

October 20, 2017

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and
Governmental Affairs
228 Russell Senate Office Building
Washington, DC 20510

The Honorable Claire McCaskill
Ranking Member
Committee on Homeland Security and
Governmental Affairs
228 Russell Senate Office Building
Washington, DC 20510

RE: Make Permanent the Whistleblower Protection Enhancement Act Pilot Programs

Dear Chairman Johnson and Ranking Member McCaskill,

The undersigned leadership of the Make It Safe Coalition (MISC)¹ writes to support permanent enactment of pilot programs essential for continued implementation of the Whistleblower Protection Enhancement Act (WPEA).

The most fundamental unfinished business is to make permanent the WPEA's "all circuits review" provision, which provides whistleblowers normal access to federal appeals courts for review of Merit Systems Protection Board (MSPB) decisions. Restoring normal appellate review was the WPEA's structural cornerstone, and last year Congress renewed the four-year pilot program for another year. On October 11, without objection the House voted to make this reform permanent in the All Circuit Review Act, H.R. 2229.

This initiative is fundamental for the WPEA to achieve its objectives. Congress has had to unanimously reenact the Whistleblower Protection Act's free speech rights four times because of the Federal Circuit's hostile judicial activism. The WPEA's mandate will not be secure until Congress institutionalizes this structural reform.

A brief review of all circuit review's track record over the last five years demonstrates that it has been noncontroversial and effective. Since the WPEA's passage, there have been 34 decisions on the merits, with around 85% or 29 handled by the Federal Circuit. Whistleblowers' track record at the Federal Circuit is 1 to 28; at other circuits, it is 1 to 4. In two decisions, the Federal Circuit disregarded the WPEA's language protecting disclosures of "trivial illegality," restoring the

¹ The Make It Safe Coalition is a non-partisan, trans-ideological network of more than 75 member organizations whose missions span taxpayer protection, homeland security, scientific integrity, natural disasters, consumer hazards, and corruption in government contracting and procurement. We are united in the cause of protecting employees who honor their duties to serve and warn the public.

loophole without reference to the statutory text. There haven't been any aberrant decisions at the other circuits, and *Kerr v. Jewell* even challenged the Federal Circuit's pre-WPEA loopholes.²

On balance, Federal Circuit decisions have been more reasonable since all circuit review, reflecting the end of its monopoly and the specter of more *Jewell*'s. But the Federal Circuit's trivial illegality rulings openly defy a significant WPEA showdown resolution, and they illustrate the need for an appellate insurance policy from other circuits if the loopholes start to proliferate again. In the absence of any side effects, a structure that institutionalizes healthy competition could help to keep the Federal Circuit from engaging in judicial activism. Further, it could function as a safety valve if and when necessary for higher stakes issues than trivial illegality cases. This structural cornerstone must be institutionalized to sustain Congress' intent under the WPEA.

We also applaud the bipartisan Whistleblower Protection Coordination Act (S. 1869), legislation to enhance and make permanent the whistleblower protection ombudsman program within the WPEA. Introduced by Senate Judiciary Chairman Charles Grassley (R-IA) and Senator Ron Wyden (D-OR), as well as Senate Homeland Security and Governmental Affairs Chairman Ron Johnson (R-WI) and Ranking Member Claire McCaskill (D-MO), this common-sense good government bill would strengthen the ability of whistleblower protection coordinators in inspector general offices to support their respective whistleblower programs.

Under the WPEA, each Presidentially-appointed Inspector General is required to designate a Whistleblower Protection Ombudsman to educate employees, contractors and grantees about prohibitions on retaliation for protected disclosures, as well as their rights and remedies if they have been retaliated against for making protected disclosures. Over the past five years the Whistleblower Protection Ombudsman program, largely under the leadership of the Department of Justice's Office of Inspector General in coordination with the Office of Special Counsel, has been the bedrock of agency whistleblower protection education. However, the program is scheduled to sunset at the end of 2017.

The Whistleblower Protection Coordination Act would make the program permanent and change the ombudsman title to "Whistleblower Protection Coordinator," so that there is greater clarity around the official's role. Specifically, the coordinator would assist inspectors general in whistleblower communications with other stakeholders such as the Office of Special Counsel and Congress, and help the inspectors general strengthen their own roles in investigating reprisal and whistleblower disclosures. The legislation also requires inspectors general to provide additional reporting to Congress on concrete steps taken to hold accountable individuals who engage in whistleblower retaliation.

² This research was gathered by the Government Accountability Project and is available upon request.

Given that whistleblowers serve as Congress' lifeline to information about federal waste, fraud and abuse, we urge Congress to resolve unfinished business from the WPEA and enact the All Circuit Review Act and Whistleblower Protection Coordinate Act before the year's end.

Sincerely,

Tom Devine, Legal Director
Government Accountability Project

Michael Ostrolenk, National Director
Liberty Coalition

Pete Sepp, President
National Taxpayers Union

Elizabeth Hempowicz, Policy Counsel
Project on Government Oversight

Shanna Devine, Worker Health and Safety Advocate
Public Citizen

David Williams, President
Taxpayers Protection Alliance

Yogin Kothari, Washington Representative
Union of Concerned Scientists