

February 25, 2020

The Honorable Mitch McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Charles E. Schumer
Minority Leader
United States Senate
322 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
1236 Longworth House Office Building
Washington, D.C. 20515

The Honorable Kevin Owen McCarthy
Minority Leader
U.S. House of Representatives
2468 Rayburn House Office Building
Washington, DC 20515

The Honorable Steny Hoyer
Majority Leader
U.S. House of Representatives
1705 Longworth House Office Building
Washington, D.C. 20515

Dear Congressional Leaders:

The undersigned organizations from the Make It Safe Coalition's Steering Committee write to seek your leadership on whistleblower rights, which are the foundation for congressional oversight and Executive Branch accountability. The last year has seen dramatic advances internationally, as a global consensus has emerged that whistleblowers are society's most effective resource against corruption and abuses of power.

Unfortunately, despite four unanimous mandates for rights in the Whistleblower Protection Act, they have become dysfunctional in the United States, and the longstanding bi-partisan consensus for protection is endangered. While our organizations have widely differing political and policy views, we all agree freedom of speech for those who challenge abuses of power is essential for democracy. Significant whistleblowing disclosures can threaten short-term political interests of either party. That also means safe channels for the free flow of lawful, responsible disclosures are the best resource against such abuses of power.

The United States was the pioneer creating whistleblower rights in 1978. Yet, while other nations are expanding the scope and strength of whistleblower protection, our bi-partisan Whistleblower Protection Act (WPA) is at severe risk of complete breakdown.

RESTORE THE MERIT SYSTEM PROTECTION BOARD

The most obvious symptom is that the Merit Systems Protection Board (MSPB) is dysfunctional. The Board has a monopoly on WPA due process enforcement, but because the Senate did not act on highly qualified nominees in 2015, since January 2017 the Board has been unable to issue decisions. The result is an expanding backlog currently at over 2,500 cases. And because the Senate has not acted on any of three pending nominations, two of which are noncontroversial, currently the Board has no Members. This means the Office of Special Counsel cannot seek stays for temporary relief against retaliation. When

employees prevail after administrative hearings their victories remain indefinitely in limbo while agencies petition for review by a nonexistent Board. This is unprecedented. Previously the Board has operated effectively for extended periods with two Members. Due to a related constitutionality challenge, until the Board has Members there may not even be the opportunity for an administrative hearing to challenge violations. The Whistleblower Protection Act is on the verge of paralysis.

FINISH WHAT CONGRESS STARTED IN THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT

Even if the Board were staffed, the Whistleblower Protection Act is compromised by an unacceptable irony. Federal employees who blow the whistle make the nation's most significant disclosures, but have the weakest rights of any significant sector of the labor force. We believe the following additional teeth are necessary for the WPA to achieve its mandate.

* *Jury trials*: Federal whistleblowers are the only significant segment of the U.S. labor force who cannot seek justice from a jury to defend themselves against retaliation. To make matters worse, their administrative remedy is dysfunctional with a 2,500 case backlog. Federal whistleblowers make the disclosures most important for America, but they have the weakest due process rights to defend themselves against retaliation. Congress should give whistleblowers and all congressional witnesses the same access to juries that it has enacted in every corporate whistleblower law since 2002.

* *Retaliatory investigations*: Witch-hunts are the foundation for nearly all retaliation, and the knee jerk reaction to threatening disclosures. They can hang over the employee's head indefinitely, and graduate into referrals for criminal prosecution, outside the WPA's scope. Unlike nearly all of America's other laws, including even the Military Whistleblower Protection Act, federal employees cannot challenge retaliatory investigations until there has been a subsequent personnel action. They should have the right to nip retaliation in the bud.

* *Temporary relief*: Federal employees do not have a realistic chance to obtain temporary relief in lawsuits that routinely take years to complete. By then, it may be too late for the whistleblower who has lost home, family, professional credibility, and even gone bankrupt. Extended litigation also prolongs unnecessary disputes, because there is no incentive for the government to settle. The WPA should provide temporary relief whenever whistleblowers meet the legal standard for a *prima facie* case. When it enacted that standard, Congress explained it was because there is a zero tolerance for retaliation. That principle should apply at the beginning of a case, not be delayed until the dispute is over.

PROTECT AGAINST THE FULL SCOPE OF RETALIATION

As employment rights have become stronger, retaliation tactics have become more creative. Worse substitutes increasingly are circumventing U.S. whistleblower laws. Criminal and civil liability have a far greater chilling effect than mere workplace harassment. But whistleblowers face multi-million dollar SLAPP suits for breaching gag orders that would be illegal to enforce through termination. Increasingly they face threats of violence to themselves or their families. Not only the EU and Ukraine, but nearly all recent whistleblower laws globally cover *all* forms of discrimination, including civil and criminal liability. The U.S. needs to expand the boundaries of all its whistleblower laws for them to remain relevant.

Now more than ever America needs federal whistleblowers to hold government accountable. Our ranks are bi-partisan and trans-ideological, because we share that goal. We request congressional leadership to modernize America's pioneering but outdated whistleblower rights without further delay.

Sincerely,

Acorn 8
American Civil Liberties Union
Government Accountability Project
Liberty Coalition
National Security Counselors
National Taxpayers Union
Public Employees for Environmental Responsibility
Project On Government Oversight
Public Citizen
Taxpayers Protection Alliance
Union of Concerned Scientists
Whistleblowers of America

cc: The Honorable Carolyn Maloney,
Chair, U.S. House Oversight and Reform Committee

The Honorable Mark Meadows,
Ranking Member, U.S. House Oversight and Reform Committee

The Honorable Ron Johnson,
Chair, U.S. Senate Homeland Security and Governmental Affairs Committee

The Honorable Gary Peters,
Ranking Member, U.S. Senate Homeland Security and Governmental Affairs Committee

Members of the U.S. Senate Whistleblower Protection Caucus

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