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Congress Can Honor Servicemembers Through Military Whistleblower Bill | Commentary

By **Special to Roll Call**

Posted at 5 a.m. on June 5

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By **Tom Devine and Shanna Devine**

The Department of Defense Office of Inspector General's program to protect armed-services whistleblowers has just flunked, again. For the second time in three years, the Government Accountability Office has concluded the OIG systematically violates the law protecting those who challenge illegality in the military. The OIG's reconfirmed inadequacy should be a powerful boost for legislative efforts to enhance the laws designed to protect those challenging armed forces fraud, waste or abuse. Coupled with legislation is a need to reform the OIG so new laws will, when enacted, be implemented. Legislatively, however, only the Democrats in Congress appear ready to act.

According to an anonymous official who contributed heavily to the investigation, the latest findings raise basic questions about whether uniformed personnel can get fair treatment from the rule of law from an organization in which a quarter of OIG employees are reported to fear reprisal. The report also revealed that the average case processing time is 526 days, compared to the 180 day statutory limit. This is despite closing 80 percent of complaints without an investigation, and ruling against the whistleblower 96 percent of the time. Further, the Pentagon IG does not even have files for more than 20 percent of reprisal investigations by service IGs, often accused of collusion with local military officers to silence internal critics. The findings are consistent with a 2012 report that concluded 70 percent of decisions fail when compared to the legal standards enacted by Congress.

This is unacceptable. There is no dispute that a military whistleblower law should restrict the audiences for permissible disclosure to institutional channels relevant for a responsible, effective defense. When whistleblowing in the military service is necessary, however, the stakes can be unsurpassed both from misconduct and retaliation. The consequences could range from unnecessary casualties to human-rights violations to security breaches. Servicemembers who exercise proper channels to challenge that type of misconduct should have best practice rights against retaliation.

It is thanks to military whistleblowers that we have learned of human-rights abuses that poisoned support for America, due to regular contempt for universal rules of law and military engagement. We have learned of routine sexual harassment that has made service to our country a nightmare for too many of America's women. We have learned of prosecutorial misconduct that threatens accountability. We have learned of recruitment cheating that allowed individuals possibly unfit for America's streets to serve in America's armies. But consistently, none of the patriots who defended the military rule of law received justice themselves. Even worse, numerous DOD IG whistleblowers who sought accountability and reform themselves were harassed or purged from government.

This all could change with legislation just introduced by Sens. **Barbara Boxer**, D-Calif., **Edward J. Markey**, D-Mass. and **Ron Wyden**, D-Ore., and Rep. **Jackie Speier**, D-Calif. The Legal Justice for Servicemembers Act does not expand the contexts for legally protected whistleblowing. Rather, it is a comprehensive overhaul of existing law so that its due process

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structure for enforcement is on parity with other whistleblower laws.

In particular, the legislation permits legal challenges to retaliatory investigations; permits the Inspector General to issue a 90 day "stay" of alleged retaliation while it is investigated; guarantees an administrative due process hearing at the Board of Correction of Military Records; applies the Whistleblower Protection Act burdens of proof against retaliation; strengthens independence, allows service members to have an investigation by the Department of Defense Office of Inspector General, instead of by a Service Inspector General; requires OIG investigative reports to consider discipline for retaliation; and establishes general military justice due process reforms.

This legislation applies the proper balance when the free flow of information is essential for the national defense. The audiences and contexts for military whistleblowing should not be expanded. But when whistleblowing is needed, best practice due process is a necessity both for whistleblowers and for the national defense.

The legislation already has support from citizens across the political spectrum who depend on our troops for safety. Nearly 30 groups, ranging from the conservative National Taxpayers Union and the Liberty Coalition, to liberal bastions like Public Citizen and the Union of Concerned Scientists, have endorsed the reform. But there's a conspicuously absent elephant who should be in this room: Republican Members of Congress. Republicans have been aggressive leaders for adequate resources to defend the country. Will Democrats be the only leaders for accountability when OIG and military bureaucrats abuse their power and betray the national defense?

Tom Devine is legal director of the Government Accountability Project, where he has assisted more than 6,000 whistleblowers and led passage of every major federal whistleblower statute since 1979. Shanna Devine is legislative director of the Government Accountability Project, where she has led campaigns to strengthen whistleblowers' free speech rights since 2008.

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