Testimony of

Mr. Tom Devine

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MISTER CHAIRMAN:

Thank you for inviting my testimony. My name is Tom Devine, and I serve as legal director of the Government Accountability Project, a nonprofit, nonpartisan, public interest law firm dedicated to helping whistleblowers -- those employees who exercise free speech rights to challenge illegality or other abuses of power that betray the public trust. GAP has led outside campaigns that led to passage of numerous government, military and corporate whistleblower protection laws. We represent whistleblowers in test cases of those statutes, and to investigate their dissent against alleged misconduct threatening the public. We steadily monitor implementation of whistleblower statutes and share our results through books, law review and popular articles, as well as congressional testimony. See, e.g., The Whistleblower's Survival Guide: Courage Without Martyrdom, and "The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Dissent," 51 Administrative Law Review 531 (1999). We teamed up with American University Law School to draft a model whistleblower protection law implementing the Inter-American Convention Against Corruption.

It is rare for the Government Accountability Project, but my primary goal in this testimony is to offer credit where it is due. Through unanimously approved provisions creating state of the art whistleblower protection, this Committee exercised bipartisan leadership for a genuine breakthrough in corporate accountability. The Corporate Fraud and Accountability Act of 2002 is outstanding good government legislation. The Act lengthens the statute of limitations and empowers state Attorney Generals to prosecute corporate criminals under existing federal racketeering law. Its centerpiece, however, is legal rights for whistleblowers at publicly-traded corporations. Future Sherron Watkins could not be fired at will when warning corporate leaders or shareholders of consequences from cheating such as bankruptcy, liability or other risks that could sabotage investments.

The bill's strategy is whistleblower protection to create a safe channel for shareholders and management's right to know, as well as for testimony in law enforcement investigations. Its goal is to frustrate coverups: employees are protected from reprisal for releasing information the shareholders are legally entitled to under Securities and Exchange Commission disclosure rules. Witnesses in criminal investigations also are shielded. It gives reprisal victims access to district court jury trials if they cannot receive a timely decision from what all too frequently has been the black hole of the Department of Labor administrative law system. Their cases would be governed by the modern legal burdens of proof from the Whistleblower Protection Act of 1989 for government workers.

Disclosure has been the trans-ideological, bipartisan cornerstone of all post-Enron reform proposals, from Democrats to President Bush. The common sense logic is unassailable. Two long-accepted truths are that secrecy is the breeding ground for corruption, and sunlight is the best disinfectant. Otherwise even the best corporate leaders are ignorant of misdeeds until they are blamed for the consequences. Similarly, shareholders and their investments are blindsided by risks taken behind heir backs. Political leaders' support on the Senate Judiciary Committee's

whistleblower protection bill will be a test whether they are serious, or their posturing about full disclosure is as cheap talk as Enron and WorldCom's SEC filings.

Whistleblowers are the Achilles heel of bureaucratic corruption. As eyewitnesses to the birth of scandals, they are indispensable to bridge the secrecy gap. Their free speech right goes beyond the freedom to protest misconduct. It also includes the freedom to warn. In the Netherlands, these same individuals are called "bell ringers," after those who warn their communities of danger. Other nations refer to whistleblowers as "lighthouse keepers," after those who save ships from sinking by shining the light on areas where rocks are both invisible and deadly. The common theme is that they warn about threats to the public's well-being, before avoidable crimes or disasters occur and we are limited to damage control. They are the living disclosure statements who refuse to be falsified.

Their dormant potential already has been proved anecdotally since the 1980's, when investors believed whistleblowers over Nuclear Regulatory Commission rubber-stamps and pulled the plug on plants that were accidents waiting to happen. The common theme in the disclosures of GAP clients has been warning of liability or government sanctions for cheating. Sherron Watkins acted as a corporate Paul Revere by warning that devastating liability was coming. Enron chief Ken Law ignored her at his own peril and sealed his doom.

They are the lifeblood of anti-corruption campaigns, which are lifeless, empty symbols doomed to failure without testimony from those who bear witness. It is difficult to win criminal convictions without leads and testimony. Whistleblowing disclosures to the SEC doubled normal rates during congressional Enron hearings. As SEC enforcement chief Stephen Cutler commented, "Because of this phenomenon, among other reasons, we are learning of potential securities law violations earlier than ever before. Keep those cards and letters, not to mention emails, coming."

Unless rights are locked in, things will soon be back to normal as would-be whistleblowers decide instead to stay silent observers. Ironically, the norm is that whistleblowers proceed at their own risk when sounding the alarm, except when shielded by the False Claims Act for challenging fraud in government contracts. Corporate law is a crazy-quilt of hit or (usually) miss protections generally tucked into specific environmental or public safety laws. With scattered exceptions, the lucky ones with rights generally are unemployed prisoners of an administrative law system that commonly takes well over two years for decisions, with no chance for interim relief - professionally akin to patients who die while waiting for an operation or organ donor. Ms. Watkins only survived because Enron collapsed before retaliation could be carried out, and then she became a celebrity. For whistleblowers the sad truth is that if you're not a celebrity, you're cooked. As University of Maryland Professor Fred Alford, author of Whistleblowers: Broken Lives and Organizational Power, observed, "[F]or every Sherron Watkins, there are several hundred whistleblowers that lack the protection of visibility." Those at Paine Webber, Global Crossings, World Com and similar firms will confirm his insight. In some instances they were openly fired for disloyalty - to company managers who themselves were breaching their fiduciary duty of loyalty to shareholders.

Initially reform appeared trapped by a partisan deadlock. Then the staffs of longtime whistleblower champions Senators Leahy and Grassley worked beyond the call of duty to craft a composite model that sparked a consensus. They agreed to drop punitive damages, and to restrict court access unless administrative proceedings are bogged down over 180 days.

The Leahy-Grassley compromise is a win-win for everyone except corporate crooks. Honest managers, Boards, shareholders, whistleblowers and federal law enforcement agencies will be

empowered with an early warning system to prevent new Enron disasters by nipping scandals in the bud. It would place the U.S. in compliance with the whistleblower requirement in the OAS Inter-American Convention Against Corruption, ratified last year after leadership by Senator Chafee. Comprehensive corporate whistleblower protection also has been recommended internationally in Organization for Economic Cooperation and Development Guidelines. Unanimous Judiciary Committee approval suggests the Senate may be ready to prove it is serious about making a difference. Then it will be the House and the President's turn. Throughout the Enron hearings, legislators of both parties rhetorically lionized whistleblowers and chastised those who violated their "duty" by remaining silent. It is time to add genuine free speech rights to the rhetoric, which rings cynically hollow to someone fired and facing bankruptcy for warning a corporation of that same risk.

The Leahy-Grassley bill should be a beachhead for other stalled, pending legislation. Amendments to revive the Whistleblower Protection Act for federal employees are stalled. That law was the strongest free speech law in history when unanimously approved by Congress in 1989 and strengthened in 1994. But after brazenly hostile activism by a court with a monopoly on judicial review, it is a trap that creates more victims than it helps. The rules have been rigged so that whistleblowers are guaranteed legal endorsement of reprisals they challenge, unless they present "irrefragable" proof of government misconduct. That means undeniable, uncontestable proof, although the law as written only calls for evidence of a reasonable belief. In the absence of a confession there is no such thing as a whistleblower. Amazingly, the House has not even scheduled hearings on the bill. . A bipartisan Paul Revere Freedom to Warn Act in the House would secure Congress' right to know through similar protection for anyone who blows the whistle to Congress. Legislation to provide whistleblower rights for FBI employees, also approved by this Committee, and federal baggage screeners, introduced by Senators Grassley and Levin, also would close inexcusable loopholes.

The Judiciary Committee bill is only a first step. Employees of private corporations are not covered, and tools to help whistleblowers make a difference should be seriously considered. The inspirational track record of the False Claims Act in exposing government contract fraud should be an expanding beachhead for corporate accountability, not an island. Those future challenges should be put in perspective, however. This committee's corporate whistleblower bill is a giant step forward. It means future Coleen Rowleys will have rights when they risk their personal financial future to defend the shareholders.' It is unrealistic to expect whistleblowers to defend shareholders or the public if they can't defend themselves. Like current corporate whistleblower laws, Profiles in Courage are the exception, not the rule.