

TESTIMONY OF THOMAS DEVINE,  
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before the

HOUSE COMMITTEE ON VETERANS' AFFAIRS,  
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

on

LEGISLATION TO REFORM THE OFFICE OF ACCOUNTABILITY AND  
WHISTLEBLOWER PROTECTION

June 16, 2022

MR. CHAIRMAN:

Thank you for the opportunity to testify on legislation to restructure the Department of Veterans Affairs (VA) Office of Accountability and Whistleblower Protection. (OAWP) After reviewing the discussion draft, Government Accountability Project (GAP) believes this bi-partisan legislation is the beach head for significant reform at the agency with our government's worst record of whistleblower retaliation.

Over more than 43 years Government Accountability Project has formally or informally helped over 9,000 whistleblowers to "commit the truth" and survive professionally while making a difference. We have been leaders in campaigns to pass 38 whistleblowers laws ranging from Washington, DC to the recently-enacted European Union Whistleblower directive, which created enforceable free speech rights in 28 member nations. This testimony is based on painful lessons we have learned from this experience. We cannot avoid gaining practical insight into which whistleblower systems are genuine reforms that work in practice, and which are illusory.

Along with POGO, 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). The Coalition includes organizations for better government ranging from the Center for American Progress, the 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

and the American Federation of Government Employees. 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.

Before analyzing the legislation, it matters first to give credit where due. When I testified twice at previous oversight hearings, OAWP itself was producing a plurality of GAP's VA retaliation clients. Since Ms. Maryanne Donaghy became OAWP's chief, there have not even been any new requests for OAWP reprisal clients. She has met personally so that those with prior complaints were heard and made conscientious efforts that to date have resolved all but one case. Introducing civility and empathy in OAWP's leadership team is a welcome breakthrough, and frankly a relief.

Unfortunately, good vibes are no substitute for structural reforms applicable to any leadership, which is why your legislation is so welcome. Our comments are below:

**SECTION 2. COUNSEL OF OFFICE OF ACCOUNTABILITY AND WHISTLEBLOWER PROTECTION**

This is the badly-needed, welcome cornerstone for structural reform. The agency's Office of General Counsel (OGC) has an inherent conflict of interest with priorities frequently adverse with OAWP's mission. We echo Whistleblowers of America's concerns, however, whether the infrastructure will allow OAWP counsel to eliminate the conflict. The committee report and all other legislative history should make clear that -- 1) OAWP counsel's performance appraisal will be prepared by OAWP's chief, not the agency OGC; 2) OAWP counsel will have final decision-making authority for recommendations on OAWP issues; and 3) OAWP counsel will have authority to prepare independent legal opinions without OGC review or approval for OAWP matters.

### **SECTION 3. MODIFICATIONS TO FUNCTIONS OF OFFICE OF ACCOUNTABILITY AND WHISTLEBLOWER PROTECTION**

We fully support transfer of reprisal investigative authority from OAWP to the Office of Special Counsel (OSC), an agency with structural independence that has four decades more experience and accumulated expertise. Without any aspersions to good faith efforts by OAWP, in the absence of independent enforcement authority no internal agency ever has been able to protect whistleblowers. The most they can do is ask the parent agency to change its mind.

A technical matter is that statutory language or legislative history should assure parity with all other complaints processed by the OSC under the Whistleblower Protection Act. (WPA) Under 5 USC 1221, if the Special Counsel does not provide help within 120 days the employee can appeal *de novo* through a Merit Systems Protection Board (MSPB) administrative Individual Right of Action (IRA) due process hearing. Without explicitly guaranteeing jurisdiction, OAWP referrals to the OSC under section 3 may not be an accepted as the base for IRA jurisdiction.

### **SECTION 4. EXPANSION OF WHISTLEBLOWER PROTECTIONS**

\* Section 4(a) expands 38 USC 731(c)(3) to make referrals to licensing boards a form of illegal retaliation. This is an important principle because agencies often bypass civil service remedies with this tactic. There are few state due process rights against referrals that can lock in blocklisting and permanent exile from the profession.

However, as a technical matter the authority for this and the other forms of harassment in section 731 must be expanded also to include 5 USC 2302(a)(2), the personnel actions creating jurisdiction for Whistleblower Protection Act remedies. Otherwise, if the OSC does not help the whistleblower against the licensing referral, the case will be over without jurisdiction for an IRA. Other actions currently in section 731 that already face this due process

gap include protection against retaliatory investigations and peer reviews. As a practical matter, in my 43 years experience, in the absence of settlements the OSC never has formally sought relief against a retaliatory investigation, or the more recent prohibition on retaliatory peer reviews. That means the rights may be a mirage unless there is a due process backstop.

\* Section 4(b) provides a more realistic legal burden of proof for temporary relief than currently available under the WPA for whistleblowers. If the OSC finds a preponderance of evidence that whistleblowing was a contributing factor, OAWP will have authority to enforce temporary relief. A necessary modification for the burden of proof is that the OSC only should have to find a “substantial likelihood” of contributing factor. That would confirm this provision to House language in the Whistleblower Protection Improvement Act (WPIA), HR 2988. The WPIA language would relieve the employee of having to have the evidence for a final victory a victory for temporary relief.

However, this is one area where OAWP’s track record suggests “if it ain’t broke, don’t fix it.” Currently OAWP has authority to order temporary relief whenever it opens an investigation. The problem has been enforcing final corrective action. Section 4(b) would cancel this automatic right, and employees would have to wait for OSC findings after an investigation, which can be a lengthy process. We recommend that if OAWP refers a retaliation case to OSC for investigation, OAWP also retains its current authority to impose temporary relief.

\* Section 4(c) extends current protection against preemptive strikes during open investigations so that they apply to the Senior Executive Service when there is a pending investigation. We agree with this expansion, as SES employees often have access to the most significant evidence of mission breakdowns.

## **SECTION 5. TRACKING AND ENFORCEMENT OF RECOMMENDATIONS AND SETTLEMENT AGREEMENTS REGARDING WHISTLEBLOWERS**

This provision mandates a tracking system for how the law is working, from enforcement of reprisal settlements to agency action on corrective action recommendations for mission breakdowns, including discipline. It is unfortunate that Congress must legislate compiling this basic data on OAWP's track record. But it is necessary due to the mismanagement that previously caused this vacuum. Section 7 requires that Annual Report include this data, which will enhance the capacity for institutionalized congressional oversight.

## **SECTION 6. TRAINING**

We strongly agree with enfranchising OSC in the training process. Due to OAWP's past track record on this fundamental issue, we'd also recommend that its training programs be approved by OSC.

We are concerned, however, that the requirement to receive anonymous disclosures has been removed. Studies consistently have confirmed their value. Indeed, in the private sector they are responsible for exposing and catching more fraud against institutions than audit departments, compliance department and law enforcement combined.<sup>1</sup> It will undermine accountability to cut off anonymous disclosures to the whistleblower agency. OAWP should remain a repository that refers an anonymous disclosure to the appropriate entity for further action.

## **MISSING PROVISIONS**

Shifting OAWP's mission from being primarily an enforcement to a resources

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<sup>1</sup> PricewaterhouseCoopers and Martin Luther University Economy and Crime Research Center, Economic Crime: People, Culture and Controls: The 4th Biennial Global Economic Crime Survey (2007), [http://www.pwc.com/en\\_GX/gx/economic-crime-survey/pdf/pwc\\_2007gecs.pdf](http://www.pwc.com/en_GX/gx/economic-crime-survey/pdf/pwc_2007gecs.pdf); Society of Certified Fraud Examiners, 2008 Report to the Nation on Occupational Fraud and Abuse (2008), at 4, 30.

agency is simply sound public policy. However, it is confusing why this legislation removes two of the most significant resource provisions of Chairman Pappas' prior initiative, Strengthening VA Whistleblower Protection Act of 2021 -- whistleblower counseling, and Alternate Disputes Resolution. (ADR) Both had been successful programs as two of OAWP's few bright spots before the prior administration abolished them. Both resources make a real difference.

Whistleblower counseling is an essential service, because employees are seldom familiar with the requirements for their rights. They need a navigator who knows how to help them through treacherous, challenging legal territory to avoid traps, and unravel their options and responsibilities. This resource helped over 1,000 VA whistleblowers before its abolition. Counseling at official whistleblower channels is a cornerstone for the EU Whistleblower Directive.

In my experience, few aspects of whistleblower policies have made more of a difference than ADR to prevent unnecessary conflict and expedite resolution of disputes that otherwise drag on for years. OAWP previously had a unique form of ADR as an alternative to . when closed down.

We recommend that both of these resources which worked be restored to OAWP's mandatory mission. Even requiring OAWP to issue regulations restoring these two services would be helpful. A consultation could be added into the Section 6 training provision as well.

### CONCLUSION

Government Accountability Project deeply appreciate the chance to help make a difference contributing to this significant legislation. Please consider us on call for the issues raised in this testimony, or wherever you think we can contribute.