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Justice Department Opposition Holds Up Whistle-Blower Measures

By Stephen Barr

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Bipartisan efforts in Congress to help protect federal employees who become whistle-blowers appear to be stalled because of opposition from the Justice Department.

Bills in the House and Senate would clarify congressional intent in cases where agencies take reprisals against federal employees who risk their jobs when they disclose waste, fraud and abuse in government.

The issue of whistle-blower rights has taken on some urgency in the past year, in part because some lawmakers worry that current statutory protections are inadequate and discourage federal employees from bringing their concerns about national defense and homeland security issues to the Congress.

The House and Senate bills, while different in some aspects, would rein in the authority of judges on the U.S. Court of Appeals for the Federal Circuit to interpret some parts of whistle-blower law and would write into law the "anti-gag" riders that Congress includes in appropriations bills to encourage federal employees to speak up about wrongdoing in their agencies.

The Senate bill goes further than the House bill in some areas, such as providing a remedy for whistle-blowers whose security clearances are yanked in retribution for speaking up.

But because of opposition from the Justice Department, the bills have not been scheduled for floor votes, even though they have been approved by committees, congressional aides said.

In a letter to the Senate Governmental Affairs Committee, **William E. Moschella**, assistant attorney general for legislative affairs, called the Senate bill "burdensome, unnecessary and unconstitutional."

"Rather than promote and protect genuine disclosures of matters of real public concern, it would provide a legal shield for unsatisfactory employees," Moschella wrote.

Moschella's portrayal of the bill has drawn objections from Sen. **Daniel K. Akaka** (D-Hawaii), a longtime advocate of federal employee rights.

Akaka, in a letter to Moschella, said the Senate bill would not encourage the filing of frivolous whistle-blower claims and would not let deadbeat workers escape discipline by assuming the guise of a whistle-blower.

The Senate bill, Akaka said, does not alter underlying requirements that whistle-blowers "must reasonably believe" that they have learned of potential wrongdoing inside the government, and the bill continues to permit federal investigators to determine whether there is enough evidence to move a case forward.

Akaka, in the letter, faulted the department for claiming that the FBI, the CIA and the National Security Agency "can discipline employees for whistle-blowing." The assertion, Akaka said, "demonstrates a bias against federal whistle-blowers."

Congress, Akaka said, has made clear its intent: "All agencies in the federal government are barred from retaliating against employees for whistle-blowing."

One of the bill's key provisions addresses a long-standing complaint that some agencies revoke security clearances as a way to punish whistle-blowers. Losing a security clearance usually ends an employee's career.

The Senate bill would allow the Merit Systems Protection Board, which rules in federal employee disciplinary cases, to review cases in which whistle-blowers lost their security clearance because of retaliation. MSPB could not restore a revoked security clearance but would be allowed to call for a remedy, such as back pay or other relief.

The House bill would authorize a study of allegations that the government improperly revokes clearances as a way to punish whistle-blowers.

The Justice Department opposes the Senate approach, Moschella wrote, because determinations related to security clearances are "a prerogative" of the executive branch and not the MSPB and courts. Agencies have internal boards for employee appeals of revoked clearances, he said.

"In any event, we are not aware of any pattern of abusing security clearance decisions to retaliate against whistle-blowers," Moschella wrote.

In addition to Akaka, sponsors of the Senate bill include Sen. **Susan Collins** (R-Maine) and **Charles E. Grassley** (R-Iowa). The House bill's chief sponsor is Rep. **Todd R. Platts** (R-Pa.).

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