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S. 372—THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2009

HEARING

BEFORE THE

OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA SUBCOMMITTEE

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

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THURSDAY, JUNE 11, 2009

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT
MANAGEMENT, THE FEDERAL WORKFORCE,
AND THE DISTRICT OF COLUMBIA,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:49 p.m., in room SD–342, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Subcommittee, presiding.

Present: Senators Akaka and Burris.

Also Present: Senator McCaskill.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. I call this hearing of the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia to order.

I want to welcome our witnesses and thank you so much for being here. Today's hearing will examine S. 372, the Whistleblower Protection Enhancement Act of 2009, which I and other Members introduced earlier this year. First, I would like to thank Senator Collins, the lead Republican cosponsor of S. 372, and Members of the Homeland Security and Governmental Affairs Committee who are cosponsors, including my good friend Senator Voinovich, a champion of Federal employees, and Chairman Lieberman for their support. I want to mention that Senators Collins and Voinovich are not able to attend today's hearing due to last-minute scheduling conflicts, but I know they very much wanted to be here. I would also like to recognize Senators Grassley and Levin, who have been long-time supporters of strengthening whistleblower protections.

The Whistleblower Protection Act is an important cornerstone of our Nation's good government laws. Federal employee whistleblowers play a crucial role in alerting Congress and the public to government wrongdoing and mismanagement, protecting our civil rights and civil liberties, helping to keep us safe, and rooting out waste, fraud, and abuse. I should also add that many of them have some good ideas that can improve government operations.

Congress passed the Whistleblower Protection Act of 1989 (WPA), and amendments to improve the WPA in 1994, to strengthen protections for Federal employee whistleblowers. However, a series of rulings by the Merit Systems Protection Board and the Fed-

eral Circuit Court of Appeals have created a number of loopholes in the law's protections. The law has become so weak that many employees, with good reason, fear they will not be protected from retaliation if they come forward to report wrongdoing.

In 2000, I first introduced a bill to strengthen the WPA with Senator Levin. Over the years, the consensus that action is needed has grown broader, and the commitment of those involved has grown deeper. During each Congress, we have moved closer to enacting stronger whistleblower protections.

Last year, our bill passed the Senate by unanimous consent. The House passed a similar bill, H.R. 985. Unfortunately, we were not able to work out the differences between the bills before the 110th Congress adjourned.

It is very encouraging to be working with an Administration this year that is engaged in trying to work through the details of the legislation. President Obama has stated that his "Administration is committed to creating an unprecedented level of openness in Government."

I know this Administration is deeply committed to transparency and accountability, and I believe that by working together we will enact stronger whistleblower protections, which is so important to those larger goals.

There is broad agreement on a number of provisions that are in both S. 372 and the House companion bill, H.R. 1507. These include the need to: Clarify that "any" whistleblower disclosure truly means any disclosure; provide a process to review retaliatory security clearance revocations and suspensions; provide whistleblower protections to employees of the Transportation Security Administration (TSA); protect disclosures of scientific censorship; suspend the Federal circuit court's exclusive jurisdiction; and make a number of other important changes. However, there remain a few unresolved issues, and this hearing will focus largely on grappling with those particular issues.

The first is how to best protect national security whistleblowers. For too long, national security whistleblowers have not had secure avenues to disclose government waste, fraud, abuse, and mismanagement. Some undoubtedly have stayed quiet, while some have leaked classified information to the media. We must ensure that there are secure channels to bring problems in the Federal Government to Congress' attention. Congress, with the appropriate security clearance requirements and procedures for safeguarding information, must be able to fulfill its constitutional oversight responsibilities. I hope today we will have a productive discussion on ways to address this important issue.

The other unresolved issue is whether a safety valve is needed to protect whistleblowers if the administrative process is not working. The House companion bill would allow whistleblowers to file their cases in district court if the Merit Systems Protection Board (MSPB) has not acted within 180 days. Many whistleblower advocates believe that this is a needed check to ensure that our efforts to strengthen whistleblower protections are not gradually undone, as they have been in the past. On the other hand, management groups and the past Administration have expressed concerns that fear of having to defend their actions to a jury might dissuade Fed-

eral managers from disciplining problem employees. Additionally, the past Administration was concerned that this would allow forum shopping; employees dissatisfied with the direction of their MSPB proceedings could move into district court after 180 days.

I hope to address these two issues in some depth today and explore the effects different approaches would have on the protections for Federal employee whistleblowers, on Federal agencies, on congressional oversight, and on national security.

Whistleblowers make government more efficient and effective by disclosing waste, fraud, abuse, and illegal activity. As a long-time proponent of improving government performance through sound management practices and accountability, I am confident we will succeed in enacting legislation this year that will enhance the system of whistleblower protections.

I look forward to hearing from our witnesses today. I want to welcome our first panel to the Subcommittee today. Rajesh De, Deputy Assistant Attorney General in the Office of Legal Policy at the Department of Justice, is the sole witness on this panel.

It is the custom of this Subcommittee to swear in all witnesses, and I ask you to please stand and raise your right hand. Do you swear that the testimony you are about to give this Subcommittee is the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. DE. I do.

Senator AKAKA. Thank you very much. The record will note that the witness responded in the affirmative.

Before we start, I want you to know that your full written statement will be part of the record.

TESTIMONY OF RAJESH DE,[1] DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE

Mr. DE. Good afternoon, Chairman Akaka. Thank you, and thank you to Ranking Member Voinovich and the other Members of the Subcommittee for the opportunity to appear here today to discuss the Whistleblower Protection Enhancement Act. This Administration 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, 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. We need to empower all Federal employees as stewards of accountability. Put simply, accountability cannot be imposed solely from the top down.

The bottom line is we must make sure that all Federal employees at all levels are able to do what it takes to eliminate waste, fraud,

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

and abuse. At the same time, we must preserve the President's constitutional responsibility with regard to national security information and ensure that agency managers have effective tools to discipline employees who themselves may engage in waste, fraud, or 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 these constitutional differences to the extent possible, our focus today is on achieving common ground and a workable solution toward our shared goal of increasing the protections available 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. This Administration believes that the time to reform the system has come again.

I would like to discuss some key components of whistleblower reform as they relate to the legislation currently pending before the Senate—both with respect to civil service issues and national security issues.

Turning first to the civil service 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 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 would also make several important changes to the definition of "protected disclosure." Under current law, a whistleblower is not protected if she informs her boss of wrongdoing, only to find out later that her boss was the one responsible for that wrongdoing. Thus, under current law, the employee would be protected for going to the *Washington Post,* but not to her own supervisor. 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.

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 that disclosure was made outside of the 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, 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 TSA screeners, who literally stand 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 (DHS).

As this Subcommittee knows, the intelligence community is generally excluded from the Whistleblower Protection Act. Yet it is es-

sential 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.

With this goal in mind, we propose the creation of an Intelligence Community Whistleblower Protection Board (Board) within the Executive Branch. This Board would be comprised of senior presidentially appointed officials from key agencies within and outside of the intelligence community, including inspectors general, to provide a safe and effective means for intelligence community employees to obtain redress if they suffer retaliation for disclosing waste, fraud, or abuse. The Administration is currently in the process of developing a proposal for how this Board would operate in a manner that protects both intelligence community whistleblowers and the highly sensitive programs in which they work. We look forward to working with the Subcommittee to craft a scheme that satisfies our shared goals.

We also believe that this Board could provide a better vehicle to review allegedly retaliatory security clearance revocations than the measures set forth in the pending legislation. We are aware that Congress has heard testimony in the past from individuals who have claimed that their security clearances have been revoked due to whistleblowing activities. This Administration has zero tolerance for such actions. We believe that an employee who alleges that her clearance was revoked for retaliatory purposes, for example, should be able to appeal that revocation outside of her own agency.

Our proposed Board 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.

Finally, we believe that the proposed Board could provide an additional avenue for employees in the intelligence community to inform Congress of governmental wrongdoing. The Intelligence Community Whistleblower Protection Act of 1998 (ICWPA) currently provides a vehicle for the Intelligence Community (IC) employees to report matters of "urgent concern" to Congress. The ICWPA, however, affords the individual employee no avenue for review of a potential disclosure outside her specific agency. This Administration believes that no Federal agency should be able to hide its own wrongdoing. For this reason, we believe an IC employee should be able to appeal to the Board if the agency head declines to transmit information to Congress or declines to provide instructions to the employee on how to do so.

Individual employees should also 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 to our Board.

This legislation is merely one step in this Administration's plan to ensure accountability in government. We very much appreciate the efforts this Subcommittee has made over many years to devise whistleblower protections that work. We look forward to working

with you to help revise and improve this legislation to achieve our shared goals.

Thank you, and I would be happy to take your questions.

Senator AKAKA. Thank you very much, Mr. De, for your strong statement. The whistleblower community has expressed a strong desire for mechanisms to provide a check on the MSPB and the Federal Circuit should they again begin to undermine congressional intent for stronger whistleblower protections. Suspending the Federal Circuit's exclusive review of whistleblower cases might be one mechanism for doing that. Additionally, the House bill would allow whistleblowers to file their cases in district court after the MSPB's decision or if the MSPB has not decided the case within 180 days.

Mr. De, is it appropriate to provide alternative court review to ensure that new whistleblower protections are not gradually chipped away under the existing review process, and if so, how should it be structured?

Mr. DE. Thank you, Mr. Chairman. We agree in the first instance that there need to be multiple checks and balances or safety valves, as you have put it, to ensure that the MSPB or any individual agency is not the last word in terms of having recourse for Federal whistleblowers.

Now, with respect to Federal court review, we think one way to accomplish that, as the Senate bill does, is to allow for multi-circuit review of MSPB decisions. Although we think there have been benefits to allowing centralized review in the Federal circuit, namely, a development of expertise and consistency in the law, we certainly recognize that there are a number of concerns particularly among those who are advocates for whistleblower rights and within the Administration that this has not been sufficient. Accordingly, we think multi-circuit review could allow for more expansive development of the law and serve as one of the safety valves that you have suggested.

Thinking about this issue in a broader sense, we think that safety valves should be addressed in the context of the Federal Government more generally, whether it is the courts, the Congress or the Executive Branch. So, on the one hand, while all circuit review could be one way to accomplish this through the courts, we also think there are important ways both within the Executive Branch and within the Legislative Branch—incorporating Congress into this—that we could achieve this as well.

For example, some of the proposed changes to the definition of "protected disclosure" in both bills we think would actually allow for additional outlets for safety valves for whistleblowers. For example, by allowing whistleblowers to tell their supervisors about alleged wrongdoing or by allowing them to be protected for disclosures they make in the ordinary course, particularly for public health and safety, this will provide new avenues for whistleblowers to make sure that waste, fraud, and abuse is exposed.

In the Board structure that we have proposed and are working through now, we think there is a vital role for Congress, particularly with respect to making sure that Congress is aware whenever an alleged concern is raised to the Board. So we would hope, working with your Subcommittee, to build in multiple mechanisms to

serve as another safety valve to bring in the Legislative Branch as well. So when there is a potential disclosure that an IC employee would like to make and raises it with the Board, we think it is very important that employee be able to notify Congress that they have raised such a concern with the Board.

So speaking at the macro level, we think there are multiple ways to achieve this safety valve concept across the Federal Government. One way would be to do so to allow for multi-circuit review in the courts.

Senator AKAKA. Thank you, Mr. De. I understand that the Administration has not yet determined its position on whistleblower access to U.S. district courts and jury trials outside of the national security context. Assume for the moment that a jury trial provision will be included in the final bill. Could you tell us what concerns the Administration would have with crafting this provision, and do you have any suggestions for how those concerns might be reduced or resolved?

Mr. DE. Thank you, Mr. Chairman. Let me make a few preliminary remarks on the jury trial issue, and then I will address the specific question.

We certainly recognize that the question of jury trials is an important one for advocates of whistleblower reform and for the Administration. Whereas the House bill, as you mentioned, provides for jury trials, at least for non-national security whistleblowers, the Senate bill allows for direct review, all-circuit review from the MSPB. And as you mentioned, we have yet, as an Administration, to come to a definitive view on where we stand on this issue, but I would like to note that we think there are valid policy concerns on both sides, and if I may make a few specific points in that regard.

As you noted, in particular with respect to national security whistleblowers, we think district court review and jury trials is particularly inappropriate in that context given the sensitive nature of the information at issue and the potential for wide-ranging disclosure in district court. So putting that aside as a preliminary matter, the second point I would like to make is we fully recognize that jury trials are an essential part of our judicial system and a reflection of our democratic values, and are seen by many as an important remedial outlet for the airing of whistleblower allegations and for claims of reprisal.

The key issue from our perspective is the striking of an appropriate balance between the extent to which the prospect of a jury trial serves as an effective tool for encouraging whistleblowers to come forward with allegations of waste, fraud, and abuse versus the extent to which it serves as a disincentive to agency managers who may be increasingly concerned about taking legitimate personnel actions against poorly performing employees, some of whom themselves may actually be engaged in waste, fraud, and abuse. So that is the balancing that we are thinking through now.

Getting to your specific question about if a jury trial provision is included in a bill ultimately by Congress, there are a couple specific suggestions we would have, two specific concerns about juries in particular in the whistleblower context.

As you know, the way a whistleblower case generally proceeds is that once the claimant makes a prima facie case, the defendant must establish by clear and convincing evidence that the personnel action was taken for a legitimate purpose. We have concerns that juries may not be the most well-equipped venue to deal with the clear-and-convincing-evidence standard. As a general matter, juries either deal with the preponderance standard in the civil context or the beyond-a-reasonable-doubt standard in the criminal context.

The second point I would like to make is putting whistleblower claims in front of a jury raises complex, although certainly not insurmountable, questions about what issues would be most appropriate for the jury versus the judge. In other words, what questions are questions of law versus questions of fact?

Now, this is an issue that comes up in many areas of law, so it is not unique here, but one prime example might be what would constitute a gross mismanagement of funds. Now, I think we would probably all agree that figuring out what is a gross mismanagement, once you unpack it, has both questions of law and questions of facts built in.

When we contemplate the idea of expanding the right to jury trial with the idea of all-circuits review, I think we need to take special care to ensure that we have a good sense of what would be appropriate questions for the jury versus the court to ensure that we do not have inconsistent development across multiple circuits.

So with these thoughts in mind, the suggestions we would have are three-fold:

One, if a right to a jury trial is included, we would suggest that it be limited to the non-national security context.

Two, we would also suggest that Congress consider adopting a preponderance-of-the-evidence standard at least for jury trials and a burden-shifting framework similar to the Title VII context, rather than incorporating the clear-and-convincing standard that is used before the MSPB.

And, third, we would suggest that Congress consider adopting damages caps analogous to the Title VII context to ensure that incentives are properly aligned and to alleviate concerns about runaway juries.

So, to the extent a jury provision is included, those are some of our specific suggestions.

Senator AKAKA. Thank you, Mr. De. Let me now call on Senator McCaskill for her questions. Senator McCaskill.

TESTIMONY OF HON. CLAIRE MCCASKILL, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator MCCASKILL. Thank you, Mr. Chairman, and I especially am appreciative today because I think technically I am not on this Subcommittee, but because this is an area in which I am very interested, the Subcommittee was kind enough to allow me to come and question.

Let me cut to the chase. My concern is about jury trials, and I must tell you I am perplexed and confused that everyone would not want a whistleblower to be able to get a jury trial—every whistleblower on the face of the planet. The exceptions and the differences we have carved out to me make no sense.

For example, right now, if you are a contractor in the Department of Defense (DOD) and there is a whistleblower in your company, that whistleblower is entitled to a jury trial. Now, how weird is it that they could be sitting side by side with a Federal employee doing the exact same work, seeing the exact same problem, and one would be entitled to a jury trial because they worked for a private contractor and the other one would not because they worked for the Federal Government?

Can you give me any rational basis on which to distinguish between these two people?

Mr. DE. First, the Administration appreciates your support in particular for the provisions in the Defense Reauthorization Act last year and in the stimulus bill this year for extending jury trial rights to contractors, both in the defense community and for recipients of stimulus funds.

I think the short answer is it is too soon to tell what the ramifications have been from those provisions. So, in other words, to the extent that there are concerns about the chilling effect of jury trials on legitimate agency managers, putting aside those that we think are doing bad things, we feel like we have not yet had an opportunity to determine from these limited extensions that have been put in place so far whether the balance that I discussed earlier is something that should be of concern.

So I am not going to defend a distinction between Federal employees and contractors. We are trying to puzzle through the impact of the provisions that have been recently enacted and whether there is a valid concern that we have heard articulated and can understand in theory but is playing out under the provisions that you have helped enact recently.

Senator MCCASKILL. Well, we know that 46 percent of the fraud that has been uncovered, according to the certified fraud examiners (CFEs) report, they sampled 1,000 cases in 2008; 46 percent of the fraud we found came from employees. That is half. The majority of all Federal fraud recoveries coming from whistleblower discoveries.

I am trying to understand what is it about a whistleblower being able to go to trial that keeps management in an agency from getting rid of a bad employee. I do not understand the causal connection there.

Mr. DE. I think there are a couple of factors that we have been trying to unpack and put forth for your consideration. One is a perception—and we are trying to uncover what is behind that—as to whether there is a fear of a greater litigation burden that agency managers will feel like they will get dragged into, both in terms of time and in terms of personal reputation.

Now, that may or may not be a legitimate concern that we need to address, but that is something that has been expressed. So we are trying to assess the validity as to what is behind that.

I think the second point is that, as a general matter, I think we all want to ensure that waste, fraud, and abuse is exposed, just as a first principle. How do we get there? And part of the way of getting there is ensuring that agency managers are not all bad. They can actually take effective action against subordinates who they believe are engaging in this abuse.

So that is the waste, fraud, and abuse we do not necessarily hear of because it is taken care of in a simple personnel action. But I say that because we want to make sure we do not discourage managers from being able to take—out of fear of being dragged into a district court action, fear of taking legitimate personnel actions.

Senator MCCASKILL. So what you are saying is a manager has a bad employee, and they are worried that if they try to take action against this bad employee, this bad employee is all of a sudden going to claim whistleblower status and try to get into court because they are being disciplined in the workplace, they are going to claim that they have whistleblower status. Is that what they are alluding to?

Mr. DE. I think there is partly a concern, given that in the whistleblower context the standard—the evidentiary standard is relatively low at the prima facie stage, and for good reason. We do not want whistleblowers to have a hard time of making their case. But I think the concern is given that low standard and the clear-and-convincing rebuttal standard, as Congress set up, that is particularly concerning in the context of a jury trial in Federal district court.

Senator MCCASKILL. Well, I know that you are probably aware—I know you are a very smart guy, but, first of all, the cases are really hard to make. I wish I could stack documents here to show you all the successful whistleblower cases that have been brought. They are expensive. It is difficult to find a lawyer that will represent you. I really think the arguments against jury trials in this area are a pig in a poke, and I think we need to get to the business of respecting and being deferential to whistleblowers and giving them every right we can possibly give them, because they are doing the heavy lifting when it comes to waste, fraud, and abuse in this government right now, and we need to give them every tool they can possibly have to do it well.

I thank you, Mr. Chairman, for giving me the opportunity to ask questions.

Senator AKAKA. Thank you very much, Senator McCaskill, and thank you for being here.

Senator Burris, your questions, please.

OPENING STATEMENT OF SENATOR BURRIS

Senator BURRIS. Thank you, Mr. Chairman. And to our witness, the whistleblower issues seem to be the hot topic, and, Mr. Chairman, you certainly raised the question. I am just trying to see if this Administration's position is that the whistleblower should not have a jury trial if they are involved in one of the security agencies. Is that what you are saying?

Mr. DE. Certainly with respect to the national security agencies, yes, we believe that jury trials would be particularly inappropriate in that context, yes, sir.

Senator BURRIS. So what type of protection, other than the hearing officer or the administrative judge—is that the only person who would then hear the evidence that is presented by this whistleblower that is saying that something is afoot here?

Mr. DE. Definitely not. We certainly agree that review should not stop within the individual employee's agency. We agree that no in-

dividual agency should be the last word in terms of waste, fraud, and abuse——

Senator BURRIS. Pardon me, Mr. De. I am taking it beyond the agency. I am taking it to some arbitrating body. And you are saying it should be only the hearing officer or the administrator or the judge that would be hearing this whistleblower's evidence against whatever they are alleging is taking place that is waste, fraud, or abuse.

Mr. DE. We would propose that the appeal of the whistleblower's claim, at least for the national security world, could be taken outside of their agency to a new Executive Branch Intelligence Community Whistleblower Protection Board. That Board would be comprised of senior Presidential appointees, both within and outside the intelligence community, and it would include inspectors general.

Senator BURRIS. Yes, because I am looking at this, and in one of the testimonies of the persons who are coming on the second panel of witnesses, it called for reviewing past cases and trying to find ways to make amends for some of the unfortunate situations whistleblowers have endured in the past.

What is the Administration's stand on some retroactive review of these cases?

Mr. DE. As an initial matter, we believe that this bill is just one piece of the Administration's broader effort to ensure increased accountability in government, increased protections for whistleblowers, and increased transparency. Accordingly, we would hope that once this bill is—even as this bill is being moved through, we can start discussions on a range of fronts, whether it has to do with the MSPB, the Office of Special Counsel (OSC), or a range of other issues of interest to this community.

With respect to the retroactive consideration of cases, that is certainly something that we think should be paid attention to, and we will take it under consideration.

Senator BURRIS. And back to this special Board, you do not think that the MSPB would be sufficient to handle these security whistleblowers?

Mr. DE. That is correct. We think it would be an inappropriate venue for these cases for a variety of reasons. One, we do not think as currently constituted the MSPB is well equipped to deal with the potentially large amount of sensitive information that could potentially arise in these cases. Second, with respect to the security clearances in particular, we believe that the granting of security clearances and issues around who should have access to sensitive national security information is a core Executive Branch Presidential prerogative, and for that reason we would suggest creating this new Board. If the Board is going to be dealing with security clearance revocation issues——

Senator BURRIS. What experience would this new Board have? Who is this new Board?

Mr. DE. The Board would be comprised of folks who have experience in this area. We would love to work with the Subcommittee to determine the exact composition of the Board, but it would be independent, presidentially appointed nominees.

Senator BURRIS. That has to have a whole staff and a whole other bureaucracy established and hearing officers and more cost to the taxpayers.

Mr. DE. We would hope that the initial adjudications and the record would be established during the agency process. This Board would take a *de novo* review of the process and the staffing expertise that happened at the agency level.

Senator BURRIS. OK. The House version of this bill calls for protection for Federal contractors, and this would be a broad expansion of the existing law. Does the Administration have an opinion on providing these protections for Federal contractors? And do you believe that this protection would aid us in ensuring adequate oversight of government spending and operations?

Mr. DE. Given the scope of the Federal activities performed by contractors and the amount of Federal dollars that go to Federal contractors, we certainly understand the imperative to extend whistleblower protections to Federal contractors. And as a general matter, yes, we do support that extension.

I would note that this has only been done in piecemeal fashion so far. Under the DOD authorization act last year, such rights were extended to DOD contractors, and under the stimulus bill this year to recipients of Federal stimulus funds. We have not yet seen how that has played out, and to the extent that there are any tweaks necessary in the framework for the contractor side of things, that is yet to be determined.

I would make two particular points as Congress considers whether to extend whistleblower rights to Federal contractors. In particular, as currently drafted, the House bill would require the appropriate agency inspectors general (IG) to conduct an investigation of every whistleblower allegation unless it were determined to be frivolous.

Now, I think it is unclear to us to what extent this would pose an additional burden on our already stretched-thin resources among IG offices across the Executive Branch, and so that is one issue I would flag as Congress thinks about this.

The second issue is that it is worthwhile to consider what limitations period would be appropriate to ensure that contractor whistleblower claims are both raised and resolved in a timely manner.

And the third point I would make is the Recovery Act expressly covered State and local grantees of Federal funds, Federal stimulus funds. To the extent that a provision is included in this legislation that covers contractors and grantees, I think there are some unique State and local concerns that would be raised by extending Federal whistleblower protection coverage to all State and local jurisdictions that are recipients of Federal funds. It is not that it is an insurmountable problem; it is just something that I think needs to be thought through carefully.

Senator BURRIS. Thank you, Mr. Chairman.

Senator AKAKA. Thank you very much, Senator Burris.

Mr. De, at the 2007 hearing before the House Federal Workforce Subcommittee, the MSPB witness at that time expressed concern that the House bill's district court provision effectively would create a 180-day standard for the Board to adjudicate whistleblower appeals.

Do you think this time frame would create pressure on the MSPB to come to a decision in 180 days, perhaps not giving it enough time to fully consider a case?

Mr. DE. Let me start by saying we are well aware of concerns that have been raised about the pace of adjudications moving through the MSPB. As you rightly point out, that needs to be considered, if such a provision is included, is what effect that would have on the MSPB as it is currently constituted if litigants could go directly to Federal court after 180 days and whether that would have a salutary effect or a negative effect on how the MSPB goes about its own business.

I think it would be best to hear directly from the MSPB, and I know some of the witnesses today feel strongly about the MSPB's structure and time frame. But I do think it is a valid concern at least to be considered as to what the impact would be on the MSPB as currently structured if a provision were allowed—if it were allowed for claimants to go to Federal district court until the MSPB had made a resolution and what a time frame would do to that decisionmaking cycle.

Senator AKAKA. Mr. De, national security whistleblowers make some of the most important disclosures regarding the security and safety of this Nation. We will hear later from witnesses who feel strongly that the system to hear retaliation claims by FBI and other intelligence community whistleblowers does not work.

Please tell us more about the Administration's views on the need to improve protections for whistleblowers in the national security realm, both within and outside the intelligence community.

Mr. DE. First, we could not agree more that waste, fraud, and abuse needs to be exposed in the intelligence community in the same way it needs to be exposed across the Federal Government. It is just as important there as it is elsewhere. In fact, it might be more important given the importance of those programs to our collective security.

For precisely the reasons that you have articulated, Mr. Chairman, we believe—and the reasons we have proposed an Intelligence Community Whistleblower Protection Board is that we believe it is high time that IC whistleblowers had a mechanism to address reprisal concerns that is outside their own agency. That is how they are limited today. So for the first time, we think it is critical that there be an avenue to address their retaliation claims outside of their individual agency.

This Board that we are proposing would be able to review *de novo* the record that was established within the agency and would bring a different perspective to these claims. It would be comprised of people from within and outside the intelligence community and would have membership that included inspectors general from across the government, folks who have experience dealing with whistleblower claims generally and understand the burdens in these types of cases.

I think as a general matter we think it is important that any structure that is set up for national security whistleblowers in making disclosures is structured in such a way to create incentives that those disclosures are made through appropriate channels, to

either Executive or Legislative Branch officials who are properly cleared with the appropriate mechanisms in place.

So I think, as a general matter, it is important to structure a system that reduces the incentive for national security employees to feel that their only recourse is to go to the press, then they have to risk the potential of retaliatory implications of those disclosures.

Senator AKAKA. Thank you. Mr. De, as you noted, the Administration has proposed creating the Intelligence Community Whistleblower Protection Board for Federal employees who want to make classified disclosures to Congress. As I noted earlier, I understand that the Administration is committed to transparency, but we must ensure that this Board makes fair decisions and facilitates congressional oversight and transparency regardless of the Administration.

Do you have thoughts on what safeguards should be built in to accomplish that?

Mr. DE. Thank you, Mr. Chairman. Yes, I think there are a couple of things I would propose. One is that we think congressional notification is a key element of this, so we believe that any structure that is set up with this new Intelligence Community Whistleblower Protection Board should ensure that Congress is notified whenever an adverse decision is made against an employee who brings a claim of retaliation to the Board as an initial matter.

Second, we think it is absolutely critical that an intelligence community employee who wishes to make a disclosure to Congress and wants to avail themselves of the Board in order to do so is able to alert appropriate Members of Congress that they have presented an issue to the Board so that Congress is aware that there is an issue pending and can take the appropriate measures in dealing with the Executive Branch to provide sufficient oversight.

Third, we think there probably is room for considering what appellate rights from this Board would make sense. I think this is an issue that needs to be thought through carefully, particularly with respect to security clearance determinations, which we feel must stay within the Executive Branch, and disclosures of classified information. However, there are a range of whistleblower complaints that may come from intelligence community employees that may have nothing to do with sensitive information. And for those cases, we think there may be a role for some additional appellate review, and we would be happy to work with the Subcommittee to think through that.

Senator AKAKA. Thank you very much for your responses.

Senator Burris, do you have further questions?

Senator BURRIS. I have no further questions for this witness.

Senator AKAKA. Thank you. Mr. De, I want to say thank you so much for being here. As you know, we are trying to craft a bill that can be effective, and we are pleased to be working with you on this. Your responses will be helpful to us as we move forward in the legislative process.

Mr. DE. Thank you, Mr. Chairman.

Senator AKAKA. Thank you.

Now I would like to call on the second panel to come forward. The second panel of witnesses includes William L. Bransford, who is the General Counsel of the Senior Executives Association. We also will have Danielle Brian, who is the Executive Director of the

Project on Government Oversight; Thomas Devine, Legal Director of the Government Accountability Project; and Robert G. Vaughn, Professor of Law at the American University's Washington College of Law.

I want to welcome all of you to this hearing today. As you know, we have a custom here in the Subcommittee to swear in all witnesses. I would ask all of you to stand and raise your right hand. Do you swear that the testimony you are about to give this Subcommittee is the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. BRANSFORD. I do.

Ms. BRIAN. I do.

Mr. DEVINE. I do.

Mr. VAUGHN. I do.

Senator AKAKA. Thank you. Let the record note that the witnesses responded in the affirmative.

Before we start, I want you to know that your full written statements will be made part of the record. I would also like to remind you to keep your remarks brief given the number of people testifying this afternoon.

Mr. Bransford, will you please proceed with your statement?

TESTIMONY OF WILLIAM L. BRANSFORD,[1] GENERAL COUNSEL, SENIOR EXECUTIVES ASSOCIATION

Mr. BRANSFORD. Thank you, Chairman Akaka and distinguished Members of the Subcommittee. I appreciate the opportunity to testify this afternoon about reforms on whistleblower protection. The Senior Executives Association (SEA) supports increased protections for Federal whistleblowers and is supportive of S. 372 and H.R. 1507. But the association does object to the jury trial provisions contained in the House bill. We believe that whistleblower reform is long overdue, and we hope the differences between the Senate and the House legislation can be reconciled and that common-sense reform can occur.

SEA would like to ensure that such legislation protects whistleblowers, holds managers accountable for their acts while not imposing burdens on supervisors who are trying to effectively manage their employees.

The last time major reform of whistleblower protection laws occurred was in 1989, with the passage of the Whistleblower Protection Act. A series of decisions from the MSPB and Federal Circuit Court of Appeals narrowly interpreted that reform, resulting today in little, if any, protection for whistleblowers.

Both S. 372 and H.R. 1507 greatly expand the definition of what constitutes a protected disclosure. In my opinion, most instances over the past decade where protection was not provided to a would-be whistleblower are related to interpretations by the Federal circuit.

Senior executives hold a unique position in the government: They both oversee employees who are whistleblowers and may be whistleblowers themselves. Although SEA supports the reforms provided in the legislation, we do not support jury trials for those who

[1] The prepared statement of Mr. Bransford appears in the Appendix on page 44.

claim reprisal. Section 9 of H.R. 1507 would allow the right to a jury trial 180 days after an employee files a whistleblower claim with the MSPB or the OSC. In our opinion, jury trials will contribute to the perception of unacceptable risk for a Federal manager who is trying to deal with a problem employee.

The reasoning behind a jury verdict when it occurs is not explained. A sensational jury trial resulting in a finding against the government because of the manager's actions along with a substantial award of damages will create a fear among fellow managers of being subjected to a similar fate. This leads managers to be wary of making those tough decisions they have to make when dealing with problem employees.

It is important to remember that the issue in a whistleblower case is often whether the employee claiming whistleblower status is a problem employee using whistleblower laws as an undeserved shield or, on the other hand, is a legitimate whistleblower who is experiencing an adverse action because of protected activity. Adding jury trials to the mix will give even the best manager pause before confronting an employee who has made a disclosure, regardless of how valid the manager's case or how pure the manager's motives.

The jury trial provision in the House bill is particularly problematic because it contains no limit on damages and is vague about what issues go to the jury. Also, it calls for a right to a jury trial even if the special counsel or the MSPB promptly and appropriately dispose of a whistleblower claim. SEA believes that the MSPB should be given a chance to apply a broader, more appropriate law that protects whistleblowers. The Board's record of efficient resolution will result in prompt and thorough decisions that can be reviewed by any appropriate circuit court of appeals in the country.

To this end, SEA also supports other common-sense provisions in the bill such as providing transparency to a claim that security clearance revocation is based on whistleblower reprisal, providing managers with indemnification for attorneys' fees they expend if the manager is found to have been just doing his or her job after having been accused of reprisal, and allowing combinations of disciplinary actions to be imposed on a guilty manager.

SEA encourages the Subcommittee to move forward with the language contained in S. 372. In our view, whistleblower reform without jury trials will contribute to a government that works.

On behalf of SEA, I thank you for your consideration of the critical enhancements to the Whistleblower Protection Act that will clarify the law for agencies, Federal managers, and whistleblowers. This bill is clearly a good government initiative that SEA would like to see move forward. SEA looks forward to working with you to ensure that this legislation creates a fair and transparent system for addressing whistleblower and executive concerns.

Thank you, Mr. Chairman.

Senator AKAKA. Thank you, Mr. Bransford. And now we will hear from Ms. Brian.

TESTIMONY OF DANIELLE BRIAN,[1] EXECUTIVE DIRECTOR, PROJECT ON GOVERNMENT OVERSIGHT

Ms. BRIAN. Thank you very much, Chairman Akaka, for inviting me to testify today and for your long leadership on whistleblower protections and protecting Federal employees.

Project on Government Oversight (POGO) was founded by Pentagon whistleblowers concerned with wasteful spending and weapons that did not work. Over the years, our mission has evolved, but we remain devoted to our roots of protecting brave truth tellers inside the Federal Government.

In general, POGO believes the House language does a much better job providing meaningful whistleblower protections than the Senate companion bill for two reasons: It provides real due process through access to jury trials, and it extends protections to our very important national security whistleblowers. My colleague, Tom Devine, is representing our coalition of organizations in supporting access to jury trials, so I will focus my testimony on why we need to protect national security whistleblowers.

Many Federal employees working in the intelligence agencies were carved out from getting even the pathetic whistleblower protections that are accorded to other Federal employees, so that we now have a situation, as Senator McCaskill just pointed out, where contractors are protected even if, for example, the Federal employee who is overseeing them is not. There is currently a random patchwork of laws, which provides protections to national security contractors and some national security Federal employees, even intelligence ones, for example, at the Department of Energy (DOE) and the Nuclear Regulatory Commission (NRC), but not others. And these separate but equal systems set up within the CIA and FBI are not working.

We entrust national security and intelligence Federal employees with our Nation's most sensitive information. Why would we not also trust them to protect those secrets when working to correct problems? And I would like to point out that in the earlier testimony from the Justice Department, I did not hear any argument that explains why national security whistleblowers should not be given the same right to a jury trial that other Federal employees should have.

It is because of national security whistleblowers that we have learned that, for example, Congress was being misled about A.Q. Khan's nuclear proliferation scheme; the existence of the CIA's secret prisons; our government's use of warrantless wiretaps; TSA and FBI incompetence; and secret detentions at Guantanamo. Congress learned about all of these disclosures through the press, and all of these whistleblowers lost their jobs. By not providing real protections for national security whistleblowers, we are actually driving them to the press and encouraging leaks of classified information. That is a lose-lose situation.

I want to be very clear. We are not asking to protect the disclosure of classified information to anyone who is not cleared to receive it. Whistleblower protections will not supersede existing rules

[1] The prepared statement of Ms. Brian appears in the Appendix on page 48.

for handling classified information. We would support adding language to the bill to make this explicit, if necessary.

It is in the self-interest of the Congress, perhaps most importantly, to encourage those who are aware of wrongdoing to make their disclosures to Congress. Formal briefings from agency heads have their place, but they do not truly inform the Congress of the real goings-on at an agency, and House Intelligence Chairman Silvestre Reyes just recently articulated this point in the letter he sent to every CIA employee where he pointed out that essentially the House Intelligence Committee had been focused on notification rather than real discussion. I would argue the most effective way to begin real oversight would be to encourage and protect national security whistleblowers coming to the Congress.

By virtue of your being elected to office, you have both a right and a duty to hear the vast majority of our Nation's secrets, and many of your staff have been similarly cleared. For particularly sensitive information, you as Members of Congress also have a right to demand to be read into those programs. POGO believes strongly that the Congress should not blindfold itself by adding new restrictions on your access to information.

It is in this provision regarding disclosures to Congress that the Senate language is actually preferable to the House. We believe the House language is too confusing for a whistleblower in that it is very specific about which committee and which kind of information is protected, and the reality is that most whistleblowers do not know which Member of Congress sits on what committee and which committee has what jurisdiction over what agency.

For example, I would also point out the best congressional oversight of the FBI has been conducted by Senator Grassley, and it has been out of his personal office.

One problem that remains with the Senate provision is the use of the word "authorized" before "Members of Congress." Who authorizes them? The Executive Branch? History has shown the Executive Branch has repeatedly and mistakenly asserted its power to do so.

Let me briefly put faces on three national security whistleblowers.

As a CIA intelligence officer and later in the Pentagon, Rich Barlow learned that top U.S. officials were allowing Pakistan to manufacture and possess nuclear weapons. He also discovered that U.S. officials were hiding these activities from Congress. Barlow objected and suggested to his supervisors that Congress should be made aware of the situation. Because Barlow merely suggested that Congress should know the truth, he was fired. Barlow is now destitute and living in a trailer.

Federal Air Marshal Robert MacLean protested DHS plans to secretly neutralize budget shortfalls by canceling air marshal coverage on long-distance flights, even though there was a suicide terrorist hijacking alert. He protested up the chain of command to no avail. Ultimately, he made an unclassified disclosure to the press. Three years later, the agency fired him because they retroactively labeled information in his disclosure as "sensitive security information." His case has been pending before the MSPB for 3 years without a hearing. He is unemployed.

When the Department of Justice (DOJ) lawyer, Thomas Tamm, became aware of the government's use of warrantless wiretaps, he agonized over the legality of the program. He was rebuffed when he tried to tell a former colleague working on the Hill about his concerns. Ultimately, he alerted the *New York Times,* their story earning a Pulitzer. Congress constrained the program, but Mr. Tamm became a target of an FBI investigation, lost his job, and has racked up tens of thousands of dollars in legal fees.

Passing strong whistleblower legislation is a significant step. It will not, however, be enough. We cannot forget these people whose careers have been shattered because this law has been so late in coming.

I was very gratified, Senator Burris, that you raised this question to the Justice Department witness and that he expressed an open mind to reviewing cases such as Barlow, Maclean, and Tamm to see if there is some way of making them whole. That would be a message sent around the Federal Government that whistleblower protections are more than a campaign promise, they are a reality.

Thank you.

Senator AKAKA. Thank you very much, Ms. Brian. Now we will hear from Mr. Devine.

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

Mr. DEVINE. Thank you, Mr. Chairman. I am testifying today for the Government Accountability Project, but my views reflect those of the Make It Safe Coalition, a trans-ideological, non-partisan network of whose mission is supporting whistleblowers, those employees who use free speech rights to challenge abuses of power that betray the public trust. It used to be a little bit more lonely battle. A few years ago, there were only about 20 groups working on this. As of today, we have over 300 who have signed our coalition letters or sent their own letters of support.

Just this morning, the Society for Conservation Biology sent you a letter on behalf of its 12,000 members, many of them Federal scientists, in support of H.R. 1507, the House version of this legislation.

A few weeks ago, during a 24-hour time period, we got so much public support for the House version of the Whistleblower Protection Act that it took second place in the White House's Open Government Dialogue for Transparency in Government.

All of us are united behind one basic principle: That whistleblowers should be entitled to best practice free speech rights enforced by full access to court, which is what President Obama promised when he ran for office.

I also want to thank you, Mr. Chairman, because we have to thank you for marathon leadership of this issue. I have very vivid memories of back in 1999, your aide, Nancy Langley, taking me to every Member of this Committee just to get them interested in the Whistleblower Protection Act—let alone fix it. And after 10 years,

[1] The prepared statement of Mr. Devine with attachments appears in the Appendix on page 57.

with your continued leadership, we are going to get this job done, and we are going to do it right.

We have learned a lot over the last 10 years, and today's forum creates the necessary record to apply those final lessons learned. And the foremost lesson is that doing it right means a fair day in court.

This is the fourth time Congress will have passed the same free speech rights. Why? The Achilles heel has always been inadequate due process. The Whistleblower Protection Act was largely passed because employees had only won four cases before the MSPB in the 1980 whistleblower cases. Congress kept the same due process structure, but gave more guidance for the Board. Well, they ignored it, so in 1994, Congress amended the law, and again gave the Board more guidance. Well, guess what? In this millennium, since 2000, we have only had three whistleblowers who have won decisions on the merits.

Enough is enough. It is time to end the broken record syndrome, Mr. Chairman.

One thing that has been very conspicuous by its absence from today's hearing is a defense of the MSPB's record. It is not surprising, though, because there is no credible defense. Its track record is 3 in 53 against whistleblowers for decisions on the merits since the millennium. And never has a whistleblower won a case in 30 years on the misconduct that matters most to the taxpayers, government breakdowns that have national implications: The Challenger disasters, Star Wars, Iran-Contra, domestic surveillance, food contamination, tens of thousands of people dying from unsafe prescription drugs; weapon of mass destruction; the warnings before 9/11. None of the whistleblowers who challenged those breakdowns could find justice at the MSPB.

I want to spend the last portion of my time responding to some of the concerns that were raised this morning, and, in particular, that Federal managers would be too scared to fire whistleblowers if they had access to jury trials. And there actually is some common ground here.

Mr. Bransford made this point by stating that, "Adding jury trials to the mix will give even the best manager pause before confronting an employee who has made a disclosure. . . ." Well, that means the law might finally start working. Federal managers might pause before they take actions to fire whistleblowers. Thank goodness.

But why is it that Federal managers are the only ones too scared to do the right thing in whistleblower cases? We have had jury trials for State and local employees for over a century. It has been there for Equal Employment Opportunity (EEO) employment discrimination cases since 1991. It has been there for corporate workers in 13 precedents, including eight since 2002, five in the last Congress. What is it about these Federal managers that they are afraid to exercise authority when people challenge government misconduct? Maybe the solution, Mr. Chairman, is to have additional training for Federal managers as part of S. 372 so that they will exercise their authority when they need to.

Finally, this fear has flunked the reality test. It is not about jury trials. It is about anything that strengthens whistleblower rights.

It was brought up as the reason to veto in 1988 when the Whistleblower Protection Act was first passed. It has never been proven in reality. The rates of adverse actions and performance-based actions, accountability measures, have stayed constant before and after whistleblower rights were strengthened, before and after State and local governments added jury trials. It is time for Federal managers to stop crying "Wolf." And if they will not stop, it is time for Congress to stop listening to them.

Senator AKAKA. Thank you very much, Mr. Devine. Now we will hear from Mr. Vaughn. Will you please proceed?

TESTIMONY OF ROBERT G. VAUGHN,[1] PROFESSOR OF LAW, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY

Mr. VAUGHN. Thank you. My name is Robert Vaughn, and I am a Professor of Law and A. Allen King Scholar, at the American University's Washington College of Law. Mr. Chairman, I appreciate this opportunity to speak to this Subcommittee about this important piece of legislation. My testimony focuses on one of the differences between the House and Senate versions of the legislation: The alternative recourse provision, including a trial *de novo* in a Federal District Court with a right to trial by jury.

I would like to say a few things about the right to trial by jury in these cases and use the remainder of my time to talk about the implications of the alternative recourse provision on the administrative process.

The jury trial is an integral part of our democracy. From the time of the enactment of the Seventh Amendment, the jury has been seen as a coordinate branch of government checking the power of unelected judges, representing the community, providing insights into the weaknesses of the laws, creating political awareness in citizens, and providing an important "badge of citizenship."

Because whistleblowers help to guarantee legal and political accountability of unelected executive officials, the use of juries in these cases is particularly apt. Despite popular stereotypes to the contrary, several decades of social science research emphasized the competence and dedication of jurors. Jurors and judges usually agree, and disagreement cannot be ascribed to jury incompetence or to the unwillingness to follow the law.

The research also shows that juries are as capable as legal experts in deciding complex factual cases. The common stereotypes about juries belied by the research are that jurors favor individuals against organizations, particularly corporations; that jurors find against defendants based on the defendant's ability to pay; and that jurors are disabled by complex factual cases. These stereotypes are pertinent to the use of the jury trial and whistleblower cases because these cases pit often sympathetic individuals against the government with the resources to pay any damage.

One scholar studying the literature regarding the treatment of corporate defendants concludes that jurors are largely supportive of the aims of American business, but hold them to a higher standard than individuals regarding the care needed to protect workers and consumers. Moreover, she found "several studies question the con-

[1] The prepared statement of Mr. Vaughn appears in the Appendix on page 141.

ventional wisdom that the financial resources of corporate defendants encourage a deep pockets approach."

Assuming that whistleblower cases could be classified as complex cases, research shows that jurors are effective in such cases. They are diligent and skeptical in evaluating expert testimony. Jurors perform as ably as judges in complex factual cases. The general research regarding jury performance reassures us about the use of the jury in whistleblower cases.

One expert calls a jury trial a "trial by jury and a judge." Federal judges have ample powers to supervise juries and to correct and prevent mistakes.

I also want to address the implications of the alternative recourse provision. In my written testimony, I present several arguments supporting the following propositions:

First, use of the alternative recourse to Federal district courts will be the unusual not the common occurrence.

Second, a rational decisionmaker would not rush the resolution of whistleblower claims before the Board to satisfy the 180-day deadline.

Third, the effects of the alternative recourse provision on the Board does not counsel against the adoption of the provision. The alternative recourse provision will not waste administrative resources. Even if all whistleblowers who are likely to use the alternative recourse provision have had their claims fully adjudicated by the Board, the administrative resources devoted to these cases is a small percentage of the Board's revenues, something on the magnitude of tenths of 1 percent.

Four, the alternative recourse provision can benefit judicial and administrative adjudication The encouragement of settlement is one important benefit.

I believe that both the alternative recourse provision contained in the House version and the right to jury trial that it provides is both an effective and a safe way of providing an alternative form to whistleblowers. Thank you.

Senator AKAKA. Thank you very much, Mr. Vaughn, for your statement.

Mr. Bransford, Mr. Devine responded to SEA's concerns that giving whistleblowers access to district courts could contribute to a perception among Federal managers that it is too risky to discipline problem employees. Would you like an opportunity to respond to Mr. Devine's comments?

Mr. BRANSFORD. Yes, Mr. Chairman. I do appreciate having that opportunity. I think the life of a Federal manager is difficult and complex. Typically, a career Federal employee becomes a manager because they are the best technician, not necessarily because they are the best supervisor or the best person with people skills. Then they are put in the job with little or no training—in the government, it is hit and miss. Some agencies are better than others at providing that training, and I know we have worked with you, Chairman Akaka, to try to correct that.

Then the manager trying to get the job done deals with a system where there is an EEO system, where EEO complaints are filed, and the employee can simply with impunity file a complaint of EEO, and if you talk to EEO professionals, they will tell you that

many employees who file them really are not complaining about discrimination. They are complaining about workplace issues.

And then you have the whistleblower laws, and you have a complex set of circumstances. And all of these give the manager some reason to avoid dealing with a problem employee. And the complaint is often heard that managers let problems go and they do not deal with them; then the problems become big. And I think as you make this more complex and even more difficult, I think the uncertainty of a jury trial, the sensationalism of it will just add to that and make it more difficult for managers to deal with problem employees. I have seen it. I have seen also 10, 15 years ago much more enforcement of the whistleblower laws, much more activity by the MSPB, a lot of settlements that Mr. Devine does not talk about that used to occur. Cases just simply are not brought anymore, and they are ignored. Something needs to be done to reform the law, but I think jury trials goes too far. Thank you.

Senator AKAKA. Thank you. Mr. Bransford, if a jury trial provision were included in a final bill, do you have any thoughts on possible ways to solve or mitigate the concerns of Federal managers?

Mr. BRANSFORD. Senator, I was very intrigued by Mr. De's approach, and I found most of what he was saying things that I would agree with, particularly the limit on compensatory damages along the lines of what is in an EEO case. But I have a real concern about changing the burden of proof to agencies from clear and convincing—in other words, when an agency can get out of whistleblower reprisal by proving by clear and convincing evidence that it would have taken the action anyway. I think reducing that standard is problematic because it is difficult enough for a whistleblower to prevail even with that fairly high standard, and that is one of the significant reforms in 1989 that, I believe, has actually made a difference.

So I would be concerned about changing that. The other changes, though, I did find intriguing.

Senator AKAKA. To follow up on this, Professor Vaughn's and Mr. Devine's testimony suggest that there likely would be a very small number of whistleblower cases brought before juries. Mr. Bransford, do you agree or disagree with that analysis, and how would this affect your concerns for Federal managers?

Mr. BRANSFORD. Well, I think initially because of the existence of this new remedy, there would be a lot of cases. I think over time the cases may diminish because judges may use certain tools they have that Professor Vaughn talked about, such as motions for summary judgment and things like that. But I think that we have seen in the EEO system a lot of employees using that as a way of coming back against a manager, and I think that you would see a lot more whistleblowers, a lot more employees who would claim to be whistleblowers, who were in a problem employee situation, and I think they would use whatever system they had that was available.

I do agree that it is expensive to go to Federal court, and that may keep down the numbers somewhat.

Senator AKAKA. Mr. Devine, would you like to address why this issue is so important to whistleblower rights advocates, if the House's district court provision likely would be used infrequently?

Mr. DEVINE. Thank you, Mr. Chairman. First, there is a question of credibility. This was the policy that the President campaigned on, and we have not heard a reason, a public policy basis to back off of that commitment.

Second, it is a matter of fairness for Federal employees. They are about the only whistleblowers in the labor force who do not have access to juries to enforce their rights. And it is not sending a very good message to them that we are serious about whistleblower protection if we give them second-class due process compared to the rest of the labor force. So it is for credibility and legitimacy of the law.

Third, it is for the public's right to know. Mr. Bransford feels that this may be sensational. That means the public is enfranchised to make decisions about government actions that have an impact on them, and we think that is a real advantage of jury trials consistent with Professor Vaughn's insights.

The fourth is the people who do make a significant investment—which few can afford, but if they do, they will actually have a fighting chance to win when the trial is over with. They do not at the Merit Systems Protection Board right now.

Fifth, there will be a much better chance for settlements. Managers will know, as Mr. Bransford is concerned, that they might actually lose when somebody files a lawsuit, and that means they will be negotiating in good faith, settlements will be more fair, and there will be a lot more of them to prevent litigation. That is what happened when Congress gave jury trials to DOE and NRC employees under the Energy Policy Act in 2005. Before that Act was passed, there were 191 cases in the 3 years before its passage. The 3 years after its passage, there were 112. The litigation load went down because there was more of a fair fight when there is a conflict. But, most significant, it is not about quantity. It is about quality. It is about the types of cases. Most of the cases probably can be heard by the MSPB, and we want to also work with you to improve the administrative process. But the Board is not structured for the cases that are the most significant reason we have this law, those with national impact, those where there has been a serious governmental breakdown. That is out of the MSPB's pay grade, quite frankly. They do not have the resources for it.

We did one trial that went on for 5 weeks, and the poor administrative judge said, "Mr. Devine, this is like trying to get a snake to swallow an elephant. We are going to have to have a supplemental appropriation for the gap docket if you keep bringing cases like this."

Well, there has to be a home that is ready for the most significant government breakdowns, the laundry list of those where the Whistleblower Protection Act has been AWOL over the last 30 years.

Senator AKAKA. Thank you. Ms. Brian.

Ms. BRIAN. Mr. Chairman, if I could add yet one more reason to Mr. Devine's long list, which is we believe that having access ultimately to jury trials after the administrative process would actually improve the quality of the administrative process because they would know someone outside was actually reviewing their work. That is essentially how the court system works outside this admin-

istrative process, and we think, if the MSPB knew there was going to be genuine scrutiny of their work, that it would actually improve the work and would not necessarily require people to go on to jury trials at all.

Mr. DEVINE. We think the Board's track record will be more balanced if there is Federal court interpretations of the facts to help keep them more honest.

Senator AKAKA. Thank you. Professor Vaughn, your written testimony provides a great deal of detail on how a jury trial provision would function in practice, which will be useful to this Subcommittee's understanding of the issues involved. Your testimony concludes that few whistleblower cases likely would be filed in district court. I would like to give you an opportunity to walk us through your analysis and its implications.

Mr. VAUGHN. Thank you. I think that there are several reasons. One is that the cost of essentially Federal litigation—when I was growing up, my father was a small-town attorney, and when I would complain about things, he would say, "Don't make a Federal case out of it." And what he meant by not making a Federal case out of it was that was an expensive, time-consuming activity. It is also one where we have some of the most important cases decided, which is what we also mean by making it a Federal case.

I think the costs, time, and money of mounting a Federal case would limit the number of whistleblowers who would use the alternative recourse provision. I think that the Board's practice, there are aspects of it. The majority of persons who appear before the Board are unrepresented or are represented by persons who are not attorneys. As we heard earlier, whistleblowers have trouble finding someone to represent them. Those *pro se* whistleblowers would, I think, particularly find it difficult to use the alternative.

At the Board there is a right to a hearing. That is not necessarily the case in Federal court. There is interim relief at the Board. Many cases decided at the Board would be decided within the 120-day limit. About 50 percent of the cases are dismissed for timeliness or lack of jurisdiction. So the suggestion would be that a lot of the cases do not consume very much resources at the Board.

Our experience with other statutes like Title VII, the Sarbanes-Oxley Act, demonstrate that the majority of whistleblowers who would be able to leave the administrative process do not do so. And then there are problems also of delay in Federal court. The statistics I have in my testimony deal with the time from filing a civil action in Federal court regarding employment-based actions until there is a disposition at trial, and those times, depending on the kind of case that it is, run from over 1 year to over 2 years. So there would be—a whistleblower would face delay.

As I mentioned in my written testimony, there are a number of dispositive motions that are available in Federal court. The motion for summary judgment, motion for judgment is a matter of law, the renewed motion for judgment is a matter of law which prevent the cases from being decided by a jury or reverse the jury's determination. Summary judgment has become a very common motion in Federal court. The data regarding employment-based cases show that a very small percentage of those cases proceed to a jury trial, and few civil cases that are filed in Federal court actually reach

trial, the most recent statistics say less than 2 percent. And, finally, there will be a confined limit of the pool of potential whistleblowers to use this process. So I think that the number of jury trials that we would expect in Federal court would be fairly limited.

If I could, I also wanted to mention and agree about the problem with the removing the clear and convincing evidence standard. I am not sure I agree with the conclusion that juries would find it difficult to apply the clear-and-convincing-evidence standard when they apply preponderance-of-the-evidence and the reasonable-belief standard. Juries, as a group, may not have as much experience with the standard as they do with a preponderance or reasonable belief, but the individual juries themselves do not have experience at all when they begin a case. And one of the functions of the court is to describe the character of the burdens of persuasion that are based—that rest in the case, and juries do a diligent job of following those. And just off the top of my head, in civil actions we have a number of tort actions, including defamation, where clear and convincing evidence is the standard that is used, that juries have to be instructed on. In almost all cases, contract and commercial cases that involve fraud or allegations of fraud, clear and convincing evidence is the standard that the court has to instruct the jury about.

So I am, I think, more optimistic about juries being able to use the clear-and-convincing-evidence standard.

Senator AKAKA. Professor Vaughn, thank you for walking us through that. As you know, the House bill would allow whistleblowers to file district court cases after the MSPB decision and get a *de novo* trial by jury. Are you aware of other statutes that allow a similar process, and what are your views on this process?

Mr. VAUGHN. Title VII has that procedure. I think more recently the Consumer Product Safety Improvements Act of 2008, one of the sections of that provision, has a similar mechanism in it. There is probably an analogous provision in the American Recovery and Reinvestment Act of 2009. It is analogous because exhaustion in those cases are through the Office of Inspector General, not through administrative adjudication. But it has a similar provision in it. These are the ones I can think of, but these seem to me to be not an uncommon or unexpected provision in this kind of law.

Senator AKAKA. Thank you. Ms. Brian, as you know, the DOJ has proposed a new Executive Branch Board to review classified disclosures to Congress. Could you address the areas of agreement or disagreement with the Administration on the appropriate methods and protections for whistleblowers in the intelligence agencies?

Ms. BRIAN. Given the hybrid model that was testified to earlier, there was some new information that I thought was encouraging. There was an acknowledgment that the people on that Board would be presidentially appointed. We hope that also means Senate confirmed. The reason that is important to us is it would allow the Congress time to evaluate whether you think those people are appropriate and independent in making these kinds of judgments.

I was also pleased to see that there was an acknowledgment that it is important that a whistleblower have the access to the Congress by notifying the Congress not after the end of any review, but

I am hoping what they meant was at the initiation of a disclosure to this Board so that if a Member of Congress was so inclined, that they could go to that Board and find out exactly what this disclosure is up front.

One of the big concerns I have had is that this Board not become a way of preventing information from getting to the Congress. I want the Congress to be able to access it as it wishes.

We think that there is some possible agreement on how to make this Board work. It is just really going to be very important to get a better sense of the details of exactly what the procedures would be for those who were making disclosures to it and the rights for those people.

Senator AKAKA. Thank you. Mr. Devine.

Mr. DEVINE. Mr. Chairman, we also think that it is very important that the Board's jurisdiction be limited to cases where there is a demonstrable harm to national security. The idea that because you work at the FBI, or because you work at the National Security Agency (NSA), you are not entitled to normal due process, we really cannot accept that. Title V has a breakdown for employees whose jobs are principally for intelligence functions and those whose jobs are more generic public service. And if you are an employee at one of these agencies who is not doing sensitive work, there is really no excuse to put you at a lower level of due process. And then even if you are an employee who is doing sensitive work, there needs to be a demonstration that a public trial would harm national security. It might actually help national security by nipping serious problems in the bud with the scrutiny.

Senator AKAKA. Professor Vaughn, in your view, would it be possible to conduct jury trials for intelligence community whistleblowers without jeopardizing security?

Mr. VAUGHN. In many instances, I think that might be possible. I was struck by the testimony of the American Civil Liberties Union in the House on the House version of the bill where they talked about a number of the kinds of devices that would be available to a judge to limit the risks and the most serious cases where national security information might be involved.

Mr. DEVINE. Mr. Chairman, they already do have jury trials all the time under the EEO laws. There is no second-class status for FBI or intelligence agency employees who are challenging individual misconduct which violates their personal rights. This only seems to be impermissible when they challenge government misconduct that violates the public interest. I do not think that is really a valid distinction.

Ms. BRIAN. Mr. Chairman, if I could add one more point——

Senator AKAKA. Thank you, Mr. Devine. Ms. Brian.

Ms. BRIAN [continuing]. Which is that GAO looked into this question and concluded that there should be no concerns about providing intelligence agency employees with full due process rights, including jury trials, given that the courts already have a long history of handling classified materials and knowing how to manage those problems.

Senator AKAKA. Ms. Brian, with respect to national security, the House whistleblower bill would protect disclosures only if they are made to members of specific congressional committees. In your tes-

timony, you stated your preference for the Senate provision because it allows whistleblowers to make disclosures to legislative staff holding an appropriate security clearance.

Can you discuss the challenges that whistleblowers experience when making disclosures of classified information to Members of Congress?

Ms. BRIAN. Thank you very much, Chairman. I think that is a really central question as you consider this legislation. It is not only to properly cleared legislative staff, but it is also to any Member of Congress, regardless of committee. And the problem a whistleblower will face is they are very likely, as they decided to make a disclosure—which is in itself a very difficult decision to make. But once they have decided to make such a decision, the likely place they will turn is to their own Member of Congress because they are a constituent. It is very unlikely that Member of Congress sits on the committee of jurisdiction.

The next problem is it is unlikely that the whistleblower has read the law that specifies that their disclosure is only protected if they go to a particular committee. And so it creates this unfair burden for that person who is in good faith going to either their Senator or Congressman or perhaps a Member who they have seen is already conducting oversight in that arena outside of the committee jurisdiction, and they want to go to them because they think they are a particularly effective Member of Congress. I believe that person handling classified information properly by going to the cleared staff or meeting with the Congressman himself should be protected.

Senator AKAKA. Ms. Brian, under the WPA, agencies are required to inform their employees of their whistleblower rights. In response to this mandate, OSC created a voluntary program to assist agencies in making their employees aware of their rights. Currently, numerous agencies have completed the certifications or are participating in the program. However, you have indicated that many employees, particularly national security employees, are not educated on their whistleblower rights and how to report misconduct.

What further actions must Congress and the agencies take to ensure that employees understand their whistleblower rights?

Ms. BRIAN. I think to clarify my testimony, I was not suggesting that they are not aware of their rights. They just do not have adequate rights in the first place. And so what we need to do is give them those rights. That is what I would say.

Mr. DEVINE. Mr. Chairman, the premise of your question was well taken; however, I am not sure what else Congress can do to legislate. It might be very helpful to have a special program for managers on rights and responsibilities under this legislation. But it was part of the 1994 amendments that agency heads have a duty to train, to inform their employees of their rights. It was part of the No Fear Act that they have to have detailed programs, and the agencies simply have not been complying. I do not think the problem is lack of congressional legislation. It has been lack of leadership within the Executive Branch.

The prior Special Counsel program that you referenced was an ambitious and genuine one to get agencies up to speed and making

commitments to train their employees on their rights, and it ended with the last special counsel.

The way you folks can really help is to push the Administration to hurry up and appoint a new special counsel and a new chair of the MSPB so the agencies that turn these laws into reality can start functioning properly.

Senator AKAKA. Thank you so much. This has been a good discussion.

Finally, I want to give each of you an opportunity to give closing remarks on your thoughts about what has been said or on what challenges lie ahead. Mr. Bransford, will you please begin.

Mr. BRANSFORD. Thank you, Chairman Akaka. I believe, if my memory serves me correctly, Mr. Devine and I sat on a similar panel to this in November 2003 with similar legislation making similar positions. And here it is 2009, and there is still no reform.

What I have seen in my law practice and what I have seen in representing the Senior Executives Association over the years is a gradual erosion, to the point where today there is no whistleblower protection. It is non-existent. Just this week, I had two people telephone me who were concerned that they are being retaliated against because they raised issues as part of their jobs, absolutely 100 percent part of their jobs. And, of course, the current whistleblower law would not protect them, so we are dealing with helping these people through other means, perhaps EEO or whatever. So I hope that there is a prompt resolution and reconciliation.

I also would say that on a regular basis I meet with hundreds of Federal managers every year. I do training for Federal managers. I focus on why is it that Federal managers do not deal with problem employees. And while fear of whistleblower prosecution does not come up—it does not come up because it does not happen. But it does come up in the context of EEO; it does come up in the context of the complexity of the Federal system, the absence of training and other such things. And I do know that Federal managers will sometimes have pause in taking action out of fear of uncertainty of the system. And my genuine concern is that jury trials will add to that.

And I do believe the MSPB is capable of deciding these cases, of hearing them and issuing good decisions, assuming the law were changed, and especially allowing review by the other circuit courts of appeals to interpret those laws.

So I hope the reform can take place and can take place this year, because I do believe it is needed.

Senator AKAKA. Thank you very much, Mr. Bransford. Ms. Brian.

Ms. BRIAN. Chairman Akaka, thank you for the opportunity. I have been working on these issues since the 1980s, and I think you probably have also. There has been longstanding concern on the part of the Congress to fix the problems that we have been discussing. I think the important change that we are seeing is this is the first Administration that I think is, first of all, not threatening to veto this legislation. We see a dramatic change in the level of communication with the community and hearing our concerns and engaging. And I think it is something that is going to finally mean that we will be seeing a Rose Garden ceremony where whistleblower protections will pass this year.

Senator AKAKA. Thank you. Mr. Devine.

Mr. DEVINE. Mr. Chairman, this legislation has evolved and grown over the last 10 years as we have learned a lot of lessons. When it was first introduced, almost all the whistleblower laws were enforced through administrative, solely administrative remedies. Now the rule is to give people normal access to enforce these rights, as we have learned from track records.

I think the point that we are at with the Whistleblower Protection Act is consolidating the lessons learned of the last 10 years and creating a truly modern law for Federal employees. The mandate does not seem to be in debate from any side at this point. It is just how to do it right. And that is merely a process of making sure that we have kept track of the best practices and that we incorporate them into this legislation so that four will be the charm. And the timing is very critical.

We are in a period of unprecedented government spending, crises in terms of civil liberties, human rights abroad, as well as our economy that will require our government to be at its best. And that is why we put first-class accountability measures for whistleblowers for all the people who receive stimulus funds, and that is the reason why we cannot settle for second-class due process in a first-class good government law for the Federal workers. It is not too late, but we need to finish this before the stimulus spending gets fully underway, and we will be ready for whatever comes.

Senator AKAKA. Thank you very much. Mr. Vaughn.

Mr. VAUGHN. Mr. Chairman, my last word is it is always dangerous how you begin your career. As a 26-year-old young attorney, I began to work with Ralph Nader on a project on civil service reform, and it was his opinion that the most important part of that reform was the protection of whistleblowers. And over the course of my career, I have seen how whistleblowers disclose mismanagement and corruption. They secure openness in government, impose accountability, support the rule of law, protect the First Amendment.

It is our obligation to many ethical and brave employees to protect them. The protections that we provide them are also the cost that we pay, the price that we pay for the important disclosures that they make that make our government accountable to the people, and I think that in doing that, we can take risks. With the House provision, I think that we are not taking risk that the provisions that are contained in the House provision that I have discussed are not novel or untried or dangerous. And I think they are part of that obligation and price we have to pay for all the benefits of whistleblower protection.

Senator AKAKA. I want to thank all of our witnesses. You have helped us to really think through the key concerns for finalizing this bill. This issue is a priority for me, and I am optimistic that finally we will enact protections for whistleblowers this year. My colleagues in Congress and I will be working closely with the Administration and stakeholders on this.

This hearing record will be open for one week for additional statements or questions from other Members of the Subcommittee.

This hearing is adjourned.

[Whereupon, at 4:36 p.m., the Subcomittee was adjourned.]

APPENDIX

STATEMENT OF

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

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA
UNITED STATES SENATE

ENTITLED

"S. 372 - THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2009"

PRESENTED

JUNE 11, 2009

STATEMENT OF
RAJESH DE
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY
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BEFORE THE
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT,
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"S. 372 - THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2009"

JUNE 11, 2009

Good morning Chairman Akaka, Ranking Member Voinovich, and Members of the Subcommittee. 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 the President signed on May 20, 2009, 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 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 Senate—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 Subcommittee 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 highly classified programs and information. Airing the details of such a program or making public such information 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.

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

[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.

wrongdoing. Such whistleblowers expose flaws in programs that are essential for protecting our national security. 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.

With this goal in mind, we propose the creation of an Intelligence Community Whistleblower Protection Board within the Executive Branch. This Board could be composed of senior presidentially-appointed officials from key agencies within and outside of the intelligence community, including inspectors general, to provide a safe and effective means for intelligence community employees to obtain redress if they suffer retaliation for disclosing waste, fraud, or abuse. The administration is currently in the process of developing a proposal for how this Board would operate in a manner that protects both intelligence community whistleblowers and the highly sensitive programs in which they work. We look forward to working with the Subcommittee to craft a scheme that satisfies these shared goals.

We also believe that the Board could provide a better vehicle to review allegedly retaliatory security clearance revocations than the system currently set forth in S. 372. We are aware that Congress 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 that her clearance was revoked for retaliatory purposes, should be able to appeal outside her own agency.

The current bill would allow an employee who alleges that his security clearance was revoked in retaliation for whistleblowing to challenge that determination before the MSPB. The bill provides that the MSPB, or any reviewing court, may grant "declaratory relief and any other appropriate relief" except for the restoration of a security clearance. That limitation 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 entity 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.

The proposed Board, however, 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. Further, we believe that such a Board could ably review allegedly retaliatory security-clearance revocations from all agencies, including agencies in the intelligence community, rather than limiting review to Title 5 agencies, as S. 372 apparently would do.

Finally, we believe that the proposed Board could provide an additional avenue for employees in the intelligence community to inform Congress of governmental wrongdoing. The Intelligence Community Whistleblower Protection Act of 1998 currently 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

[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.

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 believe an intelligence community employee should be able to appeal to the Board if the agency head declines to transmit information to Congress, or declines to provide instructions to the employee on how he may do so. 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 S. 372. The current bill would grant employees the unilateral right to reveal national security information to Congress 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, such as the proposed Board, 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.

This legislation is merely one step in the administration's plan to ensure accountability in government. On March 9, the President issued a memorandum to the heads of all executive departments and agencies on the subject of scientific integrity. That memorandum instructed the Director of the Office of Science and Technology Policy to develop recommendations within

120 days for Presidential action designed to guarantee scientific integrity through the executive branch. The President instructed the Director to keep in mind that "Each agency should adopt such additional procedures, including any appropriate whistleblower protections, as are necessary to ensure the integrity of scientific and technological information and processes on which the agency relies in its decisionmaking or otherwise uses or prepares."

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 do not 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 Subcommittee has made to devise whistleblower protections that work. We look forward to working with the Subcommittee to revise and improve the legislation.

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TESTIMONY

of

WILLIAM L. BRANSFORD

General Counsel

SENIOR EXECUTIVES ASSOCIATION

Before the

SENATE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA

"S. 372 – THE WHISTLEBLOWER ENHANCEMENT ACT."

June 11, 2009

Chairman Akaka and Distinguished Members of the Subcommittee:

Thank you for the opportunity to testify before the Subcommittee on S. 372, the Whistleblower Enhancement Act. The Senior Executives Association (SEA) supports increased protections for federal whistleblowers and appreciates the interest of the Chairman and the members of the Subcommittee in improving the laws protecting whistleblowers from reprisal and of improving administration of the process by which it is determined whether a protected whistleblower has been subjected to prohibited reprisal.

SEA is supportive of S. 372 and also supports H.R. 1507, sponsored in the House by Rep. Chris Van Hollen (D-MD), but the Association does object to the jury trial provisions contained in the House bill. We believe that whistleblower reform is long overdue, and we hope the differences between the Senate and the House in legislation considered during previous Congressional sessions can be reconciled so that needed reform can occur. In considering whistleblower reform, I will focus on the need for the enhanced protections contained in both the Senate and House bills, the impact of this legislation on federal managers and executives, and concerns with the jury trial provisions contained in H.R. 1507. I will also address some of the ancillary provisions of the bill, which the Association believes are important to whistleblower reform.

The last time major reform of whistleblower protection laws occurred was 1989, with the passage of the Whistleblower Protection Act. That law was supposed to cure the climate where potential whistleblowers were deterred from coming forward because the legal standard for proving reprisal was too high. For a number of years, a perception existed that whistleblowers would be protected from illegal reprisal, but then a series of decisions from the Merit Systems Protection Board and the Federal Circuit Court of Appeals narrowly interpreted the earlier reform, resulting in what is today little, if any, protection for whistleblowers.

Under current law, an employee is <u>not</u> a whistleblower if the employee merely discloses wrongdoing to the supervisor who is the perpetrator of the wrongdoing. The rationale of the Federal Circuit for this definition is that the Whistleblower Protection Act is aimed at disclosures to persons who can correct the wrongdoing, not the wrongdoer him or herself. The reality is that it takes a very brave employee to tell his or her supervisor that the law is being violated. Yet, the guilty supervisor may very well retaliate against someone who points out wrongdoing as a way of neutralizing the objection from a dissident employee.

Another dynamic of the workplace that is not protected by today's whistleblower laws is the employee who makes a disclosure that is just a routine part of his or her job. For example, an internal auditor may, in the course of an audit, uncover a several million dollar shortfall and then disclose it. That same auditor may then receive a less than fully successful rating and may believe the appraisal is due to the disclosure. Currently, the auditor is not protected.

Both S. 372 and H.R. 1507 greatly expand the definition of what constitutes a protected disclosure. This provision seems designed to overturn precedent from the Federal Circuit

that creates the lack of protection described above. In our opinion, most instances over the past decade where the protection was not provided to a would-be whistleblower are related to those interpretations.

Senior Executives hold a unique position in the government; they both oversee employees who are whistleblowers and may be whistleblowers themselves. Although SEA supports the reforms outlined above, we do have concerns with H.R. 1507 due to the jury trial provision. SEA does not support jury trials for those who claim whistleblower reprisal. Section 9 of H.R. 1507 would allow a civil action to be filed, which includes the right to a trial by jury, 180 days after an employee files a whistleblower claim with the Office of Special Counsel or the Merit Systems Protection Board (MSPB). Allowing such jury trials would be a dramatic departure from the current process. The potential unintended, negative consequence of this change is enormous.

Jury trials, by their very nature, will contribute to the perception of unacceptable risk for the federal manager who is trying to deal with a problem employee. The reasoning behind a jury verdict is not explained and a sensational jury trial resulting in a finding against the manager with a substantial award of damages will create significant pause for managers who must make decisions to confront and deal with problem behavior for fear of being subjected to a similar fate.

SEA believes that the MSPB should be given a chance to apply a broader, more appropriate law that protects whistleblowers. The Board's record of efficient resolution will result in prompt and thorough decisions that can be reviewed, under the Senate bill, by any appropriate Circuit Court of Appeals in the country.

The jury trial provision in the House bill is particularly problematic because it contains no limit on damages and is vague about what issues go to a jury. Also, it calls for a right to a jury trial even if the Office of Special Counsel and the MSPB promptly and appropriately dispose of a whistleblower reprisal claim.

It is important to remember that the issue in a whistleblower case is often whether the employee claiming whistleblower status is a problem employee using whistleblower laws as an undeserved shield or is a legitimate whistleblower that is experiencing an adverse action because of protected activity. Federal managers are on the front lines of dealing with questions such as these as they try to deal with problem employees. Adding jury trials to the mix will give even the best manager pause before confronting an employee who has made a disclosure, regardless of how valid the manager's case is or how pure the manager's motives are.

SEA encourages the Subcommittee to move forward with the language contained in the Senate bill, especially given the increased protections it provides for national security personnel and all federal whistleblowers, without adding to the complexity of whistleblower cases with the addition of jury trials. In our view, whistleblower reform without jury trials will contribute to a government that works.

To this end, SEA also supports enhancements in S. 372 as explained below.

Section 1(j) of S. 372 establishes a new section 7702a in Title 5 setting forth a new process if a security clearance decision appears motivated by whistleblower reprisal. In our opinion, the bill appears to be consistent with the Supreme Court's decision in Department of the Navy v. Egan, 484 U.S. 518 (1988), because it does not require or allow the MSPB or a court to actually grant a security clearance. We believe that a new 5 U.S.C. 7702a would provide transparency and attention to a claim that a security clearance revocation is not based on whistleblower reprisal. To us, this seems to be a reasonable balance between protecting whistleblowers and national security interests.

SEA also supports the provisions in section 1(h) of S. 372 concerning attorney fees. Current law allowing such fees has been interpreted to require that fees for managers who successfully defend reprisal charges be paid by the Office of Special Counsel. SEA believes that the appropriate policy determination in awarding fees to managers who are found to be substantially innocent of whistleblower reprisal is one of employer indemnification for expenses to an employee who is found to have been doing his or her job. Often, this job includes continuing to manage a whistleblower after a disclosure is made. A manager who does so risks a charge of reprisal. A manager who successfully defends against a reprisal charge should not be required to pay fees him or herself, and we submit that the employing agency should indemnify its employees in these circumstances. Such a change in the law will also allow the Office of Special Counsel to make prosecutorial decisions without concern for the impact of the decision on the Office's budget.

Furthermore, SEA supports section 1(g) of S. 372 allowing combinations of disciplinary action to be imposed (as opposed to current precedent that allows only one of the actions) and to clarify that a manager accused of reprisal can avoid liability by proving that the personnel action in question would have been taken in the absence of protected activity. Clarification of this latter point is especially significant since a manager or supervisor should be able to avoid liability if the evidence of whistleblower reprisal was of no consequence to the personnel action in question.

On behalf of the Senior Executives Association, I thank you for your consideration of the critical enhancements to the Whistleblower Protection Act that will clarify the law for agencies, federal managers, and whistleblowers. This bill is clearly a good government initiative that SEA would like to see move forward. However, we encourage you to support S. 372 as the primary vehicle for whistleblower reform. SEA looks forward to working with you to ensure that this legislation creates a fair and transparent system for addressing whistleblower and executive concerns.

Testimony of
Danielle Brian, Executive Director
Project On Government Oversight (POGO)
before the
Senate Homeland Security and Governmental Affairs Committee
on
"S. 372: The Whistleblower Protection Enhancement Act of 2009"

June 11, 2009

Thank you for inviting me to testify today. I am the Executive Director of the Project On Government Oversight, also known as POGO. POGO was founded in 1981 by Pentagon whistleblowers who were concerned about wasteful spending and weapons that didn't work. They needed a safe way of getting that information out to Congress and the public without their risking their jobs, and so we were created as the Project on Military Procurement. Over the years POGO has evolved, but we remain devoted to our roots of protecting brave truth-tellers inside the federal government.

Happily, Congress does not have to be persuaded there is a problem in the current system of protecting federal whistleblowers. Congress has been grappling with this issue for years. As a result, I will not focus on the "why," but will instead focus on the "how" and "who."

In general, POGO believes H.R. 1507, the "Whistleblower Protection Enhancement Act of 2009," does a much better job providing meaningful protections for federal employees who blow the whistle than Senate companion bill S. 372. We prefer the House bill for two reasons: it allows federal whistleblowers real due process through access to jury trials after they have exhausted their administrative remedies; and it extends meaningful protections to national security whistleblowers, the eyes and ears inside the government who are looking out for our safety and security.

Federal Employees Should Have Access to Due Process Through Jury Trials
My colleague Tom Devine of the Government Accountability Project is focusing his testimony on our first reason for preferring the House companion bill: the many arguments for allowing federal employees access to the same due process rights as the tens of millions of employees in

the private sector and, perhaps more importantly, the many federal contractors they oversee.[1] As a fellow member of the Make It Safe Coalition, Mr. Devine speaks for POGO when he speaks in support of providing federal employees this essential due process right. We believe the mere existence of access to jury trials will both encourage those who know of wrongdoing but have hesitated to come forward because they didn't believe they had a fighting chance. We also believe it will deter those managers who are inclined to shoot the messenger and punish their employees for making disclosures. In the end, what we want is a system that will avoid the need for a courtroom, but will allow for it if necessary.

National Security Whistleblowers Are Left Out in the Cold

I will focus my testimony on the second reason we prefer the House companion bill: because it provides protections to national security whistleblowers. When the Whistleblower Protection Act was passed in 1989, those federal employees who work in the intelligence agencies—especially the FBI, CIA, DIA, and NSA—were carved out from getting even the pathetic protections accorded to other federal employees.[2] This was a terrible mistake. Now, an intelligence contractor working at the Defense Intelligence Agency is protected if he reports misconduct, but the federal employee overseeing him is not. This is unacceptable.

It is essential to cover national security whistleblowers with meaningful protections for several reasons. The first is that federal employees working in national security and intelligence are the people with whom we are entrusting our nation's most sensitive information. The government already determined that they are both serious and trustworthy when it issued them security clearances. It is wholly incongruous that the intelligence community has historically opposed giving these employees whistleblower protections by either trivializing the issues they raise as frivolous or, alternatively, suggesting they would recklessly spread state secrets if given whistleblower protections.

If we value these employees enough to entrust them with our secrets, we must also trust that they will protect those secrets when working to correct unaddressed problems or threats. We should give them the same protections we already give the contractors they oversee or with whom they work,[3] and the same access to courts we give them if they are discriminated against.[4] I would argue that national security whistleblowers make the most vital disclosures because of the safety, security, and civil-liberty implications of the problems they reveal. Some examples include the national security whistleblowers who revealed that Congress was being misled about A.Q. Khan's nuclear proliferation scheme[5]; the existence of the CIA's secret prisons[6]; our

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[1] American Recovery and Reinvestment Act (Public Law 111-5), Section 1553; Defense Authorization Act, 10 USC 2409(c)(2); False Claims Act, 31 U.S.C. § 3730 (h)

[2] 5 U.S.C. § 2302(a)(2)(C)(ii)

[3] Defense Authorization Act, 10 USC 2409(c)(2); False Claims Act, 31 U.S.C. § 3730 (h)

[4] Civil Rights Act (Pub. L. 88-352), Title IIV

[5] Lyndsey Layton, "Whistle-Blower's Fight For Pension Drags On: Former Defense Official Seeks Private Relief Bill," *Washington Post,* July 7, 2007. http://www.washingtonpost.com/wp-dyn/content/article/2007/07/06/AR2007070602127.html (Downloaded June 8, 2009)

[6] Dafna Linzer, "CIA Office is Fired for Media Leaks; The Post was Among Outlets that Gained Classified Data," *The Washington Post,* April 22, 2006.h ttp://pogoarchives.org/m/wi/wapo-cia-20060422.pdf

government's use of warrantless wiretaps[7]; TSA[8] and FBI[9] incompetence; and secret detentions at Guantanamo.[10] It is simply bad public policy to discourage those whistleblowers.

In each of the above cases, none of the whistleblowers had a safe and effective way to make these disclosures internally or to Congress. As a result, most of them made their revelations to the press or other outside organizations, lost their federal jobs or were otherwise retaliated against, or both. By not providing real protections for national security whistleblowers, we are driving them to the press and actually encouraging leaks of classified information. Congress learned about all of these disclosures from the press, not the other way around. That is a lose/lose situation. And, worse, how many other people of conscience working in the government have seen what has happened to these whistleblowers and have remained silent—leaving those problems to fester? That is perhaps the biggest—and most dangerous—loss of all.

Congress Needs Access to National Security Whistleblowers

An even more compelling reason to offer national security whistleblowers protections is that it is in the self-interest of the Congress to encourage those who are aware of wrongdoing to make their disclosures to Congress. It helps you do your job better. In fact, the Congress cannot do its job overseeing the national security and intelligence operations of the executive branch *without* hearing from whistleblowers, and communicating informally with other federal employees in those agencies. Formal briefings from agency heads to Congress have their place, but they do not truly inform the Congress of the real goings-on at an agency. House Intelligence Committee Chairman Silvestre Reyes recently articulated this point, which is particularly acute in the intelligence arena, in a letter he sent this April to every CIA employee. He wrote,

> One important lesson to me from the CIA's interrogation operations involves congressional oversight. I'm going to examine closely ways in which we can change the law to make our own oversight of CIA more meaningful; I want to move from mere notification to real discussion.[11]

I would submit that the most effective way to encourage real oversight would be to protect those national security whistleblowers who come to the Congress.

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[7] Michael Isikoff, "The Fed Who Blew the Whistle: Is He a Hero or a Criminal?," *Newsweek,* December 13, 2008. http://www.newsweek.com/id/174601 (Downloaded June 8, 2009)

[8] Stephen Losey, "Air Marshal's Firing Prompts Whistleblower Suit," *Federal Times,* November 7, 2006. http://www.federaltimes.com/index.php?S=2331806 (Downloaded June 8, 2009); "Ex-air marshal to sue over 'SSI' label," *The Washington Times,* October 29, 2006. http://washingtontimes.com/news/2006/oct/29/20061029-115609-8718r/ (Downloaded June 8, 2009)

[9] Testimony of Michael German, Policy Counsel, American Civil Liberties Union, Former Special Agent, Federal Bureau of Investigation before the Subcommittee on Crime, Terrorism, and Homeland Security House Judiciary Committee on "The FBI Whistleblowers: Corruption and Retaliation Inside the Bureau,", May 21, 2008. http://www.aclu.org/images/general/asset_upload_file419_35426.pdf (Downloaded June 8, 2009); Michael German, "Statement of Michael German," *American Civil Liberties Union.* http://www.aclu.org/whistleblower/statements/2.html (Downloaded June 8, 2009)

[10] Tim Golden, "Naming Names At Gitmo," *The New York Times,* October 21, 2007. http://query.nytimes.com/gst/fullpage.html?res=9406EEDA103CF932A15753C1A9619C8B63&sec=&spon= (Downloaded June 8, 2009)

[11] Letter from Silvestre Reyes, Chair House Intelligence Committee, to CIA employees, April 29, 2009. http://www.fas.org/irp/congress/2009_cr/reyes042909.pdf (Downloaded June 8, 2009)

For the past two years, POGO has had the pleasure of hosting monthly bi-partisan training sessions for Hill staff on how to conduct oversight. Each session includes experienced retired or current staffers—always both a Democrat and a Republican—who discuss techniques in the art of congressional oversight. In every session, these seasoned veterans tell the newer staff that they cannot do their jobs well if they do not learn how to work with whistleblowers and to develop informal lines of communication with people at the agencies they oversee. It is often pointed out by our panelists that this is even more true in the national security arena, where agencies are under less scrutiny by the public and the media – making it even more important that Congress conduct rigorous oversight.

Whistleblower Protections Do Not Protect Leaks of Classified Information

I want to be very clear that the Make It Safe Coalition is in consensus that we do not support a law to protect people who disclose classified information to anyone who isn't cleared to receive it. Although there is nothing in H.R. 1507 that would permit employees to make unauthorized disclosures of classified information, we would support adding language to the bill to make this explicit.

Passage of whistleblower protections for national security whistleblowers will in no way supersede existing rules and systems established to protect the integrity of the handling of classified information. During last month's hearing on the House companion whistleblower protection legislation, the Congress heard testimony from former FBI agent Mike German to that end. He testified that,

> 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.[12]

Furthermore, concerns that a national security whistleblower's case cannot safely be heard in court were fully debunked in a March 1996 GAO report that concluded "Congress Could Grant Intelligence Employees Standard Federal Protections Without Undue Risk to National Security," because the courts have long established procedures for handling classified information.[13] In fact, National Whistleblowers Center General Counsel David Colapinto testified that he and his colleagues regularly bring cases on behalf of national security employees to the courts under Title VII because

> 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

[12] 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 on "The Whistleblower Protection Enhancement Act of 2009 (H.R. 1507)," May 14, 2009, p.5. http://www.aclu.org/safefree/general/39593leg20090514.html#attach (Downloaded June 8, 2009)

[13] General Accounting Office, *Report to the Honorable Patricia Schroeder on Intelligence Agencies: Personnel Practices at CIA, NSA, and DIA Compared with Those of Other Agencies* (GAO/NSIAD-96-6), March 1996, p. 35. http://www.gao.gov/archive/1996/ns96006.pdf (Downloaded June 8, 2009)

Service Reform Act ("CSRA") and the Whistleblower Protection Act ("WPA") to bring Title VII discrimination and retaliation claims in federal court.[14]

Lawful Disclosures to Congress Should Be Protected

Disclosure to Congress is not the same thing as making the information public. By virtue of your being elected to office, you have both a right and a duty to hear the vast majority of our nation's secrets, and many of your staff have been similarly cleared, regardless of the committees on which you serve. For those particularly sensitive Special Access or Compartmentalized Programs, you as Members of Congress have a right to demand to be read into them.[15] POGO believes strongly that the Congress should not blindfold itself by statutorily limiting its access to information by adding new restrictions.

It is in the provision specifying the protection of disclosures to Congress that the Senate language in S. 372[16] is preferable to the comparable language in H.R. 1507.[17] The House language is too confusing for a whistleblower because it specifies that particular disclosures are only protected if they are made to members of specific committees. Our problem with this language is that most people do not know who sits on what committee, or even which committee has jurisdiction over which agency. Why would the Congress not want to protect a person of conscience who wants to make a disclosure to a specific Member as a constituent or because they believe that Member of Congress is a particularly effective elected official? Shouldn't that whistleblower be protected from retaliation because they came to you in good faith? While the Senate language avoids these problems by not specifying particular committees, it does retain problematic language in that disclosures are only protected if they are made to "authorized" Members of Congress or their staff. Who authorizes them? The executive branch? History has shown the Executive has repeatedly and mistakenly asserted its power to do so.[18]

During four days of deliberations over the Intelligence Community Whistleblower Protection Act (ICWPA), the Congress dispensed of the perennial executive branch assertion that it is unconstitutional for national security whistleblowers to make even lawful disclosures to Congress.[19] In the ensuing legislation, the Congress enumerated six principles regarding the right of Congress to receive classified information. The statute states,

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[14] Testimony of David K. Colapinto, General Counsel, National Whistleblowers Center, before the House Committee on Oversight and Government Reform on "Protecting the Public from Waste, Fraud, and Abuse: H.R. 1507, the Whistleblower Protection Enhancement Act of 2009," May 14, 2009. p.6.

[15] Congressional Research Service Memorandum,*S tatutory Procedures Under Which Congress Is To Be Informed of U.S. Intelligence Activities, Including Covert Actions*, January 18, 2006; Congressional Research Service, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments* (RL30319), September 17, 2007; Congressional Research Service, *The Protection of Classified Information: The Legal Framework* (RS21900), December 21, 2006; Congressional Research Service, *Protection of Classified Information by Congress: Practices and Proposals* (RS20748), April 5, 2006; Congressional Research Service, *Congressional Access to Executive Branch Information: Legislative Tools* (RL30966), May 17, 2001.

[16] S. 372, Sec. 1(b)(1)(C)(ii)(I-III)

[17] H.R. 1507, Sec. 10(f)(3)(A-C)

[18] Louis Fisher, *Congressional Access to National Security Information: Precedents from the Washington Administration* (2009-002846), May 22, 2009. p.1.

[19] Testimony of Louis Fisher, Specialist in Constitutional Law, Law Library of the Library of Congress Appearing before the House Committee on Oversight and Government Reform on 'The Whistleblower Protection Enhancement Act of 2009,'" May 14, 2009, p 14.

> 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.[20]

The Library of Congress Law Library Constitutional Scholar Louis Fisher recently wrote that,

> The Department [of Justice]'s position about presidential control over national security information has a direct bearing on the constitutional capacity of Congress to perform its oversight and investigative duties. It also rests on very incomplete and misleading historical grounds. . . . The President does not have plenary or exclusive authority over national security information. The scope of the President's power over national defense and foreign affairs depends very much on what Congress does in asserting its own substantial authorities in those areas.[21]

The executive branch has also repeatedly asserted that protecting national security whistleblowers would improperly allow a mid-level agency employee to "unilaterally" make "unauthorized" disclosures to Congress.[22] This is a particularly troubling complaint. Intelligence agency officials make these "unilateral" decisions every day when they discuss classified information with their colleagues at executive branch agencies and with their many contractors. It appears the intent of this assertion is to ensure that the same information being discussed across Washington is simply not discussed with the Congress.

As you consider this legislation, I urge you to reject any remnants of the misperception that the executive branch has sole authority to control classified information, and assert the right of any Member of Congress or their properly-cleared staff to receive disclosures of classified information from whistleblowers. It is also important to note that currently, even unclassified disclosures from national security whistleblowers to the Congress are exempt from WPA protections.

"Separate But Equal" Protections for National Security Whistleblowers Do Not Work
Under the Civil Service Reform Act and the ICWPA, a "separate but equal" system for FBI and intelligence whistleblowers was created as an alternative to the WPA. Unfortunately, this system is not working. For almost a decade after Congress created the "separate but equal" system, the FBI failed to even implement that system.[23] We are unaware of any employees who have successfully resolved a whistleblower retaliation case using the FBI's system, and the FBI does

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[20] Intelligence Community Whistleblower Protection Act (Public Law 105-272), Section 701.
[21] Louis Fisher, *Congressional Access to National Security Information: Precedents from the Washington Administration* (2009-002846), May 22, 2009. pp 1, 7.
[22] Most recently, in the testimony of Rajesh De, Deputy Assistant Attorney General, Office of Legal Policy, Department of Justice before the House Committee on Oversight and Government Reform on "Protecting the Public from Waste, Fraud and Abuse: H.R. 1507, The Whistleblower Protection Enhancement Act of 2009," May 15, 2009. p.9.
[23] In 1989, Congress amended 5 U.S.C. §2303 requiring the President to provide FBI employees with administrative rights and remedies consistent with those available to Title 5 employees under 5 U.S.C. §§ 1214 and 1221.After FBI whistleblower Frederic Whitehurst filed a lawsuit in federal court alleging retaliation in violation of the First Amendment and the Privacy Act, President Clinton issued an order directing the Attorney General to implement the FBI procedures under 5 U.S.C. § 2303. See Delegation of responsibilities concerning FBI employees under the Civil Service Reform Act of 1978. Pres. Mem. of April 14, 1997, 62 Fed. Reg. 23123.

not make any such records publicly available. Over the past seven years, fewer than ten CIA employees have used the system of reporting their concerns to the CIA IG, who reports his findings to the congressional Intelligence Committees, and in only one single case did the IG recommend corrective action to the Agency head.[24] Yet, during this time major disclosures of wrongdoing at the CIA have repeatedly been revealed by whistleblowers directly to the press. Then-Acting DoD IG Thomas Gimble testified before the House in 2006 that, "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."[25] These systems do not work, and are no substitute for due process.

Furthermore, the Department of Justice IG has recently reviewed the FBI's alternative whistleblower disclosure and protection system, and concluded that,

> ...30 percent of survey respondents who had observed misconduct said they either never reported misconduct they observed or reported less than half of the misconduct they observed. . . . We found there continues to be a significant percentage of FBI employees who believe that there is a double standard of discipline for higher-ranking and lower-ranking FBI employees. In our review, we found that allegations of misconduct against SES employees were unsubstantiated at a much higher rate than allegations against non-SES employees. Even more significant, SES employee's penalties were mitigated on appeal at a much higher rate than non-SES employees' penalties. Moreover, when we examined the appellate officials' decisions to mitigate penalties for SES employees, we found that the mitigation in most of these SES cases was unpersuasive and unreasonable.[26]

The brave, honest public servants deserve better than this second-class system.

Let me briefly put faces on a few of these national security whistleblowers.

Richard Barlow

Working as a CIA counter-proliferation intelligence officer in the 1980s, Richard Barlow learned that top U.S. officials were allowing Pakistan to manufacture and possess nuclear weapons, and that the A.Q. Khan nuclear network was violating U.S. laws. He also discovered that top officials were hiding these activities from Congress. After engineering the arrests of Khan's nuclear agents operating in the U.S., Mr. Barlow left to work for the Office of the Secretary of Defense. Top officials at the DoD continued to lie about Pakistan's nuclear program. Mr. Barlow objected and suggested to his supervisors that Congress should be made aware of the situation. Because

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[24] Testimony of David K. Colapinto, General Counsel, National Whistleblowers Center, before the House Committee on Oversight and Government Reform on "Protecting the Public from Waste, Fraud, and Abuse: H.R. 1507, the Whistleblower Protection Enhancement Act of 2009," May 14, 2009. p.4

[25] Statement of Thomas F. Gimble, Acting Inspector General, Department of Defense before the House Committee on Government Reform Subcommittee for National Security, Emerging Threats, and International Relations on National Security Whistleblower Protection, February 14, 2006. http://www.dodig.mil/IGInformation/PressReleases/DODIG_Testimony_Final_0206.pdf (Downloaded June 8, 2009)

[26] Department of Justice, Office of Inspector General, *Review of the Federal Bureau of Investigation's Disciplinary System* (Report Number I-2009-002), May 2009. pp. xiii-xiv.

Barlow merely *suggested* that Congress should know the truth, Mr. Barlow was fired. In 1998, following seven years of congressionally directed investigations by three IGs and the GAO, a virtually unanimous bipartisan majority in Congress and the President of the United States concluded that Mr. Barlow deserved to be compensated with relief. However, a bill to pay him minimal damages was blocked in the federal claims court where the executive branch invoked the President's State Secrets Privilege.[27]

Robert MacLean
Robert MacLean was a ten-year federal law enforcement officer, and U.S. Department of Homeland Security (DHS) Federal Air Marshal (FAM) with an unblemished record. He protested plans to secretly neutralize budget shortfalls and save money by canceling air marshal coverage on long-distance flights, even though it was during a suicide terrorist hijacking alert. He protested up the chain of command to a supervisor and to three DHS Office of Inspector General field offices, all whom declined to act and said he should drop the issue. Mr. MacLean ultimately alerted the press of this dangerous DHS plan. After public congressional pressure, DHS's plans were canceled. On April 11, 2006—three years later—the agency fired him because they had retroactively labeled the information in his 2003 disclosure as Sensitive Security Information (SSI). His case has been pending before the Merit Systems Protection Board for three years without a hearing.[28]

Thomas Tamm
In late 2003, Thomas Tamm, a Department of Justice lawyer, became aware of the existence of a secret program that bypassed existing procedures for obtaining judicial approval for national security wiretaps of alleged spies and terrorists. Mr. Tamm, whose Justice career had earned him top honors and whose father and uncle both held high posts in the FBI, agonized about the legality of the program. He was rebuffed when he tried to tell a former colleague working for the Senate Judiciary Committee about his concerns. Ultimately he decided his only recourse was to alert *The New York Times* to what he knew. The story earned a Pulitzer, and Congress ultimately acted to constrain the Justice Department's surveillance tactics. But Mr. Tamm became a target of intense FBI inquiries, even a 2007 search of his home by 18 FBI officials in which his wife and children were questioned and his computers and laptops were seized. Mr. Tamm lost his job and has racked up tens of thousands of dollars in legal fees.[29]

Passing strong whistleblower legislation is a significant step forward. It will not, however, be enough. In addition, the President should issue an Executive Order that includes strict administrative, civil, and criminal penalties for officials who retaliate against whistleblowers. The Executive Order should also include rewards such as commendations, public recognition,

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[27] Project On Government Oversight, "Richard Barlow Resource Page." http://www.pogo.org/investigations/government-oversight/rbarlow.html
[28] Project On Government Oversight, "Robert MacLean v. Department of Homeland Security (DHS)," July 29, 2003. http://www.pogo.org/pogo-files/alerts/homeland-security/hs-aviation-20030729.html
[29] The Ridenhour Prizes, "The Ridenhour Truth-Telling Prize." http://www.ridenhour.org/recipients_03g.shtml (Downloaded June 8, 2009)

and monetary awards for federal employees who disclose waste, fraud, and abuse, or who suggest ways to improve the operations of their agency.[30]

Finally, we cannot forget these people whose careers—or even lives—have been shattered because this law has been so late in coming. For real reform, we not only need to pass real protections so that there are no future Barlows, MacLeans, or Tamms, but we also need to review cases such as these and find some way to make amends for the untenable situation we forced these people into—people who were just doing their jobs and upholding their oath of service to their country. That would be a message sent around the federal government that whistleblower protections are more than a campaign promise, they are a reality.

[30] Project On Government Oversight, "POGO's Recommended Good Government Reforms for Presidential Transition Teams," October 16, 2008. http://www.pogo.org/pogo-files/reports/good-government/pogos-recommended-good-government-reforms/gg-ptp-20081016.html.

TESTIMONY OF THOMAS DEVINE,
GOVERNMENT ACCOUNTABILITY PROJECT

before the

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WPRKFORCE AND THE DISTRICT OF COLUMBIA,

SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS COMMITTEE

on S. 372

THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT

June 11, 2009

Thank you for inviting this testimony on legislation to put protection back in the Whistleblower Protection Act (WPA). Until now, the new millennium has been the Dark Ages – unprecedented levels of corruption, sustained by secrecy and enforced through repression. This legislation is necessary to turn on the light just in time. Already this year we have embarked on the largest spending program in government history through the stimulus law. 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 million 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

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* Thanks are due to Kasey Dunton and Sarah Goldmann, who helped with the research to prepare this testimony.

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 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, 293 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 in H.R. 1507, the House companion to S. 372 -- 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 this 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. Just this week the National Air Disaster Alliance joined.

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. Last month 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.

The public's priority support for accountability through whistleblower protection has remained steady. After the 2006 elections, a Democracy Corps poll of swing voters ranked stronger whistleblower protection second in their priorities for the new Congress, only behind the companion issue of ending illegal government spending. Last month, in slightly over 24 hours, public support for the MISC petition was second on the White House Office of Science and Technology Policy website for Transparency in Government priorities in its Open Government Directive project, second only to a ban on secret pending laws. After the 2006 elections Congress reacted by enacting or upgrading five federal statutes to reflect best practices for government contractor and corporate whistleblowers. In February Congress did the same for all recipients of stimulus funds. The Whistleblower Protection Enhancement Act bills (S. 372 and H.R. 1507), however, will be Congress' primary response to the public mandate.

MAKING A DIFFERENCE

There can be no credible debate about how much this law matters. Whistleblowers risk their professional survival to challenge 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, whistleblowers 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, a Security and Exchange Commission (SEC) enforcement attorney, exposed SEC 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 three 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 "Organization 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

[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.

"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 Department of Homeland Security (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 American Civil Liberties Union (ACLU) filed a law suit on his behalf.

Federal 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. 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. MacLean 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 legitimate 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 there is no national security screening mechanism for mechanics who received these fraudulent certificates but have failed to complete the reexamination. 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 reveal 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) OC-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 breaches. 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 to developing 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 of 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 one 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

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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."

"sweetheart" contracts to unqualified political supporters; cost overruns of up to ten times to obtain research already available for an anti-corruption law enforcement training conference; and use of the government's visa power to bring highly suspect Russian women, such as one previously arrested for prostitution during dinner with a top DOJ official in Moscow, to work for Justice Department management.

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

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

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

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

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

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

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

[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).

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 Southwest 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 under the current WPA.

The causes are no mystery. First, hearings are conducted by Administrative Judges (AJ) 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 AJs 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 dollar 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).

AJs 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. A landmark case creating the "irrefragable proof" standard for protection dragged on over a dozen years. *Infra* pp. 20, 21.

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 decisions on the merits since the millennium 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 grounds 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 of the initial disclosures, 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 individual 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 to 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.

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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).

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 for agencies 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.

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 his case 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. On February 10, 2009 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's decision 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 3-200 against whistleblowers in final 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. A digest of all reported decisions since October 1994 is enclosed as Exhibit 6.

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 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 (CSRA) 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

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[6] H.R. Rep. No. 103-769, at 18.
[7] 145 Cong. Rec. 29,353 (1994).

> 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 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 doctrine turns *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

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[8] S. Rep. No. 969, at 8. 95th Cong. 2nd Sess.

[9] 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)

"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 the agency's 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 s/he is merely suspected

of making the disclosure. The employee must prove s/he 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 from permitting retaliation against 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 for anyone to qualify 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 that 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: "[P]ublic 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 federal 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 about filing a claim under the WPA 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 directly conflicted with the January 20, 2002 memorandum 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 since 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 <u>all</u> 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 H.R. 1507 will not have a material fiscal impact.

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 to challenge constitutional violations) (1871)
- Equal Employment Opportunity Act, 42 USC 2000e, (government, 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) (1991)
- Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, 12 USC 1831j(b), (FDIC) (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 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)

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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 original statement posted on whitehouse.gov can be found at http://pogoarchives.org/m/gc/wh-ethics-agenda-20090121.pdf.

- 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 H.R. 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 (SOX) for corporate workers and Equal Employment Opportunity (EEO) for federal employees, proves that the fears have been baseless in those analogous laws. SOX'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 move 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 when considering the EEO amendments, 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 (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

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[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 s/he 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.

[13] Letter from President George Bush to Senator Don Nickles (October 30, 1991).

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 7.

In the whistleblower context, the MSPB will remain the primary forum for WPA cases, and it is capable of effectively handling many of the cases when the proposed changes in H.R. 1507 / S 372 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 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 managers held them accountable for misconduct and poor performance, and that intimidated managers would be paralyzed by their threats. That was a core issue underlying 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.

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[14] Devine, "The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Dissent," 51 *Administrative Law Review* 532, 554-58.

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 are 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 of whistleblower laws empirically confirms that 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 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 demonstrates that there has been no impact on disciplinary/performance actions against employees. In the first five years (2001-05), there were only 12 reported decisions under DC's new whistleblower law. There were 220 reported decisions on adverse and performance based-actions from 1996-2000. There were 220 from 2001-2005.[18]

Unqualified jurors

Another objection currently being raised is that the issues in whistleblower cases are too complex for jurors to understand. In other words, citizens are not smart enough to sort out the complex issues involved in alleged government misconduct. Being diplomatic to a fault, this objection seeks to be a breakthrough of intellectual elitism.

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[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.

[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.

This is not an argument against whistleblower jury trials. It is an argument against enfranchising citizens. We are confident the Committee agrees that Americans who have the intellectual capacity to vote also are smart enough to recognize if and when the government bullies its employees to cover up misconduct the voters would not accept. The objection's premise is that the founders were wrong to provide jury trials for criminal and civil damage cases in the constitution. Jurors hear equally or more complex matters all the time in complex anti-trust or fraud cases. They judge national security issues such as espionage if the defendant is an *individual employee*. The objection presumes citizens only are unfit to judge repression to keep alleged *government* misconduct secret.

There should be little question why whistleblowers view the right to a jury trial as the litmus test for their free speech rights on paper to be genuine the fourth time around. It is a necessity for credibility through consistency. Federal workers aren't going to be impressed with anti-reprisal rights that have second class enforcement compared to the contracting and private sector. Second, it is the foundation for justice by the people, instead of by political institutions with their own agenda. Even if they weren't as smart as administrative or other judges, jurors are the only voice inherently free from political pressure.

NATIONAL SECURITY ISSUES

I will not repeat the detailed analysis from my colleagues on most relevant issues for national security provisions in the final legislation. Five 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 in their agencies. 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 command is the primary value at those institutions, which set the standard for intensity of retaliation.

Second, this is the moment to act – when 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, the House provision primarily is an anti-leaks measure. It offers no protection for public disclosures by national security employees, 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

[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 anti-retaliation provision.

Fifth, predicted difficulties from sensitive evidence already have been carefully scrutinized and rejected, both in practice and from expert review. Objections have been raised that it could threaten national security, if whistleblowers seek to introduce classified or other sensitive evidence. This has not been a problem in other contexts, such as EEO proceedings or criminal trials. Well-established administrative and statutory procedures such as the Classified Information Procedures Act always have sufficed. Even the MSPB has procedures for classified evidence for procedural review over security clearance decisions. If that were not sufficient, the House legislation specifically provides for Inspector General findings on sensitive evidence so whistleblower's reprisal case can proceed if the government finds it necessary to invoke the state secrets privilege.

The General Accountability Office long ago put this red herring in perspective, after a year study finding that 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. GAO/NSIAD-96-6, *Intelligence Agencies: Personnel Practices at the CIA, NSA and DIA Compared with Those of Other Agencies* (hereinafter, "GAO Report").[22] "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." *Id.*, at 45. The National Whistleblower Center's May 14 House testimony last month analyses the study in-depth.

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. It is the reprisal of choice against national security whistleblowers because they cannot defend themselves. Since introduction of this legislation in 2000, 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 U.S. Supreme Court did not provide a green light for any approach, the decision did not ban congressional action. All analysis was that Congress

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[20] ODNI Office of Inspector General, *Critical Intelligence Community Management Challenges* 11 (November 12, 2008).
[21] 31 USC 3729 *et seq.*
[22] Excerpts from this GAO Report are attached to this testimony.

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.*

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 to the WPA. 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.[23]

[23] S. Rep. No. 103-358, at 9-10.

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.[24]

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, as demonstrated in H.R. 1507 and S 372.

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 106-398,10 USC 986, 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.

RECOMMENDATIONS

S. 372 is significant good faith legislation. To achieve its stated objectives the legislation needs the last two legs of the table – coverage for national security employees, and due process through a day in court before a jury to enforce the law's rights. There also are fine tuning revisions, necessary for provisions to operate as intended. GAP is available to assist committee staff on conceptual recommendations, or any of the following more technical 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.

* "all circuits" review when it counts most. Unlike the House bill, S. 372 retains the Federal Circuit's appellate monopoly for the most significant cases, those in which the Office of Personnel Management petitions for normally unavailable appellate review of an employee victory at the MSPB, because the result allegedly threatens the merit system (from management's perspective). These are the test cases that define the law's boundaries, where all circuits review is needed most to prevent the Federal Circuit from gutting the law a fourth time. For example, it was an OPM petition for review of whistleblower John White's *third* MSPB victory that led to the "irrefragable proof" precedent. The all circuits loophole must be closed through an employee choice of forum provision for those test cases, as in the House bill.

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[24] 140 Cong. Rec. 29,353 (1994).

* 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 boundaries for employees covered by the stimulus law's whistleblower provision. The House bill, H.R. 1507, excludes those categories, which are extremely significant sources of vulnerability to large scale, taxpayer-financed misconduct. There must be consistent, best practice accountability safeguards for all federal spending, not just the stimulus.

* privacy and confidentiality for closed case files under contractor whistleblower provisions. This is a key safeguard to prevent the files from being used as dossiers in the stimulus contractor whistleblower provision, and is a cornerstone of complainant rights in the WPA for civil service employees. 5 USC 1213(g). It is not contained in H.R. 1507, and the Senate should address the omission.

* 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 H.R. 1507, or it may backfire and lead to retaliation by exposing whistleblowers who want or need to remain confidential.

CONCLUSION

Whistleblower rights advocates are not asking you to enact new concepts or models. This legislation has evolved and grown over ten years, not only as WPA reform, but as lessons and learned and advances in government contractor and corporate whistleblower law since the millennium. The final step is consolidating those precedents into a modern Whistleblower Protection Act. Consistency is the key criterion at this moment. As a matter of justice, federal employees deserve rights consistent with whistleblower best practices that Congress repeatedly enacted without dissent during the last Congress for government contractor and corporate workers. Why should federal employees who challenge government misconduct have weaker due process than those who challenge discrimination against themselves?

Consistency also is necessary for accountability to the taxpayers. This reform 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. Contractor whistleblowers who challenge stimulus misspending have full court access to enforce whistleblower rights. There is no excuse for the same accountability shield to be second class at government agencies. It 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 Senate should act quickly on this legislation.

Exhibit 1

293 Organizations and Corporations Support Swift Action to Restore Strong, Comprehensive Whistleblower Rights

June 9, 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

Ruth Caplan
Alliance for Democracy

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
Association of American Publishers

Prudence Adler, Associate Executive Director
Association of Research Libraries

Ms. Bobbie Paul, Executive Director
Atlanta WAND (Women's Action for New Directions)

Samuel H. Sage, President
Atlantic States Legal Foundation, Inc.

Jay Stewart, Executive Director
Better Government Association

Jay Feldman, Executive Director
Beyond Pesticides

Matthew Fogg, First Vice-President
Blacks in Government

Chip Pitts, President
Bill of Rights Defense Committee

Diane Wilson, President
Calhoun County Resource Watch

Jane Williams, Executive Director
California Communities Against Toxics

Peter Scheer, Executive Director
California First Amendment Association

Terry Franke, Executive Director
Californians Aware

Reece Rushing, Director of Regulatory and Information Policy
Center for American Progress

William Snape, Senior Counsel
Center for Biological Diversity

Charlie Cray, Director
Center for Corporate Policy

Gregory T. Nojeim, Senior Counsel and Director, Project on Freedom, Security & Technology
Center for Democracy and Technology

J. Bradley Jansen, Director
Center for Financial Privacy and Human Rights

Joseph Mendelson III, Legal Director
Center for Food Safety

Paul Kurtz, Chairman
Center for Inquiry

Robert E. White, President
Center for International Policy

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
Center to Advance Human Potential

Craig Williams, Director
Chemical Weapons Working Group & Common Ground

Phil Fornaci, Counselor
C.H.O.I.C.E.S.

Leonard Akers
Citizens Against Incineration at Newport

Evelyn M. Hurwich, President and Chair
Circumpolar Conservation Union

David B. McCoy, Executive Director
Citizen Action New Mexico

Doug Bandow, Vice President for Policy
Citizen Outreach

Deb Katz, Executive Director
Citizens Awareness Network

Barbara Warren, Executive Director
Citizens' Environmental Coalition

Elaine Cimino
Citizens for Environmental Safeguards

James Turner, Chairman of the Board
Citizens for Health

Michael McCormack, Executive Director
Citizens for Health Educational Foundation

Gerard Beloin
Citizens for Judicial Reform

Laura Olah, Executive Director
Citizens for Safe Water Around Badger

Anne Hemenway, Treasurer
Citizen's Vote, Inc.

Rick Piltz
Climate Science Watch

John Judge
Coalition on Political Assassinations 9/11 Research Project

Zena Crenshaw, 2nd Vice-Chair
3.5.7 Commission on Judicial Reform

Sarah Dufendach, Vice President for Legislative Affairs
Common Cause

Greg Smith, Co-Founder
Community Research

Clarissa Duran, Director
Community Service Organization del Norte

Neil Cohen, Publisher
Computer Law Reporter, Inc.

Joni Arends, Executive Director
Concerned Citizens for Nuclear Safety

Lokesh Vuyyuru, MD, Founder
Concerned Citizens of Petersburg

Daniel Hirsch, Member, Executive Committee
Concerned Foreign Service Officers

Matthew Fogg, President
Congress Against Racism & Corruption in Law Enforcement (CARCLE)

Linda Sherry, Director of National Priorities
Consumer Action

Ellen Bloom, Director of Federal Policy
Ami Gadhia, Policy Counsel
Consumers Union

Bob Shavelson, Director
Cook Inlet Keeper

Neil Takemoto, Director
CoolTown Betta Communities

Tonya Hennessey, Project Director
CorpWatch

Louis Wolf, Co-Founder
CovertAction Quarterly

John Issacs, Executive Director
Council for a Livable World

Anne Weismann, Chief Counsel
CREW, Citizens for Responsibility and Ethics in Washington

Cathy Harris, Founder, Executive Director
Customs Employees Against Discrimination Association

Miho Kim, Executive Director
DataCenter

Mary Elizabeth Beetham, Director of Legislative Affairs
Defenders of Wildlife

Sue Udry, Director
Defending Dissent Foundation

Bob Fertik, President
Democrats.com

Paul E. Almeida, President
Department for Professional Employees, AFL-CIO

Courtney Dillard, Founder
Dillard-Winecoff Boutique Hotel

Ben Smilowitz, Director
Disaster Accountability Project

Dr. Patrick Campbell
Doctors against Fraud

Dr. Disamodha Amarasinghe
Doctors for National Healthcare

James J. Murtagh, Jr., President
Doctors for Open Government

Dr. John Raviotta
Doctors for Reform of JCAHO

Marco Simons, Legal Director
EarthRights International

Bruce Baizel, Senior Staff Attorney
Earthworks

Larry Chang, Founder
EcolocityDC

Thea Harvey, Executive Director
Economists for Peace and Security

Lisa Walker, Executive Director
Education Writers Association

Mike Ewoll, Founder and Director
Energy Justice Network

Gregory Hile
EnviroJustice

Chuck Broscious, President
Environmental Defense Institute

Carol Werner
Environmental and Energy Study Institute

Judith Robinson, Director of Programs
Environmental Health Fund

Eric Shaeffer, Executive Director
Environmental Integrity Project

Peter Montague, Ph.D, Director
Environmental Research Foundation

Jason Zuckerman
The Employment Law Group

Rob Weissman
Essential Information

George Anderson
Ethics in Government Group (EGG)

Bob Cooper
Evergreen Public Affairs

Gabe Bruno
FAA Whistleblowers Alliance

Robert Richie, Executive Director
FairVote

Janet Kopenhaver, Washington Representative
Federally Employed Women (FEW)

Steven Aftergood, Project Director
Federation of American Scientists

Marilyn Fitterman, Vice President
Feminists for Free Expression

Ellen Donnett, Administrative Director
Fluoride Action Network

Andrew D. Jackson
Focus-On-Indiana for Judicial Reform

Wenonah Hauter, Executive Director
Food and Water Watch

Bob Darby, Coordinator
Food Not Bombs/Atlanta

Andy Stahl
Forest Service Employees for Environmental Ethics (FSEEE)

Tom Ferguson
Foundation for Global Community/Atlanta

Ruth Flower, Legislative Director
Friends Committee on National Legislation (Quakers)

Brent Blackwelder, President
Friends of the Earth

Conrad Martin, Executive Director
Fund for Constitutional Government

Gail Naftalin, Owner
Gail's Vegetarian Catering

Karyn Jones, Director
G.A.S.P

Gwen Marshall, Co-Chairman
Georgians for Open Government

Neil Tangri
Global Anti-Incinerator Alliance

Denny Larson, Executive Director
Global Community Monitor

Reede Stockton
Global Exchange

Paul F. Walker, Ph.D., Legacy Program Director
Global Green USA
(The US Affiliate of Green Cross International, Mikhail Gorbachev, Chairman)

Bill Owens, President
The Glynn Environmental Coalition

Tom Devine, legal director
Government Accountability Project

Bill Hedden, Executive Director
Grand Canyon Trust

Molly Johnson, Area Coordinator
Grandmothers for Peace, San Luis Obispo County Chapter

Alexis Baden-Mayer
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

James C. Turner, Executive Director
HALT, Inc. -- An Organization of Americans for Legal Reform

Tom Carpenter, Executive Director
Hanford Challenge

Arthur S. Shoor, President
Healthcare Consultants

Helen Salisbury, M.D.
Health Integrity Project

Vanessa Pierce, Executive Director
Healthy Environment Alliance of Utah (HEAL Utah)

Gerry Pollet
Heart of America Northwest

Ernie Reed, Council Chair
Heartwood

Liz Havstad, Chief of Staff
Hip Hop Caucus

Doug Tjapkes, President
Humanity for Prisoners

Keith Robinson, Interim President
Indiana Coalition for Open Government

Scott Armstrong, Executive Director
Information Trust

Arjun Makhijani, Ph.D., President
Institute for Energy and Environmental Research

Brenda Platt, Co-Director
Institute for Local Self-Reliance

Donald Soeken, President
Integrity International

Michael McCray, Esq., Co-Chair
International Association of Whistleblowers

Mory Atashkar, Vice President
Iranian American Democratic Association

Mark S. Zaid
James Madison Project
John Metz, Executive Director
JustHealth

Brett Kimberlin, Director
Justice Through Music

Elizabeth Crowe, Director
Kentucky Environmental Foundation

Tom FitzGerald, Director
Kentucky Resources Council, Inc.

Kit Wood, Owner
Kit's Catering

James Love
Knowledge Ecology International

Josephine Carol Cicchini
LeapforPatientSafety

Jonathon Moseley, Executive Director
Legal Affairs Council

James Plummer
Liberty Coalition

Greg Mello, Executive Director
Los Alamos Study Group

Dr. Janette Parker
Medical Whistleblower

Ayize Sabater, Organizer
Mentors of Minorities in Education's Total Learning Cic-Tem

Jill McElheney, Founder
Micah's Mission
Ministry to Improve Childhood & Adolescent Health

Ellen Smith, Owner and Managing Editor
Mine Safety and Health News

Mary Treacy, Executive Director
The Minnesota Coalition on Government Information

Helen Haskell
Mothers Against Medical Error

Mark Cohn, President
MPD Productions, Inc.

James Landrith, Founder
The Multiracial Activist

Larry Fisher, Founder
National Accountant Whistleblower Coalition

Matthew Ziemkiewicz, President
National Air Disaster Alliance/Foundation

Tinsley H. Davis, Executive Director
National Association of Science Writers

Jim L. Jorgenson, Deputy Executive Director
National Association of Treasury Agents

Dominick DellaSala, Ph.D., Executive Director of Programs and Chief Scientist
National Center for Conservation Science & Policy

Joan E. Bertin, Esq., Executive Director
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.

Kim Gandy, President
National Organization for Women

Paul Brown, Government Relations Manager
National Research Center for Women & Families

Sibel Edmonds, President and Founder
National Security Whistleblowers Coalition

Pete Sepp, Vice President for Policy & Communications
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

Sr. Simone Campbell, SSS, Executive Director
NETWORK, A National Catholic Social Justice Lobby

Ron Marshall, Chairman
New Grady Coalition

Rick Engler, Director
New Jersey Work Environment Council

Douglas Meiklejohn, J.D., Executive Director
New Mexico Environmental Law Center

Caroline Heldman Ph.D., Director
New Orleans Women's Shelter

Marsha Coleman-Abedayo, Chair
No FEAR Coalition

Nina Bell, J.D., Executive Director
Northwest Environmental Advocates

Alice Slater, Director
Nuclear Age Peace Foundation, New York

David A. Kraft, Director
Nuclear Energy Information Service (NEIS)

Michael Mariotte, Executive Director
Nuclear Information and Resource Service

Jay Coghlan, Executive Director
Nuclear Watch New Mexico

Gwen Lachelt, Executive Director
Oil & Gas Accountability Project

Sean Moulton, Director, Federal Information Policy
OMB Watch

Nikuak Rai, Arts Director
One Common Unity

Rob Kall
Op Ed News

Patrice McDermott, Executive Director
OpenTheGovernment.org

Paul Loney, President
Oregon Wildlife Federation

Ellen Paul, Executive Director
The Ornithological Council

Joe Carson, Chair
P. Jeffrey Black, Co-Chair
OSC Watch Steering Committee

Judy Norsigian, Executive Director
Our Bodies Ourselves

Betsy Combier, President and Editor
Parentadvocates.org

Ashley Katz, MSW, Executive Director
Patient Privacy Rights

Blake Moore
Patient Quality Care Project

Dianne Parker
Patient Safety Advocates

Former Special Agent Darlene Fitzgerald
Patrick Henry Center

Paul Kawika Martin, Organizing, Political and PAC Director
Peace Action & Peace Action Education Fund

Bennett Haselton, Founder
Peacefire.org

Rev. Paul Alexander, Ph.D., Director
Pentecostals & Charismatics for Peace & Justice

Michael McCally, MD, PhD, Executive Director
Physicians for Social Responsibility

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
Project On Government Oversight

Ellen Thomas, Executive Director
Proposition One Committee

David Arkush, Director, Congress Watch
Public Citizen

Jeff Ruch, Executive Director
Public Employees for Environmental Responsibility

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

Gillian Caldwell, Campaign Director
1Sky

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
StopClearCuttingCalifornia.org

Kevin Kuritzky
The Student Health Integrity Project (SHIP)

Daphne Wysham, Co-Director
Sustainable Energy and Economy Network (SEEN)

Jeb White, Executive Director
Taxpayers Against Fraud

Alec McNaughton
Team Integrity

Ken Paff, National Organizer
Teamsters for a Democratic Union

Thad Guyer, Partner
T.M. Guyer & Ayers & Friends

Peter Barnes
Tomales Bay Institute

Marylia Kelley, Executive Director
Tri-Valley CAREs
Communities Against a Radioactive Environment

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
Whistleblowers USA

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

Exhibit 2

FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION
P.O. Box 326 Lewisberry, PA 17339
www.fleoa.org
(717) 938-2300

Representing Members Of:
AGENCY for INTERNATIOANAL DEVELOPMENT
AGRICULTURE-OIG and FOREST SERVICE
COMMERCE
Export Enforcement, OIG
& NOAA Fisheries Law Enforcement
DEFENSE
Air Force - OIG
Army - CID
Defense Criminal Investigative Service
Naval Criminal Investigative Service
OIG
EDUCATION - OIG
ENERGY -OIG
ENVIRONMENTAL PROTECTION AGENCY - CID & OIG
FEDERAL DEPOST INSURANCE CORPORATION – OIG
GENERAL SERVICES ADMIN -OIG
HEALTH & HUMAN SERVICES
Food & Drug Administration & OIG
HOMELAND SECURITY
Border Patrol
Coast Guard Investigative Service
Immigration & Customs Enforcement
Federal Air Marshal
Federal Emergency Management Agency
Federal Protective Service
US Secret Service
Transportation Security Administration
HOUSING & URBAN DEVELOPMENT - OIG
INTERIOR
Bureau of Indian Affairs
Bureau of Land Management
Fish & Wildlife Service
National Park Service
OIG
U.S. Park Police
JUSTICE
Bureau of Alcohol, Tobacco, Firearms & Explosives
Drug Enforcement Administration
Federal Bureau of Investigation
US Marshals Service
OIG
U.S. Attorney's Office-CI
LABOR- OIG & Racketeering
NATIONAL AERONAUTICS & SPACE ADMIN. - OIG
NUCLEAR REGULATORY COMMISSION - OIG
POSTAL SERVICE-OIG & Inspection
RAILROAD RETIREMENT BOARD - OIG
SECURITIES & EXCHANGE COMMISSION - OIG
SMALL BUSINESS ADMINISTRATION - OIG
SOCIAL SECURITY ADMINISTRATION - OIG
STATE DEPARTMENT
Bureau of Diplomatic Security & OIG
TRANSPORTATION-OIG
TREASURY
FINCEN & OIG
Internal Revenue Service - CI
TIGTA
U.S. COURTS (JUDICIAL)
Probation, Parole & Pretrial Services
VETERANS AFFAIRS -OIG

NATIONAL OFFICERS
President
JON ADLER
Executive Vice-President
NATHAN CATURA
Vice President - Operations
LAZARO COSME
Vice President – Agency Affairs
CHRISTOPHER SCHOPPMEYER
Vice President – Membership Benefits
JOHN RAMSEY

May 11th, 2009

President Barack H. Obama
United States of America
Washington, DC 20500

Dear President Obama:

As the National President of the Federal Law Enforcement Officers Association (FLEOA), a 26,000 member nonprofit, nonpartisan professional law enforcement association, I am writing to you regarding our support for The Whistleblower Protection Enhancement Act (H.R. 1507).

In the past eight years, too many of my members - dedicated, patriotic federal law enforcement officers - have fallen victim to the intolerance and self-serving short sightedness of certain officials in the executive branch. I refer to those executive branch officials who either felt threatened or inconvenienced by federal law enforcement officers who bravely stepped forward to report waste, fraud or abuse under the Whistleblower Protection Act. Unfortunately, these brave officers were rewarded with severe reprisals that shattered their lives. Now it is time to heal those wounds and restore the federal law enforcement community's confidence in the integrity of the whistleblower process. My members are the dedicated guardians of democracy, and they should be protected by the executive branch administration.

The Whistleblower Protection Enhancement Act (H.R. 1507) is the first step necessary to restore trust and confidence in Federal Law Enforcement. H.R. 1507 represents an opportunity for the nation to establish a unified and fine tuned method by which Federal Law Enforcement Officers (and all other national security employees) may report misconduct and

receive appeal for retribution used against them to discourage truth. H.R. 1507 does not require immediate exposure to the public of all national security concerns; instead, it merely requires that there be impartial rules and due process to protect ethical law enforcement and intelligence agency professionals (and by extension the United States)from coercion and retaliation. The Federal Law Enforcement Officer Association (FLEOA) believes that it is a critical matter of national security that our nation takes immediate and decisive action to reverse the de-facto practice of government misconduct without consequence.

H.R. 1507 is more than an enhancement to the individual protections afforded to those who come forward to report wrongdoing. It establishes an immutable system of checks and balances against misconduct that would otherwise go unreported. It is a vital tool that the President of the United States can present to the American people as indisputable proof that the current administration stands behind its pledge to restore the honor of government. H.R. 1507 is a clear message to all that the United States Government will hold all of its agents and agencies individually accountable to oversight and legal action for misconduct. It is a first step towards restoring the United States to its position as the protector of the unalienable rights of all men.

President Abraham Lincoln best embraced the spirit of this when he stated in his first annual message to Congress, "It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.

Respectfully,

Jon Adler

Jon Adler
National President

Exhibit 3

May 11, 2009

President Barack H. Obama
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear President Obama:

Like millions of Americans we, the undersigned national security whistleblowers, are inspired by the bold and creative measures you have taken to put people back to work while at the same time re-engineering government to make it more responsive to people's needs and more accountable to voters and taxpayers.

We are particularly heartened by your special relationship with America's young people and by your call on them to make a significant contribution to their country through public service.

For those reasons and more, we write you today to ask that you take concrete steps in favor of national security whistleblowers that will help to restore time-honored values of openness, honesty and transparency to the federal service – and help those entrusted with the nation's secrets to do their jobs in a manner consistent with the public interest.

A call to public service without needed whistleblower protection can only - at some future date - put at risk those most inspired by your leadership.

We the undersigned feel we have a special bond with you and your Administration, given your long-standing support for federal employee free speech and against acts of bureaucratic retaliation against those who dare to "commit the truth." We have been thrilled by your strong statement of support for whistleblowers, both during your 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.

In the years before your presidency, each one of us undertook a largely solitary battle in favor of the values we share with you and against the kind of wrongdoing that resulted in many of the American people flocking to your standard last year. And in doing so, each one of us, together with our families, and sometimes our friends and colleagues, have paid a heavy price for our ethical dissent.

While we national security whistleblowers made critical disclosures that exposed corruption and protected life at the expense of our own careers and financial security, our federal peers took the safe route by turning a "blind eye" and remaining silent, so that their careers could advance.

The steps we are asking that you take are a necessary remediation for past wrongs and would be a clear signal to those now heeding your call for service that by adhering to the standards you have so clearly embraced, they will not become – as we did not so long ago – victims of bureaucratic wrongdoers, who may still feel that they can get away with continued misdeeds.

As the federal government of necessity grows in response to the many crises that you have inherited from your predecessor, the lack of protection currently afforded to whistleblowers means that federal workers – the front line in the fight against fraud and waste, and best guarantee that taxpayer dollars are spent wisely and government works effectively – must either sit on the sidelines or, still forced to look over their shoulders for signs of reprisal, risk their careers.

Not only did the U.S. Office of Special Counsel fall into ridicule under the stewardship of George W. Bush appointee Scott Bloch. In the last nine years, the Merit Systems Protection Board (MSPB), charged with adjudicating federal worker claims, has found only one case of illegal retaliation in 56 decisions on the merits. And only three whistleblowers out of 212 prevailed in decisions on the merits in the Federal Circuit Court of Appeals since October 1994, when the current whistleblower "protection" law last was modified.

We the undersigned, national security whistleblowers from agencies across the federal government, know the special vulnerability people like us have in trying to do right by our principles and by the country we love. And we still do not have any real safeguards against retaliation. Instead, for protecting this nation, we and others face having our security clearances yanked, as well as a rosary of humiliation, demotions, threats, punitive polygraphs and myriad other intimidatory measures. To be sure, these are meant not only to destroy our careers – and in the process our physical and mental well being, our marriages and the tranquility necessary for nurturing our families in a wholesome environment. They also serve as a warning to others – that the price is high, too high, and the possibility for real vindication remote. Even if Inspectors General, Congressional committees, the reputable news media, or other outside groups are fully able to corroborate our complaints, wrongdoers are mostly allowed to retain their posts – and many even receive promotions.

For all that you have accomplished in little more than 100 days in office, we are sure you would agree that ensuring true transparency and accountability means the enforcement of a zero-tolerance policy for repression and retaliation, and the guaranteeing of the legal rights of every federal employee.

We urgently need a law to protect national security whistleblowers from retaliation, including those in agencies where even paper protections do not exist. We ask you to make one of your highest priorities support for whistleblower protection legislation that would end our second-class status compared to that of all other federal employees, contractors, and private sector workers who report threats to public health and safety, violations of laws or regulations, or waste, fraud and mismanagement. We also ask that you seek the criminalization of bureaucratic retaliation against whistleblowers, whose only "crime" is the exercise of their employee free speech rights for the common good.

Finally, we respectfully request that for those of us who have lost jobs, reputations and significant professional opportunities because we stood fast in favor of the principles you maintained even before you announced your presidential candidacy, consideration be given to "making us whole" once again. In giving us the opportunity to restore our often shattered lives, others will know that better times are in store for people who tell truth to power on behalf of the American people.

With warmest best wishes to your and to your family, we remain,

Martin Edwin Andersen
Former senior advisor for policy planning at the Department of Justice's Criminal Division; Winner of the U.S. Office of Special Counsel's 2001 "Public Servant Award"

Mark Danielson
Department of Energy SRT whistleblower

Michael DeKort
Former Lockheed Martin program manager/systems engineer; exposed waste, fraud and abuse on Coast Guard Deepwater program and major security/safety issues

Bogdan Dzakovic
Aviation Security whistleblower regarding the 9-11 attacks, as well as current issues within the Transportation Security Administration

Richard E. Hoskins II
Formerly of the Federal Air Marshal Service; Only Non-Air Marshal to report corrupt behavior and violations of veterans rights to the Office of Special Counsel and Congress

Robert J. MacLean
Former Federal Air Marshal, U.S. Department of Homeland Security
National Whistleblower Liaison, Federal Law Enforcement Officers Association (FLEOA)

Spencer A. Pickard
Former Federal Air Marshal, U.S. Department of Homeland Security

Coleen Rowley
Retired FBI Agent (retired 2004) and former Minneapolis FBI Division Legal Counsel

Craig R. Sawyer
Former Tier-1 level U.S. Navy SEAL Operator, decorated for "Heroic Service" in combat;
"Original 33" Air Marshal and whistleblower, as an ATSAIC (manager) in the Federal Air Marshal Service, against gross mismanagement and retaliation.

Lt. Eric N. Shine
Graduate of the United States Merchant Marine Academy at Kings Point [1991]; Federal maritime engineering watch officer

George R. Taylor
U.S. Department of Homeland Security/Federal Air Marshal Service

Frank Terreri
Federal Law Enforcement Officers Association director of labor relations; FLEOA Federal Air Marshal Agency President

Russell D. Tice
Former intelligence analyst and capabilities operations officer for Special Access Programs (SAP) Information Warfare, National Security Agency (NSA)

(Non-National Security Whistleblower Category)

Peter D. Nesbitt
FAA Whistleblower Alliance

Exhibit 4

February 12, 2007

Memorandum
From: Tom Devine, ext. 124; whistle47@aol.com
Re: Merit Systems Protection Board whistleblower decisions since 2000

Below is an index of all Merit Systems Protection Board decisions on the merits for Whistleblower Protection Act appeals and Individual Rights of Action since 2000. Congress strengthened the law in October 1994 amendments. The track record is 3-53 against whistleblowers. They are indexed below. For purposes of this memorandum, "decisions on the merits" means a ruling whether an employee's free speech rights were violated. It does not include rulings on cases disposed or remanded because of issues like harassment not covered under the law, timely filing, improper presentation of legal briefs or due process issues whose correction requires further fact finding.

It may be helpful to preview the abbreviated format for each listed case. At a minimum, it will include the legal citation, (and where possible) identify the employee's position and the legal element why any given employee lost. The elements will be broken down into four categories: 1) Protected speech ("PS"): whether the employee is entitled to any reprisal protection for his or her disclosures. 2) Knowledge ("K"): whether an official with responsibility to recommend or take a relevant personnel action knew or should have known of the whistleblowing disclosure. 3) Nexus ("N"): whether the disclosure was a contributing factor to alleged discriminatory treatment the employee is challenging. 4) Clear and convincing evidence ("CCE") for independent justification ("CCE"): whether that degree of evidence proves the agency would have taken the same action for innocent, independent reasons even if the whistleblower had remained silent.
Many of the decisions are highly cursory, but where sufficient facts about whistleblowing are included to be meaningful, that dimension will be added.

An overview of trends can be insightful. For reported and unreported cases, of rulings sufficiently explained to identify the dispositive element, the court based rulings against whistleblowers on the following elements: 1) protected speech: 21; knowledge:6; nexus: 6; clear and convincing evidence: 21. In two decisions, the board did not disclose the element(s) on which it based decisions against employees.

2000 (0-2)

Easterbrook v. Department of Justice, 85 M.S.P.R. 60 (2000) (Correctional Counselor)(K) Disclosed sanitation breakdown at prison to OSHA.

Chianelli v. Environmental Protection Agency, 86 M.S.P.R. 651 (2000) (Environmental Protection Specialist) (PS) Despite relevant personal responsibilities, complaints about lack of return on spending were generalized and without evidence, and were rebutted by OIG conclusions.

2001 (0-4)

Kinan v. Department of Defense, 87 M.S.P.R. 561 (2001)(EEO Specialist)(CCE) Alleged breakdown in compliance with employment discrimination laws.

Redschlag v. Department of Army, 89 M.S.P.R. 589 (2001) (Environmentalist)(CCE)

Gerges v. Department of Navy, 89 M.S.P.R. 669 (2001) (Chemist)(CCE)

Comito v. Department of Army, 90 M.S.P.R. 58 (2001) (Supervisory Financial Administrator)(CCE) Challenged $500,000 in ongoing cost overruns from unauthorized treatment in Pacifc medical facility, and unauthorized billing practices. Without explanation, concluded that a broad range of harassment would have occurred for independent reason of allegedly false statement on SF-171 job application, despite finding the employee previously had disclosed and explained the discrepancy, and the agency had not acted on it until she blew the whistle.

2002 (2-3)

Larson v. Department of Army, 91 M.S.P.R. 511 (2002) (Motor Vehicle Operator)Blew whistle on light bulb in a storage area containing explosives. **Upon remand from the Federal Circuit Court of Appeals, found a violation of WPA, and canceled one day suspension and lowered performance appraisal.**

Laberge v. Department of Navy, 91 M.S.P.R. 585 (2002) (Environmental engineer)(PS) Reprimanded after disclosed illegal, concealed release of PCB's. Protection denied, because making those disclosures were part of his job duties.

Harvey v. Department of Navy, 92 M.S.P.R. 51 (2002) (Sheet Metal Worker)(PS) No protected speech for referenced whistleblowing in a personnel file, because the file itself did not contain supporting evidence for referenced disclosures. Therefore, nonselection for promotion based on reading of whistleblowing reference in personnel file did not violate WPA. This opens the door to fire whistleblowers based on referencing to their dissent in dossiers, which almost never include the whistleblower's evidence of government misconduct.

Poster v. Department of Veterans Affairs, 92 M.S.P.R. 501 (2002) (Psychiatrist)(CCE) Disclosed substandard medical and psychiatric care violating accreditation standards.

Miller v. Department of Veterans Affairs, 92 M.S.P.R. 610 (2002) (Financial Administrator) Disclosed significant number of employees on payroll without funding for their salaries. **Board dismissed retaliatory suspensions and demotions.**

2003 (0-8)

Clark v. Department of Army, 93 M.S.P.R. 563 (Contract Specialist) (N) Disclosed ethical violations in contract award.

Sutton v. Department of Justice, 94 M.S.P.R. 4 (Administrative Service Specialist) (CCE) Disclosed falsified timekeeping records, resulting in improper payments. Decision based on independent justification, without considering evidence of whistleblowing and retaliation.

Johns v. Department of Veterans Affairs, 95 M.S.P.R. 106 (Criminal Investigator) (CCE) Disclosed false firearms qualification scores for law enforcement employees.

Johnson v. Department of Defense, 95 M.S.P.R. 192 (Sales Store Checker) (K) Disclosed rats and other sanitary violations for produce in Pentagon retail store.

Salinas v. Department of Army, 94 M.S.P.R. 54 (Sandblaster) (N) Disclosed evidence of fake injuries in workers compensation.

White v. Department of Air Force, 95 M.S.P.R. 1 (Computer Specialist) (PS) Disclosed counterproductive results from advanced computer training contract that duplicated and contradicted services training already provided by accredited universities, Although an independent management review backed concerns and program was canceled, whistleblower did not have a reasonable belief he was disclosing evidence of mismanagement, because reasonable people could disagree. "Evidence that the agency changed the program to conform to the appellant's criticism, as well as criticism by the educational institutions, does not support the conclusion that the appellant reasonably believed the agency committed gross mismanagement when it implemented the program in 1992." *White*, at 14.

Brosseau v. Department of Agriculture, 97 M.S.P.R. 637 (Supervisory auditor)(No information provided why whistleblower claim denied.) Disclosed time and attendance reporting violations of a GS-15 manager.

Iyer v. Department of Treasury, 95 M.S.P.R. 239 (IRS attorney) (K) Disclosed generic underpayments to taxpayers on several exemptions.

2004 (0-10)

Holloway v. Department of Interior, 95 M.S.P.R. 650 (CCE) Neither whistleblowing nor Board's basis to uphold Administrative Judge's independent justification ruling are provided.

Hawkes v. Department of Agriculture, 95 M.S.P.R. 664 (K) (Laboratory Manager) Disclosed improper practices for control of blood borne pathogens.

Kleckner v. Department of Veterans Affairs, 96 M.S.P.R. 331 (Physician) (PS) Disclosed six month backlog of colon cancer screening tests. No explanation why failed to constituted protected speech.

Grubb v. Department of Interior, 96 M.S.P.R. 361 (Production Accountability Technician) (CCE) Disclosed time and attendance violations. Board held that it was an *independent* justification from whistleblowing to fire her, because she violated orders not to gather the evidence of cheating or discuss it with co-workers.

Grubb v. Department of Interior, 96 M.S.P.R. 377 (Despite identical captions, case refers to a different human being than above citation.) (Petroleum Engineer Technician) (CCE) Disclosed to Inspector General misappropriation of funds for inspection and enforcement, and failure to verify oil and gas volumes on federally-leased lands.

Hood v. Department of Agriculture, 96 M.S.P.R. 438 (CCE) Disclosed fraudulent and fictitious loan practices to Inspector General that were confirmed. Without findings on protected speech or retaliation, affirmed on independent justification.

Ray v. Department of Army, 97 M.S.P.R. 101 (CCE) (Executive Assistant) Disclosed illegal surveillance and Privacy Act violations. Without findings on whistleblowing or retaliation, overturned on factual grounds the Administrative Judge's ruling that the agency did not prove its independent justification defense by clear and convincing evidence.

Powers v. Department of Navy, 97 M.S.P.R. 554 (Supervisory police office) (N) Disclosed use of decertified dogs to detect explosives. OverturnsAdministrative Judge ruling on factual grounds.

McCollum v. National Credit Union Admin., 97 M.S.P.R. 479 (CCE)

Downing v. Department of Labor, 98 M.S.P.R. 64 (PS) (Economist) Evidence of overall adverse impact on rights from an office closing was not sufficient for abuse of authority, without evidence on impact of particular individuals.

2005 (0-8)

McCorcle v. Department of Agriculture, 98 M.S.P.R. 363 (PS) Veterinary Medical Officer

Flores v. Department of Army, 98 M.S.P.R. 427 (PS) (Jig and Fixture Builder) Otherwise protected whistleblowing disclosures only are credited as protected activity for exercise of appeal rights under 5 USC 2302(b)(9) if disclosed during litigation. This means specific Whistleblower Protection Act anti-retaliation rights are unavailable.

Smart v. Department of Army, 98 M.S.P.R. 566 (PS) (Security Guard) Publicly charged violation of requirement for mandatory special training.

Simmons v. Department of Air Force, 99 M.S.P.R. 28 (CCE) (IT Specialist) Disclosed violations of computer security.

Bacas v. Department of Army, 99 M.S.P.R. 464 (K) (Industrial Engineer) Without discussing the nature of whistleblowing, case dismissed for lack of knowledge about protected activity.

Kirkpatrick v. Department of Veterans Affairs, 100 M.S.P.R. 214 (PS)

Tatsch v. Department of Army, 100 M.S.P.R. 460 (K) (Clinical Nurse) Disclosed inadequacies in orientation and ambulance care for late term pregnancies that had led to adverse consequences for patients.

Gryder v. Department of Transp., 100 M.S.P.R. 564 (PS) (Railroad Safety Inspector) Disclosed hiring of unqualified personnel to a supervisor, OPM and congress. Board dismissed disclosures to supervisor as too generalized, without addressing those to outside audiences.

2006 (0-7)

Gonzales v. Department of Navy, 101 M.S.P.R. 248 (CCE) (Detective) Reported that Rapid Response Team had improperly pointed automatic weapons at a family, and charges were confirmed. His hours were then changed, and overtime removed. Without considering retaliation, the Board dismissed on independent justification. The Board did not apply its "clear and convincing evidence" criterion of whether the reassignment was reasonable, because it was not "disciplinary." Only one of eleven listed personnel actions in current law *is* disciplinary. On its criterion of disparate treatment 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 the Board said that did not count, because there is an unexplained difference between unexplained retaliatory animus and retaliatory motive. Therefore, the Board concluded that the agency proved by clear and convincing evidence it would have taken the same action absent whistleblowing.

Page v. Department of Navy, 101 M.S.P.R. 513 (PS) (Radio Electronics Technician) Put in ship's brig and fired after disclosures of alleged occupational safety violations and false statements. Board said disqualified because prepared in context of a grievance.

Rzucidlo v. Department of Army, 101 M.S.P.R. 616 (PS) (Physical Science Technician) Disclosures about being victimized personally by abusive behavior do not qualify for WPA protection, because the law only protects those who challenge misconduct affecting general public. Without explanation, this reverses a longstanding MSPB doctrine that if harassment does not technically qualify as a listed personnel action to trigger prohibited personnel practice rights, an employee can safely blow the whistle on it as an abuse of authority.

Sinko v. Department of Agr., 102 M.S.P.R. 116 (PS) (Human Resources Specialist)

Santos v. Department of Energy, 102 M.S.P.R. 370 (CCE)(Student Trainee) No explanation why upholds ALJ's undisclosed findings on undisclosed independent justification.

Chambers v. Department of Interior, 103 M.S.P.R. 375 (PS) (Chief of Park Service Police) Disclosures about increased dangers to public from impact of budget shortages such as not guarding monuments at night are not protected speech, when
made in connection with mere policy agreements about which reasonable people may disagree. Warnings of public safety threats do not qualify as disclosures of substantial and specific danger to public health or safety if made in the context of a policy disagreement. MSPB Vice Chair Sapin dissented vigorously that the disclosures should qualify at least as information evidencing a reasonable belief of a public health and safety threat. The Federal Circuit also late agreed that Chief Chambers had made protected whistleblowing disclosures, and remanded the case to consider the independent justification affirmative defense.

Tuten v. Department of Justice, 104 M.S.P.R. 271 (PS) Disclosures of falsified records and illegal transfer of sick inmates out of the above named institution in order to pass program review" were too non-specific to qualify as protected WPA disclosures.

2007 (1-7)

Jensen v. Department of Agriculture, 104 M.S.P.R. 379 (PS) (Supervisory Computer Specialist) Otherwise-protected whistleblowing disclosures made in the context of EEO testimony are not protected by the WPA. Without explanation, the Board rejected disclosures to OIG of alleged fraud as not satisfying reasonable belief test for disclosures of illegality. Without explanation, the Board also rejected that there was a reasonable belief for disclosures that an official signing incorrect and possibly illegal contract invoices and failing to enforce oversight duties evidenced an abuse of authority.

Durr v. Department of Veterans Affairs, 104 M.S.P.R. 509 (PS)(doctor, Chief of Nephrology at a VA Medical Center) Disclosure that can't handle new patients because there are no beds for more and computer hasn't worked for 10 days wasn't specific enough to qualify for WPA coverage. It was too late to demonstrate a reasonable belief for that disclosure by filling in more details after getting fired for making it originally.

Cook v. Department of Army, 105 M.S.P.R. 178 (CCE) (Flight Training Instructor) Disclosed OSHA safety violations. Board overturns a favorable Administrative Judge ruling without analyzing evidence of protected whistleblowing or retaliation. Concludes agency has proven independent justification by clear and convincing evidence because the official who fired the whistleblower had no motive to retaliate since he was new to his position, despite knowledge and critical remarks about the whistleblower's history of raising problems and despite acting on a file prepared by supervisory staff targeted by the whistleblower's disclosures. Board ruled that this satisfied the clear and convincing evidence standard, without considering the other two criteria.

Azbill v. Department of Homeland Sec., 105 M.S.P.R. 363 (CCE) (Border and Customs Officer) Disclosed failure to inspect and enforce security and excessive drinking rules for private aircraft. Without analyzing whistleblowing or retaliation, the decision is based on independent justification.

Davis v. Department of Defense, 106 M.S.P.R. 560 (N) (Teller)

Shope v. Department of the Navy, 106 M.S.P.R. 590 (PS)

Armstrong v. Department of Justice, 107 M.S.P.R. 375 (N) (Program Analyst) Disclosures included racial discrimination and lack of performance standards. **Relief granted for denial of promotion but denied on denial for compensatory time.**

2008 (0-4)

Rodriguez v. Department of Homeland Security, 108 M.S.P.R. 76 (PS) (Deportation Officer) He disclosed that an alien detainee who had been maced and whose neck had been broken by officers had to go to hospital, and was fired. He did not provide full extent of misconduct in initial disclosure, due to fear of retaliation. While provided all details subsequently in court before proposed termination, the Board did not consider the disclosure in court as protected whistleblowing.

Fisher v. Environmental Protection Agency, 108 M.S.P.R. 296 (CCE) (Accountant) He disclosed untrustworthy data due to reliance on untested accounting procedures applied by untrained personnel. Without analyzing the whistleblowing or retaliation or appellant's arguments on independent justification, the Board made conclusory findings that an independent basis had been proved by clear and convincing evidence.

Carson v. Department of Energy, 109 M.S.P.R. 213 (N) (Engineer)

Boechler v. Department of Interior, 109 M.S.P.R. 542 (PS) (Forestry Technician) Disclosures to Senate office of premature termination of a government contract due to personal animosity were conclusory and not protected, because the communication did not attach or reference available evidence behind the charges.

2009 (0-3)

Chambers v. Department of Interior, 2009 WL 54498 (CCE) (Park Service Police Chief) After Federal Circuti remand, found that she would have been fired anyway, because – 1) she protested an abuse detail of subordinate "outside the chain of command," without considering that the allegation accused her of protected activity; 2) animus toward Chief Chambers predated her whistleblowing disclosures, so there was no new motive to retaliate; and 3) she would have been fired for violating a general gag on communicating about the budget, so her specific whistleblowing budget-related disclosures did not count when she violated the gag order by communicating them.

Pendelose v. DOD, 2009 MSPB 16. (CCE) On petition of the Office of Personnel Management, without explaining why it was wrong previously, reversed an earlier favorable decision. Employee disclosed alleged waste and safety violations to the Inspector General, and did not cooperate with an internal investigation after what Board initially were legitimate concerns that it

was obstructing the IG's efforts. Board did not consider whether the employee would have violated the law by obstructing the pending investigation.

Wadhwa v. DVA, 2009 WL 648507 (2009) (CCE) (physician) He disclosed safety violations for doctors against pathological or violent patients. Found clear and convincing evidence of independent justification, without considering relevant arguments by whistleblower.

Exhibit 5

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT J. MACLEAN,
Appellant

DOCKET NUMBER
SF-0752-06-0611-I-2

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency

BRIEF OF THE GOVERNMENT ACCOUNTABILITY PROJECT (GAP)
AS AMICUS CURIAE

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INTEREST OF THE AMICUS

The Government Accountability Project (GAP) is a non-partisan, non-profit public interest law firm specializing in legal advocacy on behalf of "whistleblowers" – government and corporate employees who expose illegality, gross waste and mismanagement; abuse of authority; substantial or specific dangers to public health and safety; or other institutional misconduct undermining the public interest.

GAP's efforts on behalf of federal whistleblowers are based on the belief that a professional and dedicated civil service is essential to an effective democracy. The link between the government and the public it serves, civil servants are the foundation of a responsible, law-abiding political and corporate system. However, when whistleblowers encounter retaliation, poor performance reviews, and even discharge for speaking truth to power, that link is severed. While laws written to protect federal employees from Prohibited Personnel Practices (PPPs), particularly whistleblower reprisals, are an important first step, those laws cannot fulfill their intended purpose if they remain unenforced. It is GAP's firm belief that, in order to protect both the independence of the civil service and the responsiveness of federal institutions to the citizenry, the government must operate in an open environment where truth and accountability are not only encouraged, but respected. The dedicated members of the federal civil service must not be forced to choose between their jobs and their integrity.

GAP has substantial expertise on protecting government employees' rights against the Office of Special Counsel. GAP attorneys have testified before Congress over the last two decades concerning the effectiveness of existing statutory protection, filed numerous amicus curiae briefs on constitutional and statutory issues relevant to whistleblowers, co-authored the

model whistleblower protection laws to implement the Inter-American Convention Against Corruption, and led legislative campaigns for a broad range of relevant federal laws, including the Whistleblower Protection Act of 1989, P.L. No. 101-12, 103 Stat. 16 (April 10, 1989) (WPA) and subsequent 1994 amendments, as well as the employee rights provisions in the Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A.

BACKGROUND AND PROCEEDINGS BELOW

On February 10, 2009 Merit Systems Protection Board ("MSPB" or "Board") Administrative Judge ("AJ") Craig Berg certified an interlocutory appeal to the full Board in *MacLean v. Department of Homeland Security,* MSPB No. SF-0752-06-0611—I-2 (February 10, 2009). ("MacLean interlocutory certification") While defendant Transportation Security Administration ("TSA") sought review of several alleged errors not addressed by *amici*, the AJ *sua sponte* added a third issue: "Whether a disclosure of information that is SSI can also be a disclosure protected by the Whistleblower Protection Act under 5 U.S.C. section 2302(b)(8)(A). *Amici* urge the Board to reverse the AJ's initial ruling on that issue and unequivocally reaffirm a constant premise of the law for over 30 years: agency rules or regulations may not cancel protection for public disclosures that otherwise satisfy the Whistleblower Protection Act's ("WPA") requirements.

The relevant factual context is straightforward and not at issue for concerns raised by *amicus*. In July 2003 TSA Federal Air Marshal Robert MacLean received an order from the Federal Air Marshals Service ("FAMS") canceling air marshal coverage on all overnight flights, from August 2 through September 30, the end of the fiscal year. FAMS sent its employees the

order at the same time TSA's parent agency, the Department of Homeland Security (DHS), had issued a terrorist alert of a planned airlines hijacking. The order did not have any marking that it was classified, or otherwise provide prior notice for any restriction on its distribution.

Mr. MacLean believed the order was illegal and dangerous. When his internal protests were rebuffed, he shared the order with a media representative as part of a whistleblowing disclosure. The story quickly spread, sparking protests from Congress. FAMS then rescinded the order, claiming that it had been a mistake. Air Marshal coverage was not interrupted. Two and a half years later, however, FAMS terminated Mr. MacLean, charging that he had publicly disclosed Sensitive Security Information (SSI) prohibited by agency regulation.[25]

Mr. MacLean subsequently filed suit under the Whistleblower Protection Act, contending, *inter alia,* that agency regulations may not cancel his statutory free speech rights. TSA responded that in the Aviation Transportation and Security Act (ATSA) Congress had directed the agency to issue regulations "prohibiting the disclosure of information ... if the Under Secretary decides that disclosing the information would ... be detrimental to the security of transportation." 49 USC 114(s)(1). TSA contended that because it issued SSI regulations pursuant to that authority, terminating Mr. MacLean for violating SSI *rules* complied with 5 USC 2302(b)(8). That provision, the statement of WPA free speech rights, protects public disclosures meeting other statutory requirements unless the information disclosed is classified[26] or its release is "specifically prohibited by law."[27] The AJ agreed with the agency.

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[25] Mr. MacLean hotly contests the imposition of ex post facto liability, as well as the timing and applicability of SSI regulations. While *amici* are sympathetic, this submission is limited to the ruling's destructive impact on the WPA if upheld.

[26] There is no contention that Mr. MacLean disclosed classified information.

[27] Section 2302(b)(8) provides as follows: Any employee who has authority to take, direct others to take,

In a Request for Reconsideration, Mr. MacLean protested that only statutes qualify as "law" under the WPA, not agency regulations. He added that the statutory provisions were not specific, another prerequisite to interfere with WPA public free speech rights. The AJ rejected Mr. MacLean's protest, reasoning as follows:

> I agree with the agency that it would be an absurd result for Congress to direct TSA to issue regulations prohibiting the disclosure of information that is a threat to transportation security, and at the same time to intend that a TSA employee be shielded from discipline by the WPA for violating the regulations by
> Disclosing such information.

(MacLean interlocutory certification, at 9) He affirmed his original resolution of the issue and certified it for the Board's interlocutory review. *Id.*, at 10.

ARGUMENT

Since Congress enacted whistleblower rights in section 2302(b)(8) with passage of the Civil Service Reform Act of 1978, only one MSPB case has carefully considered this issue. *Kent v. General Services Administration*, 50 MSPR 536 (1993). The Board rejected GSA's contention that the WPA did not apply to an employee's public disclosure, despite a nondisclosure rule in Federal Acquisition Regulations that Congress by statute had authorized

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recommend, or approve any personnel action, shall not, with respect to such authority--
(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of-- (A) any disclosure of information by an employee or
applicant which the employee or applicant reasonably believes evidences-- (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if
such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or (B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes
evidences-- (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

the Administrator to issue. The Board reasoned that a statutory delegation to issue regulations was not the same as a specific, statutory disclosure prohibition that could override WPA free speech rights.

There has been almost no case law developing a doctrine to interpret this issue, because there are no grounds for confusion. Congress made a clear, unequivocally expressed decision in 1978 that agency regulations are not relevant for non-classified disclosures otherwise protected by section 2302(b)(8). Only Congress can cancel WPA public free speech rights, and even then only through specific restrictions. In three decades there only has been one unsuccessful challenge to that premise, over 15 years ago.

The AJ reasoned that it would be "absurd" to deny TSA's Under Secretary the authority to issue whatever secrecy regulations he deemed necessary, since Congress ordered him to issue them. As discussed below, that judgment amounts to ending the long-standing WPA cornerstone that agencies have no discretion to override the protections afforded to employees under the WPA for non-classified disclosures of information that the employee reasonably believes evidence waste, fraud, abuse, illegality, or dangers to the public.

I.THE AJ'S DECISION CANNOT CO-EXIST WITH CONGRESSIONAL INTENT OR PUBLIC POLICY UNDERLYING THE WHISTLEBLOWER PROTECTION ACT.

Since 1978, when Congress initially created whistleblower protection in 5 USC 2302(b)(8), it has unequivocally stated its intention to create a safe channel for employees to disclose evidence of agency illegality or other misconduct. In an August 24, 1978 Dear Colleague letter, a bi-partisan coalition of seventeen Senators representing both the Senate's

conservative and liberal wings succinctly summarized the purpose of the final legislative package,

> [to] vindicate the Code of Ethics for Government Service, established by Congress twenty years ago, which demands that all federal employees "Uphold the Constitution, laws and legal regulations of the United States and all governments therein, and never be a party to their evasion" and "Expose corruption wherever discovered." Under our amendment, an Employee can fulfill those obligations without putting his or her job on the line.

(Reprinted in 124 Cong. Rec. S14302-03 [daily ed. Aug. 24, 1978]) As the Senate Committee Report, S. Rep. No. 969, 95th Cong., 2d Sess. at 8, reprinted in 1978 USCCAN 2725, 2733, emphasized,

> Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast federal bureaucracy, it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth.

Senator Charles Grassley (R.-IA.), an original sponsor of the Whistleblower Protection Act, applied that purpose directly to congressional oversight:

> As a Senator, I have conducted extensive oversight into virtually all aspects of the Federal bureaucracy. Despite the differences in cases from agency to agency and from department to department, one constant remains: the need for information and the need for insight from whistleblowers. This information is vital to effective congressional oversight, the constitutional responsibility of Congress, in addition to legislating.
>
> Documents alone are insufficient when it comes to understanding a dysfunctional bureaucracy. Only whistleblowers can explain why something is wrong and provide the best evidence to prove it. Moreover, only whistleblowers can help us truly understand problems with the culture of Government agencies, because without changing the culture, business as usual is the rule.

153 Cong. Rec. S6034 (daily ed., May 14, 2007).

To defend this policy against hostile activism by administrative and judicial institutions responsible to enforce the Whistleblower Protection Act, Congress has worked since 1999 to restore its original mandate. The 2007 Senate Committee Report on S. 274 applied the effort to national security whistleblowers such as Mr. MacLean.

> The Federal Employee Protection of Disclosures Act is designed to strengthen the rights and protections of federal whistleblowers and to help root out waste, fraud, and abuse. Although the events of September 11, 2001, have brought renewed attention to those who disclose information regarding security lapses at our nation's airports, borders, law enforcement agencies, and nuclear facilities, the right of federal employees to be free from workplace retaliation has been diminished as a result of a series of decisions of the Federal Circuit Court of Appeals that have narrowly defined who qualifies as a whistleblower under the WPA and what statements are considered protected disclosures.

S. Rep. No. 110-32 (110th Cong., 2d. Sess.) at 2.

The AJ in this proceeding proposes to go far beyond "diminishing" WPA rights. It would make them discretionary for any agency whenever Congress requires secrecy regulations to achieve its mission. There is no basis in legislative intent or public policy for a doctrine that an agency's mission lawfully can include canceling the Whistleblower Protection Act. Congress carefully drafted this law, with stated modifications and limitations to protect legitimate exercises of government secrecy. It is Congress' role to draw those boundaries for responsible disclosure.

II. THE AJ'S RULING CANNOT CO-EXIST WITH STATUTORY LANGUAGE.

The ruling below is incompatible with the "plain meaning doctrine," the most basic canon of statutory construction. As the Supreme Court has explained: "[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . .[C]ourts must presume that

a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). Indeed, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: `judicial inquiry is complete.' "*Id.* The Board long has recognized this premise for statutory construction, in *Kent* reaffirming that "the plain language of a statute controls absent a clearly expressed legislative intent to the contrary." *Kent, supra,* at 542n.8, quoting *Bennedetto v. Office of Personnel Management*, 32 MSPR 530, 533034 (1987).

As discussed below, the AJ's ruling cannot withstand scrutiny under either the plain meaning doctrine or of any relevant, specific standards for statutory construction.

A. The AJ's ruling would restore specific agency authority rejected by Congress.

Another basic statutory construction principle is that when Congress removes proposed language from legislation it enacts, that means Congress has rejected the associated policy. *Russello v. United States*, 464 U.S. 16, 23-24 (1983) Congress definitively decided this issue in 1978, rejecting and removing language that would have provided a statutory basis for the AJ's ruling.

When initially proposed, language for section 2302(b)(8) would have canceled protection for public disclosures that violated "law, rule or regulation." After spirited debate, the exception was narrowed to violations of law. The 1978 Senate Report noted the language was deleted. S. Rep. No. 95-969, *supra*, at 12 (1978). As the Conference Report clearly defined, "[P]rohibited

by law refers to statutory law and court interpretations of those statutes." HR Conf. Rep. No. 95-717, 95th Cong., 2d Sess. 130, *reprinted in* 1978 USCCAN 2860, 2864. Congress acted, because it was concerned that otherwise agency rules and regulations could impede the disclosure of government wrongdoing. *Id.*

Noted authority Professor Robert Vaughn provided context for the change in the most detailed commentary published on section 2302(b)(8):

> Both the House and Senate committees rejected this [administration] proposal [to remove protection for disclosures barred by agency rule or regulation] and restricted the limitations only to those situations where release was prohibited by statute. These committees believed that the original proposal gave an agency too much discretion to prohibit disclosure of information, and reduce the scope and therefore the effectiveness of protection.

Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. Ill. L.R. 615, 629.

In *Kent*, *supra* at 542-43, the Board recognized and analyzed the law in deference to this basic policy choice. While referencing *Kent*, the AJ's analysis below contains no mention of the watershed choice.

B. <u>The AJ's ruling below fails to recognize that Congress used different language when referring to statutory versus regulatory authority</u>.

A second, directly relevant canon is that "when Congress includes a specific term in one section of a statute but omits it in another section of the same Act, it should not be implied where it is excluded. *Ariz. Elec. Power Co-op. v. United States*, 816 F.2d 1366, 1375 (9th Cir. 1987); *see also West Coast Truck Lines, Inc. v. Arcata Community Recycling Ctr.*, 846 F.2d 1239, 1244 (9th Cir. 1988), *cert. denied*, 488 U.S. 856 (1988).

In this instance, the AJ went further than disregarding different terms for different concepts in the same statute. He disregarded different language in the same statutory subsection. In 5 USC 2302(b)(8)(A) protects disclosures of alleged "violation of law, rule or regulation," creating a right to disclosure violations of agency rules and regulations. The same subsection bars public disclosure rights for information whose release is "specifically prohibited by law," conspicuously excluding references to rules or regulations.

C. The AJ's ruling would add loopholes to whistleblower protection not included in statutory language.

A statutory construction rule whose violation has been particularly painful for the WPA is that only Congress can create exceptions to provisions it enacts. When Congress enumerates an exception or exceptions to a rule, no other exceptions may apply. *Horner v. Adnrzjewski*, 811 F.2d 571, 574-75 (Fed. Cir.), *cert. denied*, 484 U.S. 912 (1987); *Koniag v. Koncor Forest Resource*, 39 F.3d 991, 998 (9th Cir. 1994); 2A Norman J. Singer, Sutherland Statutes and Statutory Construction S 47.23 (5th Ed. 1992).

The AJ's ruling does not accept this canon. His ultimate conclusion is that, although Congress did not include any exceptions for agency regulations, he remained unconvinced that non-disclosure regulations directed by Congress "can never be considered law for purposes of the WPA." MacLean Interlocutory Certification, at 10 n.8.

Congress chose to include exceptions to public disclosure rights for whistleblowers -- classified information, or information whose release is specifically prohibited by law. As noted

above, Congress clearly explained that the term "law" is meant only to include specific statutory provisions or court interpretation of such statutes. It created a whole separate, restricted channel to disclose that information. 5 USC 2302(b)(8)(B).

But it included no exceptions for agency regulations. As discussed above, it cleanly removed their relevance for disclosures that otherwise comply with the "reasonable belief" requirements of the WPA. The AJ simply had no authority to substitute his judgment for that of Congress either by creating, or restoring an exception that includes agency regulations.

The AJ reasoned, however, that in this instance Congress required the agency to issue secrecy regulations necessary to protect air security, including to prohibit release of information that the Under Secretary…determines to be detrimental to aviation security.
He contrasted that scenario with *Kent*, in which the statute merely authorized issuance of regulations.

> I conclude that the fact that congress specifically mandated the SSI regulations, unlike in *Kent*, brings the regulations within the definition of "law' in 5 USC 2302(b)(8)(A), and that disclosure of information falling within the meaning of the SSI regulations is therefore "specifically prohibited by law," and cannot be a "protected disclosure" under the WPA.

MacLean Interlocutory Certification, at 10.

This distinction has never existed before and is irrelevant, because it was not the AJ's to make. Congress could have added another exception to section 2302(b)(8), restricting public speech when a statute requires issuance of regulations that prohibit the release of general categories of information. It didn't.

In reality, the distinction created by the AJ is not meaningful. For purposes of transparency rights to promote government accountability, it is immaterial whether Congress

orders or permits an agency to issue secrecy regulations. ***This is an inherent management function for any law enforcement or security agency covered by the merit system, as well as every government agency entrusted with government resources and authority.***

Congress has expended enormous energy to close loopholes created by the Federal Circuit Court of Appeals on the scope of protected speech. *Horton v. Dep't Navy*, 66 F.3d 279 (Fed. Cir. 1995) (excluding disclosures to co-workers and supervisors from the definition of "any"), *Willis v. Dep't Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998) (excluding disclosures made in the course of job duties from the definition of "any"); *Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999) (excluding disclosures challenging illegal or otherwise improper policies from the definition of "any"; and defining "reasonably believes evidences" to mean "irrefragable proof"); *Meeuwissen v. Dep't of Interior*, 234 F.3d 9 (Fed. Cir. 2000)(defining disclosure to exclude any issue raised previously by another employee). None, however, would be as destructive as that the AJ proposes. This loophole would render the entire statute discretionary whenever Congress requires issuance of regulations to achieve an agency's mission.

Stripped to its core, the AJ's reasoning seems to conclude that the information disclosed by Mr. MacLean *was* prohibited by statute, because of the existence of 49 U.S.C. s. 114(s)(1). In fact, the statutory provision contains no prohibition for the disclosure of any information whatsoever. It merely directs the TSA Under Secretary to determine what information would be detrimental to aviation security, with open-ended discretion to decide whatever that is, and then issue corresponding regulations. Therefore, the information Mr. MacLean disclosed could not have been prohibited by statute, the threshold requirement for an exception to WPA protection.

D. The AJ's ruling disregards the critical criteria of specificity even for statutory restrictions on whistleblowing disclosures.

Most fundamentally, the AJ's ruling ignores that the statutory basis he relied on cannot pass muster as sufficiently "specific" to establish any restriction on WPA rights, even on its own terms. Still another basic statutory construction canon is the prohibition against construing statutes so as to render any of their provisions superfluous. *See Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991). That is precisely what happened below.

In his initial decision the AJ did not deny that the statute was insufficiently precise to restrict WPA disclosures. He conceded that regulations "set the exact parameters, rather than the statute itself." *MacClean, supra*, Order (December 23, 2008), at 6. After Mr. MacLean sought reconsideration on grounds, *inter alia*, that the underlying statute had to be specific, the AJ recognized but declined to address the specificity issue. The entirety of his relevant reasoning on specific statutory prohibitions was as follows:

> I have afforded specific consideration to the appellant's argument that the use of the word 'specifically' in the statute, which I left out in some of my discussion in my prior order, undermines my analysis. I am nonetheless unconvinced that inclusion of the word means that regulations to prohibit disclosure of certain information, promulgated at the direction of Congress, can never be considered 'law' for purposes of the WPA.

MacLean Interlocutory Certification, at 10 n.8. In other words, the AJ declined to fill the analytical vacuum.

The AJ's silence was understandable. His ruling is incompatible with statutory language, rendering superfluous the requirement for specificity. In 1978 Congress gave clear guidance on the requirements to be a "specific statutory prohibition" on public disclosure. The Senate Report

explained that in order to qualify a statutory restriction either must "leave no discretion on the issue, or [be] a statute which establishes particular criteria." Sen. Rep., *supra*, at 2743. As the AJ conceded, the statute does not have precise nondisclosure criteria.

The *Kent* decision, *supra* at 542-48, carefully analyzed the standards for a specific statutory prohibition, analysis which the AJ disregarded as not "relevant for "analysis in this order whether the can be considered 'law' in 5 USC 2302(b)(8)...." MacLean Interlocutory Certification, at 9 n.7. The analysis he dismissed carefully explains the type of statutory prohibition that is sufficient. In 18 USC 1905, the Trade Secrets Act prohibits disclosure of "processes, operations, style of work or apparatus, or to the identity, confidential statistical date, amount or source of any income, profits, loss or expenditures of any person, firm, partnership, corporation or association." By only requiring secrecy regulations for a category as broad as "aviation security," Congress did not attempt to issue specific criteria.

That is why the ruling below, if not clearly rejected, would permit agencies to issue gag orders that eliminate all public whistleblowing. An agency official can judge virtually any information's release as "detrimental to aviation security," based on that official's unchecked judgment as permitted by the ATSA. On balance, while 49 USC 114(s)(1) is statutory, it is neither specific nor a prohibition – the two requirements for a statute to restrict WPA rights.

CONCLUSION

While the AJ found it "absurd" that the WPA could tie a TSA official's hands, a final, relevant statutory construction principle is that courts must interpret the law to avoid an "absurd" result the legislature did not intend. (*Bruce v. Gregory*, 65 Cal.2d 666, 673 (1967).)

There is no basis in law, legislative intent, or public policy that whenever Congress requires agencies to create secrecy regulations, that is a blank check to cancel Whistleblower Protection Act rights for non-classified public disclosures. The Board must reject the ruling below for the WPA to remain a viable statute. This decision also is an opportunity for Board leadership to require that AJ's enforce the WPA consistent with basic canons of statutory construction.

RESPECTFULLY SUBMITTED this 9th day of March, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2009, I served two true and correct copies of the foregoing FILE BRIEF OF AMICUS CURIAE by depositing the same in United States Mail, postage prepaid, addressed to the following persons:

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Exhibit 6

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June 9, 2007

Memorandum
From: Tom Devine, ext. 124; tomd@whistleblower.org
Re: Federal Circuit whistleblower decisions since passage of 1994 amendments

Below is an index of all Federal Circuit decisions on the merits for Whistleblower Protection Act appeals since Congress strengthened the law in October 1994 amendments. The track record is 2-177 against whistleblowers, including 2-65 for precedential decisions published in the federal reporter system. The latter are indexed below. For purposes of this memorandum, "decisions on the merits" means a ruling whether an employee's free speech rights were violated. It does not include rulings on cases disposed or remanded because of issues like harassment not covered under the law, timely filing, improper presentation of legal briefs or due process issues whose correction requires further fact finding.

It may be helpful to preview the abbreviated format for each listed case. At a minimum, it will include the legal citation, (and where possible) identify the employee's position and the legal element why any given employee lost. The elements will be broken down into four categories: 1) Protected speech ("PS"): whether the employee is entitled to any reprisal protection for his or her disclosures. 2) Knowledge ("K"): whether an official with responsibility to recommend or take a relevant personnel action knew or should have known of the whistleblowing disclosure. 3) Nexus ("N"): whether the disclosure was a contributing factor to alleged discriminatory treatment the employee is challenging. 4) Clear and convincing evidence ("CCE") for independent justification ("CCE"): whether that degree of evidence proves the agency would have taken the same action for innocent, independent reasons even if the whistleblower had remained silent.

Many of the court decisions are highly cursory, but where sufficient facts about whistleblowing are included to be meaningful, that dimension will be added.

An overview of trends can be insightful. For reported and unreported cases, of rulings sufficiently explained to identify the dispositive element, the court based rulings against whistleblowers on the following elements: 1) protected speech: 89; knowledge: 15; nexus: 33; clear and convincing evidence: 34. There was a sharp drop in reported decisions in 2001, the year after legislation with a provision permitting "all circuits review" was first introduced to share the Federal Circuit's appellate jurisdiction.

2009 No reported decisions

2008 (1-0)

Drake v. A.I.D., 543 F. 3d 1377 (10/07/08) Foreign Service investigator, Granted relief against reassignment. It qualifies as whistleblowing to disclosure drunkenness by State Department personnel at an embassy party.

2007 (0- 3)

Stoyanov v. Dep't Navy. 474 F.3d 1377 *rehearing. en banc denied* (4/13/07) Employees have no WPA rights to challenge retaliation against family members.

Kalil v. Department of Agriculture, 2007 WL 489471 (2/16, 2007). (Administrator at Farm Service Agency) (CCE) Challenged overcharges in debt repayments from farmers. Protected speech disqualified because Mr. Kalil did not have the authority to tell court about false statements by government in litigation. This creates an all-encompassing Catch 22 potentially eliminating any whistleblower protection, because the Willis/Garcetti doctrine disqualifies employees from coverage when they carry out activities for which their jobs do provide authority.

Smart v. MSPB, 2007 WL 130334 (1/16/07). (Air Force police officer) (PS) Challenged allegedly illegal personnel testing system in a grievance, rather than other context.

Louie v. Department of Treasury, 2007 WLR 46022 (1/9/07). (IRS revenue agent) (N)

2006 (1-2)

Greenspan v. DVA, , 464 F.3d 1297 (9/8/06) VA Hospital Medical Director. **Found illegal retaliation, remanding for correct action to cancel reprimand and reduced proficiency rating.)** Otherwise-protected disclosure of nepotism and conflict of interest does not lose Act's protection, even through "anchored" in inflammatory manner of delivery.

Fields v. Department of Justice, 452 F.3d 1297 (6/16/0 6) (DEA supervisory criminal investigator) (PS) Pressure by agency counsel to slant testimony in internal disciplinary proceeding against a subordinate not protected; mandatory disclosures during internal management review about arrest of cooperating source not protected b/c non-discretionary job responsibility.

Garcia v. Department of Homeland Security, 437 F.3d 1322 (2/1 0/06) INS HQ Assistant Chief Inspector (PS; contents in EEO complaint do not qualify).

2005 (0-1)

Carson v. Department of Energy, 398 F.3d 1369 (3/1/0 5) Nuclear engineer. Cumulative safety violations in nuclear weapons laboratories. (N)

2004 (0-4)

White v. Department of Air Force, 391 F.3d 1377, 391 F.3d 1377 (12/15/04). Replaces earlier "irrefragable proof" test with a substitute applicable only to whistleblowing disclosures of mismanagement: the "reasonable belief" test is not met unless "a conclusion that the agency erred is not debatable among reasonable people."

Sutton v. DOJ, 366 F.3d 322. (5/6/04) (CCE). Assistant U.S. Attorney Office administrative staff. (doesn't describe whistleblowing).

Clark v. MSPB, 361 F.3d (3/17/04). Contract specialist in directorate of community activities in Belgium. (PS; pre-federal employment disclosures do not trigger reprisal protection in later federal employment context). (Doesn't describe whistleblowing.)

Frey v. DOL, 359 F.3d 1355. (3/3/04). Mines Safety Health Administration supervisory coal mine inspector. (K) (racial name calling)

2003 (no reported decisions)

2002 (0-1)

Francisco v. OPM, 295 F.3d 1310 (7/9/02) Navy retiree. (PS) Illegal pension

2001 (1-3)

Langer v. Treasury, 265 F.3d 1259 (6/20/01) IRS Assistant District Counsel. (PS) violation of mandatory controls for confidential grand jury information (unprotected because illegality inadvertent and trivial), and racial imbalance in tax investigations (unprotected because disclosure part of job duties).

Larson v. Army, 260 F.3d 1350 (8/14/01) Army motor vehicle operator. **(Found illegal whistleblower retaliation, and ordered stronger performance appraisal)** (unsafe removal of light fixture from storage facility still containing ammunition)

Yunus v. DVA, 242 F.3d 1367 (3/22/01) VA physician. (CCE) (lack of certification for VA radiologist)

Briley v. NARS, 236 F.3d 1373 (1/22/01) Archivist. (CCE) (failure to properly control classified documents)

2000 (0-10)

Meeuwissen v. Interior, 234 F.3d 9 (12/4/00) Interior Dept. Administrative Law Judge. (PS; "disclosure" only covers initial communication of alleged misconduct; this had been exposed previously) (illegal rulings in Interior Department case law controlling estate proceeds to heirs of Native Americans)

Ince v. Army, 234 F.3d 567 (11/17/00) Army Corps of Engineers electrician (PS; just doing job) (safety violations in connection with electrical installation)

Giove v. Dept. Transportation, 230 F.3d 1333 (10/31/00) FAA Air Traffic Controller. (PS) (testified that air traffic training omission may have contributed to fatal crash)

Nater v. Department of Education ("DOE"), 232 F.3d 916 (5/9/00) Office of Inspector General ("OIG") auditor. (PS; mere professional disagreements) (pattern of auditing irregularities)

Williams-Moore v. DVA, 232 F.3d 912 (4/10/00) VA nurse. (CCE) (violations of Family Medical Leave Act)

Orr v. Treasury, 232 F.3d 912 (4/10/00) (N) (Whistleblowing not described.)

Bristow v. Army, 232 F.3d 908 Army civilian; job not described further. (CCE) (Whistleblowing not described.)

Walton v. USDA, 230 F.3d 1383 (2/16/00). Management analyst. (N) (operating private business on government time)

Wilborn v. DOJ, 230 F.3d 1383 (2/16/00) Border Patrol communications assistant. (N) (Whistleblowing not described.)

Guin v. Air Force, 230 F.3d 1382 (2/10/00) (N) Air Force civilian supervisor. (racial and sexual harassment, and illegal hiring practices)

1999 (0-15)

Brundin v. Smithsonian, 230 F.3d 1373 (12/14/99) Education specialist at Smithsonian American History Museum. (N) (toxic substances in workplace)

Escandon v. DVA, 230 F.3d 1373 (12/13/99) VA Medical Center housekeeping aide. (PS; disclosure of workplace violence and unsafe conditions too imprecise, although specific incidents and medical consequences were described with specificity)

Herman v. DOJ, 193 F.3d 1375 (10/25/99) Chief psychologist at federal prison camp. (PS; alleged illegality and other misconduct "trivial") (whistleblowing was on lack institutionalized suicide watch, and copying of confidential patient information)

Tchakmakjian v. DOD, 217 F.3d 855 (10/12/99) DOD civilian employee. Neither job nor whistleblowing further described. (N)

Crews v. Army, 217 F.3d 854 (10/8/99) Army voucher examiner. (P.S.; alleged gross waste trivial) (preferential travel benefits for another employee)

Venziano v. DOE, 189 F.3d 1363 (9/1/99) DOE engineer. (N) (failure to implement OMB management requirements for efficiency of engineering work)

Randles v. VAMC, 215 F.3d 1348 (8/11/99) VA Medical Center physician. (PS; disclosed unauthorized prescriptions to suspected wrongdoer and co-workers, which are ineligible audiences for protected speech)

Carr v. SSA, 185 F.3d 1318 (7/30/99) Social Security Administration Administrative Law Judge. (CCE) (mismanagement of docket)

Eisenger v. MSPB, 194 F.3d 1339 (6/17/99) Job and agency not identified. (PS; supporting testimony to confirm a pioneer witness' charges of document destruction do not qualify as whistleblowing)

Therrien v. DOJ, 194 F.3d 1338 (6/11/99) Marshals Service reality specialist. (PS; disclosures were just doing his job; and charges of illegality were mere policy disagreements) (whistleblowing on alleged violations of law for taxes on forfeited property)

Cordero v. MSPB, 194 F.3d 1338 (6/10/99) FAA Air Traffic Controller (turned down for 33 job applications) (PS; not entitled to whistleblower protection if merely suspected of blowing the whistle) (Mismanagement investigation; not described further.)

Lachance v. White, 174 F.3d 1378 (May 14, 1999) Air Force computer training specialist. (PS; mere policy disagreements; failure to have reasonable belief because did not overcome presumption that government acts "correctly, fairly, lawfully and in good faith" with "irrefragable proof" [undeniable, uncontestable, incontrovertible, or incapable of being overthrown]) (whistleblowing on alleged duplicative computer training program that undermined ongoing, accredited training, with consequences so counterproductive that charges backed by independent management review and duplicative training program canceled by Secretary of Air Force) [Remand; so not included as final decision on merits]

Dews-Miller v. USIA, 194 F.3d 1330 (3/10/99) OIG administrative staff. (N) (credit cards abuses)

Moss v. Air Force, 185 F.3d 883 (2/10/99) Chief of Air Force travel unit at Wright Patman Air Force Base. (PS) (alleged abuse of authority, through improper pressure of another employee to provide adverse information against him)

Smith v. HUD, 185 F.3d 883 (2/9/99) HUD employee; job not described further. (PS; alleged misconduct must be committed by government) (organized crime harassment and threats while at government job)

1998 (0-14)

Waller v. Army, 178 F.3d 1307 (11/10/98) Army wastewater treatment operator (K, N) (falsified flouride readings and water flow report)

Horst v. HHS, 173 F.3d 436 (10/15/98) Indian Health Service education specialist. (PS; unsafe working conditions in disclosure were already known to agency; and N, because she requested the desk audit used to lay her off)

Engler v. Navy, 173 F.3d 435 (10/13/98) Navy nuclear engineering technician (CCE) (higher costs by using engineers for jobs that technicians could perform)

Barry v. Treasury, 173 F.3d 435 (10/13/98) IRS night shift tax examiner (K) (Whistleblowing not described.)

Kewley v. HHS, 153 F.3d 1357 (8/20/98) Indian Health Service clinical supervisor. (CCE) (non-crisis counseling of minors without consent of parent/guardian)

Thompson v. Treasury, 155 F.3d 574 (7/10/98) IRS correspondence exam technician. (PS) (generalized charge of systematic IRS corruption and racism, and defamatory attack on supervisor)

Thomas v. Navy, 155 F.3d 570 (6/5/98) Fails to describe job, alleged whistleblowing, or reason for adverse decision below. Upholds ruling against whistleblower claim, with explanation that Administrative Judge wasn't biased and did not err by failing to accept new post-hearing evidence into the record.

Willis v. USDA, 141 F.3d 1139 (4/15/98) USDA conservationist. PS; because failing soil conservation plans for regulatory noncompliance merely was doing his job, and dissent about regulatory violations permitted by reversal of his rulings was disagreement to supervisor not eligible to be a whistleblowing disclosure. This WPA case law was the forerunner for the Supreme Court's 2006 *Garcetti* decision similarly stripping government workers of constitutional rights while they are carrying out job duties.

Head v. Post Office, 152 F.3d 947 (4/10/98) Postal mechanic. (K) (Whistleblowing not described.)

German v. DOE, 152 F.3d 947 (4/7/98) Energy Department mechanical engineer. (PS) (improper procurement and use of certain machine shop equipment)

Holtgrewe v. FDIC, 152 F.3d 944 (3/18/98) FDIC assistant bank examiner. (N; disclosures several years before alleged retaliation are too remote.) (Whistleblowing not described.)

Tesanovich v. DOJ, 135 F.3d 778 (2/6/98) Assistant U.S. Attorney assigned to border corruption task force. (CCE)

King v. SSA, 135 F.3d 776 (1/15/98) Social Security hearing clerk. (CCE) (Whistleblowing not described.)

Harper v. DVA, 135 F.3d 776 (1/13/98) SES manager responsible for agency acquisitions. (PS) (criticism of agency connected with proposed legislation affecting procurement price for pharmaceuticals)

1997 (0-3)

Powell v. Air Force, 132 F.3d 54 (12/10/97) Air Force environmental protection specialist. (CCE) (embezzlement, backdating form, mismanagement)

Srinivasan v. MSPB, 129 F.3d 134 (10/10/97) IRS tax technician. (PS) (travel fraud)

Geyer v. DOJ, 116 F.3d 1497 (6/18/97) Immigration inspector. (CCE) (Scheduling precludes compliance with mandatory pace for immigration services.)

1996 (0-8)

Lessard v. Navy, 104 F.3d 375 (12/6/96) General foreman of navy boiler plant. (PS) (falsified pay records)

Dooley v. DVA, 101 F.3d 717 (11/21/96) DVA cemetery caretaker. (K) (Cemetary manager's handling of his duties and hiring practices.)

Kell v. DVA, 101 F.3d 716 (11/14/96) Veteran Services Officer. (PS) (covering up fraud in state vouchers for veteran education services.

Lopez v. HUD, 98 F.3d 1358 (9/19/96) Temporary HUD equal opportunity specialist. (PS, because disclosures of negligence in monitoring state housing discrimination cases aren't protected as gross mismanagement.)

Serrao v. MSPB, 95 F.3d 1569 (9/17/96) Department of Commerce Office of Export Enforcement Special Agent. (PS, because whistleblowing disclosures within a grievance aren't protected.)

Meadows v. USDA, 92 F.3d 1207 (7/16/96) Farmers Home Administration employee. (Neither job, whistleblowing or reason for decision are discussed beyond generic references.)

Locus v. HHS, 91 F.3d 171 (6/19/96) National Institute of Environmental Health Sciences contracting specialist. (No further details are provided about the dispute, other than that whistleblowing was about treatment of employees.)

Marchese v. Navy, 91 F.3d 168 (5/30/96) Navy historian. (K) (Whistleblowing not described.)

1995 (0-4)

Aliota v. DVA, 73 F.3d 381 (12/31/95) VA Hospital pharmacy chief. (CCE) (Whistleblowing not described.)

Horton v. Navy, 66 F.3d 279 (9/12/95) Marine Corps librarian. (PS, because disclosures to co-workers, possible wrongdoers or supervisor don't count as whistleblowing) (sleeping on the job, falsified time cards, failure to process books)

Watson v. DOJ, 64 F.3d 1524 (8/29/95) Border Patrol agent. (PS and CCE; 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 an implied death threat by the shooter if silence were broken.)

Pyles v. Department of Defense, 61 F.3d 918 (7/5/95) Pentagon auditor. (CCE) (Whistleblowing not described.)

Exhibit 7

	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002
OSHA	1745	1554	1576	1539	1403	1441	1446	1332
AHERA	2	2	5	1	3	4	1	2
EPAs	0	0	45	70	70	77	66	59
ERA	0	0	66	67	62	81	75	67
STAA	323	303	270	287	299	245	264	295
AIR21	0	0	0	0	0	5	52	88
SOX	0	0	0	0	0	0	0	3
PSIA	0	0	0	0	0	0	0	0
NTSSA								
FRSA								
CPSIA								

*Half year

Fiscal year = Oct. 1 of the previous year to Sept.30

Testimony of Professor Robert Vaughn before the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia

Thursday June 11, 2009

My name is Robert Vaughn and I am Professor of Law and A. Allen King Scholar at American University's Washington College of Law. At the Washington College of Law I teach Torts, Civil Procedure, Introduction to Administrative Law and Regulation: Whistleblowing, the Role of the Jury in Civil Litigation, and seminars on Public Information Law and on Public Employment Law. I have written several articles on whistleblower protection and books on civil service law, on civil service reform, on the Merit Systems Protection Board, and on civil procedure. I have consulted on whistleblower protection with the Office of Legal Cooperation of the Organization of American States and with the World Bank.

I appreciate the opportunity to speak with the committee about whistleblower legislation now pending before this committee. Protection of federal employees who disclose information regarding government misconduct and mismanagement secures openness in government, imposes accountability, supports the rule of law, and protects the First Amendment and Due Process rights of federal employees. I commend the committee for consideration of important improvements in these whistleblower protections and the continuation of bipartisan Congressional efforts over the last thirty years.

My testimony addresses one of the differences between the House and Senate versions of the Whistleblower Protection Enhancement Act of 2009—trial in a federal district court in which a right to trial by jury would apply. The House version in Section 9 permits employees alleging certain claims of retaliation, including ones for "whistleblowing disclosures" under 5 U.S.C. § 2603(b)(8) to bring in certain circumstances an action *de novo* in a federal district court. In such an action, an employee would be entitled to a trial by jury. Such an alternative procedure applies if the Merit Systems Protection Board (Board) has not issued a final decision within 180 days of the filing of a request for corrective action. In addition, an employee within 90 days of a final decision by Board could also pursue recourse in a federal district court.

First, I examine the values underlying trial by jury, including the important role that trial by jury may play in the resolution of whistleblower claims. In doing so, I summarize research suggesting that juries are more diligent, fair-minded and competent than often reflected in popular culture and in attacks on the jury. I briefly consider some of the specific concerns about the use of juries in whistleblower cases, including possible bias against the government and sympathy for individual claimants, a "deep pockets" perspective toward large defendants, and juries' inability to resolve whistleblower cases because of the "complexity" of these cases. I focus on the right to trial by jury because it would be possible to have an alternative recourse to federal district courts without the trial by jury.

Second, I describe how a jury trial might be conducted in a whistleblowing case, including the division of functions between the judge and jury. This division considers the

distinction between determinations of law and fact and the character of judicial controls incorporated in the rules of civil procedure.

Third, I consider the implications of recourse to federal district courts. These implications follow from *de novo* review in federal district courts whether or not a trial by jury is provided. In particular, I evaluate a number of concerns regarding effects of alternative judicial trials on the procedures and practices of the Board. Many of these concerns suggest reexamination of Board practices rather than rejection of the alternative recourse provision.

In assessing these issues, the burden must now rest on those supporting the proposition that this alternative recourse involving the right to trial by jury will encumber the federal courts or disable the administrative process for redress of retaliation claims. Such alternative procedures have operated for decades in the context of Title VII retaliation claims and have become a part of redress procedures for analogous whistleblower retaliation claims. Many federal whistleblower statutes covering millions of employees contain similar provisions. Nothing in the testimony that I have read regarding the Whistleblower Protection Enhancement Act of 2009(Enhancement Act) establishes these propositions regarding obstruction of the federal courts or the Equal Employment Opportunity Commission or the Department of Labor. Instead, the evidence in the relevant testimony supports the conclusion that implementation of similar and analogous alternative methods of recourse have functioned without impeding either judicial or administrative remedies. The alternative recourse provision in the House version is not a novel, untried or dangerous procedure.

My examination of these three topics leads to several conclusions about the value and effects of the alternative recourse provision. Let me first summarize my principal conclusions and then present the support for them.

Summary

Trial by Jury

•Trial by jury represents a fundamental aspect of our democracy. The jury trial protects the rights of the community because jury service educates citizens in democratic responsibilities, represents the values of the community and bestows an important "badge of citizenship." Juries check the other branches of government, including the power of unelected judges. Whistleblower protection represents similar values. Such protection ensures democratic accountability, protects the rule of law, permits political oversight of the executive branch and informs others of the derelictions and misconduct of government officials.

•Trial by jury recognizes the importance of fair adjudication of whistleblower claims. It allows citizens to participate in the adjudications that help to secure legal control of bureaucracy

•Juries can fairly and effectively decide the retaliation claims of whistleblowers. Decades of social science research on the behavior and competence of jurors present a more favorable view of jurors than many of the stereotypes found in popular culture. Jurors deal with complex cases much better than popularly believed and judges have similar difficulties in these cases.

Jurors are competent and attempt to follow the law. Jurors are diligent and skeptical in evaluating expert testimony.

•With corporate defendants, jurors do not automatically find for the "little guy" but do expect businesses to exhibit a higher degree of care than individuals for workers and consumers. Studies also question the traditional wisdom that the financial resources of corporate defendants encourage jurors to adopt a "deep pockets" approach to liability. These studies apply to similar concerns about the government as a defendant in these cases.

•Jury trials in federal court take place under procedural rules allowing judges to influence, control, and, in some circumstances, to replace jury fact finding. The distinction between questions of fact, decided by the jury, and questions of law, decided by the judge, is unclear. The decision as to whether an issue is a question of law or fact can be viewed as another way in which courts decide how much supervisory authority judges should exercise of juries.

•The motions for summary judgment, judgment as a matter of law and the renewed motion for judgment as a matter of law permit judges to direct a verdict for the government if the whistleblower lacks substantial evidence to support her claim. The motion for a new trial allows federal judges to order a new trial when a verdict in favor of a whistleblower is against the weight of the evidence. Using the power to grant a new trial, judges may reduce excessive verdicts in favor of a whistleblower.

•Federal judges instruct jurors on the applicable law, can require juries to return special verdicts and may determine the order of issues at trial.

•Less than two percent of the civil actions filed in federal district courts reach trial.

Implications of the Alternative Recourse Provision

In my testimony, I present arguments that lead to the following four propositions and conclusions necessarily following from them. These propositions should ameliorate anxieties regarding the effects of the alternative recourse provision on the administrative process administered by the Board.

Proposition One: Use of Alternative Recourse to Federal District Courts by Whistleblowers Claiming Retaliation Will Be the Unusual Not the Common Occurrence

Many characteristics of Board adjudication and of federal litigation support this proposition. Even if *all* of the eligible cases followed the alternative recourse provision, it is unclear how these cases would harm the Board's procedures.

Proposition Two: A Rational Decision Maker at the Board Would Not "Rush" the Resolution of Whistleblower Cases In Order to Meet the 180-day Deadline

Proposition Three: The Effects of the Alternative Recourse Procedure on the Board Does Not Counsel Against Adoption of the Provision

For example, I roughly estimate that between one-tenth and two-tenths of one percent of the Board's 2006 revenue would have been devoted to the whistleblower cases that likely would have followed the alternative recourse provision had it be available in that year.

Proposition Four: The Alternative Recourse Provision Can Benefit Judicial and Administrative Adjudication

The alternative recourse provision can encourage settlement of cases.

The Importance of Trial by Jury

Trial by Jury in Whistleblower Retaliation Cases Implements Values of Democracy

Trial by jury is not an archaic vestige of our English common law past but a fundamental aspect of our democracy. The Seventh Amendment to the Constitution preserved the right to trial by jury and was one of the amendments seen as necessary to address omissions in the Constitution. The amendment reflected not only the role of the jury in English common law but also provided a foundation for the American Revolution. The 1735 trial of Peter Zenger in New York, in which a jury refused to convict him for seditious libel, influenced English practice and helped to develop the theories of democratic accountability which fueled the revolution. Scholars, Neil Vidmar and Valarie Hans believe that the trial "helped to generate the First, Fifth and Sixth Amendments to the Constitution."

According to constitutional law scholar, Akil Amar, the Seventh Amendment was crucial. At least five of the thirteen ratifying conventions declared that more safeguards of juries were required. The justifications of the right to trial by jury emphasized at the beginning of the Republic articulate many of the values of jury trial in our democratic society.

According to Professor Amar, Americans at the time of the enactment of the Seventh Amendment saw the jury as protecting the rights of the community as well as the rights of the parties. Citizens have a right to serve on juries and through that service to help to govern. Juries as an aspect of citizenship explains why the expansion of the rights of citizenship to women and then to minorities included the right to serve on juries as an important part of the recognition of full citizenship. The Supreme Court has based its restrictions on the rejection of jurors because of race or gender on the Equal Protection rights of excluded jurors.

In the system of checks and balances incorporated into the Constitution, the right to trial by jury allowed citizen-jurors to check and balance the influence of federal judges who enjoyed life tenure as officials of the government. Professor Amar describes the jury and the judge as a judicial analogy to the bicameralism of the legislative branch.

This check on the power of unelected judges served not only to ensure democratic accountability but also to protect against corruption both in terms of bribery and in terms of the preference that judges acting alone might show to other government officials. Juries became then a way of preserving the authority of the courts by ensuring that citizens who served only in a single case represented the community in ways that a professional unelected judge could not.

The Supreme Court's jurisprudence on the right to trial by jury under the Seventh Amendment has broadly interpreted the scope of that Amendment. First, the Court has applied the Seventh Amendment in the context of changes and reforms in civil procedure. The combination of law and equity in a single civil action allowed the Court to abandon doctrines that otherwise limited the right to trial by jury.

Second, and more importantly for our purposes, the Court has permitted Congress to provide for the right to trial by jury in actions created by statute. Indeed, specific authorization of jury trial may not be necessary because under the Supreme Court's decisions regarding the right to trial by jury in statutory actions, the right to a trial by jury may attach in a *de novo* action before a federal district court because the provision provides for compensatory remedies.

An expert on the American jury, Professor Nancy Marder, describes the current political role of the jury in similar ways. It operates as a coordinate branch of government checking the power of unelected judges, providing feedback to the other branches of government on weaknesses in the law, creating political awareness in citizens, and providing an important "badge of citizenship."

The application of trial by jury to whistleblower claims of retaliation appropriately vindicates the democratic values underlying the right to jury trial. Whistleblower protection ensures democratic accountability and the rule of law by providing reliable protections to those federal employees who report misconduct by unelected federal officials. This information allows evaluation of the conduct of these officials, assures us that government actions follow the legal standards and regulations that guide their official conduct, and deters misconduct. In addition, this information permits citizens and their elected representatives to seek political redress through new laws or effective oversight of executive actions. The disclosures of federal employees may address the mundane but important derelictions of administrators or the significant, wide-ranging misconduct of high-level government officials that broadly threaten public health and safety, the rule of law, or constitutional restrictions on the powers of government officials. This second category of disclosures is often crucial but politically charged and involves situations where powerful officials are prepared to bring pressure to bear on decision makers.

The connections of both the right to trial by jury and whistleblower protection to theories of accountability in a democratic government suggest the aptness of allowing jury trials in whistleblower claims by federal employees. Provision of the right to trial by jury reassures whistleblowers that citizens will participate in the adjudication of claims of retaliation. It alerts whistleblowers and others to the importance of fair adjudication of these claims; it recognizes that some cases may be politically sensitive and it provides an avenue of redress where political pressures are less easily brought to bear. It reassures whistleblowers of more than one avenue of redress. It allows citizens as representatives of communities throughout the country to participate in these adjudications that help secure legal control of bureaucracy. These reassurances and alternatives are significant in whistleblower retaliation claims when an individual employee is often pitted against a large and powerful government

agency regarding the conduct of leaders of that agency who seek to justify or hide their own misconduct—misconduct that may violate their obligations to the law, to their agency or to the United States government or to its citizens.

Juries Can Fairly and Effectively Decide the Retaliation Claims of Whistleblowers

Regarding civil litigation, the words "trial by jury" likely conjure a variety of troubling stereotypes: jurors befuddled by complex evidence, confused by science, and mislead by statistics; jurors uninterested in or unconcerned about the proceedings; jurors driven by bias against large organizations or who at public expense ignore the law to indulge personal prejudices. Tales are commons about absurd or outrageous jury verdicts. These stereotypes reflect ones found in popular culture. To some, the stereotypes reflect popular culture's preoccupation with the bizarre and the entertaining; to others, these images result from a carefully orchestrated campaign to limit access to the courts and to discredit litigation as a means of bringing large bureaucracies to account.

The social science research on the behavior of jurors presents more favorable stereotypes. This social science research spans over fifty years with similar impressions of jury performance. An influential book, *American Juries*, in a new edition published in 2007, reviews and evaluates studies of the performance of juries. My examination draws upon this work. The authors of this book, Professors Valarie Hans and Neil Vidmar summarize the findings of the "most important single study of juries" conducted over fifty years ago. "The central findings from Kalven and Ziesel's research, then, are that agreement between judge and jury was substantial and that most instances of disagreement could not be ascribed to jury incompetence or unwillingness to follow the law." More recent studies have shown a similar agreement between judges and juries. These more recent studies also do not find that disagreement is related to the complexity of the case. Thus, the complexity of the case does not seem to cause juror's opinions to vary from those of legal experts suggesting that jurors are as capable as legal experts in deciding such cases.

One study of the appellate review of factual findings by judges and juries in patent cases "which can contain highly technical and complex testimony and legal rules" concluded that judges and juries were equally accurate. This study suggests that jurors are as competent as judges in resolving "highly technical and complex testimony."

Moreover, surveys of judges and lawyers familiar with juries produced positive evaluations of the performance of juries. After reviewing the more recent literature, the authors of *American Juries* believe that Kalven and Zeisel's conclusions about jury competence apply as well today .

Regarding the ability of jurors to evaluate the testimony of expert witnesses, Professors Hans and Vidmar state: "Contradicting the anecdotal evidence, we now have systematic findings from a series of research studies that show jurors to be diligent and skeptical in evaluating expert testimony." Moreover, judges also confront difficulties in interpreting expert opinions regarding complex subjects; for example, testimony regarding statistical evaluations.

The reality of jury performance is complex and scholars note instances of jury weaknesses, such as confusion about scientific evidence, cognitive biases in complex procedural cases involving multiple parties, and biases against different groups, such as foreign plaintiffs. In many of these instances, however, courts can ameliorate these weaknesses through common reforms, such as instruction of the jury prior to the trial, evidence checklists, note taking, the ability of jurors to submit questions to witnesses, deliberation of jurors prior to the end of the trial and the ability of jurors to review evidence, testimony and instructions.

In an important article, a leading scholar explored jury bias against corporations. Examination of jury bias against corporations is relevant to concerns regarding such bias against the government as a defendant. In both types of litigation, individuals are suing large bureaucratic organizations presumed to have large resources from which to pay any judgment.

In her article, Professor Valarie Hans concluded regarding jury treatment of corporate defendants: "Reflecting the citizenry from which they are drawn, civil jurors are largely supportive of the aims of American business and extremely concerned about the potential negative effects on business corporations of excessive litigation. At the same time, they hold corporate defendants to more exacting standards compared to individual litigants, and expect businesses to exhibit a high degree of care for workers and consumers. The application of this distinctive standard appears to be consistent with the political function of the American jury." She also concluded "several studies question the conventional wisdom that the financial resources of the corporate defendant encourage a deep pockets approach."

Of particular import are studies that judges confront the same types of cognitive biases in complex procedural cases, also have difficulties in evaluating the testimony of experts, and can be confused by complex statistic proof. These weaknesses of judges as fact finders have led to proposals for the use of experts as judges or for the creation of science or technology courts. Based on these studies of the performance of judges and juries, if whistleblower cases are "too complex" for juries, they may also be too complex for judges. If so, we would need to rethink administrative adjudication of whistleblower claims altogether; for, if we had to chose decision makers on other criteria we might direct this important and politically sensitive body of cases solely to federal judges, who are likely to be more experienced members of the profession and who enjoy life tenure rather than to administrative judges who lack the protections accorded to administrative law judges, much less to Article III judges.

The Practical Implementation of Jury Trials in Whistleblower Retaliation Claims

A number or rules of civil procedure and practice surround a trial by jury. Used conscientiously these rules and practices permit a judge to aid the jury and to correct its errors without intruding into the role of the jury. In fact, some jury experts refer to a trial by jury as a trial by a jury and a judge. Among the most important rules and practices are those relating to summary judgment, selection of the jury, the order of trial, motions for judgment as a matter of law, instructions, the form of judgments, motions for a new trial, reductions in the amount of a verdict, and a renewed motion for judgment as a matter of law.

In addition, a number of judicial practices, often involving judicial discretion, surround these rules and address questions such as whether an issue is a factual one to be decided by the jury or an issue of law to be decided by the judge, review of the admissibility of evidence, the qualification of expert witnesses and control of trial preparation, including pretrial discovery. This body of rules and practices influences how jury will address and decide whistleblower retaliation claims.

In this section, I conclude that practical application of jury trials should eliminate fears of the jury as an irrational element in the determination of these claims. Thus, the fear of trial by jury is not a basis for rejecting the jury in the adjudication of a whistleblower retaliation claim.

The Fact Finding Function of the Jury

The rule for the distribution of functions between the judge and jury asserts that juries determine questions of fact while judges decide questions of law. The reality of fact finding by the jury is more complex reflecting the uncertainty of the division between law and fact and the variety of judicial procedures that regulate fact finding by the jury.

The uncertainty of the division between law and fact not only follows from the imprecision of the definition of fact and law but also reflects the difficulties of using two categories, law and fact, to describe three functions in adjudication--determination of the relevant law, determination of the facts and application of the law to the facts. In distinguishing findings of fact and law courts often consider whether the decision requires the type of legal expertise possessed by judges and whether the decision should be one that establishes standards of conduct in other circumstances; in these instances courts are more likely to characterize a determination as one of law.

An example from the whistleblower protection provision allows us to explore the application of the law/fact distinction. The whistleblower provision addresses the standard for a protected disclosure--whether an employee reasonably believes that disclosure evidences one of the types conduct listed in the provision. For example, did an employee have a reasonable belief that the information related to conduct creating a gross waste of funds.

The standard for reasonable belief and for gross waste of funds is one of law. Evaluation of the particular disclosure requires the jury to determine the circumstances in which the employee acted as well as the character of the disclosed information. Both of these determinations are likely to be called questions of fact. The conclusion, however, that the disclosure is a protected one involves the application of the articulated legal standard to the facts. Often this application of law to fact is seen as part of the jury's evaluation of the character of the particular disclosure and within its fact finding function. In particular, determinations of the reasonableness of conduct or belief, even though they involve the application of law to fact, are normally seen as within the fact finding function of the jury. In a case in which a whistleblower prevails, the determination of damages would ordinarily require findings of fact by the jury under the applicable legal standards for such damages.

These conclusions regarding fact finding in a whistleblower retaliation claim might be affected by the application of procedures that regulate fact finding by the jury discussed below. Another way of thinking about the problem is to see the law/fact distinction as another way of deciding how much supervisory authority should be exercised by judges.

Regulation of the Jury's Fact Finding

Several motions permitted by the Federal Rules of Civil Procedure—the motion for summary judgment, the motion for judgment as a matter of law and the renewed motion for judgment as a matter of law--prevent the jury from deciding a case when a jury using reason and logic could not resolve evidence in favor of one of the parties. If one of these motions is granted the court enters a judgment by applying the applicable legal standards. In these instances, when one of these motions is granted, a jury's finding for one party would be based on passion, bias or mistake. For example, a whistleblower retaliation claim must be supported by sufficient evidence to permit a jury using reason and logic to find for the whistleblower.

On the other hand, the standard for such judicial intervention must be limited to prevent a judge from substituting her judgment regarding the facts for the jury's. In federal court, the standard for these three motions require the judge to assume that the jury will evaluate the evidence in the following ways: the jury will draw all permissible inferences in favor of the party against whom a judicially imposed judgment is sought (in our example, the whistleblower), the jury will find that all of the whistleblower's witnesses are more credible than any opposing witnesses but the jury must consider any clear, uncontradicted, and consistent evidence to the contrary.

This standard is applied to all three motions. The principal difference between these motions is their timing. The motion for summary judgment is made before trial and is based on a prediction of the trial record and whether a motion for judgment as a matter of law based on that record would have to be granted at trial. A motion for judgment as a matter of law and the renewed motion vary as to the time at which they are made during the trial. The motion for judgment as a matter of law can be made any time during the presentation of evidence; the renewed motion for judgment as a matter of law must be made after the jury returns a verdict.

These motions result in a judgment in favor of the moving party, in our example, the government who argued that the whistleblower could not obtain a verdict from the jury under these standards. A judge, however, may after a jury's verdict grant a motion for a new trial. If a judge grants this motion, the judge does not issue a judgment for either party but requires that case to be retried. Because grant of the motion permits another jury to assess the evidence, the standard for this motion is whether the jury's verdict is against the weight of the evidence. In this motion the court is able to weigh the evidence in a way prohibited in the three motions discussed above. Using the power to grant a new trial, a trial judge may also reduce the size of an excessive verdict which provides inappropriately high damages to a whistleblower. Judges also may a grant a new trial to address errors at trial, including erroneous and prejudicial jury instructions and misconduct by jurors during jury deliberations.

These procedural rules, in the words of one scholar, allow the judge to "back stop" the jury. Under these procedural rules failures in jury decision making leading to unsupported verdicts are commonly overturned or excessive judgments are reduced. Such procedures do not provide the same "back stops" to errors in fact finding made by judges.

A second set of procedural rules control fact finding by the jury. These procedural rules address instructions to the jury, the form of a verdict that a jury must return and the order of the trial. The judge's instructions to the jury inform it of the legal standards to be applied by the jury in its deliberations. The language used in these instructions may require the jury to resolve facts in a particular way in order to render a verdict for a whistleblower. In federal courts, judges also have the authority to require juries to return special verdicts. Instead, of returning a general verdict for a whistleblower with a determination of damages, the jury is required to answer questions or interrogatories; on the basis of these answers, the judge enters a verdict for one of the parties. The jury is limited to answering questions that structure its fact finding and limits the discretion that a general verdict gives to the jury.

A judge may also determine the order of trial; for example, in a whistleblower retaliation case, a judge might separate the question of liability from the issue of damages. A judge might also subdivide the elements of liability by requiring the jury to decide one element of liability prior to the consideration of others.

A third set of procedural rules influence the fact finding role of the jury by affecting what evidence is presented to the jury. The judge can determine what evidence is admissible. In cases involving experts, the judge has considerable discretion in deciding whether a witness is qualified as an expert. The judge has discretion regarding the type and amount of discovery. These rules may expand or limit the evidence available to a whistleblower to present to the jury.

Apart from these rules, federal judges have considerable influence on the composition of the jury. The judge decides whether to excuse qualified jurors from service. The judge evaluates each challenge for cause made by the representatives of the parties. These challenges seek to remove a potential juror from the jury because the juror is unable to render a fair and unbiased verdict. A number of informal practices also influence the composition of the jury; for example, judges have considerable discretion in directing the process in which attorneys assert peremptory challenges and in some judges appoint the foreperson of the jury. Judges also enjoy the right to dismiss jurors who have been selected to serve on the jury for misconduct during the trial.

A jury trial in federal court takes place under procedural rules and standards that permit judges to influence, control, and, in some circumstances, replace jury fact finding. The rules give judges ample powers to supervise jurors.

Perhaps the most significant aspect of federal practice limiting jury trials is the disappearance of the trial itself. Although statistics vary, the percentage of cases filed in federal court that reach trial has declined over the last decades. Today, a small percentage of civil cases reach trial, perhaps less than two percent. Jury trials comprise only a portion of

these cases. Scholars differ as to the reasons for the decline in the percentage of trials and whether or not such a decline is a good or bad development.

Settlements remove a significant percentage of cases from federal courts prior to trial. The effect of alternative recourse for whistleblower retaliation claims on the administrative process will enable us to consider the implications of this procedure for settlement.

Implications of Alternative Recourse

Because of the strong reasons for providing alternative recourse, I turn to its implications. I examine these implications to determine whether this provision has unintended consequences that would give us pause in providing it. In this section, I conclude that based on past experience with similar provisions and in light of the characteristics of Board procedures, the provision will not undermine or damage Board adjudication.

The alternative recourse provision affects both the federal courts and the administrative process. I principally address the implications for the administrative process of the Board. I do so, because testimony in the House examining experience under other whistleblower laws makes a strong case that the number of cases reaching the federal courts will likely not be large. First, there are simply not that many whistleblower retaliation claims brought annually to the Board. Even if all these were appealed to federal district courts, a highly unlikely assumption for a number of reasons that I will discuss regarding the implications for the Board, the number of cases is less than 150.

Second, experience with the Sarbanes-Oxley (SOX) shows that most claimants before the Department of Labor (DOL), who could do so, do not seek alternative recourse. Professor Richard Moberly's study of the adjudication of claims under SOX by the DOL demonstrated that DOL is unable to resolve most SOX claims within the required 180-day period. For example, in fiscal year 2005, an average investigation of a claim, the first step in the adjudication of a claim, took well over 120 days, which meant that because of the additional time required in adjudication of the case, nearly 100% of the cases were subject to alternative recourse in federal district courts. Still many employees who could have left stuck with the administrative process even though under SOX, unlike the provision in the Enhancement Act, waiting for a final decision of DOL would lead to appellate not *de novo* review.

The alternative recourse provision affects the parties not simply in terms of delay but more generally regarding litigation strategy. Particularly, the alternative recourse provision may alter settlement practices in whistleblower claims. These implications for settlement practice could reduce both administrative and judicial burdens.

Finally, my examination of the effects of the alternative recourse provision on the Board suggests a number of changes in the administrative process. These changes may go beyond the scope of this legislation but indicate that the appropriate response to the implications of the provision for the Board may be administrative changes not rejection of the alternative recourse provision.

Implications of the Alternative Recourse Provision for the Board and the Administrative Process

Traditionally, the advantages of administrative adjudication have been economy, expedition, and expertise. These advantages flow from a number of factors, including less formal procedures, routine processing of many similar cases, and less costly staff and facilities. In some instances, these advantages can also been seen as disadvantages. Economy becomes second-class, assembly-line treatment of important issues. Expedition becomes perfunctory consideration and the denial of detailed development of cases. Expertise becomes bias where ingrained attitudes and approaches deny an impartial evaluation of claims. The same conditions that create benefits engender costs. Thus, any analysis should be specific to the Board.

This dual nature of administrative adjudication may also explain why a good deal of literature in the last decades regarding the future of the federal courts expresses fear about the "bureaucratization" of the federal courts. These fears rest on the assumption that litigation in a federal district court provides a different and superior form of litigation.

Several aspects of Board practice influence an assessment of the implications of the alternative recourse provision. These specific aspects of the Board will be useful in examining concerns about the effect of alternative recourse on Board practice. In particular, they will help in deciding whether the alternative recourse provision will be commonly invoked or a less common escape clause.

First, the Board has adopted a formal approach to adjudication. This conclusion rests on my study of all of the Board's opinions in its first two years; a conclusion supported by my observations of the Board over the last three decades. The Board's rules of procedure and evidence, however, are less formal than those applied in a federal district court. Although the Board uses the Federal Rules of Civil Procedure and often refers to federal court interpretations of them, the Board states that these rules are not binding but looked to for guidance. The Board's rules of evidence are less demanding than those applied in a federal district court. For example, a number of Board decisions discuss how hearsay evidence that would be excluded in federal court may be used in Board adjudications.

Despite this formal model, all adjudicatory authority rests with the Board and is delegated to its administrative judges (AJs). Thus, these AJs are not like federal trial judges in that the Board can review their decisions on its own motion and substitute its judgment for that of AJs. These AJs do not enjoy the independent status of Administrative Law Judges. The Federal Circuit, however, has severely limited the ability of the Board to overturn determinations of AJs based on evaluations of the credibility of witnesses.

Second, with some variance over time, most persons appearing before the Board are not represented or are represented by persons who are not attorneys. The Board has accommodated its formal procedurals relying on adversary presentation to this aspect of its caseload. To do so, the Board has moved toward an inquisitorial rather than adversary model with *pro se* appellants. Administrative judges have obligations to ensure a proper consideration of the issues and to alert unrepresented appellants of their burdens and the evidence required

to satisfy them. On some issues, these appellants are given benefits unavailable to represented parties.

Third, in most classes of cases before the Board and in the vast percentage of cases, the employee appealing an action to the Board is entitled to a hearing. Although the Board has a procedure analogous to summary judgment regarding a few classes of cases, it has an obligation to conduct a hearing in many circumstances where a federal judge could grant summary judgment prior to trial.

Fourth, the resources of the Board are limited and its costs of processing a case have remained stable. At the same time, the character of the classes of cases that it reviews has changed. Statutes, such as the Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunities Act, as well as the IRA claims under the Whistleblower Protection Act have added new groups of cases to the Board's jurisdiction. Regarding the USERRA and an IRA, the Board must hold a hearing. In addition, the Board anticipates an increasing number of retirement related adjudications.

Fifth, The Board has a goal that fifty percent of initial decisions and petitions for review each be decided within 110 days. The Board's Performance and Accountability Report for Fiscal Year 2008 reports an average case processing time in initial decisions of administrative judges of 87 days and an average case processing time for petitions for review to the Board of 112 days. Seventy-two percent of initial appeals were decided with 110 days and sixty percent of petitions for review were decided within 110 days. These processing times do not record the length of time required for cases in which hearings are held because these times include approximately half of the cases those that are settled as well as those that are dismissed for untimely filing or on jurisdictional grounds. It is also fair to assume that more complicated cases take longer to adjudicate because of time required in discovery, in development of the issues and in hearings and evaluation of evidence and law. Thus, it is fair to assume that in adjudicated, complex cases, the Board is less likely to satisfy the 180 day requirement in the alternative recourse provision.

Sixth, the employee has no automatic right to review by the Board and can choose whether to seek Board review. If the employee does not seek review, the opinion of the administrative judge becomes the final decision of the Board. The process of seeking, much less obtaining such review, may prevent the issuance of a final decision by the Board within the 180 day period. The cases least likely to be resolved are presumably the more complex and difficult ones.

Seventh, the Board has considerable authority to require other agencies to take corrective action or provide relief ordered by it. Thus, neither the Board nor the prevailing employee needs to seek judicial action in order to enforce the decisions of the Board.

Eighth, with few exceptions, employees who lose before the Board may seek appellate review but only before the United States Court of Appeals for the Federal Circuit. Under the alternative recourse provision, these employees who have received a final decision of the Board

may choose between appellate review, which might or might not be in the Federal Circuit, or *de novo* review in an appropriate federal district court.

These aspects of Board adjudication permit evaluation of the following propositions. Acceptance of these propositions ameliorates concerns about the effects of the alternative recourse provision on administrative adjudication.

• Proposition One: Use of Alternative Recourse to Federal District Court by Whistleblowers Claiming Retaliation Will Be the Unusual Not the Common Occurrence.

Some aspects of Board practice suggest that the alternative recourse could be attractive to many whistleblowers. The whistleblower has the advantage of adjudication by a federal judge with the possible use of a jury if the whistleblower or the government demands one. A whistleblower would not have the incentive that federal employees obtaining redress from the EEOC have to abandon the administrative process for federal district court. Because a federal employee who is successful before the EEOC may need to go to federal court to ensure that an agency follows the EEOC's order, the employee may have an incentive to abandon the administrative process.

Whistleblowers prevailing before the Board do not have the same incentive. Even with this additional incentive for federal employees appearing before the EEOC, testimony in the House asserted that EEOC "Administrative Judges review 8,000 claims" brought annually by federal employees. In 2007 "The United States was a defendant in 857 civil rights employment cases." Assuming that all of these cases emerged from the EEOC, only about ten percent of claimants sought the alternative recourse in Title VII similar to alternative recourse in the House version of the Enhancement Act.

Many aspects, however, of the Board practice may incline a whistleblower to remain with the administrative process. An employee successful in an initial appeal is entitled to interim relief and is no longer without income, in the case of a removal, during the remainder of the adjudication. Such preliminary relief is unlikely in a federal district court. The rules of evidence and procedure are less formal than a litigant would confront in federal court.

The costs of mounting a "federal case" are substantial and will likely discourage many employees from doing so. An employee who has already expended time and resources in an administrative adjudication confronts another, more expensive litigation that will require considerable additional resources.

An employee will likely face extensive delay in a federal district court. Because statistics are not available specifically addressing the length of time it takes to resolve SOX and other alternative recourse provisions in recent whistleblower statutes in federal courts, a Washington College of Law student, Dania Douglas, drew comparisons to other employment and labor law case statistics for the twelve-month period prior to June 2008. I rely on her data, data provided by the Administrative Office of the U.S. Courts. The data describes "U.S. cases" in which the United States is a party and "federal question cases" in which it is not but jurisdiction rests on the presence of a claim arising under constitution, laws or treaties of the United States.

Resolution of a case at trial may take months or a year or more. The cases in which the United States was a party include the following categories of cases. Of 1, 265 civil rights employment cases brought in federal district court, 68 of those cases reached trial. The median time from filing to a determination at trial was more than two years (26.2 months). Of 145 cases brought under the Fair Labor Standards Act, 19 reached trial; the median time from filing to determination at trial was 17 months. Of 270 characterized as "other labor litigation," only 4 reached trial; the median time from filing to a trial determination for these cases was not available.

Federal question cases in which the United States was not a party include the following categories of cases. Of 12, 786 civil rights employment cases brought during this period, 412 reached trial; the median time from filing to a determination at trial was slightly over two years (24.1 months). Of 4, 621 cases brought under the Fair Labor Standards Act, 53 of these reached trial; the median time from filing to a determination at trial was 16.5 months. Of 1,032 cases brought under the Labor Management Relations Act nine reached trial; the median time from filing to a trial determination was unavailable. Finally, of 10, 135 cases categorized as "other labor legislation," 83 reached trial; the median time from filing to a trial determination was over two years (24.8 months).

As discussed above in regard to judicial supervision of jury trials, an employee is not guaranteed a trial-type hearing in federal court; the whistleblower confronts summary judgment not available before the Board. The guarantee of a hearing at the Board may be an important advantage for claimants, such as whistleblowers. A study by Professors Samuel Issacharoff and George Loewenstein of the effect of changes in Supreme Court precedent making summary jury easier for defendants in federal court found that these cases made summary judgment a more valuable tool for defendants.

A whistleblower should also be alert to the small percentage of cases filed in district court that ever reach trial. In addition to the small overall percentage of all civil cases reaching trial, the data from the Administrative Office of the U.S. Courts regarding employment-based actions also supports the conclusion that a whistleblower should carefully consider whether the whistleblower would obtain a trial in a federal district court. This data shows that a small percentage of each category of these employment-based cases reaches trial.

This analysis suggests that most employees asserting whistleblower claims before the Board are unlikely to seek recourse in a federal district court. Whistleblowers representing themselves are less likely to do so than whistleblowers as a whole. These *pro se* whistleblowers lack the resources and the legal support required to make litigation in a federal district court an attractive alternative.

In addition, many federal district courts may not depart from the adversarial model to aid *pro se* litigants in the ways that Board has adopted. Perhaps not all *pro se* whistleblowers could be presumed to reject *de novo* review in a federal district court; after all, some appellants before the Board appear *pro se* before the Federal Circuit. Although challenging, preparation of an appeal may not be as daunting as the preparation and conduct of trial. In any event, the

substantial percentage of *pro se* litigants before the Board is another reason to conclude that whistleblowers claiming retaliation will not routinely use the alternative recourse contained in the Enhancement Act.

The previous discussion of the behavior of whistleblowers under SOX also supports Proposition One. Most of these litigants stuck with the administrative process even though doing so allowed DOL to issue a final decision that denied them any recourse to a federal district court. Under the Enhancement Act, whistleblowers would not lose the right to go to a federal district court by continuing with the administrative process. They would still have the choice to use the alternative recourse provision. Thus, if SOX whistleblowers generally remained with the administrative process within DOL when they could have left, it is more likely that federal employee whistleblowers will continue with administrative adjudication before the Board.

The alternative recourse provision discourages whistleblowers from using it in order to obtain a more favorable law. A whistleblower who wants the law of a circuit other than the Federal Circuit need not seek alternative redress in a federal district court to do so. The employee can appeal to an appropriate court of appeals, which is either the Federal Circuit or any circuit which would have had jurisdiction over an appeal from the district court in which the employee could have sought alternative recourse. This provision eliminates the alternative recourse provision as an incentive for choosing to use the alternative recourse provision.

Board decisions regarding the applicable law, however, might create some, but not compelling, reasons for using the alternative recourse provision to avoid unfavorable law. Under the Enhancement Act, several circuits will begin to develop a body of whistleblower law that will vary from that articulated by the Federal Circuit. Federal Circuit precedent, however, will remain the largest and most comprehensive body of applicable law. The Federal Circuit will retain exclusive jurisdiction over other areas within the Board's jurisdiction; it will also continue to evaluate Board procedures and practices. What precedent will the Board apply in whistleblower cases in which circuits are in conflict? How will it treat the decisions of other circuits regarding more general Board practices and procedures over which the Federal Circuit has traditionally exercised exclusive jurisdiction?

If the Board applies to a determinative issue the precedent of the Federal Circuit different from and less favorable to the whistleblower than the law of the circuit to which the whistleblower may appeal, the whistleblower has incentives to avoid a predetermined outcome and to seek alternative recourse in a federal district court. In these instances, a whistleblower might see little benefit in expending resources in a losing cause when those resources could be better deployed in a forum where success is more likely. How the Board will address this question is difficult to predict because there are justifications for either approach. Even if the Board elects to follow precedent of the Federal Circuit, it is difficult to estimate, however, the number of cases that would be affected. That number, however, is not likely to be large enough to undermine Proposition One.

Other circuits in the course of a whistleblower case will likely have to address other issues of federal employment law and Board practice. Circuits may well in these instances follow the precedent of the Federal Circuit; however, in some circumstances they may find the whistleblower claim and these issues so closely intertwined that they will create precedent inconsistent with that of the Federal Circuit. In these instances, the Board may be more likely to follow the precedent of the Federal Circuit. The application of the federal circuit precedent to related issues, particularly procedural ones, may provide less incentive for an employee to seek review in a federal district court.

There is little tension between the policies supporting alternative recourse to a federal district court and the analysis demonstrating that it will not be commonly used. The policies supporting alternative recourse focus on the importance of allowing the most contentious and complex cases an alternative forum for adjudication. The cases most likely to need an alternative forum are those most likely to satisfy the criteria set out in the Enhancement Act.

The analysis that alternative recourse will not be commonly used reminds us that the Board will remain an important adjudicator of whistleblower claims. As such, a future task for Congress is to improve the Board. These hearings are not the occasion to discuss proposals for improvement but the discussion thus far suggests upgrading the Board by providing increased funding, by considering the status of the Board's AJs, and by seeking ways to improve its reputation and influence.

Even if the above analysis is incorrect, whistleblower cases form a small percentage of the Board's case load. If *all* of these cases used the alternative recourse to federal district courts, an improbable occurrence, it is unclear how departure of these cases would harm the Board's procedure. If all or most of these cases had received a complete hearing at the time of use of the alternative procedure, the "loss" of administrative resources might be greater than contained in the rough estimate in the analysis of Proposition Three. The routine use of the alternative recourse procedure would focus on the policy supporting the adoption of such a procedure but that examination would be independent of whether alternative recourse would harm the Board.

We can only speculate on the effect on the Enhancement Act on the analysis. Conceivably the Enhancement Act by improving the Whistleblower Protection Act and by providing credible protection would encourage more federal whistleblowers to seek redress from the Board. Effective protection, however, might also encourage agencies to open internal channels for disclosure and redress that would avoid the necessity of adjudicating retaliation claims. The Enhancement Act may also increase settlement of claims.

•Proposition Two: A Rational Decision Maker at the Board Would Not Rush the Resolution of Whistleblower Cases in Order to Meet the 180-day Deadline

Assuming good faith and a conception of the Board's mission as fairly and expeditiously adjudicating appeals with its available resources, a rational decision maker would not "rush" whistleblower cases to meet the 180-day deadline. To "rush" the adjudication of these cases could mean a number of things but there are two possible and interrelated likely responses.

One processes these whistleblower cases with expedition as the sole or principal value in their adjudication. The other diverts resources from other appeals to insure that appeals subject to the alternative recourse provision are resolved within the 180-day limit.

Both of these responses are inconsistent with the mission of the Board. The first risks sacrificing a full and fair hearing in order to meet the deadline. The second, in some ways more extreme, threatens the mission of the Board in many other classes of appeals as well. The severity of the threat depends on the amount of resources that will have to be redirected. Moreover, these responses do not necessarily insure that the employee will not seek the alternative recourse after the Board reaches a final decision.

Assuming that Proposition One is valid, a rational decision maker would conclude that these responses would be unnecessary because most employees would remain in the administrative process. If so, the injury to the Board's mission would be unjustified even if keeping these cases in the administrative process was a valid goal. A decision maker would ask why should the goal of meeting this 180-day period in every case justify the actions that would be required?

A rational response would continue to accomplish the goals that Board has articulated regarding the treatment of appeals and petitions for review. In 2008, these goals were resolution of 50% of initial appeals within 110 days and within 150 days for petitions for review. In 2008, 72% of initial appeals were decided within 110 day, the average processing time for an initial appeal was 87 days; 60% of petitions for review were decided within 110 days ; the average processing time for a petition for review was 112 days. Given this performance, the Board would proceed to treat each appeal on its merits. It is probable that more complex and contentious cases could exceed the 180-day period but meeting that deadline in all cases is inconsistent with the way in which the Board now evaluates its efficiency in case processing (a method that does not measure success by having every case meet goals and targets) and would come at potentially high cost to little effect.

In his study of DOL's adjudication of SOX claims, Professor Richard Moberly found that processing time for SOX cases *increased* over time. He attributed this increase in processing time to a lack of adequate resources, a reason that would be considered by a rational decision maker, perhaps leading to the same result.

A decision maker might consider personal or agency reputational interests in meeting the 180-day deadline but against such reputational interests a decision maker would balance the loss to reputation and standing that the accomplishment of this goal could incur. Emotional responses such as pique or anger would be irrational ways to make such a decision. Other reasons might be rational but perverse because they assume other goals for "rushing" such adjudications unconnected with the mission of the Board.

•Proposition Three: The Effects of the Alternative Recourse Procedure on the Board Does Not Counsel Against Adoption of the Provision

A critic argued that the alternative recourse provisions of SOX "wasted" administrative resources. In this view, any time spent in the adjudication of a claim is lost if the claim is subsequently adjudicated in an alternative forum. The more administrative resources that have been devoted to a claim, the greater the loss. Thus, an employee who leaves the process at or near its end imposes a greater loss than one who leaves earlier. The 180-day requirement ensures that a good deal of resources will be expended before an employee decides to leave. Likewise, the level of this loss rises with the number of employee who use the alternative recourse provision. (The argument paradoxically supports a different policy in which a claimant would be able initially to choose between administrative adjudication and litigation in a federal district court.)

Proposition One assures us that the percentage of employees who use the alternative recourse provision is small. The amount of the loss then is controlled by the size of the pool of persons who pursue administrative adjudication. In testimony in the House, one witness asserted that in 2006, 146 new whistleblower cases were brought to the Board; eighty nine of those cases were considered on the merits. In the first three year of SOX, 491 cases were brought to DOL; one hundred and thirty of them were considered in adjudication. These statistics suggest that many cases consume limited adjudicatory resources.

It is possible to estimate the administrative costs of the alternative recourse provision if all of the persons using it are employees who receive a hearing. The estimate is a rough one and can do little more than give a "ball park" figure of what administrative resources are likely devoted to these cases. I begin with the 89 whistleblower cases adjudicated in 2006 at the Board; I assume 10% of these will have used that alternative recourse mechanism if it had been available. This percentage comes from the large EEOC sample of 8,000 cases and involves an alternative recourse provision like the one in the Enhancement Act. Thus, approximately nine whistleblower would be assumed to use the alternative recourse procedure.

I also assume that all of these cases have completed an initial consideration. (this is a generous assumption because 72 percent of the initial decisions were reached within 110 days in 2008 suggesting that some of these nine cases would not have completed the initial decision process—I use the 2008 percentage because no comparable figure is available for 2006). I assume that some of them have proceeded to but not completed the process of a Petition for Review by the Board before the 180-day period runs. These assumptions mean that a hearing had been completed and an initial decision reached in each case. Thus, all nine whistleblowers using the alternative recourse provision would be assumed to leave after a full hearing.

In its 2008 Performance and Accountability Report, the Board states that the average case processing cost for 2006 was $2, 830. This average processing cost includes cases that were dismissed or settled and thus the cost of a case that completed adjudication would be larger than the average. If that cost were doubled or even tripled, the processing costs for these cases would be respectively $5,660 and $8,490. If these processing costs are multiplied by nine (the number of whistleblowers assumed to use the alternative recourse provision) the resulting products are respectively $50, 940 and $76, 410.

I stress that this is only the roughest of estimates but one that gives a sense of the magnitude of the loss incurred by the Board as a result of the alternative recourse provision. These figures are respectively .1 percent (one tenth of one percent) and .2 percent (two tenths of one percent) of the revenues of the Board for that year. First, it is not clear that these figures represent a loss. The Board carried out its function in each of these cases, adjudicating the whistleblower claims brought before it. The parties did gain some benefits from the adjudication, benefits that may make subsequent adjudication more efficient or eliminate the need for it if the parties settle the claim. Second, even if we were to treat these costs as losses and a "waste" of resources, we can conceive of them as a cost of achieving the goals of providing relief to whistleblowers and encouraging the disclosures that assure democratic accountability, that deter misconduct, that prevent waste and corruption, and that secure the First Amendment rights of federal employees.

•Proposition Four: The Alternative Recourse Procedure Can Benefit Judicial and Administrative Processes

The Alternative Recourse Provision Can Benefit the Judicial Process

The example above suggests that the each of the parties, the whistleblower and the agency, affected by the alternative recourse provision acquire considerable information in the administrative process about the positions, evidence and arguments of the other party. This information can benefit the judicial process in two ways.

First, this information may lead to more focused and efficient adjudication in a federal district court. For example, discovery in federal court may be less extensive than would otherwise be the case without the preparation of the administrative process. The issues and positions of the parties, as well as their legal positions, may be more fully developed thereby reducing the need for pretrial hearings.

Second, the information acquired in the administrative process may increase the likelihood of settlement eliminating the need for further litigation. Settlement occurs when the parties can agree to an outcome, usually monetary damages, that put each in a better position than if they litigated the case. Thus, the settlement offers of the two parties must overlap and such overlap requires a similar assessment of the likelihood that a whistleblower will prevail and of the amount of damages or monetary value attached to other relief that the whistleblower is likely to receive if successful. Thus, more similar assessments of these factors by the parties, increase the likelihood that the settlement offers of the parties will overlap.

The litigation costs of the parties also influence what each party will offer. The whistleblower will subtract anticipated litigation costs from her demand because those costs will not be incurred if the whistleblower's settlement demand is satisfied. On the other hand, the whistleblower will add already incurred litigation costs to her demand because the whistleblower seeks to recoup these costs as part of the settlement. In contrast, the government will add anticipated litigation costs to the settlement offer because the settlement offer will allow the government to forego these costs. On the other hand, the government will subtract the incurred litigation costs from the offer because this subtraction is a way for the

government to recoup these costs. Assuming that the incurred and anticipated litigation costs of the parties are similar, the anticipated litigation costs of each party are likely to be greater than the incurred costs because judicial litigation is more expensive than administrative adjudication (and this is probably true even if the administrative process reduces the litigation costs that otherwise might be anticipated in federal court). Thus, this factor also increases the likelihood of settlement.

The alternative recourse provision encourages settlement that will reduce the likelihood of litigation in a federal district court. In this way, this provision benefits the judicial process.

The Alternative Recourse Provision Can Benefit the Administrative Process

The Board relies on settlement in administrative adjudication. One of the goals of the Board is to "[m]aintain a settlement rate of initial appeals that are not dismissed at 50% or higher." The Board has successfully met this goal over the last four year; the settlement rates of initial appeals not dismissed for fiscal years 2005, 2006, 2007, 2008 are respectively 55%, 58%, 57% and 54%. In addition, some group of petitions for review are targeted for settlement with a goal of settling 25% of them. In the fiscal years above the settlement rate for this group are respectively 47%, 38%, 23% and 34%.

Undoubtedly, AJs are aware of the goals for initial appeals and appreciate that this goal is one standard used to evaluate their performance. Some have criticized the Board arguing that this emphasis on settlement pressures AJs to "encourage" aggressively such settlements and emphasizes a case processing approach to adjudication.

The analysis above regarding the judicial process is useful in considering how the alternative recourse provision might influence settlement in whistleblower retaliation cases filed with the Board. For example, an agency might be inclined to settle a case earlier in the process, appreciating that the whistleblower can seek *de novo* review in a federal district court. Such early settlement reduces both the incurred litigation costs and increases the saving from settlement.

Two aspects of the Enhancement Act counsel for settlement. First, the Act increases the likelihood of success of a whistleblower by changes in the law and the provision of an alternative forum. Second, this alternative forum increases the total anticipated litigation cost that the government may confront at the beginning of an administrative adjudication. Because the choice to use the alternative recourse procedure rests with the whistleblower, an agency must assume that in most relevant cases the whistleblower will seek such recourse. Even if the agency makes the analysis leading to Proposition One above, the agency may know that most whistleblowers may not use the alternative recourse provision, but at the time that it considers settlement, it cannot know *which whistleblowers* will do so. (The analysis in this paragraph is complicated by the separation of authority in administrative adjudication and federal litigation. Agencies control the administrative adjudication; the Department of Justice will in most instances control the federal litigation. These complications, however, do not undermine the analysis above.)

An example mentioned earlier illustrates the interaction of these two aspects of the Enhancement Act. That example involved the Board's application of a determinative precedent of the Federal Circuit less favorable to the whistleblower than the law of the circuit containing the appropriate federal district under the alternative recourse provision. In this instance, settlement becomes possible only because of the alternative recourse provision. This possibility rests on both the applicable law available under the alternative recourse provision and the litigation costs of *de novo* review in a federal district court.

Agencies may also be more willing to settle whistleblower claims prior to administrative adjudication. The analysis above is also applicable to settlement at the agency level. The substantive changes in the law and the alternative recourse provision may have a similar effect on settlement. This is particularly true with whistleblower claims because whistleblowers now essentially lose all cases before the Board and before the Federal Circuit.

To the extent that the alternative recourse provision encourages settlement (and it seems likely that it does), it benefits the judicial and administrative processes. Thus, the alternative recourse procedure can create benefits as well as costs.

BACKGROUND
S. 372 – THE WHISTLEBLOWER ENHANCEMENT ACT
JUNE 11, 2009

Background

Civil Service Reform Act of 1978 (CSRA)

Federal employees are encouraged to disclose government waste, fraud, and abuse, also referred to as "whistleblowing." The Civil Service Reform Act (CSRA) of 1978 created statutory protections for federal employees to encourage disclosure of government illegality, waste, fraud, and abuse.[1] The CSRA replaced the Civil Service Commission with the Merit Systems Protection Board (MSPB), the Office of Special Counsel (OSC), and the Federal Labor Relations Authority. The MSPB was established to uphold the Federal merit systems by protecting and adjudicating Federal employee appeals. The OSC, which originally was established within the MSPB, was charged with investigating and prosecuting allegations of prohibited personnel practices.

Statutory protections covered all executive agencies, except the Federal Bureau of Investigation (FBI), the Central Intelligence Agency (CIA), the Defense Intelligence Agency (DIA), the National Security Agency (NSA), and as determined by the President, an agency that conducts foreign intelligence or counterintelligence activities. In the event the OSC received classified information from an employee, the statute directed the OSC to transmit the information to the House and Senate intelligence committees.

Whistleblower Protection Act of 1989 (WPA)

Over the years, Congress determined that the CSRA did not protect whistleblowers from reprisals as intended. The OSC was found to be ineffective, and it had not brought any cases to the MSPB since 1979. Thus, in 1989, Congress enacted the Whistleblower Protection Act (WPA), which amended the CSRA and enhanced protections for employees who disclose wrongdoing in the federal government.[2] The WPA established the OSC as an independent agency within the Executive Branch, separate from the MSPB, and empowered the OSC to enforce whistleblower protections. Furthermore, the WPA allowed whistleblowers to file appeals with the MSPB; authorized the MSPB to give protective orders to a witness or person during a proceeding before the Board or an OSC investigation; prohibited the OSC from intervening in cases or providing information concerning the individual making an allegation without the individual's consent; required whistleblowers to prove reprisal by showing that their disclosure was a contributing factor in adverse actions against them; authorized federal agencies to give preference in granting transfers to whistleblowers; and required the OSC to report annually to Congress on its activities.

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[1] Pub. L. No. 95-454, 92 Stat. 1111 (1978).
[2] Pub. L. No. 101-12 (1989).

1994 Amendments to the Whistleblower Protection Act

Despite passage of the WPA, whistleblowers were still experiencing difficulty in proving their cases. In November 1993, the Government Accounting Office (GAO) (now the General Accountability Office) released a report focusing on a survey of the views of whistleblower complainants to the OSC.[3] The report revealed that 81 percent of complainants surveyed gave very low ratings for the OSC's overall effectiveness. The majority of complainants believed that OSC did not protect their interests. GAO also found that most survey respondents did not fully understand the complaint process and wished they had known the procedures better before they filed their complaints. Therefore, GAO recommended that Congress require agencies to inform employees of their whistleblower rights and how to report misconduct.

In 1994, Congress further strengthened whistleblower protections by amending the WPA to address a series of actions by the OSC and decisions made by the MSPB and the Federal Circuit that were found to be inconsistent with Congressional intent of the 1989 Act. The 1994 legislation imposed a 240 day time limit on agency action; extended coverage to approximately 160,000 employees of the Veterans Administration and other government agencies; broadened the definitions of personnel actions covered under the WPA; made federal agencies primarily responsible for educating employees of their rights under the WPA; required OSC to serve as a consultant to federal employees on the whistleblower process; and required the OSC to issue a policy statement regarding the implementation of the WPA.

Intelligence Community Whistleblower Protection Act of 1998 (ICWPA)

In 1996, the Office of Legal Counsel (OLC) in the Department of Justice issued an opinion[4] stating that (1) federal employees are not authorized to decide unilaterally to disclose classified information to a Member of Congress; (2) the revocation of a security clearance is not considered a personnel action within the WPA; and (3) Executive Order 12356, which provides a system for classifying, declassifying, and safeguarding national security information, and related directives and practices, govern the question of who is an appropriate authority to receive classified information.

In response to the OLC's opinion, Congress passed the Intelligence Community Whistleblower Protection Act of 1998 (ICWPA).[5] The ICWPA established a process to disclose classified information to Congress. An employee of the intelligence community who intends to report an "urgent concern"[6] to Congress may report a complaint to the agency's Inspector

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[3] The General Accounting Office, "Reasons for Whistleblower Complainants Dissatisfaction Need to be Explored," November 2003, GAO/GGD-94-21, <http://archive.gao.gov/d14t3/150505.pdf>.

[4] Office of Legal Policy, U.S. Department of Justice, "Memorandum/Opinion: Access to Classified Information," November 26, 1996, < http://www.usdoj.gov/olc/nuccio.op.htm>.

[5] Note: The Intelligence Community Whistleblower Protection Act was passed as Title VII to the Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272.

[6] 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

General (IG). The IG has 14 calendar days to determine if the complaint is credible. If the IG decides it is credible, then the IG transmits the complaint to the head of the agency. The agency head then has seven days to decide whether to forward the case to the House and Senate intelligence committees. If the IG decides not to transmit the complaint to the agency head, the employee can submit the information to Congress by contacting the intelligence committees, after notifying the IG and the agency and following appropriate security procedures.

Legislative History of S. 372

The MSPB and Federal Circuit has continued to narrowly interpret the WPA. To date, Federal whistleblowers have prevailed on the merits of their claims before the Federal Circuit Court of Appeals, which currently has sole jurisdiction over federal employee whistleblower appeals, only three times in hundreds of cases since 1994.

Senators Akaka and other Members have introduced several bills to strengthen the WPA, starting with S. 3190, introduced in October 2000. These bills have passed the Senate in the two most recent Congresses. In 2005, Senator Akaka reintroduced the legislation (S. 494), which was reported out of the Homeland Security and Governmental Affairs Committee (HSGAC), and passed the Senate as part of the Fiscal Year 2007 National Defense Authorization Act (H.R. 5122), on June 26, 2006. However, the whistleblower provisions were removed from the final bill during conference.

On January 11, 2007, Senator Akaka and others reintroduced the Federal Employee Protection of Disclosures Act (S. 274). That bill was reported out of HSGAC with an amendment on November 16, 2007,[7] and passed the Senate by unanimous consent on December 17, 2007. A companion bill (H.R. 985) passed the House, but the differences between the bills were not reconciled by the end of the 110th Congress.

Current Legislation: S. 372 and H.R. 1507

S. 372, the Whistleblower Protection Enhancement Act of 2009, was introduced on February 3, 2009, by Senators Akaka, Collins, Grassley, Levin, Lieberman, Voinovich, Leahy, Kennedy, Carper, Pryor, Mikulski; Senators Cardin and Burris since have joined as cosponsors.

H.R. 1507, the House companion bill, was introduced on March 12, 2009, by Representatives Van Hollen, Waxman, Towns, Braley, and Platts; Representatives Maloney and Cummings since have joined as cosponsors.

Key Components of S. 372

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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.

[7] S. Rep. No. 110-232 (2007).

Some of the key components of S. 372 are discussed below. For a more detailed analysis of these provisions (except the final two), please refer to the Committee Report to S. 274.[8]

1. Protected Disclosures

The bill would clarify that the law covers any disclosure, even if made as part of an employee's job duties, concerns consequences of policy or individual misconduct, is oral or written, or is made to any audience inside or outside an agency, and without restriction to time, place, motive or context. The bill also would protect certain disclosures of classified information to Congress, when the disclosure is to a Member or legislative staff holding an appropriate security clearance and authorized to receive the type of information disclosed.

2. Objective Test for Reasonable Belief

The bill would codify the meaning of reasonable belief for whistleblower cases. Whistleblowers would be deemed to reasonably believe they disclosed wrongdoing if "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude" that the actions evidence government wrongdoing.

3. Prohibited Personnel Actions

The bill would add three actions to the list of prohibited personnel actions that may not be taken against whistleblowers for protected disclosures: enforcement of a nondisclosure policy or agreement; retaliation relating to an employee's security clearance or other access determination; and investigations (other than routine, non-discretionary agency investigations).

If an employee's security clearance is revoked, the bill would authorize the MSPB to conduct an expedited review and issue declaratory and other appropriate relief, but not to restore a security clearance. If MSPB or a reviewing court were to find that a security clearance decision was retaliatory, the agency involved would be required to review its security clearance decision and issue a report to Congress. For the sole purpose of determining whether a security clearance determination was made in retaliation for whistleblowing, the agency would be required to demonstrate by a preponderance of the evidence, rather than clear and convincing evidence, that it acted for independent, lawful reasons.

4. Exclusions from WPA

The President is permitted to exclude certain employees and agencies from prohibited personnel practice liability if they perform certain confidential or policy-making functions or work in certain intelligence-related agencies. With regard to the former, the agency must have made the determination before the challenged personnel action. The bill, likewise, would require

[8] S. Rep. No. 110-232 (2007).

that the determination to remove intelligence-related agencies from WPA coverage be made prior to the challenged personnel action.

5. Judicial Review

In 1982, Congress replaced normal Administrative Procedures Act appellate review of MSPB decisions with exclusive jurisdiction in the U.S. Court of Appeals for the Federal Circuit. Subject to a five-year sunset, the bill would suspend the Federal Circuit's exclusive jurisdiction over whistleblower appeals and allow petitions for review to be filed either in the Federal Circuit or a federal circuit court of competent jurisdiction.

6. Authority of Special Counsel

Under current law, OSC has no authority to request MSPB to reconsider a decision or seek appellate review of an MSPB decision. The bill would authorize OSC to appear as *amicus curiae* in any civil action brought in connection with the WPA and the Hatch Act.

7. Attorney Fees

Currently, OSC must pay the legal fees if it loses a disciplinary case. This is an impediment to OSC's pursuit of such actions because the potential liability is significant in comparison to OSC's small budget. The bill would require the employing agency, rather than OSC, to reimburse fees.

8. Advising Employees of Rights

The bill would require agencies to advise employees of their rights and protections and how to make a protected disclosure of classified information to the Special Counsel, IGs, Congress, or other designated agency official authorized to receive classified information.

9. Providing Coverage to Employees at the Transportation Security Administration

In *Schott v. Department of Homeland Security*, the MSPB ruled that Transportation Security Officers do not have whistleblower protections. The bill would extend WPA coverage to employees of the Transportation Security Administration (TSA).

10. Disclosures Related to Research, Analysis, or Technical Information

The bill would protect disclosures an employee reasonably believes are evidence of censorship related to research, analysis, or technical information if the employee reasonably believes the censorship is or will cause gross government waste or mismanagement, a substantial and specific danger to public health or safety, or a violation of law.

Comparison of S. 372 and H.R. 1507

Many provisions of H.R. 1507 are identical or very similar to the major provisions of S. 372. H.R. 1507 contains provisions similar to all of those described above. In addition to these provisions in common, each bill contains some distinct provisions.

S. 372, but not H.R. 1507, would:

- authorize the Director of the Office of Personnel Management (OPM) to obtain review of an MSPB final order interpreting whistleblower protections under specified circumstances.;
- would require the Comptroller General to report to Congress on the implementation of the Act; and
- require MSPB to report on the number of WPA cases filed and the outcome.

H.R. 1507, but not S. 372, would:

- allow employees to bring WPA cases in district court if the MSPB does not make a decision within 180 days;
- expand whistleblower protection to employees or former employees of a national security agency by prohibiting reprisals against such employees for making disclosures, including revocations of their security clearances; and
- provide whistleblower protections to federal contractor employees.

House Hearing on H.R. 1507

On May 14, 2009, the House Committee on Oversight and Government Reform, chaired by Congressman Towns, held a hearing on H.R. 1507. The Committee heard testimony from whistleblower advocacy groups, experts, whistleblowers who suffered retaliation, and a representative from the Administration.

Mr. De testified on behalf of the Administration. The Administration supports many of the provisions common to both S. 372 and H.R. 1507, including: (1) allowing whistleblowers to obtain compensatory damages; (2) protecting disclosures that are made to supervisors; (3) the normal-duty disclosure rule, while ensuring that agency managers are not dissuaded from taking disciplinary actions against poorly performing employees; and (4) providing whistleblower protections to Transportation Security Officers. He emphasized the Administration's commitment to whistleblower rights.

However, Mr. De stated that the Administration opposed aspects of H.R. 1507's protection of national security whistleblowers. In particular, Mr. De stated that the

Administration opposes granting "federal employees the unilateral right to reveal national security information whenever they reasonably believe the information provides evidence of wrongdoing..." He stated the Administration's belief that H.R. 1507 would unconstitutionally restrict the President's ability to protect classified information related to national security.[9] Mr. De instead proposed the creation of an "extra-agency" entity within the Executive Branch for federal employees who decide to make classified disclosures to Congress under the ICWPA. The entity would consist of senior presidentially-appointed officials from agencies within and outside of the intelligence community. If the head of the agency decides not to transmit the information to Congress, the employee could appeal to the entity, which would have the power to override the head of the agency. The Administration also proposed using the extra-agency mechanism to review alleged retaliatory security clearance revocations.

Additionally, the Administration stated that it does not believe that federal district courts are an appropriate venue for national security whistleblowers. The Administration recommends instead the extra-agency entity or the MSPB.

Louis Fisher, Special Assistant to the Law Librarian of Congress, testified that Congress has coequal duties and responsibilities for the government, domestic and foreign. According to Mr. Fisher, the Executive Branch has argued that whistleblowing is generally permitted for domestic programs, but not for national security. He testified that the Administration's position is to protect executive, not legislative, interests, and he believes Congress must protect its institutional prerogatives in the system of checks and balances.[10]

Professor Robert F. Turner, from the University of Virginia School of Law and co-founder of the Center for National Security Law, testified primarily on provisions extending whistleblower protections to employees of the intelligence community. Professor Turner believes this to be unconstitutional because the Framers of the Constitution intentionally excluded Congress from "the business of intelligence" because it could not keep secrets and also because the Constitution grants Executive Privilege over national security information.[11]

Thomas Devine, from the Government Accountability Project; Angela Canterbury, from Public Citizen, Congress Watch Division; Michael German, from the American Civil Liberties Union; and David Colapinto, from the National Whistleblower Center, all expressed their support for the bill.

Legislation

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[9] Written Statement of Rajesh De, Hearing on Protecting the Public from Waste, Fraud, and Abuse: H.R. 1507, the Whistleblower Protection Enhancement Act of 2009: House Committee on Oversight and Government Reform, May 14, 2009, < http://oversight.house.gov/documents/20090513192835.pdf>.

[10] Written Statement of Louis Fisher, Hearing on Protecting the Public from Waste, Fraud, and Abuse: H.R. 1507, the Whistleblower Protection Enhancement Act of 2009: House Committee on Oversight and Government Reform, May 14, 2009, < http://oversight.house.gov/documents/20090513183833.pdf>.

[11] Written Statement of Robert F. Turner, Hearing on Protecting the Public from Waste, Fraud, and Abuse: H.R. 1507, the Whistleblower Protection Enhancement Act of 2009: House Committee on Oversight and Government Reform, May 14, 2009, < http://oversight.house.gov/documents/20090513183900.pdf>.

The Civil Service Reform Act of 1978, Public Law 95-454

Intelligence Authorization Act for Fiscal Year 1999, Public Law 105-780

The Whistleblower Protection Act of 1989, Public Law 101-12

S. 372, The Whistleblower Protection Enhancement Act of 2009

H.R. 1507, The Whistleblower Protection Enhancement Act of 2009

Additional Information

Louis Fisher, Congressional Research Service, *National Security Whistleblowers* (December 30, 2005), Order Code RL33215

L. Paige Whitaker, Congressional Research Service, *The Whistleblower Protection Act: An Overview* (March 12, 2007), Order Code RL33918

II

111TH CONGRESS
1ST SESSION

S. 372

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

IN THE SENATE OF THE UNITED STATES

FEBRUARY 3, 2009

Mr. AKAKA (for himself, Ms. COLLINS, Mr. GRASSLEY, Mr. LEVIN, Mr. LIEBERMAN, Mr. VOINOVICH, Mr. LEAHY, Mr. KENNEDY, Mr. CARPER, Mr. PRYOR, and Ms. MIKULSKI) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

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A BILL

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

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

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

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

5 (b) CLARIFICATION OF DISCLOSURES COVERED.—

6 (1) IN GENERAL.—Section 2302(b)(8) of title
7 5, United States Code, is amended—

8 (A) in subparagraph (A)—

9 (i) by striking "which the employee or
10 applicant reasonably believes evidences"
11 and inserting ", without restriction to
12 time, place, form, motive, context, forum,
13 or prior disclosure made to any person by
14 an employee or applicant, including a dis-
15 closure made in the ordinary course of an
16 employee's duties, that the employee or ap-
17 plicant reasonably believes is evidence of";

18 (ii) in clause (i), by striking "a viola-
19 tion" and inserting "any violation"; and

20 (iii) by striking "or" at the end;

21 (B) in subparagraph (B)—

22 (i) by striking "which the employee or
23 applicant reasonably believes evidences"
24 and inserting ", without restriction to
25 time, place, form, motive, context, forum,
26 or prior disclosure made to any person by

1 an employee or applicant, including a dis-
2 closure made in the ordinary course of an
3 employee's duties, of information that the
4 employee or applicant reasonably believes
5 is evidence of";
6 (ii) in clause (i), by striking "a viola-
7 tion" and inserting "any violation (other
8 than a violation of this section)"; and
9 (iii) in clause (ii), by adding "or" at
10 the end; and
11 (C) by adding at the end the following:
12 "(C) any disclosure that—
13 "(i) is made by an employee or appli-
14 cant of information required by law or Ex-
15 ecutive order to be kept secret in the inter-
16 est of national defense or the conduct of
17 foreign affairs that the employee or appli-
18 cant reasonably believes is direct and spe-
19 cific evidence of—
20 "(I) any violation of any law,
21 rule, or regulation;
22 "(II) gross mismanagement, a
23 gross waste of funds, an abuse of au-
24 thority, or a substantial and specific
25 danger to public health or safety; or

"(III) a false statement to Congress on an issue of material fact; and

"(ii) is made to—

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

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

"(III) an employee of Congress who has the appropriate security clearance and is authorized to receive information of the type disclosed.".

(2) PROHIBITED PERSONNEL PRACTICES UNDER SECTION 2302(b)(9).—

(A) TECHNICAL AND CONFORMING AMENDMENTS.—Title 5, United States Code, is amended in subsections (a)(3), (b)(4)(A), and (b)(4)(B)(i) of section 1214, in subsections (a), (e)(1) and (i) of section 1221, and in subsection

1 (a)(2)(C)(i) of 2302 by inserting "or
2 2302(b)(9) (B) through (D)" after "section
3 2302(b)(8)" or "(b)(8)" each place it appears.
4 (B) OTHER REFERENCES.—Title 5, United
5 States Code, is amended in subsection
6 (b)(4)(B)(i) of section 1214 and in subsection
7 (e)(1) of section 1221 by inserting "or pro-
8 tected activity" after "disclosure" each place it
9 appears.
10 (c) DEFINITIONAL AMENDMENTS.—
11 (1) DISCLOSURES.—Section 2302(a)(2) of title
12 5, United States Code, is amended—
13 (A) in subparagraph (B)(ii), by striking
14 "and" at the end;
15 (B) in subparagraph (C)(iii), by striking
16 the period at the end and inserting "; and";
17 and
18 (C) by adding at the end the following:
19 "(D) 'disclosure' means a formal or informal
20 communication or transmission, but does not include
21 a communication concerning policy decisions that
22 lawfully exercise discretionary authority unless the
23 employee or applicant providing the disclosure rea-
24 sonably 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.".

(2) 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.".

(d) REBUTTABLE PRESUMPTION.—Section 2302(b) of title 5, United States Code, is amended by amending the matter following paragraph (12) to read as follows: "This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress. 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 they have disclosed in-

1 formation that evidences any violation of law, rule, regula-
2 tion, gross mismanagement, a gross waste of funds, an
3 abuse of authority, or a substantial and specific danger
4 to public health or safety shall be made by determining
5 whether a disinterested observer with knowledge of the es-
6 sential facts known to and readily ascertainable by the em-
7 ployee could reasonably conclude that the actions of the
8 Government evidence such violations, mismanagement,
9 waste, abuse, or danger.".

10 (e) PERSONNEL ACTIONS AND PROHIBITED PER-
11 SONNEL PRACTICES.—

12 (1) PERSONNEL ACTION.—Section
13 2302(a)(2)(A) of title 5, United States Code, is
14 amended—

15 (A) in clause (x), by striking "and" after
16 the semicolon; and

17 (B) by redesignating clause (xi) as clause
18 (xiv) and inserting after clause (x) the fol-
19 lowing:

20 "(xi) the implementation or enforce-
21 ment of any nondisclosure policy, form, or
22 agreement;

23 "(xii) a suspension, revocation, or
24 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"

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

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

(B) in paragraph (12), by striking the period and inserting a semicolon; and

(C) by inserting after paragraph (12) the following:

"(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: 'These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Con-

1 gress); section 1034 of title 10, United States Code
2 (governing disclosure to Congress by members of the
3 military); section 2302(b)(8) of title 5, United
4 States Code (governing disclosures of illegality,
5 waste, fraud, abuse, or public health or safety
6 threats); the Intelligence Identities Protection Act of
7 1982 (50 U.S.C. 421 et seq.) (governing disclosures
8 that could expose confidential Government agents);
9 and the statutes which protect against disclosures
10 that could compromise national security, including
11 sections 641, 793, 794, 798, and 952 of title 18,
12 United States Code, and section 4(b) of the Subver-
13 sive Activities Control Act of 1950 (50 U.S.C.
14 783(b)). The definitions, requirements, obligations,
15 rights, sanctions, and liabilities created by such Ex-
16 ecutive order and such statutory provisions are in-
17 corporated into this agreement and are controlling';
18 or
19 "(14) conduct, or cause to be conducted, an in-
20 vestigation, other than any ministerial or nondis-
21 cretionary fact finding activities necessary for the
22 agency to perform its mission, of an employee or ap-
23 plicant for employment because of any activity pro-
24 tected under this section.".

1 (f) EXCLUSION OF AGENCIES BY THE PRESIDENT.—
2 Section 2302(a)(2)(C) of title 5, United States Code, is
3 amended by striking clause (ii) and inserting the following:
4 "(ii)(I) the Federal Bureau of Investiga-
5 tion, the Central Intelligence Agency, the De-
6 fense Intelligence Agency, the National
7 Geospatial-Intelligence Agency, the National Se-
8 curity Agency; and
9 "(II) as determined by the President, any
10 executive agency or unit thereof the principal
11 function of which is the conduct of foreign in-
12 telligence or counterintelligence activities, if the
13 determination (as that determination relates to
14 a personnel action) is made before that per-
15 sonnel action; or".
16 (g) DISCIPLINARY ACTION.—Section 1215(a)(3) of
17 title 5, United States Code, is amended to read as follows:
18 "(3)(A) A final order of the Board may im-
19 pose—
20 "(i) disciplinary action consisting of re-
21 moval, reduction in grade, debarment from
22 Federal employment for a period not to exceed
23 5 years, suspension, or reprimand;
24 "(ii) an assessment of a civil penalty not to
25 exceed $1,000; or

1 "(iii) any combination of disciplinary ac-
2 tions described under clause (i) and an assess-
3 ment described under clause (ii).
4 "(B) In any case in which the Board finds that
5 an employee has committed a prohibited personnel
6 practice under paragraph (8) or (9) of section
7 2302(b), the Board shall impose disciplinary action
8 if the Board finds that the activity protected under
9 paragraph (8) or (9) of section 2302(b) was a sig-
10 nificant motivating factor, even if other factors also
11 motivated the decision, for the employee's decision to
12 take, fail to take, or threaten to take or fail to take
13 a personnel action, unless that employee dem-
14 onstrates, by preponderance of evidence, that the
15 employee would have taken, failed to take, or threat-
16 ened to take or fail to take the same personnel ac-
17 tion, in the absence of such protected activity.".
18 (h) REMEDIES.—
19 (1) ATTORNEY FEES.—Section 1204(m)(1) of
20 title 5, United States Code, is amended by striking
21 "agency involved" and inserting "agency where the
22 prevailing party is employed or has applied for em-
23 ployment".
24 (2) DAMAGES.—Sections 1214(g)(2) and
25 1221(g)(1)(A)(ii) of title 5, United States Code, are

1 amended by striking all after "travel expenses," and
2 inserting "any other reasonable and foreseeable con-
3 sequential damages, and compensatory damages (in-
4 cluding attorney's fees, interest, reasonable expert
5 witness fees, and costs)." each place it appears.
6 (i) JUDICIAL REVIEW.—
7 (1) IN GENERAL.—Section 7703(b)(1) of title
8 5, United States Code, is amended to read as fol-
9 lows:
10 "(b)(1)(A) Except as provided in subparagraph (B)
11 and paragraph (2), a petition to review a final order or
12 final decision of the Board shall be filed in the United
13 States Court of Appeals for the Federal Circuit. Notwith-
14 standing any other provision of law, any petition for re-
15 view must be filed within 60 days after the date the peti-
16 tioner received notice of the final order or decision of the
17 Board.
18 "(B) During the 5-year period beginning on the effec-
19 tive date of the Whistleblower Protection Enhancement
20 Act of 2009, a petition to review a final order or final
21 decision of the Board in a case alleging a violation of para-
22 graph (8) or (9) of section 2302(b) shall be filed in the
23 United States Court of Appeals for the Federal Circuit
24 or any court of appeals of competent jurisdiction as pro-
25 vided under subsection (b)(2).".

1 (2) REVIEW OBTAINED BY OFFICE OF PER-
2 SONNEL MANAGEMENT.—Section 7703(d) of title 5,
3 United States Code, is amended to read as follows:
4 "(d)(1) Except as provided under paragraph (2), this
5 paragraph shall apply to any review obtained by the Direc-
6 tor of the Office of Personnel Management. The Director
7 of the Office of Personnel Management may obtain review
8 of any final order or decision of the Board by filing, within
9 60 days after the date the Director received notice of the
10 final order or decision of the Board, a petition for judicial
11 review in the United States Court of Appeals for the Fed-
12 eral Circuit if the Director determines, in his discretion,
13 that the Board erred in interpreting a civil service law,
14 rule, or regulation affecting personnel management and
15 that the Board's decision will have a substantial impact
16 on a civil service law, rule, regulation, or policy directive.
17 If the Director did not intervene in a matter before the
18 Board, the Director may not petition for review of a Board
19 decision under this section unless the Director first peti-
20 tions the Board for a reconsideration of its decision, and
21 such petition is denied. In addition to the named respond-
22 ent, the Board and all other parties to the proceedings
23 before the Board shall have the right to appear in the pro-
24 ceeding before the Court of Appeals. The granting of the

1 petition for judicial review shall be at the discretion of the
2 Court of Appeals.
3 "(2) During the 5-year period beginning on the effec-
4 tive date of the Whistleblower Protection Enhancement
5 Act of 2009, this paragraph shall apply to any review re-
6 lating to paragraph (8) or (9) of section 2302(b) obtained
7 by the Director of the Office of Personnel Management.
8 The Director of the Office of Personnel Management may
9 obtain review of any final order or decision of the Board
10 by filing, within 60 days after the date the Director re-
11 ceived notice of the final order or decision of the Board,
12 a petition for judicial review in the United States Court
13 of Appeals for the Federal Circuit or any court of appeals
14 of competent jurisdiction as provided under subsection
15 (b)(2) if the Director determines, in his discretion, that
16 the Board erred in interpreting paragraph (8) or (9) of
17 section 2302(b). If the Director did not intervene in a
18 matter before the Board, the Director may not petition
19 for review of a Board decision under this section unless
20 the Director first petitions the Board for a reconsideration
21 of its decision, and such petition is denied. In addition
22 to the named respondent, the Board and all other parties
23 to the proceedings before the Board shall have the right
24 to appear in the proceeding before the court of appeals.

1 The granting of the petition for judicial review shall be
2 at the discretion of the Court of Appeals.".
3 (j) MERIT SYSTEM PROTECTION BOARD REVIEW OF
4 SECURITY CLEARANCES.—
5 (1) IN GENERAL.—Chapter 77 of title 5, United
6 States Code, is amended by inserting after section
7 7702 the following:
8 **"§ 7702a. Actions relating to security clearances**
9 "(a) In any appeal relating to the suspension, revoca-
10 tion, or other determination relating to a security clear-
11 ance or access determination, the Merit Systems Protec-
12 tion Board or any reviewing court—
13 "(1) shall determine whether paragraph (8) or
14 (9) of section 2302(b) was violated;
15 "(2) may not order the President or the des-
16 ignee of the President to restore a security clearance
17 or otherwise reverse a determination of clearance
18 status or reverse an access determination; and
19 "(3) subject to paragraph (2), may issue declar-
20 atory relief and any other appropriate relief.
21 "(b)(1) If, in any final judgment, the Board or court
22 declares that any suspension, revocation, or other deter-
23 mination with regard to a security clearance or access de-
24 termination was made in violation of paragraph (8) or (9)
25 of section 2302(b), the affected agency shall conduct a re-

1 view of that suspension, revocation, access determination,
2 or other determination, giving great weight to the Board
3 or court judgment.

4 "(2) Not later than 30 days after any Board or court
5 judgment declaring that a security clearance suspension,
6 revocation, access determination, or other determination
7 was made in violation of paragraph (8) or (9) of section
8 2302(b), the affected agency shall issue an unclassified re-
9 port to the congressional committees of jurisdiction (with
10 a classified annex if necessary), detailing the cir-
11 cumstances of the agency's security clearance suspension,
12 revocation, other determination, or access determination.
13 A report under this paragraph shall include any proposed
14 agency action with regard to the security clearance or ac-
15 cess determination.

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

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

1 (2) TECHNICAL AND CONFORMING AMEND-
2 MENT.—The table of sections for chapter 77 of title
3 5, United States Code, is amended by inserting after
4 the item relating to section 7702 the following:

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

5 (k) PROHIBITED PERSONNEL PRACTICES AFFECT-
6 ING THE TRANSPORTATION SECURITY ADMINISTRA-
7 TION.—
8 (1) IN GENERAL.—Chapter 23 of title 5, United
9 States Code, is amended—
10 (A) by redesignating sections 2304 and
11 2305 as sections 2305 and 2306, respectively;
12 and
13 (B) by inserting after section 2303 the fol-
14 lowing:

15 **"§ 2304. Prohibited personnel practices affecting the**
16 **Transportation Security Administration**

17 "(a) IN GENERAL.—Notwithstanding any other pro-
18 vision of law, any individual holding or applying for a posi-
19 tion within the Transportation Security Administration
20 shall be covered by—
21 "(1) the provisions of section 2302(b)(1), (8),
22 and (9);
23 "(2) any provision of law implementing section
24 2302(b) (1), (8), or (9) by providing any right or

1 remedy available to an employee or applicant for em-
2 ployment in the civil service; and
3 "(3) any rule or regulation prescribed under
4 any provision of law referred to in paragraph (1) or
5 (2).
6 "(b) RULE OF CONSTRUCTION.—Nothing in this sec-
7 tion shall be construed to affect any rights, apart from
8 those described in subsection (a), to which an individual
9 described in subsection (a) might otherwise be entitled
10 under law.".
11 (2) TECHNICAL AND CONFORMING AMEND-
12 MENT.—The table of sections for chapter 23 of title
13 5, United States Code, is amended by striking the
14 items relating to sections 2304 and 2305, respec-
15 tively, and by inserting the following:

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

16 (3) EFFECTIVE DATE.—The amendments made
17 by this section shall take effect on the date of enact-
18 ment of this section.
19 (l) DISCLOSURE OF CENSORSHIP RELATED TO RE-
20 SEARCH, ANALYSIS, OR TECHNICAL INFORMATION.—
21 (1) DEFINITIONS.—In this section—
22 (A) the term "applicant" means an appli-
23 cant for a covered position;

1 (B) the term "censorship related to re-
2 search, analysis, or technical information"
3 means any effort to alter, misrepresent, or sup-
4 press research, analysis, or technical informa-
5 tion;
6 (C) the term "covered position" has the
7 meaning given under section 2302(a)(2)(B) of
8 title 5, United States Code;
9 (D) the term "employee" means an em-
10 ployee in a covered position; and
11 (E) the term "disclosure" has the meaning
12 given under section 2302(a)(2)(D) of title 5,
13 United States Code.
14 (2) PROTECTED DISCLOSURE.—
15 (A) IN GENERAL.—Any disclosure of infor-
16 mation by an employee or applicant for employ-
17 ment that the employee or applicant reasonably
18 believes is evidence of censorship related to re-
19 search, analysis, or technical information shall
20 come within the protections of section
21 2302(b)(8)(A) of title 5, United States Code,
22 if—
23 (i) the employee or applicant reason-
24 ably believes that the censorship related to

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

1 (B) APPLICATION.—Paragraph (1) shall
2 apply to any disclosure of information by an
3 employee or applicant without restriction to
4 time, place, form, motive, context, forum, or
5 prior disclosure made to any person by an em-
6 ployee or applicant, including a disclosure made
7 in the ordinary course of an employee's duties.
8 (C) RULE OF CONSTRUCTION.—Nothing in
9 this section shall be construed to imply any lim-
10 itation on the protections of employees and ap-
11 plicants afforded by any other provision of law,
12 including protections with respect to any disclo-
13 sure of information believed to be evidence of
14 censorship related to research, analysis, or tech-
15 nical information.
16 (m) CLARIFICATION OF WHISTLEBLOWER RIGHTS
17 FOR CRITICAL INFRASTRUCTURE INFORMATION.—Section
18 214(c) of the Homeland Security Act of 2002 (6 U.S.C.
19 133(c)) is amended by adding at the end the following:
20 "For purposes of this section a permissible use of inde-
21 pendently obtained information includes the disclosure of
22 such information under section 2302(b)(8) of title 5,
23 United States Code.".
24 (n) ADVISING EMPLOYEES OF RIGHTS.—Section
25 2302(c) of title 5, United States Code, is amended by in-

1 serting ", including how to make a lawful disclosure of
2 information that is specifically required by law or Execu-
3 tive order to be kept secret in the interest of national de-
4 fense or the conduct of foreign affairs to the Special Coun-
5 sel, the Inspector General of an agency, Congress, or other
6 agency employee designated to receive such disclosures"
7 after "chapter 12 of this title".

8 (o) SPECIAL COUNSEL AMICUS CURIAE APPEAR-
9 ANCE.—Section 1212 of title 5, United States Code, is
10 amended by adding at the end the following:

11 "(h)(1) The Special Counsel is authorized to appear
12 as amicus curiae in any action brought in a court of the
13 United States related to any civil action brought in con-
14 nection with section 2302(b) (8) or (9), or subchapter III
15 of chapter 73, or as otherwise authorized by law. In any
16 such action, the Special Counsel is authorized to present
17 the views of the Special Counsel with respect to compli-
18 ance with section 2302(b) (8) or (9) or subchapter III of
19 chapter 73 and the impact court decisions would have on
20 the enforcement of such provisions of law.

21 "(2) A court of the United States shall grant the ap-
22 plication of the Special Counsel to appear in any such ac-
23 tion for the purposes described in subsection (a).".

24 (p) SCOPE OF DUE PROCESS.—

1 (1) SPECIAL COUNSEL.—Section
2 1214(b)(4)(B)(ii) of title 5, United States Code, is
3 amended by inserting ", after a finding that a pro-
4 tected disclosure was a contributing factor," after
5 "ordered if".
6 (2) INDIVIDUAL ACTION.—Section 1221(e)(2)
7 of title 5, United States Code, is amended by insert-
8 ing ", after a finding that a protected disclosure was
9 a contributing factor," after "ordered if".
10 (q) NONDISCLOSURE POLICIES, FORMS, AND AGREE-
11 MENTS.—
12 (1) IN GENERAL.—
13 (A) REQUIREMENT.—Each agreement in
14 Standard Forms 312 and 4414 of the Govern-
15 ment and any other nondisclosure policy, form,
16 or agreement of the Government shall contain
17 the following statement: "These restrictions are
18 consistent with and do not supersede, conflict
19 with, or otherwise alter the employee obliga-
20 tions, rights, or liabilities created by Executive
21 Order No. 12958; section 7211 of title 5,
22 United States Code (governing disclosures to
23 Congress); section 1034 of title 10, United
24 States Code (governing disclosure to Congress
25 by members of the military); section 2302(b)(8)

1 of title 5, United States Code (governing disclo-
2 sures of illegality, waste, fraud, abuse or public
3 health or safety threats); the Intelligence Iden-
4 tities Protection Act of 1982 (50 U.S.C. 421 et
5 seq.) (governing disclosures that could expose
6 confidential Government agents); and the stat-
7 utes which protect against disclosure that may
8 compromise the national security, including sec-
9 tions 641, 793, 794, 798, and 952 of title 18,
10 United States Code, and section 4(b) of the
11 Subversive Activities Act of 1950 (50 U.S.C.
12 783(b)). The definitions, requirements, obliga-
13 tions, rights, sanctions, and liabilities created
14 by such Executive order and such statutory
15 provisions are incorporated into this agreement
16 and are controlling.".
17 (B) ENFORCEABILITY.—Any nondisclosure
18 policy, form, or agreement described under sub-
19 paragraph (A) that does not contain the state-
20 ment required under subparagraph (A) may not
21 be implemented or enforced to the extent such
22 policy, form, or agreement is inconsistent with
23 that statement.
24 (2) PERSONS OTHER THAN GOVERNMENT EM-
25 PLOYEES.—Notwithstanding paragraph (1), a non-

1 disclosure policy, form, or agreement that is to be
2 executed by a person connected with the conduct of
3 an intelligence or intelligence-related activity, other
4 than an employee or officer of the United States
5 Government, may contain provisions appropriate to
6 the particular activity for which such document is to
7 be used. Such form or agreement shall, at a min-
8 imum, require that the person will not disclose any
9 classified information received in the course of such
10 activity unless specifically authorized to do so by the
11 United States Government. Such nondisclosure
12 forms shall also make it clear that such forms do
13 not bar disclosures to Congress or to an authorized
14 official of an executive agency or the Department of
15 Justice that are essential to reporting a substantial
16 violation of law.
17 (r) REPORTING REQUIREMENTS.—
18 (1) GOVERNMENT ACCOUNTABILITY OFFICE.—
19 (A) IN GENERAL.—
20 (i) REPORT.—Not later than 40
21 months after the date of enactment of this
22 Act, the Comptroller General shall submit
23 a report to the Committee on Homeland
24 Security and Governmental Affairs of the
25 Senate and the Committee on Oversight

1 and Government Reform of the House of
2 Representatives on the implementation of
3 this Act.
4 (ii) CONTENTS.—The report under
5 this paragraph shall include—
6 (I) an analysis of any changes in
7 the number of cases filed with the
8 United States Merit Systems Protec-
9 tion Board alleging violations of sec-
10 tion 2302(b)(8) or (9) of title 5,
11 United States Code, since the effective
12 date of the Act;
13 (II) the outcome of the cases de-
14 scribed under clause (i), including
15 whether or not the United States
16 Merit Systems Protection Board, the
17 Federal Circuit Court of Appeals, or
18 any other court determined the allega-
19 tions to be frivolous or malicious; and
20 (III) any other matter as deter-
21 mined by the Comptroller General.
22 (B) STUDY ON REVOCATION OF SECURITY
23 CLEARANCES.—
24 (i) STUDY.—The Comptroller General
25 shall conduct a study of security clearance

1 revocations of Federal employees at a se-
2 lect sample of executive branch agencies.
3 The study shall consist of an examination
4 of the number of security clearances re-
5 voked, the process employed by each agen-
6 cy in revoking a clearance, the pay and
7 employment status of agency employees
8 during the revocation process, how often
9 such revocations result in termination of
10 employment or reassignment, how often
11 such revocations are based on an improper
12 disclosure of information, and such other
13 factors the Comptroller General deems ap-
14 propriate.
15 (ii) REPORT.—Not later than 18
16 months after the date of enactment of this
17 Act, the Comptroller General shall submit
18 to the Committee on Homeland Security
19 and Governmental Affairs of the Senate
20 and the Committee on Oversight and Gov-
21 ernment Reform of the House of Rep-
22 resentatives a report on the results of the
23 study required under this subparagraph.
24 (2) MERIT SYSTEMS PROTECTION BOARD.—

1 (A) IN GENERAL.—Each report submitted
2 annually by the Merit Systems Protection
3 Board under section 1116 of title 31, United
4 States Code, shall, with respect to the period
5 covered by such report, include as an addendum
6 the following:
7 (i) Information relating to the out-
8 come of cases decided during the applicable
9 year of the report in which violations of
10 section 2302(b)(8) or (9) of title 5, United
11 States Code, were alleged.
12 (ii) The number of such cases filed in
13 the regional and field offices, the number
14 of petitions for review filed in such cases,
15 and the outcomes of such cases.
16 (B) FIRST REPORT.—The first report de-
17 scribed under subparagraph (A) submitted after
18 the date of enactment of this Act shall include
19 an addendum required under that subparagraph
20 that covers the period beginning on January 1,
21 2009 through the end of the fiscal year 2009.
22 (s) EFFECTIVE DATE.—This Act shall take effect 30
23 days after the date of enactment of this Act.

○

June 10, 2009

Craig R. Sawyer
1500 W. Sunset Ridge Place
Tucson, AZ 85704
Telephone: 520-297-0808 Email: iamsawman@aol.com

United State Senate
Committee on Homeland Security and Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

ATTENTION: Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia

Dear Members of the Subcommittee:

Thank you for introducing this legislation to reform federal whistleblower protection.

I want to bring to your attention what happened to me and other national security whistleblowers.

I am a disabled former U.S. Marine and U.S. Navy SEAL (Sea, Air, Land), decorated for "Heroic Service" in combat. I served at the highest, Tier-1 level of Counter-Terrorist operation (NAVSPECWARDEVGRU). You may be more familiar with the name, SEAL Team Six. After 13 years in the Navy, I joined the Federal Aviation Administration's Federal Air Marshal Division in 1999.

In the summer of 2002, our country's Federal Air Marshal mission became a highly-funded false front, or "security theater," destined for failure.

As a Tier-1 level Navy SEAL, I had been responsible for hunting down and dealing with our country's most hardened and well-prepared enemies in good faith. Once the Federal Air Marshal Service was taken over by the managers who came after the 9/11 Attacks, I was tasked with patrolling the airports searching only for fellow Federal Air Marshals (FAMs) who were feared to not be wearing their suits and ties properly. At the hands of our new FAMS management, I was effectively reduced from a world-class counter-terrorist, to that agency's "fashion police." This was but one example of the problem. That problem, in my personal opinion, was the wrong group of men had been chosen to run the FAMS.

I rightfully blew the whistle on men who had been grossly mismanaging the Transportation Security Administration (TSA) / Federal Air Marshal Service (FAMS), retaliating against whistleblowers, and compromising national security. As an Assistant to the Special in Charge (ATSAC) of the FAMS Las Vegas Field Office (LASFO), I had subordinates come to me with valid safety and operational concerns, which were being entirely ignored by upper management. I finally called for an investigation after several FAMs mentioned that they feared "violence in the workplace." I also heard the term, "Someone is going to go postal in here!" I felt I had to come forward because as FAMs, everyone carried a service-issued firearm for duty. There were many in our field office who had serious concerns, due to the pressure-cooker atmosphere

created by this hostile work environment. While desperately trying to stay focused on the mission, I quickly realized that part of my job was going to have to be attempting to keep all my fellow officers and managers safe in an extremely hostile work environment.

Due to the gravity of my subordinate officers' concerns, I followed what I believed to be proper procedure in reporting this ongoing situation to the Department of Homeland Security / Office of Inspector General (DHS/OIG) Oakland Field Office. Not only did the DHS/OIG Oakland Field Office blatantly ignore my complaint, but also complaints from other Las Vegas FAMS supervisors who had reported that our Special Agent in Charge was attempting to coerce FAMs to physically retaliate against other FAMS whistleblowers! I know this may be initially difficult to believe. That is why I have provided documented evidence. There is a sworn affidavit by FAM Philip Black to support those facts, in addition to the dozens of witnesses, who were FAMs assigned to our field office.

Congress and executive branch internal affairs agencies have since investigated those FAMS managers and indeed, GROSS MISMANAGEMENT and WHISTLEBLOWER RETALIATION were found. Of course, those who were culpable were simply allowed to resign to avoid justice and are still collecting their federal retirement.

Before the managers responsible resigned, they retaliated against me extensively and effectively, which eventually forced me to resign. When I resigned, I lost 18 years of hard-earned federal service toward a retirement. I found out the hard way the current Whistleblower Protection, the DHS/OIG, and the U.S. Office of Special Counsel (OSC) was an absolute farce. I was refused due process. The DHS/OIG Oakland Field Office failed to conduct a legitimate investigation and, in fact, notified my Special Agent in Charge that he was going to be investigated, even alerting him as to who filed the complaint! I had no idea OSC was the agency I should have come to for protection -- I always believed that the DHS/OIG was responsible for investigating abusive managers. I was never advised of my OSC rights and management never directed us supervisors to pin up OSC posters. There was no information provided to me regarding procedure, or rights, perhaps due to the DHS being such a new entity at the time, as well as the open hostility and corruption that has since been exposed by the House Committee on the Judiciary in their May 25, 2006 report, ***"In Plane [sic] Sight":***

http://tinyurl.com/hjc2006

The 575-page San Diego Immigration & Customs Enforcement / Office of Professional Responsibility (ICE/OPR) -- agency at the time tasked with internal affairs investigations for the FAMS -- investigation lead by their Associate Special Agent in Charge, James Wong:

http://tinyurl.com/iceopr

The U.S. Merit Systems Protection Board (MSPB) refused me a timely hearing. One of the Federal Air Marshals (FAM) I supervised in the FAMS Las Vegas Field Office, Robert MacLean, is still waiting over three years for his INITIAL regional MSPB hearing after being fired for also whistleblowing on the FAMS. Mr. MacLean lost his TOP SECRET clearance and has been unemployed ever since. Instead of having a termination in my perfect federal career record and losing my TOP SECRET clearance only to spend years fighting in the MSPB forum -- which has ruled against whistleblowers 3-53 since 2000 -- I took the route most whistleblowers

take: Resign with a clean record and my TOP SECRET clearance so I can continue to provide for my family in private security.

I spent five years in the FAMS, reaching the J-Payband (SV pay schedule) management level, with 210 agents to personally manage for seven months, then 25 agents thereafter. When I blew the whistle on the corruption that I witnessed, I was immediately retaliated upon in an arrogant, open, and blatant manner. I filed several complaints with the DHS/OIG Oakland Field Office, which proved to be futile, as too many personal relationships were allowed to interfere with justice. The DHS/OIG did not act in good faith; in fact they actually alerted my Special Agent in Charge and told him I had initiated the investigation. What came next was ugly and took a terrible toll on my family as my reputation and career were relentlessly assaulted. It was particularly disheartening to experience the various entities responsible for my protection fail me when I stood up for what was right. It was disheartening and downright humiliating.

Now that those men I identified have each resigned subsequent to the May 25, 2006 House Committee on the Judiciary and the ICE/OPR San Diego investigations, which found my claims to be valid, I feel it is time to right the wrongs and reverse the damage done to my family and my federal career. It is unacceptable that the Deputy Secretary for DHS, Michael P. Jackson, conveniently "buried" the results of ICE/OPR's extensive and revealing investigation against the implicated FAMS managers.

I am a good man who has spent my entire life serving our country. My service to our country and my personal reputation are impeccable. My contributions and sacrifices for our country have been great. In fact, I STILL serve our country in combat zones, protecting Americans as they carry out their missions. I must now do it as an independent contractor, without benefiting toward a retirement I feel I have already earned. In my case, there is no law set up to repair all that has been wrongfully done against me. However, the facts are on my side. Right is on my side. I have many pertinent witnesses who will be pleased to testify on my behalf, and that my word is righteous and accurate. A former senior manager for ICE/OPR -- now Assistant Inspector General for U.S. Treasury -- publicly weighed in on three of the whistleblowers in the Las Vegas Field Office who I stood up for:

http://tinyurl.com/issman

More recently, in early 2005, I was the Agent In Charge of the High-Threat, Mobile Security Detail for the Department of State Regional Embassy Office in Kirkuk. My team provided security for U.S. Senators John McCain and Hillary Clinton. I got a picture before the meeting began.

http://tinyurl.com/sawmac

In addition to Senators Clinton and McCain, I have also protected Donald Rumsfeld, John Negroponte, Admiral Leighton Smith, as well as other U.S. Ambassadors and Diplomats in the various, "high-threat" war zones. In cooperation with your efforts, I trust the members of the Homeland Security & Government Affairs Committee will help bring a righteous solution to this situation, which clearly demonstrates a catastrophic failure of the Whistleblower protection system.

I respectfully request that you take notice of what was wrongfully done against me and other FAMS whistleblowers by the executives who have been **PROVEN** to be in the wrong by the House Committee on the Judiciary and the ICE/OPR. Because there is no current law to correct this damage, a group of former FAMs that worked for me have initiated a cause to urge President Barack Obama to enact an Executive Order that would resurrect our careers. We feel this is the best way my country can help our families after all that has been wrongfully taken from us.

Here is a copy of the Executive Order proposal that has already been sent to the White House:

http://tinyurl.com/wbeop

Potential whistleblowers will not expose future wrongdoing if they know that past whistleblowers are still unemployed.

I believe the FAMS is set up for failure, and there is much that is not being done to protect our skies in good faith. We are still very vulnerable in aviation security -- especially in flight. It should be known that many of the civilian law enforcement and military special operations veterans have been chased out of the FAMS. All necessary factual data to prove our claims is available -- especially the 147-page May 25, 2006 House Committee on the Judiciary and 575-page San Diego ICE/OPR reports.

I have extensively documented the chain of events that was allowed to occur against others and me in the Las Vegas field office. I am standing by and ready to provide all witnesses, documentation and information necessary to bring a righteous solution to this situation. The attorneys all readily admit my case has all the merit it needs, but there has been no venue in which to present it! The MSPB has been playing "not it" and denying me a venue. It is yet another link in the broken chain which has made our whistleblower protection system a mockery. The head of the U.S. Office of Special Counsel from 2003 until 2008, Scott Bloch, was supposed to protect us, but we now know he was busy getting chased out of office by the Office of Personnel Management / Office of Inspector General (OPM/OIG) and the Federal Bureau of Investigation (FBI).

I greatly appreciate your time and consideration on this most important matter of national security and overall justice.

Respectfully Submitted,

Craig R. Sawyer
Former Assistant to the Special Agent in Charge
Las Vegas FAMS Field Office

Additional pertinent links:

ABC News 20/20 video on House Committee on the Judiciary investigation of the FAMS: http://tinyurl.com/spencer2020

January 2009 U.S. GAO report: http://tinyurl.com/gao2009

Las Vegas Review Journal Article with me and other whistleblowers from my office: http://tinyurl.com/sawlas

April 30, 2009 U.S. House of Representatives whistleblower letter to President Barack Obama: http://tinyurl.com/housewb

Statement of Colleen M. Kelley

National President

NATIONAL TREASURY EMPLOYEES UNION

on

S. 372, the Whistleblower Protection Enhancement Act of 2009

Submitted to

Oversight of Government Management, the Federal Workforce and the District of Columbia Subcommittee

Homeland Security and Governmental Affairs Committee

U. S. Senate

June 11, 2009

Chairman Akaka and other members of this Committee, I thank you for introducing this important legislation providing significant improvements to Chapter 23 of Title 5, U. S. Code, which encompasses whistleblower protections. I commend you for holding this important hearing today.

Whistleblower protection enhancements are particularly important to the National Treasury Employees Union because we represent several thousand Transportation Security Officers (TSOs) at the Transportation Security Administration. TSOs have very limited whistleblower protection, and it is not guaranteed by law, yet they are charged with the frontline security of the nation's travelers. Federal employees with such important responsibilities need adequate protections to feel safe enough to report problems that could affect our security. We thank you for including them in your bill.

As you know, whistleblowers perform a vital function in highlighting instances of fraud, waste, abuse, and mismanagement in the federal government. Unfortunately, protections for this group have been damaged by hostile administrative review and limited judicial review. Although S. 372 does much to strengthen whistleblower protection, it does not contain the right to jury trials. In the past four years, several laws have been passed that provide jury trials in whistleblower cases to trucking and cross- country bus carrier workers, to railroad workers, to defense contractors, and to state and local workers. Just about the only group of people for whom jury trials do not apply are federal workers. There is really no chance for justice in a whistleblower case without full access to court. Since 2000, the Merit Systems Protection Board has ruled 3-53 against whistleblowers. The Federal Circuit Court of Appeals, the only court now available, has an even worse record.

Some arguments have been raised that federal managers might not be able to exercise their supervisory oversight if federal employees have access to jury trials. Filing a whistleblower complaint does not protect a federal employee from a legitimate action by a manager. Good managers keep records of employee performance, and an employee can be fired for any number of legitimate reasons. If the reason for firing is not legitimate, why shouldn't that action be protected? Government works best when people are free to expose destructive elements in the system. We all benefit from this.

Congressman Chris Van Hollen wisely recognized that, with all the money being expended for stimulus and recovery for this country, enhanced whistleblower protections are needed to uncover any fraud, waste, or abuse in the deliverance of that package. That is why he attached the House whistleblower language to the stimulus bill in the House of Representatives. Unfortunately, the whistleblower language was dropped from the bill before final passage, but it is critically important to enact these provisions quickly. The money is still being expended, and earlier this week, President Obama indicated that he would speed up the pace on the release of funds. I look forward to working with the subcommittee and full committee to produce a bill that will, finally, extend whistleblower rights to TSOs and strengthen whistleblower protections in Title 5.

I thank the Committee for this opportunity to present our union's views.

June 11, 2009

President Barack Obama
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C.

Attention: Offices of Science and Technology Policy and Congressional Relations

Dear Mr. President:

The Society for Conservation Biology, a global community of conservation professionals with senior scientists and managers in virtually every federal natural resource and environmental agency, once again urges you to take a leadership role in supporting legislative action to implement your campaign and transition policy for the protection of whistleblowers.

This afternoon the subcommittee on Oversight of the Federal Government of the Senate Committee on Homeland Security and Governmental Affairs will hold a hearing on legislation to protect whistleblowers, S. 372 - The Whistleblower Protection Enhancement Act of 2009. In that hearing they will examine the differences between their bill and the companion measure in the House, H.R. 1507. I have been assured by subcommittee staff that this letter will be entered into the record of the hearing.

We know from our members' personal experiences that challenging conventional wisdom in science in recent years has been nearly as financially and professionally dangerous as it was during the time of Galileo and Copernicus, both of whom suffered severe retaliation for defending the scientific method over the politicized science of their time. With the global threat from climate change and accelerating extinctions scientific freedom today has become even more important. Yet until further steps are taken it will still be seen quite logically as treacherous for those who practice it.

In December we briefed your transition team in detail on our "Recommendations for actions by the Obama Administration and the Congress to advance the scientific foundation for conserving biological

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diversity." Section 5 of those "Recommendations" is entitled "Restoring Scientific Integrity". In the final subsection entitled 'Strengthening the Law that Supports Science Across the Agencies" we asked you to "work with Congress to allow Federal whistleblowers who seek redress for retaliation to sue in U.S. District Court if they have not received a response to their claim through an administrative process within 180 days of filing that claim, or if they wish to appeal a Merit Systems Protection Board decision."

We are grateful that both Houses of Congress are moving forward with very similar legislation to empower federal scientists and others who see serious wrongdoing such as the suppression or intentional and significant misrepresentation of science in federal proceedings or reports. We are specifically gratified that there is now a consensus among the majority of members of the House and Senate Committees of jurisdiction for a stronger scientific freedom provision, which is now in the bills of both Committees with identical language.

We were pleased and gratified by the policy of your campaign and transition team on whistleblowers:

> **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. http://change.gov/agenda/ethics_agenda/

Unfortunately, this policy commitment was removed from the White House website after the first day, and has not reappeared.

We also appreciated your March 9 policy initiative on scientific integrity, and are participating in that effort. As we have explained in our comments filed with the White House Office of Science and Technology Policy in

support of your initiative on scientific integrity, there is much that agencies can do to replace the current culture and corresponding internal environment of scientific repression with scientific freedom.

What is missing so far, however, is the commitment of your Administration and the Senate Committee to that timely access to the Federal District Courts where juries as a general rule are the finders of fact and where the rights of litigants are much more thoroughly enforced.

For example, my own disclosure of what I perceived to be violations of the Pelosi Amendment and related laws and regulations concerning environmental reviews of potentially harmful World Bank projects led to a lost job in 2002, an administrative appeal lasting nearly two years and a delay in correcting dangerous failures to obey the law (e.g., provisions of 22 U.S.C. 262m). I also disclosed the suppressing and redacting of my reports due to pressure from by officials of the Treasury Department when I was seconded to USAID from the Department of Agriculture. This led to an administrative appeal that lasted almost two years until the Merit Systems Protection Board ruled in my favor and reversed the ruling of the administrative judge (John M. Fitzgerald v. Department of Agriculture, 97 M.S.P.R. 181, September 1, 2004). I was one of relatively few to overcome an erroneous decision by the initial administrative judge, as in recent years very few whistleblowers have succeeded in this administrative process whose judges and board members do not have the full independence enjoyed by judges and juries. With the support of its author and namesake, and Senators Leahy, Lugar, and Biden, among others, the Congress eventually amended the Pelosi amendment in order to prevent some of the abuses of the law that I had pointed out. Faster access to the District Courts might well have more rapidly resolved my case and ended the Treasury Department's failure to obey the law and to honor established norms of environmental assessment practice, which failure had the effect of sweeping under the rug serious environmental and public health risks around the world.

The cornerstone for your campaign and transition commitments to whistleblower protection was that "full court access." The Administration's pledges will ring hollow unless whistleblowers have access to juries to enforce scientific integrity rights, the same as available for Americans generally when government abuses its power and violates their rights. For many years, censorship and repression of federal science has violated

countless policy statements yet the corresponding legal rights have had no effective remedy. The problem is that none of those rights have had credible enforcement structures for those who want to live the rhetoric on the job, and who must defend themselves against harassment and violations of their rights by those who are intolerant.

Thank you for considering the views of an organization whose members deeply believe in, and regularly risk their careers for, the principles restated in your policies. We hope that you will exercise active leadership in developing your Administration's policies and in your work with Congress. We ask now that that leadership include visible support for due process through full court access, so that the rights and responsibilities of federal scientists and others who seek to speak out to protect the public will no longer be dangerous for those who take those rights and responsibilities seriously enough to act upon them when confronted with wrong-doing.

Sincerely,

John M. Fitzgerald, J.D.
Policy Director
Society for Conservation Biology

Cc: Oversight Subcommittee Chairman Akaka
Tom Devine, J.D., Government Accountability Project
Francesca Grifo, Ph.D., Union of Concerned Scientists
Jeff Ruch, J.D., Public Employees for Environmental Responsibility

AAUP
American Association of University Professors

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June 16, 2009

Senator Daniel K. Akaka, Chairman
Senator George V. Voinovich, Acting Ranking Member
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia
U.S. Senate Committee on Homeland Security and Governmental Affairs
605 Senate Hart Building
Washington, DC 20510

Dear Chairman Akaka and Acting Ranking Member Voinovich:

I write to express the support of the American Association of University Professors (AAUP) for measures to enhance protections for federal employee whistleblowers contained in S. 372, The Whistleblower Protection Enhancement Act of 2009. College and university faculty members frequently serve as contractors, consultants, external reviewers, and even employees on federal government projects. They need to be assured that they and their federal employee colleagues can report improprieties in the expenditure of federal funds without fear of retaliation. The AAUP's advocacy of strong protection for federal whistleblowers is part of our longstanding commitment to scientific integrity and open and transparent government as vital components of American democracy.

To this end, the 95th Annual Meeting of the AAUP passed the following resolution on June 13, 2009:

> The American Association of University Professors expresses its support for the inclusion, without exception, of the option for jury trial in the Whistleblower Protection Enhancement Act of 2009.

On behalf of our approximately 47,000 members at colleges and universities around the country, I look forward to working with you and the other members of the subcommittee to ensure that strengthened whistleblower protections are enacted into law in this Congress. Please feel free to contact me if I can provide any further information or assistance; my direct telephone is (202) 737-5900 extension 143, and e-mail address jcurtis@aaup.org.

Sincerely,

John W. Curtis, PhD
Director of Research and Public Policy

June 18, 2009

Chairman Daniel Akaka
Committee on Oversight of Gov't Management
Hart SOB
Washington, DC 20510
202-224-4551; fax 202-224-2271

Attention: Ben Rhodeside <ben_rhodeside@hsgac.senate.gov>

Re: Statement for the Record for June 11, 2009 hearing on Whistleblower Protection Enhancement Act of 2009, S. 372

Dear Chairman Akaka,

I must appreciate your allowing people like me to submit statements for the hearing record. I fully support H.R. 1507 and hope its provisions for jury trials and national security whistleblowers are added to S.372.

However, based on my singular experiences as a multiple-time "prevailing" whistleblower in US Department of Energy, S.372 does not address, directly at least, key factors that make the realities concerned federal employees - including national security whistleblowers - so dismal (one can google my name for details).

Simply put, OSC is supposed to be the "immune system" of the federal civil service and its near-complete failure to comply with its fundamental duty as a federal law enforcement agency - to report its determinations of prohibited personnel practices (PPP's), particularly the whistleblower reprisal type PPP to the involved agency head, per 5 U.S.C. 1214(e), has had a very corrupting impact of the federal civil service. Until I forced the issue in court, OSC claimed that somehow, despite the clear wording of the law and its legislative history, the reporting requirements of §1214(e) did not apply to PPP's and other civil service laws, rules, or regulations within its enforcement jurisdiction. In recently concluded litigation, OSC did not make this argument and the decision, in a dicta statement, found that the scope of §1214(e) includes PPP's, see Carson v. Office of Special Counsel, 2009 WL 1346052 (E.D. Tenn.) at *5.

In the past 30 years, based on its annual reports to Congress, OSC has investigated about 50,000 PPP complaints, alleging about 100,000 specific PPP's (about a third of these are whistleblower reprisal type PPP's), without ONCE making and reporting, per §1214(e), its determination "there is reasonable cause to believe" the PPP occurred. This is an incontestable, the 1978 law (now numbered §1219(a)(3)), requires such reports (and the agency-head certified responses) be retained as permanent, publicly available records at OSC. A review of OSC permanent, publicly available records (as well as OSC's responses to FOIA requests) demonstrated the absence of any such reports.

OSC is supposed to be a very transparent investigatory agency, based on the requirements of §1214(e), §1218 and §1219 which details the extensive information OSC is to provide to Congress and the public. But, for 30 years, it has been a very opaque, unaccountable, agency, despite its being, by the law, the primary bulwark to protect federal employees from PPP's, particularly the whistleblower reprisal type PPP.

MSPB has, for 30 years, failed to uncover OSC's self-nullifying interpretation of §1214(e). This is because it has yet to conduct the statutory required special studies of 5 U.S.C. §1204(a)(3) to determine whether federal employees are adequately protected from PPP's. This MSPB duty is not limited to agencies for which it has adjudicatory jurisdiction - the limitations of §2302(a)(2)(C)(ii) on its adjudicatory jurisdiction over FBI and national security agencies do not apply, given the wording (and legislative history) of §1204(a)(3) to conduct special studies of the "civil service and other merit systems in the executive branch."

The attached questions call attention to these issues, most of which have existed since 1979, when OSC and MSPB were created by the Civil Service Reform Act of 1978 (initially OSC was a part of MSPB, it became an independent agency in 1989). I realize that only members of the Committee have the authority to insert "questions for the record" into the hearing record, together with their answers, which would be under oath, just as the written and spoken testimony at the hearing was.

I have requested Senator McCaskill to consider inserting these questions into the record. I do not know if she will so I am providing them as what I think are relevant questions that warrant the Committee's attention, even though I know that unless a Senator inserts them into the record, they will not be addressed as part of the hearing record.

Chairman Akaka, I have been raising these concerns to Congress for about 5 years, getting more and more specific based on results of my related litigation. Congress and the Courts are the two Constitutional tools someone as myself has to expose such agency non-compliance with law. I have tried to responsibly do so. I hope the Committee takes the steps necessary to substantiate or dispel my concerns.

Respectfully,

s/

Joe Carson, PE
10953 Twin Harbour Drive
Knoxville, TN 37934
865-300-5831
jpcarson@tds.net

August 9, 2009

Mr. Norm Eisen, Esq
Special Counsel for Ethics and Government Reform
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Subject: Targeted White House and/or Congressional Oversight of US Office of Special Counsel and U.S. Merit Systems Protection Board?

Dear Mr. Eisen,

We, current or former federal whistleblowers, are writing in response to Joe Davidson's July 30, 2009 column in the Washington Post, "Good News for Whistleblowers," which mentioned you and leaders of several "watchdog" groups.

First, we applaud your efforts to reform the Federal Whistleblower Protection Act. The Federal Circuit and Merit Systems Protection Board have effectively nullified the existing law and the current case law needs to be legislatively overturned - everyone agrees on that.

However, we are concerned that a real cause of grave harm to the rule of law and America's welfare and national security during the past 30 years remains unaddressed and will remain uncorrected - that the US Office of Special Counsel (OSC), the primary bulwark against whistleblower reprisal type prohibited personnel practice (PPP) (and other types of agency violations of the merit principles of the federal civil service, the law lists at least 12 types of PPP), essentially negated its duty to do so via its statutory interpretation of what is now 5 U.S.C. §1214(e) when it was created in 1979.

Contrary to the clear wording of §1214(e) and its legislative history, OSC has claimed for 30 years that its reporting requirements do not apply to the laws, rules, or regulations within its jurisdiction, particularly PPP's and most particularly the whistleblower reprisal-type PPP. As a result, OSC claims it has no duty to formally report its determinations that "there is reasonable cause/grounds to believe" such a violation occurred to the involved agency head, thereby making it impossible for agency heads to comply with their duty to "prevent PPP's" in their agencies, per 5 U.S.C. §2302(c).

The undeniable fact is that in the 30 years in which OSC has investigated about 50,000 complaints alleging about 100,000 violations within its jurisdiction, it has not made a single §1214(e) report to the responsible agency head. By 5 U.S.C. §1219(a)(3), these reports and the agency-head certified responses shall be permanent, publicly available records - but inspection of OSC's publicly available records demonstrates that none exist. Instead, OSC claims it only

has to inform the agency head when it makes the additional, completely discretionary, determination that the violation is one "which requires corrective action," per 5 U.S.C. §1214(b)(2)(B). OSC only rarely does this, probably about 100 - 200 times in 30 years.

The Civil Service Reform Act of 1978 created OSC as the federal law enforcement agency charged to protect federal employees from PPP's, particularly the whistleblower reprisal-type PPP. OSC was then an autonomous part of the (also new) U.S. Merit Systems Protection Board (MSPB). MSPB was charged to check OSC's compliance with its duties in two complementary ways: 1) to prevent OSC from exceeding its statutory mandate through its adjudicative function and 2) conducting "special studies" to ensure OSC and agency heads complied with their positive statutory mandates to prevent PPP's and to protect federal employees from PPP's, per 5 U.S.C. §1204(a)(3).

In 1979, MSPB apparently interpreted §1204(a)(3) to mean it would conduct "special studies" on any civil service-related topic EXCEPT whether federal employees were adequately protected from PPP's (this interpretation was possibly made by the same attorney who made the interpretation about §1214(e)). Mr. Eisen, this is something you can readily verify. By this law, MSPB is required to report to the President and Congress the results of its "special studies" - whether federal employees are adequately protected from PPP's. It has never made such a report and is unable to make one today, as it has not required the requisite "special studies."

While the Senate Bill S.372 now provides some degree of whistleblower protection to employees in intelligence agencies and addresses the security clearance loophole in whistleblower protection, it is possible that by current law (since 1979, and even more so since 1989) that these employees had a degree of protection at OSC, including improper revocation of security clearances, even if OSC has never enforced it, *see* Romero v. Dept. of Defense, 527 F.3d 1324 (Fed. Ckt. 2008)

Specifically, by 5 U.S.C. §1216(a)(4), OSC is required to investigate allegations of agency "activities prohibited by any civil service law, rule, or regulation." By Supreme Court precedent, *see* Doyle v. VA, 229 S.Ct. Cl. 261 (1982), agency personnel directives are "civil service rules." If OSC seeks corrective action on behalf of the impacted employee, the "make whole remedy" is available. It is indisputable that by §1216(a), OSC can investigate a CIA employee for Hatch Act violations or a FBI employee for improperly withholding information in a FOIA response, so there is sound legal grounds to claim it has jurisdiction to investigate if intelligence agencies violated their personnel directives in removing a security clearance. However, contrary to the clear wording of the law, its legislative history, and Supreme Court precedent, OSC's position is that agency personnel directives are not "civil service rules" - while also claiming its position is beyond Court review!

Mr. Eisen, the White House can influence Congress to conduct targeted oversight of OSC's interpretation of and compliance with §1214(e) and MSPB's interpretation of and compliance with §1204(a)(3). It can also direct the Department of Justice Office of Legal Counsel to review:

1) OSC's interpretation of §1214(e), 2) whether OSC has jurisdiction, per §1216(a)(4), to investigate complaints by intelligence agency employees alleging violations of agency directives occurred in revoking their security clearances, and 3) MSPB's interpretation of §1204(a)(3). Since there is no statute of limitations to file such a complaint with OSC, it is possible that some remedy for those claiming to have been harmed by improper revocation or suspension of security clearances, since 1989, if not 1979, can be available under current law.

Mr. Eisen, federal employees take oaths to defend the U.S. Constitution, "against all enemies, foreign and domestic." When a federal law enforcement agency as OSC abnegates its duty to enforce the laws under its jurisdiction, could it be considered a "domestic enemy?" We think it a fair question, particularly the grave harm we contend America has suffered as a result of OSC's lawbreaking. Simply put, OSC is supposed to be the "immune system" of the federal civil service, so its self-nullifying interpretation of its duties has allowed much dysfunction and corruption to take root and flourish in many federal workplaces during the past 30 years. In turn, this enabled 9/11, the unlawful politicization of the Department of Justice in past 8 years, going to war in Iraq about non-existent WMD, and the financial meltdown, among many other lesser-known instances of failure and corruption by federal agencies. We fear it may enable a nuclear 9/11, so describing OSC, because of its lawbreaking, as a "domestic enemy" might not be hyperbole.

We respectfully ask you to engage David Nolan, Esq., as our informal representative in discussions about substantiating or dispelling our concerns - as it appears the representatives of the "watchdog" groups you have engaged are uninterested in them. Mr. Nolan can contact us directly.

Mr. Nolan's contact information:

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Respectfully,

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NATIONAL ACCOUNTANT WHISTLEBLOWER COALITION (NAWBC)
http://www.nawbc.com

Federal Accountant Whistleblower - Larry Fisher

President Obama and his administration are committed to changing the government's policies that allowed the outsourcing of American jobs oversees. The government's outsourcing of its financial management-related responsibilities to the private sector requires a similar review. This is especially true given a government-wide cover-up involving a twenty-plus year, multi-billion dollar outsourcing failure involving: (1) the Central Agencies (GAO, OMB, Treasury, and GSA), (2) the 24 CFO Act agencies, and (3) their private sector allies that include AICPA firms, financial management software companies, and management consulting firms.

As background information, the Federal government's Central Agencies and 24 CFO Act agencies are charged with the overall responsibility of ensuring the integrity of our government's accounting and budgeting financial statements. The **Central Agencies** are responsible for overseeing the design and testing of the government-wide accounting and financial software standards and processes that all 24 CFO Act agencies are required to use. The **24 CFO Act agencies** are responsible for: (1) critiquing those Central Agencies' standards and processes, and (2) implementing agency-level accounting and financial software processes that are both in compliance with generally accepted accounting principles (GAAP). Using accounting jargon, if

each of the 24 CFO Act agency's accounting and financial software processes are GAAP-based, each of those CFO Act agencies will have the capability of summarizing their accounting and budgeting data (their debits and credits) in a single trial balance to generate their respective financial statements. Then, at a higher level, GAO will summarize those individual 24 CFO Act agency trial balances (their debits and credits) to generate our government's Consolidated Financial Statements (CFS's), again, from a single consolidated trial balance. Congress gave GAO, their Central Agency partners, and the 24 CFO Act agencies ten years, from 1997 to 2007, to accomplish this most basic accounting requirement that is required of all private sector corporations.

As noted earlier, this joint effort has failed over the past twenty-plus years and cost the taxpayers many billions of dollars. This government-wide failure is do to our government's politically induced deficiencies (discussed in the next paragraph) and to the following two technical deficiencies: (1) the Central Agencies allowed the 24 CFO Act agencies to procure off-the-shelf financial software with no government-wide GAAP-based standard in place beginning in 1987 and continuing over the past twenty-plus years (discussed later), and (2) with no GAAP-based standard in place, the financial software companies merely recreated the non-GAAP-based accounting processes of each of the 24 CFO Act agencies. After all this time and money, the 24

CFO Act agency's generated financial statement totals are so bad that this same summary level data is reentered, manually, into Excel spreadsheets to produce their financial statements. Another consequence of this government-wide accountability failure was GAO's failure to meet Congress' 2007 deadline for producing our government's CFS's. GAO, their Central Agency partners, and their corporate allies failed to admit responsibility for their gross waste of our tax dollars and our government's inability to generate accurate financial statements in written Congressional testimony.

The politically induced deficiencies that contributed to this government-wide failure, cover-up, and threat to our financial security are directly attributable to: (1) Congress' failure to pass meaningful whistleblower protection and real penalties for those revolving door bureaucrats (RDB's) who violate our Constitution and Congress' laws, (2) allowing these same RDB's to eliminate the Office of Personnel Management (OPM) educational requirements for our Central Agencies' and CFO Act Agency accountants to hide all levels of incompetence and wrongdoing, (3) the failure of the Office of Special Counsel and the Merit Systems Protection Board to protect government employees, including whistleblowers, from the prohibited personnel practices (PPP's) of employing agencies, and (4) no government version of

the Sarbanes Oxley Act of 2002 and no real effort to have accountability or transparency in this government-wide financial management fiasco.

The following is Larry Fisher's story:

I did not arrive at these philosophies involving the gross failures of our Central Agencies and CFO Act agencies over night but over a 40 year government accountant career involving the full gamut of our government's operation – **Environmental Protection Agency (EPA) Branch Chief over accounting operations** that involved my staff's payment of bills, establishing accounts receivables, recording liabilities, etc, **EPA Systems Accountant** designing and implementing cash management-related reports, **Veterans Administration (VA) Branch Chief** where my staff summarized the VA's field hospital accounting data to prepare the agency-level VA financial statements that were submitted to OMB and the Department of Treasury, **Treasury Department Systems Accountant** and liaison with OMB and GAO responsible for establishing the government-wide financial software standards for all 24 CFO Act agencies, and **EPA Branch Chief over Systems and Accounting.** The last 11 years of my EPA career were spent in a fake management accountant position to silence me and limit all union protection for voicing legitimate concerns over both the Central Agencies and CFO Act agencies illegal practices. When this internal effort failed, I contacted the media on countless occasions (with limited results) and

designed two accountant whistleblower websites – (1) National Accountant Whistleblower Coalition (NAWBC) - **http://www.nawbc.com** and, (2) the Taxpayers for Government Accounting Reform (TGAR) – **http://www.tgar.org**. The following is a quick summary of key points regarding the last twenty-plus years of my career as an accountant whistleblower.

In March 1980, I accepted a Branch Chief of Agency Reports position with the VA. My staff oversaw the consolidation of the VA's field hospital's accounting data to produce its summary level financial statements. During the six years that I worked for the VA, I became aware of the use of rote formulas and large manual adjustments to hide all problems and to accommodate the Central Agencies' inadequate and incongruent accounting policies. In an effort to resolve this impasse, I read all the Central Agencies' documentation and contacted countless individuals within those agencies for an explanation. The more I read and the more explanations that I heard, the more I was convinced that our government had a real problem. I requested that the VA support me in questioning the divergent and conflicting accounting policies between the GAO, OMB, and Treasury. The VA's managers were not interested.

During the period April 1981 through June 1984 while at the VA, on my own time, I completed an integrated accounting and budgeting model that was patterned after the

private sector and based upon Generally Accepted Accounting Principles (GAAP), ~~while at the VA.~~ I completed this GAAP-based government-wide accounting model because it is a necessary prerequisite to designing, testing, and implementing the government's financial software; the GAAP-based standard that I designed accommodates the needs of not just the federal government but also of state and local governments. Also, because of the confusion that I encountered in reading three separate sets of documentation (by OMB, GAO, and Treasury), I also completed a book, "Principles of Accounting, Budgeting, and Cash Management for Government." About the time that I finished the book, my staff found a $40 million dollar antideficiency violation (the VA exceeded their budget). I was asked to sign a letter authorizing the necessary adjustments to hide the problem. I refused. Another manager, two levels up from me, signed the letter for me while I was on leave.

I resigned from the VA in October 1986, citing "falsification of the agency's financial statements" as my reason for leaving. My personnel records were illegally altered to attribute my resignation to "conflicting views over systems improvement." During my subsequent one year *unpaid sabbatical*, I lobbied members of Congress and the Central Agencies' top managers to adopt a GAAP-based, integrated accounting and budgeting process. I also proposed that the government use an objective basis (such as an accounting model) to test its accounting standards before requiring compliance

by all federal agencies. GAO reviewed my book, after much prompting by my Congressional contacts, but did not approve of the concept because, as they stated, it was too complicated; they were right. I then lobbied OMB and Treasury with no success. Yet, in October 1990, the Central Agencies formed the Federal Accounting Standards and Advisory Board (FASAB) to produce a single government-wide accounting standard as I had requested in January 1987.

In October 1987, I rejoined the federal government and obtained a Systems Accountant position with the Treasury Department. I was selected to represent Treasury (along with an OMB and GAO representative) on a committee charged with establishing the system requirements for all government procured, contractor off-the-shelf financial software appearing on the General Services Administration (GSA) Schedule. I questioned the logic of this decision since the government had no GAAP-based accounting standard in place at the time and thus no basis for testing financial software. The OMB representative told me not to worry about it since management (OMB, GAO, Treasury, and GSA) had already decided that the two off-the-shelf financial software contractors, American Management Systems (AMS) and Computer Data Systems Inc. (CDSI), would be placed on the GSA Schedule. Our only responsibility was to prepare a meaningless systems questionnaire that all contractors would complete and certify that they had satisfied the government's (non-

existent accounting and system) requirements. I protested the decision and resigned from the committee and was told by the OMB representative that I had not made a good career move; he was right! Subsequent testing revealed that none of the vendor accounting software packages was capable of generating a single financial statement. As before, all financial statements would have to be done manually. Despite their knowledge of this problem, the Central Agencies' top managers made both the AMS and CDSI off-the-shelf software packages available to all 24 CFO Act agencies.

In March 1990, I obtained a Branch Chief, Systems and Accounting position with the Environmental Protection Agency. After a year or so in that position, I questioned the number of contractors my supervisor, an engineer, used to complete essentially meaningless accounting tasks and their access to the confidential business information of other contractors (i.e. cost rates). I also questioned the logic of replacing government employees with contractors, the corresponding lack of checks and balances, and the very real possibility of generating fraudulent payments. I was subsequently reduced to making weekly staff presentations on the amount of paper used by our agency's printers and fax machines. I also had to give presentations on branch initiatives without being in on related meetings. When I reported this supervisor to the Inspector General's Office for entering into illegal verbal contracts, I was relieved of all Branch responsibilities, placed in an unclassified position, lost

my office, and relocated to the basement mailroom office, complete with the electrical circuit breakers for the entire building for eight years.

In June 1993, I was transferred to the Washington, D.C. Policies and Procedures Office, though I remained at Research Triangle Park, NC. I enjoyed my job for approximately three years. Then, I was given the responsibility for critiquing the newly formed FASAB (and AICPA) accounting policies and standards. I noted a number of major concerns with the FASAB standards by a written report that was disregarded. I was told that it was not my place to disagree with these government-wide accounting standards. I disagreed and accordingly voiced my concern to then Vice President Al Gore, the FASAB chairman, and Central Agency heads. Within a few months, I was offered a restrictive and meaningless staff accountant position – to be further ostracized by management. Since I did not want to risk the possibility of a "forced" transfer to Washington, D.C., I reluctantly accepted this position.

On June 8, 1998, I gave a presentation to Senator Fred Thompson's staff in which I identified: (1) the Executive and Legislative Branches' archaic budgeting policies (four digit budget codes to record all government assets and expenses) as stumbling blocks to instituting the very accounting reforms that Congress had mandated by law, (2) the FASAB (and AICPA) accounting policies as fatally flawed and one of the

reasons for our government's failed financial systems, and (3) the need for Congress to make FASAB responsible for producing an accounting model before wasting more tax dollars on these processes.

In June 1999, about a year after I was told that Congress was not interested in addressing accounting related issues, I had an Op-Ed published in the Washington Times where I, again, expressed my concern with the FASAB standards. Four and one-half months later, the AICPA designated FASAB as the accounting-standards-setting body for the federal government; this effort was, just a bit, disingenuous since the AICPA wrote the government's accounting standards for FASAB. Recall the outrage when ENRON wrote our government's energy-related policies, their self-serving agenda, and the over inflated energy prices to the American people. Where is Congress' and the public's outrage for the AICPA's oversight of our FASAB government-wide accounting standards and GAO's (and the AICPA's) false claim of a GAAP-based government-wide accounting standard?

During the eleven years in my fake accountant management position, I noticed that other credentialed accountants (with their 4 year accounting degrees and CPA's) were also being forced out of their accountant positions or placed into meaningless positions like mine; eleven accountants were eliminated from the Research Triangle

Park, NC office alone (7 from the Office of the Chief Financial Office and 4 from the Contract Management Division). When I checked the Office of Personnel Management's (OPM's) job requirements for a government accountant (GS-0510 series), I noticed that the 4 year accounting degree requirement was easily bypassed to allow virtually anyone to be classified as a government accountant.

During the period April 7, 2006 through October 23, 2006, I decided to formally document my concerns with both EPA's OCFO managers and David Walker, the Comptroller General of the U.S. In those emails, I questioned EPA's systematic elimination of our 4 year degreed accountants and replacement with minimally qualified people, the problem of still alluding to these individuals as "accountants" and "managers," the waste of using AICPA firms, financial software companies, and management consulting firms for work that could easily be done by government personnel (with upgraded OPM standards for accountants and computer science), more waste involving EPA's recent procurement of $84 million in financial software, the gross waste that I noted as the lead Treasury systems accountant (in liaison with OMB and GAO) in completing a meaningless questionnaire where 2 financial software vendors (AMS and CDSI) certified that they had met all Central Agency standards (when there were none). During that period, the Director, RTP Finance Center cautioned me not to send any more emails outside of his office. I

ignored his warnings and subsequently faced a bogus allegation involving a co-workers fear for her life (from me) based on a comment that she overheard me make about her. I did take the allegations against me seriously since they included removal, suspension, and reduction-in-grade or pay. I was subsequently suspended with 4 days LWOP and spent the next year or so dealing with an equally dysfunctional Office of Special Counsel and Merit Systems Protection Board. Even though I won all the key points regarding my case (I was a whistleblower, my charges against EPA and the Central Agencies were serious, the timing of the charges against me were suspect), I lost the case to recover my 4 days LWOP. Also, the individual who was so in fear for her life (also a non accountant) volunteered to be my supervisor shortly after I returned from my 4 days LWOP suspension.

The sad fact is that our government's inability to generate accurate accounting and budgeting financial statements are the direct result of the *political deficiencies* mentioned earlier. This government-wide failure and our current economic crisis have one thing in common – the lack of checks and balances to prevent these very preventable disasters from occurring. As President Obama has stated, "its time to put our differences aside and to work together." See the NAWBC website, **http://www.nawbc.com**, What We Need section, to begin resolving this government-wide financial management problem.

ADD THIS

FDA Scientists Complain to Obama of "Corruption"

Thursday 08 January 2009
by: Ricardo Alonso-Zaldivar | Visit article original @ ***The Associated Press***

Washington - In an unusually blunt letter, a group of federal scientists is complaining to the Obama transition team of widespread managerial misconduct in a division of the Food and Drug Administration.

"The purpose of this letter is to inform you that the scientific review process for medical devices at the FDA has been corrupted and distorted by current FDA managers, thereby placing the American people at risk," said the letter, dated Wednesday and written on the agency's Center for Devices and Radiological Health letterhead.

The center is responsible for medical devices ranging from stents and breast implants to MRIs and other imaging machinery. The concerns of the nine scientists who wrote to the transition team echo some of the complaints from the FDA's drug review division a few years ago during the safety debacle involving the painkiller Vioxx.

The FDA declined to publicly respond to the letter, but said it is working to address the concerns.

In their letter the FDA dissidents alleged that agency managers use intimidation to squelch scientific debate, leading to the approval of medical devices whose effectiveness is questionable and which may not be entirely safe.

"Managers with incompatible, discordant and irrelevant scientific and clinical expertise in devices...have ignored serious safety and effectiveness concerns of FDA experts," the letter said. "Managers have ordered, intimidated and coerced FDA experts to modify scientific evaluations, conclusions and recommendations in violation of the laws, rules and

regulations, and to accept clinical and technical data that is not scientifically valid."

A copy of the letter, with the names of the scientists redacted, was provided to The Associated Press by a congressional official.

"Currently, there is an atmosphere at FDA in which the honest employee fears the dishonest employee, and not the other way around," the scientists wrote.

FDA spokeswoman Judy Leon said in response: "We have been working very closely with members of the transition team and any concerns or questions they have on any issue, we will address directly with the team. Separately, the agency is actively engaged in a process to explore the staff members' concerns and take appropriate action."

Senior Democratic and Republican lawmakers are urging Obama to appoint a commissioner who will shake up the FDA and restore the confidence of its working-level scientists and medical experts. But industry officials fear that approval of new drugs and devices could be delayed by endless scientific disputes - which is the agency's reputation.

The FDA dissidents have previously taken their concerns to Congress and found support from lawmakers in the House.

In the letter the group singled out mammography computer-aided detection devices as an example of a technology that should not have gone forward. The devices were supposed to improve breast cancer detection, but instead studies showed they were associated with false alarms that led to unnecessary breast biopsies.

Since 2006, FDA experts have recommended five times against approving the devices without better clinical evidence, the letter said. In March of last year, a panel of outside advisers supported some of the concerns of the FDA's in-house scientists. Nonetheless, FDA managers overruled the objections and ordered approval.

Top FDA managers "committed the most outrageous misconduct by ordering, coercing and intimidating FDA physicians and scientists to recommend approval, and then retaliating when the physicians and scientists refused to go along," the letter said.

March 1, 2006

GAO Highlights

Highlights of GAO-06-406T, testimony before the Subcommittee on Government Management, Finance, and Accountability, Committee on Government Reform, House of Representatives

FISCAL YEAR 2005 U.S. GOVERNMENT FINANCIAL STATEMENTS

Sustained Improvement in Federal Financial Management Is Crucial to Addressing Our Nation's Financial Condition and Long-term Fiscal Imbalance

Why GAO Did This Study

GAO is required by law to annually audit the consolidated financial statements of the U.S. government. The Congress and the President need to have timely, reliable, and useful financial and performance information. Sound decisions on the current results and future direction of vital federal government programs and policies are made more difficult without such information.

Until the problems discussed in GAO's audit report on the U.S. government's consolidated financial statements are adequately [illegible] (1) [illegible] measure the full cost as well as the financial and nonfinancial performance of certain programs and activities; (3) impair the federal government's ability to adequately safeguard significant assets and properly record various transactions; and (4) hinder the federal government from having reliable financial information to operate in an economical, efficient, and effective manner.

www.gao.gov/cgi-bin/getrpt?GAO-06-406T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Jeffrey C. Steinhoff or Gary T. Engel at (202) 512-2600.

What GAO Found

For the ninth consecutive year, certain material weaknesses in internal control and in selected accounting and financial reporting practices resulted in conditions that continued to prevent GAO from being able to provide the Congress and American people an opinion as to whether the consolidated financial statements of the U.S. government are fairly stated in conformity with U.S. generally accepted accounting principles. Three major impediments to an opinion on the consolidated financial statements continued to be (1) serious financial management problems at the Department of Defense, (2) the federal government's inability to adequately account for and reconcile intragovernmental activity and balances between federal agencies, and (3) the federal government's ineffective process for preparing the consolidated financial statements. Further, in our opinion, as of September 30, 2005, the federal government did not maintain effective internal control over financial reporting and compliance with significant laws and regulations due to numerous material weaknesses.

More troubling still is the federal government's overall financial condition and long-term fiscal imbalance. While the fiscal year 2005 budget deficit was lower than 2004, it was still very high, especially given the impending retirement of the "baby boom" generation and rising health care costs. Importantly, as reported in the fiscal year 2005 *Financial Report of the United States Government*, the federal government's accrual-based net operating cost—the cost to operate the federal government—increased to $760 billion in fiscal year 2005 from $616 billion in fiscal year 2004. This represents an increase of about $144 billion or 23 percent. The federal government's gross debt was about $8 trillion as of September 30, 2005. This number excludes such items as the gap between the present value of future promised and funded Social Security and Medicare benefits, veterans' health care, and a range of other liabilities, commitments, and contingencies that the federal government has pledged to support. Including these items, the federal government's fiscal exposures now total more than $46 trillion, representing close to four times gross domestic product (GDP) in fiscal year 2005 and up from about $20 trillion or two times GDP in 2000. Given these and other factors, a fundamental reexamination of major spending programs, tax policies, and government priorities will be important and necessary to put us on a prudent and sustainable fiscal path. This will likely require a national discussion about what Americans want from their government and how much they are willing to pay for those things.

We continue to have concerns about the identification of misstatements in federal agencies' prior year financial statements. Frequent restatements to correct errors can undermine public trust and confidence in both the entity and all responsible parties. The material internal control weaknesses discussed in this testimony serve to increase the risk that additional errors may occur and not be identified on a timely basis by agency management or their auditors, resulting in further restatements.

March 20, 2007

FISCAL YEAR 2006 U.S. GOVERNMENT FINANCIAL STATEMENTS

Sustained Improvement in Federal Financial Management Is Crucial to Addressing Our Nation's Accountability and Fiscal Stewardship Challenges

GAO Highlights

Highlights of GAO-07-607T, a testimony before the Subcommittee on Government Management, Organization, and Procurement, Committee on Oversight and Government Reform, House of Representatives

Why GAO Did This Study

GAO is required by law to annually audit the consolidated financial statements of the U.S. government. The Congress and the President need to have timely, reliable, and useful financial and performance information. Sound decisions on the current results and future direction of vital federal government programs and policies are made more difficult without such information.

Until the problems discussed in GAO's audit report on the U.S. government's consolidated financial statements are adequately addressed, they will continue to (1) [illegible] measure the full cost as well as the financial and nonfinancial performance of certain programs and activities; (3) impair the federal government's ability to adequately safeguard significant assets and properly record various transactions; and (4) hinder the federal government from having reliable financial information to operate in an economical, efficient, and effective manner.

www.gao.gov/cgi-bin/getrpt?GAO-07-607T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Jeffrey C. Steinhoff or Gary T. Engel at (202) 512-2600 or engelg@gao.gov.

What GAO Found

For the 10th consecutive year, certain material weaknesses in financial reporting and other limitations on the scope of GAO's work resulted in conditions that continued to prevent GAO from being able to provide Congress and the American people an opinion as to whether the consolidated financial statements of the U.S. government are fairly stated in conformity with U.S. generally accepted accounting principles. While over the past 10 years significant progress has been made in improving financial management since the U.S. government began preparing consolidated financial statements, three major impediments continue to prevent GAO from rendering an opinion on the consolidated financial statements: (1) serious financial management problems at the Department of Defense, (2) the federal government's inability to adequately account for and reconcile intragovernmental activity and balances between federal agencies, and (3) the federal government's ineffective process for preparing the consolidated financial statements. Further, in GAO's opinion, as of September 30, 2006, the federal government did not maintain effective internal controls over financial reporting and compliance with significant laws and regulations due to numerous material weaknesses.

From a broad federal financial management perspective, the federal government's financial condition and fiscal outlook are worse than many may understand. The U.S. government's total reported liabilities, net social insurance commitments, and other fiscal exposures continue to grow and now total over $50 trillion, representing approximately four times the nation's total output (GDP) in fiscal year 2006, up from about $20 trillion, or two times GDP in fiscal year 2000. The federal government faces large and growing structural deficits in the future due primarily to known demographic trends and rising health care costs. These structural deficits which are virtually certain given the design of our current programs and policies will mean escalating and ultimately unsustainable federal deficits and debt levels. Based on various measures and using reasonable assumptions the federal government's current fiscal policy is unsustainable. Continuing on this imprudent and unsustainable path will gradually erode, if not suddenly damage, our economy, our standard of living, and ultimately our domestic tranquility and national security. Tough choices by the President and the Congress are necessary in order to address the nation's large and growing long-term fiscal imbalance.

The federal government should consider the need for further revisions to the current federal financial reporting model to recognize the unique needs of the federal government. While the current reporting model recognizes some of these needs, a broad reconsideration of issues such as the kind of information that may be relevant and useful for a sovereign nation, could stimulate needed discussion and lead to reporting enhancements that might help the Congress deliberate strategies to address the nation's growing long-term fiscal imbalance. Furthermore, additional transparency in connection with federal budget reporting and legislative proposals is needed.

June 5, 2008

GAO Highlights

Highlights of GAO-08-847T; a testimony before the Subcommittee on Government Management, Organization, and Procurement, Committee on Oversight and Government Reform, House of Representatives

FISCAL YEAR 2007 U.S. GOVERNMENT FINANCIAL STATEMENTS

Sustained Improvement in Financial Management Is Crucial to Improving Accountability and Addressing the Long-Term Fiscal Challenge

Why GAO Did This Study

The Congress and the President need to have reliable, useful and timely financial and performance information to make sound decisions on the current and future direction of vital federal government programs and policies.

Unfortunately, except for the 2007 Statement of Social Insurance, GAO was again unable to provide assurance on the reliability of the consolidated financial statements of the U.S. government (CFS) due primarily to certain material weaknesses in the federal government's internal control. GAO has reported that unless these weaknesses are adequately [illegible] reliably measure the full cost as well as the financial and nonfinancial performance of certain programs and activities.

This testimony presents the results of GAO's audit of the CFS for fiscal year 2007 and discusses the federal government's long-term fiscal outlook.

What GAO Recommends

Over the years, GAO has made numerous recommendations directed at improving federal financial management, including ones regarding issues addressed in this testimony.

To view the full product, including the scope and methodology, click on GAO-08-847T. For more information, contact McCoy Williams or Gary T. Engel at (202) 512-2600 or Susan Irving at (202) 512-9142.

What GAO Found

For the 11th consecutive year, three major impediments prevented GAO from rendering an opinion on the federal government's accrual basis consolidated financial statements: (1) serious financial management problems at the Department of Defense, (2) the federal government's inability to adequately account for and reconcile intragovernmental activity and balances between federal agencies, and (3) the federal government's ineffective process for preparing the consolidated financial statements. In addition, financial management system problems continue to hinder federal agency accountability. Although the federal government still has a long way to go, significant progress has been made in improving federal financial management. For example, audit results for many federal agencies have improved and federal financial system requirements have been developed. In addition, GAO was able to render an unqualified opinion on the 2007 Statement of Social Insurance. Further, for the first time, the federal government issued a summary financial report which is intended to make the information in the *Financial Report of the U.S. Government* (*Financial Report*) more understandable and accessible to a broader audience.

It is important that this progress be sustained by the current administration as well as the new administration that will be taking office next year and that the Congress continues its oversight to bring about needed improvements to federal financial management. Given the federal government's current financial condition and the nation's long-term fiscal challenge, the need for the Congress and federal policymakers and management to have reliable, useful, and timely financial and performance information is greater than ever. Information included in the *Financial Report*, such as the Statement of Social Insurance along with long-term fiscal simulations and fiscal sustainability reporting, can help increase understanding of the nation's long-term fiscal outlook.

The nation's long-term fiscal challenge is a matter of utmost concern. The federal government faces large and growing structural deficits due primarily to rising health care costs and known demographic trends. Simply put, the federal government is on an imprudent and unsustainable long-term fiscal path. Addressing this challenge will require a multipronged approach. Moreover, the longer that action is delayed, the greater the risk that the eventual changes will be disruptive and destabilizing.

Finally, the federal government should consider the need for further revisions to the current federal financial reporting model to recognize the unique needs of the federal government. A broad reconsideration of issues, such as the kind of information that may be relevant and useful for a sovereign nation, could lead to reporting enhancements that might help provide the Congress and the President with more useful financial information to deliberate strategies to address the nation's long-term fiscal challenge.

September 23, 2002

The Honorable David M. Walker
Comptroller General of the United States
U.S. General Accounting Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Walker,

Recently, we formed an organization called the Taxpayers for Government Accounting Reform (TGAR). TGAR is comprised of federal employees with backgrounds in accounting, auditing, budgeting, contracts management, and property management. We have used our professional and government experience to design and/or critique an accounting process that integrates the government's accounting, budgeting, procurement, and property management processes. This accounting model is based on Generally Accepted Accounting Principles (GAAP) and thus allows for the generation of all integrated financial statements from a single trial balance. In order to limit the time required to critique this process, the enclosed accounting model compares all government input/output on a one-for-one basis with a corporation.

But, why would the federal government consider another process when it already has an accounting process? As you know, the Federal Accounting Standards Advisory Board (FASAB), comprised of the General Accounting Office (GAO), Office of Management and Budget (OMB), and Treasury, oversees the government's accounting process. As you also know, in March 2001, the GAO revealed in written testimony to the U.S. Congress that it has been unable to express an opinion on the integrity of the U.S. government's financial statements for the last four consecutive years.

In the public relations portion of that testimony, GAO indicated that the federal government had made marked strides in obtaining 18 (out of 24) unqualified opinions from agency internal auditors. GAO further stated in that very same testimony that "A number of these unqualified opinions were obtained by expending significant resources in ad hoc procedures and making billions of dollars in adjustments ... and that such practices, if continued, would serve to mislead the public as to the true status of the agencies' financial management capabilities." In short, the federal government has no credible accounting process.

Like Enron, the federal government's accountants and auditors lack the necessary independence to question either the government's FASAB policies or integrity of the individual agency financial statements. Consider, for example, the career potential of an agency CFO who questioned the FASAB accounting policies and placed his/her agency in jeopardy of a GAO audit or possible budget problem with OMB. Likewise, it is not in the best interest of agency accountants or auditors to stand in the way of an unqualified opinion (as our careers can attest).

It is simply a fact of life in the career service – never question the government's entrenched procedures no matter how inane or illegal. It is our position that the government's intolerance of outspoken critics has effectively prevented the adoption of a viable accounting process and a true accounting of our tax dollars (now or in the foreseeable future).

We ask that you join us in articulating and addressing the fundamental accountability issues that have been ignored, for too long. While our group does possess the technical skills to radically improve government accountability, at all levels, we need a champion (and an accountant such as you) to articulate the long-range, intergovernmental benefits, and a strategy for implementing this integrated accounting process. (Our proposed GAAP-based alternative would require minimal budgeting policy changes).

Our web site, www.tgar.org contains background information on the fundamental failings of all governmental accounting processes, a summary of the problems and solutions of government accountability-related issues, and a scaled-down version of our accounting model. For your convenience, we have included a hard copy of our web site in this package.

We appreciate any feedback and support that you can give us in articulating our concerns and proposing a strategy for, at long last, bringing government accountability to the Executive branch, Legislative branch, and the American people. We look forward to hearing from you in the near future.

Sincerely,

Larry Fisher

Larry Fisher, Accountant

Ollie Darby

Ollie Darby, CPA

William Newby

William Newby, Contracting Officer

Post-Hearing Questions for the Record
Submitted to William L. Bransford
From Senator Susan M. Collins

"S. 372 - The Whistleblower Protection Enhancement Act of 2009"
June 11, 2009

1. The House version of the Whistleblower Protection Enhancement Act of 2009, H.R. 1507, contains a provision that will allow a federal employee whistleblower to seek relief in the U.S. District Court before a jury if the Merit System Protection Board does not issue a decision on a whistleblower claim within 180 days of receiving the case. What effects do you believe the ability to seek jury trials could potentially have on employee-management relations?

The availability of jury trials will detract from employee-management relations, and contribute to a less responsive and efficient government. Whistleblower reprisal cases tend to be among the most complicated that arise. The difficult question for a fact finder (such as a jury or an MSPB judge) is whether the whistleblower is really a problem employee using whistleblower protection as an undeserved shield, or a good employee who is suddenly viewed through a negative prism as a result of animus that develops because the whistleblower discloses some inconvenient and uncomfortable issue.

Managers will react to the possibility of jury trials as one more unknown in a world of unknowns for managers. Already managers must deal with employees who may file employment discrimination complaints with impunity and without a threshold of evidence to establish validity. Employees in a bargaining unit may ask their union to take a matter to an outside arbitrator. These and numerous other currently existing rights contribute to an atmosphere of caution that must be countered with training (that does not occur with consistency) and leadership (that is sometimes hesitant because of the legal complexities of these rights and processes).

Whistleblower reform should occur and that reform in and of itself will add to the complexity and the hesitancy. But managers will know that, under the current process, their actions will be adjudicated by a knowledgeable judge who understands government processes and has a respect for the efficiency of the service. A less informed jury that is not required to explain and rationalize its fact findings will be viewed by federal managers as a great unknown and a risk that should be avoided. The result will be that problem employees will be able to cloak themselves with whistleblower status and at least chill, if not paralyze, their managers.

Also, managers must deal with a plethora of activity in dealing with problem employees running the gamut from counseling, letters of admonishment, or negative performance appraisals all the way up to removal. Under current whistleblower law, most minor personnel actions are covered. The House bill would also allow a jury trial for relatively minor actions such as reprimands, details or reassignments. Allowing jury trials by an employee for the full spectrum of management actions in dealing with problem employees merely because an employee has claimed whistleblower status (an easy thing to do) will impede a federal manager and create pause in taking the initial and follow up steps in dealing with a problem employee.

Post-Hearing Questions for the Record
Submitted to Robert G. Vaughn
From Senator Susan M. Collins

"S. 372 - The Whistleblower Protection Enhancement Act of 2009"
June 11, 2009

1. Could you explain the current MSPB process in terms of the average time a case is pending to when it is decided?

2. Could you explain what factors contribute to the length of time a case is pending before the MSPB?

I have combined my answers to the two questions because these questions are closely related. The annual reports of the Board contain case processing information. A large percentage of cases are settled and thus the annual processing time for all cases is lower than it would be if we focused only on those cases which received a hearing before the Board. Cases in which review is sought by the Board take more time than similar cases from which no Board review is sought. My written testimony explores Board statistics including case processing information directly relevant to the differences between the House and Senate versions of the Whistleblower Protection Enhancement Act.

My discussion focuses on expedition which is related to but can be different than the quality of decisions. Many critics argue that an emphasis on expedition alone can lead to a mechanical case processing approach that undermines thorough review. My comments are general and while most of them are applicable to whistleblower cases, the number of these cases that proceed to hearings at the Board suggests that aspects of these cases might also influence the time taken in processing them. For example, some witnesses suggested during the hearings that the Board is ill suited to address high profile public policy cases or political cases. The inordinate amount of Board resources that these case could properly command indicates the incompatibility of these cases with Board practice

The factors that contribute to timely processing of cases include factors applicable to all litigation as well as some that are specific to the Board. The following discussion incorporates these two sets of factors.

The Complexity of the Case: A case can be legally or factually complex. Both types of complexity can lengthen the time necessary for the resolution of the case. A factually complex case requires more extensive discovery and likely involves a longer hearing. A legally complex case may require more detailed review and perhaps an interlocutory or intermediate appeal from an administrative judge to resolve an unsettled but widely applicable issue. Such interlocutory

appeals lengthen the time otherwise required to resolve the case. Complex legal issues may implicate a number of cases also pending before the Board. In these circumstances, the Board may stay hearings in all similar cases until the issue or issues are resolved. A caseload of factually simple cases to which clear legal standards are easily applied will be more quickly resolved than one consisting of factually complex cases involving intricate legal rules and standards.

The Quality of Advocates: Although aggressive advocacy can increase time spent in the resolution of a case by raising all relevant issues and pursuing discovery devices, competent advocacy can formulate and develop the issues. During the Senate hearings on S 375, one witness suggested that high profile whistleblower cases could overwhelm the Board. These cases are likely to be one involving complex factual and perhaps legal issues in which the whistleblower would be represented by counsel.

Because many employees before the Board are unrepresented, these cases are less likely to be developed fully either factually or legally. In some cases, better prepared advocates may increase processing time and in other instances may reduce it. For example, well prepared counsel reduce the burdens on administrative judges to do the same work expected of counsel.

The Burdens on Administrative Judges: The burdens on adjudicators influence both the speed and quality of adjudication. Judges with many cases may not be able to resolve them as expeditiously as judges with fewer cases. Thus, the burden on an adjudicatory system increases the number of cases each adjudicator must determine and affects the speed with which individual cases are decided. On the other hand, judges confronting significant burdens are tempted to sacrifice the thoroughness of adjudication for expedition. In this regard, the Board's lack of summary judgment increases the burdens on administrative judges by requiring hearings in all cases. Hearings are more time consuming than summary adjudications.

The Qualifications and Experience of Adjudicators: Better qualified adjudicators with greater experience may resolve even difficult cases more quickly than less qualified or experienced colleagues with a similar set of cases. Administrative judges at the Board do not enjoy the protections and in some cases the salaries of Administrative Law Judges. It is more difficult to determine if administrative judges at the Board perceive ALJs as more prestigious adjudicators. If so, all of these factors, job protection, salary, and prestige, would affect the recruitment and retention of administrative judges at the Board. To determine this effect, we could examine the turnover of administrative judges at the Board. Do more experienced and able administrative judges tend to leave for positions as ALJs in other agencies?

Institutional Incentives for Expedition: Throughout its history the Board has stressed the expeditious adjudication of employee appeals. Efficiency in case processing has been one of the performance standards that the Board has used to evaluate itself and presumably its administrative judges. Institutional practices and incentives play an important role in

determining processing time. For example, scholars have noticed the effects on expedition between individual dockets where a single judge is accountable for the disposition of a case and a master docket where several judges may share responsibility for a single case.

Expedition as One Part of Board Reform: These questions suggest that expedition is an appropriate goal for assessment of the performance of the Board. Several witnesses, however, argued that apart from S 375, reform of the Board required the attention of Congress. If the conclusion in my testimony is correct, that the Board will continue to adjudicate a number of whistleblower cases, then improvements in the Board including an assessment of its adjudicatory resources remains an important Congressional concern.

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