United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

September 3, 2013

President Barack Obama
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. President:

On August 20, 2013, the U.S. Court of Appeals for the Federal Circuit released an *en banc* decision in the case of *Kaplan v. Conyers* (Case 11-3207).[1] The majority held in *Kaplan* that the Merit Systems Protection Board (MSPB) cannot review the merits of Department of Defense (DOD) national security determinations concerning the eligibility of an employee to occupy a sensitive position.[2] I am extremely concerned about this decision and its impact on whistleblower protections.

With the passage of the Civil Service Reform Act of 1978 (CSRA), Congress created a process for employees against whom adverse personnel actions are taken. That process, found in 5 U.S.C. § 7513, includes a provision which states in part: "An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title."[3] An alternate process is outlined in 5 U.S.C. § 7532, which provides that "[n]otwithstanding other statutes, the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security."[4] Further, the head of an agency may remove such an employee if he determines that removal is necessary or advisable in the interests of national security.[5] When action is taken under this section, the determination of the head of the agency is final.[6] Nevertheless, this process requires that if certain criteria are met, the employee must be provided with due process protection, such as a written statement of the charges against him and a hearing before an agency authority.[7]

---

[1] Kaplan v. Conyers, 2013 U.S. App. LEXIS 17278 (Fed. Cir. 2013) (en banc).
[2] *Id.* at 34. The definitions for critical-sensitive, noncritical-sensitive, and nonsensitive positions were established by Congress and are found in 32 C.F.R. § 154.13.
[3] 5 U.S.C. § 7513(d) (2012).
[4] 5 U.S.C. § 7532(a) (2012).
[5] 5 U.S.C. § 7532(b) (2012).
[6] *Id.*
[7] 5 U.S.C. § 7532(c) (2012).

In *Kaplan*, DOD chose not to exercise its authority under § 7532, yet nevertheless argued that it had the authority to make final determinations. However, unlike the authority that has been delegated by executive order with respect to final security clearance determinations and which was upheld in *Department of the Navy v. Egan*,[8] DOD has had no authority delegated to it to make final decisions on suitability determinations.[9] In *Kaplan*, Circuit Judge Timothy Dyk wrote in a dissenting opinion joined by Judges Pauline Newman and Jimmie Reyna: "[T]he majority's decision rests on the flawed premise that the DoD, acting on its own—without either Congressional or Presidential authority—has 'inherent authority' to discharge employees on national security grounds. No decision of the Supreme Court or any other court supports this proposition."[10]

By holding in DOD's favor, the majority in *Kaplan* strips several hundred thousand employees of rights under CSRA and the Whistleblower Protection Act (WPA) when an agency bases an adverse action on an eligibility determination. In *Conyers v. Department of Defense*, the December 22, 2010, MSPB decision which was appealed by DOD, the MSPB warned: "Accepting the agency's view could, without any Congressional mandate or imprimatur, preclude Board and judicial review of alleged unlawful discrimination, whistleblower retaliation, and a whole host of other constitutional and statutory violations."[11] The Office of Special Counsel noted in an amicus brief that over 25% of the existing federal work force would be impacted by this exception from the CSRA and the WPA.[12]

In addition to automatically exempting some employees from the provisions of the WPA, this decision will also have a chilling effect on other potential whistleblowers throughout the federal government. Even if a federal employee's current position is not considered sensitive, an employee who blows the whistle will now fear that his or her position may be designated non-critical sensitive as a means of retaliation. A new rule proposed by the Office of Personnel Management (OPM) and the Office of the Director of National Intelligence (ODNI) would expand the range of federal employees whose positions could be deemed non-critical sensitive,[13] and as the dissent in *Kaplan* stated: "If positions of grocery store clerk and accounting secretary are deemed to be sensitive, it is difficult to see which positions in the DoD or other executive agencies would not be deemed sensitive."[14] OSC reasoned in its amicus brief that the arguments for deeming these positions sensitive "could be made about most federal employees, by virtue of

---

[8] Dep't of the Navy v. Egan, 484 U.S. 518 (1988).
[9] Exec. Order No. 10,865, 3 CFR 398 (1959-1963).
[10] *Kaplan*, 2013 U.S. App. LEXIS 17278 at 2 (Dyk, J., dissenting).
[11] Conyers v. the Dep't of Defense, 2010 MSPB 247 (2010).
[12] Brief for Amicus Curiae The United States Office of Special Counsel in Support of Respondents and in Favor of Affirming the Merit Systems Protection Board's Decision at 4, Berry v. Conyers, 692 F.3d 1223 (Fed. Cir. 2012).
[13] Designation of National Security Positions in the Competitive Service, and Related Matters, 78 Fed. Reg. 102 (proposed May 28, 2013) (to be codified at 5 C.F.R. pt. 732), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-05-28/html/2013-12556.htm.
[14] *Kaplan*, 2013 U.S. App. LEXIS 17278 at 2 (Dyk, J., dissenting).

their access to federal facilities and their ability to observe their surroundings."[15] OSC noted: "At a minimum, such logic could be extended to virtually any employee of DOD, DHS, and DOE. The combined workforces for these three departments alone account for nearly 50% of the approximately two million federal employees who are covered by the CSRA."[16]

Without clear rules preventing a suitability determination being made in retaliation for a protected disclosure, federal employees will have a clear disincentive against blowing the whistle. In *MacLean v. Department of Homeland Security*, a Federal Air Marshal disclosed to the press a text message stating that Air Marshal missions were cancelled for a period, which the Marshal believed was detrimental to public safety.[17] After the Marshal disclosed the text message to the press, he subsequently received a notice of proposed removal alleging that he had violated a regulation prohibiting the disclosure of "sensitive security information" (SSI). Although the text message had not been labeled as SSI when it was sent, nearly one year later, while the Marshal was appealing the notice before the MSPB, the Transportation Safety Agency (TSA) issued a final order stating that the text message's content was SSI.[18] Among other things, the Marshal argued that his disclosure of the text message was protected under the WPA, an issue which the U.S. Court of Appeals for the Federal Circuit recently remanded to the MSPB for determination.[19] Regardless of the propriety of disclosing information to the press or whether the MSPB finds this particular instance to be a protected disclosure, this case illustrates the type of scenario a whistleblower could face after making a disclosure that would ordinarily be protected under the WPA. *Kaplan* eliminates the procedural protection of being able to turn to the MSPB if such a whistleblower suffered from an adverse suitability determination as retaliation.

Therefore, I respectfully request that you issue an executive order clarifying that neither DOD nor any other agency has received the authority delegated from you to make final, unreviewable decisions regarding suitability determinations and clarifying that such determinations should be made under the provisions of 5 U.S.C. § 7513, which permits MSPB review. At the very least, please direct that all employees who are not subject to the provisions of § 7513 must be given the protections offered by 5 U.S.C. § 7532. Finally, please ensure that rules are promulgated to ensure that whistleblowers do not have their positions deemed non-critical sensitive after the fact when they have already blown the whistle. This could be accomplished by amending the rule proposed by OPM and ODNI on designating national security positions. Without such protective guidelines, federal employees will be left in limbo, with no certainty about whether disclosing information about waste, fraud, and abuse will be protected or not. The chilling effect of such uncertainty would be devastating and would certainly discourage whistleblowers from reporting wrongdoing.

---

[15] Brief for Amicus Curiae, *supra* note 12, at 10.
[16] *Id.*
[17] MacLean v. Dep't of Homeland Security, 543 F.3d 1145, 1148 (9th. Cir. 2008).
[18] *Id.* at 1149.
[19] MacLean v. Dep't of Homeland Security, 714 F.3d 1301 (Fed. Cir. 2013).

Your transition website from 2008 states:

> Often the best source of information about waste, fraud, and abuse in government is an existing government employee committed to public integrity and willing to speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled. We need to empower federal employees as watchdogs of wrongdoing and partners in performance. Barack Obama will strengthen whistleblower laws to protect federal workers who expose waste, fraud, and abuse of authority in government. **Obama will ensure** that federal agencies expedite the process for reviewing whistleblower claims and **whistleblowers have full access to courts and due process.**[20]

I trust that you will keep the commitment you made to the American people to ensure due process for whistleblowers.

Thank you for your prompt attention to this important matter.

Sincerely,

Chuck Grassley

Charles E. Grassley
Ranking Member
Committee on the Judiciary

[20] The Office of the President-Elect, "Agenda: Ethics," http://change.gov/agenda/ethics_agenda (last visited Aug. 29, 2013).