TESTIMONY OF THOMAS DEVINE,

GOVERNMENT ACCOUNTABILITY PROJECT

before the

HOUSE COMMITTEE ON VETERANS' AFFAIRS,

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

on

LEARNING FROM WHISTLEBLOWERS AT THE DEPARTMENT OF VETERANS AFFAIRS

June 25, 2019

MR. CHAIRMAN:

Thank you for inviting testimony from the Government Accountability Project (GAP). This hearing is timely and necessary. Despite repeated legislation, a presidential Executive Order and national media scandals, the Department of Veterans Affairs (DVA) remains a free speech Death Valley for government whistleblowers. This is not surprising. Retaliation is ingrained in the culture of the DVA. It will take years of aggressive oversight and accountability before this agency respects the First Amendment or the Whistleblower Protection Act (WPA) in practice, rather than empty rhetorical promises. This conclusion reflects the bitter experience of whistleblower rights lawyers from all perspectives. Two of today's witnesses are from GAP's docket of ten DVA clients, representing 40% of the 25 whistleblowers whom I represent. That ratio is consistent with the U.S. Office of Special Counsel's (OSC) experience. This is an extraordinary record for one agency in the nearly two million Executive branch work force. Forty-percent of whistleblowers is an extraordinary number for an Agency that comprises less than 20% of the Executive branch work force. Our experience is consistent with that of attorneys at the Senor Executive Association (SEA) who represent management whistleblowers. Their disclosures are the highest stakes exposure of mission breakdowns threatening the health of America's veterans.

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

Over nearly 40 years we have formally or informally helped over 8,000 whistleblowers to "commit the truth" and survive professionally while making a difference. We have been leaders in campaigns to pass 35 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 shares and is illustrated by 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.

Our work for corporate whistleblower protection rights includes those in the Sarbanes-Oxley law for some 40 million workers in publicly-traded corporations, the 9/11 law for ground transportation employees, the defense authorization act for defense contractors, 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 airline employees, among others. Last year GAP was counsel for an *amicus curiae* brief filed by Representative Speier, as well as Senators Grassley and Johnson, which successfully defended the WPA burdens of proof for analogous corporate whistleblower statutes.

We teamed up with professors from American University Law School to author a model whistleblower law approved by the Organization of American States (OAS) to implement at its Inter American Convention against Corruption. In 2004 we led the successful campaign for the United Nations to issue a whistleblower policy that protects public freedom of expression for the first time at Intergovernmental Organizations, and in 2007 analogous campaigns at the World Bank and African Development Bank. GAP has published numerous books, such as *The Whistleblower's Survival Guide: Courage Without Martyrdom*. We have also published law review articles analyzing and monitoring the track records of whistleblower rights legislation.

See "Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 Administrative Law Review, 531 (1999); Vaughn, Devine and Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 Geo. Wash. Intl. L. Rev. 857 (2003); *The Art of Anonymous Activism* (with Public Employees for Environmental Responsibility and the Project on Government Oversight)(2002); and *The Corporate Whistleblower's Survival Guide: A Handbook for Committing the Truth (2010).*The latter won the International Business Book of the Year Award at the Frankfurt Book Fair. This spring, with the Project on Government Oversight (POGO) and Public Employees for Environmental Responsibility (PEER), we co-authored a survival guide for anonymous whistleblowers: *Caught Between Conscience and Career: Expose Abuse without Exposing your Identity.*

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, Competitive Enterprise Institute, American Conservative Defense Alliance and the American Policy Center, to unions and other national member based groups from American Federation of

Government Employees and the National Treasury Employees Union, to the National Organization for Women. But the coalition itself is only the tip of the iceberg for public support of whistleblowers. Some 400 organizations with over 80 million members joined the petition for passage of the WPEA.

ILLEGAL GAG ORDERS

If there were any hopes that the DVA has learned from years of scandal and remedial legislation, the agency dashed them this month. On June 13 the DVA officially reaffirmed its illegal intolerance for freedom of speech by whistleblowers. The attached memorandum on media policy to all employees from the Acting Deputy Under Secretary for Health Operations and Management imposed the following policy:

> Queries that may yield negative coverage or are controversial in nature must immediately be forwarded for review to the appropriate regional Office of Public and Intergovernmental Affairs (OPIA) staff and VISN public affairs contacts … to generate an approved response….
> Regardless of subject, any query from national outlets also requires the same review. This includes outlets such as the Associated Press, Reuters, New York Times, Los Angeles Times, Wall Street Journal, Washington Post, Newsweek, USA Today, Huffington Post, National Public Radio, TIME magazine, CNN, and the network news and magazine programs of ABC, CBS, Fox, NBC and PBS.

While the memorandum further orders employees not to communicate with the media as government representatives on official time, there is no clarification that they have that right speaking as free citizens on their own time. As a result, on its face this prior restraint violates three provisions of federal law, including two in the unanimously-passed Whistleblower Protection Enhancement Act of 2012. (WPEA) – 5 U.S.C. § 2302(b)(13) and § 114 of the WPEA, as well as a longstanding appropriations law provision. As explained in the attached legal memorandum, both the WPEA and an annual appropriations rider since FY 1988 require that any nondisclosure policy contain a clarifying addendum with the following message: rights

in federal whistleblower laws trump its restrictions. This agency policy is very clear about its free speech restrictions, and silent on employees' legal rights. Hopefully this hearing will lead to the DVA respecting the rule of law, at least in terms of official policy.

CASE STUDIES

Government Accountability Project's best contribution today will be sharing the nightmares of DVA whistleblowers who risked their professional lives to save the lives of America's veterans. Illustrative examples from our docket are below.

James Hundt

The 2014 "secret waiting list" scandal for Department of Veterans Affairs (DVA) hospital care horrified the nation, and sparked a serious corrective action effort that was making significant progress at ending both the backlog and the deception. Unfortunately, over the last two years the Veterans Health Administration (VHA) has gutted the effort by replacing virtually the entire team of over 175 seasoned, professional career employees at its Veterans Engineering Resource Center (VERC) with the green crew of a buddy system contractor. The civil service team had been aggressively imposing, working closely with hospitals to implement and inspect, corrective action. Its effective efforts initially led to agency commendations.

But they were all replaced in favor of a buddy system contract. The switch was accomplished through a reorganization illegally planned and controlled by the favored contractor. It reversed Commission on Care's internal agency recommendations and violated basic contracting and spending laws. To illustrate, the agency allowed the prospective contractor to draft a reorganization plan that would replace the civil service professionals with unqualified, completely inexperienced contractor staff. Since the civil service employees have been purged,

on-site inspections have been replaced by an honor system in which facilities certify completion of various tasks. This helps to explain other testimony today such as Mr. Dettbarn's, concerning the persistence of secret waiting lists.

VERC Associate Director James C. Hundt persistently blew the whistle internally to challenge the reorganization. The agency then opened illegal retaliatory investigations on Mr. Hundt, using it to fire him on pretextual grounds after he challenged the reorganization. He led a group of staff whistleblowers, the most active ones receiving the same treatment. In a stunning display of pretextual double standards, the agency fired Mr. Hundt for seeking personal gain on government time, although he had checked for prior approval of the same actions that non-whistleblowers engaged in and received promotions.

This case of whistleblowing and reprisal calls for intensive congressional oversight to restore progress addressing the most serious challenge in recent years both to the DVA's integrity and the health of America's veterans. After initial support, since last year the U.S. Office of Special Counsel's efforts have become dormant, leaving the whistleblowers unemployed and further corrective action dysfunctional for the waiting lists. It also severely challenges respect for Congress' mandate in the Patient Protection Act, the Dr. Chris Kirkpatrick Whistleblower Protection Act and other recent statutory efforts against DVA whistleblower retaliation.

Dr. Sophia Chun

The retaliation is not limited to line employees. It gets more intense and uglier for senior executives whose disclosures have the highest stakes. In 2014 the agency hired Dr. Sophia Chun as Executive Director of the Spinal Cord Injuries and Disorders (SCI/D) at the National Office of the Veterans Health Administration. (VHA) She held this position until 2016, when she blew the

whistle and was fired after protesting failure to act on desperately-needed reforms that she had been hired to propose and implement. Because she was a non-career senior executive, Dr. Chun has not had access to the anti-retaliation rights of other DVA employees. Her case illustrates why this loophole severely threatens both the agency mission and the health of paralyzed veterans suffering from spinal injuries.

Dr. Chun is a nationally-respected expert in spinal treatment with a successful history at the DVA's Long Beach, California facility. The agency selected her to clean up a dysfunctional national program after repeated complaints by the Paralyzed Veterans of America. She was dismayed, however, that she was supposed to be a figurehead without a mandate for change.

In disclosures through the chain of command and to PVA, Dr. Chun exposed a serious monthly miscounting of the nurse staffing levels at the VA's SCI/D centers—numbers still reported to Congress—that falsely represented SCI/D access to care and camouflaged the unavailability of specialized SCI inpatient beds. She disclosed how the unobtainable nurse staffing ratio, as defined by how many nurses are needed for each inpatient bed, in effect decreased the number of available inpatient SCI unit beds for the most vulnerable veterans at the time they most desperately needed care. Rather than supporting Dr. Chun's efforts to increase access and develop a transparent method of measuring wait times for SCI care, the VA adamantly insisted on maintaining the status quo—perpetuating inpatient wait list chaos and deception by endorsing a nurse staffing policy that mandated unreasonable and unobtainable nurse staffing ratios.

Dr. Chun further disclosed the deliberately erroneous calculation and publication of the average Length of Stay (LOS) for SCI/D patients, a measure of the average number of days that a patient occupies a bed. The VA routinely reported the average LOS as only one-quarter of its

true value. This deception unsurprisingly painted the VA in a favorable light and provided a front for denying the necessity of an inpatient wait list. However, to the veteran in need of care, this distortion simply hid the unavailability of a bed at an SCI/D center. The use of this flawed metric prohibited the accurate assessment of the demand for patient care and the allocation of resources necessary to reduce inpatient wait times.

Perhaps most disturbing, Dr. Chun disclosed the failure of the Spinal Cord Injury and Disorders Outcomes (SCIDO) system, a patient database developed to measure the effectiveness of patient treatments, as well as the ongoing cover up of that failure. The database system should have collected clinical data from veterans with SCI/D and made that data available to improve patient care. Instead, veterans lost the life-saving insights potentially gleaned from that data because of a bungled development that took years, cost millions of dollars, and still yielded a broken system marred with duplicate and invalidated records totaling a miniscule 263 megabytes—not enough data to fill one-tenth of a $5 thumb drive. Additionally, by design the SCIDO system ignored 99% of the veterans with SCI/D—the aging World War II, Korean and Vietnam War veterans suffering from chronic medical illness and secondary complications of aging with SCI. Even more distressing was the deliberate cover up of this failure.

The breadth of the mission breakdown was vast. To illustrate, Dr. Chun disclosed mismanagement of the deployment of a technology especially promising for patients with SCI/D—Clinical Video Telehealth (CVT). After five years, the CVT program only served fifty patients from a pool of thousands of rural veterans with SCI/D. CVT uses high-resolution imaging to connect a veteran at a remote site with a healthcare provider. The potential of this technology to dramatically improve access to care for patients was clear, and the VA made a substantial investment in the equipment and its deployment. Dr. Chun disclosed that thousands

of rural veterans with SCI/D should have been enjoying timelier, more convenient, and less expensive access to care, but mismanagement and misleading progress reports prevented it from having more than a token impact. On balance, agency employees in a well-funded, high-stakes program were being paid to cover up the work they were not performing for paralyzed veterans.

When Dr. Chun attempted to impose responsible corrective action, the agency reacted with ugly negative retaliation. Agency managers recruited the same employees who had been neglecting their duties to file mass “mobbing” allegations against her. They were led by the official responsible for the mission breakdown, whom the agency retained as Dr. Chun’s deputy after she replaced him. Although Dr. Chun is a soft-spoken, extremely courteous, low key personality, they portrayed her as a tyrant. Normally the agency circles the wagon around managers whom employees accuse of abusing their authority. In this case it was just the opposite.

The agency used their charges as the pretext to open Administrative Investigatory Board (AIB) proceedings. The AIB subjected her to over four hours of interrogation in a fishing expedition so aggressive that she suffered from clinical depression, heart palpitations, extreme weight loss and Post Traumatic Stress Disorder (PTSD) that still persists. It then used the AIB’s report to fire her in July 2016 on different allegations. One ground was that she had violated patient privacy in a study with records, although she had neither compiled nor maintained the records. The other charge was that she had been using agency facilities for her private practice, when she did not have a private practice. Nearly three years after filing a Whistleblower Protection Act complaint, it may be resolved shortly despite the technical barrier from her senior status that bars the OSC from acting beyond good offices to mediate resolution. But due to

lingering trauma from the prior harassment, Dr. Chum is unable to return. The agency has successfully driven her out.

Kuauhtemoc "Krod" Rodriguez

Mr. Rodriguez is an Iraq war veteran and former infantry officer who was serving as a Management Analyst in the agency's Phoenix, Arizona Health Care System when he began blowing the whistle to the OIG, to Congress and to the media about what has since been recognized as the agency's worst facility. He was one of the key pioneer whistleblowers who broke the secret waiting list scandals. In addition to challenging the Agency's gross waste of funds and cronyism, as an advanced computer expert he disclosed that the agency incorrectly scheduled approximately 400 patients, while another 400 patients had been waiting over 120 days for an appointment and over 8,000 appointments were waiting to be scheduled. He later disclosed to Congress a list of 38,000 veterans waiting over 280 days for specialty care clinic appointments. He tracked how the agency was covering up the secret waiting lists. Using his computer skills, he has traced for Congress how the secret waiting lists were exponentially more severe than the agency had publicly conceded, and how the secret waiting lists extended well beyond Phoenix. Mr. Rodriguez not only disclosed the deception, but the tragic medical impacts including patient deaths.

In response, agency managers moved him to a small, windowless office without air conditioning in Arizona; placed him under surveillance; eliminated his supervisory authority; actively recruited mobbing allegations against him; lowered his performance appraisals, referred to him as a "rat" and "media whore"; failed to respond to death threats against him; placed him under criminal investigation; and subjected him to an AIB proceeding.

Thanks to intervention from the agency's Office of Accountability and Whistleblower Protection's mentoring program, Mr. Rodriguez has been placed in a new location where the harassment has subsided. But his career has been paralyzed by denial of promotions for which he is eminently qualified, and the agency has denied all misconduct in WPA proceedings.

Daniel Martin

Mr. Martin was the Chief of Engineering Services at the Veterans Affairs Northern Indiana Healthcare System ("VANIHCS"). He oversaw engineering operations at VANIHCS's two campuses (in Marion and Ft. Wayne, Indiana), and the nearby Marion National Cemetery, where he also supervised over 100 employees. After refusing attempted inducements by a contractor, he disclosed evidence to the DVA OIG that his superiors were engaged in illegally accepting gratuities, including at least free meals and entertainment, and possibly cash bribes from the VA contractor, in exchange for steering and awarding illegal sole source contracts to that contractor in violation of long-established anti-bribery statutes and procurement regulations. One of the suspect contracts concerned the water purification system that is essential for sterilization of medical equipment and safe drinking water for patients. He later learned and disclosed evidence that the Indiana contracting abuses were not aberrations, but reflected corruption occurring nationally with contracts.

In response, the agency stripped Mr. Martin of his duties, assigned him to an isolated office that was unheated in winter and not air-conditioned in summer, and had him perform menial chores under supervision of a junior staffer. He was exposed to asbestos that he believes already is having a destructive medical impact. He was placed under three retaliatory investigations, primarily for an "altercation" that his so-called victims denied was more than a

conversation. The third probe was conducted by an AIB that denied him access or even the identities of adverse witnesses.

Active intervention by OAWP, combined with GAP's Whistleblower Protection Act (WPA) appeal, prevented the agency from terminating Mr. Martin. But the Agency refused an OAWP-mediated solution to move him to Seattle, Washington, where the management said they would welcome him. Despite canceling his duties, Indiana officials said they could not spare Mr. Martin.

During his WPA appeal, Government Accountability Program depositions of the officials who retaliated against Mr. Martin established that they knew of his OIG disclosures when they acted, which they previously had denied under oath during an inquiry by the Office of Accountability and Review (OAR). It appears that Mr. Martin may finally be allowed to work in Seattle and stop being a prisoner of those he blew the whistle against. But for over three years his professional life has been a nightmare, because he challenged corruption that could threaten the lives of DVA patients and staff.

Christopher "Shea" Wilkes

Shea Wilkes is another pioneer VA whistleblower for exposure of secret waiting lists at VA hospitals in 2014. The OSC found there was a "substantial likelihood" that his wait list disclosures were correct, but the Special Counsel later lambasted the VA Inspector General and the VA Office of Accountability Review for an obvious whitewash of this breakdown in their subsequent report on patient care.

While his disclosures sparked a national spotlight on the VA's deadly neglect of veterans, Mr. Wilkes faced serious reprisal after blowing the whistle. Ten days after his disclosure to Congress and the VA Inspector General, he was placed under criminal investigation regarding

his access to and the source of the secret lists. He was also stripped of his duties, denied any new training, and steadily harassed in a hostile workplace environment. After four years of steady hostility, an OAWP mentoring effort helped relieve the pressure on Mr. Wilkes. He is currently working for a new hospital director and attempting to resolve an active complaint at the Office of Special Counsel.

Following his disclosures, Wilkes co-founded the 50+ member "VA Truth-Tellers" organization, one of the most effective whistleblower self-help groups currently operating today.

Dr. Nishant Pavel

Dr. Patel is a psychologist with the Department of Veterans Affairs (VA) in New York whom the agency is gagging from attempting to help asylum seekers. For the last few years, he has volunteered with Weill Cornell Medical Center for Human Rights, an organization at Cornell's medical school that helps those individuals. He has assessed the mental state of numerous asylum seekers, and in six cases submitted affidavits on their behalf in immigration proceedings. No objection was ever raised by the Department of Homeland Security (DHS) or the VA to his submission of these affidavits. His work with the Center is pro bono.

Last year Dr. Patel planned to offer expert testimony on behalf of another asylum seeker. As with his previous work, he would receive no compensation for his testimony, nor would he be identified as a VA employee during the proceedings. Before he was able to testify, however, attorneys for the Department of Homeland Security (DHS) asserted that he could not testify without permission from the DVA.

Dr. Patel duly sought permission from his DVA superiors to testify, but was denied. The only explanation provided was that the VA would need permission from the Department of Justice (DOJ) but would not be able to get it. His supervisors also threatened him with criminal liability under 18 U.S.C. § 205 if he testified. That statute bars government employees from acting as attorneys or agents for those in lawsuits against the United States.

The newly-created objections are a shameless legal bluff that defy well-established case law interpreting the First Amendment and 5 CFR § 2635.805, which governs outside activities of government employees. The threat of criminal liability is particularly baseless. There is no hint in statutory language of this extended application for § 205, which repeatedly has been rejected in court. Nonetheless, the DVA has refused to eliminate the gag order, and if he resumes helping asylum seekers Dr. Patel will risk termination and prosecution.

OFFICE OF ACCOUNTABILITY AND WHISTLEBLOWER PROTECTION

OAWP enjoys a legislative and presidential mandate to help whistleblowers to make a difference and defend themselves against retaliation. Its authority to grant temporary relief against retaliation initially had an outstanding impact, and is unprecedented. It made a difference in several cases described above. Unfortunately, despite genuine commitment from some leaders and an impressive initial track record, it has become a threatening source of frustration for whistleblowers as the rule, and an effective remedial agency as the exception.

This submission will not duplicate the in-depth analysis of my colleagues today on OAWP. However, it would be irresponsible not to share lessons learned about the basic causes of this frustration. Most basically, the Office lacks structural independence. In practice it cannot act

without approval by the DVA Office of General Counsel, whose mission is to defeat whistleblower cases. This is a hopeless structural conflict of interest.

On a cultural level, the OAWP staff lacks empathy and whistleblowers frequently complain of hostility. Many of its investigators come from offices where they accumulated anti-whistleblower bias by spending their careers conducting retaliatory investigations of them. That does not end with a new duty station and job description.

OAWP lacks enforcement teeth for permanent relief. Agency officials have the discretion to defy it with impunity. For example, early in the Dan Martin case it negotiated a transfer to Seattle. But the same Indiana manager who refused to give Mr. Martin any duties defied the resolution on grounds that he could not be spared.

The Office inexplicably canceled its effective mentoring program. This effort had successfully defused conflict and shrank litigation by finding whistleblowers a fresh start with offices that would welcome their commitment to the agency mission, instead of being threatened by it.

Most fundamentally, OAWP operates on an ad hoc basis, without accountability to regulations. This maximizes employee confusion and enables arbitrary actions in any given case, and permits inexcusable wastes of resources that exhaust targeted employees. To illustrate, the Senior Executive Association has detailed how OAWP conducted seven lengthy, draining investigations of a manager that resulted in a five day suspension, only made possible by removing exculpatory testimony from the evidence file.

In short, without serious oversight, training and structural reform, this remedial office will degenerate into a Trojan horse for whistleblowers.

RECOMMENDATIONS

It is clear that changing the DVA's repressive way of life will require marathon persistence, both in terms of oversight and stronger legal controls based on lessons learned. Based on these experiences, GAP has teamed up with our colleagues today and Public Citizen to share the following recommendations to keep pace with circumvention of prior reforms.

Agency-wide recommendations

- Jurisdiction to challenge retaliatory investigations as prohibited personnel practices when opened against the whistleblowers. Although made illegal in the Patient Protection Act, there is no enforcement mechanism.

- Jurisdictions to challenge Administrative Investigations Board proceedings as prohibited personnel practices, if initiated against an employee because of (or subsequent to) whistleblowing. AIBs should focus on halting abuses of power, not perpetuating them.

- Reform of the AIB structure and process so it stops being a "Star Chamber." Board proceedings should conform to the due process requirements of the Administrative Procedures Act and the constitution, such as the right to call witnesses and confront accusers.

- Roll back gutted due process for internal agency personnel rights, which have been exploited against whistleblowers. For example, if a PPP is alleged, employees should have 30 days to respond to proposed personnel actions.

- Prohibit the delegation of authority to apply Section 714 any lower than the director level, whether it be Network or Hospital. That is, any Section 714 disciplinary action would have to be proposed and decided by directors or higher.

- Extend to senior DVA executives the same protections in 5 U.S.C. § 714(e)(1)-(2) that apply to all other agency whistleblowers: after an alleged prohibited personnel practice, proposed termination, demotion or suspension cannot proceed without prior OSC approval. There should be analogous OAWP authority if an employee blows the whistle to that office.

- Provide temporary relief after an initial OSC, Inspector General or Merit Systems Protection Board Administrative Judge finding that there is a *prima facie* case under the Whistleblower Protection Act that an adverse action was taken because of whistleblowing. Few actions will be more effective to prevent retaliation than a realistic chance to freeze retaliatory *faits accompli* that exile whistleblowers for years while legal actions proceed at a molasses pace.

- If necessary as a pilot program, provide a jury trial "kick-out option" for whistleblowers who do not receive a legal decision on appeals within 180 days. This would be similar to

provisions under the Energy Reorganization Act (42 U.S.C. § 5851) giving this option to Nuclear Regulatory Commission and Department of Energy employees.

- Identify as a prohibited personnel practice retaliatory referrals to licensing boards or the National Practitioner Data Bank. Employees should be able to challenge and have the agency vacate false or inaccurate reports, and must include in any report that the employee was a whistleblower. The DVA routinely uses these referrals to blacklist whistleblowers after firing them.

- Reinforce existing confidentiality protection with best practices. Employees should receive notice when their personnel or medical records have been accessed and by whom. Confidentiality rights, including those in OIG investigations, should extend beyond identities to shield all "identifying information." Whistleblowers should receive immediate notice of legally-required, specific boundaries for confidentiality rights, such as court orders. Whistleblowers should receive advance notice when their identities must be exposed or compromised.

- Develop oversight measures to ensure all investigations, both disclosure and retaliation, referred to facility and program offices are consistent with policy and reviewed by an official independent of and at least one level above the individual involved in the allegation. To ensure independence, referred allegations of misconduct should be investigated by an entity outside the control of the facility or program office involved in the misconduct. This suggestions echoes (Recommendation 12 of the Government Accountability Office report GAO-18-137, July 2018).

OAWP specific recommendations

- The Secretary of Veterans Affairs should direct OAWP to develop a process to inform employees how reporting lines operate, how they are used, and how the information may be shared between the OSC, the OIG, OAWP, or VA facility and program offices when misconduct is reported (GAO Recommendation 16).

- OAWP should have, and only be responsible to report to its own General Counsel and directly to the Secretary.

- OAWP should have authority to enforce stays and other corrective action(s), including in response to actions proposed under authority other than Section 714.

- There should be mandatory annual OAWP staff training on whistleblower rights, identification of prohibited personnel practices, and the psychosocial elements of working with whistleblowers suffering from workplace traumatic stress. No OAWP employee should be permitted to participate in a whistleblower case without certification of completing this training course.

- OAWP should be required to provide mandatory No Fear Act training to all DVA employees on how to work most effectively with the Office both for whistleblowing disclosure and retaliation cases.

- The prior OAWP mentoring program should be restored as a mandatory channel for counseling and negotiation to find a fresh start for whistleblowers as an alternative to litigation, and should include solutions to reduce workplace traumatic stress.

- Regulations should be published that include dataset definitions (including veteran status), engagements procedures, and outcome options. Referral for adjudication of non-employee complaints should also be highlighted. The Secretary of Veterans Affairs should direct OAWP to develop a time frame for the completion of published guidance that would develop an internal process to monitor cases referred to facility and program offices (GAO Recommendation 14).

- There should be a Memorandum of Understanding Better between OAWP & OSC to reduce whistleblower confusion and prevent duplication by remedial agencies that already are overextended.

Government Accountability Project has appreciated the thorough committee staff preparations for this hearing. The GAP team is available and would be honored to work with committee staff further on any of these recommendations. Both your committee and the whistleblower community are committed to making Whistleblower Protection Act rights a reality at the DVA. However, our work is far from finished.

ATTACHMENT 1

Department of
Veterans Affairs

Memorandum

Date: JUN 1 3 2019

From: Acting Deputy Under Secretary for Health for Operations and Management (10N)

Subj: Veterans Health Administration (VHA) Media Interview and Query Policy

To: Veterans Integrated Service Network (VISN) Directors (10N1-23)

1. The purpose of this memorandum is to reiterate VA's policy for responding to media queries and interview requests for public affairs specialists and all other staff.

2. Queries that may yield negative coverage or are controversial in nature must immediately be forwarded for review to the appropriate regional Office of Public and Intergovernmental Affairs (OPIA) staff and VISN public affairs contacts, who will work with local officials, OPIA leadership and VHA's media relations team to generate an approved response.

3. Regardless of subject, any query from national outlets also requires the same review. This includes outlets such as the Associated Press, Reuters, New York Times, Los Angeles Times, Wall Street Journal, Washington Post, Newsweek, USA Today, Huffington Post, National Public Radio, TIME magazine, CNN, and the network news and magazine programs of ABC, CBS, Fox, NBC and PBS.

4. Generally, facility-level public affairs specialists may respond directly to local media queries that are not negative in nature and involve local programs and issues.

5. VISN and Medical Center Directors are encouraged to work on, pitch and promote positive news stories. Employees who are not authorized to speak on behalf of VA should refer the media request to their facility or VISN public affairs office.

6. VA employees are responsible for obtaining appropriate authority before speaking in an official capacity for the agency or for the organizational activity in which they participate. VA employees may not accept or seek opportunities to appear on radio, or television programs for or on behalf of VA without authority to act in such capacity.

7. Employees may not use their official titles, VA stationery, or duty time to engage in activities involving the communication of comment or opinions directed to media without the expressed consent of the highest official, or designee, of the facility to which assigned.

VA FORM 2105
MAR 1989

8. Whether interviews are done in a personal or official capacity, employees should conduct themselves in a professional manner.

9. Please contact Mr. Alan Greilsamer, Director of Media Relations, VHA Office of Communications, at Alan.Greilsamer@va.gov for any questions regarding this memo.

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Renee Oshinski

2105 VA FORM MAR 1989

ATTACHMENT 2

GOVERNMENT ACCOUNTABILITY PROJECT
1612 K Street, NW, Suite #1100
Washington, DC 20006
(202) 457-0034 | info@whistleblower.org

June 19, 2019

Memorandum

From: Tom Devine, GAP
Re: Anti-gag provisions in current appropriations law

The below provisions are from Title VII, the Financial Services and General Government Appropriations Act that is part of PL 115-141, the Consolidated Appropriations Act for FY 2018.

I. General anti-gag appropriations rider:

This general provision echoes 5 USC 2302(b)(13) of the Whistleblower Protection Act, which makes violations a prohibited personnel practice for Title 5 employees. The ban is repeated government-wide as well in Section 115 of the Whistleblower Protection Enhancement Act of 2012. Unfortunately, neither the latter WPEA provision nor the riders have a remedy, so they have been unenforceable.

Sec. 744. (a) No funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Forms 312 and 4414 of the Government or any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: ``These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.'': Provided, That notwithstanding the preceding provision of this section, a nondisclosure policy form or agreement that is to be executed by a person connected with the conduct of an intelligence or intelligence-related activity, other than an employee or officer of the United States Government, may contain provisions appropriate to the

particular activity for which such document is to be used. Such form or agreement shall, at a minimum, require that the person will not disclose any classified information received in the course of such activity unless specifically authorized to do so by the United States Government. Such nondisclosure forms shall also make it clear that they do not bar disclosures to Congress, or to an authorized official of an executive agency or the Department of Justice, that are essential to reporting a substantial violation of law.

(b) A nondisclosure agreement may continue to be implemented and enforced notwithstanding subsection (a) if it complies with the requirements for such agreement that were in effect when the agreement was entered into.

(c) No funds appropriated in this or any other Act may be used to implement or enforce any agreement entered into during fiscal year 2014 which does not contain substantially similar language to that required in subsection (a).

[[132 STAT 599, 600]]

II. Congressional anti-gag appropriations rider:

The below provision echoes the Lloyd Lafollette Act of 1912, 5 USC 7211, which protects all communications by government employees to Congress.

Sec. 713. No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who--

(1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee; or

(2) removes, suspends from duty without pay, demotes, reduces in rank, seniority, status, pay, or performance or efficiency rating, denies promotion to, relocates, reassigns, transfers, disciplines, or discriminates in regard to any employment right, entitlement, or benefit, or any term or condition of

[[Page 132 STAT. 591]]