# TESTIMONY OF THOMAS DEVINE AND ADAM MILES, GOVERNMENT ACCOUNTABILITY PROJECT

before the

HOUSE OVERSIGHT AND GOVERNMENT REFORM COMMITTEE

On

the Whistleblower Protection Enhancement Act

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Thank you for inviting this testimony on legislation to put protection back in the Whistleblower Protection Act. Although a work in progress, this committee is close to approving a global gold standard for public employee free speech rights, and a breakthrough for government accountability. Quick passage restoration of genuine whistleblower rights also would be a signal that new Congressional leadership is serious about two basic taxpayer commitments – oversight that ends a pattern of secret government, and structural reform to help end a culture of corruption.

My name is Tom Devine, and I serve as legal director of the Government Accountability Project ("GAP"), 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 publicly-traded corporations, the Energy Policy Act for the nuclear power and weapons industries, and AIR 21 for airlines employees, among others. 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 are in the advanced stages to finalize similar reforms 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).

Over the last 30 years we have formally or informally helped over 4,000 whistleblowers to "commit the truth" and survive professionally while making a difference. This testimony shares and is illustrated by painful lessons we have learned from their experiences. 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 network 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. Last fall 43 citizen organizations in the coalition pressed for passage of Senate-approved whistleblower reforms in the defense authorization bill. At the beginning of this month, the coalition held a day long summit on the state of whistleblower rights. This testimony seeks to reflect the coalition's across-the-board consensus on the need for and structure to achieve reform.

## MAKING A DIFFERENCE

There can be no credible debate about how much this law matters. Whistleblowers risk their professional survival to challenges abuses of power that betray the public trust. This is freedom of speech when it counts, unlike the freedoms akin to yelling at the referee in a sports stadium, or late night television satire of politicians and pundits. It not only encompasses the freedom to protest, but the freedom to warn, so that avoidable disasters can be prevented or minimized. It also encompasses the freedom to challenge conventional wisdom, such as outdated or politically-slanted scientific paradigms. In every context, they are those who keep society from being stagnant and are the pioneers for change.

Both for law enforcement and congressional oversight, whistleblowers represent the human factor that is the Achilles' heel of bureaucratic corruption. They also serve as the life blood for credible anti-corruption campaigns, which can degenerate into empty, lifeless magnets for cynicism without safe channels for those who bear witness.

Their importance for congressional oversight cannot be overemphasized, as demonstrated by this committee's January hearings on climate change censorship. Creating safe channels will determine whether Congress learns about only the tips, or uncovers the icebergs, in nearly every major investigation over the next two years.

Whistleblowers are poised to bear witness as the public's eyes and ears to learn the truth about issues vital to our families, our bank accounts, and our national security. Consider examples of what they've accomplished recently without any meaningful rights:

* FDA scientist Dr. David Graham successfully exposed the dangers of pain killers like Vioxx, which caused over 50,000 fatal heart attacks in the United States. The

drug was finally withdrawn after his studies were confirmed. Today at the Energy and Commerce Committee three whistleblowers are testifying about government reliance on fraudulent data to approve Ketek, another high risk prescription drug.

* Climate change whistleblowers such as Rick Piltz of the White House Climate Change Science Program exposed how political appointees such as an oil industry lobbyist rewrote the research conclusions of America's top scientists. Scientists like NASA's Dr. James Hansen refused to cooperate with censorship of their warnings about global warming; namely that we have less than a decade to change business as usual, or Mother Nature will turn the world on its head. It appears the country has heard the whistleblowers' wake up call.

* Gary Aguirre exposed Securities and Exchange Commission cover-ups of vulnerability to massive corruption in hedge funds that could threaten a new wave of post-Enron financial victims.

A host of national security whistleblowers, modern Paul Reveres, have made a record of systematic pre-9/11 warnings that the terrorists were coming and that we were not prepared. Tragically, they were systematically ignored. They keep warning: inside the bureaucracy, few lessons have been learned and America is little safer beyond appearances. They have paid a severe price. Consider the experiences of six national security and public safety whistleblowers assisted by GAP's national security director Adam Miles over the last two years.

Frank Terreri was one of the first federal law enforcement officers to sign up for the Federal Air Marshal Service, out of a sense of patriotic duty after the September 11 tragedy. His experience illustrates the need for provisions in the legislation that codify protection against retaliatory investigations, as well as a remedy for the anti-gag statute. For over two years, he made recommendations to better meet post-9/11 aviation security demands. On behalf of 1,500 other air marshals, he suggested improvements to bizarre and ill-conceived operational procedures that compromised marshals' on-flight anonymity, such as a formal dress code that required them to wear a coat and tie even on

flights to Florida or the Southwest. The procedures required undercover agents to display their security credentials in front of other passengers before boarding first, and always to sit in the same seats. Disregarding normal law enforcement practices, the agency had all the agents maintain their undercover locations in the same hotel chains, one of which then publicly advertised them as its "Employees of the month."

Instead of addressing Terreri's security concerns, air marshal managers attacked the messenger. First, they sent a team of supervisors to his home, took away his duty weapon and credentials, and placed him on indefinite administrative leave. Then headquarters initiated a series of at least four uninterrupted retaliatory investigations. At one point, Terreri was being investigated simultaneously for sending an alleged "improper email to a co-worker," for "improper use of business cards," association with an organization critical of the air marshal service, and for somehow "breaching security" by protesting the agency's own security breaches. All of these charges were eventually deemed "unfounded" by DHS investigators, but the air marshal service didn't bother to tell Terreri and didn't take him off of administrative "desk duty" until the day after the ACLU filed a law suit on his behalf.

Air Marshal Robert MacLean's experience demonstrates the ongoing, critical need to codify the anti-gag statute. He blew the whistle on an indefensible proposed cost saving measure from Headquarters that would have removed air marshal coverage on long-distance flights like those used by the 9/11 hijackers. After numerous unsuccessful efforts to challenge the policy change through his chain of command, Mr. MacLean took his concerns to the media. An MSNBC news story led to the immediate rescission of the

misguided policy. Unfortunately, three years later the agency fired Mr. MacLean, specifically because of his whistleblowing disclosure, without any prior warning or notice. In terminating Mr. MacLean, the TSA cited an "unauthorized disclosure of Sensitive Security Information." The alleged misconduct was entirely an *ex post facto* offense. There had been no markings or notice of its restricted status when Mr. McClean spoke out. This rationale violates the WPA and the anti-gag statute on its face. The agency, more intent on silencing dissent than following the law, hasn't backed off.

The ongoing treadmill for one of last year's witnesses, Mike German, illustrates the necessity to close the WPA's FBI loophole. Not long ago, Mr. German was a rising star in the FBI's counter-terror program. As an undercover agent, he twice successfully infiltrated domestic terrorist organizations, resolved pending bombing investigations, and prevented potential acts of terrorism by helping to obtain criminal convictions of several would-be terrorists. But, in 2002, Mr. German found serious problems with the Tampa Division's handling of a counter-terror investigation, including a violation of Title III wiretapping regulations. When Mr. German reported this misconduct, his supervisor asked him to ignore it. Alarmed, he reported the violation up his chain of command, as directed by FBI policy.

Rather than address the problems, Tampa Division officials began a large-scale effort to backdate and falsify official FBI records to hide their mishandling of the terror investigation. They were so unconcerned about the internal investigation they actually used white-out to falsify the records. Meanwhile, the Unit Chief of the Undercover Unit at FBI Headquarters told his staff that Mr. German would never work undercover again,

because he blew the whistle. The FBI's Inspection Division then opened a "broad" investigation into the Tampa mishaps that in reality was a transparent effort to dig up dirt on Mr. German. They found nothing, but the message was clear enough. With no opportunity to resume his successful counterterrorism career, and with no protection from continuing retaliation, Mr. German was compelled to resign from the FBI in June 2004.

His case typifies the failure of the FBI's "separate, but equal" whistleblower protection program. A Justice Department IG report confirms that the FBI retaliated against Mr. German for reporting misconduct, but it intentionally obscures the extent of the retaliation, and holds just one FBI supervisor accountable. The IG's findings are now being considered internally by the Justice Department's Office of Attorney Recruitment and Management (OARM), an adversarial proceeding in which Mr. German will be required to produce evidence entirely within the control of the Department of Justice. Mr. German now finds himself in an adversarial position with the Inspector General – his supposed institutional "protector" – and OARM has ruled that he is not entitled to use the very documents he provided to the IG almost four years ago. There is almost no hope that Mr. German will prevail in this kangaroo court proceeding.

Another whistleblower's five-decade career in public service is in danger, because of his efforts to ensure that critical components on high performance Naval Aircraft are repaired according to military specifications. It illustrates why protection for carrying out job duties is essential. Mr. Richard Conrad, who served honorably in Vietnam and is now an electronic mechanic at the North Island Naval Aviation Depot, knew his unit could not guarantee the reliability or the safety of the parts they produced for F/A-18s because

Depot management failed to provide them with the torque tools needed for proper repair and overhaul of certain components. The Secretary of the Navy formally substantiated Mr. Conrad's key allegations, and the Depot took some immediate, although incomplete, corrective action.

But nothing has been done to protect Mr. Conrad. In response to his disclosures, he was transferred to the night shift in a unit at the Depot that doesn't do any repairs at night. He has received an average of some 10 minutes work per eight hour shift for the last 14 months, and spends the majority of the time reading books – on the taxpayer's dime.

Former FAA manager Gabe Bruno challenged lax oversight of the newly-formed AirTran Airways, which was created after the tragic 1996 ValuJet accident that killed all 110 on board. His experience highlights the need to protect job duties, and to ban retaliatory investigations. He was determined not to repeat the mistakes that led to that tragedy, and raised his concerns repeatedly with supervisors. In response, they initiated a "security investigation" and demoted Mr. Bruno from his management position. The lengthy, slanderous investigation ultimately led to Mr. Bruno's termination after 26 years of outstanding government service with no prior disciplinary record.

The flying public was the loser. Following Mr. Bruno's demotion and reassignment, FAA Southern Region managers abruptly canceled a mechanic re-examination program that he had designed and implemented to assure properly qualified mechanics were working on commercial and cargo aircraft. The re-exam program was necessary, because the FAA-contracted "Designated Mechanic Examiner" was convicted on federal criminal charges and sent to prison for fraudulently certifying over 2,000

airline mechanics. Individuals from around the country, and the world, had sought out this FAA-financed "examiner" to pay a negotiated rate and receive an Airframe and Powerplant Certificate without proper testing. After the conviction, Mr. Bruno's follow-up re-exam program, which required a hands-on demonstration of competence, resulted in 75% of St. George-certified mechanics failing when subjected to honest tests. The FAA's arbitrary cancellation of the program left over 1,000 mechanics with fraudulent credentials throughout the aviation system, including at major commercial airlines.

Mr. Bruno worked through the Office of Special Counsel to reinstitute his testing program, but after two years Special Counsel Scott Bloch endorsed a disingenuous FAA re-testing program that skips the hands-on, practical tests necessary to determine competence. The FAA's nearly-completed re-exam program consists of an oral and written test only. In effect, this decriminalizes the same scenario – incomplete testing – that previously had led to prison time for the contractor. The FAA recently conceded that it does not know how many of these fraudulently certified mechanics are currently working at major commercial airlines, or even within the FAA.

National security whistleblower Mike Maxwell was forced to resign from his position as Director of the Office of Security and Investigations (internal affairs) for the US Citizenship and Immigration Services (USCIS) after the agency cut his salary by 25 percent, placed him under investigation, gagged him from communicating with congressional oversight offices, and threatened to remove his security clearance. His experience highlights five provisions of this reform – security clearance due process rights, classified disclosures to Congress, protection for carrying out job duties, the anti-gag statute and retaliatory investigations.

What had Mr. Maxwell done to spark this treatment? Quite simply, he had a job that required him to blow the whistle, often after investigating disclosures from other USCIS whistleblowers. In order to carry out his duties, he reported repeatedly to USCIS leadership about the security breakdowns within USCIS. For example, he had to handle a backlog of 2,771 complaints of alleged USCIS employee misconduct -- including 528 criminal allegations and allegations of foreign intelligence operatives working as USCIS contractors abroad -- with a staff of six investigators. He challenged agency leadership's refusal to permit investigations of political appointees, involving allegations as serious as espionage and links to identified terrorist operations. And, he challenged backlog-clearing measures at USCIS that forced adjudicators to make key immigration decisions, ranging from green cards to residency, without seeing law enforcement files from criminal and terrorist databases.

These examples are not aberrations or a reflection of recent political trends. They are consistent with a pattern of steadily making a difference over the last 20 years challenging corruption or abuses of power. We can thank whistleblowers for --

* increasing the government's civil recoveries of fraud in government contracts by over ten times, from $27 million in 1985 to over one billion in three of the last four years, totaling over $18 billion total since reviving the False Claims Act. That law allows whistleblowers to file lawsuits challenging fraud in government contracts.

* 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 four 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.

## NECESSITY FOR STRUCTURAL CHANGE

From the perspective of government watchdogs in every sector, the last six years have been Dark Ages of secrecy sustained by repression. It is about to get a lot worse. The ugliness of retaliation depends on how much those in power feel threatened – kind of a bureaucratic "wounded rat" instinct. That means the dangers will be unprecedented over the next two years for those who work with Congress. Unfortunately, until Congress acts they are defenseless.

The Make it Safe Coalition's easiest consensus was that the Whistleblower Protection Act has become a disastrous trap which creates far more reprisal victims than it helps. This is a painful conclusion for me to accept personally, since the WPA is like my professional baby. I spent four years devoted to its unanimous passage in 1989, and another two years for unanimous 1994 amendments strengthening the law, which then was the strongest free speech law in history on paper. But reality belied the paper rights, and my baby grew up to be Frankenstein. Instead of creating safe channels, it degenerated into an efficient mechanism to finish off whistleblowers by rubber-stamping retaliation with an official legal endorsement of any harassment they challenge. It has become would-be whistleblowers' best reason to look the other way or become silent observers.

How did this happen, after two unanimous congressional mandates for exactly the opposite vision? There have been two causes for the law's frustration. The first is structural loopholes such as lack of protection for FBI and intelligence agency whistleblowers since 1978, and lack of protection against common forms of fatal retaliation such as security clearance removal. The second is a Trojan horse due process

system to enforce rights in the WPA. Every time Congress has addressed whistleblower rights it has skipped those two issues. That is why the legislative mandates of 1978, 1989 and 1994 have failed. This legislation finally gets serious about the twin cornerstones for the law to be worth taking seriously: seamless coverage and normal access to court.

A year ago GAP testified on the need for national security whistleblower reform (attached as Exhibit 1). This submission will not repeat that contribution for the record. We were gratified that, despite shrill administration objections, this committee unanimously approved the model to protect national security whistleblowers that is being perfected in this legislation.

This committee has not held hearings, however, on the due process breakdown of enforcement for rights that Congress intended to provide through unqualified statutory language. The structural cause for this breakdown has two halves. First is the Merit Systems Protection Board, where whistleblowers receive a so-called day in court through truncated administrative hearings. The second is the Federal Circuit Court of Appeals, which has a monopoly of appellate review for the administrative rulings. With token exceptions, the track record for each is a long-ingrained pattern of obsessively hostile judicial activism for the law they are charged with enforcing.

The MSPB should be the reprisal victim's chance for justice. Unfortunately, that always has been a fantasy for whistleblowers. In its first 2,000 cases from 1979-88, the Board only ruled in favor of whistleblowers four times on the merits. Since June 1999, the track record is 2-53. Since the new MSPB chair assumed office in May 2003, the record is 0-33. That means the civil service system has not recognized a single victim of illegal whistleblower retaliation during one of the most secretive, internally repressive

cycles of executive branch history. And throughout its history, the Board never has found retaliation in a high stakes whistleblowing case with national consequences. But those are exactly the scenarios when protection for whistleblowers is most needed.

The reason should be no surprise. First, hearings are conducted by Administrative Judges without any judicial independence from political pressure. As a rule, they not only avoid politically significant conflict, they run away from it. To illustrate, several years ago Senators Grassley and Durbin conducted a bi-partisan investigation and held hearings that confirmed charges by Pentagon auditors of a multi-million ghost procurement scheme for non-existent purchases. The exposure led to criminal prosecutions and jail time. The auditors were fired and sought justice at the MSPB. The AJ screened out all whistleblowing issues except for their disclosures of far less significant improprieties at a drunken office Christmas party. Even then, the auditors lost.

Second, the Board is not structured or funded for complex, high stakes conflicts that can require lengthy proceedings. As one AJ remarked after the first five weeks of a trial where the dissent challenged alleged government collusion with multi-million dollar corporate fraud, “Mr. Devine, if you bring any more of these cases the Board will have to seek a supplemental appropriation. It’s like a snake trying to swallow an elephant. We’re not designed for this.”

In short, the WPA’s due process structure at best only can handle relatively narrow, small scale whistleblowing disputes. That is the overwhelming scenario for litigation, and very important for individual justice. But the law’s potential rests on its capacity to protect those challenging the most significant government abuses of power

with the widest national impact. Realistically, a minor league forum cannot and will not provide justice for those challenging major league government breakdowns.

The second cause for the administrative breakdown has been beyond the Board's control. The Board is limited by impossible case law precedents from the Federal Circuit Court of Appeals, which since its 1982 creation has abused a monopoly of appellate review at the circuit level. Monopolies are always dangerous. In this case, the Federal Circuit's activism has gone beyond ignoring Congress' 1978, 1989 and 1994 unanimous mandates for whistleblower protection. Three times this one court has rewritten it to mean the opposite. Until there is normal appellate review to translate the congressional mandate, this and any other legislation will fail.

This conclusion is not a theory. It reflects nearly a quarter century, and a dismally consistent track record. From its 1982 creation until passage of 1989 passage of the WPA, the Federal Circuit only ruled in whistleblowers' favor twice. The Act was passed largely to overrule its hostile precedents and restore the law's original boundaries. Congress unanimously strengthened the law in 1994, for the same reasons. Each time Congress reasoned that the existing due process structure could work with more precise statutory language as guidance.

That approach has not worked. Since Congress unanimously strengthened the law in October 1994, the court's track record has been 2-177 against whistleblowers in decisions on the merits. A legal memorandum summarizing each of those decisions is attached as Exhibit 2. It is almost as if there is a legal test of wills between Congress and this court to set the legal boundaries for whistleblower rights.

The Federal Circuit's activism has created a successful, double-barreled assault against the WPA through – 1) nearly all-encompassing loopholes, and 2) creation of new impossible legal tests a whistleblower must overcome for protection. Each is examined below.

Loopholes

Here judicial activism not only has rendered the law nearly irrelevant, but exposes the unrestrained nature of judicial defiance to Congress. During the 1980's the Federal Circuit created so many loopholes in protected speech that Congress changed protection from "a" to "any" lawful, significant whistleblowing disclosure in the 1989 WPA. The Federal Circuit continued to create new loopholes, however, so in the legislative history for the 1994 amendments Congress provided unqualified guidance. "Perhaps the most troubling precedents involve the … inability to understand that 'any' means 'any.'" H.R. Rep. No. 103-769, at 18. 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 Court promptly responded in 1995 with the first in a series of precedents that successfully translated "any" to mean "almost never":

Preparations for a reasonable disclosure. *Horton v. Navy*, 66 F.3d 279 (Fed. Cir. 1995). "Any" does not include disclosures to co-workers, possible wrongdoers, and supervisors (later modified to supervisors without authority for corrective action). This

cancels the most common outlet for disclosing concerns, which all federal employees are trained to share with their supervisors. It reinforces isolation, and prevents the whistleblower from engaging in the quality control to make fair disclosures evidencing a reasonable belief, the standard in 5 USC 2302(b)(8) to qualify for protection.

Disclosures while carrying out job duties. *Willis v. USDA*, 141 F.3d 1139 (Fed. Cir. 1998). This decision exempted the Act from protecting politically unpopular enforcement decisions, or challenging regulatory violations if that is part of an employee's job duties. It predates by eight years last year's controversial Supreme Court decision in *Garcetti v. Ceballos*, 547 U.S. __, 126 S. Ct. 1951 (2006). Contrast the court-created restriction with Congress' vision, expressed in the Senate report for the civil Service Reform Act of 1978.

> What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants.

S. Rep. No. 969, 95th Cong., 2d. Sess. 8, reprinted in USCCAN 2725 *et seq.* There is no room for doubt: the reason Congress passed the whistleblower law was exactly what the Federal Circuit erased: the right for government employees to be public servants instead of bureaucrats on the job, even when professionally dangerous.

Protection only for the pioneer whistleblower. *Meeuwissen v. Interior*, 234 F.3d 9 (Fed. Cir.2000). This decision revived a 1995 precedent in *Fiorillo v. Department of Justice*, 795 F.2d 1544 (1986) that Congress specifically targeted when it changed

protection from "a" to "any" otherwise valid disclosure.[1] It means that anyone speaking out against wrongdoing, after the Christopher Columbus for a scandal, proceeds at his or her own risk. This means there is no protection for those who corroborate the pioneer whistleblower's charges and there is no protection against ingrained corruption. *See Ferdik v. Department of Defense*, 158 Fed.Appx. 286 (Fed. Cir. 2005) (Disclosures that a non-U.S. citizen had been illegally employed for twelve years were not protected, because the misconduct already constituted public knowledge since "almost the entire school knew that the employment was a statutory violation.")

A bizarre application of this loophole doctrine occurred in *Allgood v. MSPB*, 13 Fed. Appx. 976 (Fed. Cir. 2001). In that case an Administrative Judge protested that the Board engaged in mismanagement and abuse of authority by opening an investigation and reassigning another Administrative Judge before the results were received that could validate these actions. The Federal Circuit applied the loophole, *because the supposed wrongdoers at the Board already were aware of their own alleged misconduct*. This would turn *Meeuwissen* into an all-encompassing loophole, except for pathological wrongdoers who are not cognizant of their own actions.

Whistleblowing disclosure included in a grievance or EEO case: *Garcia v. Department of Homeland Security*, 437 F.3d 1322 (Fed. Cir. 2006); *Green v. Treasury*, 13 Fed., Appx. 985 (Fed. Cir. 2001). These frequently are the context that uninformed

[1] *See* S. Rep. No 100-413, at 12-13: After citing and rejecting *Fiorillo*, the Committee instructed, "For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue. S. 508 emphasizes this point by changing the phrase 'a' disclosure to 'any' disclosure in the statutory definition. This is simply to stress that *any* disclosure is protected (if it meets the reasonable belief test and is not required to be kept confidential)." (emphasis in original)

employees use to blow the whistle, particularly the grievance setting. They have no protection in these scenarios.

Illegality too trivial or inadvertent: *Schoenrogge v. Department of Justice*, 148 Fed.Appx. 941 (Fed. Cir. 2005) (alleged use of immigration detainees to perform menial labor, falsification of billing and legal records, paying contractors and maintenance staff for time not working); *Buckley v. Social Security Admin.*, 120 Fed.Appx. 360 (Fed. Cir. 2005) (alleged irreparable harm to litigation from mishandling a government's attorney's case while on vacation, rejected as illustrative of "mundane workplace conflicts and miscues") *Gernert v. Army*, 34 Fed. Appx. 759 (Fed. Cir. 2002) (supervisor's use of phone and government time for personal business); *Langer v. Treasury*, 265 F.3d 1259 (Fed. Cir. 2001) (violation of mandatory controls for protection of confidential grand jury information); *Herman v. DOJ*, 193 F.3d 1375 (Fed. Cir. 1999) (Chief psychologist at VA hospital's disclosure challenging lack of institutionalized suicide watch, and copying of confidential patient information).

As seen above, "triviality" is in the eye of the beholder, and these cases show the wisdom of language expanding protected speech for disclosures of "a" violation of law to "any" violation. In these cases, "triviality" has been intertwined with "inadvertent" as a reason to disqualify WPA coverage. That judicially-created exception may be even more destructive of merit system principles. The difference between "inadvertent" and "intentional" misconduct is merely the difference between civil and criminal liability. Employees shouldn't be fair game for reprisal, merely because the government breakdown they try to correct was unintentional. The loophole further illustrates the benefits of specific legislative language protecting disclosures of "any" *illegality*.

Disclosure too vague or generalized. *Chianelli v. EPA*, 8 Fed. Appx. 971 (Fed. Circ. 2001) This was the basis to disqualify an EPA endangered species/groundwater specialist's disclosure of failure to meet requirements in funding for two state pesticide prevention programs; and expenditure of $35 million without enforcing requirement for prior groundwater pesticide treatment plans.

Substantiated whistleblowing allegations, if the employee had authority to correct the alleged misconduct. *Gores v. DVA*, 132 F.3d 50 (Fed. Cir. 1997) This amazing precedent is a precursor of *White's* judicially-created burdens beyond the statutory "reasonable belief" test. The decision means it is not enough to be right. To have protection, the employee also must be helpless. A manager who imposes possibly significant and/or controversial corrective action cannot say anything about it until after a fait accompli. Otherwise, s/he has no merit system rights to challenge subsequent retaliation, and proceeds at his or her own risk by honoring normal principles for responsible decision making.

Waiting too long. *Watson v. DOJ*, 64 F.3d 1524 (Fed. Cir. 1995) The court held that a Border Patrol agent's disclosure wasn't protected and he would have been fired anyway for waiting too long (12.5 hours overnight) to report another agent's shooting and unmarked burial of an unarmed Mexican after implied death threat by the shooter if silence were broken.

Supporting testimony. *Eisenger v. MSPB*, 194 F.3d 1339 (Fed. Cir. 1999) The court rejected protection for supporting testimony to confirm a pioneer witness' charges of document destruction. This case precedes *Meeuwissen* and illustrates the worst case scenario for the "Christopher Columbus" loophole.

Blamed for making a disclosure. Cordero v. MSPB, 194 F.3d 1338 (Fed. Cir. 1999) An employee is not entitled to whistleblower protection if merely suspected of making the disclosure. The employee must prove he or she actually did it. This decision overturns longstanding Board precedent that protects those harassed due to suspicion (even if mistaken). The reason for that doctrine is the severe chilling and isolating effect of allowing open season on anyone accused of whistleblowing or leaks, even if the disclosure of concealed misconduct itself qualifies for protection. It contradicts prior Board case law. *Juffer v.USIA*, 80 MSPR 81, 86 (1998). It also is contradictory to consistent interpretation of other whistleblower statutes.

Nongovernment illegality. *Smith v. HUD*, 185 F.3d 883 (Fed. Cir. 1999). This loophole also is addressed by the switch from "a" to "any" illegality. The exception is highly destructive of the merit system, because a common reason for harassment is catching the wrong (politically protected) crook or special interest. It allows agencies to take preemptive strikes at the birth of a cover up to remove and discredit potential whistleblowers who may challenge it.

## "Irrefragable proof"

One provision in the Civil Service Reform Act of 1978 that Congress did not modify was the threshold requirement for protection against retaliation -- disclosing information that the employee "reasonably believes evidences" listed misconduct. The reason was simple: the standard worked, because it was functional and fair. To summarize some 20 years of case law, until 1999 whistleblowers could be confident of

eligibility for protection if their information would qualify as evidence in the record used to justify exercise of government authority.

Unfortunately, the Federal Circuit decided to judicially amend the reasonable belief test. In *LaChance v. White*,174 F.3d 1378, 1381 (Fed. Cir. 1999), it eliminated all realistic prospects that anyone qualifies for whistleblower protection unless the specifically targeted wrongdoer confesses. The circumstances are startling, because the agency ended up agreeing with the whistleblower's concerns. John White made allegations concerning the misuse of funds in a duplicative education project. An independent management review validated his claims, resulting in the Air Force Secretary's decision to cancel the program. Unfortunately, the local official held a grudge, stripped Mr. White of his duties and exiled him to a temporary metal office in the desert outside the Nevada military base. Mr. White filed a claim against this official's retaliation and won his case three times before the MSPB. However, in 1999 the Federal Circuit sent the case back with its third remand in nine years, ruling he had not demonstrated that his disclosure evidenced a reasonable belief.

Since the Air Force conceded the validity of Mr. White's concerns, the Court's conclusion flunks the laugh test. The Federal Circuit circumvented previous interpretations of "reasonable belief" by ruling that an employee must first overcome the presumption of government regularity: "public officers perform their duties correctly, fairly, in good faith and in accordance with the law and governing regulation." The court then added that this presumption stands unless there is "irrefragable proof to the contrary'" (citations omitted). The black magic word was "irrefragable." Webster's Fourth New Collegiate Dictionary defines the term as "undeniable, incontestable,

incontrovertible, incapable of being overthrown." This creates a tougher standard to qualify for protection under the whistleblower law than it is to put a criminal in jail. An irrefragable proof standard allows for almost any individual's denial to overturn a federal employee's rights under the WPA.

GAP joined this case as an amicus because of the implications it had for all subsequent whistleblower decisions. If the Court could rule that John White's disclosures did not qualify him for whistleblower protection, no one could plausibly qualify for whistleblower protection. It appears that was the court's objective. Since 1999 our organization has been obliged to warn all who inquire that if they spend thousands of dollars and years of struggle to pursue their rights, and if they survive the gauntlet of loopholes, they inevitably will earn a formal legal ruling endorsing the harassment they received. The court could not have created a stronger incentive for federal workers to be silent observers and to look the other way in the face of wrongdoing. This decision direct conflicted with the January 20, 2002 Executive Order signed by then newly-inaugurated President Bush stating that federal employees have a mandatory ethical duty to disclose fraud, waste, abuse and corruption.

After a remand and four more years of legal proceedings, the Federal Circuit upheld its original decision. *White v. Department of Air Force*, 391 F.3d 1377 (Fed.Cir. 2004). In the process, it replaced the "irrefragable proof" standard with an equivalent but more diplomatic test -- "a conclusion that the agency erred is not debatable among reasonable people." *Id*., at 1382. To illustrate what that means, Mr. White then lost because the Air Force hired a consultant to provide "expert" testimony at the hearing that disagreed with Mr. White (as well as the Air Force's own independent management

review and the Secretary). The court did limit this "son of irrefragable" decision's scope to cases where a whistleblower discloses gross mismanagement. Legislative history through the committee report and floor speeches should not leave any doubt that the bill's ban on rebuttable presumptions and definition of "reasonably believes" apply to all protected speech categories, without any loophole that functionally eliminates protection for those challenging gross mismanagement.

If Congress expects the fourth time to be the charm for this law, the Federal Circuit's record is irrefragable proof for the necessity to restore normal appellate review.

## A GENUINE LEGISLATIVE REFORM

Justice Brandeis once declared, "If corruption is a social disease, sunlight is the best disinfectant." By that standard, this is outstanding good government legislation. If the final version includes normal appellate review, it will upgrade federal workers from the lowest common denominator in modern U.S. whistleblower laws, to the world's strongest free speech shield for government employees. This claim is not just supportive rhetoric. GAP has researched and summarized a global best practices index for whistleblower protection laws. (Attached as Exhibit 3) By those criteria, this legislation would upgrade U.S. law to substantial compliance with ten evaluation criteria currently failing out of twenty.[2] In general, the legislation achieves this result by overturning twelve years of hostile case law, closing the coverage gaps for national security and contractor whistleblowers, and providing enforcement teeth through normal due process

[2] Our recommendations address other areas for separate legislation, such as the informal support intended to be available from the Office of Special Counsel.

rights. While the final provisions have not yet been released, we understand that the legislation as proposed for committee review would --

* Codify the legislative history for "any" protected disclosure, meaning the WPA applies to all lawful communication of misconduct. This restores "no loopholes" protection and cancels the effect of *Garcetti v. Ceballos* on federal workers.

* Restore the unqualified, original "reasonable belief" standard established in the 1978 Civil Service Reform Act for whistleblowers to qualify for protection.

* Provide whistleblowers with access to district court for de novo jury trials if the Merit Systems Protection Board fails to issue a ruling within 180 days, providing whistleblowers with the same court access as with EEO anti-discrimination law.

* End the Federal Circuit Court of Appeals monopoly on appellate review of the Whistleblower Protection Act through restoring "all circuits" review, as in the original Civil Service Reform Act of 1978.

* Close the loophole that has existed since 1978 and provide WPA coverage to employees of the FBI and intelligence agencies.

* Restore independent due process review of security clearance determinations for whistleblower reprisal, unavailable since a 1985 Supreme Court decision.

* Provide whistleblower rights to government contractor employees, helping create accountability for government spending that has increased from $207 billion in 2000 to over $400 billion last year, according to published reports last week.

* Restore intended civil service and whistleblower rights for some 40,000 Transportation Security Administration baggage screeners on the front lines of homeland security.

* Make permanent and provide a remedy for the anti-gag statute – a rider in the Treasury Postal Appropriations bill for the past 17 years – that bans illegal agency gag orders. The anti-gag statute neutralizes hybrid secrecy categories like "classifiable," "sensitive but unclassified," "sensitive security information" and other new labels that lock in prior restraint secrecy status, enforced by threat of criminal prosecution for unclassified whistleblowing disclosures by national security whistleblowers.

* Take initial steps to prevent the states secrets privilege from canceling a whistleblower's day in court.

* Specifically shield scientific research from political censorship, repression or distortion.

* Codify protection against retaliatory investigations, giving whistleblowers a chance to end reprisals by challenging preliminary “fact-finding” charades.

* Protect whistleblowers who disclose classified information to Members of Congress on relevant oversight committees or their staff.

* Strengthen the Office of Special Counsel’s authority to seek disciplinary sanctions against managers who retaliate.

* Authorize the Special Counsel to file friend of the court briefs.

## RECOMMENDATIONS

### A. Minor Repairs

We recognize that this legislation reflects a unanimous committee consensus from the last Congress. We also appreciate, respect and agree with the committee’s top priority to act without delay. Realistically that precludes significant changes from last year’s bill. Our research since the last Congress, however, has confirmed the need for two significant but technical amendments that are consistent with last year’s bill. Without changing the meaning, they would reinforce and expand its intended impact.

1. “Clear and convincing evidence” definition. Congress already has defined or is now addressing two of three tests for relief under the WPA -- "reasonable belief," and "contributing factor." For the administrative process to function as intended, Congress also must define the "clear and convincing evidence" burden of proof for an agency's affirmative defense that it would have taken the same action on independent grounds in the absence of protected conduct. This normally tough standard has become the primary basis cited to rule against whistleblowers. That is because the Board discarded long-standing judicial and administrative norms, substituting three factors -- 1) the merits of an agency's stated independent justification for acting against a

whistleblower; 2) whether there was a motive to retaliate; and 3) whether the action reflects discriminatory treatment compared to that afforded employees who have not engaged in protected conduct. In practice, Board AJ's exercise discretion in any given case for how many of these criteria an agency must demonstrate, and by what level of proof for each factor. We recommend that the Committee adopt a definition consistent with Supreme Court precedent, and grounded in case law ranging from remedial employment legislation to the myriad of contexts in *Black's Law Dictionary*: "evidence indicating that the thing to be proved is highly probable or reasonably certain." The legislative history should specify that each criteria used to apply the definition must conform to these terms.

2. Displaced whistleblowers. Another loophole deprives whistleblowers of access to WPA coverage if they make their disclosures in litigation, whether it is their own disclosure or as a witness. This deprives them of access of Independent Rights of Action due process access, and stronger burdens of proof than if they made the same disclosure on television. Those who refuse to violate the law are similarly deprived despite the increased peril. These exclusions from normal whistleblower protection rights are arbitrary. Indeed, administrative or judicial testimony under oath should have the strongest shield in searching for "the whole truth." An amendment should end the second class legal treatment for their already-protected activity.

3. Scientific freedom. The legislation eliminates any confusion that the Act protects government scientists against abuse of authority from obstructing, censoring or tampering with their research. The Union of Concerned Scientists and GAP believe, however, that this provision should be its own prohibited personnel practice, instead of

merely a subset tfor another protected speech category. The latter structure would proactively ban attacks on the integrity of scientific research, instead of just shielding whistleblowers who disclose it.

B. Deference to Senate Legislation.

The Senate's counterpart legislation, S. 274, has provisions that cover two scenarios which could frustrate the goals of this bill but were not addressed in last year's House version. Each should be non-controversial, but each could be essential to avoid this reform being circumvented for many whistleblowers. If both bills make it to conference, we recommend that the House accept these Senate reforms.

1. Critical Infrastructure Information. This broad hybrid secrecy category is not covered by the anti-gag statute, because it is derived from legislation. Taken literally, it could cancel out nearly any disclosure otherwise shielded by the Whistleblower Protection Act. This is not the law's intended result, as recognized by Department of Homeland Security's regulations disclaiming that authority. For the same reasons Congress is acting to codify the anti-gag statute, the DHS boundaries should be codified as well.

2. Restoring whistleblowers' right to present their cases at hearings. An almost surreal exercise of administrative law judicial economy has deprived whistleblowers of the right to present their cases when they qualify for a hearing. The Board routinely skips the whistleblower's side of the story and goes straight to the agency's affirmative defense of independent justification. If the agency prevails, as now routinely occurs with the Board's unique "clear and convincing evidence" test, the case is over and there is no need to hear from the whistleblower. That means reprisal victims never get to make a public

record or even present their side of the story, including what they blew the whistle to challenge and how they were harassed. They only earn the right for the agency to pile on further. This denial of due process is inexcusable. The Senate addressed the procedural breakdown by a provision preventing an agency from presenting an affirmative defense until the employee has demonstrated a prima facie case of retaliation.

C. Next steps:

Realistically it is not possible for this legislation to cover all the flaws in whistleblower law, without first building the record for objectives and problems not considered in the bill. We recommend that Congress consider and build the record for the following ongoing conceptual problems, or further structural loopholes in current law.

1. The Office of Special Counsel. Under Special Counsel Scott Bloch, this agency has become a caricature and an object of contempt among the constituencies it supposedly serves. The agency charged with defending the merit system from repressive secrecy illegally gags its own employees, engages in ugly retaliation against its staff, and is engaging in heavy handed obstruction of justice tactics to intimidate its own employees from testifying in a President's Council on Integrity and Efficiency investigation of its OSC misconduct. The Office of Special Counsel should be targeted for intensive oversight, to determine whether the institution can be salvaged or should be abolished.

2. Making a difference. MSPB studies have confirmed for decades that many more whistleblowers remain silent observers because they don't think their efforts will matter than those who are fearful of retaliation. The channels for whistleblowers to make a difference are largely unchanged since their 1978 creation, however. There is a similar need and opportunity for this Committee to thoroughly examine and overhaul the whistleblower disclosure channels, as it is doing with protection against retaliation.

3. Protection for Library of Congress and General Accountability Office employees. Last year, Lou Fisher, the legendary Congressional Research Service author, faced retaliation and was transferred out of the CRS after writing a report that demonstrated increased retaliation against national security whistleblowers since 9/11. Like the many GAO employees who have described internal intimidation, he had no WPA or other third party legal rights to defend himself. Congress should act to protect its own sources of information.

4. Peer review as a listed personnel action. While hospital peer review is an important safeguard for patient care, it has no checks and balances and is too often used

by hospital administrators as the medical equivalent of security clearance reviews. Like national security agencies that retaliate against whistleblowers, hospitals have unique and unchecked ability to retaliate against physicians that challenge inadequate patient care at their institutions. Like security clearance proceedings, physician peer reviews are conducted secretly and bypass the normal procedural rights available to the accused in a normal setting. This should be addressed in the same way as psychiatric fitness for duty examinations were in 1994, and security clearance determinations are under this legislation. While medical judgments could not be reviewed, the WPA should be available to determine if the peer review was initiated in reprisal for protected whistleblowing.

5. Apply normal whistleblower rights to employees at federal banking agencies. Since 1989 employees at the FDIC and other federal agencies with federal banking responsibilities have been able to file cases in court, but without access to jury trials. That distinction has meant the difference between night and day in terms of track records, compared to EEO law and more modern employment statutes adopting that model. The playing field should be leveled for whistleblowers at banking agencies By fiving them access to juries.

6. Protection for all funded by the taxpayers. This bill's protection for contractors should be expanded to cover all employees paid with taxpayer funds. Consistent with the False Claims Act, conventional contractor protection should extend to entities receiving research grants or other federal funds.

7. MSPB pre-hearing due process standards. The Board does not honor normal rules of civil or administrative procedure in approving witnesses or pre-trial discovery to prepare for a hearing. It will not be a credible administrative forum until these deficiencies are addressed.

8. Expert witness fees. Unlike other remedial employment laws, the Board has interpreted the WPA to exclude recovery for expert witness fees. They can be essential for a whistleblower to prevail in any case involving professional or technical judgments. There is no rational basis for this arbitrary financial barrier to a fair hearing.

9. Compensatory damages. Unlike EEO and corporate whistleblower law, whistleblowers are not entitled to compensatory damages when they prevail. Again, this discriminatory standard is arbitrary and should be erased.

The top priority for this legislation is to act on it quickly. Every day that Congress delays, employees will have to continue risking professional suicide to cooperate with congressional oversight. This committee is doing more than its share, but that has been the case for four years. The reform isn't law already, because in 2004 and 2006 House

leadership has refused to permit a vote on this committee's work. If the new leadership is committed to serious reforms that reflect informed choices, it will schedule a prompt vote this time. If that occurs, in a few months those who defend the public finally will have a fair chance to defend themselves.