

Testimony of William G. Weaver

Representing the National Security Whistleblowers Coalition

House Government Reform Committee

Subcommittee on National Security, Emerging Threats and International Relations

Honorable Christopher Shays, Chairman

February 14, 2006

Dear Chairman Shays and Members of the Committee:

Thank you for the opportunity to appear before you today. My name is Bill Weaver, and I am the senior advisor to the National Security Whistleblowers Coalition (NSWBC), associate in the Center for Law and Border Studies at the University of Texas at El Paso, which is subventing my appearance, and Director of Academic Programs at the Institute for Policy and Economic Development, also at UTEP. My testimony should in no way be construed as reflecting any position or policy of UTEP.

The NSWBC is an organization made up exclusively of members who have blown the whistle in national security matters, and it is the only such organization. Our members come from diverse backgrounds and experience and average about 20 years of federal service. Few people set out to become whistleblowers, and such an intention is perhaps less common in the area of national security where employees take oaths of secrecy and are often driven by patriotism, courage, and institutional loyalty.

In 2001, in one of the first memoranda to heads of departments, President George W. Bush directed that “employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.” Whistleblowers are usually the people who take such admonitions to heart, the people who believe that the rules are there to make the government better and the people safer. Sometimes, disclosures are appreciated by managers who take their roles seriously as guardians of not only the public monies but as the first line that must apply law and constitutional principles to real life problems. But many times this is not the case, and reporting employees are retaliated against by weak administrators who operate in a culture of tolerated lawlessness.

Although administrators bear responsibility for their own actions, the greater failure is

and has been with Congress, which suffers from an institutional lack of nerve in the area of oversight of national security activities in the executive branch. Whistleblowers in non-national security settings at least have a chance to get the facts of the matter before the courts and the public, but national security whistleblowers do not have that crucial advantage. All recent presidents have asserted plenary power to control the dissemination and disclosure of classified information, the vast majority of which is classified pursuant to executive order. Rather than contesting this claim, Congress seems to have capitulated on this issue. This capitulation greatly increases the difficulty associated with executive branch oversight in national security matters. One need only review recent events for proof of that conclusion. Secrecy and claims of national security are regularly used by presidents to curtail Congress' oversight responsibilities.

These constitutionally questionable claims of executive branch plenary control over national security information are not afflictions of a particular party, but rather institutional problems; Democratic and Republican presidents alike will push to the limit, and beyond, powers that crowd out congressional oversight.

Over time, administrators as well as presidents and their advisors have pursued a strategy of secrecy to set up successive pickets against all efforts, congressional, judicial, or public to provide oversight of what agencies are doing in the name of national security. Congress' failure to counter these efforts acquiesces to presidential authority in a way clearly unintended in the Constitution. Rather than preserving its institutional power, Congress sometimes gives it up to the executive in an embarrassing display of servitude. The enemy here is not the President or a particular party, but the natural tendencies of government bureaucracy to hide embarrassing and

criminal activity, and to view congressional and judicial oversight as unwarranted intrusions into their world.

Many of our members and many people we converse with are employees of the Department of Homeland Security (DHS). These people describe an agency riddled with problems that defeat the very mission of the organization. Embarrassing issues concerning management of the Federal Air Marshal Service, incompetence in the administration of the Transportation Safety Administration, and numerous other problems indicate an agency with deep problems. Some might argue that the importance of the DHS mission requires freedom from oversight, but in fact the opposite is true: the agency charged with protecting the physical security of the nation must be guarded against natural bureaucratic tendencies to cover up mistakes and hide incompetence. Whistleblowers present one of the only means for Congress to get reliable information on these problems.

Whistleblowers provide insight into executive branch activity that cannot be achieved otherwise than through allegedly unauthorized disclosure to Congress. Congress is dependent on national security whistleblowers for information affecting the deepest, most important functions of the government. But Congress leaves in place the broken mechanisms of past attempts to provide whistleblower protection. Although inspectors general and the Office of Special Counsel are empowered to investigate allegations of wrongdoing, they are managed and populated by partisans of whatever administration is in power. In the event that an inspector general or the Office of Special Counsel comes out in support of a whistleblower, as in the cases of Sibel Edmonds and Bogdan Dzakovic, nothing happens.

Neither the FBI translation department nor the Transportation Security Administration adopted changes to address the substantiated charges of gross incompetence and malfeasance lodged by Edmonds and Dzakovic. Agencies are never made to internalize the costs of their administrators' misdeeds, and so there is little incentive to reform agency customs and practices. And apparently it is no longer even tolerable in certain government quarters for people to speak the truth about these difficulties. Louis Fisher, perhaps the most prestigious researcher at the Congressional Research Service (CRS), and a 35-year veteran of that organization, is being threatened with termination for stating the obvious: Managers in national security agencies retaliate against whistleblowers with abandon and without fear of censure. The irony of retaliating against Fisher for writing about retaliation against whistleblowers seems to be lost on CRS management.

Present proposed legislation in Congress, H.R.1317 and S.494, specifically excludes national security employees from protection, employees engaged in the most sensitive work related to citizen safety and who are most likely to observe malfeasance posing the greatest risks to our citizens and country. Explicitly excluded in S. 494 are "the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Security Agency, and. . . as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, if the determination (as that determination relates to a personnel action) is made before that personnel action." H.R. 1317 is even worse, by additionally allowing exclusion of agencies involved in "homeland security." But which types of agencies are listed is really irrelevant, since the President may exclude, under terms of either

bill, any agency even remotely affected with intelligence or law enforcement functions. This is simply unacceptable to our constituency, and continues a needless and unwise deference to executive claims of power in the national security area.

What is needed is a complete overhaul of whistleblower protection, not a Frankenstein of appendages meant to correct problems that are in fact irreparable within the confines of existing legislation. The piecemeal or “pragmatic” approach to legislative reform has been useless to national security employees. In these times, where national security is at the front of public policy concern, can we afford to leave intelligence and law enforcement whistleblowers, crucial conduits to truth, indefinitely unprotected?

The proposed legislation also unnecessarily undermines congressional constitutional authority by assuming that Congress must statutorily authorize disclosures of classified information to its members. Congress is constitutionally empowered to receive such information and any statutory “authorization” would actually weaken Congress’ position. By “demoting” its constitutional power to receive information from government employees it makes itself more vulnerable to executive branch claims, especially under cases with dicta that indicate the President has plenary control of classified information. Congress has inherent authority pursuant to its oversight responsibilities to receive information of waste, fraud, and abuse, regardless of whether or not such information is classified.

Most alarming to our organization is the fact that national security employees are excluded from protection under the proposed legislation. What would appear to be the only consequential help to national security employees turns out, on closer inspection, to be toothless. The proposed legislation requires that the President must determine that a unit is exempt from

the statute *before* a personnel action is instituted if it is not one of the listed excepted agencies. But this will only encourage the President to exempt as many agencies as possible before hand to withdraw protection from potential whistleblowers in order to discourage disclosure of information embarrassing to the executive branch. The provision will result in *less* protection for whistleblowers, not more.

As the NSWBC has consistently stated, and included in our model legislation, the indispensable features to an effective whistleblower protection statute are:

1) Create a cause of action permitting whistleblowers to sue retaliators for money damages in their personal and official capacities and to bring suit against agencies in *respondeat superior* for failure to rectify misdeeds by employees or provide sufficient safeguards against whistleblower retaliation. And:

- Allow suits to be filed in U.S. District Courts
- Provide for reasonable attorneys fees recoverable from defendants for prevailing plaintiffs
- If agencies claim secrecy privileges that thwart suits, then let disputed facts covered by secrecy privileges be resolved in favor of plaintiffs. This would mirror the way factual inferences are construed against moving parties in summary judgment. At present, assertion of secrecy privileges is costless to agency administrators, and so will be used beyond legitimate grounds to protect agencies and administrators from embarrassment. Agencies must be made to internalize the costs of their instruments of secrecy when use of those instruments thwarts justice.

The law counsels that people by nature respond most readily to threats to their property or their liberty. At present administrators who engage in retaliation against employees for disclosure of waste, fraud, and abuse are virtually guaranteed to suffer no harm; they have no fear of money damages or criminal conviction. Indeed, often times these administrators are rewarded with promotion for “protecting” the agency.

2) Criminalize retaliation against whistleblowers. If administrators knowingly engage in retaliation against whistleblowers to prevent discovery of agency activity that is felonious in character, then those administrators should be subject to criminal prosecution.

3) Discontinue the office of Special Counsel and start over with something that is truly independent of executive branch vicissitudes and has not been deformed by decades of partisan politics.

In their present form, we cannot support either H.R. 1317 or S. 494. To do so would be to betray our constituency and our principles.

Presently, with both houses of Congress controlled by the party of the president, the transpartisan considerations of how to maintain the institutional integrity of Congress take a backseat to party power. This may continue to happen to the detriment of the United States and its citizens, but the wisest course of action would be to address the problem with the future security of the nation in mind, regardless of the temporary state of power of the respective parties. Thank you.