

1 WHISTLEBLOWER PROTECTIONS FOR GOVERNMENT CONTRACTORS

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3 TUESDAY, DECEMBER 6, 2011

4 United States Senate,

5 Ad Hoc Subcommittee on Contracting Oversight,

6 Committee on Homeland Security and Governmental Affairs,

7 Washington, D.C.

8 The Subcommittee met, pursuant to notice, at 10:05

9 a.m., in Room SD-342, Dirksen Senate Office Building, Hon.

10 Claire McCaskill, Chairman of the Subcommittee, presiding.

11 Present: Senators McCaskill, Tester, and Portman.

12 OPENING STATEMENT OF SENATOR McCASKILL

13 Senator McCaskill. Good morning. Thank you all for

14 being here today.

15 We are going to hold a hearing today on whistleblower

16 protections, and just briefly I wanted to talk overall about

17 this subject matter because I think it is incredibly

18 important. This is probably not the best attended hearing

19 that will be held on the Hill today, but those of you that

20 are here understand the importance of whistleblowers in

21 terms of Government oversight.

22 I really do not think there is anything that is more

23 important than whistleblowers because if you look around, it

24 is very clear that whistleblowers have made a difference

25 time and time again in terms of ferreting out serious and

1 significant problems in the Federal Government. I can look
2 no further than Arlington and Dover, and I can give many
3 other examples where the reason that problems were
4 identified and the reason we had the ability to go in and
5 correct problems was because somebody who worked there told
6 someone, someone who saw the problem said to themselves, "I
7 cannot deal with this anymore. Someone has to do something
8 about this." And that is the best instincts, and those are
9 the instincts that we must protect. And a whistleblower
10 that has reprisals against them is something that we cannot
11 stand for in this Government. And that is what this hearing
12 is about.

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

22 Now, there is a dirty little secret that people like to
23 ignore, and, frankly, one of the reasons I voted against the
24 Republican proposal last week on the extension of the
25 payroll tax is because it was all about limiting Federal

1 employees. It did not say a word about contractors. Anyone
2 who thinks they are going to get at the problem of the
3 growth of the Federal Government and the spending that is
4 occurring in the Federal Government, if they think they can
5 do that by leaving contractors out of the equation, they do
6 not understand the Federal Government right now.

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

22 So I think it is really important that we expand the
23 protections for whistleblowers to people who work for
24 contractors. We have been able to do that in two important
25 respects. Senator Collins and I sponsored an amendment to

1 the National Defense Authorization Act in 2008 that extends
2 protections to whistleblowers for contractors that work for
3 the Department of Defense. We also did the same thing for
4 contractors that were receiving any of the money under the
5 stimulus act.

6 So it is not that this is without precedent. We have
7 now done it for stimulus dollars, and we have done it for
8 contractors that work for DOD. Why not the rest of
9 Government? Why is this important to do with contractors
10 who work for DOD and not with contractors that work for the
11 Department of Energy or contractors that work for Homeland
12 Security? I think we have got thousands and thousands and
13 thousands.

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

22 So that is what this hearing is about. I have
23 introduced legislation, along with my friend Jim Webb, that
24 will expand the protection of whistleblowers to any
25 whistleblower, whether they are an employee or whether they

1 are a Federal contractor. And if there is a reason we
2 should distinguish between the two, I hope someone today
3 points it out because I would be anxious to hear what that
4 reasoning is.

5 So that is why we are here, and I think this will be a
6 good hearing to explain the underpinnings of the legislation
7 we have proposed, and I now will turn the microphone over to
8 the Ranking Member of the Committee, my friend, who has been
9 a great Senator to work with on this Committee, Senator
10 Portman.

11 OPENING STATEMENT OF SENATOR PORTMAN

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

20 The stopping of wasteful spending and detecting it and
21 preventing it ultimately is something that whistleblowers
22 play a key role in. There are others as well. We need
23 official oversight and monitoring, including by contracting
24 officers in the agencies and Inspectors General and law
25 enforcement authorities. But whistleblowers are often the

1 eyes and ears for all of us and for the American taxpayer to
2 be sure we are detecting, preventing, and stopping wasteful
3 spending. And they often serve as a vital communication
4 link, too, between what is really happening in the daily
5 operations of major Federal programs and the policymakers
6 here in Congress and in the executive branch who are
7 responsible for oversight of these programs.

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

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

24 But unlike these public sector protections, there is no
25 standard whistleblower statute that covers private sector

1 employees. Instead, Congress has taken a more piecemeal
2 approach to that, creating whistleblower protections to
3 address abuses in specific areas: Sarbanes-Oxley would be
4 one in the securities and bank fraud areas; within specific
5 departments such as the Department of Energy whistleblower
6 provisions; or more recently to major new spending
7 commitments. There were provisions, for instance, in the
8 2009 stimulus bill.

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

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

18 When we are dealing with taxpayer dollars of that
19 magnitude, there can be no question that we have got to take
20 every effort to ensure good stewardship. The law provides a
21 number of protections for contractor employees from the
22 False Claims Act to civilian protections in the FAR
23 regulations, Federal Acquisition Regulation 3.9, to defense
24 contractor protections in Section 2409. I would be
25 interested to hear from our witnesses today on how these

1 existing protections for contractors have proven effective
2 and where they might fall short.

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

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

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

23 Unfortunately, many whistleblower laws are one-sided in
24 this respect. I give you as one example the securities
25 whistleblower provisions in Dodd-Frank. It fails to protect

1 employees who report security violations internally and
2 instead offers large financial incentives to bypass those
3 internal controls and immediately report out.

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

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

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

25 So with that, I look forward to hearing from our

1 witnesses on how best to protect contractor whistleblowers
2 and how best to save taxpayer dollars.

3 Thank you, Madam Chair.

4 Senator McCaskill. Thank you, Senator Portman, and we
5 will begin with our witnesses.

6 First, we have Peg Gustafson, the Inspector General for
7 the Small Business Administration and the Chair of the
8 Legislation Committee of the Council of Inspectors General
9 on Integrity and Efficiency, or better known in this
10 Committee and other places that know a lot about Inspectors
11 General as CIGIE. Prior to becoming Inspector General, Ms.
12 Gustafson was my general counsel, where she wisely advised
13 me on oversight issues and helped to write the legislation
14 that has strengthened the Offices of Inspectors General.
15 From 1997 to 2007, Ms. Gustafson was, in fact, general
16 counsel when I served as State auditor of Missouri. It is
17 great to see you, Peg.

18 Marguerite Garrison is the Deputy Inspector General for
19 Administrative Investigations at the Department of Defense.
20 Prior to becoming the Deputy IG, Ms. Garrison was a career
21 army military police officer where she achieved the rank of
22 colonel. Before retiring from that position, Ms. Garrison
23 served as the chief of the initiatives group in the army
24 where she identified and coordinated key issues of strategy,
25 police, future concepts, and comprehensive army information

1 requirements across the army staff.

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

8 Ms. Gustafson. I do.

9 Ms. Garrison. I do.

10 Senator McCaskill. Thank you both.

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

1 TESTIMONY OF THE HONORABLE PEGGY E. GUSTAFSON,
2 INSPECTOR GENERAL, U.S. SMALL BUSINESS
3 ADMINISTRATION

4 Ms. Gustafson. Chairman McCaskill, Senator Portman,
5 thank you very much for the opportunity to be here today and
6 for your continued support of the work of Inspectors
7 General. I am happy to be here in my capacity as Chair of
8 the Legislation Committee for the Council of Inspectors
9 General on Integrity and Efficiency, which I will also call
10 "CIGIE" from now on in my testimony.

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

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

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

25 One such survey involves the perspective of IGs in

1 agencies that were allocated funds under the American
2 Recovery and Reinvestment Act, also known as ARRA or the
3 stimulus act, which includes a provision aimed at protecting
4 State and local government contractor whistleblowers.

5 During the time frame of February 2009 through April
6 2011, IGs who had responded to the survey had received 1,652
7 complaints regarding ARRA transactions from employees of
8 non-Federal entities. The complaints related to
9 approximately 323 distinct ARRA transactions, meaning that
10 multiple complaints had been received on some of these
11 transactions. Of the 1,652 complaints, 35 percent, or 580,
12 resulted in the opening of an investigation, audit, or other
13 OIG review, and 150 others at the time of the survey were
14 still being considered for IG action. Though the judicial
15 and criminal investigative process can be lengthy and may
16 still be ongoing in some these cases, responding OIGs
17 indicated that their investigations and reviews of the
18 whistleblower complaints had resulted in recovery of
19 approximately \$1.85 million as of April of this year.

20 One of the key provisions of ARRA is Section 1553 that
21 gives the authority of OIGs to investigate reprisal
22 complaints from non-Federal employee whistleblowers. Of the
23 surveyed IGs, 8 of the OIGs had received a total of 18
24 reprisal complaints, and 11 of those had been accepted for
25 investigation. The majority of IGs that had received these

1 complaints had not experienced any problems or concerns with
2 implementing Section 1553 or in responding to the
3 complainants' request to access the completed investigation
4 file.

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

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

20 The ability of IGs to carry out their mission is
21 dependent on the authority to access records pertinent to
22 the investigation of the complaint. In instances of IGs
23 having authority to access the records of State, local, and
24 private sector employers who received ARRA funds, the IGs
25 believe that Section 1515 of the Recovery Act serves as a

1 viable model for giving IGs this access.

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

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

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

25 [The prepared statement of Ms. Gustafson follows:]

1 Senator McCaskill. Thank you, Ms. Gustafson.
2 Ms. Garrison?

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

4 Ms. Garrison. Madam Chairman McCaskill and Ranking
5 Member Portman, thank you for the opportunity to appear
6 before you this morning to discuss whistleblower protections
7 for Government contractor employees.

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

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

21 DOD IG has overall responsibility for the whistleblower
22 protection program across the Department. A strong
23 whistleblower protection program includes a confidential
24 channel for the disclosure of wrongdoing, reliable
25 protection against reprisal for making protected

1 disclosures, and assurance that everyone concerned
2 understands their rights and responsibilities under the law.

3 Since the late 1980s, Congress has passed a series of
4 laws protecting members of the armed forces, appropriated
5 and non-appropriated fund employees, and DOD contractor
6 employees from reprisal. DOD IG has the authority to
7 investigate these complaints and to oversee allegations
8 conducted by Department of Defense component Inspectors
9 General.

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

15 Our authority with respect to DOD contractor employees
16 is drawn from Title 10, United States Code, Section 2409, as
17 amended in 2008. Since 1986 the statute has been amended on
18 multiple occasions. The 2008 amendment expanded the types
19 of protected disclosures and their authorized recipients.
20 It also imposed additional deadlines for agency heads to
21 resolve reprisal complaints. We welcomed those enhancements
22 to protections for defense contractor whistleblowers.

23 In 2008, we recommended legislation to require defense
24 contractors to inform their employees in writing of their
25 whistleblower rights under the statute. Our recommendation

1 resulted in the inclusion of that requirement in the
2 National Defense Authorization Act for fiscal year 2009.

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

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

24 In closing, I would like to thank the Subcommittee for
25 the opportunity to discuss the important topic of

1 whistleblower protections for Government contractor
2 employees. I look forward to answering your questions.

3 [The prepared statement of Ms. Garrison follows:]

1 Senator McCaskill. Thank you very much to both of you.

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

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

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

18 Ms. Gustafson. Well, I think that actually there has
19 definitely been thought given to that, and I think actually
20 S. 241 has some provisions in there that the IGs are very
21 supportive of, which is to say there is an investigation
22 that needs to be done, there is some discretion given to the
23 IGs with an accountability in the semiannual reports as to
24 why an investigation has not been completed within a certain
25 length of time. And there is also accountability built in

1 when you have to report to the whistleblower if you have
2 decided not to undertake that investigation.

3 So I actually think that that is there and that is
4 something the IG community is very supportive of. And it
5 goes on to then give the whistleblower access to the court
6 immediately after that so that the whistleblower's rights
7 are not estopped by an IG. You know, some of these IG shops
8 are three people, four people.

9 Senator McCaskill. Right.

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

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

19 Ms. Gustafson. Well, it gives complete discretion to
20 the Inspectors General.

21 Senator McCaskill. Okay, good. I am confused, Ms.
22 Garrison, about the number--since we changed the law and the
23 standards, I am confused about the number of complaints that
24 you have had as to whistleblower retaliation among the
25 contractor community and the total investigated, and the

1 fact that there have been none substantiated. But more
2 troubling, whether or not they have been substantiated, I
3 mean, you had--the law changed in 2008. You had 44
4 complaints in 2009, 51 in 2010, and 68 in 2011. And of all
5 of those, there have only been five investigations. Why is
6 that?

7 Ms. Garrison. Well, many times when we look at the
8 incoming complaint, there are several reasons for that,
9 Madam Chairman. Number one is that the complaint is from a
10 subcontractor and not a contractor employee. Another reason
11 may be that the employee made the complaint to a company
12 management official, not a Government official.

13 A third reason could be that the complainant received
14 some type of reprisal from--the Government official directed
15 the reprisal action, the unprotected--the unfavorably
16 personnel action rather than the contractor because they saw
17 that there was some deficiency in the performance of the
18 employee.

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

22 Senator McCaskill. Okay. On the last point you made,
23 I am confused. What was the last point, that--

24 Ms. Garrison. The last point was that--excuse me,
25 Madam Chairman.

1 Senator McCaskill. That is okay.

2 Ms. Garrison. The last point was that the unfavorable
3 personnel action that was directed against the employee came
4 as a result of a Government official perceiving a deficiency
5 in the duty performance of the individual and, therefore--

6 Senator McCaskill. Isn't that always the defense?

7 Ms. Garrison. Pardon me?

8 Senator McCaskill. Isn't that what would have to be
9 investigated? Isn't the Government always going to say the
10 reprisal was not because they were whistleblowers but
11 because they were not a good employee?

12 Ms. Garrison. No, the contractor is the one that let
13 the employee go based upon what the Government official
14 said, and it was a perceived deficiency in the duty
15 performance, so no. But in some cases, if we see that the
16 Government employee directed that unfavorable personnel
17 action because of some disclosure that the employee made,
18 then under the IG Act we have the authority to--

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

23 Ms. Garrison. Well, we have conducted preliminary
24 inquiries and looked at the basis of the fact of the
25 termination of the employment, and based upon our initial

1 inquiry, we have determined that the performance of that
2 employee was deficient prior to the protected disclosure.

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

6 Ms. Garrison. Yes.

7 Senator McCaskill. Okay. We were told in a briefing
8 that DOD IG was also relying on the previous standards in
9 the law as opposed to the standards that were put in place
10 in 2008 based on the fact that the contract was executed
11 before 2008. Is that correct?

12 Ms. Garrison. That is correct.

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

20 Ms. Garrison. When we looked at the 1994 statute, we
21 look at the date of the contract and when was the contract
22 let. The provision that was in place at the time of the
23 contract is what we are looking at. So, for example, we had
24 a contract that was executed in 2007. The 2009 amendment
25 was not in place at that time, so we look at the statute of

1 1994 to determine where we are going to head in that
2 investigation or whether we are going to pursue it.

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

13 Ms. Garrison. Well, it has been our experience thus
14 far that the complaints we have received have been on
15 contracts that are before two thousand--

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

22 Ms. Garrison. I would like to take that one for the
23 record.

24 Senator McCaskill. That would be great. And if there
25 was a legal opinion, I would love to review it. I would

1 love to see it and get the basis for that, because I do not
2 believe that is correct in the law. I think that the
3 standard that should be used should apply across the board
4 going forward, because this is not something that materially
5 impacts the contract provisions for the contractor. It
6 materially impacts the protections for the whistleblower.
7 And I think that that is a distinction with a real
8 difference. So I would love to see where that decision was
9 made and how it was made and get the backup documentation
10 for it.

11 [The information follows:]

12 / SUBCOMMITTEE INSERT

1 Senator McCaskill. Thank you, Ms. Garrison.

2 Senator Portman?

3 Senator Portman. Thank you, Madam Chair, and thank you
4 all for your testimony.

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

11 Ms. Garrison. We see that S. 241 does extent it to
12 subcontractors, and we see that as a positive, so yes.

13 Senator Portman. Okay. Who should these reports of
14 wrongdoing be made to--the prime contractor first?

15 Ms. Garrison. We also see in S. 241 that the
16 disclosures have been expanded so that they can be made to
17 them internally and that we could also be involved from a
18 DOD IG's perspective.

19 Senator Portman. On the internal disclosures, as I
20 noted in my statement, I do think it is very important to
21 have greater symmetry between the protections for external
22 reporting and internal reporting, and the fact is that most
23 whistleblowers report inside their organization first, and I
24 think we should be encouraging them rather than, in effect,
25 telling whistleblowers to circumvent the internal company

1 procedure in order to be guaranteed protection.

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

5 Ms. Garrison. It is hard for us to speculate the
6 number of substantiation rates or what kind of effect that
7 would have. However, we do believe with the passage of S.
8 241 that since the whistleblower protections will be
9 expanded, we may see an increase in the number of cases in
10 subcontractors as long as we have a good education after the
11 law is passed will come forward.

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

15 Ms. Garrison. Well, I know that in 2008, as I said
16 previously, and NDAA 2009, we made it mandatory that there
17 would be in writing in all contracts that the employers
18 would have to inform their employees of all the
19 whistleblower protections. We see that as one means of
20 doing it. We also could have a communications campaign
21 where we would have various posters about internal
22 disclosures, and we would have to educate our contracting
23 officer representatives and our Government contracting
24 offices on how to expand those protections.

25 Senator Portman. And, Ms. Gustafson, about internal

1 reporting, do you have some thoughts on that? How do you
2 believe this gap has affected folks coming forward and what
3 tools can you see are necessary to promote more internal
4 reporting and better self-regulating?

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

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

24 In your view, what accounts for this disparity?

25 Ms. Garrison. Yes, Senator. We believe that the

1 disparity is accounted for because we have done a great job
2 of going out and advising the military population and
3 various service IGs and Department of Defense component IGs
4 about the whistleblower protections under 1034. That
5 increases the number of, we believe, incoming complaints.

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

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

14 Ms. Gustafson. Well, I guess I would say I have no
15 reason to think it would be just across DOD. I do not know
16 why it would. And I do think that one of the issues maybe
17 even with ARRA is, you know, the stimulus bill went pretty
18 far in applying whistleblower protections, but, of course,
19 it had to be related to just ARRA funds. And so you really
20 did have a relatively small subset of people who would be
21 able to take advantage of those provisions when you compare
22 it to all Federal monies. And I think that may have had
23 something of a tamping-down effect, too, because that is
24 something that you would have to know in order to go
25 forward. You have to know that the rights are there, know

1 it is an ARRA project, and then know where to go.

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

9 I am just wondering if you all could both comment on
10 this. Do you think the contractor workforce is sufficiently
11 aware today of the protections under Section 2409 or the FAR
12 3.9? Do you think that is generally known among contractor
13 employees?

14 Ms. Gustafson. With all due respect, Senator, I really
15 do not know the answer to that question, and I would hate to
16 guess. I mean, that is something that we have not taken the
17 temperature of the IG community on, so I really do not think
18 I can speak to that. DOD may have a better view.

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

23 Senator Portman. And do you have other thoughts as to
24 how that notification could be improved other than the
25 thoughts you gave us earlier? Either one of you. Ms.

1 Gustafson, has your group looked at this?

2 Ms. Gustafson. We have not, Senator. So that is
3 something we--

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

6 Ms. Gustafson. We could certainly for the Committee
7 seek opinions of the IG community. That is something I
8 would be happy to do, sure.

9 Senator Portman. Okay.

10 [The information follows:]

11 / SUBCOMMITTEE INSERT

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

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

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

24 I just wondered what you all thought about that. Do
25 you think that is the right approach? Do you think there

1 should be a statute of limitations both on the filing of the
2 reprisal complaint and bringing a civil action?

3 Ms. Gustafson. Senator Portman, I do not--in the
4 survey of the IG community, I would note that nobody had
5 brought that up as an issue, which I find, I guess, telling
6 enough that I want to point out that nobody had brought up
7 whether that was a concern. It may be that ARRA is so
8 recent that it has not yet become a question. So it may be
9 something moving forward, as it becomes not just about ARRA
10 but whether S. 241 becomes the law of the land. We might
11 have something we want to look at. But as of right now,
12 even though I am a lawyer, quite frankly, I have not thought
13 about that question, and so that might be something that we
14 going forward would want to work on. Whether it would go
15 back to a different whistleblower--you know, refer back to a
16 different whistleblower law already in place to have the
17 kind of symmetry that you talked about where there is a
18 uniformity among laws might be one alternative.

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

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

24 Senator Portman. And again, Section 1553 could become
25 a template for further action, including some of the

1 legislative proposals talked about today, so we would like
2 to get your input on that.

3 Ms. Gustafson. Okay.

4 [The information follows:]

5 / SUBCOMMITTEE INSERT

1 Senator Portman. Any thoughts on that, Ms. Garrison?

2 Ms. Garrison. Yes, Senator. On the statute of
3 limitations, we found that a statute of limitations results
4 in a more timely investigation, that evidence can become
5 stale, so the longer it takes to file the complaint, the
6 staler the evidence will become. So that is what we look at
7 when we are at the Department of Defense IG.

8 Senator Portman. Okay. Good. Thanks very much.

9 Thanks, Madam Chair.

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

15 Ms. Garrison. Yes, Madam Chair.

16 Senator McCaskill. I understand that.

17 Welcome, Senator Tester. Good to see you.

18 Senator Tester. Thank you, Madam Chair.

19 Senator McCaskill. Would you like to ask some
20 questions of these witnesses?

21 Senator Tester. I sure would.

22 First of all, I want to express my appreciation for you
23 and the Ranking Member holding this hearing. I appreciate
24 your work that you have done on cutting waste, fraud, and
25 abuse during your tenure here. You know, as we look to

1 balance the budget, this is the low-hanging fruit. We have
2 just got to be able to make sure that we know about it so we
3 can deal with it, and how we can enhance our ability to get
4 the information about waste, fraud, and abuse is critically
5 important. And I want to thank the members for testifying.
6 Sorry I was not here. I had a previous conflict.

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

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

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

23 Senator Tester. Would you agree with that?

24 Ms. Garrison. Yes, we would. We have found in our
25 experience that internal allegations or reprisal complaints

1 that come forward.

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

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

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

24 Ms. Garrison. I agree with my colleague.

25 Senator Tester. Okay. Some have noted the low

1 instance of fraud in the Recovery Act. Were there things in
2 the Recovery Act that we should apply to other pieces of
3 legislation that come to your mind that would prevent--or as
4 far as that goes, is there anything we should be putting in
5 pieces of legislation that would help prevent waste, fraud,
6 and abuse?

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

21 Senator Tester. Okay. Anything to add to that?

22 Ms. Garrison. No.

23 Senator Tester. Okay. I know your positions. I do
24 not want you to incriminate yourselves. But compared to the
25 media, compared to Inspectors General, compared to auditors,

1 regulatory organizations, where would you stack
2 whistleblowers in that as far as their ability to stop
3 waste, fraud, and abuse? Inspectors General, number one, I
4 am sure.

5 [Laughter.]

6 Ms. Gustafson. There are a lot of people who work for
7 me that would be very disappointed if I did not say that.
8 But, again, there is only so much that we can do. I can
9 speak just, for example, for SBA. A lot of the risk that
10 comes from my--and the Small Business Administration deals
11 with the lending going on that is done under delegated
12 authority. And, quite frankly, if we did not have a good
13 relationship with lenders to tell us about those problems,
14 for example, we simply would not know. So it is not even
15 just about outsourcing. It is really just about the nature
16 of the beast that a lot of this really happens once the
17 money is finally done, and we are simply not there. So how
18 about even footing?

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

22 Thank you, Madam Chair.

23 Senator McCaskill. Thank you, Senator Tester.

24 I think that one of the things we have tried to get at
25 in 241--and I just want to put this on the record--kind of

1 goes to the point you were making, Ms. Garrison, earlier
2 about the Government asking for something to happen with an
3 employee as opposed to the contractor asking something to
4 happen or the subcontractor asking something to happen with
5 the employee. Right now the DOD provision just covers
6 retaliation by the employer. It does not even cover
7 retaliation by the Government.

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

18 Ms. Garrison. Yes, ma'am.

19 Senator McCaskill. Which we fix in 241.

20 Ms. Garrison. Yes, ma'am.

21 Senator McCaskill. So that the retaliation, no matter
22 where it occurs, whether it occurs by the Government or
23 whether it occurs by the employer, be it a contractor or
24 subcontractor, would all be covered. And I assume that you
25 would agree that would be a major improvement in terms of us

1 being able to protect whistleblowers.

2 Ms. Garrison. Yes, Madam Chair, we would agree.

3 Senator McCaskill. Okay, great. Thank you.

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

6 Senator Portman. No. Thank you.

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

15 Ms. Gustafson. Thank you.

16 Senator McCaskill. Thank you.

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

19 Mr. Tamosaitis. That is very good.

20 Senator McCaskill. Thank you. Dr. Tamosaitis was the
21 Research and Technology Manager and Assistant Chief Process
22 Engineer for the Waste Treatment Project at the Hanford
23 nuclear site in Washington State. Mr. Tamosaitis has a
24 Ph.D. in systems engineering and systems management, and he
25 has over 40 years of experience. As a contractor employee

1 at the Waste Treatment Project, Dr. Tamosaitis raised
2 serious safety concerns about project testing.

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

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

20 Mr. Tamosaitis. I do.

21 Ms. Canterbury. I do.

22 Senator McCaskill. Thank you both, and we will begin
23 with you, Dr. Tamosaitis.

24 Mr. Tamosaitis. I may go a tad more than 5 minutes.

25 Senator McCaskill. That is fine.

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

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

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

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

19 The objective of the WTP is to put 56 million gallons
20 of hazardous nuclear waste into a stable waste form to
21 eliminate an environmental and safety threat. This material
22 is in 177 aging waste tanks that long ago have exceeded
23 their design life. One-third of those tanks have already
24 leaked. Any delay in startup or throughput of the WTP
25 increases the chance of additional radioactive leaks to the

1 environment.

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

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

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

24 At 7:00 a.m. on July 2, 2010, I was suddenly terminated
25 from the WTP job and escorted off the premises after I

1 continued to raise valid safety and technical concerns
2 during a time when Bechtel was attempting to meet a June
3 30th deadline for closing the mixing issue.

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

10 Two days earlier, I submitted a list of nearly 50
11 technical issues, many of which included mixing concerns.
12 On July 2nd, I went into work to finalize the details of my
13 team's next assignment in WTP. I found my e-mail account
14 had been turned off the night before. I was directed to go
15 into an office and told, "Hand over your badge, your
16 BlackBerry, and your phone." I was then unceremoniously
17 escorted off the WTP site. I was not allowed to talk to
18 anyone and could not go to my office to get any of my
19 personal belongings.

20 My termination sent a chill through the WTP and the
21 community. After termination from my WTP job, my employer,
22 URS, assigned me to a basement office that housed two
23 working copying machines. I have been sitting in a basement
24 office now for nearly 16 months. I have little meaningful
25 work and no contact from URS management. I have not been

1 invited to any safety or staff meetings, which are the
2 staple of normal operations.

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

8 I found no help for whistleblowers in the State of
9 Washington, no help from the IG, and very little help from
10 the DOL. The DOE Inspector General was supposed to look
11 into my termination but stopped as soon as they learned I
12 had filed a claim with the DOL. After a year, the DOL time
13 expired, and with no outcome I asked for my case to be moved
14 to Federal court. Any information we received from the IG
15 in DOL was so heavily redacted, it was virtually useless.
16 It will be nearly 2 years before a trial first occurs.

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

21 I wrote a letter to the Defense Nuclear Facilities
22 Safety Board which prompted several investigations and a
23 public hearing last October. The Defense Board has
24 substantiated my technical and cultural concerns. The
25 cultural issues in the WTP with Bechtel surround anyone who

1 challenges Bechtel engineering, especially when cost and
2 schedule is on the line and they can earn fee against it.
3 Even their own survey released last week identified the
4 problems of delay and working difficulties within the WTP.

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

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

24 Despite my career being ended, I would do it again
25 because it was the right thing to do. Given the tools, more

1 people like me will stand up against waste, fraud, abuse,
2 bad practices, and poor quality in Government contracts.

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

5 [The prepared statement of Mr. Tamosaitis follows:]

- 1 Senator McCaskill. Thank you, Dr. Tamosaitis.
- 2 Ms. Canterbury?

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

3 Ms. Garrison. Thank you and good morning. I am the
4 director of public policy at the Project On Government
5 Oversight, or POGO, a 30-year-old nonpartisan, independent
6 watchdog that champions good government reforms.

7 Whistleblowers are the guardians of the public trust
8 and safety and among the best partners in crime fighting.
9 It is well known that whistleblowers have saved countless
10 lives and billions of taxpayer dollars. Studies have also
11 shown that whistleblowers play a bigger role in exposing
12 corporate fraud than auditors, Government regulators, or the
13 media.

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

21 However, the FCA does not cover a host of other
22 wrongdoing, in spite of the Government's huge exposure to
23 these risks given the amount of Federal dollars distributed
24 to non-Federal entities. According to USAspending.gov, out
25 of nearly \$3.8 trillion in the Federal budget, roughly half

1 was spent on prime awards to contractors, grantees, States,
2 and localities.

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

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

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

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

9 The Non-Federal Employee Whistleblower Protection Act
10 of 2001, S. 241, builds on the success of the Recovery Act
11 and mirrors many of its provisions. Introduced earlier this
12 year by Madam Chair McCaskill, along with Senator Webb, S.
13 241 would bridge the wide gaps in current coverage and
14 comprehensively apply best practice protections to employees
15 of all entities that receive Federal funds. Like the
16 Recovery Act, it would do the following:

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

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

23 It would require an Inspector General to review and
24 report all claims of retaliation and investigate non-
25 frivolous claims within a reasonable time frame.

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

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

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

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

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

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

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

1 protections for Federal contractors.

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

4 [The prepared statement of Ms. Canterbury follows:]

1 Senator McCaskill. Thank you very much, Ms.
2 Canterbury.

3 Let me start. I think it is important to focus in on
4 the independent investigation of the Defense Nuclear
5 Facilities Safety Board as it relates to your case, Dr.
6 Tamosaitis. They reviewed 30,000 pages of documents and did
7 45 different witness interviews and then released a report
8 that--and I believe that report was released in June of this
9 year--that was highly critical of Bechtel and the management
10 of safety at Hanford.

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

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

25 Mr. Tamosaitis. Regarding me, no. They have announced

1 that they are going to do another HSS, Health Safety
2 Security survey, but that is as much as I know of.

3 Senator McCaskill. And I assume Bechtel is still in
4 charge?

5 Mr. Tamosaitis. Bechtel is still in charge of the
6 project, yes, Senator.

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

9 Mr. Tamosaitis. Yes, ma'am.

10 Senator McCaskill. And knows that you are not allowed
11 to work even though you are there on site and getting paid?

12 Mr. Tamosaitis. Correct.

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

17 Mr. Tamosaitis. Yes, Senator. Very directly. It is a
18 very visible example of what happens if you speak up.

19 Senator McCaskill. It is just unbelievable to me that
20 we have allowed this to occur. And I know that you have a
21 case in court, but it is--

22 Mr. Tamosaitis. Yes, I want--

23 Senator McCaskill. You know, it would be one thing if
24 this was an initial stage and you did not have this
25 independent review. It would be another thing if this was,

1 frankly, you know--I mean, I am all about trying to save
2 money, but this is about safety. And that is what is really
3 of concern.

4 Mr. Tamosaitis. It is safety and it is billions of
5 dollars, and the reimbursement for Bechtel to be--while they
6 pursue their defense, for example--I am re quoting my verbal
7 testimony, but the survey they released last week cost
8 taxpayers nearly \$2 million.

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

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

17 Senator McCaskill. Were you working--I assume you
18 worked side by side with Federal employees at Hanford, at
19 the waste treatment--

20 Mr. Tamosaitis. Yes, ma'am.

21 Senator McCaskill. Now, if a DOE employee reports
22 waste of Government funds, they are fully protected from
23 retaliation; whereas, it is not clear that you as a
24 contractor employee have that same protection.

25 Mr. Tamosaitis. I am not sure what the DOE employees--

1 what coverage they have. In the State of Washington, there
2 is essentially no whistleblower remedies. The Hanford site,
3 a Supreme Court decision in the State of Washington said
4 that any Hanford whistleblower cases had to take the Federal
5 route and go to the DOL.

6 Senator McCaskill. Right.

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

12 Senator McCaskill. So is the Government reimbursing
13 Bechtel for the costs of the legal suit against you, do you
14 know?

15 Mr. Tamosaitis. Yes. It is my clear understanding
16 that they are being reimbursed, and it is my understanding
17 that if they are found guilty, they could have to repay.
18 But if they are not found guilty, which means if they settle
19 at the end of whatever period of time and admit no guilt,
20 they are fully reimbursed. The survey, again--

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

23 Mr. Tamosaitis. I do not know that.

24 Senator McCaskill. Ms. Canterbury, do you know what
25 the situation is? And is this common that the Government is

1 funding the defense for these cases across the board for
2 contractors?

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

7 Senator McCaskill. So we need to look into that. We
8 need to ask some significant questions of DOE about who is
9 paying for the defense of this case and whether or not
10 taxpayers are--

11 Mr. Tamosaitis. It is my--we can look into it also,
12 Senator. It is my clear understanding they are being
13 reimbursed for it.

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

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

25 Mr. Tamosaitis. They were heavily redacted. Very

1 difficult to understand for the information that we
2 received. My understanding is Bechtel and URS did not
3 provide full information, and I do not have a summary of the
4 totality of what they provided.

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

8 Mr. Tamosaitis. No, Senator, I do not know what they
9 looked at. I will say that the Defense Board was the only
10 group that looked at the issue in a timely manner and
11 identified the issue correctly.

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

14 Mr. Tamosaitis. Yes, ma'am.

15 Senator McCaskill. So you had the Safety Board that
16 did the job they were supposed to do, and then you have had
17 to turn to the courts because the administrative--which, of
18 course, we have designed the administrative process in order
19 to try to avoid the courts, and, clearly, that is not
20 working out.

21 Mr. Tamosaitis. Again, the administrative process
22 internally, Bill Taylor of the ECP, Employee Concerns
23 Program, told me to seek help outside, which I did.

24 Senator McCaskill. So, in fact, the people who are
25 tasked with the administrative process are the ones who

1 advised you, you know, Get out of Dodge, so to speak, and
2 get into the civil court system because the administrative
3 system is not going to be adequate in terms of addressing
4 your problem?

5 Mr. Tamosaitis. Correct. One hundred percent correct.

6 Senator McCaskill. Okay. Thank you very much.

7 Senator Portman?

8 Senator Portman. Thank you, Madam Chair, and I
9 appreciate the testimony.

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

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

19 You have got the False Claims Act, which you mentioned,
20 and that gives whistleblowers the right to file the suits
21 against contractors. "Qui tam" I think is the Latin for it,
22 the qui tam suits, and then others for defrauding the
23 Government. So it can be a suit against contractors or
24 anyone, right, for defrauding the Government? And then
25 there is the DOD statute we talked about earlier, Section

1 2409, and for the civilian agencies, FAR 3.9, which
2 prohibits any contractor from "discharging, demoting, or
3 otherwise discriminating against" an employee for reprisals
4 for reporting substantial violations of law related to a
5 contract, and complaints under those provisions are brought
6 to the IG, as we heard about earlier, of the relevant
7 agency, so the Inspector General in this case of DOE.

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

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

22 Beyond that, there are no time limitations on
23 investigations that might be conducted by an IG, no time
24 limitation on agency actions, so it is conceivable that
25 there could be interminable limbo for a whistleblower who

1 might try to rely on those protections. And as I said, I
2 would not advise any contractor to do so.

3 In terms of cases in which with better protections we
4 might have had more accountability or the whistleblower
5 might have found justice, it is very hard to say. In fact,
6 most of the cases of which we are aware have come under the
7 False Claims Act. Because of its underlying very strong
8 public policy, that is the avenue through which most
9 contractors have sought to bring to light instances of fraud
10 or to seek protections from retaliation. And so those are
11 the cases we are most familiar with, and I think that there
12 are certainly many, many more who have not come forward at
13 all, and billions in taxpayer dollars that have been wasted.
14 I believe the public has been put in jeopardy in terms of
15 health and safety because there has not been a strong public
16 policy for whistleblowers.

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

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

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

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

15 Ms. Canterbury. Yes.

16 Senator Portman. --helped to clean up the Federal
17 side. But we have not done that on the non-Federal side.

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

25 Mr. Tamosaitis. The project, no. The project has

1 award fees in it. It is not a cost-plus. It is a capital
2 project. They have intermediate milestones and I will say
3 incentives for meeting various targets.

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

6 Mr. Tamosaitis. Well, no, I would say not fixed cost.
7 It is going up by billions.

8 Senator Portman. Yes, that is what it sounded like
9 from what you said earlier.

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

19 Senator Portman. Yes, well, I appreciate that, and I
20 am not expecting you to be the lawyer on this, but I do
21 think some of the waste that we hear about in this
22 Committee, talking about contracting generally and some of
23 the things that you raised, are related to the incentives.
24 As you said earlier, companies who are paid to build
25 something and then when it does not work are paid to fix it

1 would be another example of that, where the structure of the
2 contract itself leads to some of these excessive taxpayer
3 payments that you typically would not see in the private
4 sector on a fixed-cost basis.

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

21 In answer to an earlier question on the adequacy of the
22 whistleblower laws, I think the laws clearly have to be
23 improved, stepped up. There is also for the management of
24 the company, attention needs to be given on that side
25 because what really provides a memory is publicity and

1 money. So if they--I will say not so much the law may be
2 written, sitting on a shelf. So the companies need to see
3 that there is a sting to them and money will be memory as
4 well as the bad publicity. And until the management of the
5 companies see that, it is a continual uphill battle.

6 Senator Portman. Well, thank you both for your
7 testimony. I appreciate it.

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

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

25 The one thing I would say to you, Ms. Canterbury, you

1 know, we have this chart that we prepared for this hearing,
2 and this is the various different provisions for
3 whistleblowers in different parts of the law--who is
4 protected, what disclosures are protected, who to disclose
5 to, additional protections and remedies. And they are
6 different. And one of the things I would really like to see
7 us get done in S. 241 is to clean up this patchwork, because
8 how in the world can we expect people to know what their
9 rights are if it depends on which contract you are working
10 under, where you are working, whether you are in stimulus
11 dollars, or whether you are DOD? Our attempt to try to
12 clean this up, all of this was done with good intentions.
13 It is like our job training programs. We have got 47, 48 of
14 them, and every one of them was created by a Member of
15 Congress that had good intentions in terms of job training.
16 But we have created this labyrinth of job training that
17 ultimately falls in terms of its effectiveness because of
18 the weight and complexity of the myriad programs.

19 So any help that your organization can give us in terms
20 of making sure that what we have done with S. 241 is to try
21 to clean this up--and it is complicated by the fact that
22 Issa's bill has a pilot program for contractors, which I
23 think we know we do not need a pilot program. And Senator
24 Akaka's bill does not include contractors at all. So we
25 have right now in Congress three different pieces of

1 legislation that are going to make this worse, not better.
2 So hopefully we can all get together and try to clean this
3 up because I think that is how we are going to get to more
4 effective protection of whistleblowers and ultimately then
5 more effective expenditure of Federal dollars.

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

8 Ms. Canterbury. Thank you.

9 Mr. Tamosaitis. Thank you.

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