TESTIMONY OF THOMAS DEVINE

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before the

HOUSE GOVERNMENT REFORM COMMITTEE

on

PROTECTION FOR NATIONAL SECURITY WHISTLEBLOWERS

February 14, 2006

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for inviting my testimony today on protection for national security whistleblowers, a topic long overdue for congressional oversight. By necessity, some of the whistleblowing disclosures most significant for our nation's homeland security, as well as for our domestic freedom must come from public servants at the Federal Bureau of Investigation and intelligence agencies. Yet none of those employees have third party enforcement of their paper rights. Instead, they must depend on an honor system, in which they can ask what normally would be the institutional defendant to change its mind. Even employees at agencies covered by the merit system have no enforceable rights for the most common harassment technique against those who challenge security breaches – yank the whistleblower's security clearance or othersie block access to classified information necessary to perform the employee's job duties.

The Government Accountability Project (GAP) is a nonprofit, nonpartisan, public interest law firm that assists whistleblowers, those employees who exercise free speech rights to challenge abuses of power that betray the public trust. GAP has led campaigns to enact or defend nearly all modern whistleblower laws enacted by Congress, including the Whistleblower Protection Act of 1989 and 1994 amendments. 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 its Inter American Convention Against Corruption. We have published numerous books, such as The Whistleblower's Survival Guide: Courage Without Martyrdom, 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); and Devine, "The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers," 35 George Washington U. Law Review 857 (2003). On the topic for today's hearing, the Administrative Law Review shortly will be publishing an article, "Defending Paul Revere from Friendly Fire: Providing the Freedom to Warn for National Security Whistleblowers." ...

Since 1976 we have represented or personally assisted well over 100 national and homeland security whistleblowers from the Federal Bureau of Investigation (FBI) , Department of Defense (DOD), Central Intelligence Agency (CIA), National Security Agency (NSA), Transportation Security Administration (TSA), Department of Energy (DOE) and Nuclear Regulatory Commission (NRC), as well as relevant whistleblowers from associated contractors and from Offices of Inspector General (OIG) throughout the Executive branch. In a plurality of cases the reprisal of choice has been removal of the employee's security clearance, or blocking access through a myriad of other available techniques. There are two reasons why security clearance actions are the harassment of choice. First, the consequences are much uglier and destructive than mere termination. Clearance revocation brands the employee who had attempted to challenge security breaches as untrustworthy, and the whistleblower likely will be professionally blacklisted forever with a presumed scarlet "T" (for traitor) on his or her professional chest. Second, bureaucratic bullies get a free ride when engaging in clearance retaliation. For all practical purposes, the only limit to abuse of power is self-restraint by those considering security clearances as a weapon to retaliate.

Based on GAP's experience in partnerships with these national and homeland security whistleblowers, we hope to make three contributions to the record today: (1) share their vital role as modern day Paul Reveres exercising the freedom to warn, and defend America's freedom against threats from both outside and within; 2) confirm that despite paper rights these patriots are functionally defenseless against retaliation through loss of security clearance; and 3) rebut the Department of Justice's (DOJ) objections to any restriction of the Executive branch's discretionary authority over security clearance decisions.

Today's participation also sparks a sense of déjà vu. GAP represented witnesses whose testimony helped develop the record for a series of joint House Judiciary-Post Office and Civil Service Committee hearings during the early 1990's. For example, one witness who made an impression was Robert Beattie, a fireman whose clearance was revoked shortly after challenging numerous fire code violations on Air Force One. As will be discussed more fully, the record from those hearings was the foundation for House action to close the security clearance loophole in 1994 amendments to the Whistleblower Protection Act. Unfortunately, the Federal Circuit Court of Appeals frustrated that unanimous mandate by rejecting the reform as part of the law, because it was merged with a broader Senate provision that did not specifically list "security clearances" (or any other actions covered by the umbrella clause).

These hearings could help give the House a chance to finish what it started over a decade ago. They are particularly timely for pending legislation to structurally reform the Whistleblower Protection Act (WPA). Both this Committee and the Senate Committee on Homeland and Governmental Affairs have approved parallel legislation, H.R. 1317 and

S. 494. The latter extends WPA coverage to security clearance actions. The former does not. We hope the record you are creating will help earn a conference committee consensus resolution for this reform, which is essential for America's national security.

The Modern Paul Reveres

Who are "whistleblowers"? In some sense, like beauty and truth, they are in the eye of the beholder. One person's heroic Profile in Courage may be another's backstabbing turncoat. Nor is there anything magic about the term. In the Netherlands, whistleblowers are called Bell Ringers, after those who warn towns of impending danger. In other societies they are known as Lighthouse Keepers, after those who shine the light on rocks that otherwise would sink ships.

Legally, under federal civil service law they are employees who lawfully disclose information that they reasonably believe is evidence of illegality, gross waste, gross mismanagement, abuse of authority or a substantial and specific danger to public health or safety. If information's release is specifically banned by statute, or if it is classified, it can only be disclosed to the agency chief, Inspector General or U.S. Office of Special Counsel.[1]

Whatever the label, these are individuals who exercise freedom of speech in contexts where it counts the most. The most commonly recognized scenario is the freedom to protest or make accusations, where they are important agents of accountability whether bearing witness through testimony in court or Congress, or exposing cover-ups through communications with the media. They also act as modern Paul Reveres, exercising the freedom to warn about threats to the public's well-being,

[1] 5 USC 2302(b)(8) The Special Counsel is an independent office designed to safeguard the merit system within the civil service, through investigations and litigation against prohibited personnel practices that violate employee rights listed in 5 USC 2302, such as whistleblower retaliation.

before avoidable disasters occur and the only thing left is finger pointing or damage control. While this type speech is quieter and more constructive than protesting a fait accompli, it may be tolerated even less by those who betray the public trust.

In the months after 9/11, it became clear that professionals throughout the federal civil service had been warning that the nation's defenses were a bluff, at our airports, nuclear facilities, ports or borders. In the three months before 9/11, nine calls for help were from national security whistleblowers, compared to 26 intakes in the three months afterwards. They explained going public out of frustration in the aftermath, to prevent renewed tragedies. They contended that too many comfortable agency officials had been satisfied to maintain the false appearance of security, rather than implementing well-known solutions to long confirmed, festering problems.

While there have been exceptions due to political champions or media spotlights, as a rule these messengers have been silenced or professionally terminated by friendly fire from a defensive federal bureaucracy. Case studies help to illustrate how the public has been endangered by that reality. A review of their status as legal third class citizens in the civil service merit system is necessary to understand the causes for this threat to national security from within the government.

Third class legal rights

The landscape of legal rights for national whistleblowers is a professional Death Valley. The defining premise is that employees of the Federal Bureau of Investigation (FBI), Central Intelligence Agency (CIA), National Security Administration and similar offices are excluded from third party enforcement of merit system principles and rights in

Title 5 of the United States Code, which establishes personnel law for the nonpartisan, professional civil service system.[2] While the same rights exist on paper in these agencies, they are enforced through an honor system -- appeals to the same institution that normally would be the adverse party. Federal Bureau of Investigation (FBI) whistleblowers have a "separate but equal system" of in-house rights equivalent to the Whistleblower Protection Act, but there is no independent due process to enforce them.[3] The Intelligence Community Whistleblower Protection Act[4] allows Offices of Inspector General to investigate and recommend corrective action, but again there is no independent due process structure for whistleblowers to seek mandatory relief.

Even for national security employees covered under Title 5, the security clearance loophole has been the Achillees' heel of the merit system. Security clearances certifying loyalty and trustworthiness are a perquisite for an employee's access to classified information necessary to perform the duties for most sensitive positions. Removing an employee's clearance is a back door way to fire the employee without triggering normal appeal rights, because there is no third party review except for the Merit Systems Protection Board's authority to monitor compliance with internal procedures by the U.S. Merit Systems Protection Board.[5]

In 1994 amendments to the Whistleblower Protection Act of 1989, Congress thought it had closed the security clearance loophole as part of new catchall protection outlawing discrimination through "any other significant changes in duties, responsibilities

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[2] 5 USC 2302(a)(2)(C).
[3] 5 USC 2303.
[4] P.L. No. 105-272, Title 7; Intelligence Authorization Act of 1999, section 501.
[5] *Department of Navy v. Egan*, 484 U.S. 518 (1988).

or working conditions."[6] In legislative history, Congress repeatedly instructed that the highest priority for protection in this broad provision was security clearance actions.[7] Nonetheless, in a 2000 decision the U.S. Federal Court of Appeals for the Federal Circuit held that the provision did not create rights, because a broad provision translated through legislative history was insufficient. The specific personnel action "security clearance" had to be listed in statutory language, not explained in legislative history.[8]

The result is that security clearances have become the harassment tactic of choice against whistleblowers. As then Special Counsel Elaine Kaplan testified at Senate hearings on S. 494,

> It is sort of Kafkaesque. If you are complaining about being fired, and then one can go back and say, 'Well, you are fired because you do not have your security clearance and we cannot look at why you do not have your security clearance, ' it can be a basis for camouflaging retaliation.[9]

Case Studies

Several representative case studies illustrate the impact of this legal minefield on national security whistleblowers directly, and the public indirectly. An illustrative recent example involved national security whistleblower Linda Lewis, a USDA employee protesting the lack of planning for terrorist and other threats to the nation's food supply. She also had been warning for over a decade that emergency planning by the Federal Emergency Management Administration (FEMA) was window dressing, and that if there were a disaster the government would be dysfunctional – prophetic warnings vindicated by Katrina. After coming forward with her charges, she was assigned to work at her

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[6] 5 USC 2302(a)(2)A)(xi).
[7] S. REP. No. 103-358, at 9-10); 140 CONG. REC. 29,353 (1994) (statement of Rep. McCloskey).
[8] 217 F.3d 1372 (Fed. Cir. 2000)
[9] *S. 995 – Whistleblower Protection Act Amendments: Hearings on S. 995 before the Subcommittee on International Security, Proliferation, and Federal Services of the Committee on Governmental Affairs*, S. Hrg. 107-160 (2001).

home for over 3 1/2 years without duties while waiting for a hearing to restore her clearance, which lasted 90 minutes – with that limit enforced to the second. Afterwards, she still had not been told the specific charges against her. She had not been allowed to confront her accusers or even know who they were, put the lion's share of her evidence on the record, or call witnesses of her own. The "Presiding Official" of the proceeding might as well have been a delivery boy. He had no authority to make findings of fact, conclusions of law, or even recommendations on the case. He could only forward the transcript to an anonymous three-person panel which upheld revocation of Ms. Lewis' clearance without comment, and without ever seeing her.[10] Ms. Lewis experienced a system akin to Kafka's The Trial,[11] only in 21st century reality, not 19th century fiction.

Ms. Lewis' experience is not unique. Senior Department of Justice policy analyst Martin (Mick) Andersen blew the whistle on leaks of classified documents that were being used as political patronage. Within days, he was told that the Top Secret security clearance he had been using for over a year had never existed. Without access to classified information, he could not do any work. Instead, he was reassigned without duties to a storage area *for classified documents*, where he spent his days reading the biography of George Washington and the history of America's Civil War.[12]

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[10] Whistleblower disclosure of Linda Lewis, U.S. Office of Special Counsel 17 October 2003; 2003 Hearings, Devine testimony, 9.
[11] Franz Kafka, *The Trial* (New York: Schocken Books Inc., 1952).
[12] U.S. Office of Special Counsel, Press Release, 12 June 1998, *OSC Seeks Stay for Whistleblower*; U.S. Office of Special Counsel, Press Release, 16 June 2001, *U.S. Office of Special Counsel Announces Martin Andersen's Selection as Recipient of Special Counsel's Public Servant Award, and Settlement of his Prohibited Personnel Practice Complaint Against the Department of Justice*; 2003 Hearings; Marci Nussbaum "Blowing the Whistle: Not for the Fainthearted," *New York Times*, 10 February 2002, 3; Devine testimony, 9-10.

Two Department of Energy (DOE) whistleblowers illustrate how security clearance reprisals are used to suppress dissent against inexcusable negligence in defending homeland security. Chris Steele is in charge of nuclear safety at the Los Alamos nuclear weapons complex. He blew the whistle on problems such as the government's failure even to have a plan against suicide airplane attacks into nuclear weapons research and production facilities at the Los Alamos Laboratory, a year after the 9/11 World Trade Center tragedy. His clearance, too, was yanked without explanation. Mr. Steele was going to the mat on this and equally serious nuclear safety breakdowns, such as secret plutonium waste site without any security or environmental protection. This occurred at the climax of a showdown with Los Alamos contractors, and involved the same DOE officials forced out a few months later in connection with credit card fraud. Without warning or specific explanation, Mr. Steele was gagged and exiled – sidelined by using the clearance action to strip all his duties and reassign him to his home for five months.[13]

Richard Levernier, the Department of Energy's top expert on security and safeguards, got the same treatment when he dissented against failure to act on repeated findings of systematic security breakdowns for nuclear weapons facilities and transportation. For example, he challenged the adequacy of plans to fight terrorists attacking nuclear facilities that were limited to catching them on the way out, with no contingency for suicide squads not planning to leave a nuclear plant they came to blow up. Mr. Levernier did not have to guess why his clearance was suspended. DOE formally charged him with blowing the whistle without advance permission. The Office

[13] Affidavit of Christopher Steele, 25 February 2003; Hertsgaard, "Nuclear Insecurity;" 2003 Hearings, Devine testimony, 10.

of Special Counsel found a substantial likelihood that his disclosures demonstrated illegality, gross mismanagement, abuse of authority, and a substantial and specific danger to public health or safety.[14] Although an OSC investigation found the harassment against Levernier was illegal retaliation under the Whistleblower Protection Act, it could not act to protect his clearance due to the loophole in current law.[15]

The harassment is not limited to security clearances. Consider the experience of Bogdan Dzakovic. Mr. Dzakovic was a senior leader on the Federal Aviation Administration's Red Team, which checked airport security through covert tests. For years the Red Team had been breaching security with alarming ease, at over a 90% rate. Mr. Dzakovic and others warned that a disastrous hijacking was inevitable without a fundamental overhaul. In response the FAA ordered the Red Team not to write up its findings, and not retest airports that flunked to see if problems had been fixed. The agency also started providing advance warnings of the secret Red Team tests. After 9/11 Mr. Dzakovic felt compelled to break ranks and filed a whistleblowing disclosure with the U.S. Office of Special Counsel, which found a substantial likelihood his concerns were well taken and ordered an investigation. The Transportation Security Administration was forced to confirm Mr. Dzakovic's charges that gross mismanagement created a substantial and specific danger to public health or safety in connection with the 9/11 airplane hijackings.

In order to strengthen national security, TSA should be taking advantage of Mr. Dzakovic's expertise and allowing him to follow through on his confirmed insights. He has a significant contribution to make in preventing another terrorist hijacking. Instead,

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[14] Letter from Elaine Kaplan, Special Counsel, U.S. Office of Special Counsel, to Richard Levernier, 25 October 2002.
[15] 2003 Hearings, Devine testimony, 10-11.

the agency has sentenced him to irrelevance. TSA reacted to national debate on Mr. Dzakovic's charges by stripping him of all his professional duties. When he asked to help train his successors, he was allowed to punch holes and staple documents for their classes. After the Special Counsel protested the example being set, TSA promised to stop wasting Mr. Dzakovic's talents. But his new assignment was to answer a local metropolitan airport's hotline phone on the graveyard shift, where he regularly communicated with self-described visitors from outer space and had to wake up a supervisor to act on any genuine problems. After further protests, the agency moved him to TSA's offices in the new Department of Homeland Security (DHS) headquarters. His next assignment was to update the old FAA telephone book so it would be current for DHS.[16]

Turning the Tide

There are encouraging signs that national security whistleblowers may be on the road to achieving genuine free speech rights. Their post 9/11 disclosures have received extensive media coverage.[17] As a constituency they are organizing as well, illustrated by

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[16] Letter from Elaine Kaplan, Special Counsel, U.S. Office of Special Counsel, to the President, 18 March 2003, *U.S. Office of Special Counsel Sends Report Confirming Gross Mismanagement of FAA's Red Team, Resulting in Substantial and Specific Danger to Public Health or Safety*; Statement of Bogdan Dzakovic to the National Commission on Terrorist Attacks Upon the United States, 27 February 2002, *The Paul Revere Forum: National Security Whistleblowers Speak*; Hearings Before the Committee on Governmental Affairs, *The Federal Employee Protection of disclosures Act: Amendments to the Whistleblower Protection Act, S. 1358, S. Hrg. 108-414*, Written testimony of Thomas Devine, 7-9 (2003) (*Hereinafter* "2003 Hearings, Devine testimony").

[17] Hertsgaard, "Nuclear Insecurity;" Blake Morrison, "Agent: FAA buried lapses," *USA Today*, 25 February 2002, 1A; Blake Morrison, "Agent blew whistle 'for the American people," *USA Today*, 25 February 2002, 4A; Bill Miller, "More Help Sought for Those Who Blow the Whistle," *The Washington Post*, 28 February 2002, A21; CBS News, "Nuclear Insecurity," *60 Minutes*, 27 August 2004, www.cbsnews.com; Chris Strohm, *9/11 investigation spawns whistleblower movement*, GovExec.com, 13 September 2004, http://www.govexec.com/dailyfed/0904/091304c1.htm

newly formed organizations like the National Security Whistleblowers Coalition.[18] In the larger context, 135 nongovernmental organizations petitioned Congress to provide federal whistleblowers the same right to a jury trial available for corporate whistleblowers. The citizen groups argued, "State of the art whistleblower protection is needed just as much for government workers to protect America's families as it is for corporate workers to protect America's investments."[19]

The results are beginning to translate into legislative progress recognizing the importance of their role. For example, in 2002 when the Department of Homeland Security was created, the only civil service merit system right that retained independent enforcement was whistleblower protection.[20] In August 2005, as part of the Energy Policy Act Congress provided jury trials for employees of the Department of Energy and the Nuclear Regulatory Commission.[21] In September you and other members of the House Government Reform Committee approved jury trials for all employees covered by the Whistleblower Protection Act in a 34-1 vote for amendments to restore that law's legitimacy.[22]

The most promising chance for structural reform of national security whistleblower rights also is with legislation pending to restore and further strengthen the Whistleblower Protection Act. On April 13, 2005 the Senate Governmental Affairs and

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[18] National Security Whistleblowers Coalition, "About Us," www.nswbc.org (30 October 2005).
[19] Thomas Devine, "Paul Revere Freedom to Warn Petition for Whistleblower Protection," *New Criminologist*, 16 August 2005, http://www.newcriminologist.co.uk/grady.asp?aid=1794758418.
[20] *Establishment of Human Resources Management*, U.S. Code, vol. 5, sec. 9701(b)(3)(C); However, the Merit Systems Protection Board held that, again due to insufficient precision in statutory language, prior exclusions of merit systems rights for baggage screeners means they still do not have Whistleblower Protection Act coverage. *Schott v. Department of Homeland Security*, MSPB No. DC1221-03-0807-W-1 (slip op. Aug. 12, 2004).
[21] *Employee Protection*, U.S. Code, vol. 42, secs. 5851(a)(2)(F-G); 5851(b).
[22] Section 9, H.R. 1317; U.S. House Government Reform Committee, Press release, *GRC OKs Mail for Military in Iraq and Afghanistan, Stronger Whistleblower Protections, D.C. Property Transfer*, 29 September 2005, http://reform.house.gov.

Homeland Security Committee unanimously approved S. 494,[23] which, if enacted, would provide the following significant advances in national security free speech rights. Analogous provisions in H.R. 1317 are referenced.

1) Security Clearance Due Process

Section 1(e)(1) of the legislation formally lists security clearance related determinations as personnel actions under 5 U.S.C. 2302(a)(2)(A). Section 1(e)(3) provides merit system relief for security clearance actions. While not challenging the President's authority to take final action on clearances, S. 494 permits Board and court relief for any ancillary actions, such as termination or failure to reassign meaningful duties, which are normally available when a personnel action is a prohibited personnel practice barred under 5 U.S.C. 2302. The bill also provides for deferential agency review of any clearance action that the Board finds is a prohibited personnel practice, as well as a report to Congress on resolution of the matter.[24]

2) Classified Disclosures to Congress

Section 1(b) clarifies that classified information can be included in protected whistleblowing disclosures to congressional audiences with appropriate clearances.[25] The scope of protected speech would be narrower than for unclassified disclosures to legislators. Disclosures of alleged illegality would have to consist of "direct and specific evidence," an extra degree of proof not normally required. A new category of protected speech also is included, however: "false statement to Congress on an issue of material

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[23] Senate Committee Report, 24.
[24] *Id.*, 14-18.
[25] *Prohibited Personnel Practices*, U.S. Code, vol. 5, sec. 2302 (b)(8)(B). (Under current law, the Whistleblower Protection Act applies for classified disclosures to the Special Counsel, agency Inspector General or another recipient designated by the agency head).

fact."[26] The legislation clarifies a vague mandate for unrestricted communications to Congress in an underview to 5 U.S.C. 2302(b),[27] and codifies legislative history guidance in the intelligence community whistleblower law.[28]

3) Codifying the Anti-Gag Statute

Section 5 of H.R. 1317 and Section 1(k) of S. 494 would codify and provide a remedy for what has become known as the "anti-gag" statute. Since 1988 Congress has annually passed this provision, which bans spending to implement or enforce nondisclosure policies, forms, or agreements that do not contain a qualifier notifying employees that rights in the Whistleblower Protection Act and Lloyd Lafollette Act protecting communications with Congress, inter alia, supercede any free speech restrictions.[29] The provision serves as the only barrier to the implementation of an Official Secrets Act," akin to what exists in British law. An official state secrets act would criminalize the disclosure of unclassified wrongdoing, corruption, abuse, or

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[26] Senate Committee Report, 18-20.

[27] *Id.* As provided by an underview to 5 USC 2302(b), "Nothing in this subsection shall be construed to authorize the withholding of information to Congress or the taking of any personnel action against an employee who discloses information to Congress".

[28] *Id.*

[29] *See, e.g.,* P.L. 105-277, The Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Sec. 636. The text of the anti-gag statute is as follows: "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 restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Code, as amended by the Whistleblower Protection Act (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by such Executive order and such statutory provisions are incorporated into this agreement and are controlling.'"

illegality. The anti-gag law's presence has been effective in individual cases ranging from censorship of medical and global warming research to congressional testimony.

But the law's presence has been vulnerable to annual removal from appropriations law, and it has been a right without a remedy for gagged whistleblowers. The legislation designates agency gag orders as personnel actions and makes violating the anti-gag statute a prohibited personnel practice,[30] eligible for the Special Counsel to challenge,[31] or for an employee to use an affirmative defense in any appeal to the Merit Systems Protection Board.[32]

4) Critical Infrastructure Information Shield

Section 1(l) applies the same principle of WPA supremacy over whistleblower rights to restrictions on disclosure of Critical Infrastructure Information (CII), a new hybrid secrecy category created by Congress in the Homeland Security Act, with criminal penalties up to ten years imprisonment for unauthorized disclosure.[33] CII means information about infrastructure when "incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters"[34] That language is so broad that almost any non-classified, public Whistleblower Protection Act disclosure could be criminalized through CII designation. That was not the congressional intent, as recognized by interim Department of Homeland Security regulations that exempt CII

[30] Senate Committee Report, 14-15, 25.
[31] *Investigation of Prohibited Personnel Practices; Corrective Action*, U.S. Code vol. 5, sec. 1214.
[32] *Appellate Procedures*, U.S. Code, vol. 5, sec. 7701(c)(2)(B).
[33] *Homeland Security Act of 2002*, Public Law 107-296, (25 November 2002), 214(f).
[34] *Id.*, 2, 214(c); Senate Committee Report, 21-2, 26.

status from canceling Whistleblower Protection Act free speech rights.[35] S. 494 codifies this preliminary reprieve.

5) Ending the ex post facto national security agency loophole

Section 6 of H.R. 1317 and Section 1(f) of S. 494 would eliminate agencies from using the President's authority in the middle of a WPA lawsuit to cancel jurisdiction and extinguish the employee's merit system rights, based on working in an office whose "principal function...is the conduct of foreign intelligence or counterintelligence activities."[36] Amazingly, in one case involving Navy national security whistleblower Carol Czarkowski, the Navy invoked intelligence-gathering status to cancel her Whistleblower Protection Act access after a Merit Systems Protection Board administrative judge ordered a hearing into retaliation. It was over a year into the case.[37] To prevent that sort of sophistry from canceling whistleblower rights again, H.R. 1317 and S. 494 require that any intelligence designation must occur before an employee files a prohibited personnel practice case for it to affect any given proceeding.[38]

Rebuttal to Relevant Justice Department objections

Unfortunately, to date leadership of both chambers have refused to schedule a vote on this legislation. At the end of 2004 both House and Senate versions died, because congressional leaders would not schedule "up or down" votes after the Department of Justice objected to the legislation.[39]

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[35] 6 CFR 29.8(f).
[36] *Prohibited Personnel Practices*, U.S. Code, vol. 5, sec. 2302(a)(2)(C)(ii).
[37] *Czarkowski v. Dept. of Navy*, 87 M.S.P.R. 107 (2000), and subsequent case evolution.
[38] Senate Committee Report, 20-21, 25.
[39] Devine, "Freedom to Warn Petition."

There is no credible public policy basis for this deference to DOJ, because its objections cannot withstand scrutiny. Indeed, the ongoing DOJ position per se is an institutional insult to the legislative process, because it verbatim reiterates initial objections while ignoring changes in S. 494 and/or detailed, thoroughly researched responses in Senate Governmental Affairs Committee Reports. For every DOJ comment, the Committee either made corresponding modifications to the bill, or rebutted the Justice Department's assertions in thoroughly researched detail through a series of three Committee Reports adopted without dissent. (*See* S. 3070: S. Rep. 107-349, 107th Cong., 2d Sess,. November 19, 2002; S. 1358/2628: S. Rep. No. 108-392; S. 494: S. Rep. No. 109-72, 109th Cong., 1st Sess., May 25, 2005.) In an April 12, 2005 letter to the Senate Homeland Security and Governmental Affairs Committee, as in its Senate testimony and prior letters, Justice has not even purported to respond, reference or otherwise recognize the Committee Reports' existence.

The debate relevant for today's proceedings primarily concerns S. 494's provisions on security clearance due process. While not challenging the President's authority to take final action on clearances, S. 494 permits Board and court relief for any ancillary actions, such as termination or failure to reassign meaningful duties. These remedies are normally available when a personnel action is a prohibited personnel practice barred under 5 USC 2302. The bill also provides for deferential agency review of any clearance action that the Board finds is a prohibited personnel practice, and a report to Congress on resolution of the matter.

DOJ mischaracterizes the bill as "permitting, for the first time, the Merit Systems Protection Board and the courts to review the Executive branch's decisions regarding

security clearances." This is fundamentally, conceptually inaccurate. Under the controlling Supreme Court precedent, *Department of the Navy v. Egan*, 484 U.S. 518 (1988), it is elementary that the Board and the courts retain appellate authority to review whether agencies comply with their own rules, and order relief accordingly.

DOJ further protests that the provision is unworkable and unconstitutional through scattershot objections, specifically discussed below. Three overviews provide context, however. First, DOJ's arguments merely reiterate, without advancing, objections, sometimes to the extent of attacking the wrong bill, with outdated provisions that had been modified in response to Justice's earlier objections.

More fundamentally, since 1994 this Committee and Congress have made the public policy choice to close the merit system's security clearance loophole. The decision was not made lightly. The House held four joint Judiciary-Post Office and Civil Service Committee hearings before voting unanimously to close the security clearance loophole in the WPA. The Senate Report for 1994 amendments clearly highlighted security clearances as the primary example of the reasons for what in conference became a new category of personnel action -- "any other significant change in duties responsibilities or working conditions." 5 USC 2302(a)(2)(A)(11) As the Committee report explained in 1994, after specifically rejecting the security clearance loophole,

> The intent of the Whistleblower Protection Act was to create a clear remedy for all cases of retaliation or discrimination against whistleblowers. The Committee believes that such retaliation must be prohibited, regardless what form it may take. For this reason, [S. 622, the Senate bill for the 1994 amendments] would amend the Act to cover any action taken to discriminate or retaliate against a whistleblower, because of his or her protected conduct, regardless of the form that discrimination or retaliation may take.

S. Rep. No. 103-358, at 9-10. The consensus for the 1994 amendments explained that the new personnel action includes "any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system," again specifying security clearance actions as the primary illustration of the provision's scope. 140 Cong. Rec. 29,353 (1994).[40]

In *Hess v. Department of State*, 217 F.3d 1372, (Fed. Cir. 2000), however, the Federal Circuit rejected legislative history for a broad anti-harassment provision, finding it insufficient to meet the Supreme Court's requirement that Congress must act "specifically" to assert authority over clearance actions beyond review whether an agency follows its own rules. *Egan*, 484 U.S. at 530. In a real sense, S. 494 is merely a technical fix to meet Supreme Court requirements for how Congress must implement a *specific* decision it already has made to assert merit system authority over clearance actions.[41]

Third, the public policy basis for the mandate is far stronger than in 1994. As seen above, since 9/11 a long-ingrained, dangerous pattern that sustains national security breakdowns has become more visible and prevalent, with higher stakes. When their clearances are yanked, employees cannot defend themselves against retaliation in scenarios where protected disclosures are needed most -- to responsibly facilitate

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[40] In 1994 Congress also codified the legislative requirement for agencies to respect due process rights in clearance actions. 50 USC 435(a)(5)

[41] The Court's problem in *Egan* with independent Board appeals on the merits for security clearance decisions could not have been more simple: "The Act by its terms does not confer broad authority on the Board to review a security-clearance determination." Id. According to the Court, the Act's terms only need to be made specific to properly give the Board this authority under the constitution. In an April 15 letter to Senator Akaka, at 6, DOJ ignored the the Supreme Court's unequivocal language in *Egan* to somehow assert, "In *Hess*, the Federal Circuit followed longstanding Supreme Court precedent, *i.e., Egan*, in finding that the MSPB did not have jurisdiction to review security clearance decisions. Thus, *Hess* does not suggest the need for statutory change." This raises serious questions whether the DOJ author has read the *Hess* decision, either, which states, 217 F.3d at 1376, "The principles we draw from the [Supreme] Court's decision in *Egan* are these.... (2) *unless Congress specifically authorizes otherwise*, the Merit Systems Protection Board is not authorized to review security clearance determinations or agency actions based on security clearance determinations...." (emphasis added).

solutions and accountability for long term security weaknesses due to the government's own misconduct.

DOJ's cornerstone objection is that under *Egan*, *supra*, the President has a monopoly of power to make any and all determinations relevant for a security clearance. That premise is so conceptually inaccurate that it raises serious credibility concerns. In *Egan* the Court specifically explained that Congress may act constitutionally to enforce merit system principles in clearance actions, if it explicitly makes its intention clear to assert that authority. In *Hess* the Federal Circuit interpreted that standard to mean statutory language. DOJ's generic objection that all statutory rights or third party reviews of security clearance retaliation are unconstitutional is its own creation. It simply does not exist within *Egan*.[42]

DOJ continues by falsely asserting S. 494 would create a new burden for agencies to prove clearance actions by clear and convincing evidence, replacing the current standard that access to classified information only may be provided "when clearly consistent with the interests of national security" -- a "shockingly inconsistent" change.

The attack is shockingly misplaced. Initially, DOJ objected to the wrong bill. The "clear and convincing evidence" language it criticized was in S. 1358, an earlier version of the legislation. As the Committee Report on S. 494 explained, after considering Justice's prior objection the committee "change[d] the agency's burden to mere preponderance. We believe that such a change better preserves an agency's discretion

[42] In the FY 2001 National Defense Authorization Act, P.L. 106-398, Congress legislatively imposed its judgment call on the flip side, by banning the Executive from granting clearances to certain classes of employees, such as ex-felons, those certified as drug addicts, or those who have been dishonorably discharged from military service. 10 USC 986.

with respect to security clearance determinations, and may also be less intrusive into the agency's security clearance or classified access process." (Committee Report II, at 18).[43]

More fundamentally, S. 494 is inherently irrelevant to the merits of a clearance decision, whatever the legal standards for the agency's defense. Just as with an adverse action, review for a decision on the merits is independent from the affirmative defense of prohibited personnel practice. The Board will not receive any authority to make national security judgment calls. Rather, its authority is limited to review of clearance actions based on civil service violations within its expertise that threaten the merit system. Committee Report I, at 22.

DOJ adds that the provision is unnecessary, because it is not aware of any abusive patterns, and agency internal review boards effectively enforce fair play. There is no basis in reality for those conclusions. *Reality* is the experience of whistleblowers forced to live with that rhetoric. Consider the experience of whistleblowers bearing testimony today, and the nightmares of those whose experiences are summarized above. Obtain full disclosure of the won-loss records for employees who assert whistleblower retaliation in these for a. Gather data on the time it takes to process their cases. Delays of three years are common for employees with suspended clearances just to be informed of the charges against them.

Far from being an effective means of redress, agency internal boards have become objects of dark cynicism. That is not surprising. Inherently they have a structural conflict of interest, with the board judging the dispute while working for what also is the adverse party. That is why Congress rejected internal review boards as an acceptable enforcement mechanism for whistleblower rights in legislation creating the Department of Homeland

[43] In a June 15, 2005 letter to Senator Akaka DOJ corrected the mistake.

Security. Particularly in the national security area, objective fact-finding and credible enforcement of the reprisal ban in section 2302(b)(8) require third party review.

The Justice Department asserts that jurisdiction for an "other determination relating to a security clearance" is too vague. To a degree, the concern is well taken. The statutory language should be tightened to specify jurisdiction for any actions "affecting access to classified information." Access determinations are an independent, but parallel technique to security clearances as a virtually identical way to harass whistleblowers without redress. Technical clarification and further legislative history should make clear that security clearance reform cannot be circumvented through back door access barriers.

DOJ somehow argues that banning retaliatory investigations, section 1(e)(2), also restricts routine inquiries relevant for security. The objection flunks the oxymoron test. Routine investigations and retaliatory investigations inherently are contradictory concepts. If the inquiry is routine, by definition it is not because of protected activity and would be permissible under S. 494.

On balance, by failing to concede any legitimate role for Congress under *Egan*, DOJ by default fails to rebut that S. 494 properly carries out the *Egan* court's specific instructions how Congress may act constitutionally. The Department has provided no basis aside from its stated desire to avoid checks and balances to disrupt Congress' 1994 policy choice to outlaw security clearance reprisals. This provision meets head on the expanded repression against post 9/11 national security whistleblowers who have proved an intensified need to enforce the mandate in practice.

3. Codification and remedy for anti-gag statute.

DOJ argues that codification of the anti-gag statute should be deleted for reasons "similar" to its objections for rights against security clearance reprisals and retaliatory investigations. It states, "These sections purport to dictate and micromanage the specific content of nondisclosure agreements applicable to Executive branch employees (and contractors), in violation of the President's authority 'to decide, based on the national interest, how, when and under what circumstances particular classified information should be disclosed.'"

Justice's argument cleanly misses the point. The anti-gag statute only requires that agency gag orders are within the law as established by statutes the President has signed. When the current language was adopted in 1989, the Justice Department withdrew litigation challenging its constitutionality. Justice has not filed a new legal challenge in the sixteen years Congress has re-passed language identical to that in S. 494. Indeed, the anti-gag statute initially was passed to control abuses of blanket gag orders on unclassified information restrained through hybrid secrecy categories such as "classifiable."

Conclusion

While little has yet changed at the bottom line, there are encouraging signs. More than ever before, the freedom to warn is essential to prevent or mitigate an escalating pattern of catastrophes not only from traditional Cold War adversaries, but new dangers from terrorist organizations, threats to liberty from our own government, and perhaps from the greatest threat of all --: an increasingly angry Mother Naure.