WRITTEN TESTIMONY

OF

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HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HEARING ON

"PROTECTING THE PUBLIC FROM WASTE, FRAUD AND ABUSE: H.R. 1507, THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2009"

PRESENTED ON MAY 14, 2009

Thank you, Chairman Towns, Ranking Member Issa, and Honorable Members of the Committee, for the opportunity to testify in support of H.R. 1507, the Whistleblower Protection Enhancement Act of 2009. I'm Angela Canterbury, advocacy director of Public Citizen's Congress Watch division. Public Citizen is a national, nonpartisan, nonprofit membership organization that has advanced accountability and transparency in administrative agencies, the courts, and the Congress, for more than thirty-eight years.

The Imperative for More Accountability and Transparency

As our country faces challenges of historic proportions, one reform could save billions of taxpayer dollars and help fulfill the imperative for more transparency and accountability: authentic whistleblower protections for all federal employees. Whether the issue is stimulus spending, a financial bailout of the banking or auto industry, fraud at a Wall Street firm, prescription drug safety, environmental protection, national health care, homeland security, or national defense – federal workers must be empowered to safeguard the public trust. They must have the confidence that if they speak out, they will not face repression and retaliation.

Unfortunately, that is not the case today.

A pervasive culture of secrecy in the federal government is fostered by the ease with which repression and retaliation can be meted out to any employee who dares to point out wrongdoing. For example, more than 1,400 of the nearly 3,400 federal scientists at nine agencies surveyed by the Union of Concerned Scientists said that they fear retaliation for raising concerns about the work and mission of their agencies.[1] Many whistleblowers suffer from some form of serious retaliation, including threats, demotion or outright firing.

In 2007, the Ethics Resource Center in 2007 concluded that misconduct and employee retaliation in the federal government is unacceptably high. The study found that fraud occurs in government as much as it does in the private sector, and that more than half of the federal workforce observes misconduct on the job. Furthermore, one-quarter of government employees who observed wrongdoing did not

[1] Union of Concerned Scientists, *Voices of Federal Scientists: Americans' Health and Safety Depends Upon Independent Science*, January 2009, pages 2 and 4. Accessed at http://www.ucsusa.org/assets/documents/scientific_integrity/Voices_of_Federal_Scientists.pdf.

report it because they feared retaliation; and only 7 percent of employees reported wrongdoing outside the management chain, such as to Inspectors General.[2]

Not only is it a national disgrace that speaking out about wrongdoing in government is still such a risky endeavor; it's unsustainable, as the stakes for public programs and funds have rarely been higher. We are a nation at war – with lives in peril, and hundreds of billions of dollars at risk. In addition, federal spending is at unprecedented levels as we attempt to reverse the course of a severe economic recession. The need for strict accountability and oversight to protect lives and prevent waste, fraud and abuse has never been more urgent.

In January of this year, the President of the Ethics Resource Center, Patricia Harned, warned:

> The next Enron could occur within government. Almost one quarter of public sector employees identify their work environments as conducive to misconduct – places where there is strong pressure to compromise standards, where situations invite wrongdoing and/or employees' personal values conflict with the values espoused at work.[3]

Recognizing this, President Obama declared a "new era of openness" and has taken steps towards that goal. He created new positions and initiatives within his administration such as a transparency team, a special counsel for ethics and government reform, and the Open Government Directive. He also issued executive orders and memoranda on ethics, transparency and scientific integrity, signifying his intent to have his administration end the culture of secrecy in the federal government.[4] Likewise, he has committed to strictly scrutinize the spending of

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[2] Ethics Resource Center, *National Business Ethics Survey*, November 2007. Accessed at https://www.ethics.org/research/nges-order-form.asp.

[3] Ethics Resource Center. Accessed at http://www.ethics.org/about-erc/press-releases.asp?aid=1148

[4] Presidential Executive Order on Ethics Commitments by Executive Branch Personnel, January 21, 2009; Accessed at http://www.whitehouse.gov/the_press_office/ExecutiveOrder-EthicsCommitments/. Presidential Memorandum For The Heads Of Executive Departments And Agencies: Freedom of Information Act, January 21, 2009; Accessed at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/. Presidential Memorandum For The Heads Of Executive Departments And Agencies: Transparency and Open Government, January 21, 2009; Accessed at http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/. Presidential Memorandum For The Heads Of Executive Departments And Agencies: Scientific Integrity, March 9, 2009; Accessed at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09/.

federal funds to ensure that tax dollars are not wasted, creating the Recovery Accountability and Transparency Board and promoting "unprecedented levels of transparency and accountability" on Recovery.gov.[5]

Importantly, in a recent weekly radio address, President Obama had this to say about efforts to reform spending and government waste: "It means strengthening whistleblower protections for government employees who step forward to report wasteful spending."[6]

But the President's call will not be met without meaningful protections for all employees safeguarding the public trust and our tax dollars, including national security workers and contractors. Without codification of authentic protections, including access to jury trials for all government employees who blow the whistle, the Obama Administration will have a Potemkin Village of accountability.

Protecting Whistleblowers Works

Every worker, public or private, should be able to report fraudulent spending, gross mismanagement and illegalities without fear of retaliation – it's just good business.

Under the False Claims Act,[7] the law that encourages private sector whistleblowers to file lawsuits challenging fraud in government contracts, the government's civil recoveries of fraud in government contracts has substantially increased to more than $20 billion since the law was strengthened in 1986. According to the United States Department of Justice, whistleblower disclosures now account for the majority of fraud recoveries from dishonest contractors – $1.45 of the $2 billion recovered in 2007 alone. About this recovery, Peter D. Keisler, then Acting Attorney General and Assistant Attorney General for the Civil Division, said, "It also attests to the fortitude of whistleblowers who report fraud and the tireless efforts of the civil servants who investigate and prosecute these cases." [8]

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[5] See www.Recovery.gov.
[6] President Obama's Weekly Radio Address, April 18, 2009.
[7] False Claims Act, 31 U.S.C. § 3730.
[8] U.S. Department of Justice, Press Release: *Justice Department Recovers $2 Billion for Fraud Against the Government in Fy 2007; More Than $20 Billion Since 1986,* November 1, 2007. Accessed at

The effectiveness of whistleblowers in combating waste and fraud also is evident in the corporate world. Consider the important roles of exposing fraud and corruption by Sherron Watkins of Enron and Cynthia Cooper at Worldcom.[9] PriceWaterhouseCoopers surveyed 5,400 companies in 40 countries and found that whistleblowers detected more fraud than auditors or law enforcement officers. It also stressed the importance of "whistle-blowing systems" and listed "safeguard employees who report misconduct against any form of retaliation (i.e., threats, harassment and demotion)" as the first requirement for a whistleblower program.[10]

The Current System Is Broken and Outmoded

The current system for protecting federal whistleblowers is badly broken and outmoded. While many employees in the private sector have strong protections for whistleblowing, federal workers suffer under an antiquated, hobbled system of second-class rights. Not all federal employees are covered, nor are the fleets of federal contractors who increasingly manage our public affairs and funds. Those who are covered under the law face a flawed and politicized administrative process for reviewing whistleblower disclosures and claims, and lack normal access to court. In addition, the only court authorized to hear claims of retaliation by federal employees, the U.S. Court of Appeals for the Federal Circuit, has a record of ruling against whistleblowers and eroding the law.[11] The result is that the law intended to protect federal workers and tax dollars is virtually useless.

The Whistleblower Protection Act (WPA), aptly nicknamed the Taxpayer Protection Act, passed unanimously in 1989 and unanimously strengthened in 1994, was a landmark shield law that provided the strongest statutory free speech rights to date.[12] But the law has failed to live up to the intent of Congress. Whistleblowers who try to fight retaliation by appealing to the Merit System Protection Board (MSPB)

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http://www.whistleblowers.org/storage/whistleblowers/documents/doj%20fca%20statistics%202007.pdf.

[9] TIME Magazine, "Persons of the Year 2002," December 2002. Accessed at http://www.time.com/time/subscriber/personoftheyear/2002/poyintro.html.

[10] PriceWaterhouseCoopers, *Economic crime: people, culture and controls: The 4th biennial Global Economic Crime Survey*, 2007. Accessed at http://www.pwc.com/extweb/pwcpublications.nsf/docid/1E0890149345149E8525737000705AF1.

[11] Testimony of Tom Devine before the Senate Governmental Affairs Committee on S. 1358, November 2003, pages 20-24.

[12] Tom Devine quote, Freedom of Information Center Online, *"Law, retaliation doom whistleblowers, panelists say,"* March 17, 2006.

face daunting odds. Since 2000, of the 53 cases decided on the merits by the Board, only three whistleblowers have won.[13] Hearings are conducted by administrative judges who lack judicial independence from political pressure. Moreover, the MSPB is not structured or funded to address complex, high-stakes cases that can require lengthy proceedings.

A very modest number of federal whistleblowers have the means or appetite for an appeals process. But for the minority who appeal a decision by the MSPB, there is only one court of jurisdiction, the U.S. Court of Appeals for the Federal Circuit. Whistleblowers win less than one and a half percent of decisions on the merits.[14]

The U.S. Court of Appeals for the Federal Circuit also has consistently narrowed the circumstances under which whistleblowers can win. For example, although the statute protects "any" lawful disclosure that an employee "reasonably believes evidences" significant misconduct, the Court now excludes the most common situations in which whistleblower disclosures are made. A whistleblower is not protected in common situations, such as when the disclosure is made in the course of doing one's job duties, as an auditor or safety inspector might, and when someone else previously has pointed out the same misconduct. These and other decisions over the years have gutted the rights for whistleblowers that Congress intended.[15]

Importantly, in the years since the WPA was last reaffirmed, our national circumstances have changed dramatically. Since September 11, 2001, there have been many controversial changes in our national security programs and warnings of malfeasance in those programs, which often have been ignored.[16] The need has never

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[13] *"An Open Letter to President Obama and Members of Congress: 286 Public Interest Organizations Support Swift Action to Restore Strong, Comprehensive Whistleblower Rights*," May 12, 2009, "Since 2000, only three out of 53 whistleblowers have received final rulings in their favor from the MSPB. The Federal Circuit Court of Appeals, the only court which can hear federal whistleblower appeals of administrative decisions, has consistently ruled against whistleblowers, with whistleblowers winning only three cases out of 209 since October 1994 when Congress last strengthened the law." Accessed at http://www.citizen.org/congress/govtaccount/articles.cfm?ID=18349.
[14] Ibid at 13.
[15] Ibid at 11.
[16] TIME, "The Bombshell Memo," May 21, 2002. Accessed at http://www.time.com/time/covers/1101020603/memo.html. *The New York Times,* "Another FBI Employee Blows Whistle on Agency," August 2, 2004. Accessed at http://www.nytimes.com/2004/08/02/us/another-fbi-employee-blows-whistle-on-agency.html?pagewanted=1. *The Village Voice,* "The Silencing of Sibel Edmonds," April 19, 2005. Accessed at http://www.villagevoice.com/2005-04-19/news/the-silencing-of-sibel-edmonds/http,

been greater for more lawful scrutiny of our programs, and yet national security workers have fewer rights for protected disclosures than do privately employed defense contractors. Also, Transportation Security Officers (TSOs) who are on the front lines of homeland security at our airports currently have no protection for disclosing potentially threatening mismanagement.

Recognizing the merits of whistleblower protections in numerous contexts, eight federal laws have been passed since the WPA was reaffirmed, all of which provide private sector employees with better protections than those of federal employees. These protections include full access to court, including jury trials, for employees who work in manufacturing and as defense contractors, for example. However, the patchwork laws and antiquated WPA means that an employee at a toy factory has more protection for exposing toxic or dangerous toys than a toy inspector at the Consumer Product Safety Commission.[17]

Congress should restore and modernize the Whistleblower Protection Act to ensure we have the most effective federal workforce with functional rights without further delay. We must have meaningful protections for those who expose waste, fraud, abuse, suppression of federal research, threats to public health and safety, and illegality. The risks to our nation are too great to allow civil servants to continue to face retaliation for dedicated public service.

H.R. 1507 Would Restore and Modernize the WPA

The House version of the Whistleblower Protection Enhancement Act would go a long way to repair and modernize the broken system of protection for federal workers and tax dollars – but it does not go too far. It does not propose sweeping change, but rather is an essential update to the policy to ensure functional rights for all federal employees and contractors.

[17] Sarbanes Oxley law, 18 USC 1514A(b)(1)(B), (publicly-traded corporations)(2002); Energy Policy Act, 42 USC 5851(b)(4), (nuclear power and weapons) (2005); Commercial Motor Vehicle Safety Act, 49 U.S.C. § 31105(c), (trucking and cross country bus carriers)(2007); Federal Rail Safety Act, 49 U.S.C. § 20109(d)(3), (railroads)(2007); National Transit Systems Security Act, 6 USC 1142(c)(7), (metropolitan transit)(2007); Defense Authorization Act, 10 USC 2409(c)(2), (defense contractors)(2007); Consumer Products Safety Improvement Act, 15 USC 2087(b)(4), (retail commerce)(2008); American Recovery and Reinvestment Act, section 1553(c)(3), (corporate or state and local government stimulus recipients)(2009).

H.R. 1507 restores the intent of Congress in areas where erroneous judicial decisions have undermined the law. It also closes loopholes and modernizes the Whistleblower Protection Act, consistent with effective advances in private sector whistleblowing systems and the extraordinary demands upon the federal government today.

There are significant improvements in H.R. 1507, the bill:

- Protects *all* federal employees and contractors who report waste, fraud, abuse, attempts to alter federal research, threats to public health and safety, and other illegalities.
- Provides for full access to court and jury trials for all federal employees and contractors when the administrative process fails.
- Creates a process for review of retaliatory revocation of national security clearances.
- Assures that reports of waste, fraud and abuse made in the course of regular job duties are protected from retaliation.
- Protects disclosures made to supervisors.
- Protects disclosures even if the wrongdoing was previously known by others.
- Bars the MSPB from ruling for an agency before whistleblowers have the opportunity to present evidence of retaliation.
- Improves due process rights, including extension of hearing rights to employees who testify as witnesses in investigations and those who refuse to violate the law.

This legislation importantly protects *all* federal employees and contractors, ending the patchwork of coverage that left loopholes where waste, fraud, abuse and attempts to alter and suppress research have flourished. H.R. 1507 extends specialized coverage to national security workers, allowing for review procedures sensitive to national security concerns. This is one area in which the Senate version of the bill, S. 931, comes up short. TSOs are covered under the WPA for the first time, and federal scientists who report efforts to alter, misrepresent or suppress federal research are given specific protections.

H.R. 1507 also clarifies that "any" disclosure of waste, fraud and abuse, means "without restriction to time, place, form, motive, context, or prior disclosure" whether it is formal or informal. This is a restoration of congressional intent, and addresses several court decisions that severely limited the protections of disclosures.[18]

Perhaps the most important improvement to the law is the addition of access to jury trials and more judicial review, granting the same safety net for federal workers that Congress has already granted to millions of private-sector employees. If a federal worker or contractor experiences retaliation and the administrative process fails to provide relief after 180 days, an employee can elect to take the case to a U.S. district court with jury. Also, if the MSPB rules against the whistleblower, an appeal can be made within 90 days. Those who win will be "made whole" through back pay and compensatory damages. Access to jury trials is another reform missing from the Senate version of this legislation.

As noted earlier, Congress already has given court access to millions of employees of publicly held companies, including most recently approximately 20 million workers employed by firms that make or sell products regulated by the Consumer Product Safety Commission. In addition to the Privacy Act, the Equal Employment Opportunity Act and other civil rights laws providing jury trials to federal employees, there are thirteen whistleblower jury trial laws currently available for corporate, government corporation, and some federal employees.[19]

The Department of Justice under previous presidential administrations argued that giving federal whistleblowers access to jury trials would result in a "clogging of the courts." But this has not been the case with any of the other laws granting court access. In fact, in the first three years after Congress passed the Sarbanes-Oxley law,

[18] Ibid at 11: "In 1994 when Congress last addressed this issue, the House Report reaffirmed that precedents creating loopholes violate the Act's statutory language and a basic premise of the law. 'Perhaps the most troubling precedents involve the … inability to understand that 'any' means 'any.' H.R. Rep. No. 103-769, at 18.

[19] Privacy Act, 5 USC 552a, (all citizens, including federal employees)(1974); Civil Rights Act, 42 USC 1983, (state and local government employees to challenge constitutional violations)(1971); Equal Employment Opportunity Act, 42 USC 2000e, (government employees, employment discrimination)(1991); False Claims Act, 31 U.S.C. § 3730 (h), (federal government contractors on civil fraud)(1986); Major Fraud Act, 18 U.S.C. § 1031(h), (federal government contractors on criminal fraud)(1989); Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991,12 USC 1790b(b), (banking employees)(1991); Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, 12 USC 1831j(b), (FDIC employees)(1991); and Ibid at 17.

giving whistleblower protections to the employees of publicly traded corporations, only 54 of the 42 million employees covered by the law went to court over a whistleblower dispute, and fewer than 500 workers even complained about retaliation for whistleblowing. As we stated in a coalition memo to Senate staff in July 2008: "Extrapolating this experience to the WPA, we can predict an average of 37 cases in federal court in a typical year. The cases would be spread over 678 federal district court judges and 505 magistrates, an addition of .029 cases annually for each decision maker in the federal courts." Similarly, if we predict an experience like that of the EEOC, where there also is access to jury trial after 180 days, we anticipate 17.4 cases per year. [20]

Additionally, when the Congressional Budget Office (CBO) scored H.R. 985 in 2007, substantially the same bill as H.R. 1507, it took into consideration the increase in caseload for OSC and MSPB and the federal courts. The CBO found that the additional resources needed to implement the legislation "would not be significant."[21]

This legislation also would end the monopoly of the Court of Appeals for the Federal Circuit, allowing for important judicial review by federal district and appeals courts. A trial by jury, though only a safety net likely to be used by a small minority of whistleblowers who face retaliation, will deter sloppy management of both wrongdoing and complaints of retaliation. It also will serve to improve the due process rights for whistleblowers even in the administrative review process.

Bunnatine H. Greenhouse, the former procurement executive in the Army Corps of Engineers who blew the whistle on improper no-bid contracting with Halliburton for reconstruction in Iraq, poignantly said, "The bottom line is that without access to independent courts, real judges and juries, whistleblowers don't stand a chance, and fairness and transparency will not see the light day."[22]

[20] Memo from Whistleblower Advocates to Senate Homeland Security and Government Affairs Staff, July 2, 2008.
[21] Congressional Budget Office Cost Estimate, March 9, 2007, *"H.R. 985 Whistleblower Protection Enhancement Act of 2007, as ordered reported by the House Committee on Oversight and Government Reform on February 12, 2007."*
[22] Bunnatine H. Greenhouse, Personal Letter, February 2009. Accessed at http://www.whistleblowers.org/index.php?option=com_content&task=view&id=780&Itemid=71.

Ensuring Whistleblowers Aren't Forced Into Arbitration

Real access to court for all federal whistleblowers will be fulfilled only if Congress also prohibits companies from stripping that right by using forced arbitration in terms for employment. This legislation also rightly attempts to nullify this practice for contract employees who have claims of retaliation. However, unless the legislation is slightly amended, a recent Supreme Court ruling could prevent judicial review for federal contractor whistleblowers who happen to be members of a union.

Today millions of employers write forced arbitration into the fine print of employment applications, employment handbooks, and even pension plans. *Employees have no choice – they must sign these documents if they want to get a job or to keep the job they have.* If later employees believe their employer is violating their rights, it is mandatory that they take their claim to arbitration. They are not allowed to go to court, and the arbitrator's decision is binding.

Forced arbitration is regularly used by federal contractors like Halliburton and its subsidiaries.[23]

In a recent national public opinion poll by Lake Research Partners, commissioned by Public Citizen and the Employee Rights Advocacy Institute for Law & Policy, Americans were asked what they thought about how mandatory binding arbitration might be used. More than 76 percent of likely voters were concerned that in forced arbitration one "cannot sue for harassment, abuse, retaliation or wrongful termination" and "cannot protect whistleblowers." Six in ten likely voters support banning forced arbitration in employment contracts.[24]

H.R. 1507 would ensure that a federal whistleblower's rights would not be waived due to a forced arbitration clause between a worker and an employer, but makes an exception for collective bargaining agreements, contracts between a union and an employer or another union. However, a very recent Supreme Court decision, made after the drafting of this legislation, warrants a slight improvement to the language in the bill.

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[23] ABC News, *"Victim: Gang-Rape Cover-Up by U.S., Halliburton/KBR,"* December 10, 2007. Accessed at http://abcnews.go.com/Blotter/Story?id=3977702.
[24]Lake Research Partners, *National Study Of Public Attitudes On Forced Arbitration*, April 2009. Accessed at http://www.fairarbitrationnow.org/content/forced-arbitration-public-opinion-research-slides.

On April 1, 2009, the Supreme Court held in *14 Penn Plaza v. Pyett* that employment discrimination claims brought by union employees can be subject to arbitration, and its holding may extend to whistleblower claims as well. [25] Collective bargaining agreements generally require arbitration of employment disputes between the union and the company. But before this decision, employees covered by collective bargaining agreements were never precluded from going to court when challenging discrimination or other workplace legal violations. Now, they may well be.

But being covered by a collective bargaining agreement should not mean that an employee can't sue for retaliation in court. Unions shouldn't be able to force employees into arbitration over legal violations any more than employers should. Moreover, unions agree – labor arbitration should not be the only way union employees have to vindicate their legal rights.[26]

This committee can easily remedy this issue in the context of whistleblower retaliation claims covered by the Whistleblower Protection Enhancement Act by adding language to the current provision in H.R. 1507 similar to that in the Arbitration Fairness Act of 2009, S.931: "except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising there from."

Overwhelming Support for H.R. 1507

Public Citizen strongly endorses swift passage and enactment of H.R. 1507 – and we are not alone. This legislation enjoys tremendous, widespread support from the American people, demonstrated not only by the broad array of supporting organizations representing hundreds of thousands of members,[27] but also by editorializing by newspapers across the country,[28] and by the bipartisan support of

[25] *14 Penn Plaza v. Pyett*, 129 S. Ct. 1446 (2009).
[26] Brief of the American Federation of Labor and Congress of Industrial Organizations and Change to Win as Amici Curiae in Support of Respondents, The Supreme Court of the United States, *14 Penn Plaza v. Pyett*, pp. 12 et seq.
[27] Ibid at 13.
[28] *E.g. The Washington Times*, February 5, 2009; *Fort Worth Star-Telegram*, September 18, 2008; *Hartford Courant*, September 17, 2008; *Delco Times* (PA), September 10, 2008; *Republican Herald*

this Congress, which already passed this measure unanimously earlier this year. President Obama also has repeatedly voiced support for strengthening and expanding protections for federal whistleblowers, including support for full access to jury trials and extending rights to national security workers.

The impressive collection of trans-partisan, trans-ideological groups supporting H.R. 1507 includes more than 286 organizations representing hundreds of thousands of members, and is led by a core group of committed legislative advocates from Public Citizen, POGO, GAP, the Union of Concerned Scientists, the American Federation of Government Employees, to the National Whistleblowers Center. The diverse organizations, many of which comprise the Make It Safe Coalition, include good government groups, employment, civil rights and taxpayer rights groups, including the National Tax Payers Union, OMB Watch, the American Civil Liberties Union, OpenTheGovernment.org, the Campaign for Liberty, the National Treasury Employees Union and many others. Our open letter of support to President Obama and members of Congress, which is attached to this testimony, makes clear that these organizations support the key provisions of H.R. 1507. On the other hand, the Senate bill, S. 931, as introduced, comes up short by failing to cover all federal workers and provide access to courts.[29]

The Senate has been a road block to sufficient reform of the WPA for the past several years. This committee and the House of Representatives overwhelmingly supported and passed this legislation once in March 2007, and again as part of the stimulus bill in January of this year. Reps. Van Hollen and Platts, Speaker Pelosi[30] and the rest of the members of the House understood the critical importance of protecting federal whistleblowers as an accountability measure for the spending bill. However, the Senate did not accept these protections and stripped them from the bill in the final negotiations.

However, real progress is being made in convincing the Senate of the merits of the House framework, including coverage of all federal workers and contractors, expanded judicial review to more than one court, and access to jury trials.

(PA), September 4, 2008; *Kennebec Journal* (ME), July 30, 2008; *The San Francisco Chronicle*, February 16, 2006.

[29] Ibid at 13.

[30] *Pelosi Statement on Whistleblower Protections Added to American Recovery and Reinvestment Act*, Wednesday, January 28, 2009. Accessed at https://www.house.gov/pelosi/press/releases/Jan09/whistleblower.html.

President Obama has endorsed stronger whistleblower protections, both in response to a formal National Whistleblowers Center survey[31] and in his policy positions. In fact, the President has a proven, longtime commitment to helping whistleblowers. As a young attorney he wrote briefs for a landmark Supreme Court case under the False Claims Act. As a senator he voted for legislation to reform the Whistleblower Protection Act. He also made a very strong statement of support for whistleblowers during his presidential campaign and the transition:

> Often the best source of information about waste, fraud, and abuse in government is an existing government employee committed to public integrity and willing to speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled as they have been during the Bush administration. We need to empower federal employees as watchdogs of wrongdoing and partners in performance. Barack Obama will strengthen whistleblower laws to protect federal workers who expose waste, fraud, and abuse of authority in government. Obama will ensure that federal agencies expedite the process for reviewing whistleblower claims and whistleblowers have full access to courts and due process.[32]

Our coalition has called on President Obama to fulfill his campaign promise and support passage of H.R. 1507.[33] At today's hearing we may likely learn if Obama's administration will reaffirm his support, or whether the Department of Justice or the Office of Management and Budget will recycle old arguments against reform.[34] The responsibility of defending the U.S. Government agencies against claims by government employees naturally creates a tension with supporting strong whistleblower protections. No doubt the committee will keep the views of the Department of Justice in context, as it has in the past. There is certainly an opportunity for more discussion and development of an effective policy, since the President, this committee and whistleblower reform advocates share the ultimate goal of true accountability and transparency.

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[31] National Whistleblowers Center, *Survey of Candidates for President 2008*. Accessed at http://www.whistleblowers.org/storage/whistleblowers/documents/obama.survey.scanned.pdf.
[32] Obama Policy Statement, during presidential campaign and transition, formerly accessed on www.change.gov and www.mybarackobama.org.
[33] Make It Safe Coalition, Letter to President Obama, April 1, 2009. Accessed at http://www.citizen.org/congress/govtaccount/articles.cfm?ID=18518.
[34] *Statement on Administration Policy*, Office of Management and Budget, Re.: H.R. 985, March 13, 2007; *Letter to Speaker Nancy Pelosi*, Office of the Attorney General, Re.: S.274, December 17, 2007.

Conclusion

Whistleblowers are our most effective deterrent against fraud and waste, protecting their honest disclosures is our best assurance that taxpayer dollars are spent wisely and government works effectively. But the current reality is that federal employees who expose improper multi-billion-dollar, no-bid defense contracts, cozy relationships between FAA inspectors and airlines, hundreds of billions of dollars in "underestimates" for the cost of prescription drug coverage, and illegal wiretapping at the Federal Bureau of Investigation still face intimidation and are often fired or demoted.

Like our hard fought civil rights laws, this shield law both protects individuals and codifies our values for the greater good of the public interest. H.R. 1507 serves the public's interest by skillfully achieving the essential but delicate balance between the rights of the employee and the interests of effective management of the federal workforce. Also similar to other shield laws, it's greatest efficacy will be in the deterrent to waste, fraud and abuse, helping to foster a change in government culture from one of secrecy and repression to one of transparency and accountability. If the goal is to create a system that encourages early detection and resolution of potential problems, then H.R. 1507 is crafted to do just that.

It's time to fulfill the imperative for more accountability and transparency in the federal government. It's time to end the discrimination and retaliation - as well as the unmistakable and deeply chilling message it sends to all employees that they should keep quiet, or else. Congress should complete the marathon legislative effort to restore a credible Whistleblower Protection Act by enacting H.R. 1507.

286 Organizations and Corporations Support Swift Action to Restore Strong, Comprehensive Whistleblower Rights

May 12, 2009

An Open Letter to President Obama and Members of Congress

The undersigned organizations and corporations write to support the completion of the landmark, nine-year legislative effort to restore credible whistleblower rights for government employees. We offer our support to expeditiously pass legislation that includes the critical reforms listed below. Whistleblower protection is a foundation for any change in which the public can believe. It does not matter whether the issue is economic recovery, prescription drug safety, environmental protection, infrastructure spending, national health insurance, or foreign policy. We need conscientious public servants willing and able to call attention to waste, fraud and abuse on behalf of the taxpayers.

Unfortunately, every month that passes has very tangible consequences for federal government whistleblowers, because none have viable rights. Last year, on average, 16 whistleblowers a month lost initial decisions from administrative hearings at the Merit Systems Protection Board (MSPB). Since 2000, only three out of 53 whistleblowers have received final rulings in their favor from the MSPB. The Federal Circuit Court of Appeals, the only court which can hear federal whistleblower appeals of administrative decisions, has consistently ruled against whistleblowers, with whistleblowers winning only three cases out of 209 since October 1994 when Congress last strengthened the law.

It is crucial that Congress restore and modernize the Whistleblower Protection Act by passing all of the following reforms:

- Grant employees the right to a jury trial in federal court;
- Extend meaningful protections to FBI and intelligence agency whistleblowers;
- Strengthen protections for federal contractors, as strong as those provided to DOD contractors and grantees in last year's defense authorization legislation;
- Extend meaningful protections to Transportation Security Officers (screeners);
- Neutralize the government's use of the "state secrets" privilege;
- Bar the MSPB from ruling for an agency before whistleblowers have the opportunity to present evidence of retaliation;
- Provide whistleblowers the right to be made whole, including compensatory damages;
- Grant comparable due process rights to employees who blow the whistle in the course of a government investigation or who refuse to violate the law; and

- Remove the Federal Circuit's monopoly on precedent-setting cases.

We know you share the commitment of every group signing the letter below to more transparency and accountability in government. Please let us know how we can participate to make this good government reform law to protect federal whistleblowers and taxpayers.

Sincerely,

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