Senior Executives Association

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TESTIMONY

of

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Before the

SENATE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA

"S. 372 – THE WHISTLEBLOWER ENHANCEMENT ACT."

June 11, 2009

Chairman Akaka and Distinguished Members of the Subcommittee:

Thank you for the opportunity to testify before the Subcommittee on S. 372, the Whistleblower Enhancement Act. The Senior Executives Association (SEA) supports increased protections for federal whistleblowers and appreciates the interest of the Chairman and the members of the Subcommittee in improving the laws protecting whistleblowers from reprisal and of improving administration of the process by which it is determined whether a protected whistleblower has been subjected to prohibited reprisal.

SEA is supportive of S. 372 and also supports H.R. 1507, sponsored in the House by Rep. Chris Van Hollen (D-MD), but the Association does object to the jury trial provisions contained in the House bill. We believe that whistleblower reform is long overdue, and we hope the differences between the Senate and the House in legislation considered during previous Congressional sessions can be reconciled so that needed reform can occur. In considering whistleblower reform, I will focus on the need for the enhanced protections contained in both the Senate and House bills, the impact of this legislation on federal managers and executives, and concerns with the jury trial provisions contained in H.R. 1507. I will also address some of the ancillary provisions of the bill, which the Association believes are important to whistleblower reform.

The last time major reform of whistleblower protection laws occurred was 1989, with the passage of the Whistleblower Protection Act. That law was supposed to cure the climate where potential whistleblowers were deterred from coming forward because the legal standard for proving reprisal was too high. For a number of years, a perception existed that whistleblowers would be protected from illegal reprisal, but then a series of decisions from the Merit Systems Protection Board and the Federal Circuit Court of Appeals narrowly interpreted the earlier reform, resulting in what is today little, if any, protection for whistleblowers.

Under current law, an employee is <u>not</u> a whistleblower if the employee merely discloses wrongdoing to the supervisor who is the perpetrator of the wrongdoing. The rationale of the Federal Circuit for this definition is that the Whistleblower Protection Act is aimed at disclosures to persons who can correct the wrongdoing, not the wrongdoer him or herself. The reality is that it takes a very brave employee to tell his or her supervisor that the law is being violated. Yet, the guilty supervisor may very well retaliate against someone who points out wrongdoing as a way of neutralizing the objection from a dissident employee.

Another dynamic of the workplace that is not protected by today's whistleblower laws is the employee who makes a disclosure that is just a routine part of his or her job. For example, an internal auditor may, in the course of an audit, uncover a several million dollar shortfall and then disclose it. That same auditor may then receive a less than fully successful rating and may believe the appraisal is due to the disclosure. Currently, the auditor is not protected.

Both S. 372 and H.R. 1507 greatly expand the definition of what constitutes a protected disclosure. This provision seems designed to overturn precedent from the Federal Circuit

that creates the lack of protection described above. In our opinion, most instances over the past decade where the protection was not provided to a would-be whistleblower are related to those interpretations.

Senior Executives hold a unique position in the government; they both oversee employees who are whistleblowers and may be whistleblowers themselves. Although SEA supports the reforms outlined above, we do have concerns with H.R. 1507 due to the jury trial provision. SEA does not support jury trials for those who claim whistleblower reprisal. Section 9 of H.R. 1507 would allow a civil action to be filed, which includes the right to a trial by jury, 180 days after an employee files a whistleblower claim with the Office of Special Counsel or the Merit Systems Protection Board (MSPB). Allowing such jury trials would be a dramatic departure from the current process. The potential unintended, negative consequence of this change is enormous.

Jury trials, by their very nature, will contribute to the perception of unacceptable risk for the federal manager who is trying to deal with a problem employee. The reasoning behind a jury verdict is not explained and a sensational jury trial resulting in a finding against the manager with a substantial award of damages will create significant pause for managers who must make decisions to confront and deal with problem behavior for fear of being subjected to a similar fate.

SEA believes that the MSPB should be given a chance to apply a broader, more appropriate law that protects whistleblowers. The Board's record of efficient resolution will result in prompt and thorough decisions that can be reviewed, under the Senate bill, by any appropriate Circuit Court of Appeals in the country.

The jury trial provision in the House bill is particularly problematic because it contains no limit on damages and is vague about what issues go to a jury. Also, it calls for a right to a jury trial even if the Office of Special Counsel and the MSPB promptly and appropriately dispose of a whistleblower reprisal claim.

It is important to remember that the issue in a whistleblower case is often whether the employee claiming whistleblower status is a problem employee using whistleblower laws as an undeserved shield or is a legitimate whistleblower that is experiencing an adverse action because of protected activity. Federal managers are on the front lines of dealing with questions such as these as they try to deal with problem employees. Adding jury trials to the mix will give even the best manager pause before confronting an employee who has made a disclosure, regardless of how valid the manager's case is or how pure the manager's motives are.

SEA encourages the Subcommittee to move forward with the language contained in the Senate bill, especially given the increased protections it provides for national security personnel and all federal whistleblowers, without adding to the complexity of whistleblower cases with the addition of jury trials. In our view, whistleblower reform without jury trials will contribute to a government that works.

To this end, SEA also supports enhancements in S. 372 as explained below.

Section 1(j) of S. 372 establishes a new section 7702a in Title 5 setting forth a new process if a security clearance decision appears motivated by whistleblower reprisal. In our opinion, the bill appears to be consistent with the Supreme Court's decision in Department of the Navy v. Egan, 484 U.S. 518 (1988), because it does not require or allow the MSPB or a court to actually grant a security clearance. We believe that a new 5 U.S.C. 7702a would provide transparency and attention to a claim that a security clearance revocation is not based on whistleblower reprisal. To us, this seems to be a reasonable balance between protecting whistleblowers and national security interests.

SEA also supports the provisions in section 1(h) of S. 372 concerning attorney fees. Current law allowing such fees has been interpreted to require that fees for managers who successfully defend reprisal charges be paid by the Office of Special Counsel. SEA believes that the appropriate policy determination in awarding fees to managers who are found to be substantially innocent of whistleblower reprisal is one of employer indemnification for expenses to an employee who is found to have been doing his or her job. Often, this job includes continuing to manage a whistleblower after a disclosure is made. A manager who does so risks a charge of reprisal. A manager who successfully defends against a reprisal charge should not be required to pay fees him or herself, and we submit that the employing agency should indemnify its employees in these circumstances. Such a change in the law will also allow the Office of Special Counsel to make prosecutorial decisions without concern for the impact of the decision on the Office's budget.

Furthermore, SEA supports section 1(g) of S. 372 allowing combinations of disciplinary action to be imposed (as opposed to current precedent that allows only one of the actions) and to clarify that a manager accused of reprisal can avoid liability by proving that the personnel action in question would have been taken in the absence of protected activity. Clarification of this latter point is especially significant since a manager or supervisor should be able to avoid liability if the evidence of whistleblower reprisal was of no consequence to the personnel action in question.

On behalf of the Senior Executives Association, I thank you for your consideration of the critical enhancements to the Whistleblower Protection Act that will clarify the law for agencies, federal managers, and whistleblowers. This bill is clearly a good government initiative that SEA would like to see move forward. However, we encourage you to support S. 372 as the primary vehicle for whistleblower reform. SEA looks forward to working with you to ensure that this legislation creates a fair and transparent system for addressing whistleblower and executive concerns.