

TESTIMONY OF THOMAS DEVINE,
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before the

HOUSE OVERSIGHT AND GOVERNMENT REFORM COMMITTEE,
SUBCOMMITTEE ON FEDERAL WORKFORCE, U.S. POSTAL SERVICE AND THE
CENSUS

on

WHISTLEBLOWER PROTECTION SINCE PASSAGE OF THE WHISTLEBLOWER
PROTECTION ENHANCEMENT ACT

September 9, 2017

MR. CHAIRMAN:

Thank you for inviting the Government Accountability Project's (GAP) testimony on the first five years of the Whistleblower Protection Enhancement Act. (WPEA) My name is Thomas Devine, and I serve as GAP's legal director. This hearing is significant for two reasons – 1) oversight of how the WPEA has worked in reality; and 2) building a record for legislative action. Action is essential to address newly emerging threats and loopholes that obstruct or circumvent the Act's good government mandate. Most fundamental, 2017 will be the year of truth for unfinished business on the due process structure to enforce the Whistleblower Protection Act's (WPA) free speech rights. If Congress acts in a responsible timely manner to meet those challenges, after 39 years federal whistleblowers will have legal rights on which they can rely – a genuine metal shield against retaliation.

GAP is a nonprofit, nonpartisan, public interest organization that assists whistleblowers, those employees who exercise free speech rights to challenge abuses of power that betray the public trust. GAP has led or been on the front lines of campaigns to enact or defend nearly all modern whistleblower laws passed by Congress, including the Whistleblower Protection Act of 1989 and 1994 amendments.

Our work for corporate whistleblower protection rights includes those in the Sarbanes-Oxley law for some 40 million workers in publicly-traded corporations, the 9/11 law for ground transportation employees, the defense authorization act for defense contractors, and the Consumer Product Safety Improvement Act for some 20 million workers connected with retail sales, the Energy Policy Act for the nuclear power and weapons industries and AIR 21 for airlines employees, among others. Last year GAP was counsel for an *amicus curiae* brief filed by Representative Speier, as well as Senators Grassley and Johnson, which successfully defended the WPA burdens of proof for analogous corporate whistleblower statutes.

We teamed up with professors from American University Law School to author a model whistleblower law approved by the Organization of American States (OAS) to implement at its Inter American Convention against Corruption. In 2004 we led the successful campaign for the United Nations to issue a whistleblower policy that protects public freedom of expression for the first time at Intergovernmental Organizations, and in 2007 analogous campaigns at the World Bank and African Development Bank. GAP has published numerous books, such as The Whistleblower's Survival Guide: Courage Without Martyrdom, and law review articles analyzing and monitoring the track records of whistleblower rights legislation. See "Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 Administrative Law Review, 531 (1999); Vaughn, Devine and Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 *Geo. Wash. Intl. L. Rev.* 857 (2003); *The Art of Anonymous Activism* (with Public Employees for Environmental Responsibility and the Project on government Oversight)(2002); and *The Corporate Whistleblower's Survival Guide: A Handbook for Committing the Truth* (2010). The latter won the International Business Book of the Year Award at the Frankfurt Book Fair.

Over nearly years we have formally or informally helped over 8,000 whistleblowers to “commit the truth” and survive professionally while making a difference, and been leaders in campaigns to pass 34 whistleblowers laws ranging from Washington, DC to the United Nations. This testimony shares and is illustrated by painful lessons we have learned from this experience. We could not avoid gaining practical insight into which whistleblower systems are genuine reforms that work in practice, and which are illusory.

Along with the Project on Government Oversight, GAP also is a founding member of the Make it Safe Coalition, a non-partisan, trans-ideological network of 75 organizations whose members pursue a wide variety of missions that span defense, homeland security, medical care, natural disasters, scientific freedom, consumer hazards, and corruption in government contracting and procurement. We are united in the cause of protecting those in government who honor their duties to serve and warn the public. Our coalition led the citizen campaign for passage of the Whistleblower Protection Enhancement Act. (WPEA) Our coalition has some 75 members, including good government organizations ranging from Center for American Progress, National Taxpayers Union and Common Cause, environmental groups from Council for a Livable World, Friends of the Earth and the Union of Concerned Scientists, conservative coalitions and organizations such as the Liberty Coalition, Competitive Enterprise Institute, American Conservative Defense Alliance and the American Policy Center, to unions and other national member based groups from American Federation of Government Employees and the National Treasury Employees Union, to the National Organization for Women. But the coalition itself is only the tip of the iceberg for public support of whistleblowers. Some 400 organizations with over 80 million members joined the petition for passage of the WPEA.

WPEA TRACK RECORD TO DATE

Positives

2017 continued a consistent pattern since the WPEA's passage. The last five years have been the best of times and the worst of times for federal whistleblowers. On the positive side, its blanket closure of prior loopholes means that employees no longer have to guess whether they are covered by the law. Similarly, increased training and multiple legislative mandates have created unprecedented management respect for whistleblowers, if not acceptance. Perhaps most

exciting, in *Department of Homeland Security v. MacLean*, the Supreme Court heard its first test case of the Whistleblower Protection Act and decisively backed the law's cornerstone. Its 7-2 ruling held that agency secrecy regulations cannot override WPA free speech rights. In the decision's aftermath only Congress can restrict the WPA's right to public freedom of expression, through specific statutory language that provide fair notice of restraints on public disclosures.

In terms of impact, whistleblowers are making a difference more than at any time in history. Consider the impact of just a few who have testified before this committee. An avalanche of whistleblowers at the Department of Veterans Affairs (DVA), spearheaded by the VA Truth Tellers, has sparked an unprecedented spotlight on corruption and deadly neglect, as well as initial reforms that may save the lives of countless veterans. Marine scientist Franz Gayl's disclosures sparked delivery of effective mine resistant armored vehicles that cut Iraqi land mine casualties from 60% of the total (and 90% of fatalities) to 5% of the total. They exposed and stopped the sale of Fast and Furious weapons to Mexican drug cartels. Government is taking whistleblowers more seriously than ever before, and it is producing results.

Although he blew the whistle before the WPEA, Justice Scalia's comment at the Supreme Court oral argument in *MacLean* highlights how whistleblowers can change the course of history, if we listen. In 2003 Mr. MacLean publicly exercised the freedom to warn, and prevented the Transportation Security Administration from ordering cancelation of all relevant Federal Air Marshal missions during a more ambitious rerun of 9/11 planned by Al Qaeda. Thanks to Mr. McLean, DHS conceded error, Air Marshals stated on the job and the high-jacking was prevented. But rather than honor Mr. MacLean, TSA pseudo-classified its order after-the-fact and fired him supposedly for endangering national security by exposing the agency's secret order to go AWOL during an enemy attack. When counsel at the Supreme Court

argued that Mr. Maclean acted to better protect the nation, Justice Scalia interjected, “And he was successful!”

Another net positive has to be the Office of Special Counsel’s (OSC) track record. Since the House already has acted on reauthorizing the OSC, this testimony will not be a detailed analysis. By any measure, however, under Special Counsel Carolyn Lerner and her management team its performance has peaked, and whistleblowers have been the beneficiaries. At GAP we often get frustrated with the OSC on individual cases and procedures. But it would be dishonest to ignore the obvious. The Office’s leadership has displayed unqualified commitment to the WPEA’s goals, and on balance has the most impressive record in agency history of helping whistleblowers.

There is a good reason why the OSC’s record of new complaints has nearly doubled since 2008: results. Since 2014 the OSC has obtained 164 informal or formal stays of retaliation, including over 100 during the last two years. Its corrective actions in 2016 alone thwarted prohibited personnel practices in 216 cases, including 174 whistleblower complaints. Additionally, the OSC’s reborn Alternative Disputes Resolution (ADR) has become one of the WPA’s most effective resources. GAP’s experience is that both sides end up getting defeated to a painful degree in win-loss litigation. By contrast, mediation offers win-win resolutions that allow both sides to move on, and can produce creative relief not available through litigation. The OSC’s roughly 80% success rate for mediations is far better than the 25-30% norm for private sector lawsuits.

Overall, 5.2% of those who challenge prohibited personnel practices through the Office obtain some corrective action. This is almost double the rate of other remedial agencies for whistleblowers covering the private sector and military services. Conservatively, the tlyOSC

under Mr. Lerner's leadership has saved careers or stopped retaliation against more than 500 whistleblowers. That is why the Special Counsel has switched from being the last to the first option for GAP when defending whistleblowers. Currently it is the best protection available.

The Office deserves credit for making its whistleblowing disclosure channels far more whistleblower friendly. For example, the OSC now reviews with the employee how issues are worded before forwarding for investigation. Along with referrals ordering investigations of whistleblowing disclosures, the Office now puts agencies on notice of tough criteria to evaluate subsequent reports. Supported by this Committee, the Office properly has pressed for authority to monitor corrective action commitments.

The OSC has been a leader in policy advocacy to strengthen whistleblower protection. It actively has used WPEA's authority to file *amicus* friend of the court briefs that champion interpretations of the law true to congressional intent. It already has exercised this authority in 12 cases, ranging from the Merit Systems Protection Board (MSPB) to the Supreme Court. The OSC's advocacy has ranged from WPEA retroactivity, to the WPA's supremacy over agency secrecy rules, to credible due process in security clearance cases, to the scope and evidentiary burdens for modified "job duty" protection, to protection against blacklisting.

The Office has exercised an effective leadership role in agency training on WPA rights and responsibilities, the most significant factor to prevent retaliation. Before Ms Lerner's term, no cabinet agencies were certified as completing the WPA's training requirement. Now the 100 certified agencies represent a majority of cabinet departments and some two thirds of Executive branch agencies.

Negatives

The stark rise in OSC complaints illustrates another stark truth: retaliation has not decreased. It is a sad truth that the OSC's track record of 5.2% corrective action reflects the best option. As a rule, employee rights under the Whistleblower Protection Act continue to be a mirage when agencies violate them. Whistleblowing is more dangerous than ever. Four primary causes are reviewed below.

Administrative agency enforcement. Part of the reason is the enforcement agencies. Despite its intensified informal efforts, the OSC only has filed two formal corrective action complaints in whistleblower cases since 2011. Its failure to litigate almost at all weakens the terms of settlements it negotiates, and prevents victories from becoming case law with precedents. There has been a similar litigation vacuum for disciplinary actions, which are essential to deter reprisals. While the current OSC administration has obtained 84 disciplinary actions informally, it only has filed three formal disciplinary complaints. Discrete discipline simply does not have the same chilling effect on retaliation as visible punishment.

Delays also have been a particular source of frustration. To illustrate, 5 USC 213 calls for 15 day OSC reviews of whistleblowing disclosures to determine if there is a substantial likelihood of misconduct and order an agency investigation, followed by a 60 day turnaround for agencies to report back. Admittedly, those time frames are unrealistic. But it took us over three years advocacy before the Office referred a disclosure of significant misconduct that was sustaining abuse of foster children. Another disclosure has been pending for nearly two years. The delays do not stop when the OSC makes up its mind. On the average, agencies take 387 days to turn in their 60 day investigative reports. The WPA's disclosure channel is designed to spark timely reports that can make a difference about current events, not history lessons.

The frustrations summarized above do not reflect bad faith by the OSC. They reflect the facts of life, and unavoidable trade-offs. Without an exponential increase in resources, the OSC cannot hope to provide timely action except in emergency scenarios, when it has acted impressively. More thorough review of cases and enfranchisement of whistleblowers inherently causes delays. Further, formal actions exhaust far more resources than conflict, and the OSC has chosen the tradeoff that helps the most whistleblowers for the buck. That is hard to disagree with.

Positive or negative judgments about this Office do not change the facts of life, however. At best, the OSC never can or will be more than an anecdotal source of justice that can make impressive points. To consistently achieve the WPA's promise, no remedial agency can be a substitute for credible due process.

Unfortunately, whistleblowers are not getting it at the Merit Systems Protection Board. (MSPB) As a rule, decisions by Board Members have interpreted the WPA consistent with legislative intent and backed by well-reasoned legal analysis. They have been good faith, responsible stewards of the WPA.

But the hearings are conducted by Administrative Judge's (AJ) who have been openly hostile to the Act. In fact, they have been far more hostile even than the Federal Circuit Court of Appeals, whose rulings sparked passage of the WPA and WPEA to restore unanimously enacted rights gutted by judicial activism. Depending on the year, AJ's rule against whistleblowers on the merits from 95-98% of decisions on the merits. Combined with the OSC's 5% corrective action rate, this means whistleblowers do not have more than a token chance for justice.

Further, delays at the Board are as bad or worse than at the Office of Special Counsel. For example, the Board still has not completed proceedings to implement Mr. MacLean's January 2015 Supreme Court victory.

Frequently the reason for delays is the common practice of remanding cases instead of reversing initial AJ rulings. The ordeal of Kim Farrington is sadly illustrative. Ms. Farrington was a safety instructor whom the Federal Aviation Administration (FAA) harassed and then fired after she challenged the agency's failure to assure training of flight attendants. Her case has been pending for seven years. In 2012 the Board issued an excellent decision overturning a hostile AJ decision on numerous errors of law, but reversed rather than remanding the case. After an 18 month delay, a new Administrative Judge held a December 2014 hearing. When there was no decision by May 2016, she protested to the Board. In response, the Board appointed a third AJ who ended the delays by promptly ruled against her initially without even referencing the hearing transcript. Her case again is on appeal to the full Board through a Petition for Review. However, due to vacancies the Board cannot issue decisions and there is no end in sight. The lack of credible due process at the MSPB is the Whistleblower Protection Act's Achilles heel.

Shifting tactics. Since the WPEA made it more difficult to fire employees, many agencies have shifted to a new tactic: put them under criminal investigation and seek prosecution. To illustrate, at Senate hearings last year VA Truth Tellers leader Shea Wilkes testified that all of the 50 plus members in that whistleblower coalition had been placed under criminal investigation. That is not surprising. First, criminal investigations are much easier and less burdensome than multi-year litigation with teams of lawyers, depositions, hearings and appeals. All it takes is an investigator who is proficient at bullying. Second, there is no risk of losing. In a worst case scenario, an agency merely closes the investigation (and can open up a new probe on a new pretext at any time). Third, the chilling effect of facing jail is much more severe than facing an adverse action.

Criminal witch hunts are the most effective means available to scare employees into silence, but under current law WPA anti-retaliation rights are not available until an investigation leads to a personnel action. Unfortunately, prosecution referrals are not personnel actions, and merely leaving a criminal probe open indefinitely can create more fear than a completed adverse action. It would be ironic if the WPEA's stronger employment rights led to an uglier substitute for traditional retaliation.

"Sensitive jobs" loophole. The sensitive jobs loophole. A decision by the Federal Circuit Court of Appeals which the Supreme Court declined to review has created the most significant threat to the civil service merit system in our lifetime. In *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), cert. denied, 134 S. Ct. 1759 (U.S. Mar. 1, 2014), the courts declined to interfere with policies by the last two presidents to create a 'sensitive jobs' loophole that could eliminate independent due process rights for virtually the entire federal workforce. The roots of this doctrine are a McCarthy era regulation creating a prerequisite security check for those who jobs do not currently but some day may need a security clearance for access to classified information. Although the practice had been long dormant, it has been revived by the last two presidents for implementation throughout the Executive branch.

In the aftermath, the government has uncontrolled power to designate any position as "sensitive." The Federal Circuit applied the principle to those who stock sunglasses at commissaries, and proposed OPM regulations will permit the designation for all jobs that require access either to classified or unclassified information—in other words, all jobs that require literacy. "Sensitive" employees no longer can defend themselves through an independent due process proceeding at the MSPB, and there are no consistent procedures to achieve justice within agencies. Already workers are being removed for old debts or other financial problems, despite

having good credit without significant current debt—even if financial hardship were a valid basis to purge the civil service. In effect, we are on the verge of replacing the merit system with a national security spoils system. This would provide absolute authority over nearly two million workers to the most secretive, wasteful bureaucracy in government, whose surveillance abuses already have created a national crisis for freedom. Since 1883 the merit system has kept the federal labor force comparatively non-partisan and professional. The “sensitive jobs” loophole would open the door to replace accountability with a national security spoils system. GAP’s associated friend of the court brief to the Federal Circuit, and public comments on the Office of Personnel Management’s proposed new rules are attached as Exhibits 1 and 2.

Lack of acceptance. At GAP we frequently celebrate that the legal revolution in whistleblower rights has been matched by the public’s cultural revolution of acceptance. That revolution has not reached the federal bureaucracy. While agencies treat whistleblowers with greater respect, that is not because of acceptance. It is because whistleblowers rightly are viewed as greater threats to abuses of power than ever before, and therefore must be silenced in a manner that stops others from speaking out.

Mr. MacLean’s experience at the TSA is a microcosm of ongoing hostility to the WPA. Despite explicit statutory authority, MSPB proceedings, two Federal Circuit opinions and the Supreme Court ruling, in legal briefs the agency still does not concede that Title 5 applies to TSA. Immediately after his victory, the agency assigned Mr. MacLean to Air Marshal missions on flights to the Mideast. It acted, despite intelligence that ISIL was combing the internet to find the identities of undercover Air Marshals. Mr. MacLean is the most publicly visible Air Marshal in history, having testified in Congress and appearing in the Internet over 50 times. TSA might as well have painted a red X on planes with him. It appeared the agency was intensifying retaliation

to the point of threatening not only Mr. Maclean's life, but all the passengers he was responsible to protect. After the OSC intervened, the agency reassigned Mr. MacLean to an empty room with no duties for four months. It refused to consider providing him with even routine promotions that he would have received during the nearly nine years he was unemployed, which has forced him to file bankruptcy. Although Mr. MacLean continues to make impressive disclosures that expose air security breaches, TSA still will not assign him to any duties beyond junior level due to lack of seniority – due to its own illegal termination. It held up processing his security clearance for 18 months, and has placed him under groundless investigation. In short, due to agency disrespect for the law, Mr. MacLean still has lost by winning.

His experience is hardly unique at TSA. Supervisors who tried to shield him since reinstatement have faced retaliatory investigations and counseling. Nor is it just that case. His treatment is consistent with so many other whistleblowers that TSA employees believe the agency strategy is to flood the legal system. To illustrate its intransigence, after the OSC blocked termination TSA placed two aviation security whistleblowers on administrative leave, paid to gather dust, for some 500 days now and counting.

TSA is not an exception. As Congress has confirmed, retaliation at the Department of Veterans Affairs is even worse. Most discouraging, GAP's docket currently is dominated by personnel at non-OSC agencies charged with protecting whistleblowers, who faced retaliation for trying to fulfill that mission. Without cultural acceptance, whistleblower rights always will be resources for an uphill battle. I regularly counsel whistleblowers that if all they have on their side is the law, they are in big trouble.

It is encouraging that agencies respect whistleblowers more than ever before. But until they respect the law, whistleblowing will continue to be as dangerous as ever. Or more so. The

backlash is likely to get worse as managers feel threatened by an Administration committed to “draining the swamp.”

Last week’s wave of blanket nondisclosure policies is not grounds for optimism and makes the WPEA’s numerous “anti-gag” provisions particularly significant. Five agencies issued a series of gag orders that are incompatible with four provisions of the WPA, two longstanding appropriations spending bans, a century old shield on congressional communications, and the First Amendment. They were issued at the Departments of Agriculture, Energy, Health and Human Services and Interior, as well as the Environmental Protection Agency. So far, they appear primarily to target scientists and other professionals. They range from restrictions on social media, to blanket prior restraint on all communications, including Congress.

A January 18 memo is illustrative. The Energy Department’s public relations chief directed that “NOTHING is released after 12:01 on Friday that I have not cleared on New team, new rules.”

The new rules cancel the rule of law. Four federal laws reaffirm a requirement that restrictions on federal employee speech have “anti-gag” language. That means any nondisclosure policy, form or agreement must also include a congressionally-required qualifier stating the free speech rights in whistleblower and related laws trump any contradictory restrictions. To date, there is no indication that any of the new gag orders have that qualifier.

Without anti-gag language, prior approval and uncontrolled restraints on speech violate the constitution and seven federal laws, all passed unanimously. For starters, prior restraint is the foundation for an Official Secrets Act that is incompatible with the First Amendment.

The gags also violate the Lloyd Lafollette Act of 1912, which shields all communications by government employees with Congress. The Whistleblower Protection Enhancement Act of 2012 has three anti-gag provisions, as well as a ban on censorship that threatens scientific freedom. Two appropriations riders that have been passed for decades without opposition ban any spending to implement or enforce uncontrolled nondisclosure rules. One bans spending for any restraints without anti-gag language. The other adds teeth for the Lloyd Lafollette Act by banning salary payments for those who obstruct congressional communications.

There is a reason for this broken record of legal mandates, and it is consistent with the election mandate for government accountable to the citizens. As Justice Brandeis explained, “If corruption is a social disease, sunlight is the best disinfectant.” Whistleblowers live that principle, by exercising free speech rights to challenge government abuses of power that betray the public trust.

Hopefully these gag orders are just spontaneous efforts by scattered bureaucrats afraid to offend the new boss. If so, the boss needs to set them straight. If he wants whistleblowers to believe in him, President Trump needs to intervene and show he has the back of those who risk their professional lives for his campaign promises. Washington’s swamp won’t get drained without them. This Committee and the OSC have been doing their share. Since 2012 the OSC actively has enforced the WPEA’s anti-gag provisions. And all whistleblowers should say thank you to Ranking Member Cummings for last week’s in-depth, well-reasoned challenge to the policies’ legality.

RECOMMENDATIONS

While the WPEA was landmark legislation, the above concerns demonstrate that we have a lot of work left to achieve its purposes. The recommendations below are a menu of unfinished

business that badly needs completion. Suggestions are organized to reflect issues remaining from the WPEA; structural reforms for emerging threats from new loopholes and tactics; and fine tuning of rights already established.

Holdover issues

* *Jury trials*: This is the most significant, necessary reform, because currently there is no legitimate due process forum for whistleblowers to defend their rights. As seen above, credible due process has not been available at the MSPB. In the WPEA Congress postponed whether to provide jury trials for civil service whistleblowers until after a Government Accountability Office (GAO) study last fall. GAO did not find any disadvantages. Without further delay federal whistleblowers should have the right to seek justice from the citizens they risk their careers to defend. They are the only significant portion of the labor force without the option for jury trials. Since 2002 Congress has included it for corporate whistleblowers in 13 laws for nearly the entire private sector. Further, even if were functional, the MSPB lacks the expertise and independence from political pressure for politically-sensitive or high-stakes cases of national significance. But those cases are the most important reasons we need whistleblowers.

Currently federal whistleblowers are the only major sector of the labor force without access to juries to enforce their rights. They are available for all state and local government employees, as well as nearly the entire private sector. This loophole must be closed. First class public service requires first class due process.

* *MSPB Summary Judgment authority*: Unfortunately, many unemployed whistleblowers cannot afford to seek justice in court. For them an MSPB administrative hearing is their only chance for due process. Agency desires to avoid public hearings also lead to a significant number of settlements. The Board previously sought authority to deny hearings

though summary judgment authority, so Congress sought GAO review. The MSPB has stopped seeking summary judgment powers, and last fall's GAO report did not recommend providing them.

This proposal should be shelved. The right to some hearing is important for whistleblowers to achieve closure, and to obtain at least some relief. Most significant, summary judgment authority means denying a hearing on legal grounds. But Board AJ's legal interpretations have butchered the law and forced lengthy Board remands. The Administrative Judge corps badly needs WPA training. It would be irresponsible to consider giving them any power to further curtail whistleblower due process rights until training has been completed.

* *All Circuits Review*: This issue should be as noncontroversial as it is significant. In 2012 Congress experimented with giving whistleblowers normal access to appeals courts for challenges to MSPB decisions. If the experiment is not made permanent this year, the Federal Circuit Court of Appeals again will have a judicial monopoly on how the WPA is interpreted. There should not be any opposition to institutionalizing this right consistent with the Administrative Procedures Act. The Federal Circuit's prior hostility is why Congress has had to reenact three times the rights it passed in 1978. The pilot solution of all circuits review has not had any adverse side effects; and has provided healthy competition that has improved the quality of Federal Circuit statutory interpretations, such as in *MacLean v. DHS*. While not a final decision, the court twice unanimously rejected an MSPB decision that would have permitted agency regulations to cancel the WPA.

Unfortunately, based on its track record the Federal Circuit remains a forum that is hostile to the Act's bottom line goal – canceling retaliation. The court's record is 0-15 against whistleblower for final decisions on the merits. While its respect for the law has improved, the

court remains close minded to whistleblowers. At other circuits, the track record is 1-2. Digests are enclosed as Exhibits 3 and 4. Significantly, the favorable decision in *Kerr v. Jewell* not only supported the whistleblower but held that the pre-WPEA Federal Circuit loopholes were erroneous. If we had all circuits review previously, Congress may not have needed to spend 13 years enacting the WPEA. If we institutionalize it now, it may not be necessary for statutory whistleblower rights to be born again a fourth time.

* *Ombudsmen*: The WPEA also included an experiment for every Office of Inspector General (OIG) to have a Whistleblower Ombudsman. Again, it must be made permanent this year, or lapse. This resource should be made permanent. This experiment has been an unqualified success, with effective leadership government-wide by the Department of Justice OIG to help train and share lessons learned.

Structural reforms to address newly emerging threats

Four other issues must be addressed to counter emerging threats to whistleblower rights that may be more severe than conventional termination.

* *Retaliatory criminal actions*: Since the WPEA made it more difficult to fire whistleblowers, as discussed above agencies increasingly have shifted to harassment through criminal investigations and prosecution referrals. The bottom line is that whistleblowers are defenseless against criminal witch hunts. This loophole must be closed by giving them the right to challenge retaliatory investigations as soon as they are opened. Last year Congress outlawed retaliatory investigations at the Department of Veterans Affairs, and by Offices of Inspector General. Those sound precedents should be adopted generally in the WPA.

* *Temporary relief*: More than any other factor, temporary relief makes a difference to end unnecessary, prolonged conflict. When granted, agencies try to resolve retaliation disputes

quickly and constructively, because they are losing until the case is over. Without it, agencies drag out conflict as long as possible. Until the dispute is over, they are winning with maximum chilling effect, because the whistleblower has vanished from the workplace. This is fatal for the Act's goals, since OSC and MSPB final decisions often take three to six years, or more. By that point, whistleblower victories may be too late. They could not survive for years without a salary, and already have gone bankrupt. That creates an incentive for agencies to stall, appeal indefinitely, or do whatever is necessary to starve out the whistleblower.

Currently only the OSC has a realistic chance to obtain stays. The OSC and Offices of Inspector General should have the authority to grant stays automatically, without resorting to litigation. But those agencies only can act anecdotally and never will be reliable as a consistent source for temporary relief. As this Committee previously has approved in subcommittee markup, the legal standards should be changed to provide temporary relief whenever employees prove a *prima facie* case of illegal retaliation.

* *Accountability through discipline*: Currently there is no deterrent effect to prevent retaliation, because accountability only occurs on a token basis. Only the OSC can seek discipline under tougher legal standards than to prove retaliation, and formal disciplinary prosecutions almost never occur.

To prevent harassment, accountability through discipline must become a credible threat for agencies to consider whistleblower retaliation. At GAP we are concerned about a schedule for automatic discipline based solely on OSC, OIG or board AJ rulings as passed last year for the DVA, because it bypasses due process. Agencies frequently use the Machiavellian tactic of accusing whistleblowers of whistleblower retaliation, and under the constitution no one should be deprived of a fair day in court. In our view, a better option is enfranchising employees to file

disciplinary counterclaims when defending themselves. Judges could order discipline as part of relief. Most significant, there should be personal liability and punitive damages for retaliation. That would institutionalize both deterrence and make it easier for whistleblowers to find attorneys.

* *Sensitive jobs*: As discussed above, this national security loophole to the merit system can be imposed at will to cancel all civil service rights for any employee working in the federal government. Normal civil service appeal rights for a non-partisan, professional work force must be restored for any commitment to prevent government abuses of power. Last session's Senate bill for OSC reauthorization wisely closed the due process loophole. We recommend enacting the Senate provision, and reinforcing it by making sensitive job designations a personnel action to lock in protection against merit system violations like whistleblower retaliation.

Fine tuning

Similar to hostile specific pre-WPEA precedents, the post-WPEA requires clarification to make boundaries more precise. OSC *amicus* briefs have effectively isolated the most significant new loopholes. We recommend WPA clarifying amendments for the following issues.

* *OSC access to information*: Another reason for delays and low corrective action rates is that agencies do not cooperate with, or even obstruct OSC investigations. Passive resistance through long delays or refusal to provide relevant documents frustrate the WPEA's goals. The OSC should have the same subpoena authority to enforce the law as Offices of Inspector General. Further, the WPA should specify that if agencies do not provide relevant documents or answer relevant inquires, the OSC can presume the silence is a legal admission. GAP applauds prior Committee and House action on this issue.

* *Scope of job duties exception*: In terms of public policy, it does not make any difference whether a federal whistleblower discloses fraud, waste and abuse as part of a job duty or as personal compliance with the Government Employee Code of Ethics. The heightened requirement for retaliation only was added to the WPEA to prevent another Senate hold. It should be interpreted narrowly only to cover specific assignments that are part of an employee's primary responsibility, such as the contents of audits, inspections, reports of investigation or professional research publications. It would rewrite the WPA if the heightened job duties were applied whenever a disclosure is *related to* a job duty.

* *Burden of proof for job duties exception*: If the category applies, the statute should specify that retaliation can be established through circumstantial evidence, consistent with the standards for all other prohibited personnel practices. Circumstantial evidence of retaliation includes factors such as threats, inconsistent treatment, motive, hostile reactions or personal attacks, failure to take corrective action, and failure to follow agency procedures. Those standards have been consistent for a quarter century since the Board's precedent in *Valerino v. Department of Health and Human Services*, and have served the merit system well.

* *Pre-employment disclosures*: Under current case law, disclosures covered by the WPA may not be protected if made before an application for federal employment. There is no basis for this temporal loophole, either in law or public policy. Congress repeatedly has specified that the WPA protects "any" disclosure. The point of the merit system is to protect the entry of qualified public servants, not just to prevent their removal.

* *Blacklisting*: The law also is unclear about protection for ongoing retaliation after a whistleblower leaves federal service. For many agencies termination is not enough. In order to make an example that scare others into silence, they use negative references or even pressure

tactics with contractors and private employers to blacklist the whistleblower from the profession or any employment, not just the civil service. The National Defense Authorization Act holds federal contractors liable for whistleblower retaliation even when directed by a federal agency to retaliate. The WPA should balance accountability for the civil service by making clear that the same rights and responsibilities apply. Recommendations or other actions to support or oppose employment should be institutionalized as a personnel action.

* *Right to refuse illegal rules and regulations.* Since 1989 it has been equally illegal to act against an employee for refusing to violate the law, the same as for blowing the whistle. In the *Rainey* decision, however, the Board and Federal Circuit ruled that protection does not extend to those who refuse to violate illegal regulations. This is essentially a sophist loophole, since statutes are the authority for rules and regulations. Even if there were a valid distinction, as a matter of public policy the loophole is invalid. Whistleblowers are protected for disclosing any illegality, not just statutory violations. The same shield should protect them for walking the talk. Last Congress the House passed the Follow the Rules Act to close this loophole, but the Senate failed to act. WPEA revisions should include this well-taken reform.

CONCLUSION

The Whistleblower Protection Act is a law with deep ironies. Congress first enacted these rights in the Civil Service Reform Act of 1978, and unanimously has restored, reaffirmed or strengthened them three times since. On paper the WPA has the world's strongest free speech rights. In practice, however, it has failed to provide more than anecdotal success. Due to weak due process, no whistleblower can count on the WPA for justice. The Enhancement Act was a landmark breakthrough for rights on paper, and an excellent start. But I feel like whistleblowers

are in a similar spot to Moses looking at the Promised Land of credible free speech rights. We can see it, but we're not there yet. This year Congress can finish the journey. GAP pledges to do our share however will be helpful to get there.

Tom Devine



Tom Devine is GAP Legal Director, and has worked at the organization since 1979. Since that time, Tom has assisted over 5,000 whistleblowers in defending themselves against retaliation and in making real differences on behalf of the public – such as shuttering accident-prone nuclear power plants, rebuffing industry ploys to deregulate government meat inspection, blocking the next generation of the bloated and porous "Star Wars" missile defense systems, and sparking the withdrawal of dangerous prescription drugs such as Vioxx.

Tom has been a leader in the campaigns to pass or defend 20 major national or international whistleblower laws, including every one enacted over the last two decades. These include: the Whistleblower Protection Act of 1989 for federal employees; ten breakthrough laws since 2002 creating the right to jury trials for corporate whistleblowers; and new United Nations, World Bank and African Development Bank policies legalizing public freedom of expression for their own whistleblowers. Tom has also served as "Whistleblower Ambassador" in over a dozen nations on trips sponsored by the U.S. State Department.

Tom has authored or co-authored numerous books, including 2011's *The Corporate Whistleblowers Survival Guide: A Handbook for Committing the Truth*, *Courage Without Martyrdom: The Whistleblower's Survival Guide*, law review articles, magazine articles and newspaper op-eds, and is a frequent expert commentator on television and radio talk shows. Tom is the recipient of the "Hugh Hefner First Amendment Award" and the "Defender of the Constitution Award" bestowed by the Fund for Constitutional Government. In 2006 he was inducted into the Freedom of Information Act Hall of Fame.

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