January 16, 2009

Memorandum
To: Obama transparency transition team
From: Tom Devine, GAP legal director, tomd@whistleblower.org; 240-888-4080
Re: Robert MacLean fact sheet

Robert MacLean was a 10 year federal law enforcement officer, and U.S. Department of Homeland Security (DHS) Federal Air Marshal (FAM) with an unblemished record. In July 2003, he successfully blew the whistle on plans to secretly neutralize budget shortfalls by canceling long distance air marshal coverage during a suicide terrorist hijacking alert. After public congressional pressure, DHS's plans were canceled. On April 11, 2006, the agency fired him for using previously-undesignated Sensitive Security Information (SSI) in the 2003 disclosure. That illustrates two serious issues requiring visible policy and legislative reform: 1) a pervasive bureaucratic culture of retaliation against whistleblowers whose primary loyalty is to their public service mission rather than their government agency; and 2) abuse of uncontrolled hybrid secrecy categories to block or punish the flow of unclassified information. His case is pending before the Merit Systems Protection Board (MSPB) under the Whistleblower Protection Act (WPA). Supporting documents are available however the transition team would find helpful. His experience is illustrative of "Paul Revere" national security whistleblowers.

* In late July 2003, Mr. MacLean received a DHS intelligence warning of an imminent terrorist suicide hijacking threat. It was so severe that FAMs were mandated to attend unprecedented, one-on-one threat briefings in their field office regardless of their duty status. No successful attacks were carried out, but a subsequent DHS report confirmed the plans.

* In late July Mr. MacLean also learned that nonetheless due to a budget shortfall (caused by suspect contract spending), 60 days of FAM coverage would be canceled from August 2 until the fiscal year ended on September 30, 2003 for the highest risk, long distance flights, because they required overnight accommodations. He protested to a supervisor, and to three DHS Office of Inspector General field offices, all whom declined to act and said he should drop the issue.

* Mr. MacLean then disclosed to a media representative the TSA text message canceling coverage. Other media quickly picked up the story, which spread and sparked outraged bipartisan congressional protests. Less than a day after the initial news story, the TSA canceled the plans to eliminate coverage, publicly explaining that its orders to FAMs had been "a mistake."

* Almost three years later, the TSA fired Mr. MacLean on April 11, 2006, specifically because his disclosure was SSI. The TSA justified its position through an ad hoc order issued on August 31, 2006 (three years after his disclosure – four months after his termination), that the text message was SSI. When he disclosed the message, there had been no markings indicating that the information was classified, SSI, or in any way restricted. It was not sent by secure means.

The FAMS also fired Mr. MacLean despite the anti-gag statute, which since 1988 as an annual appropriations rider has banned government spending to implement or enforce agency non-disclosure rules conflicting with the WPA, including protection for public disclosure unless information specifically has been marked as classified.[1] This law originally was in response to a

[1] Language for the current anti-gag statute is from Section 719 of H.R. 2764; Public Law 110-161), the Financial Services and General government Appropriations Act of 2008: 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

Reagan era National Security Decision Directive requiring prior approval to release any "classifiable" information that "could" or "should" have been classified. [2]

As an appropriations rider, the anti-gag statute does not have a remedy for individuals victimized by its violation. This legal loophole, and the MacLean case, present two opportunities: First, HR 985, pending WPA legislation, makes the anti-gag statute a permanent merit system right with a remedy. The Obama Administration can help solve the structural loophole by reinforcing its quick passage. Second, the MacLean case offers an opportunity to send a quiet message that managers would hear loud and clear: end illegal DHS funding to keep enforcing anti-gag statute through litigation to fire Mr. MacLean.

That quiet anecdotal leadership would have an immediate impact to set the stage for structurally restoring a significant free speech boundary. Like "classifiable," the TSA's use of SSI creates a back door "Official Secrets Act" through unconstitutional prior restraint. First, the free speech restriction is boundless (anything "detrimental to the security of transportation"); 2) the information does not have to be marked until after-the-fact. That means the only way to be safe from later liability is to obtain advance permission. Mr. MacLean's experience makes him a poster child for quick action to precede structural reform for a functional First Amendment.

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[1] Legislation Needed to Curb Secrecy Agreements, HR Rep. 100-91 (100th cong. 2d Sess.

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[2] *Legislation Needed to Curb Secrecy Agreements,* HR Rep. 100-91 (100th cong. 2d Sess.