



WRITTEN TESTIMONY OF THOMAS DEVINE,
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Before the House Committee on Oversight and Reform
on
The Whistleblower Protection Improvement Act

May 3, 2021

Madame Chair:

The Government Accountability Project commends you and the bi-partisan co-sponsors of the Whistleblower Protection Improvement Act. We are a nonprofit, nonpartisan, public interest organization that assists whistleblowers, those employees who exercise free speech rights to challenge abuses of power that betray the public trust. We have led or been on the front lines of campaigns to enact or defend nearly all modern whistleblower laws passed by Congress, including the Civil Service Reform Act of 1978, Whistleblower Protection Act of 1989, 1994 amendments and the Whistleblower Protection Enhancement Act.

This legislation is desperately needed, because the structures to defend the non-partisan, professional merit system are dormant when needed most as our nation prepares for unprecedented spending to meet unprecedented challenges. Further, your bill is necessary to update the Whistleblower Protection Act, America's primary whistleblower law. In 1978 America pioneered whistleblower protection globally, sparking a legal revolution that now covers 49 nations, the European Union, the World Bank and the United Nations. Unfortunately, our pioneering law now have produced one of the world's worst track records in terms of results.¹ Part of the reason we have fallen behind is the failure to act on fundamental issues left unresolved in the Whistleblower Protection Enhancement Act of 2012.

COURT ACCESS

Your reform's cornerstone is providing access to court and jury trials to seek justice, a due process right already available to nearly all other whistleblowers in the U.S. labor force, and indispensable since the Merit Systems Protection Board administrative remedy has been paralyzed since January 2017 due to a vacuum of Members. It faces more than a 3,500 case backlog that will take years to overcome after it becomes functional again. Even if the Board were providing justice, a safety valve is imperative to become functional again.

Unfortunately, in practice the Board's monopoly on due process is not producing justice. Even without full Board Members for appeal, Administrative Judges have been producing Initial Decisions entitled to legal deference. Those AJ's are overextended, do not have judicial

¹ Feinstein and Devine, *Are Whistleblower Laws Working? A Study of Global Whistleblower Litigation* (Government Accountability Project and International Bar Association 2021), <file:///C:/Users/tomd/Downloads/Are-Whistleblowing-Laws-Working-report-2021March.pdf>.



independence and have a track record of hostility to the whistleblower rights over which they preside for the only available day in court.

That track record has been a disaster. Even with active Board review, AJ's consistently have ruled against whistleblowers in 95% of cases. Without Board review, the record is even worse. I studied all 51 Whistleblower Protection Act decisions on the merits this year through April by MSPB Administrative Judges. The track record was 1-51 against whistleblowers.

Hostile judicial activism has been consistent with the Federal Circuit Court of Appeals' arbitrary interpretations and loopholes that convinced Congress in the WPEA to end its appellate monopoly. To illustrate, recent cases have held that violating Center for Disease Control standards for ventilators and Personal Protective Equipment at hospitals was too speculative to qualify for WPA protection as disclosing a substantial and specific threat to public health or safety.

FULL SCOPE OF REFORM

As discussed below, the legislation will provide comprehensive, global best practices against employment retaliation.

* Protecting whistleblowers from retaliatory investigations, which can frighten them into silence for years or lead to criminal referral, a protection already available to the rest of the U.S. labor force, including even soldiers.

* Providing a timely opportunity to obtain temporary relief, which is essential to shrink unnecessary conflict, and for whistleblowers to remain functional long enough to win a decision in proceedings that frequently take 2-5 years to complete, and sometimes over a decade.

* Strengthening channels to communicate with Congress, necessary to overcome steadily increasing Executive branch barriers that threaten constitutional checks and balances.

* Detailing standards for protection of whistleblowers' confidentiality, necessary because current vague protections have proven unreliable.

* Restoring accountability for Offices of Inspector General (OIG's), necessary because a loophole has rendered unenforceable the Office of Special Counsels orders to investigate abuses by OIG's.

* Closing loopholes that deny WPA coverage for non-career Senior Executive Service, Public Health Service and National Oceanic and Atmospheric Administration employees, necessary because the former are the most significant whistleblowers for Executive branch abuses. and the latter because they are the whistleblowers for accountability in the government's response to two of America's most urgent crises -- the COVID 19 pandemic and climate change.



* Closing loopholes that mean whistleblowers still are not made whole and lose when they “win” their cases, such as lost promotions during periods of illegal termination;

* Expanding attorney fees to cover court representation, necessary to reinforce the right to counsel when it is needed most.

* Creating due process rights to challenge violations of the WPA’s anti-gag provisions, necessary because that tactic has intensified sharply and prevents disclosures, even more threatening to the merit system than retaliation after making disclosures.

RECOMMENDATIONS

Several modifications will help the bill to fully achieve its objectives. First, the bill’s protection against retaliatory investigations exempts those conducted by an Office of Inspector General. (OIG) Those institutions are among the most frequent abusers of this reprisal tactic. Their investigations regularly lead to criminal referrals outside the scope of the Whistleblower Protection Act, which have a far worse chilling effect than mere personnel actions. The loophole has been unnecessary in analogous whistleblower laws for law enforcement purposes and would be unprecedented, including all corporate statutes and even the Military Whistleblower Protection Act.

If deference to OIG’s is unavoidable, the impact on retaliation can be minimized through two adjustments. First, allow whistleblowers to challenge all *referrals* for investigation as retaliatory. This would provide protection when an agency tries to manipulate an OIG that is acting in good faith. OIG investigations opened without a referral could be subject to prior review and certification by the Office of Special Counsel that the investigation does not violate the Whistleblower Protection Act.

A second recommendation is that the WPIA’s provisions be retroactive. While normally not the case, with over a 3,500 case backlog at the MSPB, this is essential for whistleblowers whose rights have been dormant for four years, and for the new Board to address an unprecedented backlog.

CONCLUSION

Combined with WPA training of Administrative Judges in the committee’s Whistleblower Protection Empowerment Act, this legislation closes the due process loophole that has been the law’s Achilles heel. It also will finish what Congress started 42 years ago when it first created whistleblower rights in the Civil Service Reform Act of 1978. Four times Congress has passed those rights in principle but failed to provide legitimate enforcement mechanisms. As a result, they were gutted in practice and Congress had to reenact the same rights.



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The Whistleblower Protection Improvement Act directly addresses the structural weaknesses that doomed previous mandates in principle. When we need America's federal whistleblower's most, it will upgrade their protection from a mirage to global best practices against workplace harassment. All federal employees who want to be public servants owe a debt of gratitude to the sponsors of this legislation.