

LETTER FROM THE COMMUNITY OF WHISTLEBLOWERS TO THE NATIONAL WHISTLEBLOWERS CENTER

We, the community of whistleblowers who have actively been seeking the passage of the Whistleblower Protection Enhancement Act (S. 372), are deeply concerned that the National Whistleblowers Center (NWC) has taken a position in opposition to S. 372 that very well could leave us in peril. We cannot reconcile this recklessness given NWC's consistently expressed advocacy for strengthening whistleblower rights. S.372 accomplishes just that, and to an extent not witnessed since 1994 by providing us stronger rights than ever before in our history.

We know that you know this yourselves. Nevertheless, analogies are worth repeating given the disastrous continuation of our plight that your determined opposition foretells:

1) S. 372 is like a good modern dam that will undoubtedly have flaws and require routine maintenance. Right now WikiLeaks is a wild river that ends up flooding and destroying farms and towns. You can never stop the river, but you can divert it and control it with a very well designed dam, even creating new energies to power communities. But the dam is not perfect and will eventually need more routine maintenance and upgrades – after the bill passes, it already is on the table for the MSPB and OSC to get much needed restructuring and protections in the OSC-MSPB reauthorization bill, on which work will not start until S. 372 is completed. We need to get this one finished, so we can start on those two agencies.

2) For years there were no controls in place to prevent the abuse of information designations to hide embarrassing mismanagement and whistleblowers were retaliated against using bogus and retroactive secrecy markings. Now everyone is afraid to make good faith disclosures through government venues and a few may even choose counterproductive, reckless, and ultimately dangerous avenues such as WikiLeaks.

3) Right now more than ever, S. 372 needs to get passed and the Administration should consider the resurrection of the careers of past whistleblowers who drowned in the raging river. Not only will restoring our careers send a real message to all potential whistleblowers right now, but to the bureaucracy. Such a bold act will showcase to all federal front-line officials that our government leadership's perception of good faith whistleblowers is believable and tangible. The President Barack Obama administration has already expressed interest in considering this action:

“As an initial matter, we believe this bill is just one piece of the administration's broader effort to ensure increased accountability in government, increased protections for whistleblowers, and increased transparency. Accordingly we would hope that once this bill is even – as this bill is being moved through, we can start discussions on a range of fronts whether it has to do with the [Merit Systems Protection Board], the [U.S.] Office of Special

Counsel, or a range of other issues of interest to this community. With respect to the retroactive consideration of cases, that's certainly something we think should be paid attention to and we will take it under consideration.”

<http://www.youtube.com/watch?v=C1B9Ja-IUAo>

Including a bipartisan group of House members in an April 30, 2009 letter to President Obama:

“In addition to these forward-looking reforms, we encourage you to take action to restore the careers of employees who were wrongly terminated or marginalized by previous administrations after blowing the whistle. Specifically, we recommend the issuance of an Executive Order establishing a program to review individual cases, and where significant injustice has occurred, to make the employee whole by restoring them to government service. The country can undoubtedly benefit from the professionalism and expertise of many of the employees who were wrongly removed from federal service.”

<http://www.publicintegrity.org/assets/pdf/WhistleblowerLetterFINAL.pdf>

Yet, you say this reform is a *bad deal* for whistleblowers—we couldn't disagree more. It leaves us far better off than without it. No one contends S. 372 is perfect, or as strong as the House version (H.R. 1507). At a meeting of the Make It Safe Coalition (MISC), members of the steering committee estimated it is 2/3 of the loaf we sought, and detailed all the frustrations, mainly caused by negotiations to lift or prevent Senate “holds.” But even though not perfect, S. 372 is more than just a good deal. It is a much needed breakthrough, and the reality is that no time left to “fix” S. 372 further in this Congress.

NWC has stated without evidence that some congressional offices say there is still time for changes. *But who are they?* If such alterations were even possible, the whole whistleblower rights community would want to help them.

Frankly, you have been invisible to us when there was still time during this year. We know who has been working 24/7 to get us stronger rights, because those advocates kept asking our help. We also know that they kept going until there was no time left for further changes without killing the bill by running out of time. This you know as well, yet you waited until the last minute before the formal approvals to become active obstructionists, and now it is too late to resolve any of your complaints in constructive negotiation. We dismiss your suggestion that it is possible to get stronger legislation through the next Congress as baseless. If any legislation is even possible – which is doubtful – it will be weaker than S. 372. That is the view of every Senate and House office that has worked on whistleblower reform.

We reemphasize, we want the rights in this legislation, and we need them. There is overwhelming support for this reform in our community. Every whistleblower at the MISC community meeting shared that view with you, from the heart. You should listen, because we serve as the credible witnesses to your advocacy in the very offices that matter most. For years, presidents and lawmakers have taken turns individually blocking stronger rights for us. Now you're efforts could very well do the same. As for the objections to the bill that you have distributed, we again disagree:

1) One is about a technical rollback of whistleblower rights against "trivial illegality" that was only shrunk to irrelevance, not completely eliminated. Now at worst it would only apply in a factual scenario that never has come up in any case since 1994. It is too bad this loophole was not canceled outright. But we are more worried about rolling back the Federal Circuit case law used to end our careers in hundreds of decisions of Federal Circuit and MSPB decisions during that time period. In terms of making our rights stronger or weaker, this is a trivial price to pay for wiping out 16 years of decisions that savaged our rights.

2) You also object to giving the MSPB summary judgment authority to dismiss cases. While disappointing, it merely standardizes the same administrative procedure that already controls EEO and corporate whistleblower laws. Experts have explained that this is little more than a housekeeping matter, because the MSPB already has a hybrid summary judgment system, with analogous results. Further, our community has been told that Senate Judiciary Committee Republicans already have said they will ensure this change in procedures will occur, whether or not S. 372 passes. They view the hybrid procedure as an embarrassment and will change it to normal summary judgment on another bill, if necessary. We aren't convinced that this objection is unique or relevant for deciding whether to support S. 372.

3) All of NWC's other objections are nitpicking over the fine print on advances that could have gone farther, been cleaner or been more permanent. None of these is a secret. Those doing the work for the bill openly shared the bill's weaknesses, not just last week but for the last few years as they sought our help fighting for stronger rights. We won most of those struggles, but lost some. Here is what we need you to understand: When we are starving, it is better to eat two thirds of a loaf than to continue with nothing.

Unfortunately, your actions have caused us to question your motives. As attorneys who make a fine living off of whistleblowers, perhaps you see us more as commodities than as truth tellers. We need the support of kindred spirits, not opportunists in search of economic opportunities. We used to think that you were sincerely the former, but now we are in doubt. Respect *our* right to decide whether S. 372 will leave us better off. Again, we don't agree that you know what is best for us, below is what *we believe*:

1) S. 372 creates the structural reforms we've needed for three decades so our rights will be worth the paper they're written on when we enforce them. For most cases it gives us access to court for jury trials, even if the fine print has access barriers around the

margins. It ends the Federal Circuit's monopoly on appeals court access. The five year sunset provision means we have a second bite to clean up those compromises, after the reform no longer is so controversial. While it does not provide court access for security clearance decisions, it ends agencies' ability to hold "star chamber" internal hearings, and creates a new system of appellate review, where each agency has final word over whether its initial decision was wrong. It rolls back and bans recent rulings shrinking the MSPB's authority over all decisions connected with the security clearance.

2) S. 372 adds new prohibited personnel practice rights which do not exist in current law, such as blowing the whistle on policy consequences, and protection against gag orders and scientific censorship.

3) S. 372 expands the scope of employees who have whistleblower rights, such as 40,000 baggage screeners who will go from nothing to full WPEA coverage. It expands internal and congressional free speech rights to the intelligence community, although there will be years of work to get effective enforcement regulations.

4) Most significant, in S. 372 Congress has legislatively overturned every legal doctrine used to rewrite WPA rights and rule against whistleblowers during the last 16 years as the Federal Circuit compiled a 3-210 track record against us.

In short, we can't wait any longer. Even if you could get us a three quarters loaf two years from now at the end of the next Congress instead of two thirds now, we can't wait. We need stronger rights *now*. Many of us have been hanging on for years already, waiting for a new law that would give us a fighting chance. We're running out of time, money and hope. Our cases are getting stale, with witnesses moving on. We need to file in January 2011. We can't wait until January 2013. Now, we urge you to stand with us or stand aside.

Raymond "Ray" Adams

Air Traffic Controller

Newark Airport

Federal Aviation Administration / Department of Transportation

Martin Edwin Andersen

Former Senior Advisor

Policy Planning Criminal Division / Department of Justice

First-ever National Security Winner of U.S. Office of Special Counsel's "Public Servant Award"

Bruce Bessette

Former Aviation Safety Inspector

Federal Aviation Administration / Department of Transportation

Gabe Bruno

Former Headquarters Office Manager
Federal Aviation Administration / Department of Transportation

Mark Danielson

Former: Police Officer / Department of Energy / Special Response Team

Current: Police Officer / Department of the Army
Fort Irwin, California

Kim A. Farrington

Former Aviation Safety Inspector / Cabin Safety
Federal Aviation Administration / Department of Transportation

Rand Foster

Aviation Safety Inspector / Flight Standards Service
Federal Aviation Administration / Department of Transportation

Franz Gayl

Major, U.S. Marine Corps (Retired)

Currently: Civilian Science & Technology Advisor
U.S. Marine Corps

Tamarah Grimes

Former Paralegal
Department of Justice

Gordon Hamel

Former Director
Executive Placement / White House

Dan Hanley

Captain / Pilot B-777
United Airlines

Edward T. Jeszka, Jr.

Retired Aviation Safety Inspector
Federal Aviation Administration / Department of Transportation

Robert MacLean

Former Federal Air Marshal
Federal Air Marshal Service / Transportation Security Administration / Department of
Homeland Security

Peter D. Nesbitt

Air Traffic Controller
Austin, Texas
Federal Aviation Administration / Department of Transportation

David Pardo

Former attorney, Office of Chief Counsel
Federal Aviation Administration / Department of Transportation

Dr. Janet Parker, DVM

Executive Director
Medical Whistleblower

Spencer Pickard

Former Federal Air Marshal
Federal Air Marshal Service / Transportation Security Administration / Department of Homeland Security

Nada Prouty

Former Special Agent
Federal Bureau of Investigation / Department of Justice
Former Covert Operations Officer
Central Intelligence Agency

Curt Read

Colonel, U.S. Army (Retired)
Former Deputy Sheriff
Former Commercial pilot
Former Air Traffic Controller
CPP, CFE, PCI

Current: Special Agent
Federal Aviation Administration / Department of Transportation

George G. Sarris

Master Sergeant, U.S. Air Force Reserve (Retired)

Current: Aircraft Mechanic
Offutt Air Force Base, Nebraska

Craig Sawyer

Former Assistant to the Special Agent in Charge
Federal Air Marshal Service / Transportation Security Administration / Department of Homeland Security

Frank Serpico

Retired Police Detective
City of New York Police Department

Anthony Shaffer

Lieutenant Colonel, U.S. Army Reserve
Former Intelligence Officer
Defense Intelligence Agency / Department of Defense

George Randall Taylor

Master Chief Petty Officer, U.S. Navy (Retired)
Former Master-at-Arms
Bermuda Naval Air Station

Current: Federal Air Marshal
Federal Air Marshal Service / Transportation Security Administration / Department of
Homeland Security

Frank Terreri

Federal Air Marshal
Federal Air Marshal Service / Transportation Security Administration / Department of
Homeland Security

R.W. Van Boven, M.D., D.D.S.

Former Director
The Brain Imaging and Recovery Laboratory / Department of Veterans Affairs

Dr. Glenn A. Walp, PhD

Former Office Leader of the Office of Security and Inquiries
Los Alamos National Laboratory

Currently: Published Author and Adjunct Professor and Consultant for Penn State
University

Anne R. Whiteman

Retired, Air Traffic Control Supervisor

Joseph C. Wilson IV

Ambassador / Foreign Service Officer
Department of State

Richard Wyeroski

Safety Inspector
Federal Aviation Administration / Department of Transportation