

June 23, 2016

The Honorable John McCain  
Chairman  
Senate Committee on Armed Services  
228 Russell Senate Office Building  
Washington, DC 20510

The Honorable Jack Reed  
Ranking Member  
Senate Committee on Armed Services  
228 Russell Senate Office Building  
Washington, DC 20510

The Honorable Mac Thornberry  
Chairman  
House Committee on Armed Services  
2120 Rayburn House Office Building  
Washington, DC 20515

The Honorable Adam Smith  
Ranking Member  
House Committee on Armed Services  
2120 Rayburn House Office Building  
Washington, DC 20515

Dear Chairmen and Ranking Members:

As you begin to reconcile the differences between the House and Senate versions of the National Defense Authorization Act for Fiscal Year 2017 (NDAA, H.R. 4909 and S. 2943), the undersigned organizations, concerned with openness and accountability, urge you to maintain the integrity of specific military whistleblower provisions.

While military whistleblowers play an important role in safeguarding our nation from fraud, waste and abuse, speaking out against wrongdoing is particularly challenging for servicemembers. A 2015 Government Accountability Office report exposed deficiencies in the protections offered to military whistleblowers and widespread whistleblower retaliation<sup>1</sup>. Two 2014 Office of Personnel Management surveys revealed that a fifth of Department of Defense employees<sup>2</sup> and a quarter of Department of Defense Inspector General employees<sup>3</sup> could not disclose a suspected violation of the law without fear of reprisal. The stakes could not be higher for military whistleblowers. Recognizing this issue's importance, the following House and Senate provisions provide responsible and overdue reforms that should be included in the final NDAA:

*House Section 545. Burdens of Proof Applicable to Investigations and Reviews Related to Protected Communications of Members of the Armed Forces and Prohibited Retaliatory Actions.* When compared to civilian employees, whistleblower protections for servicemembers are severely limited. The burdens of proof that military whistleblowers must meet are particularly oppressive. In military reprisal cases, servicemembers must prove retaliation was illegal; in civilian cases, the agency must prove retaliation was *not* illegal. Burdens are greater for military personnel than for civilians. Consequently, the Department of Defense and Service Inspectors General are unable to substantiate the vast majority of allegations they receive. This section applies the Whistleblower Protection Act burdens of proof language, found in every other

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<sup>1</sup> Government Accountability Office, Whistleblower Protection: DOD Needs to Enhance Oversight of Military Whistleblower Reprisal Investigations, May 7, 2015 <http://www.gao.gov/assets/680/670067.pdf>

<sup>2</sup> Office of Personnel Management, Department of Defense 2014 Federal Employee Viewpoint Survey, 2014.

<sup>3</sup> Office of Personnel Management, Department of Defense Office of Inspector General 2014 Employee Viewpoint Survey, Aug. 4, 2014.

whistleblower law since 1989, to the Military Whistleblower Protections Act. The Department of Defense Office of Inspector General (DODIG) supported this recommendation in 2014 as a step toward consistent legal standards across whistleblower investigations.

*House Section 546. Improved Investigation of Allegations of Professional Retaliation.* This provision would require the Secretary concerned to ensure that individuals investigating alleged whistleblower reprisal have whistleblower retaliation training. Additionally, if the investigation involves alleged retaliation in response to a communication regarding rape, sexual assault, or other sexual misconduct, then the training shall include specific instruction regarding such violations.

*Senate Subtitle D. Whistleblower Protections for Members of the Armed Forces.* This subtitle strengthens military whistleblower rights in a number of ways by: categorizing new reprisal tactics, such as retaliatory investigations, as prohibited personnel actions (*Sec. 961*); granting the IG authority to notify the Secretary concerned of active investigations, shielding Service members from retaliation during investigations (*Sec. 961*); strengthening notice requirements for the untimely completion of DODIG whistleblower reprisal investigations (where each took an average of 438 days to close in 2014) (*Sec. 961*); requiring the DODIG and Service IGs to develop uniform procedures for conducting military whistleblower investigations and training staff, effectively raising the quality of Service IG reprisal investigations to match the DODIG standard (*Sec. 961*); modifying whistleblower protection authorities to restrict contrary findings of prohibited personnel action by the Secretary concerned (*Sec. 962*); assisting servicemembers in filing claims, detailing the specific information or documents they must attach to make a claim reviewable (*Sec. 963*); requiring Correction Boards to make reasonable efforts to obtain medical or personnel records if a Service member is unable to obtain them (*Sec. 963*); removing the one-year statute of limitations for reconsideration of Correction Board decisions, allowing for the consideration of new evidence (*Sec. 963*); publishing final Correction Board decisions, assisting Service members and building case law (*Sec. 963*); clarifying the right of Service members to seek judicial review of Correction Board decisions in federal court (*Sec. 963*); establishing a uniform training curriculum for Correction Board members and requiring timely retraining (*Sec. 963*); mandating that the United States Comptroller General review the integrity of the DODIG whistleblower program (*Sec. 964*). These provisions would empower military whistleblowers to disclose incidences of fraud, waste and abuse by minimizing illegal reprisal, improving IG efficiency and integrity, and clarifying existing laws and procedures.

We appreciate all of the work your committees have done to enhance whistleblower protections and further public integrity. The FY 2017 NDAA has the potential to solidify common sense protections for military whistleblowers facing retaliation and incentivize internal whistleblowing within the Department of Defense. These reforms already enjoy extensive bipartisan support in the House and Senate Armed Services Committees. We hope you will seize this opportunity to eliminate fraud, waste and abuse within the United States Armed Forces.

If you would like more information on any of these sections, please contact the Government Accountability Project's Legislative Director, Shanna Devine, at 202-457-0034 (ext. 132) [ShannaD@whistleblower.org](mailto:ShannaD@whistleblower.org), or the Project On Government Oversight's Policy Counsel, Liz Hempowicz, at 202.347.1122 [ehempowicz@pogo.org](mailto:ehempowicz@pogo.org).

Sincerely,

American Civil Liberties Union

American Library Association

Bill of Rights Defense Committee/Defending Dissent Foundation

Bogdan Dzakovic, FAA Whistleblower

Center for Defense Information

Center for Financial Privacy and Human Rights

Demand Progress

Federal Law Enforcement Officers Association

Government Accountability Project

Human Rights Watch

Just Foreign Policy

Law Office of Elaine Mittleman

Liberty Coalition

Marvell D. Lavy, DVA Whistleblower

National Center for Transgender Equality

National Taxpayers Union

National Workrights Institute

OpenTheGovernment.org

Project On Government Oversight

Protect Our Defenders

Public Citizen

Public Employees for Environmental Responsibility (PEER)

Restore The Fourth

Service Women's Action Network

Sunlight Foundation

Taxpayers Protection Alliance

TechFreedom

The James Madison Project

The Rutherford Institute

X-Lab

cc: Members, House and Senate Armed Services Committee