Department of Justice

STATEMENT OF

RAJESH DE
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY
DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA
UNITED STATES SENATE

ENTITLED

"S. 372 - THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2009"

PRESENTED

JUNE 11, 2009

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Good morning Chairman Akaka, Ranking Member Voinovich, and Members of the Subcommittee. Thank you for the opportunity to appear before you today to discuss the Whistleblower Protection Enhancement Act.

This administration strongly supports protecting the rights of whistleblowers. The administration recognizes that the best source of information about waste, fraud, and abuse in government is often a government employee committed to public integrity and willing to speak out. Empowering whistleblowers is a keystone of the President's firm commitment to ensuring accountability in government.

The administration is pleased that Congress has moved quickly on this front. The American Recovery and Reinvestment Act of 2009, which the President signed into law on February 17, 2009, includes significant new protections for government contractors who blow the whistle on abuse related to the use of stimulus funds. Likewise, the Fraud Enforcement and

Recovery Act of 2009, which the President signed on May 20, 2009, will, among other things, strengthen the False Claims Act, which allows private-sector whistleblowers with evidence of fraud by government contractors to file suit on behalf of the government to recover the stolen funds.

The administration is grateful that Congress is also examining protections for federal employees who ferret out waste, fraud, and abuse in government. We are committed to making every effort to ensure that federal agencies act in accordance with the great trust placed in them by the President, by Congress, and by the American people.

A government employee who speaks out about waste, fraud or abuse performs a public service. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled. Yet too often whistleblowers are afraid to call attention to wrongdoing in their workplace. Blowing the whistle often means taking great risks. The whistleblower may suffer retaliation from his boss and scorn from his colleagues. Knowing that he is performing a public service is cold comfort if his patriotic duty costs him a promotion, valuable assignments, or even his job.

We need to empower all federal employees as stewards of accountability. Put simply, accountability cannot be imposed solely from the top down. Even the best agency managers may be unaware of certain waste, fraud or abuse that occurs on their watch; and managers of course must be held accountable for their own actions. Therefore, we must make sure that federal employees have safe and effective ways to blow the whistle on waste, fraud and abuse. That means providing clear avenues to report wrongdoing, and ensuring that no one suffers retaliation for making such a report.

The bottom line is that we cannot tolerate waste, fraud, and abuse, and we must make sure that federal employees at all levels are able to do what it takes to eliminate it. At the same time, we must preserve the President's constitutional responsibility with regard to the security of national security information and ensure that agency managers have effective tools to discipline employees who themselves may engage in waste, fraud, and abuse.

We recognize that the Executive Branch and the Congress have long held differing views regarding the extent of the President's constitutional authority over national security information. Putting aside those constitutional differences to the extent possible, our focus today is on achieving common ground and a workable solution toward our common goal of increasing the protections for federal whistleblowers, including those who work in the national security realm.

Creating a system that sets the right incentives for federal employees and managers is not easy, as evidenced by multiple efforts to reform the system. In each of the past three decades, Congress has passed legislation attempting to set the right balance, most notably the Civil Service Reform Act of 1978, the Whistleblower Protection Act of 1989 (WPA), and the Intelligence Community Whistleblower Protection Act of 1998 (ICWPA).

The administration believes the time has come to amend the system once again. The President is eager to sign legislation this year that ensures safe and effective channels for whistleblowers to report and correct wrongdoing without fear of retaliation. I would like to discuss some key components of whistleblower reform as they relate to the legislation currently pending before the Senate—both with respect to civil service reform and national security aspects of the pending bill.

Turning first to the civil service reform issues, this bill would make changes to the ways in which whistleblower claims are adjudicated. For example, under the WPA, covered employees are limited to pursuing appeals from the Merit Systems Protection Board (MSPB) to the Federal Circuit. While we have found there are advantages to having a single circuit decide these issues, the administration has no objection to the bill's choice to disperse whistleblower appeals to the regional circuits. In addition, this bill would for the first time allow whistleblowers to obtain compensatory damages. That is a matter both of simple fairness and of practicality. A whistleblower who suffers retaliation should be made whole, plain and simple, and we agree with this measure.

The bill also makes several changes to the definition of protected disclosure. Under current law, a whistleblower is not protected if she informs her boss of wrongdoing, only to discover that her boss was the one responsible for the wrongdoing. For example, imagine that a federal employee discovers that her agency is wasting large sums of money by purchasing supplies from a company whose prices are not competitive. She reports this to her boss—a logical first step. Yet it turns out that her boss is the one who authorized the purchases. He is furious that his employee should question his actions, and he takes key assignments away from her as punishment for daring to speak up. If she filed a whistleblower claim, she would lose. The Federal Circuit has held that bringing wrongdoing to the attention of the wrongdoer does not constitute a "disclosure" under the WPA because the wrongdoer already knows about his own misconduct, and thus nothing has been "disclosed." Thus, under current law, the employee would be protected for going to the Washington Post, but not for going to her boss. Changing

the law will encourage employees to tell their supervisors about problems in the first instance, which is usually the easiest way to resolve them.

The administration also supports modification of another Federal Circuit interpretation of the WPA: what is known as the normal-duty disclosure rule. In *Huffman v. Office of Personnel Management,* 263 F.3d 1341 (Fed. Cir. 2001), the court held that an employee is not protected when he discloses wrongdoing as part of his normal job duties, unless he makes his disclosure outside of the normal channels. Imagine, for example, that an inspector's diligent work at documenting safety violations aggravates the company that he is inspecting. The company asks his supervisor to rein him in. If the boss takes action against the inspector because the inspector disclosed these threats to public safety, the inspector has no recourse under the WPA because his disclosure was part of his normal duties. The administration believes that such normal-duty disclosures should be protected when public health and safety is at stake. At the same time, however, we believe that any new rule extending protection to normal-duty disclosures must be tailored to ensure that agency managers are not chilled from taking legitimate personnel actions against poorly performing employees.

As we encourage civil servants to bring to light evidence of agency waste, fraud, and misconduct, we should not inadvertently make it more difficult for civil servants in supervisory roles to discipline employees who themselves engage in such acts or whose job performance is otherwise inadequate. Indeed, federal employees may be forced to blow the whistle on their colleagues if agency managers neglect to take action. Problems are solved more quickly when managers take swift steps to correct misconduct, thereby obviating the need for their employees to make the difficult decision whether to blow the whistle on their peers. Accountability in

government means that we must ensure that managers retain the ability and confidence to remedy wrongdoing and poor performance when they see it.

The administration also believes that whistleblowers in the national-security realm must have a safe and effective method of disclosing wrongdoing without fear of retaliation. We are pleased to see that this bill provides full whistleblower protection to Transportation Security Administration screeners, also known as Transportation Security Officers. Transportation Security Officers stand literally at the front lines of our nation's homeland security system. They deserve the same whistleblower protections afforded to all other employees of the Department of Homeland Security.

As this Subcommittee knows, the intelligence community is generally excluded from the WPA.[1] The historical reason for this exclusion by Congress is that the intelligence community handles highly classified programs and information. Airing the details of such a program or making public such information may risk the continued viability of the program—and indeed may risk the safety of the individuals who work in the program or who depend on its benefits.

Yet it is essential that we root out waste, fraud and abuse in the intelligence community just as elsewhere, and that intelligence community employees have safe channels to report such

[1] The FBI is a partial exception: Congress mandated the creation of a system specifically for the Bureau. *See* 5 U.S.C. § 2303. In 1999, the Department of Justice promulgated regulations, designed to protect FBI whistleblowers from retaliation, in large measure based on relevant provisions of the WPA, although with key differences. To prevent the inappropriate dissemination of sensitive information, an FBI whistleblower's disclosure is protected only if made to specified DOJ or FBI offices or individuals listed in the regulations. And instead of contesting reprisals before the MSPB, an FBI whistleblower must first report the alleged reprisal to DOJ's Office of the Inspector General (OIG) or its Office of Professional Responsibility (OPR). Either OIG or OPR will investigate the allegations and transmit their report, along with any recommendation for corrective action, to the Office of Attorney Recruitment and Management (OARM), which adjudicates the claim. OARM may order corrective action if it finds that the employee has proven by a preponderance of the evidence that the employee made a protected disclosure that was a contributing factor in the personnel action at issue, as long as the FBI has failed to prove by clear and convincing evidence that it would have taken the same personnel action against the employee in the absence of the protected disclosure. An employee may appeal OARM's determination to the Deputy Attorney General.

wrongdoing. Such whistleblowers expose flaws in programs that are essential for protecting our national security. We believe it is necessary to craft a scheme carefully in order to protect national security information while ensuring that intelligence community whistleblowers are protected in reality, not only in name. Properly structured, a remedial scheme should actually reduce harmful leaks by ensuring that whistleblowers are protected only when they make disclosures to designated Executive Branch officials or through proper channels to Congress.

With this goal in mind, we propose the creation of an Intelligence Community Whistleblower Protection Board within the Executive Branch. This Board could be composed of senior presidentially-appointed officials from key agencies within and outside of the intelligence community, including inspectors general, to provide a safe and effective means for intelligence community employees to obtain redress if they suffer retaliation for disclosing waste, fraud, or abuse. The administration is currently in the process of developing a proposal for how this Board would operate in a manner that protects both intelligence community whistleblowers and the highly sensitive programs in which they work. We look forward to working with the Subcommittee to craft a scheme that satisfies these shared goals.

We also believe that the Board could provide a better vehicle to review allegedly retaliatory security clearance revocations than the system currently set forth in S. 372. We are aware that Congress has heard testimony in the past from individuals who have claimed that their security clearances were revoked due to whistleblowing activities. This administration has zero tolerance for such actions. Although current law provides some procedural protections, the administration believes that an employee who is denied a security clearance should be able to seek recourse outside of her agency. Under Executive Order 12968, an employee who is denied

a clearance, or whose clearance is revoked, is entitled to a panoply of due process protections, including the right to a lawyer and to submit evidence at a hearing, unless the agency head determines that such procedures cannot be invoked in a manner that is consistent with national security. We believe that an employee who is dissatisfied with the outcome of this process, and alleges that her clearance was revoked for retaliatory purposes, should be able to appeal outside her own agency.

The current bill would allow an employee who alleges that his security clearance was revoked in retaliation for whistleblowing to challenge that determination before the MSPB. The bill provides that the MSPB, or any reviewing court, may grant "declaratory relief and any other appropriate relief" except for the restoration of a security clearance. That limitation quite properly recognizes this function to be the prerogative of the Executive Branch. Indeed, under Executive Order 12968, a security clearance may be granted "only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security." Providing a judicial remedy, even one that does not mandate restoration of the clearance, is inconsistent with the traditional deference afforded Executive Branch decision-making in this area. Indeed, in a case where an employee was terminated due to his inability to perform his job without a security clearance, the bill would apparently empower the reviewing entity to order the agency to restore him to his former position, even if he cannot do his job properly absent a clearance. The result would be that the agency might well be required to pay an employee to show up to work, and yet not be able to give him any work to do—a result that cannot be desirable from any perspective.

The proposed Board, however, could recommend full relief to the aggrieved employee, including restoration of the clearance, and could ensure that Congress would be notified if that recommendation is not followed by the agency head. This mechanism would ensure that no agency will remove a security clearance as a way to retaliate against an employee who speaks truths that the agency does not want to hear. Further, we believe that such a Board could ably review allegedly retaliatory security-clearance revocations from all agencies, including agencies in the intelligence community, rather than limiting review to Title 5 agencies, as S. 372 apparently would do.

Finally, we believe that the proposed Board could provide an additional avenue for employees in the intelligence community to inform Congress of governmental wrongdoing. The Intelligence Community Whistleblower Protection Act of 1998 currently provides a vehicle for intelligence community employees to report matters of "urgent concern" to Congress.[2] The employee must first inform her Inspector General, who then determines whether the complaint is credible. If so, she must transmit the information to her agency head, who will then transmit the information to the House and Senate Intelligence Committees. If the Inspector General does not deem the complaint to be credible or does not transmit the information to the agency head, the employee may provide the information directly to the House and Senate Intelligence Committees, as long as she notifies her Inspector General and agency head of her intent and

[2] A matter of "urgent concern" is defined as: (1) a serious or flagrant problem, abuse, violation of law or executive order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information; (2) a false statement to the Congress on, or willful withholding from the Congress of, an issue of material fact relating to the funding, administration, or operation of an intelligence activity; or (3) an action constituting reprisal in response to an employee's reporting of an urgent concern.

obtains and follows instructions on how to do so. By requiring the employee to first contact the agency before going to Congress, the ICWPA provides the Executive Branch with notice of the intended disclosure, the ability to provide the employee with appropriate instructions regarding how to transmit classified information to the Congress, and an opportunity to review and control disclosure of certain classified information, if appropriate, in accordance with the President's constitutional authority.

The ICWPA, however, affords the individual employee no avenue for review of a potential disclosure beyond her specific agency. The administration believes that no federal agency should be able to hide its own wrongdoing. For this reason, we believe an intelligence community employee should be able to appeal to the Board if the agency head declines to transmit information to Congress, or declines to provide instructions to the employee on how he may do so. Individual employees, moreover, would be entitled to alert appropriate members of Congress to the fact that they have made such an appeal so that Congress is aware that a concern has been raised.

We believe that such a mechanism within the Executive Branch would constitute an improvement upon the relevant provisions of S. 372. The current bill would grant employees the unilateral right to reveal national security information to Congress whenever they reasonably believe the information provides evidence of wrongdoing, even when such information is legitimately classified or would be subject to a valid claim of executive privilege. We believe that this structure would unconstitutionally restrict the ability of the President to protect from disclosure information that would harm national security.

Of course, Congress has significant and legitimate oversight interests in learning about, and remedying, waste, fraud and abuse in the intelligence community, and we recognize that Congress has long held a different view of the relevant constitutional issues. However, as Presidents dating back to President Washington have maintained, the Executive Branch must be able to exercise control over national security information where necessary. *See Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 94-99 (1998) (statement of Randolph D. Moss, Deputy Assistant Attorney General, Office of Legal Counsel, before the House Permanent Select Committee on Intelligence) (tracing history). As Randolph Moss, Deputy Assistant Attorney General in the Office of Legal Counsel, explained in testimony before the House intelligence committee in 1998:

> In the congressional oversight context, as in all others, the decision whether and under what circumstances to disclose classified information must be made by someone who is acting on the official authority of the President and who is ultimately responsible to the President. The Constitution does not permit Congress to authorize subordinate executive branch employees to bypass these orderly procedures for review and clearance by vesting them with a unilateral right to disclose classified information—even to Members of Congress.

See id. at 100. Putting these differences in constitutional analysis aside, we believe that an extra-agency mechanism within the Executive Branch, such as the proposed Board, could offer a way forward to balance the Executive's need to protect classified information with Congress's responsibility to help ferret out waste, fraud and abuse.

This legislation is merely one step in the administration's plan to ensure accountability in government. On March 9, the President issued a memorandum to the heads of all executive departments and agencies on the subject of scientific integrity. That memorandum instructed the Director of the Office of Science and Technology Policy to develop recommendations within

120 days for Presidential action designed to guarantee scientific integrity through the executive branch. The President instructed the Director to keep in mind that "Each agency should adopt such additional procedures, including any appropriate whistleblower protections, as are necessary to ensure the integrity of scientific and technological information and processes on which the agency relies in its decisionmaking or otherwise uses or prepares."

The administration looks forward to examining all other parts of the whistleblower protection system. More broadly, the administration will examine whether agencies can do more to ensure that employees know of their rights. Having the greatest protections in the world is of no help if employees do not know how to use them. The administration is dedicated to make sure that they do.

At the same time, we must make sure that managers know of these rules and follow them. We will have won a Pyrrhic victory if this legislation simply leads to a flood of successful whistleblower claims. Rather, we must strive to reduce the need for such suits in the first place. Our goals are two-fold: to prevent waste, fraud and abuse, and to prevent retaliation against those who bring it to light when it occurs. Accordingly, this administration is dedicated to ensuring that agency managers know two things. First, managers must be vigilant against any waste, fraud and abuse that happens on their watch. And second, managers must not retaliate against whistleblowers who bring to light wrongdoing that managers may have missed.

The administration is pleased by the efforts that this Subcommittee has made to devise whistleblower protections that work. We look forward to working with the Subcommittee to revise and improve the legislation.