# Groups Support Whistleblower Protections for Defense Contractors on Defense Authorization Legislation

November 27, 2007

To: Chairman Ike Skelton, House Armed Services Committee

Re: **Please support and clarify whistleblower protections in Section 861 of the Senate Amendment to H.R. 1585**

Dear Chairman Skelton,

We write to express our strong support for the Senate's bipartisan effort to protect whistleblowers at Department of Defense (DoD) contractors in this year's defense authorization legislation (Sec. 861 of H.R. 1585 as amended by the Senate). This measure is a strategic investment on behalf of U.S. taxpayers. The most important first step toward curbing wartime contracting abuses is to protect witnesses who expose corruption and waste. The bipartisan provision, sponsored by Senators Claire McCaskill and Susan Collins and approved unanimously by the Senate, significantly advances this goal. Its provisions are consistent with recently passed rights for employees in the ground transportation industry to strengthen the homeland security safeguards in the 9/11 law.

We understand at this late stage of the conference process that many of the determinations on final language have been made. However, with news reports indicating that negotiations on the defense bill have extended into the Thanksgiving recess, we are compelled to take the opportunity to formally share our views on the importance of this provision.

Government spending in contracts and grants has nearly doubled in the first seven years of this millennium. The Department of Defense oversees 70 percent of all government spending in contracts – nearly $300 billion annually. The increase in government spending through contracts and grants has not been matched by increased safeguards, leaving our tax dollars vulnerable to waste, fraud, and abuse.

Repeated House and Senate hearings have demonstrated how federal contracting officers are overburdened, and too often vulnerable to corrupt hidden agendas by contractors. The potential for and the stakes of abuse are heightened under wartime spending conditions. In an April report to Congress, the Government Accountability Office found that the Department of Defense's "heavy reliance on contractors in Iraq, long-standing contract and contract management problems, and poor security conditions provide opportunities for waste, fraud and abuse." Pentagon auditors further confirmed over $10 billion of questionable costs in Iraq and Afghanistan. **To genuinely challenge this corruption, contractor employees must know they will be protected for defending the integrity of their operations.**

Beyond the economic costs, there is a strategic and moral imperative for this reform. Defense Secretary Gates and other top military officials have noted the adverse impact on America's mission in Iraq and Afghanistan created by contract employees who abuse their authority while acting as representatives of the U.S. Government. Stated simply, illegal activity

and abuses of power by contractors threatens the U.S. mission in Iraq and Afghanistan. But currently there are not meaningful protections for contractor employees who blow the whistle on such activity. In over a decade, only a tiny handful of whistleblowers have been helped by current law.

The McCaskill-Collins defense contracting whistleblower amendment responds with a qualified version of the modern, "best practices" whistleblower rights model that already has been signed into law by President Bush this Congress. In addition to the above-mentioned protections for ground transportation employees, including some DHS and DOT contractors, Congress already has approved, or is on the verge of approving, similar rights for nuclear weapons and power contractors, the federal civil service, and all employees who work for manufacturers, retailers, or distributors of consumer products.

The cornerstone of each of these laws is at least one guaranteed opportunity for a due process hearing, including a jury trial in federal district court if there is no timely administrative relief. Often a jury trial is the only opportunity for whistleblowers to receive a fair day in court, with justice decided by the citizens they risk their careers to defend.

The McCaskill-Collins amendment represents a much needed improvement of current law. In one area, however, the amendment requires clarification to achieve its objective most effectively. The whistleblower protections must apply to disclosures within the contractor's organizational chain of command. Otherwise, to avoid waiving their anti-reprisal rights employees will have to bypass the company and go straight to the government, depriving contractors of the first opportunity to correct good faith mistakes or clean their own houses if misconduct occurred.[1] This imposes unnecessary burdens on the government, is unfair to contractors, and increases retaliation. Whistleblower laws typically do not specify this obvious protected audience, but it is a longstanding principle. Unfortunately, some recent administrative law decisions are eroding the principle in interpretations of civil service and corporate statutes. As a result, when not specified in statutory language that long-standing principle must be reaffirmed.

To prevent confusion, we request that the conference report include the following language:

> "Consistent with decades of case law interpreting analogous employee protection provisions, and the conferees intention to protect employees for disclosures made within the course of their job duties, it would violate this provision to retaliate against an employee for making disclosures of protected information to his or her employer." *See Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir.1984); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985).

We strongly urge you to support this reform, and the clarification of its scope of protection, to help bring accountability back into the DoD contracting process.

---

[1] Other technical fine tuning to the Senate model will significantly increase its impact. For example, the legislation does not shield disclosures of mission-related abuses of authority, the spotlight of unfortunate scandals with contractors from Blackwater to Halliburton. Second, the fifteen month period for an administrative investigation before access to court is unprecedented, and may leave a whistleblower out of work and uncompensated for retaliation beyond the period in which they can survive financially. The administrative exhaustion period should be standardized with other law.

Tom Devine, Legal Director
**Government Accountability Project**

Danielle Brian, Executive Director
**Project On Government Oversight**

Steve Kohn, President
**National Whistleblower Center**

Sean Moulton, Director, Federal Information Policy
**OMB Watch**

Laura MacCleery, Director, Congress Watch
**Public Citizen**

Francesca Grifo, Ph.D., Director
Scientific Integrity Program
**Union of Concerned Scientists**

Jeb White, Executive Director
**Taxpayers Against Fraud**

Jeff Ruch, Executive Director
**Public Employees for Environmental Responsibility**

Steve Aftergood, Project Director
**Federation of American Scientists**

Patrice McDermott, Executive Director
**OpenTheGovernment.org**

Conrad Martin, Executive Director
**Fund for Constitutional Government**

Michael Ostrolenk, National Director
**Liberty Coalition**

Terisa E. Chaw, Executive Director
**National Employment Lawyers Association**

James C. Turner, Executive Director
**HALT, Inc. -- An Organization of Americans for Legal Reform**

Marsha Coleman-Adebayo, Chair
**No FEAR Coalition**

Former Special Agent Darlene Fitzgerald
**Patrick Henry Center**

Scott Armstrong, President
**Information Trust**

Dane von Breichenruchardt, President
**U.S. Bill of Rights Foundation**

Linda Lewis, Director
**Whistleblowers USA**

Matthew Fogg, President
**Congress Against Racism & Corruption in Law Enforcement (CARCLE)**

Daphne Wysham, Director
**Sustainable Energy and Economy Network**

Evelyn Hurwich, President
**Circumpolar Conservation Union**

Betsy Combier, President and Editor
**Parentadvocates.org**

Carol Bernstein, PhD, Former President
**American Association of University Professors, Arizona Conference**

Arthuretta Martin
**Federal Employees Against Discrimination**

Donald Soeken, President
**Integrity International**

Dr. Janet Chandler, Co-Founder
**Whistleblower Mentoring Project**

Ron Marshall, Chairman
**The New Grady Coalition**

Gwen Marshall, co-Chairman
**Georgians for Open Government**

George Anderson
**Ethics in Government Group (EGG)**

Dr. Roland Chalifoux

**The Semmelweis Society International (SSI)**

Dr. Jim Murtagh
**Doctors for Open Government**

Gil Mileikowsky, M.D.
**Alliance for Patient Safety**

Helen Salisbury, M.D.
**Health Integrity Project**

Kevin Kuritzky
**The Student Health Integrity Project (SHIP)**