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S. 1358--THE FEDERAL EMPLOYEE PROTECTION OF DISCLOSURES ACT: AMENDMENTS TO THE WHISTLEBLOWER PROTECTION ACT

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HEARING

before the

COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

S. 1358

TO AMEND CHAPTER 23 OF TITLE 5, UNITED STATES CODE, TO CLARIFY THE DISCLOSURES OF INFORMATION PROTECTED FROM PROHIBITED PERSONNEL PRACTICES, REQUIRE A STATEMENT IN NONDISCLOSURE POLICIES, FORMS, AND AGREEMENTS THAT SUCH POLICIES, FORMS, AND AGREEMENTS CONFORM WITH CERTAIN DISCLOSURE PROTECTIONS, PROVIDE CERTAIN AUTHORITY FOR THE SPECIAL COUNSEL, AND FOR OTHER PURPOSES

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NOVEMBER 12, 2003

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Wednesday, November 12, 2003

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S. 1358--THE FEDERAL EMPLOYEE PROTECTION OF DISCLOSURES ACT: AMENDMENTS TO THE WHISTLEBLOWER PROTECTION ACT

WEDNESDAY, NOVEMBER 12, 2003

U.S. Senate,
Committee on Governmental Affairs,
Washington, DC.

The Committee met, pursuant to notice, at 3:37 p.m., in room SD-342, Dirksen Senate Office Building, Hon. Peter G. Fitzgerald presiding.

Present: Senators Fitzgerald, Levin, and Akaka.

OPENING STATEMENT OF SENATOR FITZGERALD

Senator Fitzgerald. The Committee will now come to order. Having completed the hearing on the nomination of Scott Bloch for the position of Special Counsel, we move now to a related hearing to consider legislation, S. 1358, the Federal Employee Protection of Disclosures Act. I am chairing this hearing because the bill was referred to and polled out by the Subcommittee on Financial Management, the Budget, and International Security which I Chair. I am pleased to recognize the Ranking Member, Senator Akaka, who is not only the Ranking Member of the Subcommittee on Financial Management but also the lead sponsor of S. 1358 which we will consider today.

The Federal Employee Protection of Disclosures Act was introduced on June 26, 2003, by Senators Akaka, Grassley, Levin, Leahy, and Durbin. Senator Dayton joined as a co-sponsor of the bill on July 9, 2003. On October 8, 2003, the Subcommittee on Financial Management polled this bill out to the full Governmental Affairs Committee for consideration.

To put this bill in historical context, 1989 was a landmark year for whistleblower protection. By a vote of 97 to 0, the Senate passed Senator Levin's Whistleblower Protection Act, which subsequently was signed into law. Among other innovations, the Whistleblower Protection Act introduced a burden of proof allocation that was unprecedented, but has since become the benchmark for whistleblower protection laws. In essence, the 1989 law eases the burden for employees to establish a prima facie case of retaliation for whistleblowing activity. And once the employee establishes that prima facie case, the burden then shifts to the agency to prove by clear and convincing evidence, which is one of the highest evidentiary burdens in civil law, that the agency would have

taken the same action in the absence of the employee's whistleblowing.

In 1994, Congress further strengthened whistleblower protections. In 2001, Congress considered legislation similar to the bill we consider today but did not take final action before adjournment, sine die. S. 1358 would amend Federal whistleblower laws to, among other things, clarify the scope of protected disclosures, specifically to address certain court decisions that limit that scope; include actions with respect to security clearances within the scope of prohibited personnel practices; include investigations within the scope of prohibited personnel practices; require an informative statement in non-disclosure policies and agreements; provide independent litigating authority for the Office of Special Counsel; and open appeals to all Federal Circuits rather than the current exclusive jurisdiction of the U.S. Court of Appeals for the Federal Circuit.

We owe much to the many Federal employees who have had the courage and fortitude to reveal government waste, fraud, abuse and gross fiscal mismanagement. Over the years these whistleblowers have saved the taxpayers hundreds of millions of dollars and disclosed endangerment of public safety by officials in the Federal Government. It behooves us in Congress to encourage this bravery in the Federal workforce. We compliment Senator Grassley, Senator Levin, and Senator Akaka for their consistent and forceful advocacy of efforts to strengthen protections for whistleblowers.

On the other side of the ledger, we want to remain mindful of the challenges in managing the vast Federal workforce. Many whistleblowers are heroes. But some who claim that mantle in fact dishonor those who are. And for many Federal supervisors who are unfairly accused of retaliation, the experience can be damaging. Whistleblower challenges and the ensuing litigation can be expensive and time-consuming, diverting valuable agency resources to protracted defense.

Moreover, the easier it becomes to establish a prima facie case of whistleblower retaliation, the more likely it becomes that Federal managers will hesitate to take steps to eliminate unproductive or counterproductive appointees, impose reasonable disciplinary measures, or insist on efficiencies that some workers might challenge as retaliatory. Therefore, in revisiting this important area of law, I look forward to hearing specifically from the witnesses how their views best promote this delicate balance between encouraging good faith whistleblowing on the one hand, and on the other, encouraging proactive and non-risk averse management of the Federal workforce.

Before I introduce our first witness I would like to turn to our Ranking Member, Senator Akaka, for his opening statement.

OPENING STATEMENT OF SENATOR AKAKA

Senator Akaka. Thank you, Mr. Chairman. Thank you very much for having this hearing today on S. 1358, the Federal Employee Protection of Disclosures Act, which makes needed changes to the Whistleblower Protection Act. I want to add my welcome to the Hon. Peter Keisler to our hearing.

Our legislation would enhance the Federal Government's efforts to eliminate waste, fraud and abuse by strengthening the rights and protections available to whistleblowers. This

bill is essentially the same as S. 3070 which the Committee on Governmental Affairs favorably reported to the Senate on October 9, 2002. Whistleblowers play a crucial role in alerting Congress and the public to serious cases of government wrongdoing and mismanagement.

Following the events of September 11, courageous Federal employees stepped forward to blow the whistle on significant lapses in our efforts to protect this country and its people from terrorism. FBI agent Colleen Rowley alerted Congress to serious institutional problems at the FBI which impacted the agency's ability to investigate terrorist activities and prevent terrorism. Border Patrol agents Mark Hall and Bob Lindemann alerted us to serious security lapses at our northern border.

The importance of whistleblowing was highlighted when Time magazine named Ms. Rowley and two other whistleblowers as its Persons of the Year. These brave Americans captured the Nation's attention and earned our respect for risking their careers for the public good.

Although nearly a year has passed since whistleblowers gained national attention, we should not forget the contributions they make to our everyday lives. Just last week, Senator Fitzgerald and I held a hearing on abuses in the mutual funds industry where witnesses testified that it was a whistleblower who first brought attention to this problem. Specifically, Stephen Cutler, Director of Enforcement at the Securities and Exchange Commission said, ``tips from whistleblowers are critical to our program.''

Through passage of the Whistleblower Protection Act in 1989 and the subsequent strengthening amendments in 1994, Congress has encouraged Federal employees to come forward with information of threats to public safety, government waste, fraud, and mismanagement. Congress has passed strong laws to encourage the disclosure of critical information, but we also need the courts to interpret the law consistent with Congressional intent. Without judicial decisions consistent with the intent and spirit of the Whistleblower Protection Act Federal employees will continue to fear reprisal for blowing the whistle. As a result, we fail to protect not only the whistleblower but we fail to protect taxpayers and national security as well.

Our bill is intended to close loopholes which have made it impossible for whistleblowers to come forward without the threat of retaliation. Based on the repeated misinterpretation of Congressional intent and the track record of the Federal Circuit, Court of Appeals, it is clear why Federal employees would fear making disclosures evidencing government wrongdoing. Since the 1994 amendments to the WPA, the Federal Circuit, which has sole jurisdiction over appeals, has issued only 75 decisions on the merits of the whistleblower cases, and in 74 of those cases the whistleblowers lost.

A free society should not fear the truth. Public servants should report government mismanagement, threats to national security, or specific dangers to public health. People will not speak out if they do not feel protected from retaliation. That is why the Whistleblower Protection Act must be strengthened.

I look forward to hearing from our witnesses and working with you, Mr. Chairman, to protect the American public and our Federal whistleblowers. I also want to add to the list of those Governmental Affairs Committee colleagues who are co-sponsors to our bill the name of Senator Pryor. Thank you, Mr. Chairman.

Senator Fitzgerald. Thank you very much, Senator Akaka. Senator Levin, do you wish to proceed?

OPENING STATEMENT OF SENATOR LEVIN

Senator Levin. Mr. Chairman, thank you, I do have an opening statement. First let me begin by thanking you for chairing this hearing on a very important bill. I know you are fitting this into an incredibly difficult schedule and we are very much in your debt, those of us who have spent a lot of time on this subject. I know the Chairman himself is very much interested in whistleblowing and protecting whistleblowers and doing a lot of other important things to make this government work better.

I do not know if Senator Grassley was here a moment ago or not, but I also want to thank him, and obviously Senator Akaka for their efforts on behalf of whistleblowers. I hope that we can mark up this bill next year. But today's hearing is essential to that markup.

The Office of Special Counsel who was before us today, at least the nominee for that office, is an independent agency. We have got to defend that independence. Whistleblowers often reveal embarrassing, sometimes damaging information about people whom they work for, or the government agencies where they are employed. There can be significant pressures on the Special Counsel to ignore retaliation that may have occurred or to pursue cases less vigorously than they ought to be pursued. But the OSC is our first line of defense, and it is important that we give the OSC those powers.

It is also important that we strengthen the whistleblower in a number of other ways. That includes the power of the OSC to appeal decisions, and participate in those appeals. There is no reason why the OSC should not be allowed to appeal the decision when a decision is contrary to the needs of whistleblower protection.

We have also got to address some of the holdings of the U.S. Court of Appeals for the Federal Circuit. Some of these decisions have been totally inconsistent with Congressional intent. In the case of Lachance vs. White,--and I know our witness from the Justice Department will address this case today--we have an example of where the Congress has adopted a reasonable standard of proof and the Court of Appeals has taken that standard and turned it into an impossible hurdle. In that case, the Lachance case, the court imposed an unattainable standard on Federal employee whistleblowers to prove their cases.

The Federal court ruled in that case that in order for a whistleblower to demonstrate reasonable belief that his disclosure was evidence of gross mismanagement he has to demonstrate with irrefragable proof that the government had acted in violation of the law. Now that is an impossible standard. That is undeniable, incontestable, incontrovertible, incapable of being overthrown proof. That proof does not exist in any case unless there is a plea of guilty. Yet that is the kind of decision that we have gotten from the Federal Circuit.

So our bill is intended to address the powers of the Office of Special Counsel. I had hoped to be here earlier and I could not be because of the Defense bill being on the floor and I had to manage that bill, to ask our nominee for that position; whether or not there would be support for the bill that Senator Akaka, Senator Grassley, I and others have introduced. But in

the absence of being able to address those issues directly with our nominee we look forward to raising those questions with the Justice Department and our other witnesses today, and getting answers to those questions from the nominee in written form.

Again, I just want to thank you, Mr. Chairman, for your commitment to so many good government causes.

Senator Fitzgerald. Thank you, Senator Levin. I would now like to introduce our witness on our first panel. The Hon. Peter Keisler serves as Assistant Attorney General for the Civil Division in the U.S. Department of Justice. He has also served as Principal Deputy Associate Attorney General and Acting Associate Attorney General. Prior to his appointments at the Justice Department, Mr. Keisler was a partner at Sidley, Austin, Brown and Wood in their Washington, DC office. I would note that esteemed law firm is headquartered in Chicago. He also served in the Reagan Administration as Associate Counsel to the President and as a law clerk to U.S. Supreme Court Justice Anthony Kennedy, as well as Judge Robert H. Bork of the U.S. Court of Appeals for the District of Columbia Circuit.

In the interest of time your full statement will be included in the record and we ask that you limit your summary statement to 5 minutes. Mr. Keisler, you may proceed with your opening statement.

TESTIMONY OF PETER KEISLER,\1\ ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. Keisler. Thank you very much, Mr. Chairman and Members of the Committee. I very much appreciate the opportunity to appear before you today and to include my full statement in the record. I will just briefly summarize our principal concerns with S. 1358.

\1\ The prepared statement of Mr. Keisler appears in the Appendix on page 31.

But let me first begin by emphasizing that the Department is strongly committed to the protection of whistleblowers who bring to light evidence of fraud, abuse, mismanagement, and violations of the law in the government. The current law though, we believe, adequately protects the interest of whistleblowers and we think the costs associated with this bill, both in terms of its impact on important national security interests and the inefficiencies it could create in the management of the Federal workforce outweigh the incremental increase in protections that the bill might afford.

We are particularly concerned about the provisions of the bill that relate to security clearances and classified information. For example, the bill would permit the Merit Systems Protection Board and the Federal Circuit to review security clearance determinations. Review by those non-expert bodies would, we believe, have a substantial chilling effect upon the decisionmaking process of security professionals. If a security professional knows that his or her decision will be second-guessed by the MSPB and that any reverse decision may subject his agency to substantial damages, that possibility will inevitably be considered in the security clearance decision, even though the only appropriate and permissible standard that should be considered is whether the clearance is clearly consistent with national security.

Beyond that objection, we do not believe the amendment in

that respect is necessary. Currently, Executive Order 12968 requires all agencies to establish an internal review board to consider appeals of security revocations.

We have one at the Department of Justice which is fairly typical. Background investigations are reviewed by career adjudicators on the Department's security staff and any recommendation to deny or revoke a security clearance is reviewed personally by the director of that staff, also a career employee of the Department. If the director's decision is to deny or revoke a clearance, then a comprehensive written statement of reasons must be provided to the employee or the applicant, who may also request access to any documents relied upon, including the investigative file. The employee may then request reconsideration by the director and is given a statement of reasons and the result of that reconsideration as well.

If the employee continues to object, he may then be given an opportunity to appeal to a high-level panel appointed by the Attorney General and comprised of three members, two of whom are from outside the security field. The members of the Department's panel are all high-ranking career employees. The employee may be represented by counsel, there is a transcript of the hearing, and the final decision is in writing and final.

We believe that by providing the employee with a written explanation of the reasons for a clearance denial and with an appeal to a high-level panel that had no role in the initial decision we have provided a process that is fundamentally fair to the employee and that provides sufficient procedures to ensure that a security clearance decision is not based upon unlawful reprisal.

The bill would also allow individuals to make unauthorized disclosures of classified information to members of Congress and their staff who possess security clearances. We oppose these provisions because we believe they would interfere with the Executive Branch's constitutional responsibility to control and protect information relating to national security. And more specifically, the determination which individuals have a need to know specific types of classified information.

Executive Branch agencies frequently provide classified information to the Congressional Intelligence Committees in fulfilling our obligations to keep them fully informed about intelligence matters within their purview. We also provide classified information from time to time to other committees in response to requests from their chairmen in the context of Congressional oversight regarding Executive Branch operations. The decisions about the provision of such information are made within the Executive Branch based upon assessments about whether the particular Congressional entity has a need to know the classified information, which remains an important standard in avoiding unnecessary disclosures that would not be consistent with our national security interests.

We believe the Executive Branch should retain the responsibility to determine the dissemination of classified information, both within the branch and to the Legislative Branch. This bill would encourage the disclosure of classified information outside of that carefully considered process.

We also object to the provision which would prohibit the consideration of time, place, form, motive, context, or prior disclosure in considering whether an individual made a protected disclosure under the law. The context in which an alleged disclosure is made is essential to determining whether

the statement made by an employee is the type of statement that falls within a common sense definition of disclosure.

By prohibiting the consideration of context, the bill transforms any statement that potentially suggests a disagreement about law or policy into a protected disclosure. Thus, because employees make those types of statements on a regular basis, the bill would potentially allow almost any Federal employee to claim whistleblower status in the face of legitimate personnel actions. This protection, which would then require management to justify its action by the much higher clear and convincing standard, would create costly inefficiencies in the operation of the Federal workforce and also would detrimentally impact the morale of good workers.

The bill would provide the Special Counsel independent litigating authority and authorize him to appeal decisions of the MSPB and whistleblower cases, and represent himself before the Federal Circuit. We object to this provision, as we generally do to any extension of independent litigating authority beyond the Department of Justice for two primary reasons. First, it could result in the undesirable situation of two different parts of the government litigating against each other and taking different positions in court. The government, we believe, should speak with one voice.

Second, it undermines the centralized control the Department maintains over litigation involving the government in the Federal courts. Centralized control furthers a number of important policy goals, including the presentation of uniform positions on significant legal issues, the objective litigation of cases by attorneys unaffected by concerns of a single agency that may be inimicable to the interest of the government as a whole, and the facilitation of presidential supervision over Executive Branch policies implicated in government litigation.

Finally, we object to the proposal to permit review of MSPB decisions by the regional Circuit Courts of Appeals rather than the currently exclusive review by the Federal Circuit. Review by the regional circuits would result in a fractured personnel system causing confusion among both the employing agencies and the employees about their respective rights and responsibilities. And it would inevitably require the Supreme Court to intervene more in Federal personnel matters to resolve inconsistencies among the circuits.

I thank the Committee for the opportunity to testify and I am pleased to answer any questions you might have.

Senator Fitzgerald. Thank you, Mr. Keisler. I want to ask you right off the bat what you think about what Senator Levin said in his opening statement. He noted, I think it was the Lachance vs. White case, that imposed the irrefragable proof standard. Is that not pretty much an impossible level of proof for the whistleblower?

Mr. Keisler. Pretty much, Mr. Chairman. I am not here to defend that. My understanding is that discussion in Lachance was dicta. That the MSPB when it next considered the issue said essentially, the Federal Circuit cannot have meant what it said. And no case that I am aware of, either before the MSPB or the Federal Circuit since then has actually applied the irrefragable proof standard.

I would certainly agree that it would not be appropriate. We think the standard should be what it normally is in a case like this, which is proof by a preponderance of the evidence.

Senator Fitzgerald. Are there any aspects of the current whistleblower law that you think should be improved, or is it

your contention that the current law adequately protects whistleblowers?

Mr. Keisler. Our feeling is that the current law provides adequate protection. We are always open to considering proposals that this Committee or others in Congress might have about ways in which it could be improved, but we generally think the current law strikes a sufficient balance.

Senator Fitzgerald. Is it your understanding that an employee who discloses information that is already known is not a protected whistleblower?

Mr. Keisler. That is the holding of the Federal Circuit, I think in the Wissen case, that a disclosure is something that was not previously laid bare, something that is being revealed for the first time. So that one of the tests that has been applied to determine whether a disclosure provides protection under the statute is whether the individual making the disclosure is informing of something new or instead reporting about something that is already known. Only in the former case, I think, does it get that protection under existing law.

Senator Fitzgerald. Could you describe for this Committee more precisely what you mean by the burden you fear will be imposed on management of the Federal workforce? What are some of the financial, managerial, and human costs involved in participating in these whistleblower applications and adjudications?

Mr. Keisler. Of course, any time someone is accused of acting improperly, that imposes a personal cost on that person and a financial cost on either that person or the government in litigating it. That does not mean that there should not be an opportunity to bring these charges. There are very important interests that are implicated, as each Member of the Committee has said. But we think it is important that the law strike a balance between the needs of managers in the workplace to take appropriate personnel actions when adverse decisions need to be made, and the important need to protect legitimate whistleblowers who are bringing to light information about fraud, abuse, mismanagement, or violations of the law.

Senator Fitzgerald. I listened with great interest to your concerns about imposing the machinery of whistleblower protection into the sensitive arena of security clearances. But I wonder if I could ask you, on the other side of the ledger, what meaningful recourse is there for Federal employees who are subject to retaliation by revocation of their security clearance?

Mr. Keisler. Every department and agency under the executive order is required to have its own independent, internal review process. When I say independent, I mean independent of the initial decisionmaker who will first decide to revoke or deny a security clearance.

We have one in the Department of Justice. The three members of that board are at the deputy assistant attorney general level. I can tell you, it is a robust process. It is not a rubber stamp. It frequently results in decisions being reversed. That panel is empowered to consider all evidence, to look at the entire totality of the case that the employee or applicant presents. In that respect, it functions much more broadly than any court or administrative agency would be able to do because their general practice would be to give deference to the administrative decision in the first instance. This board gives no deference to the initial decision to deny or revoke a security when it is asked to review it. It looks at it

afresh, and as I said, frequently makes a decision to reverse the decision.

The employee or applicant has all aspects of due process before that board: The right to be represented by counsel, the right to present testimony, a written record is created, and a statement of reasons is created. So that has been our effort to make sure that, while we have not supported outside review of clearance decisions, that there is a measure of due process and second look given to those decisions because we recognize they are important. They are important not only for the government but they are important for the employee or applicant, in many cases whose job may require a security clearance.

Senator Fitzgerald. Senator Akaka.

Senator Akaka. Thank you very much, Mr. Chairman.

Mr. Keisler, the Department opposes the provision in S. 1358 granting MSPB the right to review secret clearances relating to retaliation for a protected activity. I understand this opposition is in part to the current internal review process for security clearance matters. What is the track record for the internal security clearance review process in restoring clearances to whistleblowers?

Mr. Keisler. I can only speak generally. I do not have statistics on that, and even my general knowledge is limited to what we have done in the Department of Justice. But I have been told by the security officials there that this is a process which quite frequently results in reversals of initial decisions to deny or revoke clearances. That it is a meaningful process and one in which the look is genuinely a fresh one.

Senator Akaka. Thank you. The Department objects to the provision clarifying that employees may make disclosures of classified information to Congress because DOJ believes an employee would have the unilateral authority to decide who should receive classified information and when.

However, the WPA already provides that employees can make classified disclosures to the Special Counsel and an agency's inspector general. Furthermore, the law states that nothing in the WPA shall be construed to authorize the taking of any personnel actions against any employee who discloses information to Congress.

In light of these existing statutory provisions on the disclosure of classified information, can you elaborate on the Department's objection to this provision?

Mr. Keisler. Certainly, Senator, and thank you for giving me that opportunity. First of all, I would like to be clear about what our position is and is not. We do believe that as a general matter, government employees have the right to go to Members of Congress and their staff with information about misconduct or legal violations without getting prior approval from the Executive Branch. The exceptions, we believe, to that general principle are in those instances in which that kind of action would undermine the President's constitutionally-based authority to carry out his particular responsibilities.

Congress' oversight is constitutionally based. The President has some constitutionally-based powers and sometimes there is tension between the two. The category in which this most often arises, of course, is the President's constitutionally-based power that the Supreme Court recognized, to control access to national security information.

Our belief is that when there is a tension between the President's constitutional powers and Congress' constitutional need and power to conduct oversight, that is something that

should be worked out through the committees, through the oversight process, but not that each individual employee with access to classified information should be able to make the determination for himself or herself that a disclosure should be made.

Senator Akaka. The Department of Justice has expressed extremely strong opposition to this legislation. The Department also opposed the 1989 Whistleblower Protection Act and the 1994 amendments. What changes would you recommend in order to gain the Department's support?

Mr. Keisler. I have not come here, Senator, with proposals to change the law. As I said, I think we do believe that the current law strikes a good balance, but that is always subject to further proposals and consultations. I do not want anything I just said to suggest that we would not be happy to work with the Committee to further develop ideas and consult.

Senator Akaka. Thank you very much for your responses.

Thank you, Mr. Chairman.

Senator Fitzgerald. Senator Levin.

Senator Levin. Thank you. In answer to Senator Akaka's question you indicated that the internal appeal process relative to the loss of security clearance has produced reversals.

Mr. Keisler. That is what I am told, Senator.

Senator Levin. But you did not know what percentage of cases or how often. Could you do that bit of research for us and give the Committee those numbers?

Mr. Keisler. I will see what I can find out.

Senator Levin. The question of whether or not Members of Congress ought to be able to receive classified information from whistleblowers you say should not be the unilateral decision of a whistleblower. Should Members of Congress be allowed to make a decision--if a whistleblower comes to us and we have clearance obviously, a whistleblower has clearance and they say, this information is classified and I cannot give it to you under the current law, but if you request it, that would be different I gather then in your eyes, would it?

Mr. Keisler. I think that would be a protected disclosure by the employee.

Senator Levin. So what the employees need to do then, and we ought to make it clear in the law, is that if the Member of Congress, after being informed that the employee has classified information but has not disclosed what it is, then says, yes, I would like to receive that information, there should be protection for the whistleblower?

Mr. Keisler. Yes, and I think that is protected under the law as it is written now because any disclosure to anyone, as long as it is not a disclosure of the information that is required by law or executive order to be secret, is a protected disclosure. So if an employee went to you, Senator, or your staff and said, I know something very important. I cannot tell you the contents of it because it is classified, but you should pursue this; someone yesterday gave you misleading testimony or whatever, that would not----

Senator Levin. No, not quite that. Not, you should pursue this. But if you ask me what that information is, than I can respond to your request. Is that protected?

Mr. Keisler. I am sorry, I did not fully understand your question. My conception was they would come to you and say, there is something you need to pursue and you would come demand it from us. No, I do not think it is currently protected under

the law.

Senator Levin. My question is, should we not have the right, as cleared, elected officials to seek classified information from anybody who has received that information properly?

Mr. Keisler. I think that would trench upon the President's authority to make the need-to-know determination. Because, as you know, the decision about whether information can be disclosed to any particular individual inside the Executive Branch or anywhere is a combination of, is the person cleared and is there a need to know. We regard the President's authority in this regard to encompass both categories of decision, so under our view of his constitutional role we would think that should proceed through other channels.

Senator Levin. You want to give the President that exclusive right to decide whether or not a Member of Congress should be allowed to seek classified information from a member of the Executive Branch? That is really an extreme position, I will tell you, because we ask questions all the time on our committees of members of the Executive Branch which require them to give us classified information, and obviously in a setting which is cleared. We do that all the time.

The position that you are taking is that the President ought to have a right to say, sorry, that person is in the Executive Branch. We are not going to respond to the question from the Member of Congress, or in my hypothetical, from the member of Congress who asked the whistleblower, what is that information. It is a very extreme position.

Mr. Keisler. I think when you use the word exclusive, Senator, I think in some----

Senator Levin. I think you used the word exclusive.

Mr. Keisler. Then when I use the word exclusive, I may not have fully captured the reality of the way things would work. I would presume in that circumstance there would be a back and forth between this branch and the Executive Branch, and there would be a need for negotiation and accommodation. But our position is that when the Executive Branch is engaged in that kind of process it should be the President or his delegees who do the negotiating, who set the terms on that side of the divide and that lead to the accommodation, not that each employee is authorized to make the disclosure.

Senator Levin. Upon request.

Mr. Keisler. Upon request, yes.

Senator Levin. So that when someone comes in front of us from the Department of Defense over at the Armed Services Committee and we ask that person for information which is classified, you are saying that person does not have the responsibility and does not have the obligation to respond to the question until they clear that with whoever these powers are in the Executive Branch that you want all information that is classified cleared with before it is shared with Congress. That seems to be what you are saying.

Mr. Keisler. You are obviously so much more familiar with the way these interchanges work than I am, Senator, but my assumption would be that when someone comes before you they have a sense in advance of the parameters of what they are permitted to disclose.

Senator Levin. No, frequently that is not the case. They do not always know the questions that we are going to ask in advance.

Mr. Keisler. If a witness were in genuine doubt as to

whether a piece of--whether his or her higher-ups, the ones with authority, would approve the disclosure of the information and that witness did not know whether that would be approved, I would take the position that the prudent thing would be for them to go back and find out whether that is appropriate.

Senator Levin. That is a very extreme position. When Congress asks questions, in a proper setting that is cleared, from someone who has that information, whether it is classified or not, we have a right to that information. We do not expect to, nor should we be put in a position where that person says, gee, I do not know whether I want to answer that question because I did not expect you to ask that question, and I have to go back to my superiors to see whether or not I can answer the question. That is not acceptable, and I do not think any Executive Branch has taken that position to date that I know of, and I do not believe any court would sustain that.

Congress has a right to information from the Executive Branch unless there is a privilege, an executive privilege, for instance, which is exercised. But the fact that it is classified, when we are cleared to receive classified information, is not a reason that can be sustained. So I think your position on this is really an extreme position. The red light is on. I only had one more question but I do not want to----

Senator Fitzgerald. You can go ahead, continue if you wish.

Senator Levin. On the irrefragable proof, and I was glad to hear your answer on that question, I take it then that the Justice Department would support that part of the bill which would eliminate that from anyone's mind as being the proper standard.

The reason it is important is because when it comes to settling these cases, if the whistleblower has to face the prospect of an appeal if he pursues his claim, to a court which has adopted that standard, it is going to make settlement much more--it is not going to be as good a settlement, obviously, for the whistleblower if they think that is the standard which will be applied at the end of the line.

My question though specifically is, will the Justice Department support at least that portion of the bill which puts into law that standard which you adopted, the preponderance of the evidence standard?

Mr. Keisler. I am not certain that the portion of the bill that seeks to reverse the irrefragable proof standard actually installs a preponderance of the evidence standard. I think it may say something more like, the individual need only have substantial evidence, which would be a weaker standard than preponderance of the evidence. But in terms of our position about what it should be, we think it should be preponderance of the evidence. We do not think it should be irrefragable proof.

Senator Levin. In any event, we can agree it should not be irrefragable.

Mr. Keisler. It should not be irrefragable proof. I did not even know what the word irrefragable meant before I read that decision.

Senator Levin. I looked it up and it is quite an extraordinary word.

Thank you, Mr. Chairman.

Senator Fitzgerald. Thank you, Senator Levin.

Mr. Keisler, thank you very much for appearing before us. We appreciate you coming over to the Hill to testify. If there are no further questions we will proceed to panel two.

I would like to introduce our panelists on the second panel. Elaine Kaplan currently is practicing law in the firm of Bernabei & Katz in Washington, DC. Ms. Kaplan was nominated by President Clinton in 1997 and confirmed by the Senate in April 1998 to be Special Counsel of the Office of Special Counsel. During her tenure she was credited for implementing many new programs to improve the operations of the Office of Special Counsel and the interagency process regarding personnel practices. Prior to her role as Special Counsel Ms. Kaplan served as Deputy General Counsel of the National Treasury Employees Union where she represented the interests of union members in the areas of labor and administrative law as well as racial and sexual discrimination.

Thomas Devine serves as legal director of the Government Accountability Project, a non-profit organization dedicated to promoting government and corporate accountability by advancing free speech and ethical conduct in the workplace and defending the rights of whistleblowers. Mr. Devine has published a number of articles regarding whistleblower protections and has worked for over 20 years to develop and promote policies and laws pertaining to whistleblowers.

Stephen M. Kohn serves as Chairman at the National Whistleblower Center, a non-profit advocacy center dedicated to working with whistleblowers. Mr. Kohn has litigated whistleblower cases for a number of years, including the successful lawsuit against the Department of Justice, the FBI, and the Clinton Administration that compelled implementation of regulations to enforce whistleblower protections for FBI employees.

William Bransford is General Counsel to the Senior Executives Association and a partner in the law firm of Shaw, Bransford, Veilleux & Roth where he has practiced since 1983. The Senior Executives Association was founded in 1980 as a non-profit corporation and it represents more than 7,000 career Federal executives. In his practice, Mr. Bransford represents Federal executives, managers and employees in cases regarding personnel and employment practices before the U.S. District Courts, the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Office of Special Counsel, and with offices that adjudicate security clearances.

Thank you all for being here. In the interest of time, your full statements will be included in the record, and we ask that you limit your summary statement to 5 minutes. We are going to strictly enforce the 5-minute limit. Thank you. Ms. Kaplan.

TESTIMONY OF ELAINE KAPLAN,\1\ ATTORNEY, BERNABEI AND KATZ, PLLC

Ms. Kaplan. Thank you, Mr. Chairman. Good afternoon. I appreciate being invited by the Committee to offer my perspectives on S. 1358. My testimony is based on my experience as the head of the Office of Special Counsel as well as an attorney in private practice who represents whistleblowers in both the private and public sector.

\1\ The prepared statement of Ms. Kaplan with an attachment appears in the Appendix on page 63.

In July 2001, as Special Counsel I testified in favor of S. 995, which was an earlier effort to strengthen and improve the Whistleblower Protection Act. There have been two significant

developments since the Committee considered S. 995 which I think are worth mentioning. First, after the terrorist attacks of September 11, our national focus shifted dramatically. We all have heightened concerns and a greater sensitivity to issues of national security.

Second, since the Committee considered S. 995, the Nation's markets have been rocked by a series of corporate scandals and in the aftermath of these scandals Congress enacted the Sarbanes-Oxley Act which extends whistleblower protection to employees of publicly traded corporations.

I mentioned the terrorist attacks of September 11 and the corporate scandals that led to the passage of Sarbanes-Oxley to make a point about DOJ's opposition to S. 1358. Both as Special Counsel and for many years before as an attorney practicing in the area of Federal sector employment it has been my experience that whenever amendments are proposed to strengthen the Whistleblower Protection Act, the Department of Justice opposes them. It usually uses the same objection, similar to the ones that we heard today, which are that strengthening the law will inhibit managers from taking legitimate actions against poor performers or bad employees. It also says that making changes to the act's enforcement scheme, giving the Special Counsel greater authority will undermine what it calls uniform application of the law and interfere with DOJ's control over litigation in the Federal courts.

I think that this reflexive opposition to this bill is really bad public policy, especially in a post-September 11 world. Today more than ever our emphasis should be not only on protecting whistleblowers but on encouraging them to come forward. That was certainly what Congress concluded when it extended whistleblower protection to corporate employees. It certainly is no less important that Federal employees who are sometimes on the front lines of the war against terror feel safe reporting security risks as it is that employees of Fortune 500 companies are protected when disclosing account scandals.

Now DOJ is frequently fixated on the notion that enhancing protection for Federal employees and closing loopholes in the act will protect bad employees. As the head of OSC I frequently heard this trotted out and it is sort of an old canard, that the law protects bad employees, or that employees cynically invoke the act's protection in order to make themselves immune from legitimate personnel actions. This is like an urban legend in my opinion. The fact is that weak claims, most of the them are closed--all weak claims are closed in the administrative process. The majority of cases filed with the Office of Special Counsel because the law is clear and nothing in this law changes the fact that it is not illegal to take appropriate action against bad employees even if they are whistleblowers.

Now let me give you a couple of examples of why this law is important and why existing law has these common sense lapses in it. I think it makes good sense to prevent agency officials from retaliating against an employee who is making a protected disclosure, even if they are doing it as part of their duties and through their chain of command. In fact I think it is counterintuitive to protect people only when they go outside their chain of command. One would think that it would be in management's interest to encourage people to stay inside the chain of command rather than going, for example, to the Washington Post or the New York Times.

So let me give you an example of how this would work. Let

us say there is a security screener at National Airport who works for the Transportation Security Administration and they notice that the x-ray machines are malfunctioning on a regular basis. The screener suspects that because of these malfunctions a number of passengers may be permitted to board airlines without being screened. It is part of his job to report these malfunctions to his supervisor.

So he goes to his supervisor and he tells them about the malfunctioning machines and his supervisor says to him, do not write up a report. Just go back to work. It is a lot of extra paperwork. And the supervisor does not want it to get out that the screening machines at National Airport are not working. He says, do not worry about it. I will take care of it. We will get the problem fixed.

One week later the employee comes back again, the problem has not been fixed. This time he tells his supervisor, if nothing is done, he is going to report the supervisor, his inaction, up the chain of command or maybe to the IG, and the supervisor fires the employee.

Now under current law this employee has no recourse. Because he has made his disclosure as part of his regular job duties he is not protected by the anti-retaliation provisions of the Whistleblower Protection Act. In fact a security screener at TSA, this employee does not even have normal adverse action protections that other employees have.

The same scenario could play out in any number of contexts: An inspector at the Nuclear Regulatory Commission who suffers retaliation when he recommends that a power plant's license be revoked for violating safety regulations; an auditor who is denied a promotion because he found improprieties in a Federal grant program; or an investigator in an IG's office who is geographically reassigned because he has reported misconduct by a high-level agency official.

I see that my time is up and I will refer you back to my written statement. But I do think that it is really important for the Committee to consider this balance between broadening the rights for whistleblowers and management prerogatives to understand that is really in management's interest to have broad protection for whistleblowers because it is in management's interest to understand what is going on in the work site and to created an open environment. Thank you.

Senator Fitzgerald. Thank you, Ms. Kaplan. Mr. Devine.

TESTIMONY OF THOMAS DEVINE,\1\ LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT

Mr. Devine. Thank you for requesting this testimony. GAP and a bipartisan, trans-ideological coalition of over 100 citizens and good government organizations strongly support this Committee's efforts to put the protection back in the Whistleblower Protection Act. S. 1358 is a modest good government bill that restores legitimacy for a public policy mandate that Congress has passed unanimously three times. It does not expand the intended scope of any prior Congressional actions. Most accurately, this bill could be called the Whistleblower Protection Restoration Act.

\1\ The prepared statement of Mr. Devine with attachments appears in the Appendix on page 72.

I serve as the Legal Director of the Government

Accountability Project and for 25 years we have been helping whistleblowers. I would like to begin by seconding Ms. Kaplan's closing remark, that this law will help managers as much as it will help anyone else. Whistleblower protection within an organization, if we close the loopholes that are barring it currently, serves management's right to know. The way the current law has been skewed there is only a potential to serve Congress or the public's right to know, and managers are liable to be the last ones to learn about problems because of the way the statute has been twisted.

In 25 years we could not avoid learning some lessons about which reforms work in practice and which are illusory. S. 1358 is the real thing. If enacted, the Whistleblower Protection Act will again be a genuine metal shield that gives a fighting chance for those who rely on it to defend themselves. If we keep the status quo, it is going to be a cardboard shield behind which anyone relying on it is sure to die professionally. It also will continue to be a magnet for cynicism.

This bill does basically two things. It restores the boundaries that Congress has already set, and second, it gives structural reform so that Congress will not have to pass this law a fifth time, or more. Enough is enough.

I think we should briefly review why Congress keeps reaffirming a unanimous mandate for whistleblower rights. It is because they are the human factor which is the Achilles heel of bureaucratic corruption. They warn us of preventable disasters before we are limited to damage control, or picking up the pieces. They are society's modern Paul Reveres. Since the September 11 tragedy, increasingly they have been playing an invaluable role.

As the news media increasingly has recognized, whistleblowers on national security breakdowns have been the only reliable, trustworthy lifeline for Congress and the public to learn about terrorist threats which were caused by bureaucratic negligence and sustained by abuses of secrecy. Their message has been consistent: Too often the bureaucracy has been satisfied to maintain the appearance of security rather than implementing well-known solutions to long-confirmed and festering problems. We cannot have those voices silenced if we are going to prevent another tragedy in our Nation.

My testimony gives numerous examples of whistleblowers whose warnings have been vindicated in retrospect but who are still isolated from their areas of expertise, relegated to updating the telephone books at their agencies, or serving as travel agents for people on foreign assignments, despite the fact that they have gone to the mat and risked their careers disclosing still unsolved problems that sustain our vulnerability to terrorism. Our Nation does not have the luxury to waste these talents.

Let me give a brief rebuttal of the Justice Department's specific arguments. On security clearances, they stated that since the Merit Board is not an expert body this would chill the professionals. The Merit Board would not be acting on anything outside of their expertise, which is determining whether there have been merit system violations like retaliation. They would not be touching the technical issues that they do not have expertise for.

The gentleman from the Justice Department said, we have these review boards and they work great at Justice. Justice is not any institutional guarantee of due process for the rest of

the Executive Branch. Let me share with you some of the results from the other agencies. There is everywhere an institutional conflict of interest. The body that is acting as judge and jury normally would be the adverse party in the case. That is not a healthy premise. There are no timeframes for these decisions. Whistleblowers are routinely forced to wait over 3 years before they are told what they have been accused of. The gentleman did not talk about timeframes at Justice. One of their DOJ whistleblowers was waiting 2 years to get any explanation for the loss of his clearance.

They are not allowed to confront their accusers when they have a hearing. They are not allowed to present witnesses themselves, or present their own evidence. While there may be exceptions, as a rule, security clearance hearings at internal review boards are frequently analogized to Kafka's, The Trial. Only unlike that book, they are not a 19th Century nightmare novel. They are the 21st Century reality.

Justice's other arguments are similarly specious. On it being unconstitutional to give classified information to Congress for whistleblowing disclosures, that issue was decided in 1998 with the Intelligence Whistleblower Protection Act. This is just housecleaning to extend it to the merit system. Further, Federal employees every day have to make that decision to almost 3 million people who have clearances but are not in Congress. Why should Congress be the only group that does not have the right to make a judgment call about whether a cleared individual has a need to know? You folks deserve it more than the other outlets.

On loopholes, the gentleman said that this bill would make any potential disagreement potential protected whistleblowing. This bill does not change the substance at all for what qualifies for whistleblowing except in the irrefragable proof area. It just means you cannot be disqualified because of cosmetics like formality or context. Thank you, Mr. Chairman.

Senator Fitzgerald. Thank you, Mr. Devine. Mr. Kohn.

TESTIMONY OF STEPHEN M. KOHN,\1\ CHAIRMAN, BOARD OF DIRECTORS, NATIONAL WHISTLEBLOWER CENTER

Mr. Kohn. Thank you, Chairman Fitzgerald and Senator Levin, for holding this hearing.

\1\ The prepared statement of Mr. Kohn with attachments appears in the Appendix on page 132.

I come with a different perspective than other witnesses. I have litigated whistleblower cases for almost 20 years and I use all of the laws, not just the Whistleblower Protection Act. I have come to avoid the WPA at all costs. I have won cases in reinstatements for Federal employees by avoiding the WPA. I will give you an example why.

I put together Table No. 1 which is in the testimony and on the overheads. These are laws, whistleblower laws that are apples to apples to the WPA. They are administrative laws. They are investigated by administrative agencies. They are litigated before an administrative judge. Their final decisions are rendered in Washington, DC by a centralized board, yet look at the differences. In every other law there is all-circuit review. Only the WPA does not happen. That single difference has fundamentally undermined whistleblower protection, because all-circuit review is in practice the peer review procedure

utilized by judges on a daily basis for their own oversight and accountability.

When a judge under the Pipeline Act or the Superfund Act or the Energy Reorganization Act writes a decision in the Fourth Circuit, they know when that issue comes up in the Second Circuit or the Third Circuit or the Tenth Circuit, other judges will look at it and perhaps criticize them. That is the fundamental way that the whole appellate system works. By segregating the WPA out and only having one circuit review, you have taken away the key oversight mechanism for the Federal appellate judiciary, and that alone has rendered the WPA totally inefficient and ineffective.

If you look at the other issues that are also raised by this legislation you will also see the WPA standing out. Critical is the administrative agency right to file an appeal. I know now they want OSC to be able to come in and file an appeal. Under all these laws, the administrative agency with the authority over these laws goes into the Courts of Appeals regularly and argues for the whistleblower if they have determined the whistleblower had merit. That is an outcome determinative factor.

When a government lawyer comes into a Court of Appeals and says, this whistleblower had merit, the judges listen a lot harder than as, in the testimony of the government, a pro se. They brag that the Federal Circuit has nice procedures for pro se appellants. Anyone who has clerked at a Court of Appeals knows, they may have nice procedures for pro se, but are they going to listen and what is the outcome issue?

Also on the critical issue of report to supervisors, the Federal Circuit stands alone--every other court, and there were many decisions on this, and this was fought out in the circuits over a period of years. The Supreme Court denied cert. They did need to take cert because it all worked out. In every other law they protect those reports to supervisors.

So let us now go to Table No. 5. That one issue alone, do you support the whistleblower who has the courtesy and the respect and the common sense to follow the chain of command is outcome determinative. I went through the last 20 reported decisions of the U.S. Court of Appeals under the laws set forth in Table 1 and I was actually shocked to find that in all 20 cases where the employee won it was an internal report. If those same whistleblowers who beat the higher standards, who showed the pretext, who showed the retaliation, who served the public interest had their cases heard in the Federal Circuit the outcome would have been zero.

That is what the common sense practitioner sees every day. I spend hours figuring out how to keep my clients out of the Federal Circuit.

I know my time is up. One last chart, Table No. 6, which just shows--I went through the last ten decisions issued by the Department of Labor in support of a whistleblower this year, 60 percent of those valid whistleblowers would have automatically lost their cases in the Federal Circuit. The critical piece of your legislation is the all-circuit review. I support all the other aspects of it, but without all-circuit review, Federal whistleblowers will never obtain legitimate protection. Thank you very much.

Senator Fitzgerald. Thank you Mr. Kohn. Mr. Bransford.

TESTIMONY OF WILLIAM BRANSFORD,\1\ PARTNER, SHAW, BRANSFORD, VEILLEUX & ROTH, P.C., ON BEHALF OF THE SENIOR EXECUTIVES

Mr. Bransford. Thank you, Mr. Chairman. On behalf of the Senior Executives Association, we appreciate the invitation to testify this afternoon on our views related to S. 1358. SEA is grateful to the Members of the Committee for their interest in improving the law protecting whistleblowers as well as protecting the process by which it is determined whether a whistleblower has been subjected to prohibited reprisal.

\1\ The prepared statement of Mr. Bransford appears in the Appendix on page 160.

In general, SEA is supportive of this legislation, but in several instances we think the bill has gone too far. The first sections of the bill greatly expand the definition of what constitutes a protected disclosure and in our opinion these provisions seem designed to overturn precedent from the Federal Circuit. While SEA is generally supportive of these changes and believes the precedent from the Federal Circuit should be clarified, we do have concerns related to the current Whistleblower Protection Act and what we think will be an over-reaction to the changes in S. 1358 if the following concerns are not also addressed.

SEA's primary concerns are that these changes to S. 1358 do not protect the right of a manager to continue to manage an employee who has made a bad faith disclosure. As a result, managers potentially face a claim of whistleblower reprisal for making virtually any adverse personnel decision that touches upon the whistleblower no matter how justified the action may be. SEA believes that a provision in the act providing for some sort of penalty for filing bad faith whistleblower claims would serve to discourage those non-legitimate claims.

In the alternative, the bill should be changed to deny protection for disclosures made by an employee solely to avoid accountability for the employee's misconduct or poor performance. In other words, we are addressing that provision in the law that talks about making motive irrelevant to the case.

Additionally, SEA is concerned that S. 1358 could be interpreted to expand the scope of protected disclosures to cover the policy decisions of a manager, particularly if a policy disagreement by the employee is voiced only to the manager but is couched in terms of legality. We believe it should not be the intent of S. 1358 to protect the disclosures of employees whose disagreement with the administration's policy objectives being carried about by their supervisor is made only to the supervisor and then is followed by a recalcitrant attitude being demonstrated by the employee. We are suggesting changes that allow the MSPB to deny protection for disclosures that relate only to agency policy decisions which a reasonable employee should follow.

SEA supports the new fourteenth prohibited personnel practice which prohibits referring a matter for investigation because of any activity protected under 5 U.S.C. Sec. 2302. However, we are concerned that managers have adequate protection if they refer a matter for investigation for other legitimate reasons. To correct this we propose the language in Section 1(h) of the bill which allows a manager to avoid liability for reprisal by proving the personnel action at issue would have occurred anyway also be made applicable to the new

prohibitions of retaliatory investigations.

Section 1(e) of the bill establishes a new Section 7702a in Title 5 setting forth a new process if a security clearance decision appears motivated by whistleblower reprisal. We think the bill may go too far by requiring this new procedure for agency review of security clearances for all violations of Section 2302. We propose that the new process be limited to whistleblower reprisals in violation of 5 U.S.C. Sec. 2302(b)(8), specifically only whistleblower reprisals cases.

SEA supports the provisions in Section 1(g) of S. 1358 concerning attorneys fees. The current law allowing such fees has been interpreted to require the fees for managers who successfully defend charges be paid by the Office of Special Counsel. Such a change in the law would allow the Office of Special Counsel to make prosecutorial decisions without concern for the impact of the decision on the office's budget.

SEA opposes granting an appeal directly to other Circuit Courts of Appeals other than the Federal Circuit. SEA has consistently supported a Federal employee's right to appeal to the MSPB during recent debates concerning homeland security and DOD. And where we assert our position, one of the criticisms of the MSPB that we are given in response is that the MSPB appeal process is too complex. The level of complexity will only increase with the availability of multiple Circuit Courts of Appeals being put into the new law.

Also it appears that the only reason to allow appeals to multiple circuits is a dissatisfaction with the Federal Circuit. If this is the case, Congress can always legislatively overrule the Federal Circuit, as it did in 1994 and as it appears ready to do in S. 1358. SEA contends this is preferable to the confusing complexity that will be caused by the varying decisions that will be issued by different Courts of Appeals.

On behalf of SEA, we thank you for your willingness to introduce these amendments to the Whistleblower Protection Act. Thank you.

Senator Fitzgerald. Thank you, Mr. Bransford.

Mr. Devine and Mr. Kohn, you are certainly to be commended for your dedicated and forceful advocacy on behalf of whistleblowers, and you have worked hard at calling attention to this important aspect of the law. But I am wondering whether you have ever had the opportunity to defend Federal managers or supervisors, and whether in that way or some other way you have ever had the opportunity to see whistleblower adjudications through the eyes of a Federal manager accused of retaliation.

Mr. Kohn. I have only represented whistleblowers, but mark my word, in representing whistleblowers you come to learn supervisor's motives and what they go through extremely well, through the depositions, through the trials, through the settlement process. I have also represented many Federal managers, including Senior Executive Service employees, people with significant and large-scale managerial responsibility who have themselves become whistleblowers and have talked to me about issues related to management of employees.

So I understand that there is a management side, but what I want to state is that for an employee to actually win a whistleblower case, it is very difficult. Most lose. When you look at the statistics between the other circuits and the Federal Circuit and how the outcome is, it is clear that valid whistleblowers are continuously losing in and under the WPA. One valid whistleblower losing a case is something that is

known to many managers and many other employees.

Senator Fitzgerald. Mr. Devine.

Mr. Devine. I represent Federal managers regularly because they blow the whistle as well, and one of the lessons we have learned is that the higher up in the chain of command that a whistleblower occupies, the more intensive the dissent is liable to be because their disclosure is more threatening. We are very sensitive to the pressures that they face. One of our organization's first priorities is always to try to work with the manager who is on the other side of a reprisal case to see if we can change the dynamic from accusations and conflict to problem solving about the disclosure. To see if they can work together to make a difference, and then if we can mediate a settlement. Because if there is any lesson we have learned, there are not any winners in a win-lose scenario. But unless we have a credible, legitimate system of rights there will not be any disclosures either.

Senator Fitzgerald. Senator Akaka.

Senator Akaka. Thank you, Mr. Chairman. My first question is to Mr. Bransford. Some say that clarifying the scope of protection for whistleblowers would fuel the perception that Federal managers cannot fire poor performers. However, I am curious of the training managers receive for handling poor performing employees. Can you comment on that as well as what additional training managers would need should S. 1358 be enacted as currently drafted?

Mr. Bransford. Senator, that is a problem that has been repeatedly pointed to within the Federal Government, that managers do not receive this training. This training is available. It is offered. However, not every manager receives it. There used to be a 40-hour or 80-hour training course for new managers that OPM required. But there are training opportunities available and I agree that managers should receive training on such things as how to handle poor performers, how to avoid retaliation claims, what the Whistleblower Protection Act means and what a manager's obligations are under those laws. I know Senator Voinovich has proposed legislation specifically, I think it was in the last Congress, requiring such training, but that has not been enacted. But I do agree that would help.

Senator Akaka. Thank you.

Ms. Kaplan, as the former Special Counsel for 5 years you are in a unique position to comment on how the provisions in S. 1358 would impact the Office of Special Counsel. Although many agencies have independent litigating authority, would you please elaborate on the need for this authority as a result of any conflicts of interest with the Justice Department?

Ms. Kaplan. That is one of my favorite topics, or it used to be. I felt very strongly when I was Special Counsel that it was important for the office to have independent litigating authority because the office was created as an independent entity to promote the merit system and to protect whistleblowers.

The Justice Department is the government's lawyer, but frequently, in fact always, the Justice Department appears in court defending the agencies accused of retaliation. So they are really the management lawyer. My view always was that it would have helped the development of the law for the Federal Circuit to have been able to hear from the Office of Special Counsel when the cases were in the Court of Appeals where most of the law is developed. A lot of what is being complained

about today's Federal Circuit, narrowing of the law by the Federal Circuit, in my opinion, as Mr. Kohn pointed out, if you have a government entity in there that is arguing for a broader interpretation of the law, the court is likely to pay greater attention than it does when, for example, you have a pro se petitioner, which you frequently do in the Federal Circuit.

So I think it is quite important, and I know that frequently the Justice Department takes the position that it is an odd situation because you might have one government agency in the court, and then the Justice Department in the court taking different positions. But actually that is very common in these Federal sector cases. You have a Federal Labor Relations Authority and a Merit Systems Protection Board that appears in court against the Justice Department. So I think it is a really important authority for the office to have and I would certainly urge the Committee to carefully consider it.

Senator Akaka. Thank you. My next question is for both Mr. Devine and Mr. Kohn. Mr. Bransford suggests that there should be some form of penalty for bad faith whistleblowers due to the impact on Federal managers. What is your opinion on this proposal? Mr. Devine.

Mr. Devine. Senator, there is a penalty now for filing a frivolous lawsuit. You spend tens of thousands of dollars at a minimum, you have the cloud of this conflict hanging over your head for years, and then you end up with a formal legal ruling endorsing what you are complaining about. That is quite a penalty. And probably the most significant answer to Mr. Bransford's suggestion is that his idea is premature, because right now almost all employees, or the overwhelming majority of employees who file their cases and if they are not resolved by settlement, end up suffering the penalty I described.

If we had a problem where there was a surge of whistleblower rights cases that was flooding the board, or there was a rash of questionable decisions backing whistleblowers, then we would have a real problem. But we do not right now. The bottom line for this statute is more than enough deterrence for any bad faith lawsuits.

Since Congress significantly strengthened this law in 1994 the track record for whistleblowers in decisions on the merits at the Federal Circuit is 1 in 84. Since the 1999 Lachance decision, the track record at the full board for whistleblower decisions is 2 in 27. Even the board's written testimony about administrative judge decisions shows at that early level there is only 10 percent who prevail in decisions on the merits. That is between two and three times less than all the other whistleblower statutes that Mr. Kohn was describing to you.

We just do not have a problem with people filing too many suits because they think that they have got too easy a chance to win. Our problem is they do not have a fighting chance at all.

Senator Akaka. Mr. Kohn.

Mr. Kohn. Thank you, Senator. This issue again--and I like the word urban legend--is an urban legend. There is another body of law just to look at, which are the Department of Labor whistleblower decisions and cases that are very similar to the MSPB structurally. This issue has come up 100 times theoretically. When you go down and read those decisions what you find is there are very few cases--and I have read every one of them. I have written five books on it. I have sat and read every one of the cases. Just one or two or three that would come to the frivolous cases.

So when it has gone up to the Secretary of Labor, be it a Republican or a Democrat, they have consistently said, you know what, there is no need to have any sanction and we will not even allow it. So even though they would have had the discretion to impose it, they decided by case law it was against the public policy and there is really no need. So it is just a theory.

I do want to correct my testimony, Senator Fitzgerald, one way. Although I do not directly represent managers against employees, since I do represent managers, often they have problems with employees, and I do give counsel to them on how to deal with employees, but not in court. So I just wanted to clarify that answer. Thank you.

Senator Akaka. Thank you. My time is up.

Senator Fitzgerald. Senator Levin.

Senator Levin. Thank you, Mr. Chairman. Thank you all for your testimony. It is invaluable.

On the question of independent litigating authority, Ms. Kaplan, I think you testified relative to the importance of that existing. I am wondering whether or not our other witnesses think that the Office of Special Counsel ought to have that authority to appeal to the circuit?

Mr. Devine. Senator Levin, we believe this is a no-brainer. There simply is no rational basis to gag the institutional defender of the merit system from the final decisive stages of litigation that control the evolution of the merit system. It is an inherent structural imbalance in the input to the courts. We do not think this is a tough one.

Senator Levin. Mr. Kohn.

Mr. Kohn. I think it is not only not tough, it is critical. I have been on both sides. I have been in court where the government has been on my side at the Appeals Court. I see it much easier. I have been against the government and I see the skepticism. It is much harder.

But if you look at some of the decisions like Chevron, the Supreme Court decisions where they discuss the type of deference a Court of Appeals by law must give a responsible administrative agency, then it becomes absolutely critical because when you go before the Court of Appeals who is speaking for the government and for the Whistleblower Protection Act? If it is the Department of Justice, they are going to give Chevron deference to interpretation to DOJ. They will naturally do that, even if they do not write it in their decision. If the Office of Special Counsel were permitted to go before the Court of Appeals they would then give Chevron deference to their interpretation. That is outcome determinative in many cases. That is the way the courts are used to dealing with reviews of administrative orders. Thank you.

Mr. Bransford. I have recently been party to cases where the MSPB and the Department of Justice were on opposite sides of the same issue in the Federal Circuit and it works just fine. I see no reason why the Special Counsel cannot also be given that type of authority. I personally have benefited by the fact that the Special Counsel did not have--or at least my clients benefited by the fact that the Special Counsel did not have that authority because OPM made decisions not go forward to the Federal Circuit. I agree with Ms. Kaplan completely that if the Federal Circuit could have the benefit of the Special Counsel's input in decisions some of these cases would be different. I am in support of independent litigating authority.

Senator Levin. Thank you. On this irrefragable proof

standard, it was good to hear from the Department of Justice that they do not support it. I am wondering if each of you would comment on whether or not then it is relevant? Because MSPB says it does not follow that so-called dicta. I am not sure it is dicta, by the way, but it says it is not going to follow it. Does that mean that it does not have an impact, that opinion of the Court of Appeals in Lachance? Does it mean there is no impact to it because MSPB says it is not going to be followed by them? Let us start with you, Ms. Kaplan.

Ms. Kaplan. No, I do not think it means that at all. Obviously, when you have a decision from the Court of Appeals and there is only one Court of Appeals that hears these cases, even if you could call it dicta--and I used to like to call it dicta as well because I did not want to follow it--but you still have to pay attention to even that which is called dicta by a Court of Appeals. I think if the Justice Department agrees, and I think this is a new position for them, that it is inappropriate, then I think the legislation should clarify that so we will not have the problem in the future.

Senator Levin. Mr. Devine.

Mr. Devine. I think the primary significance of the MSPB's recent views on this is that it should make the amendment non-controversial. As far as the Department of Justice dismissing it as dicta, they have not quite been able to keep their position straight. In their September letter to the Committee this year they said that the irrefragable proof standard had been helpful for them in winning cases. Now they are saying it is not relevant. I think they were right the first time around. Administrative judges have been influenced by this precedent. It has had a significant impact on the quality of settlements. And the decision is being quoted in other forums. It has been contagious at the State and local level. This is an indefensible doctrine which has to be eliminated.

We are very appreciative of the board's support for recognizing the obvious about this standard. Unfortunately, the Merit Board cannot overturn a Federal Circuit decision. Only Congress can do that.

Senator Levin. Thank you. Mr. Kohn.

Mr. Kohn. Senator Levin, I would want to second the questions and points made by Senator Akaka on this very issue. I personally have sat in settlement negotiations in Federal cases in which that case comes out and they say, you had better take what we are putting out. You will lose. Don't you see this decision here? Not just by the opposition but by good-faith administrative judges of the MSPB saying, don't you want to do what is best for your client? Look what is going to happen. As long as that case is out there, it is and will be used to the detriment of valid whistleblowers.

Senator Levin. Thank you. Mr. Bransford.

Mr. Bransford. I never thought the decision meant that the degree of proof was overwhelming. In fact, I support the idea that that language is dicta. I viewed Lachance vs. White as being primarily a case about whether policy disagreements rise to the level of whistleblowing.

Having said that, SEA would support legislation that clarifies that, and I think either the substantial evidence or preponderance of the evidence standard as suggested by Justice would be appropriate. Something to make it clear that the presumption could be overcome with some level of reasonable evidence.

Senator Levin. My time is up. I just have one more question

if there is another round, Mr. Chairman.

Senator Fitzgerald. I have been told that we have a vote on now and there are 12 minutes and 30 seconds left. What I would like to do now is to thank this panel. I could give Senator Levin--Senator Grassley has now arrived and he wishes to make a statement.

Senator Levin. I would just ask my question for the record.

Senator Fitzgerald. Sure, go ahead and ask your question for the record.

Senator Levin. Just for the record, I will just ask a question about the Willis vs. Department of Agriculture case which, as I understand it, decided if a person blows the whistle on wrongdoing but did it within the agency chain of command then the whistleblowing does not constitute a protected disclosure under the law. We have addressed that a little bit here this afternoon.

But my question is what your reaction is to that decision and the language in our bill that is set forth, whether or not that is the best way to address the problem raised by that decision, if you find or if you believe that there is a problem raised by the decision. If you could just give us that--not here, because we are out of time, but just for the record in a written response, I would appreciate it.

Senator Fitzgerald. Thank you very much, Senator Levin. And thank you to all members of the panel. We appreciate your being here. Your testimony was great. Thank you very much.

At this point I would like to call on our distinguished colleague, Senator Grassley. Senator Grassley has been busy with the Medicare hearings and he wanted to make sure he had a chance to come over here and make a statement. We appreciate his willingness to be here. I think we can allow Senator Grassley to proceed and then we can all make our vote.

Senator Grassley is, of course, from Iowa. He is the chairman of the Senate Committee on Finance. Senator Grassley was elected in 1980 and he has been a leader for many years in protecting the rights of whistleblowers. Senator Grassley was a co-author of the Whistleblower Protection Act of 1989 as well as the author of the whistleblower amendments to the False Claims Act in 1986. Senator Grassley has worked tirelessly through the legislative process to promote government accountability by ensuring that Federal employees have the opportunity to make whistleblower disclosers without retaliation.

Senator Grassley, the Committee welcomes your statement at this time, and we thank you for being here.

TESTIMONY OF HON. CHARLES GRASSLEY,\1\ A U.S. SENATOR FROM THE STATE OF IOWA

Senator Grassley. Thank you very much. Obviously, as you mentioned, those very important bills we have been involved with in the past that also included Senator Levin and Senator Akaka on those, and I am glad to be joining you on this very important piece of legislation at all.

\1\ The prepared statement of Senator Grassley appears in the Appendix on page 167.

The two bills that you have referred to, already law, largely passed to overturn a series of hostile decisions by administrative agencies in the Federal Circuit Court of Appeals

monopoly on the statute's judicial review. I think we have come to the conclusion that enough is enough. The Whistleblower Protection Act has become a Trojan horse that may well be creating more reprisal victims than it protects. The impact for taxpayers could be to increase the number of silent observers who passively conceal fraud, waste and abuse. That is why the legislation that we are discussing today is so very vital to the American taxpayer.

Our bill has five cornerstones: Providing protection for national security whistleblowers; closing loopholes in the scope of the whistleblower protection; restoring a realistic test for when reprisal protection is warranted; restoring the normal structure for judicial review; and codifying the anti-gag statute passed as an appropriation rider for the last 14 years.

While all the provisions in this bill are critical to proper functioning of whistleblower rights, the provisions that protect national security whistleblowers is particularly so. The provisions prohibit a manager from suspending, revoking, or taking any other retaliatory action with respect to an employee's security clearance in retaliation for whistleblowing.

Since September 11, government agencies seemed to have placed a greater emphasis upon secrecy and restricted information for security reasons. There might be some reasons why that is understandable, but with these restrictions come a greater danger for stopping the legitimate disclosure of wrongdoing and mismanagement, especially in public safety and security.

Although the entire bill is important, I am having to confine my comments today to national security. In their views' letter dated November 10, 2003, the Department argued that these whistleblower protections constitute ``an unconstitutional interference with the presidential constitutional responsibilities respecting national security and foreign affairs.'' We have an Iowa expression that fits that and that would be hogwash.

During the 105th Congress, the Select Committee on Intelligence thoroughly addressed the issue in our hearing entitled Disclosure of Classified Information to Congress. The Senate heard testimony from Dr. Louis Fisher, a Congressional Research Service senior specialist and also from a law professor, Peter Raven-Hansen of George Washington. These two highly respected scholars disagreed with the Department of Justice's opinion when it was offered then. Professor Raven-Hansen explained that ``the President and Congress have both historically and as a matter of constitutional text, shared authority over classified information from the very beginning.''

The Department argued then as it does now, that the President's power to regulate classified information is implied in his command authority as Commander-in-Chief. While this may be correct, the Justice Department fails to recognize that the Congress has equal, and some might argue, greater authority with regard to classified information. Nine times the Constitution explicitly gives the Congress responsibility for national security and foreign affairs. Additionally, according to Professor Raven-Hansen the Congress' power over this subject is implicit in Congress' residual authority to make all laws necessary and proper to carry out not only their vast national security powers but also the President's.

The Department of Justice relies heavily on the case of Department of Navy vs. Egan. Their reliance on this case is misguided. According to Professor Raven-Hansen, the Egan case ``stands simply for the proposition that the President has inherent authority to regulate classified information and does not need a statute to do so. It does not mean that he could violate the statute if Congress passed one regulating such matters.''

Consequently, Congress has the authority to prohibit the retaliatory taking of a security clearance. I do not want anyone to think that Congress is trying to force something down the administration's throat. Last year my staff and the staffs of Senator Levin, Akaka, and Gramm sat down with the Department of Justice and White House to work out this provision. We even agreed to make a number of suggested changes. But unfortunately, at the end of the day we are not going to agree.

Nonetheless, this provision is critical to the proper oversight of the Federal Government. In the 14 years since Congress unanimously passed the Whistleblower Protection Act it has been the taxpayers protection act as well. My office has been privileged to work with public servants who exposed indefensible waste and mismanagement at the Pentagon as well as indefensible abuses of power at the Department of Justice. Unfortunately, these courageous whistleblowers proceed at their own risk when defending the public.

It has been confirmed repeatedly that whistleblowers must prove their commitment to stamina and persistence in order to make a difference against ingrained fraud, waste and abuse. There should be no question about Congress' or this Senator's commitment, as long as whistleblowers are defending the public, we must defend credible free speech rights for genuine whistleblowers. Congress cannot watch passively as a gaping hole expands in the shield protecting public servants. The taxpayers are on the other side of the shield with the whistleblower.

Thank you very much.

Senator Fitzgerald. Senator Grassley, thank you for that very powerful statement. Thank you for making it over here. I know you are very busy. I would like to thank my colleagues for being here.

We will keep the record open until Tuesday, November 18 at 5 p.m. This meeting is now adjourned. Thank you.

[Whereupon, at 5:13, p.m., the Committee was adjourned.]

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