March 10, 2010

Senator Joseph Lieberman
Chairman
Committee on Homeland Security and Government Affairs
United States Senate
Washington, D.C. 20510

Senator Susan Collins
Ranking Member
Committee on Homeland Security and Government Affairs
United States Senate
Washington, D.C. 20510

Re: National Security and FBI Provisions in S. 372

Dear Chairman and Ranking Member:

We are writing to express our opposition to the national security provisions of the Whistleblower Protection Enhancement Act of 2009 (S. 372), including the proposed repeal of whistleblower rights for FBI employees. We hereby request that S. 372 not be approved by the Senate in its current form.

FBI employees are now and should continue to be protected from retaliation under the Civil Service Reform Act of 1978, *as amended*. The current version of S. 372 will set whistleblower protections back 30 years for hundreds of thousands of federal employees. It will become almost impossible for employees in various "national security" related agencies to obtain protection against retaliation if they disclose contractor fraud, waste and misuse of federal monies, mismanagement and threats to the public health and safety.

Although many of us have worked with Senate offices for years trying to fix the numerous well-documented problems with federal employee whistleblower protections, because of the problems with the national security provisions in the current legislation, we are compelled to urge the United States Senate not to pass S. 372 as currently drafted.

The reasons we have taken this position are set forth below.

I. REPEAL OF FBI WHISTLEBLOWER PROTECTIONS

In 1993 FBI Supervisory Special Agent Frederic Whitehurst blew the whistle on forensic fraud at the FBI crime lab. In order to protect the American people, he

sued the government in order to force the President of the United States to establish legally required protections for FBI whistleblowers under an obscure section of the Civil Service Reform Act of 1978 codified as 5 U.S.C. § 2303. That provision of the law requires the President to ensure that whistleblower protections for FBI employees are enforced "in a manner consistent" with Title 5 whistleblower rights under 5 U.S.C. § 1214 and 5 U.S.C. § 1221. *See 5 U.S.C. § 2303(c).*

From 1978 until 1997 the FBI opposed creating any rules to enforce § 2303, including vigorously fighting Dr. Whitehurst in federal court. Only at the very end of the process, when it was clear that the FBI was going to lose in court, did President William Clinton override the FBI's vigorious opposition to whistleblower rights. In 1997 President Clinton signed a "Memorandum to the Attorney General, Delegation of Responsiblities Concerning FBI Employees Under the Civil Service Reform Act." Pursuant to that Presidential Memorandum, the Attorney General issued regulations for FBI whistleblowers that remain in effect today. *See 28 C.F.R. Part 27*.

The current protections for FBI employees are as good as those that exist for most other federal employees. FBI employees can file whistleblower complaints, which are investigated by the Department of Justice Office of Inspector General (or DOJ Office of Professional Responsibility). FBI employees who file claims with the IG have the same procedural rights as other government workers who file claims before the Office of Special Counsel. An employee who disagrees with the results of the IG investigation can request a hearing within the Department of Justice. Under President Clinton's Order, the authority to investigate and adjudicate an FBI whistleblower claim can never be re-delegated back to the FBI. This Order effectuated the mandates of § 2303(c).

These FBI protections, as modest as they are, have provided protections for numerous FBI employees. For example, the DOJ OIG or OPR have issued reports validating the whistleblower claims of numerous employees, including Unit Chief Bassem Youssef, Unit Chief John Roberts, FBI support employee Mr. John Doe [name withheld under Privacy Act as Mr. Doe remains employed at the FBI], and former Special Agent Michael German. Additionally, although her federal lawsuit was dismissed under the state secrets privilege, pursuant to a complaint filed under § 2303(c) the OIG conducted an investigation of claims and issued a report favorable to former FBI translator Sibel Edmonds.[*]

S. 372 repeals this law.

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[*] Ms. Edmonds' § 2303(c) case was dismissed on a legal techncality that the FBI whistleblower law only covered federal employees, not contractors like Ms. Edmonds. S. 372 does not correct this defect in the law.

The most recent "hotlined" version of this repeal states as follows:

"(b) TRANSITION OF SECTION 2303 PROCEDURES.—
Section 2303 of title 5, United States Code, is amended by adding at the end the following:

"(d) Except as provided under section 121(c)(1)(C)(ii) of the National Security Act of 1947, this section shall terminate on the date on which rules are issued as required under section 121(c)(1)(B) of the National Security Act of 1947."

It is understandable that the FBI strongly supports the repeal of § 2303. They opposed the approval of regulations implementing the law between 1978-1997, they strongly contested Dr. Whitehurst's legal case and they opposed the Clinton Memorandum. The FBI and its supporters have essentially hijacked the Whistleblower Enhancment Act, and are using it as a vehicle to turn the clock backwards.

Moreover, there are numerous cases pending under this law. If § 2303 is repealed or "terminated", all of these cases will be automatically dismissed. Despite the fact that many of these cases have been in litigation for years, and are fully briefed and awaiting decisions, the claims will be summarily dismissed due to a lack of jurisdiction. Even if they are not dismissed, any order issued under the laws could never be enforced.

We are unalterably opposed to the repeal of § 2303. That law was originally passed as part of a compromise reached in 1978 that recognized that FBI employees should not be classified in the same manner as other "national security" related employees. Most of the functions of the FBI are non-intelligence related. The FBI enforces the criminal laws of the United States, including those covering election fraud, stock fraud, crimes against children, fraud in government contracting, tax fraud, civil rights, the rights of Native Americans who reside on Reservations, etc. The FBI administers millions of dollars in non-intelligence related grants and runs the nation's largest crime lab. The FBI partners with local law enforcement agencies in every state in matters not related to national security.

Stripping FBI agents of basic rights in whistleblower cases granted by Congress in 1978, and enforced by the Justice Department since 1997 would constitute a grave setback to civil liberties and civil rights in the United States. We believe that the vast majority of American people would be vigorously opposed such a roll-back in whistleblower protections, and we will do everything in our power to ensure that these rights are not destroyed, especially as a last-minute add-on to a larger law purporting to constitute an "enhancement" of whistleblower

rights. This is the type of legislative cynicism that the American public is correctly troubled by.

II. THE "HOTLINED" VERSION OF S. 372 DOES NOT "PRESERVE EXISTING AGENCY PROCEDURES" UNDER § 2303

The current "hotlined" version of S. 372 does not preserve the rights under § 2303. The most recent "hotlined" version of the law contained a statement regarding proposed legislative changes supported by Senator Akaka and sets forth amended language covering FBI agents.

The statement of intent reads as follows:

"Currently, if a courageous FBI employee risks their career to report fraud or abuse, he or she only has access to an internal DOJ process for whistleblower claims. Senator Akaka ensured that the Senate bill preserves the existing agency process, while giving FBI whistleblowers an additional recourse, the right to appeal their case to the independent appeals board and to federal court."

This statement is not correct. The current "hotlined" version of the law does <u>not</u> "preserve the existing agency process." In fact, S. 372 completely undermines that process.

The operative language in the "hotlined" version of the bill states as follows:

"(ii) <u>The Federal Bureau of Investigation shall</u>—
"(I) use procedures promulgated under section 2303 of title 5, United States Code, before the date of enactment of this section; and "(II) modify those procedures as necessary to ensure that the guaranties required under subparagraph (B) (i) through (vi) are provided.

The current "agency process" mandated under § 2303 derives from Congress' mandate that FBI whistleblower provisions be enforced in a manner that is consistent with the Whistleblower Protection Act provisions, 5 U.S.C. §§ 1214 and 1221. See 5 U.S.C. § 2303(b) and (c). As a result, the Department of Justice Office of Inspector General or DOJ Office of Professional Responsibility investigate and make findings concerning an FBI whistleblower claim and when fact-finding hearings are held under § 2303, the DOJ, not the FBI, is responsible for conducting the administrative hearing. The delegation of this authority outside of the FBI is the key provision in the law to carry out oversight of the FBI. This provision is so important that President Clinton, when authorizing the Department of Justice to publish rules implementing § 2303, explicitly prohibited the DOJ from ever re-delegating any authority under the law back to the FBI. *See* Clinton Memorandum (1997).

The Senate bill overturns the key provisions of § 2303 that guarantee an independent investigation. It destroys the careful balance struck by Congress in 1978 and 1989 as well as the instructions given by President Clinton, which clearly banned the re-delegation of whistleblower adjudicatory/investigatory authority to the FBI.

If the authority to investigate whistleblower claims is transferred, by statute, back to the FBI, the FBI whistleblower law will be effectively gutted and rendered toothless. Before President Clinton ordered the DOJ to implement rules enforcing § 2303, the FBI's Office of Professional Responsibility purported to be an "independent" office reviewing whistleblower cases. When Dr. Frederic Whitehurst first blew the whistle on gross scientific abuses in the FBI crime lab, the FBI's internal units not only ignored his complaints and refused to properly investigate any of his allegations, the FBI actually suspended Dr. Whitehurst, without pay, simply for exposing the fact that scientific evidence being used to convict a defendant was contaminated and could not be used in court. Worse still, the FBI OPR initiated a criminal investigation of Dr. Whitehurst when it learned that Dr. Whitehurst had written a letter to the Chairman of the Senate Judiciary Committee concerning forensic abuses in the crime lab.

The statement of intent concerning the "hotlined" version of the law also declares that the new provisions will provide "FBI whistleblowers an additional recourse, the right to appeal their case to the independent appeals board and to federal court." This statement is both false and misleading.

The statement is false because it will afford FBI whistleblowers no "additional recourse." Under current law the DOJ Inspector General and/or Office of Professional Responsibility must conduct an independent investigation of whistleblower claims, and this investigation must be conducted in a manner that fully protects the privacy of the whistleblower, consistent with other provisions of WPA.

No such comparable provision exists in S. 372. There is no independent investigation.

Likewise, once the investigation is completed, under § 2303 the FBI employee currently has the right to an independent hearing, which includes discovery and the benefit of the findings of an independent DOJ OIG or DOJ OPR investigation. This hearing is conducted within the Department of Justice, before an agency official who has the authority of an administrative judge. Under S. 372, however, there is never any independent fact-finding. The FBI is given the full authority to conduct the fact-finding process to determine whether the FBI's removal or discipline of an agent or employee constitutes illegal whistleblower reprisal. This is like letting the FBI play the role of prosecutor, judge and

executioner in whistleblower reprisal cases. Thus, not only is there no "additional recourse," the current independent discovery/hearing process is repealed or "terminated", and it is replaced with an FBI-controlled procedure in which a whistleblower will never prevail.

While it is true that under S. 372 an appeals board would be created, this board has limited powers, and must accept the factual record created by the FBI. A similar limited appeals process exists under § 2303 (to the Assistant Attorney General), but the difference is clear. Under the current law the administrative record on appeal is created as a result of an independent investigatory process by DOJ OIG or OPR, and an adversary adjudication overseen by the Justice Department, in which each side can engage in discovery. If necessary, a Department of Justice judge can conduct a full evidentary hearing, with each side permitted to call witnesses and conduct direct and cross examinations.

S. 372 does establish a very limited right for appeal. However, given the deference mandated to administrative findings, the appeal process will have limited (if any) impact on the outcome of cases. Although § 2303 is silent on the issue of judicial appeal, it is well settled under law that employees can appeal final agency action under the Administrative Procedure Act. These appeals of final agency decisions, as a matter of federal law, are filed and reviewed in U.S. District Court.

III. S. 372 UNDERCUTS SIGNIFICANT SUBSTANTIVE PROTECTIONS AFFORDED FBI EMPLOYEES

The Senate bill repeals the existing FBI Whistleblower Protection Act, 5 U.S.C. § 2303, and requires FBI agents to adjudicate their cases within a new Intelligence Whistleblower process created under S. 372. Under this regime, not only do FBI agents lose their current procedural rights to have their claims independently investigated and adjudicated, significant substantive rights are also negatively impacted. Taken together, these changes in current law provide radically less protections to FBI employees then exist under current law.

Among the substantive defects in the national security section of S. 372 are the following:

A. Statute of Limitations

Under the current Whistleblower Protection Act (and under § 2303) there is no statute of limitations for filing claims. Congress wanted to encourage whistleblower disclosures and ensure that allegations of retaliation were reported. Setting an artificial deadline for raising these issues was viewed counter to the public interest. It also forces employees to file claims when they may not be fully prepared to litigate against their agency and/or they still may

be attempting to work things out without having to file a lawsuit. Given the stigma that can attach to an employee who files a lawsuit against his or her employer, the current long-standing policy on statutes of limitations in federal employee cases is well supported.

The national security whistleblower provision creates, for the first time since the enactment of the Civil Service Reform Act in 1978, a statute of limitations period. Worse still, under the national security provisions, that statute of limitations extremely short, just sixty (60) days.

If an employee does not file a claim under the new (and highly defective) adjudicatory procedures created under S. 372 within sixty days these claims are forever waived. An employee cannot re-file them in the future, and would not be able to file for injunctive relief in federal court to remedy these adverse actions. Under current law, because there is no requirement for intelligence community employees to exhaust administrative remedies under a strict statute of limitations, employees have an opportunity to challenge retaliatory actions in federal court. The statute of limitations will act to bar these claims.

B. Secret Evidence

Under S. 372 the FBI can introduce secret evidence in a whistleblower case against the employee, and the employee is prohibited from ever learning what that evidence is. Attorneys for the FBI first present this evidence directly to the FBI official who is "hearing" the whistleblower case. That FBI official can rule against the employee, and the employee is never permitted to learn the contents of that evidence. The restrictions on disclosure related to the secret evidence are also binding during the appeals process. Thus, an employee can lose his or her case based on secret evidence that they are never able to rebut. No such "secret evidence" procedure exists under § 2303.

C. Filing a Claim can result in the Denial of a Security Clearance

Under current procedures, FBI whistleblower claims are initially investigated by the Department of Justice (either OPR or OIG). These investigations are fully protected under the Privacy Act, and the Justice Department is prohibited from releasing their investigatory findings to anyone (other then the whistleblower) without the consent of the whistleblower.

Under S. 372 the DOJ loses all of its authority to conduct independent investigations and the FBI conducts its own investigation. The FBI is explicitly vested with the power to draw "credibility" determinations against the whistleblower, with no Privacy Act protections and no protections against the dissemination of these findings within the agency. Thus, the FBI can reach a finding that the employee is not credible. This finding will not only be used to

defeat the whistleblower case, but will be sent over to the security clearance office. An employee who is found not "credible" will very likely lost their security clearance. They will lose not only their reputation, but also the ability to even obtain work in law enforcement or security-related agencies. In other words, any employee who invokes the whistleblower procedures created under S. 372 risks having their employing agency review their "credibility" and make findings that they are not reliable or truthful.

Worse still, the agency that retaliated against the whistleblower is given statutory jurisdiction to create the factual record upon which these credibility findings are based. The appeals board cannot hear new evidence and cannot even interview the whistleblower. The factual record of the retaliatory agency becomes the administrative record for purposes of appeal. A finding by the FBI that a whistleblower lacks candor or lacks credibility can and will have a devestating effect on the future employability of a whistleblower, regardless of whether that whistleblower leaves public service and tries to find a job in the private sector.

If the FBI follows-up on a negative crediblity determination and denies the employee a clearance, the negative consequences of filing a whistleblower case will be catistrophic. By filing a whistleblower claim, an employee will empower the FBI to take a new look at the employee and further retaliate against the employee for filing a whistleblower claim. Given the past treatment of whistleblowers within the FBI, this fear of escalating retaliation is well founded. Utilizing the procedures set forth in S. 372 would be irresponsible. The procedures are complex and costly, the odds that the FBI rules against itself in these cases are next to zero and the employee would place themselves at risk for negative crediblity and candor findings.

Under § 2303 the FBI is never granted the authority to make a credibility determination concerning a whistleblower. In regard to the administrative process, if the Inspector General or DOJ OPR makes a negative credibility determination, the whistleblower has the authority to keep that determination secret. In other words, it is within the control of the whistleblower whether or not to make negative investigatory findings available to the FBI for review. If the whistleblower chooses to keep adverse investigatory findings secret, they must remain secret and cannot be used as a basis to withdraw a clearance.

Because the loss of a security clearance would have a significant impact on the ability of a whistleblower to ever work as a contractor for the federal government or work in any law enforcement agency, the threat that information and credibility findings made as the result of a whistleblower proceedings could be used to revoke a clearance will have a major chilling effect on the willingness of any employee covered under the new provisions

contained in S. 372 to ever file a claim (let alone decide to file such a claim within sixty days).

D. Expansion of the State Secrets Privilege

Under § 2303 there is no explicit authorization for the invocation of the "state secrets" privilege. In the Sibel Edmonds case, the Justice Department successfully invoked that privilege in federal court proceedings. In order to sustain the privilege, the Attorney General had to make specific representations, under oath, and file those sworn statements to an independent judge. The judge had the authority to review those representations and render an independent decision as to whether to dismiss the case under the state secrets privilege.

However, Ms. Edmonds also filed a claim under § 2303. That claim was fully investigated by the Inspector General, and was not subject to summary dismissal under the state secrets privilege. Even after the federal court dismissed Ms. Edmonds' case, the DOJ Inspector General wrote a detailed report, and found that Ms. Edmonds' allegations of wrongdoing were credible and valid. The IG also concluded that the FBI subjected Ms. Edmonds to illegal retaliation. Unfortunately, her case was dismissed on the legal technicality that § 2303 only covers "employees" of the FBI, and Ms. Edmonds worked as a contractor. However, Ms. Edmonds' § 2303 claim was not the subject of a summary dismissal.

Under S. 372 all FBI whistleblower claims can now be summarily dismissed by the "head of the agency," acting alone, with no judicial review.

In other words, the state secrets privilege in FBI whistleblower cases is significantly expanded. Not only can court cases be dismissed, but also internal administrative claims can be summarily dismissed. Additionally, there is no judicial review. Unlike the state secrets privilege, which requires the Attorney General to file a sworn affidavit to an independent judge, and mandates that the judge render the final decision, under S. 372 that power is granted to agency heads, acting alone, with no supervision, to administrative or judicial review and no requirement to execute an affidavit.

E. The IGs are Stripped of Jurisdiction to Investigate Whistleblower Cases

As outlined above, the Inspector Generals are stripped of their responsibility to investigate or remedy a whistleblower retaliation case. Under S. 372, there is no investigation of a whistleblower case. Instead, the complaint is simply filed with the FBI, and the FBI can take evidence submitted by an employee to back up his or her claim.

Also, unlike the procedures implementing § 2303, S. 372 does not mandate any pre-hearing discovery. Without extensive discovery it is well settled that whistleblowers (or other employees in discrimination cases) cannot win, as the overwhelming amount of evidence that can demonstrate retaliation is usually within the control of the employer.

F. The Definition of Protected Activity is Severely Limited

Under § 2303 FBI employees who disclose any "violation" of "law, rule or regulation" and/or who disclose allegations of "mismanagement" are fully protected. S. 372 significantly reduces the scope of protected activity in two very significant manners.

First, the right to blow the whistle on "mismanagement" is cut back. Instead of protecting employees who disclose "mismanagement," the law is changed and now FBI employees would have to demonstrate that they disclosed "gross mismanagement." In the past FBI employees have used the § 2303 "mismanagement" provisions to report the misuse or waste of taxpayer monies. Although these claims do not impact national security, mismanagement of an agency or program does impact the taxpayer. Cutting this provision may also be aimed directly at pending whistleblower cases, including the case of Jane Turner, who alleged that agent's taking souvenirs from the Ground Zero 9/11 crime scene constituted mismanagement.

Second, under S. 372 FBI employees who disclose information concerning actual violations of law will lose protection if the FBI determines these violations were "minor" and "inadvertent." See Section 121(b)(A)(i)(I) and (ii) (I). This is a drastic cut in protections. Whenever an employee discloses a violation of law, managers defend that the violations were "minor" or "inadvertent." The current FBI Whistleblower Protection Act does not permit such a defense. Employees are protected for disclosing violations of laws, rules and regulations, even if a manger attempts to defend such violations as being unintentional or minor. The law properly protects and encourages the reporting of suspected violations. It clearly recognizes that putting a limit on protected activity will only serve to chill protected speech and provide a defense to a manager who engaged in wrongdoing and/or who retaliated against an employee who disclosed a violation of law, but lost protection because it turned out that the violation was simply a minor violation in the eyes of the FBI officials who have the authority to adjudicate the claims. No other federal whistleblower protection law contains the "minor" and "inadvertent" exception to protected disclosures.

Third, S. 372 prohibits employees from disclosing violations of law, if the information in the disclosure is required to be "kept secret in the interests of national defense." Section 121(b)(A)(i)(II). This restriction on protected

disclosures makes no sense. If an employee witnesses a violation of law, they must have the right to report that violation, even if the violation implicates confidential information. Under current law, FBI employees can disclose violations of law, rules and regulations that are "classified" provided that these disclosures are made to persons with the appropriate clearances. These types of whistleblower disclosures are commonplace, and in the context of an organization like the FBI, are typical.

By stripping these classified (but completely legal) disclosures of any protection, the law not only undercuts the essence of protected activities covered under § 2303, the exception defeats the entire purpose of having separate protections for national security whistleblowers in the first place. This loophole would completely undercut the substantive protections currently provided for under § 2303.

Taken together, the three cutbacks in the definition of protected disclosure contained in S. 372 will severely diminish the substantive protections under existing law.

G. The Scope of Adverse Action is Reduced

The current FBI Whistleblower Protection Act broadly defines adverse action, and includes "any significant change" in an employees "duties," among other actions. S. 372 creates a loophole in coverage. It permits agencies to suspend, with pay, whistleblowers during the course of an "investigation." There is no time limit placed on this so-called "investigation." In other words, if an agency suspends a whistleblower with pay, that whistleblower cannot file a claim under S. 372. They could remain out of work for years, with no redress. Section 121 (a)(3)(B).

Additionally, S. 372 permits agencies to radically alter the working conditions of employees by denying them access to information that is merely "sensitive" (i.e. not even classified). Thus, an employee can be denied access to such information, prevented from performing major job duties, and is prohibited from filing a claim under S. 372.

H. Judicial Review is Limited

Under S. 372 employees are required to file appeals to the U.S. Court of Appeals. For five years employees can file these appeals in any Circuit. However, under the "sunset" provision contained in the law, after five years FBI employees would be forced to file their appeals only in the Federal Circuit. Inasmuch as it could take five years for the agencies in question to render a final, appealable decision, for all intents and purposes, appeals under S. 372 will be limited to the Federal Circuit. That Circuit is unlike all other federal

appeals courts, and was created with limited jurisdiction. The Court is well known for issuing the most narrow and restrictive interpretations of federal employee whistleblower rights, and rarely rules in support of an employee. The judicial rulings of the Federal Circuit were universally criticized by both the Senate Homeland Security Committee and the House Oversight Committee. Because the primary jurisdiction of the Federal Circuit is to hear copyright and trademark cases, that Court lacks any of the expertise over labor law matters enjoyed by the other Federal Circuit courts, that regularly hear cases under all other federal employment discrimination laws Given the limited grounds for appealing an adverse administrative action under the national security provisions of S. 372, the appeal right to federal court is all but meaningless.

Although § 2303 is silent as to judicial review, under the Administrative Procedure Act, all final federal agency decisions are appealable. If a statute is silent as to the jurisdiction on appeal, appeals are filed in U.S. District Court, and the standard of review is more liberal then that offered under S. 372. If the district court rules against the employee, the FBI agent has what is known as "all circuit" review, in other words they can file in any federal appeals court with jurisdiction, and are not limited to the Federal Circuit.

IV: WHAT HAPPENED TO "ENHANCED" WHISTLEBLOWER RIGHTS FOR NATIONAL SECURITY WHISTLEBLOWERS?

The problems facing FBI whistleblowers will also face all other "national security" employees forced to file claims under S. 372. Significantly, S. 372 also expands the scope of employees who will lose their existing civil service rights.

Under current law only a handful of specified agencies are excluded from Civil Service protection, such as the CIA and NSA. S. 372 expands the scope of this exclusion. It automatically excludes from Civil Service protection employees in every executive agency, if that employee is engaged in intelligence related functions. Many of these employees are currently protected under the Civil Service Reform Act and have rights identical to all other non-national security federal workers.

Additionally, the scope of the new "State Secrets" summary dismissal powers is radically expanded. S. 372 accomplishes this by giving the heads of every agency defined under 5 U.S.C. 7532 the power to summarily fire whistleblowers, with no administrative or judicial appeal. Under S. 372 not only do the directors of the CIA and NSA have the power to summarily throw out whistleblower cases, this power is also granted to agencies and departments such as the Department of Defense, the Department of Justice and the

Department of Commerce. Section 7532 covers over one half of the entire federal workforce.

The Senate should enact reforms that will actually protect employees in the intelligence areas who have the courage to risk their careers to serve the public interest. In formulating such a remedy for national security whistleblowers, the drafters of S. 372 should carefully review the leading Congressional study on this issue. *See*, *Intelligence Agencies: Personnel Practices at CIA, NSA and DIA Compared With Other Agencies* (GAO, March 1996). The GAO conducted an in-depth review of employment-protections for employees at the CIA, the NSA and the Defense Intelligence Agency and concluded that national security employees could have full civil service protection, and could have their employment claims adjudicated in federal court, without any threat to national security. The GAO concluded that there were already in existence agency-controlled methods to prevent the release of classified information in employment cases, and that national security employees could have full civil service protections without undue risk to national security interests.

Notably, not one objection has been made by either the White House or Senate Committee staff to the findings of the GAO.

The House of Representatives did follow the guidance contained in the careful and comprehensive GAO study, and devised remedies for national security whistleblowers that are supported by over 350 public interest groups, along with the overwhelming majority of House Members. These remedies, contained in House Bill H.R. 985, were initially approved in 2007 by large bi-partisan majorities. For example, when first approved in the House, members from across the ideological spectrum supported these reforms, including Republican Ron Paul and then-Congressman Rahm Emmanuel. During this Congress, the House once again endorsed these measures, this time by unanimous consent. During the 2008 presidential election, candidate Barack Obama's campaign officially endorsed protecting federal employees in a manner consistent with the House reform measure.

As written, the national security provisions of S. 372, if enacted, will constitute the single worst legislative setback for whistleblowers in U.S. history. It will not only undercut existing rights for FBI employees, it will force all other national security employees into a system that ensures that they will not be properly protected. By granting the agencies that retaliated against the whistleblowers the primary jurisdiction to engage in all fact-finding, and by seriously undercutting other due process protections as outlined above, S. 372 will have a chilling effect on the willingness of any employee to blow the whistle, and will result render it very difficult, if not impossible, to identify waste, fraud and abuse in numerous agencies.

CONCLUSION

President Obama promised all federal employees full access to federal court when adjudicating their whistleblower cases. In one such statement, published on the official Obama transition team web site, the President-Elect stated:

> "Often the best source of information about waste, fraud, and abuse in government is an existing government employee committed to public integrity and willing to speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled. We need to empower federal employees as watchdogs of wrongdoing and partners in performance. Barack Obama will strengthen whistleblower laws to protect federal workers who expose waste, fraud, and abuse of authority in government. Obama will ensure that federal agencies expedite the process for reviewing whistleblower claims and whistleblowers have full access to courts and due process."

Senate Bill No. 372 does not fulfill that promise.

By urging that § 2303 not be repealed we are not suggesting that the existing law and procedures for FBI employees are working. However, repealing § 2303 guts the current law and makes things worse. More reform is needed than what is proposed or than what currently exists, but the Senate (at the very least) should not make it more difficult for FBI whistleblowers. If S. 372 becomes law, there will be no more whistleblowers at the FBI.

Overall, the whistleblower procedures proposed by S. 372 for FBI and intelligence agency employees are little more than internal grievance procedures controlled by the very agencies and agency officials about who the employees blew the whistle. These internal procedures already exist within each agency and they do not work for whistleblowers. There is no fairness or independence in these procedures and they will result in expediting the removal of any FBI or Intel employee who dares to blow the whistle and file a claim.

S. 372 will become known as the Whistleblower Discouragement Act of 2010 if these provisions related to national security and FBI employees are not fixed. The ability of Inspectors General, Congress and the American public to learn about waste, fraud and abuse in numerous agencies that spend hundreds of billions of dollars will be completely undercut. Intelligence failures that led to incredible blunders both before and after the 9/11 attacks will be hidden from oversight and scrutiny. Although honest federal employees who desire to

inform their government officials of mistakes and abuses will be the first victims of S. 372, the real victim will be the American people.

Until the national security provisions of the "Enhancement Act" are corrected and the repeal of the FBI whistleblower law is removed from the law, we call upon every United States Senator to vote against S. 372.

Respectfully submitted,

Dr. Frederic Whitehurst
Executive Director
Forensic Justice Project
Former FBI Supervisory Special Agent

Sibel Edmonds
Executive Director
National Security Whistleblowers Coalition
Former FBI translator

Dr. Marsha Coleman-Abadeo
Founder
No FEAR Coalition

Michael D. Ostrolenk
National Director
Liberty Coalition

Dane vonBreichenruchardt
President
U.S. Bill of Rights Foundation

Mark S. Zaid, Esq.
Executive Director
James Madison Project

Joe Carson, PE
Chairman
OSC Watch Steering Committee

Gina C. Green
Chair, Board of Directors
Lindsey M. Williams, Esq.
Director of Advocacy and Development
National Whistleblowers Center

Stephen M. Kohn
David K. Colapinto
Michael D. Kohn
Attorneys for three FBI employees whose claims will be dismissed if S. 372 is signed into law – Supervisory Special Agent Bassem Youssef, FBI Employee John Doe and former Special Agent Jane Turner

CC:

Senator Patrick Leahy
Chairman
Committee on the Judiciary

Senator Dianne Feinstein
Chairman
Select Committee on Intelligence