July 26, 2017

President Donald J. Trump
The White House
Washington, D.C.

Dear Mr. President:

In your successful election you campaigned as a whistleblower against government abuses of power that threaten America's freedom and well-being. We heard your pledge to drain the swamp with hope, because all of us have risked our professional lives to challenge government abuses of power. After your victory, we will be on duty in the swamp helping to drain it. However, we think you will agree there are a lot of snakes and alligators here. Draining the swamp will be more dangerous and harder than earning voters' support for that goal. Entrenched government bureaucracies are highly-skilled at eliminating any threat to their power. Your leadership will be essential for us to carry out your mandate. We need your leadership to complete the Whistleblower Protection Act's legislative overhaul that began in 2012 with unanimous passage of the Whistleblower Protection Enhancement Act. (WPEA). On paper, these rights are the world's strongest. In practice, however, whistleblowing is still "committing the truth." Because we have had more impact than ever before, challenging abuses of power is more dangerous than ever before.

The WPEA's unfinished business is a major cause. Due process rights for federal whistleblowers do not match those for employees in the private sector. This year Congress must act to make critical choices that were postponed in 2012 for the law's final structure. Further, the law needs changes to keep pace with new, more creative forms of retaliation. The bottom line is that despite significant improvements on paper, in terms of enforcement the rules are still rigged against whistleblowers. Structural reforms so that whistleblowers will have a fighting chance are summarized below. The first four concern unfinished business from the WPEA.

* *Jury trials:* In the WPEA Congress postponed whether to provide jury trials for civil service whistleblowers until after a Government Accountability Office (GAO) study last fall. GAO did not find any disadvantages. Without further delay federal whistleblowers should have the right to seek justice from the citizens they risk their careers to defend. They are the only significant portion of the labor force without the option for jury trials. Since 2002 Congress has included it for corporate whistleblowers in 13 laws for nearly the entire private sector. Further, the MSPB lacks the expertise and independence from political pressure for politically-sensitive or high-stakes cases of national significance. But those cases are the most important reasons we need whistleblowers. First class public service requires first class due process.

* *MSPB Summary Judgment authority:* Unfortunately, many unemployed whistleblowers cannot afford to seek justice in court. For them an MSPB administrative hearing is their only chance for due process. Agency desires to avoid public hearings also lead to a significant number of settlements. The Board previously sought authority to deny hearings though summary judgment authority, so Congress sought GAO review. The MSPB has stopped seeking summary judgment powers, and last fall's GAO report did not recommend providing them.

This proposal should be shelved. The right to some hearing is important for whistleblowers to achieve closure, and to obtain at least some relief. Most significant, summary judgment authority means denying a hearing on legal grounds. MSPB Administrative Judge have been notoriously hostile to the WPA, ruling against whistleblowers over 95% of the time. Their interpretations have butchered

the law and forced lengthy Board remands. The Administrative Judge corps badly needs WPA training. It shouldn't receive any power to further curtail whistleblower rights until training has been completed.

* *All Circuits Review:* This issue should be as noncontroversial as it is significant. In 2012 Congress experimented with giving whistleblowers normal access to appeals courts for challenges to MSPB decisions. If the experiment is not made permanent this year, the Federal Circuit Court of Appeals again will have a judicial monopoly on how the WPA is interpreted. There should not be any opposition to institutionalizing this right consistent with the Administrative Procedures Act. The Federal Circuit's prior hostility is why Congress has had to reenact three times the rights it passed in 1978. The pilot solution of all circuits review has not had any adverse side effects; and has provided healthy competition that has improved the quality of Federal Circuit rulings.

* *Ombudsmen:* The WPEA also included an experiment for every Office of Inspector General (OIG) to have a Whistleblower Ombudsman. Again, it must be made permanent this year, or lapse. This resource should be made permanent. This experiment has been an unqualified success, with effective leadership government-wide by the Department of Justice OIG to help train and share lessons learned.

Six other issues must be addressed to counter emerging threats to whistleblower rights that may be more severe than conventional termination.

* *Retaliatory criminal actions: S*ince the WPEA made it more difficult to fire whistleblowers, agencies increasingly have shifted to harassment through criminal investigations and prosecution referrals. This tactic has a far more chilling effect than conventional retaliation, is far less burdensome, and poses no risk for agencies. The worst that happens is they close the case, and can then open a new one soon after. Currently whistleblowers have no rights against retaliatory investigations until there is conventional job action, and prosecution referrals are not included. This leaves them defenseless against criminal witch hunts. This loophole must be closed by giving whistleblowers the right to challenge retaliatory investigations as soon as they are opened. Last year Congress outlawed retaliatory investigations at the Department of Veterans Affairs, and by Offices of Inspector General. Those sound precedents should be adopted generally in the Whistleblower Protection Act.

* *Temporary relief:* More than any other factor, temporary relief makes a difference to end unnecessary, prolonged conflict. When granted, agencies try to resolve retaliation disputes quickly and constructively, because they are losing until the case is over. Without it, agencies drag out conflict as long as possible. Until the dispute is over, they are winning with maximum chilling effect, because the whistleblower has vanished from the workplace. Further, OSC and MSPB final decisions often take three to six years, or more. By that point, whistleblower victories may be too late. They could not survive for years without a salary, and already have gone bankrupt. That creates an inventive for agencies to stall, appeal indefinitely, or do whatever is necessary to starve out the whistleblower. Currently only the OSC has a realistic chance to obtaining stays. The OSC and Offices of Inspector General should have the authority to grant stays automatically, without resorting to litigation. But those agencies only can act anecdotally and will never be reliable as a generally vehicle for temporary relief. The legal standards should be changed to provide temporary relief whenever employees prove a *prima facie* case.

* *Accountability through discipline:* Currently there is no deterrent effect to prevent retaliation, because accountability only occurs on a token basis. Only the OSC can seek discipline under tougher legal standards than to prove retaliation, and disciplinary prosecutions almost never occur. As a result, bureaucratic bullies have nothing to lose. The worst that will happen is they won't get away with it.

To prevent harassment, accountability through discipline must become a credible threat for agencies to consider whistleblower retaliation. This could be accomplished through a schedule for automatic discipline when retaliation is proved, as Congress passed last year for the DVA. This year under Senator Johnson's leadership the Senate already has voted to extend the same accountability at all federal agencies. Most significant, there should be personal liability and punitive damages for retaliation. That would institutionalize both deterrence and make it easier for whistleblowers to find attorneys.

* *Sensitive jobs:* Under current regulations, this is a national security loophole to the merit system that can be imposed at will to cancel all civil service rights for any employee working in the federal government. Although access to classified information is the normal boundary for special national security rules, this designation applies to employees whose jobs do not require classified access. Normal civil service appeal rights for a non-partisan, professional work force must be restored for any commitment to prevent government abuses of power.

* *Training*: In 2000 Congress passed the No Fear Act both to replaced ignorance and violation of anti-discrimination and whistleblower rights with knowledge and compliance. A foundation if the Act's reforms was comprehensive, in-depth training. Unfortunately, agencies "complied" by burying training materials at the second or third link of agency websites. Last Congress the House unanimously passed No Fear Two, and the Homeland Security and Government Affairs Committee unanimously referred it to the Senate, which adjourned before completing action. The bill increased accountability while replacing token with genuine training in the law. With your leadership, Congress will finish what it started for this badly needed legislation to prevent retaliation.

Mr. President, the key recommendations above largely already exist for corporate whistleblowers. Those who defend the taxpayers must have rights as strong as those who defend shareholders. It is not realistic to expect first class service from those with second class rights. You have been highly effective using litigation to assert your rights. We need your leadership so that we can defend ours.

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