

## APPENDIX

### GOVERNMENT ACCOUNTABILITY PROJECT STATEMENT ON NASA MEDIA POLICY

January 30, 2007

NASA and other agencies have trumpeted new media policies as proof of their good intentions and new-found respect both for scientific freedom and freedom of speech. Indeed, the policies have appealing rhetoric that can help change bureaucratic attitudes. That matters. Depending on the political cycle, the rhetoric could be sufficient to sustain an open environment within scientific agencies.

Unfortunately, the policies' fine print exposes them as a trap that could be used to fire, or potentially prosecute, almost any scientist if the political environment becomes hostile again. First let's consider what's in them. The Achilles' heel is a loophole that cancels all the new free speech rights if a scientist discloses information in new, pseudo-classified, hybrid secrecy categories. These categories, with new names such as "Sensitive but Unclassified" or "Sensitive Security Information," do not purport to have the national security significance of classified documents. In fact, they are just new names for longstanding categories like "For Official Use Only," that primarily are secrecy shields of convenience for virtually any information the agency wants to keep off the market of public discourse, either to control timing or avoid embarrassment. Although the SBU or SSI brands can be issued arbitrarily, the potential criminal liability can be even more severe than for genuinely classified information.

Even worse, information can be designated as SBU or SSI after-the-fact. For example, one GAP air marshal client has been fired three years after the fact for disclosing Sensitive Security Information, even though it was not marked as restricted at the time. The whistleblower was challenging a security breakdown, and his dissent was vindicated as the agency quickly canceled a reckless decision when it became public. Depending on the next election results or other factors that should be irrelevant, under NASA's fraudulent media policy reform, every NASA scientist communicating with this committee could be fired several years from now for disclosing Sensitive but Unclassified information.

Not only is the policy disingenuous, it is illegal. It violates the Whistleblower Protection Act on its face, because that law only permits blanket restrictions on public speech if information is properly classified.

Let's also consider what the policy doesn't include. The Anti-Gag Statute, an appropriations rider passed unanimously by Congress for the last 18 years, bans any spending to implement or enforce any nondisclosure policy, form or agreement, unless it also has an addendum with specific congressional language that, in the event of a conflict with the policy, the Whistleblower Protection Act and the Lloyd LaFollette Act protecting safe communications with Congress will supersede any contradictory language and prevail. The NASA media policy does not contain this addendum. Any funds spent to implement and enforce it have been and will be illegal expenditures.

There is no possibility that this was a good faith error. GAP's legal director Tom Devine spent over an hour tutoring the NASA Office of General Counsel lawyer who wrote the phony reform, both on the requirements of the Whistleblower Protection Act and the Anti-Gag Statute. The lawyer reassured GAP that he understood what those laws required. But NASA issued a policy that is a custom fit for violating these fundamental merit system and whistleblower rights for scientific freedom. The illegality is deliberate.

Legislation co-sponsored in the last Congress by Representatives Waxman, Davis, and Platts and marked up unanimously in committee (H.R. 1317 and H.R. 5112) directly addresses this type of back door scientific repression. It codifies and provides a remedy for the Anti-Gag Statute, and establishes checks and balances on the currently-unrestrained use of pseudo-classification gag orders. The media policy's fine print illustrates why your committee should act immediately to pass this badly needed reform. The committee also should have GAO audit how much money has been spent illegally to implement and enforce the NASA media policy. An April 1, 2006, memorandum GAP prepared on the policy is attached.

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## MEMORANDUM

**To:** Climate Scientists  
**From:** Government Accountability Project  
**Re:** Analysis of NASA's Recently Released Media Policy

The Government Accountability Project (GAP) is issuing advisory comments on NASA's new media policy that it released yesterday, March 30. The new policy came in response to public outcry over NASA's suppression of climate science research inconsistent with the Bush administration's political agenda. NASA is touting the development as a free-speech breakthrough for agency scientists.

GAP identified the areas ***in which the new policy is an improvement:***

- NASA Administrator Michael Griffin's reassuring rhetoric is of symbolic value, demonstrating official respect for scientific freedom.
- The new media policy does not cover scientific reports, web postings, or professional dialogue such as at conferences, allowing scientists to share information with their colleagues without going through public affairs political appointees.
- The policy officially recognizes the free speech right for scientists to express their "personal views" when they make clear that their statements are not being made on behalf of NASA.

However, ***in six critical areas the new policy falls short*** of genuine scientific freedom and accountability, and potentially undermines the positive guarantees:

- While recognizing the existence of a "personal views" exception, the policy doesn't announce the circumstances when that right cancels out conflicting restrictions, which are phrased in absolute terms applying to contexts such as "any activities" with significant media potential. This leaves a cloud of uncertainty that translates into a chilling effect for scientists.
- The policy fails to comply with the legally-mandated requirements of the Anti-Gag Statute to explicitly include notice that the Whistleblower Protection Act and Lloyd Lafollette Act (for congressional communications) limit and supersede its restrictions.
- The policy institutionalizes prior restraint censorship through "review and clearance by appropriate officials" for "all NASA employees" involved in "preparing and issuing" public information. This means that scientists can be censored and will need advance permission from the "appropriate" official before anything can be released.
- The policy defies the WPA by requiring prior approval for all whistleblower disclosures that are "Sensitive But Unclassified" (SBU). The legal definition of SBU is broad and vague, to the point that it can be interpreted to sweep in virtually anything. The WPA

only permits that restriction for classified documents or those whose public release is specifically banned by statute.

- The policy bans employees' free speech and WPA rights to make anonymous disclosures, requiring them to work with NASA public affairs “prior to releasing information” or “engaging in any activities or events... that have the potential to generate significant media or public interest or inquiry.”
- The policy gives NASA the power to control the timing of all disclosures, which means scientists can be gagged until the information is dated and the need for the public to know about critical scientific findings has passed.

In December of last year, NASA climatologist Dr. James Hansen was threatened with “dire consequences” by a political appointee for statements he made about the consequences of climate change. According to GAP’s legal director, Tom Devine, “Under this so-called reform, Dr. Hansen would still be in danger of ‘dire consequences’ for sharing his research, although that threat is what sparked the new policy in the first place. The new policy violates the Whistleblower Protection Act, the Anti-Gag Statute, and the law protecting communications with Congress, the Lloyd-Lafollette Act. The loopholes are not innocent mistakes or oversights. GAP extensively briefed the agency lawyer on these requirements, who insisted he understood them fully. NASA is intentionally defying the good government anti-secrecy laws.”