Date

An Open Letter to the U.S. Congress from Federal Whistleblowers: Strengthen Whistleblower and Taxpayer Protections by Improving the Whistleblower Protection Enhancement Act of 2012

Dear Member of Congress:

We, the undersigned, are federal whistleblowers who have worked in a broad array of agencies and can attest to the lack of meaningful protections for conscientious truth tellers in government. We have been following the efforts of the U.S. Congress to strengthen the Whistleblower Protection Act (WPA) for more than a decade. During the last decade there have been six unanimous House and Senate votes in favor of restoring credibility for this hopelessly-gutted but much-needed open government reform that is a prerequisite for accountability to the taxpayers. Ironically, secret holds in the Senate repeatedly have blocked final passage, killing both whistleblowers' rights to justice and the voters' right to know how their money is being spent.

The necessity to pass this reform is beyond credible debate. All studies confirm that whistleblowers are the best resource against fraud, waste and abuse, exposing more than audits, compliance departments and law enforcement combined. But while Congress has provided credible rights for private sector whistleblowers, the rights themselves for government workers are a fraud.

Since Congress last "strengthened" the Whistleblower Protection Act in 1994, the track record is 3-220 against whistleblowers for final rulings on the merits. A Merit Systems Protection Board study found that whistleblowers are

- 9 times more likely to get fired,
- 6 times more likely to get suspended,
- 5 times more likely to receive a grade-level demotion,
- 2 ½ times more likely to be reassigned to a different geographical region, and
- Twice as likely to be denied a promotion.

Now that the Senate has unanimously passed S. 743, the Whistleblower Protection Enhancement Act of 2012 (WPEA or the Act), we call upon you to build on these reforms with H.R. 3289 by addressing recent developments that could render these protections obsolete on the first day the Act takes effect.

First, the WPEA's protections should extend retroactively. The Senate Committee for Homeland Security and Governmental Affairs noted in its committee report, No. 112-155, that it

> [E]xpects and intends that the Act's provisions shall be applied in U.S. Office of Special Counsel (OSC), Merit Systems Protection Board (MSPB), and judicial proceedings initiated by or on behalf of a whistleblower and pending on or after that effective date. Such application is expected and appropriate because the legislation generally corrects erroneous decisions by the MSPB and the courts; removes and compensates for burdens that were wrongfully imposed on individual whistleblowers exercising their rights in the public interest; and improves the rules of administrative and judicial procedure and jurisdiction applicable to the vindication of whistleblowers' rights.

We could not agree more. The number of employees filing whistleblower disclosures and complaints for prohibited personnel practices is at an all-time high. Many brave current and former employees are waiting for Congress to improve whistleblower laws to have their day in court. Many of these individuals have worked to educate the public and advocate for these reforms; it would be a cruel kind of justice to provide long-sought changes but leave them outside the Promised Land, looking in. Unfortunately, the Senate was not able to cover these individuals by including key language in the bill itself. We call upon you to give effect to the WPEA's salutary effects by explicitly extending the Act's reach to pending cases or those initiated on or after the effective date, as required by Supreme Court precedent.

Second, real due process rights are needed. The hallmark of due process is the jury trial – the opportunity to have one's day in court in front of a jury of one's peers – and all other whistleblower bills passed by Congress in the last decade have included it. Federal employees deserve the same, not second class legal status. The House should join the Senate in providing jury trial rights for federal employees.

On a related note, the Senate version makes an unacceptable tradeoff: while providing for jury trials, it also Senate lowers the burden of proof for agencies in court. None of the corporate or contractor whistleblower laws require tougher burdens of proof as the price for jury trials.

Third, both the House and Senate versions contain a provision that will undermine the critical All Circuit Review: the ability for the Office of Personnel and Management to bring a case with "substantial impact" on the merit system back into the Federal Circuit. The Federal Circuit has a long and notorious reputation for being hostile to whistleblowers and showing bias for agencies. It would be detrimental to WPEA reforms to allow OPM unfettered authority to appeal major cases to the court that is responsible for undermining Congress' intent for over 30 years.

Fourth, Congress should overrule the precedent set by the MSPB in *MacLean v. Department of Homeland Security*, which allowed agencies to use Sensitive Security Information (SSI) and over 100 other non-classified, pseudo-secrecy categories under the new Controlled Unclassified Information (CUI) Executive Order to cancel WPA free speech rights. As civil service law is now written, this new Executive Order designed to shrink irresponsible government secrecy could become the largest gag order on whistleblowers in history. Congress was clear in 1978 - only statutes, their judicial interpretations, and Executive Order designate what is a disclosure prohibited by law. Congress should send a clear message by reining in federal agencies, which have incentives to retroactively designate disclosures SSI or CUI to get rid of whistleblowers.

Finally, MSPB should not be granted summary judgment powers. The reasons for this are many, but some of these include:

- **MSPB was designed by Congress to be a forum for quick and simple dispute resolution**. Summary judgment is a complicated legal maneuver that will upset the balance struck by Congress in 1978 and 1989; it would require federal employees at all levels of government to act as their own lawyers to protect their interests, or hire ones on their own dime.
- **MSPB judges would likely abuse summary judgment powers**. The MSPB has a poor track record of protecting whistleblowers and willfully thwarted the intent of Congress' major whistleblower laws. Additionally, some MSPB judges virtually never grant jurisdiction in whistleblower reprisal cases, forcing the Board to remand cases back with jurisdictional instructions, prolonging litigation and increasing the cost to appellants.
- **Summary judgment prevents appellants from cross-examining witnesses who provide adverse written statements**. The likeliest scenario is that federal managers and adverse witnesses would provide affidavits that are unfavorable to appellants. Without depositions, appellants would not be able to cross-examine the authors to expose any weaknesses in their written statements.
- **Acquiring witnesses for depositions is costly**. Agencies must make employee-witnesses available free of cost to appellants at the hearing. However, if summary judgment is granted, there will be no hearing.
- **MSPB's stated justification for summary judgment — to "speed case processing" — is not an appropriate reason**. Burdening appellants with onerous legal requirements and then denying them the opportunity to make their case in a hearing is one way to speed case processing, but protecting due process is more important. The solution to backlogs and delays is not instituting a system that is more onerous; instead, MSPB judges must apply the law in good faith and without bias, thus decreasing the number of unnecessary remands.

The last congressional election was decided by voters who are fed up with fraud, waste and abuse by government bureaucracies. Fighting those breakdowns in accountability was the new majority's campaign commitment. We whistleblowers risk our careers for that campaign rhetoric. It is long past time for results by those who campaign on the principles we live. There is no reason for further delay in finishing the job, and doing it right. What are waiting for?

Sincerely,

Ray Adams
Air Traffic Controller
Federal Aviation Administration / Department of Transportation

Evelynn Brown, J.D., LLM
Former Federal Program Officer
Administration for Children and Families / Department of Health and Human Services

Gabe Bruno
Retired Manager, Flight Standards Service
Federal Aviation Administration / Department of Transportation

Kim A. Farrington
Former Aviation Safety Inspector – Cabin Safety
Federal Aviation Administration / Department of Transportation

Rand L. Foster
Aviation Safety Inspector
Federal Aviation Administration / Department of Transportation

Edward Jeszka
Retired Aviation Safety Inspector
Federal Aviation Administration / Department of Transportation

Douglas Kinan
Former Equal Employment Opportunity Specialist
Defense Contract Management Agency / Department of Defense

Robert J. MacLean
Former Federal Air Marshal
Transportation Security Administration / Department of Homeland Security

David Pardo
Former Attorney/Advisor
Federal Aviation Administration / Department of Transportation

Dr. Janet Parker M.S., DVM
Executive Director, Medical Whistleblower
Medical Whistleblower Advocacy Network – Human Rights Defenders

Spencer A. Pickard
Federal Air Marshal
Transportation Security Administration / Department of Homeland Security

George G. Sarris
Aircraft Mechanic
Offutt AFB, Nebraska

Jane Turner
Former Special Agent
Federal Bureau of Investigation / Department of Justice

Glenn A. Walp, Ph.D.
Former Office Leader of the Office of Security Inquiries
Los Alamos National Laboratory / Department of Energy

Richard Wyeroski
Former Aviation Safety Inspector
Federal Aviation Administration / Department of Transportation