

United States Senate

WASHINGTON, DC 20510

March 9, 2017

VIA ELECTRONIC TRANSMISSION

The Honorable John F. Kelly
Secretary
U.S. Department of Homeland Security
Washington, D.C. 20528

Dear Secretary Kelly:

Whistleblowers play a vital role in helping the government identify and resolve issues of waste, fraud, and abuse, and they are crucial for Congress in the exercise of its constitutionally mandated oversight responsibilities. Since the beginning days of our nation, our Founding Fathers recognized that whistleblowers are essential to ensuring that government is functioning properly and efficiently. As early as July 30, 1778, “in demonstration of their full support for whistleblowers,” the Continental Congress unanimously approved legislation recognizing “the duty of all persons in the service of the United States” to inform “Congress or other proper authorit[ies]” of wrongdoing.¹ Today, we continue to recognize this important responsibility. President George H. W. Bush, in his October 17, 1990 Executive Order 12731, stated plainly that federal employees “*shall* disclose waste, fraud, abuse, and corruption to appropriate authorities.”²

As members of the Senate Whistleblower Protection Caucus, we enthusiastically echo these historical precedents in our support for individuals who shine a light on waste, fraud, and abuse. We believe that it is in your agency’s best interest, and the taxpayers’ best interest, to do the same, and to openly recognize and wholeheartedly support the duty and value of whistleblowers. Whistleblowers are assets, and they can help us enhance government efficiency and transparency and save taxpayers billions of dollars.

To encourage these individuals to bring problems to the surface so that they may be addressed, Congress enacted and has since strengthened federal laws that protect them from reprisal for lawful, good faith disclosures of potential wrongdoing. It is a

¹ S. Res. 522, 114th Cong. (2016) (enacted) (citing legislation of July 30, 1778, reprinted in *Journals of the Continental Congress, 1774–1789*, ed. Worthington C. Ford, et al. (Washington, D.C., 1904–37), 11:732). The 2016 Whistleblower Appreciation Day resolution was sponsored by the Senate Whistleblower Protection Caucus.

² Exec. Order No. 12,731, 3 C.F.R. 306 (1990) (emphasis added).

prohibited personnel practice to retaliate against an employee for “*any disclosure of information . . . which the employee or applicant reasonably believes evidences (i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.*”³ Protections from reprisal also extend to employees of contractors, subcontractors, grantees, and subgrantees.⁴ These statutes protect whistleblowers who report wrongdoing internally to a supervisor—as a significant majority do—so that their management has an opportunity to address it. They also protect whistleblowers who choose to report outside of their chain of command due to real fears of reprisal by their management. In either case, these brave men and women perform an invaluable public service.

That service is equally valuable and necessary when whistleblowers disclose waste, fraud, and abuse to Congress. Congress relies on these individuals working within agencies to provide the information necessary “to give effect to the checks and balances that are essential to the separation of powers.”⁵ Accordingly, title 5, Section 7211 provides that the right of federal employees to furnish information to committees of Congress may not be interfered with or denied.⁶ Officials or employees who do interfere with that right are not entitled to compensation.⁷

³ 5 U.S.C. § 2302(b)(8)(A)(i)–(ii) (2012) (emphasis added); *id.* § 2302(b)(9) (protecting employees who, among other things, exercise any right granted by law, rule, or regulation or who cooperate with an Inspector General or the Office of Special Counsel); and *id.* § 2302(b)(13) (requiring any non-disclosure agreement to contain a clear exception for lawful whistleblowing); Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, div. E, title VII, 129 Stat. 2485, § 744 (2015). Employees of the Intelligence Community also are protected under a separate regime pursuant to Presidential Policy Directive 19, the Intelligence Authorization Act of 2014, and the Intelligence Community Whistleblower Protection Act. Presidential Policy Directive 19, *Protecting Whistleblowers with Access to Classified Information* (Oct. 10, 2012); Intelligence Authorization Act for Fiscal Year 2014, Pub. L. No. 113-126, §§ 601–04, 128 Stat. 1390, 1414–22 (2014); Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, §§ 701–02, 112 Stat. 2397, 2413–17 (1998). Employees of the Federal Bureau of Investigation are protected under 5 U.S.C. § 2303 which now also explicitly clarifies that the statute protects disclosures to supervisors, the Office of Special Counsel, and Congress. Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016, Pub. L. No. 114-302, 130 Stat. 1516 (2016).

⁴ 41 U.S.C. app. § 4712 (2016); 10 U.S.C. § 2409 (2012).

⁵ Brief for Members of Congress as Amici Curiae Supporting Respondent, Dep’t of Homeland Sec. v. MacLean, No. 13-894, 2014 WL 4925075, at *7 (U.S. Sept. 29, 2014).

⁶ 5 U.S.C. § 7211 (2012) (“The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.”)

⁷ Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, div. E, title VII, 129 Stat. 2475, § 713, (2015); Letter from Susan A. Poling, Gen. Counsel, U.S. Gov’t Accountability Office to Charles E. Grassley, Chairman, S. Comm. on the Judiciary, Jason Chaffetz, Chairman, H. Comm. on Oversight and Gov’t Reform, and Bob Goodlatte, H. Comm. on the Judiciary re: GAO Op. B-325124 (Apr. 5, 2016) (available at <http://www.gao.gov/assets/680/676341.pdf>).

Despite these protections, whistleblowers still often face intimidation, retaliation, and prohibited personnel practices. Therefore it is essential that agency leadership, from the top down, promotes an open culture for employees to make disclosures and takes swift action against any employee who violates a whistleblower's rights.

All Americans are better off when whistleblowers step forward and report misconduct without fear of retaliation. Consistent with your statutory responsibilities, we ask that you remind employees at your agency about their ability to make protected disclosures in accordance with whistleblower protection laws.⁸ We also ask that you remind all incoming employees and managers that retaliation against whistleblowers will not be tolerated.

Over the past several years the members of the Senate Whistleblower Protection Caucus have endeavored to increase protections for whistleblowers and bring awareness to issues of retaliation. We will continue this work in the current Congress and will continue oversight of the executive branch's implementation and enforcement of whistleblower protections. We appreciate your assistance and look forward to working with you.

Sincerely,



Claire McCaskill
U.S. Senator



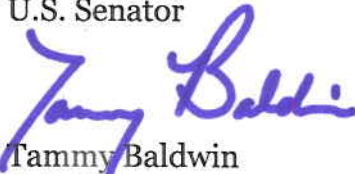
Charles E. Grassley
U.S. Senator



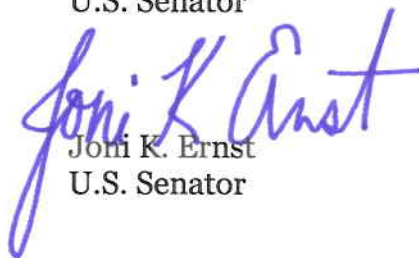
Ron Wyden
U.S. Senator



Thom Tillis
U.S. Senator



Tammy Baldwin
U.S. Senator



Joni K. Ernst
U.S. Senator

⁸ 5 U.S.C. § 2302(c) (2012) ("The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title, including how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such disclosures.").

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Tom Carper
U.S. Senator

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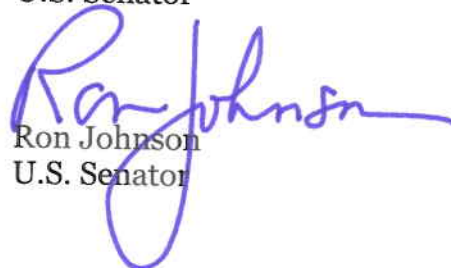
Edward J. Markey
U.S. Senator

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Gary Peters
U.S. Senator

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John Boozman
U.S. Senator

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Ron Johnson
U.S. Senator