

NOT FOR PUBLICATION UNTIL RELEASED BY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

STATEMENT

OF

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BEFORE THE

HOUSE OF REPRESENTATIVES

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

ON

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

14 MAY 2009

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

become emboldened by OSC's failure to act and escalated its retaliation to the point that I am facing potential termination in less than a month. While I have received very generous and gracious support from members of Congress who seek to ensure that whistleblowers do not suffer retaliation for disclosing vital information to them¹, it is primarily the responsibility of the OSC to protect whistleblowers from the kind of retaliation that I have suffered. By refusing to take action, the OSC tells both potential whistleblowers and those who they expose that the price of disclosing life-saving information very well could be the whistleblower's career.

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

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

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

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

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

Thank you.