

WHISTLEBLOWER WITCH HUNTS:

The Smokescreen Syndrome

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Table of Contents

Executive Summary.....	7
Introduction.....	9
Case Studies.....	11
Gabe Bruno.....	11
Thomas Drake.....	13
Franz Gayl.....	15
Michael German.....	18
Tamarah Grimes.....	19
Gordon Hamel.....	22
David Lee.....	25
Robert MacLean.....	26
Jesselyn Radack.....	28
George Sarris.....	30
Frank Terreri.....	32
Dr. Robert Van Boven.....	33
Retaliatory Investigations and the Law.....	36
Recommendations at the Policy Crossroads.....	38
Conclusion.....	39
Notes.....	40

EXECUTIVE SUMMARY

Congress is at a crossroads whether to provide whistleblowers with credible, enforceable rights against retaliatory investigations in legislation to amend the Whistleblower Protection Act of 1989. This report presents 12 case studies to illustrate the danger they risk by defending the public. Each time the whistleblower's dissent was vindicated. Eight were national security whistleblowers. Some had a profound impact, such as possibly preventing terrorist disasters or halting unnecessary fatalities in Iraq. But eight were criminally investigated. Ten remain exiled from their duties, with eight no longer employed by the government.

The case studies expose government agencies' unrestrained "whatever it takes" approach to enforce secrecy by repression. The uglier the tactic, the more effective it is at silencing critics and scaring off anyone else who might challenge abuses of power. Tactics detailed in the case studies include:

- Conflict of interest charges against a whistleblower challenging bureaucratic cronyism, a Kafkaesque routine to brand employees with the same misconduct they disclose;
- Early morning raids on whistleblowers' homes and families, confiscating their computers and files while demanding their silence if they wanted to keep living there;
- Classifying or restricting information years after the fact and then imposing ex post facto liability for blowing the whistle with it;
- Attempting prosecution for alleged false statements solely based on hearsay allegations by a mediator sworn to confidentiality;
- Prolonged searches within agencies to find hatchet people willing to make allegations after knowledgeable witnesses refuse;
- Unsupported accusations of being suicidal, violent or otherwise mentally challenged, without providing any medical basis;
- Reassigning whistleblowers to their homes, without duties, the bureaucratic equivalent of house arrest since they would be AWOL for leaving;
- Keeping it secret that the investigation cleared the whistleblower, and sustaining his exile for six weeks until exoneration was exposed by a lawsuit;
- Attempting attorney debarment;
- Placement on the No Fly list;
- Exploitation of medical vulnerability, such as intensifying harassment during the late stages of pregnancy;
- Denying the existence of active but secret investigations; and
- Relentless blacklisting campaigns for years based on the dossiers left behind.

The stakes for taxpayers could not be higher. The whistleblowers profiled in this report exposed real public and national security risks, including:

- Fraudulent certifications for mechanics who vouch for commercial aircraft safety;
- Big Brother style, blanket warrantless domestic surveillance of all computer and telephone communications;

- Failure to deliver vital troop safety equipment in order to help rival defense contractors, with consequences including loss of up to one-third of Iraqi combat fatalities;
- Attempted cancellation of all Air Marshal coverage during a confirmed terrorist plan for a more ambitious rerun of 9/11;
- Losing track of a kilogram of plutonium, nuclear waste that is among the most toxic on earth and the critical ingredient to build bombs;
- Lying to court about a dress rehearsal for Abu Ghraib tactics on American citizen John Walker Lindh;
- Continued secret control of a political prosecution by a Justice Department attorney who supposedly left the case due to collusion with Karl Rove;
- Failure by the Air Force to conduct required inspections and maintenance for over a decade on intelligence and cargo aircraft, which could lead to mechanical failures that endanger servicemen's lives, delay critical missions, and cause national security breaches; and
- Corrupt diversion of all funds reserved to treat over 400,000 Iraq and Afghanistan veterans, leaving them extremely vulnerable to homelessness.

In theory, government investigations are for law enforcement. Ironically, however, retaliatory investigations are grounded in illegality. The report includes a review of laws they regularly violate. The public policy challenge is not whether these attacks should be outlawed. It is whether to provide whistleblowers the right to defend themselves while the unlawful harassment occurs.

In that context, the report concludes by recommending that without further delay Congress complete 12 years' effort to overhaul rights for federal employees under the Whistleblower Protection Act, and offers standards for legitimate reform to end current abuses of power.

INTRODUCTION

A timeless, almost instinctual defense against those who challenge abuses of power is to “find the dirt” on any dissenter who is a serious threat. The “smokescreen syndrome” seeks to discredit, or at least obfuscate dissent by shifting attention to the source’s motives, professional competence, values and personal life, finances, credibility or any other vulnerability that can eliminate the threat, or at least dilute it by clouding the issue.

Almost by definition, the most natural target for retaliatory investigations will be whistleblowers, those who exercise free speech rights to challenge abuses of power. The attitude is illustrated by then President Nixon’s instruction to his aides Messrs Haldeman and Erlichman, in response to Air Force cost control chief Ernie Fitzgerald’s whistleblowing disclosure of government lies to Congress about a \$2 billion cost overrun for the C-5 cargo airplane: “Get that son of a bitch.”¹ A Plumber’s Unit style investigation ensued that vacuumed Fitzgerald’s life, although no misconduct was ever found.

Exoneration does not free whistleblowers from retaliation, unless they get the point and become silent observers after successfully defending their innocence. “Chain witch hunts” are a regular phenomenon. USDA meat grader John Coplin was nicknamed the John Wayne of USDA for his thirty year crusade against bribery in grading and inspection of government approved meat. He testified in Congress, was spotlighted on 60 Minutes, sent numerous criminals to jail and was the living history for books such as *Prime Rip*, by Ralph Nader’s investigators. Throughout the three decades, however, Coplin himself was under continuous investigation, sometimes by USDA’s own Office of Inspector General (OIG) at the same time he was working cases with other OIG agents on his whistleblowing disclosures. Despite 30 years of non stop effort, USDA’s bureaucracy never was able to prove any wrongdoing by Coplin. But it did not miss a beat. As soon as one investigation was closed, another was opened.²

Sometimes the results of retaliatory investigations are published as defamatory “biographies.” That was the case with tobacco industry whistleblower Dr. Jeffrey Wigand, whose disclosures of tobacco industry lies denying addiction-causing additives snapped the industry’s legal and political credibility. Within weeks, his former employer hired a private investigative firm and published a book depicting Dr. Wigand as a monster. In fact, he is a devoted father who since ending his tobacco career repeatedly has been honored as Kentucky Teacher of the Year by the public schools.³

Frequently those opening a retaliatory investigation seek to maximize the damage by making it criminal. That creates the greatest diversion of the whistleblower’s energy, and the most effective antidote against the dissenter’s evidence, no matter how strong. Most significant, branding the whistleblower as one who committed a crime creates a raw, chilling effect against others who consider whether to “commit the truth,” as Mr. Fitzgerald put it.

The experience of Nicholas Mangieri, a Labor Department OIG criminal investigator himself, illustrates why. In 1979 and 1980, Mangieri caught ingrained corruption and sexual harassment by top District of Columbia politicians a decade before it was politically acceptable. As a result, the OIG’s internal affairs unit opened an investigation into Mangieri that interviewed some 300 witnesses, going back to 1950. Finally an ex-wife revealed that he had not disclosed defaulted student loan applications

on his credit union application. Mangieri was prosecuted and convicted on six separate felony counts, one for each loan. When the judge refused to impose jail time, the prosecutor unsuccessfully sought psychiatric institutionalization.⁴ Mangieri's fate sent a powerful message to other OIG investigators, who backed off from DC-based corruption.

Congress is at a crossroads on whether to provide whistleblowers with credible, enforceable rights against retaliatory investigations, as part of legislation to amend the Whistleblower Protection Act of 1989.⁵ If Congress follows through, the new law will reaffirm their right to challenge witch hunts before there is formal punishment. It also will provide compensation for defending against an investigation when employees defeat an associated personnel action.

Lawmakers should understand and base a responsible policy choice on the consequences from this universal preliminary harassment, both for the merit system and the public. For example, the most significant consequence of prosecuting Mr. Mangieri may have been that it helped sustain the cover-up of ingrained corruption by DC's political leadership, which largely shielded by secrecy remained unabated for another decade.

This report presents 12 case studies of recent or ongoing retaliatory investigations against whistleblowers to illustrate the consequences. In each case, the whistleblower's dissent was vindicated. Eight out of twelve were national security whistleblowers. Some had a profound impact, such as possibly preventing terrorist disasters or halting unnecessary combat and civilian fatalities in Iraq. But eight out of twelve also were placed under criminal investigation. Ten out of twelve remain exiled from their duties, with eight out of twelve no longer employed by the government.

The report also analyses the subject matter of secret misconduct exposed by these whistleblowers. It demonstrates that in each case they were acting within their legal rights. It illustrates the sometimes surreal pretexts for investigations sparked by their dissent. The case studies describe the fishing expedition scope, and often heavy handed tactics used to bully whistleblowers. They also detail the direct, more tangible consequences for which the probes provide a foundation – punishments ranging from loss of security clearance, to termination, to incarceration. Most significant, the case studies illustrate the chilling effect from retaliatory investigations, which in three instances convinced whistleblowers to resign or retire due to the prolonged, draining stress and stigma.

Government investigations are supposed to serve law enforcement purposes. Ironically, however, retaliatory investigations are grounded in illegality. Supplementing the case studies is a review of the laws that regularly are violated by investigations opened because of legally protected activity. The public policy challenge is not whether these attacks should be outlawed. It is whether to provide whistleblowers the right to defend themselves while the unlawful harassment occurs.

In that context, the report concludes by calling for Congress to finish the Whistleblower Protection Reinforcement Act that it has been perfecting for 12 years.

CASE STUDIES

Gabe Bruno

Gabe Bruno was a 26 year Federal Aviation Administration (FAA) veteran and experienced manager who in 1995 took over as manager of the Orlando, Florida Flight Safety District Office (FSDO). Mr. Bruno turned around the highly-troubled FSDO, and his office received two Southern Region FSDO of the Year awards. During his career Mr. Bruno has received numerous awards and letters of commendation, including regional Manager of the Year twice, the Vice President's Award in 2000 for Reinventing Government, and Superior Accomplishment Awards for leading his offices, to "Office of the Year". Ironically, the same values that earned Mr. Bruno high marks throughout his career would result in his professional execution. Unwilling to tolerate lax FAA oversight and inspections, Mr. Bruno found himself the target of a "security investigation" after making his own safety disclosures within the agency. The lengthy, slanderous investigation ultimately led to Mr. Bruno's termination after nearly three decades of outstanding government service with no prior disciplinary record.

After the tragic 1996 ValuJet accident that killed all 110 on board, Mr. Bruno was assigned responsibility for oversight of corrective actions, and for the subsequent ValuJet-AirTran merger. The National Transportation Safety Board and the FAA's own "90 Day Safety Review" found that inadequate FAA oversight was one of the accident's contributing factors.⁶ Mr. Bruno protested lack of resources for the successor airline, with severe safety-related risks. He tried to implement necessary oversight to prevent recurrence of the tragedy. After several years of fighting for the necessary personnel to perform proper inspection of the new and growing airline, in 2001 he expressed his concerns directly in a meeting with his two immediate supervisors, then FAA Southern Region Acting Division Manager Nicholas Sabatini and his associate Dawn Veatch. The FAA's response was to initiate a "security investigation" on Mr. Bruno within days, and to reassign him from his management position.

Following his reassignment, FAA Southern Region managers abruptly canceled the mechanic reexamination program that Mr. Bruno had designed and implemented to assure that properly qualified mechanics were working on commercial and cargo aircraft nationally.⁷ The national reexamination program was necessary, because earlier disclosures by Mr. Bruno had revealed how mechanics were "purchasing" their certifications, without demonstrating hands on experience or even passing paper tests. Mr. Bruno's disclosures also contributed to the criminal conviction of Anthony St. George, an FAA-contracted "Designated Mechanic Examiner," who was sent to prison for fraudulently certifying over 2,000 airline mechanics in this scheme, which he devised. Individuals from around the country and the world sought out St. George to pay a negotiated rate and receive an Airframe and Power Plant Certificate without proper testing. After the conviction, Mr. Bruno's reexamination program, which required a hands-on demonstration of competence, resulted in 75% of St. George-certified mechanics failing when subjected to honest tests. The FAA then cancelled the program in the middle, leaving over 1,000 mechanics with fraudulently obtained credentials throughout the aviation system, including major commercial airlines.⁸

The new FAA Southern Region Acting Division Manager, Ms. Veatch, also began soliciting allegations against Mr. Bruno. Two months later, she ushered him out of his office by the most public means possible, on grounds that he was being placed under investigation for allegations of conflict of interest and sexual harassment. This created an environment of maximum intimidation for the probe of Mr. Bruno in his absence. At the same time, another whistleblower and colleague of Mr. Bruno was removed.

To illustrate the quality of charges, one was that Mr. Bruno offered to sexually service an employee whose husband had a heart attack. In reality, at Mr. Bruno's wife's request, he had offered them both his family's support to help with volunteer caretaking. Another allegation was that Mr. Bruno refused lunch breaks. In fact, he said employees had to arrange schedules so at least someone always was covering the front desk. He was accused of trying to gag union activities, when he told an alleger that she would have to get a different non-management position to be eligible for union membership. He was accused of threatening employees with a "hit list" for exercise of Equal Employment Opportunity (EEO) rights. In fact, Mr. Bruno had no such list; and the agency did not produce one to support its claims. To the contrary, he had destroyed without reading one that he received from supervisors upon coming to Orlando.

Quite simply, there was no support for the allegations against Mr. Bruno beyond the allegers recruited by Ms. Veatch. Independent witnesses stated that, rather than Mr. Bruno, the crude comments and innuendos actually reflected the behavior of the allegers themselves, who had long been an office embarrassment due to their own vulgar behavior. The audacious nature of the charges reflects classic reprisal tactics to maximize fear by making an example that whistleblowers can be fired for anything, including accusations that are oxymorons compared to reality. While wide ranging and ugly, the charges against Mr. Bruno could not withstand the most casual scrutiny.

Mr. Bruno remained off the government payroll for nine months. In the weeks prior to publicly airing his grievances before the Merit Systems Protection Board (MSPB), the FAA offered a settlement agreement loaded with retaliatory provisions, including reduced pay, replacement of his management position with runway incursion prevention duties, and forced retirement after two years. Faced with the near certainty of losing an MSPB ruling due to loopholes for retaliation sparked by carrying out his job duties, Mr. Bruno accepted the nuisance settlement. Subsequently, the FAA violated its own requirements by refusing to issue Mr. Bruno the required annual performance evaluations for his last two years work with the FAA.⁹

Mr. Bruno since has organized an "FAA Whistleblowers Alliance" whose members have set the pace for congressional oversight and hearings.¹⁰ He has played a major role as an expert for provisions in congressional air safety reform legislation. He has filed three whistleblowing disclosures on the relevant safety and security issues.¹¹ The U.S. Office of Special Counsel (OSC) found a "substantial likelihood" that each disclosure was correct and ordered an FAA investigation.¹² Despite the OSC twice flunking the FAA reports and ordering further investigation, there has been no significant corrective action. In its report conclusion, OSC stated, ". . . we note that Mr. Bruno has raised issues that warrant the Agency's consideration as it contemplates future policies and actions."¹³ Mr. Bruno

has not given up, however. Currently the FAA reauthorization bill has a provision for a new whistleblower office for which he has made significant contributions.¹⁴

Thomas Drake

Thomas Drake is a former National Security Agency (NSA) senior official and whistleblower who has the dubious distinction of being the fourth person in history (the first was Daniel Ellsberg, who disclosed the Pentagon Papers) to be prosecuted under the Espionage Act of 1917, Title 18, US Code 793(e).¹⁵ The roots were a retaliatory Department of Justice (DOJ) investigation fueled by his reports to the NSA and the Department of Defense (DoD) Offices of Inspector General (OIG) disclosing massive fraud, waste and abuse. He also reported violations of the Foreign Intelligence Surveillance Act (FISA) and the 4th Amendment. The charges are grounded in an alleged unauthorized contact that Mr. Drake had with a reporter, after he had exhausted all formal reporting and investigatory channels, including the select intelligence committees in both chambers of Congress.

Mr. Drake was first hired by the NSA as a contractor in 1989 following almost 10 years of dedicated and honorable service in the U.S. Air Force. In August 2001, he joined NSA's Signals Intelligence Directorate as a Senior Change Leader to improve the NSA's mission capabilities and internal governance, leadership and communication processes. His first day on the job was September 11, 2001. In 2002, he became the Technical Director for Software Engineering Implementation within the Cryptologic Systems and Professional Health Office. Mr. Drake, who held a Top Secret level security clearance, next served as a Process Portfolio Manager within the NSA's newly-formed Directorate of Engineering. He went on to become the NSA Chair and a visiting professor of behavioral science at the National Defense University within its Industrial College of the Armed Forces teaching strategic leadership and national security and leadership seminars, before resigning from the NSA in April of 2008.

With his broad mission and corresponding access at NSA, Mr. Drake discovered that the NSA had virtually nothing to show for what eventually was at least a \$1.2 billion dollar failed program called "Trailblazer," part of a "transformation" program intended to filter the vast amount of telephone, e-mail and Web traffic that the NSA collects and analyzes. Far worse than waste, however, were programs put in place after 9/11 that were structured to disregard and bypass existing FISA statutes and privacy rights of American citizens. Trailblazer was designed and used to sort and analyze all information accumulated, without first requiring evidence of a crime, or compliance with constitutional and other legal privacy rights such as those in the Pen Letter law. In other words, constitutional protections simply were deemed irrelevant in government decisions made post 9/11.

Amazingly, these so-called NSA transformation programs were going full steam ahead, despite the availability of an alternative "Thin Thread" program that already had been successfully tested, was ready for general deployment, and was mandated by Congress at fraction of the cost. Fundamentally, it was designed to respect constitutional rights and comply with the law. But that program had been blocked due to the preference of NSA Director Michael Hayden for Trailblazer and other programs. One reason is that Trailblazer would fund contractors who received most of the multi billion dollar increase that essentially doubled the agency's budget after 9/11.

While an effective money sponge, Mr. Drake believed that Trailblazer and related programs were a disaster for the nation, and also violated key Federal Acquisition Regulation (FAR) requirements for seeking legitimate alternatives. His research revealed that if Thin Thread had been deployed generally when ready in early 2001, it may very well have isolated and detected the 9/11 plans. Equally significant, a key Thin Thread component was privacy encryption that filtered out analysis of information unless it met judicial standards under the Foreign Intelligence Surveillance Act. In short, he believed that NSA was spending exponentially more for a system that flunked the “War on Terrorism,” but passed a secret war on America’s constitution with flying colors.

Mr. Drake’s first move was to report internally at the NSA his belief that the Trailblazer program was a wasteful failure that unnecessarily invaded Americans’ privacy. Following the procedures laid out in the Intelligence Community Whistleblower Protection Act, Mr. Drake reported to his superiors, the NSA Inspector General, the Defense Department Inspector General, and the House of Representatives and Senate Select Committees on Intelligence,¹⁶ and shared unclassified knowledge to *The Baltimore Sun*¹⁷ in connection with a congressional disclosure. He was an essential witness in a massive, two and a half year DoD OIG investigation whose still-unreleased report is said to have confirmed his charges. Mr. Drake gave literally hundreds of hours working with the DoD OIG investigators, and his active participation was well known since the investigators had set up a special office at NSA.

The Baltimore Sun published a series of articles on the NSA’s wasteful investment in the failed Trailblazer program, and abandonment of the Thin Thread program.¹⁸ The articles also explained that the Thin Thread program contained controls intended to protect Americans’ privacy and to ensure that the NSA would not spy domestically on Americans.¹⁹

Mr. Drake was placed under investigation by the Federal Bureau of Investigation (FBI) as part of the dragnet to find sources for the Pulitzer Prize-winning *New York Times* article revealing the NSA’s illegal warrantless wiretapping program.²⁰ All the key witnesses to the OIG investigation were subjected to raids of their homes. In November 2007, around a half dozen cars with a dozen FBI agents raided Mr. Drake’s home shortly after 7:00 AM. They confiscated his computers and documents, and grilled him extensively. Mr. Drake cooperated voluntarily and without counsel, because he felt he had done nothing wrong and had nothing to hide. In a series of interviews over the next five months, he tried to blow the whistle on the fraud and illegality he had been challenging, to no avail. In April 2010, Mr. Drake was indicted under the Espionage Act.²¹

The indictment alleges extensive contact between Mr. Drake and a *Baltimore Sun* reporter, though press reports indicate that the Justice Department never contacted the reporter.²² However, curiously and contrary to some media reports, Mr. Drake was not indicted for “leaking” anything to *The Baltimore Sun*. In fact, there is no crime of “leaking” in the books. Mr. Drake was not even indicted for unauthorized disclosure of classified information to the reporter. He has been indicted for the willful retention of classified information “for the purposes of unauthorized disclosure.”²³ Still, Mr. Drake is now facing the threat of decades in prison for his whistleblowing.

Thomas Drake's prosecution is an example how working through proper channels is highly dangerous beyond the employment context. Despite giving unrestrained support to the DoD OIG over a period of almost two and a half years as a material witness, his participation made him one of the prime targets for a separate "leaks" investigation that led to his public prosecution for unclassified whistleblowing on a bureaucratic betrayal of the public trust from every perspective.

Franz Gayl

For virtually his entire adult life, Franz Gayl has served the United States Marine Corps, on active duty as an infantry Marine, both enlisted and officer, and now as a civilian Science and Technology Advisor. While he was deployed in Iraq, Mr. Gayl saw first hand the deadly consequences of the refusal of the agency's procurement bureaucracy in Quantico, Virginia, when it failed to act on requests from troops in Iraq for urgently needed mine-resistant ambush protected (MRAP) vehicles, non-lethal weapons, and remote surveillance systems. Since returning from the field, Mr. Gayl has acted on what he learned, with whistleblowing disclosures that overcame the roadblocks and led to delivery of life saving equipment. In response, he has endured intense retaliation for his efforts to push a reluctant bureaucracy to better protect its own.²⁴ After multiple attempts to punish Mr. Gayl with standard personnel actions, the Corps made Mr. Gayl the subject of a retaliatory criminal investigation.

Among the most tragic consequences that Mr. Gayl disclosed resulted from delays in fielding MRAP vehicles. Going back to the mid-1990s, the Marine Corps had known that MRAPs offered far greater protection against mines than the Humvees then being relied on. Soldiers in MRAPs are at least four to five times less likely to be injured or killed by an Improvised Explosive Device (IED) blast than soldiers in armored Humvees.²⁵ In a study Mr. Gayl reported that beginning in 2005, Marine Corps officers in the field submitted urgent operational need requests for 1,169 MRAPs in order to protect their Marines and Soldiers from the IED blasts that were causing most of the U.S. casualties in Iraq. Nevertheless, the Marine Corps Combat Development Command (MCCDC) at Quantico, charged with overseeing MPRAP shipments, failed to respond to the urgent need request for roughly 19 months, from February 2005 until November 2006.²⁶ During that time, hundreds of Marines were killed and thousands were maimed due to IED blasts.²⁷ Mr. Gayl contends that officials knowingly delayed or refused the provision of urgently requested capabilities like MRAP, as the requests competed against preexisting Quantico priorities for other armored vehicles that were known to be vulnerable.

In another study, Mr. Gayl alerted his superiors and Congress to passive resistance analogous to the MRAP fiasco for an available device called the "Compact High Power Dazzler (CHPLD)" – a non-lethal weapon (NLW) technology that could have saved countless innocent Iraqi lives during escalation of force (EOF) incidents. For example, U.S. troops must make split second decisions whether persons who fail to respond to their commands at checkpoints are innocent non-comprehending civilians or insurgents ready to kill. The CHPLD would have permitted troops to temporarily dissuade individuals and oncoming vehicles, without a bullet's lethal effects against innocent civilians, as early as 2005.²⁸ Mr. Gayl first brought these issues to the attention of his Pentagon chain of command, before being deployed to Iraq in 2006. After returning to the Pentagon, and with his supervisors sitting on his warnings, he sought to raise his concerns with the Office of the Secretary of Defense (OSD). However his scheduled meeting to brief the Director, Defense Research

and Engineering (DDRE) on urgent needs at the invitation of that office was cancelled by his superiors. Mr. Gayl was concurrently and formally gagged in writing by the Marine Corps from any “outside communication on the matter.”

Undeterred, Mr. Gayl contacted Congress and the media, which triggered corrective action.²⁹ USA Today published an article that caught the attention of Defense Secretary Robert Gates, leading him to make MRAP procurement a top acquisition priority for the DoD. Later, Senators Biden, Bond, Kennedy, and Rockefeller called on the DoD to perform a complete review of how the Pentagon handles urgent wartime requests for equipment, and to begin with the Marine Corps and Mr. Gayl’s case studies.³⁰ In addition to Mr. Gates making rapid MRAP acquisition a top priority, General David Petraus thanked Gayl for identifying a discrepancy between one of the General’s expressed urgent needs, and inaction by the support establishment.³¹

Mr. Gayl’s disclosures were further vindicated by the Naval Audit Service (NAS) and the Government Accountability Office (GAO). The NAS issued a September 2007 report that found the urgent needs process at Quantico to be both ineffective and vulnerable to wasted resources, and warned, “[D]elivery of required [Urgent Universal Need Statement] requirements to Marine Corps war fighters could be delayed.” Similarly, in April of 2008 the GAO issued a report blasting the DoD’s Joint Non-Lethal Weapons Program.³² Shortly after GAO released this report, the DOD OIG requested to meet with Mr. Gayl again for an audit on the MRAP issue. In December 2008 the DoD IG audit³³ further vindicated Mr. Gayl by adopting his conclusion that the Pentagon “was aware of the threat posed by mines and improvised explosive devices (IEDs) ... and of the availability of mine resistant vehicles years before insurgent actions began in Iraq in 2003”³⁴ and that, if the Marines had not needlessly delayed action on the urgent need statement, they would have been in a better position “to mitigate the threat posed by mines and IEDs to the lives of Soldiers and Marines.”³⁵ Freed from bureaucratic passive resistance, in Afghanistan the MRAP capabilities have minimized the consequences of intensifying IED attacks, reducing the fatality rate from 80% with Humvees to 15% with MRAP’s. The result has been fewer combat deaths despite a sharp increasing in Taliban bombings.³⁶

Undeterred by Mr. Gayl’s public vindication, the Marine Corps has responded with a relentless campaign to silence the messenger. For sustained periods Mr. Gayl has endured verbal workplace harassment, assignments with threatened termination if not completed by unreasonable deadlines such as 241 tasks in 26 days, and damaging performance evaluations, to name a few.³⁷ Of the most paralyzing reprisals, Mr. Gayl has been waiting over a year and a half for renewal of his security clearance, unprecedented in his 30 year career. The delay is due to a 24 month retaliatory investigation, opened directly because of work assigned in response to his prior whistleblowing.

The retaliatory investigation was opened after the U.S. Office of Special Counsel blocked discipline for disclosures to the Inspector General and Congress, and obtained agreement for Mr. Gayl to submit further disclosures as part of his job duties.³⁸ As soon as Mr. Gayl turned in the assignment, however, his supervisor referred him for a Naval Criminal Investigative Service (NCIS) criminal investigation on grounds that a footnote referenced unmarked but somehow classified data. The Marines made this charge, although at the time the document was created its unclassified status had been approved up the chain to the commanding general in Iraq. Although Mr. Gayl was accused of criminal misconduct, the

Marines classified its report of his alleged misconduct, and refused to share it with him. Apparently he does not have a “need to know.”

Throughout this two year investigation, despite public agency challenges to his trustworthiness, Gayl maintained uninterrupted, unsupervised access to Sensitive Compartmented Information (SCI). Despite no published adverse findings or discipline, this ongoing, unresolved clearance renewal status in his security file (widely available within the government) undercuts his effectiveness and credibility.

Additional measures taken to undermine Gayl’s position include denial for further education. As a Science and Technology (S&T) advisor, Mr. Gayl’s duties require continuing education on new developments. However, since Gayl made his disclosures in 2007, all efforts to work outside headquarters have been denied, including a Congressional fellowship and Naval Postgraduate School study (twice). In 2010 he was accepted to a 10 week course at Singularity University (SU), a coveted post-graduate institution (3% 2009 acceptance rate) at the NASA-Ames research facility with curriculum in a number of areas relevant to Gayl’s S&T duties. SU attendance was denied, although Mr. Gayl personally had paid tuition and proposed attending during an unpaid leave of absence. Unwilling to give up, Mr. Gayl applied again for 2011 participation. This time the Marine Corps did not wait for him to be accepted, before telling him he cannot attend. Prior to blowing the whistle Mr. Gayl never was denied a similar request, with full tuition funding and salary paid by the Government in the line of his duties.

Just days after Mr. Gayl spoke at the National Whistleblower Assembly, where he engaged in additional protected activity reported in the media, the agency rewrote his position description, demoting him to GS-14, and removing the S&T duties for which he was hired. The justification was lack of need for the previously-indispensible S&T Advisor, which was used as a pretense to disapprove his attendance at SU. The disingenuous nature of the Command’s disapproval of Gayl’s SU was confirmed in June of 2010, when his supervisors issued him a Position Description that restored his GS-15 grade and S&T responsibilities. However, by that time the SU education opportunity was already lost.

Still not satisfied, in the summer of 2010 the Marines opened an additional “administrative” investigation after NCIS failed to uncover any crimes. The hook? NCIS’ exhaustive probe did find one item for which an allegation could be based: twice in 2008 there was an unsecure flash drive in his computer workstations, in an open classified work area that *Mr. Gayl’s supervisors who requested the investigation had failed to properly secure*. Although Mr. Gayl denies any recollection of the flash drive he is accused of employing, and which has not been traced to him, the Marines are not waiting for more evidence. His security clearance has been suspended, and he has been placed on indefinite leave without pay. His career is in a professional coma over this unproven allegation.

Without Whistleblower Protection Act coverage, he can expect to be suspended for over a year before he even has internal procedural rights to challenge the action. The latest attack has cleanly exiled Mr. Gayl from his job indefinitely by suspending his access to classified materials, placing him on administrative leave indefinitely and barring him from entering the Pentagon.

Mr. Gayl performed a significant public service to the Marines Corps mission and combat troops. To date the Marine Corps has responded with a campaign whose objective appears to be, “Never Again.” Without reform, the law provides no independent legal barriers.

Michael German

Michael German is a former FBI Special Agent of sixteen years. As an undercover agent, he twice successfully infiltrated domestic terrorist organizations, resolved pending bombing investigations and prevented potential acts of terrorism by helping to obtain criminal convictions of several would-be terrorists. Prior to his whistleblowing, Mr. German had an unblemished disciplinary record and was awarded a medal of valor from the Los Angeles Federal Bar Association.³⁹

In 2002, he was asked to assist a Tampa Division FBI counterterrorism investigation, prompted by a meeting between a supporter of an international terrorist organization and a leader of a domestic white supremacy terrorist organization. Several months after joining the investigative team, Mr. German found serious problems with the Tampa Division’s handling of the investigation, including a violation of Title III wiretapping regulations. When Mr. German reported this misconduct, the supervisor asked him to ignore what he had found. Alarmed, he reported the violation up his chain of command, as directed by FBI policy.⁴⁰

Rather than address the problems, Tampa Division officials engaged in a large-scale effort to backdate and falsify official FBI records to hide their mishandling of the terror investigation. The Tampa officials were so unconcerned about an internal FBI investigation into Mr. German’s disclosures that they actually used white-out to crudely alter some of the FBI documents.⁴¹ Mr. German was cut off from the rest of the investigative team, effectively canceling the probe before it had started.

Meanwhile, senior FBI officials took concerted steps to retaliate against Mr. German for blowing the whistle. Overlooking his previous successes, the chief of the undercover unit at FBI Headquarters told his staff that Mr. German would never work undercover again. Another proposal for an undercover terrorism operation lingered at headquarters for over a year, and was not even considered for approval by the Review Committee until Mr. German’s name was taken off the assignment.

The FBI’s Inspection Division then opened a “broad” investigation into the Tampa mishaps that in reality was a transparent effort to dig up dirt on Mr. German: “The Chief Inspector requested [that] he ‘take a look at the whole thing.’ This is how FBI managers conduct a retaliatory investigation without documenting what would be an obvious violation of whistle-blower protection laws,” Mr. German recalled.⁴²

Mr. German became the target of a probe for allegedly engaging in unauthorized travel and misusing \$50.00. However, the FBI investigators could not prove any misconduct on his part, and thereafter omitted any mention of the allegations or this focus of inquiry from their final report.⁴³ Mr. German testified to Congress: “I advised [the FBI investigators] that I considered their inquiry a retaliatory investigation and requested that they document their investigation. I also sent a letter to the Inspector

in Charge, demanding the allegations and the inquiry be documented.”⁴⁴ German took precautionary measures and provided his own documentation of the interviews to the Chief Inspector and the Justice Department OIG. Neglecting to acknowledge this evidence, the OIG issued a report⁴⁵ in 2006 denying that the probe had taken place: “[T]he OIG found nothing to indicate that the Inspection Division investigated German’s travel authorizations, his handling of case funds, or any other aspect of his conduct.”⁴⁶

Despite the Bureau’s futile efforts to discredit Mr. German, its investigation served another purpose: “[T]he FBI inspectors] told me they investigated my conduct. I took this as a warning that they would keep investigating me if I didn’t stop pressing the matter. I can’t say if it was meant to intimidate me, but it did intimidate me.”⁴⁷ With no opportunity to resume his successful counterterrorism career, and with no protection from the continuing retaliation, Mr. German resigned from the FBI in June 2004. Currently he works as Policy Counsel for the American Civil Liberties Union (ACLU) in Washington, DC.

Tamarah Grimes

Tamarah Grimes was a paralegal specialist with the Office of the United States Attorney for the Middle District of Alabama. In 2007 she blew the whistle to her supervisors on prosecutorial misconduct she witnessed during her assignment to the prosecution of several high-profile cases.⁴⁸ Her case illustrates how retaliatory investigations and national security due process loopholes can shield cover-ups of domestic political scandals.

In the prosecution of former HealthSouth chairman Richard Scrushy and former Democratic Alabama Governor Don Siegelman, Ms. Grimes provided evidence of numerous instances of prosecutorial misconduct, including communications between prosecutors and a juror during trial, tampering with two key prosecution witnesses, and theft and destruction of documents by DOJ personnel.⁴⁹ Furthermore, she brought to light the fact that the U.S. Attorney who oversaw the case, Leura Canary, had allegedly “recused herself” because her husband, a close friend of Karl Rove, was simultaneously leading a political campaign against Mr. Siegelman grounded in his prosecution. Nonetheless, Ms. Canary continued to direct the actions of subordinate attorneys in her office, including the acting U.S. Attorney Louis Franklin, even after her recusal.⁵⁰ The information Ms. Grimes provided about the prosecutorial misconduct was cited heavily in Messrs. Scrushy and Siegelman’s motions for new trials.⁵¹

After raising these issues internally on several occasions, Ms. Grimes filed a whistleblower and EEO complaint through the DOJ mandated internal procedures in July of 2007. Following DOJ’s policy which requires employees to complete its internal EEO process before making any complaint outside the DOJ to the Equal Employment Opportunities Commission (EEOC), Ms. Grimes participated in an internal DOJ mediation proceeding within three months of filing her claims. U. S. Attorney Canary, who was heavily invested in the outcome of Ms. Grimes’s whistleblower complaints of prosecutorial misconduct, attended the mediation and served as the primary decision-maker on behalf of the Justice

Department. As a Presidential appointee, Canary was the highest ranking federal official present during the DOJ mediation.

The mediator selected by DOJ to preside over Ms. Grimes's mediation was a career DOJ attorney who served as Deputy Civil Chief in an Office of the United States Attorney in a neighboring state. The mediator routinely defended the DOJ against EEO claims as part of her usual duties of employment. During confidential communications with the DOJ mediator, Ms. Grimes stated that she had kept excellent records in support of her claims. The DOJ mediator asked Ms. Grimes where these "recordings" in support of her claims were located. Ms. Grimes replied that her attorney had them. The mediator passed this information on to Leura Canary and other DOJ attorneys.

Although the confidentiality of mediation proceedings is protected by statute at 5 U.S.C. 574, press reports indicate that Leura Canary, the mediator and two other DOJ attorneys met at a local bar on the evening following the mediation proceeding for Happy Hour. After a few drinks, Ms. Canary and the DOJ attorneys speculated that Ms. Grimes could possibly have made audio tapes that might contain grand jury or other privileged information.⁵²

The following day, Ms. Grimes was asked to turn over all tapes she had allegedly made.⁵³ She replied truthfully that she had never made any tapes.

Utilizing her position as the highest ranking federal official present at the mediation proceedings, Canary immediately opened a criminal investigation against Ms. Grimes for allegedly surreptitiously audio taping DOJ employees and releasing the tapes outside the agency.⁵⁴ Ms. Grimes repeatedly, unequivocally stated that she had never made any tapes or other audio recordings, and asserted that the mediator and attorneys must have misunderstood what she meant by "records" during the mediation. Moreover, Ms. Canary had hired Grimes as a civil division paralegal. Access to grand jury material is prohibited to civil division employees under Rule 6(e) of the Federal Rules of Civil Procedure. As the hiring official, Ms. Canary knew that Ms. Grimes did not have access to grand jury material at the time she made the referral of Ms. Grimes for criminal investigation.

Ms. Grimes soon learned that defending herself was dangerous. She was accused of making false statements to DOJ investigators when she denied making any audio tape recordings. DOJ investigators contacted Ms. Grimes's attorney and threatened to search his office and subject him to criminal prosecution, unless he provided a sworn statement to DOJ implicating his client in criminal activity. He refused to cooperate.⁵⁵

The DOJ attorneys then attempted to have Ms. Grimes criminally prosecuted. However, the only evidence gathered against her were the four nearly-identical affidavits by the three attorneys (including Leura Canary) and the mediator who created the allegations in the first place. They devised the word "tapes?" on two otherwise-redacted pages of notes allegedly taken at some point during the mediation, or during the Happy Hour discussions in the bar following the mediation, as the DOJ attorneys discussed Ms. Grimes's statement to the mediator.⁵⁶

The DOJ attorneys attempted to recruit a U.S. Assistant Attorney in a neighboring district to prosecute Ms. Grimes. The neighboring Assistant U.S. Attorney denied the request, due to the lack of credible evidence to substantiate their claims that Ms. Grimes had engaged in any criminal misconduct whatsoever.

Unable to initiate a criminal prosecution of Ms. Grimes, the DOJ resorted to the last arrow in its professional quiver and claimed that her alleged fraud rendered her ineligible for a security clearance.⁵⁷ Ms. Grimes's position description required that she maintain "noncritical sensitive" qualifications as a prerequisite to someday possibly obtaining a security clearance.⁵⁸ Although Ms. Grimes position did not require access to grand jury or national security information in her capacity as a civil paralegal specialist, DOJ used the unsuccessful criminal investigation to justify yanking her "sensitive" security status, which was a prerequisite for her position, on the premise that she was no longer eligible to be afforded access to grand jury or national security information. The tactic was tailored not only to remove Ms. Grimes from federal service, but to strip her of any legal right to challenge the harassment or trigger review by the Merit Systems Protection Board of the conduct and actions undertaken by DOJ officials, including U.S. Attorney Leura Canary under the guise of "national security." The documented conduct and actions of DOJ officials, including Leura Canary in the termination of Ms. Grimes reveal outrageous, bold abuses of the merit system, abuses well hidden and carefully disguised in "national security" rhetoric designed to avoid discovery.

If this new tactic succeeds, it could mean elimination of the merit system specifically, and the civilian rule of law generally, for major portions of the civil service. That is because the requirements for a "noncritical sensitive job" can apply to virtually everyone with a federal job: any position that "could enable its occupant to bring about a material adverse effect on national security."⁵⁹ Agencies also have unrestricted authority to impose that requirement, even when an employee's job duties have never required use of classified information and there is no likelihood a clearance ever will be needed. That was the case with Ms. Grimes.

Strike three for the merit system occurred November 2009, when the Merit Systems Protection Board agreed with agencies that merit system authorities have no authority to review decisions removing "sensitive" status, because government agencies can require their employees to remain eligible for a clearance at some unspecified time in the future. In *Crumpler v. Department of Defense*,⁶⁰ then-MSPB Chairman Neil McPhie expanded a 1988 Supreme Court ruling, *Navy v. Egan*,⁶¹ excluding merit system review of national security determinations in security clearance actions, to cover everything back to the initial background investigation of applicants for "sensitive" positions. In *Egan*, the Supreme Court ruled that, where an employee was terminated as a result of a lost security clearance, the MSPB could examine only whether internal processes for clearance revocation were followed and whether a security clearance was a required qualification of the position.⁶² Chairman McPhie expanded the *Egan* loophole for merit system due process rights back to the initial background security investigation for applicants to noncritical sensitive jobs. When *Crumpler* applied the same principle to the revocation of an individual's eligibility for a clearance, it meant that the Board would no longer have jurisdiction to examine whether Ms. Grimes was stripped of eligibility in exchange for whistleblowing, or even whether she actually was required to be eligible

in order to do her job. As long as Ms. Grimes's lack of eligibility was the cause of her termination, the Board would be unable to examine any defenses or mitigating factors of her dismissal.

That could become a comprehensive cancellation of the merit system, from application to termination, for as many employees as agencies choose to exempt. At many Pentagon bases such as the one where Ms. Crumpler worked as a checkout cashier in a retail outlet, *all* civilian employees are "sensitive." At U.S. Attorney Offices, an average 57% of employees, and up to 70%, have sensitive status.⁶³ It would virtually eliminate the merit system for law enforcement personnel, including all employees at Office of Inspector General.

Fortunately, the merit system has received a reprieve. On December 18, 2009, newly-confirmed MSPB leadership vacated the decision and is reconsidering the entire doctrine.⁶⁴ Ms. Grimes's experience, however, illustrates how retaliatory investigations and national security merit system loopholes can be an effective one-two punch to eliminate those who challenge even domestic political corruption.

Gordon Hamel

Gordon Hamel worked for the federal government for three decades. Within three federal agencies he effectively blew the whistle, but with each disclosure he was put under investigation. As a result of retaliatory investigations, ultimately he was blacklisted from any federal employment or contracting position.

In 1990 Mr. Hamel was the Director of Executive Placement at the White House when he exposed illegal use of the President's Commission on Executive Exchange (PCEE) as de facto patronage for partisan political goals, such as trading junkets with certain officials for lobbying and reelection agendas.⁶⁵ Due to his disclosures about fraud, waste and abuse, President Bush abolished the PCEE on May 2, 1991 by Executive Order.^{66 67}

Within Mr. Hamel's first year at the PCEE, he had witnessed mismanagement and flagrant waste of taxpayer dollars. He cited a litany of abuses to the Deputy Director of the Office of Personnel Management; ranging from gold jewelry contracts to lengthy tours of European cities to excessive per diems. When the Deputy Director failed to respond to his disclosures, Mr. Hamel took his concerns to the Office of Personnel Management (OPM) Office of the Inspector General.

Mr. Hamel soon discovered the IG was preoccupied buttressing PCEE management defenses, and hostile to receiving evidence supporting his charges. At the request of then OPM Director Connie Newman, her personal counsel conducted an independent review of Mr. Hamel's allegations.⁶⁸ The review validated them, and the OPM Director ordered wholesale policy changes affecting the PCEE. Despite these findings, the OIG decided to conduct a spotty, superficial whitewash of Mr. Hamel's allegations that absolved the Commission of responsibility.⁶⁹ Meanwhile, the Commission's Director had requested OPM's Inspector General to "conduct a full investigation of possible abuse by Mr. Hamel of his position and professional responsibilities."⁷⁰ Within hours, Mr. Hamel was suspended and removed from his office by armed Federal Protection Service police officers.⁷¹

A congressional hearing into PCEE mismanagement later found that the sole purpose of the investigation on Mr. Hamel was retaliation for his whistleblowing. Chairman Lantos of the House Subcommittee on Employment and Housing captured the paradox of killing the messenger:

I am deeply concerned that after an employee goes to the Inspector General's office to complain about waste and mismanagement...[s]uddenly the whistleblower, the accuser, becomes the accused... This sends a chilling message to other Federal workers who observe waste, abuse and mismanagement. It tells federal employees that if you blow the whistle it is you, rather than the agency officials, who may wind up in the penalty box.⁷²

Mr. Hamel's disclosures triggered congressional investigations confirming widespread Commission abuse.⁷³ The evidence was so striking, that on the eve of another congressional hearing and just before Mr. Hamel's Whistleblower Protection Act appeal was scheduled to begin, then-President George H. W. Bush abolished the agency and mooted out the lawsuit with its threat of more public exposure.⁷⁴ There was no job to which Mr. Hamel could return.

After Mr. Hamel lost his career position at the PCEE, he found work at the Department of the Treasury, (DOT) Office of the Comptroller of the Currency (OCC) as a contracting officer. He soon discovered that akin to the PCEE, the OCC was in serious violation of federal procurement regulations, and commonly used sole source and sweetheart contracts.⁷⁵ When Mr. Hamel brought the contracting violations to senior executives at the OCC, he was ignored. They claimed that the OCC did not have to comply with federal regulations, because it was an independent agency. His first line supervisors then alleged that he was a malcontent, citing similar allegations that he made at his previous place of employment, and directed staff to withhold information from Mr. Hamel relating to the divisive contracts.⁷⁶

Mr. Hamel took his complaint to the regional Treasury Department's Inspector General, who conducted an investigation and confirmed his allegations.⁷⁷ However, the regional IG soon found herself at odds with headquarters on her findings.⁷⁸ Unwilling to alter them, she was demoted and reassigned.⁷⁹

The Treasury Inspector General for headquarters then began two separate retaliatory investigations against Mr. Hamel, acting on OCC General Counsel allegations that Mr. Hamel was engaging in acts of bribery, and that he did not consult the OCC prior to making a disclosure to the regional IG.⁸⁰

Unable to substantiate these allegations, the agency sought Mr. Hamel's obedience through scare tactics directed at him and his family. Two Treasury IG investigators went to Mr. Hamel's house and warned him to walk away from the case. When Mr. Hamel asked why he was being investigated, the armed agents responded that they were on "special business." Mr. Hamel and his family recently had moved into the home and still had unpacked boxes in sight. One of the agents commented that "it would be a shame for you to lose this lovely house." On several occasions the agents threatened

criminal prosecution if Mr. Hamel did not cooperate and drop his charges against the agency. However, the investigations proved futile for the Treasury Department, because there was no evidence of misconduct.

Aggrieved by the harassment that Mr. Hamel and his family were put through and unable to address these injustices internally, he sued the agency and won a substantial out of court agreement and a superior performance rating. However, the agreement required him to leave the Treasury Department in 1997.⁸¹

After Mr. Hamel left, OCC executives continued to withhold the true state of affairs from the Comptroller. When the Comptroller, a presidential appointee, was contacted by Congress and asked to provide information about the agency's contracting practices, he responded that the documents did not exist. After Mr. Hamel learned that the Comptroller was unaware of the truth, he briefed the Comptroller's Chief of Staff and provided him contemporaneous documentation that proved the long standing policies at the OCC were in violation of federal procurement regulation.⁸² He also identified the senior executives who had been covering it up. Mr. Hamel's disclosures lead to the resignations of several senior career federal executives.⁸³ As a result, he was offered reemployment at the OCC with a raise in salary.⁸⁴ However, this reemployment also came with the stipulation that Mr. Hamel would resign from his position at the agency when he became eligible for retirement in 2001.

As his retirement date approached, Mr. Hamel got a position at the Department of Housing and Urban Affairs (HUD) as a Senior Management Analyst in the Administrative Branch of the Departmental Enforcement Center. Within months Mr. Hamel became aware that then-HUD IG nominee Kenneth Donohue was improperly involved in federal procurement activity, and he again blew the whistle. Due to Mr. Hamel's disclosures Mr. Donohue was stripped of his contracting function in his interim HUD consultant position.⁸⁵ Mr. Hamel also reported false statements and abuse of authority in the HUD OIG prosecution of a former special agent, which was later substantiated by a U.S. District Court Judge.⁸⁶

Despite Mr. Hamel's substantiated disclosures, Mr. Donohue was confirmed as HUD IG in 2002. In a renewed attempt to discredit Mr. Hamel, HUD senior officials directed a HUD IG attorney to sign a false statement involving communications between herself and Mr. Hamel.⁸⁷ When she declined and responded with two accurate accounts of their communication that could not be used as grounds for an investigation, a HUD IG investigator wrote his own sworn statement, recorded as a "Memo to the file," to sully Mr. Hamel's name.⁸⁸ Shortly thereafter, the IG opened a 30 month investigation "to resolve whether Hamel misrepresented his disability status on his HUD employment application."⁸⁹ The IG's general counsel also used false accusations that Mr. Hamel had supplied confidential information to a whistleblower advocacy organization as grounds for the investigation. HUD IG officials entered Mr. Hamel's office and seized his computer, time and attendance records, health records, and banking records. However, because the OIG could not substantiate its claims, the investigation was never publicly released.⁹⁰

In 2003 the U.S. Attorney's Office declined a request by the HUD OIG to prosecute Mr. Hamel. This did not lead to any pause in the OIG's probe. Exhausted by the nonstop investigations, Mr. Hamel

retired in January 2004. Undeterred, the OIG continued to investigate him for 10 months more. The IG was ultimately unable to produce a credible attack; it did, however maintain a dossier that would serve a similar purpose. In 2008 Mr. Hamel was denied employment as an authorized Personnel Security Background Investigator for an information technology (IT) company contracted by OPM. The OPM determined Mr. Hamel unfit for a security clearance required by the position, based solely on the HUD OIG Report of Investigation, and after he was trained and certified as an authorized Personnel Security Background Investigator and had been on the job for over a year.⁹¹

David Lee

In early 2009 David Lee, a Technical Qualification Program Coordinator for the Department of Energy's (DOE) National Nuclear Security Administration (NNSA) Los Alamos Site Office (LASO), learned that approximately 2.2 pounds of weapons-grade plutonium was missing from the Los Alamos National Laboratory (LANL).⁹² The missing plutonium and larger questions it raised were documented in a February 2009 internal DOE letter marked "Official Use Only" (OUO).⁹³ The following day, DOE sent a letter to Los Alamos staff, "reminding" them that the release of sensitive information is not authorized without the approval of a supervisor, adding that "this reminder is not intended to inhibit the ability of individual employees to exercise their rights under whistleblower protection programs"⁹⁴

However, the letter had no indication of a classified marking, and two days later it was disclosed on the website of a government watchdog group, the Project on Government Oversight.⁹⁵ (POGO) Based on suspicions by Mr. Lee's supervisor that he had provided the letter, he was put under "leak investigation" and placed on Administrative Leave for seven months.⁹⁶

The dispute began in early February 2009, when the NNSA sent a Special Review Team to assess Los Alamos' Material Control and Accountability program housed in LANL. As documented in the letter, the team's findings raised concerns about the program's ability to perform its primary objective: "to deter and detect theft and diversion of special nuclear material," and "conclusively determine control of special nuclear material." More troubling, the memo questioned the capacity of personnel in critical positions needed to recognize and resolve the plutonium discrepancy and actively inventory nuclear materials.⁹⁷ Perhaps most startling, the memo was triggered by a Los Alamos National Security (LANS) January 2009 Incident of Security Concern "involving an inventory difference (ID) that exceeded alarm limits"⁹⁸ — an ID of approximately one kilo of unaccounted for plutonium.⁹⁹

The special nuclear material (SNM) involved in this episode had to be accounted for down to the nearest 1 gram. Since 0.5 grams can be rounded up to 1 gram, the standard of accountability for the SNM effectively was to the nearest 0.5 gram. This episode involved an SNM inventory difference of approximately 1 kg (2.2 lbs) = 1000 grams which strongly indicated that LANL's Material Control & Accountability (MC&A) system was drastically out of compliance. LANL's MC&A accounting inventory practices were so poor that LANL could actually be missing kilogram amounts of SNM, and not know it or know where it might be located.

In February 2009 when the memorandum appeared on POGO's website, public alarms were raised.¹⁰⁰ Public awareness of the missing nuclear materials triggered a larger concern over systemic flaws in controlling the U.S. stockpile of weapons materials. A former nuclear weapons expert for the Energy and Defense Departments posited, "You wonder if Los Alamos doesn't have good statisticians and good inventory systems, who would?"¹⁰¹ In response to the incident, two managers responsible for the Accountability program were removed from their positions¹⁰² But LASO managers seemed more concerned about the letter's source than the public safety stakes from hundreds of nuclear bombs worth of missing plutonium. They promptly commenced a "leak investigation" to ascertain who sent the memo to the watchdog group. Mr. Lee's supervisor called him into his office, and asked him a series of scripted questions about his knowledge of the letter.¹⁰³

From February 2009 through October 2009 Mr. Lee remained under investigation, and his security clearance was suspended. Unable to perform official job duties, he was placed on Administrative Leave and forced to fill up space at home on the taxpayer's dime.

With the exception of Mr. Lee's initial questions regarding the memo leak, he was never questioned further during his eight-month investigation, and no evidence was placed on a record he could review that warranted his Administrative Leave. Unable to fire Mr. Lee, LASO reassigned him to another agency office in Albuquerque.¹⁰⁴

Robert MacLean

Until 2006 Robert MacLean was an honorably discharged military veteran, a 10-year federal law enforcement officer as a U.S. Border Patrol Agent and a U.S. Department of Homeland Security (DHS) / Transportation Security Administration (TSA) / Federal Air Marshal (FAM) with an unblemished record. In late July 2003, he successfully blew the whistle on agency plans to secretly neutralize budget shortfalls from "buddy system" pork barrel contracts by canceling long distance air marshal coverage. Most startling, the plan was scheduled to take place during a suicide terrorist hijacking alert for a September 11, 2001 (9/11) style rerun on a more ambitious, international scale. After public outcry and congressional outrage, DHS withdrew the order, and said it all had been a mistake. Three years later, however, the agency fired Mr. MacLean by retroactively designating the previously-unrestricted text message in his whistleblowing disclosure as Sensitive Security Information (SSI), which is one of many secrecy categories created by agencies for unclassified information. His case is pending before the full Merit Systems Protection Board in Washington DC.

In late July 2003, TSA had received intelligence warnings from the Saudi government, Department of State, and the FBI of an imminent terrorist suicide hijacking threat for a 9/11 rerun against a series of American and European cities. It was so severe that all FAMs were mandated to attend unprecedented, one-on-one threat briefings in their field offices, regardless of their duty status. Years later, DHS and CIA Inspector General reports confirmed the plans that were subsequently foiled. On July 28, 2003, however, Mr. MacLean also learned about a surreal obstacle to U.S. government defenses against the terrorist plot. Due to a budget shortfall caused by the suspect contract spending, 60 days of FAM coverage would be canceled from August 2, 2003 until the fiscal year ending September 30, 2003 for

the highest risk, long distance flights. These flights were chosen because they required the extra cost of overnight accommodations at commercial hotels. These were the type flights attacked on 9/11, December 22, 2001, and December 25, 2009 -- all of these U.S. flights had no Federal Air Marshals onboard.¹⁰⁵ According to the DHS's July 26, 2003 suicide hijack warning, they also were the same flights targeted in Al-Qaeda's foiled plan.¹⁰⁶ He protested to a supervisor, and three DHS Office of Inspector General (OIG) field offices, all who declined to act and said he should drop the issue.¹⁰⁷

Mr. MacLean then disclosed to a media representative the TSA text message canceling coverage. Curiously, TSA chose to send the unmarked text message to FAMs' standard unsecured cellular phones instead of their multimillion dollar encrypted and password-protected smart-phone system. Other media quickly picked up the story, which spread and sparked outraged bipartisan congressional protests, as well as a Rose Garden press confrontation of President Bush. Less than a day after the initial news story and five days before implementing its plan to eliminate coverage, the TSA canceled it, publicly explaining that its orders to every FAM in the country had been "a mistake." Immediately, TSA management began an unauthorized investigation under the USA Patriot Act to ferret-out the "leaker."¹⁰⁸ The probe was unsuccessful at the time.

In September of 2004, Mr. MacLean stepped up his anonymous whistleblowing on national television to challenge institutional exposure of undercover agents, in support of public critic Frank Terreri.¹⁰⁹ TSA managers began another retaliatory investigation in which he identified himself to internal affairs investigators as the source for the July 2003 whistleblowing disclosure. Mr. MacLean later discovered through a Freedom of Information Act (FOIA) request that he and Frank Terreri, another FAM whistleblower, were the subjects of a 182-page investigative report by then-FAMS Director Quinn requesting the DHS Inspector General conduct a criminal investigation.¹¹⁰

During the investigation, the Federal Air Marshal Service (FAMS) was under the purview of Immigration and Customs Enforcement (ICE). Former director for the ICE Joint Intake Center Matthew Issman and subsequently Assistant Inspector General for Treasury, tasked with overseeing the investigation, stated in a letter to Congress that "Director Quinn's main focus was to revoke [Robert MacLean and Frank Terreri's] security clearances, which he actually did in one case... a grave act that would eventually result in their terminations." He further recounted, "Director Quinn kept explaining to [ICE Office of Professional Responsibility (internal affairs)] of how 'slow' our investigations were and insisted that we act faster, and used the security clearance revocation to get around this."¹¹¹

Despite FAMS management having knowledge of all Mr. MacLean's disclosures, for several months he was clear to fly armed air marshal missions. However, in September 2005 he was placed on administrative leave pending an "Unauthorized Disclosure of Sensitive Security Information" charge, and two other public disclosure charges that were not sustained. While waiting for his termination notice, FAMS management continued to communicate with Mr. MacLean and grant him access to classified information through its secure Internet portal.

Mr. MacLean's FOIA request also yielded a response by the DHS OIG to Director Quinn's investigative referral memorandum, asserting that "no criminal activities nor serious misconduct issues

are alleged; therefore these allegations are best addressed internally by the FAMS senior management.”¹¹² This conclusion precluded credibility for a clearance action. However, by also advising FAMS management to take whatever “corrective program and/or employee disciplinary action” it deemed appropriate, the DHS/OIG gave management a green light to continue targeted harassment against MacLean.¹¹³

In April 2006, the TSA fired Mr. MacLean on grounds that he had disclosed SSI in his disclosure made in July 2003. The TSA justified its position through an ad hoc order issued three years after his disclosure, and four months after his termination, that retroactively labeled the text message Mr. MacLean used as evidence as SSI. The FAMS investigation against Mr. MacLean, paired with his termination, have left him blacklisted and subsequently unemployed and on the verge of bankruptcy.

Jesselyn Radack

Jesselyn Radack began working for the Department of Justice through the Attorney General’s Honor Program after graduating from Yale Law School.¹¹⁴ After four years practicing constitutional tort litigation, she moved to the newly-created ethics unit, the Professional Responsibility Advisory Office. Little did she know, she would soon be placed in the middle of an ethics battle involving “American Taliban” John Walker Lindh, the Department of Justice and FBI -- a battle that would ultimately result in the termination of Ms. Radack’s career at DOJ, criminal investigation, bar referral, and placement on the “No-Fly” List.

On December 7th, 2001 Ms. Radack received a call from a DOJ counterterrorism prosecutor, asking her advice on the legality of a potential interview of John Walker Lindh by the FBI, in the absence of Mr. Lindh’s attorney. She was told unambiguously that Mr. Lindh was represented by counsel. Ms. Radack advised strongly against such an interview, both over the phone and through email, because it would be a “pre-indictment and custodial overt interview, which is not authorized by law”¹¹⁵. She was informed three days later that the interview had taken place in spite of her legal advice.¹¹⁶

Shortly thereafter, Ms. Radack was handed an unfounded, debasing performance review from her supervisor, who had recently given her a promotion and merit bonus. She was encouraged to find another job, lest the negative review be placed in her permanent file. Ms. Radack was being blackmailed by her supervisors at the DOJ for warning against departmental misconduct.¹¹⁷

When later asked by the Lindh prosecutor to verify that he had all of her e-mails on Lindh, Ms. Radack was shocked to find that -- 1) a discovery order that had been deliberately concealed from her even though she had responsive documents, and 2) her office had turned over only two of her more than dozen e-mails. She checked the hard-copy file, and found it still contained only two innocuous e-mails, and not the ones concluding that the FBI had committed an ethics violation in its interrogation of Lindh. Fortunately, with the help of technical support, Ms. Radack was able to recover most of the missing e-mails from her computer and submitted them to her supervisor, who, quite assertively, insisted that the supervisor would “handle” the matter. Dismayed by the Justice Department’s professional and ethical misconduct, Ms. Radack resigned from her position that day.¹¹⁸

Publicly, the Justice Department continued to assert it had never taken the position that Mr. Lindh was represented by counsel. Former Attorney General John Ashcroft concluded that “Lindh’s rights were carefully and scrupulously honored,”¹¹⁹ which Ms. Radack knew to be untrue. She believed DOJ would not have the temerity to make public statements contradicted by its own court filings, if it had indeed turned over her e-mails to the judge.¹²⁰ After hearing a *Newsweek* reporter repeating the Justice Department’s position at face value, Ms. Radack disclosed her salvaged emails to the magazine. They were promptly published, raising questions about the validity of Mr. Lindh’s confession, which lay at the heart of his prosecution. His confession was obtained in the absence of a lawyer, under torturous conditions including sleep deprivation and pain.¹²¹ An accurate account of Mr. Lindh’s case was especially significant, because his treatment foreshadowed what was to come in terms of institutionalizing torture as an interrogation technique, with implications for the rule of law domestically and abroad. In Ms. Radack’s words, “If it happens to John Walker Lindh, a white American --and it happens to me, a white, educated U.S. citizen--then you can only imagine the plight of people in this country who are Arab or Muslim, who are immigrants, who are poor, and who don’t speak English.”¹²²

The Department of Justice commenced an immediate, Kafkaesque criminal investigation against Radack, based on charges which were never explained to her. These investigations began when DOJ targeted Radack’s new job at a private DC law firm. In October of 2002, a leading attorney at Radack’s new firm asked for her resignation due to “circumstantial evidence” brought forward by the DOJ.¹²³ Department officials had contacted Ms. Radack’s new employers and insinuated that they had just hired a criminal who wasn’t to be trusted. Rather than resign from her new position or sign a false, demeaning statement of guilt, Radack accepted an “indeterminate, unpaid leave of absence” and was forced to look for a new position.¹²⁴ She sought and obtained unemployment compensation, which the firm contested with the assistance of the government. In 2003 Ms. Radack was placed on the “No-Fly List” for no reason, and only discovered that she was on such a list after being subjected to secondary security screening before almost twenty flights.

In January 2003, the Inspector General’s office informed Ms. Radack that she was being referred for criminal prosecution, but would not define the charges. This formal investigation was suddenly and suspiciously dropped eight months later, but nevertheless inflicted irreversible damage to Ms. Radack’s professional career and legal reputation. While the Department of Justice abandoned the official criminal investigation, it began using the leftover investigative file in further attempts to ruin her legal career. It filed charges with the Washington DC and Maryland bar associations, based on a secret report to which Ms. Radack did not have access, alleging that she had engaged in legal misconduct by violating the attorney-client privilege when she divulged information to the press. Ms. Radack cited the Whistleblower Protection Act, and the Maryland bar dismissed the charges. At 31 weeks pregnant, Radack was rapidly dropping weight due to the excessive and constant stress brought on by her relentless persecutors.

In January 2004, Radack acknowledged for the first time that she had been the anonymous DOJ source for *Newsweek*. She came forward with this information through one of her attorneys, who made a request that the judge who presided over the Lindh case unseal the Inspector General’s investigation of the *Newsweek* article. The DOJ complied, but stated to the press that Ms. Radack’s claims of

Departmental wrongdoing were based on “speculation and inaccurate and incomplete information.”¹²⁵ The resulting report that was finally unsealed confirmed the meticulous steps that the DOJ took in order to ruin its former employee’s career.¹²⁶ The government’s pretense: Ms. Radack acted unethically by pointing out that the DOJ was acting unethically.¹²⁷

Ms. Radack continued to struggle in her quest to find work in her field until 2006, when she began representing whistleblowers in *qui tam* (False Claims Act) cases for now-Congressman Alan Grayson (D-FL). In 2008, she became the Homeland Security Director for the Government Accountability Project in Washington, DC.

Upon learning of the Department of Justice’s retaliation against Radack, the late Senator Edward Kennedy noted: “Ms. Radack was in effect fired for providing legal advice on a matter involving ethical duties and civil liberties that higher-level officials at the Department disagreed with”.¹²⁸ Regarding her former employers, Radack explains that the DOJ tried to slander her personal reputation. “They called me a traitor and a turncoat; a terrorist sympathizer. That is what unnamed Department officials told the *New York Times* about me.”¹²⁹ Although the criminal investigation closed with no charges ever being brought, bar charges are still pending against her in DC eight years later.

George Sarris

George Sarris, a senior civilian Air Force aircraft mechanic with 30 years experience, in 2006 raised serious maintenance concerns at the Offutt Air Force Base (AFB) with 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 causing national security breaches.¹³⁰ After Air Force management ignored these concerns for years when raised through the chain of command, Mr. Sarris went to Congress, the Department of Defense Inspector General hotline and the media to get them addressed.¹³¹

In early 2006 Mr. Sarris disclosed to his civilian and military managers his maintenance and national security concerns.¹³² With no response in sight, and having experienced reprisals for previously reporting serious maintenance discrepancies, Mr. Sarris requested a Whistleblower Protection Letter from the Office of Senator Charles Grassley. In exchange for the Whistleblower Protection Letter, Mr. Sarris would provide a 77 page unclassified lawful disclosure to Senator Grassley.¹³³ A Whistleblower Protection Letter was provided to Mr. Sarris in care of the Senate Finance Committee in October 2008.¹³⁴ Mr. Sarris reciprocated by providing his entire disclosure to the Office of Senator Grassley, as well as Mr. Leonard Trahan, the director of the DOD OIG Hotline. The DOD OIG subsequently directed him to the Air Force OIG.

Mr. Sarris quickly found that the Air Force OIG was not acting impartially in its investigation, because it immediately claimed that Mr. Sarris stole government property.¹³⁵ He “stole” items from the trash that evidenced the 55th Wing’s failure to replace outdated fuel, hydraulic, and emergency system hoses

as required by the prescribed technical data. Some hoses were 30 years beyond their allowable service life, and would still be in use today had it not been for Mr. Sarris' actions.

Mr. Sarris also identified grossly outdated and inaccurate technical data utilized in maintaining the aircraft assigned to Offutt AFB. His disclosures contributed to a September 2007 Comprehensive Air Force Technical Order Program Review which described the technical data as "marginal to poor".¹³⁶ The incorrect technical data can lead to inconsistency and danger in maintenance, because mechanics are forced either to use outdated and inadequate instructions following aircraft upgrades, or use their experience to guess how to maintain or fix newly installed equipment. Mr. Sarris also identified high pressure air storage bottles in the RC-135 aircraft that were overdue for inspection by 17 years.¹³⁷ If these bottles were to rupture, it could interfere with the flight controls, the aircraft electrical systems, the aircraft pressurization system, or even blow a hole in the fuselage, as occurred on a Qantas 747 flight carrying 365 passengers that was forced to make an emergency landing.¹³⁸

In addition, Mr. Sarris identified active fuel hoses 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.¹³⁹ Replacement of these same hoses was also required by a Time Compliance Technical Order (the equivalent an FAA Airworthiness Directive), but had gone overlooked by previous generations of mechanics and managers.¹⁴⁰

Sarris' claims were substantiated by four of his co-workers – all of whom asked not to be identified for fear of reprisals, according to the *Kansas City Star*.¹⁴¹ The Air Force has a disturbing history of scapegoating mechanics for easy-to-make mistakes that were previously identified but never corrected through training manuals, recalls and warnings.¹⁴² In the case of Mr. Sarris, he faced retaliation for identifying the errors, and then speaking out when the Air Force refused to take corrective action.

Since Mr. Sarris went public, many of his concerns have been validated and corrected. The technical data is being rewritten, the Air Force eliminated the use of high pressure air storage bottles and moved to a different system, and the active fuel hoses up to 15 to 30 years past their service life were replaced.¹⁴³ In short, he has made a real difference already. But he has paid a severe price to date – his career. As Mr. Sarris told the *Kansas City Star*, "The culture at Offutt is to talk about safety, but don't act on it, or you will end up like me."¹⁴⁴

The Air Force Inspector General made Mr. Sarris the primary target of its investigation, rather than his allegations. The IG accused him of "theft" of government property -- the unclassified evidence Mr. Sarris took from a trash bin that proves his charges.¹⁴⁵ His base commander ordered further investigation based on a litany of allegations that Mr. Sarris is a risk to base security; most notably that he allegedly expressed suicidal ideations; that he said would "get" his accusers; and that he took photographs within a secured area using his personal camera, despite the fact that such a practice was commonplace.¹⁴⁶

Based on the preliminary findings regarding these alleged breaches of security, Mr. Sarris 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 was eventually transferred to the base gymnasium

where his duties include assembling gym equipment and cleaning machines.¹⁴⁷ More than 16 months after his security clearance was suspended, Mr. Sarris remains in federal employment limbo while his suitability for clearance is reviewed by the Air Force Central Adjudication Facility. Mr. Sarris continues to work in the base fitness center performing menial tasks.¹⁴⁸

Senator Grassley wrote a letter on behalf of Mr. Sarris in 2008, warning that by assisting with a Congressional investigation, he was protected from any form of retaliation.¹⁴⁹ Still, Mr. Sarris' working conditions have not improved and he is unable to perform maintenance work.

Frank Terreri

Frank Terreri was one of the first federal law enforcement officers to sign up for the Federal Air Marshal Service, also out of a sense of patriotic duty after the September 11 tragedy. For over two years, he made recommendations to better meet post-9/11 aviation security demands.¹⁵⁰ However, because he was regulated by a DHS/TSA departmental directive that prohibited FAMS employees from "making any public statement concerning the FAMS," TSA was able to derail the public safety concerns he was raising. Instead, it launched four investigations against Mr. Terreri.¹⁵¹ Mr. Terreri's law enforcement career began in 1990, and he never received, or even had proposed, disciplinary action until the FAMS began investigating him for blowing the whistle.

Mr. Terreri made several attempts within the agency to address concerns about aviation security. In two letters to the FAMS director, he detailed security lapses within TSA.¹⁵² Also acting on behalf of 1,500 other air marshals as FAMS Agency President for the Federal Law Enforcement Officers Association (FLEOA), Mr. Terreri challenged 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 at the gate area, and board prior to and in front of all other passengers, sticking out like sore thumbs for all to identify.

Disregarding normal law enforcement practices, the agency had all the agents maintain their undercover locations in the same hotel chains, where they were required to present confidential identification to civilian hotel employees in order to receive the "Federal Air Marshal Rate." They even were promoted on marquees and the internet as "Customers of the Month." Mr. Terreri also challenged FAMS management's endorsement of at least six national news segments that revealed the methods agents use to respond to a hijacking – which could provide terrorists a tactical advantage during a hijacking.¹⁵³

Instead of addressing Mr. Terreri's security concerns, FAMS management attacked the messenger. First, FAMS Director Quinn sent a team of supervisors to his home, took away his duty weapon and credentials, and placed him on indefinite administrative leave. Then, at Mr. Quinn's directive, headquarters initiated a series of four uninterrupted retaliatory investigations.¹⁵⁴ At one point, Mr. Terreri was being investigated simultaneously for sending an alleged "improper email to a co-worker,"

“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.¹⁵⁵

The goal of the probes was to yank Mr. Terreri’s security clearance. As Assistant Inspector General for Treasury Matthew Issman, who fielded the allegations for ICE/OPR at the time, wrote to Congress in 2009, “I was incredulous at the steady stream of allegations from Director Quinn and his Assistant Director Kent Jeffries, requesting investigations of FAM Terreri and other vocal FAM FLEOA Agency Chapter Vice Presidents for frivolous charges.”¹⁵⁶

All of these charges were eventually deemed “unfounded” by DHS investigators, and Mr. Terreri’s record was expunged. However, FAMS didn’t bother to inform Mr. Terreri or take him off administrative “desk duty” for over six weeks, until the day after the ACLU filed a lawsuit on his behalf.¹⁵⁷ In 2006 The Thomas Jefferson Center for the Protection of Free Expression awarded DHS the “Jefferson Muzzle,” for “seeming to give higher priority to workplace decorum than to the safety of air travelers, and severely inhibiting the free expression of federal employees who are best positioned to observe (and inform others about) potential security risks”¹⁵⁸

Mr. Terreri, along with Robert MacLean and other whistleblowing air marshals, made a difference. The U.S. Office of Special Counsel found a substantial likelihood that his whistleblowing charges were correct.¹⁵⁹ As discussed earlier, the House Judiciary Committee issued a report confirming their concerns, and significant corrective action was instituted to restore rational security procedures. While the chain witch hunts against Mr. Terreri ultimately failed, however, they neutralized him and left a cloud hanging over his family for years. In the meantime, his miseries were a highly visible warning to all other would-be FAMS whistleblowers. His case further illustrates the havoc agencies can wreak merely by *opening* a retaliatory investigation, whether or not there is any subsequent formal personnel action.

Unlike many whistleblowers, a TSA change in leadership has meant that Mr. Terreri could resume a meaningful career, and he has recently been promoted. His nightmare under repressive, inept agency leadership demonstrates the necessity for clear rights against bad faith retaliatory investigations. Terreri’s case also illustrates the necessity for rights to defend against retaliatory probes, *before* they result in formal discipline. Witch hunts are an intrinsic threat to the merit system.

Dr. Robert Van Boven

In 2007, Dr. Robert Van Boven, a distinguished neurologist, was recruited by the U.S. Department of Veterans Affairs (VA) to become the Director of the VA’s new Brain Imaging and Recovery Laboratory (BIRL) for Central Texas Veterans Health Care Services (CTVHCS).¹⁶⁰ The lab was to serve as the sole dedicated VA center in Texas for investigation and research necessary to ensure effective diagnosis and treatment by the VA of soldiers who have suffered traumatic brain injuries while in service.¹⁶¹ Unfortunately, the VA was forced to close this lab just two years later, compromising the well being of hundreds of thousands of servicemen and women returning from the wars in Iraq and Afghanistan, and putting an end to a lengthy retaliatory campaign against Dr. Van

Boven.¹⁶² This campaign included actions ranging from a lengthy retaliatory investigation to reduction of research time to involuntary reassignment, eventually culminating in Dr. Van Boven's termination; all in reprisal for his steadfast efforts to uphold a sacred pledge helping wounded warriors with brain injury, and to safeguard against gross fraud and mismanagement of millions of dollars in allocated funds.¹⁶³

Traumatic brain injuries (TBI) constitute a rapidly growing health-care crisis among today's returning veterans, affecting nearly one in five soldiers deployed for combat in the wars in Iraq and Afghanistan, or, an estimated 429,000 U.S. veterans.¹⁶⁴ Because TBI has many common symptoms with post-traumatic stress disorder (PTSD), it is often misdiagnosed due to a lack of reliable tests, and there is currently no treatment for these wounded warriors, leaving them at risk of becoming the next generation of homeless veterans.¹⁶⁵

In 2002, the VA and the University of Texas entered into an agreement establishing the Brain Imaging and Recovery Laboratory, which was to serve as a center for “investigation of brain mechanisms of cognition and motivated behavior,” providing “knowledge critical to understanding the etiology, treatment, and prevention of neuropsychiatric disorders and substance abuse.” Under Dr. Van Boven’s leadership, the program was to focus on the mission to “discover and generate new knowledge about the mechanisms of brain injury and develop novel treatment to improve brain recovery” benefiting more than 100,000 wounded soldiers.

Soon after beginning his employment in 2007, Dr. Van Boven discovered that some \$2.1 million in funds earmarked by the VA for the Center had been spent with no discernible result.¹⁶⁶ This gross waste amounted to nearly a third of its total funding.¹⁶⁷ Furthermore, he discovered that this pattern of serious waste and mismanagement was continuing, with over \$30,000 being spent each month on invalid research by unqualified personnel. The “principle investigator” had no research experience or qualifications. A semi-retired consultant who was brought in to teach the “principle investigator” how to conduct his research was allocated to the lab only 8 hours each week, yet he was billing an average of 35 hours per week. Together, these contractors spent \$120,000 in scanner time over seven months.¹⁶⁸ Their project however, bore no relation to the needs of veterans, no relation to the mission of the lab, and had produced no results whatsoever.¹⁶⁹

Dismayed, Dr. Van Boven reported these findings; first to senior officials responsible for the apparent misdirection of agency resources, and later to the chairman of the agency's Research and Development and Institutional Review Board committees, the VA's Office of Inspector General, and the VA's Office of Research Oversight.¹⁷⁰ These findings were also reported to the Office of Special Counsel and the media.¹⁷¹ In making these disclosures, Dr. Van Boven engaged in activity protected by the Whistleblower Protection Act.

He first reported his findings in September 2007 about the ongoing wasteful research expenditures to Dr. Paul Hicks, and suspended the consultants’ billing and research work within two weeks.¹⁷² In response, Dr. Hicks promptly stripped Dr. Van Boven of authority over expenditure of the lab's funds.¹⁷³ Dr. Van Boven continued making these protected disclosures and, in December 2007, managers decided to reassign and place him under the direct supervision of Dr. Hicks, marking the first

step towards his eventual removal from the lab and termination.¹⁷⁴ Rather than addressing Dr. Van Boven's concerns, management escalated the retaliation, deciding in January 2008 to remove him as director of the lab and reassign him to the Medical Service to work exclusively at the Austin Outpatient Clinic.¹⁷⁵

Despite facing this retaliation, Dr. Van Boven continued to disclose his findings and concerns to agency leadership. In response, the retaliation against him continued to escalate. On February 4, 2008, just three days after Dr. Van Boven submitted a grievance protesting harassment, abuse of power, and senior management misconduct by CTVHCS officials in suppressing his disclosures, Dr. Sherwood, the CTVHCS chief of staff, requested that an Administrative Board of Investigation (ABI) be empanelled to investigate and take up charges against Dr. Van Boven.¹⁷⁶ This decision began a process which eventually led to a Summary Review Board decision calling for termination of Dr. Van Boven's employment with the VA.¹⁷⁷

The ABI was initially tasked with investigating both the grievances made by Dr. Van Boven, and a series of allegations made against him by the CTVHCS leadership, including allegations involving his procurement of a door name tag and allegations that he had "required" an employee to fix mistakes made in a brochure during a weekend.¹⁷⁸ When this investigation was suspended, due to an Inspector General probe prompted by Dr. Van Boven's protected disclosures, Veterans Integrated Service Networks (VISN) 17 Director Timothy Shea, the convening authority of the ABI, later testified that his "feet were put to the fire" over the lack of evidence justifying the ABI investigation he had called for against Dr. Van Boven. Shea demanded that Dr. Sherwood provide more evidence in justification of the ABI if it were to go forward. In response, Dr. Sherwood began his own unauthorized investigation of Van Boven.¹⁷⁹ In violation of the agency's policy on investigations, VA Directive 0700, Dr. Sherwood personally met with various potential witnesses in an attempt to solicit negative information about Dr. Van Boven, with the intention of justifying ex-post-facto his requested ABI investigation of Dr. Van Boven.¹⁸⁰

Following Dr. Sherwood's unofficial investigation, the formal ABI was reconvened with different members, one of whom was a subordinate of an official accused by Dr. Van Boven of misconduct. Rather than investigating the misconduct reported by Dr. Van Boven, this ABI was told only to investigate the conjured claims against Dr. Van Boven.¹⁸¹ This ABI concluded that he was guilty of all claims, and its conclusions were declared "findings of facts," although Dr. Van Boven was never even informed of many charges against him, let alone given an opportunity to refute them.¹⁸² Furthermore, the claims were patently false and unsupported by credible evidence. For example, a "finding," that Dr. Van Boven had asked a University of Texas faculty member he collaborated with "when the last time was that she had unprotected sex," was made without questioning Dr. Van Boven or the faculty member.¹⁸³ When asked months after the ABI judged Dr. Van Boven guilty, the faculty member flatly denied that such a conversation had ever taken place.¹⁸⁴

Despite facing tremendous and escalating retaliation, Dr. Van Boven persistently continued to disclose his findings of waste and gross mismanagement. Ultimately, rather than remedy these abuses and hold responsible bureaucrats responsible, the VA turned its back on hundreds of thousands of veterans affected by traumatic brain injuries, closing the lab and terminating Dr. Van Boven's employment upon

recommendation by the ABI. After six years and more than \$6 million in expenditures, not a single veteran or wounded soldier with TBI was helped.

RETALIATORY INVESTIGATIONS AND THE LAW

The point of a government investigation is to uphold the law. Ironically, in this report arguably every investigation sought to enforce the law by violating numerous other laws that restrict government abuses of power. Unfortunately, only the Privacy Act has credible enforcement capacity through normal due process rights, and that law is irrelevant to an ongoing investigation. In addition to constitutional rights, investigators violated six laws relevant for whistleblower rights in cases surveyed for this report.

■ **Anti-gag statute.**¹⁸⁵ Every year since FY1988 the relevant appropriations law has banned spending to implement or enforce any nondisclosure form, policy or agreement without an addendum specifying that good government laws such as the Whistleblower Protection Act and the Lloyd Lafollette Act permitting communications with Congress supersede any conflicting language that restricts speech. In fact, the congressional spending ban incorporates those laws by reference into whatever speech ban is at issue. Another of the good government laws that trumps gags is the Intelligence Identities Protection Act, which specifies that information is not legally classified unless it is specifically designated,¹⁸⁶ to provide advance notice of its secret status. By law, no one has to guess whether information is classified. The facts presented for every investigation in this report prove crude anti-gag statute violations.

■ **Communications with Congress.**¹⁸⁷ This is the congressional right to know law, passed in 1912 to outlaw gag orders against communications with Congress. In eight instances, the retaliatory investigations followed on the heels of congressional testimony or briefings for which the government agency had to respond.

■ **False statements.**¹⁸⁸ It is a felony to lie to the government, but investigators have resorted to that tactic themselves to make the case against whistleblowers or facilitate cover-ups of the whistleblower's charges, such as by altering documents with white out to remove incriminating evidence.

■ **Privacy Act.**¹⁸⁹ This law protects Americans against dossiers opened due to exercise of free speech rights, and from false information in the files. The case studies illustrate that dossiers with false information were used openly to blacklist and otherwise harass whistleblowers, even after they left the government.

■ **Whistleblower Protection Act.**¹⁹⁰ This is the cornerstone law whose purpose agencies violate when opening a retaliatory investigation. As the law's legislative history currently is written, retaliatory investigations qualify as "threatened" personnel actions, making them as illegal as more tangible follow up actions like termination. Under case law to date, however, the Merit Systems Protection Board only has recognized this right in combination with a subsequent personnel action.¹⁹¹ In order to minimize the scope of civil service disputes and stop retaliation early before it gets out of hand,

whistleblowers must have a clear mandate to fight back against witch hunts as they occur without having to wait for the results of a *fait accompli*. In many instances, agencies do not act on the investigation, because it was not possible to find any evidence of misconduct by the whistleblower. But they keep conducting them, because there is no accountability and the chilling effect is severe just from opening and working a case.

■ Witness protection:¹⁹² Civil service law also includes witness protection for those who submit information to an Office of Inspector General or the Office of Special Counsel. While in the same family as whistleblowing, the scope of protection actually is broader. An employee only has to participate as a witness, not demonstrate a reasonable belief for specific types of government misconduct. Ironically, the OIG's themselves have been primary violators of the law designed to protect their own witnesses. While acting as a witness does not shield anyone's own misconduct absent negotiated immunity, too often the OIG's primary focus has been investigating whistleblowers instead of their evidence. As with whistleblowing, however, this protection does not kick in until there has been a tangible personnel action, in the meantime leaving a blank check to harass.

On balance, the menu of legal rights has a common, fatal weakness: with the exception of the Privacy Act after-the-fact, and theoretical WPA relief for "threatened" personnel actions," there is no remedy for witch hunt victims to defend their jobs against this type of illegality. Rights without remedies to enforce in practice are a source of frustration and a magnet for cynicism, since they leave victims helpless against illegality.

The most fundamental merit system, threat, however, is unresolved: an effort to cancel civilian due process throughout federal employment. As previewed above with Tamarah Grimes, since the last Administration there has been a major campaign for military authority to replace the civilian rule of law for personnel decisions at government agencies. This is based on a new concept this year of expanding security clearance limits on due process to an unprecedented new context, "eligibility" for a security clearance. Security clearances permit a government employee or contractor to see classified information, which is essential for many national workers to do their jobs. They can be fired or reassigned for not having the necessary clearance to perform relevant assignments. Since the 1988 Supreme Court decision, *Department of Navy v. Egan*,¹⁹³ security clearance decisions have been exempt from normal civil service due process appeal rights, on grounds that in this context it is a decision for the President wearing the hat of Commander in Chief.

Last year, however, the Merit Systems Protection Board began issuing a series of ruling that said employees can be fired without normal civil service appeal rights, because the results of agency investigations determine they are not "eligible" to receive a clearance.¹⁹⁴ The Bush administration developed new internal rules requiring security clearance "eligibility" for any "non-critical sensitive position"; i.e.

[a]ny position within the department or agency the occupant of which could bring about by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position at one of three critical levels: Special Sensitive, Critical Sensitive, or Non-Critical Sensitive.¹⁹⁵

The problem is that many of these positions *do not require access to classified information*. Arguably this definition can cover virtually any government job. The Department of Justice has used it to strip the civil service due process rights of paralegal employees working on non-national security cases, and the Pentagon has used it to strip the rights of *all* civilians employees at a military base. In the November 2009 precedent, the MSPB accepted the Pentagon's premise to fire a GS-4 worker whose job at a base retail store had no connection to classified information. For the time being, due to new MSPB leadership the doctrine is on hold. If it takes root, virtually any government whistleblower will be vulnerable to termination based on the undisclosed results of a retaliatory investigation. For example, the eligibility requirement has been applied to 57% of Justice Department employees working in U.S. Attorney Offices.¹⁹⁶

RECOMMENDATIONS AT THE POLICY CROSSROADS

Legitimate investigations are essential for government to function effectively. They are the homework for government institutions, and keep those with authority from exercising it blindly. But retaliatory investigations opened *because of* legally-protected activity are incompatible with government accountability.

For 12 years, Congress has been working to overhaul the Whistleblower Protection Act, the foundation of legal rights against secrecy that betrays the public trust and is enforced by repression. There has been a serious, stated commitment by the White House, as well as Senate and House of Representatives committee leaders, to complete the reform before adjournment this year. In the past, final approval of this anti-secrecy reform has been blocked four times by secret "holds," in which one legislator delays passage until a 60 vote override as for a filibuster. After 12 years effort, including six hearings and seven unanimous bi-partisan committee approvals, there is no valid basis for further delay. The commitment to complete this reform in a transparent manner is a litmus test of every legislator's rhetoric about fighting fraud, waste and abuse.

Although final legislative language has not been disclosed, criteria for reform on the issues spotlighted by this report that works must include:

1) protection against retaliatory investigations as they occur. The point of witch hunts often is to create silence through fear, and many never lead to any action beyond closing one probe and opening a new one. In order to thaw the chilling effect and lock in timely rights, whistleblowers must have the right to challenge this form of harassment before it graduates into a formal personnel action like termination or more severe action such as referral for prosecution.

2) legitimate due process standards and independent review of security clearance judgments. Security clearance actions currently are the Achilles' heel of whistleblower rights, because it is a back door way to fire and effectively blacklist employees without accountability under the Whistleblower Protection Act. Without a clearance to see classified information, most national security employees cannot do their jobs. Agencies have unreviewable discretion whether an employee is sufficiently loyal and trustworthy to receive a clearance. In practice those decisions are made without any consistent,

internal due process standards, and there is no independent appeal outside the agency that normally would be the adverse party. As a result, it has become the harassment tactic of choice against, ironically, those who blow the whistle on security breaches. Legitimate reform requires that -- whistleblower rights extending to protect against security clearance retaliation; fair internal agency due process rights to resolve proposed adverse clearance judgments; and independent appeal of those decisions to a forum free from institutional conflict of interest.

3) merit system coverage for decisions surrounding clearance judgments. The disturbing recent trend to expand the civil service loophole on oversight of clearance judgment calls to preliminary eligibility or access determinations threatens not only whistleblower rights, but the merit system generally. Credible legislative reform must include a clear mandate that the independent Merit Systems Protection Board retains authority to review whether agencies comply with their own procedures when making a clearance judgment call, and that it may enforce the Whistleblower Protection Act to all decisions made in connection with a clearance action, such as personnel actions connected with preliminary eligibility determinations and alternate job placement when a clearance is suspended or revoked.

4) codification and remedies for the anti-gag statute. This critical legal boundary against spending to enforce gags on non-classified whistleblowing disclosures must be codified with the Whistleblower Protection Act's enforcement teeth.

CONCLUSION

Retaliatory investigations and security clearance actions are the WPA's Achilles' heels. Currently either can render the rest of the law's rights illusory, because reprisal victims are not empowered with due process rights against either form of harassment. How these issues are resolved will be the litmus test for whether Congress provides whistleblowers credible rights that are enforceable where it matters.

NOTES

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- ¹ Brief of Amicus Curiae Government Accountability Project, *Nixon v. Fitzgerald*, 472 U.S. 531 (1982)
- ² See generally Schultz, George and Wayne Swanson. *Prime Rip*. Englewood Cliffs, NJ: Prentice-Hall, Inc., 1982.
- ³ Marie Brenner, *The Man Who Knew Too Much*, VANITY FAIR, May 1996.
- ⁴ Nick Mangieri, *Broken Badge: The Silencing of a Federal Agent* (Valor Press Ltd. 1998) (1982).
- ⁵ S. 372 and HR 1507, 111th Cong. (2009).
- ⁶ National Transportation Safety Board/AAR-97-06, Aircraft Accident Report (NTSB, Aug. 19, 1997), available at <http://www.airdisaster.com/reports/ntsb/AAR97-06.pdf>.; Federal Aviation Administration, 90-Day Safety Review (Sept. 16, 1996).
- ⁷ Press Release, U.S. Office of Special Counsel, U.S. Office of Special Counsel Transmits Report That FAA Improperly Halted Re-examinations of Aviation Mechanics with Suspect Certificates (June 14, 2005), available at http://www.osc.gov/documents/press/2005/pr05_13.htm..
- ⁸ See *id.*
- ⁹ Federal Aviation Administration, Personnel Reform Implementations Bulletin (AVR PRIB # 001), (Dec. 7, 1998)...
- ¹⁰ Critical Lapses in FAA Safety Oversight of Airlines: Abuses of Regulatory “Partnership Programs”: Hearing before the H. Comm. On Transportation and Infrastructure, 110 Congr.704-711 (2008) (Written statement of Gabe Bruno, former OFSDO Manager, FAA).
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- ³⁸ Telephone conference between Mindi Seafer and James Tackett, Naval Criminal Investigative Service and Thomas Devine and Jonathan Cantu, GAP counsel for Franz Gayl (October 20, 2009); Richard Lardner, *Anti-whistleblower Culture Persists in D.C.*, Associated Press, MSNBC, Dec. 20, 2009, available at http://www.msnbc.msn.com/id/34502824/ns/politics-more_politics/page/2/.
- ³⁹ *The FBI Whistleblowers: Corruption and Retaliation Inside the Bureau. Hearing on S. 274 and H.R. 985 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 2 (2008) (Statement of Michael German, Policy Counsel, American Civil Liberties Union),
- ⁴⁰ *Id.* at 4
- ⁴¹ *National Security Whistleblowers in the Post September 11th Era: Lost in a Labyrinth and Facing Subtle Retaliation Before the Subcommittee on National Security, Emerging Threats, and International Relations of the H. Comm. on Government Reform*, 109th Cong. 138 (2006) [hereinafter *National Security Whistleblowers in the Post September 11th Era*] (written statement of Michael German, Former FBI Agent), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:28171.pdf.
- ⁴² German, *supra* note 39, at 5.
- ⁴³ *National Security Whistleblowers in the Post September 11th Era*, *supra* note 41, at 47-100 (U.S. Department of Justice Office of Inspector General Report of Investigation into Allegations from Michael German),
- ⁴⁴ *See id.*
- ⁴⁵ The Justice Department OIG report confirms Mr. German’s allegations of wrongdoing and retaliation. Unfortunately, the report amounts to little more than hollow vindication for Mr. German. The IG makes no recommendations to hold accountable those in the Tampa Division that mishandled the counter-terror investigation and there are no disciplinary recommendations for the officials that deliberately backdated and falsified FBI records. The IG report confirms that the FBI retaliated against Mr. German for reporting misconduct, but it intentionally obscures the extent of the retaliation, denies the retaliatory investigation, and holds just one FBI supervisor accountable. *See id.*
- ⁴⁶ German, *supra* note 41, at 140.
- ⁴⁷ Written Comments of Former FBI Special Agent Michael German in Response to the Department of Justice Office of Inspector General Draft Report into Retaliation for Making Protected Disclosures Against FBI Managers on September 10, 2002. 18-19 (on file with the Government Accountability Project).
- ⁴⁸ John Schwartz, *Justice Dept. Whistle-Blower in Alabama Case is Fired* N.Y. TIMES, July 8, 2009, available at <http://www.nytimes.com/2009/07/09/us/09siegelman.html>.
- ⁴⁹ Scott Horton, *Did DOJ Retaliate Against Siegelman Whistleblower?*, Harper’s Magazine, July 7, 2009, available at <http://www.harpers.org/archive/2009/07/hbc-90005308>.
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⁵³ *Id.* at 6.

⁵⁴ Written Response of Tamarah Grimes Regarding Proposed Removal, dated August 20, 2008, available at Agency File Tab 4d.

⁵⁵ Agency File at Tab 4d, Exhibit F

⁵⁶ *Agency's Narrative Response*, supra note 52, at 17-18.

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ 5 CFR 732.201

⁶⁰ 112 M.S.P.R. 636, 642-43

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⁶² *See id.*

⁶³ Document provided to counsel for Appellant pursuant to Appellant's First Requests for Production, Grimes v. Dep't of Justice, AT-0752-09-0698-I-1 (on file with the Government Accountability Project)..

⁶⁴ 113 M.S.P.R. 94

⁶⁵ *The President's Commission on Executive Exchange – A Postmortem. Before the H. Subcomm. on Employment and Housing, Comm. on Government Operations, 102nd Cong.* (1991) (opening statement of Tom Lantos, Chairman of the H. Subcomm. on Employment and Housing) [hereinafter *The President's Commission on Executive Exchange – A Postmortem*] (on file with the Government Accountability Project); HUD OIG Case Activity Report Re: Mr. Mr. Hamel's Allegations of Illegal, Improper and Wasteful Practices at the President's Commission on Executive Exchange (Oct. 29, 2002) (on file with the Government Accountability Project).

⁶⁶ Exec Order No. 12,760, 56 Fed. Reg. 21062 (May 6, 1991).

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⁶⁸ Memorandum from Vernon B. Parker, Counselor to the Director, PCEE on Recommendations Following the Procedures and Policies on the President's Commission of Executive Exchange to Betty Heitman, Executive Director, PCEE (June 14, 1990) (on file with the Government Accountability Project).

⁶⁹ Representative Lantos, upon reviewing the OPM OIG investigative report into Mr. Mr. Hamel's disclosures, remarked "The IG Report had so many holes in it, you would think it had been drafted by Edward Scissorhands." *The President's Commission on Executive Exchange – A Postmortem*, supra note 65, at 2.

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⁷⁵ U.S. Dep't. of Treas. Inspector Gen., Report of Investigation. Case No. 95-3-240-I (1998) (on file with the Government Accountability Project).

⁷⁶ Letter from Chairman Bachus, H. Subcomm. on General Oversight and Investigations on the Comm. on Banking and Financial Services, to Eugene Ludwig, Comptroller of the Currency, OCC (Nov. 4, 1997) (on file with the Government Accountability Project).

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⁷⁸ Raisa Otero Cesario, Assistant Inspector General for Investigations, Multiple Changes Directed by Treasury OIG Management to Report of Investigation for Case No. 95-3-240-I (Feb. 23, 1998) (unpublished document, on file with Government Accountability Project)

⁷⁹ Memorandum from Emily Coleman, Special Agent in Charge, Office of Inspector General, Office of Investigations, Re: Administrative Grievance to Lawrence H. Summers, Deputy Secretary (Oct. 23, 1997) (on file with Government Accountability Project); Letter from Emily Coleman-Ball, supervisory criminal investigator and Special Agent in Charge, Eastern Region Office of Investigations, Office of Inspector General, Department of Treasury, to William E. Reukauf,

Acting Special Counsel, Office of Special Counsel, Re: Complaint of Whistleblower Retaliation (Feb. 2, 1998) (on file with the Government Accountability Project); Letter from Althea Lee, EEO Investigator, Department of Treasury, Washington Regional Complaint Center, to Gordon Mr. Hamel, Re: EEO Complaint Filed by Emily P. Coleman-Ball TD # 98-1296 (Nov. 4, 1998) (on file with the Government Accountability Project).

⁸⁰ Letter from Julie Williams, Chief Counsel, OCC, to Mr. James Cottos, Assistant Inspector General for Investigations. Dep't of Treasury (Oct. 24, 2005) (on file with the Government Accountability Project).

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⁸⁴ Settlement Agreement. Comptroller of the Currency, Administrator of National Banks, June 16, 1997 (on file with the Government Accountability Project).

⁸⁵ Mr. Hamel Documentation Re: Incident in the HUD Inspector General's Conference Room, Apr. 26, 2002. 3 (on file with the Government Accountability Project).

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⁸⁷ Electronic Letter from Brian Saddler, Senior Official, HUD, to Lynn Mathewson, former IG attorney, HUD, (June 3, 2002) (on file with the Government Accountability Project).

⁸⁸ Sworn Affidavit by Lynn Mathewson, former HUD IG Attorney, June 3, 2002. (on file with the Government Accountability Project); Sworn Supplemental Affidavit of Lynn Mathewson, former HUD IG Attorney, June 13, 2002 (on file with the Government Accountability Project)..

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⁹⁰ Sworn Affidavit by Kathleen Day Koch, Former HUD Deputy General Counsel, Sept. 10, 2009 (on file with the Government Accountability Project).

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⁹⁴ Electronic letter from Donald L. Winchell to (DL) SO-Los Alamos Feds Re: Information Disclosure Reminder (Feb. 24, 2009) <http://pogoarchives.org/m/nss/lanl-internal-email-20090224.pdf>

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¹⁰⁷ *MacLean v. Department of Homeland Security*, No. 06-75112 (M.S.P.B. Western Regional Office Jan. 29, 2007), available at <http://www.pogoarchives.org/m/hsp/MacLean-9th-01302007.pdf>.

¹⁰⁸ Department of Homeland Security Office of the Inspector General, Review of Alleged Actions by Transportation Security Administration to Discipline Federal Air Marshals for Talking to the Press, Congress, or the Public (Office of Audits) (2004), available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG-05-01_Nov04.pdf.

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¹¹³ Redman, *supra* note 110.

¹¹⁴ Ann Wright & Susan Dixon, Dissent: Voices of Conscience 82-4 (Arnie Kotler ed., Koa Books 2008).

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¹⁹⁴ *Brown v. Department of Defense*, 110 M.S.P.R. 593 (2009); *Crumpler v. Department of Defense*, 2009 WL 3600334 (M.S.P.B. slip op., Nov. 2, 2009).
¹⁹⁵ 5 CFR 732.201(a).
¹⁹⁶ Document provided to counsel for Appellant pursuant to Appellant's First Requests for Production, *Grimes v. Dep't of Justice*, AT-0752-09-0698-I-1 (on file with the Government Accountability Project).

