

STENOGRAPHIC MINUTES

Unrevised and Unedited

Not for Quotation or

Duplication

"This is a preliminary transcript of a Committee Hearing. It has not yet been subject to a review process to ensure that the statements within are appropriately attributed to the witness or member of Congress who made them, to determine whether there are any inconsistencies between the statements within and what was actually said at the proceeding, or to make any other corrections to ensure the accuracy of the record."

**HEARING ON H.R. 984, THE EXECUTIVE BRANCH
REFORM ACT OF 2007 AND H.R. 985, THE
WHISTLEBLOWER PROTECTION ENHANCEMENT ACT
OF 2007 AND FULL COMMITTEE BUSINESS
MEETING TO CONSIDER THESE MEASURES
AND COMMITTEE OVERSIGHT PLAN**

Tuesday, February 13, 2007,
House of Representatives,
Committee on Oversight and
Government Reform,
Washington, D.C.

*****Preliminary Transcript*****

Committee Hearings

of the

U.S. HOUSE OF REPRESENTATIVES



**OFFICE OF THE CLERK
Office of Official Reporters**

1 | Court Reporting Services, Inc.
2 | HGO044000

3 | HEARING ON H.R. 984, THE EXECUTIVE BRANCH
4 | REFORM ACT OF 2007 AND H.R. 985, THE
5 | WHISTLEBLOWER PROTECTION ENHANCEMENT ACT
6 | OF 2007 AND FULL COMMITTEE BUSINESS
7 | MEETING TO CONSIDER THESE MEASURES
8 | AND COMMITTEE OVERSIGHT PLAN
9 | Tuesday, February 13, 2007,
10 | House of Representatives,
11 | Committee on Oversight and
12 | Government Reform,
13 | Washington, D.C.

14 | The committee met, pursuant to call, at 10:00 a.m., in
15 | Room 2154, Rayburn House Office Building, the Honorable Henry
16 | A. Waxman [chairman of the committee] presiding.

17 | Present: Representatives Waxman, Cummings, Tierney,
18 | Watson, Yarmuth, Braley, McCollum, Cooper, Davis of Virginia,
19 | Shays, Platts, Issa, Sali

20 | Staff Present: Phil Schiliro, Chief of Staff; Phil

21 Barnett, Staff Director and Chief Counsel; Kristin Amerling,
22 General Counsel; Karen Lightfoot, Communications Director and
23 Senior Policy Advisor; Michelle Ash, Chief Legislative
24 Counsel; Mark Stephenson, Professional Staff Member; Earley
25 Green, Chief Clerk; Teresa Coufal, Deputy Clerk; Davis Hake;
26 Leneal Scott; David Marin, Minority Staff Director; Larry
27 Halloran, Minority Deputy Staff Director; Jennifer Safavian,
28 Minority Chief Counsel for Oversight and Investigations;
29 Keith Ausbrook, Minority Chief Counsel; Ellen Brown, Minority
30 Legislative Director and Senior Policy Counsel; Mason
31 Alinger, Minority Deputy Legislative Director; John Brosnan,
32 Minority Senior Procurement Counsel; Jim Moore, Minority
33 Counsel; Patrick Lyden, Minority Parliamentarian & Member
34 Services Coordinator; Benjamin Chance, Minority Clerk; Bill
35 Womack, Minority Legislative Director

36 Chairman WAXMAN. The meeting of the Committee will come
37 to order.

38 Today the Committee holds a hearing on two bills, the
39 Executive Branch Reform Act and the Whistleblower Protection
40 Enhancement Act. Both of these bills are the product of hard
41 work and close bipartisan cooperation. Both of these
42 measures were also reported out by this Committee on near
43 unanimous votes in the last Congress.

44 Last year when we marked up these bills, I said they
45 were an example of how Congress ought to work. I still feel
46 that way, and I want to thank Ranking Member Davis for all
47 the effort he has put into these measures, and for the truly
48 bipartisan spirit with which he has approached these issues.

49 The indictments and scandals that have gripped
50 Washington in recent years are proof that our existing laws
51 need to be strengthened. The public wants honesty and
52 accountability in Government and it is our job in the
53 Oversight Committee to take the lead on reform.

54 At the end of the last Congress, Ranking Member Davis
55 and I released a bipartisan report on Jack Abramoff's
56 contacts with White House officials. Our report offered "an
57 unusually detailed glimpse into a sordid subculture of fraud
58 and attempted influence peddling." We undertook this
59 investigation because we wanted to learn what reforms would
60 protect the integrity and increase the transparency of

61 Government. We were able to reach agreement on a report
62 about Jack Abramoff, because we decided to let the facts
63 speak for themselves and avoid characterizations, inferences
64 and spin. Although we drew somewhat different conclusions
65 from the facts we recounted, we did reach agreement about the
66 need for fundamental reform.

67 We recognized that changes in the law were needed to
68 bring greater transparency to meetings between the private
69 sector and Executive Branch officials by requiring all
70 political appointees and senior officials in Federal agencies
71 and the White House to report their contacts with private
72 parties seeking to influence official Government action.
73 Today, we begin this reform process. The Executive Branch
74 Reform Act, which Ranking Member Davis and I have introduced,
75 is a comprehensive reform measure that would increase
76 transparency in the Executive Branch by requiring senior
77 Government officials to report significant contacts with
78 lobbyists. It would end the secret meetings between special
79 interests and Government officials that characterize the
80 operation of Vice President Cheney's Energy Task Force, and
81 it would expose the activities of influence peddlers like
82 Jack Abramoff to public scrutiny. That is why this bill may
83 be the most significant open Government legislation since the
84 enactment of the Freedom of Information Act.

85 Today we will also be consider the Whistleblower

86 Protection Enhancement Act. This important bill would for
87 the first time extend whistleblower protections to national
88 security officials and employees of Federal contractors. It
89 would make key improvements to current law to protect all
90 whistleblowers in Federal Government agencies and it would
91 ensure that Federal scientists who report political
92 interference with their work are protected from retribution.

93 A key component of accountability is whistleblower
94 protection. Federal employees are on the inside, they see
95 when taxpayer dollars are wasted. They are often the first
96 to see the signals of corrupt or incompetent management; yet
97 without adequate protections, they cannot step forward to
98 blow the whistle. There are many Federal Government workers
99 who deserve whistleblower protection but perhaps none more
100 than national security officials. These are Federal
101 Government employees who have undergone extensive background
102 investigations, obtained security clearances and handled
103 classified information on a routine basis. Our own
104 Government has concluded that they can be trusted to work on
105 the most sensitive law enforcement and intelligence projects.

106 Yet these officials receive no protection when they come
107 forward to identify abuses that are undermining our national
108 security. This bill would finally give these courageous
109 individuals the protections they deserve.

110 I am very proud of the leadership role of our Committee

111 | on a bipartisan basis in taking on these important bills . We
112 | are the Committee with the authority to reform the ethics
113 | laws that govern the executive branch of the Federal
114 | Government. We are the Committee with the authority to
115 | restore the principles of open Government. And we are the
116 | Committee with the authority to close the revolving door
117 | between Federal agencies and the private sector to ban secret
118 | meetings between Government officials and lobbyists and to
119 | halt procurement abuses. To meet these challenges, we must
120 | use our broad oversight power to investigate and expose
121 | abuses.

122 | But we should not stop there. We should also use our
123 | legislative authority to draft essential reforms. And today
124 | we begin in this important legislative process.

125 | [Prepared statement of Mr. Waxman follows:]

126 | ***** INSERT *****

127 Chairman WAXMAN. At this point, I want to recognize the
128 Ranking Member of the Committee, Mr. Davis.

129 Mr. DAVIS OF VIRGINIA. Thank you, Mr. Chairman. I think
130 it says a great deal about our working relationship that the
131 first legislative hearing under your leadership continues the
132 Committee's consideration of two bills that you and I worked
133 together on last year, but were unable to get enacted into
134 law before the session ended. Both proposals are aimed at
135 improving transparency in Government as a way of restoring
136 trust in how the public's business is conducted.

137 The first bill being discussed today is the Executive
138 Branch Reform Act. Chairman Waxman and I introduced
139 substantially the same legislation last April, which the
140 Committee approved by a vote of 32 to nothing. In addition
141 to other reforms, the legislation would ensure that the
142 behavior of our public servants is above reproach, by
143 requiring Executive Branch officials to disclose any contacts
144 involving the discussion of pending agency business. In
145 doing so, this legislation attempts to strike that fine
146 balance between reasonable and focused rules of ethical
147 behavior and overly broad restrictions and prohibitions that
148 hamstring agency officials and prevent them from exercising
149 the discretion needed to perform their missions on behalf of
150 our citizens.

151 I applaud Chairman Waxman's continued focus on this

152 | issue. I look forward to working with him to improve this
153 | legislation as it moves forward.

154 | The second bill being discussed today is the
155 | Whistleblower Protection Enhancement Act. Last year's
156 | version of this legislation, sponsored by our colleague,
157 | Representative Todd Platts, was reported by this Committee on
158 | a 34 to 1 vote. In a nutshell, the bill would modernize,
159 | clarify and expand Federal employee whistleblower protection
160 | laws. The most significant reform would guarantee Federal
161 | employees a right to a jury trial in Federal court if the
162 | Merit Systems Protection Board does not take action on a
163 | claim within 180 days. Recourse for whistleblowers
164 | victimized by retaliatory actions in certain national
165 | security agencies would also be strengthened.

166 | In addition to the witnesses before us today, I have
167 | encouraged affected branch agencies, specifically the Merit
168 | Systems Protection Board, the Office of Government Ethics,
169 | the Office of Federal Procurement Policy and the Department
170 | of Justice to submit comments for the record regarding these
171 | proposals. Chairman Waxman, despite the fact that we are
172 | scheduled to mark up these bills soon, I hope you will keep
173 | the record open long enough for these stakeholders to have
174 | their comments included for future reference.

175 | I want to thank you again, and I look forward to hearing
176 | from our witnesses.

177 | [Prepared statement of Mr. Davis of Virginia follows:]

178 | ***** COMMITTEE INSERT *****

179 Chairman WAXMAN. Thank you. I think that is an
180 excellent suggestion. We will keep the record open for seven
181 days for members to put in opening statements and for any
182 other submissions that stakeholders may have on this
183 legislation.

184 I want to call on members who may wish to deliver an
185 opening statement at this time. But I want to acknowledge
186 the work of Congressman Platts as the chairman of the
187 subcommittee particularly on the Whistleblower Bill and
188 recognize him for any comments he wishes to make. I
189 congratulate you and express the appreciation of all of us
190 for the hard work you put into that legislation.

191 Mr. PLATTS. Thank you, Mr. Chairman. I appreciate your
192 kind words, and especially appreciate this hearing on two
193 very important pieces of legislation that are very much
194 focused on open and accountable Government. I obviously am
195 especially pleased that we are addressing the Whistleblower
196 Protection Act today and am honored to be serving with you as
197 co-sponsor of the legislation and the planned markup of both
198 of these pieces of legislation tomorrow.

199 Also I want to recognize Ranking Member Davis for his
200 leadership the past four years, working with you on this
201 Committee for the good of open and accountable Government and
202 know that through these bipartisan efforts we are going to
203 have success and move these pieces of legislation forward out

204 of Committee and hopefully through the House and Senate and
205 to the President's desk. I think that what the American
206 people, when they look to their Government, they may not
207 always agree with every action their Government takes, but if
208 they know it is done in the light of day and in a responsible
209 manner, without undue influence from outside, and where there
210 is wrongdoing, we hold those involved accountable, they will
211 respect their Government. The Whistleblower Protection Act
212 is about ensuring that when there is wrongdoing, waste,
213 fraud, mismanagement, that the public servants know they can
214 come forward and present that information and not be at risk
215 of demotions or other harm to their own careers for doing the
216 right thing for the American people.

217 So again, my sincere thanks, Mr. Chairman, for your
218 holding this hearing, and determined commitment to moving
219 these issues forward for the good of the American public.
220 Thank you, Mr. Chairman.

221 [Prepared statement of Mr. Platts follows:]

222 ***** COMMITTEE INSERT *****

223 Chairman WAXMAN. Thank you very much for your comments.
224 Anyone else wish to make an opening statement? If not,
225 we will proceed to our hearing.

226 We are pleased to have three witnesses on our first
227 panel. Dr. James Thurber, the distinguished Professor and
228 Director of the Center for Congressional and Presidential
229 Studies at American University. He is a well-known expert on
230 ethics and lobbying. Fred Wertheimer, President and founder
231 of Democracy 21 is an accomplished and effective advocate of
232 Government ethics and accountability. And Craig Holman, who
233 is representing Public Citizen, has closely studied the
234 problem of revolving door and other challenges to integrity
235 in governance.

236 It is our practice in this Committee to swear in all
237 witnesses. So I would like to ask you, if you would, to
238 please stand and raise your right hand.

239 [Witnesses sworn.]

240 Chairman WAXMAN. The record will indicate that each of
241 the witnesses answered in the affirmative.

242 Dr. Thurber, why don't we start with you?

243 | STATEMENTS OF JAMES A. THURBER, PH.D, DIRECTOR AND
244 | DISTINGUISHED PROFESSOR, CENTER FOR CONGRESSIONAL AND
245 | PRESIDENTIAL STUDIES, AMERICAN UNIVERSITY; FRED WERTHEIMER,
246 | PRESIDENT AND CEO, DEMOCRACY 21; CRAIG HOLMAN, PH.D,
247 | LEGISLATIVE REPRESENTATIVE, PUBLIC CITIZEN

248 | STATEMENT OF JAMES A. THURBER

249 | Mr. THURBER. Good morning, Mr. Chairman and Ranking
250 | Member, Mr. Davis, members of the Committee. I am pleased to
251 | accept this invitation to comment on the Executive Branch Act
252 | of 2007.

253 | I will be focused on three things, one in particular the
254 | problems that exist with respect to lobbying the Executive
255 | Branch and the problems of revolving door in and out of
256 | Government and conflict of interest. Secondly, the current
257 | attempt to solve those problems in your bill. But also I
258 | will make some recommendations for additional solutions with
259 | respect to that.

260 | I would like to summarize my remarks and keep it short.
261 | I assume that the remarks will be placed in the record and
262 | that I am open to questions later on about those remarks.
263 | But the summary is as follows.

264 | I would like to remind you of something that the
265 | audience knows. And by the way, I have several students in

266 | the audience. I am very pleased about that, because they
267 | have taken my ethics and lobbying class and several work on
268 | committees on the Hill, they are probably working right now,
269 | they cannot come to the meeting. So this is important to me
270 | in terms of my mentoring them as well as educating them.

271 | I would like to remind the Committee that Congress is
272 | only part of the ethics and lobbying problem. In fact, the
273 | laws that exist and also the two proposals out of the House
274 | and the Senate with respect to lobbying I think do not
275 | appropriately focus on the question of where most of the
276 | lobbying goes on in Washington, D.C. That is not on the
277 | Hill, it is with the Executive Branch. There are 31,000
278 | registered lobbyists. There is some discussion about whether
279 | that is accurate or not. But in my opinion, there are
280 | probably twice as many people actually in the business of
281 | lobbying in Washington, D.C., if you take into account people
282 | trying to change contracts, expand the scope and size of
283 | contracts, influence the request for proposals that come out
284 | so that only one company is eligible, really, to bid on that
285 | proposal, the total cost of lobbying in Washington in 2005,
286 | as registered through the House and the Senate records, was
287 | \$2.8 billion, \$2.8 billion. I think it is probably at least
288 | double that if you look at the people lobbying the regulatory
289 | process, the contract process, selling things to the
290 | Government, expanding contracts in secret.

291 The public confidence in Congress was at a historic low
292 and a major issue in the 2006 election. But the public
293 confidence in Government was also low. This bill and the
294 problems address in this bill, in my opinion, address that
295 question of the integrity of our Government generally. I
296 think it goes a long way toward doing that.

297 The public interest is undermined when a narrow set of
298 public interests meet in secret in Government, and when
299 no-bid contracts for Government projects are awarded to
300 political friends. And also when people who are working in
301 Government leave and immediately work for corporations and
302 make millions of dollars going back to the same organization,
303 not exactly in the same area where they worked, but generally
304 the same organization, like in the Department of Homeland
305 Security. I think that there is little transparency in the
306 Federal contracting process, and even less when it comes to
307 lobbying Executive Branch officials for contracts. And I
308 think this bill helps to improve transparency.

309 I think though the bill has an inappropriately limiting
310 definition of lobbying. The 1995 Lobbying Registration Act
311 has a narrow definition of lobbying as to who the people in
312 the Executive Branch that lobbyists must record, but also
313 what they do. Your act, I think your act would be improved
314 if you referred to those definitions in existing law and also
315 the law that may indeed be changed as a result of actions of

316 | the House and the Senate.

317 | I think the best way to eliminate the potential evils of
318 | secret meetings is to make them open or at least make them
319 | transparent through prompt and accurate reporting of their
320 | occurrence, on a quarterly basis, as you have recommended.
321 | Again, I think you should adopt similar requirements for
322 | those who lobby the Congress as with the Executive Branch,
323 | make them parallel.

324 | Attention should be paid, again, to the hundreds of
325 | secret meetings that happen each week between Government
326 | executives and lobbyists for private interests who are
327 | seeking Federal contracts or contract extensions. This is
328 | especially important, because if there is an existing
329 | contract and there is a meeting to expand the scope of that
330 | contract, that was what the situation was with Duke
331 | Cunningham. Or individuals who seek to influence the Federal
332 | regulatory process. I think there are many people doing that
333 | that are not covered under the 1946 Administrative Procedures
334 | Act, and are not registering and have undue influence.

335 | Let's focus on revolving door problems. There is a
336 | rapidly revolving door, as we know, between the private
337 | sector and K Street. Craig Holman's group has done a great
338 | job documenting that. I won't go through the documentation
339 | of all the specifics. But what does that do? It creates an
340 | unlevel playing field for some well-connected Government

341 | contractors when this happens. Since we are contracting out
342 | so much work from this Federal Government, Paul Light has
343 | documented the contracting out of many basic functions, this
344 | is a very important thing to focus on. The revolving door
345 | problem between K Street and the Executive Branch seems to be
346 | getting worse. The Reagan Administration had 214 top level
347 | officials go through the revolving door to areas that they
348 | were involved with when they were in Government. Clinton had
349 | 268 and this Bush Administration so far has had 253 officials
350 | leave their top Government offices for lobbying jobs or jobs
351 | in the private sector related to their Government
352 | responsibilities.

353 | For example, 90 Department of Homeland Security
354 | officials have left Government service to become consultants,
355 | lobbyists or executives for companies doing business with the
356 | Federal Government within a few weeks, including Secretary
357 | Tom Ridge. More than two-thirds of the top DHS officials left
358 | for the private sector in the Department's first years. It
359 | has been a revolving door that has caused management problems
360 | at DHS, but also conflict of interest issues on the outside.

361 | The current law, as you know, prohibits Federal
362 | Government employees from lobbying their former employers for
363 | one year. But a loophole created at DHS only prohibits
364 | former employees from lobbying certain agencies within DHS,
365 | which means that they can still lobby other agencies within

366 | the Department immediately after they leave. This loophole
367 | was created in 2004 when the top DHS ethics officials got
368 | approval from the Office of Government Ethics to divide the
369 | Department into seven sections for conflict of interest
370 | purposes. You work in one section, you can contact the six
371 | other sections and lobby for your client in those sections.

372 | If you look at the special study, The Revolving Door
373 | Working Group, which Craig I am sure will talk about later,
374 | and therefore I will not summarize it, they have listed at
375 | least 12 major illegal actions that are going on as a result
376 | of the revolving door, including handing out favors to former
377 | clients, writing the specifications for the request for
378 | proposal so that they can only be met by a friend or former
379 | employee, and other issues like that.

380 | What are the solutions? Well, I think this bill goes a
381 | long way toward solving these two problems of transparency in
382 | terms of lobbyists meeting with Executive Branch officials,
383 | Executive Branch officials being required to record that.
384 | Some people say that it is too onerous. Every Executive
385 | Branch official has their schedule electronically set. I
386 | think that it is reasonable in a democracy to make that
387 | transparent as to who is visiting them, what they are talking
388 | about, the purpose of it.

389 | But also I would add, by the way, to your bill, where it
390 | takes place. It may take place on a golf course. Or it may

391 take place at some resort, not just in their office. We need
392 to know about that, in my opinion.

393 Solutions. What are the solutions to ending secret
394 meetings and conflicts of interest stemming from the
395 revolving door and in and out of Government? Your bill does
396 a great job. Let me just focus on some items where you
397 should go further.

398 Chairman WAXMAN. Dr. Thurber, could you try to
399 summarize? The whole testimony is going to be in the record.

400 Mr. THURBER. Let me just summarize by saying that I
401 think you should look carefully, as I said before, at
402 existing law for the lobbyists, and apply that to the
403 executives in terms of recording. And also focus on
404 enforcement of existing law with respect to the lobbyists. I
405 know it is out of your jurisdiction, but enforcement of the
406 Executive Branch. I think a lot of people are breaking the
407 law right now in terms of this.

408 I would also extend the cooling off period to two years.
409 And as in your bill, I have mentioned some waivers that you
410 should look at besides the waivers that you have indicated.
411 Waivers are too easy for people to get in many cases, in
412 terms of the revolving door. Then also shut-down on
413 negotiation of jobs while they are in their position. It is
414 against the law now, shut down those waivers, and I think the
415 bill goes a long way toward that.

416 Thank you very much. If you have any questions, I would
417 be pleased to answer them.

418 [Prepared statement of Mr. Thurber follows:]

419 ***** INSERT *****

420 Chairman WAXMAN. Thank you very much. We appreciate
421 your testimony.

422 Mr. Wertheimer, again, to you and all the witnesses who
423 appear today, the prepared statement will be made a part of
424 the record in its entirety. We would like to ask you to
425 stick to around five minutes in summary.

426 STATEMENT OF FRED WERTHEIMER

427 Mr. WERTHEIMER. Chairman Waxman, Ranking Member Davis
428 and members of the Committee, we very much appreciate the
429 opportunity to testify today. At the outset, I would just
430 like to remark that at a time when we all see and face heavy
431 polarization in Congress, it has been very impressive to see
432 this Committee deal with these bills in the last Congress and
433 hopefully in this Congress on an almost unanimous bipartisan
434 basis, this bill in particular on a unanimous basis. We very
435 much appreciate the bipartisan leadership that you, Mr.
436 Chairman, and Ranking Member Davis have shown here to help
437 create the context for which this happened; also the
438 leadership that Representative Platts has shown.

439 This issue is being considered at a time when the public
440 as been deeply concerned about corruption and ethics concerns
441 in Congress. Government integrity reforms matter. People
442 often like to say that you can't legislate morality, and that

443 | is probably true. But you can legislate the way people
444 | conduct their affairs, you can legislate conduct. And
445 | Government integrity reforms have done that, they have been
446 | successful in the past. A number of Government integrity
447 | reforms over many years in Congress have worked.

448 | The opportunity to enact these kinds of reforms comes in
449 | cycles. And it usually comes when problems get out of
450 | control, and we are in such a period now. This Congress is
451 | off to an excellent start, in our view. The House ethics
452 | reforms enacted in January were landmark reforms. The Senate
453 | has passed similar reforms. Most of the reform efforts to
454 | date have focused on Congress and we are pleased that this
455 | Committee is focused on reforms that are needed in the
456 | Executive Branch.

457 | The bill this Committee reported out last year, as I
458 | mentioned, was reported out 32 to nothing, unanimous
459 | bipartisan support. We take that to mean that it reflects a
460 | consensus view on this Committee about the proposals that
461 | were contained in that legislation. I would like to just add
462 | a few thoughts on three sections of the Executive Branch
463 | reform bill.

464 | The contacts provision would bring sunlight to the
465 | process. That is important, and it is valuable. It would
466 | provide the public with a much clearer picture of the efforts
467 | being undertaken to influence the Executive Branch. The

468 information according to the legislation would be made
469 available in a searchable data base at the Office of
470 Government Ethics. I would just add and recommend that the
471 Committee make clear that that data base should be made
472 available on the internet to the public, so citizens can get
473 direct access to this information. If the information is not
474 available on the internet, you greatly limit the ability of
475 people who can go over to OGE and check out the reports and
476 information.

477 We also very much support the changes being made in the
478 revolving door provisions. We recommend that in addition to
479 increasing the revolving door provision to two years, that
480 the Committee, as Dr. Thurber said, look to the definitions
481 in the lobbying disclosure bill and include lobbying
482 activities as well as lobbying contacts in the restriction.
483 If you are trying to create a cooling off period between an
484 Executive Branch official leaving and taking advantage of the
485 contacts, information, et cetera that he had while at the
486 Executive Branch, then lobbying contacts, in our view, is too
487 narrow, and it should go beyond to the definition contained
488 of lobbying activities, planning, strategizing, arranging for
489 a lobbying effort.

490 We also support and think it is an important addition to
491 cover the reverse revolving door problem. That is a very
492 important issue. The idea of someone coming into Executive

493 | Branch from an organization and immediately turning around
494 | and making decisions to provide grants or policy positions to
495 | that organization is not defensible. This would really
496 | extend this idea, perhaps for the first time. We also
497 | support your effort to extend this to Government contractors.

498 | In conclusion, this is good legislation. It is
499 | important legislation. It advances the interests of the
500 | public in knowing what is going on in the Executive Branch.
501 | It is a good balance in terms of the revolving door
502 | provisions which have to be balanced between protecting the
503 | integrity of Government decisions and allowing people to come
504 | back and forth in Government. We think the Committee did a
505 | very good job last time, and with the suggestions we made, we
506 | very much support this legislation.

507 | Thank you, Mr. Chairman.

508 | [Prepared statement of Mr. Wertheimer follows:]

509 | ***** INSERT *****

510 Chairman WAXMAN. Thank you very much, Mr. Wertheimer.
511 Dr. Holman?

512 STATEMENT OF CRAIG HOLMAN

513 Mr. HOLMAN. Chairman Waxman, Ranking Member Davis, I
514 want to thank you for the opportunity to testify on behalf of
515 Public Citizen and our 100,000 members.

516 I also want to echo Mr. Wertheimer's praise for the work
517 of this Committee when it comes to lobbying and ethics
518 reform. A lot of good work has come out of this Committee,
519 and praise is appropriate.

520 In order to address the wave of scandals that has swept
521 over Washington, D.C., the debate, as this Committee
522 recognizes, must include lobbying and ethics laws as they
523 relate to the Executive Branch. As documented in this
524 report, A Matter of Trust, which was put together by a
525 coalition of 15 different civic organizations called The
526 Revolving Door Working Group, we analyzed at least two major
527 issues that need to be addressed when it comes to lobbying
528 and ethics in the Executive Branch. I ask that this report
529 be entered as part of the record.

530 Chairman WAXMAN. Without objection, so ordered.

531 [The referenced information follows:]

532 ***** COMMITTEE INSERT *****

533 Mr. HOLMAN. One of the first issues which both the
534 witnesses here brought up already is the revolving door. The
535 term revolving door is when corporations or other special
536 interests develop a very close relationship with Government
537 through the moving of key individuals back and forth between
538 the private sector and the public sector. Efforts to
539 regulate the revolving door, the current efforts, have fallen
540 short on at least three different reasons.

541 First, the recusal requirements for former private
542 sector employees who are now public officials with oversight
543 over their same businesses are very weak, often allowing a
544 newly appointed official to take actions that affect their
545 former employers. In many instances, recusal is merely
546 advised. It is not mandatory. It is up to the official him
547 or herself to determine whether or not an actual conflict of
548 interest exists and the conflict can be easily waived by the
549 ethics officer of that particular division.

550 One of the second problems is, thought there is a one
551 year cooling off period prohibiting procurement officers from
552 taking jobs with companies that they have issued contracts
553 to, it applies only to divisions within the same company, not
554 the company itself. And third, while Federal law prohibits
555 former covered officials from making direct lobbying contacts
556 for one year, it does not apply to lobbying activities as

557 defined by the LDA. Lobbying activities includes engaging,
558 organizing, strategizing, overseeing the entire lobbying
559 drive itself. And that is not subject to the cooling off
560 period, which allows former officials to immediately spin
561 through the revolving door and become lobbyists, registered
562 lobbyists or conducting lobbying activity.

563 The Executive Branch Reform Act goes a long way toward
564 helping address these problems in the Executive Branch.
565 First of all, it strengthens recusal requirements, which is
566 excellent. Third, it prohibits negotiating future
567 employments by public officials with companies that have
568 business pending before them. And third, it does extend the
569 revolving door lobbying contact prohibition from one year to
570 two years.

571 Public Citizen encourages the Committee to consider some
572 strengthening amendments beyond that. Most importantly,
573 extend the scope of the revolving door prohibition to include
574 a very narrow definition of lobbying activities: those
575 activities that are done specifically at the time with the
576 intent to facilitate a lobbying contact. That should be
577 included within the cooling off period. Secondly, the
578 cooling off period for former procurement officers should
579 apply company-wide, and not just to divisions within the
580 company.

581 The second issue that I want to briefly touch upon is

582 ethics oversight in the Executive Branch. The Office of
583 Government Ethics is charged with ethics oversight, and they
584 are a very professional organization, a very well trained
585 agency. The problem is, they have three structural flaws by
586 statutes. One is they are only advisory agency. They have
587 no actual authority to do much other than advise and try to
588 educate and train the other Executive Branch officials.

589 Second, responsibility for ethics is dispersed among
590 more than 6,000 ethics officers within the various agencies
591 of the Executive Branch. They are the ones who are actually
592 making the decisions on ethics. There is no oversight, there
593 is no uniform interpretation and application of the ethics
594 rules. And third, OGE does not serve as a clearinghouse for
595 public records. As a matter of fact, they don't even have a
596 public reading room to go there and peruse, for the public to
597 peruse through these records. The Executive Branch Reform
598 Act does a lot to help strengthen oversight. It does provide
599 a systematic record of lobbying contacts and it strengthens
600 the waiver process for conflict of interest.

601 But I would like to also recommend that some fundamental
602 restructuring needs to be done with OGE. They need to be
603 made not an advisory agency but an actual watchdog agency
604 that has the authority to promulgate rules and regulations
605 and monitor compliance. No one else is doing this.
606 Secondly, they must be made into a central clearinghouse for

607 public records. There is nowhere to go to find out what is
608 going on when it comes to ethics and contracting in the
609 Executive Branch. There is no web site, there is no library.
610 OGE would be perfectly situated to be that central
611 clearinghouse

612 Thank you.

613 [Prepared statement of Mr. Holman follows:]

614 ***** INSERT *****

615 Chairman WAXMAN. Thank you very much.

616 I want to thank the three of you for your presentation
617 and your suggestions. I think we all look at them very
618 carefully.

619 Last Congress, when we introduced this bill, we also
620 looked at the contacts that Jack Abramoff and his lobbying
621 team had with the Executive Branch. We found that there were
622 485 instances of lobbying contacts that Mr. Abramoff or his
623 associates had with White House officials. These included
624 185 meetings over meals and drinks, many at expensive
625 restaurants throughout Washington. There were also 82
626 meetings, phone calls or other interactions with the Office
627 of Senior Advisor to the President, Carl Rove, and 17 such
628 contacts with the White House Office of Political Affairs.
629 That is one thing we found.

630 Secondly, we found that there was no record of any of
631 these contacts, and when Scott McClelland, the White House
632 spokesman, was asked about Mr. Abramoff's White House
633 contacts, he asserted ``there were only a couple of holiday
634 receptions that he attended, and a few staff-level meetings
635 on top of that.'' We reviewed the lobby disclosure forms and
636 they provided almost no information. All they said was that
637 members of Mr. Abramoff's team contacted the Executive Office
638 of the President on behalf of certain clients. We had to
639 launch a seven-month investigation simply to understand the

640 | number of times Mr. Abramoff and his lobbying team contacted
641 | the White House and the issues they were lobbying on.

642 | I feel, and I gather from your testimony you also feel
643 | that we need to strengthen current law which is inadequate,
644 | insufficient. We need more disclosure about the interactions
645 | between lobbyists and Executive Branch officials.

646 | But some people have said to me, if you have to keep a
647 | log of all of these contacts, and it is on the golf course,
648 | it is a social reception, people may forget and therefore be
649 | attacked as having violated the ethics rules. Does that
650 | bother you? What kind of burden will that put on people to
651 | keep track of all these casual interactions, which may well
652 | be very much a lobbying contact but unexpected, not a set
653 | meeting? Dr. Thurber?

654 | Mr. THURBER. It doesn't bother me. In fact, the
655 | Abramoff contacts in oral and written communication right now
656 | should have indicated the time spent as well as the amount of
657 | money spent as well as the subject matter. And it should
658 | have included where, according to the law. And that is with
659 | respect to the formulation, modification or adoption of
660 | Federal legislation and rules, regulations, policies or
661 | administration of a Federal program including Federal
662 | contract, grant or license.

663 | I want to emphasize that, because there is a whole lot
664 | of lobbying going on with contracts in Washington. I have

665 | said this before, I think we need to make that transparent.
666 | I think that this is a reasonable thing to ask a public
667 | official to do in our democracy. It will bring trust and it
668 | will bring more transparency so we can ferret out problems.

669 | That is one of the obligations of public service, in my
670 | opinion, is to let people know what you are doing. And if it
671 | is on a golf course, so be it.

672 | Chairman WAXMAN. Mr. Wertheimer?

673 | Mr. WERTHEIMER. Obviously it is easier to keep track of
674 | this information when it is happening in offices. Executive
675 | Branch officials are going to have schedules of who they met
676 | with often. I don't think it is a hindrance to cover other
677 | activities. I think every Executive Branch official should
678 | be on notice that if something starts to come up, they can
679 | just cut it off and say, I am not here to discuss this. This
680 | is not the time or place.

681 | Now, I would also just note for the Committee's
682 | information that in other aspects of lobbying disclosure laws
683 | like, for example, the requirement that lobbying
684 | organizations report how much money they have spent in a
685 | quarter, the concept of good faith estimate has been used
686 | there. That is a little trickier when you are dealing with
687 | specific meetings. You could, if you wanted to, try to devise
688 | some type of protection there against inadvertent problems
689 | for meetings that don't take place in the office.

690 For us, we are comfortable with the provision the way it
691 is. But we also point out that there are other ways of both
692 imposing this requirement while leaving a little room for
693 inadvertent mistakes.

694 Chairman WAXMAN. Thank you very much.

695 Dr. Holman, did you want to comment on that?

696 Mr. HOLMAN. It is an excellent proposal, as long as it
697 is implemented exactly the way it is intended. The straw man
698 argument that is imposed against reporting of lobbying
699 contacts is some of the examples that you were bringing up,
700 that if I walk through the hallway here as a registered
701 lobbyist and I accidentally run into covered officials, I
702 have to start reporting that I ran into covered officials.

703 That is not the intent of this, or even at social
704 events, quite frankly. That is not the intent of this sort
705 of lobbying contact disclosure. The intent is to use the
706 definition of lobbying contacts and lobbying activity as
707 defined in the LDA. That is having a contact and a
708 discussion that is specifically designed to promote a
709 particular legislative issue, an actual lobbying contact. It
710 is not burden at all to require lobbyists, and speaking as a
711 lobbyist, to require us to record, or public officials to
712 record contacts we have had with covered officials for
713 lobbying purposes.

714 I know everyone I run into who I am lobbying. It is no

715 | problem for me to record this. And it should not be any
716 | problem for anyone else.

717 | I would probably limit it to oral and in-person
718 | contacts, as opposed to written contacts. A lot of
719 | organizations will send out these fax blasts and stuff. I
720 | don't think that is what is intended to be included in that
721 | provision.

722 | Chairman WAXMAN. Thank you.

723 | Mr. Davis?

724 | Mr. DAVIS OF VIRGINIA. Thank you. We have gotten some
725 | comments from the Office of Personnel Management, and I
726 | wonder if you could address them. One of the concerns is a
727 | concern of this Committee, too, but OPM has recently
728 | predicted that a peak of Federal retirements will occur
729 | between 2008 and 2010 and that the loss of so many
730 | individuals with a deep, ingrained institutional knowledge of
731 | their agency has the potential to cause a lapse or pause of
732 | service delivery.

733 | The concern is if you were to extend the time from one
734 | year to two years that this would in fact hasten many of
735 | these individuals leaving. Their comment is, although these
736 | provisions are intended to address recent unethical conduct
737 | of Government procurement officials, the provisions may have
738 | the unintended effect of harming the career prospects of the
739 | overwhelming number of honest, experienced Government

740 employees and encourage such individuals to leave Government
741 service early.

742 They note that a January 2006 report by the Office of
743 Government Ethics to the President and Congress noted
744 numerous concerns about the impact of laws restricting
745 post-Government employment, including a statement from the
746 National Academy of Science that ``The laws restricting
747 post-Government employment have become the biggest
748 disincentive to public service.'' How do we balance this? I
749 would be very interested in your comments.

750 Mr. WERTHEIMER. I think the legislation does balance it.
751 The Committee report starts off, and you mentioned this, I
752 believe, Mr. Davis, this is a balancing act. You are trying
753 to both protect the integrity of Government decisions and the
754 ability of the public to have confidence that those decisions
755 are being made in their interest with the ability of people
756 to enter and leave the Government.

757 However, Government service is a privilege. It is not
758 an obligation. When you make a judgment or if you are
759 serving in that position, part of your responsibilities is to
760 do it in ways that protect ultimately the ability of citizens
761 to be confident in how their Government is functioning. The
762 problem raised about, this will affect people potentially
763 prematurely leaving, is a problem that exists at any time
764 that you would make this kind of decision. We think a

765 | two-year period is fair and appropriate. And as you know,
766 | there have been longer periods proposed in the past.

767 | So I just, I don't think that argument holds up here.
768 | People have to adjust and keep in mind when they join the
769 | Government that they are working for the Government under a
770 | set of rules that are important for the interests of
771 | citizens. I don't think that argument holds up.

772 | Mr. DAVIS OF VIRGINIA. Before you comment, Doctor, let
773 | me just throw out this. We sit here trying to recruit very
774 | high level professional and technical people. We held a
775 | hearing here last week where the Coast Guard got up and said,
776 | we outsource because we don't have the in-house capabilities,
777 | we can't find the capabilities of getting people in to do
778 | some of these high level jobs. And of course, once you
779 | outsource it, you lose any kind of control whatsoever. So
780 | that is part of the balancing as we look through this in
781 | terms of seeing what unintended consequences could result.

782 | Dr. Thurber?

783 | Mr. THURBER. As part of that, just to comment on that,
784 | and it has always been this way, it might be with respect to
785 | salaries and the fact that contractors pay or think tanks or
786 | whoever pays a much higher salary sometimes for people to do
787 | the jobs that are needed inside, so people do not want to
788 | leave when they have the opportunity to do it through a
789 | contract.

790 I just want to point out that when individuals at a
791 certain level leave Government, they have under the law the
792 obligation to report back to the Office of Government Ethics.
793 They have an ethics officer for the rest of their life, their
794 professional life now. And the ones that have a lot of
795 integrity continue to ask, is this okay, is this okay.

796 That is where most of these people are in terms of their
797 own personal ethics. It is the ones that are on the edge
798 that this is about. I think it deals with that.

799 The same could be said about staff members on Capitol
800 Hill. The comment is that, well, if there is an extension of
801 the two-year cooling off period, many very fine staff members
802 will leave. I don't think that is a problem. People are in
803 this for public service, they know full well that they are
804 not going to cash in and leave and work exactly on the issues
805 that they were working on on the Hill or in the Executive
806 Branch. I don't see this as a problem. I think you have
807 balance in the bill.

808 Mr. HOLMAN. May I add a quick comment to this? I
809 understand it is a balancing act. No one who's pushing for a
810 stronger revolving door restriction is seeking to make anyone
811 unemployable, or to impede employment.

812 But imagine what is being asked here. The balancing act
813 is in regards to the conflict of interest. A procurement
814 officer, for instance, certainly can go to work for the

815 | certain industry in which they may have had regulation over.
816 | The conflict of interest is when it involves a specific
817 | company in which they had oversight of a contract.

818 | What is being asked by saying, this is an inconvenience,
819 | is saying that we should get rid of the policy that prohibits
820 | a procurement officer from getting a job with the same
821 | company in which they are negotiating a contract or awarding
822 | a contract. That conflict of interest is just too grave, and
823 | we have seen it abused too often to pretend it doesn't exist.

824 | Chairman WAXMAN. Thank you very much.

825 | Mr. Tierney?

826 | Mr. TIERNEY. Mr. Chairman, I have no questions of the
827 | panel. Thank you.

828 | Chairman WAXMAN. Then let's go to Mr. Yarmuth.

829 | Mr. YARMUTH. Thank you, Mr. Chairman. I appreciate the
830 | remarks of all the panel.

831 | I have a question about the reporting requirements. I
832 | will play devil's advocate for a second. Coming from a media
833 | background, I was a journalist for some period of time before
834 | entering Congress. I strongly support all transparency
835 | initiatives.

836 | Is there a risk here by requiring things, reporting of
837 | contacts when anybody trying to influence Government policy,
838 | that we are, we would be essentially creating suspicion of
839 | something that is a perfectly legitimate activity? When the

840 Congress dealt with problems involving lobbying of Congress,
841 we talked about gifts and trips and improper inducements. We
842 didn't talk about contacts, because we are contacted every
843 day. That is part of our job, to talk to people trying to
844 influence public policy.

845 So if a public citizen came to lobby me, for instance,
846 and I report that, it is perfectly legitimate, that is what
847 Government is about and lobbying is about, and we are not
848 ready to outlaw lobbying and wouldn't presume to do so. But
849 is there a risk that we are creating some kind of negative
850 connotation to the actual act of lobbying by enforcing
851 reporting requirements of all contacts?

852 Mr. THURBER. Under First Amendment rights, you had the
853 right to be a reporter and citizens have the right to
854 organize and petition Government for grievances. I think
855 that it is a legitimate activity in this democracy and most
856 citizens know that when they get involved with groups. I
857 think that more transparency but also enforcement of existing
858 law just helps improve trust in Government. And it doesn't
859 create suspicion.

860 If there is suspicion about a particular activity, then
861 it should be brought out and the media and others should look
862 at it and make a judgment. I don't see this as a problem of
863 creating more suspicion in the administration of programs.

864 Mr. WERTHEIMER. I would say sure, there is a risk. But

865 | the risk is outweighed by the value of transparency. And the
866 | transparency problem is a particular problem for the
867 | Executive Branch. I am not just talking about this
868 | particular Executive Branch. We do live in a time where part
869 | of the basic concern among citizens is whether people with
870 | influence have too much influence and it comes at their
871 | expense. I think the process can and will adjust to
872 | understanding that people meet with Executive Branch
873 | officials. When question arise out of those meetings, either
874 | they will be tied to legitimate concerns or not. And in the
875 | end, I just think we have come to a point where we need this
876 | kind of transparency for the interest of the public and the
877 | Executive Branch.

878 | So while I don't discount the question you are raising,
879 | I do think it is outweighed by the gains that will occur.

880 | Mr. HOLMAN. First of all, I couldn't imagine it being a
881 | black mark on anyone's record to be lobbied by Public
882 | Citizen. But if it is, the suspicion already exists. And the
883 | suspicion is because there are no public records of this. So
884 | most Americans believe there is this black hole going on here
885 | on Capitol Hill in which lobbyists are manipulating lawmakers
886 | and lawmakers are trying to manipulate lobbyists, and it is
887 | something going on here in which most Americans will respond
888 | to public surveys saying, the Federal Government is being run
889 | by lobbyists and special interests and it does not take into

890 | consideration my interests. So that suspension is already
891 | here, it is already widespread.

892 | If we are going to try to address that type of
893 | suspicion, disclosure is the best very first step to take.

894 | Mr. YARMUTH. Well, the follow up, and I think I know the
895 | answer, but I would like to get it on the record anyway, is
896 | why would then we not impose the same requirement on
897 | ourselves?

898 | Mr. WERTHEIMER. I think it is something you should
899 | consider.

900 | Mr. YARMUTH. Be careful what you ask for, right?

901 | Mr. WERTHEIMER. Yes. And it is an issue faced with
902 | respect to the lobbying disclosure bill that will come
903 | forward probably next month in the House.

904 | Now, there is an apples and oranges here. You do have
905 | to analyze the situations in terms of their own facts. As I
906 | think you may have mentioned, you are dealing with
907 | constituents all the time. The process in the House is not
908 | the same as the Executive Branch. You have to take recorded
909 | votes. You are out with a lot of policy positions. Whatever
910 | concerns people may have, the process in Congress is a far
911 | more open process than the Executive Branch decision making
912 | process.

913 | On the other hand, there is a question of whether the
914 | contacts between people who are being paid to influence

915 Congress should be disclosed, disclosed by the lobbyists, the
916 lobbying organizations. There are various ways of doing
917 that, and there are ways of balancing that. It might be, for
918 example, that if a lobbying organization or a lobbyist
919 contacts your office in a corridor, that ought to be listed,
920 that every single report contact doesn't necessarily have to
921 be listed.

922 You do have to analyze that problem, in my view, in
923 terms of the Congress, and not just assume it is the same.
924 But it is something that ought to be seriously considered
925 here.

926 Mr. THURBER. I agree with Fred. I was asked that
927 question before the Senate Rules Committee and the House
928 Rules Committee. I think that it would not be too onerous
929 for you to, as members, record that with respect to paid
930 lobbyists that fit under the Lobby Registration Act. Not all
931 contacts with all kinds of people.

932 By the way, in terms of transparency, you might look at
933 the transparency in this Act with respect to lobbying the
934 Executive Branch in the same way that Sarbanes-Oxley brings
935 transparency and credibility to the accounting with respect
936 to major corporations. I have worked with the Committee on
937 Economic Development as a business-oriented think tank and
938 they feel that ``Sarbanes-Oxley should be applied`` in some
939 ways to the lobbying activity. They want even more

940 | transparency and recording. That is from a bunch of CEOs
941 | from major corporations.

942 | Mr. YARMUTH. Thank you.

943 | Mr. HOLMAN. Just very briefly, if I could--

944 | Chairman WAXMAN. Every question does not have to be
945 | answered by every witness, and we have other members waiting.
946 | So if the gentleman will wait and see, maybe you can respond
947 | to another question.

948 | Mr. Platts, do you want to ask anything of this panel?

949 | Mr. PLATTS. No questions, Mr. Chairman. I just
950 | appreciate all three of our witnesses for their efforts, not
951 | just here today in supporting the efforts of a more open and
952 | accountable Government, but in their organizations over the
953 | course of many years. We appreciate your good work.

954 | Chairman WAXMAN. Thank you, Mr. Platts.

955 | Ms. Watson?

956 | Ms. WATSON. No questions, thank you, Mr. Chairman.

957 | Chairman WAXMAN. Mr. Braley?

958 | Mr. BRALEY. Thank you, Mr. Chairman, Ranking Member
959 | Davis.

960 | I believe, Dr. Holman, you were the one who raised the
961 | issue of recusals in your testimony, is that correct?

962 | Mr. HOLMAN. Yes.

963 | Mr. BRALEY. And as I understand it, the existing
964 | practice is that the agency head or official in question has

965 | a self-determination on an appropriate circumstance under
966 | which a recusal might be necessary?

967 | Mr. HOLMAN. That is correct.

968 | Mr. BRALEY. Is there no means available for any outside
969 | interested party to raise the issue of recusal based upon
970 | some of the same concerns that we have been talking about
971 | here today and is that addressed at all under the new
972 | legislation that is being considered?

973 | Mr. HOLMAN. As the procedure currently exists, it is the
974 | public official's responsibility at first to make any
975 | determination whether or not a conflict of interest does
976 | arise. There is no mechanism in which there are other
977 | avenues for outside persons to try to claim that recusal
978 | should have been granted, other than of course trying to go
979 | through the press and creating that kind of problem. There
980 | is no internal mechanism.

981 | This legislation goes a step further by requiring
982 | recusal where such a conflict of interest would exist. It
983 | does not in itself establish a procedure in which there would
984 | be alternative means of determining that. But merely by the
985 | fact of requiring a recusal, the ethics officers are going to
986 | be compelled to develop procedures in which it isn't left up
987 | to the public official to determine whether a conflict of
988 | interest exists.

989 | So at that point, I would suspect the regulations, it

990 | would be developed.

991 | Mr. BRALEY. Has Public Citizen, or any other group, to
992 | your knowledge, come up with recommended language on how such
993 | a procedure could effectively be implemented when such a
994 | procedure has existed for many, many years in the judicial
995 | system to raise issues of recusal regarding a particular
996 | judge that gives parties that opportunity to do so in an
997 | environment that is orderly and allows their concerns to be
998 | raised?

999 | Mr. HOLMAN. The general procedure that Public Citizen
1000 | has argued for dealing with the recusal problem is to ensure
1001 | that there is oversight by a single entity or a single
1002 | agency. It has to be a determination and a promulgation of
1003 | rules and regulations set up by an oversight group including
1004 | over judges. But in the case of the Executive Branch, we
1005 | would leave it up to the determination of the Office of
1006 | Government Ethics to formulate how that sort of recusal
1007 | process would operate.

1008 | The important thing is that it is the responsibility of
1009 | a single office as opposed to what currently exists where you
1010 | have literally 6,000 different ethics officers for all the
1011 | different agencies and departments left with the
1012 | responsibility to determine what is going on. That is where
1013 | we have basically chaos when it comes to ethics and ethic
1014 | oversight. A single agency would help address that problem.

1015 Mr. BRALEY. I am going to address this to the entire
1016 panel. Under the section dealing with stopping the revolving
1017 door and the prohibition on negotiation of future employment,
1018 one of the exceptions provides for waivers under exceptional
1019 circumstances. I am just trying to get my head around this
1020 concept and ask if you can describe for me potential areas
1021 where exceptional circumstances might exist to justify such a
1022 waiver?

1023 Mr. THURBER. I was troubled with that. I cannot define
1024 that. I would do away with all waivers. Maybe my colleagues
1025 could help. But I would just do away with all of them in
1026 terms of negotiation for future employment.

1027 Mr. WERTHEIMER. I don't think any of us know the genesis
1028 of that provision. And so it is hard to comment on why it is
1029 needed or what specifics it is intended to address. Someone
1030 had something in mind in the drafting of that provision. But
1031 it does raise the question you raised, what are exceptional
1032 circumstances.

1033 Mr. HOLMAN. There is always the conceivable situation in
1034 which work has been done by a public official and has to be
1035 completed in the next week or two weeks or something. So the
1036 situation is so immediate that someone else could not
1037 possibly step into the shoes. I would imagine that was what
1038 was in mind by the exceptional circumstances, although I
1039 would really, really strongly urge that any such exceptional

1040 | circumstances be exceedingly rare in granting any kind of
1041 | waiver.

1042 | Mr. BRALEY. Thank you. I yield back the balance of my
1043 | time.

1044 | Chairman WAXMAN. Thank you very much, Mr. Braley.

1045 | Mr. Shays, do you have any questions of this group?

1046 | Mr. SHAYS. Mr. Chairman, because I was not here, do you
1047 | have any other members who can ask questions? Well, then, I
1048 | would just make the statement, I am happy you are doing this
1049 | issue, and apologize to our witnesses. I happen to believe
1050 | one of the best protections of abuse in our Government is to
1051 | have a strong whistleblower statute. It was one of the
1052 | things that my subcommittee spent a lot of time on, now Mr.
1053 | Tierney's committee, spent a lot of time dealing with, is how
1054 | we protect people who are aware of things that are not
1055 | happening properly and put an end to it.

1056 | Chairman WAXMAN. Thank you very much.

1057 | I want to thank the three of you for your testimony. We
1058 | will certainly look at the recommendations you offered us to
1059 | improve the legislation. Thank you very much.

1060 | We have four witnesses on our second panel. Dr. William
1061 | Weaver is a distinguished Professor at the University of
1062 | Texas, and is here representing the National Security Whistle
1063 | Blowers Coalition. NSWBC was created to advocate for an
1064 | enhanced whistleblower protection for national security,

1065 Federal and contractor employees. Nick Schwellenbach is an
1066 investigator on the Project on Government Oversight, POGO.
1067 It is known for its expertise in Government oversight and
1068 accountability. Tom Devine is the Legal Director of the
1069 Government Accountability Project. GAP, perhaps longer than
1070 any other organization, has been advocating for the
1071 restoration of Federal employee whistleblower protections.
1072 Mark Zaid is an attorney with the law firm of Krieger and
1073 Zaid, and has represented numerous whistleblowers. He is a
1074 noted expert on the State Secret Privilege issue.

1075 We are pleased to welcome each of you to our hearing
1076 today. Your prepared statements are going to be made part of
1077 the record in its entirety. What we would like to ask you to
1078 do is to summarize in around five minutes. But it is our
1079 practice to swear in all witnesses that appear before this
1080 Committee. So if you would please stand and raise your right
1081 hand, I would like to administer the oath.

1082 [Witnesses sworn.]

1083 Chairman WAXMAN. The record will indicate that each of
1084 the witnesses answered in the affirmative. Dr. Weaver, why
1085 don't we start with you?

1086 | STATEMENTS OF WILLIAM G. WEAVER, PH.D, ASSOCIATE PROFESSOR,
1087 | UNIVERSITY OF TEXAS AT EL PASO; NICK SCHWELLENBACH,
1088 | INVESTIGATOR, PROJECT ON GOVERNMENT OVERSIGHT; THOMAS DEVINE,
1089 | LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT; MARK S.
1090 | ZAID, ATTORNEY, KRIEGER AND ZAID, PLLC

1091 | STATEMENT OF WILLIAM G. WEAVER

1092 | Mr. WEAVER. Thank you, sir. I will be brief.

1093 | National security for the last 60 years, at least as it
1094 | has been employed by the President of the United States, has
1095 | been ever-expanding and less subject to oversight and many
1096 | other areas, the Executive Branch. It has crystallized into
1097 | a prerogative, really, rather even more that a constitutional
1098 | right or privilege.

1099 | And it has gone from statute, the first statute or the
1100 | first executive order that concerned classification of
1101 | material under Franklin Roosevelt in 1940 was based solely on
1102 | statutory authorization and then it has gone in the 1960s and
1103 | 1970s from statutory authorization to constitutional right
1104 | under Article 2. And then now it is being forwarded, the
1105 | power of the President, to segment off information from
1106 | public disclosure or disclosure to Congress based on
1107 | something that is even beyond a constitutional privilege,
1108 | which is a right under a theory of the unitary executive,

1109 | where the President of the United States is first in line
1110 | ahead of Congress and the Judiciary in the protection of the
1111 | United States and the public's business.

1112 | Congress has made no such progress. The engine of
1113 | national security has converted the presidency, the
1114 | institution of the presidency, into a 21st century
1115 | institution. But Congress, at least when it concerns
1116 | national security, has been a 20th century institution
1117 | attempting to check the power of a 21st century presidency.

1118 | Secrecy is now a central axis of the Executive Branch.
1119 | It is spread to cover many areas that historically have not
1120 | been subject to secrecy. There are agencies now such as
1121 | Health and Human Services, Environmental Protection Agency,
1122 | Department of Agriculture, which have original classification
1123 | authority which did not have original classification
1124 | authority until this Administration.

1125 | And we have seen the use of national security exemption
1126 | under FOIA in ways that it was probably never intended to be
1127 | used. Most recently I filed a lawsuit against the DEA under
1128 | FOIA, and for the first time, as far as I can tell, the DEA
1129 | is refusing to give part of the information requested on the
1130 | basis of exemption one, which is the national security
1131 | exemption under the Freedom of Information Act. In that
1132 | case, there is no national security matters involved. It was
1133 | simply a case of criminal nature, where the ICE, Immigrations

1134 | and Customs Enforcement, was running an informant who, with
1135 | ICE's foreknowledge, committed up to 12 homicides in Juarez,
1136 | Mexico.

1137 | So national security is being more clearly used to cover
1138 | up embarrassment rather than protect the Nation from attack
1139 | or from divulging information that would help our enemies.

1140 | You guys play for the Article One team. And for recent
1141 | years, Congress has been batting for the Article Two team to
1142 | some degree. This legislation that has been introduced by
1143 | the Chairman and by other members of the Committee is an
1144 | excellent step in the right direction. There are a number of
1145 | very good aspects to the legislation, the Whistleblower
1146 | Protection Enhancement Act Of 2007, first as the extension of
1147 | protections to intelligence and counter-intelligence
1148 | employees, which has not happened before. Historically,
1149 | those agencies have been exempted from giving protection.

1150 | Second, the statute prohibits denying, suspending or
1151 | revoking a security clearance in reprisal for whistleblowing.
1152 | This is a direct and welcome challenge to one of the main
1153 | tools intelligence and counter-intelligence agencies employ
1154 | against whistleblowers. People are held hostage by their
1155 | jobs, their security clearances, and have to choose between
1156 | their careers and their conscience.

1157 | Likewise, the time requirements that are in the statute
1158 | are very good, because they help move along the process which

1159 | historically has been plagued by delay. And finally, the
1160 | extension of protection to employees in non-covered agencies
1161 | who are seeking to disclose wrongdoing that requires
1162 | divulgence of classified or sensitive material is also an
1163 | excellent provision of the statute. All in all, it's a very
1164 | good statute, which the NSWBC happily supports.

1165 | Unfortunately, there are several things in the statute
1166 | that are problematic. First is that what is an authorized
1167 | member of Congress to receive information that is classified.
1168 | The term authorized will be interpreted by the executive
1169 | agencies to mean those members of Congress who have been
1170 | cleared to receive the information from the whistleblower.

1171 | In the past, there have been problems that have arisen
1172 | because the Executive Branch believes that it has plenary
1173 | control over classified information and therefore it is
1174 | within the Executive Branch's purview to determine who is
1175 | authorized. Recently, in a NSA whistleblower case, the NSA
1176 | whistleblower was told that he could not divulge information
1177 | even to the House Permanent Select Committee on Intelligence
1178 | or the SSCI, because they had not been cleared. They were
1179 | not authorized to receive that information. So authorized
1180 | member of Congress creates one difficulty, perhaps.

1181 | The second matter is that all circuits review should be
1182 | in the legislation. It shouldn't be solely confined to the
1183 | Federal circuit, I believe, because the Federal circuit has

1184 | been unfriendly, to say the least, to whistleblowers.

1185 | Finally, the State Secrets Privilege, the way the bill
1186 | attempts to handle it, it allows for resolution in favor of
1187 | the plaintiff of any particular issue or element that is
1188 | challenged in a lawsuit by the State Secrets Privilege. But
1189 | it doesn't seem to deal with cases where the Government says
1190 | that the whole lawsuit should be thrown out, because the
1191 | State Secrets Privilege requires dismissal, because the very
1192 | nature of the suit is secret. So we have suggested in our
1193 | testimony language from the National Whistleblowers Center
1194 | and language from us, the National Security Whistle Blower
1195 | Coalition, to fix that problem.

1196 | [Prepared statement of Mr. Weaver follows:]

1197 | ***** COMMITTEE INSERT *****

1198 Chairman WAXMAN. Thank you very much, Dr. Weaver.

1199 Mr. Schwellenbach?

1200 STATEMENT OF NICK SCHWELLENBACH

1201 Mr. SCHWELLENBACH. Chairman Waxman, Ranking Member Davis
1202 and other members of the Committee, thank you for inviting me
1203 to testify today in support of the Whistleblower Protection
1204 Enhancement Act of 2007. I am Nick Schwellenbach of the
1205 Project on Government Oversight, an independent non-profit
1206 that investigates and exposes corruption and other misconduct
1207 in order to achieve a more accountable Federal Government.

1208 POGO is also part of the Make it Safe Coalition, a
1209 coalition of groups that work with whistleblowers and seek to
1210 improve their protection from retaliation. I am also on the
1211 steering committee of openthegovernment.org, a bipartisan
1212 coalition of groups that seek to reduce excessive Government
1213 secrecy. I would like to thank Waxman, Platts and Shays for
1214 their leadership on this issue.

1215 I would also like to congratulate your Committee's
1216 efforts to put teeth into the Whistleblower Protection Act.
1217 These efforts lay the groundwork for effective Government
1218 accountability. This is an important hearing and
1219 whistleblower protections need to be greatly improved if the
1220 Executive Branch, regardless of who is in the White House, is

1221 | to be held accountable by the Legislative, as our Nation's
1222 | founders intended.

1223 | While whistleblower protections are commonly viewed as
1224 | rights for Federal employees, they are more than that.
1225 | Whistleblower protections also protect Congress's rights, the
1226 | right to know the actions of the Executive, to oversee
1227 | implementation of law, and to fulfill its constitutional
1228 | obligations as a separate and co-equal branch of Government.

1229 | The free flow of information from Government employees
1230 | to Congress enables the Congress to fulfill its duty of
1231 | overseeing the Executive, as I stated before. But the
1232 | Executive, as my colleague Bill Weaver has just mentioned,
1233 | has been increasingly assertive in telling Congress that it
1234 | does not have the right to receive information, especially
1235 | from disclosures made outside of official channels.

1236 | In the realm of national security, the Executive has
1237 | long argued that it has exclusive control over classified
1238 | information and that its employees may not provide this
1239 | information to Congress without approval. But the Executive
1240 | has gone even further by advancing the constitutionally
1241 | questionable unitary executive doctrine in a dangerously
1242 | expansive and overreaching interpretation of executive
1243 | privilege.

1244 | In 2003, a highly publicized and troubling event
1245 | concerned the silencing of Centers for Medicare and Medicaid

1246 Services' chief actuary, Richard S. Foster, on the cost of
1247 the Medicare prescription drug plan. Foster was threatened
1248 with termination for speaking to Congress. Both the CRS and
1249 GAO issued legal opinions finding that the effort to silence
1250 Foster was an unlawful violation of the Lloyd LaFollette Act
1251 of 1912. In order to assert its unassailable right to
1252 oversee the Government, Congress has since 1988 approved
1253 so-called anti-gag provisions and annual appropriations bills
1254 that prohibit managers from silencing whistleblowers.
1255 Recently, many air marshals at the Federal Air Marshal
1256 Service have told us about a troubling trend of management
1257 retaliating against them for their communications with
1258 Congress. One air marshal, P. Jeffrey Black, made
1259 disclosures which sparked a major House Judiciary Committee
1260 investigation last year.

1261 And another case, which we should all be paying
1262 attention to, occurred over 10 years ago. Richard Barlow, a
1263 Defense Department analyst, who was unraveling the AQConn
1264 network in the late 1980s, had a security clearance revoked
1265 for simply suggesting that Congress be informed that Pakistan
1266 was peddling nuclear wares across the globe. He was then
1267 fired. He did not go to Congress initially, he just
1268 suggested the idea of doing so, because there was a law which
1269 made arms sales to nations that were engaged in nuclear
1270 proliferation illegal.

1271 We are pleased that the legislation before you makes
1272 these agency policies which silence employee communications
1273 with Congress illegal, but more should be done to ensure
1274 enforcement, which they have never been enforced, these
1275 anti-gag statutes. Passed in 1989, the Whistleblower
1276 Protection Act was intended to provide a mechanism for civil
1277 service employees to challenge retaliation and disclose
1278 waste, fraud and abuse. But despite the rights the Act
1279 provides on paper, it has suffered from a series of crippling
1280 judicial rulings that are inconsistent with Congressional
1281 intent and the clear language of the Act.

1282 The Federal Circuit Court of Appeals currently is the
1283 only court that can hear an appeal from the Merit Systems
1284 Protection Board. And it is clear from the Federal Circuit's
1285 hostile rulings and the 2 to 177 track record against
1286 whistleblowers that it is time to end its monopoly on
1287 jurisdiction.

1288 More significantly, the Act has failed because the
1289 agencies tasked with implementing the promise of
1290 whistleblower protections, the Office of Special Counsel and
1291 the MSPB, have been utter failures since their founding. We
1292 defer to our colleague, Tom Devine, from GAP, to speak more
1293 in-depth on this issue.

1294 This bill will undo the crippling judicial decisions,
1295 but it keeps jurisdiction in the Federal circuit's hands. We

1296 | also urge the Committee to provide judicial review by all
1297 | circuits, thus ending the Federal circuit court's
1298 | decades-long monopoly and ensuring that vigorous judicial
1299 | opinions are rendered from U.S. district courts nationwide.

1300 | We are also pleased that your bill extends protections
1301 | to TSA screeners, FBI and intelligence agency employees.
1302 | These are true post-9/11 reforms, long overdue. Also overdue
1303 | are whistleblower protections for Government contractor
1304 | employees. Spending on Government contractors has doubled in
1305 | recent years from \$219 billion in 2000 to roughly \$382
1306 | billion in 2005. A recent New York Times article noted
1307 | ``Contractors Sit Next to Federal Contractors at Nearly Every
1308 | Agency.'' Far more people work under contracts than are
1309 | directly employed by the Government.

1310 | Also, we are pleased that the legislation provides for a
1311 | GAO study on security clearance revocations, which are
1312 | currently not covered by the Whistleblower Protection Act.
1313 | With that, I would like to finish my testimony. Thanks.

1314 | [Prepared statement of Mr. Schwellenbach follows:]

1315 | ***** INSERT *****

1316 Chairman WAXMAN. Thanks for your testimony.

1317 Mr. Devine?

1318 STATEMENT OF THOMAS DEVINE

1319 Mr. DEVINE. Thank you for inviting this testimony, Mr.
1320 Chairman.

1321 This Committee is close to approving a global gold
1322 standard for public employee freedom of expression and a
1323 breakthrough for Government accountability. Quick passage
1324 also will be a signal that new Congressional leadership is
1325 serious about two basic commitments to taxpayers: oversight
1326 that ends a pattern of secret Government and structural
1327 reform to help challenge a culture of corruption.

1328 Over the last 30 years, the Government Accountability
1329 Project has formally or informally helped over 4,000
1330 whistleblowers to commit the truth and survive professionally
1331 while making a difference. This testimony shares and is
1332 illustrated by painful lessons we have learned from their
1333 experience. We couldn't avoid getting practical insights
1334 into which whistleblower systems are genuine reforms that
1335 work in practice and which are illusory.

1336 Along with POGO, GAP is a founding member of the Make it
1337 Safe Coalition, a non-partisan network of organizations that
1338 specialize in homeland security, medical care, natural

1339 disasters, scientific freedom, consumer hazards, corruption
1340 and Government contracting and procurement. At the beginning
1341 of this month, we held a day-long summit on whistleblower
1342 rates, and this testimony seeks to reflect the across the
1343 board consensus that we achieved there.

1344 There can be no credible debate about how much this law
1345 matters. Whistleblowers risk their professional survival to
1346 challenge abuses of power that betray the public trust. It
1347 is freedom of speech when it matters, unlike the freedom to
1348 yell at a referee in a sports stadium or engage in political
1349 satire in late night television. Whistleblowers risk
1350 everything to defend the public against abuses of power.
1351 They represent the human factor that is the Achilles heel of
1352 bureaucratic corruption. They are the lifeblood for any
1353 credible anti-corruption campaign which will degenerate into
1354 empty, lifeless magnets for cynicism without safe channels to
1355 protect those who bear witness. That is the prerequisite for
1356 a meaningful Congressional oversight, as demonstrated by this
1357 Committee's January hearings on climate change censorship.

1358 Creating safe channels for whistleblowers will determine
1359 whether Congress learns about only the tips or uncovers the
1360 icebergs in nearly ever major investigation of the next two
1361 years. Let me give you just a few examples on this.

1362 That FDA scientist, Dr. David Graham, successfully
1363 exposed the dangers from painkillers, like Vioxx, which

1364 | caused over 50,000 unnecessary fatal heart attacks in our
1365 | Country. The drug was removed. Climate change whistleblowers
1366 | like Rick Piltz, exposed how oil industry lobbyists were
1367 | hired by the White House to rewrite the research conclusions
1368 | of America's top scientists. Gary Aguirre exposed the
1369 | Securities and Exchange cover-ups of vulnerability to massive
1370 | corruption in hedge funds that could threaten a new wave of
1371 | Enron type scandals. Frank Terreri from the Air Marshal
1372 | Service exposed and successfully challenged keystone
1373 | bureaucratic practices that repeatedly blew the cover of the
1374 | air marshals we depend on to stop the next skyjacking. Air
1375 | Marshal Robert MacLean's public protest stopped the
1376 | Transportation Security Administration from pulling all
1377 | marshals from sensitive flights when they had blown their
1378 | money on pork barrel projects, and so they couldn't afford it
1379 | any more.

1380 | Mr. Richard Conrad has exposed uncontrolled maintenance
1381 | and repairs on F18s out at the North Island Naval Aviation
1382 | Depot near San Diego. That could explain why those planes
1383 | keep crashing. Whistleblowers don't give up, either. Former
1384 | FAA manager Gabe Bruno is still challenging that agency's
1385 | failure to honestly test more than 1,000 mechanics for
1386 | commercial and civilian aircraft who had received fraudulent
1387 | certifications.

1388 | There also shouldn't be any questions this bill is long

1389 | overdue. Our easiest consensus is the Whistleblower
1390 | Protection Act has become a disastrous trap which creates far
1391 | more reprisal victims than it helps. And it has become
1392 | would-be whistleblowers' best reason to look the other way or
1393 | become silent observers. Your legislation deals with both of
1394 | the causes for that disappointing result after a three-time
1395 | unanimous mandate from Congress for the opposite. One is
1396 | structural loopholes in the law, and the other is a system of
1397 | due process, which doesn't have any enforcement teeth. You
1398 | directly address both of those problems.

1399 | Mr. Chairman, I would be glad to go into a number of
1400 | examples of why the current system has failed, and
1401 | particularly the Federal Circuit Court of Appeals which has
1402 | been the Achilles heel of the law for all three passages. In
1403 | fact, there shouldn't be any delusion, unless we restore
1404 | normal appellate review. Three will not be the charm for the
1405 | Whistleblower Protection Act, and this Committee will be
1406 | reconvening in about five years.

1407 | The key now however is to pass the law and to have
1408 | quick, expeditious results. Until that happens,
1409 | whistleblowers are defenseless. Every month that we delay
1410 | means more reprisal victims who can't defend themselves when
1411 | they defend the public.

1412 | Most anti-corruption measures are very costly in terms
1413 | of our rights and in terms of money. But whistleblower

1414 protection fights corruption by strengthening our freedoms.

1415 And it doesn't cost anything to listen.

1416 [Prepared statement of Mr. Devine follows:]

1417 ***** INSERT *****

1418 Chairman WAXMAN. Thank you very much, Mr. Devine.
1419 Mr. Zaid.

1420 STATEMENT OF MARK ZAID

1421 Mr. ZAID. Good morning, Mr. Chairman, members of this
1422 Committee. It is with pleasure that I testify once again
1423 before this distinguished Committee.

1424 I have been requested to specifically focus on the State
1425 Secrets Privilege, or SSP that I will call it, I applaud this
1426 Committee for taking on this topic. You are, to my
1427 knowledge, in fact, the first Congressional Committee in
1428 decades and perhaps ever to ever directly focus on this
1429 privilege. The privilege is routinely exploited by the
1430 Executive Branch and understandably so. The Judicial Branch,
1431 despite flowery rhetoric, has abdicated its responsibility
1432 for oversight and the Legislative Branch has been
1433 historically silent.

1434 Fortunately, the latter situation, as evidenced by this
1435 hearing, is no longer. Let me state at the outset that I
1436 support the passage of the current language in this bill
1437 about the privilege, although admittedly, any favorable
1438 substantive impact it might have is likely too difficult to
1439 measure. But the importance of the legislation is that it
1440 very clearly opens the door for the first time in history for

1441 true Congressional involvement in oversight. In particular,
1442 to allow for the application of the most important type of
1443 test when it comes to Executive Branch claims of
1444 classification. That is one of smell.

1445 I know all too well the implications of litigating cases
1446 involving national security disputes and classified
1447 information. Oftentimes, my clients' very identity or
1448 relationship to the United States Government is a highly
1449 classified secret. I am frequently in the trenches fighting
1450 with Federal agencies concerning access to classified
1451 information. Over the years, I have handled or have been
1452 consulted on a number of SSP cases. I am generally aware in
1453 those cases of much of the information that is classified.
1454 Sometimes I know the exact information that is classified,
1455 but other times, I know little to none of what is involved.

1456 I do appreciate, and I think this is important to note,
1457 the nature of properly classified information. There are
1458 many secrets, as many of you know, that absolutely need to be
1459 protected. The disclosure of some of the information that I
1460 have been privy to over the years could easily cause serious
1461 damage to the national security interests of the U.S. and
1462 could lead to the loss of life, including that of my own
1463 clients. And I take that prospect very seriously.

1464 The problem is that excessive over-classification is
1465 rampant and at times purposefully abused. Secrecy was

1466 | designed to serve as a shield to protect the disclosure of
1467 | certain harmful or sensitive information. In the context of
1468 | civil litigation, it is quite the opposite. There it is, the
1469 | equivalent of a two-handed sword that in one fell swing, at
1470 | the outset of a battle, decapitates the enemy. The sword is
1471 | the privilege and the enemy is fair judicial due process.

1472 | Since the privilege was created in 1953 by the Supreme
1473 | Court in United States v. Reynolds, courts routinely remind
1474 | the Executive Branch that its assertion is not to be lightly
1475 | invoked. And as routinely as that reminder occurs, the
1476 | Executive Branch routinely ignores it. Moreover, rarely does
1477 | a Federal judge do anything other than accept carte blanche
1478 | whatever an agency head states in a classified declaration
1479 | submitted for review in camera and ex parte. There is no
1480 | role based on current law for the plaintiff's attorney even
1481 | when we do have security clearances to actually review that
1482 | declaration or comment on it. Essentially, it is the
1483 | defendant in the role of a batter telling the pitcher to
1484 | throw the pitch that he wants to guarantee that he could hit
1485 | a home run.

1486 | In the majority of the privilege cases that I am
1487 | familiar with, the court never even gets to the point where
1488 | the specific classified documents are in question. It is
1489 | only the one-sided, self-serving classified declaration that
1490 | is reviewed and serves as the basis for the Court's decision.

1491 | Indeed, there is no case that I am personally aware of where
1492 | the judge even verbally posed substantive questions or
1493 | requested clarifying information in writing based on what was
1494 | contained in the classified declaration.

1495 | Yet we know from the Reynolds case that a Federal agency
1496 | will mislead and arguably lie to a court in order to protect
1497 | itself. The mis-use of the classification system, especially
1498 | in the context of judicial proceedings, is destructive to the
1499 | fundamental tenets of our Constitution. But the courts
1500 | repeatedly hold that it is generally not within their purview
1501 | to intervene on national security matters.

1502 | Frankly, I rejected the notion that Federal judges
1503 | neither have the authority nor can exercise the expertise
1504 | regarding classification decisions. I would submit that
1505 | Congress agrees with me, due to its role in creating such
1506 | statutes as the Freedom of Information Act and the Classified
1507 | Information Procedures Act, both of which allow for judges to
1508 | explicitly exercise authority in the national security realm.

1509 | Regrettably, in 2005, 2006, the Supreme Court had an
1510 | opportunity to ensure that this hearing never occurred. It
1511 | had two cases pending for certiorari, it had two others
1512 | pending at the circuit courts of appeals and at least one
1513 | other at the district court. And in briefs that I filed that
1514 | made it very well known to the court that this was happening,
1515 | that the first time in 50 years they had an opportunity to

1516 | clarify the ambiguity, and in each of the cases, they
1517 | declined without comment to even rule.

1518 | Instead of making that decision, they didn't follow
1519 | their own admonition in Reynolds that judicial control over
1520 | the evidence in a case cannot be abdicated to the caprice of
1521 | executive officers. To put the consequences of the privilege
1522 | in some sort of understandable perspective, I find it
1523 | distressing that foreign criminal terrorist defendants
1524 | receive more rights to ensure that they and their counsel
1525 | have access to classified information than do U.S. nationals
1526 | who place their lives on the line to fight against foreign
1527 | criminal terrorists. The absurdity and irony of this
1528 | irreconcilable discrepancy must not go unnoticed any longer.

1529 | In my written statement, I go through some history that
1530 | I won't repeat here. I will very briefly just point out some
1531 | legislative suggestions for reform and then I can expand on
1532 | any in the Q&A.

1533 | The only way that this privilege is ever going to be
1534 | modified is legislatively. It is not going to happen
1535 | judicially. You have some options. You can create a special
1536 | Article Three court or an Article One administrative entity
1537 | or modify existing entities, such as the Pfizer court or the
1538 | MSPB. You could adopt statutory language that would impose
1539 | clear requirements on judges to take certain steps before
1540 | they dismiss a case in its entirety based on the privilege.

1541 | You could ensure proper education and training of Federal
1542 | judges, so that they understand what is the nature of
1543 | classification and how to protect classified information.

1544 | Certainly in the interim, an easy thing to do is to task
1545 | CRS to draft proposed statutory language to address concerns
1546 | of the Executive Branch and consider expanding the
1547 | jurisdiction of the entities I mentioned, or task the GAO to
1548 | conduct a thorough examination of the historical invocation
1549 | of the privilege and objectively analyze some of the prior
1550 | examples of classified declarations to see if what was
1551 | submitted back when meets the test back at that time or at
1552 | least now.

1553 | All these suggestions are going to require some
1554 | significant work. I am happy to work with the Committee in
1555 | drafting that, especially since some of these suggestions
1556 | will require the involvement of other committees where it
1557 | actually might be their primary jurisdiction. I appreciate
1558 | the opportunity and thank you.

1559 | [Prepared statement of Mr. Zaid follows:]

1560 | ***** INSERT *****

1561 Chairman WAXMAN. Thank you very much. I want to thank
1562 each of the witnesses for your presentation.

1563 Usually when we think about an employer retaliating
1564 against an employee whistleblower, we usually think of the
1565 individual being fired or demoted. But the suspension or
1566 revocation of an employee's security clearance can have just
1567 as chilling an effect. Last year at the National Security
1568 Subcommittee hearing on this issue we heard from Government
1569 officials who reported abuses at our Nation's most secretive
1570 counter-terrorism national security and law enforcement
1571 programs and who all claimed to have been retaliated against
1572 for trying to correct these abuses. Silencing national
1573 security whistleblowers who are attempting to report waste,
1574 fraud and abuse places our Nation in great danger.

1575 This bill before us would include revocation of security
1576 clearance as a prohibited retaliation under the Act. To
1577 whomever wishes to respond, do you think that is a
1578 significant problem and you think this provision will help
1579 better protect national security whistleblowers? Mr. Zaid?

1580 Mr. ZAID. Yes, sir. As part of my practice, I
1581 frequently deal with clearance matters. I think I testified
1582 at that hearing, in fact, as I recall. One of my clients,
1583 Anthony Schaffer, of the Defense Intelligence Agency, had had
1584 his clearance stripped, revoked in the aftermath of the Evil
1585 Danger allegations.

1586 The problem with dealing with whistleblower retaliation
1587 and the clearance issues are trying to draw a clear line of
1588 path between the two. It is very difficult in experience to
1589 be able to prove that the whistleblowing activities had
1590 something to do with the clearance, and even in the cases
1591 that it does, very often the clearance matters that are
1592 underlying the subject of the revocation or denial have some
1593 arguable standing basis on their own. Anything can happen.
1594 With Tony Schaffer, part of the allegation against him was
1595 that he had stolen pens from the embassy when he was 14 years
1596 old, 30 years earlier. And that was being used as a pattern
1597 and practice allegation against him, that he had mis-used his
1598 cell phone to the tune of \$67 at part of his work
1599 responsibilities.

1600 So the key in being able to I think deal with the
1601 clearance aspect would be, especially in whistleblowers,
1602 would be to create specific jurisdiction, whether at the MSPB
1603 or even better, at a Federal court level, to be able to
1604 review a substantive determination of a clearance decision.
1605 Right now, the way it stands, no Federal court will go
1606 anywhere near security clearance unless it is a
1607 constitutional matter.

1608 Chairman WAXMAN. What do you think about the provisions
1609 in the bill?

1610 Mr. ZAID. I think the provisions in the bill are great

1611 for a start.

1612 Chairman WAXMAN. But you would expand on it?

1613 Mr. ZAID. I would expand, I would likely expand--

1614 Chairman WAXMAN. Let me ask you to give us your thoughts
1615 further on the expansion. I just want to quickly ask a few
1616 questions and you might have noticed the bells, so we are
1617 going to have to break. So maybe even if we can complete the
1618 questioning before the last opportunity to vote, that would
1619 be helpful.

1620 Just very quickly, do you think it is appropriate to
1621 have scientists and medical professionals protected when they
1622 disclose abuses of authority? Do you all think that that is
1623 a helpful provision? Dr. Weaver?

1624 Mr. WEAVER. Of course. People should not be penalized
1625 for telling the truth, especially when it is scientifically
1626 and objectively determined.

1627 Chairman WAXMAN. On the appellate review issue, what we
1628 did is, despite there is a rationale for all appeals going to
1629 the Federal circuit, in order to have a legal landscape that
1630 is clear for all employees and employers, I would like to
1631 know how you respond to those concerns. Do you think that
1632 allowing whistleblower cases to go through the normal appeals
1633 process, rather than centralizing cases in the Federal
1634 circuit court of appeals will help maintain the integrity of
1635 the whistleblower protections passed by Congress?

1636 Mr. WEAVER. It works for all other statutes,
1637 essentially, right? I mean, you end up having the leavening
1638 effects of multiple circuits looking at the same legal
1639 problem, arriving at the truth, and then conflicts are
1640 hammered out. In the present system, there is, they have a
1641 lock on it, they essentially have it all to themselves, it
1642 should be all circuits review.

1643 Chairman WAXMAN. I appreciate that. Let me recognize
1644 Mr. Platts and see if we can get through this before the last
1645 opportunity before we have to vote.

1646 Mr. PLATTS. Thank you, Mr. Chairman. I just want to
1647 follow up on that last point. The way we had the bill
1648 introduced is with the Federal circuit. But I will be
1649 looking to offer an amendment tomorrow for all circuit to
1650 open it up the same as other reviews. If we did not do that
1651 with all the other changes that we are trying to address in
1652 the bill, if we do not address and allow all circuit review,
1653 what do you think our likelihood of success, meaning giving
1654 true protections to Federal employees under this bill without
1655 that, given the track record of the Federal circuit? Mr.
1656 Devine?

1657 Mr. DEVINE. Congressman, I think until you do address
1658 that issue, we are going to be prisoners of the broken record
1659 syndrome. Congress has made very clear that it supports a
1660 certain boundary of free speech rights for public servants.

1661 The Federal circuit has made it adamantly clear that they
1662 disagree and will not accept those boundaries.

1663 Although stability in case law is a very worthy goal,
1664 and Professor Weaver is right, it hasn't been a serious
1665 obstacle for other whistleblower issues, there is an even
1666 bigger issue here. Who is going to write the law for ethical
1667 freedom of speech by Government employees?

1668 I will just give you a few examples. This is an
1669 absolute test of wills between Congress and one particular
1670 court. In 1994, the committee report said, it is also not
1671 possible to further clarify clear statutory language.
1672 Protection for any whistleblowing disclosure evidencing a
1673 reasonable belief truly manes any. Since 1994, the court has
1674 created nearly a dozen all-encompassing loopholes so that any
1675 means almost never.

1676 I will give you another example. When Congress first
1677 passed this law in 1978, the committee report said that the
1678 purpose of it is so that Pentagon employees who disclose
1679 billions of dollars in costs overruns through doing their
1680 audits, GSA employees who find widespread fraud, nuclear
1681 engineers whose inspections find violations of safety
1682 requirements in nuclear plants, that they can do their jobs
1683 without retaliation.

1684 Well, in 1996, the Federal circuit said the
1685 Whistleblower Protection Act doesn't count for when you are

1686 carrying out your job duties. In--

1687 Chairman WAXMAN. Excuse me, Mr. Devine--

1688 Mr. PLATTS. Because we are short on time, am I safe in
1689 saying that all four of you agree that all circuit review is
1690 critically important to the reforms we are pushing for?

1691 Mr. ZAID. It may constitute legal malpractice for me to
1692 charge clients to take their whistleblower appeal up to the
1693 Federal circuit court of appeals.

1694 Mr. PLATTS. We are in agreement. And I appreciate,
1695 again, al of you, I appreciate your testimony here today.
1696 Very in-depth, which is very helpful. And your efforts
1697 leading up to this hearing, and as we go forth.

1698 Thank you, Mr. Chairman.

1699 Chairman WAXMAN. Thank you, Mr. Platts.

1700 Mr. Yarmuth and Mr. Braley, do you think you can split
1701 the next five minutes? Mr. Braley?

1702 Mr. BRALEY. I have to say that I am very, very pleased
1703 to be here. I have actually had the privilege of
1704 representing whistleblowers, and I have represented people
1705 who have been blacklisted. One of my concerns is that even
1706 though the whistleblower protection deals with what is going
1707 on at the time a decision is made affecting an employee's
1708 rights with an agency or Federal Government entity, one of
1709 the concerns I have is a lack of protection of what happens
1710 after they leave and their reputations are sullied and they

1711 | have no protection against interference with other employment
1712 | prospects. I know some of you have encountered that in your
1713 | own lives.

1714 | I am also very concerned about the lack of an adequate
1715 | remedy and the form in which that remedy occurs. Because as
1716 | I read the bill as it is currently drafted, it is limited to
1717 | reasonable and foreseeable consequential damages which may or
1718 | may not include interest that accrues for the lost time while
1719 | those employees are out there in a state of limbo. It may or
1720 | may not include the type of remedy that is recognized under
1721 | Federal law for employees who have been discriminated against
1722 | in the workplace, which is compensatory damages for the very
1723 | real problem in whistleblower cases of the intense
1724 | intimidation and emotional toll it takes upon them. And
1725 | based upon the language that appears to me to send a mixed
1726 | messages as to whether this is a legal or an equitable remedy
1727 | and if so, whether it is covered by the Seventh Amendment of
1728 | the United States bill of rights, which would guarantee the
1729 | right to trial by jury, and I think raises a lot of the
1730 | similar concerns you are talking about with the Federal
1731 | circuit right of review.

1732 | So I am saying this very rapidly but I would be
1733 | interested in any of the comments that the panelists would
1734 | have about the need to go further with this bill to provide a
1735 | true remedy, even though I am very, very pleased that we are

1736 | taking the significant steps that we are to improve the
1737 | existing remedy.

1738 | Mr. DEVINE. Mr. Braley, the bill would provide access to
1739 | jury trials. It is modeled after the same language in the
1740 | Sarbanes-Oxley law for corporate whistleblowers, which is
1741 | provided that right. I think your points are very well
1742 | taken, though, about what happens when you win. This would
1743 | be the only remedial employment law, even this legislation,
1744 | if passed, that doesn't provide compensatory damages as part
1745 | of its make-whole remedy. I think that is something for the
1746 | Committee to consider very seriously.

1747 | Mr. WEAVER. In the area of national security, any hint
1748 | of equitable remedies are going to be vigorously challenged
1749 | by the Executive Branch. And especially concerning security
1750 | clearances, the Executive Branch position will be there is no
1751 | equitable power to restore people to their job function,
1752 | essentially.

1753 | Chairman WAXMAN. Thank you, Mr. Braley. Members want to
1754 | ask further questions and have you respond in the record in
1755 | writing. We would appreciate that.

1756 | Mr. Shays, did you want to make any last minute
1757 | comments?

1758 | Mr. SHAYS. Just to thank you for participating in this
1759 | hearing, and Mr. Chairman, for bringing this bill forward.
1760 | It is nice to have a member who has had personal experience.

1761 Chairman WAXMAN. All right. Thank you very much. That
1762 concludes our hearing, we stand adjourned.

1763 [Whereupon, at 11:45 a.m., the subcommittee was
1764 adjourned.]

 CONTENTS

STATEMENTS OF JAMES A. THURBER, PH.D, DIRECTOR AND DISTINGUISHED PROFESSOR, CENTER FOR CONGRESSIONAL AND PRESIDENTIAL STUDIES, AMERICAN UNIVERSITY; FRED WERTHEIMER, PRESIDENT AND CEO, DEMOCRACY 21; CRAIG HOLMAN, PH.D, LEGISLATIVE REPRESENTATIVE, PUBLIC CITIZEN	PAGE	13
STATEMENT OF JAMES A. THURBER	PAGE	13
STATEMENT OF FRED WERTHEIMER	PAGE	21
STATEMENT OF CRAIG HOLMAN	PAGE	25
STATEMENTS OF WILLIAM G. WEAVER, PH.D, ASSOCIATE PROFESSOR, UNIVERSITY OF TEXAS AT EL PASO; NICK SCHWELLENBACH, INVESTIGATOR, PROJECT ON GOVERNMENT OVERSIGHT; THOMAS DEVINE, LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT; MARK S. ZAID, ATTORNEY, KRIEGER AND ZAID, PLLC	PAGE	49
STATEMENT OF WILLIAM G. WEAVER	PAGE	49
STATEMENT OF NICK SCHWELLENBACH	PAGE	54

STATEMENT OF THOMAS DEVINE

PAGE 59

STATEMENT OF MARK ZAID

PAGE 64

INDEX OF INSERTS

***** INSERT *****	PAGE	6
***** COMMITTEE INSERT *****	PAGE	9
***** COMMITTEE INSERT *****	PAGE	11
***** INSERT *****	PAGE	20
***** INSERT *****	PAGE	24
***** COMMITTEE INSERT *****	PAGE	26
***** INSERT *****	PAGE	29
***** COMMITTEE INSERT *****	PAGE	53
***** INSERT *****	PAGE	58
***** INSERT *****	PAGE	63
***** INSERT *****	PAGE	69