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before the

SENATE GOVERNMENTAL AFFAIRS COMMITTEE

on S. 1358,

the Federal Employee Protection of Disclsoures Act

November 12, 2003

MISTER CHAIRMAN AND COMMITTEE MEMBERS:

Thank you for requesting testimony by the Government Accountability Project (GAP) on S. 1358, the "Federal Employee Protection of Disclosures Act." My written remarks today incorporate and will not reiterate analysis in the attached July 25, 2001 testimony on S. 995, the original version of this legislation. GAP and a bipartisan, trans-ideological coalition of good government organizations strongly support your effort to put genuine "Protection" back in the "Whistleblower Protection Act." S. 1358 is a modest good government bill that restores legitimacy for a public policy mandate that Congress has thrice made or reaffirmed unanimously. It does not expand the intended scope of that mandate. Most accurately the bill could be called the Whistleblower Protection Restoration Act.

My name is Tom Devine, and I serve as legal director of the Government Accountability Project, a nonprofit, nonpartisan, public interest law firm that assists whistleblowers, those employees who exercise free speech rights to challenge abuses of power that betray the public trust. GAP has led campaigns to enact or defend nearly all modern whistleblower laws enacted by Congress, including the Whistleblower Protection Act of 1989 and 1994 amendments. We teamed up with professors from American University Law School to author a model whistleblower law approved by the Organization of American States (OAS) to implement its Inter American Convention Against Corruption. We have published numerous books, such as The Whistleblower's Survival Guide: Courage Without Martyrdom, and law review articles analyzing and monitoring the track records of whistleblower rights legislation. See "Devine, "The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment

Dissent," 51 Administrative Law Review, 531 (1999); and an upcoming issue of the George Washington University International Human Rights Journal for article surveying international whistleblower laws.

We could not avoid gaining practical insight into which whistleblower systems are genuine reforms that work in practice, and which are illusory. It is an honor and relief to share the lessons learned from GAP's 25 years experience helping whistleblowers, because Congress is at a crossroads with this legislation. If S.1358 is enacted the Whistleblower Protection Act again will be a genuine "metal shield," giving a fighting chance to those who defend themselves with it. If the status quo persists, the WPA will be a cardboard shield, behind which anyone relying on it is sure to die professionally. The law will be a magnet for cynicism, meaning more silent observers when our nation needs whistleblowers the most.

This alarming conclusion is not just from whistleblower support groups such as GAP and the National Whistleblower Center. Since 2000 we have been joined in the effort to restore a credible Whistleblower Protection Act by over 100 citizen organizations of nearly every perspective. Those who have contributed from their Washington offices include the American Library Association, Accuracy in Media, Blacks in Congress, Common Cause, Federation of American Scientists, Judicial Watch, NAACP, National Taxpayers Union, No Fear Coalition, OMB Watch, Patrick Henry Center, Public Employees for Environmental Responsibility (PEER), Project on Government Oversight (POGO) and Taxpayers Against Fraud. (TAF)

The legislation makes an impact in two ways:

1) S. 1358 restores boundaries for whistleblower rights that Congress unanimously reaffirmed in 1994 amendments to strengthen the WPA. Congress has unanimously enacted those boundaries twice before, in 1978 and 1989. All three times they have been eroded, erased and rewritten through hostile judicial activism by the Federal Circuit Court of Appeals, which has a monopoly on appellate review. The Court also rejected Congress' policy choice in 1994 amendments to cover security clearance retaliation under the WPA. Overall, the result has turned the law into a Trojan horse, creating more victims than are helped. In a very real sense, S. 1358 represents a test of wills between Congress and the Federal Circuit on whether -- 1) an oft-repeated, unanimous legislative mandate will be respected in practice; and 2) whether Congress or the Federal Circuit will set the boundaries for protected whistleblowing.

2) S. 1358 experiments with restoration of the normal judicial review structure, so that Congress will not have to pass this law a fifth time, or more. S. 1358 accomplishes this goal through a five year experiment to remove the Federal Circuit's monopoly, also offering employees the normal appellate option available under the Administrative Procedures Act to appeal in the judicial circuit where they live. This was the structure for judicial review in the Civil Service Reform Act of 1978, until creation of the Federal Circuit in 1982 in a Federal Courts Improvement Act. [Public Law L. No. 97-764, sec. 144 (April 2, 1982)]

The basis for this law is summarized below from two perspectives: 1) the increasing public policy necessity to protect those warning of national security threats caused by U.S. government breakdowns and sustained by abuses of secrecy; and 2) the utter, overwhelming empirical failure of the status quo to protect whistleblowers in

practice. Since 1994 when Congress unanimously strengthened the WPA, through September 30, 2003 whistleblowers' won-loss record for decisions on the merits is 1-84. Since the Federal Circuit's pivotal decision in *Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999), the Merit Systems Protection Board (MSPB) has ruled against whistleblowers in 25 out of 27 decisions on the merits.

The public policy mandate for whistleblowing is summarized through illustrative examples below of how they have made a difference. The ongoing need for the law is summarized through calling the bluffs of a September 30 Justice Department letter to this Committee that denies any need for S.1358.

PROTECTING THE FREEDOM TO WARN FOR OUR MODERN PAUL REVERES

It is worth reviewing why Congress keeps reaffirming a unanimous mandate for whistleblower protection. A necessary premise is to understand their role in any society. There is nothing magical about the term "whistleblower." In the Netherlands, these same individuals are called "bell ringers," after those who warn their communities of danger. Other nations refer to whistleblowers as "lighthouse keepers," after those who save ships from sinking by shining the light on areas where rocks are both invisible and deadly.

As seen by these examples, whistleblowers do not just exercise the freedom to protest or make accusations. They also act as modern Paul Reveres, exercising the freedom to warn about threats to the public's well-being, before avoidable crimes or disasters occur and we are limited to damage control.

Whistleblowers are the living histories who refuse to be rewritten. By challenging conventional wisdom, they keep society from being stagnant and act as the pioneers of change. Consider examples how they have made a difference.

* increasing the government's civil recoveries of fraud in government contracts by over ten times, from $27 million in 1985 to an average of $300 million annually the next ten years after reviving the False Claims Act. For the last two years, the figure has skyrocketed to more than one billion dollars annually, or some forty times what the government could recover for taxpayers without deputizing the whistleblowers. That law allows whistleblowers to file lawsuits challenging fraud in government contracts. There is little question that the False Claims Act is the most effective single law in history for individual whistleblowers to have an impact against corruption.

* overhauling the FBI's crime laboratory, after exposing consistently unreliable results which compromised major prosecutions including the World Trade Center and Oklahoma bombings.

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

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

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

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

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

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

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

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

Since 9/11, there has been a surge of national security whistleblowers whose disclosures are warnings so that tragedy will not recur. Dissent from highly knowledgeable, responsible professionals keeps reaffirming a consistent pattern of government misconduct that has significantly increased unnecessary vulnerability to terrorism: The bureaucracy has been satisfied to maintain the false appearance of security, rather than implementing well-known solutions to long confirmed, festering problems. Recent examples are highlighted in the attached copy of an investigative journalism profile in this month's Vanity Fair.

Unfortunately, these modern Paul Reveres have been silenced or professionally terminated by friendly fire from within a defensive government bureaucracy. The public is the loser. The experience of Bogdan Dzakovic, one of the whistleblowers profiled, is

illustrative. Mr. Dzakovic was a senior leader on the Federal Aviation Administration's Red Team, which checked airport security through covert tests. For years the Red Team had been breaching security with alarming ease, at over a 90% rate. Mr. Dzakovic and others warned that a disastrous hijacking was inevitable without a fundamental overhaul. In response, the FAA ordered the Red Team not to write up its findings or retest airports that flunked to see if problems had been fixed. The agency also started providing advance warnings of the secret Red Team tests. After 9/11 Mr. Dzakovic felt compelled to break ranks and filed a whistleblowing disclosure with the U.S. Office of Special Counsel, which found a substantial likelihood his concerns were well-taken and ordered an investigation. The Transportation Safety Administration was forced to confirm Mr. Dzakovic's charges that gross mismanagement created a substantial and specific danger to public health or safety in connection with the 9/11 airplane hijackings.

In order to strengthen national security, TSA should be taking advantage of Mr. Dzakovic's expertise and allowing him to follow through on his confirmed insights. He has a significant contribution to make in preventing another terrorist hijacking. Instead, the agency has sentenced him to irrelevance. TSA reacted to national debate on Mr. Dzakovic's charges by stripping all his professional duties. When he asked to help train his successors, he was allowed to punch holes and staple documents. After the Special Counsel protested the example being set, TSA promised to stop wasting Mr. Dzakovic's talents. But his new assignment was to answer a local hotline phone on the graveyard shift, where he had to wake up a supervisor to act on any problems. A frequent activity was taking calls from self-described aliens. After further protests, the agency moved him

to TSA's offices in the new Department of Homeland Security (DHS) headquarters. His current duties are updating the old FAA telephone book so it is current for DHS.

The most surreal harassment against national security whistleblowers also is the most frequent: yank their security clearances. Security clearance actions routinely are used to remove whistleblowers from their jobs when they dissent against lax security, by branding them as untrustworthy. They do not have any independent due process rights to challenge retaliation. As a result, employees regularly are not informed of their alleged misconduct for three years. An illustrative recent example involved national security whistleblower Linda Lewis, a USDA employee protesting the lack of planning for biochemical terrorist attacks on the food supply. She was assigned to work at her home for 2 1/2 years without duties while waiting for the hearing, which lasted 90 minutes. Afterwards, she still had not been told the specific charges against her. She was not allowed to confront her accusers, or call witnesses of her own. The "Presiding Official" of the proceeding might as well have been a delivery boy. He had no authority to make findings of fact, conclusions of law, or even recommendations on the case. He could only forward the transcript to a three person panel who upheld revocation of Ms. Lewis' clearance without comment, and without ever seeing her. Ms. Lewis experienced a system akin to Kafka's The Trial, only it is 21st century reality, not 19th century fiction.

Ms. Lewis' experience is not unique. Senior Department of Justice policy analyst Martin (Mick) Andersen blew the whistle on leaks of classified documents that were being used as political patronage. Within days, he was told that the Top Secret security clearance he had been using for over a year had never existed. Without access to classified information, he could not do any work. Instead, he was reassigned without

duties to a storage area *for classified documents*, where he spent his days reading the biography of George Washington and the history of America's Civil War.

Two Department of Energy (DOE) whistleblowers in the Vanity Fair article illustrate how security clearance reprisals are used to suppress dissent against inexcusable negligence. Chris Steele is in charge of nuclear safety at the Los Alamos nuclear weapons complex. He blew the whistle on problems such as the government's failure even to have a plan against suicide airplane attacks into nuclear weapons research and production facilities at the Los Alamos Laboratory, a year after the 9/11 World Trade Center tragedy. His clearance, too, was yanked without explanation. This occurred at the climax of a showdown with Los Alamos contractors --the same officials forced out a few months later in connection with credit card fraud). Mr. Steele was going to the mat on this and equally serious nuclear safety breakdowns, such a secret plutonium waste site without any security or environmental protection. But without warning, he was gagged and exiled, sidelined by using the clearance action to strip all his duties and reassign him to his home for five months.

Richard Levernier, the Department of Energy's top expert on security and safeguards got the same treatment when he dissented against failure to act on repeated findings of systematic security breakdowns for nuclear weapons facilities and transportation. For example, he challenged the adequacy of plans to fight terrorists attacking nuclear facilities that were limited to catching them on the way out, with no contingency for suicide squads who might not be planning to leave a nuclear plant they came to blow up. Mr. Levernier did not have to guess why his clearance was suspended. DOE formally charged him with blowing the whistle without advance permission. It also

suspended his salary. Although an OSC investigation found the harassment against Levernier was illegal retaliation under the Whistleblower Protection Act, it could not act to protect his clearance.

REBUTTAL OF JUSTICE DEPARTMENT POSITION

Three overviews are necessary to put the Justice Department objections in perspective. First, they are not a Statement of Administration Policy, but the views of an agency whose institutional mission is to defeat whistleblowers in WPA cases. DOJ has an institutional conflict of interest with protection of whistleblowers in litigation, and the point of S. 1358 is to even the playing field for reprisal lawsuits.

Second, in assessing whether the crippled WPA is a fair balance, DOJ's shotgun objections omit one factor: reality. There is no track record even of protection in the case law. As described above, whistleblowers do not have a fighting chance to defend their paper rights in practice.

Finally, the debate surrounding DOJ's objections should not be considered in isolation. In almost every instance this Committee's thoroughly researched Report on S. 3070, S. Rep. 107-349 107th Cong., 2d Sess. November 19, 2002), already rebuts in detail the Justice Department's assertions, which do not purport to respond. Indeed, DOJ does not reference or otherwise recognize the Committee Report's existence. Less than a year ago, this Committee issued the Report without dissent. This testimony largely tracks the analysis in S. Rep. 107-349. Point by point responses to the DOJ letter follow, referenced to relevant page numbers of the September 30 letter for Department positions, and to the Committee Report to credit the staff's research on these same issues.

Overview

DOJ asserts, at 1, that S. 1229 [sic -- the current bill number is S. 1358] "would permit, for the first time, the Merit Systems Protection Board and the courts to review the Executive branch's decisions regarding security clearances." This is a fundamentally, conceptually inaccurate premise. Under the controlling Supreme Court precedent, *Department of the Navy v. Egan*, 484 U.S. 518 (1988), it is elementary that the Board and the courts retain appellate authority to review whether agencies comply with their own rules, and order relief accordingly.

DOJ's second inaccurate premise is that the bill "would alter the carefully crafted scheme for judicial review of decisions of the MSPB, which is set out in the CSRA [Civil Service Reform Act of 1978]" To the contrary, S. 1358 basically restores the original structure of CSRA appellate review in the courts, through a five-year experiment with all circuits review. (Sec. 1.k) Until 1982, the Civil Service Reform Act of 1978 had all circuits review of all MSPB decisions. [See Public Law No. 95-454, sec. 205; 92 Stat. 1143 (Oct. 13, 1978)]. The only distinction for S. 1358 is in deference to the Federal Circuit structure, with that court replacing the D. C. Circuit Court of Appeals as the forum with generic jurisdiction. S. 1358's experiment also would restore consistency with the structure of appellate judicial review for every other whistleblower statute on the books, and with the Administrative Procedures Act generically. 5 USC 702. Committee Report, at 16-17.

National security whistleblowers

1. Disclosures of classified information to Congress. Section 1(b) clarifies that classified information can be included in protected whistleblowing disclosures to

congressional audiences with appropriate clearances. DOJ, at 2-3, protests the provision is unconstitutional, because it would give federal employees the extraordinary authority to "determine unilaterally how, when and under what circumstances classified information will be shared with others…."

DOJ is rebutting a straw man, while rehashing unsuccessful 1998 policy and constitutional protests. In section 501 of the FY 1999 Intelligence authorization, the Intelligence Community Whistleblower Protection Act, Pub. L. No. 105-272, title 7, Congress rejected identical objections. The conferees permitted several options for carefully circumscribed congressional whistleblowing disclosures with classified information. H.R. Rep. No. 105-760 (1998). There have been no successful constitutional challenges. In short, this is a public policy choice that already has been made, without incident.

DOJ severely mischaracterize S. 1358. Employees only have the right to disclose classified information to Congress if it is already covered by the Whistleblower Protection Act, and then only if the disclosure passes a tougher than usual test for protected speech. Other disclosures protected by 5 USC 2302(b)(8) only require that the employee reasonably believes the information "is evidence of" illegality or other listed misconduct. Section 1(b) requires that the employee reasonably believes the information *is "direct and specific* evidence of" listed misconduct.

Most fundamentally, DOJ's constitutional challenge is much ado about nothing. That was the case when first made in 1998, which is why it was rejected at the time and has not been challenged in a constitutional test of the intelligence whistleblower law. Federal employees with clearances every day "have the extraordinary authority" and cuty

to make "unilateral" decisions whether to disclose classified information to others with clearances authorizing them to receive it. The judgment call whether every recipient has a need to know its contents is a normal part of the job. S. 1358 does not change preexisting standards for them to make those judgment calls at their own risk about who is authorized to receive what, and when. None of the cases cited by DOJ specifically ban congressional audiences with appropriate clearances and a need to know from receiving classified disclosures, and in 1998 Congress declined to impose that restriction.

Current law also recognizes that all federal workers already have the right to blow the whistle with classified information, if legal prerequisites are met. The WPA already explicitly protects classified disclosures to the Office of Special Counsel, agency Office of Inspector General, and agency head or designee. 5 USC 2302(b)(8)(B)

In practical terms, S. 1358 merely clarifies that a national security whistleblower may apply preexisting rules on when it is authorized to disclose classified whistleblowing information to a cleared congressional audience with a need to know, the same as for anyone else. This should not be controversial. It is beyond debate that congressional audiences routinely have a need to know classified information in order to carry out oversight duties, and they receive it routinely on the institutional level. S. 1358 establishes boundaries for when the merit system will protect corresponding whistleblowing disclosures -- if the congressional audience has a valid need to know the information in an otherwise valid whistleblowing disclosure, in order to fulfill legislative oversight responsibilities.

Public policy demands a clearly defined, safe channel for classified whistleblowing disclosures to Congress. Whistleblowers at the Department of Energy,

Transportation Security Administration, Customs Service, Border Patrol, Nuclear Regulatory Commission and other agencies have proved have proven a basic lesson to be learned from the tragedy of 9/11. Abuses of secrecy sustain government breakdowns that create vulnerability to terrorism. These national security whistleblowers repeatedly have given classified briefings on their disclosures to cleared staff of committees with oversight duties for one reason: the national security requires it. As a result, the merit system needs a corresponding structure providing rules for when these disclosures can be made responsibly. S. 1358 provides it.[1]

2. Security clearance prohibited personnel practice. Section 1(e)(1) formally lists security clearance related determinations as personnel actions under 5 USC 2302(a)(2)(A). Section 1(e)(3) provides merit system relief for security clearance actions. While not challenging the President's authority to take final action on clearances, S. 1358 permits Board and court relief for any ancillary actions, such as termination or failure to reassign meaningful duties, that are normally available when a personnel action is a prohibited personnel practice barred under 5 USC 2302. The bill also provides for deferential agency review of any clearance action that the Board finds is a prohibited personnel practice, and a report to Congress on resolution of the matter.

DOJ, at 6-8, protests that the provision is unworkable and unconstitutional through scattershot objections, specifically discussed below. Three overviews provide context, however. First, DOJ's arguments merely reiterate, without advancing, objections that this Committee already considered and rejected without dissent in S.R. 107-349. Committee Report, at 22-4. Indeed, the structure of S. 3070 reflects extensive,

[1] The Department's arbitrary rigidity is highlighted by its objection to agency offices to guide whistleblowers on how to responsibly make classified disclosures, on grounds that

constructive negotiations in which the Committee adopted numerous administration proposals that modified the bill's original text, without undermining the its intent to end security clearance whistleblower reprisals

More fundamentally, since 1994 this Committee and Congress has made the public policy choice to close the merit system's security clearance loophole. The decision was not made lightly. The House held four joint Judiciary-Post Office and Civil Service Committee hearings before voting unanimously to close the security clearance loophole in the WPA. The Senate Report for 1994 amendments clearly highlighted security clearances as the primary example of the reasons for what in conference became a new category of personnel action -- "any other significant change in duties responsibilities or working conditions." 5 USC 2302(a)(2)(A)(11) As this Committee's report explained in rejecting the security clearance loophole,

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

S. Rep. No. 103-358, at 9-10. The consensus amendments for the 1994 amendments explained that the new personnel action includes "any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system," again specifying security clearance actions as the primary illustration of the provision's scope. 140 Cong. Rec. 29,353 (1994).

In *Hesse v. Department of State*, 217 F.3d 1372, (Fed. Cir. 2000), however, the Federal Circuit rejected legislative history for a broad anti-harassment provision, finding

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classified secrets may not be disclosed *per se*. DOJ, at 8. .

it insufficient to meet the Supreme Court's requirement that Congress must act "specifically" to assert authority over clearance actions beyond review whether an agency follows its own rules. *Egan*, 484 U.S. at 530. In a real sense, S. 1358 is merely a technical fix to meet Supreme Court requirements for how Congress must assert it a decision it already has made to assert merit system authority over clearance actions.[2]

Third, the public policy basis for the mandate is far stronger than in 1994. As seen above, since 9/11 a long ingrained, dangerous pattern that sustains national security breakdowns has become more visible: the most common harassment technique against national security whistleblowers is to yank their security clearances. The popularity is because the agency both can arbitrarily brand employees as untrustworthy, and de facto fire those whose jobs require classified access, all without having to defend its reasoning before outside review. When their clearances are yanked, employees cannot defend themselves against retaliation in scenarios where protected disclosures are needed most -- to responsibly facilitate solutions and accountability for sustained security breaches due to the government's own misconduct.

DOJ's cornerstone objection is that under *Egan*, *supra*, the "Supreme Court explicitly rejected the proposition that the MSPB and the Federal Circuit could review the decision to revoke a security clearance." DOJ, at 6. That premise is so conceptually inaccurate that it raises serious credibility concerns. In *Egan* the Court did not touch MSPB and Federal Circuit review and relief for oversight whether agencies comply with their own rules in clearance action. The only issue in question was judgment calls. The

[2] The Court's problem in *Egan* with independent Board appeals on the merits for security clearance decisions could not have been more simple "The Act by its terms does not confer broad authority on the Board to review a security-clearance determination." Id.
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Court added that Congress may act constitutionally to enforce merit system principles in clearance actions, if it explicitly makes its intention clear to assert that authority. In *Hesse* the Federal Circuit interpreted that standard to mean statutory language. DOJ's generic objection that all statutory rights or third party reviews of security clearance retaliation are inherently unconstitutional is its own creation. It simply does not exist within *Egan*.

DOJ continues, at 7, by falsely asserting S. 1358 would create a new burden for agencies to prove clearance actions by clear and convincing evidence, replacing the current standard that access to classified information only may be provided "when clearly consistent with the interests of national security" -- a "shockingly inconsistent" change.

The attack is shockingly misplaced. S. 1358 is inherently irrelevant to the merits of a clearance decision. Just as with an adverse action, review for a decision on the merits is independent from the affirmative defense of prohibited personnel practice. The Board will not receive any authority to make national security judgment calls. Rather, its authority extends to clearance actions based on civil service violations within its expertise that threaten the merit system. Committee Report, at 22.

DOJ adds, at 7, that the provision is unnecessary, because it is not aware of any abusive patterns, and agency internal review boards can enforce fair play. If the Committee thinks this perspective may be credible, it should expeditiously call hearings where reprisal victims such as those summarized above can bear witness against patterns of abuse so crude that they are clear attempts to make an example of employees' willingness to defend against anything.

Far from being an effective means of redress, agency internal boards have become objects of dark cynicism. All of the security clearance examples for "Kafka law" occurred

at the internal boards that DOJ finds trustworthy. That is not surprising. Inherently they have a structural conflict of interest, with the board judging the dispute while working for what also is the adverse party. That is why Congress rejected internal review boards as an acceptable enforcement mechanism for whistleblower rights in legislation creating the Department of Homeland Security. Particularly in the national security area, objective fact-finding and credible enforcement of the reprisal ban is section 2302(b)(8) both require third party review.

The Department asserts that jurisdiction for an "other determination relating to a security clearance" is too vague. To a degree, the concern is well taken. The statutory language should be tightened to specify jurisdiction for any actions "affecting access to classified information." Access determinations are an independent, but parallel technique to security clearances as a virtually identical way to harass whistleblowers without redress. As seen in the recommendations, the bill should make clear that security clearance reform cannot be circumvented through back door access barriers.

DOJ somehow argues that banning retaliatory investigations, section 1(c)(2), also restricts routine inquiries relevant for security. The objection flunks the oxymoron test. If the inquiry is routine, by definition it is not because of protected activity and would be permissible under S. 1358.

On balance, by failing to concede any legitimate role for Congress under *Egan*, DOJ by default fails to rebut that S. 1358 properly carries out the *Egan* court's specific instructions how Congress may act constitutionally. The Department has provided no basis to disrupt Congress' 1994 policy choice to outlaw security clearance reprisals. This

provision meets head on the expanded repression against post 9/11 national security whistleblowers who have proved an intensified need to enforce the mandate in practice.

Loopholes

Sections 1(b) and (c) of S. 1358 put the "any" back in protection for "any" lawful disclosure evidencing serious misconduct, the explicit language of 5 USC 2302(b)(8) and a cornerstone of the Whistleblower Protection Act of 1989. It removes all barriers for protection based on time, place, context, formality, motive or prior disclosure that are irrelevant for public policy, if the contents of the disclosure qualify for whistleblower protection. DOJ protests, at 4, that by overturning Federal Circuit precedents creating those exceptions to "any," this "expanded definition … would upset the delicate balance between whistleblower protection and the ability of Federal managers to defend against the workforce." It complains that oral disclosures of trivial matters could be protected, making anyone a whistleblower.[3]

In reality, as explained in the Committee Report, at 14-15, the amendment restores the balance Congress repeatedly has made. All employees protected by the merit system should be eligible for whistleblower protection if their evidence discloses serious misconduct. Triviality and significance are determined by substance, not cosmetics. As this Committee instructed in 1988, "the OSC, the Board, and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing." (quoted in Committee Report, at 14)

[3] DOJ also makes gratuitous attacks on the "contributing factor" standard in WPA burdens of proof, arguing they are so lenient it is impossible for a whistleblower not to prevail. S.1358 does not address the burdens of proof in current law, and the track record for decisions on the merits denotes an empirical imbalance against whistleblowers.

If anything, Congress' wise intention since 1978 has been that the whistleblower law will empower agency checks and balances to operate routinely, without employees having to "ignit[e] the glare of publicity" to effectively challenge problems. As stated in an August 24, 1978 Dear Colleague letter, the idea for this right was so that employees can routinely honor their duties to the Code of Ethics and the Constitution by acting on problems "wherever discovered…. Under our amendment, an employee can fulfill those obligations without putting his or her job and career on the line." *Reprinted in* 124 Cong. Rec. S14302-03 (daily ed. Aug. 24, 1978). In short, the law's first priority is to shield disclosures that solve problems early and prevent the need for scandals, not to start public controversy. The Federal Circuit and DOJ simply do not, and have never, accepted that premise.

In 1994 when Congress last addressed this issue, the House Report reaffirmed that precedents creating loopholes violate the Act's statutory language and a basic premise of the law. "Perhaps the most troubling precedents involve the … inability to understand that 'any' means 'any.'" As the late Representative Frank McCloskey emphasized in the only legislative history summarizing the composite House Senate compromise,

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

145 Cong. Rec. 29,353 (1994).

The loophole for making disclosures within the chain of command while performing job duties illustrates just how drastically the Federal Circuit has deviated from long-established norms of whistleblower law. A review of decisions interpreting

environmental and public safety whistleblower laws is instructive. Since *Phillips v. Interior Board of Mine Operators*, 500 F. 2d 772, 778-79, (D.C. Cir. 1974), the courts and Department of Labor consistently have held that the "practicalities" of government law enforcement make it a necessity to protect the free flow of information on the job to achieve the purposes of whistleblower laws.[4]

This doctrine has been followed consistently. In *Mackowiak v. University Legal Systems*, 735 F. 2d 1159 (9th Cir. 1984), and *Kansas Gas and Electric v. Brock*, 780 F.2d 1505 (10th Cir. 1985), the courts cemented it as a cornerstone of all whistleblower laws except that the federal civil service workers. They upheld protection for disclosures within the chain of command to supervisors as necessary first steps to law enforcement and regulatory compliance by properly correcting problems through normal channels. As explained in *Mackowiak*, 735 F. 2d at 1163,

> In a very real sense, every action by [corporate] quality control inspectors occurs 'in an NRC proceeding,' because of their duty to enforce NRC regulations. At times, the inspector may come into conflict with his employer by identifying problems that might cause added expense and delay If the NRC's regulatory system is to function effectively, inspectors must be free from the threat of retaliatory discharge for identifying safety and quality problems….In other words, contractors regulated by the [Energy Reorganization Act] may not discharge quality control inspectors because they do their jobs too well.

[4] The *Phillips* court's reasoning, 500 F. 2d at 778, is highly relevant for the analogous choice Congress make in S. 1358. "The miners are both the most interested in health and safety protection, and in the best position to observe the compliance or noncompliance with safety laws. Sporadic federal inspections can never be frequent or thorough enough to insure compliance. Miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with mine foreman or mine top management. Only if the miners are given a realistically effective channel of communication re health and safety, and protection from reprisal after making complaints, can the Mine Safety Act be effectively enforced."

In ruling consistently with *Mackowiak*, the 10th Circuit emphasized, "In our view, a narrow, hyper-technical reading of [the Energy Reorganization Act whistleblower clause will do little to effect the statute's aim of protection." *KG&E,* 780 F. 2d at 1512.

Courts have applied the same theory to the whistleblower clause in the False Claims Act, 31 USC 3730(h). See *U.S. ex rel. Yesudian v. Howard University,* 153 F.3d 731, 741-43 (D.C. Cir. 1998). In short, DOJ's arguments abandon the plain language of this statute, the consistent rule for all other whistleblower statutes on the books, and common sense cornerstones for public policy.

"Irrefragable proof" as a prerequisite for protection

DOJ does not argue that the Federal Circuit created a new judicial barrier to protection in *Lachance v. White*, 174 F.3d 1378, 1381 (1999). In that decision the court established a prerequisite that the employee first must overcome the "presumption that public officials perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations" by "irrefragable proof." Webste's Fourth New Collegiate Dictionary defines "irrefragable as "uncontestable, undeniable, incontrovertible or incapable of being overthrown." The statute only requires that the "employee reasonably believe his or her disclosure evidences" listed misconduct. Justice merely states that the standard was "very helpful to Federal agencies in defending against whistleblower reprisal claims."

That is an understatement. The new barrier makes it virtually impossible for a whistleblower to prevail unless the personal wrongdoer confesses, in which case there is no need for whistleblowing. In the three years prior to *Lachance* the statute was working

reasonably well, with a 36% success rate for decisions on the merits at the MSPB. Since that decision, whistleblowers only have prevailed in two out of 27 cases, in both of which protected conduct was uncontested. DOJ does not defend that this barrier is incompatible with the merit system, and it even has been emphatically rejected by the Board in a September 11 *Lachance* decision on remand:

> [U]se of the term 'irrefragable would impose what amounts to an impossible evidentiary burden on whistleblowers to prove that agencies in fact engaged in [misconduct listed by statute]. We located nothing either in the language of the WPA or its legislative history that even remotely suggests a congressional intent to impose such a standard under the WPA.

Slip op., at 9. Unfortunately in this instance, the Board cannot reverse the Federal Circuit. That takes Congress.

In short, for all practical purposes it has become noncontroversial to replace "irrefragable proof" with the normal "substantial evidence" test to overcome the presumption of government regularity.

All Circuits Review

DOJ argues, at 7, that there "simply is no good reason to revert to the old system" of all circuits judicial review in the Civil Service Reform Act, because the Federal Circuit Court of Appeals has provided certainty to whistleblower law.

The good reason is clear, as explained by the Committee Report, at 7. "This bill is the third time that Congress has had to clarify the language of the WPA to overturn {Federal Circuit] misinterpretations." Nearly all major provisions of S. 1358 are in response to Federal Circuit rulings that contradicted statutory language or prior legislative history. Unless there is structural reform, this pattern could go on indefinitely.

Overall, with a 1-84 track record since 1994 for decisions on the merits, whistleblowers do not have a fighting chance in this forum. The court has not ruled in favor of a whistleblower on the merits throughout the time Congress has considered numerous generations of this legislation. The court's utter disrespect for Congress' role in drafting the law has been extreme.

The court does not even reference to explicitly contrary legislative history in decisions creating arbitrary loopholes in statutory language. In its December 2000 *Meuwissen v. Interior* decision, 234 F. 3d 9, the Federal Circuit instituted an exception to protected speech -- anyone after the first person to raise an issue -- that it earlier raised in a 1986 case, *Fiorillo v. Department of Justice*, 795 F.2d 1544 (Fed. Cir. 1986). In 1988 this Committee -- 1) specifically rejected *Fiorillo* ["For example, it is inappropriate for disclosures to be protected only if … the employee is the first to raise the issue." S. Rep. No. 100-413 at 13 (1988)]; used it as a basis for to warn the court against arbitrarily constructing barriers to disclosure (Id., at 14, supra 20), and cited it as a reason for replacing "a" with "any" to establish all-inclusive coverage in 5 USC 2302(b)(8). The Federal Circuit ignored the existence of extensive legislative history outlawing this doctrine[5] while resurrecting it. Enough is enough.

DOJ's alarms about uncertainty are a theory that has been proven groundless. As comprehensively researched in the Senate Report, at 17, nearly all other whistleblower statutes have all circuits review. There has been neither judicial chaos nor excessive

[5] Curiously, there is a reference to 1978 legislative history, 234 F. 3d at 13, but none to the 1988 Senate Report rejecting *Fiorillo*. Similarly, in *Willis v. Department of Interior*, 141 F.3d 1139 (Fed. Cir. 1998), the court ignored all relevant 1988, 1989 and 1994 legislative history in canceling protection for those who retaliated against because of disclosures they make on the job carrying out their duties .

Supreme Court review. The Whistleblower Protection Act needs balanced judicial review, not the stability of hostile judicial activism.

To be sure, stability is needed -- for the legislative intent to be consistently respected in appellate judicial review. The case has been made beyond credible debate that structural reversion to normal all circuits appellate review is a prerequisite for this statute to meet its promise as a stable good government law.

Retaliatory investigations

DOJ makes a series of objections, at 8-11, with a unifying theme. Investigations are an important part of government, so they should be beyond accountability to the merit system. Whistleblower Protection Act liability could paralyze this essential function, Justice warns.

The problem with this theory is that Section 1(e) of S.1358 merely codifies the status quo, from 1994 legislative history, H.R.Rep. No. 103-769, at 15, to MSPB case law. *Russell v. Dept. of Justice*, 76 MSPR 317 (1997). The predicted problems simply have not happened. Retaliatory investigations have never been in a legal immunity bubble, because they are so subject to abuse. They can create liability in tort, statutes like the Privacy Act, and the constitution, both for damages and injunctive relief. It should not be intimidating to institutionalize normal accountability for witch hunts threatening the merit system.

Indeed, whistleblower rights are irrelevant for "routine" and normal government functions. The provision in Section 1(e) only creates a personnel action for investigations taken "because of any activity under this section [2302]." The point of the provision is to

outlaw retaliation in the investigative context, not investigations. This is no different than outlawing retaliatory terminations.[6]

By contrast, the need for this provision is fundamental. The first law of retaliation is the "smokescreen syndrome," -- shifting the spotlight to the whistleblower through an investigation that finds a scandalous distraction. Retaliatory investigations are the foundation for reprisal as the primary tool for "record building." This provision of S. 1358 empowers whistleblowers to nip retaliation in the bud, rather than have to live indefinitely with that cloud when used to intimidate or harass. One food safety whistleblower helped by GAP was under a series of nearly uninterrupted series of investigations for over 25 years. Codifying protection is necessary to achieve the WPA's goal of protection for actions with a "chilling effect on merit system duties and responsibilities." 140 Cong. Rec. 29,353 (1994)(statement of Rep. McCloskey). Investigations are a basic activity with a severe capacity to chill or intimidate employees. Retaliatory investigations constitute a common activity with the potential to severely threaten the merit system. Current law has proven that a sound doctrine should be codified.

[6] Other scattershot objections, DOJ at 11-12, are worth brief mention. While EEOC law does not permit challenges to proposed actions, there is no issue that proposed actions are covered under section 2302. Employees could not be liable for blowing the whistle to an Inspector General, because they have no authoritative role in any action on their disclosure. The OIG decides whether to investigate. There is little to fear from the OSC disclosing open investigative files from another agency. It fiercely defends the confidentiality of its own investigative files from complainants, let alone those from other agencies.

Strengthening OSC authority

S. 1358 reinforces the Office of Special Counsel's capacity to be functional in pursuing its mission to protect the merit system from prohibited personnel practices. The bill extends OSC litigating authority to court (Section 1k), restores realistic burdens of proof for disciplinary prosecutions and relieves the OSC from liability out of its fixed annual budget to pay defendant attorney fees for unsuccessful disciplinary cases. Section 1(g). DOJ objects, at 9-10, that the OSC should not be enfranchised, because it could take an inconsistent position with its own views on behalf of the Office of Personnel Management. It warns, at 12-13, that the barriers against OSC disciplinary prosecutions should be maintained or strengthened, to keep the Office from abusing its power.

While it would be presumptuous to speak for the OSC, DOJ's objections are an an injustice to the merit system. The OSC currently can litigate in federal court in appropriate cases to defend the merit system, with Justice Department approval. It's just that DOJ never has agreed OSC participation would be appropriate. The result is hardly surprising, since DOJ always is counsel for the adverse party. That is an institutional conflict of interest, and it sustains an inherent structural imbalance against the merit system in court. The Office of Personnel Management (OPM) is enfranchised to advocate the views of management. But there is no government agency in court whose mission is to speak for the merit system. There is simply no rational basis to gag the merit system's institutional defender from participating in the final, decisive stage of litigation that controls the merit system.

With respect to discipline, DOJ advocates a legal standard where the existence of any innocent motive in a reprisal should eliminate eligibility for discipline. That balance

would concede the concept of deterrence for merit system violations. On payment of attorney fees, DOJ offers no empirical basis to support its fears of OSC abusing its authority during some two decades when it didn't have to pay private counsel if the prosecution were unsuccessful. This liability could have a severe chilling effect on OSC actions to seek accountability. With the Office operating on a fixed budget, the practical impact is that any OSC prosecution could threaten funding for ongoing remedial actions.

RECOMMENDATIONS

The trustworthiness of this law is that it does not try to make any new policy choices beyond those already adopted unanimously, twice in some instances. S.1358 is a solid proposal that needs little fine tuning. It is a model of rights that Congress has developed before, and mainly needs a chance to prove itself operating within a balanced implementing structure.

Three further steps are necessary to reach the potential of S.1358's good government goals. Two are statutory language fixes. As mentioned before, the statute must be clear that it protects against any reprisal that would block access to classified information necessary for a national security security whistleblower to do his or her job.

Second, the definition of "gross mismanagement" needs to be established by statute. In the recent remand of *Lachance, White v. Department of Air Force*, MSPB No. DE-1221-92-0491-M-4 (slip op. Sept. 11, 2003), the Board did to "gross mismanagement" -- functionally eliminated the concept -- what the Federal Circuit did previously to "reasonable belief." To qualify now as gross mismanagement, the Board now requires misconduct so blatant in misconduct so severe that experts can't disagree

about its propriety. Id., slip op. at 16-17. Anything else is an unprotected policy disagreement. In essence, the Board canceled "irrefragable proof" as a prerequisite for "reasonable belief," but created a "son of irrefragable" proof to qualify for "gross mismanagement." This standard replaces the longstanding test that the misconduct must be arbitrary and capricious action or inaction that creates a substantial risk of interfering with the efficient accomplishment of the agency mission. *D'Elia v. Department of Treasury*, 60 MSPR 514 (1994). *Harvey v. Department of Navy*, 92 MSPR 51 (2002). In light of the new precedent, that longstanding definition needs to be codified.

Second, Congress needs to extend the Sarbanes Oxley corporate whistleblower and EEO procedure to federal employees -- permit them to file a civil action in U.S. district court if they do not receive an administrative ruling within 180 days. An analogous provision was passed unanimously by the House of Representatives prior to the 1994 amendments. While few choose that option due to expense, for whistleblowers with high stakes dissent involving national consequences, court may be the only chance for justice under the Act. The MSPB was not designed for major scandals with a national impact involving high-level government officials; it adjudicates employment disputes. On the personal level, the professionalism and dedication of individual Administrative Judges has inspired GAP lawyers. But as a rule and institutionally, the Board has neither the resources nor the judicial independence to provide a reliable forum for the cases where the Whistleblower Protection Act is needed most.

CONCLUSION

The Whistleblower Protection Act is at a crossroads. For the third time Congress must reaffirm a unanimous mandate erased by judicial activism, or else the law's impact will range from irrelevant to counterproductive. For four to be the charm and institutionalize the statutory mandate, this time it must be reinforced with structural reform as well.

There should not be any delusion about the reason for congressional action on S.1358. It is unrealistic to expect would-be whistleblowers to defend the public, if they can't defend themselves. Profiles in Courage are the exception, not the rule.