

October 4, 2017

Honorable Trey Gowdy, Chairman
Honorable Elijah Cummings, Ranking
Member
Government Oversight and Reform
Committee
U.S. House of Representatives
Washington, DC 20515

Honorable Phil Roe, Chairman
Honorable Tim Walz, Ranking Member
Committee on Veterans' Affairs
U.S. House of Representatives
Washington, DC 20515

RE: Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, HR 3042

Dear Chairman Gowdy, Chairman Roe, Ranking Member Cummings, and Ranking Member Walz,

The undersigned leadership of the Make It Safe Coalition¹ writes to express appreciation for Representative Duffy's leadership introducing HR 3042, the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 and to offer some suggestions on how the legislation could be made even clearer. This is badly needed good government legislation to strengthen one of the weakest links in the Whistleblower Protection Act (WPA) – deterrence to prevent illegal retaliation. In theory, the Civil Service Reform Act and WPA include disciplinary sanctions. In practice, however, there is nothing beyond token, largely symbolic sanctions.

HR 3042 would require agencies to act when there is a prohibited personnel practice finding by an agency head, the Office of Special Counsel (OSC), a Merit Systems Protection Board (MSPB) forum, a federal judge or an Inspector General. After a first finding, the agency must propose a three day suspension; after the second finding, termination. The bill does not affect MSPB appeal rights available under current law. Nor does it even require final agency disciplinary action. But after an independent finding of illegal retaliation, agencies must propose action to seek accountability.

This would be a paradigm shift. Currently agency bullies have nothing to lose. They can retaliate with impunity. The worst that happens is they do not get away with it. Even then, past treatment indicates that they probably will be rewarded with a bonus or promotion for doing the dirty work of harassment. However, this section would benefit from additional clarity on who is substantiating allegations of retaliation, what evidentiary standard applies in this decision, and who makes the final decision on what disciplinary action should be taken.

In theory, the OSC already can seek discipline. But the OSC monopoly has created an accountability vacuum. From a review of OSC budget requests and annual reports, it annually receives 3,000 to 4,000 prohibited personnel practice complaints. It finds illegal retaliation and obtains corrective action ranging from 80 to nearly 300 cases annually. From 2010 to date, however, the OSC only has conducted four disciplinary prosecutions – none for whistleblower retaliation. Even with negotiated corrective action, the OSC only has obtained discipline in 89 out of 1240 cases from FY 2010-2016, or seven percent. No manager ever has been fired for firing a whistleblower.

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.

No issue is more important to the whistleblower community than filling the accountability vacuum. All of our organizations are committed to merit system rights for all federal workers, so there cannot be political purges or similar abuses of power. But it is unacceptable that managers can fire whistleblowers with impunity.

We are especially impressed with the balance attempted by this legislation. Its key structural change from the status quo is to preclude the current knee jerk practice of rewarding bureaucratic bullies. HR 3042 does not make any judgments, or deprive employees of the due process rights available when they have engaged in any other alleged illegality without a third party finding of underlying misconduct. Instead, when there is an independent judgement of illegality, it only requires agencies to replace positive reinforcement for illegality with an official proposal to begin the accountability process. This responsible balance helps explain why the Senate unanimously approved this legislation. To maintain that balance, it is essential that the final legislation leaves no uncertainty: any third party that “determines” illegal retaliation has occurred under section 104 must meet the “preponderance of the evidence” burden of proof the merit system requires for any other disciplinary action. Without that balance, the provision could backfire and enable purges of whistleblowers with supervisory duties. It is also essential that the various roles are clarified under this legislation to ensure that implementation can be carried out without issue or confusion.

HR 3042 has the potential to be a major breakthrough for respect of merit system and whistleblower rights. We urge its swift consideration and approval. Thank you for considering our views.

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