

TESTIMONY OF THOMAS DEVINE,
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before the

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

SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL
AFFAIRS COMMITTEE

on S. 372

THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT

June 11, 2009

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

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

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

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

We teamed up with professors from American University Law School to author a model whistleblower law approved by the Organization of American States (OAS) to implement at its Inter American Convention against Corruption. In 2004 we led the successful campaign for the United Nations to issue a whistleblower policy that protects

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

public freedom of expression for the first time at Intergovernmental Organizations, and in 2007 analogous campaigns at the World Bank and African Development Bank. GAP has published numerous books, such as The Whistleblower's Survival Guide: Courage Without Martyrdom, and law review articles analyzing and monitoring the track records of whistleblower rights legislation. See: Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 Administrative Law Review, 531 (1999); Vaughn, Devine and Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 Geo. Wash. Intl. L. Rev. 857 (2003); *The Art of Anonymous Activism* (with Public Employees for Environmental Responsibility and the Project on Government Oversight)(2002); and *Running the Gauntlet: The Campaign for Credible Corporate Whistleblower Rights* (2008).

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

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

Our coalition is just the tip of the iceberg for public support of whistleblowers. As of this morning, 293 NGO’s, community organizations and corporations have signed a letter to President Obama and Congress to give those who defend the public the right to defend themselves through the same model as in H.R. 1507, the House companion to S. 372 -- no loopholes, best practices free speech rights enforced through full access to court for all employees paid by the taxpayers. It is enclosed as Exhibit 1. The breadth of the support for this approach is breathtaking – including good government organizations ranging from Center for American Progress, National Taxpayers Union and Common Cause, environmental groups from Council for a Livable World, Friends of the Earth and the Union of Concerned Scientists, conservative coalitions and organizations such as the Liberty Coalition, Competitive Enterprise Institute, American Conservative Defense Alliance and the American Policy Center, to unions and other national member based groups from American Federation of Government Employees and the National Treasury Employees Union, to the National Organization for Women. Just this week the National Air Disaster Alliance joined.

Last June only 112 organizations had signed an analogous letter. Support for genuine reform will continue to expand steadily until whistleblowers have rights they can believe in. Last month the Federal Law Enforcement Officers Association, and 14 of America’s most celebrated, vindicated national security whistleblowers wrote to

President Obama, asking him to keep his campaign pledge of full court access for all employees paid by the taxpayer. Their letters are enclosed as Exhibits 2 and 3, respectively.

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

MAKING A DIFFERENCE

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

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

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

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

* FDA scientist Dr. David Graham successfully exposed the dangers of pain killers like Vioxx, which caused over 50,000 fatal heart attacks in the United States. The

drug was finally withdrawn after his studies were confirmed. Today at the Energy and Commerce Committee three whistleblowers are testifying about government reliance on fraudulent data to approve Ketek, another high risk prescription drug.

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

* Gary Aguirre, a Security and Exchange Commission (SEC) enforcement attorney, exposed SEC cover-ups of vulnerability to massive corruption in hedge funds that could threaten a new wave of post-Enron financial victims.¹

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

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

Instead of addressing Terreri's security concerns, air marshal managers attacked the messenger. First, they sent a team of supervisors to his home, took away his duty weapon and credentials, and placed him on indefinite administrative leave. Then headquarters initiated a series of at least four uninterrupted retaliatory investigations. At one point, Terreri was being investigated simultaneously for sending an alleged

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

“improper email to a co-worker,” for “improper use of business cards,” association with an organization critical of the air marshal service, and for somehow “breaching security” by protesting the agency’s own security breaches. All of these charges were eventually deemed “unfounded” by Department of Homeland Security (DHS) investigators, but the air marshal service didn’t bother to tell Terreri and didn’t take him off of administrative “desk duty” until the day after the American Civil Liberties Union (ACLU) filed a law suit on his behalf.

Federal Air Marshal Robert MacLean’s experience demonstrates the ongoing, critical need to codify the anti-gag statute. He blew the whistle on an indefensible proposed cost saving measure from Headquarters that would have removed air marshal coverage on long-distance flights like those used by the 9/11 hijackers, *during* a hijacker alert. After unsuccessfully trying to challenge the policy change through his chain of command, Mr. MacLean took his concerns to the media. An MSNBC news story led to the immediate rescission of the misguided policy. Unfortunately, three years later the agency fired Mr. MacLean, specifically because of his whistleblowing disclosure, without any prior warning or notice. In terminating Mr. MacLean, the TSA cited an “unauthorized disclosure of Sensitive Security Information.” The alleged misconduct was entirely an *ex post facto* offense. There had been no markings or notice of its restricted status when Mr. MacLean spoke out. This rationale violates the WPA and the anti-gag statute on its face. The agency, more intent on silencing dissent than following the law, hasn’t backed off.

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

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

Former FAA manager Gabe Bruno challenged lax oversight of the newly-formed AirTran Airways, which was created after the tragic 1996 ValuJet accident that killed all 110 on board. His experience highlights the need to protect job duties, and to ban retaliatory investigations. He was determined not to repeat the mistakes that led to that tragedy, and raised his concerns repeatedly with supervisors. In response, they initiated a “security investigation” against him and demoted Mr. Bruno from his management

position. The lengthy, slanderous investigation ultimately led to Mr. Bruno's termination after 26 years of outstanding government service with no prior disciplinary record.

The flying public was the loser. Following Mr. Bruno's demotion and reassignment, FAA Southern Region managers abruptly canceled a mechanic re-examination program that he had designed and implemented to assure properly qualified mechanics were working on commercial and cargo aircraft. The re-exam program was necessary, because the FAA-contracted "Designated Mechanic Examiner" was convicted on federal criminal charges and sent to prison for fraudulently certifying over 2,000 airline mechanics. Individuals from around the country, and the world, had sought out this FAA-financed "examiner" to pay a negotiated rate and receive an Airframe and Powerplant Certificate without proper testing. After the conviction, Mr. Bruno's follow-up re-exam program, which required a hands-on demonstration of competence, resulted in 75% of St. George-certified mechanics failing when subjected to legitimate tests. The FAA's arbitrary cancellation of the program left over 1,000 mechanics with fraudulent credentials throughout the aviation system, including at major commercial airlines.

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

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

Mr. Bruno also disclosed to the Special Counsel in 2007 that 33 foreign nationals with P.O. Boxes in the same city in Saudi Arabia and an individual with the same name as a 9/11 hijacker received mechanic certificates from the criminal enterprise during the time period that the 9/11 hijackers were learning how to fly planes into the Twin Towers. Mr. Bruno further disclosed that there is no national security screening mechanism for mechanics who received these fraudulent certificates but have failed to complete the reexamination. The FAA's failure to provide the names of these individuals to national security intelligence agencies creates a security vulnerability that leaves the aviation industry open to terrorist activities. The Office of Special Counsel substantiated last month that his disclosures reveal a substantial likelihood that serious security and safety

concerns persist in the management and operation of the certification and maintenance programs at the FAA. Mr. Bruno's experience illustrates that of members in a newly-formed, growing FAA Whistleblower Alliance.

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

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

Another revealing case involves Air Force mechanic George Sarris. A senior civilian Air Force aircraft mechanic with 30 years experience, Mr. Sarris raised concerns about poor maintenance of two aircraft critical for national security – 1) RC-135 aircraft that carry some of the United States' most advanced electronic equipment and currently fly reconnaissance missions in Iraq and Afghanistan; and 2) OC-135 aircraft that monitor an international nuclear treaty. The maintenance issues could lead to mechanical failures, delaying critical missions, endangering servicemen's lives, and national security breaches. After Air Force management ignored these concerns for years when raised through the chain of command, he went to Senator Charles Grassley, Congressmen Steven King and Lee Terry, the Department of Defense Inspector General hotline and the media to get the maintenance concerns addressed. Mr. Sarris' disclosures evidenced—

* the failure to have updated technical data in instructions manuals when the aircraft parts are upgraded. This leads to inconsistency and danger in the maintenance because mechanics are forced to either use outdated and inadequate instructions for a new aircraft part or use their experience to guess best on how to maintain or fix the new part.

* high pressure air storage bottles in the RC-135 aircraft that had not been serviced since they were installed in 1983 and were overdue for inspection by 17 years. If these bottles split open, it could interfere with the flight controls, the aircraft electrical

systems, and the aircraft pressurization or even blow a hole in the fuselage, as has occurred in prior incidents such as a 2005 Qantas flight carrying 365 passengers.

* active fuel hoses that feed into the Auxiliary Power Unit in the OC-135 aircraft that were 15 years past their service life and vulnerable to developing leaks or rupture, which could cause the aircraft to catch fire in flight or on the ground.

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

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

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

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

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

* sparking a top-down removal of top management at the U.S. Department of Justice (“DOJ”), after revealing systematic corruption in DOJ’s program to train police forces of other nations how to investigate and prosecute government corruption. Examples included leaks of classified documents as political patronage; overpriced

² www.taf.org

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

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

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

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

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

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

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

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

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

NECESSITY FOR STRUCTURAL CHANGE

The Make it Safe Coalition’s easiest consensus was that the Whistleblower Protection Act has become a disastrous trap which creates far more reprisal victims than it helps. This is a painful conclusion for me to accept personally, since the WPA is like my professional baby. I spent four years devoted to its unanimous passage in 1989, and another two years for unanimous 1994 amendments strengthening the law, which then was the strongest free speech law in history on paper. But reality belied the paper rights, and my baby grew up to be Frankenstein. Instead of creating safe channels, it degenerated into an efficient mechanism to finish off whistleblowers by rubber-stamping retaliation with an official legal endorsement of any harassment they challenge. It has become would-be whistleblowers’ best reason to look the other way or become silent observers.

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

The Merit Systems Protection Board

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

The MSPB should be the reprisal victim’s chance for justice. Unfortunately, that always has been a fantasy for whistleblowers. In its first 2,000 cases from 1979-88, the Board only ruled in favor of whistleblowers four times on the merits. History is repeating itself. Since the millennium, the track record is 3-53, with only one victory under the current Board Chair Neil McPhie. And throughout its history, the Board never has found

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

retaliation in a high stakes whistleblowing case with national consequences. Even at the initial hearing stage, in 30 years of practice I do not know an attorney aware of any whistleblower in the National Capital Region – home for the government’s most significant abuses of power – who has won a decision on the merits since the law’s 1978 passage. This is exactly the scenario where genuine protection is most needed.

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

The causes are no mystery. First, hearings are conducted by Administrative Judges (AJ) without any judicial independence from political pressure. Second, the Board is not structured or funded for complex, high stakes conflicts that can require lengthy proceedings. As one AJ remarked after the first five weeks of a trial where the dissent challenged alleged government collusion with multi-million dollar corporate fraud, “Mr. Devine, if you bring any more of these cases the Board will have to seek a supplemental appropriation. It’s like a snake trying to swallow an elephant. We’re not designed for this.” Third, the Board’s policy is speedy adjudication of office disputes, with Administrative Judge performance appraisals based on completing cases in 120 days.

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

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

AJs also display scheduling schizophrenia. This occurs when they are assigned high stakes reprisal cases that allege cover-ups with national consequences. Contrary to the normal “rush to judgment” schedule, high stakes whistleblower cases are on the

“molasses track.” Federal Air Marshal Robert MacLean is still waiting for an MSPB hearing, over three years after he was fired. At the Forest Service, a whole environmental crimes unit was dissolved when they caught multi-million dollar corporate timber theft in the national forests by politically powerful firms. They filed their WPA lawsuit in 1995. They did not get a hearing until 2003, eight and a half years later. A landmark case creating the “irrefragable proof” standard for protection dragged on over a dozen years. *Infra* pp. 20, 21.

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

A digest of all final MSPB decisions on the merits since the millennium is attached as Exhibit 4. The patterns of creative sophistry illustrate why the Board for whistleblowers has become a symbol of cynicism rather than a hope for justice. The following new Board doctrines illustrate how Chairman McPhie has only found one instance of retaliation during the Bush administration. Most of the Board’s rulings against whistleblowers are on grounds that the employee did not engage in protected speech, or that there was clear and convincing evidence the agency would have taken the same action even if the employee had remained silent.

Protected speech

Specificity. Disclosures of illegal transfer of sick inmates out of a VA medical care facility are too vague and generalized to be eligible for WPA protection. *Tuten v. Department of Justice*, 104 M.S.P.R. 271 (2006). Similarly, it is not sufficiently specific to disclose that a medical care facility cannot accept new patients, because there are no more beds and the computer has not worked for ten days. *Durr v. Department of Veterans Affairs*, 104 M.S.P.R. 509 (2007).

Requirement to reveal all supporting evidence immediately. Contrary to prior Board precedents, it is not sufficient for a whistleblower to have a reasonable belief when making a disclosure. At the time of the initial disclosures, the whistleblower also must reveal all the supporting information for the reasonable belief. Otherwise, the belief isn’t reasonable. If the employee waits to disclose supporting evidence, it is too late. *Durr*, supra. It is still too late, even if the whistleblower provides the information in court testimony for associated litigation, *before* getting fired. *Rodriguez v. Department of Homeland Security*, 108 M.S.P.R. 76 (2008). This simply defies the normal dynamics of communication.

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

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

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

“Abuse of authority” loophole for those disclosing harassment of themselves. The harassment must be about discriminatory acts toward others, not the person making the disclosure. Without explanation, this overturns a longstanding MSPB doctrine that if retaliation does not technically qualify as a personnel action, it can safely be challenged as a whistleblowing disclosure of abuse of authority. *Rzucidlo v. Department of Army*, 101 M.S.P.R. 616 (2006).

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

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

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

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

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

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

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

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

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

Indeed, the Board's most destructive precedent may be imminent. On February 10, 2009 the Board agreed to make an interim ruling in Air Marshal Robert MacLean's appeal that could leave the Whistleblower Protection Act discretionary for all government agencies. Since 1978 the WPA's cornerstone has been that agencies cannot cancel its public free speech rights by their own regulations. Under 5 USC 2302(b)(8)(A), whistleblowers only can be denied public free speech rights if they are disclosing information that is classified, or whose release is specifically prohibited by Congress.

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

The Federal Circuit Court of Appeals

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

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

That approach has not worked. Since Congress unanimously strengthened the law in October 1994, the court's track record has been 3-200 against whistleblowers in final decisions on the merits. It is almost as if there is a legal test of wills between Congress and this court to set the legal boundaries for whistleblower rights. A digest of all reported decisions since October 1994 is enclosed as Exhibit 6.

The Federal Circuit's activism has created a successful, double-barreled assault against the WPA through – 1) nearly all-encompassing loopholes, and 2) creation of new

impossible legal tests a whistleblower must overcome for protection. Each is examined below.

Loopholes

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

It also is not possible to further clarify the clear statutory language in [section] 2302(b)(8)A that protection for 'any' whistleblowing disclosure evidencing a reasonable belief of specified misconduct truly means 'any.' A protected disclosure may be made as part of an employee's job duties, may concern policy or individual misconduct, and may be oral or written and to any audience inside or outside the agency, without restriction to time, place, motive or context.⁷

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

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

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

What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who

⁶ H.R. Rep. No. 103-769, at 18.

⁷ 145 Cong. Rec. 29,353 (1994).

discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants.⁸

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

Protection only for the pioneer whistleblower. *Meeuwissen v. Interior*, 234 F.3d 9 (Fed. Cir. 2000). This decision revived a 1995 precedent in *Fiorillo v. Department of Justice*, 795 F.2d 1544 (1986) that Congress specifically targeted when it changed protection from “a” to “any” otherwise valid disclosure.⁹ It means that, after the Christopher Columbus for a scandal, anyone speaking out against wrongdoing proceeds at his or her own risk. This means there is no protection for those who corroborate the pioneer whistleblower’s charges. There is no protection against ingrained corruption. *See Ferdik v. Department of Defense*, 158 Fed.Appx. 286 (Fed. Cir. 2005) (Disclosures that a non-U.S. citizen had been illegally employed for twelve years were not protected, because the misconduct already constituted public knowledge since almost the entire institution was aware of the illegality.)

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

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

Illegality too trivial or inadvertent: *Schoenrogge v. Department of Justice*, 148 Fed. Appx. 941 (Fed. Cir. 2005) (alleged use of immigration detainees to perform menial labor, falsification of billing and legal records, paying contractors and maintenance staff for time not working); *Buckley v. Social Security Admin.*, 120 Fed. Appx. 360 (Fed. Cir. 2005) (alleged irreparable harm to litigation from mishandling a government’s attorney’s case while on vacation, rejected as illustrative of

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

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

“mundane workplace conflicts and miscues”) *Gernert v. Army*, 34 Fed. Appx. 759 (Fed. Cir. 2002) (supervisor’s use of phone and government time for personal business); *Langer v. Treasury*, 265 F.3d 1259 (Fed. Cir. 2001) (violation of mandatory controls for protection of confidential grand jury information); *Herman v. DOJ*, 193 F.3d 1375 (Fed. Cir. 1999) (Chief psychologist at VA hospital’s disclosure challenging lack of institutionalized suicide watch, and copying of confidential patient information).

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

Disclosure too vague or generalized. *Chianelli v. EPA*, 8 Fed. Appx. 971 (Fed. Cir. 2001) This was the basis to disqualify an EPA endangered species/groundwater specialist’s disclosure of the agency’s failure to meet requirements in funding for two state pesticide prevention programs; and expenditure of \$35 million without enforcing requirement for prior groundwater pesticide treatment plans.

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

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

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

Blamed for making a disclosure. *Cordero v. MSPB*, 194 F.3d 1338 (Fed. Cir. 1999) An employee is not entitled to whistleblower protection if s/he is merely suspected

of making the disclosure. The employee must prove s/he actually did it. This decision overturns longstanding Board precedent that protects those harassed due to suspicion (even if mistaken). The reason for that doctrine is the severe chilling and isolating effect from permitting retaliation against anyone accused of whistleblowing or leaks, even if the disclosure of concealed misconduct itself qualifies for protection. It contradicts prior Board case law. *Juffer v. USIA*, 80 MSPR 81, 86 (1998). It also is contradictory to consistent interpretation of other whistleblower statutes.

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

“Irrefragable proof”

One provision in the Civil Service Reform Act of 1978 that Congress did not modify was the threshold requirement for protection against retaliation -- disclosing information that the employee "reasonably believes evidences" listed misconduct. The reason was simple: the standard worked, because it was functional and fair. To summarize some 20 years of case law, until 1999 whistleblowers could be confident of eligibility for protection if their information would qualify as evidence in the record used to justify exercise of government authority.

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

Since the Air Force conceded the validity of Mr. White's concerns, the Court's conclusion flunks the laugh test. The Federal Circuit circumvented previous interpretations of "reasonable belief" by ruling that an employee must first overcome the presumption of government regularity: "[P]ublic officers perform their duties correctly, fairly, in good faith and in accordance with the law and governing regulation." The court

then added that this presumption stands unless there is "irrefragable proof to the contrary" (citations omitted). The black magic word was "irrefragable." Webster's Fourth New Collegiate Dictionary defines the term as "undeniable, incontestable, incontrovertible, incapable of being overthrown." This creates a tougher standard to qualify for protection under the federal whistleblower law than it is to put a criminal in jail. An irrefragable proof standard allows for almost any individual's denial to overturn a federal employee's rights under the WPA.

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

After a remand and four more years of legal proceedings, the Federal Circuit upheld its original decision. *White v. Department of Air Force*, 391 F.3d 1377 (Fed.Cir. 2004). In the process, it replaced the "irrefragable proof" standard with an equivalent but more diplomatic test -- "a conclusion that the agency erred is not debatable among reasonable people." *Id.*, at 1382. To illustrate what that means, Mr. White then lost because the Air Force hired a consultant to provide "expert" testimony at the hearing who disagreed with Mr. White (as well as the Air Force's own independent management review and the Secretary). The court did limit this "son of irrefragable" decision's scope to disclosures of misconduct other than illegality, and it has been shrunken since until it only applies to disclosures of gross mismanagement. But there is no rational basis for the reasonable belief test to have one meaning when challenging mismanagement, and another when challenging all other types of misconduct. Legislative history through the committee report and floor speeches should not leave any doubt that the bill's ban on rebuttable presumptions and definition of "reasonably believes" apply to 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 H.R. 1507 will not have a material fiscal impact.

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

- Civil Rights Act, 42 USC 1983, (state and local government to challenge constitutional violations) (1871)
- Equal Employment Opportunity Act, 42 USC 2000e, (government, employment discrimination) (1991)
- False Claims Act, 31 U.S.C. § 3730 (h), (federal government contractors on civil fraud) (1986)
- Major Fraud Act, 18 U.S.C. § 1031(h), (federal government contractors on criminal fraud) (1989)
- Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, 12 USC 1790b(b), (banking) (1991)
- Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, 12 USC 1831j(b), (FDIC) (1991)
- Sarbanes Oxley law, 18 USC 1514A(b)(1)(B), (publicly-traded corporations) (2002)
- Energy Policy Act, 42 USC 5851(b)(4), (nuclear power and weapons, including federal government at the Department of Energy and the Nuclear Regulatory Commission) (2005)
- Commercial Motor Vehicle Safety Act, 49 U.S.C. § 31105(c), (trucking and cross country bus carriers) (2007)

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

Since removed from <http://www.whitehouse.gov/agenda/ethics/>. The original statement posted on whitehouse.gov can be found at <http://pogoarchives.org/m/gc/wh-ethics-agenda-20090121.pdf>.

- Federal Rail Safety Act, 49 U.S.C. § 20109(d)(3), (railroads) (2007)
- National Transit Systems Security Act, 6 USC 1142(c)(7), (metropolitan transit) (2007)
- Defense Authorization Act, 10 USC 2409(c)(2), (defense contractors) (2007)
- Consumer Products Safety Improvement Act, 15 USC 2087(b)(4), (retail commerce) (2008)
- American Recovery and Reinvestment Act, section 1553(c)(3), (corporate or state and local government stimulus recipients) (2009)

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

Flooding the courts

A primary reason that employees do not flood the courts is that it costs too much. Except in rare circumstances, unemployed workers who first must exhaust layers of administrative remedies as in H.R. 1507 simply cannot afford to pay for two proceedings, and court litigation costs exponentially more than administrative hearings. Where available, the safety valve of federal court access has been limited to instances where it was clear that the administrative process offered the employee a dead end in a case that an Administrative Judge did not want to hear, or that the issues are too complex or technical for an administrative hearing.

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

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

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

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

In 1991 when considering the EEO amendments, President George H.W. Bush wrote to Sen. Don Nickles that he “strongly support[s]” the amendments to the Civil Rights Act that would provide federal employees with the “right to a jury trial,” and stated that he had “no objection” to providing federal (and even White House) employees with the “identical protections, remedies, and procedural rights” granted to private sector employees in the bill.¹³ Since, there have been no complaints that the federal EEO docket has unduly burdened the courts or the government.

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

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

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

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

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

statutes accounted for only 124 out of 3221 new whistleblower complaints filed with DOL – a 3.3% increase.

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

Those findings also are consistent with research for the Energy Policy Act. The number of complaints filed *decreased* significantly, *after* Congress added jury trials for enforcement and provided access to the law for federal government workers at the Department of Energy and Nuclear Regulatory Commission. According to Department of Labor statistics, before jury trials were added in 2005 there were 191 employee appeals under 42 USC 5851. From 2006 through 2008, by contrast, there were only 112. Data on the DOL-administered statutes is drawn from a chart by the Department’s Office of Whistleblower Protection, attached as Exhibit 7.

In the whistleblower context, the MSPB will remain the primary forum for WPA cases, and it is capable of effectively handling many of the cases when the proposed changes in H.R. 1507 / S 372 are enacted. Yet, it is imperative that juries, the “cornerstone” of our civil law system, be allowed to hear a limited number of high stakes whistleblower cases in order to create balance with the administrative system. Only then will Congress’ intent to protect the courageous federal employees who report waste, fraud and abuse be fully realized.

Paralyzing intimidated managers

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

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

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

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

Consistent with the nonexistent litigation surge, the litigation track record surrounding passage of whistleblower laws empirically confirms that there was not a drop-off in accountability actions. That has been the case with before and after passage of the Whistleblower Protection Act. In each case, the empirical record indicates that managers were not afraid to hold employees accountable, and that there was not a surge of litigation by newly-emboldened employees. The rate of adverse actions and performance appeals remained virtually identical. The WPA was signed into law in March 1989. From 1986-88, there were 175 MSPB decisions in adverse action and performance appeals.¹⁶ Few employees jumped on their new opportunity to file lawsuits. From 1989-91 there were 174. There are no comparative statistics for Individual Rights of Action newly created by the WPA, but the litigation burden was modest in the first three years -- 74 cases, or less than 25 annually, out of a nearly two million employee labor force at the time.¹⁷

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

Unqualified jurors

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

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

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

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

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

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

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

NATIONAL SECURITY ISSUES

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

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

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

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

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

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

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

The General Accountability Office long ago put this red herring in perspective, after a year study finding that there is "no justification for treating employees" at "intelligence agencies differently from employees at other federal agencies" in regard to protections against retaliatory discharge or other discriminatory actions. GAO/NSIAD-96-6, *Intelligence Agencies: Personnel Practices at the CIA, NSA and DIA Compared with Those of Other Agencies* (hereinafter, "GAO Report").²² "If Congress wants to provide CIA, NSA, and DIA employees with standard protections against adverse actions that most other federal employees enjoy, it could do so without unduly compromising national security." *Id.*, at 45. The National Whistleblower Center's May 14 House testimony last month analyses the study in-depth.

Constitutional issues on security clearances

One issue that should be squarely addressed is whether Congress has the constitutional authority to grant third party review of security clearance actions. It is the reprisal of choice against national security whistleblowers because they cannot defend themselves. Since introduction of this legislation in 2000, the Justice Department has attempted to create a new legal doctrine that Congress is powerless to assert itself.

In the past, DOJ has claimed its authority from *Department of Navy v. Egan*, 484 US 518 (1988). While the U.S. Supreme Court did not provide a green light for any approach, the decision did not ban congressional action. All analysis was that Congress

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

²¹ 31 USC 3729 *et seq.*

²² Excerpts from this GAO Report are attached to this testimony.

hadn't acted to legislate authority for the security clearance judgment call in question. There was no holding or analysis that it *couldn't*.

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

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

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

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

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

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

The intent of the Whistleblower Protection Act was to create a clear remedy for all cases of retaliation or discrimination against whistleblowers. The Committee believes that such retaliation must be prohibited, regardless what form it may take. For this reason, [S. 622, the Senate bill for the 1994 amendments] would amend the Act to cover any action taken to discriminate or retaliate against a whistleblower, because of his or her protected conduct, regardless of the form that discrimination or retaliation may take.²³

²³ S. Rep. No. 103-358, at 9-10.

The consensus for the 1994 amendments explained that the new personnel action includes "any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system," again specifying security clearance actions as the primary illustration of the provision's scope.²⁴

In *Hess v. Department of State*, 217 F.3d 1372, 1377-78 (Fed. Cir. 2000), however, the Federal Circuit did not recognize legislative history, and found the catchall provision inadequate because it did not specifically identify security clearances. That led to Congress' initiative to make the technical fixes in statutory language necessary to implement its policy choice, as demonstrated in H.R. 1507 and S 372.

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

RECOMMENDATIONS

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

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

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

²⁴ 140 Cong. Rec. 29,353 (1994).

* protection under the contractor provision for employees of grant recipients or indirect government spending such as Medicare. This would define the scope of WPA accountability as broad as the False Claims Act and this year's boundaries for employees covered by the stimulus law's whistleblower provision. The House bill, H.R. 1507, excludes those categories, which are extremely significant sources of vulnerability to large scale, taxpayer-financed misconduct. There must be consistent, best practice accountability safeguards for all federal spending, not just the stimulus.

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

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

CONCLUSION

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

Consistency also is necessary for accountability to the taxpayers. This reform is essential as the integrity foundation for unprecedented spending, and for a commitment that America no longer will abuse human rights at home or abroad. Contractor whistleblowers who challenge stimulus misspending have full court access to enforce whistleblower rights. There is no excuse for the same accountability shield to be second class at government agencies. It must be enacted before stimulus spending gets fully underway, to keep it honest. And until national security workers have first class rights when they "commit the truth," congressional pledges to learn the truth about torture and human rights abuses will ring hollow. It is not too late to turn on the lights, but there is no time to delay. The Committee and the Senate should act quickly on this legislation.

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

June 9, 2009

An Open Letter to President Obama and Members of Congress

The undersigned organizations and corporations write to support the completion of the landmark, nine-year legislative effort to restore credible whistleblower rights for government employees. We offer our support to expeditiously pass legislation that includes the critical reforms listed below. Whistleblower protection is a foundation for any change in which the public can believe. It does not matter whether the issue is economic recovery, prescription drug safety, environmental protection, infrastructure spending, national health insurance, or foreign policy. We need conscientious public servants willing and able to call attention to waste, fraud and abuse on behalf of the taxpayers.

Unfortunately, every month that passes has very tangible consequences for federal government whistleblowers, because none have viable rights. Last year, on average, 16 whistleblowers a month lost initial decisions from administrative hearings at the Merit Systems Protection Board (MSPB). Since 2000, only three out of 53 whistleblowers have received final rulings in their favor from the MSPB. The Federal Circuit Court of Appeals, the only court which can hear federal whistleblower appeals of administrative decisions, has consistently ruled against whistleblowers, with whistleblowers winning only three cases out of 209 since October 1994 when Congress last strengthened the law.

It is crucial that Congress restore and modernize the Whistleblower Protection Act by passing all of the following reforms:

- Grant employees the right to a jury trial in federal court;
- Extend meaningful protections to FBI and intelligence agency whistleblowers;
- Strengthen protections for federal contractors, as strong as those provided to DoD contractors and grantees in last year's defense authorization legislation;
- Extend meaningful protections to Transportation Security Officers (screeners);
- Neutralize the government's use of the "state secrets" privilege;
- Bar the MSPB from ruling for an agency before whistleblowers have the opportunity to present evidence of retaliation;
- Provide whistleblowers the right to be made whole, including compensatory damages;
- Grant comparable due process rights to employees who blow the whistle in the course of a government investigation or who refuse to violate the law; and
- Remove the Federal Circuit's monopoly on precedent-setting cases.

We know you share the commitment of every group signing the letter below to more transparency and accountability in government. Please let us know how we can participate to make this good government reform law to protect federal whistleblowers and taxpayers.

Sincerely,

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ACORN 8

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David Swanson, co-founder
AfterDowningStreet

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Former Special Agent Darlene Fitzgerald Patrick Henry Center	Robert L. FitzPatrick, President Pyramid Scheme Alert
Paul Kawika Martin, Organizing, Political and PAC Director Peace Action & Peace Action Education Fund	Dr. Diana Post, President Rachel Carson Council, Inc.
Bennett Haselton, Founder Peacefire.org	Lucy A. Dalglish, Executive Director The Reporters Committee for Freedom of the Press

Kirsten Moore, President and CEO
Reproductive Health Technologies Project

Tim Little, Executive Director
Rose Foundation for Communities and the Environment

John W. Whitehead, president
The Rutherford Institute

Adrienne Anderson, Coordinator
Safe Water Colorado and Nuclear Nexus Projects
Rocky Mountain Peace and Justice Center
(Whistleblower Anderson v Metro Wastewater)

Angela Smith, Coordinator
Seattle Healthy Environment Alliance (Seattle HEAL)

Dr. Roland Chalifoux
The Semmelweis Society International (SSI)

Rufus Kinney
Serving Alabama's Future Environment (SAFE)

Ed Hopkins, Director of Environmental Quality Program
Sierra Club

Shane Jimerfield, Executive Director
Siskiyou Project

Gillian Caldwell, Campaign Director
1Sky

Andrea Shipley, Executive Director
Snake River Alliance

Matthew Petty, Executive Director
The Social Sustenance Organization

Dave Aekens, National President
Society of Professional Journalists

Laureen Clair
SOL Communications Inc

Amy B. Osborne, President
Southeastern Chapter of the American Association of Law Libraries

Don Hancock, Director of Nuclear Waste Safety Program
Southwest Research and Information Center

Donna Rosenbaum, Executive Director
S.T.O.P. - Safe Tables Our Priority

Mauro Oliveira
StopClearCuttingCalifornia.org

Kevin Kuritzky
The Student Health Integrity Project (SHIP)

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

Jeb White, Executive Director
Taxpayers Against Fraud

Alec McNaughton
Team Integrity

Ken Paff, National Organizer
Teamsters for a Democratic Union

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

Peter Barnes
Tomales Bay Institute

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

Paul Taylor
Truckers Justice Center

Francesca Grifo, Ph.D., Director
Scientific Integrity Program
Union of Concerned Scientists

Dane von Breichenruchardt, President
U.S. Bill of Rights Foundation

Dr. Joseph Parish
U.S. Environmental Watch

Gary Kalman, Director, Federal Legislative Office
U.S. Public Interest Research Group (U.S.PIRG)

Nick Mangieri, President
Valor Press, Ltd.

Brad Friedman, co-founder
Velvet Revolution

Dr. Jeffrey Fudin, Founder
Veterans Affairs Whistleblowers Coalition

Sonia Silbert, Co-Director
Washington Peace Center

Nada Khader, Foundation Director
WESPAC Foundation

Janine Blaeloch, Director
Western Lands Project

Gloria G. Karp, Co-Chair
Westchester Progressive Forum

Greg Costello, Executive Director
Western Environmental Law Center

Mabel Dobbs, Chair
Livestock Committee
Western Organization of Resource Councils

Ann Harris, Executive Director
We the People, Inc

Janet Chandler, Co-Founder
Whistleblower Mentoring Project

Dan Hanley
Whistleblowing United Pilots Association

Linda Lewis, Director
Whistleblowers USA

John C. Horning, Executive Director
WildEarth Guardians

George Nickas, Executive Director
Wilderness Watch

Tracy Davids, Executive Director
Wild South

Scott Silver, Executive Director
Wild Wilderness

Kim Witczak
WoodyMatters

Tom Z. Collina, Executive Director
20/20 Vision

Paula Brantner, Executive Director
Workplace Fairness

Exhibit 2



FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION

P.O. Box 326 Lewisberry, PA 17339

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(717) 938-2300

Representing Members Of:

AGENCY for INTERNATIONAL DEVELOPMENT
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Naval Criminal Investigative Service
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JUSTICE
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Drug Enforcement Administration
Federal Bureau of Investigation
US Marshals Service
OIG
U.S. Attorney's Office-CI
LABOR - OIG & Racketeering
NATIONAL AERONAUTICS & SPACE ADMIN. - OIG
NUCLEAR REGULATORY COMMISSION - OIG
POSTAL SERVICE-OIG & Inspection
RAILROAD RETIREMENT BOARD - OIG
SECURITIES & EXCHANGE COMMISSION - OIG
SMALL BUSINESS ADMINISTRATION - OIG
SOCIAL SECURITY ADMINISTRATION - OIG
STATE DEPARTMENT
Bureau of Diplomatic Security & OIG
TRANSPORTATION-OIG
TREASURY
FINCEN & OIG
Internal Revenue Service - CI
TIGTA
U.S. COURTS (JUDICIAL)
Probation, Parole & Pretrial Services
VETERANS AFFAIRS -OIG
NATIONAL OFFICERS
President
JON ADLER
Executive Vice-President
NATHAN CATURA
Vice President - Operations
LAZARO COSME
Vice President - Agency Affairs
CHRISTOPHER SCHOPPMAYER
Vice President - Membership Benefits
JOHN RAMSEY

May 11th, 2009

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

Dear President Obama:

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

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

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

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

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

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

Respectfully,

Jon Adler

Jon Adler
National President

Exhibit 3

May 11, 2009

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

Dear President Obama:

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

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

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

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

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

Often the best source of information about waste, fraud, and abuse in government is an existing government employee committed to public integrity and willing to speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled as they have been during the Bush administration. We need to empower federal employees as watchdogs of wrongdoing and partners in performance. Barack Obama will strengthen whistleblower laws to protect federal workers who expose waste, fraud, and abuse of authority in government. Obama will ensure that federal agencies expedite the process for reviewing whistleblower claims and whistleblowers have full access to courts and due process.

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

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

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

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

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

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

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

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

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

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

Martin Edwin Andersen

Former senior advisor for policy planning at the Department of Justice’s Criminal Division; Winner of the U.S. Office of Special Counsel’s 2001 “Public Servant Award”

Mark Danielson

Department of Energy SRT whistleblower

Michael DeKort

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

Bogdan Dzakovic

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

Richard E. Hoskins II

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

Robert J. MacLean

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

Spencer A. Pickard

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

Coleen Rowley

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

Craig R. Sawyer

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

Lt. Eric N. Shine

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

George R. Taylor

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

Frank Terreri

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

Russell D. Tice

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

(Non-National Security Whistleblower Category)

Peter D. Nesbitt

FAA Whistleblower Alliance

February 12, 2007

Memorandum

From: Tom Devine, ext. 124; whistle47@aol.com

Re: Merit Systems Protection Board whistleblower decisions since 2000

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

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

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

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

2000 (0-2)

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

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

2001 (0-4)

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

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

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

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

2002 (2-3)

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

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

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

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

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

2003 (0-8)

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

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

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

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

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

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

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

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

2004 (0-10)

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

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

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

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

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

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

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

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

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

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

2005 (0-8)

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

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

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

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

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

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

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

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

2006 (0-7)

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

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

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

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

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

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

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

2007 (1-7)

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

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

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

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

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

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

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

2008 (0-4)

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

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

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

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

2009 (0-3)

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

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

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

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

Exhibit 5

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT J. MACLEAN,
Appellant

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

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency

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

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INTEREST OF THE AMICUS

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

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

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

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

BACKGROUND AND PROCEEDINGS BELOW

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

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

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

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

Mr. MacLean subsequently filed suit under the Whistleblower Protection Act, contending, *inter alia*, that agency regulations may not cancel his statutory free speech rights. TSA responded that in the Aviation Transportation and Security Act (ATSA) Congress had directed the agency to issue regulations "prohibiting the disclosure of information ... if the Under Secretary decides that disclosing the information would ... be detrimental to the security of transportation." 49 USC 114(s)(1). TSA contended that because it issued SSI regulations pursuant to that authority, terminating Mr. MacLean for violating SSI *rules* complied with 5 USC 2302(b)(8). That provision, the statement of WPA free speech rights, protects public disclosures meeting other statutory requirements unless the information disclosed is classified²⁶ or its release is "specifically prohibited by law."²⁷ The AJ agreed with the agency.

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

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

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

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

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

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

ARGUMENT

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

recommend, or approve any personnel action, shall not, with respect to such authority--

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

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

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

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

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

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

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

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

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

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

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

As a Senator, I have conducted extensive oversight into virtually all aspects of the Federal bureaucracy. Despite the differences in cases from agency to agency and from department to department, one constant remains: the need for information and the need for insight from whistleblowers. This information is vital to effective congressional oversight, the constitutional responsibility of Congress, in addition to legislating.

Documents alone are insufficient when it comes to understanding a dysfunctional bureaucracy. Only whistleblowers can explain why something is wrong and provide the best evidence to prove it. Moreover, only whistleblowers can help us truly understand problems with the culture of Government agencies, because without changing the culture, business as usual is the rule.

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

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

The Federal Employee Protection of Disclosures Act is designed to strengthen the rights and protections of federal whistleblowers and to help root out waste, fraud, and abuse. Although the events of September 11, 2001, have brought renewed attention to those who disclose information regarding security lapses at our nation's airports, borders, law enforcement agencies, and nuclear facilities, the right of federal employees to be free from workplace retaliation has been diminished as a result of a series of decisions of the Federal Circuit Court of Appeals that have narrowly defined who qualifies as a whistleblower under the WPA and what statements are considered protected disclosures. S. Rep. No. 110-32 (110th Cong., 2d. Sess.) at 2.

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

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

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

a legislature says in a statute what it means and means in a statute what it says there."

Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992). Indeed, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: `judicial inquiry is complete.'

"*Id.* The Board long has recognized this premise for statutory construction, in *Kent* reaffirming that "the plain language of a statute controls absent a clearly expressed legislative intent to the contrary." *Kent, supra*, at 542n.8, quoting *Benedetto v. Office of Personnel Management*, 32 MSPR 530, 533034 (1987).

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

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

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

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

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

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

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

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

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

B. The AJ’s ruling below fails to recognize that Congress used different language when referring to statutory versus regulatory authority.

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

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

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

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

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

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

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

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

The AJ reasoned, however, that in this instance Congress required the agency to issue secrecy regulations necessary to protect air security, including to prohibit release of information that the Under Secretary...determines to be detrimental to aviation security.

He contrasted that scenario with *Kent*, in which the statute merely authorized issuance of regulations.

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

MacLean Interlocutory Certification, at 10.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

RESPECTFULLY SUBMITTED this 9th day of March, 2009.

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CERTIFICATE OF SERVICE

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

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June 9, 2007

Memorandum

From: Tom Devine, ext. 124; tomd@whistleblower.org

Re: Federal Circuit whistleblower decisions since passage of 1994 amendments

Below is an index of all Federal Circuit decisions on the merits for Whistleblower Protection Act appeals since Congress strengthened the law in October 1994 amendments. The track record is 3-200 against whistleblowers, including 3-66 for precedential decisions published in the federal reporter system. The latter are indexed below. For purposes of this memorandum, “decisions on the merits” means a ruling whether an employee’s free speech rights were violated. It does not include rulings on cases disposed or remanded because of issues like harassment not covered under the law, timely filing, improper presentation of legal briefs or due process issues whose correction requires further fact finding.

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

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

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

2009 No reported decisions

2008 (1-0)

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

2007 (0- 3)

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

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

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

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

2006 (1-2)

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

Fields v. Department of Justice, 452 F.3d 1297 (6/16/06) (DEA supervisory criminal investigator) (PS) Pressure by agency counsel to slant testimony in internal disciplinary proceeding against a subordinate not protected; mandatory disclosures during internal management review about arrest of cooperating source not protected b/c non-discretionary job responsibility.

Garcia v. Department of Homeland Security, 437 F.3d 1322 (2/10/06) INS HQ Assistant Chief Inspector (PS; contents in EEO complaint do not qualify).

2005 (0-1)

Carson v. Department of Energy, 398 F.3d 1369 (3/1/05) Nuclear engineer. Cumulative safety violations in nuclear weapons laboratories. (N)

2004 (0-4)

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

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

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

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

2003 (no reported decisions)

2002 (0-1)

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

2001 (1-3)

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

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

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

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

2000 (0-10)

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

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

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

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

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

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

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

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

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

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

1999 (0-15)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1998 (0-14)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1997 (0-3)

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

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

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

1996 (0-8)

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

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

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

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

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

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

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

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

1995 (0-4)

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

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

Watson v. DOJ, 64 F.3d 1524 (8/29/95) Border Patrol agent. (PS and CCE; disclosure wasn't protected and he would have been fired anyway for waiting too long (12.5 hours, overnight) to report another agent's shooting and unmarked burial of an unarmed Mexican after an implied death threat by the shooter if silence were broken.)

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

Exhibit 7

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

NTSSA

FRSA

CPSIA

*Half year

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

