UNITED STATES SENATE
COMMITTEE ON GOVERNMENTAL AFFAIRS

CONSIDERATION OF THE FEDERAL EMPLOYEE PROTECTION OF DISCLOSURES ACT, S. 1358

TESTIMONY OF STEPHEN M. KOHN
CHAIRMAN OF THE BOARD OF DIRECTORS OF THE
NATIONAL WHISTLEBLOWER CENTER

November 12, 2003

Chairman Susan M. Collins, Ranking Member Joseph I. Lieberman and Honorable Members of the Committee on Governmental Affairs:

My name is Stephen M. Kohn and I am Chairperson of the Board of Directors of the National Whistleblower Center, a non-profit, non-partisan, tax-exempt organization in Washington, D.C. specializing in the support of employee whistleblowers. Over the past 19 years I have specialized in representing employee whistleblowers, many of whom are loyal federal public servants. In 1985 I wrote the first legal text evaluating the legal protections afforded to whistleblowers. Since then, I have testified before Congress, argued cases in court and authored five additional books on whistleblower law. In the past I have represented federal whistleblowers, including employees of the Department of Defense, Veterans Affairs, the Federal Reserve Bank, the Federal Bureau of Investigation, the Department of Justice, the Social Security Administration and NASA.

I am deeply honored by your invitation to testify before the Committee.

In enacting the Civil Service Reform Act of 1978, the Whistleblower Protection Act of 1989, the Whistleblower Protection Act Amendments of 1994, and the No Fear Act of 2002, Congress has consistently, and often unanimously, recognized the vital role federal whistleblowers play in protecting the American people.

Congress has not been alone. On October 17, 1990 President George H.W. Bush signed Executive Order 12731 which required, as a condition of

federal employment, that every federal employee disclose waste, fraud and abuse of authority within their agencies. President Bush ordered the following:

> ***"Public service is a trust requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain. . . .***
>
> ***" Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities."***

Before the ink was even dry on this Order, five federal agencies attempted to water down these requirements. Some agencies went on-the-record and attempted to change the requirement that federal employees "shall" report wrongdoing to a mere recommendation that they "should" report misconduct, thus eliminating the requirement that employees blow the whistle. Others wanted to incorporate into the ethical standard a complex legal definition of "fraud and corruption." Other agencies wanted to limit the "appropriate authorities" to whom employees could blow the whistle.

The United States Office of Government Ethics rejected these "suggestions." The reason was simple: "The Government's interest in curbing waste, fraud, abuse and corruption is better served by over reporting . . . Adoption of [these suggestions] might be viewed as limiting an employee's reporting options . . . ." 57 *Federal Register* 35006 (August 7, 1992).

What these agencies could not obtain before the Office of Government Ethics, they obtained from the United States Court of Appeals for the Federal Circuit. Today, Executive Order 12731 is completely ignored throughout the federal workforce. The legal interpretations, given the Whistleblower Protection Act, are inconsistent with the requirements of the Executive Order. Employees who agree that "public service is a trust" and take their obligation to "disclose waste, fraud, abuse and corruption" seriously are without any meaningful protection. Bluntly stated, the overwhelming majority of valid whistleblowers cannot obtain any protection whatsoever under the Whistleblower Protection Act of 1989, as amended ("WPA").

COMPARISON OF THE WPA AND OTHER

FEDERAL WHISTLEBLOWER LAWS

The WPA has established a centralized administrative approach to protecting federal employee whistleblowers. Under the WPA whistleblowers are required to file administrative claims, which generally are filed with the Office of Special Counsel. Decisions of the Special Counsel are reviewable, de novo before the Merit Systems Protection Board. Decisions of the MSPB are subject to judicial review. However, review is limited to the U.S. Court of Appeals for the Federal Circuit.

As set forth in Table 1, the WPA is the only federal whistleblower law which does not provide for review in all judicial circuits. Table 1 compares apples with apples. The chart only compares the WPA with similar whistleblower protection laws. Specifically, the eleven laws set forth in Table 1 all establish a centralized federal administrative process for adjudicating whisleblower cases. They all require a complaint be filed, not in Court, but with an administrative agency (i.e. the U.S. Department of Labor). Under each law, an agency conducts an investigation which can be reviewed, de novo. Just as in the WPA, the hearings are not conducted in federal court, but are assigned to administrative law judges for non-jury trials. Again, similar to the WPA, the decisions of the administrative law judges are reviewed in Washington, D.C. by a federal agency appointed by the President of the United States. Under the WPA, that agency is the Merit Systems Protection Board. Under the eleven other federal laws, that agency is the Administrative Review Board.

Here the similarity ends. All of the DOL-administered whistleblower laws provide for compensatory damages, permit the Department of Labor to file and defend appeals on behalf of employees in the Courts of Appeal and protect employees whose disclosures are purely internal. Most significantly, all of the other 11 DOL-administered laws provide for all-circuit appellate review. Only the WPA restricts appeals to one recently created judicial circuit.

A review of the 16 laws analyzed by the Congressional Research Service also demonstrates this point. As set forth in Table 2, all of the whistleblower laws reviewed by CRS are subject to all circuit judicial review. Moreover, under every law in which the issue arises, courts protect internal

whistleblowers. All or most of the laws permit special or compensatory damages and permit the relevant federal agency to defend the claims in federal court. Some of the laws permit whistleblowers to have their cases heard directly in federal court, while a handful of others permit whistleblowers to have their cases heard by juries and permit the whistleblowers to obtain punitive damages.

In addition to the laws referenced in Tables 1 and 2, a number of other federal whistleblower laws exist which provide even more protection to employees. The False Claims Act permits the Department of Justice to litigate claims on behalf of the employees, permits the employees to share a percentage of any recovery obtained by the federal government, permits wrongfully discharged whistleblowers to obtain special damages (which includes emotional distress damages) and double back pay, and protects whistleblowers who engage in purely internal disclosures to management from retaliation. *U.S. ex rel Yesudian v. Howard University*, 153 F.3d 731, 739-40 (D.C. Cir. 1998).

The Civil Rights Act of 1871 protects municipal and state employee whistleblowers. Under the Civil Rights Act, employee whistleblowers are entitled to direct federal court relief, punitive damages, compensatory damages, and jury trials. The U.S. Supreme Court has explicitly protected purely internal disclosures, and has held that whistleblowing directly to a supervisor is protected under the First Amendment free speech clause. *Givhan v. Western Line*, 439 U.S. 410 (1979).

On the whole the WPA, primarily as a result of narrow and hyper technical judicial interpretations, is the weakest and least protective of all major whistleblower laws. This was not Congress' intent when the WPA was passed.

RESTRICTED APPELLATE REVIEW: THE PRIMARY CAUSE FOR THE WEAKNESSES IN THE WPA

After carefully evaluating the statutory language of the WPA and the numerous judicial interpretations of that statute, unquestionably, the primary

reason that the WPA is ineffective rests with the exclusive jurisdiction of the Federal Circuit over all appellate decisions. This experiment in exclusivity of appellate review, which is unique in federal employment law, has been a colossal failure.

No other employment law or whistleblower protection law restricts appeals courts from hearing cases. The only whistleblower law in the United States that is heard exclusively by one judicial circuit is the WPA. Unless this provision of the WPA is repealed and WPA appeals are adjudicated throughout the United States in a manner identical to all other whistleblower laws, the WPA will never properly protect whistleblowers.

Restricting appeals to one judicial circuit undermines the basic principle of appellate review applicable to all other whistleblower laws. That principle is based on an informed peer review process which holds all circuit judges accountable. Our appellate system of justice initially hears cases in three judge panels. The legal reasoning employed in these decisions are regularly analyzed by three other judge hearing panels when a similar issue is presented to another court. Specifically, if a Court of Appeals issues a decision on, for example, the scope of protected activity under a whistleblower law, whenever that issue comes up in another jurisdiction, a different Court of Appeals reviews and analyzes the prior precedent. This forces the attorneys to argue whether the decision of the sister circuit is good law. Often, appeals courts disagree with each other. Based on these disagreements, courts either reconsider prior decisions and/or the case is heard by the Supreme Court, which resolves the dispute.

By segregating federal employee whistleblowers into one judicial circuit, the WPA avoids this peer review process. In the Federal Circuit no other judges critically review the decisions of the Court, no “split in the circuits” can ever occur, and thus federal employees are denied the most important single procedure which holds appeals court judges reviewable and accountable. A “split in the circuits” is the primary method in which the U.S. Supreme Court reviews wrongly decided appeals court decisions. By creating a system in which such “splits” cannot exist, the Federal Circuit need not worry about a terribly decided anti-whistleblower decision being reversed.

Employees cannot obtain meaningful Supreme Court review of cases decided against whistleblowers, but the government-employers can. The second method for which an appeals court decision is subject to Supreme Court review, is when the Solicitor of the United States asserts that the case raises a significant question of law. In the case of the WPA, the Solicitor represents the employer-agency. That authority has never (and most likely can never) been exercised in support of an employee-whistleblower.

There is no justification whatsoever for restricting appeals to the Federal Circuit. The following justifications traditionally used to justify the Federal Circuit monopoly are not supported in law or fact:

The Federal Circuit Developed Expertise in Whistleblower Law: This is simply not the case. The Federal Circuit hears numerous cases outside of the context of employee-employer relations. The Circuit has an international reputation for trademark and copyright law, and almost all of the judges on the Circuit have backgrounds in corporate law unrelated to labor relations. On the other hand, the other U.S. Courts of Appeal have jurisdiction to hear cases under the approximately 20 other federal whistleblower laws, the retaliation cases filed under Title VII of the Civil Rights Act, and other retaliation cases filed under numerous employee protection laws, such as the Age Discrimination Act, the Fair Labor Standards Act and the Americans with Disabilities Act. Many of the Appeals Court judges sat as District Court judges and adjudicated numerous employee-employer disputes. Although some of the procedures under the WPA are unique, the heart of a WPA case, like the heart of any employment case, concerns evaluating management motives and justifications for adverse action. The Federal Circuit has no special expertise in evaluating these types of issues. Given the fact that the Federal Circuit is not an appeals court of general jurisdiction, does not hear constitutional claims, and does not hear employment cases arising under scores of other similar whistleblower laws, a strong argument can be made that the Federal Circuit is the least qualified court in the United States to hear whistleblower appeals.

Eliminating the Federal Circuit Monopoly Would Create Inconsistencies in the Law: As explained above, inconsistences in appellate decisions is a good thing. It is the mechanism

used on a day- to-day basis for the informal and formal review of the reasoning applied to a case by any one panel of judges. In no other area of whistleblower law does a desire for uniformity trump a desire for sound appellate decision making. On a practical level, this argument is also a red herring. A review of the rulings in whistleblower cases of all of the other twelve circuits demonstrates that the vast majority of Courts of Appeal consistently interpret the law.

All Circuit Review would provide a Choice of Forums: This is not the case. The appellate jurisdiction of the U.S. Courts of Appeals is determined primarily on the jurisdiction in which the underlying cause of action arose. Thus, an employee fired in Virginia could not pick and choose which of the twelve Courts of Appeals in which to file his or her appeal; he or she must file it in the appeals court with jurisdiction over Virginia. Under proper all-circuit review, there is no choice of forum.

Additional Costs: Testimony was presented before a subcommittee of the U.S. Senate Governmental Affairs Committee that all-circuit review would increase the litigation costs of the MSPB. This is not the case. Regional attorneys of the MSPB and the U.S Department of Justice could argue any case before various Courts of Appeals. However, forcing all whistleblowers to argue their appeals court cases in Washington, D.C. can create a hardship on the employees. Federal employees who reside throughout the United States, such as in California, Minnesota, and Alabama, face a hardship when forced to retain attorneys in Washington, D.C. and/or travel to Washington to have their case heard.

Both the initial Senate and House reports (House Report No. 100-274 and Senate Report No. 100-413) recommended the passage of the Whistleblower Protection Act of 1989 and included all-circuit review as one of the primary reforms. The House Report correctly noted that the Federal Circuit was "created" by judges who worked in the Court of Customs and Patent Appeals and the Court of Claims. Given the origin of the Court, the judges were "inexperienc(ed) with federal employee" law. The House Report also noted that the decisions of the Federal Circuit were "generally" "adverse to employees." House Report, p. 26.

In 1994 the House of Representatives Committee on Post Office and Civil Service again recommended that Congress adopt all-circuit review. House Report No. 103-769. That Committee's findings ring even more true today:

> [The] Federal Circuit Court of Appeals have not been favorable to Federal whistleblowers. . . The committee received extensive testimony at hearings that the MSPB and Federal Circuit have lost credibility with the practicing bar for civil service cases . . . .The body of case law, developed by the Board and Federal Circuit, has represented a steady attack on achieving the legislative mandate for effective whistleblower protection . . . .The committee recognizes that realistically it is impossible to overturn destructive precedents as fast as they are issued . . . .

House Report, pp. 17-18.

Unfortunately, the recommendations regarding all-circuit review was not adopted. This is not surprising. The federal employer managers, represented by the U.S. Department of Justice, fully understood that without strong judicial oversight, and a judicial commitment to uphold the legislative intent behind the WPA, most of the other reforms enacted by Congress would, over time, ring hollow. The Justice Department's assessment was correct.

Today, the need for all-circuit review is even more pronounced than in 1989 or 1994. The decisions "adverse to employees" have multiplied. Worse, because the Federal Circuit case law is binding precedent on the Merit Systems Protection Board (MSPB) and Office of Special Counsel (OSC), those administrative agencies have not been fully protective of employees. The litigation procedures of the MSPB are very hostile to whistleblowers. This hostility reflects the numerous "adverse" decisions regularly issued by the Federal Circuit, which have prevented the overwhelming majority of valid whistleblowers from obtaining any legal protection.

THE MERITS OF THE FEDERAL CIRCUIT DECISION MAKING PROCESS

Procedurally, there is no valid justification or precedent for the monopoly the Federal Circuit currently exercises over WPA cases. All other federal whistleblower statutes are subject to all-circuit review. *See* Tables 1 and 2.

Substantively, the protection of federal employee whistleblowers has been devastated by Federal Circuit decisions. *See* Statement of Special Counsel Elaine Kaplan before the Subcommittee on Internal Security, Proliferation and Federal Services (July 25, 2001) (various "Federal Circuit decisions establish unduly narrow and restrictive tests for determining whether employees qualify for the protection of the WPA").

Statistically, federal employee whistleblowers often point to the terrible win-loss ratio whistleblowers face at the Federal Circuit. This poses a valid question: Do federal employees lose their WPA claims because their cases lack merit or do they lose their cases because of the precedents established by the Federal Circuit?

To evaluate the impact of the Federal Circuit case law on the win-loss ratio for WPA whistleblowers, it is important to determine whether the Federal Circuit's statistics regarding whistleblower cases is significantly different from that of other Courts of Appeals. By a review of cases published in West Law, and cases identified in the Federal Circuit's web page, the National Whistleblower Center identified the 25 most recent merit-based WPA cases decided by the Federal Circuit. All 25 cases were substantively reviewed to determine whether a judgment was rendered for or against the employee. Whistleblower employees were found to have lost 91.67% of their cases. In the 8.33% of the cases in which the employees were victorious, the only issue resolved at the Federal Circuit level was the scope of damages. Thus, whether the Federal Circuit would have reversed the ruling of the MSPB on the merits is not known. In any event, based on our findings, the chances of winning a WPA case before the Federal Circuit was less then 10%.

The National Whistleblower Center then reviewed the most recent 25 cases issued by the Courts of Appeals under the Commercial Motor Vehicle Safety Act. This law was chosen because it is administered in a manner similar to the WPA and had the most number of appeals court decisions of all DOL-administered whistleblower laws.

Under the Commercial Motor Vehicle whistleblower law claims are filed before an administrative agency (the U.S. Department of Labor) and are adjudicated before an administrative law judge (not a jury). Likewise, in each case a presidentially appointed board located in Washington, D.C. issues the final and enforceable administrative ruling. Thus, the only distinguishing procedural difference between the WPA and the Commercial Motor Vehicle whistleblower law is that the MSPB orders are reviewable only by the Federal Circuit and the DOL orders are subject to all-circuit review.

Under the Commercial Motor Vehicle Safety Act, employees prevailed in 60% of the appeals court decisions. Thus, truck driver whistleblowers won at the court of appeals 60% of the time, while federal employee whistleblowers only prevailed in 8.33% of the cases presented to the Federal Circuit.

Thus, the anecdotal belief that it is far more difficult to prevail in a whistleblower case before the Federal Circuit than other Courts of Appeals is supported by the evidence.

In addition, our studies have lead us to conclude that substantive Federal Circuit case law hostile to employee-whistleblowers was the cause for this dramatic difference in the win-loss ratio.

Under the Federal Circuit's decisions in *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998) and *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. 2001), most "internal" whistleblowing is not protected. Specifically, disclosures to an employee's supervisor are generally not protected. Additionally reports made by an employee in the course of his duty were stripped of protection. Thus, under the Federal Circuit case law whistleblowers must make so-called "external" reports, i.e. a disclosure to an Inspector General or similar persons. Unlike the Federal Circuit's interpretation of the WPA, **all** of the laws administered by the DOL protect internal whistleblowers. Specifically, under these laws, employees are fully protected if they raise their concern to their immediate supervisor. The DOL statues and case law protect the types of disclosures unprotected under *Willis* and *Hoffman*. Table 1. *Accord.,* Table 2.

By focusing on the *Willis/Hoffman* decisions, the direct impact of the Federal Circuit's jurisdiction over a whistleblower case could be objectively evaluated.

The analysis was very simple. Through a review of the U.S. Department of Labor's web site and a computer search on West Law, the Whistleblower Center was able to identify the twenty most recent decisions issued by the Courts of Appeals in which the Court found that the employee's claim had merit. These twenty most recent decisions all concerned reviews of final decisions issued by the U.S. Department of Labor's Administrative Review Board.

The decisions of the Administrative Review Board and the MSPB are comparable. In both circumstances the Courts of Appeals do not hear cases *de novo*. Instead, the cases are initially tried before administrative law judges and the Court only reviews final agency decisions. Under the DOL-whistleblower cases, the ARB issues the final agency order. Under WPA cases, the MSPB issues final agency orders. The standard of review applied by the Courts of Appeals under a WPA case or a DOL-whistleblower case is identical.

In order to evaluate whether or not the Courts of Appeals in which the case was heard would have impacted the actual merits-determination, the substance of each reported decision was analyzed. This evaluation consisted of a review of to whom the employee reported his or her whistleblower concern. By evaluating to whom each report was made, it was possible to determine that the exclusivity of the Federal Circuit's appellate jurisdiction was the outcome-determination. According to our findings the Federal Circuit would not support internal whistleblowers, while all of the other circuits did.

The results of this evaluation were stunning. In all twenty cases favorably decided under the DOL-administered whistleblower laws, the employee had only engaged in internal whistleblowing. Thus, in the Federal Circuit, all twenty employees would have lost their cases. *See* Table 5.

The destructive nature of Federal Circuit precedent is not limited to the decisions of the Federal Circuit; the administrative agencies that adjudicate the

WPA (i.e. the MSPB and OSC) are required to follow Federal Circuit precedent. Thus, a bad decision of the Federal Circuit has a ripple effect on all federal employee cases.

In order to quantify this effect, the National Whistleblower Center reviewed the ten most recent favorable decisions issued by the Department of Labor under the DOL-administered whistleblower laws. These decisions, all decided in 2003, all evaluate whether the whistleblower engaged in internal protected activity not protected under *Willis/Huffman.*

Again, the results are dramatic. Sixty percent of the whistleblowers who prevailed before the DOL would have lost automatically under a *Willis/Huffman* analysis if the case had been heard before the MSPB. Table 6 reflects this evaluation.

THE *WILLIS/HUFFMAN* CASES WERE WRONGLY DECIDED

As set forth above, the Federal Circuit's decisions concerning internal protected activity, set forth in cases such as *Willis* and *Huffman*, are inconsistent with the interpretation provided other whistleblower laws. This raises one final issue: Is the Federal Circuit correct and everyone else wrong?

The issue of whether to protect internal disclosures has been adjudicated for years. Over time, the vast majority of courts have firmly and broadly protected internal disclosures. These judicial interpretations have been "endorsed" by Congress on numerous occasions. The two most recent whistleblower laws passed by Congress, the Sarbanes-Oxley corporate whistleblower law and the airline safety whistleblower law, both contain specific Congressional endorsements of internal whistleblowing.

Some of the decisions which discuss the need to protect internal whistleblowing are: *Lambert v. Ackerley*, 180 F.3d 997, 1002-1008 (9th Cir. 1999) (*en banc*) (collecting cases and discussing protected activity under various antiretaliation laws); *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12 (1st Cir. 1998); *Baker v. Board of*

Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); *Munsey v. Morton*, 507 F.2d 1202 (D.C. Cir. 1974); *Phillips v. Board of Mine Operations Appeals*, 500 P.2d 772, 781-782 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 938 (1974); *Donovan v. Peter Zimmer America, Inc.*, 557 F. Supp. 642 (D. S.C. 1982); *Dunlop v. Hanover Shoe Farms Inc.*, 441 F. Supp. 385 (M.D. Pa. 1976); *NLRB v. Retail Store Employees' Union*, 570 F.2d 586, 591 (6th Cir. 1978), *cert. denied*, 439 U.S. 819 (1978); *U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731 (D.C. Cir. 1998); and, *Bechtel Construction v. SOL*, 50 F.3d 926, 931-933 (11th Cir. 1995).

In *Passaic Valley Sewerage Commissioners v. United States Department of Labor,* 992 F.2d 474, 478-479 (3rd Cir. 1993), the U.S. Court of Appeals for the 3rd Circuit explained why internal whistleblowing was protected:

> We believe that the statute's purpose and legislative history allow, and even necessitate, extension of the term "proceeding" to intra-corporate complaints. The whistleblower provision was enacted for the broad remedial purpose of shielding employees from retaliatory actions taken against them by management to discourage or to punish employee efforts to bring the corporation into compliance with the Clean Water Act's safety and quality standards. If the regulatory scheme is to effectuate its substantive goals, employees must be free from threats to their job security in retaliation for their good faith assertions of corporate violations of the statute. Section 507(a)'s protection would be largely hollow if it were restricted to the point of filing a formal complaint with the appropriate external law enforcement agency. Employees should not be discouraged from the normal route of pursuing internal remedies before going public with their good faith allegations. Indeed, it is most appropriate, both in terms of efficiency and economics, as well as congenial with inherent corporate structure, that employees notify management of their observations as to the corporation's failures before formal investigations and litigation are initiated, so as to facilitate prompt voluntary remediation and compliance with the Clean Water Act. Where perceived corporate oversights are a matter of employee

misunderstanding, this would afford management the opportunity to justify or clarify its policies.

The court's holding in Passaic Valley reflects basic "common sense." Discouraging employees from discussing concerns with their immediate supervisors undermines the "prompt and voluntary remediation" of most problems.

FAILURE TO REFORM THE WPA WILL RESULT IN NUMEROUS CONFLICTS IN THE LEVEL OF PROTECTION AFFORDED TO FEDERAL EMPLOYEES

Today there is a crisis in federal employee whistleblower protection. Federal employees cannot obtain a fair and reasonable review of their decisions in the Federal Circuit.

The Federal Circuits' emasculation of the WPA has created a vacuum. Whistleblowers still need protection, but the law designed to afford that protection is broken. Consequently, experts in whistleblower protection are increasingly abandoning the WPA and attempting to carve out other legal protections for federal employees. Table 7 sets forth some of the laws that now provide protection for federal employee whistleblowers outside of the WPA/MSPB/Federal Circuit system.

For example, when Congress amended its banking laws it protected federal employee whistleblowers. However, instead of forcing those employees into the WPA system, Congress created a new cause of action in federal court, and specifically permitted employees in the federal banking system to file their whistleblower claims directly in federal court.

In the area of environmental protection federal employees have successfully litigated and obtained protection from the U.S. Department of Labor. Again, the case law now permits all federal employees to avoid the MSPB and seek environmental whistleblower protection from the DOL. Employees of the Department of the Navy, Department of the Army, the Coast

Guard, the Environmental Protection Agency and the Department of Interior have all obtained protection in DOL proceedings. These employees all avoided the WPA.

Title VII of the Civil Rights Act of 1964 permits federal employees who allege discrimination on the basis of sex, race, religion, and national origin to file claims in federal court. Employee whistleblowers who are protected under both the WPA and Title VII are regularly filing claims under Title VII, and ignoring the WPA. Similarly, federal employees are using, with increasing frequency, the Privacy Act to have their retaliation cases heard. The Privacy Act is applicable to employee whistleblowers when management violates the Privacy Act as part of retaliatory conduct.

The WPA is ineffective. Thus, federal employees have no option but to seek protection outside of the MSPB and Federal Circuit. Additionally, as happened under the federal banking laws, until the WPA is properly fixed, whistleblower advocates will request Congress to carve out exceptions to the WPA and permit federal employees, on a case by case basis, to file claims in federal court or before other administrative agencies.

The end result will be a system in which a small group of federal whistleblowers, by luck and circumstance, are able to escape the traps set by a broken WPA-system and gain protection under other laws. However, the majority of federal employees simply have no realistic remedy whatsoever. Clearly, this was not the intent of Congress.

THE WPA MUST BE AMENDED TO INCLUDE "SPECIAL DAMAGES"

Currently, the WPA is silent on the entitlement of federal employees to special damages. Based on this silence, the Federal Circuit has narrowly construed the scope of relief available to meritorious whistleblowers under the WPA, and has denied claims for compensatory damages, such as compensation for emotional distress.

The basic remedy in all employment cases is "make whole" relief. The theory behind "make whole" remedies is that an employee who suffers illegal

retaliation should be restored to the same position he or she would occupy had the retaliation not occurred. Make whole relief is sound public policy. Whistleblowers who fulfill their public service mandates should not be penalized without a full "make whole" remedy. Instead, whistleblowers face severe sanctions even if they win their case.

Under the current law, most whistleblowers cannot be made "whole." As interpreted by the Federal Circuit, the current law provides for actual and consequential economic damages. However, without the statutory authority to award special damages, it is simply not possible to make most whistleblowers "whole." Special or compensatory damages are specifically permitted under most whistleblower laws (see Table 1), including the False Claims Act and the Sarbanes-Oxley corporate whistleblower law. The reason why special damages are an essential component of "make whole" relief was explained by the U.S. Court of Appeals for the 7th Circuit in a False Claims Act retaliation case. *Neal v. Honeywell, Inc.* 191 F.3d 827 (7th Cir. 1999).

Simply stated, special damages are damages which result from "consequences" directly attributable to the wrongdoing. *Neal* 191 F.3d at 831-32. "Special damages" are damages which "naturally, but not necessarily, flow from the wrongful conduct." *Id.* In *Neal* the court held that emotional distress could very well be a "natural" result stemming from a wrongful discharge.

Only by permitting the MSPB to award special damages in cases when an employee-victim demonstrates that such damages were the "natural" result of the retaliation, can an employee be made fully "whole." This fact was made clear in another False Claims Act case decided by the Eight Circuit:

> "The FCA whistleblower provision explicitly mandates 'compensation for any special damages sustained as a result of the discrimination.' Damages for emotional distress caused by an employer's retaliatory conduct plainly fall within this category . . . Providing compensation for such harms comports with the statute's requirement that a whistleblowing employee 'be entitled to all relief necessary to make the employee whole."

Hammond v. Northland Counseling Center, 218 F.3d 886, 892-93 ((8th Cir. 2000).

If an employee can prove that a damage "naturally" flowed from illegal retaliation, that employee must be able to obtain compensation for that damage. To hold otherwise would deny federal employee whistleblowers the full "make whole" relief necessary to correct the adverse impact of the illegal conduct.

CONCLUSION

Today federal employee whistleblowers are not protected. While other agencies have recognized that whistleblowers are a "vital part of American society" and constitute "conscientious public-spirited citizens,"(*Knox v. U.S. Department of Interior*, 2001-CAA-7, Department of Labor Administrative Law Judge decision in federal whistleblower case filed under Clean Air Act), the Federal Circuit and MSPB are stuck in the mud. The regulations and case law governing the WPA all but guarantee that the overwhelming majority of valid whistleblowers will lose their cases. The few lucky enough to prevail will not be made fully "whole." Congress must reform the WPA.

In 1989 and 1994 the Federal Circuit was given the benefit of the doubt. Congress hoped that its strong messages would provide the Federal Circuit with the guidance it needed to properly protect federal whistleblowers. Unfortunately, the Federal Circuit did not adjust its narrow and hostile approach to whistleblower protection. All circuit review is clearly the keystone for any successful reform of the WPA; every institution in government needs oversight. All circuit review rests at the center of appellate judicial accountability.

Congress should enact S. 1358, with two changes. First, all circuit review should be made permanent and the jurisdiction of the Federal Circuit over WPA cases should be terminated. Second, the WPA should be amended to authorize "special damages."

Respectfully submitted by:

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Mr. Kohn is a recognized expert on whistleblower law. Prior to being named to the Board of Directors of the Center he was the Director for Corporate Litigation and Clinical Director of the Government Accountability Project, and a former Clinical Supervisor at the Antioch School of Law in Washington, D.C. Mr. Kohn was also a student law clerk to the Honorable A. Leon Higginbotham, Jr., U.S. Court of Appeals for the Third Circuit.

The National Whistleblower Center is a non-profit, tax-exempt organization specializing in the support of employee whistleblowers. Created in 1988, one of the major goals of the Center is to protect the taxpayers by educating the public about the need to protect employees to disclose government abuse, misconduct and corruption. The Center publishes an educational web page, www.whistleblowers.org, supports precedent-setting litigation on behalf of employee whistleblowers, and provides counsel and attorney referrals to whistleblowers.

The National Whistleblower Center acknowledges the invaluable contributions to this testimony by the following legal interns: Lauren Regan, Mia Munro, Eric Murrell, Phil Marr, Abigail Serna, Donna Lee, and Lisa Yigit.

SOURCES FOR TABLES 1-7

Table 1: 18 U.S.C. § 1514A; 42 U.S.C. § 7622; 42 U.S.C. § 9610; 49 U.S.C. § 60129; 42 U.S.C. §300j-9(l); 42 U.S.C. § 6971; 15 U.S.C. § 2622; 33 U.S.C. § 1367; 42 U.S.C. § 5851; 49 U.S.C. § 42121; 49 U.S.C. § 31105; 5 U.S.C. § 1221, 7703.

Table 2: 49 U.S.C. § 31105*;* 42 U.S.C. § 7621*;* 42 U.S.C. § 9610; 10 U.S.C. § 2409*;* 42 U.S.C. § 5851*;* 29 U.S.C. § 215*;* 30 U.S.C. § 815*;* 33 U.S.C. § 1251; 33 U.S.C. § 948*;* 29 U.S.C. § 1855*;* 29 U.S.C. § 660*;* 42 U.S.C. § 300j-9*;* 18 U.S.C. § 1514A*;* 42 U.S.C. § 6971*;* 15 U.S.C. § 2622*;* 5 U.S.C. 1221, 7703.

Table 3: *Heckman v. Dept. of Agriculture,* 73 Fed.Appx. 409 (Fed. Cir.); *Cruise v. Dept. of Homeland Security,* 70 Fed.Appx. 555 (Fed. Cir.); *Spencer v. Dept. of the Navy*, 327 Fed.3d 1354 (Fed. Cir.); *Carson v. Dept. of Energy,* 64 Fed.Appx. 234 (Fed. Cir.); *Sabersky v. Dept of Justice,* 61 Fed.Appx. 676 (Fed. Cir.); *Chakravorty v. Dept of the Air Force,* 58 Fed.Appx 507 (Fed. Cir.); *Kraushaar v. Dept of Agriculture,* 60 Fed.Appx. 295 (Fed. Cir.); *Ward v. Federal Communications Commission,* 58 Fed.Appx. 517 (Fed. Cir.); *Crockett v. Dept. of the Army,* 54 Fed.Appx. 938 (Fed. Cir.); *Guzman v. Office of Personnel Management,* 53 Fed.Appx. 927 (Fed. Cir.); *Roach v. Dept of the Army,* 53 Fed. Appx. 922 (Fed. Cir.); *Ablestein v. Dept of Agriculture,* 53 Fed.Appx. 84 (Fed. Cir.); i 48 Fed.Appx. 778 (Fed. Cir.); *Francisco v. Office of Personnel Management,* 295 Fed.3d 1310 (Fed. Cir.); *Gernert v. Dept. of the Army,* 34 Fed.Appx. 759 (Fed. Cir.); *Meyers v. Dept. of Veterans Affairs,* 33 Fed. Appx. 523 (Fed. Cir.); *Wainwright v. Dept. of Health and Human Services,* 28 Fed.Appx. 952 (Fed. Cir.); *Raiszadeh v. Dept. of Veterans Affairs*, 25 Fed.Appx. 959 (Fed. Cir.); *Langer v. Dept of the Treasury,* 265 Fed.3d 1259 (Fed. Cir.); *Steele v. Merit Systems Protection Board,* 20 Fed.Appx. 863 (Fed. Cir.); *Flores v. Dept. of the Treasury,* 25 Fed.Appx. 868 (Fed. Cir.); *Egan-Byron v. Dept. of Health and Human Services,* 28 Fed.Appx. 923 (Fed. Cir.); *Amarille v. Office of Personnel Management,* 28 Fed.Appx. 931 (Fed. Cir.); *Camastro v. Dept. of Justice,* 25 Fed.Appx. 930 (Fed. Cir.); *Huffman v. Office of Personnel Management,* 263 F.3d 1341 (Fed. Cir.).

Table 4: *Dalton v. DOL,* 58 Fed.Appx.442 (10th Cir.); *Zurenda v. DOL,* 182 F.3d 902 (2nd Cir.); *Shannon v. Consolidated Freightways Corporation,* 181 F.3d 10 (6th Cir.); *Goggin Truck Line Company, Inc. v. ARB, DOL,* 172 F.3d 872 (6th Cir.); *UPS, Inc. v. ARB, DOL,* 166 F.3d 1215 (6th Cir.); *BSP Trans, Inc. v. DOL,* 160 F.3d 38 (1st Cir.); *Brink's v. Herman,* 148 F.3d 175 (2nd Cir.); *Clean Harbors Environmental Services, Inc. v. Herman,* 146 F3d 12 (1st Cir.); *Intermodal Cartage Co., Ltd. v. Reich, SOL,* 113 F.3d 1235 (6th Cir);

Yellow Freight System, Inc. v. Reich, SOL, 103 F.3d 132 (6th Cir.); *J.L.C. Industries, Inc. v. Reich, SOL,* 89 F.3d 826 (2nd Cir.); *Toland v. Burlington Motor Carriers, Inc.,* 72 F.3d 130 (6th Cir.); *Reemsnyder v. OSHA,* 56 F.3d 65 (6th Cir.); *Castle Coal & Oil Co., Inc. v. Reich, SOL,* 55 F.3d 41 (2nd Cir.), *Yellow Freight Systems, Inc. v. Reich, SOL,* 38 F.3d 76 (2nd Cir.); *Roadway Express, Inc. v. Reich, SOL,* 34 F.3d 1068 (6th Cir.); *Yellow Freight Systems, Inc. v. Reich, SOL,* 27 F.3d 1133 (6th Cir.); *Western Truck Manpower, Inc. v. DOL,* 12 F.3d 151 (9th Cir.); *Yellow Freight Systems, Inc. v. Reich, SOL,* 8 F.3d 980 (4th Cir.); *Trans Fleet Enerprises, Inc. v. Boone,* 987 F.2d 1000 (4th Cir.); *Yellow Freight System, Inc. v. Martin, SOL,* 983 F.2d 1195 (2nd Cir.); *Roadway Express, Inc. v. Dole, SOL,* 929 F.2d 1060 (5th Cir.); *The Lewis Grocer Company v. Holloway,* 874 F.2d 1008 (5th Cir.); *Duff Truck Line, Inc. v. Brock, SOL,* 848 F.2d 189 (6th Cir.); *Moon v. Transport Drivers, Inc.,* 836 F.2d 226 (6th Cir.).

Table 5: *Tennessee Valley Authority v. United States Secretary of Labor*, 59 Fed.Appx. 732 (6th Cir. 2003); Georgia Power Company v. DOL, Case No. 01-10916 (11th Cir. 2002); *Goggin Truck Line Co, Inc., v. ARB*, 172 F.3d 872 (6th Cir. 1999); *Dalton v. United States Department of Labor*, 58 Fed.Appx. 442 (10th Cir. 1999); *Clean Harbors Environmental Services, Inc., v. Herman*, 146 F.3d. 12 (1st Cir. 1998); *Intermodal Cartage Co., Ltd., v. Reich*, 113 F.3d 1235 (6th Cir., 1997); Stone & Webster Engineering Corporation *v. Herman, United States Secretary of Labor*, 115 F.3d 1568 (11th Cir. 1997); *Fluor Constructors, Inc., v. Reich, United States Secretary of Labor*, 111 F.3d 94 (11th Cir. 1997)*; Blackburn v. Reich, United States Secretary of* Labor, 79 F.3d 1375 (4th Cir. 1996); Connecticut *Light & Power Co. v. United States Secretary of Labor*, 85 F.3d 89, (2nd Cir. 1996); *Bechtel Construction Co. v. United States Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995); *J.L.C. Industries, Inc., v. United States Secretary of Labor*, 89 F.3d 826 (2nd Cir. 1995); *Yellow Freight Systems, Inc., v. Reich*, 38 F.3d 76 (2nd Cir. 1994); *Roadway Express, Inc., v. Reich*, 34 F.3d 1068 (6th Cir. 1994); *Yellow Freight System, Inc., v. Reich*, 27 F.3d 1133 (6th Cir. 1994); *Yellow Freight System, Inc., v. SOL*, 983 F.2d 1195 (2nd Cir. 1993)*; Western Truck Manpower, Inc. v. United States Department of Labor*, 12 F.3d 151 (9th Cir. 1993); *Yellow Freight Systems, Inc., v. Reich*, 8 F.3d 980 (4th Cir. 1993); *Passaic Valley Sewerage Commissioners v. United States Department of Labor*, 992 F.2d 474 (3rd Cir. 1993) *Trans Fleet Enterprises, Inc., v. Boone*, 987 F.2d 1000 (4th Cir. 1992).

Table 6: *Kester v. Carolina Power & Light Co.*, No. 2000-ERA-31 (ARB Sept. 30, 2003); *Jackson v. Butler & Co.*, No. 2003-STA-26 (ALJ June 24, 2003); *Palmer v. Triple R Trucking*, No. 2003-STA-28 (ALJ June 19, 2003); *Dourherty v. Hayward Tyler, Inc.*, No. 2001-ERA-43 (ALJ Sept. 23, 2003); *Hillis v. Knochel Brothers, Inc.*, No. 2002-STA-50 (ALJ July 21, 2003); *Moder v. Village of Jackson, Wisconsin*, No. 2000-WPC-5 (ARB June 30, 2003); *Trueblood v. Von Roll America*, No. 2000-WPC-3 (ALJ Mar. 26, 2003); *Griffith v. Atlantic Inland Carrier*, No. 2002-STA-34 (ALJ Oct. 21, 2003); *Negron v. Vieques Air Link*, No. 2003-AIR-10 (ALJ Oct. 21, 2003); *Roberts v. Marshall Durbin Co.*, No. 2002-STA-35 (ALJ Mar. 6, 2003).

Table 7: 12 U.S.C. § 1831, 42 U.S.C. § 7622, 42 U.S.C. § 300j-9(l), 42 U.S.C. § 6971, 42 U.S.C. § 9610, 33 U.S.C. § 1367, 42 U.S.C. § 2000e-3.