

## **Whistleblower Protections**

### **BACKGROUND**

Whistleblowers who speak out against government abuses of power help to protect against waste, fraud, or abuse and ensure government accountability and effectiveness. Government whistleblowers play a crucial role by alerting outside organizations, including AALL, to problems at their agencies that have the potential to severely affect the public's right to know. Whistleblowers act as a defense, along with the Freedom of Information Act (FOIA) and open meetings laws, to ensure public access and accountability.

Unfortunately, federal law fails to adequately protect government whistleblowers. Congress enacted the *Whistleblower Protection Act of 1989* (P.L. 101-12) to protect federal employees against reprisals for the exposure of government inadequacies. Over the past two decades a series of court decisions in the Federal Circuit Court of Appeals have eviscerated the statutory burden of proof to such a degree that few victims can satisfy the judicial standard.

As highlighted in a [joint letter](#) sent on May 15, 2009 and signed by AALL and more than 200 other organizations, only three out of 53 whistleblowers since 2000 have received final rulings in their favor from the Merit Systems Protection Board (MSPB), where whistleblowers receive their "day in court" through truncated administrative hearings. The Federal Circuit Court of Appeals, the appellate court with exclusive jurisdiction, has ruled against whistleblowers in 209 cases since October 1994 when Congress last strengthened the law, while deciding only 3 cases in their favor during the same period. As of March 2010, 375 groups have signed onto the letter in support on stronger whistleblower protections for government employees.

AALL supports whistleblower rights through our work with the OpenTheGovernment.org coalition and projects such as the 21<sup>st</sup> Century Right to Know Project, which developed the report, "[Moving Toward a 21st Century Right-to-Know Agenda: Recommendations to President-elect Obama and Congress](#)." The report, which AALL helped draft and ten AALL chapters and more than 75 individual law librarians signed on to support, included several key recommendations on much-needed whistleblower protections. We also work with other open government organizations such as the Government Accountability Project (GAP) whose mission is dedicated to defending whistleblowers, and the Make It Safe Coalition, which brings together a diverse set of groups dedicated to ensuring strong whistleblower protections.

As a senator, President Obama voted for legislation to reform the *Whistleblower Protection Act*, and during his presidential campaign, then-candidate Obama supported greater whistleblower protections. AALL was pleased when, during his [weekly radio address](#) on April 18, 2009, President Obama once again expressed his support for whistleblowers, stating, "It means strengthening whistleblower protections for government employees who step forward to report wasteful spending."

## **STATUS IN THE 112<sup>th</sup> CONGRESS (AS OF SEPTEMBER 2011)**

### ***Action in the Senate***

- On April 6, 2011, Senator Daniel Akaka (D-HI) introduced the Whistleblower Protection Enhancement Act ([S. 743](#)). The bill was referred to the Senate Committee on Homeland Security and Governmental Affairs, where it awaits consideration.

### ***Action in the House***

- None

### ***Other***

- On September 20, 2011, the White House released its [Open Government National Action Plan](#), building on the Open Government Initiative. The Plan includes a commitment to advocate for legislation to support whistleblower protections, as well as explore administrative mechanisms to expand rights for those who expose waste, fraud or abuse.

## **STATUS IN THE 111<sup>th</sup> CONGRESS (2009-2010)**

### ***Action in the House***

- On January 28, 2009, the House of Representatives passed the *American Recovery and Reinvestment Act of 2009* ([H.R.1](#)), which included an amendment introduced by Reps. Chris Van Hollen (D-MD-8) and Todd Platts (R-PA-19). The amendment, which AALL strongly supported, was identical to a bill introduced in the 110<sup>th</sup> Congress that passed by a bipartisan vote of 331-94, the *Whistleblower Protection Enhancement Act of 2007* ([H.R. 985](#)). Unfortunately, the Senate stripped the amendment from the bill. The final version of the stimulus package included “best practices” protections for contractors, grantees, and state and local government employees who work in programs that receive stimulus funding, but not federal employees.
- On March 12, 2009, Reps. Van Hollen and Platts introduced standalone legislation in the House, the *Whistleblower Protection Enhancement Act of 2009* ([H.R. 1507](#)), that included the strong provisions in their earlier amendment. The bill was referred to the House Committee on Oversight and Government Reform and House Committee on Homeland Security. H.R. 1507 would protect whistleblowers who are government contractors and national security employees.
- On May 14, 2009, the House Committee on Oversight and Reform held a hearing on H.R. 1507, during which Deputy Assistant Attorney General Rajesh De [testified](#) in support of expanding whistleblower protections, but stopped short of expressing the Administration’s support for the bill.

- On December 22, 2010 the House passed S. 372, but with weakened protections for whistleblowers in intelligence agencies in order to meet some of the concerns that Rep. Issa and others had expressed over the recent WikiLeaks disclosures.

### *Action in the Senate*

- On February 3, 2009, Sen. Daniel Akaka (D-HI) introduced a bill in the Senate to provide whistleblower protections for government employees, the *Whistleblower Protection Enhancement Act of 2009* ([S. 372](#)). The bill was referred to the Senate Committee on Homeland Security and Governmental Affairs. Though S. 372 as introduced would have added some protections to the gutted *Whistleblower Protection Act of 1989*, we were disappointed that the bill did not include jury trials or protections for national security employees.
- On June 11, 2009, the Senate Homeland Security and Governmental Affairs Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia held a hearing on S. 372. During the [hearing](#), Subcommittee members seemed receptive to adding several key provisions to the bill that are included in the House version.
- On July 29, 2009, the Senate Homeland Security and Governmental Affairs Committee voted by unanimous consent to order the bill to be reported favorably with an amendment in the nature of a substitute. We were pleased that the bill as reported includes several of the protections that our members asked for during AALL's [Day on the Hill](#) Advocacy Training, including access to jury trials in federal district court. However, it still does not go as far as the House bill, especially on protections for national security whistleblowers.
- On December 25, 2009, Sen. Kit Bond (R-MO), the Vice Chairman of the Intelligence Committee, placed a hold on S. 372, preventing it from receiving consideration on the Senate floor. Sen. Bond lifted his hold after his concerns regarding the protection of classified information were met.
- On December 10, 2010, S. 372 passed the Senate under unanimous consent. Unfortunately, as the bill awaited consideration by the full House, Rep. Darrell Issa (R-CA-49), incoming chair of the House Oversight and Government Reform Committee, withdrew his support based on concerns over the WikiLeaks disclosures.
- On December 16, 2010 AALL joined 60 good government groups from across the ideological spectrum on a [letter](#) to Rep. Issa urging him to support passage of the bill. The letter makes clear that, rather than exposing the United States to increased security risks, S. 372 will actually prevent leaks and strengthen national security by creating a safe, lawful avenue for whistleblowers to expose waste, fraud or abuse.
- On December 22, after the House passed the bill, it was sent back to the Senate where an anonymous senator put a hold on it. With action stalled because of the hold and the end of the Congress just days away, the bill was effectively dead.

AALL and other whistleblower advocates are disappointed with Congress's failure to pass whistleblower protections in the 111<sup>th</sup> Congress despite strong bipartisan support from members of Congress and the White House. AALL will continue to work with GAP and the Make It Safe Coalition to ensure that protections for whistleblowers are expanded in the 112<sup>th</sup> Congress.