

TESTIMONY OF THOMAS DEVINE,  
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PROJECT

before the

HOUSE COMMITTEE ON VETERANS' AFFAIRS,

SUBCOMMITTEE ON OVERSIGHT AND  
INVESTIGATIONS

on

LEGISLATION TO REFORM THE OFFICE OF ACCOUNTABILITY AND  
WHISTLEBLOWER PROTECTION

October 19, 2023

MR. CHAIRMAN:

Thank you for the opportunity to contribute with testimony at today's hearing on the Department of Veterans Affairs (DVA) Office of Accountability and Whistleblower Protection. (OAWP) I serve as Legal Director of the Government Accountability Project, a non-profit, non-partisan whistleblower support organization. This is the fourth time GAP has testified on OAWP. Two prior written submissions are attached as Exhibits 1 and 2 with a summary of GAP's qualifications to assess the effectiveness of whistleblower support offices like OAWP. The Committee's persistence in oversight reflects a genuine, bi-partisan commitment to provide veterans with the medical care they deserve.

Veterans also should appreciate this committee's persistence is obtaining a rare bi-partisan consensus last Congress for approval of H.R. 8510, the Strengthening Whistleblower Protections at the Department of Veterans Affairs Act. I am testifying today to explain why this solid good government legislation is needed more than ever.

One reason is that the DVA remains the government's most hostile agency for whistleblowers who challenge patient care breakdowns, despite the life or death consequences of its mission. As summarized previously, the DVA is a free speech Death Valley for government whistleblowers. This is not surprising, because retaliation is an ingrained tradition. 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.

Despite this long-term challenge, it matters to give credit where it is due. Under prior OAWP leadership, my docket was dominated by whistleblowers facing OAWP retaliation from inside and outside this agency whose job is to protect whistleblowers. Since Ms. Maryanne

Donaghy assumed leadership, all the OAWP reprisal cases have been constructively resolved and GAP has not received any new complaints of OAWP retaliation. OAWP administratively has restored programs such as counseling and Alternate Disputes Resolution (ADR) whose cancelation initially had sparked internal whistleblowing.

Anecdotal leadership is no substitute for structural reforms to institutionalize better practices. Otherwise, depending on the whims of less effective leadership, the prior nightmarish mismanagement and abuses of power can resume at will. That is why it matters so much whether Congress institutionalizes reform through the sound good government mandate of H.R. 8510. That is why groups in the Make It Safe Coalition will continue our commitment as resources until this goal is achieved. Below is a summary of why H.R. 8520's legislative teeth are still needed.

\* Independent counsel. This provision should not be controversial, because the agency already has largely permitted OAWP lawyers to take control of their cases without vetoes by the DVA Office of General Counsel (OGC). However, OGC still will have a decisive role in assessing discipline, which is the bottom line for accountability, deterrence and corrective action. Independent counsel is the cornerstone for a legitimate watchdog mission. Now is the proper time to institutionalize and H.R. 8510's requirement for complete structural independence of the current voluntary, partial improvements.

\* Transfer of investigative authority to the Office of Special Counsel (OSC) At first glance, improvements in OAWP's performance appear to make this provision unnecessary. Unfortunately, no matter how good faith OAWP operates, it always will be an inherently inferior substitute to the Office of Special Counsel. That is because OAWP does not have enforcement teeth. OSC can litigate to enforce its corrective action recommendations after confirming

retaliation. OAWP can only recommend that agencies engaging in harassment change their minds and stop. DVA bullies can and routinely do defy the recommendations with impunity. If OAWP retains its authority to investigate retaliation, the only way this role can be legitimate is if Congress expands the scope of H.R. 8510 to provide the Office with litigative enforcement authority.

\* Retaliatory state licensing board referrals. This common form of retaliation allows DVA to circumvent the Whistleblower Protection Act again with impunity to seek permanent blacklisting of agency whistleblowers. None of OAWP's voluntary improvements have the legal authority to affect this practice, which can have a worse chilling effect than firing from an immediate position. The loophole must be closed.

\* Transparency for track record. Again, the agency deserves credit where due. It has significantly expanded public disclosure for the scope of its work and impact. OAWP also has created a stakeholder liaison office that appears to operate constructively and in good faith. Particularly impressive is that office's Climate Review initiative, to evaluate office environments for whistleblowing. Again, however, Congress should institutionalize and complete the job. The lights for transparency still can be turned off at whim.

Further, the current voluntary effort is incomplete. For example, OAWP now is monitoring and assessing agency corrective action on whistleblowing referrals. OAWP shares its evaluations with the agency chain of command. Unlike the Special Counsel under 5 U.S.C. 1213(e), however, the public does not get to see the results. Congress should assure that there is parity for OAWP transparency, the same as in the Whistleblower Protection Act. The assessments should be more than a management resource. They are vital for congressional and public oversight.

Similarly, OAWP boasts that 95% of its recommendations have been accepted ,at least in part. However, there is a transparency loophole for the nature of mission breakdowns, recommendations' substance, and a complete vacuum of data whether the “accepted” recommendations actually were implemented in good faith. Agencies commonly accept recommendations and promise to do better, without implementing them in whole or part.

Similarly, OAWP has created a Compliance Analysis and Reporting system to track compliance and prepare trend analyses. However, this should not be merely an internal management resource. The full results should be required in an annual report to Congress, and posted on the OAWP website.

\* OAWP navigator. The agency initially had whistleblower counselors who played an invaluable role in helping over 1,000 whistleblowers to understand and functionally act on their rights. The program was canceled, but thankfully OAWP has restored it under current leadership with the navigator function. This serviced is essential for OAWP's mission. It should not be controversial to legislatively institutionalize this voluntary initiative as a mandatory structure.

\* Alternative Disputes Resolution: OAWP initially had a “mentoring” program that achieved promising initial results for no fault, mediated resolution of reprisal cases. The goal was to find a new professional home for whistleblowers that would welcome their initiatives rather than suppress them. Despite promising initial results, the program was canceled. Under Ms. Doherty's leadership, a pilot ADR program has been restored. Again, it should not be controversial to institutionalize this pilot legislatively, mandating the no fault mediation dimension that has worked well previously.

If this Committee chooses to be more ambitious than H.R, 8510, GAP stands behind its detailed recommendations listed in prior testimony. However, that bill reinforced by the

counseling and ADR elements, is an excellent breach had to lock in a legitimate, badly needed resource for whistleblowers. OAWP was a good idea that went bad due to normal growing pains and too much discretion to abuse. You have our organization's unqualified commitment to be a resource finishing what the Committee started in the last Congress.