

O.A.S Special Meeting:
Enhancing Probity and the Fight Against
Corruption in the Hemisphere
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The Government Accountability Project

Whistleblowers and Corruption

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THE GOVERNMENT ACCOUNTABILITY PROJECT

MISSION AND HISTORY

Every year, thousands of Americans witness wrongdoing on the job. Some speak out. Their actions may ultimately save lives and billions of dollars. But rather than receive praise for their integrity, these brave individuals are often targeted for harassment, intimidation, demotion and dismissal. Twenty years ago, GAP was created to help these employees, who, through their individual acts of conscience, serve the public interest. Since 1977, we have provided assistance to thousands of citizens who have “blown the whistle” on lawlessness and threats to public health and the environment. We have simultaneously advised public agencies and legislative bodies about management policies and practices that would help government deal more effectively with substantive information about problems while also protecting the jobs and sometimes identities of those who provide this critical information.

The social importance of whistleblowers has grown exponentially in recent decades. The rise of massive bureaucracies in business and government has created new types of threats to institutional integrity and accountability. In many cases, the prevailing bureaucratic logic is one that sets social responsibility behind the organizational interest, that prizes expedience over integrity. The result is sometimes the egregious abuse of the public interest – chemical companies unlawfully dump hazardous waste and endanger the environment and unknowing local communities; violations of safety codes at nuclear plants threaten the health of thousands of workers or nearby residents; unhealthy practices on inspection lines in meat and poultry processing plants lead to subhuman working conditions and widespread food-poisoning among unsuspecting consumers of unsafe meat. All too often, the most credible witnesses of such violations are employees on the job. Precious few are willing to come forward, but those that do can make a profound difference.

GAP was created in direct response to the growing need for support for ethical employees and for the institutionalization of new management practices in the workplace. In the wake of the Pentagon Papers scandal, founders of GAP hosted a conference for whistleblowers in June 1977. The conference was a success, and participants overwhelmingly signaled the need for organizational support for whistleblowers across government agencies. In response, GAP was launched as a project of a Washington, D.C.-based think tank. With a modest budget of \$30,000, we relied extensively on student interns from Antioch Law School, where the GAP legal clinic became an accredited educational program. GAP assisted 42 clients that year, ranging from a high-level Defense Department official reporting misappropriation of funds to nineteen employees of the Equal Employment Opportunity Commission. In 1979, at the special request of the first Special Counsel, we drafted proposed regulations for the operation of the newly created Office of Special Counsel. That year at the request of the District of Columbia City Administrator, we developed the outlines of an office that if created would protect city government whistleblowers while also getting to the bottom of the alleged problems.

Five years later, in 1984, GAP was incorporated as an independent tax-exempt organization for educational and charitable purposes. GAP's caseload and public education efforts more than doubled in 1986, after the disaster of the Challenger brought public awareness to a new level and led to a dramatic increase in the number of individuals willing to risk their security to challenge wrongdoing and threats to public safety.

Now in our twenty-first year, GAP has expanded to 16 full-time staff, and we maintain an annual budget of about \$1.2 million dollars. Our clinical program has also grown and evolved with us, now as an official part of the District of Columbia School of Law. Each year, several hundred law students nationwide apply to participate in a class of approximately sixty in the legal clinic. Students receive either academic credit or a modest stipend, as well as a fascinating education into how government operates and how involved citizens can help government work better. Moreover, the tremendous staff hours contributed by this dedicated group of young people provides GAP with the equivalent of ten to twelve full-time employees.

EXAMPLES OF ACCOMPLISHMENT

The need for an organization like GAP was clear from the outset. But the best evidence for GAP's effectiveness lies in our record:

- As a result of GAP's work with citizen groups, the Nuclear Regulatory Commission, and hundreds of whistleblowers from nuclear power plants across the country, three unsafe nuclear utilities were canceled and dozens more were reworked, reinspected, and reorganized. During the 1980s GAP staff members worked very closely with NRC headquarters, regional NRC offices, the Office of Investigations (OI), and occasionally with the Office of Technology Assessment (OTA). In addition to sharing investigative information with the federal government, GAP helped these agencies devise policies and systems to simultaneously aid the government in obtaining vital information about nuclear power safety violations and protect whistleblowers by maintaining their anonymity.
- As a result of GAP's challenge to the Fernald uranium-processing facility on Ohio, production was stopped, a planned expansion of the facility was canceled, and Fernald was slated for decommission with the highest priority and appropriation in the nation's nuclear weapons complex. Throughout the investigation, GAP staff members worked closely with the Senate Governmental Affairs Committee and with the Department of Energy. Eventually the whistleblowing concerns about the breakdown of the quality assurance program led to major reforms.
- With a steady stream of whistleblowers from other nuclear weapons production facilities, we are now leading a snowballing campaign to expose the monumental dangers of past and present operations in the nuclear weapons

complex and to work with the Department of Energy in developing management policies to deal effectively with whistleblower concerns and information. For example, the Department of Energy permanently closed the dangerous N-reactor at Hanford after receiving critical information from whistleblowers represented by GAP attorneys.

- In 1989, GAP led a successful campaign for passage of the Whistleblower Protection Act for federal employees. Since enactment, GAP has helped to monitor and test the new law, regularly advising federal agencies about how best to protect whistleblowers. We also report our findings about whistleblower protection to Executive Branch offices and congressional committees.
- In 1992, at the request Congresswomen Barbara Boxer and Patricia Schroeder, GAP Legal Director Tom Devine supplied much-needed expertise that has informed congressional consideration of legal protections for military whistleblowers involuntarily held in mental hospitals or ordered to take psychiatric examinations for exposing military wrongdoing.
- Based on the disclosures of high-level whistleblowers in the Strategic Defense Initiative Office (Star Wars), GAP was able to supply key congressional committees and the Department of Defense Inspector General Office with information that helped Congress and the Executive Branch to reevaluate the entire program.

GAP'S SERVICES

Annually, over six hundred whistleblowers and staff members of government agencies and legislative committees contact us for our help or expertise. Of the potential whistleblowers, in addition to direct calls to our intake coordinator, many are referred to us by other public interest groups, members of Congress, Executive Branch officials, and news reporters. While each requested receives some guidance – such as advice and referrals – our resources limit us to accepting only a fraction of these cases for legal representation by GAP attorneys. Potential cases are evaluated on the following merits: the seriousness and urgency of the individual's situation and the broader public interest issues behind it; the possibility of bringing the concerns to the appropriate federal government office for investigation and resolution; the potential for setting far-reaching precedents; the viability of the personnel case itself; and the strength of the evidence about substantive problems. Most of the requests for assistance from staff members of agencies and legislative committees have to do with our expertise about the proper management of specific concerns or the development of broader management policies affecting whistleblowing more generically.

The public interest concerns raised by the potential whistleblowers who contact GAP span a wide range of issues. One of GAP's strengths is our flexibility to move quickly on new information, responding effectively to unexpected whistleblower disclosures. The deeper knowledge base developed through dozens of investigations and education

campaigns makes us particularly able to work with government agencies and committees that have responsibility in the area of concern that is the focus of our efforts. Our policy areas are: strengthening the legal rights of the whistleblower, cleaning-up the meat and poultry industry, promoting environmental accountability, reforming abusive or wasteful national security practices, and developing effective government management mechanisms to address whistleblower concerns.

GAP's strategic approach works on several fronts simultaneously. Our staff members unite whistleblower concerns with various government agencies, the news media, grassroots citizens organizations, and the broader public interest community to expose, publicize and galvanize a public response to an issue. We then collaborate with selective government agencies, congressional committees, and others on Capitol Hill to investigate and correct the problems.

In effect, we help the government to manage internal whistleblowing in ways that are likely to resolve problems, not stifle dissent. For federal regulatory and investigative agencies our advice usually centers on how to attract significant whistleblowers and encourage others with important information to come forward as well. For congressional committees our help provides the key evidence they need in overseeing the effective operation of the Executive Branch. The unanimous passage of the Whistleblower Protection Act of 1989 and President Bush's enthusiastic signing of that law is a testament to the universal acceptance of whistleblowers as important contributors to the effective operation of government.

International Work

Consistent with our mission to protect the public interest and promote government and corporate accountability by advancing occupational free speech, defending whistleblowers, and empowering citizen activists, GAP has been expanding its focus to include work in the international arena. Increased globalization of government and corporate power exponentially expands the impact of institutional wrongdoing on the environment, public health and worker safety. Accountability achieved through expanded whistleblower protection becomes critical to checking abuses of power and corruption.

GAP is focusing its international efforts in three primary ways:

1) Supporting Whistleblower Protection Initiatives in Other Countries

From its twenty-two years and experience, GAP is developing a repository of information on whistleblower protection law, both domestically and internationally, to provide as resources to foreign governments and civil society groups seeking to expand occupational free speech rights in other countries. GAP will work at the invitation of civil society organizations, parliamentarians, foreign governments or corporations. GAP has worked with organizations and parliamentarians in Argentina, Australia, Canada, Great Britain, Korea, Russia, and Slovakia. As part of this effort GAP is available for informal counsel, document review, speaking engagements, and joint projects and partnerships. GAP's website will contain country by country information about existing or pending whistleblower protection legislation.

Specifically, GAP will:

- A. Assist foreign civil society organizations, parliamentarians, foreign governments and corporations by formulating model language and model whistleblower protection policies. These models may include:
 - 1) a covenant or statement of general employee rights on whistleblowing
 - 2) model language to be used in international treaties that would facilitate enforcement of treaty provisions
 - 3) model language to be used in corporate dispute resolution systems
 - 4) model language for legislation providing mechanisms for the assertion of personal whistleblower rights upon violation
- B. Make available GAP documents, including:

- 1) Model legislation for states (i.e. provinces), adding an alternative dispute resolution mechanism of enforcement
 - 2) Corporate models using as templates two different approaches: GAP's involvement with the Hanford Joint Council for Resolving Employee Concerns, a structured process being used to resolve whistleblower concerns at the Department of Energy's Hanford Nuclear Weapons site and the Commission on Research Integrity.
 - 3) Model Citizen Enforcement Act legislation
- C. Publish papers and articles involving and advocating whistleblower protection as a means of facilitating corporate and government accountability internationally. Translate and publish relevant publications.

2. Supporting Whistleblower Protection Initiatives at Multinational Institutions

As economic globalization continues apace, GAP will focus on those opportunities that might significantly check global abuses of corporate and government power and promote institutional accountability.

- A. Identify and help support test cases that illustrate the value of whistleblower protection in the context of free trade regulation, when violations of international commitments undermine public interest values by threatening the environment, human rights, labor standards, and democratic rule.
- B. Help to identify and support test cases for whistleblower protection as a human rights precedent in international tribunals.
- C. Help support coalitions of citizen's groups active on globalization issues by:
 - 1) Creating a database of citizen's groups that both are actively working on issues affected by free trade regulations, while also advocating that whistleblower protection be included in international agreements on anti-corruption, free trade and human rights.
 - 2) Collaborate on research and case studies for publication aimed at educating the public interest community on the value of whistleblower protection as a fundamental labor right, as well as an indispensable resource to check corporate and government wrongdoing.
- D. Develop model language and advocate for whistleblower protection in multinational institutions or agreements (e.g. the North American Free Trade Agreement, the World Trade Organization, and the Inter-American Convention Against Corruption).
- E. Work with effective corporate anti-corruption organizations and campaigns that advocate whistleblower protection as a mechanism for promoting anti-corruption.

3. Building Program-Specific Strategic Alliances

GAP leads well-developed programs covering nuclear weapons facilities oversight, food safety, forestry, national security abuses, and environmental enforcement, including projects on chemical weapons incineration and Alaska oil pipeline oversight. GAP frequently looks to build international partnerships in order to address domestic and global problems, share knowledge, experience and training, and to protect domestic standards. GAP's strongest alliances have come from work on nuclear weapons oversight and food safety.

A. Nuclear Weapons Facility Oversight

- 1) Alliances with Non-Governmental Organizations in Russia
- 2) Hague Appeal for Peace Conference, May 1999

B. Food Safety Initiatives

- 1) Alliances with Australian Meat Inspectors on Problems with Corporate Meat Inspection
- 2) Review of *Codex Alimentarius Commission* Food Safety Standards and Impacts to Public Health

CHECKLIST FOR EFFECTIVE WHISTLEBLOWER PROTECTION LAWS

Tom Devine, Legal Director

The Government Accountability Project (GAP) is a non-profit, nonpartisan public interest law firm that specializes in protection for genuine whistleblowers, employees who exercise free speech rights to challenge institutional illegality, abuse of power or other betrayals of the public trust they learn of or witness on the job. GAP has led the public campaigns for passage of the Whistleblower Protection Act of 1989 ("WPA") (federal employees); Military Whistleblower Protection Act (armed services members); numerous related statutes for private industry sectors such as nuclear weapons and nuclear power; and numerous state whistleblower laws.

While whistleblower protection laws are increasingly popular, in many cases the rights have been largely symbolic and therefore counterproductive. Employees have risked retaliation thinking they had genuine protection, when in reality there was no realistic chance they could maintain their careers. In those instances, acting on rights contained in whistleblower laws has meant the near-certainty that a legal forum would formally endorse the retaliation, leaving the careers of reprisal victims far more prejudiced than if no whistleblower protection law had been in place at all. Review of the track records for these and prior laws over the last 23 years has revealed numerous lessons learned, which have steadily been solved on the federal level through amendments to correct mistakes and close loopholes.

GAP labels token laws as "cardboard shields," because anyone relying on them is sure to die professionally. We view genuine whistleblower laws as "metal shields," behind which an employee's career has a fighting chance to survive. The checklist of 21 requirements below reflects GAP's 23 years of lessons learned on the difference. All the minimum concepts exist in various employee protection statutes currently on the books.

SCOPE OF COVERAGE

1. "No loopholes" protected speech. Protected whistleblowing should cover "any" disclosure that would be accepted in a legal forum as evidence of significant misconduct or would assist in carrying out legitimate law enforcement functions. There can be no loopholes for form, context or audience, unless release of the information is specifically prohibited by statute. In that circumstance, disclosures should still be protected if made to representatives of institutional leadership, or to designated law enforcement or legislative offices.

2. Realistic scope of subject matter. Whistleblower laws should cover disclosures of any illegality, gross waste, mismanagement, abuse of authority, substantial and

specific danger to public health or safety, as well as any other information that assists in implementing or enforcing the law or achieving its purpose.

3. Duty to disclose illegality. This provision helps switch the whistleblowing context from a personal initiative for conflict, to a public service duty to bear witness.

4. Right not to violate the law. This provision is fundamental to stop faits accomplis and in some cases prevent the need for whistleblowing. Significantly, however, an employee who refuses to obey an order on grounds that it is illegal must proceed at his or her own risk, assuming vulnerability to discipline if a court subsequently determines the order would not have required illegality.

5. Protection for the full scope of activity that leads to harassment. The law should cover all common scenarios that could have a chilling effect on responsible exercise of free speech rights. Representative scenarios include employees who are perceived as whistleblowers, even if mistaken (to guard against guilt by association), and employees who are “about to” make a disclosure (to preclude preemptive strikes to circumvent statutory protection). These indirect contexts often can have the most significant potential to lock in secrecy by silencing employees.

6. Coverage for all employees performing public service functions. Coverage should extend to all employees who are challenging betrayals of the public trust, whether the employer is public or private. Public whistleblower statutes should protect all who are paid with taxpayer funds to carry out government functions, including employees of government contractors or corporations.

7. Coverage for confidential disclosures. To maximize the flow of information necessary for accountability, protected channels must be available for those who choose to make anonymous disclosures. As the WPA sponsors recognized, denying this option creates a severe chilling effect.

8. Protection for the full scope of harassment. The forms of harassment are limited only by the imagination. As a result, it is necessary to ban any discrimination taken because of protected activity, whether active such as termination, or passive such as refusal to promote or provide training. The prohibition must cover recommendations as well as the official act of discrimination, to guard against managers who “don’t want to know” why subordinates have targeted employees for an action.

9. Anti-gag order provision. Any whistleblower law must include a ban on “gag orders” through an employer’s rules, policies, or nondisclosure agreements that would otherwise override free speech rights and impose prior restraint.

10. Prominent posting of rights. As a practical matter whistleblowers are not protected by any law, if they do not know it exists. Whistleblower rights, along with the duty to disclose illegality, must be posted prominently in any workplace.

FORUM

The setting to adjudicate a whistleblower's rights must be free from institutionalized conflict of interest. The records of administrative boards and grievances have been so unfavorable that as a rule, laws adjudicated in these settings are Trojan horses. Two settings have a track record of giving whistleblowers a fair day in court.

11. Right to a jury trial. This option institutionalizes normal judicial due process rights, the same available for citizens generally who are aggrieved by illegality or abuse of power. Most significant, it means that whistleblowers will be judged by a jury of peers from the citizens whom they purport to defend.

12. Option for Alternative Disputes Resolution with an arbitrator selected by mutual consent. Arbitration can be an expedited, less costly forum for whistleblowers, if the decisionmaker is selected by mutual consent through a "strike" process.

RULES TO PREVAIL

13. Modern burdens of proof. The federal Whistleblower Protection Act of 1989 overhauled antiquated, unreasonable burdens of proof that had made it hopelessly unrealistic for whistleblowers to prevail when defending their rights.

The current standard, which since 1989 has been adopted consistently in federal laws, is that a whistleblower established a prima facie case of violation by establishing through a preponderance of the evidence that protected conduct was a "contributing factor" in challenged discrimination. The discrimination does not have to involve retaliation, which could require personal hostility, but only need occur "because of" the whistleblowing. Once a prima facie case has been made, the burden of proof shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the same action for independent, legitimate reasons in the absence of protected activity.

Since the federal government switched the burden of proof in whistleblower laws, the rate to prevail on the merits has increased from 1-5% annually, which institutionalizes a chilling effect, to 25-33%, which gives whistleblowers a fighting chance to successfully defend themselves.

14. Realistic statute of limitations. Although some laws require employees to act within 30-60 days or waive their rights, most whistleblowers are not even aware of their rights within that time frame. A one year statute of limitations is consistent with common law rights and has proved functional.

RELIEF FOR WHISTLEBLOWERS WHO WIN

15. Full scope of consequences. If a whistleblower prevails, the relief must be comprehensive to cover all the direct, indirect, and future consequences of the reprisal.

16. Interim relief. Even after winning a hearing or trial, an unemployed whistleblower could go bankrupt waiting for completion of an appeals process that frequently drags out for years. Relief should be awarded during the interim for employees who prevail after their day in court. Awards of back salary would be conditional, to be returned if the initial decision is overturned subsequently.

17. Attorney fees. Attorney fees should be available for all who substantially prevail. Otherwise whistleblowers could not afford to assert their rights, or even to win. The fees should be awarded if the whistleblower obtains the relief sought, whether or not it is directly from the legal order issued in the litigation. Otherwise, employers can and have unilaterally surrendered outside the scope of the forum and avoided fees by declaring that the whistleblower's lawsuit was irrelevant to the result. Employees can be ruined by that type victory, since attorney fees not uncommonly reach five to six figures.

18. Transfer preference. It is unrealistic to expect a whistleblower to go back to work for a boss whom he or she has just defeated in a lawsuit. In order to prevent repetitive reprisals that cancel the law's impact, those who prevail must have a strong transfer preference for any realistic chance at a fresh start after winning.

19. Personal accountability for wrongdoers. To deter repetitive violations, it also is indispensable that those responsible for whistleblower reprisal must be held accountable. Otherwise, managers have nothing to lose by doing the dirty work of harassment. The worst that will happen is that they won't get away with it, and they may well be rewarded informally for trying. The most effective option to prevent retaliation is personally liability for punitive damages by those found responsible for violating whistleblower laws. Another option is to allow whistleblowers to counterclaim for disciplinary action, including termination. The most superficial is to make compliance with the whistleblower law a critical element in every manager's performance appraisal, and for decisionmakers in reprisal cases to refer responsible officials for investigation to determine if sanctions are appropriate for violating this element.

20. Laws that are additive, not substitutive. Because of some recent court decisions, legislatures that pass whistleblower laws must specify they are not substitutes that cancel out pre-existing constitutional or common law rights. Otherwise, the new law risks being an inferior substitute and significant retreat.

MAKING A DIFFERENCE

21. Action against wrongdoing exposed by whistleblowing disclosures. Federal studies repeatedly have confirmed that the primary reason would-be whistleblowers remain silent is not fear of retaliation. It is that they will not make a difference. Otherwise, there is no point to risking harassment. An effective whistleblower law should have provision to channel reasonable disclosures of misconduct for appropriate legislative or executive investigation, whether or not retaliation occurs.