Department of Justice

STATEMENT

OF

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BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

CONCERNING

S. 1358
THE FEDERAL EMPLOYEE PROTECTION OF DISCLOSURES ACT

PRESENTED ON

NOVEMBER 12, 2003

Mr. Chairman and Members of the Committee, I am pleased to appear before you today on behalf of the Department of Justice to advise you of our strong objections to S. 1358, a bill to amend Chapter 23 of Title 5, United States Code ("the bill").

The Department is strongly committed to the protection of whistleblowers who bring to light significant information about waste, fraud, or abuse in Federal agencies. We support the protections against retaliation that are afforded to them by current law. We are not aware of any specific evidence, nor have we been provided any, indicating that current law has not served those important purposes. In litigating and settling hundreds of these cases, we have found that not every individual who claims to be a whistleblower meets the statutory definition and not every agency action against such an individual is improper retaliation. This bill must be judged not simply on whether it would provide maximum protection to any and all allegations of whistleblower reprisal, but whether the additional protection afforded by this bill is worth the costs. In seeking to strike the appropriate balance, the Committee should make no mistake that the costs would be substantial, both in terms of the bill's impact on vital national security interests, and the inefficiencies the bill would create in the management of the Federal workforce.

S. 1358 would make a number of significant and extremely undesirable changes to the Whistleblower Protection Act ("WPA") and the Civil Service Reform Act ("CSRA"). It would, for the first time, encourage the disclosure without supervisory approval of classified information and then insulate the individuals who committed the unauthorized disclosure from adverse action. It also would allow the Merit Systems Protection Board ("MSPB") and the Federal courts to review decisions regarding Federal employee security clearances. In this time of heightened national security concerns, these changes pose an unacceptable danger to our national security interests.

Although we strongly support protections for Federal employees who disclose fraud, waste, and abuse, the changes proposed in this bill do nothing to strengthen the protection for legitimate whistleblowers, but instead would provide a legal shield for unsatisfactory employees. The bill would make sweeping changes to the definition of a protected disclosure by including within the definition certain disclosures of information regardless of time, place, form, motive or context. These changes would permit almost any employee against whom an unfavorable personnel action is taken to claim whistleblower status. In the long run, these changes would lead to costly inefficiencies in the Federal workplace and would impair the effectiveness of Federal agencies.

The bill also would alter the scheme for judicial review of decisions of the MSPB. The Federal Courts Improvement Act of 1982, established exclusive jurisdiction to entertain appeals by employees from MSPB decisions not involving discrimination in actions initiated by their employing agencies lies in the United States Court of Appeals for the Federal Circuit. By investing other circuits with concurrent review authority, the bill would destroy the uniform interpretation of Federal personnel law and inevitably result in the grant of different rights to different Federal employees depending upon their geographic location.

Finally, the bill would expand the authority of the Special Counsel by permitting him independently to decide to seek review of the decisions of the MSPB in the United States Court of Appeals for the Federal Circuit, and it would vest the Special Counsel with the authority to represent himself in all Federal courts other than the Supreme Court. These provisions are undesirable as a matter of policy, and undermine the Department's central role in coordinating the Government's litigation positions.

I. Constitutional Objections

The Department has serious objections to the bill's proposals to allow for review of security clearance decisions and to protect the unauthorized disclosure of classified information to certain members of Congress and Executive Branch or

congressional employees with appropriate clearance. The constitutional concerns raised by these provisions are set forth in our previous letter regarding this bill, a copy of which is attached to this testimony. If the Committee has questions regarding our constitutional objections, we will be pleased to supply additional information or respond to further questions in writing. Our remarks today focus on some of the many reasons why this bill is bad policy.

II. Expanded Definition of Protected Disclosure

We begin from a central and shared premise: it is important to protect employees who disclose fraud, waste, and abuse. The amendments in this bill do little to aid those who are actual whistleblowers. There already are a number of existing systems in place to detect such fraud, waste, and abuse, including agency Inspectors General and the existing Whistleblower Protection Act framework. This bill, however, would make it far too easy for unsatisfactory employees to use the whistleblower laws as a shield against legitimate agency actions. Ultimately, it would discourage Government managers from making the decisions necessary to running an efficient and effective Federal workplace. In the long run, the changes proposed by this bill would be far more costly and would certainly outweigh any minor increase in protection for legitimate whistleblowers this bill contains.

The WPA, as currently enacted, already provides extensive protections for legitimate whistleblowers. Employees can seek assistance from the Office of Special Counsel, the independent agency charged, in part, with protecting whistleblowers, or bring their own claims to the MSPB. This bill does not enhance these existing protections but, with its expansive definition of disclosure, has the potential to convert any disagreement or contrary interpretation of a law, no matter how trivial or frivolous, into a whistleblower disclosure. It would simply increase the number of frivolous claims of whistleblower reprisal. Such an increase in the number of frivolous claims would be an unwarranted burden upon Federal managers and, ultimately, the MSPB and the Federal Judiciary.

The bill would broaden the definition of protected disclosure by amending section 2302(b)(8)(A) to read:

> any disclosure of information by an employee or applicant, without restriction to time, place, form, motive, context, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties that the employee or applicant reasonably believes evidences
>
> (i) any violation of any law, rule, or, regulation, or
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Proposed 5 U.S.C. § 2302(b)(8)(A) (new language emphasized).

Current law properly recognizes that, in determining whether an employee's statement constitutes a "disclosure," place, time, context, and motive are important factors to consider. They further the statutory purpose of protecting legitimate whistleblowers. The bill's proposed amendment would do nothing to enhance the protections for actual whistleblowers. Rather, by prohibiting the consideration of "time, place, form, motive, context" and including the performance of one's job duties in the definition of "disclosures," the bill would convert every Federal employee into a potential whistleblower and every minor workplace dispute with a supervisor into a potential whistleblower case. Nearly every Federal employee would, sometime during the course of his or her career, disagree with a statement or interpretation made by a supervisor, or report, during the course of performing his or her everyday responsibilities, an error that may demonstrate a violation of a law, rule, or regulation. Without the ability to take the context – the time, the place, the motive – of the alleged disclosure into account, even trivial or de minimis matters would become elevated to the status of protected disclosures. Cf. Herman v. Department of Justice, 193 F.3d 1375, 1378-79 (Fed. Cir. 1999) (concluding that the WPA was not intended to apply to trivial matters). This bill would undermine the effectiveness of the WPA, not enhance its protections.

The danger of this broad definition of "disclosure" is even more apparent when it is understood in the context of the existing statutory scheme of the WPA. Once an individual has made a qualifying disclosure pursuant to 5 U.S.C. § 2302(b)(8), a prima facie case of whistleblower reprisal can be made by showing that a deciding agency official (a) knew of the disclosure and, that (b) an adverse action was taken within a reasonable time of the disclosure. Kewley v. Department of Health & Human Serv., 153 F.3d 1357, 1362-62 (Fed. Cir. 1998) (citing 5 U.S.C. § 1221(e)(1)). Once the employee makes this prima facie case, the burden shifts to the employing agency to show, by clear and convincing evidence, that it would have taken the adverse action, regardless of the protected disclosure. Kewley, 153 F.3d at 1363.

With the expansive definition of "disclosure" proposed by S. 1358 and the relatively light burden of establishing a prima facie case of whistleblower reprisal, due to the knowledge/timing test, it would become extremely easy for employees to use whistleblowing as a defense for every adverse action taken by an agency. In contrast, the agency would be required to meet the much higher burden of demonstrating that it would have taken the adverse action, regardless of the disclosure, by clear and convincing evidence. Thus, for all practical purposes, this bill would transform the statutory standard that an agency must meet

in sustaining almost every adverse action from a preponderance of the evidence, 5 U.S.C. § 7701(c)(1)(B), to the clear and convincing standard required by 5 U.S.C. § 1221(e)(2).

The ease with which a Federal employee would be able to establish a prima facie case of whistleblower reprisal, no matter how frivolous, under this bill would seriously impair the ability of Federal managers to effectively and efficiently manage the workforce. If Federal managers knew that it is likely that they will be subject to a charge of whistleblower reprisal every time that they take an adverse personnel action, they inevitably would be deterred from taking any such action. This chilling effect would impede not only the effectiveness of Federal managers, but also have a serious detrimental impact upon the morale of good employees. Studies demonstrate that one of the most important factors impacting upon employee morale is the existence of poorly performing employees and the difficulty that managers face in addressing those problems. This bill would exacerbate those problems.

Perhaps most importantly, the very low standards that would be required under this bill to make a whistleblower claim would vastly increase the number of such claims and create costly inefficiencies. The flood of new whistleblowers would obscure the claims of legitimate whistleblowers, burdening the Office of Special Counsel, and the MSPB, and ultimately delaying relief to

those who may be entitled to it. This would not be an improvement upon the Civil Service Reform Act and the Whistleblower Protection Act, but a step backwards.

III. Security Clearances

S. 1358 contains three significant provisions regarding security clearances. First, subsection 1(e)(1) of the bill would amend 5 U.S.C. § 2302(a)(2)(A) to add "a suspension, revocation, or other determination relating to a security clearance," to the definition of a personnel practice. Second, section 1(e)(2) (adding a new subparagraph (14) to 5 U.S.C. § 2302(b)) would amend the definition of prohibited personnel practices to include "conduct[ing] or caus[ing] to be conducted, an investigation of an employee or applicant for employment because of any activity protected under this section." Third, subsection 1(e)(3) of the bill would authorize the MSPB and the courts to review these security clearance decisions to determine whether a violation of 5 U.S.C. § 2302 (prohibited personnel practices) had occurred and, if so, to order certain relief.

We strongly oppose these amendments because they would authorize the MSPB and the courts to review any determination relating to a security clearance – a prerogative left firmly within the Executive branch's discretion. In *Egan v. Department of the Navy*, 484 U.S. 518 (1988), the Supreme Court explicitly rejected the proposition that the MSPB and the Federal Circuit

could review the decision to revoke a security clearance. In doing so, the Court relied upon a number of premises, including: 1) that decisions regarding security clearances are inherently discretionary and are best left to the security specialists rather than non-expert bodies such as the MSPB and the courts; 2) that review under the CSRA, which provides for a preponderance of the evidence standard, conflicts with the requirement that a security clearance should be given only when clearly consistent with the interests of the national security; and 3) that the President's exclusive power to make security clearance determinations is based on his constitutional role as Commander-in-Chief.

An example demonstrates one of the many fundamental problems with this bill's security clearance provisions. As noted above, the burden of proof in CSRA cases is fundamentally incompatible with the standard for granting security clearances. This conflict is even more apparent in whistleblower cases. Under the WPA, a putative whistleblower establishes a *prima facie* case of whistleblower retaliation by establishing a protected disclosure and, under the knowledge/timing test, a personnel action taken within a certain period of time following the disclosure. Once the employee meets that minimal burden, the burden shifts to the agency to establish *by clear and convincing evidence* that it would have taken the action absent the protected disclosure.

Therefore, the bill would require in the security clearance context, that when individuals make protected disclosures (which, as explained above, would include virtually every Federal employee under other provisions of this bill), the agency must justify its security clearance decision by the stringent standard of clear and convincing evidence. Thus, rather than awarding security clearances only when clearly consistent with the interests of national security, agencies would be penalized for denying or revoking them unless they could affirmatively justify their decision upon the basis of clear and convincing evidence. This standard would be shockingly inconsistent with national security, especially in these times of heightened security concerns.

Section 1(e)(3) of the bill contains language stating that the MSPB or any reviewing court "may not order the President to restore a security clearance." While this language may be intended to alleviate concerns about the Executive Branch prerogative with regard to security clearance determinations, it does not. The vague language of section 1(e)(3) is troublesome because it states only that the MSPB cannot order the "President" to "restore" a security clearance. Thus, the provision could be read to permit the MSPB to order an agency head or lower ranking agency official to restore the security official. Likewise, because the prohibition only prohibits restoration of a security

clearance, it could be read to permit the MSPB to award an initial clearance, to order an upgrade, or to stop an investigation.

More importantly, even if this interpretation were obviated by clarifying language, the MSPB still could order back pay, damages, or even reinstatement to a position not requiring a security clearance. These types of remedies and the burden they would place upon the agencies likely would impose a substantial chilling effect upon decisions regarding security clearances. If the agency official knows that the agency might be required to pay damages or place an employee in a new position if the security decision is judged to be incorrect by the MSPB, that possibiliy inevitably would be considered in making the security clearance decision, even though the only appropriate and permissible basis for the decision is whether the award of the security clearance is clearly consistent with the interests of national security. The chilling effect that would result from this provision is flatly inconsistent with national security concerns.

The bill also would allow individuals to make unauthorized disclosures of classified information to Members of Congress and their staff who possess security clearance. We strongly oppose these provisions because it interferes with the Executive Branch's constitutional responsibility to control and protect

information relating to national security. We are concerned not only with the Executive Branch's prerogative to determine which individuals are authorized to receive classified information, but, just as importantly, whether those individuals have a "need to know" specific types of classified information. As the Committee is aware, there are different types of classified information, requiring different levels of security clearances. Moreover, even individuals with the appropriate clearances do not automatically have access to all information classified at that level. Rather, the appropriate authorities within the Executive Branch make determinations upon a case by case basis about which individuals have a need to know certain classified information. It cannot be overemphasized that every high ranking Government official who has a security clearance and works in the national security field is granted access to only a tiny fraction of our Nation's classified information and, even then, only on a need-to-know basis. This bill would encourage the disclosure of classified information outside of those specifically compartmentalized channels. Such disclosures, even when made to trustworthy individuals, cause serious national security concerns.

Beyond these objections, the amendments are simply unnecessary. Currently, Executive Order 12968 requires all agencies to establish an internal review board to consider

appeals of security clearance revocations. These internal boards provide sufficient protections for the subjects of the revocations, while, at the same time, preserving the authority of the Executive branch to make the necessary decisions. The members of such an employee appeal panel do not include the direct supervisor so it is unlikely that retaliation would be encountered at this stage.

The bill's proposed reform in the area of security clearances is a solution in search of a problem. We are not aware of any pattern of abusing security clearance decisions to retaliate against whistleblowers that should prompt Congress to seek to enact subsections 1(e)(1) and 1(e)(3), which are potentially unconstitutional and are certainly bad policy.

IV. Judicial Review

We also object to the bill's proposal to provide for review of MSPB decisions by the regional courts of appeal, rather than the Federal Circuit. Review by the Federal Circuit promotes conformity in decisions and fosters uniformity in Federal personnel law. Granting the regional circuits jurisdiction to entertain appeals from the MSPB would undo Congress's sensible centralization of those appeals and add more work to those already overburdened regional courts of appeal. Moreover, it would add substantially to the Federal Government's cost of complying with the law.

Since the enactment of the Federal Courts Improvement Act of 1982, the Federal Circuit has exercised exclusive jurisdiction to consider appeals from the MSPB in cases not involving discrimination. In those years, the court has developed substantial expertise and a well-defined body of law regarding Federal personnel matters that inures to the benefit of both the Federal Government and its employees. Moreover, the court's rules, which provide for more expedited and informal briefing in pro se cases provide an added benefit for Federal employees, many of whom choose to appeal the MSPB's decisions without the aid of an attorney.

Replacing the Federal Circuit's exclusive jurisdiction with review by the regional circuits would result in a fractured personnel system. Inevitably, conflicts among the circuits would arise as to the proper interpretation of the Federal personnel laws so that an employee's rights and responsibilities would be determined by the geographic location of his or her place of employment. The change also could prompt confusion for employees transferred to duty stations in different circuits. Not only is such a non-uniform system undesirable, it could contribute to a loss of morale as Federal employees are treated differently depending upon where they live. It also would inevitably require the Supreme Court to intervene more often in Federal personnel matters to resolve inconsistencies among the circuits.

The CSRA and the Federal Courts Improvement Act resolved the problems of regional review. Considering the Federal Circuit's now substantial expertise, there is simply no good reason to revert to the old system.

V. Litigating Authority for the Special Counsel

The Department also opposes the bill's proposed changes in the authority of the Office of Special Counsel to prosecute appeals and to represent itself in litigation. The bill would expand the authority of the Office of Special Counsel, which is currently limited to the right to appear before the MSPB, by authorizing the Special Counsel unilaterally to seek review in the United States Court of Appeals for the Federal Circuit in any case to which she was a party and to grant the Special Counsel the authority to designate attorneys to appear upon her behalf in all courts except the Supreme Court. Proposed 5 U.S.C. § 1212(h) and § 7703(e).

Under current law, employees who are adversely affected by a decision of the MSPB possess the right to appeal to the Court of Appeals for the Federal Circuit. 5 U.S.C. § 7703(a). The Department of Justice represents the respondent Federal agencies in these appeals.

Federal employing agencies do not possess the same right to appeal MSPB decisions which are adverse to them. The Office of Personnel Management is the only Government agency which may

seek to appeal an MSPB decision and it may do so only after it has intervened in the MSPB proceeding to present its position and only after its Director has made a determination that an MSPB decision rejecting OPM's position will have a "substantial impact" upon the administration of the civil service law. 5 U.S.C. § 7703(d). Moreover, once the Director makes such an determination, OPM must seek authorization from the Solicitor General to file a petition for review which the Federal Circuit possesses discretion to grant or deny. OPM is represented in the Federal Circuit by the Department of Justice.

The bill would disrupt this carefully crafted scheme by authorizing the Special Counsel, without approval of the Solicitor General, to petition the Federal Circuit for leave to appeal any adverse MSPB decision. The only limitation the bill would place upon this right is to require the Special Counsel to petition the MSPB for reconsideration of its decision if he was not a party or intervenor in the matter before the MSPB.

The bill would further erode centralized control over personnel litigation by authorizing the office of the Special Counsel to represent itself in all litigation except litigation before the Supreme Court. This authority would be contrary to the Department of Justice's longstanding role as the centralized coordinator of the Government's litigation positions. Moreover,

it could result in the Special Counsel litigating against other Executive Branch agencies.

The disruption of centralized control that would be caused by granting independent litigating authority to the Special Counsel is undesirable. 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 inimical to the interests of the Government as a whole, and the facilitation of presidential supervision over Executive Branch policies implicated in Government litigation. This policy benefits not only the Government but also the courts and citizens who, in the absence of the policy, might be subjected to uncoordinated and inconsistent positions on the part of the Government.

Conclusion

The WPA already provides the necessary protections for legitimate whistleblowers. This bill would not enhance those protections in any useful way but, rather, it would simply increase the number of frivolous claims and place a tremendous strain upon the entire Federal personnel system. The processing of those frivolous claims would adversely affect Federal managers, the MSPB, the Federal Circuit and, ultimately, those

legitimate whistleblowers whose claims would take longer to be heard.

The proposed protection for unauthorized disclosure of classified information is also troubling because it intrudes upon the President's constitutional power to control the flow of classified information. As a practical matter, it also would vitiate well-established safeguards for limiting the dissemination of sensitive information, even among those who hold security clearances.

Finally, the proposals to change the system of judicial review of MSPB decisions and to expand the authority of the Office of Special Counsel would unnecessarily disturb a system that is working well.

To repeat, the Department is strongly committed to the protection of whistleblowers. We believe that the current law strikes the appropriate balance by affording protection to legitimate whistleblowers while preserving a process within which the agencies can respond effectively to poorly performing employees. This proposal would turn that system upside down and, in addition to its constitutional flaws, significantly impair the ability of agencies to effectively manage the Federal work force. We oppose this as a fundamentally flawed proposal, which is unnecessary, burdensome, and, in part, potentially unconstitutional.

Thank you for your consideration of our views. I would be happy to respond to your questions.