

**UNITED STATES SENATE
DEMOCRATIC POLICY COMMITTEE**

**“Mistreatment of Iraq Contracting Whistleblowers:
The Need for Legislative Action”**

**WRITTEN TESTIMONY OF STEPHEN M. KOHN^{1/}
Executive Director, National Whistleblower Center**

September 21, 2007

Chairman Byron L. Dorgan and Honorable Members of the Senate Democratic Policy Committee:

On behalf of the National Whistleblower Center, thank you for the opportunity to testify today regarding critically-needed policy reforms necessary to ensure that employees who expose waste, fraud and abuse in federal contracting or who disclose other violations of federal law are not subject to career ending retaliation.

OVERVIEW

Bluntly stated, the overwhelming majority of whistleblowers cannot obtain protection under current laws. Three major factors have undermined the safety-net needed to protect whistleblowers: (1) The lack of any legislative protection for the majority of American employee-whistleblowers; (2) Loopholes in existing legislation; (3) Bad judicial decisions which require legislative corrective action.

It is up to Congress to provide the legal framework necessary to protect whistleblowers.

The American people fully understand the scope of this problem, and the need for prompt Congressional action. This was evidenced by a recent scientifically validated bipartisan opinion poll of 1014 "likely voters" in which 79 percent of the voters expressed a clear expectation that Congress will enact strong whistleblower protections.²

The responsible committees in the House and Senate have conducted numerous hearings fully documenting the deficiencies in current whistleblower laws and the need for prompt Congressional action.³

Most of the major Democratic candidates for President, along with a number of the Republican candidates, have explicitly, in writing, endorsed the enactment of major whistleblower reforms, including legislation which would protect all American workers who blow the whistle and the passage of pending legislation (such as H.R. 985). These candidates include: Senator Hillary Clinton, Senator Chris Dodd, former Senator John Edwards, former Senator Mike Gravel, Representative Dennis Kucinich, Senator Barak Obama, and Governor Bill Richardson. In addition to the Democratic candidates, a number of Republican candidates have

also, in writing, fully endorsed comprehensive whistleblower protection, including Governor Mike Huckabee.⁴

We recognize that Congressional leaders have shown their strong commitment to protecting employees from retaliation when they tell the truth about workplace misconduct and contractor fraud. Numerous whistleblower protection laws have been introduced into both chambers of Congress. H.R. 985, the *Whistleblower Protection Enhancement Act of 2007*, passed the House by an overwhelming 331-94 majority this spring. This *Enhancement Act* built upon the work of the Senate Committee on Homeland Security and Governmental Affairs, and Senators Akaka, Grassley, Collins, Leahy, Lieberman, and others, who carefully studied the deficiencies in federal whistleblower protections and introduced S. 274 as the first step in addressing these problems. Additionally, language protecting DOD contractors is contained in Section 861 of the National Defense Authorization Act for FY 2008 (S.1547).

Most recently, Congress overwhelmingly passed transportation-industry whistleblower protection provisions in sections 1413, 1536, and 20109 of H.R. 1, the "Implementing Recommendations of the 9/11 Commission Act of 2007." This law contains an effective model for protecting whistleblowers, but as enacted only applied to bus drivers, truck drivers, railroad employees and other persons involved in surface transportation.

These are very positive steps, but do not solve the problem. The majority of American employees are not protected under H.R. 1, and will still lack adequate whistleblower protection, even if S.274 and S.1547 were signed into law.

It is now time for Congress to get the job done. A reasonable, effective whistleblower protection provision should contain the following features: (1) all employees, including all federal employees, contractors and federal grant recipients, must be protected; (2) procedures protecting whistleblowers must be meaningful, and include, at a minimum, procedural protections from the Whistleblower Enhancement Act and/or the recently passed transportation whistleblower laws; (3) the remedies available to employees must, at a minimum, contain a complete "make whole" remedy and full compensatory damages, consistent with the damage provisions in the Enhancement Act, Title VII and the newly enacted transportation whistleblower laws.

Perhaps the best method to directly clean up misconduct in defense contracting would be the immediate enactment of the *False Claims Act Correction Act of 2007*, which was introduced into the Senate in a bi-partisan manner by Senators Patrick Leahy (D-VT), Arlen Specter (R-PA), Charles Grassley (R-IA), and Dick Durbin (D-IL). This law would hold federal contractors fully accountable for any fraud on the taxpayer or intentional misuse of federal funds. The Correction Act is narrowly tailored to correct specific technical deficiencies in the current False Claims Act that have permitted unscrupulous contractors to escape accountability.

The *Correction Act* is essential legislation for protecting the integrity of the Department of Defense procurement and contracting process. It is narrowly designed to correct a number of

judicial interpretations which undermined the original intent of the False Claims Act. For example, the *Correction Act* would Congressionally reverse the Appeals Court decision in the *U.S. ex rel. Totten v. Bombardier Corp*, 380 F.3d 488 (D.C. Cir. 2004). That case endorsed Enron-style “shell games” which permit government contractors to hide behind third party entities to escape liability. The result: Billions of dollars in Iraq war spending stolen and wasted, and no recourse open to protect the American taxpayers or the whistleblowers who exposed the frauds. The *Correction Act* also directly addresses the problem created by the Federal District Court for the Eastern District of Virginia in *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 2006 WL 2388790 (E.D. Va. Aug. 16, 2006), which dismissed a jury verdict finding FCA violations for funds allocated to contractors operating on Iraqi funds administered by the U.S. Government.

HOW DO WE KNOW THAT WHISTLEBLOWER PROTECTIONS ARE URGENTLY NEEDED?

As set forth in detail in the Congressional hearing records identified above, the public record is filled with example after example of whistleblowers who have lacked any meaningful protection after having their careers shattered solely because they served the public interest and reported waste, fraud and corruption. But in order to further demonstrate the scope this problem, especially in light of the currently pending National Defense Authorization Act, S. 1547, I have examined one whistleblower law administered, in part, by investigators for the Department of Defense. This law, the False Claims Act, was amended in 1986 in direct response to the scandals plaguing defense procurement.

When the False Claims Act was originally amended in 1986 to protect the taxpayers from defense contractor abuses, numerous cases were filed, billions of dollars in abuses were uncovered and the taxpayers were able to recover millions of dollars directly from the unscrupulous contracts. However, the contractors fought back, and prevailed in a number of high profile cases which undermined the law, such as *Totten* and *Custer Battles*.

Department of Justice statistics concerning False Claims Act recoveries demonstrate how DOD contractors have escaped liability and accountability for misusing taxpayer monies. For example, before the terrible judicial precedents were adopted or followed, DOD fraud constituted 72.96% of the fraud-recoveries obtained by the DOJ civil fraud program. Today, that percentage has declined to 14.14%. *See*, Slide 1. A similar decline occurred in DOJ civil fraud claims based solely on whistleblower disclosures. *See*, Slide 2. Moreover, the actual dollar recovery obtained from fraudulent defense contractors substantially *declined* over the three year period from the 1990-92 and 2004-06. *See* Slide 3. In other words, during the current Iraq War, and the massive war-related contracting, the total amount of fraud recoveries has *declined*, both as a percentage of fraud recoveries government-wide, and in direct dollar amounts. Simply stated, decisions like *Totten* and *Custer Battles* are costing the taxpayers billions of dollars.

Beyond the loopholes which permit fraud and abuses to exist unchecked, the following are other examples of American employees who lack *any* whistleblower protections whatsoever:

- DOD contractors and all other federal contractors, have no private cause of action if they expose violations of federal law outside of the narrow confines of the FCA;
- Most federal employees involved in the “war on terror” are currently excluded from any federal whistleblower protections, including national security related whistleblowers;
- There is no judicial remedy for federal employees who are retaliated against for testifying before the U.S. Congress;
- The vast majority of federal contractors lack any private right of action to prevent retaliation based on their truthful testimony before the U.S. Congress;
- Although the federal obstruction of justice laws *criminalize* retaliation against employees who provide federal law enforcement agencies with evidence that federal laws have been violated, that statute does not contain any civil remedies for the victims of the retaliation.

The list goes on. The need for prompt and effective action cannot be overestimated.

CONCLUSION

Today whistleblower protections are stuck in the mud. Congress can fix this problem. Legislative models exist which, if properly enacted, will provide reasonably effective legislative protection for whistleblowers who work for the American taxpayers or who have information about the violation of federal laws for the misuse of taxpayer money.

Here is what needs to happen now:

1. *Whistleblower Protection for Employees of Federal Contractors:* Section 861 of the National Defense Authorization Act for FY 2008 (S.1547) represents a strong first step in fixing the loophole which permits federal contractor to fire whistleblowers who expose fraud. Section 861 should be modified to include all federal contractors and recipients of federal monies, and ensure that those employees also have adequate substantive and procedural protections;
2. *Whistleblower Protection for Federal Employees:* S. 274 and H.R. 985 should be harmonized and signed into law in order to ensure that all federal employees have whistleblower protections and adequate procedural and substantive rights.
3. *Whistleblower Protections to Prevent Contractor Fraud:* The False Claims Act Corrections Act must be signed into law in order to ensure that employees can report contractor fraud, and that contractors who rip off the taxpayers are held fully accountable under the FCA. The days when contractors can hide behind the narrowest technical defenses and get away with multi-million dollar rip-offs must end.

4. *Comprehensive Legislation:* Congress should enact a comprehensive whistleblower protection law, modeled on current legislation which protects specific classes of employees (such as the recently enacted surface transportation whistleblower law or the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964), in order to finally eliminate the loopholes in current procedures and provide bottom-line protection for all American workers who, in good faith, disclosure violations of federal laws and misuse of taxpayer monies. The framework for this model is posted at <http://www.whistleblowers.org/model.bill.senate.pdf>.

Ensuring that all whistleblowers – including government contractors and federal employees – are protected under laws which contain adequate procedural and substantive rights is not only strongly endorsed by the National Whistleblower Center, but the major national organizations active in whistleblower protection issues, ranging from the Project on Government Oversight and Public Citizen and Taxpayers Against Fraud to the American Library Association, OMB Watch and the Federal Law Enforcement Officers Association. A letter to Congress from these groups, and numerous other leading whistleblower advocacy organizations, is attached to this testimony.

Thank you for the opportunity to testify at this very important hearing. We look forward to working with you to ensure that adequate and effective legislation can be voted on during this Congressional session.

Respectfully submitted by:

STEPHEN M. KOHN
Executive Director
National Whistleblower Center
3238 P Street, N.W.
Washington, D.C. 20007
(202) 342-1903
www.whistleblowers.org



¹ Stephen M. Kohn is the Executive Director of the National Whistleblower Center, a partner in the Washington, D.C. law firm of Kohn, Kohn & Colapinto, LLP. For over 20 years he has represented nationally known whistleblowers in retaliation and qui tam cases, including Department of Defense employees. He is currently co-counsel for Bunnatine Greenhouse. Mr. Kohn is the author or co-author of six books on whistleblower law: *Whistleblower Law* (Greenwood Publishing, 2004); *Concepts and Procedures in Whistleblower Law* (Quorum, 2000), *The Whistleblower Litigation Handbook*, (Weily

Legal Publishing, 1990), *The Labor Lawyers Guide to the Rights and Responsibility of Employee Whistleblowers* (Quorum, 1988), *Protecting Environmental and Nuclear Whistleblowers: A Litigation Manual* (NIRS, 1985) and *Federal Whistleblower Laws and Regulations* (NWC, 2003). In 2006, he was awarded the Daynard Public Interest Visiting Fellowship by the Northeastern University School of Law.

The National Whistleblower Center is a non-profit, tax-exempt organization specializing in the support of employee whistleblowers. Created in 1988, one of the major goals of the Center is to protect the taxpayers by educating the public about the need to protect employees to disclose government abuse, misconduct and corruption. The Center publishes an educational web page, www.whistleblowers.org, supports precedent-setting litigation on behalf of employee whistleblowers, and provides counsel and attorney referrals to whistleblowers.

² A copy of the poll is available at:

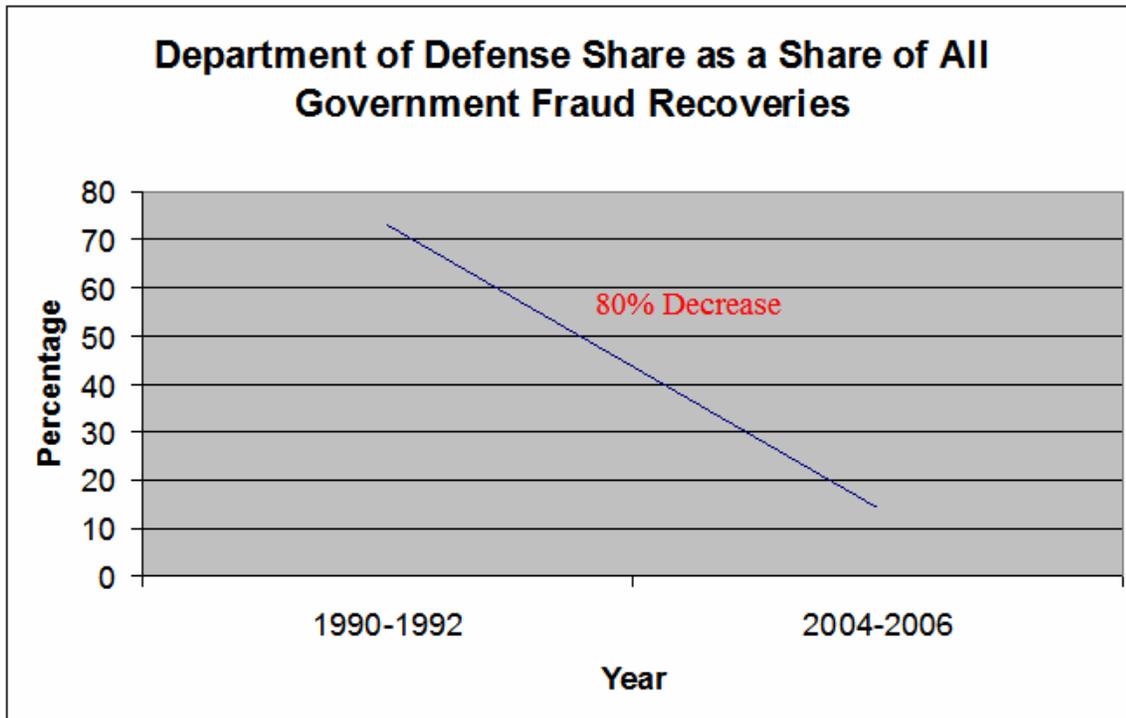
http://www.whistleblowers.org/Democracy_Corps_February_14-19_2007_Survey_1_.pdf

³ See, e.g., Senate Committee on Government Affairs, “S-1358 – The Federal Employee Protection Disclosures Act: Amendments to the Whistleblower Protection Act (S. Hearing 108-414); Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia, Committee on Homeland Security and Government Affairs, “Safeguarding the Merit System: A Review of the U.S. Office of Special Counsel (S. Hearing 109-68); House Committee on Government Reform, “What Price Free Speech? Whistleblowers and the Ceballos Decision,” (Serial No. 109-161); Subcommittee on National Security, Emerging Threats and International Relations, Committee on Government Reform, “National Security Whistleblowers in the Post-September 11th Era: Lost in the Labyrinth and Facing Subtle Retaliation,” (Serial No. 109-150); Subcommittee on Workforce Protections, House Committee on Labor and Education, (Private Sector Whistleblowers: Are there Sufficient Legal Protections,” (Hearing conducted May 15, 2007).

⁴ Additionally, Representatives Ron Paul and Tom Tancredo endorsed H.R. 985 and Senator Sam Brownback issued a statement in support of whistleblower protection. All of the candidate statements and survey responses are posted on the web at:

http://www.whistleblowers.org/html/2008_survey.html.

CHART 1



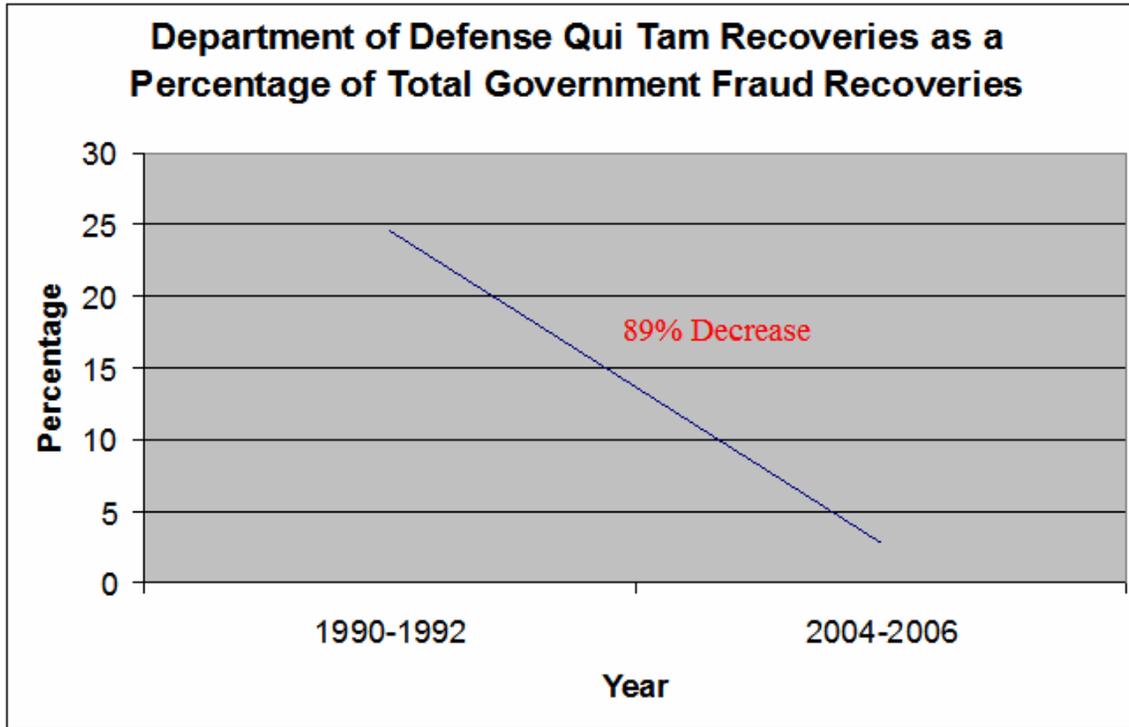
** Source: Statistics Compiled by U.S. Department of Justice, “Fraud Statistics-DOD, October 1, 1986 – September 30, 2006, Civil Division, DOJ” and “Fraud Statistics-Overview, October 1, 1986 – September 30, 2006, Civil Division, DOJ.” The Chart measures the Department of Defense total fraud recoveries as a percentage of the Government’s total fraud recoveries and compares the recoveries. We chose the most recent fiscal years available (2004-2006) and compared them with the fiscal years 1990-1992. The fiscal years 1990-1992 were chosen for comparison as they represent the first three years in which cases brought under the 1986 amendments would have reasonably matured and resulted in actual taxpayer recoveries.

FY 1990-1992 Total Fraud Recoveries by Department of Defense \$ 617,569,087
 FY 1990-1992 Total Fraud Recoveries by the Government \$846,474,611

In those three years the department of defense accounted for some 72.96% of all fraud recoveries.

FY 2004-2006 Total Fraud Recoveries by Department of Defense were \$ 762,295,434
 FY 2004-2006 Total Fraud Recoveries by the Government were \$ 5,290,014,403
 By this time, the Department of Defense Total Fraud Recoveries accounted for only 24.6% of the total Fraud Recoveries by the Government.
 That is a decline of 80%.

CHART 2



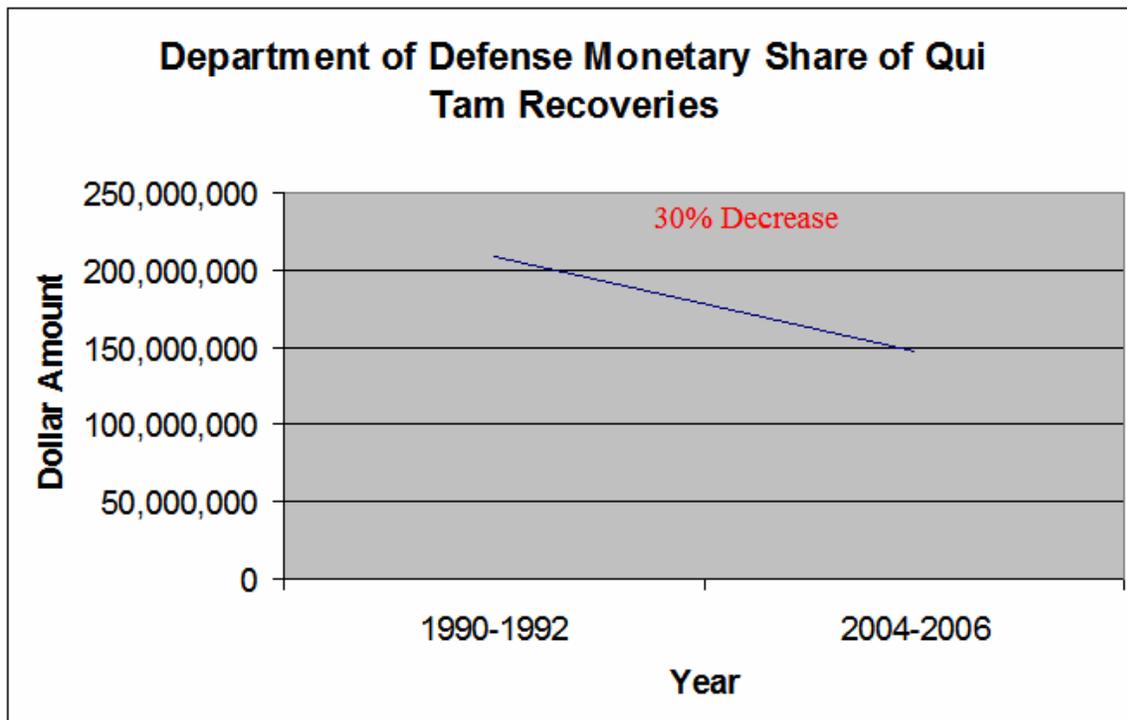
** This chart uses statistics compiled by the U.S. Department of Justice in two charts entitled “Fraud Statistics - Overview October 1, 1986-September 30-2006 Civil Division, U.S. Department of Justice” and “Fraud Statistics - Department of Defense October 1, 1986-September 30-2006 Civil Division, U.S. Department of Justice.” It measures the Department of Defense recoveries based on information provided by whistleblowers under the qui tam provisions of the False Claims Act as a percentage of the Government’s total fraud recoveries.

We chose the most recent fiscal years available (2004-2006) and compared them with the fiscal years 1990-1992. The fiscal years 1990-1992 were chosen for comparison as they represent the first three years when cases brought under the 1986 amendments would have matured.

FY 1990-1992 Fraud Recoveries by Department of Defense based on information provided by whistleblowers: \$ 208,236,169; FY 1990-1992 Total Fraud Recoveries by the Government: \$846,474,611. During this time period *qui tam* DOD whistleblowers, along, accounted for 14.41% of all government fraud recoveries.

FY 2004-2006 FY 1990-1992 Fraud Recoveries by Department of Defense based on information provided by whistleblowers were \$ 146,716,623. During the same time period, total Fraud Recoveries by the Government were \$ 5,290,014,403. Thus DOD whistleblowers accounted for only 2.77% of the total Fraud Recoveries by the Government. That is a decline of 89%.

CHART 3



** This chart uses statistics compiled by the U.S. Department of Justice in a chart entitled “Fraud Statistics - Department of Defense October 1, 1986-September 30-2006 Civil Division, U.S. Department of Justice.”

It measures the Department of Defense recoveries based on information provided by whistleblowers under the qui tam provisions of the False Claims Act and compares the most recent fiscal years available (2004-2006) with the fiscal years 1990-1992. The fiscal years 1990-1992 were chosen for comparison as they represent the first three years when cases brought under the 1986 amendments would have matured.

FY 1990-1992 Fraud Recoveries by Department of Defense based on information provided by whistleblowers were \$ 208,236,169

FY 2004-2006 FY 1990-1992 Fraud Recoveries by Department of Defense based on information provided by whistleblowers were \$ 146,716,623

That is a decline of 29.54% of actual taxpayer dollars recovered.

September 20, 2007

The Honorable Harry Reid
Majority Leader, U.S. Senate
528 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Nancy Pelosi
Speaker, U.S. House of Representatives
H-232, U.S. Capitol
Washington, D.C., 20515

The Honorable Mitch McConnell
Minority Leader, U.S. Senate
361-A Russell Senate Building
Washington, D.C. 20510

Honorable John Boehner
Minority Leader, U.S. House of Representatives
1011 Longworth H.O.B.
Washington, D.C., 20515

Dear Majority Leader Reid, Madam Speaker Pelosi, Senator McConnell and Congressman Boehner:

We are writing to request your firm commitment to bring legislation to protect all whistleblowers to a vote during this Congressional term.

The public record, which includes numerous Congressional hearings, overwhelmingly supports immediate Congressional action to ensure that all employees who risk their jobs and careers to report violations of federal law are adequately protected. Currently, a majority of whistleblowers in the United States lack any protection whatsoever. The few existing whistleblower laws are riddled with loopholes and are ineffective.

The American people fully understand the scope of this problem, and the need for prompt Congressional action. This was evidenced by a recent scientifically validated bipartisan opinion poll of 1014 "likely voters" in which 79 percent of the voters expressed a clear expectation that Congress will enact strong whistleblower protections. A copy of this polling report is attached.

We recognize that Congressional leaders have shown their strong commitment to protecting employees from retaliation when they tell the truth about workplace misconduct. Numerous whistleblower protection laws have been introduced into both chambers of Congress. H.R. 985, the Whistleblower Protection Enhancement Act of 2007, passed the House by an overwhelming 331-94 majority this spring. Most recently, Congress overwhelmingly passed transportation-industry whistleblower protection provisions in sections 1413, 1536, and 20109 of H.R. 1, the "Implementing Recommendations of the 9/11 Commission Act of 2007." These are positive steps, but do not solve the problem. The vast majority of American employees will still lack whistleblower protection, even if the Enhancement Act is signed into law.

It is now time for Congress to get the job done. A reasonable, effective whistleblower protection provision should contain the following features: (1) all employees, including all federal employees, contractors and federal grant recipients, must be protected; (2) procedures protecting whistleblowers must

be meaningful, and include, at a minimum, procedural protections from the Whistleblower Enhancement Act and/or the recently passed transportation whistleblower laws; (3) the remedies available to employees must, at a minimum, contain a complete "make whole" remedy and full compensatory damages, consistent with the damage provisions in the Enhancement Act, Title VII and the newly enacted transportation whistleblower laws.

Finally, we also strongly support immediate enactment of the False Claims Act Correction Act of 2007, which was introduced into the Senate in a bi-partisan manner by Senators Patrick Leahy (D-VT), Arlen Specter (R-PA), Charles Grassley (R-IA), and Dick Durbin (D-IL). This law would hold federal contractors fully accountable for any fraud on the taxpayer or intentional misuse of federal funds. The Correction Act is narrowly tailored to correct specific technical deficiencies in the current False Claims Act that have permitted unscrupulous contracts to escape accountability.

Thank you very much for your time and careful consideration. We look forward to working with you to ensure that this legislation can be voted on during this Congressional session.

Sincerely yours,

Stephen M. Kohn
Executive Director
National Whistleblower Center

Linda Andros
Legislative Counsel
Public Citizen

Beth Daley
Director of Investigations
Project On Government Oversight

Lynne Bradley
Director, Office of Government Relations
American Library Association

Joseph E. B. White, Esq.
Executive Director
Taxpayers Against Fraud

Jeff Ruch
Executive Director
Public Employees for Environmental Responsibility

Celia Wexler
Washington Representative for Scientific Integrity
Union of Concerned Scientists

Sean Moulton
Director, Federal Information Policy

OMB Watch

George Anderson
Ethics in Government Group

Carol Bernstein, PhD
Past President
American Association of University Professors, AZ Conference

P. Jeffrey Black
Nevada State Chapter President
Federal Law Enforcement Officers Association

Lynne Bradley
Director, Office of Government Relations
American Library Association

Dr. Roland Chalifoux
The Semmelweis Society International

Betsy Combier
Editor, Parentadvocates.org
President, The E-Accountability Foundation

Zena D. Crenshaw
Campaign Director
Focus-On-Indiana

Andrew D. Jackson,
Project Coordinator
National Judicial Conduct and Disability Law Project, Inc.

Kevin Kuritzky
The Student Health Integrity Project

Linda Lewis
Director
Whistleblowers USA

Gwen Marshall
Co-Chairman
Georgians for Open Government

Ron Marshall
Chairman
The New Grady Coalition

Patrice McDermott
Director

OpenTheGovernment.org

Gil Mileikowsky, M.D.
Alliance for Patient Safety

Dr. Jim Murtagh
Doctors for Open Government

Pete Sepp
Vice President for Communications
National Taxpayers Union

Dane vonBreichenruchardt
President
U.S. Bill of Rights Foundation

Mark Zaid
James Madison Project