NWC RESPONSE TO LETTER FROM WHISTLEBLOWERS

Dear Whistleblowers:

Thank you for your letter received on December 13, 2010 concerning S. 372 and the position of the National Whistleblower Center. Given the importance of obtaining proper protection for federal employees, I understand and respect the concerns you have raised. I also welcome the opportunity to state our position on these issues.

The actual differences of opinion on S. 372 developed in the summer of 2009. At that time the NWC was part of the "Steering Committee" of the Make it Safe Coalition (MISC). We were fully engaged in a series of face-to-face meetings at the Old Executive Office Building with representatives from the White House. In response to a survey circulated by the NWC during the 2008 presidential election, a number of candidates (including then candidate Barack Obama, Hilary Clinton, Ron Paul, among others) had pledged to support H.R. 985. This bill had passed the House of Representatives with a strong bi-partisan majority, was fully supported by the whistleblower community and contained true due process rights for all federal employees.

At a meeting I attended, the White House counsel/representative specifically stated that President Obama would not adhere to his promise to support H.R. 985, and that the White House did not care if we accused them of breaking their promise. I was startled. But what followed was worse. The White House proposals for federal employees were a major step backward. The White House proposals for federal employees were a major step backward. Yet they were being sold as advancement, and promises of a White House celebration were in the air.

As the negotiations progressed, it became clear that the White House and the Senate had formulated a proposal that was radically different from the H.R. 985, and that many of the White House/Senate proposals were in fact rollbacks from current legal rights.

We could not accept this. At the end of July, 2009 the Senate Homeland Security Committee "marked-up" S. 374. The bill was terrible. But the MISC Steering Committee issued statements in support of the bill, and praising the White House for its contributions, when in fact those contributions were counterproductive and dangerous.

At that time we were compelled to voluntarily resign our membership in the MISC Steering Committee (although we remain members of the MISC itself). In September, 2010 I wrote a series of 12 blogs on S. 372. Our concerns were well known to all.

After we opposed S. 372, negotiations commenced to fix the bill. Although not a part of the Steering Committee, we worked hard to fix the bill, and some of our suggested compromises were adopted. Of the twelve major problems we had identified in the blogs, five were fixed. We were also informed by the Steering Committee that the overall strategy was to have the Senate pass the bill, but have the problems with the bill fixed in a conference with the House.

Shortly before Thanksgiving, a newspaper reporter told me that the Senate bill was about to be approved by Unanimous Consent, and that the House leadership had agreed to approve it, without any changes. Furthermore, I was informed that the White House and the MISC Steering Committee were all in support of this process.

No one informed us of this change in strategy, except a reporter at the last minute. Additionally, the MISC Steering Committee refused to provide us with a copy of the Senate bill that was about to be approved. We objected to this process, and demanded to see a copy of the bill. Eventually, a source not connected with the Senate staff or the MISC provided us with a copy of the bill after the MISC Steering Committee asked groups to express support for approval of S. 372 without changing a word.

After reviewing the Senate bill, it became clear why those supporting the new strategy of blind House approval did not share the bill with us. The bill still contained two serious rollbacks of current whistleblower rights, and other compromises that significantly weakened many of its positive features. The bill was a Trojan Horse. Along with the National Security Whistleblowers Coalition and the Federal Ethics Center, we published our views on the bill, linked here.

With this as background, let me address some of your major concerns:

1) "S. 372 is like a good modern dam that will undoubtedly have flaws and require routine maintenance."

The bill contains more than just "flaws," it rolls back important rights. Our main concern is not just that the bill is not "good enough," it is that specific "poison pills" were inserted in the law at the behest of (a) the White House and (b) some of the most anti-whistleblower Senators, that repeal current rights. These are not just flaws. From our perspective, these rollbacks should have been vigorously and aggressively attacked from the start. It is just plain wrong to use an "Enhancement Act" to actually rollback significant whistleblowers rights. The right to protection for raising any violation of law and the right to a hearing are core principles of federal employee whistleblower protection.

2) "For years there were no controls in place to prevent the abuse of information designations to hide embarrassing mismanagement . . ."

When the Civil Service Reform Act was originally passed in 1978, whistleblowers had the right to blow the whistle on "mismanagement." This was a good part of the law.

However, in 1989, as part of the WPA of 1989 "enhancements" advocated by many whom today aggressively support S. 372, that definition was changed. Employees lost their right to blow the whistle on "mismanagement." The term was changed to "gross mismanagement." As a result, the ability of employees to obtain protection for blowing the whistle on mismanagement was dealt a devastating blow.

Significantly, in the *Drake* decision (which will be further discussed), the Federal Circuit pointed the finger at Congress for creating the "gross" standard qualifying "mismanagement." The Federal Circuit justified some of its bad decisions on that definition.

The Enhancement Act does not fix this. The qualifications on protected disclosures remain, and only disclosures of "gross" mismanagement and "gross" waste of funds are protected.

Worse, as fully explained in our letter to Congressional leadership, the Enhancement Act seriously compromises the ability of employees to blow the whistle even on violations of law.

S. 372 actually reverses one of the most important pro-whistleblower decisions issued by the Federal Circuit. In the *Drake* case, the Merit Systems Protection Board weakened or qualified the rights of federal

employees to blow the whistle on violations of law in a manner consistent with prior Circuit Court rulings on gross mismanagement; however, the Federal Circuit in *Drake* reversed the MSPB and upheld the right to blow the whistle on violations of law without the qualifications urged by the MSPB and federal agency management.

By reversing the *Drake* decision, which upheld whistleblower rights to report violations of law, S. 372 would require the Federal Circuit to apply the case law it developed interpreting "gross mismanagement" in cases concerning disclosures of violations of law. Please review our letter to the key Congressional offices for a full explanation of this major problem.

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."

Passing S.372 has nothing whatsoever to do with forcing the Administration to help whistleblowers who have already been harmed. Even if helpful, the terms of the bill only apply to new cases filed 30 days after the bill is signed into law.

The NWC has always supported making the reform legislation retroactive to September 11, 2001. We have also supported inserting specific provisions into the law that would address some of the more outrageous decisions issued in the past ten years that have harmed employees who have tried to do the right thing and we have repeatedly urged the Obama administration to undertake a review of past cases to reverse unjust dismissals of whistleblowers.

Unfortunately, S. 372 will not help anyone who lost their case.

If the administration is serious about correcting past wrongs, it is long past the time to start doing that. It is irresponsible for the White House or others to hold out false hopes to whistleblowers, that if they somehow support S. 372, there may be a review of individual cases. This is an odd manner of horse-trading rights. In any event, as an attorney who represents many employees who were harmed by the terrible provisions in the current law, and some of the terrible decisions of the prior administrations, there has been no indication that the White House is serious about addressing injustices created under prior administrations. In fact, we are currently engaged in litigating against the current

administration in regard to retaliation that has occurred (or is being continued) under the new White House.

3A) "Frankly, you have been invisible to us when there was still time during this year."

We have worked tirelessly to try to: (a) fix the Senate bill; and (b) urge the House to hang-tough in the negotiations. For your information, the MISC Steering Committee had asked us to back-off on our public campaigns on this issue, in deference to their inside-negotiation strategy. We accommodated that request, until we learned that the new strategy included a process in which the most serious problems in the Senate bill would not be fixed (or even addressed) by the House. NWC does not advocate an all or nothing approach and was willing to support a reasonable compromise. Unfortunately, the choice presented by the Senate and the White House is to support a bill that rolls back rights and harm whistleblowers or do nothing. We have continually advocated both publicly and privately to Congress that the most serious mistakes and problems in S. 372 that set back whistleblower rights must be fixed.

3B) "We dismiss your suggestion that it is possible to get stronger legislation through the next Congress as baseless."

I do not believe that the NWC ever stated a belief that the next Congress would be better, we simply stated that all hope would not be lost in the next Congress because whistleblower protection is a bi-partisan issue. After a very careful review of S. 372 as a whole, it is our professional opinion that the costs of the legislation outweigh the benefits. This conclusion is based primarily on the inclusion of two major "roll-backs" on whistleblower rights.

4) In regard to one of these roll-backs, you state as follows: "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."

Unfortunately, this statement demonstrates that the community still does

not understand the significance of the Enhancement Act's roll-back on the definition of a protected disclosure.

First, you state that our concern was focused on a "technical rollback" that "was only shrunk to irrelevance, not completely eliminated."

The change in the scope of protected disclosures is not merely "technical." It is a major substantive provision that will cause havoc in real-life cases, and will lead to even more unjust dismissals. The change in definition actually conflicts with current statutory merit system principles, and Executive Order and years of good case law. The way this provision materially harms whistleblowers is set forth in our letter to Congressional leadership.

Second, you state that you "are more worried about rolling back the Federal Circuit case law used to end our careers." But the case at issue here was not used to "end" anyone's career. The *Drake* case, which the Enhancement Act will statutorily reverse, is one of the very few cases in which a whistleblower actually prevailed in a lawsuit. The Federal Circuit ruled for this employee from the bench, and ordered corrective action. Sadly, S. 372 reverses that important precedent.

It is strange that the Enhancement Act would undermine one of the only safe-harbors existing in federal whistleblower law (i.e. the unqualified right to blow the whistle on any violation of law), and would overturn one of the only pro-whistleblower decisions.

Indeed, just think of how the MSPB, the Federal Circuit and other courts will view this so-called "enhancement." How will they interpret the Congressional intent behind the Enhancement Act when the law actually reversed one of the Federal Circuit's only pro-whistleblower decisions?

5) In regard to summary judgment, you state that the new authority given to the MSPB to summarily dismiss employee cases is not a major concern because "the MSPB already has a hybrid summary judgment system."

Make no mistake about it. The MSPB does not have summary judgment authority, and once it gets that authority, every whistleblower case will be seriously and irreparably harmed.

First, a little history. Before 1978, federal employees could bring whistleblower cases in federal court under *Bivens* and they had other court access rights that were extinguished when the Civil Service Reform Act was passed. In 1978, when federal employee whistleblower rights were established under the Civil Service Reform Act, there was a hot debate over giving the MSPB summary judgment powers. As part of the compromises reached, Congress rejected the attempt to give this power to the MSPB. See H.R. Rep. 95-1717, 95th Cong. 2d Sess. 137 (1978).

Thus, this issue has been around since 1978, and under the Enhancement Act, the "community" is apparently ready to forfeit a major right that was obtained in 1978.

Second, executive agencies have, for years, tried to use the Federal Circuit as a vehicle for obtaining summary judgment authority. They have, on numerous occasions, strongly urged the Federal Circuit to approve such authority. The Federal Circuit has rejected these requests. See, e.g., Crispin v. Dept. of Commerce, 732 F.2d 919, 922 (Fed. Cir. 1984).

Thus, what the White House and federal agency management could not obtain from Congress in 1978 or from the Federal Circuit, they are now going to get through an Enhancement Act.

Third, do not confuse the MSPB's current process of dismissing cases at the "jurisdictional" level, with summary judgment. In federal court there are two gate-keeping procedures. The first is a motion to dismiss. If, on the face of your complaint, you simply cannot win, you case can be dismissed. The second is summary judgment. The MSPB's long practice of requiring whistleblowers to demonstrate jurisdiction at the initial phase of a case is more analogous to responding to a motion to dismiss than it is to summary judgment.

A strong employment case usually survives a motion to dismiss, as the standards to obtain dismissal are very high.

But summary judgment is much different. Giving this new power to MSPB will result in a substantial increase in litigation costs in whistleblower cases, a decrease in the ability to obtain settlements and the creation of a "record" that will be very difficult to reverse on appeal. Many cases will be dismissed by MSPB under this new power.

6) It is unfortunate that you have attacked the NWC's motives, and essentially accused us of being greedy lawyers. Although that may be an easy stereotype, our record speaks for itself and this type of discussion is not productive.

An example of NWC's record in this area is an award received by NWC's Advocacy Director, Lindsey Williams, "for demonstrating her commitment through POPULAR to helping poor and other disadvantaged people access affordable and competent legal representation, important civil and criminal justice system reforms, as well as appropriate judicial oversight."

Read more: http://www.prweb.com/releases/prweb2010/12/prweb4840764.htm

After S. 372 is passed, whistleblowers will need lawyers. Currently, there are very few who will handle federal employee cases on an affordable, contingency fee or *pro bono* basis. Many of the public interest groups that support S. 372 do not provide any, let alone free, legal services to federal employee whistleblowers. When the law is passed, whistleblowers will need attorneys to represent them.

The key to obtaining representation from an attorney is for the law to be strong enough to justify a lawyer taking the case on an affordable or contingency fee basis. We fear that the problems in S. 372 will not stimulate increased private sector support for federal employees. Our recent survey of private sector attorneys reinforces this position.

Attorneys who are willing to represent federal employees are not your enemy. They have no interest in blocking a law that would help them win cases. Their interest in a strong law mirrors yours.

You also state that attorneys should move aside, and yield to the "whistleblowers" opinion of the law. The NWC is a non-profit organization, and 6 of our 13 board members are former federal employee whistleblowers. The NWC's position reflects an analysis of the law, and incorporates the legal staff's near century of combined experience in this area to judge the actual merits of S. 372.

7) You raise a number of points regarding the progressive provisions contained in S. 372. We agree there are some. But in our "Bad Deal" statement, we explained how many of these reforms are not as strong as they are currently being marketed. Many have loopholes. Please review

this Statement for a better understanding of our position and our conclusion that the bad parts of the bill outweigh the good parts.

8) We agree that federal employees need "need stronger rights now." But the defects in the law are significant, and any progressive features are not retroactive, and will not help employees who have already filed cases or lost cases. In our considered judgment, after reviewing the bill in its entirety, we remain convinced that S. 372 is not an advance given the poison pills and limitations.

9) In conclusion, you state that "Now, we urge you to stand with us or stand aside." This dichotomy simply does not hold. The NWC's Board of Directors also consists of whistleblowers, six of whom are former federal employee whistleblowers, some of whom have current legal cases. Their voices also have a right to be heard, as do many other whistleblowers whom we assist (and who fully support our position). Free speech is needed within the whistleblower rights community. An open discussion of the relative merits of S. 372 should be encouraged and the motives of those who express their opinion that whistleblower rights will be rolled back by S. 372 should not be attacked for voicing their concerns.

We hope you recognize that the NWC is not strong enough to block this law and our aim is to fix it before it becomes law. S. 372 is supported by the federal managers lobby organization, the White House, the Senate, the majority of the MISC and now the Democratic leadership of the House. Even the most anti-whistleblower Senators (i.e. Senators who opposed many of the more progressive whistleblower laws that were recently approved) support this bill. We are flattered that many think we are "powerful" enough to block this law. This is simply not the case.

If S. 372 can get scarce floor time during the remaining lame duck session it will most likely be passed and signed into law. Although we understand this political reality, we believe that we are morally and ethically bound to voice our viewpoint. We do not do this lightly, or to be obstructionist. We do it based on our objective analysis of the law, and the need for effective whistleblower protection. Other classes of employees have been able to obtain effective whistleblower protections in this Congress. Federal employees should not have to remain second-class citizens when it comes to the right to blow the whistle.

Respectfully yours,

Stephen M. Kohn
Executive Director
National Whistleblower Center
Washington, D.C.

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