TESTIMONY OF THOMAS DEVINE

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on

CORPORATE WHISTLEBLOWER LAWS AT THE DEPARTMENT OF LABOER

before the

HOUSE COMMITTEE ON EDUCATION AND LABOR

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

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MADAM CHAIR:

Thank you for inviting my testimony. My name is Tom Devine, and since January 1979 I have served as legal director of the Government Accountability Project, a nonprofit, nonpartisan, public interest law firm dedicated to helping whistleblowers -- those employees who exercise free speech rights to challenge illegality or other abuses of power that betray the public trust. Since we began 30 years ago, GAP has assisted over 4,000 whistleblowers. GAP has led outside campaigns that led to passage of numerous government, military, and corporate whistleblower protection laws. We represent whistleblowers in test cases of those statutes, and to investigate their dissent against alleged misconduct threatening the public. We steadily monitor implementation of whistleblower statutes and share our results through books, law review and popular articles, as well as congressional testimony. See, e.g., The Whistleblower's Survival Guide: Courage Without Martyrdom, and "The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Dissent," 51 Administrative Law Review 531 (1999).

Since 2000 GAP has worked hard for whistleblower protection on the international level as a transparency cornerstone for globalization. For example, we teamed up with American University Law School to draft a model whistleblower protection law implementing the Organization of American States (OAS) Inter-American Convention Against Corruption. Over the last two years we have worked closely with officials at the United Nations and the African Development Bank to issue new whistleblower policies that for the first time protect public freedom of expression by employees at Intergovernmental Organizations. Currently we are completing work with

the Tanzanian government's Prevention and Combating Corruption Bureau for a national whistleblower law to be introduced in that nation's Parliament this summer.

Unfortunately, in all too many instances we cannot point to U.S. laws as the baseline for global best practices in whistleblower protection. While well intentioned, their roads have led to a professional hell on earth for whistleblowers who rely on legal rights. The system of corporate whistleblower laws has been dysfunctional at best, and frequently a trap that rubber stamps retaliation for all naive enough to assert their rights.

Word spreads like wildfire in the employment grapevine at any institution when that occurs, and the lesson learned is unfortunate: don't work within the system. When corporate abuses of power betray the public trust, there are three choices other than professional suicide: look the other way, remain a silent observer, or go behind the company's institutional back to out-Machiavelli the Machiavelli's with an anonymous campaign. Blowing the whistle through established structural checks and balances is like "committing the truth." One of America's most effective whistleblowers, Ernie Fitzgerald, coined that phrase, because you will be treated like you committed a crime. Corporate whistleblower law is a crazy-quilt of hit or (usually) miss protections generally tucked into specific public health and safety laws. With scattered exceptions, the lucky ones covered by the law generally are unemployed, while serving open-ended sentences as prisoners of an administrative law system with rigid, unforgiving deadlines to act on rights, despite unrealistically short deadlines and a convoluted maze of inconsistent bureaucratic procedures with decisions seldom less than two to three years. and most statutes without any chance for interim relief. This is professionally akin to patients who die while waiting for an operation or organ donor.

The ultimate losers are the public. Two long-accepted truths are that secrecy is the breeding ground for corruption, and sunlight is the best disinfectant. Hand in hand with accountability, whistleblowing as the freedom to warn is at least as significant. Otherwise even the best leaders are ignorant of misdeeds, and those who fly blind are liable to crash. When whistleblowers have the freedom to warn, both corporate and government institutions can prevent avoidable disasters, before there is nothing left but damage control and finger pointing.

In GAP's experience, since the 1980's whistleblowers have proved their importance to society again and again. To illustrate, investors believed whistleblowers over Nuclear Regulatory Commission rubber-stamps and pulled the plug on plants that were accidents waiting to happen. At the Hanford nuclear waste site, after a contractor publicly announced the loss of 5,000 gallons of radioactive waste but reassured there was no danger of it reaching the public, whistleblowers exposed the truth: The real volume was 440 *billion* gallons. There already are trace readings of the wrong kind of radioactive "hot" water in the Columbia River water basin for the Pacific Northwest. Corporate whistleblowers at meat and poultry plants repeatedly exposed attempts to profit from fecally-contaminated products if the government deregulated. Their disclosures helped keep public health disasters such as the deadly Jack in the Box food poisoning tragedy from becoming the norm. Dr. Jeffrey Wigand's rock of the truth turned into a landslide that destroyed the tobacco industry's credibility and helped spark a global cultural sea change about cigarettes.

Whistleblowers are the life blood for effective law enforcement. It is difficult to win criminal convictions without testimony from those who bear witness against

corruption. Without protection for witnesses, anti-corruption campaigns are empty and lifeless. Whistleblowing disclosures to the SEC doubled normal rates during congressional Enron hearings. As SEC enforcement chief Stephen Cutler commented, "Because of this phenomenon, among other reasons, we are learning of potential securities law violations earlier than ever before. Keep those cards and letters, not to mention emails, coming." This committee has serious work to do, or government officials like Mr. Cutler will be waiting for Godot. Profiles in Courage are the exception, not the rule.

Every day at GAP we are called by whistleblowers asking us the facts of life if they rely on legal rights. Below are a baker's dozen examples of the questions we receive, and the answers we are forced to give if we want to be honest.

While there are 32 federal laws offering scattered protection for corporate whistleblowers, the answers are for the most common scenarios – witness protection provisions through a three step Department of Labor process in enforcement clauses of 14 public health and safety laws.[1] For simplicity, they will be referred to as the DOL-administered laws. Although even these statutes are not consistent, as a rule their common features are an initial investigation by the Occupational Safety and Health Administration (OSHA), an opportunity to start with a clean slate at a due process hearing before an Administrative Law Judge (ALJ), and appellate review for the Secretary of Labor by an Administrative Appeals Board (ARB) which issues the final agency decision. In most cases employees can seek limited review by the relevant U.S. Court of Appeals. As seen below, even within the DOL- administered whistleblower

model, there are numerous, significant variations, generally due to nothing more than when the particular statute was passed.

1. Who do the corporate whistleblower laws protect? In any given industry, potentially any employee or almost no one. The limited subjects eligible for protection are like a road with more potholes than pavement. The 14 whistleblower statutes are part of the enforcement provisions for laws covering specific issues, most frequently public health and safety laws such as the Clean Air, Water or Superfund Acts. The list also includes truck (Surface Transportation Act, or STA) and airlines safety (AIR21), occupational safety generally and mine safety, and scattered narrow areas like safe cargo container and. Pipelines. Any corporation may violate environmental or occupational safety laws, so all employees have rights to challenge those particular types of misconduct. But for other potentially greater abuses of power, they may have none. No one can be sure without a lawyer to navigate.

For example, an employee at a meat packing plant has free speech rights when challenging release of fecally contaminated water flowing into the river. But the same employee has no rights when challenging fecally contaminated meat and poultry that shows up on our families' dinner table. A truck driver is protected for challenging bad tires, but not illegal cargo. An employee of a pharmaceutical company has protection for disclosing false statements in financial reports to the shareholders. But there is none for challenging false statements to the government and the public about potentially lethal drug safety hazards, like the threat of unnecessary heart attacks from killer pain killers such as Vioxx that killed 50,000 Americans.

2. What am I protected for blowing the whistle against? Most whistleblower statutes protect those who challenge illegality or take any other action to "assist in carrying out the purposes" of that particular law. The Sarbanes Oxley (SOX) law's early track record illustrates the risk of omitting the catchall phrase. In theory, SOX sweeps through industry distinctions by protecting those who challenge fraud, or any illegality that materially affects the shareholders' interest. But employees at privately-held subsidiaries of public corporations cannot count on having rights, and those working at a large corporation's international offices have none.

Most frustrating under Sarbanes Oxley, it is not enough to blow the whistle on illegality. The question still has not been clearly answered, "How illegal is illegal enough for free speech rights?" Under some early decisions it also is necessary to prove that – 1) the fraud itself is material (such as one percent of annual revenues); 2) the government would take action to punish the misconduct; and 3) the punishment would have a direct and specific impact on shareholders that lowers stock value. There is no protection for challenging any misconduct with "speculative" consequences. So much for knowing where you stand. And it's doubtful whether the law applies at all if the company requires submission of all disputes to a company-controlled system of arbitration as an employment condition.

None of the laws have the well-established protected speech boundaries of the Whistleblower Protection Act for federal government workers that also are included in many state laws: illegality, gross waste, gross mismanagement, abuse of authority or a substantial and specific danger to public health or safety.

3. If I speak out, when will I become a legally-recognized whistleblower? That's a good question. It used to be that challenging corporate misconduct triggered rights as an "essential preliminary step" for responsible disclosures to the government. But recent Surface Transportation Act decisions have disqualified protection for internal disclosures, forcing employees to contact the government behind their employer's back or else risk waiving their rights. To illustrate the consequences, the ARB recently canceled protection for a trucking employee who "red tagged" (required repairs before use) vehicles for safety violations. This adds significant, potentially unnecessary burdens for government enforcement units, where a corporation would have acted in good faith if employees had the freedom to warn of problems that may well have been honest mistakes.

It also can have lethal consequences for the public. Examples of red tags are broken doors, inoperable lights, and defective brakes. (On a personal note, the latter is the same violation that caused my brother's death at 30 years old while waiting at a stop light -- depriving his wife, six month and three year old children of a father.)

4. Am I protected for refusing to violate the law? Rarely. Unlike the Whistleblower Protection Act for government workers and an increasing number of state laws, in most DOL administered laws, you're only protected for making noise. If you try to walk the talk, you are walking the plank.

5. How long do I have to act on my rights? It ranges from 30-90 days in most DOL-administered statutes. In theory, the law could provide flexibility through a doctrine called "equitable tolling." But don't count on it. In one case, DOL extended the deadline to a year. But in another dispute involving organic market employee Henry Immanuel, DOL threw out his case for being 43 days late.

Mr. Immanuel's surreal ordeal is illustrative. Ironically, he was fired for blowing the whistle when an organic market threw five gallons of toxic industrial cleaner in a trash dumpster. Within 13 days he filed a reprisal complaint with the Maryland Occupational Safety and Health (MOSH) agency. After six months, they informed him that they were the wrong agency to handle the dispute. He then began a campaign asking government offices where he was supposed to defend his rights. Despite a series of false leads, he found out about OSHA and filed a complaint 73 days later. That was 43 days after the normal 30 day deadline. According to DOL, it was too late and there were no excuses. In order to avoid Mr. Immanuel, without explanation the ARB disregarded a series of prior rulings extending deadlines up to a year due to similar circumstances. Despite a legal doctrine that asserted the same rights in the wrong forum qualifies for deadline purposes, the ARB somehow asserted that he hadn't made the same "precise" complaint before the Maryland and federal OSHA's, again without explanation.

In another recent decision, the ARB abandoned the longstanding doctrine of continuing violations. This means employees must file new lawsuits against each act of additional harassment within 30 days.

6. How long will this case take? In theory, most statutes give the Department of Labor 90 days for a decision. In reality, expect to be twisting in the wind for at least two to three years. One vindicated Department of Energy whistleblower on radioactive releases at nuclear weapons facilities twisted for 14 years before the current political appointees reversed a series of preliminary victories that had kept getting sent back to perfect technicalities. Six years is not uncommon. To illustrate the double standard between deadlines for whistleblowers and deadlines for the government, it took the Labor

Department 4.5 years to tell Mr. Immanuel that he was too late to keep his rights by filing 43 days after the 30 day deadline.

7. Can I get any interim relief while I'm waiting? In a few recent DOL-administered laws such as AIR21 and SOX, you can get a ruling for interim relief. But even then don't count on enforcing it. A recent court decision held that since employers cannot immediately appeal interim rulings, it would violate the company's due process rights for courts to enforce a DOL ruling that the employer defies.

8. When it's all over, what are my chances of winning? Around one in twenty. This is the bottom line for whistleblowers. If there is no realistic chance of success, the law is a trap that offers legal wrongs, not rights. If there is not a fair chance to win, asserting your rights costs tens of thousands of dollars and drags out painful disputes for years – all to officially endorse the retaliation you are challenging by rubberstamping it. GAP regularly must ground whistleblowers in this reality.

Professor Moberly's statistics on SOX results are representative for the DOL legal system generally, so they are worth emphasizing: 3.6% win rate at the OSHA level, 6.5% with Administrative Law Judges, and not a single case where the ARB has ordered retaliation to stop in over four and a half years.

9. Will the government respect my rights on paper? The ARB seems to have a blind spot for congressional language. For example, the Board functionally has erased the common catchall provision providing protection for any action to assist the government "to carry out the purposes" of the relevant statute. Recent rulings on the STA truck safety law are illustrative. In one case, the ARB disregarded a driver's refusal to drive while impaired due to sleep deprivation – specifically protected activity in that statute.

Instead, it created a loophole with the explanation that the employee shouldn't have been hired in the first place.

Despite unqualified statutory language banning any discrimination because of legally-protected activity, discrimination no longer counts until there is a victim. For example, companies can issue retaliatory warning letters, even though their effect is to mean the person can be fired for the next offense. That is the employment equivalent to saying nothing can be done when someone points a gun, until the bullet enters flesh and draws blood. The SOX language outlawing "threats" of retaliation apparently has vanished, although that type of harassment can have the worst chilling effect – de facto prior restraint.

There is no way to predict how DOL will read the law in any particular case. Recent trucking decisions canceling protection for "essential preliminary steps" to a disclosure reverse over two decades of case law, without explanation. This means those with jobs like safety inspectors, auditors or truck drivers proceed at their own risk when issuing reports or notices of violation that are the foundation for government disclosures.

GAP has been frustrated by Kramer vs. Kramer type scenarios in the same case. In one instance the Secretary of Labor reversed an Administrative Law Judge and sent the case back to properly interpret the law in a scathing ruling. The ALJ issued a nearly identical opinion, and the next time up the decision was approved.

10. What do I have to prove to win; what tests will I have to pass? It all depends on which law. Ten of the laws are governed by antiquated burdens of proof from 1974: an employee must prove that protected activity is the "primary, motivating factor" in order to establish a basic prima facie case. Then the burden of proof shifts, and the

employer can still prevail if it proves by a preponderance of the evidence" that it would have taken the same action for independent reasons. Under four recent DOL-administered whistleblower statutes, the more modern standards of the Whistleblower Protection Act apply: the employee only has to prove protected activity was a "contributing [or relevant] factor" for a prima facie case, and the employer must prove its independent justification with "clear and convincing" evidence.

11. Will I be able to go to court for my day in court? For two of the 14 laws, yes. Under SOX an employee can go to court and start fresh, if the DOL administrative process has not produced a final ruling in 180 days and the delays are not due to the whistleblower's bad faith. Under the Energy Reorganization Act, nuclear energy and weapons workers have that same option if it takes DOL more than 360 days. Under all the other DOL-administered statutes: no. Most of the DOL-administered laws provided limited review in U.S. Courts of Appeals, but not all. For example, for mine safety or OSHA violations, there is only review to internal commissions where an employee can ask the agency to change its mind.

12. If I go to court, will a jury decide whether my rights were violated? In theory, that is possible under SOX, but no one has made it to a jury since the law's 2002 passage. The same is true for nuclear whistleblowers, although their access was not established until the 2005 Energy Policy Act. The courts have warned they may not accept jury trials despite clear congressional intent, because of a technical error in drafting the law.

13. When it's over, will I understand why I won or lost? Get serious. While there are exceptions, increasingly the rule is not to supply an answer or even hints about "why"

any given conclusion was reached. The Board regularly keeps secret both the evidence and reasoning for its conclusions.

No solution can be reliable unless it addresses a problem's causes. At the Department of Labor, there are two Achilles' heels are at the beginning and end of the process – the Occupational Safety and Health Administration (OSHA), and the Appeals Review Board (ARB). To put whistleblowers' frustrations at OSHA in perspective, due to the volume of complaints GAP had to develop a manual for how whistleblowers can find their cases when OSHA loses them. During the investigation, the agency regularly engages in double standards on the right to counsel, access to evidence and the opportunity to rebut the other side's arguments.

The ARB has the final word for the Secretary of Labor after an administrative hearing. It reflects the legal system's lowest common denominator for appellate review. The members are political appointees selected by the Secretary of Labor for one year terms – effectively minor league patronage appointments without enough time to accumulate expertise even if they were qualified. They view their jobs as part time, frequently living in their home states except when they fly in for meetings and tell the career staff how to rule, without consistently first reading the staff's memoranda analyzing the record and the law. While the Office of Administrative Law Judges (OALJ) is well-respected, realistically it cannot overcome the legitimacy breakdown that surrounds it.

In piecemeal fashion, Congress has been acting in good faith, if inconsistently, to protect corporate whistleblowers for over 30 years. The piecemeal inconsistencies reflect scattershot lessons learned, and demonstrate Congress' good faith in trying to improve

whistleblower rights. But the system is broken. In the process, there has been an opportunity to learn many lessons.

Our organization is available and pleased to assist staff to develop solutions, based on 28 years of frequently painful experience learning the reality behind free speech rights on paper. At GAP we divide whistleblower laws into cardboard and metal shields. Anyone going into battle with a cardboard shield, no matter how impressively it is painted, is doomed. While conflict is always dangerous, a person with a metal shield has a fighting chance to survive. The current system of corporate whistleblower laws is a cardboard shield.

The result? The current corporate laws have created more victims than they have helped. The net impact of free speech laws has been to punish those who exercise that right, while creating a chilling effect in the process. Your leadership is long overdue. It is long past time to get it right, with a composite law that is coherent, consistent, comprehensive, and actually works.