

# Lead Report

## Whistleblowers

### Witnesses Debate Whistleblower Jury Trials, Protections for National Security Employees

**W**hile projecting a general consensus that the current Whistleblower Protection Act does not adequately protect federal employees who disclose government waste, fraud, and abuse, witnesses at a June 11 Senate hearing debated the extent and type of protections that should be added to the measure.

In his opening statement before the Senate Homeland Security and Governmental Affairs Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Chairman Daniel Akaka (D-Hawaii) said that there is "broad agreement" on certain provisions contained in the House (H.R. 1507) and Senate (S. 372) versions of the Whistleblower Protection Enhancement Act of 2009.

Those provisions, Akaka said, include a new definition of "disclosure" to ensure that all disclosures are protected, providing for review of retaliatory security clearance revocations and suspensions, granting whistleblower protections to Transportation Security Administration employees, protecting disclosures of scientific information, and suspending the U.S. Court of Appeals for the Federal Circuit's exclusive jurisdiction over whistleblower appeals.

However, "there remain a few unresolved issues," Akaka noted, in particular how to treat national security whistleblowers and whether or not federal employee whistleblowers should have access to jury trials. The House bill would allow appeals of Merit Systems Protection Board decisions in federal district court, as well as district court lawsuits if MSPB does not act on a whistleblower complaint within 180 days, he said.

**No Administration Position.** According to Rajesh De, deputy assistant attorney general in the Justice Department's Office of Legal Policy, the Obama administration has yet to take a position on jury trials. "We certainly recognize that the question of jury trials is an important one," but "we think there are valid policy concerns on both sides," he said.

De noted that jury trials can be effective tools for encouraging whistleblowers to come forward, but they may discourage federal managers from taking legitimate personnel actions against poorly performing employees. In addition, he said, there is concern that juries will not be equipped to decide cases under the current clear and convincing evidence standard, and that complex questions will arise over what matters are appropriate for the jury to decide as opposed to the court.

If jury trials are provided, De suggested, Congress should consider lowering the government's burden to a preponderance of the evidence standard with a burden-shifting framework similar to that of Title VII of the

1964 Civil Rights Act, and consider adopting damages caps.

**McCaskill: Exceptions 'Make No Sense.'** "I am confused that everyone would not want a whistleblower to be able to get a jury trial," Sen. Claire McCaskill (D-Mo.) said, speaking as a witness on the panel. The exceptions being carved out from that right "to me make no sense," she said.

McCaskill noted that recent legislation provides jury trials for whistleblowers working for federal contractors. Therefore, she said, a federal employee could be working side by side with a contractor, performing the same work, and seeing the same problem, and yet one individual has access to a jury trial if he or she faces retaliation while the other does not.

"It's too soon to tell what the ramifications have been from those provisions," De responded, noting that there has not been sufficient time to determine whether they have created a chilling effect preventing managers from taking appropriate disciplinary action.

De said that the clear and convincing evidence standard—under which agencies must prove the legitimacy of the adverse action by clear and convincing evidence after the employee makes a prima facie case—is particularly concerning for federal managers.

**Federal Managers, Jury Trials.** William Bransford, general counsel of the Senior Executives Association, said that managers' fear of litigation is real. A sensational whistleblower jury trial coupled with a substantial damages award "will create a fear among fellow managers of being subjected to a similar fate," he said.

The House bill, he added, "is particularly problematic because it contains no limit on damages and is vague about what issues go to the jury." Rather, Bransford said, MSPB should have a chance "to apply a broader, more appropriate law that protects whistleblowers," with review by any federal appeals court.

While he opposed jury trials, Bransford did not agree with De's suggestion that the government's burden of proof be lowered. He said that it is difficult for whistleblowers to prevail even with the higher standard, which he said was a reform that did make a difference.

**'We're Going to Do It Right.'** "We're going to get this job done, and we're going to do it right," Government Accountability Project Legal Director Thomas Devine said, but "doing it right means a fair day in court." With respect to whistleblower protections, "the Achilles heel has always been inadequate due process," he asserted.

If managers must pause before disciplining employees for fear of being accused of whistleblower retaliation, "that means the law might finally start working," Devine said. The solution to a chilling effect could be additional training for managers "so that they'll exercise their authority when they need to."

The rates of adverse personnel actions against federal employees have remained constant both before and after whistleblower protections have been strength-

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ened, showing that managers are not afraid to exercise legitimate disciplinary authority, Devine said. "It's time for federal managers to stop crying wolf, and if they won't stop, it's time for Congress to stop listening to them," he said.

Robert Vaughn, a law professor at American University's Washington College of Law, added that "use of juries in these cases is particularly apt." Even if there is some truth to stereotypes about juries—that they favor individuals over organizations, are more likely to rule against defendants who are more able to pay damages, and can get confused by complex facts—"federal judges have ample powers to supervise juries and correct and prevent mistakes," Vaughn said.

**Low Incidence of Jury Trials.** Vaughn suggested that there would not be many jury trials because the cost and delay of federal lawsuits cause potential litigants to forgo the process. Statistics on other statutes that require completing administrative procedures prior to litigation, such as Title VII and the Sarbanes-Oxley Act, show that few individuals take their cases to court after the administrative process. He added that summary judgment has become common, and so few cases would get to a jury even if filed in district court.

Danielle Brian, executive director of the Project On Government Oversight, agreed that the number of jury trials in whistleblower cases would be small. She suggested that jury trial availability would improve the quality of MSPB's rulings because the board would know that individuals outside the system would review its decisions.

Bransford admitted that the cost of federal district court lawsuits "may keep down the numbers somewhat," but said that, because employees often use the equal employment opportunity system to challenge otherwise legitimate personnel actions, they likely would use a whistleblower system if available.

Akaka noted concern that MSPB may be pressured not to adjudicate whistleblower cases fully if it must render a decision within 180 days. De responded that a representative from the board would be better positioned to report on what the board can handle, but said that "it is a valid concern at least to be considered."

Vaughn suggested that rational decisionmakers will not rush a resolution, and at any rate the effect on the board does not counsel against allowing for district court access.

In addition, Vaughn said, district court access following completion of an administrative process is "not an uncommon or unexpected provision in this kind of law."

**National Security Matters.** While not taking a position on jury trials in general, De said that the Obama administration adamantly opposes jury trials for federal employees in national security and the intelligence community because of the sensitive nature of the information involved. "No individual agency should be the last word in terms of waste, fraud, and abuse," but jury trials are "particularly inappropriate," he said.

As he did before the House committee considering the issue (47 GERR 579, 5/19/09), De recommended an Intelligence Community Whistleblower Protection Board, an executive branch agency comprised of senior presidential appointees both within and outside the intelligence community, including inspectors general.

He added that the administration believes that national security whistleblowers should have a safe forum to disclose waste, fraud, and abuse so that they do not feel compelled to leak sensitive information to the press because they have no other recourse.

**Congressional Notification.** Akaka asked what measures would be incorporated into the design of the board to ensure that it makes fair decisions and facilitates congressional oversight, regardless of the presidential administration in power. "Congressional notification is a key element of this," De responded, stating that any structure should ensure that Congress is notified whenever an adverse decision is made against an employee who brings a retaliation claim.

But Brian said that there has been no real explanation for why national security whistleblowers should not have access to jury trials along with other federal employees. "By not providing real protections . . . we are actually driving them to the press," she said, adding that "whistleblower protections will not supersede existing rules" on disclosure of classified information.

She also expressed concern that the intelligence board could become "a way of preventing information from getting to the Congress."

Brian said that the House bill's language only permits disclosures to certain congressional committees. This is problematic, she said, because the average whistleblower will not know which committee has jurisdiction over the matter and is more likely to turn to his or her own senator or representative, or at least a member of Congress who has been outspoken on whistleblower issues but is not necessarily on the appropriate committee.

**'Demonstrable Harm to National Security.'** Devine said that the board's jurisdiction should be limited to cases with a "demonstrable harm to national security" if the information is disclosed. There are employees who work for agencies such as the National Security Agency and the Federal Bureau of Investigation who have no dealings with classified information, and so there is "no excuse" for them to have lowered due process rights, he said.

Vaughn said that the American Civil Liberties Union testified at the House hearing that there are tools available to federal judges to protect sensitive national security information, and so jury trials are a possibility for national security whistleblowers.

Brian also pointed out that the Government Accountability Office has found that jury trials for federal employee whistleblowers in intelligence agencies are not a threat to national security because of district courts' history of handling classified materials.

**Optimism for Passage.** Despite these disagreements, all witnesses supported reform of the current whistleblower law and optimism that a bill will be passed in the 111th Congress. Brian noted that the Obama administration is the first in several years that has not threatened to veto whistleblower reform legislation.

"This legislation has evolved and grown over the last 10 years as we've learned a lot of lessons," Devine said. Congress is at the point of "consolidating the lessons learned . . . and creating a truly modern law for federal employees," he said.

By LAURA D. FRANCIS