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December 29, 2015

Subject: The Zero Tolerance for Retaliation Against Whistleblowers Act (ZTRA)

Dear Senator Hatch:

“Zero”. I have not heard from you. Now I understand that because I am not a constituent, you may feel that this letter is best handled by one of my Senators (Tim Kaine and Mark Warner) or my Representative (Barbara Comstock). While all of them are aware of my efforts, I do not believe that it would be appropriate simply to push the issue aside whether you are a Member of Congress or a Congressional staff person.

No other piece of legislation is more critical to the safety and security of this Nation than the enactment of legislation that ends retaliation against whistleblowers.

No other piece of legislation will have a greater impact on the quality of our government than the enactment of legislation that ends retaliation against whistleblowers.

When you take the time to reflect on the underlying truth of both of these statements, you will be hard pressed not to take an active role in seeing to it that this legislation is enacted as quickly as possible. However, your opinion of what constitutes a whistleblower may be limited to just a few of the thousands of cases each year where the whistleblower has been subjected to retaliation. These individuals are the public image of the whistleblower and they should be recognized as the champions of integrity.

Regrettably, and because of the failure of the Office of Special Counsel (OSC) disclosure process and avenues limited to the lowest level of a chain-of-command; a few individuals conclude that their only course of action is to make their disclosures through the media. In reality, the reporting of some potential infraction of rule, regulation, or law is an everyday occurrence in the normal operations of government and business as individuals at every level of the business cycle contemplate the impact of the actions they are taking. In most cases, the potential infraction is fully vetted and a compliant course of action is taken – without retaliation.

Unfortunately, there are bad apples in management who insist that things be done their way regardless of magnitude of the infractions, the threat to public safety, or the potential for public harm; and these bad apples will initiate acts of retaliation for their own self interests. It is a significant distinction that at the core of the acts of retaliation are the self-interests of the retaliator and not the public good or safety.

While the caseload of OSC has swelled over the decades, it is primarily attributable to the ineptness of OSC. No matter how pretty a picture is painted of OSC's progress in its handling of complaints, OSC remains as incompetent and unproductive as it was in 1994 when I worked with the Government Accountability Project (GAP) to address OSC's shortcomings. This Nation cannot afford another 20 years of trial and error to improve OSC's operations.

The impact of retaliation on the federal workforce has reached a critical level that now threatens the safety and security of this Nation. Your life and the lives of those who you care about are now very much at risk because thousands of acts of unpunished retaliation have suppressed the will of the average federal employee to withstand the career-suicide of disclosing wrongdoing by a superior. With this letter, I am firmly placing the responsibility for ending retaliation on your shoulders and denying you any excuse you may offer for your inaction. You can no longer point the finger down the hall at some other office or committee and say that it was their job to get the ZTRA to the floor for a vote; it is your job to get this done.

I am a nobody; each of you is a somebody. Because of the potential significance of my proposal to end retaliation, it would be inappropriate for me to exclude any Member of Congress from my mailing list. While I have the highest regard for those of you who have stood firm in your support for whistleblowers and mean you no disrespect by taking this matter to every Member, it's time that every Member be held accountable to the electorate for action or inaction to end retaliation against whistleblowers.

For those of you who are not Members, you may think this is just about the actions or inactions of your Member. That too would not be an appropriate conclusion. Not only are you the Hill's worker bees, but you are the first line of constituents for your Member and for the other Members who represent you in either the Senate or the House. It does not matter whether you are a senior staff person, an intern, or just there to answer phones and open the mail, you are just as important to the effort to end retaliation as your Member. Take a moment to contemplate what it means, "We the People"

I have exercised great restraint so that all of you may have the opportunity to get involved with the enactment of this proposed legislation. I know how to use social media and direct mail to reach into every Congressional District and to bring this issue to the forefront of the political agenda. As I work more closely with my friends, associates, and fellow whistleblowers in the Make It Safe Coalition (MISC), we can begin to see a time when ending retaliation against whistleblowers can be the reality of the day and not just politically correct rhetoric.

**It does not matter whether you are a Republican, a Democrat, or an Independent;
there is no such thing as a "partisan" position on the issue.**

It should be readily apparent that the electorate is very dissatisfied with the state of affairs in Washington and I do not limit this to a particular party. In that regard, this letter presents each of you with the opportunity to take ownership of Congressional dysfunction, and do something about it. Let's start in your own office by sharing this letter with your colleagues. How would each of you feel if I knew about a pending attack on your town, or your family's home, but was afraid to speak up because I was afraid of the retaliation against me if I spoke up? Are you even aware that the Department of Homeland Security is now intimidating federal employees from speaking up by requiring mandatory training on the topic of "Insider Threats"? For your information, an insider threat has nothing to do with acts of violence; it is "a person who wants to embarrass the agency". Do you feel safer or less safe knowing that the employees of your government are being forced into silence?

So how can you, one person, one Member begin to bring about a change on the Hill that has eluded this Nation's leadership? Believe it or not, you can do it with just one word. Yes, one word! After sharing this letter

with another person, introduce your next conversation with that person with “zero” as the first word of that conversation. Once you are aware of what “zero” means, your response ought to be “zero” if you agree.

What about the office across the hall, to the left, or to the right as you exit your office? Do you even know these people? In almost seven decades of selling different products and services (I sold Christmas cards to get my first bike), I have called on thousands of businesses in the Washington area -- including Congressional offices from both parties when I helped produce the newsletters that were mailed to your constituents. I can honestly say that going door-to-door on the Hill has been the most enjoyable of “house” calls. If you haven’t done it, try it – and introduce yourself with the first word – “zero”.

“Tear Down This Wall”

What about you – “the Member”. Which of you will be the first to start your next floor speech with, “zero”? What will be the response from your colleagues in the Chamber? President Reagan brought about the end the Cold War when he had the courage to speak these words. Who among you will have the intestinal fortitude to stand before your colleagues and take the first step to end the political hostility that is crushing innovative ideas to solve difficult issues facing this Nation? Have you ever just stopped in the office across the hall to say good morning? You don’t have to be best friends, but of course it would be a place to start. Oh, and by the way, the first word should be – “zero”. Once any of you have uttered the word “zero” in the manner that I have prescribed, you will have a better understanding of what it is like to become a whistleblower by going against the grain in an attempt to right a wrong.

Every Whistleblower Is an American Hero

Two of my best friends made the ultimate sacrifice during the Vietnam Conflict and I was called upon to present this Nation’s flag as the symbol of this Nation’s gratitude to the mother of one of them. One of my uncles served as an officer in a Ranger Battalion at Normandy and as the smoke cleared on that day in history, he was one of the few survivors of the battalion. As of my last count, seventeen of my roommates during my military service did not return alive or did not come back whole from their Vietnam service. I chose not to account for the others who served with me during my infantry training or my class at the Army’s Officer Candidate School. During his lifetime, my father was recognized by his colleagues in the American Legion when they awarded him the honor, Doctor Emeritus, and upon his death, they assembled to honor his service.

With this preface, I have weighed carefully whether or not whistleblowers should be acclaimed as American Heroes. The men I’ve mentioned and the others who have served in any uniform of this Nation did far more than to serve to protect our freedoms. They fought and died on distant shores to preserve a form of government based on law and equality for all. The vast majority of whistleblowers have simply stepped forward to prevent or to report some impropriety in compliance with rule, regulation, or law. As the result, many of them have experienced the personal loss of friends, family, career, or life on a par with those who knowingly put on a uniform. I have concluded that failing to recognize whistleblowers as heroes is a disservice to those who have served in uniform at any time in this Nation’s history. As I reach out and share my views with others, I am being joined by more and more veterans with the same view.

If you, any of you, open even one conversation, one speech, or one letter with “zero”; you will have honored every veteran. More and more public gatherings include the recognition of our veterans as part of their opening ceremonies, something that did not happen during the Vietnam years. It was years after Vietnam that the Vietnam veterans were welcomed home. In comparison, it has been centuries since Congress first stood side-by-side with whistleblowers. I hope to see the day when the public is more appreciative of the service rendered by the thousands of whistleblowers who step forward every year. Are there really thousands of whistleblowers?

Every year? If you've only read the occasional media story or then perhaps you should read the testimony of the Honorable Carolyn N. Lerner, the U.S. Special Counsel who heads the Office of Special Counsel.

The Future of the Office of Special Counsel

Without doubt, Ms. Lerner has accomplished a great deal in her tenure as Special Counsel. However, her testimony statistically supports a paradigm shift in the process of disclosing wrongdoing and retaliation against whistleblowers. Her statisticians have done their best to convince you that her office is performing a fantastic service. In reality, her office is only cherry picking the cases that receive media or Congressional attention. Of the **six-thousand complaints received annually**, her office was "*able to secure 278 "favorable actions"*" [Lerner testimony, page 2] which correlates to her office only achieving a five-percent rate of favorable actions. No matter how you run the numbers that equates to failure.

What about the other thousands of cases? Do you think these cases are without foundation and that they should simply be dismissed as irrelevant? Over the last 25-years my own experience is that more than 80% of whistleblower complaints are valid, less than 15% are employees attempting to cover-up their poor performance, and about 5% are completely off the wall. I believe that these figures are consistent with the findings of the National Whistleblowers Center (NWC), the Government Accountability Project (GAP), and the Project on Government Oversight (POGO); but I would yield to them for their findings. I am aware that the Senate's Homeland Security Committee interviewed hundreds of whistleblowers and that their findings would also show that the vast majority of whistleblower complaints of wrongdoing and retaliation are valid.

This demonstrates that the performance of OSC over the years has been a complete failure. Whether you want to excuse this performance because of underfunding, under staffing, or simply not doing the job, it still means that there are thousands of cases every year that are not receiving their proper attention. It is little wonder that bad apples openly express their disdain of OSC. I recognize that the matter of OSC's reauthorization falls within the purview of the House Subcommittee on Government Operations and I strongly suggest that those of you in either Chamber who are interested in this issue gain access to my cases that are still pending at the Merit System Protection Board (MSPB). I understand that the Senate rules require me to sign a form for you to have access to the case and I presume that the House has a similar rule. So, send me a form to sign. You need to see OSC's response to my request for discovery from OSC to better understand that the Office will never be able to perform its intended task regardless of how much money you throw at it.

Nobody Needs to Be Fired

The best way to resolve the OSC dilemma is not to expand its staff; it is to reduce its caseload. By eliminating retaliation against whistleblowers you would automatically reduce OSC's and MSPB caseloads thereby negating the need for additional funding for either organization. Retaliation exists largely because the retaliators are protected by more senior bad apples that are empowered by an ineffective OSC. The sooner that the word gets out that you will be fired for participating in an act of retaliation, the sooner the caseloads will diminish. Although enactment of the ZTRA would not be retroactive, an idea has come forth that would allow a brief period of 120 days after enactment during which every pending OSC complaint and every pending case at MSPB would be subject to agency settlement that would make the whistleblower whole, provide for corrective action of the alleged impropriety, and negate any disciplinary personnel action for the perpetrators and the retaliators while actions that are not settled would subject the retaliator to termination. There is also a proposal on the table to require OSC to provide all of the results of their investigation to the agency and to the whistleblower (and/or counsel) with adequate protections for classified information when OSC closes a case and does not move forward with the whistleblower to MSPB. These additional provisions are best addressed at the subcommittee level, but if necessary I will include proposed legislation at a later time.

As proposed the ZTRA works within the existing judicial process to give agency management and MSPB Judges the authority to terminate any person who is found to have retaliated against a whistleblower. It has been suggested a provision be included for agency management to intercede within 60-days of the allegation of an act of retaliation so that they can reverse the retaliatory act and subsequently determine whether or not the retaliator(s) should be terminated or otherwise disciplined. I have amended the proposed legislation as follows:

SEC. 3 REMOVAL FOR ACTS OF RETALIATION

Part 433 is added to the Code of Federal Regulations to read as follows:

PART 433 – REMOVAL FOR ACTS OF RETALIATION

§ 433.101(a) If the Head of the Agency determines from the results of any internal or external investigation, administrative process, grievance, or other agency resource; that a person has knowingly committed, or recommended, an act of retaliation against a whistleblower, who has made a lawful disclosure as defined in Section 2302(b)(98) or (b)(9) of title 5, or as defined in Section 1034(2) of title 10, by taking, or failing to take, a personnel action with regard to the whistleblower, the Head of the Agency shall order the termination of the retaliator from Federal Service, shall order that the retaliator be debarred from Federal employment for a period of not less than five years, and shall order that the retaliator be debarred from serving in any capacity on any contract or subcontract which receives Federal funds for a period of not less than five years. This authority may not be delegated to a lower level official.

§ 433.101(b) If the Head of the Agency determines from the results of any internal or external investigation, administrative process, grievance, or other agency resource; that a person has been subjected to retaliation for having made a lawful disclosure and that this person has been made whole within sixty days from the date of the disclosure of the alleged act of retaliation to a supervisor, higher level manager, the Office of Special Counsel, or the Merit Systems Protection Board, the Head of the Agency may order disciplinary action to be imposed on the retaliator other than that specified in (a).

Personally, I have seen the destruction to our government agencies caused by those who retaliate against whistleblowers and I am firmly of the opinion that anyone who participates in an act of retaliation against a whistleblower should be removed from government service and barred from ever serving in any capacity in any government related position. It is my opinion that anyone who wishes to be sympathetic to the retaliators has failed this Nation although I firmly support granting retaliators their day in court to face a jury of taxpayers.

Trial by Jury

Many within the whistleblower community have called for the right of the whistleblower to take their cases directly to the federal courts and allowing them to present their cases to a jury of taxpayers. I have no doubt that this would produce a significant overhaul of the federal government as throngs of retaliators and wrongdoers are led off to jail. To appreciate just how extensive the overhaul would be, you have to be aware that retaliation is not a singular event undertaken by one person. While the scope of retaliation can be narrowed to one “Big Bad Apple”, retaliation is an organizational event that spoils the barrel up and down the chain of command whether it is a civilian or military agency. It is a virus that spreads horizontally as it encompasses those in human resources who implement or fail to implement the prohibited personnel practices; it easily contaminates an agency’s legal staff that sees the opportunity to get their names before the Supreme Court at taxpayer expense, and it infects many others in every branch of government who want to look the other way and not get involved. In my opinion, adding the right to a jury trial for whistleblowers to the current process would be a mistake.

Good Order and Discipline “IS” Corrupted By Silence Among the Ranks

Make no mistake about it, those who have proffered or agreed that granting protections to our military personnel for acts of whistleblowing are acting in their own self-interest and not acting in the defense of this

Nation. The legacy of the Vietnam Conflict is that at its beginning Americans were just as compelled to join the military as had been the case at the beginning of each of the World Wars. The loyalty of the troops and their willingness to follow orders was not questioned until it became obvious from the daily media reports that our troops were being led by a political agenda earmarked by false statements concerning the battlefield and rules of engagement that protected the enemy more than it protected our troops. The military mandate to die first and question later protected incompetent leadership which yielded “fragging” as a means of self-preservation. The public’s will to support military intervention bottomed out when it became apparent that our sons and daughters in uniform were being sacrificed to preserve and protect the financial gains of a few. The current state of affairs where generals and admirals are dismissed from service for voicing a difference of opinion or for not going-along-to-get-along with the company line are indicative of lessons not learned. Getting rid of the retaliators in the military would build a soldier’s confidence in their military and political leadership such that they would leap from the trenches or walk the streets of some dusty, distant town. I dare you to take the few hours to visit the battlefields at Lexington, Concord, or Yorktown, I dare you to invite a nearby offices to accompany you, and I dare you to stand on any battlefield and not find the courage to speak the word, “zero”.

Shifting the Paradigm from Protecting Whistleblowers to Ending Retaliation

We have marched down the road of legislative patchwork trying to protect whistleblowers such that it has become an annual fire drill to find some new group to “protect”. Some may see Senator Reid’s recent blockage of more patches as political retribution, but I see it as an opportunity to redirect the effort to ending retaliation. Changing the direction of the past will be no less difficult for those in the whistleblower community as it will be for the recipients of this letter. For those of us who have been engaged in this contest for decades, it is not time to pass the baton to a younger generation, it is time to bring the baton across the finish line and to protect whistleblowers by ending retaliation and removing retaliators from federal civilian and military service.

Who Should Draft the Bills? Who Should Step Forward As Sponsors?

The effect of the repetitive amendments and patchwork legislation has served to gradually improve the plight of whistleblowers wherever they work. However as whistleblower heads continue to roll at an increasingly alarming rate, it calls into question whether this was the best strategy. More than twenty-five years ago during my earlier visits to the Hill, my effort to punish the retaliators was overruled. At the time, I knew that the heads of every future whistleblower would be served up on a silver platter. Nevertheless, I yielded to the power brokers of the day who were convinced that “some” progress was better than none. I choose to withdraw to the sidelines for this reason and for other reasons that are not appropriately addressed at this time. It should be apparent that I am no longer sitting on the sideline.

The advocates for the protection of whistleblowers have been well established over the decades of modifications to the Whistleblower Protection Act, the Whistleblower Protection Enhancement Act, and the abundance of agency or job related bills that have sought to prevent retaliation. There are the members of the Senate’s Whistleblower Caucus and efforts are underway to establish a similar caucus in the House. If normal protocol were followed it would be easy to determine who should draft the Bills for each Chamber and who should be at the head of the list to sign on as sponsors. Protocol might suggest that it is my responsibility to seek out a sponsor. For the moment I will leave it up to each of you to contact the appropriate persons to get Bills drafted and introduced. Go ahead and discuss the matter in your office and in the nearby offices. I am hopeful that you can decide amongst yourselves how to proceed. I just look for it to be sooner rather than later.

Sincerely,

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