

TESTIMONY OF THOMAS DEVINE,
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before the

HOUSE OVERSIGHT AND GOVERNMENT REFORM COMMITTEE

on

the Whistleblower Protection Enhancement Act

May 14, 2009

Thank you for inviting this testimony on legislation to put protection back in the Whistleblower Protection Act. If enacted, HR 1507 will set the global gold standard for accountability through transparency. Until now, the new millennium has been the Dark Ages – unprecedented levels of corruption, sustained by secrecy and enforced through repression. This legislation turns on the lights just in time. Already this year we have embarked on the largest spending program in government history through the stimulus. We are on the verge of landmark societal overhauls to prevent medical care disasters for America’s families due to national health insurance, and to prevent environmental disasters for the whole planet from global warming. We have been shamed by torture and widespread domestic surveillance.

The President has promised the taxpayers will get their money’s worth, and that never again will America betray the core values of freedom, and humanity. That commitment is a fantasy unless public servants have the freedom to bear witness, whether it is the freedom to warn of disasters before they happen, or to protest abuses of power that betray the public trust. Timely passage of genuine whistleblower rights also would be a signal that new Congressional leadership is serious about three basic taxpayer commitments that require best practices accountability checks and balances —1) getting our money’s worth from unprecedented stimulus spending; 2) locking in checks and balances to keep honest the new markets created by health care and climate change laws; and 3) informed oversight so that the next time abuses of human rights abroad and freedom at home will end while they are the exception, instead of the rule after eight years of secrecy.

My name is Tom Devine, and I serve as legal director of the Government Accountability Project (“GAP”), a nonprofit, nonpartisan, public interest organization that assists whistleblowers, those employees who exercise free speech rights to challenge abuses of power that betray the public trust. GAP has led or been on the front lines of campaigns to enact or defend nearly all modern whistleblower laws passed by Congress, including the Whistleblower Protection Act of 1989 and 1994 amendments.*

Our work for corporate whistleblower protection rights includes those in the Sarbanes-Oxley law for some 40 millions workers in publicly-traded corporations, the 9/11 law for ground transportation employees, the defense authorization act for defense contractors, and the Consumer Product Safety Improvement Act for some 20 million workers connected with retail sales, the Energy Policy Act for the nuclear power and weapons industries and AIR 21 for airlines employees, among others.

We teamed up with professors from American University Law School to author a model whistleblower law approved by the Organization of American States (OAS) to implement at its Inter American Convention against Corruption. In 2004 we led the successful campaign for the United Nations to issue a whistleblower policy that protects public freedom of expression for the first time at Intergovernmental Organizations, and in 2007 analogous campaigns at the World Bank and African Development Bank. GAP has

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

published numerous books, such as The Whistleblower's Survival Guide: Courage Without Martyrdom, and law review articles analyzing and monitoring the track records of whistleblower rights legislation. See "Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 Administrative Law Review, 531 (1999); Vaughn, Devine and Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 Geo. Wash. Intl. L. Rev. 857 (2003); *The Art of Anonymous Activism* (with Public Employees for Environmental Responsibility and the Project on government Oversight)(2002); and *Running the Gauntlet: The Campaign for Credible Corporate Whistleblower Rights*. (2008).

Over the last 30 years we have formally or informally helped over 5,000 whistleblowers to "commit the truth" and survive professionally while making a difference. This testimony shares and is illustrated by painful lessons we have learned from their experiences. We could not avoid gaining practical insight into which whistleblower systems are genuine reforms that work in practice, and which are illusory.

Along with the Project on Government Oversight, GAP also is a founding member of the Make it Safe Coalition, a non-partisan, trans-ideological network of 50 organizations whose members pursue a wide variety of missions that span defense, homeland security, medical care, natural disasters, scientific freedom, consumer hazards, and corruption in government contracting and procurement. We are united in the cause of protecting those in government who honor their duties to serve and warn the public.

Our coalition is just the tip of the iceberg for public support of whistleblowers. As of this morning, 286 NGO's, community organizations and corporations have signed a letter to President Obama and Congress to give those who defend the public the right to defend themselves through the same model as HR 1507 -- no loopholes, best practices free speech rights enforced through full access to court for all employees paid by the taxpayers. It is enclosed as Exhibit 1. The breadth of the support for HR 1507's approach is breathtaking – including good government organizations ranging from Center for American Progress, National Taxpayers Union and Common Cause, environmental groups from Council for a Livable World, Friends of the Earth and the Union of Concerned Scientists, conservative coalitions and organizations such as the Liberty Coalition, Competitive Enterprise Institute, American Conservative Defense Alliance and the American Policy Center, to unions and other national member based groups from American Federation of Government Employees and the National Treasury Employees Union, to the National Organization for Women.

Last June only 112 organizations had signed an analogous letter. Support for genuine reform will continue to expand steadily until whistleblowers have rights they can believe in. Just this week the Federal Law Enforcement Officers Association, and 14 of America's most celebrated, vindicated national security whistleblowers wrote to President Obama, asking him to keep his campaign pledge of full court access for all employees paid by the taxpayer. Their letters are enclosed as Exhibits 2 and 3, respectively.

MAKING A DIFFERENCE

There can be no credible debate about how much this law matters. Whistleblowers risk their professional survival to challenges abuses of power that betray the public trust. This is freedom of speech when it counts, unlike the freedoms akin to yelling at the referee in a sports stadium, or late night television satire of politicians and pundits. It not only encompasses the freedom to protest, but the freedom to warn, so that avoidable disasters can be prevented or minimized. It also encompasses the freedom to challenge conventional wisdom, such as outdated or politically-slanted scientific paradigms. In every context, they are those who keep society from being stagnant and are the pioneers for change.

Both for law enforcement and congressional oversight, whistleblowers represent the human factor that is the Achilles' heel of bureaucratic corruption. They also serve as the life blood for credible anti-corruption campaigns, which can degenerate into empty, lifeless magnets for cynicism without safe channels for those who bear witness.

Their importance for congressional oversight cannot be overemphasized, as demonstrated by this committee's January hearings on climate change censorship. Creating safe channels will determine whether Congress learns about only the tips, or uncovers the icebergs, in nearly every major investigation over the next two years.

Whistleblowers are poised to bear witness as the public's eyes and ears to learn the truth about issues vital to our families, our bank accounts, and our national security. Consider examples of what they've accomplished recently without any meaningful rights:

* FDA scientist Dr. David Graham successfully exposed the dangers of pain killers like Vioxx, which caused over 50,000 fatal heart attacks in the United States. The drug was finally withdrawn after his studies were confirmed. Today at the Energy and Commerce Committee three whistleblowers are testifying about government reliance on fraudulent data to approve Ketek, another high risk prescription drug.

* Climate change whistleblowers such as Rick Piltz of the White House Climate Change Science Program exposed how political appointees such as an oil industry lobbyist rewrote the research conclusions of America's top scientists. Scientists like NASA's Dr. James Hansen refused to cooperate with censorship of their warnings about global warming; namely that we have less than a decade to change business as usual, or Mother Nature will turn the world on its head. It appears the country has heard the whistleblowers' wake up call.

* Gary Aguirre exposed Securities and Exchange Commission cover-ups of vulnerability to massive corruption in hedge funds that could threaten a new wave of post-Enron financial victims.¹

A host of national security whistleblowers, modern Paul Reveres, have made a record of systematic pre-9/11 warnings that the terrorists were coming and that we were not prepared. Tragically, they were systematically ignored. They keep warning: inside the bureaucracy, few lessons have been learned and America is little safer beyond appearances. They have paid a severe price. In addition to today's testimony from four national security whistleblowers, consider the experiences of six national security and public safety whistleblowers GAP has assisted over the last four years.

Frank Terreri was one of the first federal law enforcement officers to sign up for the Federal Air Marshal Service, out of a sense of patriotic duty after the September 11 tragedy. His experience illustrates the need for provisions in the legislation that codify protection against retaliatory investigations, as well as a remedy for the anti-gag statute. For over two years, he made recommendations to better meet post-9/11 aviation security demands. On behalf of 1,500 other air marshals, he suggested improvements to bizarre and ill-conceived operational procedures that compromised marshals' on-flight anonymity, such as a formal dress code that required them to wear a coat and tie even on flights to Florida or the Southwest. The procedures required undercover agents to display their security credentials in front of other passengers before boarding first, and always to sit in the same seats. Disregarding normal law enforcement practices, the agency had all the agents maintain their undercover locations in the same hotel chains, one of which then publicly advertised them as its "Employees of the month."

Instead of addressing Terreri's security concerns, air marshal managers attacked the messenger. First, they sent a team of supervisors to his home, took away his duty weapon and credentials, and placed him on indefinite administrative leave. Then headquarters initiated a series of at least four uninterrupted retaliatory investigations. At one point, Terreri was being investigated simultaneously for sending an alleged "improper email to a co-worker," for "improper use of business cards," association with an organization critical of the air marshal service, and for somehow "breaching security" by protesting the agency's own security breaches. All of these charges were eventually deemed "unfounded" by DHS investigators, but the air marshal service didn't bother to tell Terreri and didn't take him off of administrative "desk duty" until the day after the ACLU filed a law suit on his behalf.

Air Marshal Robert MacLean's experience demonstrates the ongoing, critical need to codify the anti-gag statute. He blew the whistle on an indefensible proposed cost saving measure from Headquarters that would have removed air marshal coverage on long-distance flights like those used by the 9/11 hijackers, *during* a hijacker alert. After unsuccessfully trying to challenge the policy change through his chain of command, Mr.

¹ Unless noted otherwise, all cases discussed concern current or former GAP clients who have consented to having their stories publicly shared. With the relevant whistleblower's consent, GAP will provide further information verifying the events in their cases upon request.

MacLean took his concerns to the media. An MSNBC news story led to the immediate rescission of the misguided policy. Unfortunately, three years later the agency fired Mr. MacLean, specifically because of his whistleblowing disclosure, without any prior warning or notice. In terminating Mr. MacLean, the TSA cited an “unauthorized disclosure of Sensitive Security Information.” The alleged misconduct was entirely an *ex post facto* offense. There had been no markings or notice of its restricted status when Mr. McClean spoke out. This rationale violates the WPA and the anti-gag statute on its face. The agency, more intent on silencing dissent than following the law, hasn’t backed off.

Another whistleblower’s five-decade career in public service is in danger, because of his efforts to ensure that critical components on high performance Naval Aircraft are repaired according to military specifications. It illustrates why protection for carrying out job duties is essential. Mr. Richard Conrad, who served honorably in Vietnam and is now an electronic mechanic at the North Island Naval Aviation Depot, knew his unit could not guarantee the reliability or the safety of the parts they produced for F/A-18s because Depot management failed to provide them with the torque tools needed for proper repair and overhaul of certain components. The Secretary of the Navy formally substantiated Mr. Conrad’s key allegations, and the Depot took some immediate, although incomplete, corrective action.

But nothing has been done to protect Mr. Conrad. In response to his disclosures, he was transferred to the night shift in a unit at the Depot that doesn’t do any repairs at night. He has received an average of some 10 minutes work per eight hour shift for the last 14 months, and spends the majority of the time reading books – on the taxpayer’s dime.

Former FAA manager Gabe Bruno challenged lax oversight of the newly-formed AirTran Airways, which was created after the tragic 1996 ValuJet accident that killed all 110 on board. His experience highlights the need to protect job duties, and to ban retaliatory investigations. He was determined not to repeat the mistakes that led to that tragedy, and raised his concerns repeatedly with supervisors. In response, they initiated a “security investigation” against him and demoted Mr. Bruno from his management position. The lengthy, slanderous investigation ultimately led to Mr. Bruno’s termination after 26 years of outstanding government service with no prior disciplinary record.

The flying public was the loser. Following Mr. Bruno’s demotion and reassignment, FAA Southern Region managers abruptly canceled a mechanic re-examination program that he had designed and implemented to assure properly qualified mechanics were working on commercial and cargo aircraft. The re-exam program was necessary, because the FAA-contracted “Designated Mechanic Examiner” was convicted on federal criminal charges and sent to prison for fraudulently certifying over 2,000 airline mechanics. Individuals from around the country, and the world, had sought out this FAA-financed “examiner” to pay a negotiated rate and receive an Airframe and Powerplant Certificate without proper testing. After the conviction, Mr. Bruno’s follow-up re-exam program, which required a hands-on demonstration of competence, resulted in 75% of St. George-certified mechanics failing when subjected to honest tests. The

FAA's arbitrary cancellation of the program left over 1,000 mechanics with fraudulent credentials throughout the aviation system, including at major commercial airlines.

Mr. Bruno worked through the Office of Special Counsel to reinstitute his testing program, but after two years Special Counsel Scott Bloch endorsed a disingenuous FAA re-testing program that skips the hands-on, practical tests necessary to determine competence. The FAA's nearly-completed re-exam program consists of an oral and written test only. In effect, this decriminalizes the same scenario – incomplete testing – that previously had led to prison time for the contractor.

Six months after the decision that the FAA had properly resolved the public safety issue, Chalk's Ocean Airlines carrying 20 people crashed off the Florida coast. In 2007, Mr. Bruno disclosed to the Office of Special Counsel that the FAA does not have a system to check the certification or re-examination status of a mechanic who worked on an airplane that crashed because of mechanical problems. The Office of Special Counsel substantiated his disclosures shortly thereafter. Unfortunately, just a few months later, Continental Airlines feeder Colgan Air crashed in Buffalo, New York killing 50 people. The FAA still has not established a system to check the certification or re-examination status of mechanics who worked on that airplane. The FAA recently conceded that it does not know how many of these fraudulently certified mechanics are currently working at major commercial airlines, or even within the FAA.

Mr. Bruno also disclosed to the Special Counsel in 2007 that 33 foreign nationals with P.O. Boxes in the same city in Saudi Arabia and an individual with the same name as a 9/11 hijacker received mechanic certificates from the criminal enterprise during the time period that the 9/11 hijackers were learning how to fly planes into the Twin Towers. Mr. Bruno further disclosed that is no national security screening mechanism for mechanics who received these fraudulent certificates but have failed to complete the reexamination endorsed by Scott Bloch. The FAA's failure to provide the names of these individuals to national security intelligence agencies creates a security vulnerability that leaves the aviation industry open to terrorist activities. The Office of Special Counsel substantiated last month that his disclosures reveals a substantial likelihood that serious security and safety concerns persist in the management and operation of the certification and maintenance programs at the FAA. Mr. Bruno's experience illustrates that of members in a newly-formed, growing FAA Whistleblower Alliance.

National security whistleblower Mike Maxwell was forced to resign from his position as Director of the Office of Security and Investigations (internal affairs) for the US Citizenship and Immigration Services (USCIS) after the agency cut his salary by 25 percent, placed him under investigation, gagged him from communicating with congressional oversight offices, and threatened to remove his security clearance. His experience highlights five provisions of this reform – security clearance due process rights, classified disclosures to Congress, protection for carrying out job duties, the anti-gag statute and retaliatory investigations.

What had Mr. Maxwell done to spark this treatment? Quite simply, he had a job that required him to blow the whistle, often after investigating disclosures from other USCIS whistleblowers. In order to carry out his duties, he reported repeatedly to USCIS leadership about the security breakdowns within USCIS. For example, he had to handle a backlog of 2,771 complaints of alleged USCIS employee misconduct -- including 528 criminal allegations and allegations of foreign intelligence operatives working as USCIS contractors abroad -- with a staff of six investigators. He challenged agency leadership's refusal to permit investigations of political appointees, involving allegations as serious as espionage and links to identified terrorist operations. And, he challenged backlog-clearing measures at USCIS that forced adjudicators to make key immigration decisions, ranging from green cards to residency, without seeing law enforcement files from criminal and terrorist databases.

Another revealing case involves Air Force mechanic George Sarris. A senior civilian Air Force aircraft mechanic with 30 years experience, Mr. Sarris raised concerns about poor maintenance of two aircraft critical for national security – 1) RC-135 aircraft that carry some of the United States' most advanced electronic equipment and currently fly reconnaissance missions in Iraq and Afghanistan; and 2) 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 develop leaks or rupture, which could cause the aircraft to catch fire in flight or on the ground.

Because Mr. Sarris spoke out, many of his concerns have been validated and corrected. The technical data is in the process of being rewritten, the Air Force eliminated the use high pressure air storage bottles and moved to a different system, and the active air fuel hoses 15 years passed their service life were replaced. In short, he has made a real difference already.

But he has paid a severe price to date – his career. The Air Force Inspector General made him the primary target of its investigation, rather than his allegations. It is now accusing him of “theft” of government property -- the unclassified evidence that proves his charges. His base commander ordered further investigation after concocting dozens of machine gun style allegations that generally do not specify Mr. Sarris’ specific misconduct, identify accusers, or describe any of the supporting evidence. Relying on the open investigation, the Air Force suspended his access to classified information for at least six months while it is pending, even if he defeats permanent loss of clearance. In the meantime, he was stripped of all duties and reassigned to the employee “break room,” where his job was to fill space -- the bureaucratic equivalent of putting him in stocks. He recently has been allowed to perform physical maintenance such as painting.

These examples are not aberrations or a reflection of recent political trends. They are consistent with a pattern of steadily making a difference over the last 20 years challenging corruption or abuses of power. We can thank whistleblowers for --

- * increasing the government’s civil recoveries of fraud in government contracts by over ten times, from \$27 million in 1985 to almost billion annually since, totaling over \$18 billion total since reviving the False Claims Act. That law allows whistleblowers to file lawsuits challenging fraud in government contracts.²

- * catching more internal corporate fraud than compliance officers, auditors and law enforcement agencies combined, according to a global Price Waterhouse survey of some 5,000 corporations.³

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

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

² www.taf.org

³ See 2007 PricewaterhouseCoopers study, “Economic Crime: people, culture and controls;” Ethics Resource Center (“ERC”), “National Government Ethics Survey” (2007); Association of Certified Fraud Examiners, “2008 Report To The Nation On Occupational Fraud & Abuse.”

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

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

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

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

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

* forcing abandonment of plans to replace government meat inspection with corporate “honor systems” for products with the federal seal of approval as wholesome – plans that could have made food poisoning outbreaks the rule rather than the exception.⁴

NECESSITY FOR STRUCTURAL CHANGE

The Make it Safe Coalition’s easiest consensus was that the Whistleblower Protection Act has become a disastrous trap which creates far more reprisal victims than it helps. This is a painful conclusion for me to accept personally, since the WPA is like my professional baby. I spent four years devoted to its unanimous passage in 1989, and another two years for unanimous 1994 amendments strengthening the law, which then was the strongest free speech law in history on paper. But reality belied the paper rights,

⁴ Written Remarks for Thomas Devine, “Whistleblower Rights and Anti-Corruption Campaigns: You Can’t Have One Without the Other,” State Department sponsored program, Accras, Ghana (May 28, 2008).

and my baby grew up to be Frankenstein. Instead of creating safe channels, it degenerated into an efficient mechanism to finish off whistleblowers by rubber-stamping retaliation with an official legal endorsement of any harassment they challenge. It has become would-be whistleblowers' best reason to look the other way or become silent observers.

How did this happen, after two unanimous congressional mandates for exactly the opposite vision? There have been two causes for the law's frustration. The first is structural loopholes such as lack of protection for FBI and intelligence agency whistleblowers since 1978, and lack of protection against common forms of fatal retaliation such as security clearance removal. The second is a Trojan horse due process system to enforce rights in the WPA. Every time Congress has addressed whistleblower rights it has skipped those two issues. That is why the legislative mandates of 1978, 1989 and 1994 have failed. This legislation finally gets serious about the twin cornerstones for the law to be worth taking seriously: seamless coverage and normal access to court.

The Merit Systems Protection Board

A due process enforcement breakdown is why so-called rights have threatened those they are designed to protect. The structural cause for this breakdown has two halves. First is the Merit Systems Protection Board, where whistleblowers receive a so-called day in court through truncated administrative hearings. The second is the Federal Circuit Court of Appeals, which has a monopoly of appellate review for the administrative rulings. With token exceptions, the track record for each is a long-ingrained pattern of obsessively hostile judicial activism for the law they are charged with enforcing.

The MSPB should be the reprisal victim's chance for justice. Unfortunately, that always has been a fantasy for whistleblowers. In its first 2,000 cases from 1979-88, the Board only ruled in favor of whistleblowers four times on the merits. This is repeating itself. Since the millennium, the track record is 3-53, with only one victory under the current Board Chair Neil McPhie. And throughout its history, the Board never has found retaliation in a high stakes whistleblowing case with national consequences. Even at the initial hearing stage, in 30 years of practice I do not know an attorney aware of any whistleblower in the National Capital Region – home for the government's most significant abuses of power – who has won a decision on the merits since the law's 1978 passage. This is exactly the scenario where genuine protection is most needed.

The public loses when the Board avoids significant cases and issues, such as the commercial air maintenance breakdowns at South West and other airlines, leading to last summer's airport paralysis; or failure to enforce VA privacy procedures, leading to the loss of millions of confidential patient records. It would be delusional, however, to expect that matters will improve.

The causes are no mystery. First, hearings are conducted by Administrative Judges without any judicial independence from political pressure. Second, the Board is not structured or funded for complex, high stakes conflicts that can require lengthy

proceedings. As one AJ remarked after the first five weeks of a trial where the dissent challenged alleged government collusion with multi-million dollar corporate fraud, “Mr. Devine, if you bring any more of these cases the Board will have to seek a supplemental appropriation. It’s like a snake trying to swallow an elephant. We’re not designed for this.” Third, the Board’s policy is speedy adjudication of office disputes, with Administrative Judge performance appraisals based on completing cases in 120 days.

To compensate, as a rule AJ’s not only avoid politically significant conflict, they run away from it whenever possible and trivialize it when they can’t. To illustrate, several years ago Senators Grassley and Durbin conducted a bi-partisan investigation and held hearings that confirmed charges by Pentagon auditors of a multi-million ghost procurement scheme for non-existent purchases. The exposure led to criminal prosecutions and jail time. The auditors were fired and sought justice at the MSPB. The AJ screened out all whistleblowing issues except for their disclosures of far less significant improprieties at a drunken office Christmas party. Not surprisingly, the auditors lost.

Perhaps the most common MSPB tactic to avoid a whistleblower’s case has been to skip it entirely. In order to “promote judicial economy,” the Board commonly “presumes” whistleblowing and retaliation, and then jumps straight to the employer’s affirmative defense that it would have taken the same action even if the whistleblower had remained silent. If the employer prevails, the case is over. Having spent thousands of dollars, the employee who finally gets a hearing is disenfranchised from presenting evidence on the government’s misconduct, or retaliation for challenging it. The whole proceeding is about the employee’s misconduct. *See, e.g., Wadhwa v. DVA*, 2009 WL 648507 (2009); *Fisher v. Environmental Protection Agency*, 108 M.S.P.R. 296 (2008); *Azbill v. Department of Homeland Sec.*, 105 M.S.P.R. 363 (2007).

AJ’s also display scheduling schizophrenia. This occurs when they are assigned high stakes reprisal cases that allege cover-ups with national consequences. Contrary to the normal “rush to judgment” schedule, high stakes whistleblower cases are on the “molasses track.” Federal Air Marshal Robert MacLean is still waiting for an MSPB hearing, over three years after he was fired. At the Forest Service, a whole environmental crimes unit was dissolved when they caught multi-million dollar corporate timber theft in the national forests by politically powerful firms. They filed their WPA lawsuit in 1995. They did not get a hearing until 2003, eight and a half years later. The “irrefragable proof” case dragged on over a dozen years.

In short, the WPA’s due process structure at best only can handle relatively narrow, small scale whistleblowing disputes. That is the most common scenario for litigation, and very important for individual justice. But the law’s potential rests on its capacity to protect those challenging the most significant government abuses of power with the widest national impact. Realistically, a bush league forum cannot and will not provide justice for those challenging major league government breakdowns.

A digest of all final MSPB rulings is attached as Exhibit 4. The patterns of creative sophistry illustrate why the Board for whistleblowers has become a symbol of cynicism rather than a hope for justice. The following new Board doctrines illustrate how Chairman McPhie has only found one instance of retaliation during the Bush administration. Most of the Board's rulings against whistleblowers are on 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, the whistleblower also must reveal all the supporting information for the reasonable belief. Otherwise, the belief isn't reasonable. If the employee waits to disclose supporting evidence, it is too late. *Durr*, supra. It is still too late, even if the whistleblower provides the information in court testimony for associated litigation, *before getting fired*. *Rodriguez v. Department of Homeland Security*, 108 M.S.P.R. 76 (2008). This simply defies the normal dynamics of communication.

* Testimony loophole. When a whistleblower discloses evidence of misconduct by bearing witness through testimony in litigation, it does not qualify as a disclosure. *Flores v. Department of Army*, 98 M.S.P.R. 427 (2005).

* Ghost of "gross mismanagement". The final *White* Federal Circuit decision upheld the first Board ruling against Mr. White, after three prior MSPB decisions that his whistleblowing rights had been violated. The Board concluded that since a reasonable person could disagree, Mr. White did not have a reasonable belief that he was disclosing evidence of mismanagement -- whether or not he was correct about it. *White v. Department of Air Force*, 95 M.S.P.R. 1 (2003).

* "Abuse of authority" loophole for broad consequences. "Abuse of authority" is arbitrary action that results in favoritism or discrimination. That only applies to personal discrimination, not to actions that have broad consequences. *Downing v. Department of Labor*, 98 M.S.P.R. 64 (2004).

* "Abuse of authority" loophole for those disclosing harassment of themselves. The harassment must be about discriminatory acts toward others, not the person making the disclosure. Without explanation, this overturns a longstanding MSPB doctrine that if

retaliation does not technically qualify as a personnel action, it can safely be challenged as a whistleblowing disclosure of abuse of authority. *Rzucidlo v. Department of Army*, 101 M.S.P.R. 616 (2006).

* “Substantial and specific danger” loophole. It is not protected to warn about threats public health and safety with factual disclosures, if they are in the context of a policy dispute. *Chambers v. Department of Interior*, 103 M.S.P.R. 375 (2006).

Clear and convincing evidence that the agency would have acted independently in the absence of whistleblowing. This is a doctrine that traditionally has meant “highly likely” or “substantially probable,” the strict burden of proof intended by Congress when it already has been established that an action was retaliatory at least in part.⁵ The Board, by contrast, has created its own definition. The MSPB considers three factors -- merits of the agency’s case against the employee; motive to retaliate and discriminatory treatment compared with other, similarly situated employees. *Chambers v. Department of Interior*, 2009 WL 54498 (2009). It does not pin itself down whether they all must be considered, or whether there must be clear and convincing evidence for any of them alone. The stakes are very high. If the Board finds independent justification, it means that as a matter of law the whistleblower had it coming, and generally that the employee will not get to present his or her case. Unfortunately, as illustrated below, this is where the Board’s decisions have been the most extreme.

* Only considering one “clear and convincing evidence” factor. In *Cook v. Department of Army*, 105 M.S.P.R. 178 (2007), the Board ruled that the agency had proven independent justification by clear and convincing evidence, after only analyzing the retaliatory motives factor. It did not consider the other two criteria of merits or disparate treatment.

* No requirement to present clear and convincing evidence for any of the factors. Indeed, the issue of the agency’s burden of proof for any criterion did not come up in any of the 56 MSPB rulings reviewed. The Board has functionally erased the clear and convincing evidence burden of proof by creating new subcategories as substitutes.

* Independent justification based on employees’ legally protected activity. In *Chambers v. Department of Interior*, 2009 WL 54998 (2009), on remand the Board held there was an “independent” justification, in part because Chief Chambers protested alleged abuse of authority outside the chain of command, and because she violated a general agency gag order when she blew the whistle on public safety threats. But protecting those activities is the point of the WPA. In *Grubb v. Department of Interior*, 96 M.S.P.R. 361 the Board held it was a justification *independent* from whistleblowing to fire her, because she violated orders not to gather the evidence of cheating or discuss it with co-workers.

⁵ See, e.g., *Peck v. Safe Air International, Inc.*, ARB No. 02-028 at 6, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004) (citing BLACK’S LAW DICTIONARY 1201 at 577 (7th ed. 1999)).

* Enabling plausible deniability. In *Cook, supra*, the Board held that the official who fired the whistleblower had no motive to retaliate since he was new to his position, despite acting on a file prepared by supervisory staff who had been targeted by the whistleblower's disclosures.

Perhaps the most contrived distortion of the clear and convincing evidence standard occurred in *Gonzales v. Department of Navy*, 101 M.S.P.R. 248 (2007), where the whistleblowers charges were confirmed that a Rapid Response Team improperly had pointed automatic weapons at a family. He was then reassigned to the night shift, and overtime removed. Without considering retaliation, the MSPB dismissed on grounds of independent justification. The Board did not apply its "clear and convincing evidence" factor of whether the reassignment was reasonable, because it was not "disciplinary." But only one of eleven listed personnel actions covered by the WPA *is* disciplinary. 5 USC 2302(a). On its disparate treatment factor, the Board disregarded the whistleblower being the only person in the office reassigned, because he was the only detective working there. It conceded retaliatory animus by the official reassigning but said that did not count, because there is an unexplained difference between unexplained retaliatory animus and retaliatory motive. On that basis, the Board concluded that the agency proved by clear and convincing evidence it would have taken the same action absent whistleblowing.

There are no signs that the Board's career staff is reconsidering its approach. To illustrate, for years MSPB Administrative Judge Jeremiah Cassidy has told practitioners that he is the Board's designated AJ for high-stakes cases due to their political or policy impact. That is very unfortunate, because since the millennium Judge Cassidy has not ruled for a whistleblower in a decision on the merits. Despite, if not because of this track record, the Board promoted him to be Chief Administrative Judge for the Washington, D.C. regional office.

Indeed, the Board's most destructive precedent may be imminent. In February (?) the Board agreed to make an interim ruling in Air Marshal Robert MacLean's appeal that could leave the Whistleblower Protection Act discretionary for all government agencies. Since 1978 the WPA's cornerstone has been that agencies cannot cancel its public free speech rights by their own regulations. Under 5 USC 2302(b)(8)(A), whistleblowers only can be denied public free speech rights if they are disclosing information that is classified, or whose release is specifically prohibited by Congress.

Three years after the case began, however, the Administrative Judge ruled that since Congress gave TSA authority to issue secrecy regulations, when the *agency* issued *regulations* creating a new hybrid secrecy category that covers virtually any WPA security disclosure, the resulting public disclosure ban counted as a specific *statutory* prohibition. Virtually every agency has this authority. A Board ruling upholding the Administrative Judge means WPA rights only will exist to the extent they do not contradict agency regulations. A friend of the court brief from GAP that fully explains the threat is enclosed as Exhibit 5. Last week the Federal Law Enforcement Officers Association joined the brief.

The Federal Circuit Court of Appeals

The second cause for the administrative breakdown has been beyond the Board's control. The Board is limited by impossible case law precedents from the Federal Circuit Court of Appeals, which since its 1982 creation has abused a monopoly of appellate review at the circuit level. Monopolies are always dangerous. In this case, the Federal Circuit's activism has gone beyond ignoring Congress' 1978, 1989 and 1994 unanimous mandates for whistleblower protection. Three times this one court has rewritten it to mean the opposite. Until there is normal appellate review to translate the congressional mandate, this and any other legislation will fail.

This conclusion is not a theory. It reflects nearly a quarter century, and a dismally consistent track record. From its 1982 creation until passage of 1989 passage of the WPA, the Federal Circuit only ruled in whistleblowers' favor twice. The Act was passed largely to overrule its hostile precedents and restore the law's original boundaries. Congress unanimously strengthened the law in 1994, for the same reasons. Each time Congress reasoned that the existing due process structure could work with more precise statutory language as guidance.

That approach has not worked. Since Congress unanimously strengthened the law in October 1994, the court's track record has been 3-209 against whistleblowers in decisions on the merits. It is almost as if there is a legal test of wills between Congress and this court to set the legal boundaries for whistleblower rights.

The Federal Circuit's activism has created a successful, double-barreled assault against the WPA through – 1) nearly all-encompassing loopholes, and 2) creation of new impossible legal tests a whistleblower must overcome for protection. Each is examined below.

Loopholes

Here judicial activism not only has rendered the law nearly irrelevant, but exposes the unrestrained nature of judicial defiance to Congress. During the 1980's the Federal Circuit created so many loopholes in protected speech that Congress changed protection from "a" to "any" lawful, significant whistleblowing disclosure in the 1989 WPA. The Federal Circuit continued to create new loopholes, however, so in the legislative history for the 1994 amendments Congress provided unqualified guidance. "Perhaps the most troubling precedents involve the ... inability to understand that 'any' means 'any.'"⁶ As the late Representative Frank McCloskey emphasized in the only legislative history summarizing the composite House Senate compromise,

It also is not possible to further clarify the clear statutory language in [section] 2302(b)(8)A) that protection for 'any' whistleblowing disclosure evidencing a reasonable belief of specified misconduct truly means 'any.' A protected disclosure may be made as part of an employee's job duties, may concern policy

⁶ H.R. Rep. No. 103-769, at 18.

or individual misconduct, and may be oral or written and to any audience inside or outside the agency, without restriction to time, place, motive or context.⁷

The Court promptly responded in 1995 with the first in a series of precedents that successfully translated “any” to mean “almost never”:

Preparations for a reasonable disclosure. *Horton v. Navy*, 66 F.3d 279 (Fed. Cir. 1995). “Any” does not include disclosures to co-workers or supervisors who may be possible wrongdoers. This cancels the most common outlet for disclosing concerns, which all federal employees are trained to share with their supervisors regardless of whom is at “fault.” It reinforces isolation, and prevents the whistleblower from engaging in the quality control to make fair disclosures evidencing a reasonable belief, the standard in 5 USC 2302(b)(8) to qualify for protection.

Disclosures while carrying out job duties. *Willis v. USDA*, 141 F.3d 1139 (Fed. Cir. 1998). This decision exempted the Act from protecting politically unpopular enforcement decisions, or challenging regulatory violations if that is part of an employee’s job duties. It predates by eight years last year’s controversial Supreme Court decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006). Contrast the court-created restriction with Congress’ vision, expressed in the Senate Report for the Civil Service Reform Act of 1978.

What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants.⁸

There is no room for doubt: the reason Congress passed the whistleblower law was exactly what the Federal Circuit erased: the right for government employees to be public servants instead of bureaucrats on the job, even when professionally dangerous.

Protection only for the pioneer whistleblower. *Meeuwissen v. Interior*, 234 F.3d 9 (Fed. Cir.2000). This decision revived a 1995 precedent in *Fiorillo v. Department of Justice*, 795 F.2d 1544 (1986) that Congress specifically targeted when it changed protection from “a” to “any” otherwise valid disclosure.⁹ It means that, after the Christopher Columbus for a scandal, anyone speaking out against wrongdoing proceeds at his or her own risk. This means there is no protection for those who corroborate the pioneer whistleblower’s charges. There is no protection against ingrained corruption. *See Ferdik v. Department of Defense*, 158 Fed.Appx. 286 (Fed. Cir. 2005) (Disclosures that a

⁷145 Cong. Rec. 29,353 (1994).

⁸
⁹ See S. Rep. No 100-413, at 12-13: After citing and rejecting *Fiorillo*, the Committee instructed, “For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue. S. 508 emphasizes this point by changing the phrase ‘a’ disclosure to ‘any’ disclosure in the statutory definition. This is simply to stress that any disclosure is protected (if it meets the reasonable belief test and is not required to be kept confidential).” (emphasis in original)

non-U.S. citizen had been illegally employed for twelve years were not protected, because the misconduct already constituted public knowledge since almost the entire institution was aware of the illegality.)

A bizarre application of this loophole doctrine occurred in *Allgood v. MSPB*, 13 Fed. Appx. 976 (Fed. Cir. 2001). In that case an Administrative Judge protested that the Board engaged in mismanagement and abuse of authority by opening an investigation and reassigning another Administrative Judge before the results were received that could validate these actions. The Federal Circuit applied the loophole, *because the supposed wrongdoers at the Board already were aware of their own alleged misconduct*. This would turn *Meeuwissen* into an all-encompassing loophole, except for wrongdoers suffering from pathological denial of their own actions.

Whistleblowing disclosure included in a grievance or EEO case: *Garcia v. Department of Homeland Security*, 437 F.3d 1322 (Fed. Cir. 2006); *Green v. Treasury*, 13 Fed., Appx. 985 (Fed. Cir. 2001). These frequently are the context that uninformed employees use to blow the whistle, particularly the grievance setting. They have no protection in these scenarios.

Illegality too trivial or inadvertent: *Schoenrogge v. Department of Justice*, 148 Fed.Appx. 941 (Fed. Cir. 2005) (alleged use of immigration detainees to perform menial labor, falsification of billing and legal records, paying contractors and maintenance staff for time not working); *Buckley v. Social Security Admin.*, 120 Fed.Appx. 360 (Fed. Cir. 2005) (alleged irreparable harm to litigation from mishandling a government's attorney's case while on vacation, rejected as illustrative of "mundane workplace conflicts and miscues"); *Gernert v. Army*, 34 Fed. Appx. 759 (Fed. Cir. 2002) (supervisor's use of phone and government time for personal business); *Langer v. Treasury*, 265 F.3d 1259 (Fed. Cir. 2001) (violation of mandatory controls for protection of confidential grand jury information); *Herman v. DOJ*, 193 F.3d 1375 (Fed. Cir. 1999) (Chief psychologist at VA hospital's disclosure challenging lack of institutionalized suicide watch, and copying of confidential patient information).

As seen above, "triviality" is in the eye of the beholder, and these cases show the wisdom of language expanding protected speech for disclosures of "a" violation of law to "any" violation. In these cases, "triviality" has been intertwined with "inadvertent" as a reason to disqualify WPA coverage. That judicially-created exception may be even more destructive of merit system principles. The difference between "inadvertent" and "intentional" misconduct is merely the difference between civil and criminal liability. Employees shouldn't be fair game for reprisal, merely because the government breakdown they try to correct was unintentional. The loophole further illustrates the benefits of specific legislative language protecting disclosures of "any" *illegality*.

Disclosure too vague or generalized. *Chianelli v. EPA*, 8 Fed. Appx. 971 (Fed. Circ. 2001) This was the basis to disqualify an EPA endangered species/groundwater specialist's disclosure of failure to meet requirements in funding for two state pesticide

prevention programs; and expenditure of \$35 million without enforcing requirement for prior groundwater pesticide treatment plans.

Substantiated whistleblowing allegations, if the employee had authority to correct the alleged misconduct. *Gores v. DVA*, 132 F.3d 50 (Fed. Cir. 1997) This amazing precedent is a precursor of *White's* judicially-created burdens beyond the statutory "reasonable belief" test. The decision means it is not enough to be right. To have protection, the employee also must be helpless. A manager who imposes possibly significant and/or controversial corrective action cannot say anything about it until after a fait accompli. Otherwise, s/he has no merit system rights to challenge subsequent retaliation, and proceeds at his or her own risk by honoring normal principles for responsible decision making.

Waiting too long. *Watson v. DOJ*, 64 F.3d 1524 (Fed. Cir. 1995) The court held that a Border Patrol agent's disclosure wasn't protected and he would have been fired anyway for waiting too long (12.5 hours overnight) to report another agent's shooting and unmarked burial of an unarmed Mexican after implied death threat by the shooter if silence were broken.

Supporting testimony. *Eisenger v. MSPB*, 194 F.3d 1339 (Fed. Cir. 1999) The court rejected protection for supporting testimony to confirm a pioneer witness' charges of document destruction. This case precedes *Meeuwissen* and illustrates the worst case scenario for the "Christopher Columbus" loophole.

Blamed for making a disclosure. *Cordero v. MSPB*, 194 F.3d 1338 (Fed. Cir. 1999) An employee is not entitled to whistleblower protection if merely suspected of making the disclosure. The employee must prove he or she actually did it. This decision overturns longstanding Board precedent that protects those harassed due to suspicion (even if mistaken). The reason for that doctrine is the severe chilling and isolating effect of allowing open season on anyone accused of whistleblowing or leaks, even if the disclosure of concealed misconduct itself qualifies for protection. It contradicts prior Board case law. *Juffer v. USIA*, 80 MSPR 81, 86 (1998). It also is contradictory to consistent interpretation of other whistleblower statutes.

Nongovernment illegality. *Smith v. HUD*, 185 F.3d 883 (Fed. Cir. 1999). This loophole also is addressed by the switch from "a" to "any" illegality. The exception is highly destructive of the merit system, because a common reason for harassment is catching the wrong (politically protected) crook or special interest. It allows agencies to take preemptive strikes at the birth of a cover up to remove and discredit potential whistleblowers who may challenge it.

"Irrefragable proof"

One provision in the Civil Service Reform Act of 1978 that Congress did not modify was the threshold requirement for protection against retaliation -- disclosing information that the employee "reasonably believes evidences" listed misconduct. The

reason was simple: the standard worked, because it was functional and fair. To summarize some 20 years of case law, until 1999 whistleblowers could be confident of eligibility for protection if their information would qualify as evidence in the record used to justify exercise of government authority.

Unfortunately, the Federal Circuit decided to judicially amend the reasonable belief test. In *LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), it eliminated all realistic prospects that anyone qualifies for whistleblower protection unless the specifically targeted wrongdoer confesses. The circumstances are startling, because the agency ended up agreeing with the whistleblower's concerns. John White made allegations concerning the misuse of funds in a duplicative education project. An independent management review validated his claims, resulting in the Air Force Secretary's decision to cancel the program. Unfortunately, the local official held a grudge, stripped Mr. White of his duties and exiled him to a temporary metal office in the desert outside the Nevada military base. Mr. White filed a claim against this official's retaliation and won his case three times before the MSPB. However, in 1999 the Federal Circuit sent the case back with its third remand in nine years, ruling he had not demonstrated that his disclosure evidenced a reasonable belief.

Since the Air Force conceded the validity of Mr. White's concerns, the Court's conclusion flunks the laugh test. The Federal Circuit circumvented previous interpretations of "reasonable belief" by ruling that an employee must first overcome the presumption of government regularity: "public officers perform their duties correctly, fairly, in good faith and in accordance with the law and governing regulation." The court then added that this presumption stands unless there is "irrefragable proof to the contrary" (citations omitted). The black magic word was "irrefragable." Webster's Fourth New Collegiate Dictionary defines the term as "undeniable, incontestable, incontrovertible, incapable of being overthrown." This creates a tougher standard to qualify for protection under the whistleblower law than it is to put a criminal in jail. An irrefragable proof standard allows for almost any individual's denial to overturn a federal employee's rights under the WPA.

GAP joined this case as an amicus because of the implications it had for all subsequent whistleblower decisions. If the Court could rule that John White's disclosures did not qualify him for whistleblower protection, no one could plausibly qualify for whistleblower protection. It appears that was the court's objective. Since 1999 our organization has been obliged to warn all who inquire that if they spend thousands of dollars and years of struggle to pursue their rights, and if they survive the gauntlet of loopholes, they inevitably will earn a formal legal ruling endorsing the harassment they received. The court could not have created a stronger incentive for federal workers to be silent observers and to look the other way in the face of wrongdoing. This decision directly conflicted with the January 20, 2002 Executive Order signed by then newly-inaugurated President Bush stating that federal employees have a mandatory ethical duty to disclose fraud, waste, abuse and corruption.

After a remand and four more years of legal proceedings, the Federal Circuit upheld its original decision. *White v. Department of Air Force*, 391 F.3d 1377 (Fed.Cir. 2004). In the process, it replaced the “irrefragable proof” standard with an equivalent but more diplomatic test -- “a conclusion that the agency erred is not debatable among reasonable people.” *Id.*, at 1382. To illustrate what that means, Mr. White then lost because the Air Force hired a consultant to provide “expert” testimony at the hearing who disagreed with Mr. White (as well as the Air Force’s own independent management review and the Secretary). The court did limit this “son of irrefragable” decision’s scope to disclosures of misconduct other than illegality, and it has been shrunken 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 all protected speech categories, without any loophole that functionally eliminates protection for those challenging gross mismanagement.

If Congress expects the fourth time to be the charm for this law, the Federal Circuit’s record is irrefragable proof for the necessity to restore normal appellate review.

CALLING BLUFFS ON COURT ACCESS

Government attorneys and managers have raised two primary objections to providing whistleblowers normal access to court, as pledged by President Obama in his campaign and transition policy.¹⁰ First, they contend that providing a right to jury trials will clog the courts. Second, they insist that genuine rights mean employees will bully their managers by threatening lawsuits, which will paralyze intimidated agency managers from firing or taking other actions for accountability when needed. Both objections have had an opportunity to pass the reality test. Both have flunked.

Fourteen federal employment laws already give government or corporate employees access to court to enforce remedial rights provided by the Civil Rights Act, or in 13 cases by whistleblower laws – including all eight passed since 2002. Administration opponents have not cited a scintilla of evidence that either warning has come true empirically. There isn’t any. That helps explain why the Congressional Budget Office estimates HR 1507 will not have a material fiscal impact.

¹⁰ During the campaign, transition and through President Obama’s first day in office, the President posted the following policy: ***Protect Whistleblowers:*** *Often the best source of information about waste, fraud, and abuse in government is an existing government employee committed to public integrity and willing to speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled. We need to empower federal employees as watchdogs of wrongdoing and partners in performance. Barack Obama will strengthen whistleblower laws to protect federal workers who expose waste, fraud, and abuse of authority in government. Obama will ensure that federal agencies expedite the process for reviewing whistleblower claims and whistleblowers have full access to courts and due process.*

since removed from <http://www.whitehouse.gov/agenda/ethics/>

The following 14 laws permit corporate, and/or state, local and in some cases federal employees to seek justice in federal court with a jury:

- Civil Rights Act, 42 USC 1983, (state and local government employees to challenge constitutional violations) (1871)
- Equal Employment Opportunity Act, 42 USC 2000e, (government employees, employment discrimination) (1991)
- False Claims Act, 31 U.S.C. § 3730 (h), (federal government contractors on civil fraud) (1986)
- Major Fraud Act, 18 U.S.C. § 1031(h), (federal government contractors on criminal fraud) (1989)
- Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, 12 USC 1790b(b), (banking employees) (1991)
- Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, 12 USC 1831j(b), (FDIC employees) (1991)
- Sarbanes Oxley law, 18 USC 1514A(b)(1)(B), (publicly-traded corporations) (2002)
- Energy Policy Act, 42 USC 5851(b)(4), (nuclear power and weapons, including federal government employees at the Department of Energy and the Nuclear Regulatory Commission) (2005)
- Commercial Motor Vehicle Safety Act, 49 U.S.C. § 31105(c), (trucking and cross country bus carriers) (2007)
- Federal Rail Safety Act, 49 U.S.C. § 20109(d)(3), (railroads) (2007)
- National Transit Systems Security Act, 6 USC 1142(c)(7), (metropolitan transit) (2007)
- Defense Authorization Act, 10 USC 2409(c)(2), (defense contractors) (2007)
- Consumer Products Safety Improvement Act, 15 USC 2087(b)(4), (retail commerce) (2008)
- American Recovery and Reinvestment Act, section 1553(c)(3), (corporate or state and local government stimulus recipients) (2009)

Section 1553 of the recent stimulus law provides jury trial enforcement for whistleblower rights of all state and local government or contractor employees receiving funding from the taxpayers, a right they have had for over a century under 42 USC 1983 to challenge violations of their First Amendment rights. Quite simply, it is impossible for President Obama to carry out his campaign policy of full access to court without providing jury trials for federal whistleblowers. They are the only whistleblowers in the labor force for whom jury trials are the exception, rather than the rule.

Flooding the courts

A primary reason that employees do not flood the courts is that it costs too much. Except in rare circumstances, unemployed workers who first must exhaust layers of administrative remedies as in HR 1507 simply cannot afford to pay for two proceedings, and court litigation costs exponentially more than administrative hearings. Where

available, the safety valve of federal court access has been limited to instances where it was clear that the administrative process offered the employee a dead end in a case that an Administrative Judge did not want to hear, or that the issues are too complex or technical for an administrative hearing.

An analysis of the two oldest and largest jury trial precedents, Sarbanes Oxley for corporate workers and EEO for federal employees, proves that the fears have been baseless in those analogous laws. The Sarbanes-Oxley (SOX) law's factual track record demonstrates that allowing federal employee whistleblowers to bring a civil action in district court is not likely to result in a meaningful increase in federal court cases against the government. The expected caseload is small, and is greatly outweighed by the social value of encouraging whistleblowers to come forward to air their claims of waste, fraud and abuse.

In the first 3 years after SOX was passed, 491 employees (of 42,000,000 employees working at publicly-traded corporations) filed a case. Seventy-three percent, or 361, were resolved at OSHA's informal investigation fact-finding stage before reaching any due process litigation burdens on the employer. In the first three years of SOX, only 54 whistleblowers, or an average of 18 court cases annually, sought de novo court access, pursuant to SOX's administrative exhaustion provision. By contrast, during the same period, the EEOC handled approximately 217,000 discrimination complaints.

To compare with civil service docket burdens, during 2006 146 new whistleblower cases were brought before administrative judges at the MSPB under the WPA.¹¹ Only 89 of these cases were considered on the merits (or dismissed on non-procedural grounds).¹²

If we assume a similar percentage of federal employee cases removing their case to district court as with SOX, this would result in approximately 37 court cases/year when jurisdictional concerns are taken into consideration. The cases would be spread over 678 federal district court judges and 505 magistrates, an addition of .029 cases annually for each decision maker in the federal courts. These 37 new cases would have only a marginal impact on an overall federal district court civil caseload of 250,000 filings annually.

In 1991, President George H.W. Bush wrote to Sen. Don Nickles that he "strongly support[s]" the amendments to the Civil Rights Act that would provide federal employees with the "right to a jury trial," and stated that he had "no objection" to providing federal

¹¹ Of these, 18 were screened out because of settlements, withdrawal, or a failure to timely file the appeal. More commonly, in 39 cases, failure to exhaust OSC remedies resulted in a dismissal by MSPB on jurisdictional grounds.

¹² A large percentage of these 89 cases were also dismissed on jurisdictional grounds, with the AJ ruling that the employee failed to make a non-frivolous allegation that she engaged in protected speech. Although technically "jurisdictional" rulings, and therefore do not allow for a due process hearing, these are arguably decisions on the merits that *will* likely confer jurisdiction once the definition of "any" disclosure is restored.

(and even White House) employees with the “identical protections, remedies, and procedural rights” granted to private sector employees in the bill.¹³ Since, there have been no complaints that the federal EEO docket has unduly burdened the courts or the government.

As a comparison, EEOC administrative judges review 8,000 claims brought annually by federal employees, or over 50x the number of whistleblower cases that are brought before AJs at the MSPB. Under EEO law, all federal employees may bring a civil action in federal court for a jury trial if 180 days have passed after filing an initial complaint, or within 90 days of receipt of the Commission’s final decision after an appeal. The United States was the defendant in 857 civil rights employment cases in 2007. Given this, compared with preexisting caseloads, the resulting potential increase in employment litigation against the federal government on account of whistleblower cases is likely to have an insignificant impact on the government’s overall employment litigation docket.

These conclusions are consistent with the track record for docket burdens under the four new corporate whistleblower protection laws passed by the last Congress and administered at the Department of Labor. (DOL) Overall they provide anti-retaliation rights to over 20 million new workers in the retail, railroad, trucking, cross country motor transit, and metropolitan public transportation sectors. The feared surge of litigation did not take place. Out of 14 whistleblower laws DOL administers, since 2008 the four new statutes accounted for only 124 out of 3221 new whistleblower complaints filed with DOL – a 3.3% increase.

The record is even more reassuring on district court burdens. For those four statutes and another, the defense authorization act providing jury trials after an Inspector General investigation, the total since 2008 has been only 22 new court filings, less than a .020 increased case load per federal judge or magistrate.

Those findings also are consistent with research for the Energy Policy Act. The number of complaints filed *decreased* significantly, *after* Congress added jury trials for enforcement and provided access to the law for federal government workers at the Department of Energy and Nuclear Regulatory Commission. According to Department of Labor statistics, before jury trials were added in 2005 there were 191 employee appeals under 42 USC 5851. From 2006 through 2008, by contrast, there were only 112. Data on the DOL-administered statutes is drawn from a chart by the Department’s Office of Whistleblower Protection, attached as Exhibit 6.

In the whistleblower context, the MSPB will remain the primary forum for WPA cases, and is capable of effectively handling many of the cases when the proposed changes in HR 985 / S. 274 are enacted. Yet, it is imperative that juries, the “cornerstone” of our civil law system, be allowed to hear a limited number of high stakes whistleblower cases in order to create balance with the administrative system. Only then

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

will Congress' intent to protect the courageous federal employees who report waste, fraud and abuse be fully realized.

Paralyzing intimidated managers

Every whistleblower law ever enacted has overcome a broken record type objection that it would embolden employees into a surge of lawsuits if held accountable, and that intimidated managers paralyzed by their threats would wink at misconduct and incompetence. That was a core issue underlying unanimous 1988 and 1989 unanimous passage of the Whistleblower Protection Act when Congress rejected the argument, including after President Reagan pocket vetoed the former in part on those grounds.¹⁴ After every whistleblower law was passed, this objection was subjected to the reality test. Those who keep repeating it have not presented any evidence that it passed. It is an irresponsible objection.

The attack should be put in its proper context. That risk applies to every right that Congress chooses on balance to enact. Here the balance is extraordinarily strong in terms of the right, both from benefits to taxpayers during unprecedented spending, and for freedom by putting teeth into First Amendment rights when they have the most impact. Significantly, since this objection is *deja vu* to the 1988 debate, it is an attack on the primary value judgment underlying current law. That choice is not on the table in pending legislation to strengthen the law so its original goal can be achieved.

The fear also is irrational. Threatening a lawsuit ups the ante, and employees are far more afraid of their managers stepping up harassment, than managers are of whistleblower lawsuits. Lawsuits also are extremely expensive, and the chances of success no more than ten per cent even in the most favorable whistleblower statutes on the books.¹⁵

Consistent with the nonexistent litigation surge, the litigation track record surrounding passage whistleblower laws empirically confirms there was not a drop-off in accountability actions. That has been the case with before and after passage of the Whistleblower Protection Act. In each case, the empirical record indicates that managers were not afraid to hold employees accountable, and that there was not a surge of litigation by newly-emboldened employees. The rate of adverse actions and performance appeals remained virtually identical. The WPA was signed into law in March 1989. From 1986-88, there were 175 MSPB decisions in adverse action and performance appeals.¹⁶ Few

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

¹⁵ Devine, *Running the Gauntlet: The Campaign for Credible Corporate Whistleblower Rights* 14, Government Accountability Project (2008).

¹⁶ Compiled using search terms "7701(c) 7513 4303" in the MSPB database of Westlaw, searching each calendar year individually.

employees jumped on their new opportunity to file lawsuits. From 1989-91 there were 174. There are no comparative statistics for Individual Rights of Action newly created by the WPA, but the litigation burden was modest in the first three years -- 74 cases, or less than 25 annually, out of a nearly two million employee labor force at the time.¹⁷

The record of state and local government whistleblowers is consistent on both counts. There has not been an issue for some 150 years that they have clogged the courts with their civil rights constitutional suits under 42 USC 1983. There is only one equivalent state or local statute, providing jury trials governed by WPA legal burdens of proof, Washington, DC, which passed it in 2001. Again, the empirical record has been no impact on disciplinary/performance actions against employees. In the first five years (2001-05), there were only 12 reported decisions under its new rights. There were 220 reported decisions on adverse and performance based-actions from 1996-2000. There were 220 from 2001-2005.¹⁸

NATIONAL SECURITY ISSUES

I will not repeat the detailed analysis from my colleagues on most relevant issues for national security provisions of the bill. Four factors put their arguments in context, however. Most compelling, FBI and intelligence whistleblowers need first class legal rights, because the intensity of retaliation is so much greater there. While there may be animus against whistleblowers in all domestic institutions, at the FBI and intelligence agencies it is more likely to be obsessive hostility. The code of loyalty to the chain of command is the primary value at those institutions, and they set the standard for intensity of retaliation.

Second, this is the moment to act – when the House Intelligence Committee Chair Reyes has just pledged proactive oversight to learn the truth about torture and other human rights abuses.¹⁹ It is unrealistic to expect that intelligence whistleblowers will dare bear witness, unless they have normal rights to defend themselves in a uniquely hostile environment.

Third, HR 1507 primarily is an anti-leaks measure. It offers no protection for public disclosures even of unclassified information. The theory is that by creating safe channels inside the government, FBI and intel whistleblowers would have a preferred alternative to the press.

Fourth, the provision is a taxpayer measure as well as a national security and human rights safeguard. The FBI and intelligence agencies are receiving a significant amount of stimulus funds, and they are no exception to vulnerability to fraud in the new

¹⁷ Compiled by searching for “2302(b)(8)” in the MSPB database of Westlaw, searching each calendar year individually.

¹⁸ Represents the total number of reported decisions in state and federal court under §1-615.5 et. seq. of the DC Code. We attempted to find data from either the filing or administrative levels, but the data was not available from that many years ago on such short notice.

¹⁹ Gertz, “Congress to Oversee CIA More Closely,” *The Washington Times* (May 1, 2009).

spending. As the Inspector General for the Director of National Intelligence recently warned, "The risk of waste and abuse has increased with a surge in government spending and a growing trend toward establishing large, complex contracts to support mission requirements throughout the IC; yet many procurements receive limited oversight because they fall below the threshold for mandatory oversight."²⁰ There is no national security loophole for accountability against fraud either under the stimulus law or the False Claims Act.²¹ Under both statutes, contractors for the FBI, National Security Agency or related agencies are covered by the whistleblower law.

Constitutional issues on security clearances

One issue that should be squarely addressed is whether Congress has the constitutional authority to grant third party review of security clearance actions. They reprisal of choice against national security whistleblowers because they cannot defend themselves. Since introduction of this legislation, the Justice Department has attempted to create a new legal doctrine that Congress is powerless to assert itself.

In the past, DOJ has claimed its authority from *Department of Navy v. Egan*, 484 US 518 (1988). While the Court did not provide a green light for any approach, the decision did not ban congressional action. All analysis was that Congress *hadn't* acted to legislate authority for the security clearance judgment call in question. There was no holding or analysis that it *couldn't*.

A detailed review should be reassuring. The Court's cornerstone principle for rejecting prior Board jurisdiction to order a clearance was as follows: "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Egan*, 484 U.S. at 530 (citations omitted). For the Court, the key factor was, "The [Civil Service Reform] Act by its terms does not confer broad authority on the Board to review a security-clearance determination." *Id.*

Consistent with that premise, the court left undisturbed all Board authority to modify clearance actions in pre-existing statutory provisions of the Civil Service Reform Act:

An employee who is removed for "cause" under [§ 7513](#), when his required clearance is denied, is entitled to the several procedural protections specified in that statute. The Board then may determine **826 whether such cause existed, whether in fact clearance was denied, and whether transfer to a non-sensitive position was feasible. Nothing in the Act, however, directs or empowers the Board to go further." *Id.*

²⁰ ODNI Office of Inspector General, *Critical Intelligence Community Management Challenges* 11 (November 12, 2008).

²¹ 31 USC 3729 *et seq.*

The Supreme Court said it would look at the whole statutory framework for specific intent, and analyzed all CSRA legislative history and objectives to determine whether there were an intent to cover security clearances, and found none.

In 1994, after four joint Judiciary-Post Office and Civil Service Committee hearings in the House and one in the Senate, Congress made a clear decision to add protection against security clearances. At the recommendation of the Justice Department, however, the Senate deleted the specific statutory provision and included security clearance protection in a larger provision creating catchall jurisdiction for any forms of harassment that were missed. The new personnel action, 5 USC 2302(a)(2)(xi) covered “any other significant change in duties, responsibilities or working conditions.”

There was not any doubt that the primary form of harassment for the catchall was security clearance retaliation. As the Committee report explained in 1994, after specifically rejecting the security clearance loophole,

The intent of the Whistleblower Protection Act was to create a clear remedy for all cases of retaliation or discrimination against whistleblowers. The Committee believes that such retaliation must be prohibited, regardless what form it may take. For this reason, [S. 622, the Senate bill for the 1994 amendments] would amend the Act to cover any action taken to discriminate or retaliate against a whistleblower, because of his or her protected conduct, regardless of the form that discrimination or retaliation may take.²²

The consensus for the 1994 amendments explained that the new personnel action includes "any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system," again specifying security clearance actions as the primary illustration of the provision's scope.²³

In *Hess v. Department of State*, 217 F.3d 1372, 1377-78 (Fed. Cir. 2000), however, the Federal Circuit did not recognize legislative history, and found the catchall provision inadequate because it did not specifically identify security clearances. That led to Congress' initiative to make the technical fixes in statutory language necessary to implement its policy choice.

Consistent with the above analysis, Congress has enacted other specific statutory restrictions on security clearance judgment calls that have not invoked constitutional attacks. For example, in the National Defense Authorization Act of 2001, PL 106-398, Congress forbid the President to grant clearances if an applicant has a felony record, uses or is addicted to illegal drugs or has received a dishonorable discharge. 10 USC 986.

A GENUINE LEGISLATIVE REFORM

²² S. Rep. No. 103-358, at 9-10.

²³ 140 Cong. Rec. 29,353 (1994).

Justice Brandeis once declared, “If corruption is a social disease, sunlight is the best disinfectant.” By that standard, this is outstanding good government legislation. If enacted, HR 1507 will upgrade federal workers from the lowest common denominator in modern U.S. whistleblower laws, to the world’s strongest free speech shield for government employees. In general, the legislation achieves this result by overturning twelve years of hostile case law, closing the coverage gaps for national security and contractor whistleblowers, and providing enforcement teeth through full access to court.

More specifically, HR 1507 would –

- * codify the legislative history for “any” protected disclosure, meaning the WPA applies to all lawful communication of misconduct. This restores “no loopholes” protection and cancels the effect of *Garcetti v. Ceballos* on federal workers. Secs. 2(a), 3(a).
- * restore the unqualified, original “reasonable belief” standard established in the 1978 Civil Service Reform Act for whistleblowers to qualify for protection. Sec. 4
- * provide whistleblowers with access to district court for *de novo* jury trials if the Merit Systems Protection Board fails to issue a ruling within 180 days, providing whistleblowers with the same court access as with EEO anti-discrimination law. Sec. 9(a).
- * end the Federal Circuit Court of Appeals monopoly on appellate review of the Whistleblower Protection Act through restoring “all circuits” review, as in the original Civil Service Reform Act of 1978. Sec. 9(b).
- * close the loophole that has existed since 1978 and provide WPA coverage to employees of the FBI and intelligence agencies. Sec. 10.
- * restore independent due process review of security clearance determinations for whistleblower reprisal, unavailable since the 1988 *Egan* Supreme Court decision. Secs. 5, 10(c) 14.
- * restore the due process right to present evidence of whistleblowing and alleged retaliation at administrative hearings, before a case can be decided on an agency’s alleged “independent justification” to act against the employee. Sec. 15.
- * provide WPA due process rights and burdens of proof for those who refuse to violate the law, or who testify at Office of Inspector General or Office of Special counsel investigations. Sec. 2(b).
- * provide whistleblower rights to government contractor employees, helping create accountability for the largest discretionary source of skyrocketing government spending. Sec. 11.

* restore intended civil service and whistleblower rights for some 40,000 Transportation Security Administration baggage screeners on the front lines of homeland security. Sec. 12

* make permanent and provide a remedy for the anti-gag statute – a rider in the Treasury Postal Appropriations bill for the past 17 years – that bans illegal agency gag orders. The anti-gag statute neutralizes hybrid secrecy categories like “classifiable,” “sensitive but unclassified,” “sensitive security information” and other new labels that lock in prior restraint secrecy status, enforced by threat of criminal prosecution for unclassified whistleblowing disclosures by national security whistleblowers. Sec. 5.

* establish that the statutory hybrid secrecy category, Critical Infrastructure Information, does not cancel or otherwise supersede Whistleblower Protection Act free speech rights. Sec. 16.

* take initial steps to prevent the states secrets privilege from canceling a whistleblower’s day in court. Sec. 10(c)(5)

* specifically shield scientific research from political censorship, repression or distortion. Sec. 13.

* codify protection against retaliatory investigations, giving whistleblowers a chance to end reprisals by challenging preliminary “fact-finding” pretexts to build a record of any misconduct that can be discovered. (Sec. 5)

* protect whistleblowers who disclose classified information to Members of Congress on relevant oversight committees or their staff. Sec. 10(a), 10(f).

* protect disclosures of the factual consequences from policy decisions. Sec. 3(a)(3)(D).

* define “clear and convincing evidence” so it is consistent with the well-established legal doctrine for this critical test in the legal burdens of proof for whistleblowers to win their cases. Sec. 3(b).

* strengthen the remedies section of the law, so that prevailing whistleblowers can receive normal “make whole” relief through compensatory damages when they prevail. Sec. 9(d).

* strengthen the Office of Special Counsel’s authority to seek disciplinary sanctions against managers who retaliate. Secs. 7, 19.

* Authorize the Special Counsel to file friend of the court briefs. Sec. 18.

RECOMMENDATIONS

HR 1507 is significant good faith legislation. It can and should be refined at markup, however, to prevent problems that could prevent it from achieving its potential in practice. GAP is available to assist committee staff on any of the following suggestions:

* explicit statutory language that the same “reasonable belief” definition applies to all protected speech categories, including “gross mismanagement.” There is no justification for inconsistent definitions.

* protection under the contractor provision for employees of grant recipients or indirect government spending such as Medicare. This would define the scope of WPA accountability as broad as the False Claims Act and this year’s stimulus boundaries for employees covered by that whistleblower law.

* privacy and confidentiality for closed case files under contractor whistleblower provisions. That key safeguard to prevent the files from being used as dossiers is in the stimulus contractor whistleblower provision, and is a cornerstone of complainant rights in the WPA for civil service employees. 5 USC 1213(g).

* protection for FBI and intel whistleblowing disclosures to appropriately cleared supervisors. This is the primary channel for functional communications, and the law should be designed to prevent information bottlenecks from the start. Those disclosures currently are protected under in-house FBI whistleblower regulations required the civil Service Reform Act in 5 USC 2303.

* consistent court access rights for FBI/intel employees. Although the House national security court access provision meets the Seventh Amendment standard for the right to a jury trial, unlike the other portions of the law that dimension is not specified. To preclude confusion, the language should be drafted consistently for all employees entitled to a jury trial.

* legal burdens of proof for national security whistleblower rights, consistent with those for all others covered by HR 1507. Through an apparent oversight, HR 1507 is silent on the legal burdens of proof for national security employees who file retaliation claims. To avoid arbitrary rulings, the normal standards governing all whistleblower laws passed since 1989 in any context must be specified.

* consistent definition of “disclosure” for national security whistleblowers. In another apparent oversight, the national security provision does not duplicate the definition of disclosure to include “communication” that applies to the rest of the bill. This is

necessary to close loopholes in protected speech. Again, there should be common standards.

* confidentiality rights for employees who seek counseling on how to properly make classified disclosures. Otherwise, they may not feel safe using this service created by Section 17 of HR 1507, or it may backfire and lead to retaliation by exposing whistleblowers who want or need to remain confidential.

CONCLUSION

HR 1507 does not contain new concepts or models. It is a composite of whistleblower best practices that should have been enacted as part of the stimulus law. It is essential as the integrity foundation for unprecedented spending, and for a commitment that America no longer will abuse human rights at home or abroad. This reform must be enacted before stimulus spending gets fully underway, to keep it honest. And until national security workers have first class rights when they “commit the truth,” congressional pledges to learn the truth about torture and human rights abuses will ring hollow. It is not too late to turn on the lights, but there is no time to delay. The Committee and the House should act quickly on this legislation.