

# H.R. 1507, THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2009

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## HEARING

BEFORE THE

## COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

### **H.R. 1507**

TO AMEND CHAPTER 23 OF TITLE 5, UNITED STATES CODE, RELATING  
TO DISCLOSURES OF INFORMATION PROTECTED FROM PROHIBITED  
PERSONNEL PRACTICES, AND FOR OTHER PURPOSES

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MAY 14, 2009

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### **Serial No. 111-9**

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Printed for the use of the Committee on Oversight and Government Reform



Available via the World Wide Web: <http://www.gpoaccess.gov/congress/index.html>  
<http://www.house.gov/reform>

51-323 PDF

U.S. GOVERNMENT PRINTING OFFICE  
WASHINGTON : 2009

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Chairman TOWNS. Mr. Colapinto.

**STATEMENT OF DAVID COLAPINTO**

Mr. COLAPINTO. Chairman Towns, members of the committee, thank you very much for inviting me to testify today on H.R. 1507. My name is David Colapinto. I'm the general counsel of the National Whistleblowers Center, a nonprofit, nonpartisan organization in Washington, DC, that supports whistleblowers.

To achieve whistleblower protection, Congress must enact reforms with full court access for Federal employees. We heard this morning a proposal by the Department of Justice witness for an extra-agency board, a new board to hear national security complaints without access to courts.

Simply put, the district court access for national security and FBI employees is critical to achieve true reform. Whatever administrative scheme is devised by Congress, if it is without district court access, it is doomed to fail. That conclusion is based on a more than 30-year history that tells us what works and what does not.

Laws that permit district court access, like H.R. 1507 and Title VII of the Civil Rights Act, work. Other laws, like the current Civil Service System that limit remedies through the administrative process, do not.

For more than 18 years, FBI and intelligence agency employees have had the right to go to Federal court on claims of retaliation, go before a jury and seek compensatory damages under Title VII. That exists today. They can also go to district court under the Privacy Act and seek damages. They can go to district court for pre-enforcement injunctive relief to remedy constitutional violations.

Under all of these laws, district court access for national security and FBI employees does not air details of national security programs. It just doesn't happen in our Federal courts. Likewise, H.R. 1507, as it is constructed, would pose no risk to national security under the district court access provisions.

Where national security is related to a case, district courts have many protective measures available to prevent disclosure of classified information. For example, under Title VII national security agency cases, Federal courts have used pseudonyms and protective orders to protect national security information. Other protective measures are already in existence within the Rules of Civil Procedure and the Rules of Evidence, where Federal courts routinely use in-camera proceedings in order to protect the disclosure of classified information.

More importantly, with respect to this legislation, there is nothing in H.R. 1507 that permits either an employee or the Federal court to reveal classified information. In fact, the bill is constructed to expressly authorize the agency to withhold classified information.

This issue was studied back in the mid-1990's when it was requested—a GAO report was requested by the former Post Office and Civil Service Committee of the House. The report was issued in 1996, and it found that intelligence agencies already have in place numerous safeguards to protect classified information and national security interests in employees' Federal court cases and in jury trials in Title VII cases.

The GAO concluded if Congress wants to provide CIA, NSA, and DIA employees with standard protections that most other Federal employees enjoy, it could do so without unduly compromising national security. And here's a copy of the report, which is publicly available on the Internet, and I urge anyone interested in this issue to read it, because the GAO conducted an audit and determined that information on sensitive intelligence operations can be converted into unclassified, publicly available documents.

Intelligence agency adverse action files contain generally no national security information. The files reviewed by GAO at the DIA and the NSA, actually 98 percent of those files contained no such information. And that is the case file that is used to process the employee termination or discipline case.

GAO reviewed case files in Federal courts and found declassified and redacted documents were capable of providing sufficient information to litigate the cases for both the agency and the employee.

The conclusion, based on 30 years of history and 18 years under Title VII, is clear the administrative process alone won't work. Under the current system, I can tell you what happens. You heard from Ms. Greenhouse earlier, and it happens repeatedly by lawyers who represent Federal employees, when they come into the office, it has become standard for attorneys to have to tell Federal employees and advise them that filing the whistleblower claim is futile. Statistics bear that out: 95 to 99 percent failure rate. To be honest with your clients, you have to tell them you have a 95 to 99 percent chance of losing your case. And nothing is more demoralizing than having to tell a client, particularly a dedicated Federal employee, particularly employees who work at national security or the FBI agencies, that remaining silent and not fighting retaliation is their best legal option. That won't change unless we have district court access for employees, including national security and FBI employees.

And I thank you very much.

Chairman TOWNS. Thank you very much, Mr. Colapinto.

[The prepared statement of Mr. Colapinto follows:]



Testimony  
of  
David K. Colapinto  
General Counsel, National Whistleblowers Center

Before the  
United States House of Representatives  
Committee on Oversight and Government Reform

May 14, 2009

Hearing on,  
“Protecting the Public from Waste, Fraud, and Abuse: H.R. 1507, the Whistleblower Protection  
Enhancement Act of 2009.”

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**Summary of Testimony of David K. Colapinto, General Counsel  
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Before the United States House of Representatives  
Committee on Oversight and Government Reform  
Hearing on, "Protecting the Public from Waste, Fraud, and Abuse: H.R. 1507, the  
Whistleblower Protection Enhancement Act of 2009."  
May 14, 2009**

Chairman Towns, Ranking Member Isa, and Honorable Members of the Committee, this is a one-page summary of my testimony in support of H.R. 1507, the Whistleblower Protection Enhancement Act of 2009.

(1) Employees who work in the intelligence agencies and at the Federal Bureau of Investigation ("FBI") should be provided full access to courts and juries and the other reforms included in H.R. 1507 to combat whistleblower retaliation. Similar rights and court remedies currently exist for intelligence agency and FBI employees under civil rights statutes.

(2) There is no justification for treating employees at intelligence agencies and the FBI differently from employees at other federal agencies in regard to protections against retaliation for whistleblowing. As the General Accounting Office ("GAO") found in 1996, providing national security employees with the standard protections against adverse actions enjoyed by most other federal employees poses no greater risk to national security.

(3) Also, as the GAO found in 1996, the intelligence agencies already have in place numerous safeguards within their EEO programs to protect against the disclosure of classified information, and are fully equipped to protect national security interests in employee cases that currently proceed to federal court and in jury trials.

(4) Administrative review of intelligence agency and FBI employee whistleblower cases, without providing for full court access, will be no more effective at encouraging employees at those agencies to report serious misconduct or fraud, or prevent retaliation, than what currently exists under the failed processes for Title 5 employees.

My full written testimony follows this summary. Thank you for giving me this opportunity to share the views of the National Whistleblowers Center on H.R. 1507.



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**Testimony of David K. Colapinto, General Counsel  
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Before the United States House of Representatives  
Committee on Oversight and Government Reform  
Hearing on, "Protecting the Public from Waste, Fraud, and Abuse: H.R. 1507, the  
Whistleblower Protection Enhancement Act of 2009."  
May 14, 2009**

Chairman Towns, Ranking Member Isa, and Honorable Members of the Committee, thank you for inviting me to testify today in support of H.R. 1507, the Whistleblower Protection Enhancement Act of 2009. I am speaking today on behalf of the National Whistleblowers Center, a non-profit, non-partisan organization in Washington, D.C. with a 22-year history of protecting the right of individuals to speak out about wrongdoing in the workplace without fear of retaliation. Since 1988, the Center has supported whistleblowers in the courts and before Congress, achieving victories for environmental protection, nuclear safety, government ethics and corporate accountability. The National Whistleblowers Center supports extending whistleblower protections to all federal employees based on the model for protecting federal employees from discrimination and retaliation under the civil rights laws. For that reason, on behalf of the Center, we commend this Committee for passing H.R. 985 in the last Congress, and appreciate the efforts of Rep. Van Hollen and Rep. Platts who proposed those same provisions as part of the stimulus bill that passed the House of Representatives earlier this year.

The National Whistleblowers Center strongly supports the continuing efforts of this Committee to enact strong whistleblower protections for all federal employees, including those employees who work in the intelligence agencies and at the Federal Bureau of Investigation ("FBI"), based on the civil rights law model. We have some suggestions for improvements to H.R. 1507 to ensure that strong protections are enacted for all employees, particularly for employees who work in the area of national security and law enforcement. We look forward to working with you on this long overdue and vital piece of government reform legislation.

#### **I. BACKGROUND.**

Whistleblowers are the single most important resource for detecting and preventing fraud and misconduct. That was the finding of the three most recent studies on fraud and misconduct detection in private industry and in government.<sup>1</sup>

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<sup>1</sup> See 2007 PricewaterhouseCoopers ("PWC") study, "Economic Crime: people, culture and controls." [http://www.whistleblowers.org/storage/whistleblowers/documents/pwc\\_survey.pdf](http://www.whistleblowers.org/storage/whistleblowers/documents/pwc_survey.pdf); Ethics Resource Center ("ERC"), "National Government Ethics Survey" (2007), <http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/ethicsresourcecentersurvey.pdf>; Association of Certified Fraud Examiners ("ACFE"), "2008 Report To The Nation On Occupational Fraud & Abuse."



There are three findings from these studies that are particularly relevant to considering enhancement of whistleblower anti-retaliation protections to FBI and intelligence agency employees, and federal employees generally, under H.R. 1507:

- misconduct and fraud is as common in government as the private sector;<sup>2</sup>
- most misconduct and fraud is reported by employees internally through the chain of command as opposed to being detected by other means, such as regular audits or law enforcement;<sup>3</sup> and
- strong protections against retaliation are essential to encourage reporting by employees.<sup>4</sup>

Numerous high profile examples of misconduct detected and reported by employees at the FBI and intelligence agencies have been widely reported over the years. In the federal government, serious misconduct takes many forms, all of which occur in the FBI and intelligence agencies, such as: lying to employees and stakeholders (including lying to Congress and the courts); putting one's own interests ahead of the organization's and conflicts of interest; safety violations; misuse of the organization's confidential information; internet abuse; misreporting of hours worked; other violations of law.<sup>5</sup>

Misconduct and fraud does not disappear at the FBI and intelligence agencies simply because these government agencies operate in more secrecy. Employees who work in the field of national security or at the FBI who observe these serious problems must be encouraged to report them through their agency chain of command, externally to Inspector Generals, and when appropriate to Congress, without fear of retaliation.

The published surveys and the case examples over the last 30 years demonstrate that the only way to achieve this goal is to enact strong protections for all federal employees by providing full court access. Notably, a similar finding was reached by the House Committee on Post Office and Civil Service in 1994 when it considered amendments to the WPA and stated:

The composite lesson to be learned from recent studies and the Committee's hearings is that the WPA is not working, because *it has not deterred managers*

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<http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/acfefraudreport.pdf>.

<sup>2</sup> ERC Survey, p. 4.

<sup>3</sup> ERC Survey, p. 8; PWC Survey, p. 10 (table 1.11); ACFE Report, p. 19.

<sup>4</sup> PWC Survey, p. 23; ACFE Report, p. 23.

<sup>5</sup> ERC Survey, p. 22-23.

*from trying to retaliate. That is not surprising when those who violate the merit system have nothing to lose.*<sup>6</sup>

The House had it right in 1994 when it proposed amending the WPA to include jury trials because the “WPA’s rights *have not met their promise on paper*, because the *agencies* responsible for the Act’s implementation *have been hostile*, or at least unwilling, *to enforce its mandate*.”<sup>7</sup> However, the federal agencies and federal management opposed the jury trial provisions of the 1994 amendments, and a compromise was reached to make improvements without affording full court access in whistleblower cases. Now once again, 15 years later, the same arguments are being made to support the same failed administrative and to oppose full court access for all employees.

## **II. CURRENT WHISTLEBLOWER PROTECTIONS FOR INTELLIGENCE AGENCY AND FBI EMPLOYEES.**

The current intelligence agency and FBI whistleblower provisions are a cruel hoax because they do not afford any meaningful protection to employees who blow the whistle. If the current system to protect against retaliation for whistleblowing is broken for Title 5 employees, it is virtually non-existent for employees at intelligence agencies and at the FBI.

The Intelligence Community Whistleblower Protection Act (ICWPA) provides employees of the intelligence community with a limited right to raise concerns to Congress or to the appropriate Inspector General (IG). If the employee wants to go to the intelligence committees of Congress he or she must obtain approval from the Director of the Agency. *See*, 50 U.S.C. §403q(d)(5).

Currently, under 50 U.S.C. §403q(e)(3) an intelligence agency IG does not have statutory authority to provide any remedy for whistleblower retaliation although an IG can receive complaints and investigate. There is only one known case where an intelligence agency IG has ordered relief to an employee for whistleblower retaliation under the ICWPA.

The FBI has its own statute, 5 U.S.C. §2303, in which FBI employees are supposed to have procedures that are consistent with the whistleblower rights for Title 5 civil servants. Only one FBI employee is known to have ever won a ruling from the DOJ confirming that whistleblower rights were violated. FBI whistleblower cases are reviewed by the DOJ where cases get bogged down in the bureaucracy and where there is no independent judicial review of decisions available.

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<sup>6</sup> H.R. Report No. 103-769, “Reauthorization of the Office of Special Counsel,” 103<sup>rd</sup> Cong., 2d Sess., p. 13 (Sept. 30, 1994) (emphasis added) (Report on H.R. 2970, amending Title 5, U.S. Code, to provide for *de novo* judicial review in district court for federal employees in whistleblower cases).

<sup>7</sup> *Id.* (emphasis added).

Failure by Congress to enact strong whistleblower protections with full court access for all federal employees under H.R. 1507, particularly for national security and FBI employees, will nourish an ineffective system of preventing and addressing retaliation. It would also extend an already unlevel playing field where disparities exist under the current system that favor the agency. Under the ICWPA, Inspector Generals for the intelligence agencies operate in total secrecy and have no published decisions or public reports on whistleblower retaliation. In FBI cases decisions are not published by DOJ and there is no judicial review so only the agency knows what the precedents are, placing the employees and their counsel at a disadvantage. DOJ also refuses to publish statistics on how many cases are filed and decided even though the statute requires annual reporting to the President. 5 U.S.C. §2303. There exists no subpoena power in FBI retaliation cases, the agency controls all the witnesses and it is not unusual for supervisors or management employees to retire while the case is pending. The agency has access to these retired employees and retains the right to call them at a hearing to testify against the whistleblower, but the whistleblower cannot even take a deposition or interview these former employees before an administrative trial.

Simply providing for an administrative review of the IG determination on an intelligence employee's whistleblower retaliation claim is not a substitute for the full court access and *de novo* judicial review provisions set forth in HR 1507. Administrative review of prohibited personnel action findings by the intelligence community Inspector Generals, without providing for full court access and jury trials, would not provide employees with due process or rights anywhere comparable to what currently exists for all intelligence agency and FBI employees under EEO laws.

Under the current system, it has become standard for lawyers who represent federal employee whistleblowers to advise their clients that filing a whistleblower retaliation claim is futile given the failure rates through the administrative forums. Nothing is more demoralizing than telling a client that remaining silent or not fighting retaliation is the best legal option.

That will not change unless the option of full court access with jury trials is provided for all federal employees. Denying employees that right will result in experienced legal counsel advising against filing claims due to the futility and other adverse consequences from blowing the whistle.

H.R. 1507 would create "badly needed competition – a choice of fact-finding fora between existing remedies and civil actions providing for jury trials in U.S. District Court." That was the finding by the U.S. House of Representatives Committee on Post Office and Civil Service when it passed a bill to amend the WPA in 1994 that provided for full district court access and jury trials.<sup>8</sup>

There is no more risk to national security if intelligence agency and FBI employees are also afforded the right to pursue retaliation claims through the agency Inspector Generals and then seek full court access and a jury trial under the H.R. 1507 framework than currently exists

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<sup>8</sup> H.R. Report No. 103-769, "Reauthorization of the Office of Special Counsel," 103<sup>rd</sup> Cong., 2d Sess., p. 18 (Sept. 30, 1994).

when retaliation claims are filed under Title VII of the Civil Rights Act, and other EEO laws, that provide for federal court/jury trial review.

It is a sad fact that criminals and terrorists have been provided more rights in court than our intelligence agency and law enforcement officers who blow the whistle on serious misconduct and fraud.

Creating an administrative remedy for intelligence and FBI employees, without full court access to jury trials, betrays the trust placed in the men and women who are charged with helping to prevent the next 9/11. Intelligence agency and FBI employees deserve the best protections available that are modeled on laws proven to be effective, such as Title VII of the Civil Rights Act.

### **III. EXISTING COURT ACCESS FOR INTELLIGENCE AGENCY AND FBI EMPLOYEES UNDER CIVIL RIGHTS AND OTHER LAWS.**

Currently, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000-e and 42 U.S.C. § 1981a, all federal employees, including those employed by national security agencies and the FBI, can take their employment cases into federal court to fully litigate claims of discrimination and retaliation with jury trials and compensatory damages.<sup>9</sup> In addition, federal employees at the FBI and all intelligence agencies have the right to file claims in federal court seeking damages for violations of the Privacy Act of 1974, 5 U.S.C. §552a(g), and for pre-enforcement injunctive relief against federal agencies that violate employees' constitutional rights.<sup>10</sup>

Title VII permits employees of the FBI, National Security Agency ("NSA"), Central Intelligence Agency ("CIA"), Defense Intelligence Agency ("DIA") and all other federal intelligence or law enforcement agencies excluded from the protections of the Civil Service Reform Act ("CSRA") and the Whistleblower Protection Act ("WPA") to bring Title VII discrimination and retaliation claims in federal court. This remedial scheme, which includes the right to a trial by jury in federal court, has already proven to be successful since the Civil Rights

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<sup>9</sup> Under *current* law federal employees can bypass the Merits Systems process and go directly to federal court with their Civil Service claims if they simply join the civil service issues with the Title VII complaint as a "mixed" case. Retaliation cases – whether under Title VII or under another federal law (such as the WPA) essentially adjudicate the same issues. See *Ikossi v. Department of Navy*, 516 F.3d 1037, 1042 (D.C. Cir. 2008) ("This holding [conferring federal court jurisdiction over mixed cases] also reflects the legislative history, which states that '*questions of the employee's inefficiency or misconduct, and discrimination by the employer, [are] two sides of the same question and must be considered together.*'") (emphasis added).

<sup>10</sup> See, e.g., *Weaver v. USIA*, 87 F.3d 1429, 1433-35 (D.C. Cir. 1996).

Act was amended in 1991, and it should also be adopted as the example for reforming the WPA.<sup>11</sup>

Litigating a whistleblower reprisal claim under the WPA is similar to a retaliation claim under Title VII. At issue in both types of cases is the federal employer's motive for retaliation when taking an adverse employment action. Where national security information is related to a case, the federal court has protective measures available to prevent disclosure of sensitive or classified information without imperiling the rights of the employees or the agencies to fully adjudicate these claims. For example, the federal courts have used pseudonyms and protective orders to protect national security interests in Title VII cases. Other protective measures that are available under the federal rules of civil procedure and federal rules of evidence, such as entering protective orders and the use of *in camera* proceedings, can be used to prevent the unauthorized disclosure of national security information on the public record.

**A. Title VII Jury Trials and Compensatory Damages Are Currently Available for National Security Employees.**

The Title VII cases involving FBI, CIA, DIA and NSA employees that have been adjudicated in federal court illustrate that all federal employees (including those employed in the areas of national security and law enforcement) can be afforded the right to litigate their whistleblower cases in federal court without risk of revealing classified or other sensitive intelligence information. Since these cases can be heard in federal court without releasing any intelligence information, employees from these agencies should be able to bring their whistleblower claims in federal court as well.

Although the number of discrimination and retaliation cases filed by national security employees per year under the civil rights and related statutes are limited and relatively small<sup>12</sup>

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<sup>11</sup> Employees at intelligence agencies and at the FBI have had the statutory right to file discrimination and retaliation claims in federal court under the civil rights statutes since 1964; however, it was in 1991 that federal employees were granted the right to seek a jury trial and compensatory damages because the preexisting remedies without access to juries were "not adequate to deter unlawful discrimination or to compensate victims of such discrimination." *See, e.g.,* H.R. Report 102-83, "Providing for the Consideration of H.R. 1 [the Civil Rights Act of 1991]," 102<sup>nd</sup> Cong. (June 3, 1991).

<sup>12</sup> According to the published statistics required by the No Fear Act, the "Number of Administrative Complaints for Each Agency Annually" for complaints of discrimination or retaliation under Title VII, the Age Discrimination in Employment Act and Rehabilitation Act for the CIA and the NSA, are as follows:

- CIA
  - 2003 → 13
  - 2004 → 14
  - 2005 → 21
  - 2006 → 12
  - 2007 → 24

compared with other agencies, there are still several reported cases where employees have brought their claims in federal court after exhausting remedies through the federal EEO administrative investigation and/or before the Equal Employment Opportunity Commission (“EEOC”).

In one case, a hearing-impaired former employee of the CIA, brought an action alleging that the CIA violated the Rehabilitation Act by failing to provide her with reasonable accommodations in light of her disability, and after a three-day jury trial, the plaintiff was awarded \$25,000 in compensatory damages.<sup>13</sup> In another case, the plaintiff brought a discrimination action pursuant to Title VII against the Director of the NSA. The plaintiff was granted a motion for an opportunity for discovery against the NSA, and although the NSA later won a motion for summary judgment dismissing the claim, the matter was fully litigated on the public record.<sup>14</sup>

Courts have also been able to successfully adjudicate cases that may contain classified or sensitive intelligence information by using pseudonyms. For example, when a retired program manager for the CIA sued the CIA for race and age discrimination the plaintiff’s real name was not used in the case and in order to preserve the security of American intelligence operations, one city identified in this litigation where classified operations took place was only identified as the “Main Location.”<sup>15</sup>

#### **B. Federal Employee Whistleblower and Title VII Cases Often Overlap.**

Since 1991, federal employees have been afforded the right, if they choose, to seek review of their discrimination and retaliation cases in U.S. district court, *de novo*, with a trial by jury and the right to seek an award of compensatory damages. In many cases, federal employees have achieved more success on their Title VII retaliation claims reviewed *de novo* in federal court than the administrative remedies available for whistleblower claims either through MSPB or other agencies as provided by the CSRA and WPA. Based on the history of federal court review of civil rights claims, the right to *de novo* review before federal court with a right to a jury trial and compensatory damages is essential to achieve effective oversight and to redress complaints of whistleblower retaliation by all federal employees. Federal employees who work in law enforcement sensitive agencies, who have some remedies available under the current

- 
- NSA
    - 2003 →30
    - 2004 →23
    - 2005 →32
    - 2007 →24

<sup>13</sup> *Szedlock v. Tenet*, 139, F. Supp. 2d 725, (E.D. VA 2001).

<sup>14</sup> *Fernandez v. Alexander*, U.S. Dist. LEXIS 60047 (Dist. MD 2006).

<sup>15</sup> *Peary v. Goss*, 365 F. Supp. 2d 713 (E.D. VA 2005).

version of the WPA, frequently allege retaliation or discrimination in violation of Title VII in addition to whistleblower retaliation in violation of the WPA.

Recent cases provide examples of where employees have brought claims under both Title VII and the WPA.

1. Jane Turner was a long-time FBI Special Agent who blew the whistle on the FBI's failure to investigate child abuse cases on an Indian reservation and she also disclosed theft by FBI agents of items from the World Trade Center ground zero site to the DOJ Inspector General. Turner filed a whistleblower complaint through the DOJ whistleblower procedures for FBI employees, 28 C.F.R. Part 27 and 5 U.S.C. 2303. However, after several years of languishing before the DOJ Office of Attorney Recruitment and Management ("OARM"), Turner's whistleblower complaint is still pending.

By contrast, Ms. Turner successfully appealed an adverse grant of summary judgment on a claim of retaliation under Title VII.<sup>16</sup> On remand Turner was permitted to go to trial by a jury and she prevailed by recovering \$300,000 in compensatory damages, other damages and attorneys fees and costs against the FBI for some of the adverse actions that were taken against her.

2. FBI counterterrorism expert Bassem Youssef has fought within the FBI to end discrimination against Arab Americans and to protect the American people from another terrorist attack. The recipient of the prestigious Director of Central Intelligence award for his successful undercover operations, Mr. Youssef has on many occasions called attention to the deficiencies in the FBI's counterterrorism division, e.g., on September 11, 2001, the FBI's top counterterrorism official did not know the difference between Shiite and Sunni Muslims.<sup>17</sup>

Mr. Youssef filed a Title VII claim of retaliation and discrimination on basis of national origin and a whistleblower claim under the statute for FBI employees (5 U.S.C. §2303). Both claims involve Mr. Youssef's disclosures to FBI Director Robert Mueller at a meeting with the Director and a member of Congress on June 28, 2002, in which Mr. Youssef expressed his concern that despite his expertise and qualifications as an FBI agent in the field of counterterrorism and fluency in Arabic, the FBI had not placed him into a position to utilize his skills in the fight against terrorism and that he believed he was being discriminated against on the basis of national origin.<sup>18</sup>

In Mr. Youssef's EEO/Title VII case and his WPA case, Mr. Youssef has been able to pursue his claim without risk of disclosure of classified information. The FBI has cleared all statements, affidavits, documents (such as personnel records) and redacted any classified information. Although Mr. Youssef has a security clearance and works as a Unit Chief in the

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<sup>16</sup> *Turner v. Gonzales*, 421 F.3d 688 (8<sup>th</sup> Cir. 2005).

<sup>17</sup> *Hearing on FBI Whistleblowers*, 110<sup>th</sup> Cong. (May 21, 2008) (written testimony of Stephen M. Kohn).

<sup>18</sup> *Youssef v. FBI*, 541 F.Supp.2d 121, 155-160 (D.D.C. 2008).

FBI's counterterrorism division, both cases are proceeding without the revelation of any classified information or the need for taking any other special measures beyond what is available in the Federal Rules of Civil Procedure.

3. Peter Brown, who was fired shortly after disclosing systemic breakdowns in quality assurance at the Savannah Customs Lab, brought a mixed case against his employer, the U.S. Department of Homeland Security ("DHS"), alleging whistleblower retaliation and retaliation for prior protected activity under Title VII. Before the Merit Systems Protection Board ("MSPB"), Mr. Brown was not successful on either claim. However, because Mr. Brown has the right to *de novo* review in federal court, he learned through discovery in the federal court action that DHS withheld documents that were responsive to his discovery requests served upon the agency in the MSPB case. Additionally, after Mr. Brown filed his federal court action following exhaustion from the MSPB, he learned that DHS destroyed the entire case file on his removal, including relevant notes that were never produced in the MSPB case.

The federal court granted a motion for sanctions against DHS for spoliation of evidence.<sup>19</sup> On the other hand, the MSPB failed to reopen Mr. Brown's case to reconsider the impact of the destruction of relevant documents material to Mr. Brown's removal case on the MSPB's decision.

Employees who work in the field of national security or at the FBI are able to overcome motions for summary judgment and have their Title VII retaliation claims successfully adjudicated in federal court without revealing any classified intelligence information or law enforcement sensitive information. Similarly, other federal employees routinely have whistleblower claims heard in federal court without revealing any sensitive intelligence or law enforcement information.

#### IV. SAFEGUARDS FOR PROTECTION OF NATIONAL SECURITY INFORMATION UNDER EEO AND CIVIL RIGHTS LAWS.

After conducting a comprehensive study the General Accounting Office (GAO) concluded there is "*no justification for treating employees*" at "*intelligence agencies differently from employees at other federal agencies*" in regard to protections against retaliatory discharge or other discriminatory actions.

On March 11, 1996 the National Security and International Affairs Division of the United States General Accounting Office released its comprehensive report, GAO/NSIAD-96-6, *Intelligence Agencies: Personnel Practices at the CIA, NSA and DIA Compared with Those of Other Agencies* (hereinafter, "GAO Report").<sup>20</sup> In this report, GAO "compared equal employment opportunity (EEO) and adverse action practices at these intelligence agencies with those of other federal agencies and determined whether employee protections at these three intelligence agencies could be standardized with the protections offered by other federal

<sup>19</sup> *Brown v. Chertoff*, 563 F.Supp.2d 1372 (S.D. Ga. 2008).

<sup>20</sup> Excerpts from this GAO Report are attached to this testimony.



agencies.” GAO Report, pp. 2, 14. GAO performed a year long review “in accordance with generally accepted government auditing standards.” *Id.*, p. 15.

Based on the experiences in protecting CIA, NSA and DIA employees from retaliation when they engaged in protected activities under Title VII of the Civil Rights Act, the GAO concluded that: **“If Congress wants to provide CIA, NSA, and DIA employees with standard protections against adverse actions that most other federal employees enjoy, it could do so without unduly compromising national security.”** GAO Report, p. 45 (emphasis added).

In addition, the GAO also found that the internal review process for civil rights complaints (currently existing within the CIA, NSA and DIA) (which also exist in the FBI) provides intelligence agencies with ample opportunity to resolve national security related issues and declassify information that may be necessary for a case, including but not limited to the following:

- Information on “sensitive intelligence operations can be converted into unclassified publicly available documents.” GAO Report, p. 6.
- The GAO determined that these agencies’ experience with these EEO laws “demonstrate that intelligence agencies can provide their employees with standard protections against adverse actions.” *Id.*, p.35.
- GAO found that “adverse action files generally contain no national security information.” *Id.*, p. 36. Of the files reviewed by GAO, 98% of the adverse action files contained no such information. *Id.*
- “agencies could continue to remove classified information from adverse action case files . . . [agencies have been] very diligent and successful in keeping classified information out of adverse action case files...” *Id.*, p. 38.
- GAO also found that “the agencies have overstated the sensitivity of the information contained in the vast majority of adverse action cases.” *Id.*
- All three agencies “had been able to successfully support their case with the documents at the unclassified level.” *Id.*
- GAO reviewed case files at federal courts and found declassified and redacted documents that were capable of providing sufficient information to litigate EEO cases. *Id.*, pp. 38-39.
- “GAO sees no justification for treating employees at these intelligence agencies differently from employees at other federal agencies” except in extremely “rare” cases in which national security required that an employee be summarily dismissed. *Id.*, pp. 3, 45.

Under current law, any intelligence agency employee who alleges discrimination or retaliation for engaging in activities protected under Title VII and related laws is entitled to the following procedures and protections: (1) File an initial request for counseling within an agency in order to attempt to resolve an employment related retaliation claim; (2) If informal counseling cannot resolve the dispute within 30-90 days, the employee can file a formal complaint within the agency; (3) The agency must conduct a “complete and fair investigation of the complaint” within 180 days and issue a decision on the merits of the case. GAO Report, pp.18-19; 29 C.F.R. Part 1614 (“Federal Sector Equal Employment Opportunity”).

More significantly, after exhausting these administrative remedies, all employees at these intelligence agencies have the right to file a complaint *de novo* in United States District Court and have their civil rights case heard by a trial by jury, with the same rights and remedies shared by other employees covered under these laws. *Id.*

By objectively and fairly analyzing the existing EEO complaint processing that is currently in place within all intelligence agencies referenced in H.R. 1507, the GAO was able to conclude that covering these employees under standard civil service laws, including the Whistleblower Protection Act, would not cause undue risk to national security.<sup>21</sup> The procedures set forth in H.R. 1507 are consistent with the very procedures approved by the GAO for the adjudication of national security related whistleblower claims. To the extent that additional safeguards are necessary to implement the legislation consistent with the GAO findings, H.R. 1507 can be revised to require the intelligence agencies and the FBI to implement the same safeguarding procedures that already exist to process EEO complaints to process whistleblower claims in order to prevent disclosure of classified information that is harmful to national security.

## **V. PROVISIONS WITHIN H.R. 1507 THAT PROTECT NATIONAL SECURITY.**

### **A. Retaliation is the Issue Not the Validity of the Underlying Whistleblower Claim.**

Retaliation claims under H.R. 1507 will not require litigating the validity of the employee’s underlying whistleblower allegations just as retaliation claims under federal civil rights statutes (such as Title VII) do not require litigating the underlying claim of discrimination. The merits of the whistleblower allegations (i.e., whether the whistleblower’s claims are true or

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<sup>21</sup> The GAO based its conclusion, in part, on the fact that the agency heads of intelligence agencies retain summary removal authority to suspend or remove employees when necessary in the interests of national security. *See e.g.*, 5 U.S.C. §7532, 50 U.S.C. §833 and 10 U.S.C. §1604(e). Additionally, the Civil Rights Act of 1964 contains an express provision that makes an employer’s discharge of any individual for reasons of national security unreviewable. *See* 42 U.S.C. §2000e-2(g). Although rarely invoked, these provisions provide the intelligence agencies with more than adequate assurance that these agency employees can receive the same whistleblower retaliation protections, including full court access, that are proposed for Title 5 employees under H.R. 1507. *See* GAO Report, p. 45.

false, valid or invalid) are not determined in a retaliation claim. The statute requires only a good faith belief in making a protected disclosure and does not require proof of validity of the whistleblower's allegations to maintain a retaliation claim.

What is at issue in a retaliation case is whether an employee made a protected disclosure (i.e. a disclosure of violation of law, rule or regulation; substantial threat to public health and safety; gross waste or mismanagement; and abuse of authority) and once that is established there is no in-depth examination of the underlying merits of the whistleblower allegations in the retaliation case. The making of a protected disclosure element of the whistleblower cases can be litigated without undue risk of disclosure of classified information in the same manner that such information is handled under EEO processing procedures under current law at each of the intelligence agencies and the FBI. Other provisions within H.R. 1507 that are unique to whistleblower claims, such as the role of the Inspector General in investigating the case, also will assist in ensuring that classified information is not disclosed during the course of litigation in federal court in the event *de novo* review by the district court is requested by an employee.

#### **B. Separation of Functions.**

The adjudication of the employment retaliation case and the investigation of the merits of the whistleblower disclosure are separate and independent functions. The issue in the retaliation case is whether employee has suffered retaliation in the form of an adverse personnel action, which is a totally separate inquiry from whether the employee is right or wrong on the merits of the disclosure. Once it is established that an employee lodged a whistleblower allegation with the appropriate officials within or outside the agency, the underlying merits of that disclosure are not at issue.

The two functions (i.e. protection of an employee from retaliation and the investigation into the merits of an underlying allegation of wrongdoing) would remain separate under H.R. 1507. The IG and law enforcement, when appropriate, have authority to investigate whether the whistleblower allegations are valid or have merit to warrant further administrative or law enforcement action. However, that inquiry is not mixed with the whistleblower retaliation claim alleging that an adverse personnel action was taken in retaliation for making a complaint.

#### **C. IG Function In Intelligence Agency and FBI Cases Under H.R. 1507.**

H.R. 1507 ensures classified information will not be revealed at any stage during the whistleblower retaliation case, because the administrative phase of the case is determined by the Inspector General for each intelligence agency or the FBI (i.e., DOJ IG). The Inspector General for each agency is familiar with the agency they oversee and can assist in assuring that if the case is appealed to federal court the administrative record does not contain classified information. For example, Inspector General offices are capable of preparing redacted reports and the agencies are capable of reviewing those reports so the case can be decided and released without the risk of classified information being revealed. To the extent these specific safeguards need to be made clearer, the statutory language can be amended to include provisions requiring the Inspector General to ensure that no classified information is revealed in any decision by the Inspector General on a retaliation claim, or that other appropriate measures are taken to safeguard such information to protect national security interests.

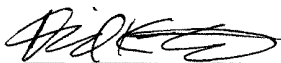
### CONCLUSION

H.R. 1507 provides a framework that would extend to employees who work at intelligence agencies and at the FBI the same protections against whistleblower retaliation as other employees, including the right to seek full court access, without risking the revelation of classified information or harming national security. Full court access, including the right to a trial by jury, is the cornerstone of the H.R. 1507 reforms. Given the 18-year track record of providing similar federal court access and jury trials to intelligence agency and FBI employees under civil rights laws, retaliation claims (whether under Title VII or H.R. 1507) can be safely litigated in federal court without risking national security.

The National Whistleblowers Center suggests that H.R. 1507 be modified in two areas to strengthen the court access provisions for employees who work at intelligence agencies at the FBI. First, the bill should make clear that employees at intelligence agencies and the FBI can seek a trial by jury. Second, specific provisions can be added to the court access provisions to ensure that there are sufficient safeguards available to protect against the public disclosure of classified information, as currently exists under agency EEO programs.

Thank you for inviting me to share the views of the National Whistleblowers Center on H.R. 1507.

Respectfully submitted,



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Chairman TOWNS. We've been joined by Congressman Cummings from Maryland as well.

Mr. FISHER, do you see a significant difference in the position taken by the current administration in today's testimony and the historical position you outlined?

Mr. FISHER. My concern is that if you look at Justice Department positions over the years, they will say the President has exclusive control over national security information. Even though you and other Members have clearance, you don't have a need to know, and they can block you.

I see that, frankly, in what was said today, because when the Justice Department testified today after talking about President Washington, the Justice Department then refers to testimony back in 1998 with regard to congressional oversight. And this is a quote from today's testimony from the Justice Department: The Constitution "does not permit Congress to authorize subordinate executive branch employees to bypass these orderly procedures for review and clearance by vesting them with a unilateral right to disclose classified information even to Members of Congress."

So if I read that correctly—and I think it's underscored by their idea of some sort of entity within the executive branch to review that. And I think what they are saying is that employees in the agency have no right to come here. They do under the 1998 CIA Whistleblower going to the Intelligence Committees, but other than that I think—I don't see the change.

I think they decided today not to expressly talk about constitutional issues as they have in the past. But I don't see the change.

Chairman TOWNS. Mr. Turner, do you have a comment on that?

Mr. TURNER. I think Dr. Fisher is right. I think they are doing what OLC and the executive branch has done throughout our history, and that is trying to uphold the Constitution, which, as it has always been interpreted, gives the President final decision on classified information. And I think they, as a matter of policy, they may well prefer this, but I think they have a duty to the Constitution just as members of this committee do.

Chairman TOWNS. Thank you very much.

Mr. Devine, you mentioned in your testimony the importance of jury trials for Federal employees, yet it is our understanding that very few of the employees will ever exercise that option because of the expense of bringing the case to Federal court. If that is the case, why is this right so important?

Mr. DEVINE. Well, Mr. Chairman, first, it matters because this is very much a litmus test of the President's credibility on transparency issues. He pledges full access to court, and it will be difficult to take those commitment serious if he leaves Federal workers as the only ones without normal court access.

But the main reason—and it far transcends the current administration—is the high-stakes cases that are the primary reason the Whistleblower Protection Act is passed, there is no chance for justice at the Merit Systems Protection Board. The ultimate point of the law, and why ours has the unanimous mandate, is not just the congressional commitment to be fair to government workers, it's the impact on the public. And the Board, the Merit Systems Protec-

tion Board for 30 years has rubber-stamped termination of anyone who challenged a significant government breakdown.

I'll just give you some examples of the sophistry here. A Federal air marshal in a week with his whistleblowing blocked the Transportation Security Administration from removing air marshal coverage on cross-country flights during the hijacking alert. They basically they had blown their budget on contractors, and they wanted to get back to even by canceling the air marshals on these flights during an alert. The whistleblower stopped them. He was fired for it.

It's taken him 3 years. He hasn't gotten a hearing. And currently the issue in the case is the preliminary ruling that he's not covered by the Whistleblower Protection Act, and that is because a loophole in the law is that it doesn't allow public disclosures of information whose release is specifically prohibited by statute.

The Merit Board, it said, well, TSA was authorized by Congress to issue regulations. So when TSA issued a regulation that imposed blanket secrecy, virtually ending any public whistleblowing, that qualified as a specific statutory prohibition.

Now every agency in the government has that authority, and if this decision sticks, it means the Whistleblower Protection Act rights will only exist to the extent that they are not contradicting agency regulations—that is hopeless—as a shield for government accountability.

The bottom line is for whistleblowers seeking justice in serious breakdowns of government service, the MSPB is the Twilight Zone.

Chairman TOWNS. Thank you very much.

I yield 5 minutes to the gentleman from Maryland Mr. Cummings.

Mr. CUMMINGS. I was at another hearing.

Thank you very much, Mr. Chairman, and thank you for holding this hearing.

I think it's extremely important that we do everything in our power to protect whistleblowers. We had a case in Maryland which I got involved with where we had at one of our hospitals someone who blew the whistle on her superiors who knew that AIDS tests, HIV/AIDS, and hepatitis B tests were being administered by faulty machinery. I'm talking about hundreds of them. And all of it was hush-hush. And this happened about 4 or 5 years ago. And by doing what she did, I believe that she saved a lot of lives.

I think that when we look at—going back to your comments, Mr. Devine, it is so very important that we have transparency. Mr. Barofsky, the Special IG for TARP, told us in another hearing that he expected numerous cases—if I remember correctly, he said hundreds of them coming out of this TARP situation.

And so I think that—I often say that a lot of times we don't act when we ought to act, and then something happens, and then we look back and said we wish we had. And, Mr. Chairman, I think that this is one of those times where we're going to have to act. And I know there are some that may disagree, but the fact is that I think America has called out for transparency and is—I've often heard it said that one of the greatest things that you can do is to shine a light so that all can see to address this whole issue of the kinds of problems that can come up in government. And one of the

things I've also noticed is in some instances it's almost impossible to find out certain information unless you do have a whistleblower. And going back to what you were saying, Mr. Colapinto, you know, some kind of way we also have to figure out how to put people in a position where they feel comfortable even coming forward and that they will not be harmed themselves. Other than that, you might as well throw this—I mean, if we have that kind of situation where they feel threatened, then it—you won't get that kind of response.

And in Baltimore, we have a situation now where there is no cooperation. We have literally about 20 percent of our most serious cases, like murders and whatever, not going to trial. Why? Because of witness intimidation. Why? Because they believe they are going to be harmed. It's a second cousin to this, but it's the same kind of concept.

In order to address the ailments of our society, a lot of times you've got to have—matter of fact, most of the time you've got to have the cooperation of people.

So I just have one question to all of you. One of the arguments that opponents of expanding whistleblower protection is we will give a forum to people who just want to complain about management or, worse, are vindictive against their employer and want to get even.

I want you to respond to those critics, and I know there are several systems in place to weed out legitimate claims from the others, and I would just like to know how do we address that?

Mr. DEVINE. Congressman, that is an objection that can be made to every right that Congress ever legislates. Every right can be abused. But you folks make a balancing test whether the benefits to the public outweigh the risk for the potential to abuse. I can't think of any legislation where the balancing test is more in favor of the rights than with whistleblowers. The benefits to the public are incredible. We've increased our recovery rate under the False Claims Act by almost 200 times annually by enfranchising whistleblowers.

The issue is probably going to come down to a question of fear. What we hear over and over again is that emboldened whistleblowers—if they have normal rights, emboldened whistleblowers will bully their managers so they will be afraid to impose accountability when it's needed. Now, the solution to that probably is to hire managers who aren't afraid to exercise their authority. That is not a reason for secrecy.

But the fear that we've got without this law is secrecy enforced by repression. When there are abuses of power that betray the public, that is the kind of really dangerous fear we have. And it's because of that fear that problems such as domestic surveillance turn into a blanket violation of constitutional rights instead of being nipped in the bud; that torture becomes almost a tradition because it wasn't challenged in a timely manner when we first started straying from the Geneva Convention. That is how little problems turn into disasters, because people are afraid to challenge illegality.

So we don't have a whole lot of respect for the argument that we can't give people rights because they might scare the power structure.

Chairman TOWNS. As we have seen from today's hearing, whistleblowers play a vital role in promoting government accountability and transparency. This has been an informative meeting, and I look forward to working with the administration and the Senate to enact the bill.

I would like to ask unanimous consent that a number of written statements that we receive be submitted for the record.

And without objection, the committee stands adjourned. And let me thank the witnesses for their testimony. We look forward to working with you as we move forward. Thank you so much.

[Whereupon, at 1:45 p.m., the committee was adjourned.]

[The prepared statement of Hon. Bruce Braley and additional information submitted for the hearing record follow:]