

October 30, 2014

The Honorable Carl Levin  
The Honorable James Inhofe  
Chairman and Ranking Member  
Senate Committee on Armed Services  
228 Russell Senate Office Building  
Washington, DC 20510

The Honorable Dianne Feinstein  
The Honorable Saxby Chambliss  
Chairman and Ranking Member  
Senate Select Committee on Intelligence  
211 Hart Senate Office Building  
Washington, DC 20510

The Honorable Howard "Buck" McKeon  
The Honorable Adam Smith  
Chairman and Ranking Member  
House Committee on Armed Services  
2120 Rayburn House Office Building  
Washington, DC 20515

The Honorable Mike Rogers  
The Honorable C.A. "Dutch" Ruppertsberger  
Chairman and Ranking Member  
House Permanent Select Comm. on Intelligence  
HVC-304 U.S. Capitol Building  
Washington, DC 20515

Dear Chairmen and Ranking Members:

The undersigned organizations write to urge you to swiftly restore best practice whistleblower protections for Intelligence Community (IC) contractors by supporting Senate Amendment (SA) 3711, introduced by Senator Claire McCaskill (D-MO) for inclusion in the National Defense Authorization Act for Fiscal Year 2015 (FY2015 NDAA). IC contractors are currently defenseless against retaliation when they disclose government waste, fraud, abuse, gross mismanagement or a violation of law. In the absence of adequate protections, they have only two alternatives to almost certain retaliation: 1) remain silent observers of wrongdoing; or 2) make anonymous leaks. Whistleblowers must be free to report abuses of power that betray the public trust without fear. It is imperative that Congress quickly fill this accountability loophole.

In 2007 whistleblower rights were enacted for all Department of Defense (DoD) contractors, including the Defense Intelligence Agency and the National Security Agency (NSA), through the FY2008 NDAA. In 2009, whistleblower rights were enacted for all contracted employees paid with stimulus funds, including other IC agencies like the Central Intelligence Agency. The whistleblower protections were successful in deterring taxpayer waste and contractor abuse, and the Council of Inspectors General for Integrity and Efficiency proposed *permanent expansion for all government contractors*. Senator McCaskill introduced a whistleblower protection amendment for all government contractors, and won bipartisan Senate approval in the FY2013 NDAA.

However, during the closing conference committee negotiations of the FY2013 NDAA, best practice rights were enacted for all employees *except* those in the IC. Preexisting rights for IC contractors were removed, despite a proven track record that the law was working as intended and did not produce

any adverse impacts on national security during its five-year lifespan. Based on the track record, there is no substantive policy argument for rolling back those existing rights. Contrary to concerns that court access would cause national security leaks, none even has been alleged. Contrary to predictions that intelligence whistleblowers would flood the courts, 25 cases were filed from 2008 through 2012 under the DoD contractor provision, including from the Intelligence Community.

The experience with the NDAA is not unique. Since 1986 IC employees have had the right to file False Claims Act lawsuits challenging fraud in government contracts, and to defend themselves in court against retaliation. That test has been passed without any allegations of negative side effects. Accountability should be extended beyond fraud, to cover waste and abuse as well. Similarly, 12 times since 2002, Congress has included best practice whistleblower protections as enforcement cornerstones of major remedial laws covering virtually the entire private sector, whether or not there is a government contract.<sup>1</sup> None has loopholes for activities involving the Intelligence Community. Again, there is no record of any national security concerns resulting from these longstanding precedents.

Correcting this obvious void is essential for preserving our democracy, because the stakes could not be higher for our nation when dealing with Intelligence agency misconduct. The country cannot afford for IC contractors to remain silent in the face of evidence of wrongdoing, whether the abuse breaches security, threatens freedom, spreads corruption, or all of the above. Congress must be able to hear from insiders who have critical information regarding problems with intelligence operations. Equally important, whistleblowers should have the legal right to safely bear witness to law enforcement officers and to work within institutional checks and balances. They report misconduct to make a difference, and those are the channels that deliver results.

According to an investigation by Top Secret America, close to 30 percent of the IC workforce is contractors.<sup>2</sup> The investigation was partially based on interviews with officials from the IC contractor community. However, the Washington Post reported that “[m]ost requested anonymity either because they are prohibited from speaking publicly or because, they said, they feared retaliation at work for describing their concerns.”<sup>3</sup> Six months after IC contractor rights were rolled back, NSA contractor Edward Snowden disclosed to journalists the U.S. government’s sweeping domestic surveillance programs. When asked why he didn’t work within the system to blow the whistle, he cited the severe retaliation that previous IC whistleblowers experienced when they worked through institutional channels without rights. The chilling effect on those who are in a position to disclose misconduct is potent, and it inhibits Congress’ ability to conduct meaningful oversight.

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<sup>1</sup> Including the: Sarbanes-Oxley Act; Energy Policy Act; FY2007 National Defense Authorization Act (Department of Defense contractors, including contractor whistleblowers at the National Security Agency and Defense Intelligence Agency); 9-11 Commission Act amending statutes for rail safety, trucking safety, and mass transit safety; American Recovery and Reinvestment Act (for all states and contractors receiving stimulus funds, including all those in the Intelligence Community); Consumer Product Safety Improvement Act; FDA Food Safety and Modernization Act; Affordable Care Act, and; Dodd-Frank Wall Street Reform and Consumer Protection Act.

<sup>2</sup> <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/>

<sup>3</sup> <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/>

The restoration of IC contractor whistleblower protections would help to safeguard billions of taxpayer dollars in government contracts, grants and reimbursements annually, and it would incentivize IC contractor whistleblowers to work within the system through legally protected public disclosures. There cannot be any doubt about the consequences of congressional action, or inaction, on whistleblower rights. In order to better protect taxpayer dollars, our country, and Americans' privacy, Congress must restore whistleblower protections for IC contractors through passage of SA 3711.

Sincerely,

American Civil Liberties Union  
Barry Commoner Center for Health and the Environment  
Bill of Rights Defense Committee  
Brennan Center for Justice  
Center for Digital Democracy  
Center for Financial Privacy and Human Rights  
Center for Media and Democracy  
Citizens for Responsibility and Ethics in Washington (CREW)  
Citizens' Environmental Coalition  
ConnectiCOSH  
Constitutional Alliance  
Consumer Action  
Consumer Watchdog  
Defending Dissent Foundation  
DownsizeDC.org  
Drum Majors for Truth  
Equal Justice Alliance  
Essential Information  
Firedoglake.com  
Freedom of the Press Foundation  
Fund for Constitutional Government  
Golden Badge  
Government Accountability Project  
Gun Owners of America  
Human Rights Watch  
International Association of Whistleblowers  
Katz, Marshall & Banks, LLP  
Liberty Coalition  
National Forum On Judicial Accountability  
National Council for Occupational Safety and Health  
National Employment Lawyers Association  
National Taxpayers Union  
NETWORK (A National Catholic Social Justice Lobby)

New Jersey Work Environment Council  
OpenTheGovernment.org  
Organizations Associating for the Kind of Change America Really Needs (OAK)  
Patient Privacy Rights  
PEN American Center  
Power Over Poverty Under Laws of America Restored (POPULAR)  
Privacy Times  
Project On Government Oversight  
Public Citizen  
The Rutherford Institute  
Sciencecorps  
State Community Councils  
Sunlight Foundation  
Taxpayers Protection Alliance  
United Support and Memorial for Workplace Fatalities (USMFW)  
Whistleblower Support Fund

CC: The Honorable Thomas R. Carper, Chairman  
Senate Homeland Security and Governmental Affairs Committee

The Honorable Thomas A. Coburn, Ranking Member  
Senate Homeland Security and Governmental Affairs Committee

The Honorable Darrell E. Issa, Chairman  
House Oversight and Government Reform Committee

The Honorable Elijah E. Cummings, Ranking Member  
House Oversight and Government Reform Committee

The Honorable Charles E. Grassley, Chairman  
Senate Committee on the Judiciary