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WHISTLEBLOWER PROTECTIONS FOR GOVERNMENT CONTRACTORS

HEARING

BEFORE THE

AD HOC SUBCOMMITTEE ON CONTRACTING OVERSIGHT

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

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WHISTLEBLOWER PROTECTIONS FOR GOVERNMENT CONTRACTORS

TUESDAY, DECEMBER 6, 2011

U.S. SENATE,
AD HOC SUBCOMMITTEE ON CONTRACTING OVERSIGHT,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:05 a.m., in Room SD–342, Dirksen Senate Office Building, Hon. Claire McCaskill, Chairman of the Subcommittee, presiding.

Present: Senators McCaskill, Tester, and Portman.

OPENING STATEMENT OF SENATOR McCASKILL

Senator MCCASKILL. Good morning. Thank you all for being here today.

We are going to hold a hearing today on whistleblower protections, and just briefly I wanted to talk overall about this subject matter because I think it is incredibly important. This is probably not the best attended hearing that will be held on the Hill today, but those of you that are here understand the importance of whistleblowers in terms of government oversight.

I really do not think there is anything that is more important than whistleblowers because if you look around, it is very clear that whistleblowers have made a difference time and time again in terms of ferreting out serious and significant problems in the Federal Government. I can look no further than Arlington and Dover, and I can give many other examples where the reason that problems were identified and the reason we had the ability to go in and correct problems was because somebody who worked there told someone, someone who saw the problem said to themselves, "I cannot deal with this anymore. Someone has to do something about this." And that is the best instincts, and those are the instincts that we must protect. And a whistleblower that has reprisals against them is something that we cannot stand for in this government. And that is what this hearing is about.

I am proud to have been active in working in this area since the time I came to the Senate, and there are changes that we have been able to make in the law as it relates to whistleblower protections. There are now proposals that have been put forth both in the Senate and in the House, and I think that they are deficient in a major way. And the way I think they are deficient is because they do not fully address those people who work for contractors. And that is why we are here today.

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Now, there is a dirty little secret that people like to ignore, and, frankly, one of the reasons I voted against the Republican proposal last week on the extension of the payroll tax is because it was all about limiting Federal employees. It did not say a word about contractors. Anyone who thinks they are going to get at the problem of the growth of the Federal Government and the spending that is occurring in the Federal Government, if they think they can do that by leaving contractors out of the equation, they do not understand the Federal Government right now.

Agency after agency, we have more contractors working for those agencies than we have Federal employees. We have more contractors working at many agencies than we have Federal employees. So if we are not including contractors in the protection of the whistleblower legislation, then we have a huge problem here. If the whistleblowers that work for contractors do not have the same protections as Federal employees, we are saying to contractors we do not think wrongdoing by you is that important. We do not think waste and fraud and abuse that occurs in a contract capacity is as important as waste or fraud or violating rules of regulations or the law, that somehow your sins are not as worthy of being reported and protection for that reporter than the sins that may be occurring by people who directly work for the Federal Government.

So I think it is really important that we expand the protections for whistleblowers to people who work for contractors. We have been able to do that in two important respects. Senator Collins and I sponsored an amendment to the National Defense Authorization Act in 2008 that extends protections to whistleblowers for contractors that work for the Department of Defense. We also did the same thing for contractors that were receiving any of the money under the stimulus act.

So it is not that this is without precedent. We have now done it for stimulus dollars, and we have done it for contractors that work for the Department of Defense (DOD). Why not the rest of government? Why is this important to do with contractors who work for DOD and not with contractors that work for the Department of Energy (DOE) or contractors that work for Homeland Security (DHS)? I think we have thousands, and thousands, and thousands.

I will never forget the day when I asked the head of the Department of Homeland Security, Secretary Chertoff, when I first arrived at the Senate, how many contractors worked there. He had no idea. He had no idea how many contractors worked at the Department of Homeland Security. Suffice it to say, I believe that there are more contractors that work for the Department of Homeland Security than there are employees.

So that is what this hearing is about. I have introduced legislation, along with my friend Jim Webb, that will expand the protection of whistleblowers to any whistleblower, whether they are an employee or whether they are a Federal contractor. And if there is a reason we should distinguish between the two, I hope someone today points it out because I would be anxious to hear what that reasoning is.

So that is why we are here, and I think this will be a good hearing to explain the underpinnings of the legislation we have proposed, and I now will turn the microphone over to the Ranking

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Member of the Subcommittee, my friend, who has been a great Senator to work with on this Subcommittee, Senator Portman.

OPENING STATEMENT OF SENATOR PORTMAN

Senator PORTMAN. Thank you, Chairman McCaskill. I appreciate it. And thanks to the witnesses for being here today, and thanks for holding this hearing on a truly important topic, particularly at a time when we are looking at bigger and bigger debt, $15 trillion now, and a deficit of about $1.3 trillion this year. We need to focus on waste and mismanagement of taxpayer dollars more than ever. So it is an appropriate hearing.

The stopping of wasteful spending and detecting it and preventing it ultimately is something that whistleblowers play a key role in. There are others as well. We need official oversight and monitoring, including by contracting officers in the agencies and Inspectors General and law enforcement authorities. But whistleblowers are often the eyes and ears for all of us and for the American taxpayer to be sure we are detecting, preventing, and stopping wasteful spending. And they often serve as a vital communication link, too, between what is really happening in the daily operations of major Federal programs and the policymakers here in Congress and in the Executive Branch who are responsible for oversight of these programs.

The laws that are currently in place, whistleblower protection laws, are necessary to give individual employees that confidence to be able to speak up, to do the right thing without fear of retaliation. Today, as I counted, we have a patchwork of those kinds of protections. I think there are 19 different laws, depending on how you count them, that deal with whistleblower protections. As I think we will hear this morning, we have found that some of them work better than others.

The Whistleblower Protection Act of 1989 is sort of the standard protection for Federal Government employees who report misconduct, and in October I was pleased to join with my colleagues in this Subcommittee on both sides of the aisle to support legislation to strengthen that statute for government employees in significant ways, including broadening the scope of protected disclosures.

But unlike these public sector protections, there is no standard whistleblower statute that covers private sector employees. Instead, Congress has taken a more piecemeal approach to that, creating whistleblower protections to address abuses in specific areas: Sarbanes-Oxley would be one in the securities and bank fraud areas; within specific departments such as the Department of Energy whistleblower provisions; or more recently to major new spending commitments. There were provisions, for instance, in the 2009 stimulus bill.

I think it is fair to say that whistleblower protections for non-Federal employees are nowhere more necessary and appropriate than in Federal contracting. After all, that is the jurisdiction of this Subcommittee, so it is appropriate for us to take a look at this.

We now spend over half a trillion dollars a year in contracts annually. Think about that. That is 15 percent of all Federal spending now goes into government contracting. That was about $539 billion last year.

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When we are dealing with taxpayer dollars of that magnitude, there can be no question that we have to take every effort to ensure good stewardship. The law provides a number of protections for contractor employees from the False Claims Act to civilian protections in the Federal Acquisition Regulation (FAR) 3.9, to defense contractor protections in Section 2409. I would be interested to hear from our witnesses today on how these existing protections for contractors have proven effective and where they might fall short.

I am also very interested in exploring some of the unique issues raised by extension of these whistleblower protections to private sector employees such as contractor employees. One of the issues is the need to ensure that the law does not disrupt or undermine a company's own internal compliance and reporting processes. I do not think that would be in our interest.

There was a recent Law Review article in the Harvard Law Review that notes that there is now a large body of research that shows that these internal whistleblowings can actually be more effective at stopping organizational wrongdoing and waste than the external reporting. So we do not want to disrupt the internal processes that are in place. And given our finite resources for enforcement and investigation, we want to encourage strong internal private compliance efforts to detect and correct wrongdoing.

Ideally, I think the law should encourage firms to be self-policing to the extent possible, and that means whistleblowing protections should extend to both the internal and external reporting of wrongdoing.

Unfortunately, many whistleblower laws are one-sided in this respect. I give you as one example the securities whistleblower provisions in Dodd-Frank. It fails to protect employees who report security violations internally and instead offers large financial incentives to bypass those internal controls and immediately report out.

The Federal Acquisition Regulation suffers, I think, from a similar flaw. It protects contractor employees who report to government officials but not those who choose to go through the internal chain of command.

I think these are serious concerns and something I would like to hear more about today because I think they may permit some abuses to go undiscovered while actually impeding good-faith internal compliance efforts. On this point, I think Senator McCaskill's whistleblower reform proposal gets it right by extending protections to employees who report misconduct to the management of their organization.

Another important consideration is the need to ensure these rights are clear and well defined for both employers and employees. Would-be whistleblowers would be more likely to stay silent if they do not understand their rights, and by the same token, employers may be overlawyered or overburdened if they are exposed to unclear requirements or ambiguous liabilities in this area. For that reason, I think the parameters should be very carefully defined in law and carefully understood.

So with that, I look forward to hearing from our witnesses on how best to protect contractor whistleblowers and how best to save taxpayer dollars.

Thank you, Madam Chairman.

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Senator MCCASKILL. Thank you, Senator Portman, and we will begin with our witnesses.

First, we have Peg Gustafson, the Inspector General for the Small Business Administration and the Chair of the Legislation Committee of the Council of Inspectors General on Integrity and Efficiency (CIGIE). Prior to becoming Inspector General, Ms. Gustafson was my General Counsel, where she wisely advised me on oversight issues and helped to write the legislation that has strengthened the Offices of Inspectors General (OIG). From 1997 to 2007, Ms. Gustafson was, in fact, General Counsel when I served as State Auditor of Missouri. It is great to see you, Peg.

Marguerite Garrison is the Deputy Inspector General for Administrative Investigations at the Department of Defense. Prior to becoming the Deputy IG, Ms. Garrison was a career Army Military Police officer where she achieved the rank of Colonel. Before retiring from that position, Ms. Garrison served as the Chief of the initiatives group in the army where she identified and coordinated key issues of strategy, police, future concepts, and comprehensive army information requirements across the Army staff.

It is the custom of this Subcommittee to swear in all witnesses that appear before us, so if you do not mind, I would ask you to stand and raise your hand. Do you swear that the testimony you will give before this Subcommittee is the truth, the whole truth, and nothing but the truth, so help you God?

Ms. GUSTAFSON. I do.

Ms. GARRISON. I do.

Senator MCCASKILL. Thank you both.

We will turn to you first, Ms. Gustafson, for your testimony.

TESTIMONY OF HON. PEGGY E. GUSTAFSON,[1] INSPECTOR GENERAL, U.S. SMALL BUSINESS ADMINISTRATION

Ms. GUSTAFSON. Madam Chairman, Ranking Member Portman, thank you very much for the opportunity to be here today and for your continued support of the work of Inspectors General. I am happy to be here in my capacity as Chair of the Legislation Committee for the Council of Inspectors General on Integrity and Efficiency, which I will also call "CIGIE" from now on in my testimony.

Inspectors General are strongly supportive of essential safeguards for whistleblowers. Tools to incentivize and protect whistleblowers, whose actions are often brave and selfless, are encouraged and needed by Inspectors General.

Offices of Inspectors General play an important role in investigating allegations brought forward by whistleblowers. Given our experience and resources, IGs are well positioned to receive information from whistleblowers, protect their confidentiality, and fully investigate the allegations in a fair, timely, and unbiased manner.

The CIGIE Legislation Committee has sought to obtain an accurate sense of the IG community on certain whistleblower-related legislative proposals by conducting several surveys within the past 2 years on matters involving whistleblowers.

One such survey involves the perspective of IGs in agencies that were allocated funds under the American Recovery and Reinvest-

[1] The prepared statement of Ms. Gustafson appears in the appendix on page 29.

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ment Act (ARRA) or the stimulus act, which includes a provision aimed at protecting State and local government contractor whistleblowers.

During the timeframe of February 2009 through April 2011, IGs who had responded to the survey had received 1,652 complaints regarding ARRA transactions from employees of non-Federal entities. The complaints related to approximately 323 distinct ARRA transactions, meaning that multiple complaints had been received on some of these transactions. Of the 1,652 complaints, 35 percent, or 580, resulted in the opening of an investigation, audit, or other Office of Inspector General review, and 150 others at the time of the survey were still being considered for IG action. Though the judicial and criminal investigative process can be lengthy and may still be ongoing in some of these cases, responding OIGs indicated that their investigations and reviews of the whistleblower complaints had resulted in recovery of approximately $1.85 million as of April of this year.

One of the key provisions of ARRA is Section 1553 that gives the authority of OIGs to investigate reprisal complaints from non-Federal employee whistleblowers. Of the surveyed IGs, 8 of the OIGs had received a total of 18 reprisal complaints, and 11 of those had been accepted for investigation. The majority of IGs that had received these complaints had not experienced any problems or concerns with implementing Section 1553 or in responding to the complainants' request to access the completed investigation file.

As a community, IGs are always concerned about statutory requirements ordering them to conduct an investigation and statutory deadlines mandating completion of an investigation within a prescribed period of time. These mandates undermine the ability of IGs to independently set priorities and create the potential for finite resources to be diverted from other high-impact investigations that may better serve taxpayers' interest.

By expanding the potential pool of non-Federal employee whistleblower complaints beyond ARRA to encompass all government contracts, grants, and payments, a significant impact on IG resources is anticipated. And, therefore, efforts to provide for IG discretion on whether to open an investigation or the timeframes will be crucial going forward in this endeavor.

The ability of IGs to carry out their mission is dependent on the authority to access records pertinent to the investigation of the complaint. In instances of IGs having authority to access the records of State, local, and private sector employers who received ARRA funds, the IGs believe that Section 1515 of the Recovery Act serves as a viable model for giving IGs this access.

One additional area of concern is the requirement that IGs disclose pending investigations of a whistleblower's reprisal complaint to the whistleblower's employer. There is a concern that these disclosure requirements could jeopardize the ability to obtain accurate information for the investigation and may jeopardize the whistleblower status with the employer if they were to figure out who the whistleblower was. Therefore, efforts to provide IGs with greater discretion on whether or when to disclose the investigation to the employer may assist OIG investigation efforts.

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CIGIE shares the perspective that IGs are well positioned to investigate these complaints but believes the scope of the legislative proposal does necessitate that IGs have the authority to access these records and give IGs the flexibility to conduct these investigations as balanced with the other IG priorities. We also believe the IGs' role should be narrow, where the IGs are conducting the investigation and reporting the findings to the agency officials authorized to make the ensuing decisions.

I want to thank you again for the opportunity to speak with you and look forward to working with you going forward on this. Thanks.

Senator MCCASKILL. Thank you, Ms. Gustafson. Ms. Garrison.

TESTIMONY OF MARGUERITE C. GARRISON,[1] DEPUTY INSPECTOR GENERAL FOR ADMINISTRATIVE INVESTIGATIONS, U.S. DEPARTMENT OF DEFENSE

Ms. GARRISON. Madam Chairman and Ranking Member Portman, thank you for the opportunity to appear before you this morning to discuss whistleblower protections for government contractor employees.

The Inspector General Act of 1978, as amended, entrusts us with responsibility for improving the economy, efficiency, and effectiveness of the Department's operations through prevention and detection of fraud, waste, and mismanagement. To do so, the Department of Defense IG (DOD IG), conducts audits, evaluations, and investigations—many of which arise from disclosures brought to light by whistleblowers. Under the broad authority of the IG Act, we may investigate any matter of concern.

DOD IG is somewhat unique among IG offices in that our responsibility to investigate whistleblower reprisal complaints derives not only from the IG Act but also from several other statutes.

DOD IG has overall responsibility for the whistleblower protection program across the Department. A strong whistleblower protection program includes a confidential channel for the disclosure of wrongdoing, reliable protection against reprisal for making protected disclosures, and assurance that everyone concerned understands their rights and responsibilities under the law.

Since the late 1980s, Congress has passed a series of laws protecting members of the Armed Forces, appropriated and non-appropriated fund employees, and DOD contractor employees from reprisal. DOD IG has the authority to investigate these complaints and to oversee allegations conducted by Department of Defense component Inspectors General.

Additionally, pursuant to the American Recovery and Reinvestment Act of 2009, DOD IG has the authority to investigate complaints of reprisal filed by employees of non-Federal employers who make disclosures related to possible fraud, waste, or abuse of Recovery Act funds.

Our authority with respect to DOD contractor employees is drawn from Title 10, United States Code, Section 2409, as amended in 2008. Since 1986 the statute has been amended on multiple occasions. The 2008 amendment expanded the types of protected

[1] The prepared statement of Ms. Garrison appears in the appendix on page 33.

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disclosures and their authorized recipients. It also imposed additional deadlines for agency heads to resolve reprisal complaints. We welcomed those enhancements to protections for defense contractor whistleblowers.

In 2008, we recommended legislation to require defense contractors to inform their employees in writing of their whistleblower rights under the statute. Our recommendation resulted in the inclusion of that requirement in the National Defense Authorization Act for Fiscal Year 2009.

While the protections under Section 2409 have been strengthened over the years, in our experience there are certain features in the law that may have impacted the potential substantiation of some complaints. For example, the law fails to protect defense contractor employees from reprisal for reporting wrongdoing to company management. It also does not protect employees from actions directed by government officials. Nor does it protect employees of subcontractors. The lack of protections in these areas stands in contrast to other similar whistleblower protection statutes, such as the American Recovery and Reinvestment Act.

We are proud of the role that Congress has assigned our agency to objectively and thoroughly investigate whistleblower reprisal complaints. For over 20 years, we have maintained a robust whistleblower protection program which has been a top priority of the DOD IG. Whistleblowers perform an important public service, often at great professional and personal risk, by exposing fraud, waste, and abuse within the programs and operations of the Department.

In closing, I would like to thank the Subcommittee for the opportunity to discuss the important topic of whistleblower protections for government contractor employees. I look forward to answering your questions.

Senator MCCASKILL. Thank you very much to both of you.

Let me start with you, Ms. Gustafson. You talk in your testimony about resources and the fact that if we mandate an investigation to be completed within a certain period of time, that would—and I understand this—really be tough in terms of potential resources and understanding—as you well remember, there were all kinds of laws that said I had to do so many audits that we could not do because we did not have the personnel, so we had to prioritize based on where we thought risk was.

The problem is that if we do not mandate the investigation and we do not mandate a time period for the investigation, I think we lose some of the public accountability.

Have you given any thought and has the Council given any thought to maybe mandating some kind of public accountability as to why an investigation was not pursued?

Ms. GUSTAFSON. Well, I think that actually there has definitely been thought given to that, and I think actually S. 241 has some provisions in there that the IGs are very supportive of, which is to say there is an investigation that needs to be done, there is some discretion given to the IGs with an accountability in the semiannual reports as to why an investigation has not been completed within a certain length of time. And there is also accountability built in when you have to report to the whistleblower if you have decided not to undertake that investigation.

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So I actually think that this is there and that is something the IG community is very supportive of. And it goes on to then give the whistleblower access to the court immediately after that so that the whistleblower's rights are not estopped by an IG. Some of these IG shops are three people, four people.

Senator MCCASKILL. Right.

Ms. GUSTAFSON. And some are thousands of people. So, I think it is actually a schematic that has been devised to kind of allow for robust investigations when that can happen without estopping the whistleblower from going elsewhere in times when it simply cannot.

Senator MCCASKILL. So do you think the way that S. 241 has been drafted, the legislation that we have drafted, do you think it gives enough discretion to the Inspectors General?

Ms. GUSTAFSON. Well, it gives complete discretion to the Inspectors General.

Senator MCCASKILL. OK, good. I am confused, Ms. Garrison, about the number—since we changed the law and the standards, I am confused about the number of complaints that you have had as to whistleblower retaliation among the contractor community and the total investigated, and the fact that there have been none substantiated. But more troubling, whether or not they have been substantiated, you had the law changed in 2008. You had 44 complaints in 2009, 51 in 2010, and 68 in 2011. And of all of those, there have only been five investigations. Why is that?

Ms. GARRISON. Well, many times when we look at the incoming complaint, there are several reasons for that, Madam Chairman. No. 1 is that the complaint is from a subcontractor and not a contractor employee. Another reason may be that the employee made the complaint to a company management official, not a government official.

A third reason could be that the government official directed the unfavorable personnel action rather than the contractor because they saw that there was some deficiency in the performance of the employee.

So those are some of the reasons why, but mostly because they have been subcontractor employees and not contractors.

Senator MCCASKILL. OK. On the last point you made, I am confused. What was the last point, that——

Ms. GARRISON. The last point was that—excuse me, Madam Chairman.

Senator MCCASKILL. That is OK.

Ms. GARRISON. The last point was that the unfavorable personnel action that was directed against the employee came as a result of a government official perceiving a deficiency in the duty performance of the individual and, therefore——

Senator MCCASKILL. Isn't that always the defense?

Ms. GARRISON. Pardon me?

Senator MCCASKILL. Isn't that what would have to be investigated? Isn't the government always going to say the reprisal was not because they were whistleblowers but because they were not a good employee?

Ms. GARRISON. No, the contractor is the one that let the employee go based upon what the government official said, and it was

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a perceived deficiency in the duty performance, so no. But in some cases, if we see that the government employee directed that unfavorable personnel action because of some disclosure that the employee made, then under the IG Act we have the authority to——

Senator MCCASKILL. But how do you know that without investigating? How do you know that they were let go for performance as opposed to being a whistleblower if you never investigate it?

Ms. GARRISON. Well, we have conducted preliminary inquiries and looked at the basis of the fact of the termination of the employment, and based upon our initial inquiry, we have determined that the performance of that employee was deficient prior to the protected disclosure.

Senator MCCASKILL. Oh, so you are saying that there is documented evidence that there were performance issues prior to any whistleblowing activity?

Ms. GARRISON. Yes.

Senator MCCASKILL. OK. We were told in a briefing that DOD IG was also relying on the previous standards in the law as opposed to the standards that were put in place in 2008 based on the fact that the contract was executed before 2008. Is that correct?

Ms. GARRISON. That is correct.

Senator MCCASKILL. On what legal basis are you all making that decision? Because this is not about protecting contractors. This is about protecting whistleblowers. And I do not know why the date of the contract execution would have legal bearing on what standard would be applied. Is that a lawyer inside the Department of Defense that is giving you that advice?

Ms. GARRISON. When we looked at the 1994 statute, we look at the date of the contract and when the contract was let. The provision that was in place at the time of the contract is what we are looking at. So, for example, we had a contract that was executed in 2007. The 2008 amendment was not in place at that time, so we look at the statute of 1994 to determine where we are going to head in that investigation or whether we are going to pursue it.

Senator MCCASKILL. But why would you do that? On what legal basis? Because there is nothing that I am aware of in the law—and I admit that I am one, a lawyer. I am not aware—since the law is focused on protecting the whistleblower, it has no bearing on not telling contractors what they can or cannot do. It is telling them that it is basically protecting a whistleblower. Why would the date of execution of the contract be the controlling date as opposed to the standard that we have put in the law going forward?

Ms. GARRISON. Well, it has been our experience thus far that the complaints we have received have been on contracts that are before two thousand——

Senator MCCASKILL. You do not understand my question. On what legal basis are you—is there any—did you get a legal opinion from someone that told you that the old law needed to control protections for whistleblowers as opposed to the new law for any contract that had been executed before 2008 or 2009?

Ms. GARRISON. I would like to take that one for the record.

Senator MCCASKILL. That would be great. And if there was a legal opinion, I would love to review it. I would love to see it and get the basis for that, because I do not believe that is correct in

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the law. I think that the standard that should be used should apply across the board going forward, because this is not something that materially impacts the contract provisions for the contractor. It materially impacts the protections for the whistleblower. And I think that is a distinction with a real difference. So I would love to see where that decision was made and how it was made and get the backup documentation for it.

Thank you, Ms. Garrison. Senator Portman.

Senator PORTMAN. Thank you, Madam Chairman, and thank you all for your testimony.

Ms. Garrison, I was just curious about one thing you said in response to the Chair's questions about subcontractors and the reporting under—you said that many of the whistleblower complaints are subcontractors and, therefore, are not investigated. Should whistleblower protections extend to employees of subcontractors?

Ms. GARRISON. We see that S. 241 does extend it to subcontractors, and we see that as a positive, so yes.

Senator PORTMAN. OK. Who should these reports of wrongdoing be made to—the prime contractor first?

Ms. GARRISON. We also see in S. 241 that the disclosures have been expanded so that they can be made internally and that we could also be involved from a DOD IG's perspective.

Senator PORTMAN. On the internal disclosures, as I noted in my statement, I do think it is very important to have greater symmetry between the protections for external reporting and internal reporting, and the fact is that most whistleblowers report inside their organization first, and I think we should be encouraging them rather than, in effect, telling whistleblowers to circumvent the internal company procedure in order to be guaranteed protection.

To what extend do you believe this gap in the law has prevented whistleblowers from coming forward or prevented substantiation of their reprisal allegations?

Ms. GARRISON. It is hard for us to speculate on the substantiation rates or what kind of effect that would have. However, we do believe with the passage of S. 241, since the whistleblower protections will be expanded, we may see an increase in the number of cases from subcontractor employees as long as we have a good education after the law is passed.

Senator PORTMAN. And what other tools do you think we should be using other than S. 241 to promote internal reporting and better self-regulating?

Ms. GARRISON. Well, as I said previously, the 2009 NDAA, made it mandatory that a written clause be included in all contracts and that the employers would have to inform their employees of all the whistleblower protections. We see that as one means of doing it. We also could have a communications campaign where we would have various posters about internal disclosures, and we would have to educate our contracting officer representatives (CORs) and our government contracting offices on how to expand those protections.

Senator PORTMAN. And, Ms. Gustafson, about internal reporting, do you have some thoughts on that? How do you believe this gap has affected folks coming forward and what tools can you see are necessary to promote more internal reporting and better self-regulating?

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Ms. GUSTAFSON. I do think it is always kind of hard to know what the gap is because it is kind of what do we not know, but I will say that just from my experience as an Inspector General, to Ms. Garrison's point, letting people know what they can do and where they should go is always very helpful. I find that both internally as an Inspector General letting the SBA employees know that we are there and they should be telling us allegations of wrongdoing or things they see that might be fraud, waste, and abuse, and I would think that would be true across the board, be it a private employer or Federal contractor or any agencies.

Senator PORTMAN. I was curious. Ms. Garrison, in your testimony you talked about complaints of reprisal filed by members of our military where you are at DOD, and you said that those reprisal complaints far outnumber those filed by contractors—436 military whistleblower reprisal allegations in fiscal year 2011 compared to 68 defense contractor employee reprisal allegations in the same space of time.

In your view, what accounts for this disparity?

Ms. GARRISON. Yes, Senator. We believe that the disparity is accounted for because we have done a great job of going out and advising the military population and various service IGs and Department of Defense component IGs about the whistleblower protections under 1034. That increases the number of, we believe, incoming complaints.

We are not so sure that the contractors are as well informed about the whistleblower protections as our military personnel.

Senator PORTMAN. And can you comment on that across the agencies or, Ms. Gustafson, maybe you could comment on that? In other words, is this something that is just DOD or is this consistent, this disparity, across the civilian agencies?

Ms. GUSTAFSON. Well, I guess I would say I have no reason to think it would be just across DOD. I do not know why it would. And I do think that one of the issues maybe even with ARRA is, the stimulus bill went pretty far in applying whistleblower protections, but, of course, it had to be related to just ARRA funds. And so you really did have a relatively small subset of people who would be able to take advantage of those provisions when you compare it to all Federal moneys. And I think that may have had something of a tamping-down effect, too, because that is something that you would have to know in order to go forward. You have to know that the rights are there, know it is an ARRA project, and then know where to go.

Senator PORTMAN. On advance notice of whistleblower rights, getting back to contractors, Ms. Garrison, you said that you believe that some notification through internal means—you mentioned posters or other sort of campaigns to let folks know might be helpful, and you said that in your contracts you require that the private sector make those rights known. I think that is under Section 1034.

I am just wondering if you all could both comment on this. Do you think the contractor workforce is sufficiently aware today of the protections under Section 2409 or the FAR 3.9? Do you think that is generally known among contractor employees?

Ms. GUSTAFSON. With all due respect, Senator, I really do not know the answer to that question, and I would hate to guess. That

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is something that we have not taken the temperature of the IG community on, so I really do not think I can speak to that. DOD may have a better view.

Ms. GARRISON. We believe the inclusion of the language in the DFARS has caused an increased awareness. However, I do not know how much of an increase that is across the Department.

Senator PORTMAN. And do you have other thoughts as to how that notification could be improved other than the thoughts you gave us earlier? Either one of you. Ms. Gustafson, has your group looked at this?

Ms. GUSTAFSON. We have not, Senator. So that is something we——

Senator PORTMAN. Is that something you could look at and get back to us on?

Ms. GUSTAFSON. We could certainly for the Subcommittee seek opinions of the IG community. That is something I would be happy to do, sure.

Senator PORTMAN. OK.

With regard to the statute of limitations, I was curious to see that there are, in effect, sort of open rights here without a statutory period. No question we want a robust, effective whistleblower protection. We want it to be clear and well defined, as I said earlier. But I do not think we want these protections to be misused either.

As I look at it—and tell me if I am wrong—it seems as though the statute of limitations is open. For instance, we would not want whistleblower reprisal allegations to serve as a pretext for an unrelated dispute with an employer—you talked a little about that earlier, Ms. Garrison—or as a defense against what were considered to be legitimate personnel actions. And often, there is a statute of limitations that is tolled upon discovery of the potential wrongdoing.

My understanding is that the whistleblower protections in Section 1533—and this is in the American Recovery and Reinvestment Act, in the stimulus—contained no time limit within which to file an IG complaint to secure protection against reprisals, and there is no limit within which a civil action must be filed after the employee has exhausted the administrative remedies.

I just wondered what you all thought about that. Do you think that is the right approach? Do you think there should be a statute of limitations both on the filing of the reprisal complaint and bringing a civil action?

Ms. GUSTAFSON. Senator Portman, I do not—in the survey of the IG community, I would note that nobody had brought that up as an issue, which I find, I guess, telling enough that I want to point out that nobody had brought up whether that was a concern. It may be that ARRA is so recent that it has not yet become a question. So it may be something moving forward, as it becomes not just about ARRA but whether S. 241 becomes the law of the land. We might have something we want to look at. But as of right now, even though I am a lawyer, quite frankly, I have not thought about that question, and so that might be something that we going forward would want to work on. Whether it would go back to a different whistleblower—refer back to a different whistleblower law

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already in place to have the kind of symmetry that you talked about where there is a uniformity among laws might be one alternative.

Senator PORTMAN. Would you be willing to have your group look at that, too, and report back to the Subcommittee what you think on the statute of limitations?

Ms. GUSTAFSON. I can certainly take the views of the IG community and get back to you.

Senator PORTMAN. And again, Section 1553 could become a template for further action, including some of the legislative proposals talked about today, so we would like to get your input on that.

Ms. GUSTAFSON. OK.

Senator PORTMAN. Any thoughts on that, Ms. Garrison?

Ms. GARRISON. Yes, Senator. On the statute of limitations, we found that a statute of limitations results in a more timely investigation, and that evidence can become stale, so the longer it takes to file the complaint, the more stale the evidence will become.

Senator PORTMAN. OK. Good. Thanks very much.

Thanks, Madam Chairman.

Senator MCCASKILL. So you are saying actually, Ms. Garrison, that a statute of limitations might help the strength of these cases in terms of our ability to investigate them because it provides some kind of deadline for everybody to either come forward or not come forward?

Ms. GARRISON. Yes, Madam Chairman.

Senator MCCASKILL. I understand that.

Welcome, Senator Tester. Good to see you.

Senator TESTER. Thank you, Madam Chairman.

Senator MCCASKILL. Would you like to ask some questions of these witnesses?

Senator TESTER. I sure would.

First of all, I want to express my appreciation for you and the Ranking Member holding this hearing. I appreciate your work that you have done on cutting waste, fraud, and abuse during your tenure here. As we look to balance the budget, this is the low-hanging fruit. We have just got to be able to make sure that we know about it so we can deal with it, and how we can enhance our ability to get the information about waste, fraud, and abuse is critically important. And I want to thank the Members for testifying. Sorry I was not here. I had a previous conflict.

But I just want to ask either or both of you, just from your perspective, how important are whistleblowers when it comes to ferreting out——

Ms. GUSTAFSON. Well, I think it is very clear and is pretty much the unanimous opinion of the IG community that much of our work could not be done if we did not have people on the ground telling us or pointing us to issues that they see involving abuse or waste or fraud of Federal funds, be it a Federal contractor employee, somebody sitting at a desk at DHS or DOD, or just be it the Federal money that is flowing out and is eventually being used to build planes or build roads.

The IG community is substantially far too small to be able to do that without having people who are firsthand witnesses to that tell us what is going on, so it is crucial.

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Senator TESTER. Would you agree with that?

Ms. GARRISON. Yes, we would. We have found in our experience that internal allegations or reprisal complaints that come forward.

Senator TESTER. OK, good. So how can we enhance their ability to come forward? Because I am sure there is a lot that goes on that we do not know about, and so how can we enhance their ability to come forward with—and sometimes it is a fine line because you do not want to get in the situation where somebody is having a fight with somebody. But the other side of the coin is that, it is a significant problem, I think, and we need every attack avenue we can get.

So how do we enhance whistleblowers to come forward? Any ideas?

Ms. GUSTAFSON. Well, first you have to make sure that if they do come forward, there will be some way for them to get restitution if they start getting reprised against and have an avenue to seek redress if somebody were to retaliate against them for coming forward. But, also, I do think a lot of it is education and letting them know what the avenues are to report these types of activities, be it internally, be it to the IG, be it to the RAT Board for the Recovery Act. That is crucial because a lot of times people, if they do not know where to go to begin with, they might be stymied from the get-go.

Ms. GARRISON. I agree with my colleague.

Senator TESTER. OK. Some have noted the low instance of fraud in the Recovery Act. Were there things in the Recovery Act that we should apply to other pieces of legislation that come to your mind that would prevent—or as far as that goes, is there anything we should be putting in pieces of legislation that would help prevent waste, fraud, and abuse?

Ms. GUSTAFSON. Well, there are a couple of provisions of the Recovery Act that I think were really new and that the Inspectors General have found to be tremendously useful. One is the level of transparency that has come about as a result of the reporting requirements and the very robust Web site that the RAT Board has put up where you really can see where the money was going and whether it is an ARRA project. Another are the whistleblower protections that were in there. I do think everybody has been very heartened by the low levels of fraud. I would hasten to add it is not over yet, but I think people have been surprised. And those have been two of the big changes, and so it would be—it seems clear that they have had some impact on why it is so.

Senator TESTER. OK. Anything to add to that?

Ms. GARRISON. No.

Senator TESTER. OK. I know your positions. I do not want you to incriminate yourselves. But compared to the media, compared to Inspectors General, compared to auditors, regulatory organizations, where would you stack whistleblowers in that as far as their ability to stop waste, fraud, and abuse? Inspectors General, No. 1, I am sure. [Laughter.]

Ms. GUSTAFSON. There are a lot of people who work for me that would be very disappointed if I did not say that. But, again, there is only so much that we can do. I can speak just, for example, for SBA. A lot of the risk that comes from my—and the Small Business Administration deals with the lending going on that is done

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under delegated authority. And, quite frankly, if we did not have a good relationship with lenders to tell us about those problems, for example, we simply would not know. So it is not even just about outsourcing. It is really just about the nature of the beast that a lot of this really happens once the money is finally done, and we are simply not there. So how about even footing?

Senator TESTER. All right. Even keel all the way across. How is that? Well, I want to thank you both for your testimony and for being here today.

Thank you, Madam Chairman.

Senator MCCASKILL. Thank you, Senator Tester.

I think that one of the things we have tried to get at in 241—and I just want to put this on the record—kind of goes to the point you were making, Ms. Garrison, earlier about the government asking for something to happen with an employee as opposed to the contractor asking something to happen or the subcontractor asking something to happen with the employee. Right now the DOD provision just covers retaliation by the employer. It does not even cover retaliation by the government.

So just so the example is made clear, let us say there is a contractor over in Afghanistan working on a highway, and they learn that somebody that is part of the military is involved in getting a kickback from some of the money we are paying for security. This is just a hypothetical example. If that government official finds out that this employee knows this, that government official could retaliate against that employee and it would not be covered in this law because it only covers action by their employer and not by the government, correct, in the DOD provision now?

Ms. GARRISON. Yes, ma'am.

Senator MCCASKILL. Which we fix in 241.

Ms. GARRISON. Yes, ma'am.

Senator MCCASKILL. So that the retaliation, no matter where it occurs, whether it occurs by the government or whether it occurs by the employer, be it a contractor or subcontractor, would all be covered. And I assume that you would agree that would be a major improvement in terms of us being able to protect whistleblowers.

Ms. GARRISON. Yes, Madam Chairman, we would agree.

Senator MCCASKILL. OK, great. Thank you.

I do not have anything else for this panel. Do you have anything else for this panel?

Senator PORTMAN. No. Thank you.

Senator MCCASKILL. Thank you both very much. I appreciate you both being here. And please tell all the men and women that work for you that, as far as I am concerned—and I think many of the people who serve in an oversight capacity in the Senate—they are the unsung heroes in terms of us trying to get at the problems we have with the government spending money in ways it should not. So thank all of them for us, please.

Ms. GUSTAFSON. Thank you.

Senator MCCASKILL. Thank you.

Let me introduce this panel. First we have Dr. Walter Tamosaitis. Am I saying that right?

Dr. TAMOSAITIS. That is very good.

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Senator MCCASKILL. Thank you. Dr. Tamosaitis was the Research and Technology Manager (R&T) and Assistant Chief Process Engineer for the Waste Treatment Project at the Hanford nuclear site in Washington State. Mr. Tamosaitis has a Ph.D. in systems engineering and systems management, and he has over 40 years of experience. As a contractor employee at the Waste Treatment Project, Dr. Tamosaitis raised serious safety concerns about project testing.

And Angela Canterbury is the Director of public policy for the Project on Government Oversight (POGO). In this capacity Ms. Canterbury has advanced public policies to combat corruption and promote openness and accountability in government. She has been an effective advocate for legislation that has improved the financial regulatory system, lobbying and congressional ethics rules, whistleblower protections, the Freedom of Information Act, and other open-government initiatives. Prior to joining POGO, Ms. Canterbury served as the Director of advocacy for Public Citizen's Congress Watch Division.

As I said before, it is the custom of this Subcommittee to swear in our witnesses, so if you all would mind standing for me, raising your hand. Do you swear that the testimony you will give today before the Subcommittee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Dr. TAMOSAITIS. I do.

Ms. CANTERBURY. I do.

Senator MCCASKILL. Thank you both, and we will begin with you, Dr. Tamosaitis.

Dr. TAMOSAITIS. I may go a tad more than 5 minutes.

Senator MCCASKILL. That is fine.

TESTIMONY OF WALTER L. TAMOSAITIS,[1] PH.D., URS CORPORATION, AND FORMER RESEARCH AND TECHNOLOGY MANAGER, WASTE TREATMENT PROJECT, HANFORD NUCLEAR SITE

Dr. TAMOSAITIS. Good morning. My name is Walt Tamosaitis and I live in Richland, Washington. I am here speaking and representing myself today. Thank you for giving me this opportunity to provide this testimony. I also think it is a very important topic. As a contractor employee, I am living the experience today.

I have a B.S., M.S., and Ph.D. in engineering, a certificate in business, and a professional engineering license, over 42 years industrial experience with DuPont and chemical plant operations with URS in DOE nuclear work.

My last position was that of the Research & Technology Manager in the $13 billion Waste Treatment Plant (WTP) project in Hanford, Washington. It is known as the WTP or the VIT plant.

The objective of the WTP is to put 56 million gallons of hazardous nuclear waste into a stable waste form to eliminate an environmental and safety threat. This material is in 177 aging waste tanks that long ago have exceeded their design life. One-third of those tanks have already leaked. Any delay in startup or through-

[1] The prepared statement of Mr. Tamosaitis appears in the appendix on page 46.

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put of the WTP increases the chance of additional radioactive leaks to the environment.

I am an advocate for the WTP, but it must be built to run safely and efficiently. While an advocate, I am opposed to corner cutting to earn fees and meet artificial schedules. This especially applies when the taxpayer cost is now over $13 billion and predicted to go to around $20 billion. The original cost for this plant was $4.6 billion.

The safety threats in the WTP are very serious. They include the trapping of explosive hydrogen gas in the waste which can lead to fires or an explosion; solids buildup, which can lead to a criticality; erosion and vessel and pipe pluggages that can render the plant totally inoperable. Several of these relate to mixing in the vessels. Because of the design of the plant, making changes later is not really an option and would be extremely costly, if it was even possible.

Bechtel is the prime contractor in the WTP. The DOE contract gives them the design authority and the design agency responsibility for the project. This means Bechtel decides what needs to be done and how it will be done. They then get rewarded for cost and schedule performance, but will have no operating responsibility. Their focus is profits, not performance.

At 7 a.m. on July 1, 2010, I was suddenly terminated from the WTP job and escorted off the premises after I continued to raise valid safety and technical concerns during a time when Bechtel was attempting to meet a June 30th deadline for closing the mixing issue.

Meeting the June 30th deadline was very important because there was a $5 million award fee on the line for them, and there was also an additional $50 million in Congress that they were trying to get. And we have e-mails which indicate that they were fearful if they did not close M3, they would have lost all that money.

Two days earlier, I submitted a list of nearly 50 technical issues, many of which included mixing concerns. On July 1, I went into work to finalize the details of my team's next assignment in WTP. I found my e-mail account had been turned off the night before. I was directed to go into an office and told, "Hand over your badge, your BlackBerry, and your phone." I was then unceremoniously escorted off the WTP site. I was not allowed to talk to anyone and could not go to my office to get any of my personal belongings.

My termination sent a chill through the WTP and the community. After termination from my WTP job, my employer, URS, assigned me to a basement office that housed two working copying machines. I have been sitting in a basement office now for nearly 16 months. I have little meaningful work and no contact from URS management. I have not been invited to any safety or staff meetings, which are the staple of normal operations.

I went to the Department of Energy Employee Concerns Program immediately after this happened. I was told that they had not seen such a flagrant case of retaliation and that I should seek help outside, which they then gave me the name of a person and I did.

I found no help for whistleblowers in the State of Washington, no help from the IG, and very little help from the Department of Labor (DOL). The DOE Inspector General was supposed to look

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into my termination but stopped as soon as they learned I had filed a claim with the DOL. After a year, the DOL time expired, and with no outcome I asked for my case to be moved to Federal court. Any information we received from the IG in DOL was so heavily redacted, it was virtually useless. It will be nearly 2 years before a trial first occurs.

Meanwhile, Bechtel gets reimbursed for their efforts. For example, in their most recent survey, which they released last week, "*Addressing the Culture*," it is estimated to have cost taxpayers nearly $2 million.

I wrote a letter to the Defense Nuclear Facilities Safety Board (DNFSB) which prompted several investigations and a public hearing last October. The Defense Board has substantiated my technical and cultural concerns. The cultural issues in the WTP with Bechtel surround anyone who challenges Bechtel engineering, especially when cost and schedule is on the line and they can earn fee against it. Even their own survey released last week identified the problems of delay and working difficulties within the WTP.

The contractors need regulation. Contractor whistleblowers and concerned employees need protection. With no whistleblower protection, the contractors do what they want. They actually make more money in DOE by not doing it right the first time. They get paid to build it, and then they get paid more to fix it, if it will run at all. And this cost the taxpayers billions at a time when our country's budget cannot afford it. The original WTP cost was about $4.6 billion, and now it is at over $13 billion in 10 years.

I encourage you to pass laws to strengthen protection for whistleblowers. I encourage you to see that DOE contracts are reviewed with more rigor and end the DOE practice of appointing one company as the design authority and the design agency. I encourage you to eliminate taxpayer reimbursement to companies for defending improper practices. I also encourage you to increase the Defense Board's scope and to give them enforcement responsibility because without teeth they can be ignored.

Despite my career being ended, I would do it again because it was the right thing to do. Given the tools, more people like me will stand up against waste, fraud, abuse, bad practices, and poor quality in government contracts.

Thank you, and I will be glad to entertain any questions you may have.

Senator MCCASKILL. Thank you, Dr. Tamosaitis. Ms. Canterbury.

TESTIMONY OF ANGELA CANTERBURY,[1] DIRECTOR OF PUBLIC POLICY, PROJECT ON GOVERNMENT OVERSIGHT

Ms. CANTERBURY. Thank you and good morning. I am the Director of Public Policy at the Project On Government Oversight a 30-year-old nonpartisan, independent watchdog that champions good government reforms.

Whistleblowers are the guardians of the public trust and safety and among the best partners in crime fighting. It is well known that whistleblowers have saved countless lives and billions of taxpayer dollars. Studies have also shown that whistleblowers play a

[1] The prepared statement of Ms. Canterbury appears in the appendix on page 67.

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bigger role in exposing corporate fraud than auditors, government regulators, or the media.

But perhaps the best illustration of how whistleblowers save taxpayer dollars is the more than $27 billion recovered since 1987 through the hugely successful False Claims Act (FCA). As you well know, the law not only acts as a deterrent to fraud, but also incentivizes whistleblowing through the financial awards and strong protections against retaliation.

However, the FCA does not cover a host of other wrongdoing, in spite of the government's huge exposure to these risks given the amount of Federal dollars distributed to non-Federal entities. According to USAspending.gov, out of nearly $3.8 trillion in the Federal budget, roughly half was spent on prime awards to contractors, grantees, States, and localities.

A recent POGO report on the costs of contractors notes that this workforce now dwarfs the Federal employee workforce by approximately four-fold, and yet most of those on the front lines do not have protections to come forward when they witness waste, fraud, and abuse. The accountability loopholes are many in the patchwork of laws that protect only some Federal fund recipients and only under very limited circumstances.

In addition to the FCA, there are also some extremely narrow protections under 42 U.S.C., Section 4705, but this is fairly flimsy policy, and few contractor employees can or should rely on those protections. However, in 2005, nuclear contractor employee rights were slightly upgraded. Also, progress has been made in closing other loopholes for the Department of Defense contractor whistleblowers.

In 2009, the protected types of disclosures and recipients were expanded. However, these still lack some basic best practices found in other modern private sector whistleblower laws and, thus, have not yielded the kind of accountability that is needed. This is apparent in Iraq and Afghanistan where the Commission on Wartime Contracting recently estimated $31 to $60 billion has been lost to waste and fraud.

However, there is a model whistleblower protection for Federal fund recipients. It simply needs to be expanded beyond its original scope. The American Recovery and Reinvestment Act of 2009 included excellent whistleblower protections for employees of entities funded by the Recovery Act. Notably, the stimulus spending so far has experienced extremely low incidence of fraud, as acknowledged here today and also by the GAO and others.

The Non-Federal Employee Whistleblower Protection Act (WPA) of 2001, S. 241, builds on the success of the Recovery Act and mirrors many of its provisions. Introduced earlier this year by Madam Chair McCaskill, along with Senator Webb, S. 241 would bridge the wide gaps in current coverage and comprehensively apply best practice protections to employees of all entities that receive Federal funds. Like the Recovery Act, it would do the following:

It would protect the most common disclosures made by employees, those made internally.

It would cover disclosures of gross mismanagement, gross waste, substantial and specific to public health and safety, abuse of authority, or a violation of a law, rule, or regulation.

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It would require an Inspector General to review and report all claims of retaliation and investigate non-frivolous claims within a reasonable timeframe.

It would provide effective remedies, including compensatory damages and enforcement when reprisal is confirmed.

It would grant normal access to a jury trial and ensure whistleblowers do not get stuck in administrative limbo for longer than a year.

In sum, S. 241 would substantially reduce the risks for whistleblowers and encourage more to come forward and create far more accountability to taxpayers. However, we do have a few suggested improvements.

First, every Federal fund recipient should be required to post notices of their rights and remedies under this section at work sites.

Second, we should require IGs to separately investigate the wrongdoing that the whistleblower exposed in the first place.

Last, though it may be beyond the scope of this particular piece of legislation, we would like to see incentives for whistleblowing expanded to emulate the successful FCA award program.

In these tough economic times, with a ballooning Federal deficit, it is just plain common sense to have more "deputies" to safeguard taxpayer dollars and the public trust. This is why POGO and partners of ours in the Make It Safe Coalition strongly support better whistleblower protections for Federal contractors.

We urge you to support enactment of S. 241, and I thank you for the opportunity to testify today.

Senator MCCASKILL. Thank you very much, Ms. Canterbury.

Let me start. I think it is important to focus in on the independent investigation of the Defense Nuclear Facilities Safety Board as it relates to your case, Dr. Tamosaitis. They reviewed 30,000 pages of documents and did 45 different witness interviews and then released a report that—and I believe that report was released in June of this year—that was highly critical of Bechtel and the management of safety at Hanford.

According to this report, done by this independent review board, safety board, Bechtel had created a chilled atmosphere adverse to safety, and it specifically recommended that DOE investigate. They found the Energy Department and contractor management suppressed technical dissent, and I am quoting from their report.

So I know that DOE kind of said, "Well, since you talked to Labor, we are going to let Labor handle it." Have you circled back around with DOE since this report was issued to—have you gotten any response from them about in light of what this independent review board found, did they feel any need to pick the mantle back up and look carefully at what happened surrounding the concerns you had raised and what happened to your employment as a result of that?

Dr. TAMOSAITIS. Regarding me, no. They have announced that they are going to do another Health Safety Security (HSS) survey, but that is as much as I know of.

Senator MCCASKILL. And I assume Bechtel is still in charge?

Dr. TAMOSAITIS. Bechtel is still in charge of the project, yes, Senator.

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Senator MCCASKILL. And everyone sees you go to work in the basement with no windows?

Dr. TAMOSAITIS. Yes, ma'am.

Senator MCCASKILL. And knows that you are not allowed to work even though you are there onsite and getting paid?

Dr. TAMOSAITIS. Correct.

Senator MCCASKILL. So every day you are an example to all the workers there, whether they are Federal employees or Bechtel employees, "Do not say anything, or you, too, will be banished to the basement"?

Dr. TAMOSAITIS. Yes, Senator. Very directly. It is a very visible example of what happens if you speak up.

Senator MCCASKILL. It is just unbelievable to me that we have allowed this to occur. And I know that you have a case in court, but it is——

Dr. TAMOSAITIS. Yes, I want——

Senator MCCASKILL. It would be one thing if this was an initial stage and you did not have this independent review. It would be another thing if this was, frankly, I mean, I am all about trying to save money, but this is about safety. And that is what is really of concern.

Dr. TAMOSAITIS. It is safety and it is billions of dollars, and the reimbursement for Bechtel to be—while they pursue their defense, for example—I am requoting my verbal testimony, but the survey they released last week cost taxpayers nearly $2 million.

Senator MCCASKILL. I am speechless about the reality of you still going there every day as a walking billboard to everyone to keep their mouth shut, because that is essentially what you are.

Dr. TAMOSAITIS. Yes, Senator, and that is why I took action because I did not want the people, especially the young engineers, to think that what happened to me was right or that they should manage that way.

Senator MCCASKILL. Were you working—I assume you worked side by side with Federal employees at Hanford, at the waste treatment——

Dr. TAMOSAITIS. Yes, ma'am.

Senator MCCASKILL. Now, if a DOE employee reports waste of government funds, they are fully protected from retaliation; whereas, it is not clear that you as a contractor employee have that same protection.

Dr. TAMOSAITIS. I am not sure what the DOE employees—what coverage they have. In the State of Washington, there is essentially no whistleblower remedies. The Hanford site, a Supreme Court decision in the State of Washington said that any Hanford whistleblower cases had to take the Federal route and go to the DOL.

Senator MCCASKILL. Right.

Dr. TAMOSAITIS. And then their year timed out, and now we have made a motion to move to Federal court. In Federal court, we have named DOE as a defendant because we have sufficient information that indicates that the Federal project manager played a role in my termination.

Senator MCCASKILL. So is the government reimbursing Bechtel for the costs of the legal suit against you, do you know?

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Dr. TAMOSAITIS. Yes. It is my clear understanding that they are being reimbursed, and it is my understanding that if they are found guilty, they could have to repay. But if they are not found guilty, which means if they settle at the end of whatever period of time and admit no guilt, they are fully reimbursed. The survey, again——

Senator MCCASKILL. For the settlement amount, too, or just for the costs of the defense; do you know?

Dr. TAMOSAITIS. I do not know that.

Senator MCCASKILL. Ms. Canterbury, do you know what the situation is? And is this common that the government is funding the defense for these cases across the board for contractors?

Ms. CANTERBURY. It was my understanding that the change that was made in 2005 disallowed DOE to pay for the defense of contractors. So if that is ongoing, that is a problem.

Senator MCCASKILL. So we need to look into that. We need to ask some significant questions of DOE about who is paying for the defense of this case and whether or not taxpayers are——

Dr. TAMOSAITIS. Senator, it is my clear understanding they are being reimbursed for it.

Senator MCCASKILL. I think this is an area that we need to get more information on, and I will task the staff to look at the funding of the defense of these lawsuits and the funding of any settlement. If the case is settled without an admission of guilt, which is the rule not the exception in most lawsuits, do the settlement monies come out of Bechtel's profits, or do they come out of the treasury? And I think it is important that we get to the bottom of that.

Have you been able to look at the investigative files of the Department of Labor?

Dr. TAMOSAITIS. They were heavily redacted. Very difficult to understand for the information that we received. My understanding is Bechtel and URS did not provide full information, and I do not have a summary of the totality of what they provided.

Senator MCCASKILL. Do you know if the information that the Safety Defense Board looked at, do you know if it was as heavily redacted as what you have been able to see?

Dr. TAMOSAITIS. No, Senator, I do not know what they looked at. I will say that the Defense Board was the only group that looked at the issue in a timely manner and identified the issue correctly.

Senator MCCASKILL. So the administrative remedies that we have in the law for whistleblowers completely failed you?

Dr. TAMOSAITIS. Yes, ma'am.

Senator MCCASKILL. So you had the Safety Board that did the job they were supposed to do, and then you have had to turn to the courts because the administrative—which, of course, we have designed the administrative process in order to try to avoid the courts, and, clearly, that is not working out.

Dr. TAMOSAITIS. Again, the administrative process internally, Bill Taylor of the Employee Concerns Program (ECP), told me to seek help outside, which I did.

Senator MCCASKILL. So, in fact, the people who are tasked with the administrative process are the ones who advised you, Get out of Dodge, so to speak, and get into the civil court system because

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the administrative system is not going to be adequate in terms of addressing your problem?

Dr. TAMOSAITIS. Correct. One hundred percent correct.

Senator MCCASKILL. OK. Thank you very much. Senator Portman.

Senator PORTMAN. Thank you, Madam Chairman, and I appreciate the testimony.

I wanted to followup, Ms. Canterbury, if I could, on some of your comments on the policy side, and I appreciate what you said about providing additional notification to private sector employees in response to my earlier question to the last panel and fleshing that out a little further.

Let me hear from both of you, if you have answers to this. I am just trying to get at what works and what does not work with regard to existing protections for private sector—for Federal contractors, non-Federal employees.

You have the False Claims Act, which you mentioned, and that gives whistleblowers the right to file the suits against contractors. "*Qui tam*" I think is the Latin for it, the *qui tam* suits, and then others for defrauding the government. So it can be a suit against contractors or anyone, right, for defrauding the government? And then there is the DOD statute we talked about earlier, Section 2409, and for the civilian agencies, FAR 3.9, which prohibits any contractor from "discharging, demoting, or otherwise discriminating against" an employee for reprisals for reporting substantial violations of law related to a contract, and complaints under those provisions are brought to the IG, as we heard about earlier, of the relevant agency, so the Inspector General in this case of DOE.

Just if you could tell us on the record, what do you see as the major gaps in these existing protections that have either prevented whistleblowers from coming forward or resulted in unprotected reprisals? And then, Ms. Canterbury, if you could, just give me any specific investigations of contractors that you believe would have been more effective with stronger whistleblower protections.

Ms. CANTERBURY. Thank you, Senator, for that question. As I mentioned in my testimony, that particular statute, which is under the FAR Rule 3.9, is rather flimsy. Substantial violations of law are the only disclosures which are protected, and I think there is a lot of concern about what "substantial" might be and in what context that might be substantiated.

Beyond that, there are no time limitations on investigations that might be conducted by an IG, no time limitation on agency actions, so it is conceivable that there could be interminable limbo for a whistleblower who might try to rely on those protections. And as I said, I would not advise any contractor to do so.

In terms of cases in which with better protections we might have had more accountability or the whistleblower might have found justice, it is very hard to say. In fact, most of the cases of which we are aware have come under the False Claims Act. Because of its underlying very strong public policy, that is the avenue through which most contractors have sought to bring to light instances of fraud or to seek protections from retaliation. And so those are the cases we are most familiar with, and I think that there are certainly many more who have not come forward at all, and billions

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in taxpayer dollars that have been wasted. I believe the public has been put in jeopardy in terms of health and safety because there has not been a strong public policy for whistleblowers.

Senator PORTMAN. Do you think as a general matter that Federal employees are more likely to step forward with reports of waste or abuse than non-Federal employees?

Ms. CANTERBURY. I think that is true. We have had the Whistleblower Protection Enhancement Act in place for many years, but as you noted in your opening remarks, that law also is in desperate need of enhancement, and this Subcommittee has moved a bill that will do that, that will strengthen the Whistleblower Protection Act.

So, yes, they do have more rights under the law currently as Federal employees than a non-Federal employee who may be sitting alongside doing the same type of work.

Senator PORTMAN. And one issue that you talked about and that we talked about earlier was just notifying non-Federal employees of their rights and being sure it is understood is the administrative procedure. I talked about the importance of having an internal process that works, which sometimes works and sometimes does not. And then we talked about just some of the statutory provisions that might be less than clear and that there is sort of a patchwork on the non-Federal side and that legislation that we did pass—I think it was unanimous out of this Subcommittee, in fact, on the Federal side——

Ms. CANTERBURY. Yes.

Senator PORTMAN [continuing]. Helped to clean up the Federal side. But we have not done that on the non-Federal side.

Dr. Tamosaitis, your contracting comments I found interesting, and I do not know as much about Hanford and how that cleanup is going. I have been involved in some other cleanups and found that if it is a cost-plus contract, sometimes it results in some of the concerns you raised, not specifically about safety but about the taxpayer dollars being wasted. Is that a cost-plus contract, do you know?

Dr. TAMOSAITIS. The project, no. The project has award fees in it. It is not a cost-plus. It is a capital project. They have intermediate milestones and I will say incentives for meeting various targets.

Senator PORTMAN. Is it a fixed-cost contract then with awards? Would that be the right way to describe it?

Dr. TAMOSAITIS. Well, no, I would say not fixed cost. It is going up by billions.

Senator PORTMAN. Yes, that is what it sounded like from what you said earlier.

Dr. TAMOSAITIS. It is a capital project, and they continue to reforecast what the total price will be. Congress allots $690 million a year in funding, "capital funding," and they are getting an additional $50 million, which Bechtel was after. If they had not closed the M3, the mixing issue, in June, the $50 million was in jeopardy. So this coming year they would have $740 million. They wanted to go for more money. But I do not know the status of that additional money.

Senator PORTMAN. Yes, well, I appreciate that, and I am not expecting you to be the lawyer on this, but I do think some of the

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waste that we hear about in this Subcommittee, talking about contracting generally and some of the things that you raised, are related to the incentives. As you said earlier, companies who are paid to build something and then when it does not work are paid to fix it would be another example of that, where the structure of the contract itself leads to some of these excessive taxpayer payments that you typically would not see in the private sector on a fixed-cost basis.

Dr. TAMOSAITIS. In this contract, they will be gone when they push the button, basically right when they push the button to start it up. So they will have limited to no operating responsibility. There is a very limited performance requirement, but I will say in my view that continues to decrease as time goes on as to what the plan has to do over what period of time when they start it up. A major issue in my mind is the design authority/design agency confounding, deciding what needs to be done and how it needs to be done. I have used the term that is like putting the fox in the henhouse to guard it. They then have schedule and cost milestones they have to meet, and if you are deciding what needs to be done and how it needs to be done and it has to be done here, you are pretty well going to meet it. And then you are not going to be there to operate it.

In answer to an earlier question on the adequacy of the whistleblower laws, I think the laws clearly have to be improved, stepped up. There is also for the management of the company, attention needs to be given on that side because what really provides a memory is publicity and money. So if they—I will say not so much the law may be written, sitting on a shelf. So the companies need to see that there is a sting to them and money will be memory as well as the bad publicity. And until the management of the companies see that, it is a continual uphill battle.

Senator PORTMAN. Well, thank you both for your testimony. I appreciate it.

Senator MCCASKILL. It is interesting, the award fee stuff we saw over and over again in Iraq and Afghanistan where there had been terrible execution of the contracts and they got the performance fees. We did a whole hearing on it in the Armed Services Committee, and it was shocking to me. And basically the culture was, "Well, we just give them those fees. No matter how good a job they did, just everybody knows they get them." I am, like, "Well, why is it considered some reward then if you are giving them to folks who are not doing a good job?"

Let me just finally say this: This has been a very helpful hearing. I think both Senator Portman and I have asked for additional information from the Inspectors General community and others in this hearing that we want to followup with. I hope that Senator Portman takes a hard look at Senate bill 241. I would love to have his help with it in making it the best we can possibly make it.

The one thing I would say to you, Ms. Canterbury, we have this chart[1] that we prepared for this hearing, and this is the various different provisions for whistleblowers in different parts of the law—who is protected, what disclosures are protected, who to dis-

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close to, additional protections and remedies. And they are different. And one of the things I would really like to see us get done in S. 241 is to clean up this patchwork, because how in the world can we expect people to know what their rights are if it depends on which contract you are working under, where you are working, whether you are in stimulus dollars, or whether you are DOD? Our attempt to try to clean this up, all of this was done with good intentions. It is like our job training programs. We have 47, 48 of them, and every one of them was created by a Member of Congress that had good intentions in terms of job training. But we have created this labyrinth of job training that ultimately falls in terms of its effectiveness because of the weight and complexity of the myriad programs.

So any help that your organization can give us in terms of making sure that what we have done with S. 241 is to try to clean this up—and it is complicated by the fact that Issa's bill has a pilot program for contractors, which I think we know we do not need a pilot program. And Senator Akaka's bill does not include contractors at all. So we have right now in Congress three different pieces of legislation that are going to make this worse, not better. So hopefully we can all get together and try to clean this up because I think that is how we are going to get to more effective protection of whistleblowers and ultimately then more effective expenditure of Federal dollars.

Thank you very much for being here. Thank you for attending the hearing. Thank you, Senator Portman.

Ms. CANTERBURY. Thank you.

Mr. TAMOSAITIS. Thank you.

[Whereupon, at 11:30 a.m., the Subcommittee was adjourned.]

[1] The chart submitted by Senator McCaskill appears in the appendix on page 78.

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APPENDIX

STATEMENT OF

PEGGY E. GUSTAFSON
INSPECTOR GENERAL
U.S. SMALL BUSINESS ADMINISTRATION
CHAIR OF THE LEGISLATION COMMITTEE
COUNCIL OF INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY

BEFORE THE

SUBCOMMITTEE ON CONTRACTING OVERSIGHT
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS
U.S. SENATE

DECEMBER 6, 2011

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Chairman McCaskill, Ranking Member Portman, and distinguished members of the Subcommittee, thank you for the opportunity to be here today and for your continued support of the work of Inspectors General. I am happy to be here in my capacity as Chair of the Legislation Committee for the Council of Inspectors General on Integrity and Efficiency, which is otherwise known as CIGIE.

CIGIE is comprised of all Inspectors General whose offices are established under section 2 or section 8G of the Inspector General Act of 1978 (5 U.S.C. App.), those that are Presidentially-appointed/Senate-confirmed and those that are appointed by agency heads (Designated Federal Entities, or DFEs). CIGIE also has other statutory members, with the Deputy Director for Management of the Office of Management and Budget serving as the Executive Chair of the Council.

As a Community, Inspectors General are strongly supportive of essential safeguards for "whistleblowers" who come forward seeking to protect the public's interest and maintain integrity in government programs. Tools to incentivize and protect whistleblowers, whose actions are often brave and selfless, are encouraged and needed by Inspectors General.

Offices of Inspectors General (OIGs) play an important role in investigating allegations of wrongdoing brought forward by whistleblowers. Given our experience and resources, such as our established Hotlines to receive reports of fraud, waste, or abuse, OIGs are well positioned to receive information from whistleblowers, protect their confidentiality, and fully investigate their allegations in a fair, timely, and unbiased manner.

Driven by Congress' ongoing dialogue relative to whistleblowers within government and of those that are non-federal employees whose disclosures involve misuse of government funds, the CIGIE Legislation Committee has sought to obtain an accurate sense of the Inspector General Community on certain whistleblower-related legislative proposals. Several surveys of appropriate OIGs have been conducted within the past two years to meet the information needs of Congress on matters involving whistleblowers.

One such survey involves the perspective of OIGs in agencies that were allocated funds under the American Recovery and Reinvestment Act (ARRA), which includes a provision aimed at protecting state and local government contractor whistleblowers. This provision is found in Section 1553 of Public Law 111-5.

The survey responses evidenced that during the time frame of February 2009 through April 2011, the OIGs received 1,652 complaints regarding ARRA transactions from employees of non-federal employers. The complaints related to approximately 323 distinct ARRA transactions, meaning multiple complaints were received for individual transactions. Of the 1,652 complaints, 35 percent (or 580) resulted in the opening of an investigation, audit, or other OIG review, with 150 others, as of April 2011, still being considered for OIG action. Though the judicial process can be lengthy and may be still

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ongoing in some these cases, responding OIGs indicated that their investigations and reviews of these whistleblower complaints resulted in recovery of approximately $1.85 million dollars as of April 2011.

One of the key provisions of Section 1553 of ARRA is the authority of OIGs to investigate reprisal complaints from non-federal employee whistleblowers. Of the surveyed OIGs, only 8 of the OIGs received a total of 18 reprisal complaints—with 11 being adopted for investigation. The majority of the 8 OIGs that received complaints did not experience any problems or concerns with implementing Section 1553 or in responding to complainants' request to access the completed investigation file.

That said, several responding OIGs did advise that they had experienced problems in responding to reprisal complaints. Several respondents noted that when reprisal complaints led to the opening of criminal fraud investigations, the investigation disclosure requirements in Section 1553, and the statutory deadline for completing the investigation within 180 days, became problematic.

These survey responses substantiate broader concerns of OIGs. As a Community, OIGs are always concerned about statutory requirements to conduct an investigation, and statutory deadlines mandating completion of an investigation within a prescribed period of time. Such mandates undermine the ability of OIGs to independently set priorities and create the potential for finite resources to be diverted from other high impact investigations that may better serve taxpayers' interest. In the case of expanding the potential pool of non-federal employee whistleblower complaints beyond ARRA to encompass all government contracts, grants, and payments, a significant impact on OIG resources is anticipated. Accordingly, efforts to provide for IG discretion as to whether to open an investigation are very important.

Notwithstanding such resource concerns, the ability of OIGs to carry out their mission is dependent on authority to access records pertinent to the investigation of the whistleblower's complaint. In instances of OIGs having authority to access the records of State, local and private sector employers who receive covered funds, and their subcontractors or subgrantees, OIGs believe Section 1515 of ARRA serves as a viable model.

An additional area of concern is a requirement that IGs disclose pending investigations of a whistleblower's reprisal complaint to the whistleblower's employer. Such disclosure requirements could jeopardize the ability to obtain accurate information for the investigation. Efforts to provide IGs with greater discretion on whether to disclose an investigation to the employer would likely assist OIG investigatory efforts.

It is evident by the number of ARRA-related complaints received that non-federal employees can play an important role in rooting out fraud, waste, and abuse in government programs and in utilization of "covered funds." Our survey also substantiates the concern that whistleblowers in this category can be subject to reprisal by their employers.

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CIGIE shares the perspective that OIGs are well positioned to investigate these complaints but believe the scope of the legislative proposal necessitates that OIGs have authority to access key records and allow OIGs flexibility in the conduct of these investigations as balanced with other priorities, some of which are mandated by other statutes. The role of OIGs in reprisal investigations should be narrow, whereby OIGs conduct the investigation and report their findings to officials authorized to make ensuing decisions.

As we continue forward and to close here today, I want to assure you that the CIGIE Legislation Committee is available to work with the Congress to provide any technical assistance that may be necessary.

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December 6, 2011

Expected Release

10:00 a.m.

Marguerite C. Garrison

Deputy Inspector General for Administrative Investigations

Department of Defense

before the

Subcommittee on Contracting Oversight

Senate Homeland Security and
Governmental Affairs Committee

on

"Whistleblower Protections for Government Contractors"

Madam Chairman McCaskill, Ranking Member Portman and distinguished members of this Subcommittee, thank you for the opportunity to appear before you this morning to discuss whistleblower protections for Government contractor employees.

Summary of DoD Inspector General's whistleblower protection program

Since the late 1980s, Congress has passed a series of laws giving the Department of Defense Inspector General (DoD IG) the authority to investigate or oversee investigations of allegations of whistleblower reprisal conducted by the DoD component inspectors general, allegations made by members of the armed forces, appropriated and non-appropriated fund employees, and DoD contractor employees. Under these statutes, DoD IG is charged with providing whistleblower protections to these individuals. Additionally, pursuant to the American Recovery and Reinvestment Act of 2009, DoD IG has the authority to investigate complaints of reprisal filed by employees of non-federal employers who make disclosures relating to possible fraud, waste or abuse of Recovery Act funds.

We are proud of the role that Congress has assigned to our agency, to objectively and thoroughly investigate whistleblower reprisal complaints. For over 20 years, we have maintained a robust whistleblower protection program, which has been a top priority of the DoD IG. Whistleblowers perform an important public service -- often at great professional and personal risk -- by exposing fraud, waste, and abuse within the programs and operations of the Department.

DoD IG has overall responsibility for the whistleblower protection program across the Department. A strong whistleblower protection program is characterized by providing a confidential channel for the disclosure of wrongdoing, reliable protection against reprisal for making protected disclosures, and ensuring that everyone understands their rights and

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responsibilities under the law, which we strive to achieve by conducting outreach to our stakeholders.

Until recently, two separate directorates within DoD IG were responsible for investigating civilian and military reprisal investigations. Two months ago, we combined those two directorates into the Whistleblower Reprisal Investigations Directorate (WRI), which is now responsible for conducting or overseeing investigations of all DoD related whistleblower reprisal complaints.

Over the past several years, DoD IG has aggressively reviewed its whistleblower reprisal investigation program to identify areas for improvement. For instance, WRI has implemented process improvements in response to internal and external reviews and dedicated more resources to the investigations of whistleblower reprisal complaints, with the goal of transforming the Department's program into the model for the Federal government. In addition, the Inspector General recently met with the military service IGs and urged them to identify and implement ways to improve their whistleblower protection processes, to include dedicating additional resources to improve the timeliness and quality of their investigations.

The Inspector General Act of 1978, as amended, entrusts us with responsibility for improving the economy, efficiency, and effectiveness of the Department's operations through prevention and detection of fraud, waste, and mismanagement. DoD IG conducts audits, evaluations, and investigations -- many of which arise from disclosures brought to light by whistleblowers -- in its efforts to promote accountability, integrity, and efficiency in DoD programs and operations. Under the broad authority of Sections 7(a) and (c) of the Act we may investigate any matter of concern. DoD IG is somewhat unique among IG offices. Our responsibility to investigate whistleblower reprisal complaints derives not only from the Inspector General Act of 1978, but also from several other statutory provisions applicable to specific classes of individuals.

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WRI receives most of its complaints through the Defense Hotline, which is the principal channel through which military service members, DoD civilians, contractor employees, and the public report fraud, waste, mismanagement, abuse of authority, and threats to homeland defense. WRI reviews the reprisal allegation, contacts the whistleblower, and decides whether the complaint should be handled in-house or by a DoD component agency or military service IG. We also ensure that no IG investigation duplicates an investigation already open (for example, in the U.S. Office of Special Counsel (OSC)). Disclosure of wrongdoing, whether made to the Hotline or during the course of investigating a reprisal complaint, is routed to the appropriate OIG component or DoD agency for action. Let me briefly describe the statutory protections afforded to DoD whistleblowers.

Members of the Military

Title 10, United States Code, Section 1034, the "Military Whistleblower Protection Act," was enacted in 1988. Over the years Congress has amended the Statute to strengthen protections for military members. Title 10 U.S.C. §1034 prohibits the taking of unfavorable personnel actions, the threatening of such actions, or the withholding of favorable personnel actions against members of the Armed Forces who make or prepare to make protected communications. It also prohibits the restriction of members' communications with a Member of Congress or an Inspector General. Protected communications are defined as lawful communications to a Member of Congress, an Inspector General, or any member of a DoD audit, inspection, investigative or law enforcement organization, and any other person or organization (including any person or organization in the chain of command) designated under Component regulations or other established administrative procedures for such communications concerning a violation of law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public safety. The implementing regulation is DoD Directive 7050.06, "Military Whistleblower Protection."

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Employees of Non-appropriated Fund Instrumentalities (NAFI)

Protections for NAFI employees derive from Title 10, United States Code, Section 1587, "Employees of Non-appropriated Fund Instrumentalities: Reprisals." The Statute prohibits the taking or withholding of a personnel action as reprisal for disclosing information that a NAFI employee reasonably believes evidences a violation of law, rule, or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. Regulations implementing the Statute are set forth as DoD Directive 1401.3, "Reprisal Protection for Non-appropriated Fund Instrumentality Employees/Applicants."

DoD Civilian Employees

In 2003, under the authority of the Inspector General Act, DoD IG began to provide, in some cases, an alternate means by which DoD civilian appropriated-fund employees could seek protection analogous to protection from reprisal provided by the Whistleblower Protection Act, Title 5, United States Code, Section 2302 (5 U.S.C. §2302). DoD Directive 5106.01 implements the program whereby DoD IG receives and investigates complaints of reprisal made by civilian appropriated-fund employees, in coordination with the OSC.

OSC receives and has primary jurisdiction to investigate a majority of the civilian whistleblower cases across the Federal government, pursuant to the "Whistleblower Protection Act." Because DoD IG's jurisdiction over civilian employees is secondary to that of OSC, we have historically reserved our investigative resources for those cases that involve employees not protected under other statutes, specifically, employees in the intelligence and counter-intelligence community; cases involving security clearance

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actions, because OSC does not have jurisdiction over these actions; or matters of high-level interest or warfighter safety.

Non-Federal Employees of Recipients of Recovery Act Funds

The American Recovery and Reinvestment Act of 2009, Section 1553, as implemented by Federal Acquisition Regulation 3.9, provides whistleblower protection to employees of non-federal entities receiving Recovery Act funds. This may include employees of State and local governments, contractors, subcontractors, and grantees or professional membership organizations acting in the interest of recovery fund recipients. Section 1553 also covers disclosures made to courts, certain state officials, and certain other company employees.

Employees of Defense Contractors

Title 10, United States Code, Section 2409, "Contractor Employees: Protection from Reprisal for Disclosure of Certain Information," as amended in 2008 and implemented by Defense Acquisition Regulation Systems (DFARS) Subpart 203.9, protects employees reporting "information that the employee reasonably believes is evidence of gross mismanagement of a Department of Defense contract or grant, a gross waste of Department of Defense Funds, a substantial and specific danger to public health or safety, or a violation of law related to a Department of Defense contract (including the competition for or negotiation of a contract) or grant." Section 2409 provides that an employee of a Defense contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress or an authorized official of an agency or the Department of Justice information relating to a substantial violation of law related to a DoD contract. Further, it protects disclosures made to a Member of Congress or to or an authorized official of an agency, the Department of Justice, a representative of a committee of Congress, an Inspector General,

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the Government Accountability Office, or a Department of Defense employee responsible for contract oversight or management. These amendments significantly improved whistleblower protections for Defense contractor employees.

Since 1986 the Statute has been amended on multiple occasions. Prior to 2008, §2409 limited the definition of protected disclosure to "information relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract) and protected only those disclosures made to a Member of Congress or to an authorized official of an agency, or the Department of Justice.

The 2008 amendment strengthened protections for Defense contractor whistleblowers in other ways as well, such as by imposing additional deadlines for agency heads to resolve reprisal complaints. We welcomed those enhancements to protections for Defense contractor whistleblowers.

Defense Federal Acquisition Regulation (DFAR) "Subpart 203.9, Whistleblower Protections for Contractor Employees," which implements the amendment, was not published until January 2009. Nearly three years later, we have yet to receive a §2409 complaint that involves a contract that incorporated the provisions of the amendment or post dates the DFAR provision. As a result, we have not yet been able to apply the 2008 amendment in a single §2409 case.

We have been concerned that contractor employees, who are often required to sign employment agreements that they will not divulge certain information outside the company, may not know that regardless of those agreements, they are protected under 10 U.S.C. §2409 for reporting wrongdoing to Government officials. Therefore, in 2008 we recommended legislation to require Defense contractors to inform their employees in writing of their whistleblower protections under the Statute. Our recommendation resulted in the inclusion in the DFARs of that requirement.

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Additionally, there are other features of §2409 that may have prevented substantiation of all but a few defense contractor reprisal allegations since the early 1990s. First, §2409 fails to protect Defense contractor employees from reprisal for reporting wrongdoing to company management. Many whistleblowers will first attempt to resolve their concerns within their own chains of command before, or instead of, reaching out to a government official. As a result, reprisal for an internal complaint frequently may occur even before a disclosure to the government is made. In fact, recent amendments to contracting law that require contractors to report fraud to the government also require either that they inform employees of their right to disclose fraud, waste or abuse to Inspectors General, or that they implement company-internal reporting channels such as hotlines. Ironically, because §2409 does not protect internal disclosures, employees who suffer reprisal for making internal hotline complaints are left without protection. Other statutes under which the DoD IG investigates reprisal complaints, such as the Military Whistleblower Protection Act and the Recovery Act, expressly protect internal communications or disclosures, as do most other whistleblower protection statutes.

Second, §2409 does not protect employees from actions directed by government officials. Rather, it only prohibits contractors from reprising against employees for making protected disclosures. Finally, §2409 only extends protection from reprisal to employees of Defense contractors, but not to employees of their subcontractors. Thus, the realities of contractual relationships have excluded employees of Defense subcontractors, who may be well positioned to report waste, fraud, or abuse to the government, from protection from reprisal. This stands in contrast to other private sector whistleblower protection statutes, such as the Sarbanes-Oxley Act, which expressly extend whistleblower protection to employees of subcontractors.

I would like now to share with you several examples of investigations conducted under various statutes in which the DoD IG has substantiated whistleblower reprisal allegations.

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- An employee of a Defense contractor was suspended for five days without pay and given an unfavorable performance evaluation in reprisal for alleging to a base IG that the company violated Army regulations by not properly managing the base Family Advocacy Program. As a result, program employees were not reporting allegations of child and spouse abuse to military police as required by Army regulation. The Defense contractor employee eventually entered into a settlement with the company.

- An Army Reserve captain threatened to suspend a staff sergeant's security clearance in reprisal for the staff sergeant's complaint to her chain of command and an IG that unescorted U.S. Army soldiers, who were not U.S. citizens, and did not have appropriate security clearances, were allowed to enter a secure facility housing detainees in Afghanistan.

- A civilian mechanic received a lowered performance evaluation in reprisal for making protected disclosures pertaining to improper installation of a key component in an air monitoring system used in chemical munitions igloos at an Army depot.

WRI's caseload has grown over the years, most notably in the area of military whistleblower reprisal allegations. For instance, in FY 2006 we received 357 complaints of military whistleblower reprisal. That number increased to 436 by FY 2011, a 22% increase.

We receive far fewer whistleblower reprisal complaints from NAFI and Defense contractor employees each year. However, they, too, have increased. NAFI reprisal complaints numbered just 6 in FY 2006. Five years later we received 28, a greater than four-fold increase. We received 18 complaints of reprisal from Defense contractor employees in FY 2006; that more than tripled to 68 by FY 2011. These Defense contractor complaints include the single ARRA §1553 reprisal complaint we have

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received and investigated. See attached Exhibit for a detailed summary of all reprisal cases received and closed by DoD IG over the past 6 years.

False Claims Act Complaints

Another vehicle by which DoD IG receives tips from whistleblowers is via the *qui tam* process under the False Claims Act. Since January 1, 2006, the Defense Criminal Investigative Services (DCIS) has conducted 115 investigations involving *qui tam* matters. These *qui tam* investigations did not necessarily arise from reprisal complaints from DoD contractor employees. Nonetheless, the "relator" -- that is, the person filing the complaint -- does contribute to the mission of the Inspector General and is considered a whistleblower in his or her own right.

Between 2006 and the present, *qui tam*-related investigations resulted in 60 indictments, 51 convictions, 24 suspensions, 30 debarments, over $2.7 billion in restitution; $3.7 billion in civil recoveries, and $14.8 million in administrative recoveries. The top five *qui tam* cases resulting in monetary recovery involved healthcare fraud. Over $73.5 million in recoveries were returned to the U.S. government by Pfizer, Incorporated; Eli Lilly & Company; Tenet Health System Desert, Incorporated; Comprehensive Cancer Center; and GlaxosmithKline Holdings, Incorporated; and Allergan Incorporated.

Some examples of *qui tams* specific to DoD contractors are:

- Northrop Grumman $325 Million Settlement for Defective Transistors

  A *qui tam* lawsuit was filed by an employee of The Aerospace Corporation. The government investigated the allegations and intervened in the lawsuit against Northrop in November 2008. In April 2009, Northrop Grumman Corporation agreed to pay the U.S. government $325 million, of which $48.7 million went to relators, to resolve a *qui tam* lawsuit. The investigation found Northrop failed to properly test and qualify certain microelectronic parts, known as heterojunction

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bipolar transistors (HBTs) that were found to be defective. The defective HBTs were integrated into National Reconnaissance Office satellite equipment as a result of the company's failure to test them. This was a joint investigation with DCIS, the Federal Bureau of Investigation, and National Reconnaissance Inspector General.

- Boeing Company $25 Million for Defective Work on KC-10 Aerial Refueling Aircraft

In August 2009, the Boeing Company agreed to pay the U.S. government $25 million to resolve allegations in a *qui tam* lawsuit that the company performed defective work on the entire KC-10 Extender fleet. The KC-10 Extender is a mainstay of the Air Force's aerial refueling fleet in the Iraq and Afghanistan war theaters. Administratively, Boeing also spent an additional $750,000 to redesign and install new smoke barriers across the fleet of KC-10 aircraft. The investigation focused on allegations Boeing defectively installed insulation blanket kits in KC-10 aircraft while performing depot maintenance at the Boeing Aerospace Support Center in San Antonio, TX. The settlement also resolved allegations that Boeing overcharged the government for installation of the blanket kits. The relators, two former Boeing employees, received $2.6 million as their share of the proceeds of the settlement. The $25 million settlement consists of a cash payment by Boeing of $18,400,000 and $6,600,000 worth of repair work to be done at the aircraft manufacturer's expense on the defective blankets. The settlement also resolves Boeing's potential liability under the False Claims Act. This was a joint investigation with DCIS, Air Force Office of Special Investigations, and the Defense Contract Audit Agency.

- American Grocers, Inc. $15 Million in Civil Settlement

A logistics manager for American Grocers, Inc. (AGI) filed a *qui tam* lawsuit alleging the owner of American Grocers, Inc. (AGI), deliberately purchased

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expired or near expired foods from food manufacturers at discounted prices and changed the expiration dates on the packages before shipping, resulting in $20 to $30 million in gross profits from the sale of foods to DoD. The food was sent to troops and DoD personnel in the Middle East. AGI created inflated invoices with bogus freight charges of $2.3 million. AGI also concealed discounts from food manufacturers that were not passed on to DoD of approximately $1.5 million. On November 8, 2010, the owner of AGI agreed to pay $15 million for violations the False Claims Act. The owner was also sentenced to two years imprisonment; three years supervised release; ordered to pay over $2 million in restitution and a fine of $100,000.

In closing, I would like to thank the Subcommittee for the opportunity to discuss the important topic of whistleblower protections for Government contractor employees. I look forward to answering any questions you may have.

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Exhibit

Complaints Received and Investigated, by Fiscal Year

	FY 06	FY 07	FY 08	FY 09	FY 10	FY 11
Military Reprisal						
Received	357	371	373	319	342	436
Substantiated	47	34	26	16	26	27
Not Substantiated	114	123	87	57	91	70
Total Investigated	161	157	113	73	117	97
Non-appropriated Fund Instrumentality Reprisal						
Received	6	16	18	23	16	28
Substantiated	1	0	0	0	0	0
Not Substantiated	3	1	0	2	2	3
Total Investigated	4	1	0	2	2	3
Defense Contractor Reprisal						
Received	18	29	37	44	51	68
Substantiated	1	0	0	0	0	0
Not Substantiated	2	0	3	0	1	4
Total Investigated	3	0	3	0	1	4
Civilian Reprisal (Appropriated Fund)						
Received	32	42	32	62	92	123
Substantiated	0	1	1	2	4	4
Not Substantiated	0	3	1	4	6	8
Total Investigated	0	4	2	6	10	12
Total Complaints Received	413	458	460	448	501	655
Substantiated Complaints	49	35	27	18	30	31
Total Complaints Investigated	168	162	118	81	130	116
Substantiation Rate	29%	22%	23%	22%	23%	27%

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Dr. WALTER L. TAMOSAITIS

BEFORE THE UNITED STATES SENATE HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

SUBCOMMITTEE ON CONTRACTING OVERSIGHT

on

"WHISTLEBLOWER PROTECTIONS FOR GOVERNMENT CONTRACTORS"

December 6, 2011

Good morning.

Thank you for giving me the opportunity to provide this information. My name is Walter L. Tamosaitis and I live in Richland, WA. I am here representing myself.

I have a BS, MS, and Ph.D. in engineering and a certificate in Entrepreneurial Business Management. I have a professional engineering license. I have over 42 years industrial experience in the chemical and nuclear industries. It is comprised of about 20 years with DuPont and 22 with URS in Department of Energy (DOE) associated work. Between March, 2003, and July, 2010, I was the Research & Technology (R&T) Manager for the Hanford Waste Treatment Plant (WTP) project in Hanford, WA. In this capacity, I had responsibility for about $500M of programs over the 7 year period.

The Hanford Waste Treatment Plant (WTP) project is a Department of Energy (DOE) project. It is essentially the largest project in our Country. It is the largest nuclear waste treatment plant to be built in the world. Bechtel is the prime contractor for DOE and the URS Corporation, whom I work for, is the prime subcontractor for Bechtel. Profits on this project are split 50/50 between Bechtel and URS so the financial relationship is closer to a partnership than a contractor-subcontractor relationship.

I was one of the few to volunteer for a job at the WTP. I accepted a job as the Research & Technology Manager, transferred from South Carolina leaving my family in SC, and started in March, 2003. On July 1, 2010, I was suddenly terminated from my WTP job as a result of continually raising technical concerns and submitting technical issues. I am still employed by URS but confined to a basement office with little to no meaningful work and essentially no contact with URS management. I have been assigned to the basement office now for almost 16 months. I will provide more details about this shortly. After my abrupt termination I investigated legal means to address this retaliation and found absolutely no help within the State of Washington legal system and very limited help in the Federal system. Before I describe what happened I would like to provide some more pertinent background on the Hanford site.

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The Hanford nuclear site is our Nation's most contaminated facility, containing two-thirds of the nation's high-level nuclear waste. Since its start up, about 60 metric tons of plutonium were produced at Hanford to support World War II and the Cold War. Hanford is the most expensive and complex environmental remediation effort on the planet today. There are 177 large underground high-level radioactive waste tanks containing 56 million gallons of radioactive wastes. Most of these tanks are single-walled tanks, 40 to 50 years old and are in significant states of deterioration. About one third of these tanks have already leaked. Also, Hanford has some 1500 soil dumping sites containing very large amounts of radioactive and hazardous wastes, including as much at least a half ton of plutonium. Since the Columbia River adjoins the site, contamination from Hanford of the largest fresh water artery in the Pacific Northwest is ongoing concern and not a trivial matter.

The Hanford Waste Treatment Plant (WTP) is backbone of the Hanford cleanup effort. The basic objective of the WTP is to put the hazardous nuclear waste into a stable (vitrified) form so uncontrolled or catastrophic releases do not need to be contemplated. By most accounts, it is the fourth attempt to build a facility to stabilize the hazardous nuclear waste. This chemical process must be done while preventing further spread of nuclear contamination through accidents, fires, leaks, explosions and other preventable events. The 56 million gallons of hazardous nuclear waste in the Hanford tanks has gel-like characteristics. The waste is a slurry that has the consistency of a thick ketchup. It is comprised of solid particles of varying sizes and densities. The gel-like characteristics, unlike a thin solution like water, requires that a significant force to be applied to the waste in order to begin to get the material to flow. Mixing, pumping, and sampling of this waste provide the upmost engineering challenges.

I am an avid supporter of the WTP. But it must be built to run safely and run well. Due to the nature of its blackcell design, making changes after it starts up is virtually impossible since much of the equipment is inaccessible. Stated another way, the design must be done right the first time. While I am an avid supporter of the WTP, I have also become an opponent to efforts to cut corners in order to meet artificial deadlines in order to earn fees. I am opposed to building a plant that will not run well. To this date, no one can assure us that the WTP will run safely and run well, completing its mission in 40 years or less. I am also opposed to the manipulative efforts being made by DOE, Bechtel, and URS to move the project ahead despite unresolved technical issues as well as their misleading communications concerning costs, schedule's, and difficulties.

Originally projected to cost about $4.3 billion in 2001, the current estimate for cost of completion is close to $13.3 billion. Until mid-November 2011 the cost was forecasted at $12.3 billion but on November 22, 2011, the DOE announced in the Tri-City Herald newspaper that cost projections were nearly a $1 billion above the current budget. With a decade to go before opening, and major technical and safety issues left to resolve, it is expected that the project's cost will rise even more, and it will incur further delays. Projections indicate that the cost could rise another $6-8 billion before it starts up. For example major facilities that are needed, but not openly discussed, are an low level waste stabilization (ex. melters) facilities, storage facilities, and effluent treatment plant

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expansions. The current Low Level Waste Vitrification facility can only handle 60% of the waste in the required time. While the construction costs grow to staggering levels, according to the GAO the lifecycle operating cost may be 10X the construction costs and exceed $100 billion.

The WTP is needed to ensure protection of the environment but it must be built to operate safely and efficiently. However, since its inception, the Waste Treatment Plant has faced many serious concerns about the adequacy of the engineering and the safety of the designs starting with concrete and seismic issues shortly after construction began. The WTP will handle dangerous radioactive materials and chemicals that, if poorly designed or built, could cause an incidents such as a hydrogen gas fire or explosion, a nuclear criticality, or a steam explosion in the melter. If there were to be a release, radioactive and chemical materials could escape the plant and contaminate a large area. The consequences of any uncontrolled release are bad but a catastrophic release would be devastating. If either of these occurred, the damage to the plant and to the cleanup at Hanford would be significant. With that brief background, let me now focus on my job and that of my group.

The main function of my R&T department was to identify and solve technical problems in the Waste Treatment Plant to ensure it ran safely and ran well. This included all aspects of the chemical process in every part of the plant as well as process support facilities. R&T could identify an issue through analysis, experience, or testing. If a design did not work as desired, R&T would provide recommendations on how to improve it. To supplement our efforts the R&T group utilized consultants from around the world, in national laboratories, and at many universities. The R&T personnel were the most knowledgeable process engineers and scientists on the WTP process.

In 2005, Congressional hearings were held on the WTP, which resulted in a 2006 Government Accountability Office (GAO) report. The GAO reported that since the WTP construction contract was awarded in 2000, the WTP's estimated cost increased more than 150 percent and the completion date has been extended from 2007 to 2017 or later. Today the costs have about tripled and the startup has been delayed almost a decade and a half. The GAO found three main causes for the increases in the project's cost and completion date: (1) the contractor's performance shortcomings in developing project estimates and implementing nuclear safety requirements, (2) DOE management problems, including inadequate oversight of the contractor's performance, and (3) technical challenges that have been more difficult than expected to address.

Because of the many technical concerns, in 2005-2006, I had responsibility to conduct the External Flowsheet (EFRT) Review chartered by then Secretary of Energy, Samuel Bodman. This 50+ consultant activity was completed on schedule at the end of February 2006. The review team identified 28 issues. It classified 17 of the 28 issues as major issues and 11 as potential but recommended that all had to be resolved. This EFRT review was also known as the "Best and Brightest" review.

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My Research &Technology department played a major role in resolving these issues. The biggest, most complex, and most costly issue, the Pretreatment Engineering Pilot (PEP) Plant was engineered and managed by my R&T group. This program cost over $100 million and was completed on scheduled on March 31, 2009. This accomplishment earned Bechtel and URS an award fee of $3.8 million.

The effort to address the EFRT issues extended from late in 2006 to mid-2010. By late 2009 the only unclosed issue was the mixing issue. A September 30, 2009, date was forecasted for its closure. The words "closure" and "mixing" require definitions. It should be noted that the word "closure", in Bechtel/DOE, is an administrative term. It does not necessarily mean finished or complete. In fact, much work can still exist and major technical issues can remain. Mixing refers to mixing of hazardous nuclear waste within a vessel to ensure solids do not settle on the bottom, that the solids are stirred well enough to prevent the trapping of gas, and the material is mixed well enough to enable adequate tank samples to be obtained. Other aspects of mixing include the process controls, erosion verification, and pumping systems to ensure adequate pump out of material from the vessels. Again, adequate mixing is critical in a chemical plant and without adequate mixing, plutonium particles could accumulate and cause a nuclear criticality and/or hydrogen gas could build-up leading to a possible fire or explosion. Improperly mixed waste could also plug the pipes which could render the facility inoperable. Mixing and pipe flow to a chemical plant is like your heart and arteries/veins is to your body.

After the September 30, 2009, closure date for the mixing issue was missed, several things happened. The DOE Office of River Protection manager, Shirley Olinger, requested that I be put in charge of the program. To date, the mixing program, called the "M3 program" had been run by other groups, not my Research and Technology group. This decision was made because it was felt that this would result in lower costs and less paperwork. It should be noted that programs run by my Research & Technology group had to meet the highest standards of quality, rigor and documentation. As of result of DOE's request, I was assigned leadership for the M3 program on October 2, 2009. In the initial meetings that followed, the two top WTP managers, Ted Feigenbaum, Bechtel, and Bill Gay, URS, approved throwing the "kitchen sink" at this issue so that we had a robust design and could put this issue behind us.

Also, with the M3 Milestone issue missing its September milestone date and with the desire to give the impression the project was moving ahead, the then DOE Environmental manager (EM-1) Ines Triay, requested her contractor associate, Frank Russo, be brought in to replace Ted Feigenbaum, the top Bechtel manager. This came to pass and Frank Russo was officially announced as the new Bechtel lead in January 2010 although he had already been involved in December 2009. Russo represented the fifth Bechtel top manager in nine years on the WTP project.

With Russo now in charge, and resolution ("closure") of the mixing issue being pursued, the future location and name of the Research and Technology group was being discussed. Bechtel and DOE wanted to project that research and technology programs were over. This was important to them for

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several reasons. The reasons included additional congressional funding, award fees, and the TriParty Agreement.

"Closure" of the M3 issue meant "closure" of the last of the 28 EFRT issues. This would give Bechtel and DOE the opportunity to sell the concept that research and technology was over. Bechtel and DOE management wanted to use this event to signal to Congress and the public that the era of research and technology development in the WTP had finished. With R&T portrayed as over, DOE and Bechtel could then tout that the project had reached a milestone and was moving on to the next phase of the project, that being completing construction and startup. This transition point would later be referred to as the pivot point. Selling the concept that technology issues were behind them would enable DOE and Bechtel to more aggressively pursue increased funding from Congress. Both DOE and Bechtel knew they needed additional money but refused to admit this to the public or Congress. All through 2010 and into 2011 they continued to claim that the funding of $12.3B was sufficient to finish the project despite the realization that there were unresolved technical issues, new technical challenges surfacing, and that the plant was not scheduled to open for another ten years.

A second reason for closing the mixing issue by June 30, 2010, was that a major fee award for Bechtel was tied to the closure. The award fee associated with Bechtel's first half 2010 performance was about $6M. Missing the June 30 closure date meant failure would impact this money.

Third, it was my understanding that the June 30, 2010, date was known to be a renegotiated date in the TriParty Agreement which Secretary Chu had allegedly signed. When the 2009 closure date for mixing was missed, the new date of June 30, 2010, had been renegotiated. Nobody in DOE wanted to miss the date again and go tell Secretary of Energy that the date had been missed twice.

Discussions on the new location for R&T began in mid-2009. Several options were considered as the new location and name for the R&T group. Everyone knew technology issues needed to be resolved and the WTP needed the continued support of the Research and Technology group. Proposals included putting the R&T group in the tank farm, in a corporate group, in WTP operations, and even establishing it as an individual corporate consulting group. No matter where it ended up it was known that much work still existed with the WTP for the R&T group. Bechtel estimated that there was over $14 million dollars of R&T work yet to do, not counting any new work which might develop.

After his arrival at the WTP, Russo immediately put a retiring Bechtel manager, Mike Robinson, a BS civil engineer, in charge of the M3 program and the existing team. Prior to this the M3 program reported through me to Bill Gay, the top URS manager in the WTP. Bechtel Engineering also reported to Bill Gay who then reported to Russo. About a month after Robinson's move, Russo moved Bechtel engineering away from Bill Gay and had it report directly to him. While these might seem as small changes in a very large project, they were very significant changes as it now

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put Frank Russo, a political science major, directly over both the engineering organization and the M3 program with no URS managers in-between him and the technology programs.

After only about 3 months in the WTP Project and with many open issues and much testing left to do, in March 2010 Russo started making public statements and predictions that M3 would close by June 30, 2010. Much testing had yet to be done and difficulties with the mixing program and technical issues continued to surface.

It became obvious to me by March that the directive of "throwing the kitchen sink" at it to provide a robust solution to the mixing problem was no longer the objective. Russo's objective was focused on closure of the mixing issue and money.

In late March, 2010, a PhD senior scientist, Dr. Don Alexander, in DOE raised further questions about mixing in the tanks. He was concerned that heavy solids in the gel-like nuclear waste could settle to the bottom due to inadequate tank mixing. This was a viable outcome that could readily lead to solids build ups, trapped hydrogen gas, and criticalities. I looked into it and concluded that insufficient data existed and recommended that testing had to be done. Bechtel did not accept this and pursued getting confirmation from other sources (Savannah River National Lab) that no testing was needed. Emails that later came to light reveal that Bechtel put much pressure on the SRNL personnel to provide the answer they wanted, i.e., that no testing was needed. In fact, in June 2010, when SRNL issued its report it said no testing was needed as Bechtel desired.

Also in the March 2010 period, DOE changed the June milestone fee award to an "all or nothing" criteria. This meant that for Bechtel to get their ~$5M ($5M of the $6M total fee) associated with closing the mixing issue, the issue must be approved by DOE for "closure". If it did not "close" Bechtel would get nothing. This further increased Russo's attention on closing M3 by June 30.

More importantly, and related to the additional funding that was being pursued, newly surfaced evidence shows that an added $50M in funding from Congress was at risk if M3 did not close. In addition to this, DOE and Bechtel were trying to get even more annual funding. If technical issues were not perceived as being closed and behind them, this added funding was all at risk. The added funding was needed because, again, DOE and Bechtel knew the project needed significantly more money. In addition, much of their annual funding was being spent correcting errors and making changes for past issues. Unofficial accounts indicate this could be as much as 20% of the annual budget. So, the extra money is essentially needed to cover past mistakes and changes, not to move the project ahead. If DOE and Bechtel could get the funding and rebaseline (reforecast the cost) the project before the cost issue surfaces, no one would know. As previously mentioned, on November 22, 2011, as a result of an internal review, DOE had to admit that the project needed nearly another $1B. It is also important to note that Bechtel and DOE were pursuing even further increases in funding so that they could allegedly accelerate the completion of the WTP. While acceleration was the description given, many felt that the objectives were to cover past problems and to push the

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project expenditures to a point where nobody would likely stand in the way of it, despite any technical and operational concerns.

After Robinson was assigned as the head of the mixing issue (M3), I continued to do my job. I and my group worked on test plans, stimulants, and with the national laboratories. I also raised issues in the February-May 2010 period as I and my group had consistently done. The repeating of issues and frequently very direct discussions with my URS senior manager, Bill Gay, occurred because it was obvious to me that Bechtel was driving to close M3 despite the inadequacy of the design. I knew from past experience that once an issue was "closed" it was hard to get any more attention on it. Since Bechtel was not going to be an operator of the plant, they only focused on getting it built and then getting out. In my opinion their management focus is on profits, not performance.

By May 2010 it was clear that I was slowly being isolated from the project. I found that I was not invited to key meetings, not included on distribution of key reports, and often virtually ignored. Meanwhile I continued to do my job and ensured that R&T provided the needed M3 support and accomplished its scheduled tasks. Despite this, by the end of May I felt like I had a target on my back. I could sense that Bechtel management was not happy with my continual raising of issues.

As June progressed, I was fearful of being fired for raising technical issues despite my continuing efforts to see that my group met its objectives. Russo focused intensely on closing the M3 issue by June 30th despite the many issues. Through discovery, emails were found where Bechtel management stated: "they needed to control Walt", "the science is over", and "I will send anyone home who does not fulfill my vision".

By June it was obvious that Bechtel and DOE were driving to close the mixing issue. DOE had hired Dale Knutson, from Pacific Northwest National Laboratory, to be the new Federal Project Manager for the Waste Treatment Plant. He was assigned to the WTP in early June. He immediately began to push for closure of the mixing issue. Being new on the job, in my opinion, he did not want a missed deadline within his first weeks on the job.

As mid-June approached there were many concerns with the adequacy of the mixing. Bechtel engineering used scaling approaches that were very questionable and challenged by other consultants. One consultant had referred to the Bechtel scaling approach as being criminally negligent. Bechtel proposed running the vessels at reduced levels and with less solids i.e., lower density. Bechtel proposed controlling the shear strength (somewhat like viscosity) in a specified range but gave no indication of how this would be done. All of these proposals reflected inadequacies of the mixing design and also further reduced plant throughput rates. The throughput rate is important because the plant is being built with a 40 year design life. Despite the concerns, Bechtel compiled the necessary paperwork to submit to DOE on June 30th 2010 for closure approval of the M3 mixing issue.

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On June 30, 2010, two key events occurred. First, a small review team comprised of Bechtel and DOE managers, a Bechtel engineer, and a couple DOE scientists reviewed the Bechtel closure package which had been submitted. Dr. Alexander, the Ph.D. DOE scientist that raised the mixing concern in March, was part of this committee and objected to closing it. He was the only one to object. This caused a major discussion on how closure would be handled. Not surprisingly it was decided by Bechtel and DOE management that M3 would be declared closed for all aspects of mixing except the concern that Dr. Alexander had raised. The mixing issue was signed closed in August 2010 and Bechtel subsequently received nearly $5M (of the $6 million maximum) for its performance.

Also on June 30 a meeting was held to review the unresolved technical issues as identified by my Research and Technology group. This was part of a project-wide effort to surface issues. Most groups submitted a few issues. What was different about my R&T list I submitted was the number and the content. Our list had nearly 50 issues on it and most dealt with mixing concerns. I had sent this list to Bill Gay who forwarded it to Barbara Rusinko, the Bechtel Chief Engineer, nearly a week earlier. In addition it included the issues we submitted in 2009 (about 100), many of which were still open and needed resolution. One of the issues on the 2010 list was the recommendation to do large scale testing supporting Dr. Alexander's recommendation. In this meeting the ranking Bechtel manager, Barbara Rusinko, who had brought fresh cherries to the meeting, made the comment to me that "maybe I would choke on them" or words to that effect after I asked if I could have some. While I was taken aback by this response at the meeting, I tried to ignore it. From the discovery process it became clear that she knew the size and extent of my list prior to the meeting. It was also her last day on the WTP project. In retrospect I believe she was reflecting, on her last day, the Bechtel management attitude towards someone who raised technical issues that challenged Bechtel's engineering approach.

I did not agree with closing M3 but I was not on the decision committee nor was I asked despite my experience and position. Clearly they knew what the answer would be. I knew that if I stood up and objected, I would be overrun. I sent an email to three expert consultants I had been working with hoping they would express concerns based on input they had from DOE consultants. These consultants had been expressing concerns to me about the design. They also had conversations with key DOE consultants who they said had concerns with the design approach to close the M3 mixing issue. I wanted them to know that the M3 issue was driving to closure despite what they felt, heard, and had told me.

As the end of June, 2010, approached it was decided that the R&T group would move into the WTP Operations group and be renamed Process Engineering. An announcement was typed up and approved by Greg Ashley, Bechtel, and Dennis Hayes, URS. Plans were made to move the group to Operations effective July 1, 2010. A final meeting to discuss the move was set up for 7am on July 2, 2010.

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On July 1 I went into work on my day off for a 7am meeting with the Operations Manager, Dennis Hayes. I took one of my managers with me. The meeting was planned to discuss the final details of my group's move to the Operations Division. This move was taking place for the reasons previously discussed. First, the R&T group would change its name so that Bechtel and DOE could say that research and technology were over (despite not being over). Second, the group would become the "Johnny Appleseed" for the future plant technical group.

When I arrived with my manager, the Operations Manager, Hayes, came out of his office and told my manager to leave. I asked him why. He said the topic of the meeting had changed and my manager was no longer needed. He told me go to into the office.

As I walked into the office, I saw the new assistant Human Relations person, Patrick Ellis, sitting in the office. I sensed something was wrong. The Operations manager told me to sit down. I asked what was going on. He said, "Give me your badge, your company phone, and your company Blackberry. You are no longer on the project. You have to leave the site immediately".

I asked him what was going on. He said he did not know and he was only doing what he had been directed to do. I asked him "who made this decision". He said Frank Russo, the top Bechtel manager, on the WTP Project had made the decision. I asked why. Hayes said he did not know. He said he had nothing more to say. Again, he directed me to turn over my badge, phone and Blackberry and then leave.

I turned to the Human Relations person. I asked him what was going on and why this was happening. He said he did not know and could not add anything. I turned back to Mr. Hayes and asked him again. He said he told me all he knew. After several times of going back and forth between them, I sensed it was futile to ask any more.

I then asked if I could go to my office to get my things. I was told very directly that I could not go get anything out of my office. Any personal items would be delivered to me later. I asked them how somebody would know the difference between a personal technical reference and a WTP Project reference. He had no answer. He just repeated that I could not go to my office and any personal items would be delivered to me later. After I turned over my phone and badge (I did not have my Blackberry with me) he told me I had to leave. To this day, some are still undelivered.

I asked if I, on my way out, I could go see a person who was going to babysit our dog for the weekend as we were headed to Seattle with my daughter and (unbeknownst to us) our future son-in-law. Mr. Hayes said I could see no one, talk to no one, and I would be escorted out via a path of least contact (with anybody else).

I asked who I could contact to get more info. He told me to contact Leo Sain, URS Vice President in Aiken, SC, and Bill Gay, the top URS manager on the project to learn what my next location would be. Mr. Gay was in California for the weekend visiting his mother. He gave me their phone numbers on a piece of paper and then told me to leave.

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Mr. Ellis walked me to the main office building front door. When we got there I asked Mr. Ellis one more time as to what was going on. I thought he might offer some insight if it was just the two of us. He repeated what he had told me before: He had no reason why this was taken place and had nothing more to offer. He said I had to leave the site immediately. I pushed the door open, said goodbye, and he pulled the door closed behind me to ensure it locked.

As I walked to my car, I remember stopping and looking around. I had a feeling like I have never had before. I felt totally alone with no one to turn to. I felt like a man without a country. All I could do was get in my car and drive home. I had no idea what the future would hold. I had no idea why this had happened.

As I pulled into the garage, my wife and daughter heard the garage door opening and came to see what was going on. I told them I had been fired from the WTP project. My daughter stood there not knowing what to say. I went into the house and sat in a state of shock. I told them I would call Leo Sain and Bill Gay to see what they could tell me.

It was now about 9am PST. I tried Bill Gay several times but could not reach him so I left a message. I then tried Leo Sain and reached him on my first call. I immediately told Mr. Sain what happened and asked him to explain what was going on. He said he could not explain it. He asked me the question of "did you make recommendations that large scale testing was needed?" My mind flashed immediately to the issues list I submitted. I knew this item was on the list. I answered honestly by saying, "yes, it was one of the items on my list". But then sensing this was the reason for my termination, I offered the comment that others had brought it up also. Mr. Sain told me to come to Aiken for Tuesday July 6th. I told him that we were headed to Seattle and asked if I could come there on July 7th. He said that would be OK.

At about 10:30am PST on that Friday, Mr. Gay returned my call. I told him what happened and asked him for an explanation. He asked if I had sent an email to consultants. He indicated that this email upset some people. He would not tell me who or why. He said he did not have any more information as he was in California (which I knew). I told him the email I sent to the consultants did not contain any derogatory comments. It was an informational email. He told me he may be back in Richland late on July 5th and maybe we could meet then. I told him I was headed to Aiken, SC, for July 7th and would not be in on Tuesday, July 6th.

In the afternoon before leaving for Seattle, the more I reflected on the morning actions, the more I felt that what had happened was not right. I then called the DOE Employee Concerns Program to let them know what had taken place. I didn't know what else to do. I told them I had been dismissed from the WTP with no reason being given. I told them I was headed to Aiken SC and would contact them again when I got back. We left for Seattle and returned late on July 4, 2010.

In the early afternoon of July 5th, Cami Krumm, the URS Human Relations Manager, called me. I asked her what was going on. She said she did not know. She said it did not sound right. She said

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that Bill Gay was coming back into town and wanted to meet around 6 pm. I told her that would not be possible as I had a dinner planned with my family. I asked her if he would give me in writing the reason for my termination from the WTP. She said he would not. I then said that even without the dinner existing, there was not a great reason to meet. I wanted answers.

I left for Aiken SC the morning of July 6th. I prepared notes for my meeting with Leo Sain on the next day. I arrived at the Aiken office at 8am. After a brief wait, I met with Leo Sain and Dave Hollan. Hollan is the division Human Relations manager.

I immediately asked Sain what was going on. He said he was not sure. He said that I had sent an email to a consultant that upset some key people. I asked him to show me the email. He said he would not. He said he would read a part of it which he did. I again asked if I could see the email. He said no. I asked him what was wrong with the email. He said, and was supported by Dave Hollan, that they saw nothing wrong with the email unless you read things into it. I asked him who made the decision to remove me from the project. He told me that it was Russo of Bechtel. I asked him how Russo could do such a thing. He told me that "URS does whatever Bechtel wants". I started to ask him the question my mother always asked me "If Bechtel told you to jump off a bridge, would you do it?" Discussion continued for nearly 2 hours. During the discussion Sain told me to work on finding myself another job in the company. I told him I would not do that as URS management had agreed with Bechtel and it was therefore up to them to find me a job. I told him that at my level I was not going to try to do that as I thought it would be a fruitless effort. We broke for lunch. In the afternoon we resumed discussion but it only lasted for about an hour. During that discussion, Sain told me that I should not raise technical issues and should send them to him to address. I told him that was my job and asked him if he was telling me not to do my job. He told me that he was telling me to send the technical issues to him.

Mr. Sain asked what I wanted out of this. I told him I wanted my job back and a public apology from Russo. He said Russo would never give me a public apology. I told him I would accept a private one-on-one apology from Russo and my job back. He said that he had a "silver bullet" he could use and would see if he could make that happen. I left the discussion with Sain thinking there was a good chance for all this to be reversed.

During this afternoon discussion, Sain also pushed me with questions to see if I was going to take any other action. I acted like I wasn't sure what he was asking but knew he wanted to know if I was going to file any complaints or take any legal action. I told him that at this time I did not know and I just wanted my job back. I felt like it was inappropriate for Sain to be asking. I wondered had I said "yes, I plan to file suit and contact the Department of Labor" if he would have acted or responded differently.

After the afternoon discussion with Sain, I met for a short time with Hollan. He told me things had not been handled properly and if it was URS they would have done it differently. He would not expand beyond that. He was very guarded with his words.

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The meeting ended about 2:30pm EST and I drove towards Columbia SC to meet with my youngest daughter. About 3pm I received a phone call from Sain and he said that he had talked with Russo and it looked good that I would be going back to the WTP as I had requested. He said he had to use his "silver bullet" and I should know by Monday. I felt somewhat uplifted that Sain was true to his word and wanted to see right got done. I later learned through discovery that while Sain was presenting a positive view to me he was also asking if any grounds for disciplinary actions existed.

I returned home and heard nothing until Sunday night July 11th. I received an email that said I would be meeting with Bill Gay the next morning at 7am. I thought that I would be told I was returning to the WTP as Sain had indicated.

I went to the meeting at 7am. Besides Gay, Hayes and Krumm were present. We went to a small room and Gay started reading from a prepared script. He said things had been reviewed and I was not going back to the WTP. I was caught by surprise. I asked as to who was responsible for my removal from the WTP. Gay stated it was Russo and Knutson, the DOE Federal Project Director. During the discussion, Gay said I was disrespectful to Bechtel management. I asked him for examples. He gave none. I asked him if I was any more disrespectful than others including him. He said no. He then said I had performance issues. I told him that this was the first I had heard of that. I asked him what they were and where they were documented. He could not provide any. He then said that URS does whatever Bechtel says. I asked him where this was written. He said in the contract. I asked him to show me those contract words. He said he did not know where they were. I have never received any contract words supporting what Gay said. In fact, my review of the contract says they do not exist. Krumm said she would take it under advisement and see if she could provide me the words. As the discussion ended, I was told I would be assigned to work with the business development group on a technical program.

Gay and Hayes left the meeting. I asked Krumm to stay behind. I asked her what was going on. She said she was not sure of the details but was sure that it had not been handled properly. I asked her if she could do anything. She said "no, it is too late, there's nothing I can do". A summary of the July 12 meeting exists.

It was now 12 days after my termination from the WTP and I had yet to receive a written reason (or even an understandable verbal description) for why I was terminated from the WTP. In fact, to this date, I have never received a written reason.

After the meeting I went to my new work location. I was assigned to report to a contract employee and work on a special assignment to develop an alternate process for stabilizing low level waste. DOE had given URS money to look at an alternate process to the one they were building in the WTP. It is important to note, as previously stated, that the current low level vitrification (glass) plant will only handle about 40% of Hanford's waste. A facility as large as or larger than the original low level vitrification plant must be built to handle the remainder. Rather than just copy

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what they are building, they were looking at an alternate processes, and URS, the subcontractor on the WTP, was doing it.

After about one month on this job, this special assignment organization changed. Rather than this group work as part of the business development group on this job, the job was being absorbed into the URS tank farm organization. I assumed that the reason for this was that it was too visible being in the business development group and caused too many questions from competitors about why URS was getting this special funding especially since they were a contractor in the WTP. By moving the task into the tank farm it was nowhere near as visible to the outside world. My assignment in this program ended about the third week of August 2010.

I was then told to report to the main URS office building in Richland , WA. When I got there I was told I was being given an office in the basement. When I went to it, I learned it had two copy machines in it and the janitor's supply room was connected to it. Another person also sat in the office but being a field assigned person he was essentially never there. His desk was only to give him a desk with computer access if he was in town and ever needed it. One of the copy machines was the high production copier used to compile large documents. I brought in a pair of ear muffs to dampen the sound when it was running.

As a brief flash forward in time, for about a year, I sat in the basement office with no meaningful work and no contact from anyone in URS management. I was not invited to any safety meeting and any staff meetings, and only received computer issued corporate information.

By July 14th, 2010, the more I thought about what had happened the more concerned I grew. What was done was not right and should not have occurred. I had always told my people to do the right thing. I told them to:

1- Ask themselves what is the right thing to do.
2- Ask themselves if they were going to do it.
3- Ask themselves it they would they stand up and tell people what they were going to do , i.e., were they willing to defend it.
4- If not, go back to question #1.

The more I thought about what had been done I decided I could not face my former workers and tell them that this action was right and I would do nothing about it. I did not want them to think that this is how you manage. More importantly, I did not want this to happen to anyone else.

I then talked to one or two people whom I thought I could trust. I shared my feelings. I told them I wanted to see that right was done and what had happened to me was wrong. I told them I planned to write a letter to the Defense Nuclear Facilities Safety Board. I chose the DNFSB because I knew they had oversight responsibility for DOE and the WTP. I did not know the full extent of their responsibilities nor what they would do. But they were the only group I could think of that might

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help. I composed the letter and sent it on July 16, 2010. I assume it arrived at the Board's office early the week of July 19.

During the weeks of July 12 and July 19, I had follow-up meeting with the DOE Employee Concerns Program as a follow-up to my July 2 call to them. I told them what had happened. Their managers said that they had never seen such a blatant case of retaliation. Bonnie Lazor, the first DOE ECP person I talked with said it appeared to be a very serious case of retaliation and the Bechtel was in deep trouble. I asked why. She said "You are smart, you are very detailed, and they are wrong". Later, Bill Taylor, the highest ECP manager I spoke with, told me that he felt this was not something to be handled by DOE ECP and I should contact somebody on the outside. I asked who. He said "Tom Carpenter".

I contacted Carpenter, who runs a non-profit group called "Hanford Challenge," on July 16th and told him what had happened. I told him I did not know who to turn to, where to go, or even who to talk with. I felt awkward talking with him in such detail but I felt like I had no other choice. Mr. Carpenter said he would be in town early the next week and would meet with me.

As I further investigated what my options were, I learned that a whistleblower case at Hanford could not be filed in Washington State court as case law had been decided by the Washington State Supreme Court that effectively prevented such a case being brought. I learned that the only route of recourse was to file with the Department of Labor but it was doubtful if they would act within the allowed time of one year. I learned that there was a statute of limitations even for these filings so I had to move fast. One time limit was 30 days and it was only about 10 days away. As I thought about it, things seemed very dark. It seemed like there was not enough time to explore options, let alone take action. I was glad I wrote the letter to the DNFSB.

I subsequently filed a complaint with the Department of Labor on July 31, 2010, just within the 30 day window. I learned that the DOL has a large backlog and does not have a good record of getting through a complaint within their one year period. I learned that if the DOL does not make a ruling within one year I could request my case be moved to Federal court. The more I learned, the more disappointed and helpless I felt. I could find no help at the State level, limited and doubtful help at the Federal level, and I only had few people I could talk with.

On July 20th, with probable knowledge of my letter to the DNFSB, Sain called me and asked me "what he could do to make Walt happy". I repeated what I had told him before. He said "Christ, Walt, Russo made a mistake. Haven't you ever made a mistake before?" I asked him what he thought Riley Bechtel would want if he had been disgraced the way I had been. I told Sain that job and career satisfaction involves reputation, responsibility, contribution, and doing something you love to do and all these had been taken away from me. I told him that my work was my calling.

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Money, titles, and even benefits do not provide job satisfaction and contribute to self esteem. It was clear to me that Sain had no personal interest in what happened to me other than for it to go away.

During the week of July 19, 2010, I had lunch with my new manager, Duane Schmoker. During the lunch he told me that "my longevity was threatened if I continued my actions against Bechtel". I asked him what he referred to when he said my longevity. I asked him if he meant my job, my employment, or my life. He just said I would not win against Bechtel.

I have since learned that after Bechtel received a copy of my letter, one of their first actions was to contact Senator Patty Murray's office and ask for support on the Hill (Congress in Washington DC) in handling the response to my letter. Emails show that his communication occurred the last week of July, 2010. No one from Bechtel, URS, DOE, or Senator Murray's office had contacted me for any input. It is like I was assumed guilty and wrong and the wheels of a large machine were immediately rolling against me.

In parallel to the Bechtel communications effort, unbeknownst to me, my letter to the DNFSB had been leaked to the local newspaper, which published a story. The Chairman of the DNFSB, Peter Winokur, was quoted in the article saying that I was a credible witness and that an investigation would begin.

As a result of my letter and the comments by the DNFSB, three investigations were initiated. One was by the DOE Health, Safety, and Security (HSS) office. Another was by the DNFSB. The third was by the DOE Office of Inspector General (IG) out of San Francisco.

From the discovery process, I learned through evidence produced by the contractor that Eric Gerber, a senior business development person who reports to Duane Schmoker, sent an email to Schmoker attaching an announcement of a talk I was going to give in Seattle. Gerber's comment was "this will not be an easy termination".

As the investigations unfolded in August 2010, I learned that their focus was;

- DOE Health, Safety and Security (HSS): Investigate the safety culture in the WTP
- DNFSB: Investigate the technical issues in the WTP
- DOE Inspector General: Investigate the circumstances around my termination.

While these reviews seemed encouraging, only one, the IG review, dealt directly with me. Multiple interviews were conducted with me by the first 2 groups. Only one interview occurred with the IG. When the IG called me to set up the interview, they said that two of their San Francisco agents would be coming. When they arrived there were three. The third agent was from the local office. At first my attorney and I objected to the presence of the local agent. I expressed concern that due to the significance of the issue we wanted independence in the investigation. Despite what they

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had told me, the San Francisco IG agents could not agree to proceed without he local IG agent until they had confirmation from their management. After several phone calls and discussions and an hour delay, the head San Francisco agent told us that the IG could not proceed with the interview without the local agent present. Since this was the only group looking into the termination aspects of case we decided to proceed with the interview. The discussion proceeded and it was the only discussion to be held with the IG.

Within about 3 weeks (early September 2010) I learned that the IG had stopped their investigation. Their reason was that I had filed a complaint with the DOL and, therefore, they would not proceed with investigating my complaint. They did not explain their reasoning.

In late September, the DOL contacted me through counsel to set up a meeting. This was the first and only meeting held with the DOL. When we got there we learned that Bechtel and URS had provided some information although it was not clear whether it was written or verbal. After a lengthy session, we stopped and said we would continue in the future. No future session was ever held. This ended my discussions with the DOL.

Also, in September, after learning much more about the case, my counsel filed suit in Washington State court against Bechtel and 2 defendants and URS and 3 defendants for conspiracy and tortious interference surrounding my employment with URS in the WTP. While this seemed like a step forward, I learned that these state court claims do not provide for attorney fees or costs if I prevail. I also learned that In the DOE contracting world, the legal costs incurred by the companies are reimbursed by the DOE. Since this is taxpayer money, I began to feel that I was battling myself. It is unclear to me that if a company loses a retaliation case, whether they have to pay DOE back for the funds they received. Further complicating it, if the company chooses to settle but admits no guilt, it appears they do not have to pay DOE back for any of the legal costs. I felt like everything was stacked to support the companies.

The DNFSB called for a public meeting on October 7 and 8, 2010, to discuss some of the technical issues in the WTP. Mixing was one of the main topics. Another dealt with vapor dispersions from a release to the atmosphere, another with pipeline explosions, and the fourth main topic involved tank farm safety.

In very early October, just before the DNFSB public meeting, the final report by the DOE HSS was issued. Despite finding many indications of concern, the summary of the report gave little acknowledgement to those issues. Overall the summary presented a rather positive view of the culture. There were findings in the body of the report that clearly indicated problems with the safety culture. For instance, the HSS report found that "a number of individuals have lost confidence in management support for safety, believe there is a chilled environment that discourages reporting of safety concerns, and/or are concerned about retaliation for reporting safety

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concerns. These concerns are not isolated and warrant timely management attention, including additional efforts to determine the extent of the concerns." Despite these finding, no action plan was put together by Bechtel or URS to address the areas of concern or findings in the report.

As a result of actions by DOE management during the public meeting and afterwards, indications of witness tampering became a concern. As a result, the DNFSB initiated an in-depth investigation in later 2010 and called people (DOE and contractors) to Washington DC to testify on video under oath. This was publicized in the TriCity Herald newspaper on March 8, 2011.

In December 2010, the DNFSB issued their recommendation 2010-2 which summarized their findings concerning mixing issues. Their findings substantiated all of my concerns and identified more. Also in December 2010, Bechtel and URS removed the Washington State court action to the US District Court. I challenged that removal, and the Federal judge found in my favor that the case should stay in State court.

After month of effort, in early 2011, through the Freedom of Information Act (FOIA) I received a copy of the summary memo compiled by the IG. It was so redacted it was impossible to make any sense of it. In mid-2011, after a year of effort, I received a more extensive file but, again, the material was so redacted that it was impossible to make any sense out of and was essentially useless.

Also in early 2011, Bechtel and URS moved to have my trial date pushed back to give them more time to prepare. While I have one or two lawyers on my case, they have two corporate teams and about three large external firms. While we can be ready, they claim they cannot. The judge ruled that the trial would not be until May 2012. Again, things seem to be slanted to support the companies.

In June 2011, following their intensive witness tampering and safety culture investigation, the DNFSB issued recommendation 2011-1 which stated that major safety culture issues existed in the

WTP. They included recommendations on how to address them. The findings included:

- In a WTP project managers' meeting on July 1, 2010, Dr. Tamosaitis raised safety concerns related to the adequacy of vessel mixing, technical justifications for closing mixing issues, and other open technical issues. The next day he was abruptly removed from the project. This sent a strong message to other WTP project employees that individuals who question current practices or provide alternative points of view are not considered team players and will be dealt with harshly."

- "The Board finds that expressions of technical dissent affecting safety at WTP, especially those affecting schedule or budget, were discouraged, if not opposed or rejected without review. Project management subtly, consistently, and effectively

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communicated to employees that differing professional opinions counter to decisions reached by management were not welcome and would not be dealt with on their merits."

- "The Board's investigation concludes that the WTP project is not maintaining a safety conscious work environment where personnel feel free to raise safety concerns without fear of retaliation, intimidation, harassment, or discrimination."

- "Previous independent reviews, contractor surveys, investigations, and other efforts by DOE and contractors demonstrate repeated, continuing identification of the same safety culture deficiencies without effective resolution."

A 30-day window existed for the public to offer comments on the 2011-1 recommendation. However, within about a week, DOE responded in writing and took issue with the DNFSB findings. Despite the lengthy and thorough investigation by the DNFSB, the DOE contended that their quick investigation in September 2010 had led them to other conclusions. Unforeseen by them, however, was the nearly 100 concerns expressed by the public in support to the DNFSB recommendation. The premature response by DOE and the thorough investigation by the DNFSB required DOE to issue a follow-up response.

As a follow-up to the DNFSB Recommendation 2011-1, DOE had announced it will do another HSS cultural audit of the WTP. This will be nearly 15 months after my termination from the WTP project. Bechtel has also brought in outsiders to perform reviews. Bechtel hand-picked the participants, outlined the scope, and paid for the reviews. Bechtel will also have an opportunity to review the draft report and make edits before publication.

As had been predicted, as August 2011 approached, it became obvious that we would not hear anything from the DOL.

As the discovery process unfolded, it became apparent that, as Sain and Gay had stated, Dale Knutson of DOE had played a major role in my termination. We learned that after Sain had called Russo on July 7th, Russo went to Knutson to get his OK to bring me back. Knutson said he did not want a whistleblower on the project. Russo told Gay that this had stopped my return to the WTP project and put end to the silver bullet which Sain had used.

In August 2011 after about a year of isolation in the basement, Bob McQuinn who had taken Sain's position started to try to get me involved in some corporate programs. I provided a couple weeks of management leadership assistance at the Savannah River Site, Aiken, SC, and also provided some marketing assistance to the National Engineering Technology Laboratory, Pittsburgh, PA. I still have not been invited to a staff or safety meeting and have had no contact in the building from the group I thought I reported to.

In November, 2011, after much review of the discovery and deposition information, I moved to:

- Drop URS from the State suit keeping only Bechtel in it.

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- Filed suit in Federal court naming URS and DOE.
- Regarding DOE, we made it known we wanted changes made within DOE to prevent similar actions, not monetary settlements from them.

It is now almost December 2011, about 18 months after my termination from the WTP. Bechtel has now filed for summary judgments and dismissal of my suits. If these suits are not dismissed the soonest the trial will occur is May 2012, almost 2 years after my termination from the WTP.

To this day I have not received a formal explanation of why I was terminated from the WTP. Bechtel and URS have offered these reasons at varying times over the past 17 months for my termination:

- My job was over.
- I sent an email which raised concern with key customers.
- I was focused on my pay and bonus and not the program
- I had performance issues.
- The Pacific Northwest National Laboratory did not like working with me.
- I was an obstacle to closing the M3 (the mixing) issue.

Information from the discovery process and depositions exists to disprove the above. While Bechtel continues to provide such comments as those above, they continue to conduct surveys to support their position. They pick the people for these surveys and even use Bechtel supporting law firms to conduct them. Then, most sadly, they are reimbursed by the government for the expenses.

What does appear to be clear, as evidenced by my termination from the WTP, is that anyone who challenges or takes a stand against Bechtel's design, especially where money (bonus, profits, fees, additional funding) is involved will be dealt with harshly.

In summary, at this time, to the best of my knowledge:

- I have learned that there is no recourse in Washington State courts for a Hanford employee who is dismissed for raising whistleblower concerns. Stated another way, the Washington State courts can do nothing for whistleblower complaint from a Hanford employee.
- The Inspector General will not investigate a complaint if the Department of Labor is involved. In fact, the IG immediately stopped its investigation when it learned that the Department of Labor was involved in my case. Stated another way, the IG did nothing.

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- The probability of the Department of Labor thoroughly investigating and coming to a conclusion in the one year period is very low. The DOL never finished its investigation nor offered any written conclusion to my case. To the best of our knowledge, Bechtel and URS ignored the DOL's request for information. No action was taken. Stated another way, the DOL did nothing.

- No members of DOE management have personally investigated the actions surrounding my termination. Stated another way, DOE management did nothing.

- No members of Bechtel or URS management have personally investigated the actions surrounding my termination from the WTP. Stated another way, Bechtel and URS management did nothing other than hand select people to do surveys for them.

- With no state court recourse and no DOL support, a Hanford employee has little recourse other than requesting a Federal trial. And whether a trial is granted is determined by the Federal judge. And more than 2 years can easily pass before any court action commences. So a person in my situation raising a valid whistleblower complaint can end up being judged without having a trial.

- It is my understanding that DOE is reimbursing the contractors for their legal fees in their fight against me. Stated another way, I am in essence financially fighting myself and other taxpayers, not the companies. The companies are at zero risk.

- The only group who took action in an attempt to correct technical and safety culture issues was the Defense Nuclear Facilities Safety Board. Without them giving oversight to DOE and its contractors, there is no one providing DOE oversight. This is like giving the fox the hen house to guard. In this case, however, without the DNFSB, the fox not only eats the chickens but laughs at the person who points this out. The issue the DNFSB faces, however, is that they have no enforcement authority, they can only issue recommendations. With no teeth, they can be ignored.

Who can a conscientious employee to turn to for help? From my experience to date, I would say that the answer is "virtually no one".

I strongly recommend that these actions at the minimum should be taken:

- Federal laws should be expanded to increase the rights and protection for concerned citizens who act on behalf of others for the betterment of our Country and the use of its resources.

- Contractors should not receive coverage for legal expenses in a whistleblower lawsuit. Currently, DOE reimburses all costs even ongoing costs (It is unclear if the contractor has to pay DOE back if found guilty).

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- If the contractor is found guilty, the contractor should have to pay a fine to DOE and the State.
- DOE should not be allowed to issue contracts where one company is both the design agent and design authority. These are separate functions which should be managed individually.
- Federal agencies, like DOE, should only be able to use a subcontractor on an Inter Personnel Agency (IPA) assignment if the program has no connection with the subcontractor, i.e., the home subcontractor is providing no support to the program.
- If DOE is found guilty in Federal court, a penalty should be imposed on DOE similar to what occurs if they miss a regulatory commitment with a State.
- Annual funding for the DNFSB should be increased to enable increased staffing and more oversight.
- The DNFSB should be given enforcement authority for their recommendations.
- A stand-down of the pretreatment facility of the WTP should be enacted until and independent panel can recommend the proper path forward to ensure a safe and efficient plant. Continuing to build it while issues exist and alternate processes are pursued in the tankfarm is a waste of taxpayer money.
- (Hanford) Whistleblowers should be able to file suit in the (Washington) State Court in addition to Federal court. The reason for dual court filings is that DOE can only be sued in Federal court.
- State court remedies should include punitive damages and coverage of legal costs.

I encourage the Senate and Congress to pursue and implement actions like those stated above. More protection should exist for contractor employees who are willing to come forward to expose retaliation, technical issues, safety concerns, waste, fraud, and abuse in all projects and especially federal projects.

Thank you for your time and attention and giving me this opportunity. Please contact me if you have any questions or would like any additional information.

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Testimony of Angela Canterbury, Director of Public Policy,
before the Subcommittee on Contracting Oversight,
Senate Committee on Homeland Security and Governmental Affairs,
on "Whistleblower Protections for Government Contractors"
December 6, 2011

Chairman McCaskill, Ranking Member Portman, Members of the Subcommittee, thank you for inviting me to testify today, and for your attention to whistleblower protections for government contractors and other recipients of federal funds. I am Angela Canterbury, Director of Public Policy at the Project On Government Oversight (POGO). Founded in 1981, POGO is a nonpartisan independent watchdog that champions good government reforms. POGO's investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government. Thus, POGO has a keen interest in contractor accountability and protecting whistleblowers who assist in uncovering and deterring government waste, fraud, abuse, mismanagement, and threats to public health and safety.

Whistleblowing works for the public, but without strong public policy, not for the whistleblower

Whistleblowers are the guardians of the public trust and safety, and among the best partners in crime fighting. It is a well-known fact that whistleblowers have saved countless lives and billions of taxpayer dollars. There also is no doubt that whistleblowers play an essential role in exposing corporate misconduct.[1]

A survey conducted this year by the Association of Certified Fraud Examiners found that nearly half of occupational fraud cases were uncovered by a tip or complaint from an employee, customer, vendor, or other source.[2] In the case of fraud perpetrated by owners and executives, more than half were uncovered by tips from whistleblowers. An academic study earlier this year

[1] Bryan Rahija, "Who Discovers More Corporate Fraud: Whistleblowers, Regulators, or Journalists?" *POGO Blog*, April 8, 2010. http://pogoblog.typepad.com/pogo/2010/04/who-discovers-more-corporate-fraud-whistleblowers-regulators-or-journalists.html

[2] Association of Certified Fraud Examiners, *2008 Report to the Nation on Occupational Fraud & Abuse*, 2008, pp. 18-23. http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/2008-rttn.pdf (Downloaded December 1, 2011)

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confirmed that whistleblowers play a bigger role than external auditors, government regulators, self-regulatory organizations, or the media in detecting fraud.[3]

But perhaps the best illustration of how whistleblowers can save taxpayer dollars is the more than $27 billion recovered since 1987 through the hugely successful False Claims Act (FCA) award program.[4]

The FCA prohibits a person or entity from fraudulently or dishonestly obtaining or using government funds. It also allows individuals or entities to bring a civil claim, in the name of the government, against contractors defrauding American taxpayers. If the claim is successful, the individual or entity can receive up to 30 percent of the recovery.[5] The law not only acts as a deterrent, but also incentivizes whistleblowing through the financial awards and strong protections against retaliation. Federal Circuit Court Judge Hall said that the FCA provisions supplement the government's "regular troops" since it "let loose a posse of ad hoc deputies to uncover and prosecute frauds against the government."[6]

What's at Stake?

However, the False Claims Act only covers fraud and does not protect or incentivize whistleblowers who witness waste, mismanagement, and a host of other illegalities, in spite of the government's huge exposure to these risks given the amount of federal dollars distributed to non-federal entities.

According to USAspending.gov, out of nearly $3.8 trillion in the federal budget in fiscal year 2011, roughly half was spent on prime awards to contractors, grantees, states and localities, and others. And yet, most of this whopping sum of $1.9 trillion in taxpayer dollars was spent without protecting those on the front lines who come forward when they witness waste, fraud, and abuse.[7]

A recent POGO report illustrates the imperative of protecting whistleblowers in this growing workforce of federal contractors. In fact, in some federal offices contractor employees outnumber federal employees[8]:

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[3] Alexander Dyck, Adair Morse, and Luigi Zingales, "Who Blows the Whistle on Corporate Fraud?" http://www.afajof.org/afa/forthcoming/4820p.pdf (Downloaded May 10, 2011)

[4] Department of Justice, Office of Public Affairs, "Department of Justice Recovers $3 Billion in False Claims Cases in Fiscal Year 2010: $2.5 Billion Health Care Fraud Recovery Largest in History—More Than $27 Billion Since 1986," November 22, 2010. http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html (Downloaded December 1, 2011)

[5] 31 U.S.C. § 3729

[6] *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992), paragraph 17. http://law.justia.com/cases/federal/appellate-courts/F2/961/46/208412/ (Downloaded December 1, 2011)

[7] In fiscal year 2011, total Prime Award Spending was $1.9 trillion, or about 50 percent of total federal spending. Contracts accounted for about 24 percent of prime awards and about 12 percent of total federal spending. Grants accounted for about 28 percent of prime awards and about 14 percent of total federal spending. And spending on states and localities accounted for about 13 percent of prime awards and about 6 percent of total federal spending.

[8] A specific example is the Department of Defense: "at 15 of the 21 [contracting] offices we reviewed, contractor employees outnumbered DOD employees and comprised as much as 88 percent of the workforce." Government Accountability Office, *Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain*

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> Since 1999, the size of the federal employee workforce has remained relatively constant at about 2 million, while the contractor workforce has increased radically—from an estimated 4.4 million to 7.6 million in 2005. In other words, the federal contractor workforce dwarfs the federal employee workforce nearly four-fold.[9]

Most known contractor whistleblowers have come forward using the False Claims Act to uncover fraud, or have relied on its remedies for retaliation for doing so. But even with solid public policy such as that underlying the False Claims Act, the road is still arduous for whistleblowers. For example:

- Michael J. DeKort was a Lockheed Martin engineer who revealed that a $96.1 million contract awarded to "Integrated Coast Guard Systems" (a joint venture of Lockheed Martin and Northrop Grumman) to remodel Coast Guard vessels resulted in faulty boats that created "unacceptable danger" to the crew. DeKort warned the company and was ignored. He attempted to work through the internal appeals procedures, but was fired in 2006.[10] DeKort filed his suit in 2006, and in 2007 the Coast Guard decommissioned the boats because they were unsafe. Lockheed settled with DeKort four years later, in 2010, for an undisclosed amount, and his claims have largely been substantiated.[11]

- James Brady III was a former Kellogg Brown & Root (KBR) employee who claimed that KBR, one of the DoD's largest contractors, violated the False Claims Act by making illegal payments to a Turkish subcontractor with money that was intended to support troops. Brady alleges that there were about $80 million in overcharges on the subcontract, $31 million of which could not be found. He also

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DOD Contractor Employees (GAO-08-169), March 2008, p. 3. http://www.gao.gov/new.items/d08169.pdf (Downloaded April 28, 2011); "DOD relies extensively upon contractors to support overseas contingency operations. As of March 2011, DOD had more contractor personnel in Afghanistan and Iraq (155,000) than uniformed personnel (145,000). Contractors made up 52% of DOD's workforce in Afghanistan and Iraq." Congressional Research Service, *Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis* (R40764), May 13, 2011, Summary. http://www.fas.org/sgp/crs/natsec/R40764.pdf (Downloaded June 9, 2011) (hereinafter *Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis* (R40764)) Another example is Department of Homeland Security (DHS): "Because of the Department of Homeland Security's aggressive Secure Border Initiative program schedule coupled with shortages of government program managers and acquisition specialists…Customs and Border Protection relied on contractors to fill the skills gap and get the program underway….[CBP] continues to rely heavily on contract personnel, who comprise more than 50% of the Secure Border Initiative workforce." Department of Homeland Security, Office of Inspector General, *Better Oversight Needed of Support Services Contractors in Secure Border Initiative Programs* (OIG-09-80), June 2009, p. 1. http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-80_Jun09.pdf (Downloaded April 28, 2011)

[9] Project On Government Oversight, *Bad Business: Billions of Taxpayer Dollars Wasted on Hiring Contractors*, September 13, 2011. http://www.pogo.org/pogo-files/reports/contract-oversight/bad-business/co-gp-20110913.html#2

[10] The Society on Social Implications of Technology of the Institute of Electrical and Electronics Engineers, "IEEE-SSIT Presents Carl Barus Award for Outstanding Service in the Public Interest to Michael DeKort," January 31, 2008. http://www.ieeessit.org/publications_sub.asp?Level2ItemID=9&Level3ItemID=67 (Downloaded December 2, 2011)

[11] Boyd & Associates, "'Deepwater' Whistleblower Michael J. DeKort's Last Minute Settlement with Lockheed Martin Approved by U.S. District Court," December 2, 2010. http://www.businesswire.com/news/home/20101202005516/en/%E2%80%9CDeepwater%E2%80%9D-Whistleblower-Michael-J.-DeKort%E2%80%99s-Minute-Settlement (Downloaded December 1, 2011)

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claims that he was fired for disclosing this information to KBR and the Army. POGO's Federal Contractor Misconduct Database shows that the case is ongoing and DOJ joined the lawsuit earlier this year.[12]

- Caroline Herron is a former Fannie Mae vice president who returned to the organization to work as a high-level consultant. She alleged to the Treasury that Fannie Mae ran the government's $113 million foreclosure-prevention campaign to benefit its own bottom line, not help troubled borrowers. She said this led to a massive waste of public funds and drove up the cost for taxpayers of modifying mortgages. She was working as an independent contractor at the time, and was fired the same month she blew the whistle. A lawsuit against Fannie Mae is currently underway.[13]

These and so many other brave acts illustrate the tremendous value to the American people when wrongdoing is exposed by whistleblowers. But there are countless other examples of contractor whistleblowers who, like Walter Tamosaitis who is testifying today, have taken great personal risk to protect the public and expose waste but who have no recourse comparable to the FCA.[14]

As I and other experts have noted in hearings before congressional panels and in the public record, the cost-benefit analysis for most whistleblowing is so often all cost to the whistleblower and all benefit to society. Professor Richard E. Moberly in his testimony before Congress aptly stated:

> Furthermore, almost all the benefits of a whistleblower's disclosure go to people other than the whistleblower: society as a whole benefits from increased safety, better health, and more efficient law enforcement. However, most of the costs fall on the whistleblower. There is an enormous public gain if whistleblowers can be encouraged to come forward by reducing the costs they must endure. An obvious, but important, part of reducing whistleblowers' costs involves protecting them from retaliation after they disclose misconduct.[15]

In addition, what can't be represented are the many other would-be-whistleblowers who never come forward because they have no real recourse should they face retaliation such as harassment, demotions, or perhaps losing their jobs. Ultimately, when whistleblowers lose, the taxpayers lose. Billions in wasteful spending, crimes perpetrated, threats to public health and safety may never come to light, simply because we have an inadequate whistleblower protection public policy.

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[12] Project On Government Oversight, Federal Contractor Misconduct Database, "KBR: Brady v. KBR (False Claims and Retaliation)." http://www.contractormisconduct.org/index.cfm/1,73,222,html?CaseID=1533

[13] Peter Overby, "Consultant: Federal Aid Program Failing Homeowners," *National Public Radio*, August 6, 2010. http://www.npr.org/templates/story/story.php?storyId=129011474 (Downloaded December 1, 2011)

[14] Government Accountability Project, "Protection for pocketbook whistleblowers," April 14, 2011. http://www.whistleblower.org/storage/documents/Pocketbook.pdf (Downloaded December 1, 2011)

[15] Testimony of Richard E. Moberly, Professor, before the Committee on Education and Labor, Subcommittee on Workforce Protections, One Hundred Tenth Congress, on "Private Sector Whistleblowers: Are There Sufficient Legal Protections?," May 15, 2007, pp. 34-37. http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg35185/pdf/CHRG-110hhrg35185.pdf (Downloaded December 1, 2011)

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Gaping Accountability Loopholes in the Law

The accountability loopholes are many in the patchwork of laws that protect only some contractors and federal fund recipient employees who blow the whistle, and only under very limited circumstances.

While the False Claims Act is in many ways the gold standard, it is limited to claims involving fraud perpetrated by a person or entity receiving federal funds. In addition, it is, practically speaking, constrained by the limited resources of the Department of Justice, and the legal community that often doesn't pursue cases when DOJ declines to intervene. As a result of its narrow scope, the FCA doesn't provide expansive whistleblower protections to contractor employees.

There also are extremely narrow protections for employees of entities with public contracts under 41 U.S.C. § 4705. This law is fairly flimsy, lacking fundamental policies for an effective whistleblower statute. It doesn't protect disclosures of gross mismanagement, gross waste, substantial danger to health and safety, or violations of law, rule, or regulations—only disclosures of "substantial" violations of law relating to the contract. 41 U.S.C. § 4705 also does not specifically protect the most commonplace disclosures—those made internally to one's supervisor or to another employee with the authority to investigate or resolve the matter.[16] It is well-documented that most whistleblowers report internally first.[17]

Also, under the statute, investigations and enforcement have no deadline. The mandated Inspector General (IG) investigation of retaliation claims, subsequent issuance of the enforcement order by the agency head after the IG confirms the retaliation, and the compliance by the contractor as ordered by the agency can at each go on interminably. No access to court is provided except for a review of the agency order, and if that order is never issued, there is no explicit right under that provision of law. In addition, even these insubstantial protections can be negated through employment agreements such as nondisclosure and forced arbitration clauses. In sum, few contractor employees can or should rely on these protections.

The protections for nuclear contractor employees under the Energy Reorganization Act were similarly flawed until the amendments in 2005.[18] As described in POGO's report earlier that year, *Homeland Security and National Security Whistleblowers: The Unfinished Agenda*, nuclear contractor whistleblowers were trapped for years in a failed administrative process, waiting for relief.[19] However, Congress addressed this issue in the Energy Policy Act of 2005, Public Law 109-58, which provided for *de novo* review in federal district court if the Secretary of Energy fails to act within a year.[20]

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[16] 41 U.S.C. § 4705 does not protect disclosures except those made to an authorized official at the Department of Justice or other agency or to a Member of Congress.
[17] Ethics Resource Center, *Blowing the Whistle on Workplace Misconduct*, December 2010, p. 5. http://www.ethics.org/files/u5/WhistleblowerWP.pdf (Downloaded December 1, 2011)
[18] 42 U.S.C. § 5851
[19] Project On Government Oversight, *Homeland and National Security Whistleblower Protections: The Unfinished Agenda*, April 28, 2005. http://www.pogo.org/pogo-files/reports/whistleblower-issues/the-unfinished-agenda/#53
[20] Energy Policy Act of 2005, Public Law 109–58, August 8, 2005. http://doi.net/iepa/EnergyPolicyActof2005.pdf (Downloaded December 1, 2011)

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In addition, progress has been made closing other loopholes for Department of Defense (DoD) contractor whistleblowers. The protections championed by Senators Claire McCaskill and Susan Collins and enacted in 2009 upgraded rights for DoD contractor whistleblowers (10 U.S.C. § 2409).[21] These protections are now broader than the other contractor provisions in that more types of disclosures to more types of recipients are protected. There also is a reasonable time limit placed on the IG investigation of 180 days (subject to extension). In addition, if the agency then fails to act on the IG's findings within 210 days, the whistleblower can take the complaint to district court.

However, the DoD contractor protections also lack some basic best practices found in other modern private sector whistleblower laws, including: protecting disclosures of abuse of authority; requiring the IG to recommend relief if the whistleblower meets the burdens of proof, the same legal standards found in every whistleblower law since 1989 and also used by federal employees in cases under the Whistleblower Protection Act[22]; and providing for a genuine remedy of compensatory damages to "make whole" those who have been found to have endured reprisal for protected disclosures.

Thus, the new specific protections have not yielded the kind of accountability needed. This is apparent in Iraq and Afghanistan where many instances of waste, fraud, or abuse have been documented—the Commission on Wartime Contracting (CWC) estimated $31 to $60 billion in waste alone.[23] Of course many contractors in these and other areas of conflict are hired by the State Department and are not even covered under 10 U.S.C. § 2409.

In June 2009, this Subcommittee held a hearing on the performance of private security contractor ArmorGroup, a subsidiary of G4S/Wakenhut Services, working for State Department.[24] At that hearing the committee found "significant problems with staffing and training'" and "supervisory negligence" in addressing those issues. In September 2009, POGO exposed an international scandal, after dozens of Kabul Embassy private security contractors working for ArmorGroup came to POGO with evidence of gross misconduct.[25] They did so at tremendous personal risk, given their utter lack of protections. As allegations of retaliation and reprisals against the whistleblowers mounted, Senators McCaskill, Collins, and Robert Bennett took action and sent a letter of inquiry to the State Department.[26] The result was finally a termination of that contract, but the government did not provide the whistleblowers with any protection. As POGO's

[21] 10 U.S.C. § 2409
[22] 5 U.S.C. § 1214(b)(4)(B) and 5 U.S.C. § 1221(3)
[23] Commission on Wartime Contracting in Iraq and Afghanistan, *Final Report to Congress: Transforming Wartime Contracting: Controlling costs, reducing risks*, August 2011. http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf (Downloaded December 1, 2011)
[24] Senator Claire McCaskill, "Contracting Subcommittee to Explore Security Contracts at Afghanistan Embassy," June 3, 2009. http://mccaskill.senate.gov/?p=press_release&id=169 (Downloaded December 1, 2011)
[25] Letter from the Project On Government Oversight to Secretary of State Hillary Clinton regarding the U.S. Embassy in Kabul, September 1, 2009. http://www.pogo.org/pogo-files/letters/contract-oversight/co-gp-20090901.html
[26] Letter from Senators Claire McCaskill, Susan Collins, and Robert Bennett, to Patrick Kennedy, State Department Undersecretary for Management, regarding allegations of whistleblower retaliation by contract guards at the U.S. Embassy in Kabul, Afghanistan, September 16, 2009. http://mccaskill.senate.gov/pdf/2009-09-16CMC-Bennett-Collins.pdf (Downloaded December 1, 2011)

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Executive Director Danielle Brian testified to the CWC, contractors still have few protections under the law, and as a result, are far less likely to report wrongdoing.[27]

As our reliance on contractors has grown, increasingly a contractor employee may be sitting alongside a federal employee performing the same work.[28] But they have different rights. Federal employees have more statutory protections under the Whistleblower Protection Act (WPA), even though that law also is inadequate.[29] Protections for federal workers and for contractor employees providing products and services to the government must keep pace with the modern protections Congress has extended to private sector whistleblowers in the eight laws passed in the past decade.[30]

The Recovery Act Model

In addition to the False Claims Act, there is another model whistleblower protection law for federal fund recipients—it simply needs to be extended beyond its original scope. The American Recovery and Reinvestment Act of 2009 included excellent whistleblower protections for employees of entities funded by the Recovery Act, including contractors, subcontractors, grantees, and states and localities.[31] Like the DoD contractor protections, it covers a wide range of disclosures of wrongdoing related to covered federal funds. But, importantly, it also covers disclosures of abuse of authority, as well as covering other protected disclosures when made to a supervisor or a person working for the employer with "authority to investigate, discover, or terminate misconduct."[32] In addition to several other best practices, there are reasonable time limits on the investigation, the agency order, and better access to court.

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[27] Testimony of Danielle Brian, Project On Government Oversight, before the Commission on Wartime Contracting in Iraq and Afghanistan on "Are Private Security Contractors Performing Inherently Governmental Functions?," June 18, 2010. http://www.wartimecontracting.gov/docs/hearing2010-06-18_testimony-Brian.pdf (Downloaded December 1, 2011)

[28] Government Accountability Office, *Defense Contracting: Army Case Study Delineates Concerns with Use of Contractors as Contract Specialists* (GAO-08-360), March 2008, p. 39. http://www.gao.gov/new.items/d08360.pdf (Downloaded December 1, 2011); "The 'blended' or 'multisector' workforce, where contractors are co-located and work side-by-side with federal managers and staff, has blurred some boundaries." Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, p. 24. https://www.acquisition.gov/comp/aap/24102_GSA.pdf (Downloaded December 1, 2011)

[29] The WPA must be expanded and modernized as proposed by the Whistleblower Protection Enhancement Act, S. 743, which was unanimously voted out of this Committee in October of this year. FederalDaily Staff, "Whistleblower protection clears another hurdle," *FederalDaily*, October 24, 2011. http://federaldaily.com/articles/2011/10/24/groups-praise-senate-clearance-whistleblower-protection-enhancement-act.aspx (Downloaded December 1, 2011) S. 743 was introduced April 6, 2011, by Senator Daniel Kahikina Akaka. http://thomas.loc.gov/home/gpoxmlc112/s743_is.xml (Downloaded December 1, 2011)

[30] 18 USC § 1514A(b)(1)(B), 42 USC § 5851(b)(4), 49 U.S.C. § 31105(c), 49 U.S.C. § 20109(d)(3), 6 USC § 1142(c)(7), 10 USC § 2409(c)(2), 15 USC § 2087(b)(4), American Recovery and Reinvestment Act, section 1553(c)(3).

[31] One Hundred Eleventh Congress, American Recovery and Reinvestment Act of 2009, Public Law 111-5, Section 1553 of Division A, Title XV. http://www.gpo.gov/fdsys/pkg/PLAW-111publ5/html/PLAW-111publ5.htm (Downloaded December 1, 2011)

[32] One Hundred Eleventh Congress, American Recovery and Reinvestment Act of 2009, Public Law 111-5, Section 1553(a).

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The Recovery Act has experienced extremely low incidence of fraud.[33] As reported by the White House in 2010, consequential investigations of the 3,806 complaints of wrongdoing "represent less than 0.2 percent of the number of total Recovery Act Awards," and the "GAO has acknowledged that levels of fraud remain quite minimal."[34] Certainly the whole story of waste, fraud, and abuse in the stimulus spending has yet to be told, but these early indicators are encouraging.

The New York Times highlighted the low incidence of fraud in Recovery Act spending, citing an interview with Earl Devaney, Chair of the Recovery Accountability Board:

> The IG community has gotten on the front end of Recovery Act spending, monitoring the money from day one and allowing the public to access the same information, [Devaney] said. IGs no longer have to "stumble upon fraud like we usually do." The result, he said has been far less fraud than expected.[35]

Better Protections, More Accountability: The Non-Federal Employee Whistleblower Protection Act

The Non-Federal Employee Whistleblower Protection Act of 2011, S. 241, builds on the success of the Recovery Act and mirrors many of its provisions.[36] Introduced earlier this year by this Subcommittee's Chair, Senator McCaskill, along with Senator Jim Webb, S. 241 would bridge the wide gaps in current coverage and comprehensively apply best-practice protections to all federal funds recipient employees.

S. 241 would:

- Eliminate the patchwork of protections by covering all non-federal recipients of federal funds—including contractors, subcontractors, grantees, state and local governments, and other professional organizations.
- Prohibit reprisals for whistleblowing to appropriate federal entities including to an inspector general, the Comptroller General of the United States, the Attorney General, a Member of Congress, a State or Federal regulatory or law enforcement agency, a court or grand jury, and the head of a Federal agency or their representatives.

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[33] The White House, Office of the Vice President, "Vice President Biden Delivers New Report to the President on Recovery Act Progress: Ambitious Spending Targets Met; Cost-Savings Fund 3,000 Additional Job-Creating Projects," October 1, 2010. http://www.whitehouse.gov/the-press-office/2010/10/01/vice-president-biden-delivers-new-report-president-recovery-act-progress (Downloaded December 1, 2011)

[34] The White House, *2010 Fiscal Year End Report to the President on Progress Implementing the American Recovery and Reinvestment Act of 2009*, September 2010. http://www.whitehouse.gov/sites/default/files/recovery_act_report_9-30-2010.PDF (Downloaded December 1, 2011)

[35] Emily Yehle, "Interior IG Brings Detective's Zeal to Stimulus Watchdog Post," *New York Times*, September 10, 2010. http://www.nytimes.com/gwire/2010/09/10/10greenwire-interior-ig-brings-detectives-zeal-to-stimulus-6880.html?pagewanted=all (Downloaded December 1, 2011)

[36] One Hundred Twelfth Congress, U.S. Senate, The Non-Federal Employee Whistleblower Protection Act of 2011 (S. 241), Introduced by Senator Claire McCaskill on January 31, 2011. http://www.gpo.gov/fdsys/pkg/BILLS-112s241is/pdf/BILLS-112s241is.pdf (Downloaded December 1, 2011)

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- Protect the most common disclosures made by employees seeking to fix a problem—those made internally to those with supervisory authority over the employee or another employee of the employer with the authority to investigate, discover, or terminate the conduct, such as an internal compliance officer.
- Protect an employee for participating in a proceeding related to the misuse of any Federal funds, such as a hearing or investigation, and also for reasonably opposing the misuse of Federal funds.
- Expand the types of protected disclosures to include those related to the implementation or use federal funds regarding gross mismanagement, gross waste, substantial and specific danger to public health and safety, abuse of authority, or a violation of a law, rule, or regulation.
- Ensure legitimate claims of reprisal will be investigated by an appropriate Inspector General and a report issued within 180 days, unless an extension is deemed necessary and explained by the IG.
- Provide for effective remedies, including compensatory damages, and enforcement when reprisal is confirmed.
- Offer opportunity for rebuttal, if employer can prove by clear and convincing evidence that the reprisal would have happened absent the whistleblowing.
- Provide for access to a jury trial and once administrative remedies have been exhausted, and a time limit of 210 days for action by the agency. Also, makes the investigative file available to the employer and employee should the employee bring a civil suit.
- Eliminate the risk of another agreement, such as a nondisclosure or mandatory binding arbitration, from nullifying the rights under this Act (except for collective bargaining agreements).

In sum, S. 241 would ensure strong protections for those on the front lines against waste, fraud, abuse of taxpayer dollars, and threats to public health and safety. This is extremely effective public policy that will result in far more accountability.

A few suggested improvements to S. 241

While POGO strongly supports the Non-Federal Employee Whistleblower Protection Act, we also recommend some improvements to strengthen the legislation and policies for whistleblowers.

First, more reporting by the IGs and GAO would help Congress conduct oversight of the new provisions. The bill currently would require IGs to include in their semi-annual reports to Congress a list of investigations that were extended, discontinued, or not conducted. This is an excellent policy to help keep Congress and the public apprised when IGs exercise this discretion, but it also would be useful to require a list of the number of complaints received and investigations concluded, and a summary of determinations. Additionally, it would be useful for the GAO to conduct a periodic review of how the protections are enforced, including actions taken by the government and the employer following affirmative determinations by IGs.

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Second, every federal fund recipient covered by the legislation should be required to post notices of the rights and remedies under this section at work sites. This requirement of the Recovery Act likely served as a powerful deterrent to waste, fraud, and abuse and an effective enforcement tool.

Third, accountability to taxpayers could be significantly increased by requiring the IGs to also separately investigate the wrongdoing the whistleblower exposed that resulted in the retaliation claim, if an investigation had not yet taken place.

Last, though it may be beyond the scope of this legislation, we'd like to see the incentives for whistleblowing expanded. The great success of the False Claims Act could be replicated more fully if the awards could also be made available in instances where waste, mismanagement, and other illegalities are uncovered and brought to justice. This FCA model of protecting and incentivizing whistleblowing in the public interest has been replicated with great success in many states,[37] as well as in the whistleblower programs at the Internal Revenue Service,[38] the Securities and Exchange Commission,[39] and the Commodities Futures Trading Commission.[40]

Regarding the IRS program, Patrick Burns, president of Taxpayers Against Fraud, said:

> This law is not designed to snag the guppies, but to harpoon the whales....Whistleblower programs have been incredibly successful in the arena of health care and defense spending, and now they are being tried as a weapon against tax cheats and Wall Street scoundrels.[41]

In fact, in 2006 Congress created a new minimum award for the IRS program to ensure more quality tips.[42] According to reports to Congress, the result has been a large jump in tips, from 2,740 cases in 2005 to 5,678 in 2009.[43] Likewise, before Congress upgraded the FCA to include awards to incentivize whistleblowing, recoveries were in the millions of dollars a year. Since

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[37] Andrew Longstreth, "Whistleblower Laws, Lucrative for Some States, Stall in Others," *Insurance Journal*, November 28, 2011. http://www.insurancejournal.com/news/national/2011/11/28/225270.htm (Downloaded December 1, 2011)

[38] Internal Revenue Service, "Whistleblower—Informant Award," July 19, 2011. http://www.irs.gov/compliance/article/0,,id=180171,00.html (Downloaded December 1, 2011)

[39] Securities and Exchange Commission, Office of the Whistleblower, "Welcome to the Office of the Whistleblower." http://www.sec.gov/whistleblower (Downloaded December 1, 2011)

[40] Commodity Futures Trading Commission, "Whistleblower Information." http://www.cftc.gov/ConsumerProtection/WhistleblowerInformation/index.htm (Downloaded December 1, 2011) (hereinafter "Whistleblower Information")

[41] MaryClaire Dale, "IRS awards $4.5M to whistleblower," *Associated Press*, April 8, 2011. http://www.usatoday.com/money/perfi/taxes/2011-04-08-irs-whistleblower-taxes-reward htm (Downloaded December 1, 2011)

[42] One Hundred Ninth Congress, Tax Relief and Health Care Act of 2006, Public Law 109-432, December 20, 2006, Section 406. http://www.gpo.gov/fdsys/pkg/PLAW-109publ432/pdf/PLAW-109publ432.pdf (Downloaded May 10, 2011)

[43] Internal Revenue Service, *FY 2009 Annual Report to Congress on the Use of Section 7623*, 2009, p. 9. http://www.irs.gov/pub/irs-utl/whistleblowerfy09rtc.pdf (Downloaded May 11, 2011)

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then, recoveries have averaged about $1 billion per year, with 2010 recoveries topping $3 billion.[44]

Indeed, strong protections are just the first step in a robust whistleblower program.

Conclusion

In these tough economic times, with a ballooning federal deficit, it's just plain common sense to have more "deputies" to safeguard taxpayer dollars and the public trust. This is why POGO and our partners in the Make It Safe Coalition strongly support better whistleblower protections for federal contractors.

Given the bipartisan support for expanding coverage of federal fund recipient whistleblowers, Congress should act now. Similar protections have passed the House twice in the two previous Congresses, as part of the Whistleblower Protection Enhancement Act.[45] In addition, the House Oversight and Government Reform Committee recently included a two-year pilot project for expanding the DoD contractor whistleblower protections to all federal contractors.[46] That shows bipartisan support, but stops short of the real reform that is needed.

We can and should move towards a better policy and more accountability now. It's time that Congress end the patchwork of protections and expand the Recovery Act provisions to all federal fund recipients in order to reduce the waste, fraud, and abuse in federal spending. We urge you to support enactment of S. 241.

Thank you for the opportunity to testify before you today. I look forward to your questions.

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[44] Department of Justice, Office of Public Affairs, "Department of Justice Recovers $3 Billion in False Claims Cases in Fiscal Year 2010: $2.5 Billion Health Care Fraud Recovery Largest in History—More Than $27 Billion Since 1986," November 22, 2010. http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html (Downloaded December 1, 2011)

[45] One Hundred Tenth Congress, Whistleblower Protection Enhancement Act of 2007 (H.R. 985), Introduced by Representative Henry Waxman on February 12, 2007. http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR00985:@@@R (Downloaded December 1, 2011); One Hundred Eleventh Congress, Amendment to the "American Recovery and Reinvestment Act of 2009," (H.R. 1), Introduced by Representative Todd Platts on January 28, 2009. http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HZ00020 (Downloaded December 1, 2011)

[46] One Hundred Twelfth Congress, Whistleblower Protection Enhancement Act of 2011, (H.R 3289), Introduced by Representative Darrell Issa. http://thomas.loc.gov/cgi-bin/bdquery/D?d112:1:./temp/~bdYPPV:@@@X|/home/LegislativeData.php| (Downloaded December 1, 2011)

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Current Contractor Whistleblower Protections and Proposed Legislative Changes

	Current Law for Contractor Whistleblowers (41 USC 4705)	Current Law for DOE / National Nuclear Security Administration Contractor Whistleblowers	Current Law for DOD Contractor Whistleblowers (2008 NDAA CMC Amendment)	Current Law for Stimulus Contractors	Proposed Law – CMC Legislation (S. 241) (Similar to ARRA but applies to all non-federal employees)	H.R. 3289 – Whistleblower Protection Enhancement Act proposed law (2 yr pilot program)
Who is protected?	All federal government contractor employees.	A contractor employee working at a DOE owned or leased site.	DOD contractor employees.	Any employee of non-federal employer receiving covered funds (including contractors and subcontractors).	Any employee of non-federal employer receiving covered funds (including contractors and subcontractors).	All federal government contractor employees.
What disclosures are protected?	Protects against reprisals for disclosing a substantial violation of law related to the contract.	Information that employee reasonably believe is: a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to public health or safety; and fraud, gross mismanagement, gross waste of funds, or abuse of authority. Or while participating in a Congressional or administrative proceeding or for refusing to participate in an activity, policy, or practice if they believe participation would constitute a violation of a federal health or safety law; or cause them to have a reasonable fear of serious injury to themselves, other employees, or members of the public.	Information that the employee reasonably believes is evidence of: gross mismanagement of a DOD contract, a gross waste of DOD funds, a substantial deadline and specific danger to public health or safety, or a violation of law related to a DOD contract.	Protects against reprisals for disclosing information that employee reasonably believes is evidence of: gross mismanagement; gross waste of funds; substantial and specific danger to public health or safety; violation of a law, rule, or regulation.	Protects against reprisals for disclosing information that employee reasonably believes is evidence of: gross mismanagement; gross waste of funds; substantial and specific danger to public health or safety; violation of a law, rule, or regulation.	Protects against reprisals for disclosing information that employee reasonably believes is evidence of: gross mismanagement; gross waste of funds; substantial and specific danger to public health or safety; violation of a law.
Who to disclose to in order for protection to apply?	A Member of Congress, authorized official of executive agency or the DOJ.	A Member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, employer, or any higher tier contractor.	A Member of Congress, a representative of a committee of Congress, DOD IG, the GAO, a DOD employee responsible for contract oversight or management.	A Member of Congress, a representative of a committee of Congress, an Inspector General, the GAO, State or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee, a court or grand jury, the head of a federal agency or their representatives.	A Member of Congress, a representative of a committee of Congress, an Inspector General, the GAO, State or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee, a court or grand jury, the head of a federal agency or their representatives.	A Member of Congress, a representative of a committee of Congress, an Inspector General, the GAO, agency employee responsible for contract oversight, authorized official of executive agency, or the DOJ.
Remedies	Individual may submit complaint to IG, who must investigate unless frivolous. Agency head may order contractor to: abate reprisal; reinstate position; pay for expenses of employee.	If the employee worked at DOE headquarters or at a field site the complaint must be submitted to the EC Director. If contractor employer worked at a DOE field facility then the complaint must be submitted to head of the DOE field element. The complaint must be filed within 90 days of the retaliation. The remedies that may be issued at the initial, intermediate, or final stage of review include reinstatement, transfer preference, back pay, and reimbursement of expenses.	Submits complaint to IG, who must investigate unless frivolous. 180 day deadline for determination. No later than 30 days after IG report, agency head shall make determination and may order contractor to abate reprisal, reinstate position, and/or pay expenses. If not enforced within 210 days, then employee may seek de novo action before district court. Right to jury trial.	Submits complaint to IG, who must investigate unless frivolous. 180 day deadline for determination. No later than 30 days after IG report, agency head shall make determination and may order contractor to abate reprisal, reinstate position, and/or pay expenses. If not enforced within 210 days, then employee may seek de novo action before district court. Right to jury trial.	Submits complaint to IG, who must investigate unless frivolous. 180 day deadline for determination. No later than 30 days after IG report, agency head shall make determination and may order contractor to abate reprisal, reinstate position, and/or pay expenses. If not enforced within 210 days, then employee may seek de novo action before district court. Right to jury trial.	Submits complaint to IG, who must investigate unless frivolous. 180 day deadline for determination. No later than 30 days after IG report, agency head shall make determination and may order contractor to abate reprisal, reinstate position, and/or pay expenses. If not enforcement within 210 days, then employee may seek de novo action before district court – bench trial.
Additional Protections	If contractor does not comply then agency head shall file enforcement order in US district court. 60 day review of order.	If informal resolution fails, then employee can refer the complaint to the Office of Hearings and Appeals (OHA) for a hearing or an investigation followed by a hearing. The employee can appeal an OHA decision, which must issue a decision within 60 days. That decision may be appealed to the Secretary of Energy, who will issue a final decision within 90 days.	Admissible evidence for de novo bench trial includes IG determination. Contractor (or person adversely affected by enforcement) may seek review within 60 days of order in a US court of appeals.	Admissible evidence for de novo jury trial includes IG investigative file. Contractor (or person adversely affected by enforcement) may seek review within 60 days in a US court of appeals. 360 day exhaustion of remedies time limit for employee. Nondisclosure agreements, waivers, and arbitration agreements are unenforceable. Burden of Proof requirement same as the WPA.	Admissible evidence for de novo jury trial includes IG investigative file. Contractor (or person adversely affected by enforcement) may seek review within 60 days in a US court of appeals. 360 day exhaustion of remedies time limit for employee. Nondisclosure agreements, waivers, and arbitration agreements are unenforceable. Burden of Proof requirement same as the WPA.	Admissible evidence for de novo bench trial includes IG determination. Contractor (or person adversely affected by enforcement) may seek review within 60 days in a US court of appeals.

Department of Energy
Washington, DC 20585

January 5, 2012

The Honorable Claire McCaskill
Chairman, Subcommittee on Contracting Oversight
Committee on Homeland Security and
Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman McCaskill:

On December 6, 2011, you chaired a hearing on "Whistleblower Protections for Government Contractors." In an agency such as the Department of Energy, which is heavily contractor-dependent, protecting whistleblowers is critically important. We share your interest in this subject, especially since whistleblowers are a vital source of information supporting the mission of the Office of Inspector General.

Dr. Walter Tamosaitis, an employee of a Department of Energy subcontractor, provided testimony regarding his personal situation as related to the topic of your hearing. After reviewing the written testimony, I wanted to clarify certain issues raised regarding my Office.

On July 28, 2010, Senator Ron Wyden informed the Office of Inspector General of Dr. Tamosaitis' allegations, specifically including his allegation of whistleblower retaliation. Because of the priority we place on such allegations, we immediately sent a team to Richland, Washington, to interview Dr. Tamosaitis. On August 2, 2010, at the conclusion of an extensive interview, Dr. Tamosaitis' attorney informed us that he and his client had chosen an alternative option and that they had decided to exercise Dr. Tamosaitis' right to file reprisal complaints with the U.S. Department of Labor (DOL) pursuant to the Energy Reorganization Act, 42 U.S.C. 5851, and the Toxic Substances Control Act, 15 U.S.C. 2622.

In the interest of avoiding duplicative investigations and a potentially confusing situation, we decided to defer further action on Dr. Tamosaitis' reprisal allegations. We informed Senator Wyden and the DOL of our decision. We also offered our case file to DOL for use in its examination of this matter. Our offer was accepted by DOL (please see the enclosure).

As Dr. Tamosaitis acknowledged in his testimony, other reviews were also being conducted by the Department of Energy's Health, Safety, and Security office on the culture of safety at Hanford and by the Defense Nuclear Facilities Safety Board on the substance of Dr. Tamosaitis'

safety issues. We were aware of these efforts at the time. Under the circumstances, we continue to believe that our action was appropriate.

Please do not hesitate to contact me if I may be of further assistance.

Sincerely,

Gregory H. Friedman
Inspector General

Enclosure

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Department of Energy
Washington, DC 20585

October 12, 2010

Mr. Tobias J. Kammer
Investigator – OSHA
Federal State Operations
U.S. Department of Labor
1111 Third Avenue
Suite 715
Seattle, WA 98101

Re: Transmittal of Department of Energy Office of Inspector General Case Documentation ((DOE OIG File No. S10IS013)

Dear Mr. Kammer:

This letter serves as a follow-up to our September 22, 2010, correspondence to Mr. Robert Fairfax, Director, Directorate of Enforcement Programs, Occupational Safety and Health Administration (OSHA). The September 22nd letter referenced this office's review of allegations raised by Dr. Walter Tamosaitis, former Deputy Chief Process Engineer and Research and Technology Manager, URS Corporation. Dr. Tamosaitis alleged that he was retaliated against and removed from his position for raising questions about outstanding safety and design issues involving the Waste Treatment Plant project at the Department of Energy's Hanford Reservation.

During the course of our review, we were told, and we later confirmed, that Dr. Tamosaitis filed two separate complaints relating to his July 2, 2010, removal with OSHA pursuant to the Toxic Substances Control Act and the Energy Reorganization Act. Pursuant to our ongoing discussions, enclosed are the following documents from our case file relating to Dr. Tamosaitis' retaliation concerns:

1. Memorandum of Inquiry Activity relating to the August 2, 2010, interview of Dr. Tamosaitis
2. Memorandum of Inquiry Activity concerning the August 19, 2010, interview of Mr. Dale Knutson
3. Memorandum of Inquiry Activity pertaining to the August 27, 2010, interview of Mr. Frank Russo.

This letter and its enclosures are the property of the U.S. Department of Energy's Office of Inspector General and are for OFFICIAL USE ONLY. Appropriate safeguards should be provided for the letter and its enclosures and access should be limited to OSHA officials who have a need to know. Public disclosure is determined by the Freedom of Information Act, Title 5, U.S.C. Section 522 and the Privacy Act, Title 5, U.S.C. Section 522a.

Please contact me on (202) 586-6031 should you have questions regarding this matter.

Sincerely,

Yvette R. Milam
Director
Special Operation
Office of Inspections and Special Inquiries
Office of Inspector General

Enclosures

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Post-Hearing Questions for the Record
Submitted to
The Honorable Peggy Gustafson, Inspector General, U.S. Small Business Administration
From Senator McCaskill
"WHISTLEBLOWER PROTECTIONS FOR CONTRACTOR WHISTLBLOWERS"
Tuesday, December 6, 2011, 10:00 A.M.
United States Senate, Subcommittee on Contracting Oversight,
Committee on Homeland Security and Governmental Affairs

1. **In your capacity as SBA Inspector General, have you seen any disclosures from contractor whistleblowers that are not protected under the current law covering Recovery Act funds? What types of disclosures are these?**

   As of January 23, 2012, the SBA OIG did not receive any disclosures from contractor whistleblowers relative to Recovery Act funds.

2. **Please explain how retaliation claims are investigated across the CIGIE member agencies and how executive agencies are carrying out their review responsibilities.**

   The CIGIE Legislation Committee does not have specific information on how CIGIE members and executive agencies are executing their responsibilities to review reprisal allegations from non-Federal employees. However, OIGs would conduct these investigations in the same manner that they conduct other criminal or administrative allegations: assess the allegations; identify, obtain and review relevant witnesses and documents; determine whether there is a basis to refer the matter for action; and prepare the correlating report.

3. **How many whistleblowers are turning to judicial review of their claims after going through the administrative process?**

   There is no central repository for this data, particularly as it pertains to federal versus non-federal whistleblowers.

4. **Have agencies been effective in requiring that remedies for retaliation be implemented by contractors? How well are they monitoring compliance? What types of remedies are you seeing most often?**

   CIGIE has not coordinated a review of agencies' effectiveness in requiring that remedies for retaliation be implemented by contractors.

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5. **Senator Portman asked you if you had taken a survey from the IG community regarding a statute of limitations on whistleblower complaints. You responded that you would look into the views of the community on this issue. Could you please provide us with the responses you get back from you fellow Inspectors General on regarding the statute of limitations?**

   The Legislation Committee will provide the results of the survey requested by Senator Portman to the Committee on Homeland Security and Government Affairs' Subcommittee on Contracting Oversight.

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Post-Hearing Questions for the Record
Submitted to
Mrs. Marguerite Garrison, Deputy Inspector General for Administrative Investigations,
U.S. Department of Defense
From Senator McCaskill
"WHISTLEBLOWER PROTECTIONS FOR CONTRACTOR WHISTLEBLOWERS"
Tuesday, December 6, 2011, 10:00 A.M.
United States Senate, Subcommittee on Contracting Oversight,
Committee on Homeland Security and Governmental Affairs

1. **You told Senator Portman that the DFARs have been effective at improving notification to contractor whistleblower of their rights, but did not know to what extent. Could you please provide information to support this contention?**

   Based on a recommendation from the DoD Inspector General (DoD IG), Section 842 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Public Law 110-417, required Defense contractors to inform their employees in writing of their whistleblower rights and protections under Title 10, United States Code, Section 2409. The Defense Federal Acquisition Regulation Supplement (DFARS) provision implementing this requirement was issued in January 2009. We note that between FY 2009 and FY 2011 the number of Defense contractor whistleblower reprisal complaints we received increased more than 50%, from 44 to 68. Based on the increase in reprisal complaints filed by Defense contractor employees, we believe it likely that the DFARS provision has meant that more Defense contractor employees are now informed about, and therefore exercising, their whistleblower rights.

   In addition, we believe the DFARS has been strengthened by a rule promulgated in the September 16, 2011, Federal Register (76 Fed. Reg. 57,671), which requires companies that have contracts with the Department of Defense to display DoD IG fraud hotline posters in common work areas and at contract work sites. Additionally, if the contractor maintains a company website as a method of providing information to employees, the contractor must display an electronic version of the poster on the website. DoD OIG has also recently introduced a poster specifically for informing contractor employees of their whistleblower protections. The poster, a copy of which is attached, states that Defense contractor employees have "whistleblower rights" and that employees should contact the DoD Hotline if they have reported serious wrongdoing and believe they have suffered retaliation.

   The DoD OIG Hotline website includes information regarding contractor employees' and others' whistleblower protections. The page for whistleblower reprisal complaints, at http://www.dodig.mil/HOTLINE/reprisal_complaint.htm, describes reprisal under each of the statutes under which we have authority and offers a downloadable guide for filing complaints, in addition to listing the steps involved in filing a complaint.

2. **As was raised during the hearing, you have been reviewing whistleblower claims under two different versions of the statute (10 U.S.C. § 2409). Could you please explain the legal rationale behind this interpretation and provide the documentation that the Office of Inspector General relied on to make this determination?**

You asked the basis for our legal opinion that the January 2008 amendment in PL 110-181, Section 846, to 10 USC §2409, Defense Contractor Employee Whistleblower Protection Act ("statute"), was not effective immediately upon passage but instead required implementation, i.e., in the publication of the Defense Federal Acquisition Regulation Supplement (DFARS) subpart 203.9 in January 2009, which implemented the statutory amendments.

Our legal opinion is fundamentally grounded in the fact that defense contractor whistleblower rights flow through the contract and are set at the time the contract is awarded or modified, as are the penalties and sanctions on contractors for violations. The contract terms, established in the DFARS, are essentially the "law" that applies to the particular contractor and its employees. As a general proposition, a contractor cannot be sanctioned because the government changed the rules after the contract terms were set.

Additionally, because the statute is a procurement provision, it is reasonable to expect the amendment's expansion of the scope of a qualifying communication will impact on contractor operations and costs, e.g., in developing internal reporting and tracking mechanisms, which would be an expense that was not included in contractor's bid under the Federal Acquisition Regulation (FAR). In short, the amended statute has the potential to expand vastly a contractor's exposure to reprisal claims beyond the exposure to which the contractor had bargained for.

Further, the DFARS itself states it implements the amended statute. In fact, the interim rule was published under the authority of the Secretary of Defense to determine that "urgent and compelling reasons" existed to publish an interim rule prior to public comment. There would have been no necessity for the Secretary of Defense to invoke "urgent and compelling" circumstances to publish an interim DFARS if the statutory amendments were already controlling.

Finally, our analysis also considered that courts are wary of the executive branch wielding the "judicial" power of imposing penalties/restitution. Courts construe penalty provisions narrowly and agencies must take care to ensure that legal rights and due process are respected. This implies a regulatory framework for imposing the penalties/orders/restitution on the contractor and notice to the contractor of this framework. This notice is accomplished through the contract.

After considering the issue in depth, we concluded, based on the factors noted above, that the statutory amendment took effect upon implementation and incorporation into contract terms rather than immediately on passage.

3. **Have you reviewed any whistleblower cases under 10 U.S.C. § 2409, as amended by the 2008 National Defense Authorization Act? To your knowledge, does the government reimburse the costs of legal expenses in whistleblower reprisal lawsuits for some contractors?**

   DoD OIG has not yet investigated any cases under 10 U.S.C. § 2409, as amended by the National Defense Authorization Act for Fiscal Year 2008. We have, however, investigated one complaint under section 1553 of the American Recovery and Reinvestment Act of 2009.

   We have no information on which to base a response to the question on government reimbursement of legal expenses.

4. **During the hearing you said that a statute of limitations on whistleblower complaints would help expedite whistleblower investigations by IGs. Could you please explain this statement further and how you think the S. 241 could be changed to address this?**

   Many whistleblower protection statutes enacted in the past decade provide for a statutory filing deadline of 180 days from the date upon which the unfavorable personnel action was taken and communicated to the employee. Statutory filing deadlines serve the purpose of prompt resolution of complaints. The more promptly an investigation can commence after an alleged act of whistleblower reprisal, the more likely the investigation will be thorough, accurate, and fair. Testimony will be less affected by the degradation of memory over time, and documentary evidence will be less likely to have been destroyed, altered, or lost. In addition, prompt resolution may prevent the build-up of tension in the workplace or uncertainty about the futures of the complainant as well as the responsible management officials.

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Post-Hearing Questions for the Record
Submitted to
Ms. Angela Canterbury, Project on Government Oversight
From Senator McCaskill
"WHISTLEBLOWER PROTECTIONS FOR CONTRACTOR WHISTLBLOWERS"
Tuesday, December 6, 2011, 10:00 A.M.
United States Senate, Subcommittee on Contracting Oversight,
Committee on Homeland Security and Governmental Affairs

1. During the hearing, Senator Portman questioned the first panel regarding applying a statute of limitation to contractor whistleblower complaints. Would you have any concerns if the law were to require a statute of limitations for whistleblower claims?

One concern would be if the statute of limitations were related to the disclosure and not the retaliation, since commencement of retaliation might happen long after the disclosure, such as after a multi-year investigation into the alleged misconduct. Notably, the Whistleblower Protection Act (WPA) does not have a statute of limitations for whistleblower retaliation claims. In WPA cases, there are many examples of administrative investigations and procedures for remedies dragging on for years. If there were any statute of limitations for contractor claims, it should be tied to the commencement of retaliation and should not be any shorter than the three years provided for claims under the False Claims Act and the Securities and Exchange Commission whistleblowers protections. If less time were afforded, the concern would be that potential remedies that might be utilized by an employee, such as internal compliance programs or mediation with the employer, might not be exhausted before the statute of limitation for civil action were reached. Worse, the potential remedies for resolution between the employer and whistleblower prior to civil action might become traps for the whistleblower should an employer seek to strategically delay resolution to surpass the statute of limitations. Therefore these other remedies might not be utilized at all by some whistleblowers, thereby undermining the potential incentives for whistleblowers to work for resolution of retaliation internally.

2. Have you seen any examples as to how contractors may be complying with the Recovery Act's notice requirements? Do you have any suggestions as to how these notice requirements should be implemented in the contractor workplace?

I have not personally visited Recovery Act worksites and haven't found information regarding compliance, so I cannot speak to whether posters and notices are being placed as required. However, a quick survey of what is posted online produces many "hits" and widespread examples of notification of the requirements and online compliance.[1] Because it's not clear if

[1] Some examples: City of Portland: http://www.portlandonline.com/index.cfm?c=50617#whistleblower; University of Central Florida: http://pegasus.cc.ucf.edu/~inspgen/Investigations.htm; NYSDOT instructions to contractors and contracting agencies: https://www.dot.ny.gov/recovery/repository/eb09024.pdf; "Request for Quote" for subcontract under AARA, cites compliance: "*Whistleblower Protection* (Section 1553 of Division A, Title XV, of the American Recovery Act of2009, P.L. 111-5) —Contractor certifies that it will comply with all provisions of the American Recovery and Reinvestment Act of 2009 as they relate to whistleblower protection. A copy of the Whistleblower Rights Poster published by the DoC Office of the Inspector General

onsite compliance parallels online compliance, it may be that requiring both, wherever possible, would be helpful. However, it does appear that the law has been well promulgated by requiring that all solicitations and contracts funded in whole or part include a clause stipulating the notification requirement. [2]

In addition, to implement contractor whistleblower notices, a toll-free hotline number for the appropriate Inspector General should be required (as opposed to an internal hotline). POGO has also recommended for similar worksite postings that the notices of rights be provided in the languages of the workers. This is especially important overseas with contractors and subcontractors who employ local or foreign nationals, but also could be important domestically at many worksites.

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will be posted at all work sites."http://www.jkmconsultinginc.com/uploadedFiles/File/RFQ-ProjectBEAR-ProgramSpecificAudit.pdf

[2] FAR 3.907-7: Use the clause at 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 in all solicitations and contracts funded in whole or in part with Recovery Act funds.