

July 1, 2015

The Honorable John McCain
Chairman
Senate Committee on Armed Services
228 Russell Senate Office Building
Washington, DC 20510

The Honorable Jack Reed
Ranking Member
Senate Committee on Armed Services
228 Russell Senate Office Building
Washington, DC 20510

The Honorable Mac Thornberry
Chairman
House Committee on Armed Services
2120 Rayburn House Office Building
Washington, DC 20515

The Honorable Adam Smith
Ranking Member
House Committee on Armed Services
2120 Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

As organizations concerned with openness and accountability in all parts of government, we are writing to remind you about the important role military whistleblowers play in ensuring the effective security of our nation, and to urge you to maintain the integrity of certain whistleblower provisions from the House and Senate versions of the National Defense Authorization Act (NDAA) for FY 2016.

Speaking out on wrongdoing in the military can be particularly challenging for service members who are trained to stay in line and follow orders. The stakes could not be higher for military whistleblowers who speak out against fraud, waste, abuse, and sexual assault in the military. A recent report by the Government Accountability Office noted a number of deficiencies in the protections offered to members of the military who report wrongdoing, and far too often, those whistleblowers are unfairly punished for their efforts to bring accountability to the armed services. The following provisions provide necessary and overdue reforms for military whistleblowers, and should be included in the final NDAA:

House Section 535. Burdens of Proof Applicable to Investigations and Reviews Related to Protected Communications of Members of the Armed Forces and Prohibited Retaliatory Actions. The whistleblower protections provided to the military are the lowest common denominator to prevent illegal retaliation for reporting wrongdoing. The burdens of proof that whistleblowers must meet are particularly oppressive when compared to civilian burdens of proof. In the military, the burden is placed on our service members to prove that they were illegally retaliated against, versus in civilian cases where the burden is placed on the agency to prove there was no retaliation. As a consequence, the DoD and service Inspectors General are unable to substantiate the vast majority of allegations they receive. This section updates the Military Whistleblower Protection Act to apply the bipartisan-supported civilian Whistleblower Protection Act burdens of proof language in an investigation into retaliation. This change was supported by the Department of

Defense Office of Inspector General in 2014, as a way to achieve consistency in legal standards in all of its whistleblower investigations.¹

House Section 544. Representation and Assistance from Special Victims' Counsel in Retaliatory Proceedings. This section will allow victims of alleged sexual assault to access help from the Special Victims' Counsel in any retaliatory proceedings stemming from their report of the offense. Sixty-two percent of those who report sexual assault experience retaliation for coming forward, and this addition is key to holding accountable those who retaliate against sexual assault victims. This section reflects recommendations made by Human Rights Watch and Protect Our Defenders following an investigation and report on military sexual assault.²

House Section 549. Strategy to Prevent Retaliation Against Members of the Armed Forces who Report or Intervene on Behalf of the Victim in Instances of Sexual Assault. It is clear that there is a systemic problem when nearly two-thirds of service members who report sexual assault experience retaliation. Combating this retaliation can only be accomplished with a comprehensive strategy that not only looks at creating protections for those who are victimized, but also for those who are trying to address this problem by reporting or intervening on their behalf. This section will require the creation of a strategy to prevent retaliation against those who report sexual assault in the armed services.

Senate Section 1088. Conflict of Interest Certification for Investigations Relating to Whistleblower Retaliation. The Council of the Inspectors General on Integrity and Efficiency's (CIGIE) standards state that investigations must be free from the appearance or the fact of a conflict of interest that would impair the independence of an investigation. A recent Government Accountability Office report found that while the DoD IG and service IGs have processes for investigators with a conflict of interest to recuse themselves, "there is no process of investigators to document whether the investigation they conducted was independent and outside of the chain of command."³ This section will require investigators to certify, in writing to the Inspector General, that they did not have a conflict of interest with either the complainant or witnesses in the retaliation complaint.

In addition, we wanted to call attention to one section that will be harmful to the protection of whistleblowers in the military, and urge you to remove it from the final NDAA.

Senate Section 1801(c). Last year Congress required the Secretary of Defense to write regulations creating a clear criminal prohibition of retaliation against victims of a crime or someone who reports a criminal offense. This section would remove the requirement

¹ Letter from POGO et al. to House Judiciary Committee Chairman Bob Goodlatte and Ranking Member John Conyers about the Inclusion of Military Whistleblower Protections in NDAA, May 6, 2014. <http://www.pogo.org/our-work/letters/2014/pogo-and-partners-urge-house.html>

² Jennifer Hlad and Heath Druzin, "Report: Most military sexual assault victims still face retaliation," *Stars and Stripes*, May 18, 2015. <http://www.stripes.com/news/us/report-most-military-sexual-assault-victims-still-face-retaliation-1.346884> (Downloaded June 22, 2015)

³ Government Accountability Office, *Whistleblower Protection: DOD Needs to Enhance Oversight of Military Whistleblower Reprisal Investigations*, May 7, 2015, p. 45. <http://www.gao.gov/assets/680/670067.pdf>

that adverse personnel actions, and the threat of adverse personnel actions, be included in the minimum definition of retaliatory actions.

We appreciate all of the work your committees have done to enhance whistleblower protections for those who report wrongdoing. The FY 2016 NDAA has the potential to usher in a new era of protection for military whistleblowers facing retaliation; we hope you will take this opportunity to ensure this happens. If you would like more information on any of these sections, please contact the Project On Government Oversight's Public Policy Associate, Liz Hempowicz, at (202) 347-1122 or ehempowicz@pogo.org.

Sincerely,

Center for Arms Control and Non-Proliferation
Center for Defense Information
Center for Financial Privacy and Human Rights
Community Research
Council for a Livable World
Demand Progress
Federal Law Enforcement Officers Association
Government Accountability Project
Human Rights Watch
Just Foreign Policy
Liberty Coalition
Malcolm X Center for Self Determination
New Media Rights
OpenTheGovernment.org
Project On Government Oversight (POGO)
Public Citizen
Service Women's Action Network
Sunlight Foundation
Taxpayers Protection Alliance
TechFreedom
Whistleblower Support Fund

cc: Members, House and Senate Armed Services Committee