

Re: Due Process Rights for National Security Whistleblowers
From: National Whistleblowers Center, Government Accountability Project

The Make Is Safe Coalition believes that district court access and jury trials in whistleblower cases for national security and FBI employees is critical for employees to have a fair chance at justice when they assert their rights. Exclusively administrative remedies without full court access as a backup inherently are vulnerable to political pressure and in cases involving significant political abuses of power. Decades of experience with full court access for national security whistleblowers in other contexts demonstrates that predicted objections are bluffs, without empirical support where they have been tested.

ADMINISTRATIVE PROCESS ALONE WON'T WORK

The Merit Systems Protection Board (MSPB) is not a viable system for intel and FBI whistleblower cases as an exclusive fact finding forum. In 1994, the House Committee on Post Office and Civil Service concluded that jury trials in district court were needed to provide a healthy competition with the MSPB remedy, which already had a dismal track record on whistleblower cases.

Currently, attorneys representing federal employees consistently advise clients that filing a whistleblower claim is counterproductive, due to the Board's consistent track record of approving almost any retaliation whistleblowers challenge. For decisions on the merits, its track record is 3-53 against whistleblowers since the millennium, and 1-44 under the current Chair.

Without court access as a backup, the Board or a less independent administrative scheme likely will be even more hostile to FBI/intel whistleblowers. The Board has most actively avoided complex cases, or politically charged disputes with national consequences. This is because it has neither the judicial independence nor the resources to credibly resolve conflicts over major government breakdowns for which the Whistleblower Protection Act is most important. Those vulnerabilities would be magnified for FBI/intel whistleblower cases.

COURT ACCESS ALREADY EXISTS FOR INTEL AND FBI WORKERS UNDER OTHER LAWS

For more than 18 years, all federal employees, including at the FBI and intelligence agencies, have had the right to go to federal district court on claims of retaliation, with jury trials and seek compensatory damages, under Title VII. Since 1974 all federal employees also have had district court access under the Privacy Act to seek damages, and they can go to district court for pre-enforcement injunctive relief against constitutional violations. Since 2005 Nuclear Regulatory Commission and Department of Energy employees have had the right to jury trials when retaliated for challenging violations of the Energy Policy Act. There are no exceptions for those DOE or NRC offices with intelligence functions. Since 2007 all defense contractors have had the right to jury trials, including those retained by offices whose primary duties are intelligence. In this year's stimulus law all federal contractors have access to jury trials, including those hired by the FBI, CIA, NSA and any other government intelligence agency to perform government functions. FBI and intelligence employees in the District of Columbia can obtain injunctive relief against First Amendment violations as well.

NO RISK TO NATIONAL SECURITY IF COURT ACCESS PERMITTED

There is nothing in H.R. 1507 that permits a court or an employee to disclose classified information. In fact, the bill provides for a procedure to prevent the disclosure of classified information. If the government invokes the state secrets privilege on a material issue, the relevant Inspector General conducts associated fact finding for the court.

There is no evidence that under any of the laws (civil rights, Privacy Act, First Amendment, etc.) where national security and FBI employees have full access to federal court that it has led to exposure of evidenced that compromises national security. There is no empirical track record or analysis why this problem would occur from the same access under HR 1507.

One reason is that where national security is related to a case, district courts have many protective measures available to prevent disclosure of classified information. For example, in Title VII cases federal courts use pseudonyms and protective orders to protect national security interests. The rules of civil procedure and rules of evidence have protective procedures, such as in-camera proceedings, and redaction of classified information. For criminal cases, the Classified Information Procedures Act has detailed procedures to safely consider classified evidence.

GAO REPORT FROM 1996 CONFIRMS NO RISK TO NATIONAL SECURITY FROM COURT ACCESS

In 1996 the General Accounting Office studied this issue and found that intelligence agencies already have in place numerous safeguards to protect against the disclosure of classified information, and that these agencies are fully equipped to protect national security interests in employee cases that proceed to federal court and in jury trials.

The GAO concluded, “If Congress wants to provide CIA, NSA, and DIA employees with standard protections that most other federal employees enjoy, it could do so without unduly compromising national security.” It noted that --

- o information on “sensitive intelligence operations can be converted into unclassified publicly available documents.”

- o based on experience with these EEO laws “that intelligence agencies can provide their employees with standard protections against adverse actions.”

- o intelligence agency “adverse action files generally contain no national security information.” Of the files reviewed by GAO, 98% of the adverse action files contained no such information.

- o case files at federal courts demonstrate declassified and redacted documents were capable of providing sufficient information to litigate cases.

THE CONSEQUENCES OF NOT PROVIDING A STRONG ANTI-REPRISAL REMEDY

Employees in intel agencies and FBI will not report wrongdoing within their chains of command. Instead, they will continue relying on the option most safe currently – leaking data to the press.

Congress will not receive evidence about wrongdoing in intel/FBI areas. After 9/11 national security whistleblowers' knowledge was needed to learn the causes of associated homeland security breakdowns. More recently, they know the truth about the extent of illegal government surveillance, secret prisons, torture and other human rights abuses. That knowledge is critical for the President's policy for full disclosure of the truth, as an alternative to punishment. They are particularly significant currently, when there is public disagreement over the integrity of CIA congressional briefings.

Attorneys will continue to be reluctant to pursue cases if there is only an administrative remedy without court access. Attorneys will continue to advise clients that remaining silent or not fighting retaliation is the best legal option.

OTHER INEQUITIES

Contractor employees who work for intel agencies and the FBI will have more whistleblower rights than government employees who oversee the work of contractors. Contractor employees will have access to jury trials, but intel/FBI employees will not. This will hamper the reporting of wrongdoing in the intel/FBI agencies.

Under current law, alleged criminals and terrorists will have more rights to court for redress of government misconduct than our intelligence agency and law enforcement officers who blow the whistle on serious misconduct and fraud.

For nearly 140 years all state and local government employees, including those with the most sensitive law enforcement and intelligence duties, have had access to jury trials for violations of their constitutional rights.

Corporate workers have access to jury trials in twelve whistleblower laws, including all relevant federal statutes since 2002.

President Obama's recent comments on reforming the state secrets privilege to provide for allowing litigation by redacting classified/privileged information, if enacted, will provide private citizens who sue the government more rights than intel and FBI employees. Private citizens who sue the government for infringement of constitutional rights (over wiretapping, etc.) will have access to courts with redacted information, etc. following reform of state secrets, but intel and FBI employees won't.