

November 10, 2014

The Honorable Tom Carper
Chairman
U.S. Senate Committee on Homeland
Security and Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Tom Coburn
Ranking Member
U.S. Senate Committee on Homeland
Security and Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Carper and Ranking Member Coburn:

Our organizations urge you to promptly mark-up S. 1809, introduced by Senator Jon Tester (D-MT), with co-sponsors Charles Grassley (R-IA) and Claire McCaskill (D-MO). The House has introduced companion bipartisan legislation (H.R. 3278), that would restore Merit System Protection Board (MSPB) jurisdiction to review sensitive determinations. The Federal Circuit *Conyers* decision creates a burden on all federal agencies to recreate a duplicative and inefficient review process that currently already exists within the MSPB. Already agencies have begun converting their entire workforce to sensitive jobs, and there are no consistent procedures to achieve justice within agencies. Without the stability, balanced treatment and consistent review Congress intended MSPB review to provide, federal workers have lost and will continue to unfairly lose their jobs.

Through proposed rules and successful litigation at the Federal Circuit, the former and current administrations have paved the way to: 1) permit agencies to designate virtually any federal job as sensitive, 2) give agencies unchecked discretion to deny or remove that status at will, 3) terminate employees who lose their sensitive designations, and 4) deny them any independent right to defend themselves.

The legislative proposal is simple: When fired or charged with misconduct, it restores the right that existed for all federal employees from 1883 through 2012 to be heard before an administrative board that is independent of the agency trying to remove them. Since 1978, that independent body has been the U.S. Merit Systems Protection Board. The legislation would restore this due process cornerstone for “sensitive” employees. It has no effect on sensitivity designations, however, and would not interfere with the authority of the Secretary of the Department of Defense or any other agency head to make sensitivity designations or any other position clarification. S. 1809 will not impact the effectiveness or the efficiency of either the MSPB or the Office of Special Counsel. During her September 9, 2014 testimony before the House Oversight and Government Reform Committee, Special Counsel Carolyn Lerner stated that “there is no doubt about the” ability of the Office of Special Counsel “to responsibly and appropriately handle” review of worker eligibility to occupy sensitive positions.

The stakes could not be higher or timelier for congressional action. Unless this legislation passes, the *Conyers* decision could greatly diminish the non-partisan, professional federal labor force that has minimized politics in government for over a century. Specifically, this legislation is necessary to preserve Congress' unanimous 2012 mandate for the Whistleblower Protection Enhancement Act (WPEA). For the moment, this Administration has not challenged WPEA

rights for sensitive job holders. But those rights are crippled, if employees cannot defend their innocence against underlying charges. Federal workers could file whistleblower retaliation actions but would be barred from defending themselves in their WPEA cases against pretext.

Taxpayers are ill-served when agencies can create their own procedures without any third-party review. If Congress fails to pass S. 1809, federal workers will never even have the opportunity to be heard by a neutral body such as the MSPB or the Office of Special Counsel, and the public will never know if the government is violating the law. To prevent this disastrous outcome, we request that you promptly mark-up S. 1809 during the November 12 business meeting.

Respectfully submitted,

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