wrong, I was not going to retire, and I was not going to remain silent. I turned to Michael Kohn, a co-founder of the National Whistleblowers Center, to help navigate the legal terrain that lay ahead. With his assistance, I brought my concerns to the then Acting Secretary of the Army and to key Members of Congress, which resulted in intense media coverage. The Acting Secretary of the Army responded by acknowledged the seriousness of my concerns and halted my demotion and removal until my concerns were reviewed by the Department of Defense Office of the Inspector General ("DOD-IG"). As far as I can tell, the DOD IG never conducted an investigation. The IG never contacted me and I continued in my job.

The status quo ended once I agreed to testify before a congressional committee regarding improper contracting. Prior to appearing, I was visited by the Army Corps' Acting General Counsel. He let it be known that it would not be in my best interest to voluntarily appear before the committee. I appeared as a witness before the United States Senate Democratic Policy Committee on June 27, 2005. I anticipated swift retaliation for doing so and I received it.

On August 27, 2005 I was removed from the SES and stripped of all contracting responsibilities. Since then, my top secret clearance was withdrawn, I continuously receive inappropriately down-graded performance reviews, others are allowed to take credit for my work, and I am kept away from my career field of contracting. I was even denied recognition for having completed 25-years of Federal Service at the Annual USACE Awards Ceremony that was afforded to other USACE eligible employees.

I am not an expert in the law, but I am well versed in how poorly it works when it comes to federal sector whistleblower protection. The current reality is that the federal Whistleblower Protection Act offers no protection. How poorly it works in exemplified in my own case. I approached the National Whistleblowers Center, a not for profit organization devoted to helping whistleblowers, and spoke with some of the most knowledgeable legal practitioners in the field of whistleblower protection. When I explained what was happening to me the advice I received was uniform -- filing a claim under the Whistleblower Protection Act would do more harm than good.

What happened to me after I blew the whistle is typical. I am the "poster child" of what federal employees can expect if they have the courage to blow the whistle on waste, fraud or abuse – a lost career with the inability to wage a meaningful legal challenge. I believe my former Commander, Lt. General Carl Strock, got it right when, during his weekly staff meeting of his office chiefs, top military officers and senior executives, he announced, in my presence, that the Corps had a "whistleblower," but that there was no need for concern because the system would take care of itself.

Chairman TOWNS. Mr. Gayl.

STATEMENT OF FRANZ GAYL

Mr. GAYL. Mr. Chairman, thank you for inviting my testimony today. I just wanted to say that I am testifying in my personal capacity and not in my official functions.

My name is Franz Gayl. I enlisted in the Marine Corps in 1974 and retired as a major in 2002. Following my retirement, I was hired back by the Marine Corps as a GS–15 civil servant.

I had enjoyed an unblemished record as a science advisor and deputy branch head until I blew the whistle on the Marine Corps' support establishment in Quantico in early 22007. I am testifying because I want my lessons to make a difference as you consider this new legislation.

In 2006, I volunteered to deploy to Iraq to assist I MEF Forces with equipment deficiencies facing Marines. In Iraq, I witnessed the tangible costs in lives lost and serious injuries incurred due to gross mismanagement of requirements at Quantico. I perceived that the Marine Corps Combat Development Command at Quantico remained willfully blind to the consequences of equipment delays.

The most tragic consequences resulted from delays in fielding the Mine Resistant Ambush Protected vehicles. I contend that officials knowingly delayed or refused the provision of urgently requested capabilities like MRAP whenever requests competed against preexisting Quantico priorities for finite resources.

Upon returning, I was committed to ensuring accountability for the preventible loss of life and to achieve lasting organizational improvements. However, after my supervisors silenced my attempts to bring the issues to the attention of the Office of the Secretary of Defense, I reached out to the offices of then-Senator Biden and Senator Bond.

For the OSD disclosures, I received a formal counseling and rewritten job description. Then I received a formal letter of reprimand for a well-received e-mail to a senior joint commander outside of my chain of command. Finally, I received a notice of proposed suspension for meeting with congressional staffers. I submitted three complaints to the Office of Special Counsel, each being rejected on different grounds.

The Government Accountability Project assisted me in getting OSC to consider a fourth submission and I was also invited for an interview, but I have not heard from OSC in over a year. GAP and concerned Members of Congress have been my only advocates.

Then, in 2007, I was directed to conduct a study aimed at modernizing combat development processes. I completed studies on MRAP, laser dazzler, and other denied capabilities. When staffers asked for the unclassified case studies, I provided them. This initiated DOD IG audits of MRAP and laser dazzler urgent needs. The MRAP audit found that the Marine Corps was aware of the threat posed by improvised explosive devices and of the availability of MRAP-type vehicles years before insurgent actions began in Iraq yet did not acquire them. Even after I MEF Forward urgently requested MRAPs to mitigate casualties, MCCDC did not respond.

The audit did not refute my case study findings that the MRAP requirement was grossly mismanaged and that inaction by MCCDC

cost many Marines their lives unnecessarily. Other independent audits further confirmed my disclosed concerns. The dazzler audit is ongoing.

More reprisals have followed from my case study disclosure to Congress, including disapproval of two separate requests to attend school, disapproval to participate in a 2-year congressional fellowship program, and a "2" performance rating for 2008 under the National Security Personnel System. A "2" places me in the bottom 3 percent of the 160 civilians against whom I was compared. I am also undergoing a periodic security clearance reinvestigation. I have no reason to believe that my supervisors portrayed me as trustworthy.

Finally, I have been issued a performance improvement program, giving me 26 workdays to complete a lengthy list of self-improvement steps. It appears clear to me that the latest reprisal will probably lead to my termination. My current situation is a far cry from the I MEF Forward commanding general's recommendation to have me considered for the senior executive service ranks when I returned from Iraq.

In conclusion, the Marine Corps is my life, and I owe back a great debt. That is why I continue to hang in there. I joined the Marine Corps following my 17th birthday in 1974, and the Corps has given me my proudest identity and a purpose for my life. I feel very fortunate indeed. But it is the Marine Corps I honor, not the Quantico and Beltway corporate Marine Corps, a culture that has acted on incentives and exhibited priorities that were and are often divorced from those of Marines in harm's way.

Officials must be held accountable for their past willful blindness to known threats and the general officers who, one, failed to supervise those officials then, or two, continue to defend their past actions today, must be held accountable as well. If those generals and officials are not held accountable for past tragedies before public attention wanes, the same officials will follow parochial priorities with renewed confidence in the future, and Marines will again pay the price in the field.

As I stated to my supervisor during a counseling session in 2007, I intend to successfully achieve a degree of accountability and concrete change at Quantico, or I will be fired in the process of trying. While I don't want to be fired, that may be the cost of me doing my duty as a Marine and a civil servant.

The legislation you are discussing today will probably come too late for me. However, I will feel good if I manage to help protect DOD Federal employees in the future from the sort of treatment I have been experiencing over the past 2 years. Thank you, sir.

Chairman TOWNS. Thank you very much.

[The prepared statement of Mr. Gayl follows:]

NOT FOR PUBLICATION UNTIL RELEASED BY
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

STATEMENT

OF

MR. FRANZ J. GAYL
DEPARTMENT OF DEFENSE FEDERAL EMPLOYEE

BEFORE THE

HOUSE OF REPERESENTATIVES

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

ON

H.R. 1507, THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2009

14 MAY 2009

NOT FOR PUBLICATION UNTIL RELEASED BY THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

Chairman Towns, Congressman Issa, and distinguished members of the Subcommittee, it is my honor to appear before you today to testify about my experience an as an employee and whistleblower at the Department of Defense.

Thank you for inviting my testimony. My name is Franz Gayl, and I am testifying today as a private citizen speaking in my personal capacity, not as a government representative. Since 1974 I have served my country. For a total of 22 years I served in the Marine Corps, retiring as a Major in 2002. I was then hired back as a GS-15 Science and Technology Advisor to the Deputy Commandant for Plans, Policies and Operations, and concurrently as a Deputy Branch Head at Headquarters U.S. Marine Corps in the Pentagon.

As a civil servant I enjoyed an unblemished record until 2007, when I blew the whistle on a procurement breakdown caused by Marine Corps support institutions at Quantico, Virginia. I felt it was my duty, because vital equipment was not getting delivered to the field, and many lives were unnecessarily lost – Marines and Soldiers, as well as Iraqi civilians. Although my charges have been largely confirmed, my professional life has been a nightmare ever since, and I anticipate further retaliation for my voluntary appearance today. The reason I am testifying before you today is because I want my lessons to make a difference as you consider this new legislation.

Some of the initiatives I either conceived or helped champion before 2007 include, but are not limited to several non-lethal and other military directed energy technologies and applications; reorganization of National Security Space to include advocating a military Space Service; and military, civil, and commercial manned space transportation technologies and applications. My efforts have directly and indirectly contributed to the launching of multiple

research and acquisition programs. Until early 2007, I was granted great freedom in interacting within the corporate Marine Corps at HQMC and Quantico, as well as the Joint Pentagon and larger U.S. Government communities. That freedom and the science and technology focus had been built into my Position Description – it was why I was hired. However, once my efforts began to point out flaws in the Marine Corps procurement system, not only did my supervisors take away my professional freedom to interact with the people and agencies that could solve these problems, they also began to retaliate against me as a whistleblower.

The changes began in 2006 when I was contacted by the staff of I Marine Expeditionary Forces (MEF) in Al Anbar Province, Iraq. The MEF staff stated that preventable delays in fielding needed gear were unnecessarily costing many lives at a time when the IED land mine threat was escalating into an emergency. The Commanding General of I MEF Forward requested me by-name to deploy into theater in September 2006 to assist with technical and process challenges facing his Marines, and I volunteered. My supervisor reluctantly agreed to a two month deployment, though I was later permitted to extend that deployment to over five months.

In Iraq I witnessed the tangible costs in lives lost and serious injuries incurred due to the apparent gross mismanagement of requirements at the Marine Corps Combat Development Command (MCCDC) at Quantico. The lack of needed equipment that had been requested and delayed or denied could be directly tied to preventable casualties. The most tragic delays concerned the Mine Resistant Ambush Protected (MRAP) vehicle, the Ground-Based Observation and Surveillance System (G-BOSS), Tier 2 Unmanned Aerial Vehicles, and a number of non-lethal laser and other directed energy devices needed to mitigate civil and

checkpoint confrontations, so that it would not be necessary to inadvertently shoot innocent civilians. Despite unambiguous and continuous feedback from the deployed Marines MCCDC at Quantico, the Marine Corps turned a blind eye to requests for urgently needed equipment whenever those requests conflicted with parochial concept or acquisition priorities in a competition for resources.

Employing the MRAP as an example, since the mid 1990s the Marine Corps has known that up-armored High Mobility Multi-Purpose Wheeled Vehicles (HMMWVs) are "death traps" in their vulnerability to mines because of the HMMWV's flat bottom, low weight, low ground clearance, and aluminum body. The Marine Corps since the mid 1990s has also been aware of the commercial availability of fourth-generation mine-resistant vehicle (MRAP) designs and products. MRAP-type vehicles have a V-shaped armored hull, and protect against the fragmentation, blast overpressure, and acceleration kill mechanisms of mines and improvised explosive devices (IEDs). MRAPs provide the best currently available protection against IEDs, as a Marine is four to five times less likely to be killed or injured in an MRAP-type vehicle than in an up-armored HMMWV. Yet, evidence shows that combat developers knowingly delayed responding to an urgent request for 1,169 MRAPs from Marines in Iraq for a period of what effectively amounted to 19 months. As a consequence, hundreds of Marines died and thousands of Marines were permanently maimed in combat, unnecessarily.

I and several other Marines first brought this issue to the attention of my Pentagon chain of command while I was still in Iraq. My concerns expressed then have been overwhelmingly validated during the course of an MRAP DoD IG Audit conducted since that

time and published in December 2008. It is noteworthy that the rapid mass fielding of MRAPs became a top priority of Secretary Gates in 2007 and remains so today.

Another example pertains to a non-lethal laser known as a "dazzler" that was repeatedly requested by Marines in Iraq. The capability was needed to non-lethally mitigate escalation of force (EOF) confrontations at check points, incidents that frequently ended in the tragic injury, and often the deaths, of innocent Iraqis due to the absence of non-lethal alternatives. The device requested was safe and commercially available. Instead of providing the requested capability promptly, combat developers at Quantico waited 18 months, only to field a different device that had been rejected by the Marines in theater due to its more hazardous configuration. As a result of the delay many unnecessary innocent Iraqi civilians were injured or killed during lethal engagements, again unnecessarily.

As with the MRAP, I and other Marines first brought this issue to the attention of my chain of command in the Pentagon while I was still in Iraq. My concerns with many aspects of the dazzler issue as well as my broader concerns with the Joint Non-Lethal Weapons Program (JNLWP) have again been overwhelmingly validated in the course of a Government Accountability Office (GAO) audit of the JNLWP published in April 2009. The DoD IG is currently conducting a separate audit of the laser dazzler issue in particular.

While in Iraq, my responsibility as the MEF Forward Science Advisor was to support the Commanding General by helping to initiate and accelerate the delivery of those urgently needed capabilities. In my personnel evaluation he recommended I be considered for the Senior Executive Service (SES) based on my contributions to the MEF mission. However, when I returned to the U.S., the same advocacy that had earned me praise from the Commanding General in the field brought me retaliation from the bureaucrats in Quantico and

my supervisors at the Pentagon who were displeased with my vocal candidness regarding lacking capabilities in Iraq.

Upon returning to the Pentagon in February 2007 my supervisors made sure I knew that my in-theater advocacy for the needs of our troops had caused unwelcome discomfort at both Quantico and HQMC in the Pentagon. However, I remained determined to address the requirements fulfillment deficiencies I MEF Forward had experienced so future Marines would not be placed at risk. To this end I made direct contact with professional acquaintances in the Office of the Secretary of Defense (OSD) to inform them of pressing issues. This led to an invitation to me and members of the MEF staff to brief the Director, Defense Research and Engineering on urgent Service and Joint needs challenges. My presentation with DDR&E was tentatively approved by my supervisors, until they realized the information would certainly embarrass the Marine Corps support institutions. I was then ordered to cease all outside communications on the matter.

Despite my supervisors' efforts to silence me, I felt and continue to feel that the issue of enforcing concrete, lifesaving change to our broken procurement system is more pressing than any personal risk. I continued to communicate with those who shared or wanted to hear my concerns, in many forms. I provided a draft of my presentation to DDR&E in spite of the prohibition. I also contacted the "Wired Danger Room" blog and "Inside the Pentagon (ITP)" paper. The ITP had reported on a letter from the Commandant of the Marine Corps (CMC) to the Chairman of the Joint Chiefs of Staff (CJCS) in which he inaccurately stated that the first combat request for MRAPs occurred much later than it actually had. This led to my first contact with the office of then-Senator Biden, a subsequent interview by USA Today, and an interview by Paul Solman on the televised "Jim Lehrer NewsHour." I have been told the

resulting USA Today contained information that factored into Secretary Gate's decision to make rapid MRAP acquisition a top priority in the DoD. I also reached out directly to General David Petraeus in an e-mail when an urgent need the General had emphasized to OSD turned out to be one of the denied capabilities we had requested in Iraq. My communication was appreciatively acknowledged by the General in a return e-mail.

The staffs of Senator Bond and Senator Rockefeller invited me to share my concerns as well. Senator Biden then wrote a letter of concern to President Bush, and he jointly signed a separate letter with Senator Bond to the Secretary of Defense. In addition, I shared with the staffs of Senator Biden, Senator Bond, and Senator Rockefeller my case studies on the procurement of MRAP, non-lethal laser dazzler, and a micro-terrain camera surveillance system, all capabilities requested by warfighters and delayed or denied by Quantico.

My concerns have been validated multiple times through independent organizations external to my chain of command.

For example, in 2007 the Naval Audit Service (NAS) independently validated many of my concerns with the MCCDC combat development process that I had begun to disclose while I was in Iraq in 2006, specifically regarding the Marine Corps' urgent need process. In fact I have been told that my disclosures from Iraq contributed significantly to the HQMC decision to initiate an audit. I was still in Iraq when the NAS began conducting phone interviews of the I MEF staff. The NAS Report on Urgent Universal Need Statement (UUNS) Process published on 28 September 2007 states in part: "...MCCDC had not established adequate oversight for the UUNS requirements process to ensure solutions were effectively and efficiently delivered to the warfighter. The UUNS process, at the time of our audit, was not effective...In addition we determined that management could not measure UUNS process

effectiveness because of limited visibility throughout the process, commands' reliance on multiple tracking systems, absence of feedback for fielded solutions, and no established metrics. As a result the effectiveness of the process could not be measured, the ability to accomplish the mission could be impacted, the potential exists for wasted resources, and delivery of required UUNS requirements to Marine Corps warfighters could be delayed." This audit was conducted prior to and separate from both the DoD IG MRAP UUNS Audit and the GAO JNLWP audits, but in the end the findings of all three turned out to be interrelated and complimentary.

In another audit the DoD IG audited the Marine Corps Systems Command (MCSC) at Quantico on MRAP-type vehicle procurements. The final report titled Procurement Policy for Armored Vehicles was published on 27 June 2007. The IG found that MCSC had inappropriately awarded sole-source contracts for limited numbers of MRAP-type vehicles in 2004 and 2005, even though MCSC officials knew other industry sources were available for both competition and additional industrial capacity. The audit also found that Quantico officials did not adequately justify contracts with an MRAP vendor even though that vendor repeatedly failed to meet contractual delivery schedules for getting vehicles to the theater. At the same time the audit found there was a significant untapped industrial capacity for the production of those types of vehicles. It is noteworthy that the larger industry capacity could have been used to respond to the Marines' request for MRAPs in early 2005. In spite of this IG evidence the Marine Corps leadership continues to promote a myth that the U.S. did not possess an industrial base capable of producing 1,169 MRAPs rapidly in early 2005. Through his leadership, our Secretary of Defense, Mr. Gates has proven that contention to be a false nearly 15 times over, and at a production rate of up to 1,000 MRAPs produced per month.

Today thousands of lighter Category 1 MRAPs are being urgently requested for Afghanistan, and thousands more are being urgently requested to replace the remaining HMMWVs in Iraq. Yet, the corporate Marine Corps incomprehensibly reduced the Corps' MRAP procurement by 1,400 in 2007. A renewed delay has thus unnecessarily been inserted into the delivery of urgently needed protection, and just at the time when both the number of Marines and the number and lethality of IED attacks are dramatically increasing in the Afghan theater. Foresight would have dictated that those addition vehicles so urgently needed in both countries be should have simply standing ready for rapid delivery. Instead, those vehicles don't yet exist and will need to be built. It is as though the corporate Marine Corps intentionally minimizes the demonstrated life-saving benefits of MRAPs in an effort to make all past decision making appear rational and deliberate. Some senior Marines even continue to compliment the HMMWV's protective characteristics, even though this has been tragically disproven. In so doing it would appear that the 1,400 MRAP reduction decision occurred for the sake of appearances rather than being based on real warfighter projections. As with MRAP decisions in 2005, this sort of corporate incentive-based decision making can have harmful consequences in the field. Following my 2008 disclosures of my case studies to Congress, the Assistant Commandant of the Marine Corps asked that the DoD IG look at allegations of gross mismanagement and possible criminal negligence in the acquisition of MRAPs and laser dazzlers. Shortly thereafter, Senators Biden, Bond, Kennedy, and Rockefeller were cosignatories to a letter making a similar request to Secretary Gates. The IG quickly initiated an audit of MRAP. DoD IG audit titled Marine Corps Implementation of the Urgent Universal Needs Process for Mine Resistant Ambush Protected Vehicles published on 8 December 2008 found that MCCDC stopped processing the UUNS for MRAP-type vehicle capabilities in August 2005. Specifically, MCCDC officials did not develop a course of action for the UUNS, attempt to

obtain funding for it, or present it to the Marine Corps Requirements Oversight Council (MROC) for a decision. Furthermore, the Marine Corps and others were aware of the threat posed by mines and IEDs in low-intensity conflicts and of the availability of mine-resistant vehicles years before insurgent actions began in Iraq in 2003. Yet, Marine combat developers at Quantico did not develop requirements for, fund, or acquire MRAP-type vehicles for low-intensity conflicts. As a result, the Marines entered into operations in Iraq without having taken available steps to acquire technology to mitigate the known mine and IED risk.

The DoD IG MRAP UUNS audit overwhelmingly validated my MRAP case study. It revealed multiple inexplicable discrepancies between the words and deeds of officials at MCCDC, as well as between the statements of senior USMC officers and factual evidence documented in the audit. It was significant that the audit did not refute my case study finding that "gross mismanagement" of the MRAP requirement was evident, and that inaction by MCCDC officials on acquiring MRAP vehicles cost many Marines their lives. Following the audit's publication I conducted an analysis to compare the IG evidence and my case study to the public statements for Marine Corps officials and leaders. I have since provided my analysis to the SASC Professional Staff and interested individual members of the committee.

While the dazzler issue is in the hands of the DoD IG auditors at this time, concerns have also been documented by other organizations. It is noteworthy that my case studies addressed my observed failings of the Joint Non-Lethal Weapons Program (JNLWP) with respect to several systems requested by operators in Iraq. These examples were included in both the MRAP and dazzler case studies to show evidence of a trend of mismanagement at Quantico, especially in as much as it related directly to the laser dazzler issue. The GAO published a report titled DOD Needs to Improve Program Management, Policy, and Testing to

Enhance Ability to Field Operationally Useful Non-lethal Weapons in April 2009. The report was highly critical of the DoD's JNLWP for which the Marine Corps and CMC serve as the Executive Agent. The report stated in-part: "The joint non-lethal weapons program has conducted more than 50 research and development efforts and spent at least $386 million since 1997, but it has not developed any new weapons and the military services have fielded 4 items stemming from these efforts that only partially fill some capability gaps identified since 1998...DoD has exercised limited general oversight of the NLW program which has resulted in gaps in key program guidance as well as limited measurement of progress and performance." Without projecting the findings of the DoD IG audit of the laser dazzler issue, the GAO report is a significant data point which seems to confirm many of my observations.

Despite external vindication, I would have much preferred to have simply made my disclosures through the Marine Corps' chain of command to the level of the DoD IG, but I knew this was not an option when my supervisors tried to silence me in the name of avoiding further discomfort at Quantico. Going outside the normal procedure has come at a high cost to me professionally and personally.

The reprisals from my supervisors began in March 2007, immediately following my return from Iraq. It was clear that my chain of command was trying to silence me by punishing me each time I exercised my rights - rights protected under the Whistleblower Protection Act (WPA) and the First Amendment - to disclose the deadly consequences of the Marine Corps broken procurement process. First, a formal counseling and rewritten job description resulted from my OSD communications. Then I received a formal reprimand for my e-mail exchange with General Petraeus. Later, following one of my meetings with Senator Bond's staff in September, I was issued a formal notice of proposed suspension based on my

unapproved communication with Congress. In February 2008 the Marine Corps Public Affairs Officer (PAO) and at least one of his subordinates engaged the media and selected blogs in carefully worded statements to denigrate the validity of my studies that I had disclosed to staffers. More recently, during my verbal counseling on my 2008 performance appraisal, my supervisor ordered me to cease and desist on my MRAP analysis "or I would be fired." He stated I was acting "cowardly, immorally, and unethically" by criticizing the Marine Corps while being employed by it, and the "only honorable thing for me to do is resign." I had submitted two separate requests to attend school in 2008 to improve my capacities as a science advisor – both were denied. I later submitted a separate request to participate in a two year Congressional Fellowship program in 2008, a program offered to HQMC civilians – this was denied as well. In each face-to-face denial I was told by my supervisors that the "drama" I had caused since early 2007 was a contributing factor. "Drama" has repeatedly been used by my supervisors as an ersatz for "whistleblowing" in my counseling in a transparent effort to avoid running afoul of the WPA.

My supervisors also rated my performance as a "2" for 2008 under the National Security Personnel System (NSPS). This placed me in the bottom three percent of more than 160 civilians of all ranks against whom I was compared. It is noteworthy that the undisguised written justification for my extraordinarily low rating related directly to my "verbose and choppy" case studies and their provision to Congress, even though at least one of those documents was found to be of quality worthy of being entered into the Congressional record. Also, using NSPS objectives as tools to distance my duties from my position description focus on science and technology, non-science and technology-related tasks now dominate my NSPS performance plan. In fact I have been told by my supervisors that my position description is

being rewritten again to minimize or eliminate all S&T functions for which I was hired in 2002.

Finally, on 30 April 2009 I was issued a Notice of Unacceptable Performance and Opportunity to Improve. Interestingly, this notice came the week after General Amos and General Chiarelli testified as to the effectiveness of MRAP, the same week that a GAO report was issued that criticized the Marine Corps Joint Non-Lethal Weapons Program (JNLWP) and specifically highlighted the dazzler debacle. The notice was also issued to me one day after I had informed my supervisors that DOD IG had requested that I be available to be interviewed in conjunction with the on-going dazzler audit. In the disciplinary notice I was given 26 work days to either complete a lengthy list of improvement steps, or be considered for termination. GAP has explained to me this reprisal constitutes a Performance Improvement Plan (PIP), which in the case of whistleblowers is normally the final stage of a firing justification process. While I have been making a committed effort to fulfill the expectations of the document - 16 working days remaining after today - I am under no illusion that the required task list and unusually short timeline are designed to insure I fail. My interim and closed-out NSPS appraisals in recent weeks have been even worse than 2008 - in fact adverse.

In addition to the direct attacks from the Marine Corps, I am also vulnerable to having action taken against me by an unwittingly complicit Office of Personnel Management (OPM), if they choose to rely upon interviews with my supervisors who are seeking to punish me for my whistleblowing in determining whether I should maintain my security clearance. I am currently undergoing a periodic five-year reinvestigation to determine if I possess the reliability to retain my access to Top Secret/Sensitive Compartmented Information (TS/SCI), an unwaiverable prerequisite for my job. My chain of command was interviewed by an OPM

investigator. While the renewal is currently being adjudicated, I have no reason to believe that my supervisors portrayed me as a trustworthy civil servant worthy of TS/SCI, and I have every reason to doubt that my TS/SCI access will be renewed. We will see, but this typifies the corporate Marine Corps treatment to which I have been subjected since my return from Iraq - a far cry from the Commanding General's recommendation to have me considered for the SES ranks when I returned. If my security clearance is revoked as a result of retaliatory misinformation provided by the officials who I blew the whistle on, I will essentially be unemployable as a government employee in my field of expertise. My reputation has been smeared and my hopes for retention, much less promotion, are in permanent doubt.

My attorneys and I have turned to the Office of Special Counsel (OSC) many times for assistance since I first blew the whistle in 2007. My first three OSC complaints were all rejected for various reasons; once for employing the wrong form, and twice for insufficient compelling information. Finally, after the Marine Corps reprimanded me for my disclosures, OSC referred my complaint to the Investigation and Prosecution Division (IPD) in September 2007. After my supervisors proposed to suspend me for 10 days for communicating disclosures to Congress and failed to change course even after my GAP attorneys pointed out that they were engaging in a clear violation of the WPA, OSC requested an informal stay of the suspension in December 2007 while they investigated. That was close to 17 months ago. OSC interviewed me in February 2008, and informed me shortly after that the case had been referred to an IPD attorney. Although my attorneys and I have contacted this attorney numerous times over the year that he has been assigned the case, we have heard nothing from him, not even the statutorily mandated form letters providing 60 day updates or a 240 day notice. We have been met with silence even as we have told him how the Marine Corps has

become emboldened by OSC's failure to act and escalated its retaliation to the point that I am facing potential termination in less than a month. While I have received very generous and gracious support from members of Congress who seek to ensure that whistleblowers do not suffer retaliation for disclosing vital information to them[1], it is primarily the responsibility of the OSC to protect whistleblowers from the kind of retaliation that I have suffered. By refusing to take action, the OSC tells both potential whistleblowers and those who they expose that the price of disclosing life-saving information very well could be the whistleblower's career.

In conclusion, the Marine Corps has been and remains my life, and I owe back a great debt – that is why I continue to hang in there. I joined the Marine Corps on my 17th birthday in 1974, and the Corps has given me my proudest identity and a purpose for my life. I feel very fortunate indeed. But it is the Marine Corps I honor, not the Quantico and beltway corporate Marine Corps, a corrupted culture which acts on incentives and exhibits priorities

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[1] Senators Biden and Bond sent a letter to CMC on 19 September 2007 defending my disclosures, stating in-part: ***"Serious flaws and gross mismanagement in the acquisition process were responsible for the delay of MRAPs and other technology our warfighters need to defeat the enemy and protect their own lives. Mr. Gayl helped disclose these life-threatening procurement problems from his position in the Pentagon. Eliminating these problems and ensuring they do not happen in the future will save hundreds, perhaps thousands of lives. Instead of commendation, Mr. Gayl is the target of an adverse personnel action against him by his superiors. Such action by the Corps may be a violation of federal 'whistleblower' statutes. It would certainly bring dishonor to those who instead should be embracing this hero...We expect much better from our Marines, particularly the leadership. The Corps' apparent retaliation against a conscientious whistleblower is reprehensible. It also creates a chilling effect that could deter others from stepping forward with alternative views."*** In addition, Senators Kennedy and McCaskill sent a jointly signed letter to CMC on 28 February 2008 in response to some of CMC's comments regarding my situation during questioning before the Senate Armed Services Committee, stating in-part: ***"In responding to a question at today's hearing of the Senate Armed Services Committee seeking assurances that Mr. Gayl, as a whistleblower, will receive full protection from the Marine Corps leadership, you appeared to focus not on ensuring that Mr. Gayl would be protected, but rather on pressing forward with an investigation of Mr. Gayl to determine if his conduct was wrongful. This approach to addressing the actions of a Marine Corps employee who provided important information on the MRAP program to the Congress flies in the face of the spirit of whistleblower protections - if not the law itself...Your statement today...clearly implies that the Marine Corps may be proceeding inappropriately to punish Mr. Gayl for his actions. Therefore, we further seek your assurance that Mr. Gayl at all times has received, is now receiving, and will continue to receive all of the protections entitled to a whistleblower under the law."*** In addition to sending these letters, the Senators' staffs have provided invaluable support and counsel as I have made my disclosures.

that are often completely divorced from those of Marines in harms way. Officials must be held accountable for their past willful blindness to known threats that have caused tragic consequences. Similarly, the General Officers who 1) failed to supervise those officials then and 2) continue to defend their past actions today should be held accountable as well.

In the realm of requirements fulfillment, Quantico combat developers are behaving better today only because focused Congressional and media attention functions as a gun to their heads. Similarly, the MRAP Joint Program managed out of MCSC today is also succeeding, but not due to corporate Marine Corps leadership. It took the Secretary of Defense's personal intervention and establishment of an MRAP Task Force, as well as the support of Senator Biden and others to force success from the outside. But if the senior Generals and subject matter expert officials are not held accountable for past tragedies before public and Congressional attention wane, the same officials will follow parochial priorities with renewed confidence in the future, and Marines will again pay the price in the field.

As I stated to my supervisor during a counseling session in 2007, I intend to successfully achieve a degree of accountability and concrete change at Quantico or I will be fired in the process of trying. While I don't want to be fired, that may be the cost of me doing my duty as a Marine and civil servant. The legislation you are discussing today will probably come too late for me. However, I will feel good if I have contributed to some nominal positive change, and so long as conscientious DoD Federal employees in the future are protected from the sort of treatment I have been experiencing over the past 2 years.

Thank you.

Chairman TOWNS. Ms. Chambers.

STATEMENT OF TERESA CHAMBERS

Ms. CHAMBERS. Thank you, Mr. Chairman and members. Thank you for this long-awaited opportunity.

My name is Teresa Chambers, and I am a 33-year career law enforcement professional, and I had been the chief of the U.S. Park Police, responsible for protecting our Nation's most notable parks, monuments, and parkways.

Being selected for this position following a nationwide search was a tremendous honor, affording me the opportunity to serve my country. For the past 5½ years, however, I have been trapped in a bizarre, utterly broken system. Years of litigation have yet to resolve a very simple question: Is telling the truth a firing offense in Federal service?

In November 2003, a Washington Post reporter contacted me for an official agency response regarding information the union had supplied him, including internal documents showing there were not enough officers to cover assignments following the attacks of 9/11. On December 2nd, the Post published the article.

After reading it, I thought it would be well received because thorny issues had been handled deftly. This was not the case. Three days later, without explanation and with three armed special agents at his side, then National Park Service Deputy Director Donald Murphy ordered me to surrender my gun, badge, and identification.

I was placed on administrative leave and ordered not to speak further with the media. Two of the agents escorted me back to my office to quickly collect personal effects. Then I was walked out into the street. Standing there at the curb in full uniform holding a cardboard box of things, I was stunned. Little did I know that a long, strange odyssey had just begun.

One week later, I was summoned to a meeting with Murphy and his senior Department of Interior attorney. They offered to forgo any punishment and fully restore me as chief if I would appear at a press conference to deny that there had been any sort of disagreement. A string was attached: A political appointee would vet all my communications with Congress and the media. I refused to participate in what would result in misleading Congress and the public.

Days later, I was charged administratively with improperly disclosing law enforcement sensitive information to the Washington Post. For good measure, Interior tacked on five administrative charges, none of which had been raised previously. The charges were not true, and I filed a detailed rebuttal.

Convinced that these charges would not withstand factual or legal scrutiny, I lodged a complaint with the U.S. Office of Special Counsel. The investigation dragged on for 5 months, but came to no conclusion. At one point, OSC hosted a dispute resolution meeting, during which a Bush appointee suggested that Interior would pay me $300,000 to resign. When I told them I was not interested in money, those negotiations quickly ended.

After more than 7 months, I filed directly with the Merit Systems Protection Board, and within a few hours of doing so, Interior announced its decision to fire me.

The MSPB process has been a long, drawn-out nightmare. After the MSPB on a split vote rejecting my appeal, I went to the Federal Circuit. In a rarity, the Federal Circuit ruled for me and sent my case back to the MSPB, which this January ruled against me again. Now my case is back before the Federal Circuit yet a second time.

My experience demonstrates that the system is broken and that Congress needs to adopt fundamental reform. First, the system must be fast and fair, fast in that there must be expeditious means to resolve cases and fair in that, if the case does not quickly resolve, it should be brought before a jury. Giving employees access to jury trials is the single biggest reform. Before juries, agencies will quickly learn that reprisal campaigns will backfire.

Second, rules must be clear. Eliminate the legal thicket that shields retaliation. Above all, honesty in Federal service should be expected and protected.

Third, look at underlying problems. The current system concentrates only on the personnel action, but completely ignores the underlying problem over which the civil servant risked his or her career.

In 2003, I told Congress and top agency officials that the U.S. Park Police was dangerously understaffed. It is still understaffed and even more so today. The men and women patrolling the monuments, parks, and parkways are not getting the support they need to do a demanding but vital job; and because of this, both they and the public remain in danger.

I am proud of my service with the U.S. Park Police, and I stand by the decisions I have made. My hope is that my experience will result in positive change for public servants who have the courage to speak the truth regardless of the consequences.

Thank you for your time, sir.

Chairman TOWNS. Thank you very much.

[The prepared statement of Ms. Chambers follows:]

Testimony of Teresa Chambers

Before the House Committee on Oversight and Government Reform
Protecting the Public from Waste, Fraud, and Abuse: H.R.1507, the Whistleblower Protection Enhancement Act of 2009
May 14, 2009

Mr. Chairman and members: Thank you for this opportunity to speak with you today about the need to reform the federal government's whistleblower protection system.

My name is Teresa Chambers and I am Exhibit A in the case for reform. I have spent the past 33 years – my entire adult life – in law enforcement. I have a master's degree in applied behavioral science from the Johns Hopkins University and am a graduate of the FBI National Academy as well as the FBI National Executive Institute.

Today, I am the Chief of Police for the Town of Riverdale Park, Maryland. Previously, I was the Chief of the United States Park Police. My story is not that of a typical whistleblower. These differences, however, more powerfully illustrate what is wrong with the current laws and framework.

For the past five and one-half years, I have been trapped in a byzantine, bizarre, and utterly broken system. All these years of litigation have yet to resolve what to me is, a very simple question – **Is telling the truth a firing offense in federal service?**

In February 2002, following a nationwide search, I was selected by the Bush administration to lead the United States Park Police. My mission was to modernize the oldest uniformed federal constabulary, commissioned by President George Washington. Reporting directly to the National Park Service (NPS) Director, I was charged with bringing the United States Park Police into the post-9/11 twenty-first century.

My swearing-in ceremony on the Mall of our Nation's Capital was one of the proudest days of my life. As an outsider and the first woman chief, I knew that my selection was not uniformly popular inside the Park Police. But I was not terribly concerned. As a cop, I had been in tough situations before; and I believed that I would win over any critics by doing this very difficult job very well.

In late November 2003, I was contacted by a reporter from *The Washington Post*. The union representing Park Police officers, the Fraternal Order of Police, had supplied this reporter with internal documents showing that the force did not have enough officers to cover all current assignments, especially given expanded patrol duties on the National Mall following the 9/11 attacks. The reporter wanted an official agency response.

As a police chief, my job requires me to be in frequent contact with the media. I met the reporter in my office accompanied by the sergeant who served as the Park Police Press Officer. I carefully but truthfully answered the reporter's questions. I also confirmed that the documents he had were accurate. Immediately after concluding the interview, I

telephoned then NPS Deputy Director Donald Murphy and gave him a detailed briefing as to what information the reporter had and the type of questions he had asked.

On December 2nd, the *Post* published an article entitled "Park Police Duties Exceed Staffing". After reading it, I thought it would be well received because thorny issues had been handled deftly. That was not the case. This was a period during the first term of the Bush administration when there was little tolerance of any publicity that was not glowingly positive. Apparently, some political appointees were quite upset by the article.

Three days after its publication, I was summoned to a meeting in the National Park Service's Director's office. When I arrived, then Director Fran Mainella was not present. Instead I was met by Deputy Director Murphy and three armed special agents. Without offering an explanation, Mr. Murphy ordered me to surrender my gun, badge and identification. I was placed on administrative leave and ordered not to speak any further with the media.

Two of the agents escorted me back to my office to quickly collect personal effects, and then I was walked out into the street – in uniform but with no badge or weapon – to the public, a police officer but with absolutely no means to protect myself in the event I was confronted, a situation with which uniformed police officers are frequently faced. Deputy Director Murphy did not even make arrangements to have me transported safely home.

Standing there at the curb in my full uniform holding a cardboard box of things, I was stunned. Little did I know that a long, strange odyssey had just begun.

An announcement was issued that I had been assigned to work at home. What followed could only be described as a media furor. My so-called leave was covered as front page news, accompanied by outraged editorials.

One week later on December 12th, I was summoned to a meeting at the U.S. Geological Survey headquarters in Reston, Virginia. There I met with Deputy Director Murphy and a senior Department of Interior (DOI) attorney. After threatening me with disciplinary action, they offered to forego any punishment and fully restore me as Chief provided that I would appear at a press conference and dispel any impression that there was any disagreement. One more string was attached – Mr. Murphy or another political appointee would screen any and all future communications that I had with Congress or the media. I asked to think about it overnight.

After reflection, I concluded that these conditions required me to lie and prevented me from doing the job I was hired to do. I refused to agree to what was, essentially, an effort to blackmail me into misleading Congress and the public.

Days later, I was charged administratively with improperly disclosing "law enforcement sensitive information" to *The Washington Post*. For good measure DOI tacked on five other administrative charges, most unrelated to the interview, none of which had been

raised previously. One specification, for example, involved my alleged failure to promptly return a phone call from an attorney in the Solicitor's Office about the "Tractor-Man" incident on the National Mall. Another charge was circumventing the chain-of-command by raising an issue with then DOI Deputy Secretary Steven Griles after he had invited the communication. Neither charge was true, and I filed a detailed rebuttal.

Convinced that these charges would not withstand either factual or legal scrutiny, I lodged a complaint with the U.S. Office of Special Counsel (OSC). The OSC conducted a Bush-administration style investigation that dragged on for five months but came to no conclusion. I got the impression that my case was too hot for them to handle, but I later learned that OSC does very little in whistleblower cases regardless of the controversy or egregiousness of the case.

At one point, OSC offered to host an alternative dispute resolution. At their offices, I met with another Bush political appointee who suggested that DOI would offer me $300,000 to resign. When I indicated that I was not interested in money, these "negotiations" quickly ended.

All during these months, I was still technically the Chief of the United States Park Police, being given full pay in return for staying home. In April, the Interior Department gave in to intense media pressure and announced that I was under no gag order. So, I began honoring interview requests from the media, notifying Interior of each and every contact as DOI required of me.

In less than one week, the gag was re-imposed. On April 12th, Jacqueline Jackson, a Deputy Solicitor, contacted one of my lawyers to indicate that "her client" had concerns about recent media interviews in which I had participated. In response to a request for written clarification, the next day Ms. Jackson sent a letter stating that the "no interview" order would remain in effect.

After more than seven months on administrative leave, I became convinced that it was futile to wait for the Special Counsel to act. The passage of time entitled me to file directly with the Merit Systems Protection Board (MSPB).

On July 9th, I filed my individual right of action for restoration of my job and law enforcement credentials with the MSPB. Only a few hours later, the Department of Interior announced its decision to fire me.

As we prepared for the MSPB hearing, I learned that the Department of the Interior had convened a secret "hearing" to determine the facts of the case. Presided over by then Deputy Assistant Secretary Paul Hoffman, a political aide with no legal training, witnesses gave transcribed testimony that was offered as the basis for Mr. Hoffman's decision to fire me. Needless to add, they did not ask to hear my side of the story.

In pre-hearing meetings with the MSPB judge, Elizabeth Bogle, I was shocked when she counseled me against taking my case to a hearing, stating that I would "embarrass"

myself. She strongly urged me to resign and said that she had already decided to sustain some of the charges. In the MSPB process, the judge is supposed to be the finder-of-fact, but it was painfully clear that my judge had already signaled her intent to rule against me.

Even after Judge Bogle's warnings, the hearing was a shock. I believed I was finally going to get my day in court. Judge Bogle, however, seemed in a hurry, limiting the number of witnesses who could be questioned and refusing to order the Department of the Interior to produce requested and relevant documents.

One key document that we requested was a copy of my Performance Evaluation covering the period in question. In depositions, we had taken sworn testimony that I had received a glowing evaluation during the period in which Interior later decided I had become troublesome. I am still attempting to obtain a copy of this now missing evaluation.

In October 2004, Judge Bogle issued a ruling upholding four of the six administrative charges against me. While throwing out two of the charges, she nonetheless found that termination was justified, in large part, because I had "expressed no remorse." It was unclear about what I was supposed to be remorseful.

My attorneys filed a voluminous appeal, citing more than forty serious procedural errors by Judge Bogle. That appeal went to the full Board of the MSPB, consisting of three presidential appointees.

The MSPB chose not to act on my appeal for more than a year-and-a-half. In September 2006, the MSPB issued a two-to-one split decision rejecting my appeal. The majority opinion, barely 24 pages long, used only one sentence to dismiss all of the procedural objections and devoted only one paragraph to its reasoning as to why it decided the removal was justified. The dissent, on the other hand, in a detailed opinion, found that the four remaining administrative charges were either not supported by the evidence or failed to constitute any offense at all.

My attorneys prepared an appeal to the U.S. Court of Appeals for the Federal Circuit. In February 2008, this court upheld my challenge. The appeals court ruling affirmed that police and other public servants are legally protected when raising warnings about "a risk to public safety."

Rather than ordering me restored, the appeals court sent my case back to the MSPB to correct its failure to recognize that I was removed "in reprisal for making a protected disclosure" under the Whistleblower Protection Act (WPA).

The MSPB, again, did not act with timing that even approximated deliberate speed. By the time it did rule in January 2009, the MSPB Board member who ruled in my favor had left. That left only the two Republican members who split on whether what I had said was protected under the Whistleblower Protection Act, but they agreed that I would have been removed anyway absent the *Post* interview which touched off the furor – a conclusion that is clearly at odds with the facts.

My legal team has again filed an appeal with the Federal Circuit. As recently as this April, however, the Justice Department indicated that its "client," the Interior Department, had no interest in resolving this case if it involved my reinstatement. Therefore, the legal battle will continue to drag on.

The foregoing has only been a brief outline of what has been nearly a six-year ordeal. For me it has meant many sleepless nights, fighting the discouragement, doubt, and fatigue. For you in Congress, as policymakers, this cannot be how you intend the system of whistleblower protections to work.

Here are three conclusions and recommendations that I have taken away from my experience:

1. The system is flat out broken. The Office of Special Counsel does not help whistleblowers and has itself become an embarrassment. The Merit Systems Protection Board does not protect merit but merely promotes delay. In reality, MSPB offers the worst of two worlds: all the procedural red tape of a real court without any of a court's substantive protections or requirement to afford proper due process in an objective setting.

Congress should junk this dysfunctional system that appears designed to defeat whistleblowers, drag out proceedings, and deter all but the most stout-hearted. Instead of legalisms, civil servants should have access to a speedy dispute resolution process to end disputes early and fairly. This one-step process would offer the employee and the agency a chance to seek mediation or other alternative dispute resolution prior to heading to trial.

If I had the opportunity to take my case to a jury of my peers, I would not be here before you today. Giving federal employees access to jury trials is the single biggest reform Congress can enact. Before juries, agencies would quickly learn that reprisal campaigns will backfire.

2. The Whistleblower Protection Act is filled with jurisdictional loopholes. For example, it protects reports of gross waste or mismanagement but does not define what it means by the term "gross" – and, in reality, it does not protect the honest federal employees who are trying to do the right thing.

In essence, the WPA does not protect telling the truth – plain and simple. Congress should make it clear that, absent some statutory prohibition like state secrets, honesty is the official policy of federal service.

3. Whistleblower protections are not just about protecting conscientious employees. They are a key channel to ensure that the United States Congress gets truthful, candid information.

In theory, federal employees are supposed to be able to communicate with members of Congress, but that law has no teeth. One of the administrative charges against me that was thrown out involved my informing congressional staff about dangerous staffing shortages.

Congress already prohibits the executive branch from using any appropriated funds to gag or restrain communication between Congress and civil servants. But this prohibition lacks any enforcement mechanism. Congress needs to put teeth behind this law so that it is more than a rhetorical prop.

Congress should consider authorizing citizen suits to recover, directly from the salaries of officials who violate this law, appropriated funds misused by restricting communication. This somewhat personal yet public benefit remedy would subject the individuals who suppress information to judgment in the bright light of day.

Finally, let me emphasize the most fundamental problem with the system. It concentrates on the personnel action but completely ignores the underlying problem over which the civil servant risked his or her career. In my case, I told Congress and top agency officials and ultimately confirmed to the media that the United States Park Police was dangerously understaffed.

It is still understaffed, even more so today. According to the last figures published in the media, the number of U.S. Park Police officers is the lowest it has been in twenty years yet its workload associated with protecting our priceless and irreplaceable national icons – and those who visit them – from terrorism continues to grow.

Despite a Federal Circuit ruling that these statements are "protected speech", nothing in the system triggers action to address the identified threats to public safety. My biggest concern continues to be for the men and women patrolling the monuments, parks, and parkways and the public who visits these national treasures. Officers are not getting the support they need to do a demanding but vital job; and, because of this, both they and the public remain in danger.

I am proud of my service with the United States Park Police, and I stand by the decisions I have made. My hope is that my experience will result in positive change for public servants who understand their obligation and have the courage to speak truth to power regardless of how inconvenient those truths may be.

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Chairman TOWNS. Let me thank all of you for your testimony, and let me thank you for your years of public service. It is an unfortunate truth that the difficulties you and others have encountered are the inspiration for this important legislation.

Let me begin, I guess, with you, Ms. Greenhouse. You note in your testimony that your Top Secret clearance was removed after you blew the whistle.

What justification did the Corps provide you for taking that kind of drastic action?

Ms. GREENHOUSE. They were feeling that they were justified because they said that I no longer had performance objectives or duties that required their billet for a Top Secret clearance.

I am quite capable even in the area where I have been placed in the Directorate of Civil Works to do a lot more jobs that would require a Top Secret clearance, but I am not placed in those jobs. And then they used that as their justification for saying that you are no longer doing jobs that are of the importance or where you will be involved with Top Secret types of material; therefore, your Top Secret clearance is now being terminated.

Chairman TOWNS. In other words, they just made up something, basically, sort of.

Ms. GREENHOUSE. When I am quite willing and ready to say I will take on any duties and I am capable. I have three master's degrees and one in engineering management, so I knew I could do the jobs. But why not give me the jobs so that I could maintain the Top Secret clearance and then be in a position to give more value to my Nation?

Chairman TOWNS. Thank you.

Ms. Chambers, could you please illustrate the type of safety concerns you believe that the National Parks are vulnerable to because of insufficient resources?

Ms. CHAMBERS. Sir, the most glaring example came last night as I attended the Law Enforcement Officers Memorial Candlelight Vigil. I buried a police officer from the U.S. Park Police. Part of the reason that he died is because there were not sufficient officers to protect an accident scene on the Baltimore-Washington Parkway.

Everyone in the Nation in law enforcement was short after 9/11, and we were no different. The difference was that while local agencies could apply for Federal benefits and increase their numbers of officers, we in the Park Police stayed stagnant. In fact, instead of increasing in numbers following 9/11, our numbers fell.

We gave great attention to our monuments and memorials, and even with that, it wasn't a sufficient amount of attention. It was, frankly, Mr. Chairman, window dressing. We had extra officers, but we weren't doing the real work behind the scenes that needed to be done. We also were pulling from our neighborhood parks and parkways, leaving them extremely short and understaffed.

I had shared this information with folks in my chain of command and it fell on deaf ears. And it wasn't until the Washington Post had asked whether this information that the union had taken to them was factual that the hammer fell.

Chairman TOWNS. Let me ask all three of you this question.

People are saying that, look, workers are not going to believe you if you talk about protecting whistleblowers based on what they

have seen down through the years, and they are just not—not going to happen.

And, of course—let me ask all three of you; and this is something that Senator Grassley has for many years talked about: a ceremony in the Rose Garden for whistleblowers to demonstrate the value of the whistleblowers to public service. And, of course, if President Obama invited each of you to a ceremony in the Rose Garden, would you show up?

Right down the line, starting with you, Ms. Greenhouse.

Ms. GREENHOUSE. I am sorry? I missed it. The question again?

Chairman TOWNS. The problem is that many workers do not feel that when it comes to protecting whistleblowers, the government—that the agencies are not serious about it. Well, Senator Grassley said that one way to do that would be to have a ceremony for all the whistleblowers in the Rose Garden.

So I am saying to you, if President Obama invited you to the Rose Garden for a ceremony, would you show up?

Ms. GREENHOUSE. I would be honored to.

Mr. GAYL. I would be honored to as well.

Ms. CHAMBERS. I would be the first there, sir.

Chairman TOWNS. I think we have to look at things like that to sort of point out how serious this legislation is.

And so let me at this point yield to my colleague. First, I want to yield to the person that sponsored the legislation, and then I am going to go next to let you know that we are really serious about it.

I want to yield to Congressman Van Hollen, and then of course I will recognize other Members as well. This is the sponsor of this legislation, Congressman Van Hollen.

Mr. VAN HOLLEN. Well, thank you, Mr. Chairman. And let me thank my colleague, Mr. Quigley, and again welcome him to the Congress as one of the newest Members. It is great to have him on this committee.

I just want to come and thank all of you for your testimony today, but for also having stood up as whistleblowers and put yourselves on the line. And your stories are the reasons that we are moving forward so aggressively with this legislation. As you have heard, it has passed the House before, twice now.

Our understanding from Members of the Senate is that this time they will engage in this. And we are going to take their statements at face value and in good faith, and we really hope that this time around we can move forward.

I think you probably heard the testimony from the Obama administration earlier today, which was a real sea change from the statements that we have had from earlier administrations on this legislation. And so I think that things are lining up.

We are very hopeful—we are confident that we will get it out of the House again. We are very hopeful we will then get it out of the Senate and to the President's desk. And as the administration witness said today, the President looks forward to signing legislation strengthening whistleblower protections.

But we wouldn't be here today and we would not know of the flaws and problems with the existing system if it hadn't been for your courage in coming forward. And so, really, as the chairman

suggested in his last question to you, this legislation is really dedicated to you and all the other whistleblowers out there who come forward to try and protect the taxpayer, protect our country. And it is time that we send a signal that kind of bravery and courage is rewarded and not punished.

So thank you all for coming forward today.

Thank you, Mr. Chairman.

Chairman TOWNS. Thank you very much.

I yield 5 minutes to Congressman Quigley from the great State of Illinois.

Mr. QUIGLEY. Thank you so much, Mr. Chairman. And thank you very much to the sponsor of this measure. It is a welcome sign here.

And I want to thank everyone in this room for their efforts. I come from a town right now that is struggling with these issues, and it is important across the whole country.

A wise man once said that illumination is the best disinfectant for government. And without transparency, without accountability, we simply can't know what is happening, and the public doesn't get the kind of government they deserve. Jefferson said, In a democracy we get the kind of government we deserve. Well, I would suggest that wouldn't be the case without efforts like yours.

We can't drive past these buildings and know what is happening inside. As large as this government is, there is just absolutely no way we can know what is happening, and we cannot promote accountability without the courage of folks like you.

So it is our role, in my mind, as a very young Member here, to foster that, your role, as much as possible and to help you in any way we can.

And I thank the chairman, for his efforts, and I thank the sponsor, for being tenacious about this, and moving us in the right direction. And as a freshman, in my own small way, I will do everything I can.

So, thank you so much for all you do and I look forward to moving this forward. Thank you.

Chairman TOWNS. Thank you very much, Congressman Quigley.

Let me ask you, Mr. Gayl—you know, an important part of this committee is to look at the effectiveness of the inspectors general. You have told us that the Department of Defense inspector general largely vindicated your concerns. Could you tell us what the Marine Corps has done to followup on any recommendations the IG made in its report?

Mr. GAYL. Sir, I am not aware of any actions that were taken in response to the IG's audit.

I do know there have been improvements made. There have been other audits, too, that have taken a look at the Marine Corps that have been very unfavorable with regard to the requirements process at Quantico. One of them was a naval audit service back as far as 2007.

I do know they were very engaged at Quantico in improving the transparency of the requirements process and improving the responsiveness to warfighters as a result of that very negative report. But as far as any activities in response to the DOD IG's audit of

the MRAP Urgent—UUNS process, I do not know of any specific actions the Marine Corps has taken.

Chairman TOWNS. Let me thank all three of you again for your testimony. I would be delighted to yield.

Mr. VAN HOLLEN. First, I want to thank the chairman for taking this up as one of the first orders of business. I appreciate that very much.

Again, thank you for your testimony.

I also want to apologize. Because of those votes, I think all of our schedules got messed up, and I want to apologize to the witnesses on the next panel that, unfortunately, I am not going to be here. But I will be reading your testimony and appreciate your input.

We have a great——

Chairman TOWNS. Turn your mic on.

Mr. VAN HOLLEN. Thank you, Mr. Chairman.

I was just saying to the next panel, I apologize. Because of the votes that messed up everyone's schedule, I am not going to be able to be here. But I will look at your testimony.

Some of you have been before this panel before. We thank you for all your contributions to this effort. Thank you.

And thank you, Mr. Chairman.

Chairman TOWNS. Thank you very much.

And let me also join by saying that we really thank you for your testimony. I do believe that what you have done today is going to make life better and make our government much stronger as a result of your activity. And I think it is going to also encourage people not to be afraid, if they see something wrong, to try and move forward and make it right.

So I want to let you know you had a lot to do with this legislation moving forward. And, of course, we are going to try to make certain this time around that it goes all the way; and based on what they are saying in the administration, that if it hits his desk, he is going to sign it. So I want to let you know that we thank you for it.

And we know that through that process of standing up, you encountered some pain and some suffering. But I think that the key to it is what you are doing in terms of paving the way for others and, at the same time, strengthening our government. That is what we want.

Transparency is something that we need too in our government. The President of the United States—in every conversation I have had with him, he has indicated that he would like more transparency, and what you are doing is to help him to get it. Thank you so much for your testimony.

Our final panel will have six witnesses made up of experts in the field of constitutional law, whistleblower law, and government accountability. Welcome.

Louis Fisher is a special assistant to the Law Librarian of Congress at the Law Library of Congress and is an expert on constitutional law and separation of power issues.

Professor Robert Turner from the University of Virginia is the associate director of the Law School's Center for National Security Law.

Tom Devine is the legal director of the Government Accountability Project, which has been advocating for strong whistleblower protection for over 30 years.

Angela Canterbury is the director of advocacy for Public Citizen, Congress Watch Division, which has been promoting government accountability for decades.

Mike German is policy counsel on national security with the ACLU. Mr. German was an agent with the FBI and resigned over concerns about failed prosecution of domestic terrorist organizations.

Finally, David Colapinto is the general counsel of the National Whistleblowers Center. Mr. Colapinto has developed expertise in litigating FBI employment cases.

We have asked this panel to provide their views on specific provisions of the legislation and to provide us with suggestions for improving the bill.

It is the longstanding policy that we swear in all of our witnesses. So if you would be kind enough to stand and raise your right hands.

[Witnesses sworn.]

Chairman TOWNS. Let the record reflect that all the witnesses answered in the affirmative.

Why don't we just start with you, Mr. Fisher, and come right down the line.

STATEMENTS OF LOUIS FISHER, SPECIAL ASSISTANT TO THE LAW LIBRARIAN OF CONGRESS, THE LAW LIBRARY OF CONGRESS; ROBERT F. TURNER, PROFESSOR, ASSOCIATE DIRECTOR, CENTER FOR NATIONAL SECURITY LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW; THOMAS DEVINE, LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT; ANGELA CANTERBURY, DIRECTOR OF ADVOCACY, PUBLIC CITIZEN, CONGRESS WATCH DIVISION; MICHAEL GERMAN, POLICY COUNSEL, AMERICAN CIVIL LIBERTIES UNION; AND DAVID COLAPINTO, GENERAL COUNSEL, NATIONAL WHISTLEBLOWERS

STATEMENT OF LOUIS FISHER

Mr. FISHER. Mr. Chairman, thank you for inviting me. I wanted to underscore, Mr. Chairman, what you said in your opening remarks, the need of Members of Congress—in order for you to carry out your constitutional duties, you need access from the executive branch and access to information, domestic information, national security information; and not just information that the President or a Department head voluntarily gives to you. You need information from agencies, in the middle of an agency, at the bottom of an agency; otherwise, you cannot know and correct wrongdoing and illegality. So that is the basic point.

I look at the statement today from the Justice Department. Although it doesn't get much into constitutional issues, I see in the statement some reflection of what the Justice Department has said in the past. And what the Justice Department has said in the past is that the President can determine what information you get, par-

ticularly in the national security area: He can withhold information so that you cannot fulfill your constitutional duties.

What the Justice Department has said in the past, they relied I think in improper ways on two Supreme Court cases. And one is the Egan case of 1988. I would just call to your attention that the Egan case had nothing to do with congressional access to national security information—nothing to do. It was a dispute solely between—inside of the executive branch between the Navy and the Merit Systems Protection Board. So it had nothing to do with congressional access.

It also was a purely statutory matter; that is, what did Congress intend in this area? It had nothing to do with any constitutional powers of the President, anything that the President has as commander in chief.

So I think that case has been misread by the Justice Department, and I think that misunderstanding is implied in the statement today from the Justice Department.

The Egan case was simply looking at Congress, what you intended. And you can control this area through statutory action; you don't have to leave that to some plenary power by the President.

The second decision that is misread by the Justice Department and I think is implied in today's statement from the Justice Department is the Curtiss-Wright case of 1936, which people read as giving the President plenary, exclusive, independent, inherent power in national security to withhold information to you.

I can only say that the Curtiss-Wright case had nothing to do with Presidential power in terms of any inherent power; it had only to do with congressional powers, to what you can delegate to the President. And yet, it has been misread ever since, and it is—I go into this in my statement for you, how that has been abused over the years.

What people do is not look at the decision of the Supreme Court, but to look at pages and pages of dicta by Justice Sutherland. And I think anyone looking at the dicta will see that it misreads particularly the statement that John Marshall—when he was a Member of the House in 1800, he made the statement that the President is the sole organ in external affairs. That implies, the sole organ, that he can do everything and has some exclusive power.

Anyone reading the speech today would see that what John Marshall meant was that once Congress has made policy by statute or by treaty, then the President is the sole organ in carrying it out. You know that. Of course, that is what the Constitution says. It is nothing new. But that has been corrupted and misused by the Justice Department.

I also want to call attention that the Justice Department seems to imply that because they make a vague reference to President Washington—I assume they mean the Jay Treaty in 1796. But the fact is that President Washington 4 years earlier in the Algerine Treaty not only gave all treaty documents to the Senate, but gave the same documents to the House. So it is not true that the House is out of the picture.

The last point I want to make is that in the past, when the Justice Department testifies, it seems to imply that there are two

steps for you to get national security information: One, you have to have clearance. But as an elected Member, you have clearance.

The second step, you have to have a "need to know." And if I read statements in the past about the Justice Department, it seems to say that the President or some executive official can say, You have clearance, but you have no need to know; therefore, you are not going to get the information.

And I will just close by reading from the 1998 CIA whistleblower statute. One of the things that Congress said in law is this: "Congress, as a co-equal branch of Government, is empowered by the Constitution to serve as a check on the executive branch; in that capacity, it has a need to know, of allegations of wrongdoing within the executive branch, including allegations of wrongdoing in the Intelligence Community.

Thank you.

Chairman TOWNS. Thank you very much for your testimony.

[The prepared statement of Mr. Fisher follows:]

Statement by Louis Fisher

Specialist in Constitutional Law
Law Library of the Library of Congress

Appearing before the

House Committee on Oversight and Government Reform

"The Whistleblower Protection Enhancement Act of 2009"

May 14, 2009

Mr. Chairman, I appreciate the opportunity to testify on H.R. 1507, "The Whistleblower Protection Enhancement Act of 2009." To fulfill its constitutional duties to legislate and monitor the executive branch, Congress must have access to agency information that reveals inefficiency, waste, corruption, and illegality. Access is needed to both domestic and national security information. The President and agency heads have a responsibility to uncover improper and illegal activities and correct them, but the experience of more than two centuries demonstrates that executive officials are often unreliable in policing themselves and will often taken steps to deliberately conceal not merely waste but legal and constitutional violations. There is thus a need for Congress to strengthen national security whistleblower rights.

Members of Congress and their committees have a duty to learn of agency deficiencies and abuses. Only by doing so can lawmakers protect their institutional prerogatives and safeguard the interests of citizens, aliens, and taxpayers. An important source of information over the years has been government employees who tell Congress about agency misconduct. As noted in a March 2009 study by the House Committee on the Judiciary, federal employees "are often the first, and perhaps the only, people to see signs of corruption, government misinformation, and political manipulation."[1]

Denied this kind of agency information, Congress is unable to carry out its core constitutional responsibilities in such areas as the budget and national defense. It cannot assure the integrity of federal programs. Access is blocked when agencies retaliate against employees and punish them for sharing information with Congress. Legislation is necessary to assure the disclosure of agency information and to protect government employees who decide to tell Congress about agency wrongdoing.

There has been a misconception for many years about agency whistleblowing. The executive branch has argued that this type of activity is generally permissible for domestic programs but not for national security. It is said that the President has special and exclusive authorities to protect national security information. As my statement explains, this claim is without merit. Congress has coequal duties and responsibilities for the whole of government, domestic and foreign. In previous years the Justice Department has consistently opposed legislation for national security whistleblowers. Lawmakers should read with care what the Justice Department says, but it is positioned to protect executive, not legislative, interests. Congress needs to make independent judgments to protect not only its institutional prerogatives but the rights of citizens and the system of checks and balances.

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[1] "Reining in the Imperial Presidency: Lessons and Recommendations Relating to the Presidency of George W. Bush," House Committee on the Judiciary Majority Staff, Final Report to Chairman John Conyers, Jr. (March 2009), at 273.

The Roosevelt-Taft "Gag Orders"

There is little disagreement about the need to uncover agency misconduct and correct it. The problem is putting that principle into practice. The Code of Ethics adopted by Congress in 1958 directs all government employees to "expose corruption wherever discovered."[2] Over the years, many agency employees have received credit for revealing problems about defense cost overruns, unsafe nuclear power plant conditions, questionable drugs approved for marketing, contract illegalities and improprieties, and regulatory corruption.[3] However, agency employees who exposed corruption were often fired, transferred, reprimanded, denied promotion, or harassed. In 1978, a Senate panel found that the fear of reprisal "renders intra-agency communications a sham, and compromises not only the employee, management, and the Code of Ethics, but also the Constitutional function of congressional oversight itself."[4]

The executive and legislative branches have long been in conflict about the disclosure of agency information to Congress. Presidents Theodore Roosevelt and William Howard Taft threatened to fire agency employees who attempted to contact Congress. Employees were directed to communicate only through the head of their agency.[5] Congress responded in 1912 with the Lloyd-LaFollette Act, nullifying the Roosevelt-Taft "gag orders" by authorizing agency employees to contact lawmakers, committees, and legislative staff.

Congressional debate on Lloyd-LaFollette explains why lawmakers did not want to be restricted to what they were told by the President or Cabinet heads. They needed to hear from agency rank-and-file members. Some Members of Congress rejected the idea of placing the welfare of citizens "in the hands and at the mercy of the whims of a single individual, whether he is a Cabinet officer or anyone else."[6] Legislative language was drafted to assure that agency employees could exercise their constitutional rights to free speech, to peaceable assembly, and to petition the government for redress of grievances.[7]

During House debate, some lawmakers objected to the Roosevelt and Taft orders as efforts by Presidents to prevent Congress "from learning the actual conditions that surrounded the employees of the service."[8] If agency employees were required to speak

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[2] 72 Stat. B12 (1958) (H. Con. Res. 175).

[3] "The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse, and Corruption," prepared for the Senate Committee on Governmental Affairs, 95th Cong., 2d Sess. 1 (Comm. Print, Feb. 1978).

[4] Id. at 49.

[5] 48 Cong. Rec. 4513 (1912).

[6] Id. at 4657 (statement of Rep. Reilly).

[7] Id. at 5201 (statement of Rep. Prouty).

[8] Id. at 5235 (statement of Rep. Buchanan).

only through the heads of the departments, Congress would be at the mercy of officials who could decide to "withhold information and suppress the truth."[9]

Similar objections were raised during Senate debate. One Senator said "it will not do for Congress to permit the executive branch of this Government to deny to it the sources of information which ought to be free and open to it, and such an order as this, it seems to me, belongs in some other country than the United States."[10] The Lloyd-LaFollette Act sought to protect agency employees from arbitrary dismissals when they attempted to communicate with Congress: "The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with."[11]

A History of Mixed Signals

The Lloyd-LaFollette language, carried forward and supplemented by the Civil Service Reform Act of 1978, is codified as permanent law. 5 U.S.C. § 7211 (2006). The conference report on the 1978 statute explains why Congress depends on agency employees to disclose information directly to the legislative branch. The Civil Service Reform Act placed limitations on the kinds of information an employee may publicly disclose without suffering reprisal, but the conference report states that there was "no intent to limit the information an employee may provide to Congress or to authorize reprisal against an employee for providing information to Congress." Nothing in the statute was to be construed "as limiting in any way the rights of employees to communicate with or testify before Congress."[12]

The Civil Service Reform Act established procedural protections for agency whistleblowers but the protections were weak. First, the statute did not cover the area of national security. Second, the creation of new institutions, particularly the Merits Systems Protection Board (MSPB) and the Office of Special Counsel (OSC), did little to protect whistleblowers. Congress acknowledged the deficiencies of the 1978 statute by enacting the Whistleblower Protection Act of 1989 and the CIA Whistleblower Act of 1998. Those steps, however, fall short of assuring Congress the information it needs from agency employees who see misconduct and want to report it.

When the Senate Committee on Governmental Affairs reported the Civil Service Reform Act, it remarked: "Often, the whistle blower's reward for dedication to the highest moral principles is harassment and abuse. Whistle blowers frequently encounter

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[9] Id. at 5634 (statement of Rep. Lloyd).

[10] Id. at 10674 (statement of Sen. Reed).

[11] 37 Stat. 555, § 6 (1912).

[12] S. Rept. No. 95-1272, 95th Cong., 2d Sess. 132 (1978).

severe damage to their careers and substantial loss." The committee said that protecting agency employees who disclose government illegality, waste, and corruption "is a major step toward a more effective civil service. . . . What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses."[13] A report by the House Committee on Post Office and Civil Service said that the bill "prohibits reprisals against employees who divulge information to the press or the public (generally known as 'whistleblowers') regarding violations of law, agency mismanagement, or dangers to the public's health and safety."[14] In supplemental views in this report, Rep. Pat Schroeder understood that whistleblower protection was an important contribution to legislative oversight: "If we in Congress are going to act as effective checks on excesses in the executive branch, we have to hear about such matters."[15] As enacted, the Civil Service Reform Act included a subsection on prohibited personnel practices, stating that the legislation "shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress."[16]

In supporting the legislation, President Jimmy Carter proposed an Office of Special Counsel "to investigate merit violations and to protect the so-called whistleblowers who expose gross management errors and abuses."[17] At a news conference, he looked to the Special Counsel to protect "those who are legitimate whistleblowers and who do point out violations of ethics, or those who through serious error hurt out country."[18] In signing the bill, President Carter said that "it prevents discouraging or punishing [federal employees] for the wrong reasons, for whistleblowing or for personal whim in violation of basic employee rights."[19]

Implementing Whistleblower Rights

The Special Counsel never functioned in the manner anticipated by Congress or President Carter. Agency whistleblowers continued to be subject to reprisals and punishment. Part of the reason lay in the conflicting values placed in the 1978 statute. Although it expressly stated its intention to protect whistleblowers, a dominant motivation for the statute was to make it easier to fire and discipline federal employees. Under this system of incentives, whistleblowers became more vulnerable to abusive

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[13] S. Rept. No. 96-969, 95th Cong., 2d Sess. 8 (1978).

[14] H. Rept. No. 95-1403, 95th Cong., 2d Sess. 4 (1978).

[15] Id. at 387.

[16] 92 Stat. 1117 (1978).

[17] Public Papers of the Presidents, 1978, I, at 437.

[18] Id. at 441.

[19] Id. at 1761.

managers and agencies possessed a new tool to prevent embarrassing information from reaching Congress and the public.

In his first year in office, President Ronald Reagan urged agency whistleblowers to disclose misconduct: "Federal employees or private citizens who wish to report incidents of illegal or wasteful activities are not only encouraged to do so but will be guaranteed confidentiality and protected against reprisals." The "vital element" in fighting fraud and waste, he said, "is the willingness of employees to come forward when they see this sort of activity." Agency employees "must be assured that when they 'blow the whistle' they will be protected and their information properly investigated." He wanted to make it clear that "this administration is providing that assurance to every potential whistleblower in the Federal Government."[20] Yet whistleblowers remained vulnerable to agency retaliation and reprisal, as they had been in the Carter administration. During hearings in 1985, Rep. Schroeder remarked on the lack of protection for whistleblowers: "We urge them to come forward, we hail them as the salvation of our budget trauma, and we promise them their place in heaven. But we let them be eaten alive."[21] In a newspaper article published on July 17, 1984, Special Counsel K. William O'Connor was asked what advice he would give, as a private attorney, to a potential whistleblower. His reply: "I'd say that unless you're in a position to retire or are independently wealthy, don't do it. Don't put your head up, because it will get blown off."[22]

Recognizing that existing procedures were inadequate to protect agency whistleblowers, Congress held hearings and reported new legislation in 1986. The House Subcommittee on Civil Service said it had been "unable to find a single individual who has gone to the Office of Special Counsel since 1981 who has been satisfied with the investigation of his or her case."[23] A study by Dr. Donald R. Soeken concluded that "most whistleblowers were not protected, and in fact, they suffered cruel and disastrous retaliation for their efforts. . . . It seems to me that the protection has also been a cruel hoax."[24] A Senate report in 1988 described the results of a 1984 report prepared by the MSPB. It estimated that 69-70 percent of federal employees knew of fraud, waste and abuse but chose not to report it. The percentage of employees who did not report agency wrongdoing because of fear of reprisal rose from an estimated 20 percent in 1980 to 37 percent in 1983.[25]

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[20] Public Papers of the Presidents, 1981, at 360.

[21] "Whistleblower Protection," hearings before the House Committee on Post Office and Civil Service, 99th Cong., 1st Sess. 237 (1985).

[22] Howard Kurtz, "Whistlin' the Blues," Washington Post, July 17, 1984, at A17.

[23] H. Rept. No. 99-859, 99th Cong., 2d Sess. 19 (1986).

[24] H. Rept. No. 100-274, 100th Cong., 1st Sees. 19 (1987).

[25] S. Rept. No. 100-413, 100th Cong., 2d Sess. 5 (1988).

Congress passed the Whistleblower Protection Act of 1988, intending to give additional protection to agency employees who reported on wrongdoing and illegality. President Reagan pocket vetoed the bill, explaining that reporting of "mismanagement and violations of the law, often called whistleblowing, contributes to efficient use of taxpayers' dollars and effective government. Such reporting is to be encouraged, and those who make the reports must be protected." However, he said it was necessary to ensure that agency heads "can manage their personnel effectively. He was concerned that "employees who are not genuine whistleblowers could manipulate the process to their advantage simply to delay or avoid appropriate adverse personnel actions."[26]

The vetoed whistleblower bill was modified in 1989 and passed the Senate by a vote of 97 to zero.[27] The House passed the bill under suspension of the rules.[28] The Whistleblower Protection Agency (WPA) of 1989 found that federal employees who make protected disclosures "serve the public interest by assisting in the elimination of fraud, waste, and unnecessary Government expenditures."[29] Congress found that protecting employees "who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service." The WPA stated that Congress, in passing the Civil Service Reform Act of 1978, "established the Office of Special Counsel to protect whistleblowers" who make protected disclosures.[30] In signing the bill, President George H. W. Bush said that "a true whistleblower is a public servant of the highest order. . . . [T]hese dedicated men and women should not be fired or rebuked or suffer financially for their honesty and good judgment."[31]

Five years later, Congress found itself working on amendments to the WPA, expressing concern "about the extent to which OSC is aggressively acting to protect whistleblowers from prohibited personnel practices."[32] A House report stated that while the WPA "is the strongest free speech law that exists on paper, it has been a counterproductive disaster in practice. The WPA has created new reprisal victims at a far greater pace than it is protecting them."[33] The House report found fault with the

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[26] Public Papers of the Presidents, 1988-89, II, at 1391-92.

[27] 135 Cong. Rec. 4535 (1989).

[28] Id. at 5040.

[29] 103 Stat. 16, § 2(a)(1) (1989).

[30] Id. at § 2(a)(2) and (3).

[31] Public Papers of the Presidents, 1989, I, at 391.

[32] S. Rept. No. 103-358, 103d Cong., 2d Sess. 3 (1994).

[33] H. Rept. No. 103-769, 103d Cong., 2d Sess. 12 (1994).

performances of the MSPB and the Federal Circuit of Appeals, as did a report by the General Accounting Office.[34]

Military Whistleblower Protection Act

Whistleblower legislation enacted in 1978, 1989, and 1994 did not cover federal employees who wanted to disclose information to Congress that is classified or prohibited by statute from disclosure. Such disclosures could be made to certain agencies within the executive branch. 5 U.S.C. § 2302(8)(B) (2006). However, Members of Congress have frequently expressed a need for information from agencies involved in national security. During debate in 1989, Rep. Barbara Boxer referred to the Military Whistleblower Protection Act and said that lawmakers learned that "without whistleblowers, frankly, we really could not do our job, because . . . we need information and we need a free flow of information from federal employees, be they military or civilian."[35]

The Military Whistleblower Protection Act (10 U.S.C. § 1034) is not a single statute but rather an accumulation of several. The first mention of Section 1034 was in 1956, with the codification of Title 10. Section 1034 provided: "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States."[36] Congress adopted this language after a tense confrontation with the Eisenhower Administration over access to agency information. In 1954 President Eisenhower, in a letter to Secretary of Defense Charles E. Wilson, prohibited testimony concerning certain conversations and communications between employees in the executive branch.[37]

Attorney General Herbert Brownell, Jr. released a legal memorandum stating that the courts had "uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold the information and papers in the public interest."[38] The Justice Department prepared a 102-page report concluding that Congress "cannot, under the Constitution, compel heads of departments to make public what the President desires to keep secret in the public interest."[39] This report misrepresented the issue. Congress never contemplated forcing a President to make secret or classified information available to the public. Congress wanted information made available to Members and

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[34] Id. at 13, 17; S. Rept. No. 103-358, 103d Cong., 2d Sess. 3 (1994); General Accounting Office, "Reasons for Whistleblower Complainants' Dissatisfaction Need to be Explored," Nov. 1993, GAO/GGD-94-21. For the 1994 amendments, see 108 Stat. 4361 (1995).

[35] 135 Cong. Rec. 5037 (1989).

[36] 70A Stat. 80 (1956).

[37] CQ Almanac, 1956, at 737.

[38] Id.

[39] Id. at 740.

committees to satisfy legislative needs. To Rep. John Moss, the Justice Department analysis was a demand that Congress "rely upon spoon-fed information from the President."[40]

Congress created an inspector general for the Defense Department in 1982. Legislation in 1988 added a section on "Safeguarding of Military Whistleblowers," including prohibitions on retaliatory personnel actions against a member of the armed services for making or preparing a protected communication with a Member of Congress or an inspector general. The IG was authorized to investigate allegations by a member of the armed services who claimed that a prohibited personnel action had been taken or threatened to be taken.[41] The conference report explained:

> The conferees note that in the course of their duties, members of the Armed Forces may become aware of information evidencing wrongdoing or waste of funds. It is generally the duty of members of the Armed Forces to report such information through the chain of command. Members of the armed forces, however, have the right to communicate directly with Members of Congress and Inspectors General (except to the extent that such a communication is unlawful under applicable law or regulation), and there may be circumstances in which service members believe it is necessary to disclose information directly to a Member of Congress or an inspector general. When they make lawful disclosures, they should be protected from adverse personnel consequences (or threats of such consequences), and there should be prompt investigations and administrative review of claims of reprisals. When such a claim is found to be meritorious, the Secretary concerned should initiate appropriate corrective action, including disciplinary action when warranted.[42]

Congress made other modifications to the Military Whistleblower Protection Act in 1989, 1994, 1998, 2000, 2002, and 2004. The text of the statute and its legislative history appear at 10 U.S.C. § 1034 (2006).

The Fight over Nondisclosure Agreements

In 1983, President Reagan directed that all federal employees with access to classified information sign "nondisclosure agreements" or risk the loss of their security clearances.[43] Concerned about losing access to agency information, Congress passed

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[40] Id.

[41] 102 Stat. 2027, § 846 (1988).

[42] H. Rept. No. 100-989, 100th Cong., 2d Sess. 436-37 (1988). This language also appears at 134 Cong. Rec. 16977 (1988).

[43] National Security Decision Directive 84 (1983); see Louis Fisher, "Congressional-Executive Struggles Over Information Secrecy Pledges," 42 Adm. L. Rev. 89, 90 (1990).

legislation in 1987 to prohibit the use of appropriated funds to implement the Administration's nondisclosure policy.[44] The dispute was taken to court and in 1988 District Judge Oliver Gasch held that Congress lacked constitutional authority to interfere, by statute, with nondisclosure agreements drafted by the executive branch to protect the secrecy of classified information.[45] Judge Gasch bolstered his decision with quotations from two Supreme Court decisions — *Department of the Navy* v. *Egan* (1988) and *United States* v. *Curtiss-Wright* (1936) — and in each case his legal analysis was flawed.

Both the House and the Senate submitted briefs rejecting Judge Gasch's understanding of the President's powers in the field of national security. On April 18, 1989, the Supreme Court issued a per curiam order that vacated Judge Gasch's decision and remanded the case for further consideration.[46] The Court cautioned Judge Gasch to avoid expounding on constitutional matters: "Having thus skirted the statutory question whether the Executive Branch's implementation of [Nondisclosure] Forms 189 and 4193 violated § 630, the court proceeded to address appellees' [the government's] argument that the lawsuit should be dismissed because § 630 was an unconstitutional interference with the President's authority to protect the national security."[47] The Court counseled Judge Gasch that the district court "should not pronounce upon the relative constitutional authority of Congress and the Executive Branch unless it finds it imperative to do so. Particularly where, as here, a case implicates the fundamental relationship between the Branches, courts should be extremely careful not to issue unnecessary constitutional issues."[48] On remand, Judge Gasch held that the plaintiffs had failed to state a cause of action and dismissed the case on that ground, finding it unnecessary to address any of the constitutional issues.[49]

Misreading of *Egan*. Judge Gasch quoted this language from the Supreme Court's decision in *Egan*: "The authority to protect such [national security] information falls on the President as head of the Executive Branch and as Commander in Chief."[50] From these words he concluded that the President has plenary power in protecting classified information, even to the extent of excluding Congress. His misconception about *Egan* has been repeated in testimony and statements by the Justice Department in opposing national security whistleblower legislation. My comments here about the deficiencies of the Gasch opinion apply equally to the position by the Justice Department.

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[44] 101 Stat. 1329-432, § 630 (1987); 102 Stat. 1756, § 619 (1988).

[45] National Federation of Federal Employees v. United States, 688 F.Supp. 671 (D.D.C. 1988).

[46] American Foreign Service Assn. v. Garfinkel, 490 U.S. 153 (1989).

[47] Id. at 158.

[48] Id. at 161.

[49] American Foreign Service Ass'n v. Garfinkel, 732 F.Supp. 13 (D.D.C. 1990).

[50] National Federation of Federal Employees v. United States, 688 F.Supp. 671, 685 (D.D.C. 1988), citing Department of the Navy v. Egan, 484 U.S. 518, 527 (1988).

The Supreme Court decided *Egan* wholly on statutory — not constitutional — grounds. Moreover, the case had absolutely zero to do with congressional access to classified information. It was purely an intra-executive dispute: the Navy versus the MSPB. The Court upheld the Navy's denial of a security clearance to Thomas Egan, who worked on the Trident submarine. It ruled that the grant of security clearance to a particular employee was "a sensitive and inherently discretionary judgment call," one that "is *committed by law* to the appropriate agency of the Executive Branch."[51] The principal issue was how to interpret congressional policy expressed in statutory language, not the Constitution.

The focus on statutory, not constitutional, issues is reflected in the briefs. The Justice Department noted: "The issue in this case is one of statutory construction and 'at bottom . . . turns on congressional intent.'"[52] The Court directed the parties to address this question: "Whether, in the course of reviewing the removal of an employee for failure to maintain a required security clearance, the Merit Systems Protection Board is *authorized by statute* to review the substance of the underlying decision to deny or revoke the security clearance."[53] The questions centered on the interpretation of 5 U.S.C. §§ 7512, 7513, 7532, and 7701.

Oral argument before the Court on December 2, 1987, explored the statutory intent of Congress. At no time did the Justice Department suggest that classified information could be withheld from Congress. Although the Court referred to the President's constitutional powers, including those as Commander in Chief and as head of the executive branch,[54] and noted the President's responsibility with regard to foreign policy,[55] the decision was one of statutory construction. In stating that courts "traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs," the Court added this important qualification: "*unless Congress specifically has provided otherwise*."[56] The Justice Department in its brief had stated: "Absent an unambiguous grant of jurisdiction by Congress, courts have traditionally been reluctant to intrude upon the authority of the executive branch in military and national security affairs."[57]

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[51] Department of the Navy v. Egan, 484 U.S. at 527 (emphasis added).

[52] U.S. Department of Justice, "Brief for the Petitioner," Department of the Navy v. Egan, October Term 1987, at 22 (citing Clarke v. Securities Industry Ass'n, No. 85-971, Jan. 14, 1987).

[53] Id. at (I) (emphasis added).

[54] Department of the Navy v. Egan, 484 U.S. at 527.

[55] Id. at 529.

[56] Id. at 530 (emphasis added).

[57] U.S. Department of Justice, "Brief for the Petitioner," Department of the Navy v. Egan, October Term, 1987, at 21.

Both the Supreme Court and the Justice Department exaggerated the extent to which federal courts have been reluctant to decide cases involving military and national security affairs. Beginning in 1800, the Supreme Court regularly accepted and decided war power cases and the legality of certain military actions. Only in the Vietnam War years did federal courts begin a pattern of ducking these cases on various grounds of standing, mootness, ripeness, political questions, prudential considerations, and equitable discretion.[58] The President's national security powers surfaced at times during oral argument on *Egan*,[59] but the case began as one of statutory construction and was decided on that ground.

In citing the President's role as Commander in Chief, the Court said that the President's authority to protect classified information "flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant."[60] If Congress had never enacted legislation regarding classified information, the President would be in the position of exercising his best judgment to protect that category of information. But if Congress expresses its policy by statute, as it has done, it narrows the President's range of action and courts turn to statutory policy for guidance.

Misreading *Curtiss-Wright*. In addition to *Egan,* Judge Gasch relied on language from the Supreme Court's *Curtiss-Wright* decision to conclude that the "sensitive and complicated role cast for the President as this nation's emissary in foreign relations requires that congressional intrusion upon the President's oversight of national security information be more severely limited than might be required in matters of purely domestic concern."[61] The central issue in *Curtiss-Wright* was at all times the scope of *congressional*, not presidential, power. The source of the authority was entirely legislative: a statute passed by Congress in 1934 giving the President authority to impose an arms embargo in a region in South America. When President Franklin D. Roosevelt issued a proclamation to implement the statute, he relied exclusively on the statutory authority. At no time during the litigation did anyone, including the executive branch, assert the existence of any type of independent or plenary presidential power.[62]

Several courts have remarked on the quality of Justice George Sutherland's opinion for the Court in *Curtiss-Wright*. The main holding — that Congress could use more general standards in foreign affairs than it could in domestic affairs — is

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[58] Louis Fisher, "Judicial Review of the War Power," 35 Pres. Stud. Q. 466 (2005).

[59] See Louis Fisher, "Congressional Access to National Security Information," 45 Harv. J. on Legis. 231-32 (2008).

[60] Department of the Navy v. Egan, 484 U.S. at 527.

[61] National Federation of Federal Employees v. United States, 688 F.Supp. at 685.

[62] Louis Fisher, "Presidential Inherent Power: The 'Sole Organ' Doctrine," 37 Pres. Stud. Q. 139, 143-44 (2007).

unexceptional. The dispute surrounds the pages of dicta he added at the end, claiming plenary, independent, and inherent powers for the President in foreign affairs. Justice Sutherland cited this language in a speech given by John Marshall when he served as a member of the House of Representatives in 1800: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[63] From that language Sutherland would write:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.[64]

Marshall's speech in 1800 had nothing to do with plenary or exclusive power of the President. It had only to do with the duty of President John Adams under the Constitution to carry out an extradition provision in the Jay Treaty. It was only after Congress had acted by statute or treaty to make national policy that the President became the "sole organ" in carrying out the law. Yet the Justice Department continues to rely on the sole-organ doctrine to object to congressional whistleblower legislation in the field of national security.[65]

In the Steel Seizure Case of 1952, Justice Robert Jackson referred to *Curtiss-Wright* by noting that "much of the opinion is dictum" and the most that can be drawn from it is the intimation that the President "might act in external affairs without congressional authority, but not that he might act contrary to an act of Congress."[66] In 1981, a federal appellate court cautioned against placing undue reliance on "certain dicta" in Sutherland's opinion: "To the extent that denominating the President as the 'sole organ' of the United States in international affairs constitutes a blanket endorsement of

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[63] United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936).

[64] Id. at 319-320.

[65] In opposing S. 494, the "Federal Employee Protection of Disclosures Act, William E. Moschella, Assistant Attorney General, wrote to Senator Susan M. Collins, chairman of the Committee on Homeland Security and Governmental Affairs, on April 12, 2005: "This provision would unconstitutionally deprive the President of his authority to decide, based on the national interest, how, when, and under what circumstances particular classified information should be disclosed to Congress. The Constitution not only generally establishes the President as the head of the Executive branch but also makes him Commander in Chief of all military forces, the sole organ of America's foreign affairs, and the officer in the Government with the express duty (and corresponding authority) to take care that the laws are faithfully executed" (at 3).

[66] Youngstown Co. v. Sawyer, 343 U.S. 579, 636 n.2 (1952) (concurring opinion).

plenary Presidential power over any matter extending beyond the borders of this country, we rejected that characterization."[67]

CIA Whistleblower Act of 1998

It is interesting that Justice Department testimony and letters consistently refer to its opposition in 1998 to pending legislation on a CIA whistleblower bill but never acknowledge that the bill, as modified, became law.[68] The House and the Senate considered the Department's constitutional objections as expressed in a written opinion by the Office of Legal Counsel (OLC) and in testimony offered by an OLC deputy. Both chambers found the objections inadequate and unpersuasive. The Senate Intelligence Committee, after listening to OLC's position at a hearing, reported the legislation two hours later by a vote of 19 to zero.[69]

On November 26, 1996, OLC issued an eight-page opinion on the application of executive branch rules and practices on the disclosure of classified information to Members of Congress. It held that bills drafted to assure congressional access to classified information, allowing intelligence community employees to share that information with Congress without the permission of their supervisors, was unconstitutional. The Senate Intelligence Committee held hearings on the OLC memo and invited the Congressional Research Service to analyze it.[70]

The committee held two days of hearings and proceeded to unanimously report legislation that OLC had decided was unconstitutional. The committee announced that the Administration's "intransigence on this issue compelled the Committee to act."[71] The House Intelligence Committee also held two days of hearings on a bill that provided an

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[67] American Intern. Group v. Islamic Republic of Iran, 657 F.2d 430, 438 n.6 (D.C. Cir. 1981). For an analysis of Justice Sutherland's opinion in *Curtiss-Wright*, the scholarly response to it, and the Supreme Court's subsequent reliance on it, see Louis Fisher, "The 'Sole Organ' Doctrine," The Law Library of Congress, August 2006, available at http://www.loc.gov/law/help/usconlaw/pdf/SoleOrgan-Aug06.pdf

[68] E.g., letter of Aug. 22, 2006 from William E. Moschella, Assistant Attorney General, to The Honorable Duncan Hunter, chairman of the House Committee on Armed Services, regarding H.R. 5122, at 3 ("We note that the prior Administration took this same position in 1998, strongly opposing as unconstitutional legislation that would have vested employees in the intelligence community with a unilateral right to disclose classified information to Congress"). The identical letter was sent to The Honorable John W. Warner, chairman of the Senate Committee on Armed Services. The position by Mr. Moschella is repeated in a letter of March 13, 2007 from Richard A. Hertling, Acting Assistant Attorney General, to The Honorable Henry A. Waxman, chairman of the House Committee on Oversight and Government Reform, at 2-3.

[69] Louis Fisher, The Politics of Executive Privilege 254-55 (2004).

[70] Prepared statement by Louis Fisher, Congressional Research Service, "Executive Employee Access to Congress," reprinted in "Disclosure of Classified Information to Congress," hearings before the Senate Select Committee on Intelligence, 105th Cong., 2d Sess. 5-13 (1998).

[71] S. Rept. No. 105-165, 105th Cong., 2d Sess. 5 (1998).

alternative procedure for giving Congress access to information from national security whistleblowers.[72]

Two major issues emerged. One was the question whether CIA employees should report their concerns only to the Inspector General. Was the IG to be the "sole process" by which an employee may report a serious or flagrant problem to Congress? Second, should the head of an intelligence agency have a "holdback" power? That is, should the agency head be authorized to block a whistleblower's complaint "in the exceptional case and in order to protect vital law enforcement, foreign affairs or national security interest."[73]

When the House bill was reported it was decided that the IG mechanism for whistleblowers should not be the "sole process" for them to report wrongdoing to Congress. The House bill provided an additional procedure to the existing IG route.[74] The House Intelligence Committee recognized that some agency employees might "choose not to report a problem either through the process outlined [in the bill] or through another process authorized by their management, but instead approach the committee directly."[75] The committee also decided to eliminate the "holdback" provision. Agency heads would have no authority to block disclosures by agency employees to Congress. A statutory acknowledgement of holdback authority was dropped because it was considered "unwarranted and could undermine important congressional prerogatives."[76]

Like the Senate, the House Intelligence Committee rejected the Administration's "assertion that, as Commander in Chief, the President has ultimate and unimpeded constitutional authority over national security, or classified, information. Rather, national security is a constitutional responsibility shared by the executive and legislative branches that proceeds according to the principles and practices of comity."[77] The committee denied that the President, as Chief Executive, "has a constitutional right to authorize all contact between executive branch employees and Congress." The issue of whether an agency employee "must 'ask the boss' before approaching the intelligence committees with unclassified information about wrongdoing seems well below any constitutional threshold."[78] The handling of classified information was addressed in the bill that became law.

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[72] House Permanent Select Committee on Intelligence, "Record of Proceedings on H.R. 3829, The Intelligence Community Whistleblower Protection Act," 106th Cong., 1st Sess. (1999).

[73] Id. at 4.

[74] H. Rept. No. 105-747 (Part 1), 105th Cong., 2d Sess. 13 (1998).

[75] Id. at 20.

[76] Id. at 14.

[77] Id. at 15.

[78] Id.

The compromise bill established "an additional process to accommodate the disclosure of classified information of interest to Congress." The new procedure was not "the exclusive process by which an Intelligence Community employee may make a report to Congress." The conference report stated that "the managers agree that an Intelligence Community employee should not be subject to reprisals or threats of reprisals for making a report to appropriate Members or staff of the intelligence committees about wrongdoing within the Intelligence Community."[79] The statute, covering communications from the agency to Capitol Hill through the intelligence committees, listed a number of principles that rejected the claim of plenary presidential power over classified information:

> (1) national security is a shared responsibility requiring joint efforts and mutual respect by Congress and the President;
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> (2) the principles of comity between the branches of Government apply to the handling of national security information;
>
> (3) Congress, as a co-equal branch of Government, is empowered by the Constitution to serve as a check on the executive branch; in that capacity, it has a 'need to know' of allegations of wrongdoing within the executive branch, including allegations of wrongdoing in the Intelligence Community;
>
> (4) no basis in law exists for requiring prior authorization of disclosures to the intelligence committees of Congress by employees of the executive branch of classified information about wrongdoing within the Intelligence Community;
>
> (5) the risk of reprisal perceived by employees and contractors of the Intelligence Community for reporting serious or flagrant problems to Congress may have impaired the flow of information needed by the intelligence committees to carry out oversight responsibilities; and
>
> (6) to encourage such reporting, an additional procedure should be established that provides a means for such employees and contractors to report to Congress while safeguarding the classified information involved in such reporting.[80]

Congress has enacted modifications to this statute but they do not alter the congressional rejection of "sole process" and "holdback."[81]

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[79] H. Rept. No. 105-780, 105th Cong., 2d Sess. 34 (1998).

[80] 112 Stat. 2413-14, § 701 (1998).

[81] 115 Stat. 1399-1400, § 309 (2001).

Policy Objections

The Justice Department has raised a number of policy objections to amendments to whistleblower legislation. Testimony in 2003 by a Justice Department official remarked that once a legislative proposal has been introduced in Congress it "must be judged not simply on whether it would provide maximum protection to any and all allegations of whistleblower reprisal, but whether the additional protection afforded by the bill is worth the costs."[82] In striking the appropriate balance, congressional committees "should make no mistake that the costs would be substantial, both in terms of the bill's impact on vital national security interests, and the inefficiencies the bill would create in the management of the Federal workforce."[83]

Congress always has the constitutional duty to weigh various concerns and potential costs when it legislates. The individuals with the legitimacy and authority for making those determinations are the elected Members of Congress, not officials in the executive branch. Observations by Administration witnesses are entitled to courteous respect but no more than that. The testimony above appears to suggest that any legislation affecting "vital national security interests" must defer to the judgment of executive officials because of some superior expertise. The final judge of national policy, however, must be Congress.

The testimony in 2003 suggested that agency employees who exercised national security whistleblower rights would invariably be of low and suspect quality. Proposed legislative changes would "do nothing to strengthen the protection for legitimate whistleblowers, but instead would provide a legal shield for unsatisfactory employees." Suggested changes "would permit almost any employee against whom an unfavorable personnel action is taken to claim whistleblower status." The bill "would make it far too easy for unsatisfactory employees to use the whistleblower laws as a shield against legitimate agency actions. Ultimately, it would discourage Government managers from making the decisions necessary to running an efficient and effective Federal workplace."[84]

This line of argument has been repeated by the Justice Department in letters issued to Congress in 2005 and 2007.[85] On what basis does an official in the Justice

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[82] Statement of Peter Keisler, Assistant Attorney General, Civil Division, Department of Justice, before the Senate Committee on Governmental Affairs, concerning S. 1358, The Federal Employee Protection of Disclosures Act, November 12, 2003, at 1 (hereafter "Keisler statement").

[83] Id.

[84] Id. at 2, 4.

[85] April 12, 2005 letter from William E. Moschella, Assistant Attorney General, to The Honorable Susan M. Collins, chairman of the Senate Committee on Homeland Security and Governmental Affairs, at 1 ("a legal shield for unsatisfactory employees"); March 13, 2007 letter from Richard A. Hertling, Acting Assistant Attorney General, to The Honorable Henry A. Waxman, chairman of the House Committee on Oversight and Government Reform, at 1 ("a legal shield for unsatisfactory employees").

Department conclude that the only likely beneficiaries of new legislation on national security whistleblowers would be malcontents and irresponsible employees who should not be in the Federal Government and would manipulate any available procedure to keep their jobs? Yet Justice Department testimony confidently predicts that the proposed bill "would simply increase the number of frivolous claims of whistleblower reprisal."[86] Such claims are too extreme, one-sided, and unsubstantiated to be taken seriously.

Similarly, the testimony refers to unnamed studies that "demonstrate that one of the most important factors impacting upon employee morale is the existence of poorly performing employees and the difficulty that managers face in addressing these problems."[87] One wonders how "poorly performing employees" are able to work in agencies that have highly classified projects and are perhaps given security clearances. On what possible grounds does the Justice Department base these generalizations?

Constitutional Objections

The Justice Department testimony in 2003 also identified what it considered to be constitutional defects in pending whistleblower legislation. Yet these objections invariably assume that the President has a superior status over Congress in matters involving national security and access to classified documents. For example, the testimony "strongly opposed" proposals to authorize the MSPB and the courts "to review any determinations relating to a security clearance — a prerogative left firmly within the Executive branch's discretion." Decisions regarding security clearances "are inherently discretionary and are best left to the security specialists rather than non-expert bodies such as the MSPB and the courts." Relying on *Egan*, the testimony claimed that the President's "exclusive power to make security clearance determinations is based on his constitutional role as Commander-in-Chief."[88] Justice Department communications to Congress after 2003, regarding national security whistleblower legislation, make similar errors in analyzing *Egan*.[89]

As explained above, *Egan* was solely a dispute between two agencies within the executive branch and had nothing to do with congressional access to classified information. Whatever discretion a President has under Article II or the Commander-in-Chief Clause can depend on legislation passed by Congress. Yet the Keisler testimony in 2003, repeated by subsequent Justice Department letters, objected to pending legislation on the ground that it "interferes with the Executive Branch's constitutional responsibility

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[86] Keisler statement, at 5.

[87] Id. at 8.

[88] Id. at 10.

[89] E.g., April 12, 2005 Moschella letter, *supra* note 85, at 3-4, 5-6; the August 22, 2006 Moschella letter, *supra* note 68, at 2, 6; March 13, 2007 Hertling letter, *supra* note 85, at 1, 3; December 17, 2007 letter from Attorney General Michael B. Mukasey to The Honorable Nancy Pelosi, Speaker of the House of Representatives, at 2, 3, 5.

to control and protect information relating to national security."[90] Notice that Congress, according to this analysis, is subordinate not only to the President but to the Executive Branch. No citations are offered to defend this theory and no reliable citations are available. Later, the Keisler testimony claims that the proposed legislation was "troubling because it intrudes upon the President's constitutional power to control the flow of classified information."[91] Implied in this statement is that the President has exclusive power over that flow, including to Members of Congress and their committees and staff.

That impression is reinforced by a Justice Department letter of August 22, 2006, which objected that pending national security whistleblower legislation "constitutes an unconstitutional interference with the President's constitutional responsibilities respecting national security and foreign affairs. Although the designated individuals might have appropriate clearances to receive the classified information, it is the President's prerogative to determine who has the need to know this information."[92] Under that interpretation, even though all Members of Congress have security clearances and many congressional staff are similarly cleared, the President could determine that lawmakers and staffers have no need to know. Such a reading of the Constitution would subordinate Congress to presidential judgments, allowing the executive branch to block information to conceal not only serious misconduct but illegal and unconstitutional actions. The CIA whistleblower statute of 1998 specifically stated that Congress "as a co-equal branch of Government is empowered by the Constitution to serve as a check on the executive branch; in that capacity, it has a 'need to know' of allegations of wrongdoing within the executive branch, including allegations of wrongdoing in the Intelligence Community."[93]

Conclusions

Statements from the executive branch offer both policy and constitutional objections to pending national security whistleblower legislation. The objections are based in large part on misinterpretations of key court decisions and a misconception about the relative roles of the President and Congress in national security affairs. Congress has a constitutional need to have access to national security information and should not be satisfied with what the executive branch, on occasion, decides to share with the lawmakers and their staff. Access is needed to preserve Congress as a coequal and separate branch and to protect its capacity to exercise the checks and balances that are vital to individual liberties and freedoms. Congress has the constitutional authority to devise procedures that will assure access not only to information voluntarily given by the President and his department heads but information made available by agency employees.

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[90] Keisler statement, at 12-13.

[91] Id. at 19.

[92] August 22, 2006 Moschella letter, *supra* note 68, at 3.

[93] 112 Stat. 2413, § 701(b)(3) (1998) (Intelligence Community Whistleblower Protection Act).

Chairman TOWNS. Mr. Turner.

STATEMENT OF ROBERT F. TURNER

Mr. TURNER. Thank you, Mr. Chairman and members of the committee. I am pleased and honored to be invited to share with you my views on H.R. 1507.

I was just invited 2 days ago and was given a newspaper article about the bill, and so my remarks are focused entirely upon section 10, the National Security Whistleblowers Rights Provision. And I would ask permission both to submit my statement for the record and also to revise it to reflect the fact that the bill covers a great deal more than this, and I do not object—I do not take a position on the other provisions of the bill. That is not my area of expertise.

Chairman TOWNS. Without objection, so ordered.

Mr. TURNER. As a matter of public policy, I think this is a truly horrible idea of passing a law authorizing low-level employees in national security agencies to at-will give classified information to Congress.

But on policy grounds we all can differ, and that is something you can decide for yourselves. But I would respectfully submit there is a bigger problem with the legislation that mandates its rejection irrespective of personal policy preference.

Each of you, before assuming office, took an oath to support the Constitution, the highest law in the Nation. And I believe this bill is flagrantly unconstitutional. I don't say that lightly.

I first became interested in these issues in 1966, when I had the privilege of attending a lecture in this area by the great Quincy Wright. I spent much of my professional life in recent decades studying, writing, and teaching about these issues. I wrote a 1,700-page doctoral dissertation on the issues and have written several books in the area. I worked on the issue for 5 years as a Senate staff member, later in the Pentagon, the White House, and the State Department, where I was the Acting Assistant Secretary For Legislative Affairs in 1984–85. I spent three terms as chairman of the American Bar Association's Standing Committee on Law and National Security. And, as you noted, in 1981, I cofounded the Nation's first think tank in this area, the Center for National Security Law.

My prepared statement, which was done very quickly but is about 20 single-spaced pages, includes more than 50 citations to the writings of George Washington, Thomas Jefferson, James Madison, Benjamin Franklin, John Jay, John Marshall, and others. It cites early legislation from the First Congress and judicial Presidents dating back to *Marbury* v. *Madison* in 1803, which I have to admit was dicta as well, but is nevertheless considered a fairly important case.

The clear message is that the Founding Fathers intentionally excluded Congress from having access to sensitive military, diplomatic, or intelligence secrets without the consent of the President.

In 1776, Ben Franklin and the rest of the Committee of Secret Correspondents of the Continental Congress unanimously agreed they could not share news of covert French assistance to the American Revolution because, "We find, by fatal experience, that Congress consists of too many Members to keep secrets."

By far the most important document in helping the American people understand the Constitution were the Federalist Papers. The official journal of the convention and Madison's lengthy notes were not published for decades. In Federalist No. 64, John Jay explained that "Important foreign intelligence sources would not be willing to confide their information to the Senate or Congress, but they would be willing to confide in the secrecy of the President"; and thus, he explained, that was why the Constitution had left, "the business of intelligence," to be managed solely by the President, "as prudence might suggest."

When Congress appropriated funds for foreign affairs and intelligence, year after year it asked the President to account specifically only for those expenditures from this fund as, "in his judgment may be made public."

In 1880, the legendary Henry Clay, Speaker of the House, declared that it would be improper for Congress to inquire into how the President spent money from his Secret Service account. Others echoed the point. No one voiced disagreement.

My prepared statement discusses a number of Supreme Court cases recognizing this power. The agreement of all three branches on this issue was so strong that, in 1957, the great Princeton constitutional scholar, Professor Edwin Corwin, who was the principal author of the massive congressional document on the Constitution annotated document, said, "So far as practice and weight of opinion can settle the meaning of the Constitution, it is today established that the President is final judge of what information he shall entrust to the Senate as to our relations with other governments."

I think I am missing page 4, but I think probably my time is up. I have another 30 seconds.

So these are very important issues. But your oath of office is also tremendously important. I hope you will look at my prepared testimony. Don't take my word for it. See the words of Jefferson and Madison.

Jefferson in one memo to President Washington in 1790 noted, "Congress was not intended to know the secrets of the executive branch."

I think the executive branch proposal for setting up some sort of machinery within the executive branch so that people who believe they have a grievance can have a fair hearing, that is not a problem as long as this is subject to the President's control.

But just as I don't believe that Congress can get involved in hearing ongoing cases before the Supreme Court and calling witnesses and then telling the Court how to decide them because that is a judicial function, I think it needs to be very careful in how far it goes in getting in the business of the executive branch for fear of usurping executive powers.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Turner follows:]

Protecting the Public from Waste, Fraud, and Abuse: By Violating the Constitution

Prepared Statement of
Prof. Robert F. Turner, SJD
Co-Founder and Associate Director
CENTER FOR NATIONAL SECURITY LAW
University of Virginia School of Law

before the

House Committee on Oversight and Government Reform

Thursday, May 14, 2009 • 10:00 AM
Rayburn House Office Building • Room 2154

MR. CHAIRMAN, it is an honor and a pleasure to appear before the Committee on Oversight and Government Reform this morning to discuss H.R. 1507, the "Whistleblower Protection Enhancement Act of 2009." Let me apologize for any typos or other errors you may find in my prepared statement, which I will submit for the record: since I received your invitation on Tuesday and I was already committed to preparing testimony on another topic for a Senate Judiciary subcommittee hearing that took place yesterday morning, my statement was of necessity prepared in some haste.

The purpose of H. 1507, as I understand it, is to extend to employees of the Intelligence Community protections already embodied in federal law for "whistleblowers" in other departments. Put differently, this is a proposed statute that would authorize employees of the Executive Branch to communicate classified national security information to members of several congressional committees irrespective of the views of their agency or departmental superiors or the President.

As a matter of public policy, I think this is a truly horrible idea that will materially undermine our national security, weaken our ability to obtain sensitive information from intelligence services in other nations, probably get a lot of innocent Americans killed, and conceivably endanger the liberty of all Americans. That is to say, on policy grounds I think this is a *very* bad idea. But others will disagree, and you may each draw your own conclusions about the desirability of this legislation as a matter of sound public policy.

I would respectfully submit that there is another problem with this legislation that mandates its rejection irrespective of your personal policy preferences. Each of you, before assuming office, took an Oath to support the Constitution[1] – the highest law in this Nation. **This bill is flagrantly *unconstitutional.***

I say the bill is unconstitutional with great confidence, having spent more than four decades studying, teaching, and writing about the separation of constitutional powers in the national security realm. I addressed these issues while serving as national security adviser to a member of the Senate Foreign Relations Committee more than three decades ago, and I wrote a 250 page-legal/historical memorandum while a lawyer in the White House more than twenty-five years ago entitled: "Congress, the Constitution, and Foreign Affairs: An Inquiry into the Separation of Powers, with Special Emphasis on the Control of Intelligence Activities."[2] My 1700-page doctoral dissertation was on "National Security and the Constitution" and had a special emphasis on intelligence issues. It included more than 3,000 footnotes – mostly to primary sources. None of us has the time to go through those lengthy writings right now, but please allow me to mention a few of the reasons for my conclusion that this bill is unconstitutional.

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[1] U.S. CONST., Art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .").

[2] Robert F. Turner, Congress, the Constitution, and Foreign Affairs: An Inquiry into the Separation of Powers, with Special Emphasis on the Control of Intelligence Activities (1984) (unpublished manuscript), (on file with the author), *available at* http://www.virginia.edu/cnsl/pdf/Turner-Cong.Constitution&ForeignAffairs.pdf.

The Framers Intentionally Excluded Congress From "The Business of Intelligence" Because It Could Not Keep Secrets

Put simply, the framers of our Constitution understood that Congress could not be trusted to keep secrets. Indeed, as early as 1776, when France agreed to provide covert assistance to the new American Revolution, Benjamin Franklin and the other four members of the Committee of Secret Correspondence agreed *unanimously* that they could not inform the Continental Congress because, "We find by fatal experience that Congress consists of too many members to keep secrets."[3] I testified at some length on this issue fifteen years ago before the House Permanent Select Committee on Intelligence.[4]

Having served as Secretary of State for Foreign Affairs and later President of the Continental Congress, and having been a key negotiator of the 1782 peace treaty with Great Britain, John Jay was America's most experienced diplomat and had first-hand experience with the problem of congressional "leaks."[5] He wrote at one point: "Congress never could keep any matter strictly confidential; someone always babbled."[6] Jay was offered the position of Secretary of Foreign Affairs (later re-designated "Secretary of State") by President Washington, but preferred instead to serve as America's first Chief Justice – a role he had earlier filled in New York.

There are some today who assume that issues of "secrecy" and the need to protect "sources and methods" of foreign intelligence are relatively modern concerns – perhaps traceable back to the presidencies of Richard Nixon, Ronald Reagan, or George W. Bush. But, in reality, the Framers were well aware of the difficulty the new nation would have in acquiring foreign intelligence information unless our government could keep secrets. As Jay explained in *Federalist* No. 64:

> There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. The convention have done will therefore in so disposing of the power of making treaties, that although *the president* must in forming them act by the advice and consent of the senate, yet he *will be able to manage the business of intelligence in such manner as prudence may suggest.*[7]

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[3] *Verbal Statement of Thomas Story to the Committee, in* 2 PAUL FORCE, AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE NORTH AMERICAN COLONIES 819 (Fifth Series 1837-53).

[4] Secret Funding and the "Statement and Account" Clause: Constitutional and Policy Implications of Public Disclosure of an Aggregate Budget for Intelligence and Intelligence-Related Activities: Hearing Before the H. Comm. on Intelligence, 103d Cong. (1994) (statement of Robert F. Turner), *available at* http://www.fas.org/irp/congress/1994_hr/turner.htm .

[5] *See, e.g., id.*

[6] HENRY MERRITT WRISTON, EXECUTIVE AGENTS IN AMERICAN FOREIGN RELATIONS 23 (1929).

[7] FEDERALIST No. 64, at 434-35 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).

That the First Congress shared this understanding is made apparent by reading Volume One of *U.S. Statutes at Large*. Despite the clear requirements of Article I, Section 9 of the Constitution, requiring that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time," when the First Session of the First Congress appropriated money for foreign affairs it provided:

> [T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify, and cause a regular statement and account thereof to be laid before Congress annually . . . .[8]

This boilerplate language was repeated for many years in subsequent statutes. Indeed, the consistent early practice under our Constitution was captured well by President Jefferson in a February 19, 1804, letter to Treasury Secretary Albert Gallatin:

> The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . . The executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties. . . . Under . . . two standing provisions there is annually a sum appropriated for the expenses of intercourse with foreign nations. The *purposes* of the appropriation being expressed by the *law*, in terms as general as the *duties* are by the *Constitution*, the application of the money is left as much to the discretion of the Executive, as the performance of the duties . . . . ***From the origin of the present government to this day . . . . it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.***[9]

Origins of "Executive Privilege" Over National Security Documents

The issue of the President's authority to deny classified information to Congress dates back to 1792, when the House of Representatives instructed Secretary of War Henry Knox to turn over documents related to a failed military expedition against the Miami Indians by Major General Arthur St. Clair. As Mark Rozell writes:

> Washington convened his cabinet to determine how to respond to this first- ever request for presidential materials related to national security by a congressional committee. The President wanted to discuss whether any harm would result from public disclosure of the

[8] 1 Stat. 129 (1790).
[9] 11 WRITINGS OF THOMAS JEFFERSON 5, 9, 10 (Mem. Ed. 1903) (bold emphasis added).

> information and, most pertinently, whether he could rightfully refuse to submit documents to Congress.[10]

Thomas Jefferson attended this cabinet meeting with Washington, Treasury Secretary Alexander Hamilton, Knox, and Attorney General Edmund Randolph. Jefferson later wrote that:

> We had all considered, and were of one mind, first, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently we're to exercise a discretion. Fourth, that neither the committees nor House has a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.[11]

Rozell continues:

> Washington eventually determined that public disclosure of the information would not harm the national interest and that such disclosure was further necessary to vindicate General St. Clair. Although Washington chose to negotiate with Congress over the investigating committee's request and to turn over relevant documents to Congress, his administration had taken an affirmative position on the right of the Executive Branch to withhold information [from Congress].[12]

This position was unanimous, and was reiterated during the controversy over whether Executive Branch should cooperate with a Senate motion "requesting" from President Washington correspondence "between the Minister of the United States at the Republic of France [Gouverneur Morris], and said Republic, and between said Minister and the Office of Secretary of State."[13] Washington once again sought the advice of his cabinet:

> General Knox is of the opinion, that no part of the correspondence should be sent to the Senate. Colonel Hamilton, that the correct mode of proceeding is to do what General Knox advises; but the principle is safe, by excepting such parts as the president may choose to withhold. Mr. Randolph, that all correspondence proper, from its nature, to be communicated to the Senate, should be sent; but that what the president thinks is improper, should not be sent.[14]

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[10] MARK ROZELL, EXECUTIVE PRIVILEGE 33 (1994).
[11] 1 WRITINGS OF THOMAS JEFFERSON 189, 190. (Paul Leicester Ford ed., Fed. Ed. 1905).
[12] ROZELL, *supra* note 10, at 33.
[13] *Id.* at 34.
[14] *Id* (citation omitted).

Attorney General William Bradford, who was not present at the meeting, wrote that "it is the duty of the Executive to withhold such parts of the said correspondence as in the judgment of the Executive shall be deemed unsafe and improper to be disclosed."[15] Having sought the input of his cabinet, the President made his decision. As Rozell writes:

> On February 16, 1794, Washington responded as follows to the Senate's request: "After an examination of [the correspondence], I directed copies and translations to be made; except in those particulars, in my judgment, for public considerations, ought not to be communicated. These copies and translations are now transmitted to the Senate; but the nature of them manifest the propriety of their being received as confidential."
>
> Washington allowed the Senate to examine some parts of the correspondence, subject to his approval. He believed that information damaging to the "public interest" could constitutionally be withheld from Congress. The Senate never challenged the President's authority to withhold the information.[16]

Two years later, in 1796, President Washington not only reserved the right to withhold national security information from Congress but exercised it when the "House passed a resolution requesting from Washington information concerning his instructions to the U.S. minister to Britain regarding the treaty negotiations" of the controversial Jay Treaty, which the Senate had consented to ratify by the narrowest of margins the previous year.[17] Rozell writes that the "resolution raised the issue of the House's proper role in the treaty-making process. Washington refused to comply with the House request and explained his reasons for so deciding in a message to the House of Representatives":[18]

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy, and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic, for this might have a pernicious influence on future negotiations or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a

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[15] *Id.*
[16] *Id.* at 34-35.
[17] *Id.* at 35.
[18] *Id.*

> foreign power would be to establish a dangerous precedent."[19]

In conclusion, Washington reasoned that "the boundaries fixed by the Constitution between the different departments should be preserved," declaring "a just regard to the Constitution and to the duty of my office . . . forbids a compliance with your request."[20]

During this debate, Representative James Madison – often referred to as the "Father of our Constitution" – argued that each Department was to judge for itself what documents to share with the other. Only a single member of the House argued the Congress had an absolute right to Executive documents—based upon its power of impeachment. However, several members argued that had the dispute actually involved a possible impeachable offense, such a right to evidence might exist.

Some modern students of Executive Privilege point to the 1974 Watergate case, *United States v. Nixon*, as evidence that traditional concepts of Executive Privilege have been narrowed. But in *Nixon* the Supreme Court *repeatedly* distinguished its holding from a setting involving national security secrets, emphasizing that the President did "not place his claim of privilege on the ground that they are military or diplomatic secrets."[21] The *Nixon* Court affirmed that the doctrine of Executive Privilege was "constitutionally based" and noted that "The President's need for complete candor and objectivity from advisers calls for great deference from the courts."[22] But where issues of national security are not involved, the privilege is not absolute and courts must *balance* the competing claims in the interest of justice. Nothing the Court said in *Nixon* called into question its earlier decision in *Reynolds* that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.[23]

The Grant of "Executive" Power to the President

Much of our modern difficulty results from a failure to study history, and to understand that when the Founding Fathers wrote in Article 2, Section 1, of the Constitution that the "executive Power" of the new nation "shall be vested in a President of the United States of America," they understood that they were giving their new leader the general management of the nation's foreign relations. Thus, in a memorandum to President Washington dated April 24, 1790, Secretary of State Thomas Jefferson reasoned:

> The Constitution . . . . has declared that "the Executive powers shall be bested in the President," submitting only special articles of it to a negative by the Senate . . . .

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[19] 1 MESSAGES AND PAPERS OF THE PRESIDENTS 194.
[20] ROZELL, *supra* note 10, at 35 (citation omitted).
[21] United States v. Nixon, 418 U.S. 683, 710 (1974).
[22] *Id.* at 706 n.36.
[23] United States v. Reynolds, 345 U.S. 1, 7-8 (1952) (emphasis added).

> The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly. . . .
>
> The Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive department. It was not intended that these should be communicated to them . . . .[24]

It is noteworthy that in his initial draft of this memo, Jefferson wrote that the Senate was not supposed to be acquainted with the "secrets" of the Executive branch.[25]

Three days later, Washington recorded in his diary that he had spoken with Representative James Madison and Chief Justice John Jay about Jefferson's memo, and both agreed that the Senate had "no Constitutional right to interfere" with the business of diplomacy save for the specific roles set forth in the Constitution, "all the rest being Executive and vested in the President by the Constitution."[26] (Madison had already recognized the importance of the grant of executive power during a House debate the previous year, while Jefferson was still representing the new nation in Paris.)

In 1793, Alexander Hamilton wrote that "[t]he general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument."[27] From this, Hamilton concluded that "as the participation of the Senate in the making of Treaties, and the power of the Legislature to declare war are exceptions out of the general 'Executive Power' vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution."[28]

For those who might wonder where such interpretations of "executive" power came from, the answer is apparent from a reading of the scholars whose writings most influenced the Framers. In his *Second Treatise on Civil Government*—described by Jefferson as being "perfect as far as it goes"[29] —John Locke coined the term "federative" power to describe the "the management of the *security* and *interest of the publick without*, with all those that it may receive benefit or damage from"; he argued that, of necessity, this power needed to be entrusted to the Executive. Locke reasoned:

> And though this *federative power* in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive Laws, than [by] the Executive;

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[24] 16 PAPERS OF THOMAS JEFFERSON 378-79 (Julian P. Boyd ed., 1961) (emphasis in original).
[25] *Id.* at 382 n.8.
[26] 4 DIARIES OF GEORGE WASHINGTON 122 (John C. Fitzpatrick ed., 1925).
[27] 15 PAPERS OF ALEXANDER HAMILTON 42 (Harold C. Syrett ed., 1969).
[28] *Id.*
[29] 16 PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 449.

> and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good. . . . [W]hat is to be done in reference to Foreigners, depending much upon their actions, and the variations of designs and interest, must be left in great part to the Prudence of those who have this Power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.[30]

In *Federalist* No. 64, John Jay virtually paraphrased Locke's argument when he explained why the new American president would be given important powers that would not be controlled by Congress:

> They who have turned their attention to the affairs of men, must have perceived that there are tides in them. Tides, very irregular in their duration, strength and direction, and seldom found to run twice exactly in the same manner or measures. To discern and to profit by these tides in national affairs, is the business of those who preside over them; and they who have had much experience on this head inform us, that there frequently are occasions when days, nay even when hours are precious. The loss of a battle, the death of a Prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either, should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of secrecy and dispatch, that the Constitution would have been inexcusably defective if no attention had been paid to those objects.[31]

Even before mentioning the business of executing laws enacted by the legislature, Montesquieu–whom James Madison in *Federalist* No. 47 described as the celebrated authority "who is always consulted and cited" on issues of separation of powers—described the "executive" power as "dependent on the law of nations" by which the executive magistrate "makes peace or war, sends or receives embassies, establishes the public security, and provides against invasion."[32] The management of foreign intercourse was also seen as "executive" by others who were widely read by the Framers, including Adam Smith[33] and William Blackstone—who in the first volume of his *Commentaries on the Laws of England* wrote that, "[w]ith regard to foreign concerns, the king is the delegate or representative of his people. . . . What is done by the royal authority, with regard to foreign powers, is the act of the whole nation . . . ."[34]

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[30] JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 147 (P. Laslett ed., rev. ed. 1963) (emphasis in original).
[31] FEDERALIST No. 64 at 435-36 (John Jay) (Jacob E. Cooke ed., 1961) (emphasis added).
[32] 1 MONTESQUIEU, SPIRIT OF THE LAWS 151 (Thomas Nugent trans., rev. ed. 1900).
[33] ADAM SMITH, LECTURES ON JURISPRUDENCE 204-09 (1978).
[34] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 245 (1765).

While it is common today to teach that the Framers sought to reject strong presidential power over foreign affairs, this is mistaken. To be sure, there are some very anti-Executive statements in the Records of the Federal Convention; but most of those statements were made on June 1, when the convention had just begun. In the months that followed, opinions changed. After noting the tendency of most of the state legislatures to usurp the power of the governors, Dr. Charles Thach in his classic 1922 study, *The Creation of the Presidency*, explained:

> State experience thus contributed, nothing more strongly, to discredit the whole idea of the sovereign legislature, to bring home the real meaning of limited government and coordinate powers. *The idea, more than once utilized as the basis of the explanation of Article II of the Constitution, that the jealousy of kingship was a controlling force in the Federal Convention, is far, very far, from the truth.* The majority of the delegates brought with them no far-reaching distrust of executive power, but rather a sobering consciousness that, if their new plan should succeed, it was necessary for them to put forth their best efforts to secure a strong, albeit safe, national executive.[35]

This problem of "omnipotent" state legislatures – and the tyranny they begat – was described by Thomas Jefferson in his 1782 *Notes on the State of Virginia*:

> All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one. . . . An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason that convention, which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. But no barrier was provided between these several powers. The judiciary and executive members were left dependant on the legislative, for their subsistence in office, and some of them for their continuance in it. If therefore the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual . . . .
>
> The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust

[35] CHARLES THACH, THE CREATION OF THE PRESIDENCY 1775-1789, at 52 (1922).

> to drawing his teeth and talons after he shall have entered. [36]

Eleven days after the new Constitution went into effect, Jefferson wrote to Madison: "The executive, in our governments is not the sole, it is scarcely the principal object of my jealousy. The *tyranny of the legislatures* is the most formidable dread at present . . . ."[37]

As a Federalist representative in the House of Representatives in 1800, John Marshall observed that under our Constitution the President was "the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . . He possesses the whole *Executive power*." Paraphrasing the words of Blackstone, the future chief justice added: *In this respect, the President expresses constitutionally the will of the nation* . . . ."[38]

As the nation's chief justice three years later, Marshall wrote in what is widely regarded as the most famous Supreme Court decision of all, *Marbury v. Madison,* that:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [A]nd *whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.* The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, *the decision of the executive is conclusive.*[39]

If there is any doubt Marshall was talking primarily about the President's exclusive constitutional control over the nation's external intercourse, the next lines in this landmark Supreme Court opinion should dispel them:

> The application of this remark will be perceived by adverting to the act of [C]ongress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. . . . The acts of such an officer, as an officer, can never be examinable by the courts.[40]

For further evidence that certain presidential powers were not to be "checked" by the other branches, we need look only at the most famous of all foreign affairs cases, *United States* v. *Curtiss-Wright Export Corp.,* where the Supreme Court said:

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[36] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 245-46 (1782), *available at*: http://etext.virginia.edu/etcbin/toccer-new2?id=JefVirg.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=all.

[37] 16 PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 659, 661.

[38] 10 ANNALS OF CONG. 613-15 (1800) (emphasis added).

[39] Marbury v. Madison, 5 U.S. [1 Cranch] 137, 165-66 (1803).

[40] *Id.* at 166.

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. *Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.*[41]

Of particular relevance to the constitutionality of H.R. 1507, the "Whistleblower Protection Enhancement Act of 2009," Justice Sutherland, speaking for the Court, went on to address the issue of executive privilege vis-à-vis documents in the foreign affairs realm (which at its core includes sensitive intelligence secrets):

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus *the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations* – a power which does not require as a basis for its exercise an act of Congress but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment – perhaps serious embarrassment – is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty – a refusal the wisdom of which was recognized by the House itself, and has never since been doubted. . . .
>
> The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution directs the

[41] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

> official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information "if not incompatible with the public interest." A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.[42]

This deference to presidential discretion in foreign affairs was recognized by both the courts and Congress well into the second half of the twentieth century. In the 1953 case of *United States v. Reynolds*, the Supreme Court discussed the Executive privilege to protect national security secrets, noting that: "Judicial Experience with the privilege which protects military and state secrets has been limited in this country . . . ."[43] But the Court recognized an absolute privilege for military secrets, explaining:

> In each case, the showing of necessity [of disclosure] which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but *even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake*."[44]

Obviously, intelligence programs designed to intercept communications from our nation's enemies during a period of authorized war are valid "military secrets." Neither the courts nor the Congress were to have access to them without leave of the President.

Four years after the *Reynolds* decision, one of the nation's leading constitutional scholars of his era, Professor Edward S. Corwin, wrote in his classic volume, *The President: Office and Powers*:

> So far as practice and weight of opinion can settle the meaning of the Constitution, it is today established that the President alone has the power to negotiate treaties with foreign governments; that he is free to ignore any advice tendered him by the Senate as to a negotiation; and that *he is final judge of what information he shall entrust to the Senate as to our relations with other governments*.[45]

Mr. Chairman, the understanding that the President is the "sole organ" of our government for what John Jay called "the business of intelligence" – the most sensitive element of diplomacy and war – was unchallenged and embraced by all three branches from the days of George Washington until the Vietnam War. This was not an unsettled issue, and the basis of this authority was understood by all to be a grant of constitutional power that could not be taken away by a mere statute.

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[42] *Id.* at 319-21.
[43] *United States v. Reynolds*, 345 U.S. 1, 7 (1953).
[44] *Id.* at 11.
[45] EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 211-12 (4th rev. ed. 1957) (emphasis added).

Origins of Congressional Usurpation of Presidential Power Over Intelligence

As far as I have been able to determine, the campaign to have Congress usurp presidential authority over foreign intelligence first came from a radical leftist named Richard J. Barnet, who was instrumental in the founding of the Institute for Policy Studies. This is a group that at one point assisted the notorious traitor and cashiered CIA spy Phillip Agee, who made a career of working with the Cuban DGI (intelligence service) and the Soviet KGB to publicize the name of western intelligence operatives. After several U.S. and allied intelligence officers were murdered – including Richard Welch, our CIA station chief in Athens – Congress enacted the Intelligence Identities Protection Act of 1982,[46] making disclosure of such information a federal felony.

In a book entitled *The Economy of Death*, Barnet argued to his radical followers:

> Congressmen should demand far greater access to information than they now have, and should regard it as their responsibility to pass information on to their constituents. Secrecy should be constantly challenged in Congress, for it is used more often to protect reputations than vital interests. There should be a standing Congressional committee to review the classification system and to monitor secret activities of the government such as the CIA. Unlike the present CIA review committee, there should be a rotating membership.[47]

Barnet is dead, and I would be surprised if anyone associated with H.R. 1507 has ever heard his name or has any motive beyond a sincere desire to protect whistleblowers and gain access to national security secrets they assume they should have access to as representatives of the American people. But I can only imagine the joy with which Barnet, Agee, and their ilk would greet this legislation. How better to neutralize the CIA and other elements of the Intelligence Community than by permitting any disgruntled employee to gleefully expose our most sensitive national security secrets to the sunshine.

If you enact this bill into law, you will earn the lasting admiration of our nation's enemies. In the process, you will no doubt also receive the approval of a considerable number of very honorable and patriotic Americans – some of them no doubt testifying in favor of this legislation this morning – who are wary of government secrets and simply fail to understand that control over such information is vested by our Constitution exclusively in the President. More importantly, if you enact this legislation you will betray the Oath of Office you each took to support our Constitution. That is your greatest duty to the Nation and to your constituents.

I have not the slightest doubt that supporters of this legislation will be able to bring before you a long line of distinguished academics who will confidently assure you this bill is constitutional. They will be every bit as honorable as I am, and some no doubt far

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[46] 50 U.S.C. § 421–26 (1982).
[47] RICHARD J. BARNET, THE ECONOMY OF DEATH 178-79 (1969).

more intelligent. And they will also likely be oblivious to the historical details I have briefly summarized in this statement.

In the end, the decision is yours. The Founding Fathers wisely entrusted legislative judgments to the two legislative chambers, providing in Article I, Section 6, that your legislative acts "shall not be questioned in any other Place."[48] To paraphrase Chief Justice Marshall's comment[49] on presidential discretion over foreign affairs in *Marbury*, for these decisions you are accountable only to your constituents in your political character – which is to say, if they conclude you have undermined our national security, they may well vote for a different candidate in the next election – and to your own conscience.

Sadly, I fear there will be some who will take that gamble and who don't take their Oath of Office very seriously. How else can we explain the failure of the Legislative Branch to address some of the most flagrant abuses of our Constitution? Twenty-one years ago this month, a distinguished group of senators – including Sam Nunn, John Warner, Robert Byrd, and George Mitchell – took to the Senate floor to denounce the 1973 War Powers Resolution. During that colloquy Senator Mitchell – soon to become Majority Leader and hardly an apologist for Executive power – remarked:

> Although portrayed as an effort "to fulfill" – not to alter, amend or adjust – "the intent of the framers of the U.S. Constitution," the War Powers Resolution actually expands Congress' authority beyond the power to declare war to the power to limit troop deployment in situations short of war....
>
> By enabling Congress to require – by its own inaction – the withdrawal of troops from a situation of hostilities, the resolution unduly restricts the authority granted by the Constitution to the President as Commander in Chief.
>
> ...[T]he War Powers resolution does not work, because it oversteps the constitutional bounds on Congress' power to control the Armed Forces in situations short of war and because it potentially undermines our ability to effectively defend our national interests.
>
> The War Powers Resolution therefore threatens not only the delicate balance of power established by the Constitution. It potentially undermines America's ability to effectively defend our national security.[50]

Just last July, the bipartisan National War Powers Commission – that included among its distinguished members your former colleague Lee Hamilton, who chaired both the House Permanent Select Committee on Intelligence and the Foreign Affairs Committee –

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[48] U.S. CONST., Art. I, § 6.
[49] *See* discussion, *supra* page 12.
[50] This statement appears in the *Congressional Record* of May 19, 1988, on pages 6177-78.

unanimously concluded that the War Powers Resolution is "unconstitutional" and ought to be repealed.[51] Yet I have detected little interest in either branch to terminate this unseemly usurpation of the constitutional powers of the President.

We are not just talking about constitutional technicalities here, but about unlawful conduct by the Legislative branch that led directly to the slaughter of 241 sleeping Marines in Beirut on October 23, 1983 – four Marines fewer than died on the most costly day of the Vietnam War. It didn't have to happen, but partisan Democrats – and the partisan nature of the debate was noted repeatedly by the *Washington Post* and other papers – thought they could improve their prospects for the 1984 elections by attacking President Reagan's efforts to bring peace in an important part of the Middle East. Working in cooperation with the British, French, and Italians, the President deployed a contingent of Marines to Lebanon as a "presence" force to try to keep the country sufficiently stable so that the rival factions could attempt to negotiate peace. When the Senate voted to extend the deployment (which had nothing to do with the power of Congress to "declare War") by 18 months, only two Democrats supported the President. And it was made very clear that if there were any further American casualties in Beirut, Congress could reconsider the vote at any time. Having unwittingly placed a bounty on the lives of our Marines, Congress set the stage for the tragedy that soon followed. Indeed, shortly before the deadly attack we intercepted a message between two radical Muslim groups that said: "If we kill 15 Marines, the rest will leave."[52]

As you may know, in 1998 Osama bin Laden told an ABC News reporter in Afghanistan that the American pullout from Beirut following the October 23 bombing demonstrated that Americans are unwilling to accept casualties. We can only speculate whether that was a major factor in his decision to attack us on 9/11 – but it reasonably follows. I would add that congressional constraints on the Intelligence Community – combined with the harm done by the Pike and Church Committee hearings on alleged "intelligence abuses" in 1975-76 – clearly weakened our ability to detect and prevent the 9/11 attacks.

I was a Senate staff member at the time of the Church Committee hearings, and I sat through some of them. I remember a lot of talk about CIA "assassinations," but, if I had not taken the time to read the lengthy volume on that topic in their final report, I would not know that the Committee could not find a single instance in which the CIA had ever "assassinated" anyone. Indeed, both Directors of Central Intelligence Richard Helms and William Colby had on their own initiative issued CIA directives prohibiting any agency involvement with "assassination" years before the Church Committee began its work. One recent study of hundreds of newly de-classified CIA "family jewels" documents that was published in the *Indiana Law Journal* concluded that but a single program – the testing of LSD on unaware subjects – was clearly illegal at the time of the Church hearings, and that program had been terminated during the Kennedy Administration.[53]

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[51] The Commission's report can be found on line at: http://millercenter.org/policy/commissions/warpowers

[52] For a more detailed discussion of this issue, see ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 138-44 (1991).

[53] Daniel L. Pines, *The Central Intelligence Agency's "Family Jewels": Legal Then? Legal Now?*, 84 IND. L. J. 639 (2009).

While I'm on the topic of legislative lawbreaking, I can't fail to mention the legislative vetoes that still permeate the statute books more than twenty-five years after the Supreme Court declared them to be unconstitutional in *INS v. Chadha*.[54] This is an issue of special interest to me, because as a Senate staff member in 1976 – seven years before the Supreme Court struck down "legislative vetoes" as unconstitutional – I wrote a lengthy floor statement for Senator Griffin making the same point for the same reasons.[55]

One might have thought that the solemn obligations of their Oaths of Office would lead legislators to act quickly in the wake of the *Chadha* decision to identify and remove unconstitutional legislative vetoes from the statute books. But that hasn't happened. Disrespect for the law – in this case, the higher law of the Constitution – apparently breeds more disrespect for the law. For, rather than repealing the hundreds of legislative vetoes that were already on the statute books when *Chadha* was decided, Congress has since 1983 enacted more than 500 *new* unconstitutional legislative vetoes. Most of the hated "signing statements" issued by presidents since 1984 have involved flagrantly unconstitutional legislative vetoes – as was the case recently when President Obama found it necessary to issue his first signing statement.

The disrespect for the rule of law engendered by statutes like the War Powers Resolution has clearly led some members to attempt further usurpations of the constitutional powers of the President – as Madison and Jefferson feared more than two centuries ago.[56] The decision of how seriously you take your Oath of Office is not mine to make. You have asked for my expert testimony on the pending legislation, and I have tried hard to provide you not only with my opinions but also with some of the historical and judicial authority that has led me to conclude that H.R. 1597 is flagrantly unconstitutional. How you individually deal with this information is a decision each of you must make.

Mr. Chairman, this concludes my prepared statement. I will be delighted to take questions at the appropriate time.

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[54] 462 U.S. 919 (1983).

[55] The statement appears in the *Congressional Record* of June 11, 1976, from pages 17,643 to 17,646, *available at* http://www.virginia.edu/cnsl/pdf/Griffin-Congressional-Record_6-11-1976.pdf.

[56] *See* discussion, *supra* page 12.

Chairman TOWNS. Mr. Devine.

STATEMENT OF THOMAS DEVINE

Mr. DEVINE. Thank you. It's an honor to be here with my colleagues from the Make It Safe Coalition, a nonpartisan, transideological, good-government network whose mission is solidarity with whistleblowers. We're part of a growing movement. About 5 years ago, there used to be 20 groups that would join the sign-on letters for the Whistleblower Protection Act; 3 years ago it was 50; last year it was 112; last week it was 280. This morning, it's 292.

We're all committed to the pledge that President Obama campaigned on: Best practice, free speech whistleblower rights for all employees paid by the taxpayers, enforced by full access to court.

And we want to offer thanks to the Obama administration. This is the first time in 30 years working on this issue that the government has asked for our views before the executive made its decision. That is very refreshing, and we appreciate it. But we won't be settling for less than justice as the outcome as much as we're enjoying the process.

Mr. Chairman, this is the fourth time that Congress is trying to pass a law that was enacted unanimously the first three times. Very curious situation. What went wrong? Even for those who are covered, the Achilles heel is no mystery. From the beginning, it's been due process. From the start, the problem has been the administrative board, which is a whistleblower's only chance for a so-called day in court.

The Whistleblowers Protection Act was passed in 1989 because only four whistleblowers had won decisions on the merits in the 1980's. Well, guess what. It's deja vu all over again. We've only had three cases where they've won since the millennium, and only one under the current Chair Neil McPhie. In 30 years, there has never been a whistleblower who won a high-stakes—a case involving high-stakes whistleblowing with national consequences. Never.

Among all of the lawyers that I know, the National Capital Region—where the most significant jobs are—since 1979, a whistleblower has never won any case, significant or petty. The public is the ultimate loser.

Whistleblowers at the FAA tried to challenge the failure to inspect Southwest Airlines, and they were fired. What happened? Paralysis last summer in the airports.

A whistleblower at the VA was challenging breakdown in patient security. He was fired. The Board said, well, he doesn't have whistleblower rights because he was challenging mere negligence. Tell that to the millions of patients whose confidential records were lost last year.

There are very serious consequences, and the causes are no mystery either. The administrative judges have no judicial independence. They're not structured or having the resources to hear complex national cases. This policy is so engrained, their performance appraisals get lowered if they spend more than 120 days working on a case. They compensate by trivializing or avoiding the issues.

Something that, in the Senate Judiciary Committee, is a controversy over multimillion-dollar ghost procurement becomes at the

Merit Systems Protection Board whether someone was fired for blowing the whistle on drunken office Christmas parties.

Cases involving national consequences are delayed from 3 to 11 years, unlike the normal case of the Board, if there ever is a hearing. It is very clear: A bush-league forum will not provide justice for those challenging major league government breakdowns. My written testimony has many examples of this phenomenon.

I would like to spend the rest of my time answering the objections raised by people in the bureaucracy that the administration is trying to deal with.

The main objection that we have to this process is a question: Why is it that the only problem we have with whistleblowers having access to juries involves Federal employees challenging Federal breakdowns? There are 14 precedents where whistleblowers have jury trials, five laws passed in the last Congress. Federal employees are the only ones in the labor force without normal access to jury trials to enforce their rights. This is completely unacceptable.

We've been told that if they have normal rights, it will be flooding the courts. Based on extrapolating from the precedents, there will be about 1/30th new case per year for each judge to contend with.

We've been told it would be paralyzing. Managers would be intimidated by these new rights. They'll be afraid to impose accountability. Look at the facts. It flunks the reality test. Before the Whistleblower Protection Act was first passed, 175 performance or misconduct-based actions in the prior 3 years; 3 years after, 174. D.C. passed a Jury Trial Whistleblower Protection Act. The 5 years before it was passed, 220 accountability actions by managers; the 5 years after, 220.

It is time for the President, for any President, and for Congress to stop listening when bureaucratic managers cry wolf.

Mr. Chairman, it's not too late to turn on the lights in the bureaucracy. We don't have time for further delay. This law needs to be passed before stimulus spending gets fully underway. We hope Congress will act quickly.

Chairman TOWNS. Thank you very much for your testimony.

[The prepared statement of Mr. Devine follows:]

TESTIMONY OF THOMAS DEVINE,
GOVERNMENT ACCOUNTABILITY PROJECT

before the

HOUSE OVERSIGHT AND GOVERNMENT REFORM COMMITTEE

on

the Whistleblower Protection Enhancement Act

May 14, 2009

Thank you for inviting this testimony on legislation to put protection back in the Whistleblower Protection Act. If enacted, HR 1507 will set the global gold standard for accountability through transparency. Until now, the new millennium has been the Dark Ages – unprecedented levels of corruption, sustained by secrecy and enforced through repression. This legislation turns on the lights just in time. Already this year we have embarked on the largest spending program in government history through the stimulus. We are on the verge of landmark societal overhauls to prevent medical care disasters for America's families due to national health insurance, and to prevent environmental disasters for the whole planet from global warming. We have been shamed by torture and widespread domestic surveillance.

The President has promised the taxpayers will get their money's worth, and that never again will America betray the core values of freedom, and humanity. That commitment is a fantasy unless public servants have the freedom to bear witness, whether it is the freedom to warn of disasters before they happen, or to protest abuses of power that betray the public trust. Timely passage of genuine whistleblower rights also would be a signal that new Congressional leadership is serious about three basic taxpayer commitments that require best practices accountability checks and balances —1) getting our money's worth from unprecedented stimulus spending; 2) locking in checks and balances to keep honest the new markets created by health care and climate change laws; and 3) informed oversight so that the next time abuses of human rights abroad and freedom at home will end while they are the exception, instead of the rule after eight years of secrecy.

My name is Tom Devine, and I serve as legal director of the Government Accountability Project ("GAP"), a nonprofit, nonpartisan, public interest organization that assists whistleblowers, those employees who exercise free speech rights to challenge abuses of power that betray the public trust. GAP has led or been on the front lines of campaigns to enact or defend nearly all modern whistleblower laws passed by Congress, including the Whistleblower Protection Act of 1989 and 1994 amendments.*

Our work for corporate whistleblower protection rights includes those in the Sarbanes-Oxley law for some 40 millions workers in publicly-traded corporations, the 9/11 law for ground transportation employees, the defense authorization act for defense contractors, and the Consumer Product Safety Improvement Act for some 20 million workers connected with retail sales, the Energy Policy Act for the nuclear power and weapons industries and AIR 21 for airlines employees, among others.

We teamed up with professors from American University Law School to author a model whistleblower law approved by the Organization of American States (OAS) to implement at its Inter American Convention against Corruption. In 2004 we led the successful campaign for the United Nations to issue a whistleblower policy that protects public freedom of expression for the first time at Intergovernmental Organizations, and in 2007 analogous campaigns at the World Bank and African Development Bank. GAP has

* Thanks are due to Kasey Dunton and Sarah Goldmann, who helped with the research to prepare this testimony.

published numerous books, such as The Whistleblower's Survival Guide: Courage Without Martyrdom, and law review articles analyzing and monitoring the track records of whistleblower rights legislation. See "Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 Administrative Law Review, 531 (1999); Vaughn, Devine and Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 Geo. Wash. Intl. L. Rev. 857 (2003); *The Art of Anonymous* Activism (with Public Employees for Environmental Responsibility and the Project on government Oversight)(2002); and *Running the Gauntlet: The Campaign for Credible Corporate Whistleblower Rights. (2008).*

Over the last 30 years we have formally or informally helped over 5,000 whistleblowers to "commit the truth" and survive professionally while making a difference. This testimony shares and is illustrated by painful lessons we have learned from their experiences. We could not avoid gaining practical insight into which whistleblower systems are genuine reforms that work in practice, and which are illusory.

Along with the Project on Government Oversight, GAP also is a founding member of the Make it Safe Coalition, a non-partisan, trans-ideological network of 50 organizations whose members pursue a wide variety of missions that span defense, homeland security, medical care, natural disasters, scientific freedom, consumer hazards, and corruption in government contracting and procurement. We are united in the cause of protecting those in government who honor their duties to serve and warn the public.

Our coalition is just the tip of the iceberg for public support of whistleblowers. As of this morning, 286 NGO's, community organizations and corporations have signed a letter to President Obama and Congress to give those who defend the public the right to defend themselves through the same model as HR 1507 -- no loopholes, best practices free speech rights enforced through full access to court for all employees paid by the taxpayers. It is enclosed as Exhibit 1. The breadth of the support for HR 1507's approach is breathtaking – including good government organizations ranging from Center for American Progress, National Taxpayers Union and Common Cause, environmental groups from Council for a Livable World, Friends of the Earth and the Union of Concerned Scientists, conservative coalitions and organizations such as the Liberty Coalition, Competitive Enterprise Institute, American Conservative Defense Alliance and the American Policy Center, to unions and other national member based groups from American Federation of Government Employees and the National Treasury Employees Union, to the National Organization for Women.

Last June only 112 organizations had signed an analogous letter. Support for genuine reform will continue to expand steadily until whistleblowers have rights they can believe in. Just this week the Federal Law Enforcement Officers Association, and 14 of America's most celebrated, vindicated national security whistleblowers wrote to President Obama, asking him to keep his campaign pledge of full court access for all employees paid by the taxpayer. Their letters are enclosed as Exhibits 2 and 3, respectively.

MAKING A DIFFERENCE

There can be no credible debate about how much this law matters. Whistleblowers risk their professional survival to challenges abuses of power that betray the public trust. This is freedom of speech when it counts, unlike the freedoms akin to yelling at the referee in a sports stadium, or late night television satire of politicians and pundits. It not only encompasses the freedom to protest, but the freedom to warn, so that avoidable disasters can be prevented or minimized. It also encompasses the freedom to challenge conventional wisdom, such as outdated or politically-slanted scientific paradigms. In every context, they are those who keep society from being stagnant and are the pioneers for change.

Both for law enforcement and congressional oversight, whistleblowers represent the human factor that is the Achilles' heel of bureaucratic corruption. They also serve as the life blood for credible anti-corruption campaigns, which can degenerate into empty, lifeless magnets for cynicism without safe channels for those who bear witness.

Their importance for congressional oversight cannot be overemphasized, as demonstrated by this committee's January hearings on climate change censorship. Creating safe channels will determine whether Congress learns about only the tips, or uncovers the icebergs, in nearly every major investigation over the next two years.

Whistleblowers are poised to bear witness as the public's eyes and ears to learn the truth about issues vital to our families, our bank accounts, and our national security. Consider examples of what they've accomplished recently without any meaningful rights:

* FDA scientist Dr. David Graham successfully exposed the dangers of pain killers like Vioxx, which caused over 50,000 fatal heart attacks in the United States. The drug was finally withdrawn after his studies were confirmed. Today at the Energy and Commerce Committee three whistleblowers are testifying about government reliance on fraudulent data to approve Ketek, another high risk prescription drug.

* Climate change whistleblowers such as Rick Piltz of the White House Climate Change Science Program exposed how political appointees such as an oil industry lobbyist rewrote the research conclusions of America's top scientists. Scientists like NASA's Dr. James Hansen refused to cooperate with censorship of their warnings about global warming; namely that we have less than a decade to change business as usual, or Mother Nature will turn the world on its head. It appears the country has heard the whistleblowers' wake up call.

* Gary Aguirre exposed Securities and Exchange Commission cover-ups of vulnerability to massive corruption in hedge funds that could threaten a new wave of post-Enron financial victims.[1]

A host of national security whistleblowers, modern Paul Reveres, have made a record of systematic pre-9/11 warnings that the terrorists were coming and that we were not prepared. Tragically, they were systematically ignored. They keep warning: inside the bureaucracy, few lessons have been learned and America is little safer beyond appearances. They have paid a severe price. In addition to today's testimony from four national security whistleblowers, consider the experiences of six national security and public safety whistleblowers GAP has assisted over the last four years.

Frank Terreri was one of the first federal law enforcement officers to sign up for the Federal Air Marshal Service, out of a sense of patriotic duty after the September 11 tragedy. His experience illustrates the need for provisions in the legislation that codify protection against retaliatory investigations, as well as a remedy for the anti-gag statute. For over two years, he made recommendations to better meet post-9/11 aviation security demands. On behalf of 1,500 other air marshals, he suggested improvements to bizarre and ill-conceived operational procedures that compromised marshals' on-flight anonymity, such as a formal dress code that required them to wear a coat and tie even on flights to Florida or the Southwest. The procedures required undercover agents to display their security credentials in front of other passengers before boarding first, and always to sit in the same seats. Disregarding normal law enforcement practices, the agency had all the agents maintain their undercover locations in the same hotel chains, one of which then publicly advertised them as its "Employees of the month."

Instead of addressing Terreri's security concerns, air marshal managers attacked the messenger. First, they sent a team of supervisors to his home, took away his duty weapon and credentials, and placed him on indefinite administrative leave. Then headquarters initiated a series of at least four uninterrupted retaliatory investigations. At one point, Terreri was being investigated simultaneously for sending an alleged "improper email to a co-worker," for "improper use of business cards," association with an organization critical of the air marshal service, and for somehow "breaching security" by protesting the agency's own security breaches. All of these charges were eventually deemed "unfounded" by DHS investigators, but the air marshal service didn't bother to tell Terreri and didn't take him off of administrative "desk duty" until the day after the ACLU filed a law suit on his behalf.

Air Marshal Robert MacLean's experience demonstrates the ongoing, critical need to codify the anti-gag statute. He blew the whistle on an indefensible proposed cost saving measure from Headquarters that would have removed air marshal coverage on long-distance flights like those used by the 9/11 hijackers, *during* a hijacker alert. After unsuccessfully trying to challenge the policy change through his chain of command, Mr.

[1] Unless noted otherwise, all cases discussed concern current or former GAP clients who have consented to having their stories publicly shared. With the relevant whistleblower's consent, GAP will provide further information verifying the events in their cases upon request.

MacLean took his concerns to the media. An MSNBC news story led to the immediate rescission of the misguided policy. Unfortunately, three years later the agency fired Mr. MacLean, specifically because of his whistleblowing disclosure, without any prior warning or notice. In terminating Mr. MacLean, the TSA cited an "unauthorized disclosure of Sensitive Security Information." The alleged misconduct was entirely an *ex post facto* offense. There had been no markings or notice of its restricted status when Mr. McClean spoke out. This rationale violates the WPA and the anti-gag statute on its face. The agency, more intent on silencing dissent than following the law, hasn't backed off.

Another whistleblower's five-decade career in public service is in danger, because of his efforts to ensure that critical components on high performance Naval Aircraft are repaired according to military specifications. It illustrates why protection for carrying out job duties is essential. Mr. Richard Conrad, who served honorably in Vietnam and is now an electronic mechanic at the North Island Naval Aviation Depot, knew his unit could not guarantee the reliability or the safety of the parts they produced for F/A-18s because Depot management failed to provide them with the torque tools needed for proper repair and overhaul of certain components. The Secretary of the Navy formally substantiated Mr. Conrad's key allegations, and the Depot took some immediate, although incomplete, corrective action.

But nothing has been done to protect Mr. Conrad. In response to his disclosures, he was transferred to the night shift in a unit at the Depot that doesn't do any repairs at night. He has received an average of some 10 minutes work per eight hour shift for the last 14 months, and spends the majority of the time reading books – on the taxpayer's dime.

Former FAA manager Gabe Bruno challenged lax oversight of the newly-formed AirTran Airways, which was created after the tragic 1996 ValuJet accident that killed all 110 on board. His experience highlights the need to protect job duties, and to ban retaliatory investigations. He was determined not to repeat the mistakes that led to that tragedy, and raised his concerns repeatedly with supervisors. In response, they initiated a "security investigation" against him and demoted Mr. Bruno from his management position. The lengthy, slanderous investigation ultimately led to Mr. Bruno's termination after 26 years of outstanding government service with no prior disciplinary record.

The flying public was the loser. Following Mr. Bruno's demotion and reassignment, FAA Southern Region managers abruptly canceled a mechanic re-examination program that he had designed and implemented to assure properly qualified mechanics were working on commercial and cargo aircraft. The re-exam program was necessary, because the FAA-contracted "Designated Mechanic Examiner" was convicted on federal criminal charges and sent to prison for fraudulently certifying over 2,000 airline mechanics. Individuals from around the country, and the world, had sought out this FAA-financed "examiner" to pay a negotiated rate and receive an Airframe and Powerplant Certificate without proper testing. After the conviction, Mr. Bruno's follow-up re-exam program, which required a hands-on demonstration of competence, resulted in 75% of St. George-certified mechanics failing when subjected to honest tests. The

FAA's arbitrary cancellation of the program left over 1,000 mechanics with fraudulent credentials throughout the aviation system, including at major commercial airlines.

Mr. Bruno worked through the Office of Special Counsel to reinstitute his testing program, but after two years Special Counsel Scott Bloch endorsed a disingenuous FAA re-testing program that skips the hands-on, practical tests necessary to determine competence. The FAA's nearly-completed re-exam program consists of an oral and written test only. In effect, this decriminalizes the same scenario – incomplete testing – that previously had led to prison time for the contractor.

Six months after the decision that the FAA had properly resolved the public safety issue, Chalk's Ocean Airlines carrying 20 people crashed off the Florida coast. In 2007, Mr. Bruno disclosed to the Office of Special Counsel that the FAA does not have a system to check the certification or re-examination status of a mechanic who worked on an airplane that crashed because of mechanical problems. The Office of Special Counsel substantiated his disclosures shortly thereafter. Unfortunately, just a few months later, Continental Airlines feeder Colgan Air crashed in Buffalo, New York killing 50 people. The FAA still has not established a system to check the certification or re-examination status of mechanics who worked on that airplane. The FAA recently conceded that it does not know how many of these fraudulently certified mechanics are currently working at major commercial airlines, or even within the FAA.

Mr. Bruno also disclosed to the Special Counsel in 2007 that 33 foreign nationals with P.O. Boxes in the same city in Saudi Arabia and an individual with the same name as a 9/11 hijacker received mechanic certificates from the criminal enterprise during the time period that the 9/11 hijackers were learning how to fly planes into the Twin Towers. Mr. Bruno further disclosed that is no national security screening mechanism for mechanics who received these fraudulent certificates but have failed to complete the reexamination endorsed by Scott Bloch. The FAA's failure to provide the names of these individuals to national security intelligence agencies creates a security vulnerability that leaves the aviation industry open to terrorist activities. The Office of Special Counsel substantiated last month that his disclosures reveals a substantial likelihood that serious security and safety concerns persist in the management and operation of the certification and maintenance programs at the FAA. Mr. Bruno's experience illustrates that of members in a newly-formed, growing FAA Whistleblower Alliance.

National security whistleblower Mike Maxwell was forced to resign from his position as Director of the Office of Security and Investigations (internal affairs) for the US Citizenship and Immigration Services (USCIS) after the agency cut his salary by 25 percent, placed him under investigation, gagged him from communicating with congressional oversight offices, and threatened to remove his security clearance. His experience highlights five provisions of this reform – security clearance due process rights, classified disclosures to Congress, protection for carrying out job duties, the anti-gag statute and retaliatory investigations.

What had Mr. Maxwell done to spark this treatment? Quite simply, he had a job that required him to blow the whistle, often after investigating disclosures from other USCIS whistleblowers. In order to carry out his duties, he reported repeatedly to USCIS leadership about the security breakdowns within USCIS. For example, he had to handle a backlog of 2,771 complaints of alleged USCIS employee misconduct -- including 528 criminal allegations and allegations of foreign intelligence operatives working as USCIS contractors abroad -- with a staff of six investigators. He challenged agency leadership's refusal to permit investigations of political appointees, involving allegations as serious as espionage and links to identified terrorist operations. And, he challenged backlog-clearing measures at USCIS that forced adjudicators to make key immigration decisions, ranging from green cards to residency, without seeing law enforcement files from criminal and terrorist databases.

Another revealing case involves Air Force mechanic George Sarris. A senior civilian Air Force aircraft mechanic with 30 years experience, Mr. Sarris raised concerns about poor maintenance of two aircraft critical for national security – 1) RC-135 aircraft that carry some of the United States' most advanced electronic equipment and currently fly reconnaissance missions in Iraq and Afghanistan; and 2) O€-135 aircraft that monitor an international nuclear treaty. The maintenance issues could lead to mechanical failures, delaying critical missions, endangering servicemen's lives, and national security breeches. After Air Force management ignored these concerns for years when raised through the chain of command, he went to Senator Charles Grassley, Congressmen Steven King and Lee Terry, the Department of Defense Inspector General hotline and the media to get the maintenance concerns addressed. Mr. Sarris' disclosures evidenced—

* the failure to have updated technical data in instructions manuals when the aircraft parts are upgraded. This leads to inconsistency and danger in the maintenance because mechanics are forced to either use outdated and inadequate instructions for a new aircraft part or use their experience to guess best on how to maintain or fix the new part.

* high pressure air storage bottles in the RC-135 aircraft that had not been serviced since they were installed in 1983 and were overdue for inspection by 17 years. If these bottles split open, it could interfere with the flight controls, the aircraft electrical systems, and the aircraft pressurization or even blow a hole in the fuselage, as has occurred in prior incidents such as a 2005 Qantas flight carrying 365 passengers.

* active fuel hoses that feed into the Auxiliary Power Unit in the OC-135 aircraft that were 15 years past their service life and vulnerable develop leaks or rupture, which could cause the aircraft to catch fire in flight or on the ground.

Because Mr. Sarris spoke out, many of his concerns have been validated and corrected. The technical data is in the process of being rewritten, the Air Force eliminated the use high pressure air storage bottles and moved to a different system, and the active air fuel hoses 15 years passed their service life were replaced. In short, he has made a real difference already.

But he has paid a severe price to date – his career. The Air Force Inspector General made him the primary target of its investigation, rather than his allegations. It is now accusing him of "theft" of government property -- the unclassified evidence that proves his charges. His base commander ordered further investigation after concocting dozens of machine gun style allegations that generally do not specify Mr. Sarris' specific misconduct, identify accusers, or describe any of the supporting evidence. Relying on the open investigation, the Air Force suspended his access to classified information for at least six months while it is pending, even if he defeats permanent loss of clearance. In the meantime, he was stripped of all duties and reassigned to the employee "break room," where his job was to fill space -- the bureaucratic equivalent of putting him in stocks. He recently has been allowed to perform physical maintenance such as painting.

These examples are not aberrations or a reflection of recent political trends. They are consistent with a pattern of steadily making a difference over the last 20 years challenging corruption or abuses of power. We can thank whistleblowers for --

* increasing the government's civil recoveries of fraud in government contracts by over ten times, from $27 million in 1985 to almost billion annually since, totaling over $18 billion total since reviving the False Claims Act. That law allows whistleblowers to file lawsuits challenging fraud in government contracts.[2]

* catching more internal corporate fraud than compliance officers, auditors and law enforcement agencies combined, according to a global Price Waterhouse survey of some 5,000 corporations. [3]

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

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

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[2] www.taf.org

[3] *See* 2007 PricewaterhouseCoopers study, "Economic Crime: people, culture and controls;" Ethics Resource Center ("ERC"), "National Government Ethics Survey" (2007); Association of Certified Fraud Examiners, "2008 Report To The Nation On Occupational Fraud & Abuse."

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

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

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

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

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

* forcing abandonment of plans to replace government meat inspection with corporate "honor systems" for products with the federal seal of approval as wholesome – plans that could have made food poisoning outbreaks the rule rather than the exception. [4]

NECESSITY FOR STRUCTURAL CHANGE

The Make it Safe Coalition's easiest consensus was that the Whistleblower Protection Act has become a disastrous trap which creates far more reprisal victims than it helps. This is a painful conclusion for me to accept personally, since the WPA is like my professional baby. I spent four years devoted to its unanimous passage in 1989, and another two years for unanimous 1994 amendments strengthening the law, which then was the strongest free speech law in history on paper. But reality belied the paper rights,

[4] Written Remarks for Thomas Devine, "Whistleblower Rights and Anti-Corruption Campaigns: You Can't Have One Without the Other," State Department sponsored program, Accras, Ghana (May 28, 2008).

and my baby grew up to be Frankenstein. Instead of creating safe channels, it degenerated into an efficient mechanism to finish off whistleblowers by rubber-stamping retaliation with an official legal endorsement of any harassment they challenge. It has become would-be whistleblowers' best reason to look the other way or become silent observers.

How did this happen, after two unanimous congressional mandates for exactly the opposite vision? There have been two causes for the law's frustration. The first is structural loopholes such as lack of protection for FBI and intelligence agency whistleblowers since 1978, and lack of protection against common forms of fatal retaliation such as security clearance removal. The second is a Trojan horse due process system to enforce rights in the WPA. Every time Congress has addressed whistleblower rights it has skipped those two issues. That is why the legislative mandates of 1978, 1989 and 1994 have failed. This legislation finally gets serious about the twin cornerstones for the law to be worth taking seriously: seamless coverage and normal access to court.

The Merit Systems Protection Board

A due process enforcement breakdown is why so-called rights have threatened those they are designed to protect. The structural cause for this breakdown has two halves. First is the Merit Systems Protection Board, where whistleblowers receive a so-called day in court through truncated administrative hearings. The second is the Federal Circuit Court of Appeals, which has a monopoly of appellate review for the administrative rulings. With token exceptions, the track record for each is a long-ingrained pattern of obsessively hostile judicial activism for the law they are charged with enforcing.

The MSPB should be the reprisal victim's chance for justice. Unfortunately, that always has been a fantasy for whistleblowers. In its first 2,000 cases from 1979-88, the Board only ruled in favor of whistleblowers four times on the merits. His is repeating itself. Since the millennium, the track record is 3-53, with only one victory under the current Board Chair Neil McPhie. And throughout its history, the Board never has found retaliation in a high stakes whistleblowing case with national consequences. Even at the initial hearing stage, in 30 years of practice I do not know an attorney aware of any whistleblower in the National Capital Region – home for the government's most significant abuses of power – who has won a decision on the merits since the law's 1978 passage. This is exactly the scenario where genuine protection is most needed.

The public loses when the Board avoids significant cases and issues, such as the commercial air maintenance breakdowns at South West and other airlines, leading to last summer's airport paralysis; or failure to enforce VA privacy procedures, leading to the loss of millions of confidential patient records. It would be delusional, however, to expect that matters will improve.

The causes are no mystery. First, hearings are conducted by Administrative Judges without any judicial independence from political pressure. Second, the Board is not structured or funded for complex, high stakes conflicts that can require lengthy

proceedings. As one AJ remarked after the first five weeks of a trial where the dissent challenged alleged government collusion with multi-million dollar corporate fraud, "Mr. Devine, if you bring any more of these cases the Board will have to seek a supplemental appropriation. It's like a snake trying to swallow an elephant. We're not designed for this." Third, the Board's policy is speedy adjudication of office disputes, with Administrative Judge performance appraisals based on completing cases in 120 days.

To compensate, as a rule AJ's not only avoid politically significant conflict, they run away from it whenever possible and trivialize it when they can't. To illustrate, several years ago Senators Grassley and Durbin conducted a bi-partisan investigation and held hearings that confirmed charges by Pentagon auditors of a multi-million ghost procurement scheme for non-existent purchases. The exposure led to criminal prosecutions and jail time. The auditors were fired and sought justice at the MSPB. The AJ screened out all whistleblowing issues except for their disclosures of far less significant improprieties at a drunken office Christmas party. Not surprisingly, the auditors lost.

Perhaps the most common MSPB tactic to avoid a whistleblower's case has been to skip it entirely. In order to "promote judicial economy," the Board commonly "presumes" whistleblowing and retaliation, and then jumps straight to the employer's affirmative defense that it would have taken the same action even if the whistleblower had remained silent. If the employer prevails, the case is over. Having spent thousands of dollars, the employee who finally gets a hearing is disenfranchised from presenting evidence on the government's misconduct, or retaliation for challenging it. The whole proceeding is about the employee's misconduct. *See, e.g., Wadhwa v. DVA*, 2009 WL 648507 (2009); *Fisher v. Environmental Protection Agency*, 108 M.S.P.R. 296 (2008); *Azbill v. Department of Homeland Sec.*, 105 M.S.P.R. 363 (2007).

AJ's also display scheduling schizophrenia. This occurs when they are assigned high stakes reprisal cases that allege cover-ups with national consequences. Contrary to the normal "rush to judgment" schedule, high stakes whistleblower cases are on the "molasses track." Federal Air Marshal Robert MacLean is still waiting for an MSPB hearing, over three years after he was fired. At the Forest Service, a whole environmental crimes unit was dissolved when they caught multi-million dollar corporate timber theft in the national forests by politically powerful firms. They filed their WPA lawsuit in 1995. They did not get a hearing until 2003, eight and a half years later. The "irrefragable proof" case dragged on over a dozen years.

In short, the WPA's due process structure at best only can handle relatively narrow, small scale whistleblowing disputes. That is the most common scenario for litigation, and very important for individual justice. But the law's potential rests on its capacity to protect those challenging the most significant government abuses of power with the widest national impact. Realistically, a bush league forum cannot and will not provide justice for those challenging major league government breakdowns.

A digest of all final MSPB rulings is attached as Exhibit 4. The patterns of creative sophistry illustrate why the Board for whistleblowers has become a symbol of cynicism rather than a hope for justice. The following new Board doctrines illustrate how Chairman McPhie has only found one instance of retaliation during the Bush administration. Most of the Board's rulings against whistleblowers are on groynds that the employee did not engage in protected speech, or that there was clear and convincing evidence the agency would have taken the same action even if the employee had remained silent.

Protected speech.

* Specificity. Disclosures of illegal transfer of sick inmates out of a VA medical care facility are too vague and generalized to be eligible for WPA protection. *Tuten v. Department of Justice*, 104 M.S.P.R. 271 (2006) Similarly, it is not sufficiently specific to disclose that a medical care facility cannot accept new patients, because there are no more beds and the computer has not worked for ten days. *Durr v. Department of Veterans Affairs*, 104 M.S.P.R. 509 (2007).

* Requirement to reveal all supporting evidence immediately. Contrary to prior Board precedents, it is not sufficient for a whistleblower to have a reasonable belief when making a disclosure. At the time, the whistleblower also must reveal all the supporting information for the reasonable belief. Otherwise, the belief isn't reasonable. If the employee waits to disclose supporting evidence, it is too late. *Durr,* supra. It is still too late, even if the whistleblower provides the information in court testimony for associated litigation, *before* getting fired. *Rodriguez v. Department of Homeland Security*, 108 M.S.P.R. 76 (2008). This simply defies the normal dynamics of communication.

* Testimony loophole. When a whistleblower discloses evidence of misconduct by bearing witness through testimony in litigation, it does not qualify as a disclosure. *Flores v. Department of Army*, 98 M.S.P.R. 427 (2005).

* Ghost of "gross mismanagement". The final *White* Federal Circuit decision upheld the first Board ruling against Mr. White, after three prior MSPB decisions that his whistleblowing rights had been violated. The Board concluded that since a reasonable person could disagree, Mr. White did not have a reasonable belief that he was disclosing evidence of mismanagement -- whether or not he was correct about it. *White v. Department of Air Force*, 95 M.S.P.R. 1 (2003).

* "Abuse of authority" loophole for broad consequences. "Abuse of authority" is arbitrary action that results in favoritism or discrimination. That only applies to personal discrimination, not to actions that have broad consequences. *Downing v. Department of Labor*, 98 M.S.P.R. 64 (2004).

* "Abuse of authority" loophole for those disclosing harassment of themselves. The harassment must be about discriminatory acts toward others, not the person making the disclosure. Without explanation, this overturns a longstanding MSPB doctrine that if

retaliation does not technically qualify as a personnel action, it can safely be challenged as a whistleblowing disclosure of abuse of authority. *Rzucidlo v. Department of Army*, 101 M.S.P.R. 616 2006).

* "Substantial and specific danger" loophole. It is not protected to warn about threats public health and safety with factual disclosures, if they are in the context of a policy dispute. *Chambers v. Department of Interior*, 103 M.S.P.R. 375 (2006).

Clear and convincing evidence that the agency would have acted independently in the absence of whistleblowing. This is a doctrine that traditionally has meant "highly likely" or "substantially probable," the strict burden of proof intended by Congress when it already has been established that an action was retaliatory at least in part.[5] The Board, by contrast, has created its own definition. The MSPB considers three factors -- merits of the agency's case against the employee; motive to retaliate and discriminatory treatment compared with other, similarly situated employees. *Chambers v. Department of Interior*, 2009 WL 54498 (2009). It does not pin itself down whether they all must be considered, or whether there must be clear and convincing evidence for any of them alone. The stakes are very high. If the Board finds independent justification, it means that as a matter of law the whistleblower had it coming, and generally that the employee will not get to present his or her case. Unfortunately, as illustrated below, this is where the Board's decisions have been the most extreme.

* Only considering one "clear and convincing evidence" factor. In *Cook v. Department of Army*, 105 M.S.P.R. 178 (2007), the Board ruled that the agency had proven independent justification by clear and convincing evidence, after only analyzing the retaliatory motives factor. It did not consider the other two criteria of merits or disparate treatment.

* No requirement to present clear and convincing evidence for any of the factors. Indeed, the issue of the agency's burden of proof for any criterion did not come up in any of the 56 MSPB rulings reviewed. The Board has functionally erased the clear and convincing evidence burden of proof by creating new subcategories as substitutes.

* Independent justification based on employees' legally protected activity. In *Chambers v. Department of Interior*, 2009 WL 54998 (2009), on remand the Board held there was an "independent" justification, in part because Chief Chambers protested alleged abuse of authority outside the chain of command, and because she violated a general agency gag order when she blew the whistle on public safety threats. But protecting those activities is the point of the WPA. In *Grubb v. Department of Interior*, 96 M.S.P.R. 361 the Board held it was a justification *independent* from whistleblowing to fire her, because she violated orders not to gather the evidence of cheating or discuss it with co-workers.

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[5] *See, e.g., Peck v. Safe Air International, Inc.*, ARB No. 02-028 at 6, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004) (*citing* BLACK'S LAW DICTIONARY 1201 at 577 (7th ed. 1999).

* Enabling plausible deniability. In *Cook, supra,* the Board held that the official who fired the whistleblower had no motive to retaliate since he was new to his position, despite acting on a file prepared by supervisory staff who had been targeted by the whistleblower's disclosures.

Perhaps the most contrived distortion of the clear and convincing evidence standard occurred in *Gonzales v. Department of Navy*, 101 M.S.P.R. 248 (2007), where the whistleblowers charges were confirmed that a Rapid Response Team improperly had pointed automatic weapons at a family. He was then reassigned to the night shift, and overtime removed. Without considering retaliation, the MSPB dismissed on grounds of independent justification. The Board did not apply its "clear and convincing evidence" factor of whether the reassignment was reasonable, because it was not "disciplinary." But only one of eleven listed personnel actions covered by the WPA *is* disciplinary. 5 USC 2302(a). On its disparate treatment factor, the Board disregarded the whistleblower being the only person in the office reassigned, because he was the only detective working there. It conceded retaliatory animus by the official reassigning but said that did not count, because there is an unexplained difference between unexplained retaliatory animus and retaliatory motive. On that basis, the Board concluded that the agency proved by clear and convincing evidence it would have taken the same action absent whistleblowing.

There are no signs that the Board's career staff is reconsidering its approach. To illustrate, for years MSPB Administrative Judge Jeremiah Cassidy has told practitioners that he is the Board's designated AJ for high-stakes cases due to their political or policy impact. That is very unfortunate, because since the millennium Judge Cassidy has not ruled for a whistleblower in a decision on the merits. Despite, if not because of this track record, the Board promoted him to be Chief Administrative Judge for the Washington, D.C. regional office.

Indeed, the Board's most destructive precedent may be imminent. In February (?) the Board agreed to make an interim ruling in Air Marshal Robert MacLean's appeal that could leave the Whistleblower Protection Act discretionary for all government agencies. Since 1978 the WPA's cornerstone has been that agencies cannot cancel its public free speech rights by their own regulations. Under 5 USC 2302(b)(8)(A), whistleblowers only can be denied public free speech rights if they are disclosing information that is classified, or whose release is specifically prohibited by Congress.

Three years after the case began, however, the Administrative Judge ruled that since Congress gave TSA authority to issue secrecy regulations, when the *agency* issued *regulations* creating a new hybrid secrecy category that covers virtually any WPA security disclosure, the resulting public disclosure ban counted as a specific *statutory* prohibition. Virtually every agency has this authority. A Board ruling upholding the Administrative Judge means WPA rights only will exist to the extent they do not contradict agency regulations. A friend of the court brief from GAP that fully explains the threat is enclosed as Exhibit 5. Last week the Federal Law Enforcement Officers Association joined the brief.

The Federal Circuit Court of Appeals

The second cause for the administrative breakdown has been beyond the Board's control. The Board is limited by impossible case law precedents from the Federal Circuit Court of Appeals, which since its 1982 creation has abused a monopoly of appellate review at the circuit level. Monopolies are always dangerous. In this case, the Federal Circuit's activism has gone beyond ignoring Congress' 1978, 1989 and 1994 unanimous mandates for whistleblower protection. Three times this one court has rewritten it to mean the opposite. Until there is normal appellate review to translate the congressional mandate, this and any other legislation will fail.

This conclusion is not a theory. It reflects nearly a quarter century, and a dismally consistent track record. From its 1982 creation until passage of 1989 passage of the WPA, the Federal Circuit only ruled in whistleblowers' favor twice. The Act was passed largely to overrule its hostile precedents and restore the law's original boundaries. Congress unanimously strengthened the law in 1994, for the same reasons. Each time Congress reasoned that the existing due process structure could work with more precise statutory language as guidance.

That approach has not worked. Since Congress unanimously strengthened the law in October 1994, the court's track record has been 3-209 against whistleblowers in decisions on the merits. It is almost as if there is a legal test of wills between Congress and this court to set the legal boundaries for whistleblower rights.

The Federal Circuit's activism has created a successful, double-barreled assault against the WPA through – 1) nearly all-encompassing loopholes, and 2) creation of new impossible legal tests a whistleblower must overcome for protection. Each is examined below.

Loopholes

Here judicial activism not only has rendered the law nearly irrelevant, but exposes the unrestrained nature of judicial defiance to Congress. During the 1980's the Federal Circuit created so many loopholes in protected speech that Congress changed protection from "a" to "any" lawful, significant whistleblowing disclosure in the 1989 WPA. The Federal Circuit continued to create new loopholes, however, so in the legislative history for the 1994 amendments Congress provided unqualified guidance. "Perhaps the most troubling precedents involve the ... inability to understand that 'any' means 'any.'"[6] As the late Representative Frank McCloskey emphasized in the only legislative history summarizing the composite House Senate compromise,

> It also is not possible to further clarify the clear statutory language in [section] 2302(b)(8)A) that protection for 'any' whistleblowing disclosure evidencing a reasonable belief of specified misconduct truly means 'any.' A protected disclosure may be made as part of an employee's job duties, may concern policy

[6] H.R. Rep. No. 103-769, at 18.

> or individual misconduct, and may be oral or written and to any audience inside or outside the agency, without restriction to time, place, motive or context.[7]

The Court promptly responded in 1995 with the first in a series of precedents that successfully translated "any" to mean "almost never":

Preparations for a reasonable disclosure. *Horton v. Navy*, 66 F.3d 279 (Fed. Cir. 1995). "Any" does not include disclosures to co-workers or supervisors who may be possible wrongdoers. This cancels the most common outlet for disclosing concerns, which all federal employees are trained to share with their supervisors regardless of whom is at "fault." It reinforces isolation, and prevents the whistleblower from engaging in the quality control to make fair disclosures evidencing a reasonable belief, the standard in 5 USC 2302(b)(8) to qualify for protection.

Disclosures while carrying out job duties. *Willis v. USDA*, 141 F.3d 1139 (Fed. Cir. 1998). This decision exempted the Act from protecting politically unpopular enforcement decisions, or challenging regulatory violations if that is part of an employee's job duties. It predates by eight years last year's controversial Supreme Court decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006). Contrast the court-created restriction with Congress' vision, expressed in the Senate Report for the Civil Service Reform Act of 1978.

> What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants.[8]

There is no room for doubt: the reason Congress passed the whistleblower law was exactly what the Federal Circuit erased: the right for government employees to be public servants instead of bureaucrats on the job, even when professionally dangerous.

Protection only for the pioneer whistleblower. *Meeuwissen v. Interior*, 234 F.3d 9 (Fed. Cir.2000). This decision revived a 1995 precedent in *Fiorillo v. Department of Justice*, 795 F.2d 1544 (1986) that Congress specifically targeted when it changed protection from "a" to "any" otherwise valid disclosure.[9] It means that, after the Christopher Columbus for a scandal, anyone speaking out against wrongdoing proceeds at his or her own risk. This means there is no protection for those who corroborate the pioneer whistleblower's charges. There is no protection against ingrained corruption. *See Ferdik v. Department of Defense*, 158 Fed.Appx. 286 (Fed. Cir. 2005) (Disclosures that a

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[7] 145 Cong. Rec. 29,353 (1994).

[8]

[9] *See* S. Rep. No 100-413, at 12-13: After citing and rejecting *Fiorillo*, the Committee instructed, "For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue. S. 508 emphasizes this point by changing the phrase 'a' disclosure to 'any' disclosure in the statutory definition. This is simply to stress that *any* disclosure is protected (if it meets the reasonable belief test and is not required to be kept confidential)." (emphasis in original)

non-U.S. citizen had been illegally employed for twelve years were not protected, because the misconduct already constituted public knowledge since almost the entire institution was aware of the illegality.)

A bizarre application of this loophole doctrine occurred in *Allgood v. MSPB,* 13 Fed. Appx. 976 (Fed. Cir. 2001). In that case an Administrative Judge protested that the Board engaged in mismanagement and abuse of authority by opening an investigation and reassigning another Administrative Judge before the results were received that could validate these actions. The Federal Circuit applied the loophole, *because the supposed wrongdoers at the Board already were aware of their own alleged misconduct.* This would turn *Meeuwissen* into an all-encompassing loophole, except for wrongdoers suffering from pathological denial of their own actions.

Whistleblowing disclosure included in a grievance or EEO case: *Garcia v. Department of Homeland Security*, 437 F.3d 1322 (Fed. Cir. 2006); *Green v. Treasury*, 13 Fed., Appx. 985 (Fed. Cir. 2001). These frequently are the context that uninformed employees use to blow the whistle, particularly the grievance setting. They have no protection in these scenarios.

Illegality too trivial or inadvertent: *Schoenrogge v. Department of Justice,* 148 Fed.Appx. 941 (Fed. Cir. 2005) (alleged use of immigration detainees to perform menial labor, falsification of billing and legal records, paying contractors and maintenance staff for time not working); *Buckley v. Social Security Admin.,* 120 Fed.Appx. 360 (Fed. Cir. 2005) (alleged irreparable harm to litigation from mishandling a government's attorney's case while on vacation, rejected as illustrative of "mundane workplace conflicts and miscues") *Gernert v. Army*, 34 Fed. Appx. 759 (Fed. Cir. 2002) (supervisor's use of phone and government time for personal business); *Langer v. Treasury*, 265 F.3d 1259 (Fed. Cir. 2001) (violation of mandatory controls for protection of confidential grand jury information); *Herman v. DOJ*, 193 F.3d 1375 (Fed. Cir. 1999) (Chief psychologist at VA hospital's disclosure challenging lack of institutionalized suicide watch, and copying of confidential patient information).

As seen above, "triviality" is in the eye of the beholder, and these cases show the wisdom of language expanding protected speech for disclosures of "a" violation of law to "any" violation. In these cases, "triviality" has been intertwined with "inadvertent" as a reason to disqualify WPA coverage. That judicially-created exception may be even more destructive of merit system principles. The difference between "inadvertent" and "intentional" misconduct is merely the difference between civil and criminal liability. Employees shouldn't be fair game for reprisal, merely because the government breakdown they try to correct was unintentional. The loophole further illustrates the benefits of specific legislative language protecting disclosures of "any" *illegality.*

Disclosure too vague or generalized. *Chianelli v. EPA*, 8 Fed. Appx. 971 (Fed. Circ. 2001) This was the basis to disqualify an EPA endangered species/groundwater specialist's disclosure of failure to meet requirements in funding for two state pesticide

prevention programs; and expenditure of $35 million without enforcing requirement for prior groundwater pesticide treatment plans.

Substantiated whistleblowing allegations, if the employee had authority to correct the alleged misconduct. *Gores v. DVA*, 132 F.3d 50 (Fed. Cir. 1997) This amazing precedent is a precursor of *White's* judicially-created burdens beyond the statutory "reasonable belief" test. The decision means it is not enough to be right. To have protection, the employee also must be helpless. A manager who imposes possibly significant and/or controversial corrective action cannot say anything about it until after a fait accompli. Otherwise, s/he has no merit system rights to challenge subsequent retaliation, and proceeds at his or her own risk by honoring normal principles for responsible decision making.

Waiting too long. *Watson v. DOJ*, 64 F.3d 1524 (Fed. Cir. 1995) The court held that a Border Patrol agent's disclosure wasn't protected and he would have been fired anyway for waiting too long (12.5 hours overnight) to report another agent's shooting and unmarked burial of an unarmed Mexican after implied death threat by the shooter if silence were broken.

Supporting testimony. *Eisenger v. MSPB*, 194 F.3d 1339 (Fed. Cir. 1999) The court rejected protection for supporting testimony to confirm a pioneer witness' charges of document destruction. This case precedes *Meeuwissen* and illustrates the worst case scenario for the "Christopher Columbus" loophole.

Blamed for making a disclosure. Cordero v. MSPB, 194 F.3d 1338 (Fed. Cir. 1999) An employee is not entitled to whistleblower protection if merely suspected of making the disclosure. The employee must prove he or she actually did it. This decision overturns longstanding Board precedent that protects those harassed due to suspicion (even if mistaken). The reason for that doctrine is the severe chilling and isolating effect of allowing open season on anyone accused of whistleblowing or leaks, even if the disclosure of concealed misconduct itself qualifies for protection. It contradicts prior Board case law. *Juffer v. USIA*, 80 MSPR 81, 86 (1998). It also is contradictory to consistent interpretation of other whistleblower statutes.

Nongovernment illegality. *Smith v. HUD*, 185 F.3d 883 (Fed. Cir. 1999). This loophole also is addressed by the switch from "a" to "any" illegality. The exception is highly destructive of the merit system, because a common reason for harassment is catching the wrong (politically protected) crook or special interest. It allows agencies to take preemptive strikes at the birth of a cover up to remove and discredit potential whistleblowers who may challenge it.

"Irrefragable proof"

One provision in the Civil Service Reform Act of 1978 that Congress did not modify was the threshold requirement for protection against retaliation -- disclosing information that the employee "reasonably believes evidences" listed misconduct. The

reason was simple: the standard worked, because it was functional and fair. To summarize some 20 years of case law, until 1999 whistleblowers could be confident of eligibility for protection if their information would qualify as evidence in the record used to justify exercise of government authority.

Unfortunately, the Federal Circuit decided to judicially amend the reasonable belief test. In *LaChance v. White,* 174 F.3d 1378, 1381 (Fed. Cir. 1999), it eliminated all realistic prospects that anyone qualifies for whistleblower protection unless the specifically targeted wrongdoer confesses. The circumstances are startling, because the agency ended up agreeing with the whistleblower's concerns. John White made allegations concerning the misuse of funds in a duplicative education project. An independent management review validated his claims, resulting in the Air Force Secretary's decision to cancel the program. Unfortunately, the local official held a grudge, stripped Mr. White of his duties and exiled him to a temporary metal office in the desert outside the Nevada military base. Mr. White filed a claim against this official's retaliation and won his case three times before the MSPB. However, in 1999 the Federal Circuit sent the case back with its third remand in nine years, ruling he had not demonstrated that his disclosure evidenced a reasonable belief.

Since the Air Force conceded the validity of Mr. White's concerns, the Court's conclusion flunks the laugh test. The Federal Circuit circumvented previous interpretations of "reasonable belief" by ruling that an employee must first overcome the presumption of government regularity: "public officers perform their duties correctly, fairly, in good faith and in accordance with the law and governing regulation." The court then added that this presumption stands unless there is "irrefragable proof to the contrary'" (citations omitted). The black magic word was "irrefragable." Webster's Fourth New Collegiate Dictionary defines the term as "undeniable, incontestable, incontrovertible, incapable of being overthrown." This creates a tougher standard to qualify for protection under the whistleblower law than it is to put a criminal in jail. An irrefragable proof standard allows for almost any individual's denial to overturn a federal employee's rights under the WPA.

GAP joined this case as an amicus because of the implications it had for all subsequent whistleblower decisions. If the Court could rule that John White's disclosures did not qualify him for whistleblower protection, no one could plausibly qualify for whistleblower protection. It appears that was the court's objective. Since 1999 our organization has been obliged to warn all who inquire that if they spend thousands of dollars and years of struggle to pursue their rights, and if they survive the gauntlet of loopholes, they inevitably will earn a formal legal ruling endorsing the harassment they received. The court could not have created a stronger incentive for federal workers to be silent observers and to look the other way in the face of wrongdoing. This decision direct conflicted with the January 20, 2002 Executive Order signed by then newly-inaugurated President Bush stating that federal employees have a mandatory ethical duty to disclose fraud, waste, abuse and corruption.

After a remand and four more years of legal proceedings, the Federal Circuit upheld its original decision. *White v. Department of Air Force*, 391 F.3d 1377 (Fed.Cir. 2004). In the process, it replaced the "irrefragable proof" standard with an equivalent but more diplomatic test -- "a conclusion that the agency erred is not debatable among reasonable people." *Id.*, at 1382. To illustrate what that means, Mr. White then lost because the Air Force hired a consultant to provide "expert" testimony at the hearing who disagreed with Mr. White (as well as the Air Force's own independent management review and the Secretary). The court did limit this "son of irrefragable" decision's scope to disclosures of misconduct other than illegality, and it has been shrunken sincde until it only applies to disclosures of gross mismanagement. But there is no rational basis for the reasonable belief test to have one meaning when challenging mismanagement, and another when challenging all other types of misconduct. Legislative history through the committee report and floor speeches should not leave any doubt that the bill's ban on rebuttable presumptions and definition of "reasonably believes" apply to all protected speech categories, without any loophole that functionally eliminates protection for those challenging gross mismanagement.

If Congress expects the fourth time to be the charm for this law, the Federal Circuit's record is irrefragable proof for the necessity to restore normal appellate review.

CALLING BLUFFS ON COURT ACCESS

Government attorneys and managers have raised two primary objections to providing whistleblowers normal access to court, as pledged by President Obama in his campaign and transition policy.[10] First, they contend that providing a right to jury trials will clog the courts. Second, they insist that genuine rights mean employees will bully their managers by threatening lawsuits, which will paralyze intimidated agency managers from firing or taking other actions for accountability when needed. Both objections have had an opportunity to pass the reality test. Both have flunked.

Fourteen federal employment laws already give government or corporate employees access to court to enforce remedial rights provided by the Civil Rights Act, or in 13 cases by whistleblower laws – including all eight passed since 2002. Administration opponents have not cited a scintilla of evidence that either warning has come true empirically. There isn't any. That helps explain why the Congressional Budget Office estimates HR 1507 will not have a material fiscal impact.

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[10] During the campaign, transition and through President Obama's first day in office, the President posted the following policy: ***Protect Whistleblowers:*** *Often the best source of information about waste, fraud, and abuse in government is an existing government employee committed to public integrity and willing to speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled. We need to empower federal employees as watchdogs of wrongdoing and partners in performance. Barack Obama will strengthen whistleblower laws to protect federal workers who expose waste, fraud, and abuse of authority in government. Obama will ensure that federal agencies expedite the process for reviewing whistleblower claims and whistleblowers have full access to courts and due process.*

since removed from http://www.whitehouse.gov/agenda/ethics/

The following 14 laws permit corporate, and/or state, local and in some cases federal employees to seek justice in federal court with a jury:

- Civil Rights Act, 42 USC 1983, (state and local government employees to challenge constitutional violations) (1871)
- Equal Employment Opportunity Act, 42 USC 2000e, (government employees, employment discrimination) (1991)
- False Claims Act, 31 U.S.C. § 3730 (h), (federal government contractors on civil fraud) (1986)
- Major Fraud Act, 18 U.S.C. § 1031(h), (federal government contractors on criminal fraud) (1989)
- Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, 12 USC 1790b(b), (banking employees) (1991)
- Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, 12 USC 1831j(b), (FDIC employees) (1991)
- Sarbanes Oxley law, 18 USC 1514A(b)(1)(B), (publicly-traded corporations) (2002)
- Energy Policy Act, 42 USC 5851(b)(4), (nuclear power and weapons, including federal government employees at the Department of Energy and the Nuclear Regulatory Commission) (2005)
- Commercial Motor Vehicle Safety Act, 49 U.S.C. § 31105(c), (trucking and cross country bus carriers) (2007)
- Federal Rail Safety Act, 49 U.S.C. § 20109(d)(3), (railroads) (2007)
- National Transit Systems Security Act, 6 USC 1142(c)(7), (metropolitan transit) (2007)
- Defense Authorization Act, 10 USC 2409(c)(2), (defense contractors) (2007)
- Consumer Products Safety Improvement Act, 15 USC 2087(b)(4), (retail commerce) (2008)
- American Recovery and Reinvestment Act, section 1553(c)(3), (corporate or state and local government stimulus recipients) (2009)

Section 1553 of the recent stimulus law provides jury trial enforcement for whistleblower rights of all state and local government or contractor employees receiving funding from the taxpayers, a right they have had for over a century under 42 USC 1983 to challenge violations of their First Amendment rights. Quite simply, it is impossible for President Obama to carry out his campaign policy of full access to court without providing jury trials for federal whistleblowers. They are the only whistleblowers in the labor force for whom jury trials are the exception, rather than the rule.

Flooding the courts

A primary reason that employees do not flood the courts is that it costs too much. Except in rare circumstances, unemployed workers who first must exhaust layers of administrative remedies as in HR 1507 simply cannot afford to pay for two proceedings, and court litigation costs exponentially more than administrative hearings. Where

available, the safety valve of federal court access has been limited to instances where it was clear that the administrative process offered the employee a dead end in a case that an Administrative Judge did not want to hear, or that the issues are too complex or technical for an administrative hearing.

An analysis of the two oldest and largest jury trial precedents, Sarbanes Oxley for corporate workers and EEO for federal employees, proves that the fears have been baseless in those analogous laws. The Sarbanes-Oxley (SOX) law's factual track record demonstrates that allowing federal employee whistleblowers to bring a civil action in district court is not likely to result in a meaningful increase in federal court cases against the government. The expected caseload is small, and is greatly outweighed by the social value of encouraging whistleblowers to come forward to air their claims of waste, fraud and abuse.

In the first 3 years after SOX was passed, 491 employees (of 42,000,000 employees working at publicly-traded corporations) filed a case. Seventy-three percent, or 361, were resolved at OSHA's informal investigation fact-finding stage before reaching any due process litigation burdens on the employer. In the first three years of SOX, only 54 whistleblowers, or an average of 18 court cases annually, sought de novo court access, pursuant to SOX's administrative exhaustion provision. By contrast, during the same period, the EEOC handled approximately 217,000 discrimination complaints.

To compare with civil service docket burdens, during 2006 146 new whistleblower cases were brought before administrative judges at the MSPB under the WPA.[11] Only 89 of these cases were considered on the merits (or dismissed on non-procedural grounds).[12]

If we assume a similar percentage of federal employee cases removing their case to district court as with SOX, this would result in approximately 37 court cases/year when jurisdictional concerns are taken into consideration. The cases would be spread over 678 federal district court judges and 505 magistrates, an addition of .029 cases annually for each decision maker in the federal courts. These 37 new cases would have only a marginal impact on an overall federal district court civil caseload of 250,000 filings annually.

In 1991, President George H.W. Bush wrote to Sen. Don Nickles that he "strongly support[s]" the amendments to the Civil Rights Act that would provide federal employees with the "right to a jury trial," and stated that he had "no objection" to providing federal

[11] Of these, 18 were screened out because of settlements, withdrawal, or a failure to timely file the appeal. More commonly, in 39 cases, failure to exhaust OSC remedies resulted in a dismissal by MSPB on jurisdictional grounds.

[12] A large percentage of these 89 cases were also dismissed on jurisdictional grounds, with the AJ ruling that the employee failed to make a non-frivolous allegation that she engaged in protected speech. Although technically "jurisdictional" rulings, and therefore do not allow for a due process hearing, these are arguably decisions on the merits that *will* likely confer jurisdiction once the definition of "any" disclosure is restored.

(and even White House) employees with the "identical protections, remedies, and procedural rights" granted to private sector employees in the bill.[13] Since, there have been no complaints that the federal EEO docket has unduly burdened the courts or the government.

As a comparison, EEOC administrative judges review 8,000 claims brought annually by federal employees, or over 50x the number of whistleblower cases that are brought before AJs at the MSPB. Under EEO law, all federal employees may bring a civil action in federal court for a jury trial if 180 days have passed after filing an initial complaint, or within 90 days of receipt of the Commission's final decision after an appeal. The United States was the defendant in 857 civil rights employment cases in 2007. Given this, compared with preexisting caseloads, the resulting potential increase in employment litigation against the federal government on account of whistleblower cases is likely to have an insignificant impact on the government's overall employment litigation docket.

These conclusions are consistent with the track record for docket burdens under the four new corporate whistleblower protection laws passed by the last Congress and administered at the Department of Labor. (DOL) Overall they provide anti-retaliation rights to over 20 million new workers in the retail, railroad, trucking, cross country motor transit, and metropolitan public transportation sectors. The feared surge of litigation did not take place. Out of 14 whistleblower laws DOL administers, since 2008 the four new statutes accounted for only 124 out of 3221 new whistleblower complaints filed with DOL – a 3.3% increase.

The record is even more reassuring on district court burdens. For those four statutes and another, the defense authorization act providing jury trials after an Inspector General investigation, the total since 2008 has been only 22 new court filings, less than a .020 increased case load per federal judge or magistrate.

Those findings also are consistent with research for the Energy Policy Act. The number of complaints filed *decreased* significantly, *after* Congress added jury trials for enforcement and provided access to the law for federal government workers at the Department of Energy and Nuclear Regulatory Commission. According to Department of Labor statistics, before jury trials were added in 2005 there were 191 employee appeals under 42 USC 5851. From 2006 through 2008, by contrast, there were only 112. Data on the DOL-administered statutes is drawn from a chart by the Department's Office of Whistleblower Protection, attached as Exhibit 6.

In the whistleblower context, the MSPB will remain the primary forum for WPA cases, and is capable of effectively handling many of the cases when the proposed changes in HR 985 / S. 274 are enacted. Yet, it is imperative that juries, the "cornerstone" of our civil law system, be allowed to hear a limited number of high stakes whistleblower cases in order to create balance with the administrative system. Only then

[13] Letter from President George Bush to Senator Don Nickles (October 30, 1991).

will Congress' intent to protect the courageous federal employees who report waste, fraud and abuse be fully realized.

Paralyzing intimidated managers

Every whistleblower law ever enacted has overcome a broken record type objection that it would embolden employees into a surge of lawsuits if held accountable, and that intimidated managers paralyzed by their threats would wink at misconduct and incompetence. That was a core issue underlying unanimous 1988 and 1989 unanimous passage of the Whistleblower Protection Act when Congress rejected the argument, including after President Reagan pocket vetoed the former in part on those grounds.[14] After every whistleblower law was passed, this objection was subjected to the reality test. Those who keep repeating it have not presented any evidence that it passed. It is an irresponsible objection.

The attack should be put in its proper context. That risk applies to every right that Congress chooses on balance to enact. Here the balance is extraordinarily strong in terms of the right, both from benefits to taxpayers during unprecedented spending, and for freedom by putting teeth into First Amendment rights when they have the most impact. Significantly, since this objection is *deja vu* to the 1988 debate, it is an attack on the primary value judgment underlying current law. That choice is not on the table in pending legislation to strengthen the law so its original goal can be achieved.

The fear also is irrational. Threatening a lawsuit ups the ante, and employees are far more afraid of their managers stepping up harassment, than managers are of whistleblower lawsuits. Lawsuits also are extremely expensive, and the chances of success no more than ten per cent even in the most favorable whistleblower statutes on the books.[15]

Consistent with the nonexistent litigation surge, the litigation track record surrounding passage whistleblower laws empirically confirms there was not a drop-off in accountability actions. That has been the case with before and after passage of the Whistleblower Protection Act. In each case, the empirical record indicates that managers were not afraid to hold employees accountable, and that there was not a surge of litigation by newly-emboldened employees. The rate of adverse actions and performance appeals remained virtually identical. The WPA was signed into law in March 1989. From 1986-88, there were 175 MSPB decisions in adverse action and performance appeals.[16] Few

[14] Devine, "The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Dissent," 51 *Administrative Law Review* 532, 554-58.
[15] Devine, *Running the Gauntlet: The Campaign for Credible Corporate Whistleblower Rights* 14, Government Accountability Project (2008).
[16] Compiled using search terms "7701(c) 7513 4303" in the MSPB database of Westlaw, searching each calendar year individually.

employees jumped on their new opportunity to file lawsuits. From 1989-91 there were 174. There are no comparative statistics for Individual Rights of Action newly created by the WPA, but the litigation burden was modest in the first three years -- 74 cases, or less than 25 annually, out of a nearly two million employee labor force at the time.[17]

The record of state and local government whistleblowers is consistent on both counts. There has not been an issue for some 150 years that they have clogged the courts with their civil rights constitutional suits under 42 USC 1983. There is only one equivalent state or local statute, providing jury trials governed by WPA legal burdens of proof, Washington, DC, which passed it in 2001. Again, the empirical record has been no impact on disciplinary/performance actions against employees. In the first five years (2001-05), there were only 12 reported decisions under its new rights. There were 220 reported decisions on adverse and performance based-actions from 1996-2000. There were 220 from 2001-2005.[18]

NATIONAL SECURITY ISSUES

I will not repeat the detailed analysis from my colleagues on most relevant issues for national security provisions of the bill. Four factors put their arguments in context, however. Most compelling, FBI and intelligence whistleblowers need first class legal rights, because the intensity of retaliation is so much greater there. While there may be animus against whistleblowers in all domestic institutions, at the FBI and intelligence agencies it is more likely to be obsessive hostility. The code of loyalty to the chain of chain of command is the primary value at those institutions, and they set the standard for intensity of retaliation.

Second, this is the moment to act – when the House Intelligence Committee Chair Reyes has just pledged proactive oversight to learn the truth about torture and other human rights abuses.[19] It is unrealistic to expect that intelligence whistleblowers will dare bear witness, unless they have normal rights to defend themselves in a uniquely hostile environment.

Third, HR 1507 primarily is an anti-leaks measure. It offers no protection for public disclosures even of unclassified information. The theory is that by creating safe channels inside the government, FBI and intel whistleblowers would have a preferred alternative to the press.

Fourth, the provision is a taxpayer measure as well as a national security and human rights safeguard. The FBI and intelligence agencies are receiving a significant amount of stimulus funds, and they are no exception to vulnerability to fraud in the new

[17] Compiled by searching for "2302(b)(8)" in the MSPB database of Westlaw, searching each calendar year individually.
[18] Represents the total number of reported decisions in state and federal court under §1-615.5 et. seq. of the DC Code. We attempted to find data from either the filing or administrative levels, but the data was not available from that many years ago on such short notice.
[19] Gertz, "Congress to Oversee CIA More Closely," *The Washington Times* (May 1, 2009).

spending. As the Inspector General for the Director of National Intelligence recently warned, "The risk of waste and abuse has increased with a surge in government spending and a growing trend toward establishing large, complex contracts to support mission requirements throughout the IC; yet many procurements receive limited oversight because they fall below the threshold for mandatory oversight."[20] There is no national security loophole for accountability against fraud either under the stimulus law or the False Claims Act.[21] Under both statutes, contractors for the FBI, National Security Agency or related agencies are covered by the whistleblower law.

Constitutional issues on security clearances

One issue that should be squarely addressed is whether Congress has the constitutional authority to grant third party review of security clearance actions. They reprisal of choice against national security whistleblowers because they cannot defend themselves. Since introduction of this legislation, the Justice Department has attempted to create a new legal doctrine that Congress is powerless to assert itself.

In the past, DOJ has claimed its authority from *Department of Navy v. Egan*, 484 US 518 (1988). While the Court did not provide a green light for any approach, the decision did not ban congressional action. All analysis was that Congress *hadn't* acted to legislate authority for the security clearance judgment call in question. There was no holding or analysis that it *couldn't*.

A detailed review should be reassuring. The Court's cornerstone principle for rejecting prior Board jurisdiction to order a clearance was as follows: "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Egan*, 484 U.S. at 530 (citations omitted). For the Court, the key factor was, "The [Civil Service Reform] Act by its terms does not confer broad authority on the Board to review a security-clearance determination." *Id.*

Consistent with that premise, the court left undisturbed all Board authority to modify clearance actions in pre-existing statutory provisions of the Civil Service Reform Act:

> An employee who is removed for "cause" under § 7513, when his required clearance is denied, is entitled to the several procedural protections specified in that statute. The Board then may determine **826 whether such cause existed, whether in fact clearance was denied, and whether transfer to a non-sensitive position was feasible. Nothing in the Act, however, directs or empowers the Board to go further." *Id.*

[20] ODNI Office of Inspector General, *Critical Intelligence Community Management Challenges* 11 (November 12, 2008).
[21] 31 USC 3729 *et seq.*

The Supreme Court said it would look at the whole statutory framework for specific intent, and analyzed all CSRA legislative history and objectives to determine whether there were an intent to cover security clearances, and found none.

In 1994, after four joint Judiciary-Post Office and Civil Service Committee hearings in the House and one in the Senate, Congress made a clear decision to add protection against security clearances. At the recommendation of the Justice Department, however, the Senate deleted the specific statutory provision and included security clearance protection in a larger provision creating catchall jurisdiction for any forms of harassment that were missed. The new personnel action, 5 USC 2302(a)(2)(xi) covered "any other significant change in duties, responsibilities or working conditions."

There was not any doubt that the primary form of harassment for the catchall was security clearance retaliation. As the Committee report explained in 1994, after specifically rejecting the security clearance loophole,

> The intent of the Whistleblower Protection Act was to create a clear remedy for all cases of retaliation or discrimination against whistleblowers. The Committee believes that such retaliation must be prohibited, regardless what form it may take. For this reason, [S. 622, the Senate bill for the 1994 amendments] would amend the Act to cover any action taken to discriminate or retaliate against a whistleblower, because of his or her protected conduct, regardless of the form that discrimination or retaliation may take.[22]

The consensus for the 1994 amendments explained that the new personnel action includes "any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system," again specifying security clearance actions as the primary illustration of the provision's scope.[23]

In *Hess v. Department of State*, 217 F.3d 1372, 1377-78 (Fed. Cir. 2000), however, the Federal Circuit did not recognize legislative history, and found the catchall provision inadequate because it did not specifically identify security clearances. That led to Congress' initiative to make the technical fixes in statutory language necessary to implement its policy choice.

Consistent with the above analysis, Congress has enacted other specific statutory restrictions on security clearance judgment calls that have not invoked constitutional attacks. For example, in the National Defense Authorization Act of 2001, PL 106-398, Congress forbid the President to grant clearances if an applicant has a felony record, uses or is addicted to illegal drugs or has received a dishonorable discharge. 10 USC 986.

A GENUINE LEGISLATIVE REFORM

[22] S. Rep. No. 103-358, at 9-10.
[23] 140 Cong. Rec. 29,353 (1994).

Justice Brandeis once declared, "If corruption is a social disease, sunlight is the best disinfectant." By that standard, this is outstanding good government legislation. If enacted, HR 1507 will upgrade federal workers from the lowest common denominator in modern U.S. whistleblower laws, to the world's strongest free speech shield for government employees. In general, the legislation achieves this result by overturning twelve years of hostile case law, closing the coverage gaps for national security and contractor whistleblowers, and providing enforcement teeth through full access to court.

More specifically, HR 1507 would –

* codify the legislative history for "any" protected disclosure, meaning the WPA applies to all lawful communication of misconduct. This restores "no loopholes" protection and cancels the effect of *Garcetti v. Ceballos* on federal workers. Secs. 2(a), 3(a).

* restore the unqualified, original "reasonable belief" standard established in the 1978 Civil Service Reform Act for whistleblowers to qualify for protection. Sec. 4

* provide whistleblowers with access to district court for de novo jury trials if the Merit Systems Protection Board fails to issue a ruling within 180 days, providing whistleblowers with the same court access as with EEO anti-discrimination law. Sec. 9(a).

* end the Federal Circuit Court of Appeals monopoly on appellate review of the Whistleblower Protection Act through restoring "all circuits" review, as in the original Civil Service Reform Act of 1978. Sec. 9(b).

* close the loophole that has existed since 1978 and provide WPA coverage to employees of the FBI and intelligence agencies. Sec. 10.

* restore independent due process review of security clearance determinations for whistleblower reprisal, unavailable since the *1988 Egan* Supreme Court decision. Secs. 5, 10(c) 14.

* restore the due process right to present evidence of whistleblowing and alleged retaliation at administrative hearings, before a case can be decided on an agency's alleged "independent justification" to act against the employee. Sec. 15.

* provide WPA due process rights and burdens of proof for those who refuse to violate the law, or who testify at Office of Inspector General or Office of Special counsel investigations. Sec. 2(b).

* provide whistleblower rights to government contractor employees, helping create accountability for the largest discretionary source of skyrocketing government spending. Sec. 11.

* restore intended civil service and whistleblower rights for some 40,000 Transportation Security Administration baggage screeners on the front lines of homeland security. Sec. 12

* make permanent and provide a remedy for the anti-gag statute – a rider in the Treasury Postal Appropriations bill for the past 17 years – that bans illegal agency gag orders. The anti-gag statute neutralizes hybrid secrecy categories like "classifiable," "sensitive but unclassified," "sensitive security information" and other new labels that lock in prior restraint secrecy status, enforced by threat of criminal prosecution for unclassified whistleblowing disclosures by national security whistleblowers. Sec. 5.

* establish that the statutory hybrid secrecy category, Critical Infrastructure Information, does not cancel or otherwise supersede Whistleblower Protection Act free speech rights. Sec. 16.

* take initial steps to prevent the states secrets privilege from canceling a whistleblower's day in court. Sec. 10(c)(5)

* specifically shield scientific research from political censorship, repression or distortion. Sec. 13.

* codify protection against retaliatory investigations, giving whistleblowers a chance to end reprisals by challenging preliminary "fact-finding" pretexts to build a record of any misconduct that can be discovered. (Sec. 5)

* protect whistleblowers who disclose classified information to Members of Congress on relevant oversight committees or their staff. Sec. 10(a), 10(f).

* protect disclosures of the factual consequences from policy decisions. Sec. 3(a)(3)(D).

* define "clear and convincing evidence" so it is consistent with the well-established legal doctrine for this critical test in the legal burdens of proof for whistleblowers to win their cases. Sec. 3(b).

* strengthen the remedies section of the law, so that prevailing whistleblowers can receive normal "make whole" relief through compensatory damages when they prevail. Sec. 9(d).

* strengthen the Office of Special Counsel's authority to seek disciplinary sanctions against managers who retaliate. Secs. 7, 19.

* Authorize the Special Counsel to file friend of the court briefs. Sec. 18.

RECOMMENDATIONS

HR 1507 is significant good faith legislation. It can and should be refined at markup, however, to prevent problems that could prevent it from achieving its potential in practice. GAP is available to assist committee staff on any of the following suggestions:

* explicit statutory language that the same "reasonable belief" definition applies to all protected speech categories, including "gross mismanagement." There is no justification for inconsistent definitions.

* protection under the contractor provision for employees of grant recipients or indirect government spending such as Medicare. This would define the scope of WPA accountability as broad as the False Claims Act and this year's stimulus boundaries for employees covered by that whistleblower law.

* privacy and confidentiality for closed case files under contractor whistleblower provisions. That key safeguard to prevent the files from being used as dossiers is in the stimulus contractor whistleblower provision, and is a cornerstone ofcomplainant rights in the WPA for civil service employees. 5 USC 1213(g).

* protection for FBI and intel whistleblowing disclosures to appropriately cleared supervisors. This is the primary channel for functional communications, and the law should be designed to prevent information bottlenecks from the start. Those disclosures currently are protected under in-house FBI whistleblower regulations required the civil Service Reform Act in 5 USC 2303.

* consistent court access rights for FBI/intel employees. Although the House national security court access provision meets the Seventh Amendment standard for the right to a jury trial, unlike the other portions of the law that dimension is not specified. To preclude confusion, the language should be drafted consistently for all employees entitled to a jury trial.

* legal burdens of proof for national security whistleblower rights, consistent with those for all others covered by HR 1507. Through an apparent oversight, HR 1507 is silent on the legal burdens of proof for national security employees who file retaliation claims. To avoid arbitrary rulings, the normal standards governing all whistleblower laws passed since 1989 in any context must be specified.

* consistent definition of "disclosure" for national security whistleblowers. In another apparent oversight, the national security provision does not duplicate the definition of disclosure to include "communication" that applies to the rest of the bill. This is

necessary to close loopholes in protected speech. Again, there should be common standards.

* confidentiality rights for employees who seek counseling on how to properly make classified disclosures. Otherwise, they may not feel safe using this service created by Section 17 of HR 1507, or it may backfire and lead to retaliation by exposing whistleblowers who want or need to remain confidential.

CONCLUSION

HR 1507 does not contain new concepts or models. It is a composite of whistleblower best practices that should have been enacted as part of the stimulus law. It is essential as the integrity foundation for unprecedented spending, and for a commitment that America no longer will abuse human rights at home or abroad. This reform must be enacted before stimulus spending gets fully underway, to keep it honest. And until national security workers have first class rights when they "commit the truth," congressional pledges to learn the truth about torture and human rights abuses will ring hollow. It is not too late to turn on the lights, but there is no time to delay. The Committee and the House should act quickly on this legislation.

Chairman TOWNS. Ms. Canterbury.

STATEMENT OF ANGELA CANTERBURY

Ms. CANTERBURY. Thank you, Chairman Towns and members of the committee, for the opportunity to testify in support of H.R. 1507, the Whistleblower Protection Enhancement Act of 2009. I'm Angela Canterbury, advocacy director for Public Citizen, Congress Watch Division.

As our country faces challenges of historic proportions, one reform could save billions of taxpayer dollars and fulfill the imperative for more transparency and accountability: authentic whistleblower protections for all employees and contractors. Whether the issue is stimulus spending, fraud at a Wall Street firm, prescription drug safety, environmental protection or national defense, Federal workers must be empowered to safeguard the public trust. But as we've heard today, that is unfortunately not the case. A pervasive culture of secrecy in the Federal Government is fostered by the ease with which repression and retaliation can be meted out to any employee who dares to point out wrongdoing.

In 2007, the nonpartisan Ethics Resource Center found that more than half of the Federal work force observes misconduct on the job, but only one-quarter reported wrongdoing because the others feared retaliation. More than 1 out of 10 who did report experienced retaliation. Not only is it a national disgrace, but speaking out about wrongdoing is still a risky endeavor. It's also unsustainable.

As the stakes for public programs and funds have rarely been higher, whistleblower protections are good government and good business. Under the False Claims Act, whistleblower disclosures now account for the majority of fraud recoveries from dishonest contracts, $1.45 of the $2 billion recovered in 2007 alone.

Since the Whistleblower Protection Act was last reaffirmed, Congress has passed eight Federal laws, all of which provide private-sector employees with better protections than those of Federal employees.

Our current system for protecting Federal whistleblowers is badly broken and outmoded, not all public employees are covered, and those who are face a flawed and politicized administrative process. They lack normal access to court. The only court authorized to hear the claims of retaliation, the U.S. Court of Appeals for the Federal Circuit, has a record of ruling against whistleblowers and eroding the law.

H.R. 1507 would go a long way to restore and modernize the Whistleblower Protection Act, but it does not go too far. It does not propose sweeping change, but rather is an essential update to the policy to ensure functional rights for all Federal employees and contractors. It closes loopholes created by bad court decisions and improves due process rights; extends necessary coverage to contractors, Transportation Security Administration workers and national security workers, allowing for a review procedure sensitive to national security concerns; and provides specific protections to Federal scientists.

Perhaps the most significant update is the addition of the access to jury trials and more judicial review, granting the same safety

net for Federal workers that Congress has already granted to millions of private-sector employees. A trial by jury, though only likely to be used by a small minority, is essential to ensuring the law will be effective.

Today I offer one suggestion for improving the bill: ensuring whistleblowers aren't forced into arbitration. This legislation rightly attempts to nullify forced arbitration for contract employees; however, on April 1st, the Supreme Court held in *14 Penn Plaza* v. *Pyett* that employment discrimination claims brought by union employees can be subject to arbitration, and its holding may extend to whistleblower claims as well. This committee can easily remedy this by adding simple language to the bill.

Like our hard-won civil rights laws, H.R. 1507 serves the public's interest by skillfully achieving the essential but delicate balance between the rights of employees and the effective management of the Federal work force. Public Citizen strongly endorse swift passage and enactment of H.R. 1507, and we are not alone. This legislation enjoys tremendous widespread support from the American people demonstrated not only by the broad array of supporting organizations, but also by editorializing of newspapers across the country and by bipartisan support in the House of Representatives, which has already passed this legislation twice.

The impressive collection of transpartisan, transideological groups supporting the bill includes more than 292 and is led by a core group of committed legislative advocates. Together we've called upon President Obama to fulfill his campaign promise and support passage of the bill.

It is extremely encouraging to hear so much commonality between the administration's testimony today and our vision for credible protections. No President has ever been more supportive of true whistleblower reform. However, there are still areas where more discussion is needed to ensure agreement on an effective policy to achieve the ultimate goal of true accountability and transparency that we share. Public Citizen and our partners stand firmly behind H.R. 1507 and completion of this marathon legislative effort, and we look forward to working with you, the Senate and the President to finally restore and modernize the Whistleblower Protection Act.

Thank you.

Chairman TOWNS. Thank you very much, Ms. Canterbury.

[The prepared statement of Ms. Canterbury follows:]

WRITTEN TESTIMONY

OF

ANGELA CANTERBURY

DIRECTOR OF ADVOCACY, CONGRESS WATCH DIVISION

PUBLIC CITIZEN

HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HEARING ON

"PROTECTING THE PUBLIC FROM WASTE, FRAUD AND ABUSE: H.R. 1507, THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2009"

PRESENTED ON MAY 14, 2009

Thank you, Chairman Towns, Ranking Member Issa, and Honorable Members of the Committee, for the opportunity to testify in support of H.R. 1507, the Whistleblower Protection Enhancement Act of 2009. I'm Angela Canterbury, advocacy director of Public Citizen's Congress Watch division. Public Citizen is a national, nonpartisan, nonprofit membership organization that has advanced accountability and transparency in administrative agencies, the courts, and the Congress, for more than thirty-eight years.

The Imperative for More Accountability and Transparency

As our country faces challenges of historic proportions, one reform could save billions of taxpayer dollars and help fulfill the imperative for more transparency and accountability: authentic whistleblower protections for all federal employees. Whether the issue is stimulus spending, a financial bailout of the banking or auto industry, fraud at a Wall Street firm, prescription drug safety, environmental protection, national health care, homeland security, or national defense - federal workers must be empowered to safeguard the public trust. They must have the confidence that if they speak out, they will not face repression and retaliation.

Unfortunately, that is not the case today.

A pervasive culture of secrecy in the federal government is fostered by the ease with which repression and retaliation can be meted out to any employee who dares to point out wrongdoing. For example, more than 1,400 of the nearly 3,400 federal scientists at nine agencies surveyed by the Union of Concerned Scientists said that they fear retaliation for raising concerns about the work and mission of their agencies.[1] Many whistleblowers suffer from some form of serious retaliation, including threats, demotion or outright firing.

In 2007, the Ethics Resource Center in 2007 concluded that misconduct and employee retaliation in the federal government is unacceptably high. The study found that fraud occurs in government as much as it does in the private sector, and that more than half of the federal workforce observes misconduct on the job. Furthermore, one-quarter of government employees who observed wrongdoing did not

[1] Union of Concerned Scientists, *Voices of Federal Scientists: Americans' Health and Safety Depends Upon Independent Science*, January 2009, pages 2 and 4. Accessed at http://www.ucsusa.org/assets/documents/scientific_integrity/Voices_of_Federal_Scientists.pdf.

report it because they feared retaliation; and only 7 percent of employees reported wrongdoing outside the management chain, such as to Inspectors General.[2]

Not only is it a national disgrace that speaking out about wrongdoing in government is still such a risky endeavor; it's unsustainable, as the stakes for public programs and funds have rarely been higher. We are a nation at war - with lives in peril, and hundreds of billions of dollars at risk. In addition, federal spending is at unprecedented levels as we attempt to reverse the course of a severe economic recession. The need for strict accountability and oversight to protect lives and prevent waste, fraud and abuse has never been more urgent.

In January of this year, the President of the Ethics Resource Center, Patricia Harned, warned:

> The next Enron could occur within government. Almost one quarter of public sector employees identify their work environments as conducive to misconduct - places where there is strong pressure to compromise standards, where situations invite wrongdoing and/or employees' personal values conflict with the values espoused at work.[3]

Recognizing this, President Obama declared a "new era of openness" and has taken steps towards that goal. He created new positions and initiatives within his administration such as a transparency team, a special counsel for ethics and government reform, and the Open Government Directive. He also issued executive orders and memoranda on ethics, transparency and scientific integrity, signifying his intent to have his administration end the culture of secrecy in the federal government.[4] Likewise, he has committed to strictly scrutinize the spending of

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[2] Ethics Resource Center, *National Business Ethics Survey*, November 2007. Accessed at https://www.ethics.org/research/nges-order-form.asp.

[3] Ethics Resource Center. Accessed at http://www.ethics.org/about-erc/press-releases.asp?aid=1148

[4] Presidential Executive Order on Ethics Commitments by Executive Branch Personnel, January 21, 2009; Accessed at http://www.whitehouse.gov/the_press_office/ExecutiveOrder-EthicsCommitments/. Presidential Memorandum For The Heads Of Executive Departments And Agencies: Freedom of Information Act, January 21, 2009; Accessed at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/. Presidential Memorandum For The Heads Of Executive Departments And Agencies: Transparency and Open Government, January 21, 2009; Accessed at http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/. Presidential Memorandum For The Heads Of Executive Departments And Agencies: Scientific Integrity, March 9, 2009; Accessed at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09/.

federal funds to ensure that tax dollars are not wasted, creating the Recovery Accountability and Transparency Board and promoting "unprecedented levels of transparency and accountability" on Recovery.gov.[5]

Importantly, in a recent weekly radio address, President Obama had this to say about efforts to reform spending and government waste: "It means strengthening whistleblower protections for government employees who step forward to report wasteful spending."[6]

But the President's call will not be met without meaningful protections for all employees safeguarding the public trust and our tax dollars, including national security workers and contractors. Without codification of authentic protections, including access to jury trials for all government employees who blow the whistle, the Obama Administration will have a Potemkin Village of accountability.

Protecting Whistleblowers Works

Every worker, public or private, should be able to report fraudulent spending, gross mismanagement and illegalities without fear of retaliation - it's just good business.

Under the False Claims Act,[7] the law that encourages private sector whistleblowers to file lawsuits challenging fraud in government contracts, the government's civil recoveries of fraud in government contracts has substantially increased to more than $20 billion since the law was strengthened in 1986. According to the United States Department of Justice, whistleblower disclosures now account for the majority of fraud recoveries from dishonest contractors - $1.45 of the $2 billion recovered in 2007 alone. About this recovery, Peter D. Keisler, then Acting Attorney General and Assistant Attorney General for the Civil Division, said, "It also attests to the fortitude of whistleblowers who report fraud and the tireless efforts of the civil servants who investigate and prosecute these cases."[8]

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[5] See www.Recovery.gov.
[6] President Obama's Weekly Radio Address, April 18, 2009.
[7] False Claims Act, 31 U.S.C. § 3730.
[8] U.S. Department of Justice, Press Release: *Justice Department Recovers $2 Billion for Fraud Against the Government in Fy 2007; More Than $20 Billion Since 1986,* November 1, 2007. Accessed at

The effectiveness of whistleblowers in combating waste and fraud also is evident in the corporate world. Consider the important roles of exposing fraud and corruption by Sherron Watkins of Enron and Cynthia Cooper at Worldcom.[9] PriceWaterhouseCoopers surveyed 5,400 companies in 40 countries and found that whistleblowers detected more fraud than auditors or law enforcement officers. It also stressed the importance of "whistle-blowing systems" and listed "safeguard employees who report misconduct against any form of retaliation (i.e., threats, harassment and demotion)" as the first requirement for a whistleblower program.[10]

The Current System Is Broken and Outmoded

The current system for protecting federal whistleblowers is badly broken and outmoded. While many employees in the private sector have strong protections for whistleblowing, federal workers suffer under an antiquated, hobbled system of second-class rights. Not all federal employees are covered, nor are the fleets of federal contractors who increasingly manage our public affairs and funds. Those who are covered under the law face a flawed and politicized administrative process for reviewing whistleblower disclosures and claims, and lack normal access to court. In addition, the only court authorized to hear claims of retaliation by federal employees, the U.S. Court of Appeals for the Federal Circuit, has a record of ruling against whistleblowers and eroding the law.[11] The result is that the law intended to protect federal workers and tax dollars is virtually useless.

The Whistleblower Protection Act (WPA), aptly nicknamed the Taxpayer Protection Act, passed unanimously in 1989 and unanimously strengthened in 1994, was a landmark shield law that provided the strongest statutory free speech rights to date.[12] But the law has failed to live up to the intent of Congress. Whistleblowers who try to fight retaliation by appealing to the Merit System Protection Board (MSPB)

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http://www.whistleblowers.org/storage/whistleblowers/documents/doj%20fca%20statistics%202007.pdf.

[9] TIME Magazine, "Persons of the Year 2002," December 2002. Accessed at http://www.time.com/time/subscriber/personoftheyear/2002/poyintro.html.

[10] PriceWaterhouseCoopers, *Economic crime: people, culture and controls: The 4th biennial Global Economic Crime Survey*, 2007. Accessed at http://www.pwc.com/extweb/pwcpublications.nsf/docid/1E0890149345149E8525737000705AF1.

[11] Testimony of Tom Devine before the Senate Governmental Affairs Committee on S. 1358, November 2003, pages 20-24.

[12] Tom Devine quote, Freedom of Information Center Online, *"Law, retaliation doom whistleblowers, panelists say,"* March 17, 2006.

face daunting odds. Since 2000, of the 53 cases decided on the merits by the Board, only three whistleblowers have won.[13] Hearings are conducted by administrative judges who lack judicial independence from political pressure. Moreover, the MSPB is not structured or funded to address complex, high-stakes cases that can require lengthy proceedings.

A very modest number of federal whistleblowers have the means or appetite for an appeals process. But for the minority who appeal a decision by the MSPB, there is only one court of jurisdiction, the U.S. Court of Appeals for the Federal Circuit. Whistleblowers win less than one and a half percent of decisions on the merits.[14]

The U.S. Court of Appeals for the Federal Circuit also has consistently narrowed the circumstances under which whistleblowers can win. For example, although the statute protects "any" lawful disclosure that an employee "reasonably believes evidences" significant misconduct, the Court now excludes the most common situations in which whistleblower disclosures are made. A whistleblower is not protected in common situations, such as when the disclosure is made in the course of doing one's job duties, as an auditor or safety inspector might, and when someone else previously has pointed out the same misconduct. These and other decisions over the years have gutted the rights for whistleblowers that Congress intended.[15]

Importantly, in the years since the WPA was last reaffirmed, our national circumstances have changed dramatically. Since September 11, 2001, there have been many controversial changes in our national security programs and warnings of malfeasance in those programs, which often have been ignored.[16] The need has never

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[13] *"An Open Letter to President Obama and Members of Congress: 286 Public Interest Organizations Support Swift Action to Restore Strong, Comprehensive Whistleblower Rights,"* May 12, 2009, "Since 2000, only three out of 53 whistleblowers have received final rulings in their favor from the MSPB. The Federal Circuit Court of Appeals, the only court which can hear federal whistleblower appeals of administrative decisions, has consistently ruled against whistleblowers, with whistleblowers winning only three cases out of 209 since October 1994 when Congress last strengthened the law." Accessed at http://www.citizen.org/congress/govtaccount/articles.cfm?ID=18349.

[14] Ibid at 13.

[15] Ibid at 11.

[16] TIME, "The Bombshell Memo," May 21, 2002. Accessed at http://www.time.com/time/covers/1101020603/memo.html. *The New York Times*, "Another FBI Employee Blows Whistle on Agency," August 2, 2004. Accessed at http://www.nytimes.com/2004/08/02/us/another-fbi-employee-blows-whistle-on-agency.html?pagewanted=1. *The Village Voice*, "The Silencing of Sibel Edmonds," April 19, 2005. Accessed at http://www.villagevoice.com/2005-04-19/news/the-silencing-of-sibel-edmonds/http,

been greater for more lawful scrutiny of our programs, and yet national security workers have fewer rights for protected disclosures than do privately employed defense contractors. Also, Transportation Security Officers (TSOs) who are on the front lines of homeland security at our airports currently have no protection for disclosing potentially threatening mismanagement.

Recognizing the merits of whistleblower protections in numerous contexts, eight federal laws have been passed since the WPA was reaffirmed, all of which provide private sector employees with better protections than those of federal employees. These protections include full access to court, including jury trials, for employees who work in manufacturing and as defense contractors, for example. However, the patchwork laws and antiquated WPA means that an employee at a toy factory has more protection for exposing toxic or dangerous toys than a toy inspector at the Consumer Product Safety Commission.[17]

Congress should restore and modernize the Whistleblower Protection Act to ensure we have the most effective federal workforce with functional rights without further delay. We must have meaningful protections for those who expose waste, fraud, abuse, suppression of federal research, threats to public health and safety, and illegality. The risks to our nation are too great to allow civil servants to continue to face retaliation for dedicated public service.

H.R. 1507 Would Restore and Modernize the WPA

The House version of the Whistleblower Protection Enhancement Act would go a long way to repair and modernize the broken system of protection for federal workers and tax dollars - but it does not go too far. It does not propose sweeping change, but rather is an essential update to the policy to ensure functional rights for all federal employees and contractors.

[17] Sarbanes Oxley law, 18 USC 1514A(b)(1)(B), (publicly-traded corporations)(2002); Energy Policy Act, 42 USC 5851(b)(4), (nuclear power and weapons) (2005); Commercial Motor Vehicle Safety Act, 49 U.S.C. § 31105(c), (trucking and cross country bus carriers)(2007); Federal Rail Safety Act, 49 U.S.C. § 20109(d)(3), (railroads)(2007); National Transit Systems Security Act, 6 USC 1142(c)(7), (metropolitan transit)(2007); Defense Authorization Act, 10 USC 2409(c)(2), (defense contractors)(2007); Consumer Products Safety Improvement Act, 15 USC 2087(b)(4), (retail commerce)(2008); American Recovery and Reinvestment Act, section 1553(c)(3), (corporate or state and local government stimulus recipients)(2009).

H.R. 1507 restores the intent of Congress in areas where erroneous judicial decisions have undermined the law. It also closes loopholes and modernizes the Whistleblower Protection Act, consistent with effective advances in private sector whistleblowing systems and the extraordinary demands upon the federal government today.

There are significant improvements in H.R. 1507, the bill:

- Protects *all* federal employees and contractors who report waste, fraud, abuse, attempts to alter federal research, threats to public health and safety, and other illegalities.
- Provides for full access to court and jury trials for all federal employees and contractors when the administrative process fails.
- Creates a process for review of retaliatory revocation of national security clearances.
- Assures that reports of waste, fraud and abuse made in the course of regular job duties are protected from retaliation.
- Protects disclosures made to supervisors.
- Protects disclosures even if the wrongdoing was previously known by others.
- Bars the MSPB from ruling for an agency before whistleblowers have the opportunity to present evidence of retaliation.
- Improves due process rights, including extension of hearing rights to employees who testify as witnesses in investigations and those who refuse to violate the law.

This legislation importantly protects *all* federal employees and contractors, ending the patchwork of coverage that left loopholes where waste, fraud, abuse and attempts to alter and suppress research have flourished. H.R. 1507 extends specialized coverage to national security workers, allowing for review procedures sensitive to national security concerns. This is one area in which the Senate version of the bill, S. 931, comes up short. TSOs are covered under the WPA for the first time, and federal scientists who report efforts to alter, misrepresent or suppress federal research are given specific protections.

H.R. 1507 also clarifies that "any" disclosure of waste, fraud and abuse, means "without restriction to time, place, form, motive, context, or prior disclosure" whether it is formal or informal. This is a restoration of congressional intent, and addresses several court decisions that severely limited the protections of disclosures.[18]

Perhaps the most important improvement to the law is the addition of access to jury trials and more judicial review, granting the same safety net for federal workers that Congress has already granted to millions of private-sector employees. If a federal worker or contractor experiences retaliation and the administrative process fails to provide relief after 180 days, an employee can elect to take the case to a U.S. district court with jury. Also, if the MSPB rules against the whistleblower, an appeal can be made within 90 days. Those who win will be "made whole" through back pay and compensatory damages. Access to jury trials is another reform missing from the Senate version of this legislation.

As noted earlier, Congress already has given court access to millions of employees of publicly held companies, including most recently approximately 20 million workers employed by firms that make or sell products regulated by the Consumer Product Safety Commission. In addition to the Privacy Act, the Equal Employment Opportunity Act and other civil rights laws providing jury trials to federal employees, there are thirteen whistleblower jury trial laws currently available for corporate, government corporation, and some federal employees.[19]

The Department of Justice under previous presidential administrations argued that giving federal whistleblowers access to jury trials would result in a "clogging of the courts." But this has not been the case with any of the other laws granting court access. In fact, in the first three years after Congress passed the Sarbanes-Oxley law,

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[18] Ibid at 11: "In 1994 when Congress last addressed this issue, the House Report reaffirmed that precedents creating loopholes violate the Act's statutory language and a basic premise of the law. 'Perhaps the most troubling precedents involve the ... inability to understand that 'any' means 'any.' H.R. Rep. No. 103-769, at 18.

[19] Privacy Act, 5 USC 552a, (all citizens, including federal employees)(1974); Civil Rights Act, 42 USC 1983, (state and local government employees to challenge constitutional violations)(1971); Equal Employment Opportunity Act, 42 USC 2000e, (government employees, employment discrimination)(1991); False Claims Act, 31 U.S.C. § 3730 (h), (federal government contractors on civil fraud)(1986); Major Fraud Act, 18 U.S.C. § 1031(h), (federal government contractors on criminal fraud)(1989); Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991,12 USC 1790b(b), (banking employees)(1991); Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, 12 USC 1831j(b), (FDIC employees)(1991); and Ibid at 17.

giving whistleblower protections to the employees of publicly traded corporations, only 54 of the 42 million employees covered by the law went to court over a whistleblower dispute, and fewer than 500 workers even complained about retaliation for whistleblowing. As we stated in a coalition memo to Senate staff in July 2008: "Extrapolating this experience to the WPA, we can predict an average of 37 cases in federal court in a typical year. The cases would be spread over 678 federal district court judges and 505 magistrates, an addition of .029 cases annually for each decision maker in the federal courts." Similarly, if we predict an experience like that of the EEOC, where there also is access to jury trial after 180 days, we anticipate 17.4 cases per year. [20]

Additionally, when the Congressional Budget Office (CBO) scored H.R. 985 in 2007, substantially the same bill as H.R. 1507, it took into consideration the increase in caseload for OSC and MSPB and the federal courts. The CBO found that the additional resources needed to implement the legislation "would not be significant."[21]

This legislation also would end the monopoly of the Court of Appeals for the Federal Circuit, allowing for important judicial review by federal district and appeals courts. A trial by jury, though only a safety net likely to be used by a small minority of whistleblowers who face retaliation, will deter sloppy management of both wrongdoing and complaints of retaliation. It also will serve to improve the due process rights for whistleblowers even in the administrative review process.

Bunnatine H. Greenhouse, the former procurement executive in the Army Corps of Engineers who blew the whistle on improper no-bid contracting with Halliburton for reconstruction in Iraq, poignantly said, "The bottom line is that without access to independent courts, real judges and juries, whistleblowers don't stand a chance, and fairness and transparency will not see the light day."[22]

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[20] Memo from Whistleblower Advocates to Senate Homeland Security and Government Affairs Staff, July 2, 2008.

[21] Congressional Budget Office Cost Estimate, March 9, 2007, *"H.R. 985 Whistleblower Protection Enhancement Act of 2007, as ordered reported by the House Committee on Oversight and Government Reform on February 12, 2007."*

[22] Bunnatine H. Greenhouse, Personal Letter, February 2009. Accessed at http://www.whistleblowers.org/index.php?option=com_content&task=view&id=780&Itemid=71.

Ensuring Whistleblowers Aren't Forced Into Arbitration

Real access to court for all federal whistleblowers will be fulfilled only if Congress also prohibits companies from stripping that right by using forced arbitration in terms for employment. This legislation also rightly attempts to nullify this practice for contract employees who have claims of retaliation. However, unless the legislation is slightly amended, a recent Supreme Court ruling could prevent judicial review for federal contractor whistleblowers who happen to be members of a union.

Today millions of employers write forced arbitration into the fine print of employment applications, employment handbooks, and even pension plans. *Employees have no choice - they must sign these documents if they want to get a job or to keep the job they have.* If later employees believe their employer is violating their rights, it is mandatory that they take their claim to arbitration. They are not allowed to go to court, and the arbitrator's decision is binding.

Forced arbitration is regularly used by federal contractors like Halliburton and its subsidiaries.[23]

In a recent national public opinion poll by Lake Research Partners, commissioned by Public Citizen and the Employee Rights Advocacy Institute for Law & Policy, Americans were asked what they thought about how mandatory binding arbitration might be used. More than 76 percent of likely voters were concerned that in forced arbitration one "cannot sue for harassment, abuse, retaliation or wrongful termination" and "cannot protect whistleblowers." Six in ten likely voters support banning forced arbitration in employment contracts.[24]

H.R. 1507 would ensure that a federal whistleblower's rights would not be waived due to a forced arbitration clause between a worker and an employer, but makes an exception for collective bargaining agreements, contracts between a union and an employer or another union. However, a very recent Supreme Court decision, made after the drafting of this legislation, warrants a slight improvement to the language in the bill.

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[23] ABC News, *"Victim: Gang-Rape Cover-Up by U.S., Halliburton/KBR,"* December 10, 2007. Accessed at http://abcnews.go.com/Blotter/Story?id=3977702.

[24] Lake Research Partners, *National Study Of Public Attitudes On Forced Arbitration*, April 2009. Accessed at http://www.fairarbitrationnow.org/content/forced-arbitration-public-opinion-research-slides.

On April 1, 2009, the Supreme Court held in *14 Penn Plaza v. Pyett* that employment discrimination claims brought by union employees can be subject to arbitration, and its holding may extend to whistleblower claims as well. [25] Collective bargaining agreements generally require arbitration of employment disputes between the union and the company. But before this decision, employees covered by collective bargaining agreements were never precluded from going to court when challenging discrimination or other workplace legal violations. Now, they may well be.

But being covered by a collective bargaining agreement should not mean that an employee can't sue for retaliation in court. Unions shouldn't be able to force employees into arbitration over legal violations any more than employers should. Moreover, unions agree - labor arbitration should not be the only way union employees have to vindicate their legal rights.[26]

This committee can easily remedy this issue in the context of whistleblower retaliation claims covered by the Whistleblower Protection Enhancement Act by adding language to the current provision in H.R. 1507 similar to that in the Arbitration Fairness Act of 2009, S.931: "except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising there from."

Overwhelming Support for H.R. 1507

Public Citizen strongly endorses swift passage and enactment of H.R. 1507 - and we are not alone. This legislation enjoys tremendous, widespread support from the American people, demonstrated not only by the broad array of supporting organizations representing hundreds of thousands of members,[27] but also by editorializing by newspapers across the country,[28] and by the bipartisan support of

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[25] *14 Penn Plaza v. Pyett*, 129 S. Ct. 1446 (2009).
[26] Brief of the American Federation of Labor and Congress of Industrial Organizations and Change to Win as Amici Curiae in Support of Respondents, The Supreme Court of the United States, *14 Penn Plaza v. Pyett*, pp. 12 et seq.
[27] Ibid at 13.
[28] *E.g. The Washington Times*, February 5, 2009; *Fort Worth Star-Telegram*, September 18, 2008; *Hartford Courant*, September 17, 2008; *Delco Times* (PA), September 10, 2008; *Republican Herald*

this Congress, which already passed this measure unanimously earlier this year. President Obama also has repeatedly voiced support for strengthening and expanding protections for federal whistleblowers, including support for full access to jury trials and extending rights to national security workers.

The impressive collection of trans-partisan, trans-ideological groups supporting H.R. 1507 includes more than 286 organizations representing hundreds of thousands of members, and is led by a core group of committed legislative advocates from Public Citizen, POGO, GAP, the Union of Concerned Scientists, the American Federation of Government Employees, to the National Whistleblowers Center. The diverse organizations, many of which comprise the Make It Safe Coalition, include good government groups, employment, civil rights and taxpayer rights groups, including the National Tax Payers Union, OMB Watch, the American Civil Liberties Union, OpenTheGovernment.org, the Campaign for Liberty, the National Treasury Employees Union and many others. Our open letter of support to President Obama and members of Congress, which is attached to this testimony, makes clear that these organizations support the key provisions of H.R. 1507. On the other hand, the Senate bill, S. 931, as introduced, comes up short by failing to cover all federal workers and provide access to courts.[29]

The Senate has been a road block to sufficient reform of the WPA for the past several years. This committee and the House of Representatives overwhelmingly supported and passed this legislation once in March 2007, and again as part of the stimulus bill in January of this year. Reps. Van Hollen and Platts, Speaker Pelosi[30] and the rest of the members of the House understood the critical importance of protecting federal whistleblowers as an accountability measure for the spending bill. However, the Senate did not accept these protections and stripped them from the bill in the final negotiations.

However, real progress is being made in convincing the Senate of the merits of the House framework, including coverage of all federal workers and contractors, expanded judicial review to more than one court, and access to jury trials.

(PA), September 4, 2008; *Kennebec Journal* (ME), July 30, 2008; *The San Francisco Chronicle*, February 16, 2006.

[29] Ibid at 13.

[30] *Pelosi Statement on Whistleblower Protections Added to American Recovery and Reinvestment Act*, Wednesday, January 28, 2009. Accessed at https://www.house.gov/pelosi/press/releases/Jan09/whistleblower.html.

President Obama has endorsed stronger whistleblower protections, both in response to a formal National Whistleblowers Center survey[31] and in his policy positions. In fact, the President has a proven, longtime commitment to helping whistleblowers. As a young attorney he wrote briefs for a landmark Supreme Court case under the False Claims Act. As a senator he voted for legislation to reform the Whistleblower Protection Act. He also made a very strong statement of support for whistleblowers during his presidential campaign and the transition:

> Often the best source of information about waste, fraud, and abuse in government is an existing government employee committed to public integrity and willing to speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled as they have been during the Bush administration. We need to empower federal employees as watchdogs of wrongdoing and partners in performance. Barack Obama will strengthen whistleblower laws to protect federal workers who expose waste, fraud, and abuse of authority in government. Obama will ensure that federal agencies expedite the process for reviewing whistleblower claims and whistleblowers have full access to courts and due process.[32]

Our coalition has called on President Obama to fulfill his campaign promise and support passage of H.R. 1507.[33] At today's hearing we may likely learn if Obama's administration will reaffirm his support, or whether the Department of Justice or the Office of Management and Budget will recycle old arguments against reform.[34] The responsibility of defending the U.S. Government agencies against claims by government employees naturally creates a tension with supporting strong whistleblower protections. No doubt the committee will keep the views of the Department of Justice in context, as it has in the past. There is certainly an opportunity for more discussion and development of an effective policy, since the President, this committee and whistleblower reform advocates share the ultimate goal of true accountability and transparency.

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[31] National Whistleblowers Center, *Survey of Candidates for President 2008*. Accessed at http://www.whistleblowers.org/storage/whistleblowers/documents/obama.survey.scanned.pdf.
[32] Obama Policy Statement, during presidential campaign and transition, formerly accessed on www.change.gov and www.mybarackobama.org.
[33] Make It Safe Coalition, Letter to President Obama, April 1, 2009. Accessed at http://www.citizen.org/congress/govtaccount/articles.cfm?ID=18518.
[34] *Statement on Administration Policy*, Office of Management and Budget, Re.: H.R. 985, March 13, 2007; *Letter to Speaker Nancy Pelosi*, Office of the Attorney General, Re.: S.274, December 17, 2007.

Conclusion

Whistleblowers are our most effective deterrent against fraud and waste, protecting their honest disclosures is our best assurance that taxpayer dollars are spent wisely and government works effectively. But the current reality is that federal employees who expose improper multi-billion-dollar, no-bid defense contracts, cozy relationships between FAA inspectors and airlines, hundreds of billions of dollars in "underestimates" for the cost of prescription drug coverage, and illegal wiretapping at the Federal Bureau of Investigation still face intimidation and are often fired or demoted.

Like our hard fought civil rights laws, this shield law both protects individuals and codifies our values for the greater good of the public interest. H.R. 1507 serves the public's interest by skillfully achieving the essential but delicate balance between the rights of the employee and the interests of effective management of the federal workforce. Also similar to other shield laws, it's greatest efficacy will be in the deterrent to waste, fraud and abuse, helping to foster a change in government culture from one of secrecy and repression to one of transparency and accountability. If the goal is to create a system that encourages early detection and resolution of potential problems, then H.R. 1507 is crafted to do just that.

It's time to fulfill the imperative for more accountability and transparency in the federal government. It's time to end the discrimination and retaliation - as well as the unmistakable and deeply chilling message it sends to all employees that they should keep quiet, or else. Congress should complete the marathon legislative effort to restore a credible Whistleblower Protection Act by enacting H.R. 1507.

Canterbury Testimony in Support of the Whistleblower Protection Enhancement Act of 2009

286 Organizations and Corporations Support Swift Action to Restore Strong, Comprehensive Whistleblower Rights

May 12, 2009

An Open Letter to President Obama and Members of Congress

The undersigned organizations and corporations write to support the completion of the landmark, nine-year legislative effort to restore credible whistleblower rights for government employees. We offer our support to expeditiously pass legislation that includes the critical reforms listed below. Whistleblower protection is a foundation for any change in which the public can believe. It does not matter whether the issue is economic recovery, prescription drug safety, environmental protection, infrastructure spending, national health insurance, or foreign policy. We need conscientious public servants willing and able to call attention to waste, fraud and abuse on behalf of the taxpayers.

Unfortunately, every month that passes has very tangible consequences for federal government whistleblowers, because none have viable rights. Last year, on average, 16 whistleblowers a month lost initial decisions from administrative hearings at the Merit Systems Protection Board (MSPB). Since 2000, only three out of 53 whistleblowers have received final rulings in their favor from the MSPB. The Federal Circuit Court of Appeals, the only court which can hear federal whistleblower appeals of administrative decisions, has consistently ruled against whistleblowers, with whistleblowers winning only three cases out of 209 since October 1994 when Congress last strengthened the law.

It is crucial that Congress restore and modernize the Whistleblower Protection Act by passing all of the following reforms:

- Grant employees the right to a jury trial in federal court;
- Extend meaningful protections to FBI and intelligence agency whistleblowers;
- Strengthen protections for federal contractors, as strong as those provided to DOD contractors and grantees in last year's defense authorization legislation;
- Extend meaningful protections to Transportation Security Officers (screeners);
- Neutralize the government's use of the "state secrets" privilege;
- Bar the MSPB from ruling for an agency before whistleblowers have the opportunity to present evidence of retaliation;
- Provide whistleblowers the right to be made whole, including compensatory damages;
- Grant comparable due process rights to employees who blow the whistle in the course of a government investigation or who refuse to violate the law; and

- Remove the Federal Circuit's monopoly on precedent-setting cases.

We know you share the commitment of every group signing the letter below to more transparency and accountability in government. Please let us know how we can participate to make this good government reform law to protect federal whistleblowers and taxpayers.

Sincerely,

Marcel Reid, Chair
ACORN 8

Adele Kushner, Executive Director
Action for a Clean Environment

David Swanson, co-founder
AfterDowningStreet

Pamela Miller, Director
Alaska Community Action on Toxics

Dan Lawn, President
Alaska Forum on Environmental Responsibility

Cindy Shogun, Executive Director
Alaska Wilderness League

Susan Gordon, Director
Alliance for Nuclear Accountability

Rochelle Becker, Executive Director
Alliance for Nuclear Responsibility

Gil Mileikowsky, M.D.
Alliance for Patient Safety

Linda Lipsen, Senior Vice President for Public Affairs
American Association for Justice (AAJ)

Mary Alice Baish, Director, Government Relations Office
American Association of Law Libraries

F. Patricia Callahan, President and General Counsel
American Association of Small Property Owners

John W. Curtis, Ph.D., Director of Research and Public Policy
American Association of University Professors

Christopher Finan, president
American Booksellers Foundation for Free Expression

Caroline Fredrickson, Director, Washington Legislative Office
American Civil Liberties Union

Michael D. Ostrolenk
American Conservative Defense Alliance

Dr. Paul Connett, Executive Director
American Environmental Health Studies Project, Inc.

John Gage, National President
American Federation of Government Employees

Charles M. Loveless, Director of Legislation
American Federation of State, County & Municipal Employees (AFSCME)

Mary Ellen McNish, General Secretary
American Friends Service Committee

Caitlin Love Hills, National Forest Program Director
American Lands Alliance

Jessica McGilvray, Assistant Director
American Library Association

Tom DeWeese, President
American Policy Center

Alexandra Owens, Executive Director
American Society of Journalists and Authors

Charlotte Hall, President
American Society of Newspaper Editors

Patricia Schroeder, President and CEO
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Prudence Adler, Associate Executive Director
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Jay Stewart, Executive Director
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Jay Feldman, Executive Director
Beyond Pesticides

Matthew Fogg, First Vice-President
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Chip Pitts, President
Bill of Rights Defense Committee

Diane Wilson, President
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Peter Scheer, Executive Director
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Terry Franke, Executive Director
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Charlie Cray, Director
Center for Corporate Policy

Gregory T. Nojeim, Senior Counsel and Director, Project on Freedom, Security & Technology
Center for Democracy and Technology

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Center for Inquiry

Robert E. White, President
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Lawrence S. Ottinger, President
Center for Lobbying in the Public Interest

Merrill Goozner, Director
Integrity in Science
Center for Science in the Public Interest

John Richard
Center for Study of Responsive Law

Linda Lazarus, Director
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Craig Williams, Director
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Phil Fornaci, Counselor
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Circumpolar Conservation Union

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Gerard Beloin
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Clarissa Duran, Director
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Dr. Disamodha Amarasinghe
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Lisa Walker, Executive Director
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Mike Ewoll, Founder and Director
Energy Justice Network

Gregory Hile
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Judith Robinson, Director of Programs
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Rob Weissman
Essential Information

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Ethics in Government Group (EGG)

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Tom Devine, legal director
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Grandmothers for Peace, San Luis Obispo County Chapter

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Grassroots Netroots Alliance

Luci Murphy
Gray Panthers of Metropolitan Washington

Alan Muller
Green Delaware

Jenefer Ellingston
Green Party of the United States

Tracy Frisch
Greenwich Citizens Committee

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Humanity for Prisoners

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Indiana Coalition for Open Government

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Tom FitzGerald, Director
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James Love
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Jill McElheney, Founder
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Jim L. Jorgenson, Deputy Executive Director
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National Coalition Against Censorship

Eileen Dannemann, Director
National Coalition of Organized Women

Russell Hemenway, President
National Committee for an Effective Congress

Sally Greenberg, Executive Director
National Consumers League

Terisa E. Chaw, Executive Director
National Employment Lawyers Association

Andrew Jackson
National Judicial Conduct and Disability Law Project, Inc.

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Paul Brown, Government Relations Manager
National Research Center for Women & Families

Sibel Edmonds, President and Founder
National Security Whistleblowers Coalition

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National Taxpayers Union

Colleen M. Kelley, National President
National Treasury Employees Union

Steve Kohn, President
National Whistleblower Center

Amy Allina
National Women's Health Network

Lewis Maltby, President
National Workrights Institute

Terrie Smith, Director
National Nuclear Workers For Justice

Tim Hermach, President
Native Forest Council

Doug Kagan, Chairman
Nebraska Taxpayers for Freedom

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Caroline Heldman Ph.D., Director
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Canterbury Testimony in Support of the Whistleblower Protection Enhancement Act of 2009

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Betsy Combier, President and Editor
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Ashley Katz, MSW, Executive Director
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Patient Quality Care Project

Dianne Parker
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Former Special Agent Darlene Fitzgerald
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Paul Kawika Martin, Organizing, Political and PAC Director
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Bennett Haselton, Founder
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Dale Nathan, J.D., President
POPULAR, Inc.

Vina Colley, President
Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS)

David Banisar, Director, FOI Project
Privacy International

Evan Hendricks, Editor/Publisher
Privacy Times

Robert Bulmash, President
Private Citizen, Inc.

Ronald J Riley, President
Professional Inventor's Alliance

Dr. Paul Lapides
Professors for Integrity

Tim Carpenter, Director
Progressive Democrats of America

Danielle Brian, Executive Director
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Ellen Thomas, Executive Director
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David Arkush, Director, Congress Watch
Public Citizen

Jeff Ruch, Executive Director
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Robert L. FitzPatrick, President
Pyramid Scheme Alert

Dr. Diana Post, President
Rachel Carson Council, Inc.

Lucy A. Dalglish, Executive Director
The Reporters Committee for Freedom of the Press

Kirsten Moore, President and CEO
Reproductive Health Technologies Project

Tim Little, Executive Director
Rose Foundation for Communities and the Environment
John W. Whitehead, president
The Rutherford Institute

Adrienne Anderson, Coordinator
Safe Water Colorado and Nuclear Nexus Projects
Rocky Mountain Peace and Justice Center
(Whistleblower Anderson v Metro Wastewater)

Angela Smith, Coordinator
Seattle Healthy Environment Alliance (Seattle HEAL)

Dr. Roland Chalifoux
The Semmelweis Society International (SSI)

Rufus Kinney
Serving Alabama's Future Environment (SAFE)

Ed Hopkins, Director of Environmental Quality Program
Sierra Club

Shane Jimerfield, Executive Director
Siskiyou Project

Andrea Shipley, Executive Director
Snake River Alliance

Matthew Petty, Executive Director
The Social Sustenance Organization

Dave Aekens, National President
Society of Professional Journalists

Laureen Clair
SOL Communications Inc

Amy B. Osborne, President
Southeastern Chapter of the American Association of Law Libraries
Don Hancock, Director of Nuclear Waste Safety Program
Southwest Research and Information Center
Donna Rosenbaum, Executive Director
S.T.O.P. - Safe Tables Our Priority

Mauro Oliveira
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Kevin Kuritzky
The Student Health Integrity Project (SHIP)

Daphne Wysham, Co-Director
Sustainable Energy and Economy Network (SEEN)

Jeb White, Executive Director
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Ken Paff, National Organizer
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Thad Guyer, Partner
T.M. Guyer & Ayers & Friends

Marylia Kelley, Executive Director
Tri-Valley CAREs
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Paul Taylor
Truckers Justice Center

Francesca Grifo, Ph.D., Director
Scientific Integrity Program
Union of Concerned Scientists

Dane von Breichenruchardt, President
U.S. Bill of Rights Foundation

Dr. Joseph Parish
U.S. Environmental Watch

Gary Kalman, Director, Federal Legislative Office
U.S. Public Interest Research Group (U.S.PIRG)

Nick Mangieri, President
Valor Press, Ltd.

Brad Friedman, co-founder
Velvet Revolution
Dr. Jeffrey Fudin, Founder
Veterans Affairs Whistleblowers Coalition

Sonia Silbert, Co-Director
Washington Peace Center

Nada Khader, Foundation Director
WESPAC Foundation

Janine Blaeloch, Director
Western Lands Project

Gloria G. Karp, Co-Chair
Westchester Progressive Forum

Greg Costello, Executive Director
Western Environmental Law Center

Mabel Dobbs, Chair
Livestock Committee
Western Organization of Resource Councils

Ann Harris, Executive Director
We the People, Inc

Janet Chandler, Co-Founder
Whistleblower Mentoring Project

Dan Hanley
Whistleblowing United Pilots Association

Linda Lewis, Director
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John C. Horning, Executive Director
WildEarth Guardians

George Nickas, Executive Director
Wilderness Watch

Tracy Davids, Executive Director
Wild South

Scott Silver, Executive Director
Wild Wilderness

Kim Witczak
WoodyMatters

Tom Z. Collina, Executive Director
20/20 Vision

Paula Brantner, Executive Director
Workplace Fairness

Chairman TOWNS. Mr. German.

STATEMENT OF MICHAEL GERMAN

Mr. GERMAN. Thank you for inviting me to testify in support of H.R. 1507, the Whistleblower Protection Enhancement Act of 2009. I represent the American Civil Liberties Union, a nonpartisan organization dedicated to defending the Constitution.

The ACLU vigorously supports meaningful legal protections for all whistleblowers, and particularly for employees and contractors within the Law Enforcement and Intelligence Communities where abuse and misconduct can have the most direct consequences to our liberty and our security.

In the weeks leading up to the September 11, 2001, terrorist attacks, FBI officials denied a New York agent's request to start looking for a known al Qaeda operative who had entered the United States in what the 9/11 Commission would later call "a clear misunderstanding of the law." The agent sent an angry e-mail warning that, "someday someone will die."

At the same time, an FBI supervisor in Minneapolis, stymied from pursuing a Foreign Intelligence Surveillance Court order to search Zacharias Moussaoui's computer by headquarter officials, who later admitted that they did not know the legal standard necessary to obtain one, shouted that he was trying to stop someone from taking a plane and crashing it into the World Trade Center. These agents clearly knew that gross mismanagement in the FBI's counterterrorism program posed a substantial threat to public safety, but neither formalized his complaint or pushed it up the chain of command. Perhaps, like one-third of those polled in a 1993 Merit Systems Protection Board study of the Federal work force who did not report illegal or wasteful activities they had seen on the job, they feared retaliation.

After 9/11, President Bush called on the FBI, CIA and other intelligence agents to report any breakdowns in national security. And FBI Director Robert Mueller vowed to protect Bureau whistleblowers. But the record reflects that the few FBI employees who answered this call, myself, Sibel Edmonds, Jane Turner, Robert Wright, John Roberts and Bassem Youssef, were not protected.

The myriad scandals involving the FBI, the CIA and the NSA, from spying on political activists to warrantless wiretapping to torture, more than demonstrate the need for more whistleblowers in the Intelligence Community. The reforms provided by H.R. 1507 will finally provide real protections to those brave law enforcement intelligence agents, agency employees and contractors who are willing to speak out when waste, fraud or abuse of authority endanger our security and violate the law.

But as important as what this bill does for our national security whistleblowers is what it does not do to our national security. H.R. 1507 does not authorize Intelligence Community employees to leak classified information to the media or any other person who does not have the appropriate security clearances. In fact, by providing safe avenues for agency employees to report waste, fraud and abuse to the appropriate authorities and to Congress, there will be less of a need to anonymously leak information in order to have serious problems addressed.

I would like to briefly offer two suggestions to strengthen the bill. First, for the reasons I described more thoroughly in my written statement, Congress should make explicit the disclosures made through the normal chain of command do not lose their protected status. We don't want these protections to set a trap for responsible agents who report problems through proper channels.

Second, Congress must make clear that all Members of Congress have the right, by virtue of their election, to receive all lawful disclosures of information from CIA, FBI, NSA and other intelligence agency employees and contractors, and that those Federal employees and contractors who make lawful disclosures to any Member of Congress should be protected under the law.

Congress needs access to information about mismanagement and misconduct within the Intelligence Community, both classified and unclassified, in order to perform its constitutional duty to check abuses of power and to serve their constituents' interests. Congress cannot perform effective oversight unless Federal employees and contractors are willing to tell the truth about what's happening within these agencies, and it is simply unfair to expect them to tell you the truth if they know it will cost them their jobs.

Congress should pass H.R. 1507 and extend meaningful protection to the work force that is charged with protecting us by granting them full and independent due process rights when they blow the whistle during government investigations or refuse to violate the law, enforced through jury trials in Federal courts once administrative measures are exhausted, with full circuit court review.

Thank you.

Chairman TOWNS. Thank you very much for your testimony.

[The prepared statement of Mr. German follows:]

Testimony
of
Michael German
Policy Counsel, American Civil Liberties Union,
Former Special Agent, Federal Bureau of Investigation

before the

House Committee on Oversight
and Government Reform

May 14, 2009

The Whistleblower Protection Enhancement Act of 2009
(H.R. 1507)

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Testimony of Michael German, Policy Counsel,
American Civil Liberties Union,
former Special Agent, Federal Bureau of Investigation,
before the
House Committee on Oversight and Government Reform,
May 14, 2009

Chairman Towns, Ranking Member Issa, members of the Committee, thank you for inviting me to testify in support of H.R. 1507, the Whistleblower Protection Enhancement Act of 2009. I represent the American Civil Liberties Union, a non-partisan organization of half a million members nationwide dedicated to defending the Constitution and protecting civil liberties. The ACLU vigorously supports meaningful legal protections for all whistleblowers, and particularly for employees and contractors within the law enforcement and intelligence communities, where abuse and misconduct can have the most serious and direct consequences to our liberty and our security.

INTRODUCTION

Executive Order 12731 requires all federal employees to report "waste, fraud, abuse and corruption to the appropriate authorities."[1] Unfortunately, employees who follow this ethical obligation are often subject to retaliation by the very managers to whom they are duty-bound to report. Efforts by Congress to protect responsible whistleblowers, beginning with the Civil Service Reform Act in 1978 and followed by the landmark Whistleblower Protection Act (WPA) in 1989, have been steadily undermined by an ineffective Merit Systems Protection Board and hostile decisions of the United States Court of Appeals for the Federal Circuit, which has a monopoly on federal whistleblower appeals. Moreover, the Department of Justice and the intelligence community successfully lobbied to have Congress exempt employees from the Federal Bureau of Investigation (FBI), Central Intelligence Agency (CIA), National Security Agency (NSA) and other intelligence agencies from the WPA, promising instead to provide internal mechanisms to protect whistleblowers in these agencies.[2] As a former FBI whistleblower, I can personally attest to the fact that these alternative regimes do not work.[3]

President Obama recognized the need to provide real protection to federal employees and his transition "ethics agenda" included a strong statement of support for whistleblowers:

> Often the best source of information about waste, fraud and abuse in government is an existing government employee committed to public integrity and willing to

> speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled as they have been during the Bush administration. We need to empower federal employees as watchdogs of wrongdoing and partners in performance. Barack Obama will strengthen whistleblower laws to protect federal workers who expose waste, fraud and abuse of authority in government. Obama will ensure that federal agencies expedite the process for reviewing whistleblower claims and whistleblowers have full access to courts and due process.[4]

H.R. 1507 answers this call to action and the ACLU applauds its introduction and urges its swift passage. The bill effectively overturns the adverse Federal Circuit Court decisions that limited the scope of disclosures protected under the WPA and raised the burden of proof necessary for whistleblowers to prevail and it eliminates the Federal Circuit's monopoly. It provides independent due process through full court access for all federal employees and contractors, including national security whistleblowers from the FBI and other intelligence agencies. When it passes, H.R. 1507 will usher in a new era of government accountability, particularly within the agencies that have proven most resistant to effective oversight, which have led to truly disastrous results for our security and our civil liberties. In my testimony today I will focus on the expansion of whistleblower protections to employees of the FBI, CIA, NSA and other intelligence agencies. I will explain why national security whistleblower protections are necessary and how Congress can ensure they remain effective in practice, both to deter retaliation against the conscientious federal agents who risk their own safety to secure ours and to provide Congress with the information it needs to check executive abuse.

I. NATIONAL SECURITY WHISTLEBLOWERS: SECURING OUR RIGHTS AND OUR SECURITY

In the weeks leading up to the terrorist attacks of September 11, 2001, FBI National Security Law Unit (NSLU) officials denied a New York agent's request to start looking for a known al Qaeda operative who had entered the United States, in what the 9/11 Commission would later call a clear misunderstanding of the law.[5] The agent sent an angry e-mail warning that "someday someone will die," and wondering whether the NSLU would stand by its decisions then.[6] At almost the same time an FBI supervisor in Minneapolis, stymied from pursuing a Foreign Intelligence Surveillance Court order to search Zacharias Moussaoui's computer by headquarters officials who later admitted to that they did not know the legal standard necessary to obtain one, shouted that he was trying "to stop someone from taking a plane and crashing it into the World Trade Center."[7]

These agents clearly knew that the gross mismanagement of the FBI's counterterrorism program posed a substantial threat to public safety, but neither formalized his complaint or pushed it up the chain-of-command. Perhaps they didn't feel confident in their analysis of the situation, or maybe, like one-third of those polled in a 1993 MSPB study of the federal workforce who did not report illegal or wasteful

activities they had seen on the job, they feared retaliation.[8] Fifty-nine percent of those who didn't report said they didn't think anything would be done to correct the activity.[9]

After 9/11 it appeared the intelligence community finally recognized the value of timely reports from within. President George W. Bush expressly called on agents to report breakdowns in national security:

> If you're a front-line worker for the FBI, the CIA, some other law enforcement or intelligence agency, and you see something that raises suspicions, I want you to report it immediately. I expect your supervisors to treat it with the seriousness it deserves. Information must be fully shared, so we can follow every lead to find the one that may prevent a tragedy.[10]

Likewise, FBI Director Robert Mueller repeatedly vowed to protect Bureau whistleblowers:

> I issued a memorandum on November 7th [2001] reaffirming the protections that are afforded to whistleblowers in which I indicated I will not tolerate reprisals or intimidation by any Bureau employee against those who make protected disclosures, nor will I tolerate attempts to prevent employees from making such disclosures. In every case where there is even intimation that one is concerned about whistleblower protections, I immediately alert Mr. Fine and send it over so that there is an independent review and independent assurance that the person will have the protections warranted.[11]

Yet the record reflects that the few FBI employees who answered this post-9/11 call -- myself, Sibel Edmonds,[12] Jane Turner,[13] Robert Wright,[14] John Roberts,[15] and Bassem Youssef[16] -- were not protected. It is certainly not for a lack of misconduct warranting disclosure that few FBI whistleblowers come forward. A review of the many Department of Justice Inspector General reports regarding the FBI over the last several years reveals significant failures in programs as critical to our national security as the management of the Terrorist Screening Center watch list[17] and oversight of Chinese intelligence agents,[18] and as mundane yet fundamental as keeping track of FBI weapons and laptops[19] and establishing a functioning computer network.[20] A report on the FBI's management of confidential case funds revealed that poor oversight and insufficient internal controls failed to prevent theft and left important bills unpaid. As a result, telecommunications lines supporting FBI surveillance efforts, including at least one FISA wiretap, were shut down[21] .

Many of the FBI management failures documented in the Inspector General reports have direct consequences on civil rights, whether these violations of law and policy involve spying on Americans without reasonable suspicion,[22] mistreating aliens after 9/11,[23] or abusing detainees in Guantanamo Bay, Iraq and Afghanistan.[24] The IG report regarding detainee abuse documented reprisals suffered by three different FBI

whistleblowers who raised concerns about the treatment of detainees in Afghanistan, Iraq and Guantanamo Bay.[25] The CIA, NSA and other intelligence agencies were involved in these or other scandals and intelligence failures, including warrantless wiretapping in violation of FISA, extraordinary rendition and the destruction of detainee interrogation tapes, among others. A more recent report that a CIA whistleblower advised then-Speaker of the House Dennis Hastert that Congress was not notified as required when a Member of Congress was recorded in an intelligence operation,[26] and the unsurprising news that the NSA had been "over-collecting" Americans' communications in violation of the broad new authorities granted under the FISA Amendments Act last year,[27] reveal the ongoing need for national security whistleblowers.

Yet Congress cannot expect whistleblowers from these agencies to come forward if it will come at the expense of their careers. The failure to provide the necessary protections not only betrays the brave federal employees who dare to come forward despite the personal consequences, but it also undermines Congress's ability to fulfill its constitutional obligation to serve as an effective check against executive abuse of power. In 1998 Congress recognized that the lack of protection for whistleblowers and the genuine risk of reprisals "impaired the flow" of information Congress needed to carry out its legislative and oversight functions in the area of national security.[28] And while Congress reiterated its right to receive classified information from intelligence community employees in the Intelligence Community Whistleblower Protection Act of 1998 (ICWPA), it failed to provide them a remedy if such disclosures resulted in reprisals.[29] Under the current system the safest way for a national security whistleblower to bring problems to Congress's attention is through anonymous leaks to the media. H.R. 1507 will provide long overdue protections for responsible disclosures to the appropriate authorities, enforceable through the independent due process that comes with full court access and jury trials.

II. PROVIDING WHISTLEBLOWER RIGHTS TO INTELLIGENCE COMMUNITY EMPLOYEES WILL NOT RISK DISCLOSURE OF CLASSIFIED INFORMATION

As important as what H.R. 1507 does for national security whistleblowers is what it does not do to national security: H.R. 1507 does <u>not</u> authorize intelligence community employees to leak classified information to the media or to any other person who does not have the appropriate security clearances. In fact, by providing safe avenues for agency employees to report waste, fraud and abuse to the appropriate authorities and to Congress, there will be less of a need to anonymously leak information in order to have serious problems adequately addressed. FBI and other intelligence community employees have the training and experience required to responsibly handle classified information and the severe penalties for the unlawful disclosure of classified information will remain intact after this legislation passes.

The access to jury trials for whistleblower reprisals likewise would not risk the unlawful disclosure of classified information. Intelligence employees and contractors already have access to courts with jury trials in employment cases under the Equal Employment Opportunity Act and other types of litigation, including criminal trials,

which might also involve classified information.[30] Courts have become accustomed to handling classified information in the decades since the passage of the Classified Information Procedures Act addressing the use of classified information in criminal trials, and the government has robust powers to protect specific pieces of classified evidence from disclosure in civil trials through the state secrets privilege.[31] The courts can already order the government to produce unclassified substitutes or summaries of classified information in the interests of justice, so the modest changes this bill makes to the manner in which the states secrets privilege can be used in whistleblower retaliation cases will not create a undue burden on the government and will only serve the interests of justice. Rewarding the responsible handling of classified information by a national security whistleblower is simply good public policy.

Moreover, the concerns regarding the unauthorized disclosure of classified information in the context of whistleblowing are substantially overstated, and I can use my own experience as an example. Like most FBI employees, I conducted much of my work in an unclassified setting. There were classified aspects to the mishandled counterterrorism investigation that was the subject of my complaint, but it was not necessary for me to reveal this material in order to give Members of Congress the information they needed to begin an investigation of my allegations. While this might be more difficult for employees with some of the other intelligence agencies it is not impossible and these employees are trained in the appropriate methods for ensuring the proper handling of the information. If critics of this bill are concerned that the whistleblowing employees of these agencies will not take their obligation to properly handle the classified information in their cases seriously, the fatal mistake of trusting them with the material was already made. These employees already have access, and giving them rights to report the information to the appropriate authorities responsibly will only help the situation.

Likewise the personnel actions taken in retaliation for making a protected disclosure, which would be the subject of the litigation in a reprisal case, are not typically classified, even if the information that actually made up the protected disclosure was. The vast majority of these cases could be tried in front of a jury as are equal employment cases involving employees of the same agencies.

III. PROVIDING WHISTLEBLOWER PROTECTION WILL NOT INHIBIT PROPER MANAGEMENT OF THE INTELLIGENCE COMMUNITY WORKFORCE

One argument made by those opposing independent due process rights for national security whistleblowers is that the fear of litigation will chill agency supervisors from taking personnel actions against problem employees. This argument at least removes all pretense that the FBI and other intelligence agencies currently respect and protect employees who report waste, fraud and abuse within these agencies. For if these agencies enforced regulations protecting whistleblowers by punishing supervisors who imposed retaliatory personnel actions, whatever chilling effect codifying these rights would have on these managers would already be realized. Moreover, many other employee rights prohibiting arbitrary or discriminatory personnel actions are enforceable

in courts of law, so if providing employees with protection from unlawful acts by agency supervisors cripples their ability to properly manage the federal workforce, the damage is already done.

But even if this hypothetical chilling effect on agency managers was regarded as a serious matter of concern, the solution is simple: require agency supervisors to properly document their employees' deficiencies and any efforts made to address the problems before taking adverse actions against them. One would hope this is already a matter of policy within these agencies. If an employee's properly documented deficiencies justify an adverse personnel action agency supervisors would have little to worry about, regardless of whether the employee later claimed to have made a protected disclosure.

To be clear, though, H.R. 1507 is designed, like most laws, to chill the behavior it specifically prohibits. FBI and other intelligence agency supervisors who desire to unjustly retaliate against good faith whistleblowers who responsibly report waste, fraud and abuse to the appropriate authorities should feel less secure when those employees are given the power to enforce their rights in court, which is exactly why Congress should pass H.R. 1507. Forcing intelligence community supervisors to become more professional, more responsible and more accountable will be a positive side effect to protecting the rights of employees who fulfill their ethical obligation to report waste, fraud and abuse of authority.

IV. POSSIBLE IMPROVEMENTS TO H.R. 1507 TO MORE EFFECTIVELY PROTECT WHISTLEBLOWERS IN PRACTICE

1. EXPLICITLY PROTECT CHAIN-OF-COMMAND DISCLOSURES

H.R. 1507 protects disclosures made to "an authorized Member of Congress, an authorized official of an Executive Branch agency, or the Inspector General of the covered agency...." The bill mandates that "an authorized official of an Executive Branch agency" will include the head, the general counsel, and the ombudsman of such agency," but leaves it to the discretion of the Office of Personnel Management (OPM) to specify others within the agencies by future regulation. If OPM chooses not to expand the list of authorized officials, H.R. 1507 would actually narrow the audience to whom FBI employees can disclose information in order to receive protection. In addition to the officials specifically named in H.R. 1507, the FBI's current regulations protect disclosures to the FBI Office of Professional Responsibility, the Deputy Directors of the FBI and "to the highest ranking official in any FBI field office."[32] Yet in a practical sense, even this broader audience creates a trap for FBI employees who want to report misconduct, which may inadvertently leave some deserving whistleblowers unprotected. My own experience highlights the problem.

When I decided to report improprieties in a counterterrorism case to which I was assigned, I attempted to follow the customary chain-of-command in fulfilling the protocols described in the Director's November 7, 2001 memorandum regarding protected disclosures. I advised my Assistant Special Agent in Charge (ASAC) that I

was going to report this matter to the "highest ranking official" in the field office, the Special Agent in Charge (SAC). As a practical matter, if I had attempted to contact the SAC directly he likely would have refused to take my call and contacted the ASAC to find out why I was calling. My ASAC would have then chastised me for violating the chain-of-command. While the FBI is not a paramilitary organization, this methodology is something the FBI takes seriously, as demonstrated by the fact that a chain-of-command violation was cited as one of the reasons the FBI provided for punishing an agent who reported concerns about abuse at Guantanamo by having a letter personally delivered to Director Mueller.[33] The catch-22 is that if the agent did follow the chain-of-command he or she would not be protected under the current regulations, nor under H.R. 1507.

In my case the ASAC directed me not to contact the SAC directly and instead to document the information in a letter, which he would deliver to the SAC. This detail seemed insignificant at the time but the FBI later argued that by passing my complaint through my ASAC I forfeited any protection from retaliation under FBI regulations. Fortunately, the Inspector General found that my complaint was a "protected disclosure" under the regulations because I intended it to be forwarded to the appropriate official and it was delivered to him in a timely manner. The FBI's cynical interpretation of the statute clearly violates the spirit and intent of the legislation, but Congress should address this ambiguity in the bill because it could easily leave well-meaning FBI employees without protections. Congress should make explicit that disclosures made through the normal chain-of-command do not lose their protected status.

2. EXPLICITLY PROTECT THE RIGHT OF ALL MEMBERS OF CONGRESS TO RECEIVE INFORMATION FROM NATIONAL SECURITY WHISTLEBLOWERS

Congress must make clear that all Members of Congress have the right, by virtue of their election, to receive all lawful disclosures of information from FBI, CIA, NSA and other intelligence agency employees and contractors, and that those federal employees and contractors who make lawful disclosures to any Member of Congress will be protected under the law. The potential for confusion arises because the definition of "covered information" in Section 10 of H.R. 1507 does not distinguish between classified and unclassified information and the definition of "authorized Member of Congress" is limited to certain committees based on jurisdiction over the type of information being provided.

Congress codified its right to receive information from federal employees with the Lloyd-LaFollette Act in 1912:

> The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.[34]

These provisions also set a potential trap for an intelligence community employee or contractor who is not familiar with the operations of Congress. A national security

whistleblower who contacts his or her own Congressperson to seek assistance would potentially not be protected from retaliation if the Member was not assigned to one of the specific committees of jurisdiction, even if no classified information was ever disclosed. Congress should explicitly state that unclassified disclosures by FBI, CIA and other intelligence agency employees and contractors to any Member of Congress are protected disclosures under H.R. 1507.

Further, the President has no right to deny Members of Congress access to national security information without asserting a constitutional privilege. In the National Security Act of 1947 Congress established a statutory requirement for the President to keep Congress "fully and currently informed of all intelligence activities" via the House and Senate intelligence committees.[35] In the ICWPA Congress emphasized that:

> ...as a co-equal branch of Government, [Congress] is empowered by the Constitution to serve as a check on the executive branch; in that capacity it has a "need to know" of allegations of wrongdoing within the executive branch, including allegations of wrongdoing in the Intelligence Community.
>
> And:
>
> ...no basis in law exists for requiring prior authorization of disclosures to the intelligence committees of Congress by employees of the executive branch of classified information about wrongdoing within the Intelligence Community.[36]

Clearly intelligence agency employees cannot disclose classified information to a Member of Congress who does not possess the necessary clearances to receive the information. This would be, by definition, an unlawful disclosure and to do so would subject the employee to serious administrative and/or criminal penalties. But this does not mean that that Members of Congress lack the power to demand the specific clearances necessary to gain access to particular information once they know it exists, and to use the robust tools available under the Constitution to compel compliance with their requests, including the appropriations power, the appointment power, the contempt power and the impeachment power.[37] Congress also has the power under its own rules to declassify information.[38]

Congress can regulate how it receives particular kinds of information, as it does in Section 10 of H.R. 1507 by specifically delineating which committees may receive disclosures in order for them to be protected, but the ACLU urges this Committee to take great care before limiting the rights of any of its Members to receive information from national security whistleblowers, even classified information. A Member of Congress who does not sit on a particular committee of jurisdiction might still require access to particular information in order to serve the needs of a constituent impacted by a classified program or policy. And every federal employee should be able to request the assistance of his or her own Senator or Congressman without fearing reprisals. Congress should strive to protect the rights of all Members to receive information necessary to fulfill their

legislative and oversight needs and should use its robust powers to ensure Members obtain the requisite clearances as needed.

V. CONCLUSION

The system that was intended to protect national security whistleblowers is broken, if it ever worked at all, and both our security and our liberty are in peril as a result. All federal employees are required to report waste, fraud and abuse of authority they see on the job, and this obligation only deepens when the agencies responsible for our national security are involved. The reforms provided in H.R. 1507 will provide real protections to those who are willing to speak truth to power. This is not a question of balancing security interests against liberty interests; it is a question of competence and accountability in the agencies that wield extraordinary power under a cloak of secrecy. The irresponsible use of this authority can have dire consequences for individual rights and can undermine the fabric of our democracy. Congress must have access to information about misconduct within the intelligence community in order to perform its constitutional duty to check these awesome and easily abused powers. But Congress cannot perform effective oversight unless informed federal employees and contractors are willing to tell the truth about what is happening within these agencies. And it is simply unfair to expect them to tell you the truth if they know it will cost them their jobs. Congress should pass H.R. 1507 and extend meaningful protection to the workforce that is charged with protecting us all by granting them full and independent due process rights when they blow the whistle during government investigations or refuse to violate the law, enforced through jury trials in federal court once administrative measures are exhausted, and "full circuit" review. Thank you for the opportunity to present our views.

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[1] Exec. Order No. 12,731, 55 Fed. Reg. 42547 (Oct. 17, 1990), *available at* http://www.usoge.gov/laws_regs/exec_orders/eo12731.pdf; 5 C.F.R. §2635.101(b)(11) (2008), *available at* http://edocket.access.gpo.gov/cfr_2008/janqtr/5cfr2635.101.htm.

[2] *See* 5 U.S.C. § 2302(a)(2)(C)(ii), which states that a "covered agency" under the Act does not include, "the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities." Congress ordered the FBI to establish regulations "consistent with the Whistleblower Protection Act," 5 U.S.C. §2303. Regulations for Whistleblower Protection for FBI Employees can be found in 28 C.F.R §27, *available at* http://www.fas.org/sgp/news/1999/11/fbiwhist.html.

[3] For a detailed description of these events, *See FBI Whistleblowers Hearing Before the Subcomm. On Crime, Terrorism and Homeland Security, H. Comm on the Judiciary,* 110th Cong. (May 21, 2008) (written testimony of Michael German); *National Security Whistleblowers in the post-September 11th Era: Lost in a Labyrinth and Facing Subtle Retaliation Hearing Before the Subcomm. on National Security, Emerging Threats and International Relations, H. Comm. on Government Reform,* 109th Cong. (Feb. 14, 2006) (written statement of former FBI Special Agent Michael German in Response to the Department of Justice Office of Inspector General Draft Report into Retaliation for Making Protected Disclosures Against FBI Managers on September 10, 2002).

[4] The Office of the President-elect; The Obama-Biden Plan, http://change.gov/agenda/ethics_agenda/.

[5] NATIONAL COMMISSION ON TERRORIST ATTACKS, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 271 (2004), *available at*

http://govinfo.library.unt.edu/911/report/911Report_Ch8.pdf. It should be noted that the 9/11 Commission found that bureaucratic rules regulating the internal sharing of intelligence information known as "the wall" were misapplied in this situation, and that no law or regulation prevented the FBI and CIA intelligence analysts from sharing the information the agent requested. *See* Notes to Chapter 8, 538, nn 80-81).

[6] NATIONAL COMMISSION ON TERRORIST ATTACKS, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 271 (2004), *available at* http://govinfo.library.unt.edu/911/report/911Report_Ch8.pdf.

[7] *Id.* at 275. *See also*, SENATOR PATRICK LEAHY, SENATOR CHARLES GRASSLEY, AND SENATOR ARLEN SPECTER, INTERIM REPORT ON FBI OVERSIGHT IN THE 107TH CONGRESS BY THE SENATE JUDICIARY COMMITTEE: FISA IMPLEMENTATION FAILURES (Feb. 2003), *available at* http://www.fas.org/irp/congress/2003_rpt/fisa.html.

[8] U.S. MERIT SYSTEMS PROTECTION BOARD REPORT, WHISTLEBLOWING IN THE FEDERAL GOVERNMENT: AN UPDATE (Oct. 1993), *available at* http://www.pogoarchives.org/m/gp/wbr2005/AppendixB.pdf.

[9] *Id.*

[10] Karen Hosler, *FBI must slim down and change culture, whistle-blower says*, BALTIMORE SUN, June 7, 2002, at 1A.

[11] *See Oversight Hearing on Counterterrorism Before the S. Comm. on the Judiciary*, 107th Cong. 16-17 (2002) (S. HRG. 107-920).

[12] U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FBI'S ACTIONS IN CONNECTION WITH ALLEGATIONS RAISED BY CONTRACT LINGUIST SIBEL EDMONDS, SPECIAL REPORT (Jan. 2005), *available at* http://www.usdoj.gov/oig/special/0501/final.pdf.

[13] Dan Browning, *Ex-Agent Wins Lawsuit Against FBI*, MINNEAPOLIS STAR-TRIB., Feb. 5, 2007.

[14] Todd Lightly, *Beleaguered FBI Agent Gets Job Back*, CHICAGO TRIB., Oct. 19, 2005.

[15] U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FBI'S RESPONSE TO JOHN ROBERTS' STATEMENTS ON 60 MINUTES (Feb. 2003), *available at* http://www.usdoj.gov/oig/special/0302/report.pdf.

[16] U.S. DEPARTMENT OF JUSTICE OFFICE OF PROFESSIONAL RESPONSIBILITY, REPORT OF INVESTIGATION OF WHISTLEBLOWER ALLEGATIONS BY FEDERAL BUREAU OF INVESTIGATION SPECIAL AGENT BASSEM YOUSSEF (Jul. 3, 2006), *available at* http://www.whistleblowers.org/storage/whistleblowers/documents/order_and_opr_report.pdf.

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[28] Pub.L. 105-277, Title VII, § 701(b)(5), Oct. 20, 1998.
[29] 5 U.S.C. App. 3, §8H(a)(1)(A). *See National Security Whistleblowers in the Post-September 11th Era: Lost in a Labyrinth and Facing Subtle Retaliation Protection: hearing before the Subcomm. for National Security, Emerging Threats, and International House Comm. on Gov't Reform Relations,* 109th Cong. (Feb. 14, 2006) (Statement of Thomas F. Gimble, Acting Inspector General, Department of Defense) (stating "Despite its title, the ICWPA does not provide statutory protection from reprisal for whistleblowing for employees of the intelligence community. The name "Intelligence Community Whistleblower Protection Act" is a misnomer; more properly, the ICWPA is a statute protecting communications of classified information to the Congress from executive branch employees engaged in intelligence and counterintelligence activity").
[30] 42 U.S.C. 2000e (1991).
[31] Pub.L. 96-456, 94 Stat. 2025, enacted October 15, 1980.
[32] 28 C.F.R. § 27.1 (2006).
[33] U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FBI'S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTANAMO BAY, AFGHANISTAN, AND IRAQ, SPECIAL REPORT 326 (May 2008), *available at* http://www.usdoj.gov/oig/special/s0805/final.pdf.
[34] 5 U.S.C. §7211 (2000).
[35] 50 U.S.C. §501(a)(1) and (4).
[36] Pub.L. 105-277, Title VII, § 701(b)(3), Oct. 20, 1998.
[37] *See* LOUIS FISHER, CONGRESSIONAL ACCESS TO EXECUTIVE BRANCH INFORMATION: LEGISLATIVE TOOLS, CRS REPORTS FOR CONGRESS (May 17, 2001).
[38] *See,* Project on Government Oversight, Congressional Tip Sheet on Access to Classified Information, (Oct. 2007), http://pogoarchives.org/m/cots/cots-october2007a.pdf.("The House rule allowing declassification by the House Permanent Select Committee on Intelligence can be found in Rules of the 109th Congress, U.S. House of Representatives, Rule X. Senate Resolution 400, section 8, agreed to May 19, 1976 (94th Congress, 2nd Session) allows the Senate to declassify").

Chairman TOWNS. Mr. Colapinto.

STATEMENT OF DAVID COLAPINTO

Mr. COLAPINTO. Chairman Towns, members of the committee, thank you very much for inviting me to testify today on H.R. 1507. My name is David Colapinto. I'm the general counsel of the National Whistleblowers Center, a nonprofit, nonpartisan organization in Washington, DC, that supports whistleblowers.

To achieve whistleblower protection, Congress must enact reforms with full court access for Federal employees. We heard this morning a proposal by the Department of Justice witness for an extra-agency board, a new board to hear national security complaints without access to courts.

Simply put, the district court access for national security and FBI employees is critical to achieve true reform. Whatever administrative scheme is devised by Congress, if it is without district court access, it is doomed to fail. That conclusion is based on a more than 30-year history that tells us what works and what does not.

Laws that permit district court access, like H.R. 1507 and Title VII of the Civil Rights Act, work. Other laws, like the current Civil Service System that limit remedies through the administrative process, do not.

For more than 18 years, FBI and intelligence agency employees have had the right to go to Federal court on claims of retaliation, go before a jury and seek compensatory damages under Title VII. That exists today. They can also go to district court under the Privacy Act and seek damages. They can go to district court for preenforcement injunctive relief to remedy constitutional violations.

Under all of these laws, district court access for national security and FBI employees does not air details of national security programs. It just doesn't happen in our Federal courts. Likewise, H.R. 1507, as it is constructed, would pose no risk to national security under the district court access provisions.

Where national security is related to a case, district courts have many protective measures available to prevent disclosure of classified information. For example, under Title VII national security agency cases, Federal courts have used pseudonyms and protective orders to protect national security information. Other protective measures are already in existence within the Rules of Civil Procedure and the Rules of Evidence, where Federal courts routinely use in-camera proceedings in order to protect the disclosure of classified information.

More importantly, with respect to this legislation, there is nothing in H.R. 1507 that permits either an employee or the Federal court to reveal classified information. In fact, the bill is constructed to expressly authorize the agency to withhold classified information.

This issue was studied back in the mid-1990's when it was requested—a GAO report was requested by the former Post Office and Civil Service Committee of the House. The report was issued in 1996, and it found that intelligence agencies already have in place numerous safeguards to protect classified information and national security interests in employees' Federal court cases and in jury trials in Title VII cases.

The GAO concluded if Congress wants to provide CIA, NSA, and DIA employees with standard protections that most other Federal employees enjoy, it could do so without unduly compromising national security. And here's a copy of the report, which is publicly available on the Internet, and I urge anyone interested in this issue to read it, because the GAO conducted an audit and determined that information on sensitive intelligence operations can be converted into unclassified, publicly available documents.

Intelligence agency adverse action files contain generally no national security information. The files reviewed by GAO at the DIA and the NSA, actually 98 percent of those files contained no such information. And that is the case file that is used to process the employee termination or discipline case.

GAO reviewed case files in Federal courts and found declassified and redacted documents were capable of providing sufficient information to litigate the cases for both the agency and the employee.

The conclusion, based on 30 years of history and 18 years under Title VII, is clear the administrative process alone won't work. Under the current system, I can tell you what happens. You heard from Ms. Greenhouse earlier, and it happens repeatedly by lawyers who represent Federal employees, when they come into the office, it has become standard for attorneys to have to tell Federal employees and advise them that filing the whistleblower claim is futile. Statistics bear that out: 95 to 99 percent failure rate. To be honest with your clients, you have to tell them you have a 95 to 99 percent chance of losing your case. And nothing is more demoralizing than having to tell a client, particularly a dedicated Federal employee, particularly employees who work at national security or the FBI agencies, that remaining silent and not fighting retaliation is their best legal option. That won't change unless we have district court access for employees, including national security and FBI employees.

And I thank you very much.

Chairman TOWNS. Thank you very much, Mr. Colapinto.

[The prepared statement of Mr. Colapinto follows:]

Testimony
of
David K. Colapinto
General Counsel, National Whistleblowers Center

Before the
United States House of Representatives
Committee on Oversight and Government Reform

May 14, 2009

Hearing on,
"Protecting the Public from Waste, Fraud, and Abuse: H.R. 1507, the Whistleblower Protection Enhancement Act of 2009."

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Summary of Testimony of David K. Colapinto, General Counsel
National Whistleblowers Center
Before the United States House of Representatives
Committee on Oversight and Government Reform
Hearing on, "Protecting the Public from Waste, Fraud, and Abuse: H.R. 1507, the Whistleblower Protection Enhancement Act of 2009."
May 14, 2009

Chairman Towns, Ranking Member Isa, and Honorable Members of the Committee, this is a one-page summary of my testimony in support of H.R. 1507, the Whistleblower Protection Enhancement Act of 2009.

(1) Employees who work in the intelligence agencies and at the Federal Bureau of Investigation ("FBI") should be provided full access to courts and juries and the other reforms included in H.R. 1507 to combat whistleblower retaliation. Similar rights and court remedies currently exist for intelligence agency and FBI employees under civil rights statutes.

(2) There is no justification for treating employees at intelligence agencies and the FBI differently from employees at other federal agencies in regard to protections against retaliation for whistleblowing. As the General Accounting Office ("GAO") found in 1996, providing national security employees with the standard protections against adverse actions enjoyed by most other federal employees poses no greater risk to national security.

(3) Also, as the GAO found in 1996, the intelligence agencies already have in place numerous safeguards within their EEO programs to protect against the disclosure of classified information, and are fully equipped to protect national security interests in employee cases that currently proceed to federal court and in jury trials.

(4) Administrative review of intelligence agency and FBI employee whistleblower cases, without providing for full court access, will be no more effective at encouraging employees at those agencies to report serious misconduct or fraud, or prevent retaliation, than what currently exists under the failed processes for Title 5 employees.

My full written testimony follows this summary. Thank you for giving me this opportunity to share the views of the National Whistleblowers Center on H.R. 1507.

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Testimony of David K. Colapinto, General Counsel
National Whistleblowers Center
Before the United States House of Representatives
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Hearing on, "Protecting the Public from Waste, Fraud, and Abuse: H.R. 1507, the Whistleblower Protection Enhancement Act of 2009."
May 14, 2009

Chairman Towns, Ranking Member Isa, and Honorable Members of the Committee, thank you for inviting me to testify today in support of H.R. 1507, the Whistleblower Protection Enhancement Act of 2009. I am speaking today on behalf of the National Whistleblowers Center, a non-profit, non-partisan organization in Washington, D.C. with a 22-year history of protecting the right of individuals to speak out about wrongdoing in the workplace without fear of retaliation. Since 1988, the Center has supported whistleblowers in the courts and before Congress, achieving victories for environmental protection, nuclear safety, government ethics and corporate accountability. The National Whistleblowers Center supports extending whistleblower protections to all federal employees based on the model for protecting federal employees from discrimination and retaliation under the civil rights laws. For that reason, on behalf of the Center, we commend this Committee for passing H.R. 985 in the last Congress, and appreciate the efforts of Rep. Van Hollen and Rep. Platts who proposed those same provisions as part of the stimulus bill that passed the House of Representatives earlier this year.

The National Whistleblowers Center strongly supports the continuing efforts of this Committee to enact strong whistleblower protections for all federal employees, including those employees who work in the intelligence agencies and at the Federal Bureau of Investigation ("FBI"), based on the civil rights law model. We have some suggestions for improvements to H.R. 1507 to ensure that strong protections are enacted for all employees, particularly for employees who work in the area of national security and law enforcement. We look forward to working with you on this long overdue and vital piece of government reform legislation.

I. BACKGROUND.

Whistleblowers are the single most important resource for detecting and preventing fraud and misconduct. That was the finding of the three most recent studies on fraud and misconduct detection in private industry and in government.[1]

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[1] *See* 2007 PricewaterhouseCoopers ("PWC") study, "Economic Crime: people, culture and controls." http://www.whistleblowers.org/storage/whistleblowers/documents/pwc_survey.pdf; Ethics Resource Center ("ERC"), "National Government Ethics Survey" (2007), http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/ethicsresourcecentersuvery.pdf; Association of Certified Fraud Examiners ("ACFE"), "2008 Report To The Nation On Occupational Fraud & Abuse,"

There are three findings from these studies that are particularly relevant to considering enhancement of whistleblower anti-retaliation protections to FBI and intelligence agency employees, and federal employees generally, under H.R. 1507:

- misconduct and fraud is as common in government as the private sector;[2]
- most misconduct and fraud is reported by employees internally through the chain of command as opposed to being detected by other means, such as regular audits or law enforcement;[3] and
- strong protections against retaliation are essential to encourage reporting by employees.[4]

Numerous high profile examples of misconduct detected and reported by employees at the FBI and intelligence agencies have been widely reported over the years. In the federal government, serious misconduct takes many forms, all of which occur in the FBI and intelligence agencies, such as: lying to employees and stakeholders (including lying to Congress and the courts); putting one's own interests ahead of the organization's and conflicts of interest; safety violations; misuse of the organization's confidential information; internet abuse; misreporting of hours worked; other violations of law.[5]

Misconduct and fraud does not disappear at the FBI and intelligence agencies simply because these government agencies operate in more secrecy. Employees who work in the field of national security or at the FBI who observe these serious problems must be encouraged to report them through their agency chain of command, externally to Inspector Generals, and when appropriate to Congress, without fear of retaliation.

The published surveys and the case examples over the last 30 years demonstrate that the only way to achieve this goal is to enact strong protections for all federal employees by providing full court access. Notably, a similar finding was reached by the House Committee on Post Office and Civil Service in 1994 when it considered amendments to the WPA and stated:

> The composite lesson to be learned from recent studies and the Committee's hearings is that the WPA is not working, because *it has not deterred managers*

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http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/acfefraudreport.pdf.

[2] ERC Survey, p. 4.

[3] ERC Survey, p. 8; PWC Survey, p. 10 (table 1.11); ACFE Report, p. 19.

[4] PWC Survey, p. 23; ACFE Report, p. 23.

[5] ERC Survey, p. 22-23.

from trying to retaliate. That is not surprising when those who violate the merit system have nothing to lose.[6]

The House had it right in 1994 when it proposed amending the WPA to include jury trials because the "WPA's rights *have not met their promise on paper*, because the *agencies* responsible for the Act's implementation *have been hostile*, or at least unwilling, *to enforce its mandate*."[7] However, the federal agencies and federal management opposed the jury trial provisions of the 1994 amendments, and a compromise was reached to make improvements without affording full court access in whistleblower cases. Now once again, 15 years later, the same arguments are being made to support the same failed administrative and to oppose full court access for all employees.

II. CURRENT WHISTLEBLOWER PROTECTIONS FOR INTELLIGENCE AGENCY AND FBI EMPLOYEES.

The current intelligence agency and FBI whistleblower provisions are a cruel hoax because they do not afford any meaningful protection to employees who blow the whistle. If the current system to protect against retaliation for whistleblowing is broken for Title 5 employees, it is virtually non-existent for employees at intelligence agencies and at the FBI.

The Intelligence Community Whistleblower Protection Act (ICWPA) provides employees of the intelligence community with a limited right to raise concerns to Congress or to the appropriate Inspector General (IG). If the employee wants to go to the intelligence committees of Congress he or she must obtain approval from the Director of the Agency. *See,* 50 U.S.C. §403q(d)(5).

Currently, under 50 U.S.C. §403q(e)(3) an intelligence agency IG does not have statutory authority to provide any remedy for whistleblower retaliation although an IG can receive complaints and investigate. There is only one known case where an intelligence agency IG has ordered relief to an employee for whistleblower retaliation under the ICWPA.

The FBI has its own statute, 5 U.S.C. §2303, in which FBI employees are supposed to have procedures that are consistent with the whistleblower rights for Title 5 civil servants. Only one FBI employee is known to have ever won a ruling from the DOJ confirming that whistleblower rights were violated. FBI whistleblower cases are reviewed by the DOJ where cases get bogged down in the bureaucracy and where there is no independent judicial review of decisions available.

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[6] H.R. Report No. 103-769, " Reauthorization of the Office of Special Counsel," 103rd Cong., 2d Sess., p. 13 (Sept. 30, 1994) (emphasis added) (Report on H.R. 2970, amending Title 5, U.S. Code, to provide for *de novo* judicial review in district court for federal employees in whistleblower cases).

[7] *Id.* (emphasis added).

Failure by Congress to enact strong whistleblower protections with full court access for all federal employees under H.R. 1507, particularly for national security and FBI employees, will nourish an ineffective system of preventing and addressing retaliation. It would also extend an already unlevel playing field where disparities exist under the current system that favor the agency. Under the ICWPA, Inspector Generals for the intelligence agencies operate in total secrecy and have no published decisions or public reports on whistleblower retaliation. In FBI cases decisions are not published by DOJ and there is no judicial review so only the agency knows what the precedents are, placing the employees and their counsel at a disadvantage. DOJ also refuses to publish statistics on how many cases are filed and decided even though the statute requires annual reporting to the President. 5 U.S.C. §2303. There exists no subpoena power in FBI retaliation cases, the agency controls all the witnesses and it is not unusual for supervisors or management employees to retire while the case is pending. The agency has access to these retired employees and retains the right to call them at a hearing to testify against the whistleblower, but the whistleblower cannot even take a deposition or interview these former employees before an administrative trial.

Simply providing for an administrative review of the IG determination on an intelligence employee's whistleblower retaliation claim is not a substitute for the full court access and *de novo* judicial review provisions set forth in HR 1507. Administrative review of prohibited personnel action findings by the intelligence community Inspector Generals, without providing for full court access and jury trials, would not provide employees with due process or rights anywhere comparable to what currently exists for all intelligence agency and FBI employees under EEO laws.

Under the current system, it has become standard for lawyers who represent federal employee whistleblowers to advise their clients that filing a whistleblower retaliation claim is futile given the failure rates through the administrative forums. Nothing is more demoralizing than telling a client that remaining silent or not fighting retaliation is the best legal option.

That will not change unless the option of full court access with jury trials is provided for all federal employees. Denying employees that right will result in experienced legal counsel advising against filing claims due to the futility and other adverse consequences from blowing the whistle.

H.R. 1507 would create "badly needed competition – a choice of fact-finding fora between existing remedies and civil actions providing for jury trials in U.S. District Court." That was the finding by the U.S. House of Representatives Committee on Post Office and Civil Service when it passed a bill to amend the WPA in 1994 that provided for full district court access and jury trials.[8]

There is no more risk to national security if intelligence agency and FBI employees are also afforded the right to pursue retaliation claims through the agency Inspector Generals and then seek full court access and a jury trial under the H.R. 1507 framework than currently exists

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[8] H.R. Report No. 103-769, " Reauthorization of the Office of Special Counsel," 103rd Cong., 2d Sess., p. 18 (Sept. 30, 1994).

when retaliation claims are filed under Title VII of the Civil Rights Act, and other EEO laws, that provide for federal court/jury trial review.

It is a sad fact that criminals and terrorists have been provided more rights in court than our intelligence agency and law enforcement officers who blow the whistle on serious misconduct and fraud.

Creating an administrative remedy for intelligence and FBI employees, without full court access to jury trials, betrays the trust placed in the men and women who are charged with helping to prevent the next 9/11. Intelligence agency and FBI employees deserve the best protections available that are modeled on laws proven to be effective, such as Title VII of the Civil Rights Act.

III. EXISTING COURT ACCESS FOR INTELLIGENCE AGENCY AND FBI EMPLOYEES UNDER CIVIL RIGHTS AND OTHER LAWS.

Currently, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000-e and 42 U.S.C. § 1981a, all federal employees, including those employed by national security agencies and the FBI, can take their employment cases into federal court to fully litigate claims of discrimination and retaliation with jury trials and compensatory damages.[9] In addition, federal employees at the FBI and all intelligence agencies have the right to file claims in federal court seeking damages for violations of the Privacy Act of 1974, 5 U.S.C. §552a(g), and for pre-enforcement injunctive relief against federal agencies that violate employees' constitutional rights.[10]

Title VII permits employees of the FBI, National Security Agency ("NSA"), Central Intelligence Agency ("CIA"), Defense Intelligence Agency ("DIA") and all other federal intelligence or law enforcement agencies excluded from the protections of the Civil Service Reform Act ("CSRA") and the Whistleblower Protection Act ("WPA") to bring Title VII discrimination and retaliation claims in federal court. This remedial scheme, which includes the right to a trial by jury in federal court, has already proven to be successful since the Civil Rights

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[9] Under *current* law federal employees can bypass the Merits Systems process and go directly to federal court with their Civil Service claims if they simply join the civil service issues with the Title VII complaint as a "mixed" case. Retaliation cases – whether under Title VII or under another federal law (such as the WPA) essentially adjudicate the same issues. *See Ikossi v. Department of Navy*, 516 F.3d 1037, 1042 (D.C. Cir. 2008) ("This holding [conferring federal court jurisdiction over mixed cases] also reflects the legislative history, which states that ***'questions of the employee's inefficiency or misconduct, and discrimination by the employer, [are] two sides of the same question and must be considered together.'***") (emphasis added).

[10] *See, e.g., Weaver v. USIA*, 87 F.3d 1429, 1433-35 (D.C. Cir. 1996).

Act was amended in 1991, and it should also be adopted as the example for reforming the WPA.[11]

Litigating a whistleblower reprisal claim under the WPA is similar to a retaliation claim under Title VII. At issue in both types of cases is the federal employer's motive for retaliation when taking an adverse employment action. Where national security information is related to a case, the federal court has protective measures available to prevent disclosure of sensitive or classified information without imperiling the rights of the employees or the agencies to fully adjudicate these claims. For example, the federal courts have used pseudonyms and protective orders to protect national security interests in Title VII cases. Other protective measures that are available under the federal rules of civil procedure and federal rules of evidence, such as entering protective orders and the use of *in camera* proceedings, can be used to prevent the unauthorized disclosure of national security information on the public record.

A. Title VII Jury Trials and Compensatory Damages Are Currently Available for National Security Employees.

The Title VII cases involving FBI, CIA, DIA and NSA employees that have been adjudicated in federal court illustrate that all federal employees (including those employed in the areas of national security and law enforcement) can be afforded the right to litigate their whistleblower cases in federal court without risk of revealing classified or other sensitive intelligence information. Since these cases can be heard in federal court without releasing any intelligence information, employees from these agencies should be able to bring their whistleblower claims in federal court as well.

Although the number of discrimination and retaliation cases filed by national security employees per year under the civil rights and related statutes are limited and relatively small[12]

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[11] Employees at intelligence agencies and at the FBI have had the statutory right to file discrimination and retaliation claims in federal court under the civil rights statutes since 1964; however, it was in 1991 that federal employees were granted the right to seek a jury trial and compensatory damages because the preexisting remedies without access to juries were "not adequate to deter unlawful discrimination or to compensate victims of such discrimination." *See, e.g.,* H.R. Report 102-83, "Providing for the Consideration of H.R. 1 [the Civil Rights Act of 1991]," 102nd Cong. (June 3, 1991).

[12] According to the published statistics required by the No Fear Act, the "Number of Administrative Complaints for Each Agency Annually" for complaints of discrimination or retaliation under Title VII, the Age Discrimination in Employment Act and Rehabilitation Act for the CIA and the NSA, are as follows:

- CIA
  - 2003 → 13
  - 2004 → 14
  - 2005 → 21
  - 2006 → 12
  - 2007 → 24

compared with other agencies, there are still several reported cases where employees have brought their claims in federal court after exhausting remedies through the federal EEO administrative investigation and/or before the Equal Employment Opportunity Commission ("EEOC").

In one case, a hearing-impaired former employee of the CIA, brought an action alleging that the CIA violated the Rehabilitation Act by failing to provide her with reasonable accommodations in light of her disability, and after a three-day jury trial, the plaintiff was awarded $25,000 in compensatory damages.[13] In another case, the plaintiff brought a discrimination action pursuant to Title VII against the Director of the NSA. The plaintiff was granted a motion for an opportunity for discovery against the NSA, and although the NSA later won a motion for summary judgment dismissing the claim, the matter was fully litigated on the public record.[14]

Courts have also been able to successfully adjudicate cases that may contain classified or sensitive intelligence information by using pseudonyms. For example, when a retired program manager for the CIA sued the CIA for race and age discrimination the plaintiff's real name was not used in the case and in order to preserve the security of American intelligence operations, one city identified in this litigation where classified operations took place was only identified as the "Main Location."[15]

B. Federal Employee Whistleblower and Title VII Cases Often Overlap.

Since 1991, federal employees have been afforded the right, if they choose, to seek review of their discrimination and retaliation cases in U.S. district court, *de novo,* with a trial by jury and the right to seek an award of compensatory damages. In many cases, federal employees have achieved more success on their Title VII retaliation claims reviewed *de novo* in federal court than the administrative remedies available for whistleblower claims either through MSPB or other agencies as provided by the CSRA and WPA. Based on the history of federal court review of civil rights claims, the right to *de novo* review before federal court with a right to a jury trial and compensatory damages is essential to achieve effective oversight and to redress complaints of whistleblower retaliation by all federal employees. Federal employees who work in law enforcement sensitive agencies, who have some remedies available under the current

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- NSA
  - 2003 →30
  - 2004 →23
  - 2005 →32
  - 2007 →24

[13] *Szedlock v. Tenet*, 139, F. Supp. 2d 725, (E.D. VA 2001).

[14] *Fernandez v. Alexander*, U.S. Dist. LEXIS 60047 (Dist. MD 2006).

[15] *Peary v. Goss*, 365 F. Supp. 2d 713 (E.D. VA 2005).

version of the WPA, frequently allege retaliation or discrimination in violation of Title VII in addition to whistleblower retaliation in violation of the WPA.

Recent cases provide examples of where employees have brought claims under both Title VII and the WPA.

1. Jane Turner was a long-time FBI Special Agent who blew the whistle on the FBI's failure to investigate child abuse cases on an indian reservation and she also disclosed theft by FBI agents of items from the World Trade Center ground zero site to the DOJ Inspector General. Turner filed a whistleblower complaint through the DOJ whistleblower procedures for FBI employees, 28 C.F.R. Part 27 and 5 U.S.C. 2303. However, after several years of languishing before the DOJ Office of Attorney Recruitment and Management ("OARM"), Turner's whistleblower complaint is still pending.

By contrast, Ms. Turner successfully appealed an adverse grant of summary judgment on a claim of retaliation under Title VII.[16] On remand Turner was permitted to go to trial by a jury and she prevailed by recovering $300,000 in compensatory damages, other damages and attorneys fees and costs against the FBI for some of the adverse actions that were taken against her.

2. FBI counterterrorism expert Bassem Youssef has fought within the FBI to end discrimination against Arab Americans and to protect the American people from another terrorist attack. The recipient of the prestigious Director of Central Intelligence award for his successful undercover operations, Mr. Youssef has on many occasions called attention to the deficiencies in the FBI's counterterrorism division, e.g., on September 11, 2001, the FBI's top counterterrorism official did not know the difference between Shiite and Sunni Muslims.[17]

Mr. Youssef filed a Title VII claim of retaliation and discrimination on basis of national origin and a whistleblower claim under the statute for FBI employees (5 U.S.C. §2303). Both claims involve Mr. Youssef's disclosures to FBI Director Robert Mueller at a meeting with the Director and a member of Congress on June 28, 2002, in which Mr. Youssef expressed his concern that despite his expertise and qualifications as an FBI agent in the field of counterterrorism and fluency in Arabic, the FBI had not placed him into a position to utilize his skills in the fight against terrorism and that he believed he was being discriminated against on the basis of national origin.[18]

In Mr. Youssef's EEO/Title VII case and his WPA case, Mr. Youssef has been able to pursue his claim without risk of disclosure of classified information. The FBI has cleared all statements, affidavits, documents (such as personnel records) and redacted any classified information. Although Mr. Youssef has a security clearance and works as a Unit Chief in the

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[16] *Turner v. Gonzales*, 421 F.3d 688 (8th Cir. 2005).

[17] *Hearing on FBI Whistleblowers,* 110th Cong. (May 21, 2008) (written testimony of Stephen M. Kohn).

[18] *Youssef v. FBI,* 541 F.Supp.2d 121, 155-160 (D.D.C. 2008).

FBI's counterterrorism division, both cases are proceeding without the revelation of any classified information or the need for taking any other special measures beyond what is available in the Federal Rules of Civil Procedure.

3. Peter Brown, who was fired shortly after disclosing systemic breakdowns in quality assurance at the Savannah Customs Lab, brought a mixed case against his employer, the U.S. Department of Homeland Security ("DHS"), alleging whistleblower retaliation and retaliation for prior protected activity under Title VII. Before the Merit Systems Protection Board ("MSPB"), Mr. Brown was not successful on either claim. However, because Mr. Brown has the right to *de novo* review in federal court, he learned through discovery in the federal court action that DHS withheld documents that were responsive to his discovery requests served upon the agency in the MSPB case. Additionally, after Mr. Brown filed his federal court action following exhaustion from the MSPB, he learned that DHS destroyed the entire case file on his removal, including relevant notes that were never produced in the MSPB case.

The federal court granted a motion for sanctions against DHS for spoliation of evidence.[19] On the other hand, the MSPB failed to reopen Mr. Brown's case to reconsider the impact of the destruction of relevant documents material to Mr. Brown's removal case on the MSPB's decision.

Employees who work in the field of national security or at the FBI are able to overcome motions for summary judgment and have their Title VII retaliation claims successfully adjudicated in federal court without revealing any classified intelligence information or law enforcement sensitive information. Similarly, other federal employees routinely have whistleblower claims heard in federal court without revealing any sensitive intelligence or law enforcement information.

IV. SAFEGUARDS FOR PROTECTION OF NATIONAL SECURITY INFORMATION UNDER EEO AND CIVIL RIGHTS LAWS.

After conducting a comprehensive study the General Accounting Office (GAO) concluded there is "***no justification for treating employees***" at "***intelligence agencies differently from employees at other federal agencies***" in regard to protections against retaliatory discharge or other discriminatory actions.

On March 11, 1996 the National Security and International Affairs Division of the United States General Accounting Office released its comprehensive report, GAO/NSIAD-96-6, *Intelligence Agencies: Personnel Practices at the CIA, NSA and DIA Compared with Those of Other Agencies* (hereinafter, "GAO Report").[20] In this report, GAO "compared equal employment opportunity (EEO) and adverse action practices at these intelligence agencies with those of other federal agencies and determined whether employee protections at these three intelligence agencies could be standardized with the protections offered by other federal

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[19] *Brown v. Chertoff*, 563 F.Supp.2d 1372 (S.D. Ga. 2008).

[20] Excerpts from this GAO Report are attached to this testimony.

agencies." GAO Report, pp. 2, 14. GAO performed a year long review "in accordance with generally accepted government auditing standards." *Id.*, p. 15.

Based on the experiences in protecting CIA, NSA and DIA employees from retaliation when they engaged in protected activities under Title VII of the Civil Rights Act, the GAO concluded that: **"If Congress wants to provide CIA, NSA, and DIA employees with standard protections against adverse actions that most other federal employees enjoy, it could do so without unduly compromising national security."** GAO Report, p. 45 (emphasis added).

In addition, the GAO also found that the internal review process for civil rights complaints (currently existing within the CIA, NSA and DIA) (which also exist in the FBI) provides intelligence agencies with ample opportunity to resolve national security related issues and declassify information that may be necessary for a case, including but not limited to the following:

- Information on "sensitive intelligence operations can be converted into unclassified publicly available documents." GAO Report, p. 6.

- The GAO determined that these agencies' experience with these EEO laws "demonstrate that intelligence agencies can provide their employees with standard protections against adverse actions." *Id.*, p.35.

- GAO found that "adverse action files generally contain no national security information." *Id.*, p. 36. Of the files reviewed by GAO, 98% of the adverse action files contained no such information. *Id.*

- "agencies could continue to remove classified information from adverse action case files . . . [agencies have been] very diligent and successful in keeping classified information out of adverse action case files..." *Id.*, p. 38.

- GAO also found that "the agencies have overstated the sensitivity of the information contained in the vast majority of adverse action cases." *Id.*

- All three agencies "had been able to successfully support their case with the documents at the unclassified level." *Id.*

- GAO reviewed case files at federal courts and found declassified and redacted documents that were capable of providing sufficient information to litigate EEO cases. *Id.*, pp. 38-39.

- "GAO sees no justification for treating employees at these intelligence agencies differently from employees at other federal agencies" except in extremely "rare" cases in which national security required that an employee be summarily dismissed. *Id.*, pp. 3, 45.

Under current law, any intelligence agency employee who alleges discrimination or retaliation for engaging in activities protected under Title VII and related laws is entitled to the following procedures and protections: (1) File an initial request for counseling within an agency in order to attempt to resolve an employment related retaliation claim; (2) If informal counseling cannot resolve the dispute within 30-90 days, the employee can file a formal complaint within the agency; (3) The agency must conduct a "complete and fair investigation of the complaint" within 180 days and issue a decision on the merits of the case. GAO Report, pp.18-19; 29 C.F.R. Part 1614 ("Federal Sector Equal Employment Opportunity").

More significantly, after exhausting these administrative remedies, all employees at these intelligence agencies have the right to file a complaint *de novo* in United States District Court and have their civil rights case heard by a trial by jury, with the same rights and remedies shared by other employees covered under these laws. *Id.*

By objectively and fairly analyzing the existing EEO complaint processing that is currently in place within all intelligence agencies referenced in H.R. 1507, the GAO was able to conclude that covering these employees under standard civil service laws, including the Whistleblower Protection Act, would not cause undue risk to national security.[21] The procedures set forth in H.R. 1507 are consistent with the very procedures approved by the GAO for the adjudication of national security related whistleblower claims. To the extent that additional safeguards are necessary to implement the legislation consistent with the GAO findings, H.R. 1507 can be revised to require the intelligence agencies and the FBI to implement the same safeguarding procedures that already exist to process EEO complaints to process whistleblower claims in order to prevent disclosure of classified information that is harmful to national security.

V. PROVISIONS WITHIN H.R. 1507 THAT PROTECT NATIONAL SECURITY.

A. Retaliation is the Issue Not the Validity of the Underlying Whistleblower Claim.

Retaliation claims under H.R. 1507 will not require litigating the validity of the employee's underlying whistleblower allegations just as retaliation claims under federal civil rights statutes (such as Title VII) do not require litigating the underlying claim of discrimination. The merits of the whistleblower allegations (i.e., whether the whistleblower's claims are true or

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[21] The GAO based its conclusion, in part, on the fact that the agency heads of intelligence agencies retain summary removal authority to suspend or remove employees when necessary in the interests of national security. *See e.g.,* 5 U.S.C. §7532, 50 U.S.C. §833 and 10 U.S.C. §1604(e). Additionally, the Civil Rights Act of 1964 contains an express provision that makes an employer's discharge of any individual for reasons of national security unreviewable. *See* 42 U.S.C. §2000e-2(g). Although rarely invoked, these provisions provide the intelligence agencies with more than adequate assurance that these agency employees can receive the same whistleblower retaliation protections, including full court access, that are proposed for Title 5 employees under H.R. 1507. *See* GAO Report, p. 45.

false, valid or invalid) are not determined in a retaliation claim. The statute requires only a good faith belief in making a protected disclosure and does not require proof of validity of the whistleblower's allegations to maintain a retaliation claim.

What is at issue in a retaliation case is whether an employee made a protected disclosure (i.e. a disclosure of violation of law, rule or regulation; substantial threat to public health and safety; gross waste or mismanagement; and abuse of authority) and once that is established there is no in-depth examination of the underlying merits of the whistleblower allegations in the retaliation case. The making of a protected disclosure element of the whistleblower cases can be litigated without undue risk of disclosure of classified information in the same manner that such information is handled under EEO processing procedures under current law at each of the intelligence agencies and the FBI. Other provisions within H.R. 1507 that are unique to whistleblower claims, such as the role of the Inspector General in investigating the case, also will assist in ensuring that classified information is not disclosed during the course of litigation in federal court in the event *de novo* review by the district court is requested by an employee.

B. Separation of Functions.

The adjudication of the employment retaliation case and the investigation of the merits of the whistleblower disclosure are separate and independent functions. The issue in the retaliation case is whether employee has suffered retaliation in the form of an adverse personnel action, which is a totally separate inquiry from whether the employee is right or wrong on the merits of the disclosure. Once it is established that an employee lodged a whistleblower allegation with the appropriate officials within or outside the agency, the underlying merits of that disclosure are not at issue.

The two functions (i.e. protection of an employee from retaliation and the investigation into the merits of an underlying allegation of wrongdoing) would remain separate under H.R. 1507. The IG and law enforcement, when appropriate, have authority to investigate whether the whistleblower allegations are valid or have merit to warrant further administrative or law enforcement action. However, that inquiry is not mixed with the whistleblower retaliation claim alleging that an adverse personnel action was taken in retaliation for making a complaint.

C. IG Function In Intelligence Agency and FBI Cases Under H.R. 1507.

H.R. 1507 ensures classified information will not be revealed at any stage during the whistleblower retaliation case, because the administrative phase of the case is determined by the Inspector General for each intelligence agency or the FBI (i.e., DOJ IG). The Inspector General for each agency is familiar with the agency they oversee and can assist in assuring that if the case is appealed to federal court the administrative record does not contain classified information. For example, Inspector General offices are capable of preparing redacted reports and the agencies are capable of reviewing those reports so the case can be decided and released without the risk of classified information being revealed. To the extent these specific safeguards need to be made clearer, the statutory language can be amended to include provisions requiring the Inspector General to ensure that no classified information is revealed in any decision by the Inspector General on a retaliation claim, or that other appropriate measures are taken to safeguard such information to protect national security interests.

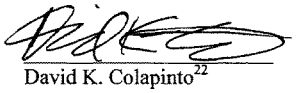
CONCLUSION

H.R. 1507 provides a framework that would extend to employees who work at intelligence agencies and at the FBI the same protections against whistleblower retaliation as other employees, including the right to seek full court access, without risking the revelation of classified information or harming national security. Full court access, including the right to a trial by jury, is the cornerstone of the H.R. 1507 reforms. Given the 18-year track record of providing similar federal court access and jury trials to intelligence agency and FBI employees under civil rights laws, retaliation claims (whether under Title VII or H.R. 1507) can be safely litigated in federal court without risking national security.

The National Whistleblowers Center suggests that H.R. 1507 be modified in two areas to strengthen the court access provisions for employees who work at intelligence agencies at the FBI. First, the bill should make clear that employees at intelligence agencies and the FBI can seek a trial by jury. Second, specific provisions can be added to the court access provisions to ensure that there are sufficient safeguards available to protect against the public disclosure of classified information, as currently exists under agency EEO programs.

Thank you for inviting me to share the views of the National Whistleblowers Center on H.R. 1507.

Respectfully submitted,



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United States General Accounting Office

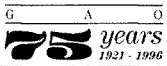
GAO

Report to the Honorable Patricia Schroeder, House of Representatives

March 1996

INTELLIGENCE AGENCIES

Personnel Practices at CIA, NSA, and DIA Compared With Those of Other Agencies



GAO/NSIAD-96-6

Executive Summary

Purpose

Intelligence agencies employ thousands of people who, for reasons of national security, are not covered by certain federal personnel statutory protections. Concerned that intelligence agency employees do not have the same protections afforded other federal employees, the Civil Service Subcommittee of the former House Committee on the Post Office and Civil Service and Representative Patricia Schroeder requested GAO to review selected personnel practices at the Central Intelligence Agency (CIA), the National Security Agency (NSA), and the Defense Intelligence Agency (DIA). Specifically, GAO compared equal employment opportunity (EEO) and adverse action practices at these agencies with those of other federal agencies and determined whether employee protections at these three intelligence agencies could be standardized with the protections offered by other federal agencies.

Background

EEO programs are programs designed to prevent discrimination in the workplace. Federal law, including title VII of the Civil Rights Act of 1964 and the Equal Pay Act, require that federal agencies have EEO programs. The Equal Employment Opportunity Commission is a separate agency that oversees EEO policies throughout the federal government. The Equal Employment Opportunity Commission also holds hearings on employee discrimination complaints and decides on appeals from federal employees with EEO complaints against their agencies.

Adverse actions are actions taken by an agency that adversely affect an employee, including suspension or removal. The 5 U.S.C. 7513 provides most federal employees with various protections when they are subject to adverse actions. The Merit Systems Protection Board is a separate agency created to, among other functions, hear and decide on federal employee appeals of adverse actions taken by their agencies.

Congress has exempted the CIA, NSA and DIA from a number of statutes that regulate and control the personnel practices of other federal agencies. The legislative histories of these exemptions indicate that the intelligence agencies are treated differently primarily for reasons of national security. Also, the directors of all three agencies have authorities to summarily remove employees.

Results in Brief

The CIA, NSA, and DIA have EEO practices similar to those of other federal agencies with respect to management, planning, reporting, complaint processing, and affirmative action. In contrast, adverse action practices at

the intelligence agencies vary by agency and type of employee. The internal procedures (and associated employee protections) at NSA and DIA are similar to those of other federal agencies. Although NSA and DIA have statutory authorities to summarily remove employees in national security cases, these agencies' implementing regulations include some basic employee protections. The internal adverse action regulations at CIA also include some employee protections, but the CIA Director can waive all employee protections and summarily remove employees at any time. The external appeals procedures at intelligence agencies differ from the procedures at other federal agencies in that most employees (all but NSA and DIA military veterans) cannot appeal adverse actions to the Merit Systems Protection Board.

GAO's review indicated that with the retention of summary removal authorities, these intelligence agencies could follow standard federal practices, including the right to appeal adverse actions to the Merit Systems Protection Board, without undue risk to national security. GAO recognizes that Congress is currently studying reforms to these standard federal practices, and GAO has testified that some of these practices have shortcomings. However, GAO sees no justification for treating employees at these intelligence agencies differently from employees at other federal agencies except in rare national security cases.

Principal Findings

EEO Practices Are Similar to Those at Other Agencies

CIA, NSA and DIA have practices for EEO management, planning, and reporting that are very similar to those at other federal agencies. These agencies generally follow Equal Employment Opportunity Commission guidelines for managing and planning their EEO programs. Intelligence agencies also provide the Equal Employment Opportunity Commission with standard EEO statistical reports that, unlike the reports of other agencies, exclude information on total agency workforce levels because this information is classified.

EEO complaint processing at CIA, NSA, and DIA is similar to the processing at other federal agencies, with internal investigations and an external hearing by or appeals to the Equal Employment Opportunity Commission. Like other federal employees, CIA, NSA, and DIA employees with EEO complaints may also pursue their concerns through civil actions in U.S. courts. In

information on sensitive intelligence operations can be converted into unclassified publicly available documents. Second, where classified information cannot be avoided, the agencies could provide security clearances to Merit System Protection Board administrative judges and employee attorneys in adverse action appeals. All three agencies have experience dealing with judges and attorneys who have security clearances in EEO appeals to the Equal Employment Opportunity Commission and in court cases. Therefore, providing employees with rights to appeal to the Merit Systems Protection Board would present no more risk to national security than do current employee appeals to the Equal Employment Opportunity Commission.

Recognizing that risks could still arise, GAO believes that agencies would need to preserve their current summary removal authorities. Because these removal authorities are not subject to external appeal, the agencies could use them to minimize national security risks in highly sensitive cases. At NSA and DIA, these special authorities have been used judiciously. CIA did not allow GAO to review case files, so GAO cannot make judgments on the frequency or propriety of cases where the director's summary removal authority was used. CIA officials stated that this authority has sometimes been used in cases not related to national security, such as reductions in force.

Recommendations

This report contains no recommendations.

Agency Comments and GAO's Evaluation

In commenting on a draft of this report, the Department of Defense (DOD) concurred with GAO conclusions about NSA and DIA regarding EEO issues. CIA's comments did not address the draft report's treatment of EEO issues.

Regarding adverse actions, CIA and DOD did not concur with GAO's conclusion that Merit Systems Protection Board appeal rights could be extended to all intelligence agency employees. CIA and DOD stated that GAO did not adequately consider the national security risks associated with such a change in policy. GAO disagrees because the report lays out a tiered process in which, depending on the level of risk involved, the agencies themselves would determine what precautionary steps would be most appropriate. In addition, GAO clearly acknowledges that there may be national security cases in which summary removal, without appeal, will be appropriate.

primary purpose was to compare CIA, NSA, and DIA with other federal agencies, rather than conduct a detailed examination of the effectiveness of each agency's personnel practices. We did not attempt to determine the merits of individual EEO or adverse action cases. Finally, our work was not aimed at evaluating or endorsing the policies, practices or procedures of EEOC or MSPB in handling employee complaints.

To compare the EEO practices of these intelligence agencies with those of other federal agencies, we reviewed appropriate statutes and guidance from EEOC and OPM. We compared these requirements with intelligence agency practices by reviewing EEO-related agency regulations. We did not directly evaluate non-intelligence agency practices. We examined statistical reports on complaint processing and workforce profile to compare intelligence agency practices with those of other federal agencies. We accepted agency EEO statistics as reported to EEOC and did not conduct independent reliability assessments on this data. We reviewed selected court cases where employees had sued the intelligence agencies for discrimination to examine how intelligence agency cases are handled in court proceedings. In addition, we met with EEO officials from each agency to discuss the full range of their programs. We also met with EEOC officials to get their views on intelligence agency programs to determine how these agencies compare with programs administered by other agencies.

To compare the adverse action practices of these intelligence agencies with those of other federal agencies, we identified and reviewed appropriate regulations and statutes. We then compared these governmentwide requirements to intelligence agency requirements by reviewing agency adverse action regulations. We did not directly evaluate non-intelligence agency practices. At NSA and DIA we conducted detailed reviews of all available adverse action case files from 1993 and 1994. We reviewed these 40 case files to determine whether NSA and DIA were following their own adverse action procedures. At MSPB we conducted detailed reviews of all available case files on CIA, NSA, and DIA employee appeals. We reviewed these 14 cases (dating from 1989 to 1994) to examine how intelligence agency cases are handled in the MSPB appeal process. In addition, we met with personnel and legal officials from each agency to discuss their procedures as well as specific adverse action cases. We also met with MSPB officials to get their views on intelligence agency adverse action appeals.

To determine whether adverse action practices at CIA, NSA, and DIA could be standardized with those of other agencies, we performed a number of audit tasks. In our reviews at NSA, DIA, and MSPB (discussed previously) we examined case files to determine the extent to which these files contained classified or declassified information. We also examined publicly available EEO court case files to determine the types of information present and whether intelligence agencies were able to remove classified information from personnel related documents. We also reviewed these intelligence agencies' summary removal authorities. Finally, we met with personnel and legal officials from CIA, NSA, DIA, EEOC, and MSPB. In these meetings, we discussed the unique requirements of intelligence agencies, focusing on potential risks to national security and ways to minimize them.

Our work was impaired by a lack of full cooperation by CIA officials. These officials denied us pertinent documents and other information related to our review. Most significantly, CIA officials would not allow us to review case files, which made it impossible for us to determine the extent to which CIA follows its own regulations. In contrast, NSA and DIA officials cooperated fully with our review, providing us with complete copies of their regulations and allowing us to review case files.

We performed our review from October 1994 to November 1995 in accordance with generally accepted government auditing standards. These standards require that we consider work done by other auditors, so we coordinated our review with the DOD Inspector General. DOD Inspector General staff had performed two reviews (one of them simultaneous to our review) on EEO practices at NSA; these reviews were completed in April 1994 and September 1995.

Comments from CIA, DOD, and EEOC on a draft of this report and our evaluation of them are presented in appendixes I, II, and III, respectively. A summary of their relevant comments appears at the end of chapters 2, 3, and 4. MSPB declined to provide any comments on our report.

requires each agency to analyze the current status of its affirmative employment program elements and address such segments as workforce composition, recruiting, hiring, promotions, and removals. Agencies are to compare the representation of EEO groups for various occupational and grade/pay categories in the agency's workforce with the representation of the same occupational groups in the appropriate civilian labor force. On the basis of their analyses, agencies are to take steps to address barriers and problems that restrict equal employment opportunities.

In addition, EEOC officials stated that these three intelligence agencies generally (1) prepare the required plans in accordance with requirements and (2) maintain current files on annual and multiyear plans. EEOC officials also stated that CIA, NSA, and DIA file their annual analysis of workforce reports and diversity profile reports in a timely manner. The only difference between these intelligence agencies and other federal agencies is that intelligence agencies omit classified information on total agency workforce. However, workforce diversity data is reported to EEOC annually as a percentage of the total agency workforce.

EEO Complaint Process Similar to Processes at Other Federal Agencies, but Slower at CIA and NSA

Complaint Process Similar

CIA, NSA, and DIA have developed systems for processing discrimination complaints that are largely consistent with EEOC Directive 110 and 29 C.F.R. part 1614. An aggrieved employee has the right to file a formal discrimination complaint against the agency after first consulting with an EEO counselor. The EEO agency counselor then has 30 to 90 days to conduct informal counseling and attempt to resolve the issue during the precomplaint counseling phase. If attempts at informal resolution fail, the aggrieved individual may then proceed to file a formal complaint in writing with the agency. If the agency accepts the complaint, it is assigned to an investigator who is responsible for gathering information and investigating the merits of the complaint. As per 29 C.F.R. part 1614, the agency is

required to conduct a complete and fair investigation of the complaint within 180-days after the formal complaint is filed—unless both parties agree in writing to extend the period.[4]

After the investigation is completed, these agencies will issue a final decision based on the merits of the complaint, unless the employee first requests a hearing before an EEOC administrative judge. In this case, the administrative judge will issue findings of fact and conclusions of law, which the agency may reject or modify in making its final decision. Like other federal employees, an intelligence agency employee who is dissatisfied with the agency's final decision may appeal this decision to EEOC.[5]

EEOC officials stated that EEO appeals from intelligence employees are like the rest of the federal government, except for measures taken to protect classified information. To protect national security information, EEOC administrative judges, as well as attorneys for employees, must have security clearances to review national security information that may be relevant to each case.

Like other federal employees, CIA, NSA, and DIA employees who wish to file EEO discrimination complaints may do so through civil actions in U.S. district courts after exhausting administrative remedies. Complainants can skip directly to district court if stages of the appeals process are not completed in a timely manner.

Complaint Processing at CIA and NSA Slower Than at Other Federal Agencies

EEOC compiles statistics on EEO complaint processing throughout the federal government. Federal EEO discrimination complaints can be closed through four methods: (1) dismissals, (2) withdrawals, (3) settlements, and (4) merit decisions (which are agency final decisions). EEOC calculates the average processing time for closing formal EEO discrimination complaints by dividing the total number of days that lapsed until a discrimination case was closed (for all closed cases), by the total number of cases closed by the agency (using any one of the four resolution methods). The complaint processing data does not include the time expended by EEOC to process appeals of agency final decisions.

[4]29 C.F.R. part 1614 became effective in October 1992. It established time frames that allow federal agencies up to 270 days to complete the EEO discrimination investigation and issue agency final decisions when EEOC hearings are not involved.

[5]Under this latter scenario, when an EEOC hearing is requested by the complainant, the entire process is allowed to take up to 450 days.

Congress Could Grant Intelligence Employees Standard Federal Protections Without Undue Risk to National Security

Adverse action protections for employees at CIA, NSA, and DIA could be standardized with those of the rest of the federal government without presenting an undue threat to national security. For many years, a substantial number of NSA and DIA employees (i.e., veterans) have had the same statutory adverse action protections as other federal employees. In recent adverse actions at NSA and DIA, almost no case files contained national security information. If CIA, NSA, and DIA employees were granted standard federal adverse action protections, these agencies could protect national security information by removing classified information from case files and, in cases where that is not possible, by providing security clearances to MSPB administrative judges and employee attorneys. Where neither of these steps would be adequate to protect national security information, these intelligence agencies could use their existing authorities to summarily remove employees. These authorities are not reviewable outside the agencies, so there would be no risk of disclosure of classified information.

NSA and DIA Illustrate That Intelligence Employees Can Have Standard Federal Protections

NSA and DIA experiences demonstrate that intelligence agencies can provide their employees with standard protections against adverse actions. As discussed in chapter 3, NSA and DIA adverse action practices are very similar to those of other federal agencies. The internal practices at NSA and DIA are almost identical to those laid out for the rest of the federal government in 5 U.S.C. 7513. Veterans at NSA and DIA (who make up approximately 21 and 32 percent of their respective civilian workforces), have the same external appeal rights as other federal employees. While officials from NSA and DIA told us that veteran appeals to MSPB were a risk to national security, these agencies have never used their summary removal authorities to prevent a veteran appeal from going to MSPB.

Further, the House Committee on Post Office and Civil Service, in a 1989 report discussing Civil Service Due Process Amendments, stated that it was not aware of any problems due to the additional procedural protections veterans receive under the Veterans' Preference Act of 1944. According to the committee report, "Permitting veterans in excepted service positions [such as employees at NSA and DIA] to appeal to the Merit Systems Protection Board when they face adverse actions has not crippled the ability of agencies excepted from the competitive service to function."

Applicability to CIA

Our review did not identify any reason why the NSA and DIA experiences would not be applicable to CIA as well. Regarding internal removal

practices, aside from the DCI's summary removal authority, the CIA regulations are not substantially different from those outlined in section 7513. Regarding external appeals, employees of all three agencies have access to classified information, the disclosure of which can do grave damage to our national security. CIA suggested that its employees have access to more sensitive information because of its clandestine operations and its higher percentage of employees under cover. In contrast, NSA and DIA officials said that, although individual cases would vary, the sensitivity of intelligence information was equivalent across the three agencies. In comparing its external adverse action practices with those at CIA, NSA wrote to us

"Certainly, disciplinary or performance based proceedings at both agencies raise equal risks to national security information and both agencies' work involves obtaining foreign intelligence information from extraordinarily sensitive and fragile intelligence sources and methods."

Recent NSA and DIA Cases Raise Few National Security Concerns

We reviewed recent NSA and DIA cases to determine whether they contained national security information. In doing so, we used an agency definition of "national security" as those activities that are directly related to the protection of the military, economic, and productive strength of the United States, including the protection of the government in domestic and foreign affairs, against espionage, sabotage, subversion, unauthorized disclosure of intelligence sources and methods, and any other illegal acts that adversely affect the national defense. If the information's unauthorized disclosure could reasonably be expected to cause damage to the national security, it should be classified at the confidential level or higher, in accordance with Executive Order 12356.[1]

We found that adverse action case files generally contained no national security information. We reviewed all available NSA and DIA adverse action cases for 1993 and 1994. Of these 40 cases, 39 cases (or 98 percent) contained no classified national security information.[2] Only one file, involving an employee removed for unsatisfactory performance, contained classified information. In this case file, the employee's poor performance was documented in a memo that contained classified information.

[1]Executive Order 12356 provides the basis for classifying national security information.

[2]Three additional NSA cases from this period were not available to review for a variety of reasons. NSA officials stated that one of these cases contained classified information, but we were unable to review the file to verify this.

public disclosure, regardless of whether or not the information is classified.

Our review indicated that the agencies have overstated the sensitivity of the information contained in the vast majority of adverse action cases. If the information was as sensitive as the agencies indicate, the agencies would be required to classify it in accordance with their own security procedures. Also, as discussed later, these agencies routinely release these types of personnel records to external forums (e.g., MSPB, EEOC, or the federal courts) in an unclassified form.

Agencies Could Remove Classified Information and Provide Security Clearances to Judges and Attorneys

Agencies Could Remove Classified Information From Case Files

If subject to standard federal practices, the agencies could continue to remove classified information from adverse action case files. As discussed previously, NSA and DIA assert that they have been very diligent and successful in keeping classified information out of adverse action case files.

CIA, NSA, and DIA already have experience preparing case files for external appeals in adverse action and/or EEO cases. In our review of case files at MSPB, we found that CIA, NSA and DIA had all been able to successfully support their case with documents at the unclassified level.[3] Several of these documents were formerly classified, including employee position descriptions, records of investigations, and related memoranda.

In our review of EEO case files at federal courts, we found similar instances of declassified agency documents. For example, in one recent case, CIA declassified several secret documents. While some sections had been deleted from these documents, they still provide information on CIA case officers such as types of postings, typical duties, types of sources

[3]The CIA example was a retirement case. As discussed in chapter 3, CIA employees generally cannot appeal to MSPB in adverse action cases.

recruited, basis for performance appraisals, number of case officers in a typical CIA station, and the importance of cover assignments. Assuming that the CIA was careful in preparing these documents (since the files are publicly available), this example shows that information on employee performance in very sensitive intelligence operations can be converted to the unclassified level.

Agencies Could Provide Clearances to Judges and Attorneys

If intelligence agencies were subject to standard adverse action practices, they could also protect national security information by providing security clearances to MSPB administrative judges and employee attorneys. Agency officials have not provided any security clearances to MSPB administrative judges or shared classified information with them; however, they stated that this would be possible. MSPB officials noted that their Board members and administrative judges go through rigorous background checks as part of their nomination process.

The intelligence agencies already deal with administrative judges with security clearances in EEO cases. According to officials, both CIA and the Justice Department have processed security clearances for EEOC administrative judges. All the agencies have been able to work with EEOC administrative judges to conduct EEOC hearings while still protecting national security information.

Intelligence officials have also dealt with employee attorneys with security clearances in EEO cases. While NSA and DIA will not initiate security clearance actions solely for the purpose of employee representation, CIA officials said they maintain a list of cleared attorneys for their employees, and the agency will process a clearance for an employee attorney. To date, all of the agencies have been able to work with employee attorneys to conduct EEOC hearings while still protecting national security information.

A recent EEO court case demonstrates that intelligence agencies can provide employee attorneys with access to classified information and agency employees without undue risk to national security. In this class action case, CIA cleared several employee attorneys to the secret level and provided them with access to approximately 4,000 classified documents. In addition, CIA provided these attorneys with dedicated offices at CIA Headquarters and provided them with secure communications. For example, a special classified cable channel was established for privileged and classified communications between the attorneys and CIA employees worldwide.

security concerns as has occurred in the past, for example to implement reductions-in-force.[8]

Our work has shown that there is no national security reason for the CIA being treated differently than NSA or DIA, and employees at all three agencies deal with highly sensitive intelligence information. Furthermore, it is clear that the unique missions of all three agencies relate to national security. Thus, if the DCI's statutory summary removal authority were amended to establish a link between exercise of the removal authority and national security, it would parallel the authorities currently provided the NSA and DIA directors.

Conclusion

If Congress wants to provide CIA, NSA, and DIA employees with standard protections against adverse actions that most other federal employees enjoy, it could do so without unduly compromising national security as long as the agencies maintain their summary removal authorities. To effectively ensure that CIA employees enjoy these protections, Congress could amend current legislation to explicitly link the CIA director's summary removal authorities to national security.

Agency Comments and Our Evaluation

CIA and DOD (responding for NSA and DIA) did not concur with our conclusion that MSPB appeal rights could be extended to all intelligence agency employees for two reasons.

First, CIA and DOD stated that our report did not adequately consider the national security risks associated with such a change in policy. The agencies stated that their extensive experience reveals that the likelihood of compromising classified information increases with any type of external proceeding. We disagree because our report explicitly discusses different types of risks to national security that could arise, including those related to external proceedings. In addition, our report lays out a tiered process where, depending on the level of risk involved, the agencies themselves would determine what precautionary steps would be most appropriate. Further, our report clearly acknowledges that there may still be some national security cases in which summary removal (without appeal) will be appropriate.

[8]As discussed previously, the DCI's statutory removal authority is not explicitly linked to national security, and the CIA's implementing regulation states directly that there need not be a national security reason for removal. Although the Supreme Court has suggested that the DCI's summary removal authority is linked to national security, neither it nor the lower federal courts have directly addressed this issue.

Chairman TOWNS. We've been joined by Congressman Cummings from Maryland as well.

Mr. Fisher, do you see a significant difference in the position taken by the current administration in today's testimony and the historical position you outlined?

Mr. FISHER. My concern is that if you look at Justice Department positions over the years, they will say the President has exclusive control over national security information. Even though you and other Members have clearance, you don't have a need to know, and they can block you.

I see that, frankly, in what was said today, because when the Justice Department testified today after talking about President Washington, the Justice Department then refers to testimony back in 1998 with regard to congressional oversight. And this is a quote from today's testimony from the Justice Department: The Constitution "does not permit Congress to authorize subordinate executive branch employees to bypass these orderly procedures for review and clearance by vesting them with a unilateral right to disclose classified information even to Members of Congress."

So if I read that correctly—and I think it's underscored by their idea of some sort of entity within the executive branch to review that. And I think what they are saying is that employees in the agency have no right to come here. They do under the 1998 CIA Whistleblower going to the Intelligence Committees, but other than that I think—I don't see the change.

I think they decided today not to expressly talk about constitutional issues as they have in the past. But I don't see the change.

Chairman TOWNS. Mr. Turner, do you have a comment on that?

Mr. TURNER. I think Dr. Fisher is right. I think they are doing what OLC and the executive branch has done throughout our history, and that is trying to uphold the Constitution, which, as it has always been interpreted, gives the President final decision on classified information. And I think they, as a matter of policy, they may well prefer this, but I think they have a duty to the Constitution just as members of this committee do.

Chairman TOWNS. Thank you very much.

Mr. Devine, you mentioned in your testimony the importance of jury trials for Federal employees, yet it is our understanding that very few of the employees will ever exercise that option because of the expense of bringing the case to Federal court. If that is the case, why is this right so important?

Mr. DEVINE. Well, Mr. Chairman, first, it matters because this is very much a litmus test of the President's credibility on transparency issues. He pledges full access to court, and it will be difficult to take those commitment serious if he leaves Federal workers as the only ones without normal court access.

But the main reason—and it far transcends the current administration—is the high-stakes cases that are the primary reason the Whistleblower Protection Act is passed, there is no chance for justice at the Merit Systems Protection Board. The ultimate point of the law, and why ours has the unanimous mandate, is not just the congressional commitment to be fair to government workers, it's the impact on the public. And the Board, the Merit Systems Protec-

tion Board for 30 years has rubber-stamped termination of anyone who challenged a significant government breakdown.

I'll just give you some examples of the sophistry here. A Federal air marshal in a week with his whistleblowing blocked the Transportation Security Administration from removing air marshal coverage on cross-country flights during the hijacking alert. They basically they had blown their budget on contractors, and they wanted to get back to even by canceling the air marshals on these flights during an alert. The whistleblower stopped them. He was fired for it.

It's taken him 3 years. He hasn't gotten a hearing. And currently the issue in the case is the preliminary ruling that he's not covered by the Whistleblower Protection Act, and that is because a loophole in the law is that it doesn't allow public disclosures of information whose release is specifically prohibited by statute.

The Merit Board, it said, well, TSA was authorized by Congress to issue regulations. So when TSA issued a regulation that imposed blanket secrecy, virtually ending any public whistleblowing, that qualified as a specific statutory prohibition.

Now every agency in the government has that authority, and if this decision sticks, it means the Whistleblower Protection Act rights will only exist to the extent that they are not contradicting agency regulations—that is hopeless—as a shield for government accountability.

The bottom line is for whistleblowers seeking justice in serious breakdowns of government service, the MSPB is the Twilight Zone.

Chairman TOWNS. Thank you very much.

I yield 5 minutes to the gentleman from Maryland Mr. Cummings.

Mr. CUMMINGS. I was at another hearing.

Thank you very much, Mr. Chairman, and thank you for holding this hearing.

I think it's extremely important that we do everything in our power to protect whistleblowers. We had a case in Maryland which I got involved with where we had at one of our hospitals someone who blew the whistle on her superiors who knew that AIDS tests, HIV/AIDS, and hepatitis B tests were being administered by faulty machinery. I'm talking about hundreds of them. And all of it was hush-hush. And this happened about 4 or 5 years ago. And by doing what she did, I believe that she saved a lot of lives.

I think that when we look at—going back to your comments, Mr. Devine, it is so very important that we have transparency. Mr. Barofsky, the Special IG for TARP, told us in another hearing that he expected numerous cases—if I remember correctly, he said hundreds of them coming out of this TARP situation.

And so I think that—I often say that a lot of times we don't act when we ought to act, and then something happens, and then we look back and said we wish we had. And, Mr. Chairman, I think that this is one of those times where we're going to have to act. And I know there are some that may disagree, but the fact is that I think America has called out for transparency and is—I've often heard it said that one of the greatest things that you can do is to shine a light so that all can see to address this whole issue of the kinds of problems that can come up in government. And one of the

things I've also noticed is in some instances it's almost impossible to find out certain information unless you do have a whistleblower.

And going back to what you were saying, Mr. Colapinto, you know, some kind of way we also have to figure out how to put people in a position where they feel comfortable even coming forward and that they will not be harmed themselves. Other than that, you might as well throw this—I mean, if we have that kind of situation where they feel threatened, then it—you won't get that kind of response.

And in Baltimore, we have a situation now where there is no cooperation. We have literally about 20 percent of our most serious cases, like murders and whatever, not going to trial. Why? Because of witness intimidation. Why? Because they believe they are going to be harmed. It's a second cousin to this, but it's the same kind of concept.

In order to address the ailments of our society, a lot of times you've got to have—matter of fact, most of the time you've got to have the cooperation of people.

So I just have one question to all of you. One of the arguments that opponents of expanding whistleblower protection is we will give a forum to people who just want to complain about management or, worse, are vindictive against their employer and want to get even.

I want you to respond to those critics, and I know there are several systems in place to weed out legitimate claims from the others, and I would just like to know how do we address that?

Mr. DEVINE. Congressman, that is an objection that can be made to every right that Congress ever legislates. Every right can be abused. But you folks make a balancing test whether the benefits to the public outweigh the risk for the potential to abuse. I can't think of any legislation where the balancing test is more in favor or the rights than with whistleblowers. The benefits to the public are incredible. We've increased our recovery rate under the False Claims Act by almost 200 times annually by enfranchising whistleblowers.

The issue is probably going to come down to a question of fear. What we hear over and over again is that emboldened whistleblowers—if they have normal rights, emboldened whistleblowers will bully their managers so they will be afraid to impose accountability when it's needed. Now, the solution to that probably is to hire managers who aren't afraid to exercise their authority. That is not a reason for secrecy.

But the fear that we've got without this law is secrecy enforced by repression. When there are abuses of power that betray the public, that is the kind of really dangerous fear we have. And it's because of that fear that problems such as domestic surveillance turn into a blanket violation of constitutional rights instead of being nipped in the bud; that torture becomes almost a tradition because it wasn't challenged in a timely manner when we first started straying from the Geneva Convention. That is how little problems turn into disasters, because people are afraid to challenge illegality.

So we don't have a whole lot of respect for the argument that we can't give people rights because they might scare the power structure.

Chairman TOWNS. As we have seen from today's hearing, whistleblowers play a vital role in promoting government accountability and transparency. This has been an informative meeting, and I look forward to working with the administration and the Senate to enact the bill.

I would like to ask unanimous consent that a number of written statements that we receive be submitted for the record.

And without objection, the committee stands adjourned. And let me thank the witnesses for their testimony. We look forward to working with you as we move forward. Thank you so much.

[Whereupon, at 1:45 p.m., the committee was adjourned.]

[The prepared statement of Hon. Bruce Braley and additional information submitted for the hearing record follow:]

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Statement of Congressman Bruce Braley
Committee on Oversight and Government Reform
"Protecting the Public from Waste, Fraud, and Abuse: H.R. 1507, the *Whistleblower Protection Enhancement Act of 2009*"
May 14, 2009

I'd like to thank Oversight Committee Chairman Towns and Ranking Member Issa for holding this important hearing today on H.R. 1507, the *Whistleblower Protection Enhancement Act of 2009*. As an original co-sponsor of this legislation, and as the Floor Manager of the *Whistleblower Protection Enhancement Act of 2007* last Congress, I urge the Oversight Committee and the Congress to move swiftly to pass this bill to provide critical protections for federal employees who speak out against waste, fraud and abuse. I also urge the Obama Administration to strongly and fully support efforts in Congress to strengthen protections for federal whistleblowers.

Enhanced protections for federal whistleblowers are long overdue, and are critical in this time of economic downturn. Whistleblowers have long been instrumental in alerting the public and the Congress to wrongdoing in federal agencies. In many cases, the brave actions of whistleblowers have led to positive changes that have resulted in more responsible, safe, and ethical practices. In some instances, the actions of whistleblowers have even saved lives. Unfortunately, despite the importance of whistleblowers in ensuring government accountability and integrity, court decisions by the U.S. Court of Appeals for the Federal Circuit have undermined whistleblower protections and have unreasonably limited the scope of disclosures protected under current law.

Hearings that were held in the Oversight Committee last Congress, when I served as a member of the Committee, highlighted the need for expanded protections for workers who shed light on wrongdoing by government agencies and departments. Several hearings held by the Committee helped uncover waste and fraud in government contracting, both here in the United States and in Iraq – waste and fraud which led to the loss of billions of taxpayer dollars, and jeopardized the safety of Americans here at home, and those serving abroad. At another hearing we learned that some officials in

the Bush Administration sought to manipulate federal climate science, compromising the health and safety of American families and the future of the planet, solely for political gain. Perhaps the starkest reminder of the need to protect those who refuse to remain silent in the face of government wrongdoing came at the Committee's March 2007 hearing at Walter Reed Army Medical Center, at which we learned about the terrible living conditions and bureaucratic hurdles that soldiers endured there. At the hearing, it became clear that nobody dared to complain about the squalid living conditions and inadequate care at what was supposed to be the best military medical facility in the world because of a fear of retribution. Because of this fear, it took an exposé by a newspaper in order for action to be taken on these severe and systemic problems, and many of our nation's heroes had to suffer there for far too long.

These hearings clearly showed – as I expect today's hearing to also demonstrate – how important it is for Congress to swiftly pass stronger protections for federal whistleblowers. I'm disappointed that, despite strong, bipartisan support for the *Whistleblower Protection Enhancement Act* in the House during the 110th Congress, and the passage of a similar bill in the Senate, enhanced protections were never enacted into law. We missed another critical opportunity to strengthen protections for federal whistleblowers just this year when the whistleblower protection amendment to the *American Recovery and Reinvestment Act*, which passed the House by voice vote, was stripped out of the bill in conference.

That's why I'm glad the Oversight Committee is holding this hearing on H.R. 1507 today, and why I hope that this Committee and the Congress will move quickly to mark-up and pass this important bill. The *Whistleblower Protection Enhancement Act* would make important changes to existing law to strengthen protections for government workers who speak out against illegal, wasteful, and dangerous practices. This bill would protect all federal whistleblowers by clarifying that any disclosure pertaining to waste, fraud, or abuse, "without restriction as to time, place, form, motive, context, or prior disclosure," and including both formal and informal communication, is protected. The bill would also give whistleblowers access to timely action on their claims, allowing them access to federal district courts if the Merit Systems Protection Board does not take action on their claims within 180 days. In addition, the bill would clarify that national security workers, employees of government contractors, and those who blow the whistle on actions that compromise the integrity of federal science, are all entitled to whistleblower protection.

H.R. 1507 would also clarify the standard used by the Merit Systems Protection Board to evaluate an employer's defense when a whistleblower claims that an employer acted in illegal retaliation. Unfortunately, the Board has ignored the intent of Congress and implemented its own test for evaluating whether or not an agency has shown clear and convincing evidence that it would have taken the same action, which has made it almost impossible for whistleblowers to successfully challenge retaliatory personnel actions. The bill's clarification that clear and convincing evidence is evidence indicating that the matter to be proved is highly probable or reasonably certain would clarify Congress's intent and strengthen protections for federal whistleblowers.

Finally, I'm very pleased that the *Whistleblower Protection Enhancement Act* includes language which I added in the 110th Congress to deter retaliation against federal whistleblowers. The provisions I added in the Oversight Committee mark-up of the bill last Congress would ensure that federal employees are protected by a right to a jury trial in whistleblower cases, and that federal employees are able to recover compensatory damages, including attorney's fees, interest, reasonable expert witness fees, and costs. These provisions are essential to ensuring that whistleblowers who face retaliation receive the fair hearings and justice that they deserve.

The enactment of all of these important whistleblower protections is critical during this time of economic downturn, and as we are making a historic investment in the American economy and American workers through the *American Recovery and Reinvestment Act*. The enactment of strong whistleblower protections is crucial to ensuring oversight and accountability of government funds, to ensuring the effectiveness and integrity of government programs, and to protecting American workers and taxpayers.

Thank you again, Chairman Towns and Ranking Member Issa for holding this important hearing today. I urge you to move swiftly to pass the *Whistleblower Protection Enhancement Act* through your Committee, and on the House floor, and I urge strong support from the Obama Administration in ensuring that these critical provisions are finally enacted into law as soon as possible.

FAA Whistleblowers Alliance
May 13, 2009

Chairman Edolphus Towns
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

RE: "FAA Whistleblowers Alliance" Support of H.R. 1507: Whistleblower Protection Enhancement Act of 2009

Dear Chairman Towns and Committee Members:

The FAA Whistleblowers Alliance wishes to express our full support of H.R. 1507. Our Alliance is comprised of a cross section of professionals from the major FAA disciplines; Air Traffic, Flight Standards, Security and Aircraft Certification. This unique mixture of members and their experiences has led us to conclude that the problems at the FAA, that put the public in danger, run deep in the organization and are systemic.

Our Alliance members' safety disclosures have all been met with FAA retaliatory actions rather than welcoming the information that would resolve problems and improve the safety of the air transportation system. The scope of the retaliatory actions has run the gamut from bogus investigations, to Prohibited Personnel Practices, to suspensions, to terminations of careers. All of this retaliatory activity continues to be conducted at great taxpayer expense.

Many of our safety disclosures were made in the ordinary course of an employee's duties, by attempting to address safety risks that others ignored. This type of disclosure of course, opens the door for retaliatory action against the whistleblower, because of judicial interpretations of what is a protected disclosure and what is not. The potential value of the safety disclosure is lost and in fact, most times is actively suppressed in favor of the FAA's desire to avoid accountability.

The value of H.R. 1507, when applied to a safety agency such as the FAA, can ultimately be measured in its potential to save lives. A number of our members' safety disclosures were attempting to deal with conditions that ultimately led to loss of life in air disasters. Many other members' disclosures deal with continuing conditions that create a pervasive risk to lives. All of our members' disclosures were made without the enhanced protection that H.R. 1507 would provide, and we have paid a heavy price for our whistleblowing. We have served as an intimidating example to others, of what would happen to them if they dared to speak out about the unsafe conditions they encountered, "in the ordinary course of their duties". FAA management principles are based on intimidation and cronyism. Imagine the benefit to the safety of our air transportation system, if the people with the expertise and in a position to observe safety risks during their normal duties were free to speak out.

Our Alliance submitted a letter to your office on April 14, 2009, FAA Whistleblowers Alliance Urges Strong Oversight of the Office of Special Counsel. In that letter we detailed the problems that whistleblowers have in seeking protection from agency retaliation. OSC is supposed to provide that whistleblower protection; however, they have been largely ineffective. H.R. 1507 may provide a partial remedy to that ineffectiveness by removing OSC's rationale for dismissing many Prohibited Personnel Practice complaints that are based on what constitutes a "protected disclosure".

We noted that your office, along with other members of Congress, sent a letter to President Obama on April 30, 2009, encouraging swift action on the issue of whistleblower protection. We applaud you for this, especially for your recommendation that the President sign an Executive Order to require a review of whistleblower cases and where significant injustice has occurred, to make the whistleblower whole again by restoring them to government service. What a strong workforce that action would make.

We would like to respectfully ask for your support for Section 331 of the upcoming FAA Reauthorization for 2009, which would require the establishment of an independent whistleblower office in the FAA. An office of this type would take the safety disclosure information out of the normal system of suppression and insure it sees the light of day for proper evaluation. This office would also deal with allegations of fraud, waste and abuse, and afford another avenue of protection for conscientious whistleblowers.

Collectively, these actions would go a long way toward supporting the Presidents' Executive Order, which he signed on his first day in office, calling for accountability, transparency and rule of law in government.

We have attached several summaries as examples of our Alliance members' experiences. Hopefully, these will give your Committee members the insiders' insight into the scope and depth of the FAA's retaliation, the internal war it rages against FAA whistleblowers, and the agency's total disregard for its aviation safety mission.

Every member of our Alliance sincerely appreciates your sponsorship of H.R. 1507. We remain available to support your efforts to protect legitimate whistleblowers in any way your committee deems appropriate, including giving testimony on our specific experiences. Please contact Gabe Bruno of the FAA Whistleblowers Alliance at 407-977-1505, or GBruno3@cfl.rr.com, if the FAA Whistleblowers Alliance can be of any help in your efforts.

Sincerely,*

Bobby Boutris, Flight Standards Inspector

Gabe Bruno, retired Manager, Flight Standards Service

Randall Buxton, Air Traffic Controller

Ricky Chitwood, Flight Standards Inspector

Mike Cole, Air Traffic Control, Flight Service Specialist

Mary Rose Diefenderfer, former Flight Standards Inspector

Bogdan Dzakovic, former Special Agent/Air Marshal Service, now TSA

Kim Farrington, former Flight Standards Inspector

Ed Jeszka, former Flight Standards Inspector

Shawn Malekpour, Program Manager, Aircraft Certification

Chris Monteleon, Flight Standards Inspector

Geoff Weiss, Air Traffic Controller

Anne Whiteman, Supervisor, Air Traffic Control

Richard Wyeroski, former Flight Standards Inspector

* Some of our members wish to keep their names confidential, due to fear of continued retaliation.
[Any listed affiliation with the FAA or any other federal agency is listed only for identification purposes. We are speaking in our capacity as citizens and as part of the FAA Whistleblowers Alliance, and not on behalf of the FAA or any federal agency.]

STATEMENT FOR THE RECORD

BY

THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

BEFORE

THE HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

ON

PROTECTING THE PUBLIC FROM WASTE, FRAUD, AND ABUSE: THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2009

MAY 14, 2009

American Federation of Government Employees, AFL-CIO
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On behalf of the American Federation of Government Employees, AFL-CIO, (AFGE), which represents over 600,000 federal workers, thank you for holding this hearing to discuss H.R. 1507, the Whistleblower Protection Enhancement Act, introduced by Representatives Chris Van Hollen (D-MD) and Todd Platts (R-PA). AFGE strongly supports this bill which is equally important to the rights of federal workers, and the protection of the American public those workers serve.

President Obama noted in his White House ethics agenda that federal employees are the "watchdogs of wrongdoing and partners in performance" and pledged that his administration would "strengthen whistleblower laws to protect federal workers who expose fraud and abuse of authority in government." He also committed to expedite the process for reviewing whistleblower claims to ensure that whistleblowers have "full access to courts and due process." The Whistleblower Protection Enhancement Act of 2009 is necessary to fulfill these goals. This legislation has twice passed the House, including as an amendment to the American Recovery and Reinstatement Act (before it was dropped before the final bill signed into law), and is now presented a third time for consideration. The Whistleblower Protection Enhancement Act of 2009 is sound and significant legislation that accords federal workers the same first-class rights and protections as private sector workers.

Federal employees have a somewhat different ethos and motivation than their counterparts in the private sector. Federal workers are required, by law, to sign Appointment Affidavits stating in part that they will "support and defend the Constitution of the U.S. against all enemies, foreign and domestic" and that they "will well and faithfully discharge the duties of the office" they hold. Reporting fraud, abuse and wrongdoing is a requisite part of upholding that oath and transparency necessary to the public trust. The Whistleblower Protection Enhancement Act is central to the accountability structures necessary to ensure that federal workers have the same level of protection as private sector and state and local employees when they report waste, fraud, and abuse. The bill also extends whistleblower protections to the 40,000 Transportation Security Officers (TSOs) who serve a crucial role as the first line of defense against acts of aviation terrorism. The exclusion of TSOs from whistleblower protections has been an egregious wrong that has continued for too long and must be corrected. These disclosures can save large amounts of taxpayer money, facilitate efficient and effective governance, and protect the safety and welfare of millions.

In addition to providing much needed protections for TSOs, the Whistleblower Protection Enhancement Act helps federal workers by granting them the right to a jury trial in federal court, protects federal scientists who report efforts to alter, misrepresent, or suppress federal research. It also grants due process rights, including the right to a jury trial and all circuits review. Each of these common-sense measures empowers federal workers to perform their duties and protect the safety, welfare, and financial interests of the nation.

Allegations that granting federal workers—unlike private sector or state or local workers—meaningful and enforceable whistleblower protections will result in the speculative filing of frivolous claims is both insulting and without merit. Any right or protection can be abused. The harm that is caused by the possibility of frivolous complaints must be weighed against the value the protection provides for the public good. Few rights have as many benefits as whistleblowing with respect to tangible taxpayer and health and safety benefits. Similar claims have been made in the past against the transparency bills such as the Freedom of Information Act and were proven to be unfounded. Any subsequent increase in claims following enactment of the Whistleblower Protection Enhancement are more likely to reflect that workers feel protected enough to come forward, not that they are "gaming the system". It is far more likely that strong whistleblower protections will serve as a deterrent for managers who retaliate against workers who report wrongdoing. Both workers and managers are aware that in the absence of meaningful whistleblower protections, retaliation goes unpunished. The likelihood of swift, certain and severe consequences for managers who engage in retaliation against legitimate whistleblowers will quickly lead to a change in management behavior.

Pursuing whistleblower claims is costly in financial and emotional resources. To date most successful federal worker whistleblower cases are pursued by union members who file a grievance under their collective bargaining agreement if they are disciplined as a result of whistleblowing. It is easy to predict that a number of federal union members will continue to utilize the grievance procedures set forth in their collective bargaining agreements to seek a remedy for retaliation.

AFGE members are increasingly outraged that private workers are protected when they blow the whistle on wrongdoing, fraud, abuse and waste and are perceived as heroes, but such protections are denied federal workers, whose motives for advocating for those protections are still questioned. Surveys show that fraud and misconduct exist in government and the public sector at comparative levels, but there is a double-standard when it comes to protecting employees from retaliation for whistleblowing in the public sector. Four new corporate whistleblower laws were passed by the 110th Congress, and none was passed for federal employees. Federal workers are asking for a fair chance to defend themselves and the American public.

AFGE strongly urges quick Congressional action on H.R. 1507, the Whistleblower Protection Act of 2009, and also calls upon President Obama to immediately sign into law this important federal worker and public protection legislation.

Statement for the record of Patrick G. Eddington
Before the
House Committee on Oversight and Government Reform
Regarding
H.R. 1507, the "Whistleblower Protection Enhancement Act of 2009"
May 14, 2009

Chairman Towns, Ranking Member Issa, members of the committee—I appreciate your invitation to offer my thoughts on H.R. 1507. As you may know, I am a former CIA whistleblower and am also currently the staff senior policy advisor to your House colleague, Rep. Rush Holt of New Jersey. The combined experience of being a national security whistleblower and a staffer working for a member who serves on two House intelligence oversight bodies informs my recommendations to you today. However, my comments today are my own and do not necessarily reflect the views of Chairman Holt.

I joined the Central Intelligence Agency in 1988 as a military analyst in what was then known as the National Photographic Interpretation Center (NPIC). During my tenure at CIA, I worked a wide range of intelligence issues: reporting on the civil unrest that led to the break-up of the former Soviet Union; providing military assessments to policy makers on Iraqi and Iranian conventional forces; and coordinating the CIA's military targeting support to NATO during Operation Deliberate Force in Bosnia in 1995, just to name a few. My career up through 1994 was very successful—I received multiple Exceptional Performance Awards for my analytical work and was promoted through the ranks with minimum time in grade. That all changed between the time I arrived at CIA headquarters in May 1994 for a new assignment and when I resigned from the CIA in October 1996. What precipitated my very public departure from the CIA was the Agency's refusal to deal openly and honestly with evidence that American Desert Storm veterans had been exposed to low levels of chemical nerve agents during and after the 1991 Gulf War.

My Whistleblowing Experience

I first became aware of this controversy in February 1994, when my wife Robin, also a CIA military analyst, obtained a temporary assignment with the Senate Banking Committee, which was at the time conducting the first Congressional investigation into what would subsequently become known in the press as "Gulf War Syndrome." The committee was utilizing its oversight authority under the Export Administration Act to determine whether dual-use technology sold to Iraq in the 1980's had been used to manufacture chemical or biological weapons that may have been used against or otherwise contaminated our troops during or after Operation Desert Storm.

By the time my wife joined the Senate Banking Committee staff in February 1994, the committee staff had already produced one report (in September 1993) that directly challenged the Pentagon's assertions that no American troops had been exposed to Iraqi chemical or biological agents. No less a figure than then-Joint Chiefs Chairman Colin Powell had, through his staff, tried to pressure the committee to abandon its investigation. The committee chairman at the time, Senator Donald Riegle of Michigan, pressed ahead with his inquiry. By early 1994, the committee had accumulated enough testimony from Desert Storm veterans to convince the chairman and his staff that U.S. troops may indeed have been exposed to Iraqi chemical agents, and that Pentagon officials were not at all keen to have that fact made public.

When my wife made me aware of the committee's preliminary findings, it brought back memories of my time working the Iraqi military problem during 1990-91. I had been on the team of NPIC analysts responsible for reporting on Saddam Hussein's invasion and subsequent occupation of Kuwait, as well as the war between Iraq and the American-led international

coalition in January and February 1991. During that six-week war, I saw multiple intelligence reports regarding Iraq's stockpiling—and in some cases, alleged use of—chemical weapons during the conflict. In each case where NPIC management queried Pentagon officials about the alleged chemical attacks or agent detections, we at the analytical level were told that all such reports were false alarms. Confronted by the testimony of the veterans to the Senate Banking Committee, I began to question the veracity of the Pentagon's wartime denials of chemical agent detections.

In order to confirm or refute my suspicions, in February 1994 I began a research project of my own to determine whether or not American troops might have been exposed to Iraqi chemical agents. As I reviewed both the available finished intelligence assessments produced prior to, during, and after the war, as well as much of the raw intelligence data on Iraqi chemical and biological weapons, it became clear to me that there was a fundamental disconnect between what the pre-war intelligence suggested (that Iraq had deployed chemical and possibly biological weapons into the Kuwait Theater of Operations) and what was allegedly found during and after the war (i.e., no chemical agent detections, no chemical weapons used, and no chemical weapons discovered in the KTO). When one examined the testimony of the veterans interviewed by the Senate Banking Committee, that disconnect became a chasm.

Space and time considerations make it impractical for me to outline each piece of evidence that supported the veteran's claims or otherwise contradicted the official executive branch line about a lack of chemical agent exposures during or after Operation Desert Storm. Indeed, the data were so voluminous that I wrote a book about the controversy, *Gassed in the Gulf*, which was published in 1997. A good summary of my allegations and their subsequent validation can be found in the October 30, 1996 and April 10, 1997 *New York Times* stories on the controversy, which are included at the end of this statement. Suffice it to say that by July 1994, I believed I had accumulated more than enough evidence to directly challenge the Pentagon's assertions that no veterans had been exposed to chemical agents during or after the war, and more ominously, that some key Pentagon officials were working to suppress or block the release of information that would contradict the department's "no chemical exposures" mantra.

When I finally decided in July 1994 to raise this issue with my superiors at CIA headquarters, they were deeply concerned—not that Pentagon officials might be misleading the public, the Congress and the veterans about what had happened in 1991, but that I had been investigating the issue at all.

To be clear, such an investigation was not my assigned "day job", which at that time was providing planning and targeting support to American unified and specified commands. Even so, as a serving intelligence officer with wartime experience on the subject, I felt a professional and moral obligation to raise the issue. My immediate supervisor assured me my allegations would be investigated thoroughly. Months would pass before I would learn that statement was not true. When I did learn the truth, I demanded—and ultimately received—the opportunity to make my case to relevant CIA officials.

However, it was immediately clear to me that Agency officials were prepared to take extraordinary measures to try to circumscribe my ability to make my case. Any time I was allowed to brief CIA officials on my allegations and findings, an Office of General Counsel attorney—invariably George Jameson—was present to monitor my presentation. I was told to stop doing computer searches for information on this subject, a directive I ignored, as I felt it was a flagrant attempt to shut down my investigation. Later, when a presidential advisory committee was established to investigate the Gulf War Syndrome issue, Agency officials—including George

Jameson—attempted to block me from making my allegations known to the panel. Finally, when I repeatedly demanded that I be allowed to brief members of the House and Senate intelligence oversight committees on my findings, my requests were denied.

Indeed, in early 1995 a senior Agency official engaged in what can only be described as an overt retaliatory act designed to destroy my career and, if possible, result in my prosecution. Beginning in February 1995—just a few days after one of my first briefings of senior Agency managers and analysts—I became the target of a completely unwarranted—and in my view, what should have been an illegal—counterintelligence investigation. The request for the investigation originated with then-Deputy Director of Intelligence Douglas McEachin, who I never met, much less briefed. On the day I officially left NPIC in September 1996, I was provided a written reminder from NPIC Security that I could go to jail if I discussed classified information publicly. A copy of each of those memos appears at the end of this statement. There is no question in my mind that Mr. McEachin's action, along with the other actions by CIA officials detailed above, were all efforts designed to intimidate me into silence.

Those efforts failed, and after CIA management refused my repeated requests to be allowed to brief Congress on my findings, I subsequently provided—clandestinely—approximately 75 classified documents to the staff of the Senate Select Committee on Intelligence in March 1995. Amazingly, despite my putting the raw data in the committee's hands, it took no action to question then-Director of Central Intelligence nominee John Deutch about his handling of the Gulf War chemical controversy while serving as Deputy Secretary of Defense. Deutch, the Pentagon's point man on the Gulf War Syndrome issue, had appeared on CBS's *60 Minutes* in March 1995—only weeks before his Senate confirmation hearing—to claim that U.S. troops had not been exposed to Iraqi chemical agents in any "widespread" way. His caveat gave viewers—and me—the very strong impression that he knew more than he was letting on.

During this period of time, the Defense Department—under intense public pressure—began a very controlled Gulf War document declassification program and put a few hundred documents on a new DoD website known as "GULFLink." It wasn't long before it became clear that a number of these documents actually supported the claims of veterans that Iraqi chemical weapons had been forward deployed, and by the fall of 1995 a senior DoD official circulated a memo on behalf of the Deputy Secretary of Defense cautioning DoD components about the release of information that could "embarrass the government or DoD." A copy of that memo appears at the end of my statement. DoD and CIA became so alarmed by the impact of the release of the information that then CIA Executive Director Nora Slatkin ordered hundreds of GULFLink documents to be reclassified—a violation of the standing executive order on the handling of classified information. I subsequently successfully sued DoD and CIA in order to have the information restored to the public domain.

It was also during the spring of 1995 that I was officially ordered to cease my inquiry, and that the Agency stated in writing that while it would further investigate my allegations, it would not interview U.S. veterans or examine the unit logs of American forces in which chemical agent detection incidents were recorded. A copy of that memo appears at the end of this statement.

In June 1996, the Defense Department abruptly announced that a small number of American troops (less than 500) may have been exposed to non-lethal doses of Iraqi chemical agents during the destruction of the Khamisiyah chemical weapons depot in southern Iraq in March 1991. That "small number" would grow to nearly 100,000 over the next two years. By this time, I had—during my off-duty hours—filed dozens of Freedom of Information Act requests for documents relevant to my investigation, including a FOIA request to CIA itself, which brought still more

phone calls from CIA's Office of Security. After spending more than two years internally trying to get the CIA to handle this issue honestly, I tired of the harassment and became convinced of the necessity of taking my allegations to the press and the American people. I elected to resign from the CIA, effective October 2, 1996.

After I went public with my allegations in an October 30, 1996 front-page story in the *New York Times*, my attorney, Mark Zaid, attempted to interest the House Permanent Select Committee on Intelligence in hearing my allegations. That resulted in a November 1996 meeting with HPSCI staff members in the committee's classified hearing room inside the Capitol.

Only one staffer questioned me in detail during the session, constantly badgering me about my public statements that I was certain that there was additional information in executive branch databases and archives on this subject. I reminded this staffer and his colleagues that there were multiple information compartments in the intelligence community, and that for years DoD had denied that American troops had even been exposed to chemical agents. I told HPSCI staff that I had provided SSCI staff with roughly 75 documents on this issue, and that I was certain more existed. To the best of my knowledge, HPSCI staff never followed up on my allegations.

When the CIA's Robert Walpole subsequently testified before Congress in April 1997 that the CIA had known about the presence of chemical weapons at the Khamisiyah depot since 1986—directly contradicting DCI George Tenet's testimony before Congress less than four months earlier—I received no follow up phone call from HPSCI staff to see if I had any other information to share on the subject. House Armed Services Committee staff proved equally uninterested in following up my allegations in the fall of 1996, even after I presented them with documentary evidence of chemical agent detections among units of the 101st Airborne Division during Operation Desert Storm.

In the end, it was only your committee—and specifically the National Security subcommittee under then-Chairman Chris Shays—that took my allegations seriously and provided me a forum in which to share my experiences and recommendations in a public hearing on December 10, 1996. That personal experience, as well as my experience since then dealing with other national security whistleblowers or their attorneys, has only reinforced my view that this committee should serve as the primary committee of jurisdiction for dealing with executive branch whistleblowers, and particularly national security whistleblowers.

Lessons Learned and H.R. 1507

I am very grateful that the committee is considering H.R. 1507, which on balance is a good bill and if passed would certainly provide considerably more protections for executive branch whistleblowers than currently exist. Had similar legislation been law when I was employed by the CIA, it might have served as a deterrent to the kinds of retaliatory actions I was subjected to. I would like to offer some detailed suggestions on how I believe the bill could be strengthened so that it has the effect I believe the committee seeks.

First, Section 10 (National Security Whistleblower Rights) should be modified to allow intelligence community (IC) employees to also report their complaints to the Director of National Intelligence IG office, or to the Office of the Special Counsel. In my experience, many IC IG's have at best mixed track records of dealing with whistleblowers. During my time at the CIA, it was common practice to temporarily detail staff from other offices to the CIA IG staff. Those temporary detailees had little incentive to investigate complaints from whistleblowers who may be reporting on wrongdoing in the IG detailee's home office. Also, many IC employees view

their agency IG as being unwilling to take on the agency's management if management is implicated in wrong doing by the whistleblower. I appeal to you to give those potential whistleblowers as many paths as possible to air their allegations.

Second, with respect to the categories of prohibited personnel practices, I recommend the committee consider adding the following new provision to Section 2302(a)(2)(A) of title 5, United States Code:

> (xii) a counterintelligence or suitability investigation or re-investigation ordered after the filing of a complaint by a covered employee.

My reading of H.R. 1507 in its current form is that the kind of unwarranted counterintelligence investigation that I was subjected to might not be considered a prohibited personnel action. Inclusion of the proposed language above would close that loophole and serve as a strong deterrent to such pernicious and illegitimate investigations.

Third, Section 8 (GAO study on revocation of security clearances) should be an annual requirement, with all IC components being audited not less than every three years. While a single GAO study of this issue would be useful in establishing a baseline, only continuous GAO monitoring and audits of security clearance revocation actions can help the committee determine if the problem is getting better or worse.

Fourth, the existing language in Section 10 (p. 17, lines 11 through 23) with respect to allowing the head of a covered agency to "re-initiate procedures to issue a directive or order denying, suspending, or revoking a security clearance or otherwise restricting access to classified or sensitive information" on the basis of "national security concerns" is too vague a standard and would likely be subject to abuse. I recommend the committee consider the following or very similar language:

> (2)(A) If the head of a covered agency, in the process of implementing corrective action under paragraph (1), voids a directive or order denying, suspending, or revoking a security clearance or otherwise restricting access to classified or sensitive information that constituted a reprisal, the head of such covered agency may re-initiate procedures to issue a directive or order denying, suspending, or revoking a security clearance or otherwise restricting access **to classified information only if those re-initiated procedures are based on demonstrable, articulated facts concerning a counterintelligence threat** and are unrelated to the actions constituting the original reprisal. (emphasis added)

Fifth, the bill should revert to the language used in last year's version with respect to which committee can hear the complaints of IC whistleblowers. With the exception of specific statutory provisions already in law governing Congressional notifications on covert actions, I see no rational reason why this committee should not be allowed to work with IC whistleblowers on the vast majority of non-covert action related issues.

Finally, the committee should strongly consider including a provision stating that "For the purpose of relaying a covered employee's need to reveal information to an authorized Member of Congress, the employee may contact his or her representative in Congress for the purpose of facilitating the disclosure of substantive information to an authorized Member of Congress."

Most executive branch employees will not be able—and should not be expected—to immediately know who constitutes "an authorized Member of Congress" under this proposed statute. They will be far more likely to know who their own Representative is and how to contact them. The suggested provision would ensure that the employee could contact their Representative with their generally stated concerns, at which time the employee's Representative would then notify the appropriate committee of jurisdiction regarding the employee's need to convey covered information to the committee, thus protecting both the employee's Constitutional rights and any classified information in question.

Matters Not Addressed By H.R. 1507

I believe that there are additional measures the committee could take to assist potential whistleblowers that would not involve the passage of legislation. At present, the committee's "Whistleblower Hotline" information is not prominently displayed on the homepage of the committee website; potential whistleblowers seeking to contact the committee have to navigate several pages in order to find the contact form. A prominent link to the "Whistleblower Hotline" page should be created on the committee website homepage, and the "Whistleblower Hotline" page itself should include contact telephone numbers for key committee or subcommittee staff. Additionally, the "Whistleblower Hotline" page should be upgraded to include an "FAQ" about whistleblower issues, including links to relevant CRS reports, existing whistleblower-related statutes, etc. These simple but important changes would help whistleblowers more easily contact and interact with the committee, thus facilitating the committee's oversight work.

Final Thoughts

Let me conclude by telling you why passing meaningful whistleblower protection legislation is imperative.

When I attempted to get the CIA to address the Gulf War chemical exposure issue forthrightly, the organization turned on me, as it has done to so many before me. As former DCI, and now Secretary of Defense, Robert Gates admitted in his memoir, the CIA is

> ...one of the most closed bureaucracies in Washington, an agency hostile to 'outsiders' at any level, a complex and clannish organization deeply averse to change.

Only when legislation like H.R. 1507 becomes law will we have a key tool we need to permanently alter the organizational and cultural mentality described by Secretary Gates. Such a change is essential if we truly want intelligence community employees of conscience to make their views and concerns known without fear of retaliation.

Finally, my story is not simply about the baneful effects of one government agency's retaliatory actions against a lone whistleblower. The CIA's refusal to deal honestly with the Gulf War Syndrome controversy caused real harm to real veterans by **delaying for years** a serious, government-wide reexamination of the effects of potential toxic exposures on those veterans. Thus, passing this bill is not simply about protecting whistleblowers—it's about protecting conscientious federal employees who are trying to protect their fellow citizens.

Mr. Chairman, thank you again for this opportunity to testify on this very important and much needed legislation, and I am at the committee's disposal should members or staff have questions or require further assistance.

New York Times stories on Eddington and the Gulf War Syndrome controversy

October 30, 1996
EX-C.I.A. ANALYSTS ASSERT COVER-UP
By PHILIP SHENON

Two intelligence analysts who resigned earlier this year from the Central Intelligence Agency say the agency possesses dozens of classified documents showing that tens of thousands of Americans may have been exposed to Iraqi chemical weapons during the Persian Gulf war in 1991.

The husband-and-wife intelligence analysts, Patrick and Robin Eddington, say that while investigating the issue at the C.I.A., they turned up evidence of as many as 60 incidents in which nerve gas and other chemical weapons were released in the vicinity of American troops.

The Eddingtons assert that the C.I.A. and the Pentagon repeatedly tried to hinder their unauthorized investigation. And they say that when they insisted on pursuing the inquiry over the protests of senior officials, their promising careers were effectively destroyed. Their inquiry attracted concern at the highest levels of the agencies, including John M. Deutch, a former Pentagon official who is now the Director of Central Intelligence.

"The evidence of chemical exposures among our troops is overwhelming, but the Government won't deal with it," said Mr. Eddington, who resigned this month after more than eight years at the agency, most of it spent as an analyst of aerial photographs from the gulf.

The C.I.A. and the Defense Department have rejected the Eddingtons' accusations. Yet despite the public appearance of unanimity among Government officials -- namely, that there was no evidence until recently that large numbers of American troops were exposed to the Iraqi poisons in the war -- the Eddingtons' account suggests that there was evidence earlier of many possible exposures, and that there was a heated internal debate within the Government over the meaning of the intelligence reports.

Mr. Eddington, who is 33 and is preparing to publish a book outlining his allegations against the C.I.A., said Government officials who had overseen investigations of gulf war illnesses "are continuing to lie, are continuing to withhold information."

He became so enraged over the Government's conduct that in 1994, he wrote a letter to the editor of the *The Washington Times*, without noting his ties to the intelligence agency. The letter, which was published, alleged a Government "cover-up."

Scientists have been unable to find an explanation for the variety of ailments reported by gulf war veterans. But increasingly, the medical debate has become separate from the issue of whether the Government has told the truth about the intelligence reports about chemical weapons that it received during and after the war.

After the war, Mr. Eddington said, he collected 59 classified intelligence reports from agency files and computer banks that provided "very, very specific" information about the presence of chemical weapons in southern Iraq and Kuwait.

Mrs. Eddington, who is 32 and now works for a military contractor, said she had seen at least one classified document suggesting that even trace exposure to chemical weapons over an extended period could cause illness, an assertion at odds with the Pentagon's official position.

The Eddingtons said they were unable to provide details of the documents that they have seen because they are still classified.

C.IA. officials said the Eddingtons were trying to portray an honest disagreement among intelligence analysts as something sinister.

"This conspiratorial theory is just not fair or logical," said Dennis Boxx, the agency's chief spokesman. Mr. Eddington, Mr. Boxx said, has "essentially vilified everybody who doesn't agree with him."

The Pentagon said in a statement that "the idea that the Defense Department has engaged in any conspiracy to cover up any information regarding Persian Gulf illnesses is simply not true."

Although C.I.A. officials acknowledged that intelligence reports suggesting the release of Iraqi chemical weapons were still classified, they said the documents had been made available to a White House panel that is investigating gulf war illnesses. The C.I.A. said the documents could not be made public because they contained information about its intelligence-gathering methods.

At the same time, the agency said that the Eddingtons had been valued employees and that their honesty, competence and emotional stability had not been questioned.

"I think Pat had a lot to offer this organization," a senior agency official said of Mr. Eddington. Mr. Boxx said of Mr. Eddington: "Do we have any reason to believe that he's not an honest or truthful person? The answer is no, we don't."

The couple's lawyer, Mark S. Zaid, said his clients were "top-notch employees of the agency, fast-rising analysts who stumbled upon something that just didn't seem right -- they are patriots."

The Pentagon has acknowledged only one incident in which a large number of soldiers may have been exposed to chemical weapons. In that incident, in March 1991, the month after the gulf war ended, American combat engineers blew up an Iraqi ammunition depot that contained nerve gas.

The Eddingtons said the C.I.A. and Pentagon were hiding evidence of scores of other potential chemical exposures. Mrs. Eddington said the intelligence agency's attitude in studying the possibility of chemical exposures was one of "cowardice and conformity." She added, "There is a complete lack of enthusiasm for trying to find answers."

The Eddingtons said their investigation raised concern at the highest levels of the Pentagon and the C.I.A. Mr. Eddington said he was told twice by a supervisor last year that Mr. Deutch, who was then Deputy Secretary of Defense and the official responsible for the investigation of gulf war illnesses, called to express his alarm over the couple's inquiry.

Mr. Boxx, the spokesman, confirmed that Mr. Deutch had been aware of the Eddingtons' analysis and had expressed concern over it -- but only because their findings had been described to him incorrectly as an official analysis by the agency.

Mr. Deutch, he said, had never tried to block the Eddingtons' investigation. When Mr. Deutch "learned that this was not a C.I.A. study, that it was an individual analyst's assessment," he raised no further concerns about the inquiry, Mr. Boxx said.

The C.I.A. said the intelligence reports identified by Mr. Eddington had already been turned over to the White House panel, the President's Advisory Committee on Gulf War Veterans' Illnesses -- proof, officials said, that the information was not being hidden.

But Mr. Eddington said that some of his superiors had wanted to withhold the documents and that they were turned over to the panel only because "it was my absolute insistence that they be turned over." Veterans may never find out what is in the gulf war documents, he said, since the White House panel is barred from releasing classified material in its final report.

The Beginning

A Honeymoon On the Eve of War

Patrick Eddington and Robin Katzman joined the C.I.A. within a week of each other in February 1988. Miss Katzman had just graduated from Brandeis University. Mr. Eddington, a veteran of the Army Reserves, had graduated from Southwest Missouri State University in 1985 and had worked in a variety of jobs before joining the agency.

The couple met when they were both studying at the agency's photo-analysis school. They were married in October 1990, three months before the gulf war began. "We spent our honeymoon watching CNN," Mrs. Eddington said.

During the war, Mr. Eddington was responsible for the analysis of satellite photographs from southern Iraq. It was clear before the war began, he said, that the Iraqis had moved chemicals onto the battlefield. "It was very clear that the Iraqis intended to use them," he said.

Mr. Eddington said his office received reports from various intelligence sources that the Iraqis had begun to use chemical weapons against the United States.

"In several specific circumstances," he said, "there was a statement that a particular chemical attack was taking place at a particular time. You'd ask management: 'Hey, what's the story? Is this for real?' And I remember being told at the time: 'No, Centcom says it didn't happen, false alarm.'"

Centcom refers to the United States Central Command, which directed the American-led alliance in the gulf war. Mr. Eddington said he was in no position at the time to question the reports from the Central Command.

The Evidence

Rising Careers, Rising Suspicions

Immediately after the war, the Eddingtons prospered in their careers. In 1993, Mrs. Eddington was placed in a fellowship program that singles out fast-rising female employees and offers experience in other agencies of the Government.

She found work on Capitol Hill in the offices of the Senate Banking Committee, which was then led by Senator Donald W. Riegle Jr., a Michigan Democrat who was interested in the question of why so many gulf war veterans were falling ill.

Although the panel would normally not deal with military issues, he asked the committee staff to investigate the possibility that troops had been exposed to chemical weapons in the war, and the inquiry was directed by James J. Tuite 3d, a retired Secret Service agent who is now widely credited with having conducted the first extensive investigation into gulf war illnesses.

"I had never heard of this issue before I went to work for Jim," Mrs. Eddington said.

She was assigned to interview the gulf veterans who were calling the committee. "Almost immediately, I started talking to the veterans," she said. "And their stories were absolutely consistent -- the symptoms, the stories about alarms going off."

She took home one of Mr. Tuite's early reports. She handed it to her husband, with the announcement, "Hey, we got gassed." Mr. Eddington read the report -- "it was powerful," he recalled -- and decided to start his own unauthorized investigation on the issue, gathering information from within the C.I.A.

Mr. Eddington said he had prevailed upon friends working in other parts of the agency to search through computers banks.

"We just plugged in key words dealing with chemical and munitions storage," he said, "and we just began to pull up all this cable traffic."

The cables, he said, confirmed that the Iraqis had indeed moved chemical weapons into southern Iraq just before the war and that American military commanders had received warnings during the war that chemical weapons had been released near their troops.

Mr. Eddington said that in July 1994 he took his evidence to his superior. "I told him that I strongly suggested that the agency needed to go back and re-examine its conclusions," he said.

Instead of reviewing the evidence, he said, agency officials set out to disprove it. Mrs. Eddington said she had accidentally met another agency analyst who told her that he was given a copy of the Banking Committee report by his superiors and that he was trying to "debunk" it.

"We were both extremely angry about that," Mr. Eddington said, "and I really began to feel, at least tentatively, that we were not going to be taken seriously. I decided to do something about it."

The Fallout

Poor Reception For Accusations

In his letter to The Washington Times, a conservative newspaper widely read at the C.I.A., Mr. Eddington suggested that the Government had orchestrated a "cover-up" of evidence of chemical exposures in the gulf war. The letter was published on Dec. 7, 1994.

Pentagon officials, he wrote, may have been "criminally negligent and obstructionist where the issue of ongoing medical problems of gulf war veterans is concerned." Mr. Eddington did not

identify himself in the letter as a C.I.A. employee. It was signed simply: "Patrick G. Eddington. Fairfax, Va."

The letter had the intended effect. Mr. Eddington said he and his wife were quickly asked to brief several agency officials about their evidence.

But Mr. Eddington said the meetings were often hostile, leading him to conclude that the C.I.A. had no intention of reviewing the evidence honestly -- that agency officials planned to "stonewall" and insist that there had been no widespread chemical exposures in the gulf war.

The Eddingtons say that by this point, their careers within the agency were largely over.

Mr. Eddington said that in reviewing his personnel file earlier this year, he discovered that he had been the target of a criminal investigation last year to determine whether he had leaked classified information. (An agency official said the investigation had been a "routine" response to the letter to The Washington Times and was not meant as retaliation.)

Mrs. Eddington said that over a few months last year, she was turned down four times for a promotion that should have been routine.

"People were looking at us like we're some kind of conspiracy nuts," she said. "The agency promotes people who don't rock the boat, and that's why you have this pervasive mediocrity ingrained in most levels of management."

In his final months at the agency, Mr. Eddington said, he completed his book, "Gassed in the Gulf," which is to be published largely at his own expense by a small, independent publishing house. He said he had never considered submitting the manuscript to large publishing houses.

"I didn't want anybody to be able to say that I was acting for profit," he said. "The reason for writing this book is to let the vets know that they are not alone."

Photo: "The evidence of chemical exposures among our troops is overwhelming, but the Government won't deal with it," said Patrick Eddington, who along with his wife, Robin, resigned from the C.I.A. this year. (Amy Toensing for The New York Times)(pg. A14)

C.I.A. REPORT SAYS IT FAILED TO SHARE DATA ON IRAQ ARMS
By PHILIP SHENON
1263 words
10 April 1997
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The New York Times
Late Edition - Final
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LANGLEY, Va., April 9 -- The Central Intelligence Agency released a report today suggesting that intelligence errors may have led to the demolition of an Iraqi ammunition bunker filled with chemical weapons after the 1991 Persian Gulf war -- an event that possibly exposed thousands of American troops to nerve gas.

At an unusual televised news conference at its headquarters here, the agency apologized to the veterans for the blunders.

The report revealed that the C.I.A. had solid intelligence in 1986 that thousands of weapons filled with mustard gas had been stored at the Kamisiyah ammunition depot in southern Iraq.

Despite that evidence, the agency failed to include the depot on a list of suspected chemical-weapons sites provided to the Pentagon before the war, an intelligence failure that led American troops to assume that it was safe to blow up the depot in the weeks after the war.

The Pentagon announced last year that more than 20,000 American troops might have been exposed to nerve gas and other chemical weapons as a result of the explosions.

"I'll give that apology -- we should have gotten that information out sooner," said Robert D. Walpole, the agency official who is overseeing the C.I.A.'s investigation of possible chemical exposures during the gulf war.

In detailing the history of intelligence-gathering during the gulf war, Mr. Walpole said, "This is the chapter that lays out some not-so-pretty news."

The report offers no new evidence to support or refute the claims of the gulf war veterans who believe that they were made sick by exposure to Iraqi chemical weapons in the gulf in 1991.

There were no reports of American troops' falling ill at the time of the explosions at Kamisiyah in March 1991, and scientists are divided on whether exposure to low levels of nerve gas can lead to chronic health problems.

But the C.I.A. report -- and the dozens of declassified intelligence reports that were released along with it -- show that there was detailed evidence before and during the war about the presence of chemical weapons at Kamisiyah.

Mr. Walpole said the information was never properly analyzed or shared within the Government in part because of the "tunnel vision" of intelligence analysts who convinced themselves that chemical weapons were not at Kamisiyah during the gulf war, even though chemical munitions were stored there in large numbers during the Iran-Iraq war in the 1980's.

In an introduction to the report, the Acting Director of Central Intelligence, George J. Tenet, said the documents proved that "intelligence support associated with operations Desert Shield and Desert Storm, particularly in the areas of information distribution and analysis, should have been better."

The release of the documents raised new questions about the credibility of C.I.A. officials who insisted repeatedly last year that the Government was withholding no information about the incident at Kamisiyah or about the possibility that American troops had been exposed to chemical weapons elsewhere in the gulf.

The issue is certain to be raised when Mr. Tenet testifies before the Senate Intelligence Committee at his confirmation hearings -- the hearings have not yet been scheduled -- and veterans groups said they thought that today's report was an effort to head off some of the criticism of the C.I.A. that could be expected at the Senate hearings.

"This is evidence either of an unraveling cover-up or of an unprecedented intelligence failure," said James J. Tuite 3d, who led a 1993-1994 investigation of gulf war illnesses for the Senate Banking Committee.

The documents also provided dramatic support to the assertions of two former agency analysts, Patrick and Robin Eddington, who resigned from the C.I.A. last year and who went public with their allegations that the agency was withholding evidence about chemical exposures during the gulf war.

Mr. Walpole, who said the documents had resurfaced in recent weeks only after an intensive search of the agency's files and computer banks, acknowledged at the news conference that the "C.I.A.'s credibility has suffered in this effort."

The documents show that some of the warnings about chemical weapons at Kamisiyah could not have been much more specific.

An intelligence report dated Feb. 23, 1991, in the middle of the war, describes information provided by an American ambassador in the Middle East -- the country was not specified in the document, and the C.I.A. refused to identify it -- who was given a hand-drawn map and map coordinates for "a location in Iraq that is described as a chemical weapons storage facility."

The coordinates were for the storage depot at Kamisiyah, and the report said the information had been provided by "someone in the Iranian air force or air force-related industry." C.I.A. officials said it was unclear why the warning was not provided to the American soldiers who blew up the depot only two weeks later.

Another document shows that in 1992, a year after the war, an intelligence officer was concerned about the possibility that American troops had been exposed to chemical weapons during the demolition of "the Kamisiyah storage area."

The officer, whose name was deleted from the document, said that on the basis of evidence gathered by United Nations weapons inspectors, "there is a distinct possibility that coalition (U.S.) ground troops destroyed bunkers or piles of munitions containing binary sarin-filled rockets, without knowing that the chemical rounds were present."

In a memorandum that was prepared for Defense Department, the officer asked the Pentagon to determine which troops were in the vicinity of the depot, "how long did they stay, what actions were taken -- i.e., did they collect and explosively destroy any munitions?"

But the warnings were not properly followed up until four years later. In a 1995 document, the same officer said "D.O.D. never responded to the request" from 1991. It was only last June that the Pentagon and the C.I.A. revealed the possibility that American troops had been exposed to chemical weapons at Kamisiyah.

The C.I.A. report said the agency first learned of the possibility that chemical weapons had been stored at Kamisiyah in July 1984, when an intelligence report warned that "a decontamination vehicle normally associated with tactical chemical defense was at the depot."

The report said the agency received a far more specific warning in May 1986, when its analysts obtained a translated copy of an Iraqi chemical-weapons production plan that mentioned the transfer of large stores of chemical weapons to Kamisiyah.

Mr. Walpole said that after the Iran-Iraq war -- which lasted from 1980 to 1988 -- C.I.A. analysts developed "tunnel vision" about the way the Iraqis stored chemical weapons.

The assumption on the part of the analysts, he said, was that the Iraqis had begun to store chemical weapons in unusual s-shaped bunkers. And because there were no s-shaped bunkers at Kamisiyah, he said, the analysts assumed -- incorrectly -- that Kamisiyah was no longer being used as a chemical-weapons site.

"They came to that bias," Mr. Walpole said.

CIA and NPIC Security Memos

SECRET

6 May 1996

MEMORANDUM FOR: Chief, [redacted]
Investigations Division

FROM: [redacted]

SUBJECT: Media Contact by Imagery Analyst Regarding Iraq's Alleged Use of Chemical and Biological Warfare During Desert Storm (U)

1. On 7 December 1994, an article appeared in *The Washington Times* focusing on Iraq's use of chemical and biological warfare during the Gulf War. The article was written by Agency employee, Patrick Eddington, AIN: 2136754. A subsequent discussion with Mr. Eddington's supervisor, [redacted] revealed that Mr. Eddington was not writing about work related activity and his article was written from data he collected from open source research. The article was not work related and did not refer to Mr. Eddington as an Agency employee, so, under current Agency regulations, Mr. Eddington was not required to submit the article for publication review. (U)

2. On 24 February 1995, the Deputy Director of Intelligence (DDI) contacted the Chief of [redacted] to advise him of a concern regarding Mr. Eddington. The undersigned and [redacted] met with the DDI at 1100 hours on 24 February 1995 to discuss the situation. The DDI alleged that Mr. Eddington had recently provided a classified briefing to several DI analysts related to Iraq's use of chemical weapons during the Gulf War. Allegedly, feedback provided to Mr. Eddington at the conclusion of the briefing revealed that there was insufficient evidence to support the theory that Iraq had used any chemical warfare during the Gulf War.

CL BY: [redacted]
CL REASON: 1.5(a)
DECL ON: X4
DRV FRM: [redacted]

SECRET

SECRET

SUBJECT: Media Contact by
Imagery Analyst Regarding Iraq's Alleged Use of
Chemical Warfare During Desert Storm (S)

Mr. Eddington allegedly then advised his audience that, "that's OK because this is coming out in the media soon anyway and DoD is going down." He also allegedly requested declassification of documents. (S)

3. Mr. Eddington was contacted by the undersigned on 24 February 1995 at 1545 hours and asked to explain this 17 February comment. He advised that he never provided any classified material to those not cleared to receive it. Secondly, Mr. Eddington claimed to have had no contact with the media. He does admit to having sent letters directly to the editor of *The Washington Times* and they were his own thoughts and not at all work related. He further stated that his knowledge of media coverage on this issue came from Mr. James Tuite III, a former Senate Banking Committee investigator. (S)

4. Allegedly Patrick Eddington's spouse, Robin Eddington, AIN: 2135286, also a National Photographic Interpretation Center analyst, worked for Mr. Tuite while she was part of the Women's Executive Leadership Program. Mr. Eddington claimed that Mr. Tuite has contacted the media to further publicize a "cover-up" by the Department of Defense claiming that American veterans are still affected by the Iraqis' use of chemical and biological weapons during Operation Desert Storm. Mr. Eddington stated that he provided Mr. Tuite no classified information. He also stated that subsequent to February 1995, "60 Minutes" would probably run a piece on the alleged use of chemical warfare by Iraq, based on information provided by Mr. Tuite. (See attached Lotus Note about Mr. and Mrs. Eddington). (S)

5. On Friday, 24 February 1995, [redacted] and the undersigned briefed the DDA regarding the above. Also in attendance at the briefing was the Chief of the [redacted] All present agreed that Mr. Eddington had not committed an unauthorized disclosure to the media and we would wait and see if and what was reported on CBS in the "60 Minutes" episode. On Monday, 27 February, the undersigned received a secure call from [redacted] Office of General Counsel (OGC). [redacted] advised that he was the OGC lawyer to the Directorate of Intelligence and he was aware of the

SECRET

SUBJECT: Media Contact by
Imagery Analyst Regarding Iraq's Alleged Use of
Chemical Warfare During Desert Storm (S)

Eddington case. He advised that he was working with [redacted], Chief, Scientific and Weapons Research, [redacted] with Mr. Eddington to explore the substantive quality of the data Mr. Eddington and his wife collected. The DDI's Special Assistant was briefed at 1700 hours the same day. Due to the fact that the "60 Minutes" segment did not invoke Mr. Eddington or the Agency, Mr. Eddington's case was closed in [redacted] with no further action. (S)

[redacted]

Attachment

SECRET

SUBJECT: Media Contact by
Imagery Analyst Regarding Iraq's Alleged Use of
Chemical Warfare During Desert Storm (S)

OPS/ID/[redacted] (7 May 96)

Distribution:
Orig - Addressee (w/att)
1 - AIN 2136754, EDDINGTON (w/att)
1 - [redacted] Chrono [redacted] (w/att)

SECRET

30 September 1996

MEMORANDUM FOR: Patrick G. Eddington

SUBJECT: Reminder of Secrecy Agreement

The purpose of this memorandum is to remind you that, upon your resignation from CIA, you will remain bound by the terms of the secrecy agreement binding upon every current or former Agency employee, including the requirement to submit for review any proposed public statements or publications that may involve Agency information. As stated in Agency Regulation 6-2, "Material which must be submitted for prepublication review consists of all writings and scripts or outlines of oral presentations intended for nonofficial publication, including works of fiction, which contain any mention of the CIA, intelligence data or intelligence activities, or material on any subject about which the author has had access to classified information in the course of his or her employment or other CIA affiliation." Further, you are reminded that the Gulflink documents that were removed from the Internet remain classified unless such documents are declassified by an appropriate CIA official.

NPIC Security Division

CHUCK - IF PAT
EDDINGTON CHECKS
OUT - HE NEEDS
TO BE GIVEN THIS
STATEMENT + SHOWN
ON #8 ON THE BACK OF
THE DEBRIEFING STATEMENT
THAT HE CAN BE ARRESTED
IF HE VIOLATES THAT

DoD Memo On Screening For Potentially "Embarrassing" Documents

OFFICE OF THE SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

3 [illegible] 1996

MEMORANDUM FOR: SEE DISTRIBUTION

SUBJECT: Identification and Processing of Sensitive Operational Records

1. The DEPSECDEF and the ASD/HA have expressed concern about potential sensitive reports or documents on GulfLINK. They have directed that the declassifiers identify such documents and forward them to the Investigation Team prior to release on GulfLINK. The purpose of this procedure is not to stop any declassified or unclassified documents from going on GulfLINK, but to allow the Investigation Team time to begin preparation of a response on particular "bombshell" reports. These responses could be provided to Dr. White and Dr. Joseph, or used in response to White House queries.

2. Realizing that a fair amount of judgment must be exercised by your reviewers in this process, request you task your teams to use the following criteria in selecting sensitive documents.

a. Documents that could generate unusual public/media attention.

b. All documents which seem to confirm the use or detection of nuclear, chemical, or biological agents.

c. Documents which make gross/startling assertions, i.e., a pilot's report that he saw a "giant cloud of anthrax gas."

d. Documents containing releasable information which could embarass the Government or DoD. Statements such as "we are not to bring this up to the press" fit this category.

e. Documents which shed light on issues which have high levels of media interest, such as the November 1995, Life article on birth defects among Gulf War Veterans' children.

All such reports should be flagged for the Investigation Team and sent directly to them by the fastest avail means, e.g. E-mail, fax, mail, or/courier.

3. The Investigation Team will make two determinations on each flagged record. One will be whether or not the subject requires further research, and the other will be who, if anyone, would receive the results of the research. As soon as these steps are expedited, the Investigation Team will notify the operational declassifier that they have completed their part of the process and that the document can be forwarded to DTIC for placement on GulfLINK. The investigation

Team will also notify the declassifiers when particular incidents or units are no longer considered potentially sensitive. In those cases, the declassifiers should stop flagging or highlighting reports on that incident or unit. The results of the Investigation Teams' investigations ultimately will be put on GulfLINK.

4. You are requested to ensure that your declassifiers follow the FOIA standards in the review, redaction, and release of health-related operational records. This will ensure that there is some consistency in operational records of the services and commands that are being made available to the public on GulfLINK. It also facilitates the use of FOIA and privacy exemption codes in the redaction of documents.

PAUL F. WALLNER
Staff Director
Senior Level Oversight Panel
Persian Gulf War Veterans' Illnesses

DISTRIBUTION:
Chief of Military History, USA
Director of Current Operation, J-33, JCS
Deputy Director, J-3, USCENTCOM
Director of Plans, XOX, USAF Air Staff
Director, Naval Historical Center
Director, USMC Historical Center
Air Force Declassification and Review Team

cc: DEPSECDEF
ASD/HA
USEC/Army
PASD/AE
DIA/DR
PASD/IS/CSI

CIA Memo Memorializing Agency's Refusal To Independently Examine Potential Chemical Agent Exposure Data Or Debrief U.S. Veterans

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21 APR 1995

MEMORANDUM FOR THE RECORD

SUBJECT: Meeting with Pat and Robin Eddington (U)

1. On 14 April, I met with Pat and Robin Eddington to discuss developments in various Executive Branch initiatives pertaining to allegations of chemical weapons use in Iraq during Desert Storm and on the phenomenon known as Gulf War Syndrome. Also present during this meeting were George J[redacted], OGC, and OSWR Division Chiefs Torrey F[redacted] (NBCD) and Jim M[redacted] (SSD). (FOUO)

2. Key points covered during this meeting included:

-- The CIA is studying the intelligence data relevant to whether troops were exposed to chemical or biological agents; the Agency will designate a focal point for Gulf War Syndrome/Iraqi CW use issues.

-- The CIA does not plan a comprehensive review of DoD information such as troop testimony, medical records, or operational logs. The study will check such information against intelligence holdings, where feasible, and follow up any leads that could help resolve continuing uncertainties.

-- The Eddingtons reiterated their conviction that Iraq used chemical weapons during the Gulf War and grave concerns about how DoD has handled relevant information.

-- This issue would be a part of the confirmation process for DCI-nominee Deutch and appropriate talking points and background material would need to be prepared. OCA also would contact the appropriate congressional committees, if it has not already done so.

-- We indicated to the Eddingtons that their role in stimulating the Agency to focus on the issue of Iraqi CW use was recognized and that they should be pleased with the results.

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FOR OFFICIAL USE ONLY

SUBJECT: Meeting with Pat and Robin Eddington (U)

-- We also discussed with the Eddingtons the importance of being scrupulous in keeping their personal efforts in this matter separate from their official duties and Agency support and information systems infrastructure. I noted that some of Pat's actions raised questions about the exercise of judgment, but that this was now behind us.

-- In view of the Eddingtons concern about DoD's handling of this matter, George J[redacted] and I reviewed the courses of action open to them, including contacting Agency and/or DoD points of contact, Inspector Generals, the Intelligence Oversight Board, the intelligence committees, DoD's oversight committees, and the FBI/DoJ. The Eddingtons did not accuse DoD or Deputy Secretary of Defense Deutch personally of illegal conduct, and they did not want to approach the DoD Inspector General because of their concern over the integrity of the DoD process. (FOUO)

Christopher M Holmes

Christopher M. Holmes
Director
Scientific and Weapons Research

FOR OFFICIAL USE ONLY

SUBJECT: Meeting with Pat and Robin Eddington (U)

Distribution:
Orig - D/SWR
1 - OSWR/ChSSD
1 - OSWR/ChNBCD
1 - OGC (George J[redacted])
1 - Pat Eddington
1 - Robin Eddington

Statement of
Colleen M. Kelley, National President

NATIONAL TREASURY EMPLOYEES UNION

on

Protecting the Public from Waste, Fraud and Abuse:
The Whistleblower Protection Enhancement Act of 2009

To the Committee on Oversight and Government Reform
U.S. House of Representatives

May 14, 2009

Chairman Towns and members of the Committee on Oversight and Government Reform, I am proud today to express the strong support of the National Treasury Employees Union (NTEU) for H.R. 1507, the Whistleblower Protection Enhancement Act of 2009. I commend you, Mr, Chairman, for holding this important hearing. NTEU is most grateful to Representative Chris Van Hollen (D-MD) for sponsoring this legislation along with you, Mr. Chairman, Representatives Platts, Maloney and the other co-sponsors.

NTEU has a long history of supporting comprehensive whistleblower rights and has been working in coalition with numerous national whistleblower advocacy groups to get the best legislation possible toward securing, maintaining and protecting the free speech rights of federal workers. Whistleblowers perform a vital function in highlighting instances of waste, fraud, abuse, and mismanagement in the federal government and by government contractors.

This bill would strengthen whistleblower protections for federal employees, including those in the national security arena and the thousands who work for the Transportation Security Administration (TSA). While this bill is important for all

federal employees, the coverage of TSA workers is of particular importance and need.

Making sure federal employees are protected from retaliation—and have available to them meaningful ways to exercise those rights—are particularly important in today's economic climate. The best protection taxpayers have to ensure their money is being spent appropriately is the ability and willingness of federal employees to step forward when they see instances where that is not the case. This legislation will help ensure that federal employees who do report instances of fraud, waste and abuse are appropriately protected

This legislation is now needed more than ever with the Obama administration's focus on restoring the public's faith in government and transparency of government operations. These enhanced whistleblower rights are essential for the success of the federal stimulus program passed by Congress and signed by the President.

The measure the Committee is considering today is the first major reform of federal whistleblower laws in 18 years and cures numerous weaknesses in existing law by:

- creating procedures for federal employee whistleblowers to have their cases heard in federal court and allowing all circuits of the appellate courts to review whistleblower cases;
- closing the loopholes which have prevented national security whistleblowers from obtaining protections; and
- legislatively overturning the Supreme Court's *Garcetti v. Ceballos* decision, which prevented government whistleblowers from obtaining first amendment protection when they reported concerns "internally" through their chain of command.

It is essential this legislation retain the important provision regarding TSA employees. NTEU cannot support this bill without it. NTEU includes in our membership thousands of TSA workers who lack many of the basic rights and protections other federal employees enjoy. This is a critical matter not only for them, but for the traveling public whose daily safety and security rests in their hands. The legislation would extend whistleblower protections to employees at the Transportation Security Administration. TSA employees currently have limited whistleblower protections yet are charged with the frontline security of the U.S. aviation industry. It is clear that employees with such important responsibilities need adequate protections when reporting serious issues that may impair the ability of the agency to live up to its mission.

Mr. Chairman, I thank the Committee for this opportunity to present our union's views.

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