

## STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

### Excerpted from Congressional Record, June 7, 2001 (Senate)

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By Mr. AKAKA (for himself, Mr. Levin, and Mr. Grassley): S. 995. A bill to amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in non-disclosure policies, forms, and agreements that such policies, forms and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes; to the Committee on Governmental Affairs.

Mr. AKAKA. Mr. President, today I am introducing amendments to the Whistleblower Protection Act, WPA, that will strengthen protections for federal employees who disclose waste, fraud, and abuse. I am proud to be joined by Senators Levin and Grassley, two of the Senate's leaders in protecting employees from retaliatory actions. The Senators from Michigan and Iowa were the primary sponsors of the original 1989 Act, as well as the 1994 amendments, both of which were passed unanimously by Congress.

One of the basic obligations of public service is to disclose waste, fraud, abuse, and corruption to appropriate authorities. The WPA was intended to protect federal employees, those often closest to wrongdoing, from workplace retaliation as a result of making such disclosures. The right of federal employees to be free from workplace retaliation, however, has been diminished by a pattern of court rulings that have narrowly defined who qualifies as a whistleblower under the WPA, and what statements are considered protected disclosures. These rulings are inconsistent with congressional intent. There is little incentive for federal employees to come forward because doing so could put their careers at substantial risk.

The bill we introduce today will restore congressional intent regarding who is entitled to relief under the WPA, and what disclosures are protected. In addition, it codifies certain anti-gag rules, extends independent litigating authority to the Office of Special Counsel, OSC, and ends the sole jurisdiction of the United States Court of Appeals for the Federal Circuit over whistleblower cases.

In the Civil Service Reform Act of 1978, CSRA, Congress included statutory whistleblower rights for "a" disclosure evidencing a reasonable belief of specified misconduct, with certain listed statutory exceptions--classified or other information whose release was specifically barred by other statutes. Unexpectedly, the court and administrative agencies created several loopholes that limited employee protections. With the WPA, Congress closed these loopholes by changing protection of "a" disclosure to "any" disclosure meeting the law's standards. However, in both formal and informal interpretations of the Act, loopholes continued to proliferate.

Congress strengthened its scope and protections by passing 1994 amendments to the

WPA. The Governmental Affairs Committee report on the 1994 amendments refuted prior interpretations by the Federal Circuit and the Merit Systems Protection Board, MSPB, as well as subsequent enforcement action by the Office of Special Counsel that there were exceptions to “any.” The Committee report concluded, “The plain language of the Whistleblower Protection Act extends to retaliation for ‘any disclosure,’ regardless of the setting of the disclosure, the form of the disclosure, or the person to whom the disclosure is made.” Since the 1994 amendments, both OSC and MSPB generally have honored congressional boundaries. However, the Federal Circuit continues to disregard clear statutory language that the Act covers disclosures such as those made to supervisors, to possible wrongdoers, or as part of an employee's job duties.

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In order to protect the statute's foundation that “any” lawful disclosure that the employee or applicant reasonably believes is credible evidence of waste, fraud, abuse, or gross mismanagement is covered by the WPA, our bill codifies the repeated and unconditional statements of congressional intent and legislative history. It amends sections 2302(b)(8)(A) and 2302(b)(8)(B) of title 5, U.S.C., to cover any disclosure of information “without restriction to time, place, form, motive or 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 is credible evidence of” any violation of any law, rule, or regulation, or other misconduct specified in section 2302(b)(8).

The bill also codifies an “anti-gag” provision that Congress has passed annually since 1988 as part of the appropriations process. It bans agencies from implementing or enforcing any nondisclosure policy, form or agreement that does not contain specified language preserving open government statutes such as the WPA, the Military Whistleblower Protection Act, and the Lloyd Lafollette Act, which prohibits discrimination against government employees who communicate with Congress. Gag orders imposed as a precondition for employment and resolution of disputes, as well as general agency policies barring employees from communicating directly with Congress or the public, are a prior restraint that not only has a severe chilling effect, but strikes at the heart of this body's ability to perform its oversight duties. Congress repeatedly has reaffirmed its intent that employees should not be forced to sign agreements that supercede an employee's rights under good government statutes. Moreover, Congress unanimously has supported the concept that federal employees should not be subject to prior restraint from disclosing wrongdoing nor suffer retaliation for speaking out.

The measure also provides the Special Counsel with greater litigating authority for merit system principles that the office is responsible to protect. Under current law, the OSC plays a central role as public prosecutor in cases before the MSPB, but cannot choose to defend the merit system in court. Our legislation recognizes that providing the Special Counsel this authority to seek such review, in precedential cases, is crucial to ensuring the promotion of the public interests furthered by these statutes.

Lastly, the bill would end the Federal Circuit's monopoly over whistleblower cases by allowing appeals to be filed in the Federal Circuit or the circuit in which the petitioner resides. This restores normal judicial review, and provides employees in states such as my home state of Hawaii, the option of a more convenient forum, rather than necessitating a 10,000 mile round trip from Hawaii to Washington, D.C.

This bill will begin the needed dialogue to guarantee that any disclosures within the boundaries of the statutory language are protected. As the Chairman of the Federal Services Subcommittee, I plan to hold a hearing on the Whistleblower Protection Act and the amendments we are proposing today.

Protection of Federal whistleblowers is a bipartisan effort. Enactment of the original bill in 1989 and the 1994 amendments enjoyed unanimous bicameral support, and I am pleased that Representatives Morella and Gilman will introduce identical legislation in the House of Representatives in the near future. I also wish to note that our bill enjoys the strong support of the Government Accountability Project and the National Whistleblower Center, and I commend both of these organizations for their efforts in protecting the public interest and promoting government accountability by defending whistleblowers. I urge my colleagues to join in the effort to ensure that the congressional intent embodied in the Whistleblower Protection Act is codified and that the law is not weakened further. I ask unanimous consent that letters in support of our bill from the National Whistleblower Center and the Government Accountability Project and the text of the bill be printed in the Record. There being no objection, the material was ordered to be printed in the Record, as follows:

### **S. 995**

Be it enacted by the Senate and House of Representatives of  
the United States of America in Congress assembled,  
SECTION 1. PROTECTION OF CERTAIN DISCLOSURES OF INFORMATION BY  
FEDERAL EMPLOYEES.

(a) Clarification of Disclosures Covered.--Section 2302(b)(8) of title 5, United States Code, is amended--(1) in subparagraph (A)--(A) by striking "which the employee or applicant reasonably believes evidences" and inserting, "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 is credible evidence of"; and (B) in clause (i), by striking "a violation" and inserting "any violation"; (2) in subparagraph (B)--(A) by striking "which the employee or applicant reasonably believes evidences" and inserting, "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 to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information that the employee or applicant reasonably believes is credible evidence of"; and (B) in clause (i), by striking "a violation" and

inserting “any violation”; and (3) by adding at the end the following: “(C) a disclosure that—“(i) is made by an employee or applicant of information required by law or Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs that the employee or applicant reasonably believes is credible evidence of--

“(I) any violation of any law, rule, or regulation; “(II) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or “(III) a false statement to Congress on an issue of material fact; and

“(ii) is made to--

“(I) a member of a committee of Congress having a primary responsibility for oversight of a department, agency, or element of the Federal Government to which the disclosed information relates”; (II) any other Member of Congress who is authorized to receive information of the type disclosed; or “(III) an employee of the executive branch or Congress who has the appropriate security clearance for access to the information disclosed.”

(b) Covered Disclosures.--Section 2302(b) of title 5, United States Code, is amended-- (1) in the matter following paragraph (12), by striking “This subsection” and inserting the following: “This subsection”; and (2) by adding at the end the following: “In this subsection, the term ‘disclosure’ means a formal or informal communication or transmission.” (c) Nondisclosure Policies, Forms, and Agreements.--(1) Personnel action.--Section 2302(a)(2)(A) of title 5, United States Code, is amended--(A) in clause (x), by striking “and” after the semicolon; and (B) by redesignating clause (xi) as clause (xii) and inserting after clause (x) the following: “(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and” (2) Prohibited personnel practice.--Section 2302(b) of title 5, United States Code, is amended-- (A) in paragraph (11), by striking “or” at the end; (B) in paragraph (12), by striking the period and inserting “or”; and (C) by inserting after paragraph (12) the following: “(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: “These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Code (governing disclosures of illegality, waste, fraud, abuse, or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosures that could compromise national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by such Executive order and such statutory provisions are incorporated into this agreement and are controlling.” (d) Authority of Special Counsel

Relating to Civil Actions.--

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(1) Representation of special counsel.--Section 1212 of title 5, United States Code, is amended by adding at the end the following: "(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Special Counsel may appear for the Special Counsel and represent the Special Counsel in any civil action brought in connection with section 2302(b)(8) or subchapter III of chapter 73, or as otherwise authorized by law." (2) Judicial review of merit systems protection board decisions.--Section 7703 of title 5, United States Code, is amended by adding at the end the following: "(e) The Special Counsel may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Special Counsel determines, in the discretion of the Special Counsel, that the Board erred in deciding a case arising under section 2302(b)(8) or subchapter III of chapter 73 and that the Board's decision will have a substantial impact on the enforcement of section 2302(b)(8) or subchapter III of chapter 73. If the Special Counsel was not a party or did not intervene in a matter before the Board, the Special Counsel may not petition for review of a Board decision under this section unless the Special Counsel first petitions the Board for reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceedings before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals. "(e) Judicial Review.--Section 7703 of title 5, United States Code, is amended--(1) in the first sentence of subsection (b)(1) by inserting before the period "or the United States court of appeals for the circuit in which the petitioner resides"; and (2) in subsection (d)--(A) in the first sentence by striking "the United States Court of Appeals for the Federal Circuit" and inserting "any appellate court of competent jurisdiction as provided under subsection (b)(2)"; and (B) in the third and fourth sentences by striking "Court of Appeals" each place it appears and inserting "court of appeals" in each such place.

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**National Whistleblower Center,**

Washington, DC, June 6, 2001.

Hon. Daniel K. Akaka,  
Chairman, Subcommittee on International Security,  
Proliferation, and Federal Services, U.S. Senate,  
Washington, DC.

Dear Mr. Chairman: The National Whistleblower Center is pleased to announce its support for your bill to update and strengthen the Whistleblower Protection Act (WPA).

We would like to commend your leadership in introducing this significant and important legislation.

The National Whistleblower Center was established because of the critical role that credible whistleblowers play in the effective functioning of our system of checks and balances. Despite this critical role, federal whistleblowers have not always enjoyed the same rights as other citizens. The Center has therefore maintained an on-going vigilance and commitment to preserving the integrity of the whistleblower process.

In recent years, protections for whistleblowers have eroded. This is mainly due to recent decisions in cases before the U.S. Court of Appeals for the Federal Circuit, which presently holds a monopoly on appeals under the WPA. The Center is therefore enthusiastic in its support of the provision in your bill that offers employees an additional venue for appeals.

Your bill would also codify so-called “anti-gag” language that has been included each year for the past twelve years in appropriations bills. The language has been needed to avoid ambiguity in the government's efforts to prevent improper disclosures of information. The ambiguity created a chilling effect for employees who otherwise had the right to make proper disclosures to Congress and elsewhere. This provision would clear a major hurdle in protecting the rights of employees to disclose instances of wrongdoing by government officials.

The Center is concerned that, in the larger picture, improvements in the whistleblower protection system require more fundamental changes. For instance, there should be tougher provisions to hold accountable those managers who retaliate against whistleblowers. In addition, those who bring their cases under laws other than the WPA have had much greater success. This is in part because of adverse decisions by the Federal Circuit, but it also suggests that the WPA is not as whistleblower-friendly in practice as we hoped it would be when we passed and amended the WPA. These are issues to be addressed down the road, and the Center would be happy to provide you the benefit of our experience in these matters.

Nonetheless, your bill, if passed, would make an important and necessary contribution toward improvements in the protection of whistleblowers under the WPA. Again, we commend your leadership in the introduction of this bill, and we look forward to working with you and your co-sponsors during the hearing process and throughout the legislative process.

Sincerely, Kris J. Kolesnik, Executive Director.

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**Government Accountability Project,**

Washington, DC, June 7, 2001.

Hon. Daniel K. Akaka, Chairman, Subcommittee on International Security, Proliferation and Federal Services, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Government Accountability Project (GAP) commends your leadership in sponsoring legislation to revive and strengthen the Whistleblower Protection Act (WPA). This is the primary civil service law applying merit system rights to good government safeguards. Your initiative is indispensable to restore legitimacy for the law's unanimous congressional mandate, both in 1989 when it was passed originally and in 1994 when it was unanimously strengthened. We similarly appreciate the partnership of original cosponsors Senators Levin and Grassley. They remain visible leaders from the pioneer campaigns that earned this legislative mandate.

GAP is a non-partisan, non-profit public interest organization whose mission is supporting whistleblowers, those employees who exercise free speech rights to challenge betrayals of the public trust about which they learn on the job. We advocated initial passage of whistleblower rights as part of the Civil Service Reform Act of 1978, and have led outside campaigns for passage of the WPA, as well as analogous laws for military service members, state, municipal and corporate employees in industries ranging from airlines to nuclear energy. Last year GAP drafted a model whistleblower law approved by the Organization of American States (OAS) for implementation of the Inter-American Convention Against Corruption.

Unfortunately, your leadership is a necessity for the Act to regain legitimacy. In 1994 on paper it reflected the state of the art for whistleblower rights. Despite pride in helping to win its passage, GAP now must warn those seeking help that the law is more likely to undermine than reinforce their rights. This is because the Federal Circuit Court of Appeals, which has a monopoly on appellate judicial review, has functionally erased basic statutory language and implicitly added new provisions that threaten those seeking help. Your legislation both solves the specific problems, and includes structural reform to prevent their recurrence by restoring normal judicial review. Congress had to approve both the 1989 and 1994 legislation to cancel previous instances of judicial activism by this same court. This pattern must end for the law again to become functional.

Your bill also incorporates an appropriations rider approved for the last 13 years, known as the "anti-gag statute." This provision requires agencies to notify employees that any restrictions on disclosures do not override their rights under the WPA, or other open government laws such as the Lloyd Lafollette Act protecting communications with Congress. The rider has worked. It has proven effective and practical against agency attempts to impose secrecy through orders or nondisclosure agreements that cancel Congress and the public's right to know. It is time to institutionalize this success story.

Even if implemented as intended, the 1989 and 1994 legislation was a beginning, rather than a panacea. More work is necessary to disrupt the deeply ingrained tradition of

harassing whistleblowers. Based on our experience, issues such as the following must be addressed for the law to fulfill its promise--closing the ``security clearance loophole" that permits merit system rights to be circumvented through removing clearances that are a condition for employment; providing meaningful relief for those who win their cases; preventing retaliation by creating personal accountability for those who violate the merit system; and giving whistleblowers access to jury trials to enforce their rights.

Your legislation is a reasonable and essential first step on the road to recovery for whistleblower rights in the merit system. It sends a clear message that congress was serious when it passed this law in 1989 and strengthened it in 1994. Congressional persistence is a prerequisite for those who defend the public to have a decent chance of defending themselves. We look forward to working with you and your co- sponsors in passing this legislation.

Sincerely,

Tom Devine, Legal Director.

Doug Hartnett, National Security Director.

Mr. LEVIN. Mr. President, I am pleased to join Senators Akaka and Grassley today in sponsoring amendments to the Whistleblower Protection Act that will strengthen the law protecting employees who blow the whistle on fraud, waste, and abuse in federal programs. I sponsored the Whistleblower Protection Act in 1989 which strengthened and clarified the intent of whistleblower rights in the merit system. But recent holdings by the United States Court of Appeals for the Federal Circuit have corrupted the intent of Congress, with the result that additional clarifying language is sorely needed. The Federal Circuit has seriously misinterpreted key provisions of the whistleblower law, and the bill we are introducing today is intended to correct those misinterpretations.

Congress has long recognized the obligation we have to protect a Federal

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employee when he or she discloses evidence of wrongdoing in a Federal program. If an employee reasonably believes that a fraud or mismanagement is occurring, and that employee has the courage and the sense of responsibility to make that fraud or mismanagement known, it is our duty to protect the employee from any reprisal. We want Federal employees to identify problems in our programs so we can fix them, and if they fear reprisal for doing so, then we are not only failing to protect the whistleblower, but we are also failing to protect the taxpayer. We need to encourage, not discourage, disclosures of fraud, waste and abuse.

Today, however, the effect of the Federal Circuit decisions is to discourage the Federal employee whistleblower and overturn Congressional intent. The Federal Circuit has

misinterpreted the plain language of the law on what constitutes protected disclosure under the Whistleblower Protection Act. Most notably, in the case of Lachance versus White, decided on May 14, 1999, the Federal Circuit imposed an unfounded and virtually unattainable standard on Federal employee whistleblowers in proving their cases. In that case, John E. White was an education specialist for the Air Force who spoke out against a new educational system that purported to mandate quality standards for schools contracting with the Air Force bases. White criticized the new system as counterproductive because it was too burdensome and seriously reduced the education opportunities available on base. After making these criticisms, local agency officials reassigned White, removing his duties and allegedly isolating him. However, after an independent management review supported White's concerns, the Air Force canceled the program White had criticized. White appealed the reassignment in 1992 and the case has been in litigation ever since.

The administrative judge initially dismissed White's case, finding that his disclosures were not protected by the Whistleblower Protection Act. The MSPB, however, reversed the administrative judge's decision and remanded it back to the administrative judge holding that since White disclosed information he reasonably believed evidenced gross mismanagement, this disclosure was protected under the Act. On remand, the administrative judge found that the Air Force had violated the Whistleblower Protection Act and ordered the Air Force to return White to his prior status; the MSPB affirmed the decision of the administrative judge. OPM petitioned the Federal Circuit for a review of the board's decision. The Federal Circuit reversed the MSPB's decision, holding that there was not adequate evidence to support a violation under the Whistleblower Protection Act. The Federal Circuit held that the evidence that White was a specialist on the subject at issue and aware of the alleged improper activities and that his belief was shared by other employees was not sufficient to meet the "reasonable belief" test in the law. The court held that "the board must look for evidence that it was reasonable to believe that the disclosures revealed misbehavior [by the Air Force] . . ." The court went on to say:

In this case, review of the Air Force's policy and implementation via the QES standards might well show them to be entirely appropriate, even if not the best option. Indeed, this review would start out with a "presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations. . . . And this presumption stands unless there is 'irrefragable proof to the contrary'."

The fact that the Federal Circuit remanded the case to the MSPB to have the MSPB reconsider whether it was reasonable to believe that what the Air Force did in this case involved gross mismanagement was appropriate. But, the Federal Circuit went on to impose a clearly erroneous and excessive standard on the employee in proving "reasonable belief," requiring "irrefragable" proof that there was gross mismanagement. Irrefragable means "undeniable, incontestable, incontrovertible, incapable of being overthrown." How can a Federal employee meet a standard of "irrefragable" in proving gross mismanagement? Moreover, there is nothing in the law or the legislative history that even suggests such a standard with respect to the Whistleblower Protection Act. The intent of the law is not for the employee to act as an investigator and compile

evidence to have “irrefragable” proof that there is fraud, waste or abuse. The employee, under the clear language of the statute, need only have “a reasonable belief” that there is fraud, waste or abuse occurring before making a protected disclosure. This bill will clarify the law so this misinterpretation will not happen again.

The bill addresses a number of other important issues as well. For example, the bill adds a provision to the Whistleblower Protection Act that provides specific protection to a whistleblower who discloses evidence of fraud, waste, and abuse involving classified information if that disclosure is made to the appropriate committee of Congress or Federal executive branch employee authorized to receive the classified information.

In closing, I want to thank Senator Akaka for his leadership in this area.

Mr. GRASSLEY. Mr. President, I rise with determination to join Senators Akaka and Levin introducing legislation on an issue that should concern us all: the integrity of the Whistleblower Protection Act of 1989. I enclose editorials and op-ed commentaries, ranging from the New York Times to the Washington Times highlighting the needs for this law to be reborn so that it achieves its potential for public service. Unfortunately, it has become a Trojan horse that may well be creating more reprisal victims than it protects. The impact for taxpayers could be to increase silent observers who passively conceal fraud, waste and abuse. That is unacceptable.

I was proud to be an original co-sponsor of this law when it was passed unanimously by Congress in 1989, and when it was unanimously strengthened in 1994. Both were largely passed to overturn a series of hostile decisions by administrative agencies and an activist court with a monopoly on the statute's judicial review, the Federal Circuit Court of Appeals. The administrative agencies, the U.S. Office of Special Counsel and the Merit Systems Protection Board, appear to have gotten the point. They have been operating largely within statutory boundaries. Despite the repeated unanimous congressional mandates, however, the Federal Circuit has stepped up its attacks on the Whistleblower Protection Act. Enough is enough.

The legislation we are introducing today has four cornerstones, closing loopholes in the scope of WPA protection; restoring a realistic test for when reprisal protection is warranted; restoring the normal structure for judicial review; and codifying the anti-gag statute passed as an appropriations rider for the last 13 years. Each is summarized below.

As part of 1994 amendments unanimously passed by Congress to strengthen the Act, the legislative history emphasized, “[I]t also is not possible to further clarify the clear language in section 2302(b)(8) that protection for ‘any’ whistleblowing disclosure truly means ‘any.’ A protected disclosure may be made as part of an employee's job duties, may concern policy or individual misconduct, and may be oral or written and to any audience inside or outside the agency, without restriction to time, place, motive or content.”

Somehow the Federal Circuit did not hear our unanimous voice. Without commenting on numerous committee reports and floor statements emphasizing this cornerstone, it has been creating new loopholes at an accelerated pace. Its precedents have shrunk the scope of protected whistleblowing to exclude disclosures made as part of an employee's job duties, to a co-worker, boss, others up the chain of command, or even the suspected wrongdoer to check facts. Under these judicial loopholes, the law does not cover agency misconduct with the largest impact, policies that institutionalize illegality or waste and mismanagement. Last December it renewed a pre-WPA loophole that Congress has specifically outlawed. The court decreed that the law only covers the first person to place evidence of given misconduct on the record, excluding those who challenge long term abuses, witnesses whose testimony supports pioneer whistleblowers, or anyone who is not the Christopher Columbus for any given scandal.

There is no legal basis for any of these loopholes. None of these loopholes came from Congress. In fact, all

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contradict express congressional intent. Since 1978, the point of Federal whistleblower protection has been to give agencies the first crack at cleaning their own houses. These loopholes force them to either remain silent, sacrifice their rights, or go behind the back of institutions and individuals if they want to preserve their rights when challenging perceived misconduct. They proceed at their own risk if they exercise their professional expertise to challenge problems on the job. They can only challenge anecdotal misconduct on a personal level, rather than institutionalized.

Our legislation addresses the problem by codifying the congressional "no exceptions" definition for lawful, significant disclosures. The legislation also reaffirms the right of whistleblowers to disclose classified information about wrongdoing to Congress. National security secrecy must not cancel Congress' right to know about betrayals of the public trust.

In a 1999 decision, the Federal Circuit functionally overturned the standard by which whistleblowers demonstrate their disclosures deserve protection: lawful disclosures which evidence a "reasonable belief" of specific misconduct. Congress did not change this standard in 1989 or 1994 for a simple reason: it has worked by setting a fair balance to protect responsible exercises of free speech. Ultimate proof of misconduct has never been a prerequisite for protection. Summarized in lay terms, "reasonable belief" has meant that if information would be accepted for the record of related litigation, government investigations or enforcement actions, it is illegal to fire the employee who bears witness by contributing that evidence.

That realistic test no longer exists. In *Lachance v. White*, the Federal Circuit overturned the victory of an Air Force education specialist challenging a pork barrel program whose concerns were so valid that after an independent management review, the Air Force agreed and canceled the program. Unfortunately, local base officials held a grudge,

reassigning Mr. White and stripping him of his duties. He appealed under the WPA and won before the Merit Systems Protection Board. The Federal Circuit, however, held that he did not demonstrate a “reasonable belief” and sent the case back. That raises questions on its face, since agencies seldom agree with whistleblowers.

The court accomplished this result disingenuously. While endorsing the existing standard, it added another hurdle. It held that to have a reasonable belief, an employee must overcome the presumption that the government acts fairly, lawfully, properly and in good faith. They must do so by “irrefragable” proof. The dictionary defines “irrefragable” as “uncontestable, incontrovertible, undeniable, or incapable of being overthrown.” The bottom line is that, in the absence of a confession, there is no such thing as a reasonable belief. If there is no disagreement about alleged misconduct, there is no need for whistleblowers.

The court even added a routine threat for employees asserting their rights. Although Congress has repeatedly warned that motives are irrelevant to assess protected speech, the court ordered the MSPB to conduct factfinding for anyone filing a whistleblower reprisal claim, to check if the employee had a conflict of interest for disclosing alleged misconduct in the first place. This means that while whistleblowers have almost no chance of prevailing, they are guaranteed to be placed under investigation for challenging harassment. Ironically, in 1994 Congress outlawed retaliatory investigations, which have now been institutionalized by the court.

In the aftermath, whistleblower support groups like the Government Accountability Project must warn those seeking guidance that if they assert rights, they will be placed under investigation and any eventual legal ruling on the merits inevitably will conclude they deserve punishment and formally endorse the retaliation they suffered. The White case is a decisive reason for those who witness fraud, waste and abuse to remain silent, instead of speaking out. Profiles in Courage are the exception, rather than the rule. Our legislation ends the presumptions of “irrefragable proof” and protects any reasonable belief as demonstrated by credible evidence.

This is the third time Congress has had to reenact a unanimous good government mandate thrown out by the Federal Circuit. This is also three strikes for the Federal Circuit's monopoly authority to interpret, and repeatedly veto, this law. It is time to end the broken record syndrome.

The Civil Service Reform Act of 1978 contained normal “all circuits” court of appeals judicial review under the Administrative Procedures Act. This was the same structure as all other employment anti-reprisal or anti-discrimination statutes. In 1982, the Federal Circuit was created, with a unique monopoly on appellate review of civil service, patent and copyright, and International Trade Commission decisions. Unfortunately, this experiment has failed. Our amendment restores the normal process of balanced review. Hopefully, that will restore normal respect for the legislative process.

In 1988, I was proud to introduce an appropriations rider to the Treasury, Postal and

General Government bill which has been referred to as the “anti-gag statute.” It has survived constitutional challenge through the Supreme Court, and been unanimously approved in each of the last 13 appropriations bills. This provision makes it illegal to enforce agency nondisclosure policies or agreements unless there is a specific, express addendum informing employees that the disclosure restrictions do not override their right to communicate with Congress under the Lloyd Lafollette Act or other good government laws such as the Whistleblower Protection Act.

The provision originally was in response to a new, open-ended concept called “classifiable.” That term was defined as any information that “could or should have been classified,” or “virtually anything,” even if it were not market secret. This effectively ended anonymous whistleblowing disclosures, imposed blanket prior restraint, and legalized after-the-fact classification as a device to cover up fraud or misconduct. Since employees no longer were entitled to prior notice that information was secret, the only way they could act safely was a prior inquiry to the agency whether information was classified. That was a neat structure to lock in secrecy when its only purpose is to thwart congressional or public oversight. I am proud that the anti-gag statute has worked, and the strange concept of “classifiable” is history. After 13 years and over 6,000 individual congressional votes without dissent, it is time to institutionalize this merit system principle.

It should be beyond debate that the price of liberty is eternal vigilance. I want to recognize the efforts of those whose stamina defending freedom of speech has applied that principle in practice. Senator Levin has been my Senate partner from the beginning of legislative initiatives on this issue. His leadership has proved that whistleblower protection is not an issue reserved for conservatives or liberals, Democrats or Republicans. Like the First Amendment, whistleblower protection is a cornerstone right for Americans.

Nongovernmental organizations have made significant contributions as well. The Government Accountability Project, a non-profit, non-partisan whistleblower support group, has been a relentless watchdog of merit system whistleblower rights since they were created by statute in 1978. Thanks to GAP, my staff has not been taken by surprise as judicial activism threatened this good government law. Kris Kolesnick, formerly with my staff and now with the National Whistleblower Center, worked on the original legislation while on my staff and continues to work in partnership with me.

In the decade since Congress unanimously passed this law, it has been a Taxpayer Protection Act. My office has been privileged to work with public servants who exposed indefensible waste and mismanagement at the Pentagon, as well as indefensible abuses of power at the Department of Justice. I keep learning that whistleblowers proceed at their own risk when defending the public. In case after case I have seen the proof of Admiral Rickover's insight that unlike God, the bureaucracy does not forgive. Nor does it forget.

It also has been confirmed repeatedly that whistleblowers must prove their commitment

to stamina and persistence in order to make a difference

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against ingrained fraud, waste and abuse. There should be no question about Congress', or this Senator's commitment. Congress was serious when it passed the Whistleblower Protection Act unanimously. It is not mere window dressing. As long as whistleblowers are defending the public, we must defend credible free speech rights for genuine whistleblowers. Those who have something to hide, the champions of secrecy, cannot outlast or defeat the right to know both for Congress, law enforcement agencies and the taxpayers. Every time judicial or bureaucratic activists attempt to kill this law, we must revive it in stronger terms. Congress can not watch passively as this law is gutted, or tolerate gaping holes in the shield protecting public servants. The taxpayers are on the other side of the shield, with the whistleblowers.

Mr. President, I ask unanimous consent that the October 13, 1999 article from The Washington Times and the May 1, 1999 article from The New York Times be printed in the Record.

There being no objection, the material was ordered to be printed in the Record, as follows:

[From the Washington Times, Oct. 13, 1999]

**Silent Whistleblowers  
worker protections are under attack**

(By Tom Devine and Martin Edwin Anderson)

Judicial activism is always suspect, but when it overturns laws protecting the public's interest in order to shield bureaucratic secrecy, it makes a mockery of the legal system itself.

The issue has become a front-burner in Congress as it takes a new look at a significant good-government law that twice won unanimous passage. In the aftermath of extremist judicial activism that functionally overturned the statute, a crucial campaign has been launched this week on the Hill to enlist members as friends of the court in a brief seeking Supreme Court review of the circuit court decision.

At issue is a ruling made final in July by the Federal Circuit Court of Appeals, which disingenuously overturned two laws unanimously passed by Congress--the code of Ethics for Government Service and the Whistleblower Protection Act. The decision, White vs. Lachance, was the handiwork of a chief judge whose previous job involved swinging the ax against federal workers who dared to commit the truth.

At issue is the fate of Air Force whistleblower John White, who lost his job in 1991 after successfully challenging a pork-barrel “quality management” training program as mismanagement. Government and private sector experts concurred with Mr. White, and universities affected by it began heading for the door. Even the Air Force agreed, canceling it after outside experts agreed with Mr. White.

Thrice the Merit Systems Protection Board (MSPB), an independent federal agency, ruled in Mr. White's favor. Each time the Justice Department appealed on technicalities. Now the federal court went further than asked while speculating that Mr. White's disclosures may not have evidenced a “reasonable belief”--the test for disclosures to be protected.

The court camouflaged its death-knell for the whistleblower law in banal legalese, defining “reasonable belief” as, “Could a disinterested observer with knowledge of the essential facts reasonably conclude gross mismanagement?” But the bland explanatory guidance exposed a feudalistic duty of loyalty to shield misconduct by bureaucratic bosses: “Policymakers have every right to expect loyal, professional service from subordinates.” So much for the Code of Ethics for Government Service, which establishes the fundamental duty of federal employees to “put loyalty to the highest moral principles and to country above loyalty to persons, party or Government department.”

The court also disarmed the whistleblower law, claiming it “is not a weapon in arguments over policy.” Yet when it unanimously approved 1994 amendments, Congress explicitly instructed, “A protected disclosure may concern policy or individual misconduct.”

Worse was a court-ordered “review” as a prerequisite to find a “reasonable belief” of wrongdoing. It must begin with the “presumption that public officers perform their duties correctly, fairly, in good faith and in accordance with the law. . . . [T]his presumption stands unless there is ‘irrefragable’ proof to the contrary.”

“Irrefragable,” according to Webster's Dictionary, means “incapable of being overthrown, incontestable, undeniable, incontrovertible.” The court's decision kills freedom of speech if there are two rational sides to a dispute--leaving it easier to convict a criminal than for a whistleblower to be eligible for protection. The irrefragable presumption of government perfection creates a thick shield protecting big government abuses--precisely the opposite of why the law was passed.

Finally, the court ordered the MSPB to facilitate routine illegality by seeking evidence of a whistleblower's conflict of interest during every review. Retaliatory investigations--those taken “because of” whistleblowing activities--are tantamount to witch-hunts and were outlawed by Congress in 1994. For federal employees, the Big Brother of George Orwell's “1984” has arrived 15 years late.

Key to understanding the decision is the role played by Chief Judge Robert Mayer. Previously, Judge Mayer served as deputy special counsel in an era when MSPB's Office of Special Counsel (under its Chief Alex Kozinski, now a 9th Circuit Court of Appeals judge) tutored managers and taught courses on how to fire whistleblowers without leaving fingerprints. Congress passed the WPA in part to deal with these abuses.

Now Judge Mayer's judicial revenge is a near-perfect gambit, as his court has a virtual monopoly on judicial review of MSPB whistleblower decisions.

Congress must act quickly to pass a legislative definition of "reasonable belief" that eliminates the certainty of professional suicide for whistleblowers and restores the law's good-government mandate. It also needs to provide federal workers the same legal access enjoyed by private citizens; jury trials and all circuits judicial review in the appeals courts.

It is unrealistic to expect federal workers with second-class rights to provide first-class public service. Returning federal workers to the Dark Ages is an inauspicious way to usher in a new millennium.

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[From the New York Times, May 1, 1999]

### **Helping Whistle-Blowers Survive**

Jennifer Long, the Internal Revenue Service agent who nearly lost her job two weeks ago after publicly blowing the whistle on abuses at the agency, was rescued at the last minute by the intervention of an influential United States Senator. But the fact that her employers had no inhibitions about harassing her is clear evidence that the laws protecting whistle-blowers need to be strengthened. As they stand, these laws merely invite the kind of retaliation that Mrs. Long endured.

A career tax auditor, Mrs. Long was the star witness at Senate Finance Committee hearings convened in 1997 by William Roth of Delaware to investigate complaints against the I.R.S. She was the only I.R.S. witness who did not sit behind a curtain and use a voice distortion device to hide her identity. She accused the agency of preying on weaker taxpayers and ignoring cheating by those with the resources to fight back. She has since said that she was subject to petty harassments from the moment she arrived back at her district office in Houston. Then, on April 15 of this year, she was given what amounted to a termination notice, at which point Mr. Roth intervened with the I.R.S. commissioner and saved her job--at least for now.

Had he not intervened, Mrs. Long's only hope of vindication would have been the remedies provided by the Civil Service Reform Act of 1978 and the Whistle-Blower Protection Act of 1989. These two statutes prescribe a tortuous and uncertain appeals

process that in theory guarantees a whistle-blower free speech without fear of retaliation, but in practice is an exercise in frustration. Despite recent improvements, only a handful of Federal employees, out of some 1,500 who appealed in the last four years, have prevailed in rulings issued by the Government's administrative tribunal, the Merit System Protection Board. Overwhelmingly, the rest of the cases were screened out on technical grounds or were settled informally with token relief.

A few prominent whistle-blowers have won redemption outside the system. Frederic Whitehurst, the chemist who was dismissed after disclosing sloppiness and possible dishonesty in the Federal Bureau of Investigation's crime laboratory, won a sizable cash settlement because he had a first-class attorney who mounted an artful public relations campaign. Ernest Fitzgerald, the Pentagon employee who disclosed massive cost overruns, survived because he was almost inhumanly persistent and because his cause, like Mrs. Long's, attracted allies in high places. But the prominence of an issue does not guarantee survival for the employee who discloses it. Notra Trulock, the senior intelligence official at the Energy Department who tried to alert his superiors to Chinese espionage at a Government weapons laboratory, has since been demoted.

Senator Charles Grassley, an Iowa Republican, has been seeking ways to strengthen the 1989 law with the help of the Government Accountability Project, a Washington advocacy group that assists whistle-blowers. One obvious improvement would be to give whistle-blowers the option to press their claims in the Federal courts, where their cases could be decided by a jury. To guard against clogging the system with frivolous litigation, the cases would first be reviewed by a nongovernment administrative panel. But the point is to give whistle-blowers an avenue of appeal outside the closed loop in which they are now trapped.

A reform bill along these lines passed the House in 1994 but died in the Senate. With Mrs. Long's case fresh in mind, the time has come for both Houses to re-examine the issue.