URGENT LEGISLATIVE MATTER

October 31, 2011

Hon. Joseph I. Lieberman
Chairman
U.S. Senate Committee on Homeland
Security and Governmental Affairs
706 Hart Office Building
Washington, DC 20510

Hon. Susan M. Collins
Ranking Member
U.S. Senate Committee on Homeland
Security and Governmental Affairs
413 Dirksen Senate Office Building
Washington, DC 20510

Hon. Daniel K. Akaka
Chairman
Subcommittee on Oversight of Government
Management, the Federal Workforce, and
the District of Columbia
U.S. Senate Committee on Homeland
Security and Governmental Affairs
141 Hart Senate Office Building
Washington, DC 20510

Hon. Darrell E. Issa
Chairman
U.S. House Committee on Oversight and
Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

Hon. Todd Platts
U.S. House of Representatives
2455 Rayburn House Office Building
Washington, DC 20515

Hon. Chris Van Hollen
U.S. House of Representatives
1707 Longworth House Office Building
Washington, DC 20515

Re: Whistleblower Protection Enhancement Act, S. 743

Dear Congressmen:

We have carefully studied the Whistleblower Protection Enhancement Act (S. 743). We would like to call your attention to two provisions in the legislation that will undercut your attempt to truly enhance federal employee whistleblower protections. We request that your offices ensure that these two provisions are fixed prior to any Senate vote on S. 743 and that these defects are not contained in any House bill. Given the significance of these two problems, we will be compelled to strongly oppose the bill if these problems are not remedied.

I. The current hearing procedures cannot be eliminated and replaced by summary dismissal proceedings.

S. 743 contains a provision enabling the Merit Systems Protection Board (MSPB) to dismiss cases without a hearing on the basis of "summary judgment." This is a major unprecedented rollback on current employee rights and undermines a compromise reached in 1978. Giving the

MSPB summary judgment authority will dramatically increase the costs of whistleblower proceedings, undermine the ability of whistleblowers to obtain or afford counsel, delay justice and result in numerous meritorious cases never being filed, being wrongfully dismissed or being endlessly delayed in a bureaucratic quagmire. It will also completely undermine the ability of whistleblowers to obtain settlement agreements without having to spend thousands of dollars defending summary judgment filings and/or appealing summary dismissals.

The current Whistleblower Protection Act traces its history back to the Civil Service Reform Act of 1978. When Congress initially considered protecting whistleblowers under that Act, the ability of the MSPB to grant summary judgment was hotly debated. The whistleblower advocates prevailed during those debates and whistleblowers were given the right to a hearing. Administration requests that cases be heard without a hearing (i.e. by summary dismissal proceedings based on affidavits filed by federal managers) was, after careful debate and consideration, rejected. This was a significant victory for whistleblowers. It has been the law for over 33 years. Executive agencies have appealed to the courts for the authority to dismiss whistleblower cases on the basis of management affidavits. However, the courts, citing the 1978 debates, have uniformly rejected this significant abrogation of whistleblower rights. *See Crispin v. Dept. of Commerce*, 732 F.2d 919 (Fed. Cir. 1984).

When Congress conducted hearings on the current Whistleblower Protection Enhancement Act (now introduced as S. 743), no record whatsoever was created to justify reversing the 1978 law. Not one witness had the audacity to come before the House or Senate to justify using an Enhancement Act as a Trojan horse to undermine whistleblower rights by implementing the long-discredited attempt to empower the MSPB to summarily dismiss whistleblower cases on the basis of management affidavits.

Despite the lack of a record, opponents of whistleblowers used back-door channels and snuck this provision into the S. 743. No whistleblower advocacy group has ever gone on the record supporting this "reform."

Congress' decision to prohibit administrative judges from issuing summary dismissals in 1978 was correct, and there is nothing on-the-record to demonstrate that this decision should be reversed. It is disingenuous to refer to a law as an "Enhancement Act," while at the same time significantly undercutting rights federal employees have had under the WPA for 33 years.

The summary dismissal provision contained in S. 743 is a major rollback on existing protections and will undermine the practical effectiveness of many of the positive reforms contained in S. 743. This provision must be cut in its entirety.

II. S. 743 will fail without all-circuit review.

Since the current efforts to reform federal employee whistleblower protections commenced, every advocate for fixing the current process identified that the current appeals process for whistleblower cases is one of the central structural problems needing reform. Briefly stated, every whistleblower law and every employment discrimination law in the United States *except* the Whistleblower Protection Act permits what is generally known as "all-circuit" review of trial

judge decisions. The normal courts of appeal hear appeals. However under the WPA, a special appeals court, known as the U.S. Court of Appeals for the Federal Circuit has exclusive authority over federal employee whistleblower cases. This court is unlike all other federal appeals courts and has limited jurisdiction over special cases (most of its docket concerns trademark and copyright disputes).

Over the years, the Federal Circuit has created a body of case law hostile to whistleblower protections and the judges appointed to that court have no expertise in protecting whistleblowers. During the extensive hearings conducted on the WPA, no witness justified continuing this procedure. For example, in testimony before the U.S. Senate, the representative from the Government Accountability Project reviewed 20 years of court precedent issued by the Federal Circuit, and concluded that the current reform legislation would *fail* if the Federal Circuit monopoly was not ended: "***Until there is normal appellate review to translate the congressional mandate, this[The Whistleblower Protection Enhancement Act] and any other legislation will fail.***" Hearing Before the Senate Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia, Senate Committee on Homeland Security and Governmental Affairs (June 11, 2009).

As far back as 1999, one of the principle sponsors of the original WPA, Senator Charles Grassley, pointed to a number of Federal Circuit rulings as the ***"judicial equivalent to contempt of Congress."*** *Congressional Record* S 11446 (September 24, 1999).

S. 743 does not achieve the goal of all-circuit review. The bill empowers the Office of Personnel Management to have appeals filed in other judicial circuits transferred back to the Federal Circuit. *See* Section 108(b). Thus, whenever the Executive wants the Federal Circuit to exercise appellate jurisdiction, the current Federal Circuit monopoly will continue to exist.

There is no justification for treating WPA cases different from all other federal whistleblower or employment discrimination laws. The argument that there should be one appeals court in order to ensure uniformity in decisions is contradictory and inconsistent. First, the vast majority of federal employment cases arise under standard anti-discrimination laws, such as Title VII or the Age Discrimination Act. These laws are all subject to "all-circuit" review. Despite that fact that all twelve normal federal appeals courts hear these cases, there is nothing on-the-record that demonstrates that this diversity has ever had a negative impact on federal employees or the administration of federal personnel practices. However, the lack of all-circuit review has resulted in barring whistleblowers from having their cases heard in real appeals courts, and instead has forced these employees (regardless of where they live) to file their appeals in a special court located in Washington, D.C. that was designed to adjudicate copyright and trademark cases.

This provision must be removed for S. 743 to be a true Enhancement Act.

CONCLUSION

Thank you for your efforts in attempting to ensure that federal employees can report waste, fraud and abuse. We hope that you will act quickly to ensure that S. 734, and any companion

legislation introduced in the House, is corrected. Until these problems are fixed we are compelled to *strongly oppose* Senate approval of S.734 and any House bill that contains these defects.

If you have any questions, please do not hesitate to contact us. We look forward to working together and ensuring that waste, fraud and abuse in federal spending is rooted out and that all employees who witness such misconduct can report these concerns free from retaliation.

Respectfully submitted,

Black Leadership Round Table
The Honorable Walter E. Fauntroy (Rev.)
Executive Director

Civil Rights Defense Fund
Rev. Dr. Ruby Reece Moone
President

Civil Rights Justice for NIH Employees
Terri Williams
President

The Coalition for Change, Inc. (C4C)
Tanya Ward Jordan
Founder

Fleur De Lis Studios
Julia Davis
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National Whistleblowers Center
Stephen M. Kohn
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Network for Women's Equality (Net-WE)
Susan M. Morris
President

No Fear Coalition
Dr. Marsha Coleman-Adebayo
Chairwoman

The USDA Coalition of Minority Employees
Lawrence Lucas
President

CC:

Chairman and Ranking Member
U.S. Senate Committee on the Judiciary

Attachment:
June 11, 2009 Testimony by Government Accountability Project on all-circuit review

ATTACHMENT
TESTIMONY OF GAP REGARDING THE FEDERAL CIRCUIT

TESTIMONY OF THE GOVERNMENT ACCOUNTABILITY PROJECT REGARDING THE FEDERAL CIRCUIT AND THE NEED FOR "ALL-CIRCUIT" REVIEW

Presented to the Senate Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia, Senate Committee on Homeland Security and Governmental Affairs (June 11, 2009)

The second cause for the administrative breakdown [in the protection of federal employee whistleblowers] has been beyond the Board's [the Board is the Merit Systems Protection Board] control. The Board is limited by impossible case law precedents from the Federal Circuit Court of Appeals, which since its 1982 creation has abused a monopoly of appellate review at the circuit level.

Monopolies are always dangerous. In this case, the Federal Circuit's activism has gone beyond ignoring Congress' 1978, 1989 and 1994 unanimous mandates for whistleblower protection. Three times this one court has rewritten it to mean the opposite. ***Until there is normal appellate review to translate the congressional mandate, this and any other legislation will fail.***

This conclusion is not a theory. It reflects nearly a quarter century, and a dismally consistent track record. From its 1982 creation until passage of 1989 passage of the WPA, the Federal Circuit only ruled in whistleblowers' favor twice. The Act was passed largely to overrule its hostile precedents and restore the law's original boundaries. Congress unanimously strengthened the law in 1994, for the same reasons. Each time Congress reasoned that the existing due process structure could work with more precise statutory language as guidance.

That approach has not worked. Since Congress unanimously strengthened the law in October 1994, the court's track record has been 3-200 against whistleblowers in final decisions on the merits. It is almost as if there is a legal test of wills between Congress and this court to set the legal boundaries for whistleblower rights. A digest of all reported decisions since October 1994 is enclosed as Exhibit 6.

The Federal Circuit's activism has created a successful, double-barreled assault against the WPA through – 1) nearly all-encompassing loopholes, and 2) creation of new
impossible legal tests that a whistleblower must overcome for protection.