GOVERNMENT ACCOUNTABILITY PROJECT

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Government Accountability Project Defends Park Service Whistleblower in *Amicus Brief*

GAP joins legal defense team of embattled Park Service Chief, Teresa Chambers

Washington, D.C. -- With hard earned whistleblower protection rights under attack, the Government Accountability Project (GAP) challenged prohibited actions taken by the US Park Service against Chief Teresa Chambers in an *amicus* brief (see attached) filed with Paul Hoffman, Deputy Assistant Secretary of the Interior Department's Fish and Wildlife and Parks Division on January 23, 2004. Mr. Hoffman has threatened to fire Park Service Chief Teresa Chambers for warning the public about funding priorities that led to reduced patrols by federal law enforcement officers. The *amicus* brief contests the actions of the US Park Service and raises the spectre of a chilling effect on federal managers who are charged with protecting public health and safety.

"Chief Chambers was simply doing her job as she commented on the need for more resources," said GAP Legal Director, Tom Devine. "Her right to warn the public is protected speech in the workplace. And yet, the Park Service chooses to derail the career of a respected and effective law enforcement official. By filing this *amicus* brief, we are standing up for Chief Chambers and whistleblowers similarly situated throughout the federal government."

Chief Teresa Chambers has been the subject of numerous news reports. As the first female leader of 620 law enforcement officers in the US Park Service, Chief Chambers has been charged by her superiors with improperly lobbying Congress and disclosing secret details of her budget to protect the national parks and property in and around Washington, D.C. In a public comment with the media, Chief Chamber pondered the challenges to protect the public with reduced numbers of law enforcement personnel. Since late December, Chief Chambers has been placed on leave. The Park Service has publicly confirmed that it intends to fire her for violating agency policies.

GAP's *amicus* brief argues that, as a matter of law and based on the public record of the Park Service's dispute with Chief Chambers, the Park Service has deliberately violated merit system principles. Some of these violations are outlined below:

1) Under the Whistleblower Protection Act, the Park Service cannot terminate Chief Chambers because she reasonably believed her disclosure in the media evidenced "a substantial and specific danger to public health or safety" due to increased danger due to lack of police protection in the parks.

2) Under First Amendment protections, public employees have free speech rights in the workplace. Unless the agency can prove dire consequences from a public comment by an employee, Chief Chambers cannot be prohibited from warning the public of increased vulnerability due to fewer police officers in the Park Service law enforcement division.
3) Under the Lloyd-LaFollette Act, the Park Service, as in Chief Chambers' case, cannot terminate an employee for communicating with Congress. The free flow of information is essential for Congress to oversee government functions and make informed, responsible spending decisions on behalf of taxpayers. Since 1912, the Lloyd LaFollette Act has been the shield protecting Congress' "right to know."
4) Under the Lloyd-LaFollette appropriations statute, the Park Service is prohibited from paying a salary to any Federal employee who attempts to inhibit another employee's communication with Congress or attempts to discipline an employee for having done so.
5) Under an Anti-Gag statute in section 622 of the Treasury, Postal and General Government bill, the Park Service has illegally spent federal funds trying to implement and enforce agency gag regulations contradicting Whistleblower Protection Act and Lloyd-Lafollette rights.
6) Finally, an investigation should be launched to determine whether the Park Service is seeking actions against Chief Chambers because she refused to illegally retaliate against another whistleblower on her staff.

Tom Devine, a leading legal expert on whistleblower law, put the public policy significance of the Chambers' case in perspective: "There will be a dangerous silence in Washington, D.C., and throughout the country, if law enforcement officials can be fired for alerting the public about the consequences of spending decisions."

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As the nation's leading whistleblower organization, The Government Accountability Project's mission is to protect the public interest by promoting government and corporate accountability through advancing free speech in the workplace and challenging abuses of power that betray the public trust, litigating whistleblower cases, and developing policy and legal reforms of whistleblower laws. For more information, visit ***www.whistleblower.org*** *.*

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January 23, 2004

Paul Hoffman
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Re: Teresa Chambers

Dear Mr. Hoffman:

The Government Accountability Project (GAP) transmits this *amicus* submission in support of Chief Teresa Chambers' response to her December 17, 2003 proposed termination. After review of the charges and a January 9 response from Chief Chambers' attorneys, the record demonstrates six prohibited personnel practices as a matter of law, with investigation appropriate for a seventh. Without taking a position on factual disputes, the proposal cannot coexist with the merit system.

GAP normally would not submit views on a whistleblower dispute until there has been final agency action. This case is extraordinary, however, for two reasons. First, a law enforcement official is on the verge of being fired for warning the public that there are fewer police patrolling federal parks, roads and property. This threatens federal employees' freedom to warn citizens about increased vulnerability to crime due to resource shifts. Most fundamental, citizens have a right to know whether they are being exposed to increased crime threats, the same as whether the terrorist threat is a "Code Orange" or "Code Yellow."

Second, the law enforcement manager is being fired for communicating with congressional staff about the effects of budget decisions and resource needs to adequately protect the public. Congress has a right -- nonnegotiable need -- to know this information. This is the normal dialogue for government to be functional. It is not realistic to make informed spending decisions for the taxpayers' money, if government officials are fired for talking with congressional staff.

These issues go well beyond alleged violations of the Whistleblower Protection Act, or even good government disputes. The actions threaten to lock in blanket secrecy through sweeping gag orders that could undermine basic government service. The Park Service proposal threatens to create a chilling effect on other federal law enforcement managers throughout the Executive branch, as normal communications become potential

firing offenses. The Whistleblower Protection Act was written to protect legitimate instances of secrecy. But government in the dark can be dangerous. If there is to be a watershed change of this type in the rules of the game, it should come from the President and Congress, not through termination of a police chief.

INTEREST OF *AMICUS*

The Government Accountability Project ("GAP") is a non-partisan, non-profit public interest law firm specializing in legal advocacy on behalf of "whistleblowers" — government or corporate employees who expose illegality, gross waste and mismanagement; abuse of authority; substantial or specific public health and safety dangers; or other institutional misconduct undermining the public interest.

GAP has expertise in the Act's provisions and implementation, providing oversight for protecting government employees' free speech rights. GAP attorneys have testified before Congress over the last two decades concerning the effectiveness of existing statutory protection, filed numerous *amicus curiae* briefs on constitutional and statutory issues relevant to whistleblowers, and played a leading role in advocating the Whistleblower Protection Act of 1989, P.L. 101-12, 103 Stat. 16 (April 10, 1989) ("WPA"), as well as the WPA's 1994 amendments. GAP has published material concerning the WPA and its practical realities. *See, e.g.*, Thomas M. Devine, *The Whistleblower's Survival Guide: Courage Without Martyrdom* (1997); Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L.REV. 531 (1999).

GAP played a similar role in passage of the provisions to protect whistleblowers at publicly traded corporations in the Sarbanes-Oxley reform law, providing expert technical assistance to congressional staff and leading the outside campaign for its passage. GAP also speaks on behalf of the State Department at international programs advocating whistleblower rights in other nations, and co-authored a model law approved by the Organization of American States to implement its Inter-American Convention Against Corruption. *See, e.g.,* Vaughn and Devine, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers,* 35 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 857 (2003).

Amicus believes this case could set a precedent that immediately cancels public safety experts' right to make disclosures warning of substantial and specific threats to public health or safety. That interpretation likely would spread to shrink the scope of analogous statutes protecting employees in the corporate, state and local and international sectors. If the matter is not resolved in a responsible manner at the administrative level, this case could represent a crisis threatening the integrity of merit system rights in particular, and whistleblower rights more generally in all employment sectors.

Precedents the Park Service seeks through this termination would be incompatible with continued legitimacy not only for the Whistleblower Protection Act, but laws necessary for normal government operations. Examples include the Lloyd-Lafollette Act (Congress right to know); and the anti-gag statute (supremacy of statutory good government laws over agency gag orders). Our specific concerns are summarized below.

FACTUAL CONTEXT

While GAP has not conducted an independent investigation of the facts in this dispute, the following allegations in Chief Chambers's attorneys' response raise severe concerns about the appearance of retaliation. To illustrate, her attorneys allege --

* The action against Chief Chambers began three hours after she filed an internal, written disclosure of mismanagement by her supervisor.

* The charges are swollen with a kitchen sink of stale issues that had not been raised, even as a subject of counseling, until her disclosures of public safety threats.

* Her disclosures to Congress and the media were consistent with those normal communications made by her predecessors and analogous law enforcement officials.

* The chief had acted in good faith, keeping the agency fully apprised of her communications.

* When the chief informed agency officials of her intended disclosures, no prior objections or concerns were raised.

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* There were not even any alleged adverse consequences from the chief's actions, and no remedial actions were taken to compensate for her disclosures.

* The charges are discredited by inherently impossible allegations of misconduct, such as accusing Chief Chambers of not attending a meeting that was canceled, or lobbying for legislation that had not been introduced.

* Chief Chambers and top aides had been subject to what they described as harassment by "internal terrorists" from an "old boys network" who resented her appointment as a woman and someone from outside the chain of command. Tactics included office break-ins, mass deletion of computer entries, stolen personal property, nails under tires, used condoms placed on or around vehicles; and pepper spray of a deputy's office door while he was conducting a meeting inside.

While there have been no findings of fact or third party investigations, the media has widely covered the details of Chief Chambers' proposed termination, including issues listed above. As a result, there is a severe danger of an abnormally broad chilling effect throughout the federal law enforcement profession if this termination is finalized. Under the circumstances, the Park Service should not act precipitously, without a thorough, independent investigation of disputed facts. A rush to judgment would freeze the chilling effect already created by the Park Service.

VIOLATIONS OF MERIT SYSTEM PRINCIPLES

Independent of disputed facts, this proposed termination constitutes six prohibited personnel practices based on the charges as stated. A seventh prohibited personnel practice merits full investigation. Our concerns are summarized below.

* Whistleblower Protection Act: Under 5 USC 2302(b)(8), it is a prohibited personnel practice to take a personnel action because of a disclosure that the employee reasonably believes evidences, inter alia, "a substantial and specific danger to public health or safety." The legal elements are well established, Salinas v. Department of Army, 94 MSPR 54 (2003), and referenced in the survey below of undisputed facts.

The agency has not disputed that Chief Chambers was accurately disclosing a substantial and specific public safety threat when she revealed risks from severe budget cutbacks in the number of Park Police guarding federal parklands and highways. Nor is there any dispute about agency knowledge or a causal link between her disclosures and the challenged personnel action. The agency is accusing her of the disclosures, as the basis to terminate her. (Charges 1-4)

While the action could still be lawful if the agency demonstrated an independent justification through clear and convincing evidence, 5 USC sections 1214(B)(4)(B)((ii) and 1221(e)(2), that is not realistic here. The only timely accusations cited as a basis for termination are her disclosures. The agency contends that her disclosures violated an Office of Management and Budget Circular No. A-11. Charge 3. But even if true, it has been established since passage of the Civil Service Reform Act of 1978 that only a statutory prohibition can cancel whistleblower free speech rights, not a rule or regulation. 5 USC 2302(b)(8).

In some circumstances WPA protections do not apply to employees who are merely performing their job duties by making the disclosures**.** Willis v. Department of Agriculture, 141 F.3d 1139 (Fed. Cir. 1998). That objection cannot apply in this dispute, however. In its charges, the agency specifically defines Chief Chambers' job duties as excluding the congressional and media disclosures for which her firing is proposed. The Park Service has waived this defense, by personally redefining her position to exclude normal communications with Congress and the public. (Charges 1-4).

Further, recent Merit Systems Protection Board ("MSPB" or "Board") case law has emphasized that WPA rights do not apply to dissent against policy. White v. Department of Air Force, MSPB No. DE-1221-92-0491-M-4) (slip op. Sept. 11, 2003). Chief Chambers' disclosures did not constitute dissent against policy, however. For example, she did not criticize the judgment that Park Police are needed more for post 9/11 special assignments than for traditional law enforcement patrols. In response to questions at scheduled interviews, she merely disclosed her expert professional opinion about the *consequences* from a policy.

* First Amendment. Since 1968, public employees have had first amendment rights, Pickering v. Board of Education, 391 U.S. 563 (1968). Under civil service law, constitutional rights are enforced through 5 USC 2302(b)(12), which makes it a prohibited personnel practice to "take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title." Saul v. United States, 928 F.2d 829, 833 (9th Cir. 1991):"Congress did expect 'prohibited personnel practices' to cover supervisors' violations of employees' constitutional and

privacy rights," *citing* H.R. Conf. Rep. No. 95-1717 (1978), 1978 U.S. Code Cong. & Admin. News 2860, 2863).

Since Pickering and subsequent established precedents, a public employee has free speech rights, even through the chain of command on the job, Givhan v. Western Line Consolidated School District, 93 S. Ct. 693, 697 (1979). The public's right to know must be balanced on a case-by-case basis; however, with the disruption it creates for management efficiency. In this instance that balance is self-evident. The public has been warned about increased vulnerability to crime due to fewer police, and the Park Service has not raised any specific adverse consequences. Chief Chambers is being fired as a matter of principle -- an unconstitutional principle.

* Lloyd-Lafollette Act 5 USC 7211 provides, "The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

This provision implements merit system principles as the congressional right to know law. It does not have any qualifiers or restrictions, because the free flow on information is necessary for Congress to uphold its legislative oversight function and make informed, responsible spending decisions on behalf of the taxpayers. The agency's charges specifically accuse Chief Chambers of communicating with Congress, as a basis to propose termination. (Charge 1) The charges cannot coexist with section 2302(b)(12).

* Lloyd-Lafollette Appropriations Statute: Congress annually passes an enforcement mechanism shielding its right to know. Section 620 of the Treasury, Postal and General Government Appropriations Law has the following spending ban that also directly concerns merit systems principles.

> No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who--
> (1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee; or
> (2) removes, suspends from duty without pay, demotes, reduces in rank, seniority, status, pay, or performance of efficiency rating, denies promotion to, relocates, reassigns, transfers, disciplines, or discriminates in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any other officer or employee of the Federal Government, or attempts or threatens to commit any of the foregoing actions with respect to such other officer or employee, by reason of any communication or contact of such other officer or employee with any Member, committee, or subcommittee of the Congress as described in paragraph (1).

On their face, the Park Service charges against Chief Chamber constitute a literal violation of section 620, and should result in personal salary accountability for violators. That means not only is the proposed termination a merit system violation, but the agency is illegally spending federal funds in its effort to fire Chief Chambers.

* Violation of the Anti Gag Statute. Since 1988, a related provision of the Treasury, Postal and General Government bill has become known as the "anti gag statute." It forbids spending to implement or enforce any nondisclosure policies not accompanied by the following addendum upholding the supremacy of the Whistleblower Protection Act, Lloyd-Lafollette Act, and other good government laws, over administrative restrictions on speech:

> Sec. 622. No funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Forms 312 and 4414 of the Government or any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: "These restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, U.S.C. (governing disclosures to Congress); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Code, as amended by the Whistleblower Protection Act (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by said Executive order and listed statutes are incorporated into this agreement and are controlling."

By continuing resolution of the Congress, Sec. 622 remained in effect until yesterday's passage of the Transportation and Treasury Appropriations Act of 2004, which contains substantially similar language to Section 622. See H.J. Res. 82 (Jan. 7, 2003)

None of the nondisclosure policies cited by the Park Service in Charges 1-3 have the legally required addendum, which may explain the sweeping, irresponsible way those policies have been interpreted. It also means, however, that due to this procedural omission, the Park Service has illegally spent federal funds trying to fire Chief Parks.

* Reprisal for exercise of appeal rights. This violation suggests basic merit system training may be badly needed at the Park Service. 5 USC 2302(b)(9)(A) prohibits taking or failing to take a personnel action "because of the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation."

The Park Service proposes to fire Chief Chambers in part, because she "appealed to Deputy Secretary Griles and convinced him to cancel my instructions that [a key aide] be detailed to the

Office of Strategic Planning." (Charge 6 Specification) The charge is worded to constitute a literal admission of violating section 2302(b)(9).[1]

GAP has intervened in this dispute at an early stage and independent of disputed facts, because of the potential consequences of this precedent. It would create a dangerous silence if law enforcement officials no longer have the freedom to warn the public that fewer police are guarding government roads and parks. We are available for a full briefing with your staff on our legal concerns as to how this action threatens the merit system. Our good offices are available to help resolve the dispute, if desired. To demonstrate good faith, we hope at a minimum that your office will seriously consider and explain in any decision how the final action respects the fundamental rights discussed in this submission. Thank you for any consideration of our views.

Respectfully submitted,

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[1] In Charge 5 the Park Service accuses Chief Chambers of refusing to carry out an order to detail the aide. Since the detail would have been involuntary and the aide had made whistleblowing disclosures along with Chief Chambers about budget improprieties, there is real concern whether the agency is charging her with refusing to violate the law by retaliating against another whistleblower on her staff. Under 5 USC 2302(B)(9)(D), it is a prohibited personnel practice to take a personnel action "for refusing to obey an order that would require the individual to violate a law." Any agency investigation of this dispute should consider whether the proposed termination is for refusing to engage in illegal whistleblower retaliation.