

Senate Democratic Policy Committee Hearing

“Abuses in Private Security and Reconstruction Contracting in Iraq: Ensuring Accountability, Protecting Whistleblowers”

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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.

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.

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 Barack 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.

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%. A similar decline occurred in DOJ civil fraud claims based solely on whistleblower disclosures. Moreover, the actual dollar recovery obtained from fraudulent defense contractors substantially *declined* over the three years period from the 1990-92 and 2004-06. 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.