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, 2014

Mr. Chairman:

Thank you for inviting my testimony. 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 (WPA) and 1994 WPA amendments, as well as the Whistleblower Protection Enhancement Act of 2012 (WPEA).

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 Commission Act for ground transportation employees, the National Defense Authorization Act for all government contractors, including defense contractors, that are outside of the intelligence community, 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, the Dodd-Frank Wall Street Reform and Consumer Protection Act for financial-sector employees, the Affordable Care Act for health care workers and patients, 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 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, The Corporate Whistleblower's Survival Guide: A Handbook for Committing the Truth, which won the "International Business Book of the Year" award at the 2011 Frankfurt Book Fair, 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 Devine, *Running the Gauntlet: The Campaign for Credible Corporate Whistleblower Rights*, (2008).

Over the last 37 years we have formally or informally helped over 6,000 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, trans-ideological network of 50 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.

Our coalition was just the tip of the iceberg for public support of whistleblowers. Community organizations and corporations have signed a letter to President Obama and Congress to give those who defend the public the right to defend themselves through the same model as HR 1507 -- no loopholes, best practices free speech rights enforced through full access to court for all employees paid by the taxpayers. It is enclosed as Exhibit 1. The breadth of the support for HR 1507's approach is breathtaking – 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.

This hearing is particularly significant, because for whistleblowers the nearly two years since passage of the WPEA have been both the best and worst of times. There is unfinished business from the WPEA, and how it is completed will resolve the struggle. My testimony below summarizes five areas where there are new challenges or hard work left to achieve the Act's promise.

I. THE SENSITIVE JOBS LOOPHOLE.

A decision by the Federal Circuit Court of Appeals (Federal Circuit), which the Supreme Court has 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* 2014 U.S. LEXIS 2280 (U.S. Mar. 1, 2014). The courts have 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 hold jobs that 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 regulations by the Office of Personnel Management (OPM) and Office of the Director of National Intelligence (ODNI) will permit the designation for all jobs that require access either to classified or unclassified information. "Sensitive" employees will no longer be entitled to defend themselves through an independent due process proceeding at the Merit Systems Protection Board (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.

For the moment, the Administration has not challenged WPEA or employment discrimination rights for sensitive job holders. But those rights are crippled, if employees cannot defend their innocence against underlying charges. And based on past experience with the security clearance loophole to civil service law, prohibited personnel practices will be the inevitable next domino to fall. It is only a matter of time.

Congress has begun to counterattack. Both the House, through Representative Eleanor Holmes Norton, Ranking Member Elijah Cummings, Representative Robert Wittman and other bi-partisan sponsors; and the Senate through companion legislation have proposed legislative action to fill this newest, potentially all-encompassing loophole to the merit system. Quick action is essential, or there will be a cumbersome, expensive, time-consuming challenge to reconstruct the civil service. Already some agencies have begun converting their entire workforce to sensitive jobs. GAP's associated friend of the court brief to the Federal Circuit, and public comments on the OPM/ODNI proposed new rules are attached as Exhibits 2 and 3.

II. UPCOMING *DEPARTMENT OF HOMELAND SECURITY v. MACLEAN* SUPREME COURT DECISION.

When Congress enacted the Whistleblower Protection Enhancement Act, original sponsor and House floor manager Todd Platts expressed his concern over a potential new loophole that could be created from the case of Robert MacLean, a Federal Air Marshal (FAM) who exercised the freedom to warn, and prevented the government from canceling all FAM coverage during a confirmed, more ambitious rerun of the 9/11 terrorist hijacking attack.

An adverse decision would cancel the two most basic, significant premises for WPA free speech rights: 1) Only Congress can restrict public whistleblowing disclosures, not the agencies who allegedly engaged in illegality, fraud, waste, abuse, mismanagement or activities creating a threat to public health or safety. Otherwise, wrongdoers would have the right to gag whistleblowers exposing agency misconduct. 2) When Congress restricts public whistleblowing disclosures, it must do so with specificity. Otherwise, employees will have to guess whether they have legal rights when they serve the public's right to know. Uncertainty creates an inherent chilling effect that would defeat WPEA's purpose of encouraging public disclosures when government officials breach the public trust.

As Mr. Platts stated,

> [A]gencies must not be allowed to circumvent whistleblower protections through so-called ''secrecy'' regulations, such as a new category of information (labeled ''Sensitive Security Information'') created by the Department of Homeland Security. Whistleblower law understandably already exempts from whistleblower protections information which is classified or ''specifically prohibited by law'' from release. Classified information is

> information that is kept secret by Executive Order, not a hybrid category of information created by agency regulation like ‘‘Sensitive Security Information.’’ Moreover, ‘‘prohibited by law’’ has long been understood to mean statutory law and court interpretations of those statutes, not to agency rules and regulations.
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> If the Federal Circuit Court broadens the ‘‘prohibited by law’’ exemption to include anything that an agency tries to keep secret under any of their regulations, a new loophole could be opened up that would substantially under- mine Congressional intent in passing this bill. It is therefore important to once again make it clear: ‘‘Prohibited by law’’ has long been understood to mean statutory law and court interpretations of those statutes, not to agency rules and regulations. Any exception to these rights must be created by Congress, and Congress must act with specificity. That has been the law since 1978, and it continues to be the law.

Cong. Rec. (Sept, 28, 2012), at E1664

Unfortunately, while the Federal Circuit agreed with Mr. Platts unanimously in two rulings, the Department of Homeland Security and the Department of Justice did not, and they persuaded the Supreme Court to hear their appeal. An adverse ruling would cancel all the open government gains in the WPEA. A congressional friend of the court brief to the Federal Circuit is attached as Exhibit 4.

III. CIRCUMVENTING THE WPEA BY MAKING IT A CRIME TO BLOW THE WHISTLE.

The Obama Administration has been harshly, justifiably criticized for a "War on Whistleblowers" through unprecedented Espionage Act prosecutions for allegedly leaking or preparing to leak classified information. In reality, the phenomenon is much broader. As a service organization, GAP cannot avoid becoming sensitive to the latest patterns of retaliation. Since passage of the WPEA, we have seen a sharp shift from traditional employment actions to criminal investigations and prosecutive referrals. Increasingly, whistleblowers are given the choice of resigning, or risking jail time. Ernie Fitzgerald once nicknamed whistleblowing as "committing the truth," because you're treated like you committed a crime. Increasingly, instead of isolating or firing whistleblowers, that literally is becoming the new reality for whistleblowers.

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 it is uncertain whether WPA anti-retaliation rights are applicable.

In legislative history, 1994 WPA amendments designated retaliatory investigations and prosecutive referrals as threatened personnel actions creating WPA rights, but so far no ruling has applied that legislative history.

To avoid WPEA rights being neutralized through a pretextual criminal backdoor, Congress must codify its longstanding intent to nip this ugliest form of retaliation in the bud, before it can lead to criminal proceedings. A GAP briefing packet on the issue is enclosed as Exhibit 5. Our white paper on the phenomenon, *Whistleblower Witch Hunts,* is enclosed as Exhibit 6.

IV. UNRESOLVED WPEA ISSUES.

Three contentious WPEA issues were postponed for resolution until after a four year study by the Government Accountability Office (GAO) – 1) whether a two year experiment in normal "all circuits review" should be extended permanently as a substitute for the Federal Circuit's' prior monopoly; 2) whether civil service employees should have access to court, as an alternative to administrative hearings when there is not a timely ruling; and 3) whether the MSPB should have summary judgment authority to rule against whistleblowers without an administrative due process hearing. Nearly two years have passed, and it is overdue for the GAO to begin serious research.

All circuits review: The House already has begun to do its share by unanimously approving the All Circuits Review Extension Act, which expands the pilot program to five years so that GAO will have time to complete its study. The Senate Homeland Security and Governmental Affairs Committee unanimously approved companion legislation. Notwithstanding responsible rulings in the MacLean case, the Federal Circuit still has not ruled in favor of a whistleblower for a final decision on the merits since passage of the WPEA nearly two years ago. Normal appellate due process is a necessity, or Congress may well have to pass the same whistleblower rights a fifth time.

District court access: Since 2002 Congress has passed twelve whistleblower statutes, all providing for *de novo* jury trials in district court if the employee does not receive a timely administrative ruling. This was necessary, because the administrative hearing system does not have the structure, resources or time for cases with the most public policy significance, and/or involving complex or highly technical issues. That applies equally or more to resolution of civil service whistleblower cases, but the widespread mandate for district court access was blocked by threat of a Senate procedural hold. The GAO study should provide the empirical basis for this long overdue, responsible and proven reform.

Summary judgment authority: The MSPB long has sought this authority to more efficiently manage its docket. Whistleblower groups led by civil rights organizations, however, have strenuously resisted, because it has been badly abused at the Equal Employment Opportunity Commission in discrimination cases. The threat of a guaranteed hearing always has been the whistleblower's only significant leverage to settle cases. There never has been a significant chance for success on the merits or settlement after hearing, due to a long, deeply ingrained track record of hostility by Administrative Judges.

V. OSC-MSPB REAUTHORIZATION.

While the WPEA clarified and restored rights against retaliation, this legislation is necessary to make the remedial agencies more accessible and user friendly in practice. Quite simply, in a structural and procedural level, too often they have become dysfunctional since their creation in 1978. In 2007, this committee prepared HR 3551 to begin the makeover, and the bill was marked up in subcommittee. Further action was postponed, however, until passage of the WPEA. It is time to resume serious work on modernizing these agencies to address lessons learned.

For whistleblowers, the most significant provisions in HR 3551 were –

* reforms to permit joinder of related cases with common facts instead of requiring separate proceedings;

* realistic standards to obtain temporary relief, the key to timely and fair settlements, by providing it whenever a whistleblower proves a *prima facie* case of retaliation; and

* an independent process for accountability when Special Counsels abuse their power.

Discussions by the Office of Special Counsel (OSC) and good government organizations with senate staff have produced a consensus for further reforms in a renewed effort through –

* mandatory regulations by the OSC, which has not issued them since its 1978 creation;

* a two year statute of limitations for employees to file prohibited personnel practice complaints;

* OSC authority to issue and enforce subpoenas;

* increased employee access to evidence in case files, in exchange for fewer OSC burdens to explain decisions;

* enfranchisement of whistleblowers in framing the issues when OSC orders an agency investigation into their disclosures;

* OSC authority to monitor agency corrective action commitments in response to whistleblowing disclosures; and

* an expanded OSC certification program for agency training in merit system principles.

This work is significant and must be completed to modernize increasingly antiquated agency structures and practices. GAP is committed to any contributions necessary for its share.

Mr. Chairman, the WPEA was landmark legislation to restore rights that Congress now has passed four times since 1978. But the pressure to enforce abuses of secrecy through silence is timeless, trans-ideological and bi-partisan. The WPEA's most significant issues have not yet been resolved, while agency creativity already is producing new, more intimidating forms of harassment. At the same time, the rules that govern practices at merit system remedial agencies increasingly are becoming out of date. We hope that the committee will take advantage of willingness by GAP and other good government organizations in the 50 member Make It Safe Coalition to reach the WPEA's mandate by finishing the toughest reform issues, and modernizing the Act's implementation.