GOVERNMENT ACCOUNTABILITY PROJECT

1612 K Street NW, Suite 1100
Washington, DC 20006
(202) 457-0034
whistleblower.org

Written Testimony before the U.S. House of Representatives,
Committee on Oversight and Reform
Subcommittee on Government Operations

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Thomas M. Devine, Esq.
Legal Director, Government Accountability Project

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Dear Mr. Chairman:

Chairman Connolly, Ranking Member Meadows, and distinguished Members of the Subcommittee, thank you for convening this hearing on whistleblowers. My name is Tom Devine, and I serve as legal director for Government Accountability Project, a non-profit, non-partisan organization whose mission is to help whistleblowers make a difference without suffering retaliation. Government Accountability Project also is a co-founder of the Make It Safe Coalition, a non-partisan network of more than75 organizations whose members pursue a wide variety of missions that span defense, homeland security, medical and pharmaceutical safety, natural disasters, scientific integrity, constitutional rights, consumer hazards, and corruption in government contracting and procurement. We are united in the cause of protecting those who honor their duties to serve and warn the public. While many of our organizations differ sharply on policies and political candidates, our common commitment reflect two basic realities:

1. Freedom of speech is the cornerstone of democracy. That is why it is in the First Amendment in the Bill of Rights.

2. Abuses of power are not limited to any ideology or political party. Our constitutional system of checks and balances is essential, whether the administration is Democratic or Republican, conservative or liberal. Whistleblowers are a necessity for these fundamental checks and balances to be credible.

America has over 60 whistleblower laws that have a variety of definitions, but they all share a common theme: whistleblowers are those who use free speech rights to defend the public against abuses of power that betray the public trust.[1] During the last few years, whistleblowers have

[1] "Whistleblowers" frequently are confused with "leakers." While there is some overlap, these are distinct concepts. Leakers are individuals who violate restrictions on disclosures through unauthorized releases of information. They are communicating without required permission. Whistleblowers are those who disclose information that exposes institutional misconduct. The classification is based on the contents of their communication, not lack of permission. Some leakers are whistleblowers because they are disclosing misconduct that violates the public trust. Often,

been more significant than ever before, both in the United States and abroad. Repeatedly, they have proven their unique, indispensable role in facilitating congressional oversight. As a result, whistleblowing has never been more dangerous. New forms of retaliation are leaving mere workplace protection outdated. Those who challenge abuses of power now may risk their lives to do so, not just their jobs.

Other nations have responded to the challenge. Over the last few years, there was a global legal revolution in free speech rights for whistleblowers, with 60 nations passing whistleblower protection laws. During the last month, the European Union (E.U.), and ironically Ukraine, enacted whistleblower rights far stronger than the United States. The E.U. Whistleblower Protection Directive protects whistleblowers in its 28 member states.

While the U.S. pioneered global whistleblower rights, unfortunately we have not kept pace as best practice standards have evolved globally. The Whistleblower Protection Enhancement Act of 2012 (WPEA), which updated the Whistleblower Protection Act (WPA) was a unanimous mandate for freedom of speech to challenge government fraud, waste, and abuse. However, the WPEA substituted studies for action on some of the most significant issues of enforcement. Further, since 2012, new forms of retaliation quickly replaced traditional workplace harassment, which is the WPA's boundary. We believe that congressional action summarized below is necessary for credible rights under U.S. whistleblower laws:

FINISH WHAT CONGRESS STARTED IN THE WPEA

For unresolved issues, such was whether to afford whistleblowers the right to jury trials, Congress had the Government Accountability Office study the relative merits. However, it did not address new retaliation threats that left the WPA's boundaries outmoded. While the Whistleblower Protection Enhancement Act of 2012 restored the boundaries for rights as one cornerstone for freedom of speech, it is still missing the other three cornerstones summarized below. We believe they are necessary for the WPA to achieve its mandate. The Make It Safe Coalition's comprehensive recommendations for reform of the Whistleblower Protection Act are attached.

- *Jury trials:* Federal whistleblowers are the only significant segment of the U.S. labor force who cannot seek justice from a jury to defend themselves against retaliation. To make matters worse, their administrative remedy at the Merit Systems Protection Board is dysfunctional with a 2,529 case backlog as of January 2020, 438 of which are whistleblower cases. Federal whistleblowers make the disclosures most important for taxpayers, but they have the weakest due process rights to defend themselves against

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however, they are leaking information outside the scope of whistleblower laws, such as information that may be personally embarrassing but is not evidence of illegality. Whistleblowers often act on the public record, such as through congressional testimony, media interviews, or by disclosures required as part of job duties. The Whistleblower Protection Act protects auditors, inspectors, and investigators whose job it is to blow the whistle.

retaliation. Congress should give whistleblowers, including all congressional witnesses, the same access to juries that it has enacted in every corporate whistleblower law since 2002.

- *Retaliatory investigations:* Counter-accusation investigations, reviews or fact-findings launched against an employee after they have made a disclosure are the foundation for nearly all retaliation cases and are the knee jerk employer reaction to whistleblowers' disclosures. Investigations can hang over the employee's head indefinitely, with no prescribed procedures, and graduate into referrals for criminal prosecution, which is outside the WPA's scope. Unlike nearly all other whistleblower laws in the U.S., including the Military Whistleblower Protection Act, federal employees cannot challenge retaliatory investigations until there has been a subsequent personnel action. Whistleblowers should have the right to nip retaliation in the bud sooner.
- *Temporary relief*: Federal employees do not have a realistic chance to obtain temporary relief in lawsuits that routinely take years to complete. By the time they can access relief, it may be too late for the whistleblower who has lost their home, family, professional credibility, and even gone bankrupt. Because there is no incentive for the government to settle when the whistleblower is not temporarily reinstated or otherwise on payroll, employers extend litigation and prolong unnecessary disputes. The WPA should provide temporary relief whenever whistleblowers meet the legal standard for a *prima facie* case. When it enacted that standard, Congress explained it was because there is a zero tolerance for retaliation. That principle should apply at the beginning of a case, not delayed until the dispute is over.

PROTECTION AGAINST THE FULL SCOPE OF RETALIATION

As employment rights have become stronger, employer retaliation tactics have become more creative to circumvent U.S. whistleblower laws. For example, criminal and civil liability investigations and SLAPP suits have a far greater chilling effect than mere workplace harassment. But whistleblowers face multi-million dollar SLAPP suits for breaching gag orders that would be illegal to enforce through termination. Additionally, whistleblowers increasingly face threats of physical and emotional violence to themselves or their families. Nearly all recent global whistleblower laws, including the E.U. and Ukraine, cover *all* forms of discrimination, including civil and criminal liability. The U.S. needs to expand the boundaries of all its whistleblower laws for them to remain relevant.

The weakest link in America's whistleblower laws is confidentiality protection, both for public and private sector employees. While statutes such as the WPA and the Inspector General Act promise confidentiality, the rights are primitive and unenforceable. For example, section 7 of the Inspector General Act prohibits exposing a whistleblower's identity unless "unavoidable." That open-ended, subjective standard can be a mirage.

To illustrate, without any valid basis, the Department of Defense Office of Inspector General exposed National Security Agency surveillance whistleblower Thomas Drake and four others to the FBI as leakers. The only grounds were that although they had followed all the rules to disclose the misconduct, that same misconduct actually was leaked by someone else. All the "confidential" whistleblowers then endured daybreak FBI raids that terrorized their families, ransacked their homes, and seized property that still has not been returned after a decade. The government sought 35 years imprisonment for Mr. Drake for allegedly violating the Espionage Act. While the unjustified prosecution failed, the impact for him was devastating. A former Pentagon Assistant Inspector General blew the whistle on this abuse of power, and the U.S. Office of Special Counsel found a substantial likelihood that the OIG violated the Inspector General Act's confidentiality requirements. Current law is so toothless, however, that there was not even any fact-finding. DOD Inspector General Glenn Fine, who is testifying today, refused to conduct an investigation. He then successfully challenged the Special Counsel's authority to make him act on the evidence, and convinced the Council of Inspectors General for Integrity and Efficiency (CIGIE) not to investigate, either. In Government Accountability Project's experience, this type of betrayal with impunity is not an aberration.

Unlike the U.S.'s WPA and Inspector General Act, nearly every nation's whistleblower law has confidentiality provisions that include teeth to enforce them.. Those who expose confidential witnesses face criminal and civil liability. Further, foreign national whistleblower laws' confidentiality provisions consistently have well-defined, objective boundaries. December's E.U. and Ukrainian whistleblower laws reflect the current global best practice standards better than U.S. laws do. The confidentiality shield extends to identifying information, not just the witness' identity. Often the facts themselves are like a whistleblower's signature because so few are privy to the truth. Second, whistleblowers must provide written consent to reveal their identity, unless exposure is non-discretionary, such as from a court order in a criminal trial. Third, the whistleblower is entitled to timely advance notice for those non-discretionary breaches.

Whistleblowers need congressional leadership for the U.S. to catch up with the rest of the world. America pioneered whistleblower protection, but our laws increasingly have become dinosaur rights compared to those enacted in other nations over the last decade. Even more ironic, while federal employees make the most significant whistleblowing disclosures for our country, they have the weakest rights. Now more than ever America needs federal whistleblowers to hold government accountable. Our ranks are bi-partisan and trans-ideological, because we share that goal. Bi-partisan congressional leadership is essential to modernize America's pioneer, but outdated, whistleblower rights without further delay.