

Calendar No. 358

112th Congress }
2d Session }

SENATE

{ REPORT
112-155 }

WHISTLEBLOWER PROTECTION
ENHANCEMENT ACT OF 2012

—
R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 743

TO AMEND CHAPTER 23 OF TITLE 5, UNITED STATES CODE, TO CLARIFY THE DISCLOSURES OF INFORMATION PROTECTED FROM PROHIBITED PERSONNEL PRACTICES, REQUIRE A STATEMENT IN NON-DISCLOSURE POLICIES, FORMS, AND AGREEMENTS THAT SUCH POLICIES, FORMS, AND AGREEMENTS CONFORM WITH CERTAIN DISCLOSURE PROTECTIONS, PROVIDE CERTAIN AUTHORITY FOR THE SPECIAL COUNSEL, AND FOR OTHER PURPOSES



APRIL 19, 2012.—Ordered to be printed

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WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2012

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Mr. LIEBERMAN, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 743]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 743) to amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in non-disclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill (as amended) do pass.

I. PURPOSE AND SUMMARY

The Whistleblower Protection Enhancement Act of 2012 will strengthen the rights of and protections for federal whistleblowers so that they can more effectively help root out waste, fraud, and abuse in the federal government. Whistleblowers play a critical role in keeping our government honest and efficient. Moreover, in a post-9/11 world, we must do our utmost to ensure that those with knowledge of problems at our nation's airports, borders, law enforcement agencies, and nuclear facilities are able to reveal those problems without fear of retaliation or harassment. Unfortunately, federal whistleblowers have seen their protections diminish in recent years, largely as a result of a series of decisions by the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over many cases brought under the Whistleblower

Protection Act (WPA).¹ Specifically, the Federal Circuit has wrongly accorded a narrow definition to the type of disclosure that qualifies for whistleblower protection. Additionally, the lack of remedies under current law for most whistleblowers in the intelligence community and for whistleblowers who face retaliation in the form of withdrawal of the employee's security clearance leaves unprotected those who are in a position to disclose wrongdoing that directly affects our national security.

S. 743 would address these problems by restoring the original congressional intent of the WPA to adequately protect whistleblowers, by strengthening the WPA, and by creating new whistleblower protections for intelligence employees and new protections for employees whose security clearance is withdrawn in retaliation for having made legitimate whistleblower disclosures. More specifically, S. 743 would, among other things, clarify the broad meaning of "any" disclosure of wrongdoing that, under the WPA, a covered employee may make with legal protection; expand the availability of a protected channel to make disclosures of classified information to appropriate committees of Congress; allow certain whistleblowers to bring their cases in federal district court (this provision being subject to a five-year sunset); allow whistleblowers to appeal decisions on their cases to any federal court of appeals (this provision also being subject to a five-year sunset); provide whistleblower and other employee protections to employees of the Transportation Security Administration (TSA); clarify that those who disclose scientific censorship are protected under the WPA; establish a remedy for certain employees of the intelligence community who are not protected under the WPA, modeled on the whistleblower protections for Federal Bureau of Investigation (FBI) employees; and provide federal employees with a way to challenge security clearance determinations made in retaliation against protected whistleblower disclosures.

II. BACKGROUND

The Civil Service Reform Act of 1978 (CSRA) first established statutory protections for federal employees to encourage disclosure of government illegality, waste, fraud, and abuse. As explained in the accompanying Senate Report:

Often, the whistleblower's reward for dedication to the highest moral principles is harassment and abuse. Whistleblowers frequently encounter severe damage to their careers and substantial economic loss. Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses

¹ Whistleblower Protection Act of 1989, Public Law No. 101-12, 103 Stat. 16 (1989).

billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.²

The CSRA established the Office of Special Counsel (OSC) to investigate and prosecute allegations of prohibited personnel practices or other violations of the merit system and established the Merit Systems Protection Board (the MSPB or the Board) to adjudicate such cases. However, in 1984, the MSPB reported that the Act had no effect on the number of whistleblowers, and that an increased percentage of federal employees who observed wrongdoing failed to report it because they feared reprisal.³ This Committee subsequently reported that employees felt that the OSC engaged in apathetic and sometimes detrimental practices toward employees seeking its assistance. The Committee also found that restrictive decisions by the MSPB and federal courts hindered the ability of whistleblowers to win redress.⁴

In response, Congress in 1989 unanimously passed the WPA, which forbids retaliation against a federal employee who discloses what the employee reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. As discussed in more detail below, the WPA makes it a prohibited personnel practice to take an adverse personnel action against a covered employee because that employee makes a protected disclosure. An employee who claims to have suffered retaliation for having made a protected disclosure may seek a remedy from the MSPB, may ask the OSC investigate the situation and advocate for the employee, or may file a grievance under a negotiated grievance procedure contained in a collective bargaining agreement. The stated congressional intent of the WPA was to strengthen and improve protections for the rights of federal employees, to prevent reprisals, and to help eliminate wrongdoing within the government.⁵ The Committee emphasized in its report on the legislation that, although it is important to discipline those who commit prohibited personnel practices, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.⁶

Congress substantially amended the WPA in 1994, as part of legislation to reauthorize the OSC and the MSPB.⁷ The amendments were designed, in part, to address a series of actions by the OSC and decisions by the MSPB and the Federal Circuit that Congress deemed inconsistent with its intent in the 1989 Act.⁸ Now, seventeen years after the last major revision of the WPA, it is again necessary for Congress to reform and strengthen several aspects of the

²S. Rep. No. 95-969, at 8 (1978).

³See Merit Systems Protection Board, *Blowing the Whistle in the Federal Government: A Comparative Analysis of 1980 and 1983 Survey Findings*, at 5-6 (October 1984).

⁴S. Rep. No. 100-413, at 6-16 (1988).

⁵*Id.* at 9.

⁶*Id.* at 23.

⁷An Act to authorize appropriations for the United States Office of Special Counsel, the Merit Systems Protection Board, and for other purposes, Public Law No. 103-424, 108 Stat. 4361 (1994).

⁸H. Rep. No. 103-769, at 12-18 (1994).

whistleblower protection statutes in order to achieve the original intent and purpose of the laws.

A. Clarification of what constitutes a protected disclosure

In order to make a claim under the WPA, an individual must qualify as a covered employee and allege that a personnel action was taken, or threatened, because of “any disclosure” of information by the individual that he or she believes evidences: 1) a violation of any law, rule, or regulation; or 2) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to the public health or safety.⁹

Unfortunately, in the years since Congress passed the WPA, the MSPB and the Federal Circuit narrowed the statute’s protection of “any disclosure” of certain types of wrongdoing, with the effect of denying coverage to many individuals Congress intended to protect. Both the House and Senate committee reports accompanying the 1994 amendments criticized decisions of the MSPB and the Federal Circuit limiting the types of disclosures covered by the WPA. Specifically, this Committee explained that the 1994 amendments were intended to reaffirm the Committee’s long-held view that the WPA’s plain language covers *any* disclosure:

The Committee . . . reaffirms the plain language of the Whistleblower Protection Act, which covers, by its terms, “any disclosure,” of violations of law, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. The Committee stands by that language, as it explained in its 1988 report on the Whistleblower Protection Act. That report states: “The Committee intends that disclosures be encouraged. The OSC, the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue.”¹⁰

The House Committee on the Post Office and the Civil Service similarly stated:

Perhaps the most troubling precedents involve the [MSPB’s] inability to understand that “any” means “any.” The WPA protects “any” disclosure evidencing a reasonable belief of specified misconduct, a cornerstone to which the MSPB remains blind. The only restrictions are for classified information or material the release of which is specifically prohibited by statute. Employees must disclose that type of information through confidential channels to maintain protection; otherwise there are no exceptions.¹¹

Despite the clear legislative history and the plain language of the 1994 amendments, the Federal Circuit and the MSPB have continued to undermine the WPA’s intended meaning by imposing limita-

⁹ 5 U.S.C. 2302(b)(8).

¹⁰ S. Rep. No. 103-358 (1994), at 10 (quoting S. Rep. No. 100-413 (1988) at 13).

¹¹ H. Rep. No. 103-769, at 18 (1994).

tions on the kinds of disclosures by whistleblowers that are protected under the WPA. S. 743 makes clear, once and for all, that Congress intends to protect “any disclosure” of certain types of wrongdoing in order to encourage such disclosures. It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions. Without that assurance, whistleblowers will hesitate to come forward.

Section 101 of S. 743 overturns several court decisions that narrowed the scope of protected disclosures. For example, in *Horton v. Department of the Navy*, the court ruled that disclosures to the alleged wrongdoer are not protected, because the disclosures are not made to persons in a position to remedy wrongdoing.¹² In *Willis v. Department of Agriculture*, the court stated that a disclosure made as part of an employee’s normal job duties is not protected.¹³ And in *Meuwissen v. Department of Interior*, the court held that disclosures of information already known are not protected.¹⁴

These holdings are contrary to congressional intent for the WPA. The court wrongly focused on whether or not disclosures of wrongdoing were protected, instead of applying the very broad protection required by the plain language of the WPA. The merits of these cases, instead, should have turned on the factual question of whether personnel action at issue in the case occurred “because of” the protected disclosure.

Section 101 of S. 743 amends the WPA to overturn decisions narrowing the scope of protected disclosures by clarifying that a whistleblower is not deprived of protection just because the disclosure was made to an individual, including a supervisor, who participated in the wrongdoing; or revealed information that had been previously disclosed; or was not made in writing; or was made while the employee was off duty. The bill also clarifies that an employee does not lose protection simply because of the employee’s motive for making the disclosure, or because of the amount of time that elapsed between the events described in the disclosure and the making of the disclosure.

Finally, an employee is not deprived of protection merely because the employee made the disclosure in the normal course of the employee’s duties, provided that actual reprisal occurred—in other words, provided that the employee can show not only that the agency took the personnel action “because of” the disclosure, but also that the agency took the action with an improper, retaliatory motive. This extra proof requirement when an employee makes a disclosure in the normal course of duties is intended to facilitate adequate supervision of employees, such as auditors and investigators, whose job is to regularly report wrongdoing. Personnel actions affecting auditors, for example, would ordinarily be based on the

¹² 66 F.3d 279, 282 (Fed. Cir. 1995). The Court did not explain its reasoning that a wrongdoer is not in a position to halt his or her own actions, stating conclusorily that such a disclosure is criticism rather than whistleblowing.

¹³ 141 F.3d 1139, 1144 (Fed. Cir. 1998) (reasoning that because Willis, as a compliance inspector, was required to report farms that were out of compliance as a regular part of his job duties, such reports could not constitute protected disclosures under the WPA). *But see Johnson v. Department of Health and Human Services*, 87 M.S.P.R. 204, 210 (2000) (limiting Willis to its factual context); *Askew v. Department of the Army*, 88 M.S.P.R. 674, 679–80 (2001) (cautioning that Willis ought not be read too broadly and rejecting the proposition that Willis held that “disclosure of information in the course of an employee’s performance of her normal duties cannot be protected whistleblowing”).

¹⁴ 234 F.3d 9, 12–13 (Fed. Cir. 2000).

auditor's track-record with respect to disclosure of wrongdoing; and therefore a provision forbidding any personnel action taken because of a disclosure of wrongdoing would sweep too broadly. However, it is important to preserve protection for such disclosures, for example where an auditor can show that she was retaliated against for refusing to water down a report. This provision is intended to strike the balance of protecting disclosures made in the normal course of duties but imposing a slightly higher burden to show that the personnel action was made for the actual purpose of retaliating against the auditor for having made a protected whistleblower disclosure.

The evident tendency of adjudicative bodies to scale back the intended scope of protected disclosures appears to have arisen, at least in part, from concern that management of the federal workforce may be unduly burdened if employees can successfully claim whistleblower status in ordinary employment disputes.¹⁵ Taking this concern seriously, the Committee has concluded that the strong national interest in protecting good faith whistleblowing requires broad protection of whistleblower disclosures, recognizing that the responsible agencies and courts can take other steps to deter and weed out frivolous whistleblower claims. Under decisions of the U.S. Court of Appeals for the Federal Circuit and the MSPB, for example, a whistleblower case cannot proceed unless an employee has first made non-frivolous allegations satisfying the elements for a *prima facie* case that the employee has suffered unlawful retaliation for having made a protected disclosure. Unless the employee can do this, there will be no hearing and the agency will be under no burden to present an affirmative defense.¹⁶ Moreover, the MSPB's procedural rules may be available to curtail frivolous litigation under certain circumstances, including in cases under the WPA. These rules generally authorize an administrative judge at the MSPB to impose sanctions necessary to meet the interests of justice and to issue protective orders in cases of harassment of a witness, including harassment of a party to a case.¹⁷ S. 743 does not affect these decisions or regulations.

In addition, to make a *prima facie* whistleblower case, the employee must show that he or she reasonably believed that the disclosed information evidenced a violation of law, gross mismanagement, or one of the other types of wrongdoing enumerated in 5 U.S.C. § 2302(b)(8). As detailed further below, the Federal Circuit has held that this reasonable-belief test is an objective one: whether a disinterested observer with knowledge of the facts known to and readily ascertainable by the employee reasonably could conclude that the conduct evidences a violation of law, gross mismanagement, or other matters identified in 5 U.S.C. 2302(b)(8).¹⁸ The Committee believes it is prudent to codify that objective test in the whistleblower statute, and has done so in section 103 of S. 743. Thus, in screening out frivolous claims, the focus for the MSPB and the courts would properly shift to whether the employ-

¹⁵ See, e.g., *Herman v. Department of Justice*, 193 F.3d 1375, 1381 (Fed. Cir. 1999); *Frederick v. Department of Justice*, 73 F.3d 349, 353 (Fed. Cir. 1996).

¹⁶ See, e.g., *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367 (Fed. Cir. 2001); *Rusin v. Department of Treasury*, 92 M.S.P.R. 1298 (2002).

¹⁷ See 5 C.F.R. §§ 1201.43 & 1201.55(d).

¹⁸ *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999); accord *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298 (2002).

ee's belief was objectively reasonable, rather than whether the employee's disclosure of information meets the statutory definition of "disclosure." In the Committee's view, any potential mischief that might otherwise arise from expanding the scope of what kinds of "disclosure" are protected will be countered by the application of this objective reasonable-belief test. In cases not so filtered, the agency would still prevail on its defense if it could demonstrate that it would have taken the same personnel action against the employee even absent the disclosure.

Moreover, to further address the concern that the WPA might impose an undue burden on agency management if employees could claim whistleblower protections in cases of ordinary workplace disputes, S. 743 requires the Government Accountability Office (GAO) to evaluate the implementation of the Act, including any trends in the number of cases filed, the disposition of those cases, and any patterns of abuse. S. 743 also requires the MSPB to report yearly on the number of cases filed, the number of petitions for review filed, and the disposition of cases alleging violations of the WPA. The Committee believes that these provisions will enable Congress to examine closely how this bill is implemented and to intervene, if necessary, if an unintended consequence of the legislation should become evident.

In restoring and enlarging the broad protection of whistleblowers under the WPA, the Committee decided it was necessary to codify one narrow, reasonable limitation on the subject matter of disclosures that are protected. The issue first emerged during the hearing on this bill's predecessor, S. 1358, in 2003 during the 108th Congress. At the hearing, the Senior Executives Association expressed concern that, if the scope of protected disclosures were completely unrestricted, the WPA could be construed to protect employees who disclose disagreements with their supervisors' or managers' lawful policy decisions, and the Association recommended that the bill be clarified to deny protection of disclosures relating to policy disagreements.¹⁹ Put another way, an employee who discloses general philosophical or policy disagreements with agency decisions or actions should not be protected as a whistleblower. Section 102 of S. 743 imposes that limitation by excluding communications concerning policy decisions that are a lawful exercise of discretionary authority. This exclusion reflects congressional intent at the inception of statutory whistleblower protection.²⁰ At the same time, the Committee seeks to ensure that the WPA covers disclosures of substantial misconduct, even if the misconduct flows from a policy decision. S. 743 balances both of these policy objectives by codifying that an employee is still protected against retaliation for disclosing evidence of illegality, gross waste, gross mismanagement, abuse of authority or a substantial and specific danger to public health or safety, regardless of whether the information arguably relates to a policy decision, whether properly or im-

¹⁹S. 1358—The Federal Employee Protection of Disclosures Act: Amendments to the Whistleblower Protection Act: Hearing on S. 1358 before the Committee on Governmental Affairs, S. Hrg. 108-414, at 163 (2003).

²⁰See S. Rep. No. 969, 95th Cong., 2d Sess. 8 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2730 ("the Committee intends that only disclosures of public health or safety dangers which are both substantial and specific are to be protected. Thus, for example, general criticisms by an employee of the Environmental Protection Agency that the agency is not doing enough to protect the environment would not be protected under this subsection.").

properly implemented. This language is consistent with Federal Circuit precedent.²¹

A second limitation that had been included in a prior version of the bill is not included in S. 743. To address concerns that minor, accidental violations of law committed in good faith would become the basis for protected disclosures, the Committee accepted an amendment to a version of the bill considered during the 111th Congress, S. 372, to exclude disclosures of “an alleged violation that is minor, inadvertent, and occurs during conscientious carrying out of official duties.”²² The language of this provision was intended to codify case law finding that disclosures of trivial or *de minimis* violations are not protected under the WPA.²³ However, whistleblower advocates expressed concerns that this provision might invite inquiry into the substance and importance of the behavior the employee disclosed, rather than the employee’s reasonable belief that he or she disclosed wrongdoing protected under the WPA, as discussed in the next section. The statute is intended to encourage disclosure of wrongdoing, and the Committee has concluded that an exception that may cause would-be whistleblowers to hesitate for fear that their disclosures might be deemed too minor for protection could be counterproductive. Accordingly, that exception was not included in S. 743. Moreover, section 101 of the bill underscores the breadth of the WPA’s protections by changing the term “a violation” to the term “any violation” in two places in the WPA.²⁴

Additionally, the Committee notes that, with respect to a disclosure of “gross mismanagement,” a “gross waste” of funds, or a “substantial and specific danger to public health or safety,” the statute requires more than disclosure of *de minimis* wrongdoing. In applying these provisions of the WPA, the Merit Systems Protection Board used an appropriate definition of “gross mismanagement” in *Swanson v. General Services Administration*.²⁵ In *Swanson*, the Board held that “[g]ross mismanagement means more than *de minimis* wrongdoing or negligence; it means a management action or inaction that creates a substantial risk of significant adverse impact on the agency’s ability to accomplish its mission.”²⁶

In sum, the intentionally broad scope of protected disclosures should be clear. The Committee emphasizes that the Board and the courts should not create new exceptions to protected disclosures in place of those overturned by S. 743.

²¹ *Gilbert v. Department of Commerce*, 194 F.3d 1332 (Fed. Cir. 1999).

²² Whistleblower Protection Enhancement Act (S. 372), 111th Congress, section 101(a)(1)(B).

²³ See S. Rep. No. 111–101, at 6–7 (citing *Drake v. Agency for International Development*, 543 F.3d 1377, 1381 (Fed. Cir. 2008)).

²⁴ Cases may nevertheless arise where an employee disclosed wrongdoing so trivial that the employee cannot succeed in gaining protection under the WPA. For example, the Federal Circuit has found that, to be protected, an employee must have reasonably believed he or she was reporting a “genuine violation.” See *Drake*, 543 F.3d at 1381–82 (recognizing that a “trivial or *de minimis* exception” may apply in an appropriate case, though it “is not appropriate in this case” because “Mr. Drake reported intoxication which he could reasonably believe constituted a *genuine* violation of a law, rule, or regulation.”) (emphasis added). Additionally, in some cases, it may be difficult to prove that a disclosure involving a trivial or *de minimis* violation actually caused the relevant personnel action. As an example, it may be easier to demonstrate to a factfinder that an employee was fired for having complained that other employees accept bribes, than to demonstrate that the employee was fired for having complained about another employee arriving ten minutes late for work.

²⁵ 110 M.S.P.R. 278 (2008).

²⁶ *Id.* at 284–85, citing *Shriver v. Department of Veterans Affairs*, 89 M.S.P.R. 239 (2001).

B. Reasonable Belief—Irrefragable Proof

As noted above, a *prima facie* whistleblower case entails a showing that the employee reasonably believes that the disclosed information evidences a violation of law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. The test for reasonable belief, as developed in case law and prospectively codified in S. 743, is an objective one. However, in a troubling decision twelve years ago, *Lachance v. White*, the Federal Circuit imposed on the whistleblower the burden of “irrefragable proof” of wrong-doing.²⁷ Although, as discussed below, the Federal Circuit has since disavowed the “irrefragable proof” requirement,²⁸ the Committee wants to ensure that no court ever again adopts this test, and so section 103 of S. 743 would codify the removal of the “irrefragable proof” requirement from whistleblower jurisprudence.

In *Lachance v. White*, the Federal Circuit held, correctly, that an objective test is required to determine whether an employee reasonably believed that he or she disclosed wrongdoing covered by 5 U.S.C. § 2302(b)(8). Where gross mismanagement was alleged, the court said that the test is: “Could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence gross mismanagement?”²⁹ However, the court then added a second hurdle to that review that implied a dramatic narrowing of whistleblower protections. The consideration of objective reasonableness must begin with the “presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations. . . . And this presumption stands unless there is ‘irrefragable proof to the contrary.’”³⁰ “Irrefragable” means impossible to refute.³¹ Read literally, therefore, the holding required employees to show *indisputable proof* that a public official or officials acted in bad faith or violated the law in order to qualify for whistleblower protection. Such an evidentiary burden was contrary to logic and clear congressional intent.

Fortunately, the MSPB recognized the misstep on remand. In 2003, on remand from the Federal Circuit, the MSPB ruled that:

The WPA clearly does not place a burden on an appellant to submit “irrefragable proof” to rebut a presumption that federal officials act in good faith and in accordance with law. There is no suggestion in the legislative history of the WPA that Congress intended such a burden be placed on an appellant. When Congress amended the WPA in 1994, it did nothing to indicate that the objective test, which had been articulated by the Board by that time, was incon-

²⁷ *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

²⁸ See, e.g., *White v. Department of Air Force*, 391 F.3d 1377, 1381 (Fed. Cir. 2004) (“The WPA does not require that whistleblowers establish gross mismanagement by irrefragable proof.”)

²⁹ *Id.*

³⁰ *Id.* (quoting *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993)).

³¹ Merriam-Webster’s Collegiate Dictionary (10th ed. 1999). The peculiar word has some currency in other jurisprudence entrusted to the Federal Circuit, government contracting for example, though the concept there is usually “almost irrefragable,” or “well nigh irrefragable”—rendered in familiar terms as “clear and convincing.” See, e.g., *Galen Medical Associates, Inc. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004).

sistent with the statute. The dictionary definition of “irrefragable” suggests that a putative whistleblower would literally have to show that the agency actually engaged in gross mismanagement, even though the WPA states that he need only have a reasonable belief as to that matter. The Federal Circuit itself has not imposed an “irrefragable proof” burden on appellants in cases decided after *White* . . . and has, in fact, stated that the “proper test” is the objective, “disinterested observer” standard.³²

The Federal Circuit, ruling on this case on appeal from the MSPB, rejected the government’s argument that disclosures are not protected without a showing of irrefragable proof that agency officials acted improperly, and endorsed an objective test for reviewing the whistleblower’s belief that governmental wrongdoing occurred.³³ To definitely disavow the “irrefragable proof” requirement, S. 743 codifies the objective reasonable-belief test in *Lachance*.

The bill also provides that any presumption relating to the performance of a duty by an employee whose conduct is the subject of a whistleblower disclosure may be rebutted by “substantial evidence” rather than “irrefragable proof.” The Supreme Court has defined substantial evidence as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”³⁴ It consists of “more than a mere scintilla of evidence but may be somewhat less than a preponderance.”³⁵ This standard is consistent with the legislative history of the existing Act. Indeed, a cornerstone of 5 U.S.C. § 2302(b)(8) since its initial passage in 1978 has been that an employee need not ultimately *prove* any misconduct to qualify for whistleblower protection. All that is necessary is for the employee to have a *reasonable belief* that the information disclosed *evidences* a kind of misconduct listed in section 2302(b)(8).³⁶ The Committee emphasizes that there should be no additional burdens imposed on the employee beyond those provided by the statute, and that this test—that the disclosure is protected if the employee had a reasonable belief it evidenced misconduct—must be applied consistently to each kind of misconduct and each kind of speech covered under section 2302(b)(8).³⁷

The Committee notes that the requirement that the employee need show only reasonable belief applies, as well, in determining whether the narrow exception for policy disputes, added by S. 743, applies. In other words, if an employee has a reasonable belief that the disclosed information evidences the kinds of misconduct listed

³² *White v. Dept. Air Force*, 95 M.S.P.R. 1, 7–8 (2003).

³³ See, e.g., *White v. Department of Air Force*, 391 F.3d 1377, 1381 (Fed. Cir. 2004).

³⁴ *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

³⁵ *Hays v. Sullivan*, 907 F. 2d 1453, 1456 (4th Cir. 1990) (quoting *Laws v. Celebrezze*, 368 F. 2d 640, 642 (4th Cir. 1966)).

³⁶ *Ramos v. FAA*, 4 M.S.P.R. 388 (1980).

³⁷ Despite adopting an appropriate test for reasonable belief, the Court in *White v. Department of Air Force* used a formulation of “gross mismanagement” that could cause confusion. The Court held that “for a lawful agency policy to constitute ‘gross mismanagement,’ an employee must disclose such serious errors by the agency that a conclusion the agency erred is not debatable among reasonable people.” 391 F.3d. at 1382. The requirement that the disclosure must lead to “a conclusion the agency erred [that] is not debatable among reasonable people” could be read to require proof that the alleged misconduct actually occurred. Disclosures of gross mismanagement, as all other forms of disclosures, must be evaluated from the perspective of the reasonable belief of the employee disclosing the information. The appropriate standard for determining whether alleged conduct constitutes “gross mismanagement” is discussed above. See the beginning of this section, entitled “Reasonable Belief—Irrefragable Proof,” *supra*.

in section 2302(b)(8), rather than a policy disagreement, the disclosure is protected.

C. *All-circuit review*

When the Civil Service Reform Act of 1978 was enacted, it gave employees an option of where to appeal final orders of the MSPB. The 1978 Act allowed them to file a petition in the Court of Claims, the U.S. Court of Appeals for the circuit where the petitioner resided, or the U.S. Court of Appeals for the D.C. Circuit.³⁸ In 1982, when Congress created the Federal Circuit, it gave that court exclusive jurisdiction over petitions for review of the MSPB's orders other than those involving certain claims of discrimination.³⁹

At the hearing on S. 1358 during the 108th Congress, attorney Stephen Kohn, Chairman of the National Whistleblower Center, testified that:

Restricting appeals to one judicial circuit undermines the basic principle of appellate review applicable to all other whistleblower laws. That principle is based on an informed peer review process which holds all circuit judges accountable. . . . [As appeals courts disagree with each other,] courts either reconsider prior decisions and/or the case is heard by the Supreme Court, which resolves the dispute.

By segregating federal employee whistleblowers into one judicial circuit, the WPA avoids this peer review process. In the Federal Circuit no other judges critically review the decisions of the Court, no “split in the circuits” can ever occur, and thus federal employees are denied the most important single procedure which holds appeals court judges reviewable and accountable. A “split in the circuits” is the primary method in which the U.S. Supreme Court reviews wrongly decided appeals court decisions.⁴⁰

The Committee believes that this argument raises valid points about the current process for judicial review consolidated at the Federal Circuit.

A number of federal statutes already allow cases involving rights and protections of federal employees, or involving whistleblowers, to be appealed to courts of appeals across the country. In cases involving allegations of discrimination, cases decided by the MSPB may be brought in the United States district courts. Likewise, state or local government employees affected by the MSPB's Hatch Act decisions may obtain review in the U.S. district courts.⁴¹ Appeal from decisions of the district courts in these cases may then be brought in the appropriate court of appeals for the appropriate circuit. Additionally, decisions of the Federal Labor Relations Authority (FLRA) may be appealed to the Court of Appeals for the circuit where the petitioner resides, transacts business, or to the D.C. Circuit.⁴²

³⁸ Public Law No. 95-454, 92 Stat. 1143, § 205 (1978) (adding 5 U.S.C. § 7703).

³⁹ Public Law No. 97-164, 96 Stat. 49, § 144 (1982); *see also* 5 U.S.C. §§ 7702, 7703(b)(2).

⁴⁰ S. 1358 Hearing *supra* note 19, (statement of Stephen Kohn, Chairman, Board of Directors, National Whistleblower Center) at 136-137.

⁴¹ 5 U.S.C. § 1508.

⁴² 5 U.S.C. § 7123(a).

Moreover, a multi-circuit appellate review process is available under existing law for many other types of whistleblower claims. Under the False Claims Act, as amended in 1986, whistleblowers who disclose fraud in government contracts may file a case in district court and, if they lose, appeal to the appropriate federal court of appeals.⁴³ Congress passed the Resolution Trust Corporation Completion Act in 1993, which provided employees of banking-related agencies the right to go to district court and have regular avenues of appeal.⁴⁴ In 1991, Congress passed the Federal Deposit Insurance Corporation Improvement Act, providing district court review with regular avenues of appeal for whistleblowers in federal credit unions.⁴⁵ Whistleblower laws passed as part of the Energy Reorganization Act, as amended in 1992,⁴⁶ and the Clean Air Act, as amended in 1977,⁴⁷ allow whistleblowers to obtain review of orders issued in the Department of Labor administrative process in the appropriate federal court of appeals. The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21),⁴⁸ enacted in 2000, allows whistleblowers to obtain review of their cases alleging retaliation for reporting air safety violations in the appropriate federal court of appeals. The Sarbanes-Oxley Act of 2002 allows whistleblowers from all publicly traded corporations access to the courts and jury trials if the whistleblower alleges retaliation for making a disclosure and if the Department of Labor does not reach a decision on a whistleblower claim in 180 days, with appeal to the appropriate federal court of appeals.⁴⁹ The American Recovery and Reinvestment Act of 2009 provides jury trials for whistleblower claims by all state and local government or contractor employees receiving funding from the stimulus.⁵⁰

In light of the significant number of statutes that successfully utilize all-circuit review of whistleblower appeals from federal district courts, the Committee concludes the rationale for the Federal Circuit's subject matter-based jurisdiction—the need for specialization in a particular area of law—does not apply in whistleblower jurisprudence. Therefore, subject to a five-year sunset, section 108 of S. 743 would conform the system for judicial review of federal whistleblower cases to that established for private sector whistleblower cases and certain other federal employee appeal systems by suspending the Federal Circuit's exclusive jurisdiction over whistleblower appeals. The five-year period will allow Congress to evaluate whether decisions of other appellate courts in whistleblower cases are consistent with congressional intent and the Federal Circuit's interpretation of WPA protections, guide congressional efforts to clarify the law if necessary, and determine if this structural reform should be made permanent.

D. Office of Special Counsel—Amicus Curiae Authority

The OSC, initially established in 1979 as the investigative and prosecutorial arm of the MSPB, became an independent agency

⁴³ 31 U.S.C. § 3730(h).

⁴⁴ 12 U.S.C. § 1441a(q).

⁴⁵ 12 U.S.C. § 1790b(b).

⁴⁶ 42 U.S.C. § 5851(c).

⁴⁷ 42 U.S.C. § 7622(c).

⁴⁸ 49 U.S.C. § 42121(b)(4).

⁴⁹ 18 U.S.C. § 1514A.

⁵⁰ Public Law No. 111–5, § 1552, 123 Stat. 115 (2009).

within the Executive Branch, separate from the MSPB, with passage of the WPA in 1989. The Special Counsel does not serve at the President's pleasure, but is appointed by and "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office."⁵¹ The primary mission of the OSC is to protect federal employees and applicants from prohibited employment practices, with a particular focus on protecting whistleblowers from retaliation. The OSC accomplishes this mission by investigating complaints filed by federal employees and applicants who allege that federal officials have committed prohibited personnel practices against them.

When such a claim is filed, the OSC investigates the allegation to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred. If the Special Counsel determines there are reasonable grounds to believe that a prohibited personnel practice has occurred, the Special Counsel sends the head of the employing agency a report outlining the OSC's findings and asking the agency to remedy the action. In the majority of cases in which the Special Counsel believes that a prohibited personnel practice has occurred, agencies voluntarily take corrective action.⁵² If an agency does not do so, the OSC is authorized to file a petition for corrective action with the MSPB.⁵³ At proceedings before the MSPB, the OSC is represented by its own attorneys, while the employing agency is represented by the agency's counsel.

If the OSC does not send the whistleblower's allegations to an agency head, it returns the information and any accompanying documents to the whistleblower explaining why the Special Counsel did not refer the information. In such a situation, the whistleblower may file a request for corrective action with the MSPB. This procedure is commonly known as an individual right of action (IRA). In IRAs, the OSC may not intervene unless it has the consent of the whistleblower.

After the MSPB renders a decision on a whistleblower claim, the OSC's ability to effectively enforce and defend whistleblower laws in the context of that claim is limited. For example, the OSC does not have authority to ask the MSPB to reconsider its decision or to seek review of an MSPB decision by the Federal Circuit. In contrast, the Office of Personnel Management (OPM), which typically is not a party to the case, can request that the MSPB reconsider its rulings. Even when a party with authority to petition for review of an MSPB decision does so, the OSC historically has been denied the right to participate in those proceedings.

Furthermore, if a case is appealed to the Federal Circuit, the Department of Justice (DOJ) recognizes the OSC's right to appear as an intervener only in those few cases where the OSC was a party before the Board and the case reaches the court of appeals on another party's petition for review. Because the OSC lacks independent litigating authority, DOJ—not OSC—attorneys represent OSC in those cases. Because DOJ usually also represents the defending agency, DOJ's representation of the OSC in such cases creates a conflict of interest and could be a significant impediment to the effective enforcement of the WPA.

⁵¹ 5 U.S.C. § 1211(b).

⁵² U.S. Office of Special Counsel, Annual Report for Fiscal Year 2010, at 10.

⁵³ 5 U.S.C. § 1214(b)(2)(C).

As a result of the current structure, the OSC is blocked from participating in the forum in which the law is largely shaped: the U.S. Court of Appeals for the Federal Circuit (and, if this legislation is enacted, the other circuits). This limitation undermines both the OSC's ability to protect whistleblowers and the integrity of the whistleblower law. The Committee believes that the OSC should play a role in whistleblower cases before the courts of appeals. Therefore, section 113 of S. 743 provides the Special Counsel with authority to file its own *amicus curiae* (or, "friend of the court") briefs with the federal courts in whistleblower cases, represented by its own attorneys, not by DOJ, thereby presenting the OSC's unfiltered views on the law.

This authority is similar to that granted to the Chief Counsel for Advocacy of the Small Business Administration (SBA). Under section 612 of the Regulatory Flexibility Act (RFA),⁵⁴ the Chief Counsel for Advocacy has the authority to appear as *amicus curiae* in any court action to review a government rule. Specifically, the Chief Counsel is authorized to present views with respect to compliance with the RFA, the adequacy of a rulemaking record pertaining to small entities, and the effect of rules on small entities. Federal courts are bound to grant the *amicus curiae* application of the Chief Counsel, which allows the Chief Counsel to help shape the law affecting small businesses.⁵⁵

The Committee believes that granting this authority to the OSC is necessary to ensure the OSC's effectiveness and to protect whistleblowers from judicial interpretations that unduly narrow the WPA's protections, as has occurred in the past.

E. Burden of proof in OSC disciplinary actions

Current law authorizes the OSC to pursue disciplinary action against managers who retaliate against whistleblowers. More specifically, the Special Counsel must present a written complaint to the MSPB if the Special Counsel determines that disciplinary action should be taken against a supervisor for having committed a prohibited personnel practice or other misconduct within the OSC's purview. The Board then may issue an order taking disciplinary action against the employee.⁵⁶

Under MSPB case law, however, the OSC bears the burden of demonstrating that protected activity was the "but-for cause" of an adverse personnel action against a whistleblower—in other words, that the manager would not have taken the adverse personnel action if the whistleblowing activity had not occurred.⁵⁷ In contrast, under 1989 amendments to the WPA, when whistleblowers seek corrective action for retaliation, agencies bear the burden of providing independent justification for the personnel action at issue and of doing so by clear and convincing evidence.⁵⁸ The 1989 amendments did not alter the burden in disciplinary actions. As a result, the Board has on many occasions ruled that whistleblower reprisal had been proven for purposes of providing relief to the employees, while at the same time rejecting the OSC's claim for dis-

⁵⁴ Public Law No. 96-354, 94 Stat. 1164 (1980).

⁵⁵ 5 U.S.C. § 612(c).

⁵⁶ 5 U.S.C. § 1215.

⁵⁷ *Special Counsel v. Santella*, 65 M.S.P.R. 452 (1994).

⁵⁸ 5 U.S.C. §§ 1214 and 1221. See also 135 Cong. Rec. 4509, 4517, 5033 (1989).

ciplinary action against the managers who had just been found responsible for the unlawful reprisal in the same case.⁵⁹

Section 106 of S. 743 addresses this inconsistency by establishing for disciplinary actions the same burden of proof the Supreme Court set forth in *Mt. Healthy v. Doyle*,⁶⁰ in which a public school teacher claimed he was unlawfully terminated from his employment for exercising his First Amendment right to freedom of speech. Under this test, the OSC would have to show that protected whistleblowing was a “significant motivating factor” in the official’s decision to take or threaten to take a personnel action, even if other factors were considered in the decision. If the OSC makes such a showing, the official would then have the opportunity to show, by a preponderance of the evidence, that he or she would have taken or threatened to take the same personnel action even if there had been no protected whistleblower disclosure. If he or she fails that burden, the Board would be authorized to impose discipline.

F. Office of Special Counsel Attorney’s Fees

The OSC has authority to pursue disciplinary actions against managers who retaliate against whistleblowers. Currently, if the OSC loses such a case, it must pay the legal fees of those against whom it initiated the action. Because the OSC’s budget is small and the amounts involved could significantly deplete its resources, requiring the OSC to pay attorney’s fees undermines the OSC’s ability to enforce the WPA and defend the merit system by protecting whistleblowers.

Illustrative of the problem and the importance of S. 743’s solution is *Santella v. Special Counsel*.⁶¹ In a 2–1 decision, the MSPB held that the OSC could be held liable to pay attorney’s fees, even in cases where its decision to prosecute was a reasonable one, if the accused agency officials were ultimately found “substantially innocent” of the charges brought against them.

The OSC argued that its decision to prosecute the supervisors was a reasonable one, and an award of fees would not be in the interests of justice. Indeed, the OSC contended that awarding fees under the circumstances would be counter to the public interest and contrary to congressional intent that the OSC vigorously enforce the Whistleblower Protection Act by seeking to discipline supervisors who violate the Act. The OSC also argued, in the alternative, that if the supervisors were entitled to be reimbursed for their attorney’s fees, then their employing agency, the IRS, rather than the OSC, should bear the cost of reimbursement. The Board majority rejected the OSC’s arguments and held that the OSC, and not the IRS, should be liable for any award of fees.⁶² Vice Chair Slavet dissented.

The Committee believes that the OSC’s disciplinary action authority is a powerful weapon to deter whistleblowing retaliation.

⁵⁹ Letter from Elaine Kaplan, Special Counsel, Office of Special Counsel, to Senator Carl Levin (Sept. 11, 2002) (arguing that the MSPB case law relating to the OSC’s disciplinary authority should be overturned, Ms. Kaplan wrote “change is necessary in order to ensure that the burden of proof in these [disciplinary] cases is not so onerous as to make it virtually impossible to secure disciplinary action against retaliators.”).

⁶⁰ *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

⁶¹ 86 M.S.P.R. 48 (2000).

⁶² *Id.* at 64–65.

Should the *Santella* case remain valid law, the OSC would be subject to heavy financial penalties unless it can predict to a certainty that it will prevail before bringing a disciplinary action. Because the OSC is a small agency with a limited budget, this burden hinders the OSC's use of disciplinary action as an enforcement mechanism and threatens the OSC's ability to implement and enforce the WPA. To correct this problem, section 107 of S. 743 would require the employing agency, rather than the OSC, to reimburse any attorney's fees the manager is entitled to recover.

G. Anti-gag provisions

In 1988, Senator Grassley sponsored an amendment to the Treasury, Postal and General Government Appropriations bill, which is referred to as the "anti-gag" provision.⁶³ This provision has been included in appropriations legislation every year since then. The annual anti-gag provision states that no appropriated funds may be used to implement or enforce agency non-disclosure policies or agreements unless there is a specific, express statement informing employees that the disclosure restrictions do not override their right to disclose waste, fraud, and abuse under the WPA, to communicate with Congress under the Lloyd-La Follette Act,⁶⁴ and to make appropriate disclosures under other particular laws specified in the statement.

S. 743 would institutionalize the anti-gag provision by codifying it and making it enforceable. Specifically, section 115 of the bill would require every nondisclosure policy, form, or agreement of the U.S. Government to contain specific language set forth in the legislation informing employees of their rights. This required language will alert employees that the nondisclosure policy, form, or agreement does not override employee rights and obligations created by existing statute or Executive Order relating to classified information, communications with Congress, the reporting of violations to an inspector general (IG), or whistleblower protection. The annual "anti-gag" provision has always included a specific list of the statutes and Executive Orders to be stated in each policy, form, or agreement. Because S. 743 would codify the provision in permanent statute, not subject to annual revision and reenactment, the Committee considered and adopted an amendment to the bill that eliminates the specific list of statutes and Executive Orders in the required statement, and instead requires that each policy, form, or agreement must state a general cross reference to the employee rights and obligations under existing statute and Executive Order relating to the topics specified in section 115 of the legislation.

The bill also requires agencies that use nondisclosure policies, forms, or agreements to post the same statement on the agency website, accompanied by a current list of the statutes and Executive Orders that provide the relevant employee whistleblower rights and obligations. The provision is designed to give employees both the statutory notice of their rights, included within each non-disclosure policy, form, or agreement, and also a specific list of con-

⁶³Public Law No. 105-277, 112 Stat. 2681-526 (1998), the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, 636.

⁶⁴The Lloyd-La Follette Act was passed as Section 6 of the Postal Service Appropriations Act of 1912, Public Law No. 336, 37 Stat. 539, 555 (1912). Federal employees' right to petition and provide information to Congress under this Act is codified at section 5 U.S.C. § 7211.

trolling laws and Executive Orders, published in a form that is easily updated.

Section 104(a) and (b) of the bill also specifically makes it a prohibited personnel practice for any manager to implement or enforce a nondisclosure policy, form, or agreement that does not contain the specific statement mandated in the bill, as amended, or to implement or enforce a nondisclosure policy, form, or agreement in retaliation for whistleblowing. Making it a prohibited personnel practice means that the anti-gag requirement is enforceable by the OSC and the MSPB, and that an employee may seek protection against a personnel action taken in violation of the anti-gag requirement.

The legislation would not make it a prohibited personnel practice to continue to enforce a nondisclosure policy, form, or agreement that is in effect before the date of enactment, even if it does not contain the statement required under the bill, provided the agency gives actual notice of the statement to any current employees who are covered by the policy, form or agreement. In addition, it would not be a prohibited personnel practice for an agency to continue to enforce such a policy, form or agreement with regard to former employees, if the agency complies with the requirement in the bill to post the statement and controlling law on its website. The Committee has concluded that these provisions strike an appropriate balance, allowing agencies to continue using existing nondisclosure agreements, while also ensuring that employees are given appropriate notice of their rights under the law.

H. Retroactive exemption of agency employees from whistleblower protections

The WPA provides that certain employees and agencies are exempt from the Act. Employees excluded from the Act include those in positions exempted from the competitive service because of their confidential, policy-determining, policy-making, or policy advocating character and those employees excluded by the President if necessary and warranted by conditions of good administration.⁶⁵

The WPA also excludes certain entire agencies from coverage: the GAO, FBI, Central Intelligence Agency (CIA), National Security Agency, Defense Intelligence Agency, and National Geospatial-Intelligence Agency, and other agencies determined by the President to have the principal function of conducting foreign intelligence or counterintelligence activities.⁶⁶ S. 743 would add to the excluded list two offices that clearly have the principal function of conducting intelligence activities to the list of statutorily excluded intelligence agencies: the Office of the Director of National Intelligence (ODNI) and the National Reconnaissance Office. For whistleblowers in all of these agencies (except GAO), statutory procedures are available under the Intelligence Community Whistleblower Protection Act (ICWPA) and similar legislation by which

⁶⁵ 5 U.S.C. § 2302(a)(2)(B).

⁶⁶ 5 U.S.C. § 2302(a)(2)(C).

they may bring their urgent concerns to Congress,⁶⁷ but the rights and remedies generally available under the WPA do not apply.⁶⁸

Under 1994 amendments to the WPA, an agency cannot deprive an employee of protection under the WPA by designating the employee's particular position as a confidential policy-making position after the agency had already retaliated against the employee for having blown the whistle. To forbid this practice, Congress restricted the statutory exemption to positions designated as exceptions "prior to the personnel action."⁶⁹

Unfortunately, a similar practice has recurred in a context with potentially broader consequences. In a troubling decision, the MSPB held that, in delegating certain intelligence functions to an agency, the President had implicitly excluded that agency and its employees from WPA protection. The claimant argued to the MSPB that the agency did not conclude it was exempt from the WPA until after the claimant had filed her whistleblower complaint, and that the exemption could therefore not apply retroactively to her; but the MSPB rejected that argument.⁷⁰

On appeal, the Federal Circuit reversed the Board's decision, holding that an agency and its employees remain covered under the WPA unless the President determines explicitly that the agency is exempt.⁷¹ However, in holding that an explicit presidential determination is required, the Court did not specifically rule on whether such a determination may be applied retroactively to remove WPA coverage from a whistleblower who suffered retaliation before the determination was made.

Section 105 of S. 743 would close the potential loophole for entire agencies in the same manner as Congress did in 1994 for individual positions. The bill specifies that, when the President excludes an agency from the Act, an employee of the agency does not lose whistleblower rights if the exclusion of the agency occurred after the agency had already taken a personnel action against that employee in retaliation for making a protected whistleblower disclosure.

I. Whistleblower protection for Transportation Security Administration employees

The Aviation and Transportation Security Act (ATSA), which created the Transportation Security Administration (TSA) in 2001, gave the TSA Administrator broad authority to establish a personnel system notwithstanding any other law and provides the Administrator with "final authority" over TSA personnel actions. As

⁶⁷The ICWPA was enacted as title VII of the Intelligence Authorization Act for FY 1999, Public Law No. 105-272 (Oct. 20, 1998) (adding 50 U.S.C. § 403q(d)(5), applicable to the CIA, and adding section 8H of the Inspector General Act of 1978, 5 U.S.C. App, applicable generally to other intelligence agencies). It provides intelligence community employees excluded from the WPA a protected path to disclose classified information to Congress. The Intelligence Authorization Act for Fiscal Year 2010, Public Law No. 111-259, 405(a)(1) (Oct 7, 2010) (adding 50 U.S.C. § 403-3h(k)(5)) adds a similar protected path, applicable to any member of the intelligence community who discloses an "urgent concern" to the Inspector General of the Intelligence Community, established under that Act.

⁶⁸Whistleblower protections are already available under 5 U.S.C. § 2303 for FBI employee, and section 201 of S. 743 would establish whistleblower protections for others in the intelligence community similar to the FBI protections.

⁶⁹Public Law No. 103-424 (1994), 108 Stat. 4361, An act to reauthorize the Office of Special Counsel and for other purposes, amending 5 U.S.C. § 2302(a)(2)(B).

⁷⁰See *Czarkowski v. Merit Systems Protection Board*, 93 M.S.P.R. 515 (2003).

⁷¹*Czarkowski v. Merit Systems Protection Board*, 390 F.3d 1347, 1350-51 (Fed. Cir. 2004), vacating and remanding 93 M.S.P.R. 515 (2003).

a result of this broad personnel authority, TSA employees do not have statutory whistleblower rights under the WPA.

However, TSA has administratively granted to TSA employees some, but not all, of the rights generally available to federal employees under the WPA.⁷² More specifically, TSA has by internal directive forbidden retaliation against its employees who make protected whistleblower disclosures.⁷³ Moreover, in May 2002, TSA and the OSC entered into a memorandum of understanding that gave the OSC authority to investigate whistleblower retaliation complaints and to recommend to TSA that it take corrective and/or disciplinary action.⁷⁴ In February 2008, TSA and the Board announced an agreement to provide TSA employees with a limited right to bring whistleblower claims before the Board;⁷⁵ and in July 2008, TSA and the Board announced that they had implemented that agreement.⁷⁶ Under the agreement, employees may file an appeal with the Board after the OSC has reviewed and closed a matter involving a whistleblower complaint.

However, the employee rights under these memoranda are subject to important limitations. Whistleblowers may not appeal Board orders to the courts, and Board hearings for whistleblowers are closed to the public unless there is good cause for opening them. Also, the OSC does not have authority to represent TSA employees before the MSPB. The agreement is subject to cancellation by either the Board or TSA at any time with 60 days' notice. And the underlying TSA policy forbidding retaliation against employees who blow the whistle is subject to revision or cancellation by administrative action of the agency.

The Committee has concluded that there is no basis for excluding TSA employees from the full protections of the WPA. The WPA protects employees of all other components of the Department of Homeland Security, and encouraging the disclosure of illegal activity, waste, and mismanagement helps to further the mission of the Department, as with all other agencies subject to the WPA. As Rajesh De, Deputy Assistant Attorney General, Office of Legal Counsel, at the Department of Justice testified on behalf of the Administration at the June 2009 hearing on the Whistleblower Protection Enhancement Act (S. 372) in the 111th Congress:

We are pleased to see that this bill provides full whistleblower protection to Transportation Security Administration screeners, also known as Transportation Security Officers. Transportation Security Officers stand literally at the front lines of our nation's homeland security system. They deserve the same whistleblower protections afforded to all

⁷² 97 M.S.P.R. 35 (2004).

⁷³ TSA Management Directive No. 1100.75-5.

⁷⁴ See Memorandum of Understanding Between OSC and TSA Regarding Whistleblower Protections for TSA Security Screeners (May 28, 2002), available at http://www.osc.gov/documents/tsa/tsa_mou.pdf.

⁷⁵ See Memorandum of Agreement between Transportation Security Administration and Merit Systems Protection Board (February 26, 2008); TSA Press Release, "TSA Announces Agreement on Enhanced Whistleblower Protection for Security Officers" (February 27, 2008), available at <http://www.tsa.gov/press/releases/2008/0227.shtm>.

⁷⁶ See Interagency Agreement and Statement of Work between the Transportation Security Administration and the Merit Systems Protection Board, Interagency Agreement Number MSPB-08-IAG-001 (July 28, 2008).

other employees of the Department of Homeland Security.⁷⁷

Therefore, consistent with the Administration's view that TSA employees should have WPA protection, section 109 of S. 743 extends full WPA protections to TSA employees.

Section 109 of S. 743 also extends to TSA employees the protections against the prohibited personnel practices listed under 5 U.S.C. § 2302(b)(1). These prohibited actions include discrimination against an employee or applicant on the basis of race, color, religion, sex, or national origin, age, as prohibited by the Civil Rights Act of 1964;⁷⁸ on the basis of age as prohibited by the Age Discrimination in Employment Act of 1967;⁷⁹ on the basis of sex under the Fair Labor Standards Act of 1938 (which, as amended, includes the Equal Pay Act);⁸⁰ on the basis of handicapping condition under the Rehabilitation Act of 1973;⁸¹ and on the basis of marital status or political affiliation as prohibited by any law, rule, or regulation.

J. Penalties for retaliatory investigations

The WPA makes it a prohibited personnel practice to take an adverse personnel action against a covered employee because that employee made a protected disclosure, and the applicable definition of "personnel action" includes a variety of actions significantly affecting employees, such as appointments, promotions, transfers or removals, performance evaluations, decisions concerning pay or benefits, significant changes in duties, responsibilities, or working conditions, and several others. However, agency investigations of employees are not explicitly covered under the statutory definition of a "personnel action." Instead, such investigations come within that definition only if they result in a significant change in job duties, responsibilities, or working conditions or have effects that otherwise fit within one of the items listed under the statutory definition of "personnel action."⁸²

In the legislative history of the 1994 amendments, House Civil Service Subcommittee Chairman Frank McCloskey highlighted that retaliatory investigation of whistleblowers may be a prohibited form of harassment. He stated:

[T]he prohibition against threats in sections 2302(b)(8) and (b)(9) should be broadly construed[, and] even if [there are] not formal changes in duties, responsibilities, or working conditions, the Board should consider whether other common forms of harassment represent prohibited threats, because they are a prelude or precondition to listed forms of personnel actions. The techniques to harass a whistleblower are limited only by the imagination. Illustrative examples, however, include retaliatory investigations, threat of or referral for prosecution, defunding, reductions in force

⁷⁷ Statement of Rajesh De, S. 372—The Whistleblower Protection Enhancement Act of 2009 before the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Committee on Homeland Security and Governmental Affairs (June 11, 2009).

⁷⁸ Public Law No. 88-352, 78 Stat. 241; 42 U.S.C. § 2000a *et seq.*

⁷⁹ Public Law No. 90-202, 81 Stat. 602; 29 U.S.C. § 621 *et seq.*

⁸⁰ Public Law No. 75-718, 52 Stat. 1060; 29 U.S.C. § 201 *et seq.*

⁸¹ Public Law No. 93-112, 87 Stat. 355; 29 U.S.C. § 701 *et seq.*

⁸² 5 U.S.C. § 2302(a)(2).

and denial or workers compensation benefits. In evaluating whether harassment constitutes a threatened personnel action, among factors the board should consider is whether the activity is discriminatory, or could have a chilling effect on merit system duties and responsibilities.⁸³

In 1997, the Board held, in *Russell v. Department of Justice*, that the WPA protects employees from retaliatory investigations under certain circumstances.⁸⁴ In that case, an employee asserted a WPA violation as a defense against a proposed personnel action, and the Board held that “[w]hen . . . an investigation is so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate, and the agency does not show by clear and convincing evidence that the evidence would have been gathered absent the protected disclosure, then the appellant [whistleblower] will prevail on his affirmative defense of retaliation for whistleblowing.”⁸⁵ The Board observed that to “hold otherwise would sanction the use of a purely retaliatory tool, selective investigations.”⁸⁶

Because retaliatory investigations are not explicitly referenced as a “personnel action” that may be prohibited under the WPA, a whistleblower might be able to demonstrate that an investigation was undertaken in retaliation for a protected disclosure, but nevertheless have no remedy under the WPA if the investigation did not result in a significant change in job duties, responsibilities, or working conditions. To prevent this outcome, predecessors to S. 743 would have explicitly and specifically recognized retaliatory investigations as a prohibited personnel practice. However, in testimony on the introduced version of S. 372 in the 111th Congress, the Administration expressed concerns about the provision. Specifically, the Administration wanted to ensure that legitimate and important agency inquiries—including criminal investigations, routine background investigations for initial employment, investigations for determining eligibility for a security clearance, IG investigations, and management inquiries of potential wrongdoing in the workplace—not be chilled by fear of challenge and litigation.⁸⁷

To address this concern, while still increasing whistleblowers’ protection from retaliatory investigations, the Committee agreed to a middle ground. S. 743 does not add retaliatory investigations as personnel actions expressly prohibited by the WPA and leaves *Russell* as the governing law. Section 104(c) of S. 743 does, however, create an additional avenue for financial relief once an employee is able to prove a claim under the WPA, if the employee can further demonstrate that an investigation was undertaken in retaliation for the protected disclosure. The bill provides that any corrective action awarded to whistleblowers may include fees, costs, and damages incurred due to an agency investigation of the employee that was commenced, expanded, or extended in retaliation for protected whistleblowing. This provision of the legislation does not in any way reduce current protections against retaliatory investigations,

⁸³ 140 Cong. Rec. 29,353 (1994); see also H. Rep. No. 103-769 (1994), at 15.

⁸⁴ 76 M.S.P.R. 317, 323-25 (1997)

⁸⁵ *Id.* at 324.

⁸⁶ *Id.* at 325.

⁸⁷ S. 1358 Hearing *supra* note 19 at 60.

and it would retain the existing standard for showing that a retaliatory investigation or other supervisory activity rises to the level of a prohibited personnel practice forbidden under the WPA.

K. Clarification of whistleblower rights for critical infrastructure information

The Homeland Security Act (HSA) encouraged non-federal owners and operators of critical infrastructure to submit critical infrastructure information voluntarily to the Department of Homeland Security (DHS) so that the Department could assess and address potential security threats.⁸⁸ To encourage submission of this information, the HSA sets out a process by which critical infrastructure information may be submitted voluntarily to DHS and stipulates⁸⁹ that such voluntarily submitted critical infrastructure information is to be treated as exempt under the Freedom of Information Act.⁹⁰ The HSA, however, makes clear that it is not to be construed to limit or otherwise affect the ability of a State, local, or Federal government entity or third party to independently obtain critical infrastructure information and to use such information in any manner permitted by law.⁹¹

At the same time, the Act criminalizes the unauthorized disclosure by a federal employee of this type of information,⁹² leading to confusion as to whether the HSA limits a whistleblower's disclosure of independently obtained critical infrastructure information. According to then-Special Counsel Elaine Kaplan:

[T]he statutory language is very ambiguous in several respects. The rights preserved under section 214(c) extend to government entities, agencies, authorities and "third parties." It is unclear whether employees of the United States would be considered "third parties." Elsewhere in section 214, the statute uses the phrase "officer or employee of the United States" when it refers to disclosures by federal employees. *See*, section 214(a)(1)(D).

Similarly, the phrase to "use" the information "in any manner permitted by law," does not clearly encompass "disclosures" of information. Elsewhere, in section 214(a)(1)(D), the statute states that an officer or employee of the United States, shall not "us[e] or disclos[e]" voluntarily provided critical infrastructure information. The use of the disjunctive "use or disclose" (emphasis added) in section 214(a)(1)(D) suggests that the word "use" alone in section 214(c) may not encompass the act of "disclosing." In short, it is unclear whether Congress intended to authorize "disclosures of information" that are protected by the WPA when it authorized the "use of information in any manner permitted by law" in section 214(c).

⁸⁸ Public Law No. 107-296, § 214, 116 Stat. 2135 (2002), codified at 6 U.S.C. § 133.

⁸⁹ 6 U.S.C. § 133(a).

⁹⁰ 5 U.S.C. § 552 (the Freedom of Information Act).

⁹¹ 6 U.S.C. § 133(c).

⁹² 6 U.S.C. § 133(f).

These ambiguities become especially troublesome in the context of the tendency of the judiciary to narrowly construe the scope of protection afforded under the WPA.⁹³

When DHS issued proposed regulations implementing section 214 of the HSA, the Department received comments expressing concern that whistleblowers could be treated unfairly and face termination, fines, and imprisonment if they disclosed critical infrastructure information. This would discourage the accurate reporting of information vital to the public. In response, in its interim regulations published in February 2004, DHS specifically referenced the WPA to ensure full protections for whistleblowers.⁹⁴ However, DHS's final regulations, published in September 2006, stated that the earlier provision that had "referred to the Whistleblower Protection Act . . . has been omitted because . . . [it] merely restates the law of the land."⁹⁵

The regulations clearly intend to ensure that disclosures of independently obtained critical infrastructure information are not exempt from the WPA. Section 111 of S. 743 would codify that regulatory intent and make clear that, when an employee or applicant covered by the WPA obtains information in a manner not covered by the critical infrastructure information program under the HSA, disclosure by the employee or applicant of that independently obtained information may be a protected disclosure under the WPA (5 U.S.C. § 2302(b)(8)) without risk of criminal penalties, even if the same information was also voluntarily submitted to DHS as part of the critical infrastructure information program.

L. Right to a full hearing

Board case law has created a disturbing trend of denying employees' right to a due process hearing and a public record to resolve their WPA claims. The Board currently allows an agency to present its affirmative defense that the agency would have taken the same personnel action for lawful reasons, independent of any retaliation against the employee for protected whistleblowing, without first allowing the employee to present his or her case proving that the whistleblower retaliation occurred.⁹⁶ The Federal Circuit has affirmed this process.⁹⁷

Taking away whistleblowers' opportunity to present their cases undermines key purposes of the WPA. The Board is imposing a process that is the inverse of what most adjudicators use, where claimants are typically permitted to present their affirmative case before the defense gets its turn to put on evidence. This is concerning for several reasons. The order in which parties get to present their cases may influence the fact-finder's perception of the merits and, therefore, potentially the outcome. Thus, employees may be disadvantaged under the MSPB practice by not being per-

⁹³ Letter from Elaine Kaplan, Special Counsel, Office of Special Counsel, to Senator Charles Grassley (March 10, 2003).

⁹⁴ See 69 Fed. Reg. 8074, 8081 (Feb. 20, 2004).

⁹⁵ See 71 Fed. Reg. 52262, 52269 (Sept. 1, 2006); see also the regulations codified at 6 C.F.R. § 29.8(f).

⁹⁶ See, e.g., *McCarthy v. International Boundary and Water Commission*, 116 M.S.P.R. 594, 612 (2011); *Azbill v. Department of Homeland Security*, 105 M.S.P.R. 363, 370–71 (2007) ("The Board may resolve the merits issues in any order it deems most efficient.")

⁹⁷ See, e.g., *Fellhoeller v. Department of Agriculture*, 568 F.3d 965, 971 (Fed. Cir. 2009) (explicitly affirming the process and noting that the court had "tacitly approved of the Board's practice" in the past).

mitted the opportunity to affirmatively and fully present the evidence for their claims. Moreover, if employees cannot present their cases, they may also lose a key opportunity to develop a full record for appeal, which is an important check on agency decisionmaking. Finally, denying whistleblowers a hearing deprives them of a forum in which to air grievances, which may be legitimate and important even where the disputed personnel action does not violate the WPA.

Furthermore, allowing the agency to present its evidence first precludes the Board from exercising some of its most significant merit system oversight duties. These include creating a public record of both parties' positions on alleged governmental misconduct that could threaten or harm citizens. Similarly, it precludes the Board from a significant merit system oversight function that Congress emphasized when it passed the 1994 amendments to the Act. As explained in the Joint Explanatory statement of the House-Senate conferees who negotiated the 1989 WPA amendments, "[w]histleblowing should never be a factor that contributes *in any way* to an adverse personnel action."⁹⁸ If reprisal for a protected disclosure is a contributing factor in a decision to take a personnel action, even if the agency ultimately prevails on its affirmative defense of independent justification, that is a significant merit system concern even if it is not an actionable legal claim. Under the current procedure, the Board does not exercise these oversight responsibilities as long as the agency has an acceptable overall affirmative defense, analyzed without the benefit of having first heard the employee's evidence.

Section 114 of S. 743 resolves this problem by requiring that, before the agency may present its defense, the employee must have first had an opportunity to present his or her evidence and must have succeeded showing, by a preponderance of the evidence, that the protected disclosure was a contributing factor in the personnel action. If the employee fails to do that, the claim fails; if the employee succeeds, then the agency may present its defense.

M. Disclosures of scientific censorship

The Committee has heard concerns that federal employees may be discouraged from, or retaliated against for, disclosing evidence of unlawful or otherwise improper censorship of research, analysis, and other technical information related to scientific research. Although disclosures of such censorship may be protected as a disclosure of a legal violation or of an abuse of authority under the WPA, uncertainty on this specific issue may cause confusion and inhibit disclosure. It is essential that Congress and the public receive accurate data and findings from federal researchers and analysts to inform lawmaking and other public policy decisions.

In order to encourage the reporting of improper censorship, section 110 of S.743 would specifically protect employees who disclose information that the employees reasonably believe is evidence of scientific or technical censorship that may cause gross government waste or mismanagement, or a substantial and specific danger to public health or safety, or that violates the law. This definition of protected disclosures is nearly identical to the general definition of

⁹⁸ Reprinted in 135 Cong. Rec. 5033 (1989).

protected disclosures that do not relate to censorship. This is intended to make unmistakably clear that employees are protected for disclosing scientific censorship in the same manner as they are protected for making any other disclosure.

N. Reporting requirements

In order to assist Congress in evaluating the effects of this legislation, section 116 of S. 743 would require a report from GAO and an annual report from the MSPB. S. 743 would require GAO to evaluate the implementation of the Act. In light of concerns that have been raised in the past that clarifying the broad scope of protected disclosures could lead to frivolous claims, the bill requires GAO specifically to report on outcomes of cases, including a review of the number of cases where the MSPB or a federal court has determined any allegations to be frivolous or malicious. Additionally, S. 743 would require the MSPB to report annually on the number of cases filed, the number of petitions for review filed, and the disposition of cases alleging violations of 5 U.S.C. § 2302(b)(8) or (9). The Committee believes that these provisions will enable Congress to examine closely how this bill is implemented, to evaluate whether provisions subject to the five-year sunset should be extended, and to consider additional steps if needed in the interim.

O. Alternative review

Subject to a five-year sunset, section 117 of S. 743 would allow whistleblower claims where the alleged retaliation involves major personnel actions under 5 U.S.C. §§ 7512 and 7542⁹⁹ to go to federal district court under certain circumstances. First, cases may be filed in district court if the MSPB does not issue a final order or decision within 270 days after the MSPB claim was submitted (unless the Board determines that the employee intentionally delayed the proceedings). Additionally, cases may be filed in district court if the MSPB certifies, upon motion from the employee, that the claim would survive a motion to dismiss under the standards set forth in the Federal Rules of Civil Procedure and that any one of the following conditions is met: the Board is not likely to dispose of the case within 270 days; or the case consists of multiple claims, requires complex or extensive discovery, arises out of the same set of facts as a civil action pending in a federal court, or involves a novel question of law. With respect to the requirement that the case would survive a motion to dismiss, the MSPB may examine any evidence or pleadings before it at the time of the certification request, but all parties must be given a reasonable opportunity to present all the material that is pertinent to the motion. If evidence is examined in the certification decision, the Board shall grant the certification only if it concludes, viewing the evidence in the light most favorable to the employee, that the employee has raised a genuine issue of material fact with respect to his or her claim. The MSPB must rule on the motion for certification within 90 days and may not rule on the merits of the underlying request for corrective

⁹⁹For a member of the competitive service and certain members of the excepted service, 5 U.S.C. § 7512 refers generally to a removal, a suspension for more than 14 days, a reduction in grade, a reduction in pay, or a furlough of 30 days or less; and, for a career appointee of the Senior Executive Service, 5 U.S.C. § 7542 refers generally to a removal from the civil service or a suspension for more than 14 days.

action within 15 days of its certification decision. If the MSPB determines that any of the specified conditions apply, then the case may be moved to federal district court.

An MSPB decision that denies certification to remove a whistleblower case to district court may be appealed only together with the appeal of the Board's final decision on the merits of the whistleblower claim and may be overturned only if the Board's decision on the merits of the claim is overturned. If a court of appeals overturns a decision denying certification, the employee may file his or her claim in federal district court without further proceedings by the MSPB.

The Committee wishes to emphasize that this provision does not replace the MSPB as the primary forum for adjudicating whistleblower lawsuits under the WPA. First, the alternative recourse provision is limited to claims that involve major personnel actions. Alternative review is further limited to cases that have taken more than 270 days to resolve, or are certified for district court because they would survive a motion to dismiss, and either are likely to take more than 270 days or involve complex or multiple claims or novel questions of law. These limitations will ensure that only the more significant and complex cases will be brought in district court.

According to Thomas Devine, Legal Director of the Government Accountability Project, certain decisions by the MSPB and the Federal Circuit Court of Appeals that narrowly interpret the WPA have undermined employees' confidence in the Board process.¹⁰⁰ In recent years, both the MSPB and the Federal Circuit Court of Appeals have repeatedly applied the WPA in a manner inconsistent with congressional intent. Employees, therefore, may feel greater confidence that they will be protected if provided alternate recourse in a federal district court and with a jury of their peers than in the Board process. Furthermore, the alternative process may provide a check against any future narrowing of the WPA by the Board and the Federal Circuit.¹⁰¹

Additionally, district courts may be better equipped than the Board to handle certain complex cases. The Board uses less formal procedures, discovery, and rules of evidence than federal courts, adapted for the fact that most employees appearing before the Board are not represented by counsel.¹⁰² For most employees, the less expensive, less formal Board process will be preferable, but district courts may be better suited for certain novel and complex cases.¹⁰³ Mr. Devine testified at the hearing on S. 372 that "the Board is not structured or funded for complex, high stakes conflicts that can require lengthy proceedings."¹⁰⁴ For these reasons, district court certification is available for WPA cases involving a "major personnel action" under 5 U.S.C. §§ 7512 or 7542 and multiple claims, complex or extensive discovery, or a novel legal question.

¹⁰⁰ See Statement of Thomas Devine, Legal Director, Government Accountability Project, S. 372 Hearing *supra* note 77.

¹⁰¹ *Id.*

¹⁰² See Statement of Robert Vaughn, Professor of Law and A. Allen King Scholar, Washington College of Law at American University, S. 372 Hearing *supra* note 77, at 12–13.

¹⁰³ See *id.* at 12–17 (arguing that relatively few whistleblowers would remove their cases to district court if provided the opportunity, but that complex and contentious cases are more likely to need an alternative forum).

¹⁰⁴ *Id.*

The Committee anticipates, however, that most employees with the option of filing their case in district court will choose to remain in the administrative system through the MSPB because it is the lower cost, less burdensome alternative.¹⁰⁵ Trends under other statutes offering district court access as a supplement to an administrative remedy are instructive. According to Professor Robert Vaughn, only approximately ten percent of discrimination claims brought by federal employees to the Equal Employment Opportunity Commission are pursued in district court.¹⁰⁶ Similarly, only a small minority of whistleblower claims filed under the Sarbanes-Oxley Act of 2002, which protects whistleblowers who report illegal corporate activity, are pursued in district court rather than the administrative process at the Department of Labor, although most Sarbanes-Oxley whistleblowers are eligible to remove their cases to district court.¹⁰⁷

As discussed in the section above regarding all circuit review, numerous whistleblower statutes provide access to district court to litigate whistleblower claims. As a few examples, discussed above, whistleblowers may file cases in district court under the False Claims Act, the Resolution Trust Corporation Completion Act, the Federal Deposit Insurance Corporation Improvement Act, and the Sarbanes-Oxley Act.¹⁰⁸

The Committee believes it is appropriate to limit the alternative review provisions in certain respects to address concerns raised at the hearing on S. 372 during the 111th Congress. At the hearing, William Bransford, on behalf of the Senior Executive Association, expressed concern that allowing jury trials in federal district courts could contribute to a perception among federal managers that disciplining a problem employee is unacceptably risky. In particular, he stated that a “sensational jury trial resulting in a finding against the manager with a substantial award of damages w[ould] create significant pause for managers.” He recommended that a limit on compensatory damages would mitigate this concern if a district court access provision were adopted.¹⁰⁹ Likewise, Rajesh De from the Department of Justice testified on behalf of the Administration that if a district court access provision were included in S. 372, the predecessor of S. 743 in the 111th Congress, “we would suggest that Congress consider adopting damages caps analogous to the Title VII [of the Civil Rights Act of 1964] context to ensure that incentives are properly aligned and to alleviate concerns about runaway juries.”¹¹⁰

To address these concerns, and to ensure that there is no financial incentive to bring less significant WPA cases in district court,

¹⁰⁵ See *id.*; see also Devine Statement, S. 372 Hearing *supra* note 77.

¹⁰⁶ Vaughn Statement, S. 372 Hearing *supra* note 77, at 14.

¹⁰⁷ See *id.* at 11, 16 (nearly all Sarbanes-Oxley litigants were eligible to go to district court, but most stuck with the administrative process); see also Richard E. Moberly, *Unfulfilled Expectations: Why Sarbanes Oxley Whistleblowers Seldom Win*, 49 William and Mary Law Review 65 (2007) & table J of “Basic Data for *Unfulfilled Expectations*” article, available at http://law.unl.edu/c/document_library/get_file?folderId=3600&name=DLFE-1326.pdf. Professor Moberly’s data shows that 54 employees withdrew from the administrative process with an intention of filing a district court claim and 82 employees withdrew from the administrative process with no stated reason. Assuming that 100 percent of those employees filed a district court claim, less than 28 percent of the 491 Sarbanes-Oxley litigants filed district court claims.

¹⁰⁸ See *supra* notes 41–49 and accompanying text.

¹⁰⁹ Statement of William L. Bransford, General Counsel, Senior Executives Association, S. 372 Hearing *supra* note 77.

¹¹⁰ De Statement, S. 372 Hearing *supra* note 77.

the alternative recourse provision limits compensatory damages to \$300,000, which is the limit on compensatory damages for Title VII discrimination claims, and it does not allow for punitive damages. Likewise, limiting the alternative recourse provisions to major personnel actions is intended to address managers' concerns with the potential burden of federal court litigation and with being able to effectively discipline employees when needed.

Additionally, Mr. De raised the concern that juries may not be as familiar with the clear and convincing evidence standard used under the WPA, but may be more familiar with the preponderance of the evidence standard. He recommended, on behalf of the Administration, that a preponderance of the evidence standard with a burden-shifting framework similar to the Title VII context might be more appropriate for district court trials.¹¹¹ The Committee has concluded that this is an appropriate limit, which may help to address the concern that allowing jury trials might discourage some supervisors from making appropriate personnel decisions. Accordingly, for district court WPA cases only, S. 743 provides that relief may not be ordered if the agency demonstrates by a preponderance of the evidence, rather than by clear and convincing evidence, that the agency would have taken the same personnel action in the absence of a protected disclosure.

The alternative review provisions are subject to a five-year sunset, in order to allow Congress to evaluate the impact of this provision on federal whistleblower protections, the MSPB, and the federal district courts.

P. MSPB summary judgment authority

Currently, the Board does not have the authority to grant summary judgment in a whistleblower case, even when there is no genuine issue as to any material fact and the moving party would be entitled to prevail as a matter of law. In its 2006 reauthorization request, the Board requested authority to grant motions for summary judgment in order to help it speed case processing.¹¹² To assist the Board with prompt adjudication of WPA claims, section 118 of S. 743 authorizes the MSPB to consider and grant summary judgment motions in WPA cases that involve major personnel actions, subject to a five-year sunset. In considering a motion for summary judgment, the MSPB should use the standards set forth in Federal Rule of Civil Procedure 56. That is, the Board shall determine, examining the evidence and pleadings before it and viewing the evidence in the light most favorable to the non-moving party, whether any genuine issue of material fact exists. This five-year period will allow Congress to evaluate the impact of this provision on the cases heard by the MSPB and any impact on the WPA protections for federal whistleblowers.

Q. Classified disclosures to Congress for employees under the WPA

If an employee covered by the WPA wants to make a protected disclosure of classified information, the WPA states that the individual may provide the information "to the Special Counsel, or to

¹¹¹ *Id.*

¹¹² See Justifications for Legislative Proposals submitted by the MSPB to accompany the Merit Systems Protection Board Reauthorization Act of 2006, available upon request to the Committee.

the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures.”¹¹³ However, the WPA does not lay out a process by which an employee covered by the Act may make a protected disclosure of classified information to Congress. The Intelligence Community Whistleblower Protection Act of 1998 (ICWPA) and similar provisions¹¹⁴ establish secure processes for disclosing certain classified information to Congress, but these processes may be used only by employees of the intelligence community, not by employees covered under the WPA. In order to clarify a procedure that federal employees who are covered under the WPA may use to disclose to Congress classified information that evidences waste, fraud, and abuse, section 119 of S. 743 amends the WPA and the ICWPA to protect employees covered under the WPA if they make classified disclosures to Congress using the process established under the ICWPA.

Certain prior versions of this legislation in past Congresses would have explicitly provided full WPA protection to federal whistleblowers who disclose classified information to Congress in certain circumstances. A whistleblower would have been covered under the WPA if he or she was retaliated against for disclosing classified information to a member of Congress who is authorized to receive the information disclosed or congressional staff who holds the appropriate security clearance and is authorized to receive the information disclosed. In order for such a disclosure to be protected, the employee would have been required to have a reasonable belief that the disclosure directly and specifically evidences wrongdoing.

The Executive Branch and Congress long have taken somewhat different positions regarding their respective roles with respect to the control and disclosure of classified information. The debate prior to enactment of the ICWPA provides useful context. In 1998, Congress considered a bill (S. 1668) with similar provisions to those in prior versions of S. 743, but that applied only to members of the intelligence community. The Clinton Administration opposed the bill, arguing that “S. 1668 would deprive the President of his authority to decide, based on the national interest, how, when and under what circumstances particular classified information should be disclosed to Congress [which would be] an impermissible encroachment on the President’s ability to carry out core executive functions.”¹¹⁵ In its report on the bill, the Senate Select Committee on Intelligence described its consideration of Constitutional and other ramifications of the legislation. That Committee concluded that the regulation of national security information, while implicitly in the command authority of the President, is equally in the national security and foreign affairs authorities vested in Congress by the Constitution. The Intelligence Committee, furthermore, was convinced that the provision was constitutional because it did not prevent the President from accomplishing his constitutionally as-

¹¹³ 5 U.S.C. § 2302(b)(8)(B).

¹¹⁴ ICWPA, Public Law No. 105-272, title VII (Oct. 20, 1998) (adding 50 U.S.C. § 403q(d)(5), applicable to the CIA, and adding section 8H of the Inspector General Act of 1978, 5 U.S.C. App, applicable generally to other intelligence agencies); the Intelligence Authorization Act for Fiscal Year 2010, Public Law No. 111-259, § 405(a)(1) (Oct 7, 2010) (adding 50 U.S.C. § 403-3h(k)(5), applicable to any member of the intelligence community).

¹¹⁵ See Whistleblower Protections for Classified Disclosures, 22 Op. O.L.C. 92 (1998) (statement of Randolph D. Moss, Deputy Assistant Attorney General, Office of Legal Counsel, before the House Permanent Select Committee on Intelligence).

signed functions, and it was justified by an overriding need to promote the objectives within the constitutional authority of Congress.¹¹⁶

Nonetheless, in order to address the concerns of the Administration then in office, the House and Senate in 1998 agreed to modify the Senate proposal and enacted the ICWPA, which provides a secure process that whistleblowers in certain intelligence agencies and offices may use to disclose classified information to Congress.¹¹⁷ The ICWPA provides that if an employee wishes to convey to Congress information about a serious problem or violation involving intelligence activities, and if the employee wishes to do so under the ICWPA process, the employee must first inform the appropriate IG. The IG is then required to determine whether the information appears credible, and, if so, the IG must transmit it to the head of the relevant intelligence agency or office, who is then required to forward it to the House and Senate Intelligence Committees. If the IG does not transmit the information to the agency head, the employee may contact either or both of the congressional intelligence committees to make the disclosure, but, before doing so, must first, through the IG, notify the head of the agency or office about the employee's intent and must follow the instructions from the agency or office head regarding how to contact Congress in accordance with appropriate security practices.

It is important to note that in enacting the ICWPA, Congress did not contradict its long-held view that an individual's right to provide information to Congress and Congress's power to receive information are inherent in our Constitutional structure. The Congressional findings enacted at the beginning of the ICWPA specifically state that "no basis in law exists for requiring prior authorization of disclosures to the intelligence committees of Congress by employees of the executive branch of classified information about wrongdoing within the Intelligence Community" and that the process under the ICWPA provides an "additional procedure" established "to encourage such reporting."¹¹⁸ Likewise, the House and Senate agreed in the ICWPA conference report it "establishes an additional process to accommodate the disclosure of classified information of interest to Congress."¹¹⁹ The conference report similarly emphasized that the new provision "is not the exclusive process by which an Intelligence Community employee may make a report to Congress."¹²⁰

During the 111th Congress, the current Administration took a similar position to that taken by earlier Administrations. Discussing the provision in S. 372 that would have explicitly extended the WPA to protect employees who disclosed classified information to Congress, Mr. De testified on behalf of the Administration:

Of course, Congress has significant and legitimate oversight interests in learning about, and remedying, waste, fraud and abuse in the intelligence community, and we recognize that Congress has long held a different view of

¹¹⁶ S. Rep. No. 105-165 (1998).

¹¹⁷ See § 8H of the Inspector General Act of 1978, 5 U.S.C. app; § 17(d)(5) of the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403q(d)(5)).

¹¹⁸ Public Law No. 105-272, §§ 701(b)(4)-(6) (Oct. 20, 1998).

¹¹⁹ H.R. Rep. No. 105-780, at 34 (1998).

¹²⁰ *Id.*

the relevant constitutional issues. However, as Presidents dating back to President Washington have maintained, the Executive Branch must be able to exercise control over national security information where necessary.¹²¹

Although the Committee believes that the provisions on classified information contained in previous versions of the legislation are consistent with Congress's constitutional role, the Committee in the 111th Congress accommodated the Administration's concerns by adopting a compromise provision,¹²² and the sponsors of the legislation in the 112th Congress included that compromise provision in S. 743.

Under this legislation, employees covered under the WPA would get WPA protection if they disclose classified information to Congress using the procedures that now, under the ICWPA, apply only to employees at certain intelligence agencies. S. 743 amends the ICWPA provisions to encompass any federal employee at an agency covered by the WPA who intends to report to Congress information about a serious problem or violation in an activity involving classified information. Under the legislation, such an employee may report the information to the IG of the individual's employing agency. Then if the IG finds the information credible, the IG is required to transmit the information to the head of the agency, to forward it to the committees of jurisdiction; and, if the IG does not do so, the employee may directly contact one or both of the committees of jurisdiction in order to provide the disclosure. As examples, generally an employee of the Department of Justice could contact the House and Senate Judiciary Committees to provide the disclosure, and generally an employee of the Department of Defense could contact the House and Senate Armed Services Committees to provide the disclosure. (Intelligence-community employees who are covered under the ICWPA would still contact the House Permanent Select Committee on Intelligence or the Senate Select Committee on Intelligence to provide the disclosure.) All such disclosures of classified information would continue to be governed by any independent legal requirements for the proper handling of such information and for disclosure only to Members of Congress or to congressional employees with the appropriate security clearance.

By providing legal protection to federal employees who disclose wrongdoing to Congress, even if the disclosure involves classified information, this provision is intended to ensure that employees who witness waste, fraud, and abuse in an activity involving classified information are not inhibited from disclosing it appropriately, and thereby seeking to end it, and to ensure that Congress receives the information necessary to fulfill its oversight responsibilities. In addition, this provision seeks to ensure the proper handling of classified documents and information in the process of reporting wrongdoing.

The Committee emphasizes that this new process is but *one* way for federal employees to disclose classified information to Congress. Federal personnel law already states explicitly that whistleblower and related protections are not to be construed to authorize the withholding of information from Congress or the taking of any per-

¹²¹ See De Statement, S. 372 Hearing *supra* note 77, at 11.

¹²² See S. Rept. 111-101, to accompany S. 372 (Dec. 3, 2009), at 26-28.

sonnel action against an employee who discloses information to the Congress.¹²³ The new process also does not in any way limit the right of an employee to communicate with Congress under the Lloyd-La Follette Act¹²⁴ (which codifies federal employees' right to petition or provide information to Congress) or any other provision of law.

R. Whistleblower Protection Ombudsman

To ensure that employees are aware of their rights under the WPA and avenues for redress, section 120 of S. 743, subject to a five-year sunset, requires each agency IG to designate a Whistleblower Protection Ombudsman within the Office of the Inspector General. This Ombudsman would educate agency personnel about the prohibition against retaliation for protected disclosures and the rights and remedies against retaliation for a protected disclosure. This provision does not apply to inspectors general in the intelligence community.

The addition of a Whistleblower Protection Ombudsman at each agency would provide the agency and the employees with an intermediary to ensure that supervisors and leaders within the agency, as well as employees, are aware of prohibited retaliatory actions and employee rights under the WPA. In this intermediary role, the ombudsman could also help provide recommendations for resolving problems between an individual and the employer before any prohibited personnel practices are taken in violation of the WPA. The ombudsman may not, however, act as a legal representative, agent, or advocate for an employee.

S. Intelligence community whistleblower protections

As discussed above, numerous elements of the intelligence community are excluded from protection under the WPA,¹²⁵ because the intelligence community handles highly classified programs and information that must be closely guarded from public disclosure. The ICWPA provides these whistleblowers a secure channel through which they may disclose sensitive information to the Intelligence Committees of Congress. The ICWPA offers two parallel processes—one for CIA employees, who may begin by submitting their information to the CIA's IG,¹²⁶ and one for members of several other elements of the intelligence community, who may begin by making their submission to the appropriate IG.¹²⁷ Additionally, in the Intelligence Authorization Act for Fiscal Year 2010 (FY10 IAA), Congress added a third similar process, under which employees of any element of the intelligence community may submit their information to the Inspector General of the Intelligence Community established by that legislation within the ODNI.¹²⁸ As described above, under all three of these processes, if the IG determines the material submitted is credible, the IG is required to send it to the head of the intelligence element, who must forward it to the Senate and House Intelligence Committees. If the IG does not send it to

¹²³ 5 U.S.C. § 2302(b).

¹²⁴ Public Law No. 336, 37 Stat. 539, 555 (1912); 5 U.S.C. 7211.

¹²⁵ See 5 U.S.C. § 2302(a)(2)(C)(ii).

¹²⁶ 50 U.S.C. § 403q(d)(5).

¹²⁷ Section 8H of the Inspector General Act of 1978 (5 U.S.C. App.).

¹²⁸ 50 U.S.C. § 403-3h(k)(5), added by the Intelligence Authorization Act for Fiscal Year 2010, Public Law No. 111-259, § 405(a)(1) (Oct 7, 2010).

the relevant agency head, the employee may contact the Intelligence Committees directly. (Contractor employees may use these same procedures as federal employees under the ICWPA and under the FY10 IAA to bring information about serious problems or violations involving intelligence activities to Congress.)

Even though the ICWPA and the similar FY10 IAA provision are designed to establish procedures by which a whistleblower may securely disclose classified information to Congress, these statutes do not provide for any redress if the employee suffers retaliation because of the disclosure.¹²⁹ Establishing a scheme to provide redress would be desirable, as Mr. De testified on behalf of the Administration at the hearing in the 111th Congress:

Yet it is essential that we root out waste, fraud and abuse in the intelligence community just as elsewhere, and that intelligence community employees have safe channels to report such wrongdoing. Such whistleblowers expose flaws in programs that are essential for protecting our national security. We believe it is necessary to craft a scheme carefully in order to protect national security information while ensuring that intelligence community whistleblowers are protected in reality, not only in name. Properly structured, a remedial scheme should actually reduce harmful leaks by ensuring that whistleblowers are protected only when they make disclosures to designated Executive Branch officials or through proper channels to Congress.¹³⁰

The Committee has concluded that providing additional protections for intelligence community employees who expose waste, fraud, abuse, and illegal activities would help protect this country's interests and strengthen its national security. Providing an effective avenue for intelligence community employees to obtain redress if they suffer retaliation for disclosing agency waste, fraud, or abuse would encourage intelligence community whistleblowers to come forward. Moreover, protecting disclosures that are made according to a specified, protected channel would likely better protect national security information, as Mr. De testified, by removing the incentive to leak information publicly.

In the 111th Congress, the version of S. 372 reported by the Committee laid out a highly structured process for protecting intelligence community whistleblowers, including the creation of an Intelligence Community Whistleblower Protection Board, modeled on the MSPB, with presidentially-appointed board members. However, the Committee subsequently heard concerns that these provisions may not have provided the Director of National Intelligence (DNI) the flexibility needed to protect national security information in the unique context of the intelligence community, and that the provisions were more constraining and costly than necessary to achieve the desired protection. In light of these concerns, the sponsors of S. 372 offered a substitute amendment when the bill was under consideration by the Senate, replacing these detailed provisions with a more flexible structure to protect intelligence community

¹²⁹ Some agencies have internal agency procedures to protect whistleblowers, which generally are not required by law. The Federal Bureau of Investigation does have whistleblower protections under 5 U.S.C. § 2303.

¹³⁰ De Statement, S. 372 Hearing *supra* note 77, at 6-7.

whistleblowers, and this more flexible approach was included in the bill that passed the Senate.¹³¹ The sponsors retained this new provision in S. 743 in the current Congress. The revised provision is nearly identical to existing protections for FBI employees under 5 U.S.C. § 2303. In approving S. 743 with this revised provision in it, the Committee determined that adopting this flexible model that already has been implemented successfully within the one key element of the intelligence community is preferable to creating a whole new, untested model for intelligence community whistleblowers.

Specifically, section 201 of S. 743 would make it a prohibited personnel practice for a supervisor to take or fail to take, or threaten to take or to fail to take, any personnel action against an intelligence community employee in reprisal for a protected disclosure.¹³² Disclosures would be protected if the employee reasonably believes that the information evidences any of the following: a violation of any law, rule, or regulation; mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. The Committee intends for the provisions governing protected disclosures by employees under this new provision to be applied, as much as possible, in the same manner they are applied under the WPA, including the clarifications of the broad scope of protected disclosures under the WPA made by S. 743.¹³³

For a disclosure to be protected, the employee must provide the information to the DNI, to the head of the employing intelligence agency, or to an employee designated by the DNI or by the agency head. The Committee expects that the DNI and the agency heads will designate IGs to receive information, as the Attorney General designated the IG in the FBI's whistleblower protection implementing regulations,¹³⁴ but, in order to conform with the existing statutory provisions applicable to the FBI, S. 743 does not state that IGs must be designated.¹³⁵ Like the FBI provisions, S. 743 directs the President to provide for the enforcement of the new protections, in a manner consistent with 5 U.S.C. § 1214, which provides for OSC investigations of whistleblower and other prohibited personnel practice complaints, and with 5 U.S.C. § 1221, which provides the process for bringing whistleblower complaints before the MSPB. This broad delegation of authority addresses the concerns that the previous provision may have been insufficiently flexible or

¹³¹ S. amend. No. 4760 to S. 372, 111th Cong.; amendment agreed to and S. 372 passed, Cong. Rec. S8809–S8824 (daily edition, Dec. 10, 2010.)

¹³² These provisions do not extend whistleblower protections to applicants for intelligence positions. In this respect, the provisions are like the protections for FBI employees under 5 U.S.C. § 2303, but unlike the WPA, which does protect applicants as well as employees. Applicants for intelligence positions are more likely to be unreliable than individuals who have already been hired into the intelligence community as employees, and are less likely to have valuable information about waste, fraud, and abuse to disclose. On balance, the risk to national security from granting appeal rights to applicants for intelligence community positions outweighs the benefits.

¹³³ More specifically, the Committee expects that the following clarifications that this bill makes to the WPA would be made applicable to whistleblowers in the intelligence community, unless there is a compelling national security basis for adopting a different rule: clarifications with respect to disclosures made during the normal course of the employee's duties; disclosures made to a person, including a supervisor, who participated in the wrongdoing; disclosures that reveal information that had been previously disclosed; disclosures not made in writing or made while the employee was off duty; without regard to the employee's motive for making the disclosure or the amount of time that has passed since the events described in the disclosure.

¹³⁴ 28 C.F.R. § 27.1.

¹³⁵ 5 U.S.C. § 2303 (FBI protections).

more structured and costly than necessary to achieve the intended result.

S. 743 does not alter the FBI's separate whistleblower protections, nor does it alter the current process as articulated by regulation at 28 C.F.R. part 27. The legislation contains language explicitly preserving existing rights of FBI employees, stating that nothing in the section shall be construed to preempt or preclude the current rights, or to provide to the President or to the DNI the authority to revise the regulations governing those rights.

T. Review of security clearance or access determinations

Whistleblowers with security clearances who are covered by the WPA have nevertheless sometimes found themselves inadequately protected when they allege government waste, fraud, and abuse, including wrongdoing that poses a risk to national security. That is because some such whistleblowers suffer retaliation not in the form of direct termination of their jobs, but instead through means against which neither the WPA, nor the ICWPA, nor the similar FY10 IAA provision currently provides any protection: the revocation of their security clearance. The effective result of the removal of an employee's security clearance or the denial of access to classified information typically is employment termination. However, in 2000 the Federal Circuit held that the MSPB lacks jurisdiction over an employee's claim that his security clearance was revoked in retaliation for whistleblowing.¹³⁶ The court held that the MSPB may neither review a security clearance determination nor require the grant or reinstatement of a clearance, and that the denial or revocation of a clearance is not a personnel action.¹³⁷

As a result, if an employee is terminated from his or her federal government job because a clearance is suspended or revoked in retaliation for whistleblowing—even if the supervisor recommended revocation of the employee's security clearance with the intent that the employee would lose his or her job as a result—there is no remedy under the WPA or the ICWPA or similar FY10 IAA provision. At the hearing during the 107th Congress on S. 995, one of the predecessor bills to S. 743, Senator Levin asked then-Special Counsel Elaine Kaplan about “a situation where a federal employee can blow the whistle on waste, fraud or abuse, and then, in retaliation for so doing, have his or her security clearance withdrawn and then be fired because he or she no longer has a security clearance.” Ms. Kaplan responded:

It is sort of Kafkaesque. If you are complaining about being fired, and then one can go back and say, “Well, you are fired because you do not have your security clearance and we cannot look at why you do not have your security clearance,” it can be a basis for camouflaging retaliation.¹³⁸

In light of the critical need to ensure that federal employees come forward with information vital to preserving our national se-

¹³⁶ *Hesse v. State*, 217 F.3d 1372 (Fed. Cir. 2000).

¹³⁷ *Id.* at 1377–80.

¹³⁸ S. 995—Whistleblower Protection Act Amendments: Hearing on S. 995 before the Subcommittee on International Security, Proliferation, and Federal Services of the Committee on Governmental Affairs, S. Hrg. 107–160 (2001) (testimony of Hon. Elaine Kaplan, Special Counsel, Office of Special Counsel).

curity, the Committee supports extending the protections for whistleblowers to include those who are retaliated against through the loss of their security clearances or access to classified information. The Administration likewise supports strengthening these protections. At the hearing on S. 372 during the 111th Congress, Mr. De testified:

We are aware that Congress has heard testimony in the past from individuals who have claimed that their security clearances were revoked due to whistleblowing activities. This administration has zero tolerance for such actions. Although current law provides some procedural protections, the administration believes that an employee who is denied a security clearance should be able to seek recourse outside of her agency.¹³⁹

Prior versions of this legislation, including S. 372 as introduced in the 111th Congress, would have allowed whistleblowers to appeal security clearance revocations under the WPA to the MSPB and to reviewing courts, but would not have authorized the Board or reviewing courts to order a security clearance restored. However, the Administration recommended during the 111th Congress that a proposed new board within the ODNI, rather than the MSPB and the courts, review security clearance revocations. This structure would ensure that security clearance decisions would be reviewed only within the Executive Branch, subject to careful protection of national security information, while also providing a process for robust review that would be independent of the agency that made the challenged security-clearance determination.¹⁴⁰ Additionally, the Administration recommended that, if a review board were established within the ODNI to review security clearance revocations, such a board—unlike the MSPB and reviewing courts—could appropriately restore improperly terminated clearances. As Mr. De testified:

The [Administration's] proposed Board, however, could recommend full relief to the aggrieved employee, including restoration of the clearance, and could ensure that Congress would be notified if that recommendation is not followed by the agency head. This mechanism would ensure that no agency will remove a security clearance as a way to retaliate against an employee who speaks truths that the agency does not want to hear. Further, we believe that such a Board could ably review allegedly retaliatory security-clearance revocations from all agencies, including agencies in the intelligence community, rather than limiting review to Title 5 agencies, as S. 372 apparently would do.¹⁴¹

Following the recommendation of the Administration, section 202 of S. 743 would forbid agencies from withdrawing security clearances in retaliation for protected whistleblower disclosures, and would provide for appeal of allegedly retaliatory security-clearance decisions, first to the agency, and then to an independent review

¹³⁹ De Statement, S. 372 Hearing *supra* note 77, at 7.

¹⁴⁰ *Id.* at 8–9.

¹⁴¹ *Id.*

panel within ODNI. The Committee has concluded that allowing appeal of alleged security clearance retaliation to a board within ODNI would provide for comprehensive relief for whistleblowers, by allowing restoration of clearances and by covering both employees who are under the WPA and employees within the intelligence community who are not under the WPA.

Specifically, S. 743 forbids an agency to take, fail to take, or threaten to take or fail to take any action with respect to any employee's¹⁴² security clearance or access determination because of a protected disclosure. A protected disclosure would include any disclosure of information that the employee reasonably believes evidences a violation of any law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. The same clarifications that this bill makes for protected disclosures under the WPA are incorporated into this security-clearance provision: that is, clarifications to ensure protection of disclosures made during the normal course of the employee's duties; disclosures made to a person, including a supervisor, who participated in the wrongdoing; disclosures that reveal information that had been previously disclosed; disclosures not made in writing or made while the employee was off duty; and without regard to the employee's motive for making the disclosure or the amount of time that has passed since the events described in the disclosure. Such disclosures are protected under the bill if made to the DNI or an employee designated by the DNI, or to the head of the employing agency or an employee designated by the head of the employing agency, or to an IG of an agency or another employee designated by the head of the agency. In addition, this section would protect disclosures that the employee makes in compliance with one of the processes under the ICWPA¹⁴³ or under the similar FY10 IAA provision.¹⁴⁴

S. 743 would require that, to the extent practicable, agencies must continue to employ individuals who challenge a security clearance suspension or revocation while the challenge is pending. The legislation would also require the development and implementation of uniform and consistent policies and procedures to ensure proper protections while a security clearance decision is being made, including the right to appeal an adverse decision. However, the bill would not authorize an employee to appeal a security clearance suspension for the purposes of conducting an investigation, if the suspension lasts no longer than one year, or if the agency head certifies that a longer suspension is needed to prevent imminent harm to national security.

S. 743 provides that an employee who believes that he or she has been subjected to retaliation in the form of revocation of his or her security clearance may first appeal that decision within 90 days within the agency. The bill requires that the agency's procedures for these appeals must be comparable to those pertaining to prohib-

¹⁴² As with applicants for intelligence positions, non-federal employees applying for federal positions are not covered by the bill's security clearance retaliation provisions. Providing appeal rights to applicants for federal positions requiring a security clearance, who are more likely to be unreliable than those who have already been hired into such a position, could pose a risk to national security.

¹⁴³ Section 8H of the Inspector General Act of 1978 (5 U.S.C. App.) (applicable to certain members of the intelligence community); 50 U.S.C. § 403q (applicable to CIA employees).

¹⁴⁴ 50 U.S.C. § 403-3h(k)(5).

ited personnel practices under 5 U.S.C. § 2302(b)(8) and must provide essential elements of due process listed in the bill. Moreover, classified information must be handled in a manner consistent with the interests of national security, and the individual would not have the right to compel the production of classified information, except evidence needed to establish that the employee made the disclosure or communication at issue. Employees who prevail would be entitled to corrective action, including up to \$300,000 in compensatory damages.

Significantly, the Committee has determined that it is appropriate to alter the burden of proof when the employee appeals an adverse security clearance determination within the agency. Generally in whistleblower cases, if the employee proves by a preponderance of the evidence that a protected disclosure was a contributing factor in the personnel action, the burden of proof shifts and the agency can prevail only by proving by “clear and convincing evidence” that it would have taken the same personnel action for independent, legitimate reasons in the absence of the whistleblower disclosure. However, application of this burden of proof may conflict with the compelling need to protect national security in every case involving a security clearance decision. Under the applicable Executive Order, security clearances may be granted “only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security.”¹⁴⁵ In this especially sensitive area, a requirement that an agency must justify its decision to deny or revoke a security clearance by “clear and convincing evidence” may conflict with the mandate in the Executive Order that “any doubt” be resolved in favor of national security.

S. 743 therefore provides that, even if an employee shows that a protected disclosure was a contributing factor in a security clearance determination, the agency will nevertheless prevail if it “demonstrates by a preponderance of the evidence that it would have taken the same action in the absence of such disclosure, giving the utmost deference to the agency’s assessment of the particular threat to the national security interests of the United States in the instant matter.”¹⁴⁶

Under the bill, this unique statutory language establishing a burden of proof and requiring deference to national security interests applies only when the fact-finder is determining whether the agency would have taken the same security clearance action in the absence of the disclosure. This statutory language does not apply to considering the employee’s affirmative evidence, including any proof the employee presents showing a motive to retaliate on the part of the agency officials involved in the decision. Moreover, after an employee prevails on a retaliation claim, the language defining burden of proof and deference to national security does not apply to the determination of what corrective action or damages are warranted.

If the agency’s decision is adverse to the employee, S. 743 allows the employee to take a further appeal to the appellate review board

¹⁴⁵ See Executive Order 12968—Access to Classified Information (August 2, 1995).

¹⁴⁶ Proposed new section 3001(j)(4)(C) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. § 435b(j)(4)(C)), as it would be added by section 202(b) of S. 743.

within ODNI within 60 days. This board will make a *de novo* decision based on the agency record, and it will not admit any additional evidence, although it can remand to the agency for further fact-finding if needed. If the board finds that the security clearance decision violated the protections provided by S. 743, the employee would be entitled to corrective action including damages. Additionally, the board may recommend, but not order, reinstating the security clearance if doing so is “clearly consistent with the interests of national security, with any doubt resolved in favor of national security.”¹⁴⁷ The board may also recommend, but not order, reinstatement or hiring of a former employee, and may order that a former employee be treated as a current federal employee when applying for other positions in the federal government. Under the bill, the board must notify Congress of any orders it issues, and an agency must notify Congress if it does not follow the board’s recommendation to reinstate a clearance.

The Administration has taken the position that legislation providing judicial review of such appeals, even if the court were not allowed to restore a security clearance, would be inconsistent with the deference traditionally afforded to the Executive Branch in this area.¹⁴⁸ The Committee notes that, as discussed above with respect to the broader issue of control of classified information, the Senate and the House of Representatives have held a different view of the scope of Executive Branch authority over security clearances and Congress’s role in regulating and overseeing security clearances. Executive Branch authority in this area is not exclusive, and providing judicial redress of retaliatory security clearance decisions is consistent with Congress’s constitutional regulatory and oversight role. The Senate and House of Representatives have each passed a previous version of this legislation that included a provision under which alleged whistleblower retaliation in security clearance decisions would have been subject to review by either the MSPB or an IG, with appeal to the federal courts.¹⁴⁹ Moreover, the possibility of court review might increase whistleblowers’ confidence in the independence and integrity of the protections against retaliation. The Committee emphasizes that the focus of any such court review, which would have been provided under earlier versions of the bill, would have been to consider whether an agency unlawfully retaliated against a whistleblower, *not* whether the national interest is served by granting or revoking a security clearance.

Nevertheless, the Committee concluded that an Executive Branch process can provide adequate review of security clearance retaliation. Moreover, this section’s congressional notification requirements will facilitate oversight of the security clearance reprocess created by this legislation and provide a check against implementation inconsistent with congressional intent. Accordingly, the Committee agreed to accommodate the Administra-

¹⁴⁷ Proposed new section 3001(j)(5)(G) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. § 435b(j)(5)(G)), as it would be added by section 202(b) of S. 743.

¹⁴⁸ De Statement, S. 372 Hearing *supra* note 77, at 7.

¹⁴⁹ See Federal Employee Protection of Disclosures Act, S. 274 in the 110th Congress, section 1(e)(3)(A), providing for MSPB and federal court review of security clearance decisions, passed the Senate by unanimous consent on December 17, 2007; Whistleblower Protection Enhancement Act, H.R. 985 in the 110th Congress, section 10(a), providing for IG and federal court review of security clearance decisions, passed the House of Representatives on March 14, 2007.

tion's concerns, and S. 743 does not provide for any judicial review of security clearance retaliation claims.

On July 29, 2011, OGM favorably polled out S. 743, and the full Committee considered the bill at a business meeting on October 19, 2011. Senator Akaka offered an amendment, which made several minor changes to the legislation¹⁵⁰ and which was agreed to by voice vote. The bill, as amended, was ordered reported favorably by voice vote. Members present for both votes were Senators Lieberman, Akaka, Carper, Pryor, McCaskill, Begich, Collins, Brown, Johnson, and Moran.

IV. SECTION-BY-SECTION ANALYSIS

Section 1—Short Title

This section titles the bill as the “Whistleblower Protection Enhancement Act of 2012.”

TITLE I—PROTECTION OF CERTAIN DISCLOSURES OF INFORMATION BY FEDERAL EMPLOYEES

Section 101—Clarification of Disclosures Covered

The protections of the WPA become applicable when a covered employee or applicant makes a protected disclosure. The WPA forbids taking, failing to take, or threatening to take or fail to take, a personnel action against an employee or applicant because of a protected disclosure, and the individual making a protected disclosure is provided redress if such a personnel action does occur. Section 101 of the legislation makes several amendments to the WPA to overturn decisions narrowing the scope of protected disclosures and reaffirms congressional intent that the law covers whistleblowing of any disclosure of the covered forms of wrongdoing.

Section 101(a) underscores the breadth of the WPA’s protections by changing the term “a violation” to the term “any violation” in two places in 5 U.S.C. § 2302(b)(8), which is a provision of the WPA stating the kinds of wrongdoing that may be the subject of a protected disclosure.

Section 101(b) makes clear that “any disclosure” means “any disclosure” by specifically stating that a disclosure does not lose protection because: the disclosure was made to a person, including a supervisor, who participated in the wrongdoing disclosed; the disclosure revealed information that had previously been disclosed; the employee’s or applicant’s motive for making the disclosure; the disclosure was made while the employee was off duty; or of the amount of time which has passed since the occurrence of the events described in the disclosure. Section 101(b) also clarifies that a disclosure is not excluded from protection because it was made during the employee’s normal course of duties, providing the employee is

¹⁵⁰The changes made by the amendment include: (1) in the anti-gag provision, requiring nondisclosure orders to include a general reference to the kinds of statutes and Executive Orders that establish employees’ rights and obligations, instead of requiring nondisclosure orders to state a specific list of statutes and Executive Orders that was set forth in the original bill; (2) extending the time period for the Government Accountability Office to complete its report on the implementation of the Act from 40 to 48 months; (3) requiring that certain complaints arising out of intelligence units within the Defense Department be sent to the Secretary of Defense in addition to the DNI; (4) requiring the DNI to consult with the Secretary of Defense in prescribing regulations against whistleblower retaliation in the intelligence community; and (5) requiring that, within the appellate review board that will hear security clearance appeals, the special subpanel drawn from the intelligence community to hear cases arising from the intelligence community shall include the new Inspector General of the Intelligence Community and the Department of Defense IG.

able to show reprisal—in other words, that the personnel action was taken with an improper, retaliatory motive, not simply “because of” the disclosure without demonstrating the motive for the action. Section 101(b) also makes technical and conforming amendments.

Section 102—Definitional Amendments

This section clarifies the definition of “disclosure” to mean a formal or informal communication or transmission, but not to include a communication concerning legitimate policy decisions that lawfully exercise discretionary agency authority unless the employee reasonably believes the disclosure evidences a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.

Section 103—Rebuttable Presumption

This section provides that any presumption relating to an employee whose conduct is the subject of a whistleblower disclosure may be rebutted with substantial evidence, in order to ensure that no court will again require “irrefragable proof,” as the court did in *Lachance v. White*, discussed above. This section also codifies the objective test for reasonable belief, which the United States Court of Appeals for the Federal Circuit established in *Lachance v. White*. Specifically, this section provides that a determination as to whether an employee has the requisite reasonable belief about the disclosed information will be made by determining whether “a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the Government evidence such violation, mismanagement, waste, abuse, or danger.”

Section 104—Personnel Actions and Prohibited Personnel Practices

The WPA generally forbids the taking of a “personnel action” against a covered employee because of a protected disclosure. The term “personnel action” is defined in 5 U.S.C. § 2302(a)(2)(A) to include a number of significant employment-related actions, such as promotions, demotions, reassignments, pay decisions, as well as any other significant change in duties, responsibilities, or working conditions. *Section 104(a)* of the legislation adds implementing or enforcing a nondisclosure policy, form, or agreement to the definition of “personnel action” under 5 U.S.C. § 2302(a)(2)(A).

Section 104(b) makes it a prohibited personnel practice under 5 U.S.C. § 2302(b) for an agency to implement or enforce any nondisclosure policy, form, or agreement that fails to contain language specified in the legislation preserving employee obligations, rights, and liabilities created by existing statute or Executive Order relating to disclosure of information. As discussed above, the amendment adopted by the Committee substitutes a general cross reference to the employee rights and obligations under existing statute and Executive Orders for the specific list of statutes and Executive Orders. Section 104(b), as reported, also requires agencies using any nondisclosure policy, form, or agreement to post this language on their websites, accompanied by a list of controlling Executive Orders and statutory provisions. Section 104(b) further pro-

vides that it shall not be a prohibited personnel practice to enforce a non-disclosure policy, form, or agreement in effect before the date of enactment with respect to a current employee, providing the agency gives the employee notice of the required statement, and with respect to a former employee, providing the public notice requirement is met.

Section 104(c) provides that corrective action awarded to whistleblowers under 5 U.S.C. §§ 1214 and 1221(g) may include damages, fees, and costs incurred due to an agency investigation of the employee that was commenced, expanded, or extended in retaliation for engaging in protected whistleblowing. The section does not address the circumstances under which a retaliatory investigation may be a prohibited personnel practice, thereby leaving the holding of *Russell v. Department of Justice*¹⁵¹ (discussed, above, under the topic “*Penalties for retaliatory investigations*”) as the governing law.

Section 105—Exclusion of Agencies by the President

This section amends 5 U.S.C. § 2302(a)(2)(C) by adding the ODNI and the National Reconnaissance Office to the list of intelligence community entities excluded from WPA coverage. This section also states that, when the President exercises his authority to remove an agency from WPA coverage because the agency’s principal function is foreign intelligence or counterintelligence, a whistleblower at the agency cannot be deprived of coverage under the WPA unless the removal of the agency occurred before the agency took a personnel action against the whistleblower.

Section 106—Disciplinary Action

This section amends 5 U.S.C. § 1215(a)(3), which governs OSC actions to impose discipline on those who commit a prohibited personnel practice; violate another law, rule, or regulation under the OSC’s jurisdiction; or knowingly and willfully refused or failed to comply with an MSPB order. Specifically, this section modifies the standard of proof OSC must meet to prevail. Under the amendment, the OSC must demonstrate to the MSPB that the whistleblower’s protected disclosure was a “significant motivating factor” in an agency’s decision to take the adverse action, even if other factors also motivated the decision. Current law requires the OSC to demonstrate that an adverse personnel action would not have occurred “but for” the whistleblower’s protected activity. Section 106 also amends 5 U.S.C. § 1215(a)(3) to allow the Board to impose a combination of the types of disciplinary action authorized under the statute. The current statute allows the Board to impose any of the types of disciplinary action individually, but not a combination of more than one type.

Section 107—Remedies

This section requires that, in disciplinary actions brought by OSC, the agency where the prevailing party was employed or had applied for employment at the time of the events giving rise to the case would reimburse any attorney’s fees awarded. Current law imposes the burden on the OSC. Section 107 also permits corrective

¹⁵¹ 76 M.S.P.R. 317, 323–25 (1997).

action awarded to whistleblowers to include reasonable and foreseeable compensatory damages.

Section 108—Judicial Review

Section 108(a) amends 5 U.S.C. § 7703(b) to suspend the exclusive jurisdiction of the U.S. Court of Appeals for the Federal Circuit over whistleblower appeals from the MSPB for a period of five years, allowing petitions for review to be filed either in the Federal Circuit or in any other federal circuit court of competent jurisdiction during this five-year period.

Section 108(b) amends 5 U.S.C. § 7703(d) to conform OPM's authority to file petitions for review of the MSPB's orders interpreting civil service laws, during the five-year period in which the Federal Circuit's exclusive jurisdiction is suspended, so that OPM could seek review of WPA cases in the Court of Appeals for the Federal Circuit or any other competent court of appeals, rather than exclusively in the Federal Circuit.

Section 109—Prohibited Personnel Practices Affecting the Transportation Security Administration

This section adds a new 5 U.S.C. § 2304, stating that employees of the TSA are covered by 5 U.S.C. § 2302(b)(1), (8), and (9). These provisions offer full WPA rights as well as protections against certain other prohibited personnel practices, including discrimination under the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973. Nothing in the new section 2304 would affect any rights to which an individual is otherwise entitled under the law.

Section 110—Disclosure of Censorship Related to Research, Analysis, or Technical Information

This section clarifies that an employee is protected from reprisal under the WPA for disclosing information that an employee reasonably believes is evidence of censorship related to research, analysis, or technical information that is or will cause gross government waste or mismanagement, an abuse of authority, a substantial and specific danger to public health or safety, or any violation of law.

Section 111—Clarification of Whistleblower Rights for Critical Infrastructure Information

To encourage non-federal owners and operators of critical infrastructure to voluntarily submit certain security-related information regarding critical infrastructure to the Department of Homeland Security, section 214 of the Homeland Security Act (HSA) (6 U.S.C. § 133) exempts such information from disclosure under the Freedom of Information Act (5 U.S.C. § 552) and makes it a crime for a federal employee to wrongfully disclose such information. Section 111 of this legislation amends section 214(c) of the HSA (6 U.S.C. § 133(c)) to clarify that, when an employee or applicant covered by the WPA obtains information in a manner not covered by the critical infrastructure information program under the HSA, disclosure by the employee or applicant of that independently obtained information may be a protected disclosure under the WPA (5 U.S.C. § 2302(b)(8)) without risk of criminal penalties, even if the same in-

formation was also voluntarily submitted to DHS under the critical-infrastructure protection program.

Section 112—Advising Employees of Rights

This section amends 5 U.S.C. § 2302(c) to require agencies, as part of their education requirements with respect to employees' rights and protections, to inform employees how to lawfully make a protected disclosure of classified information to the Special Counsel, an Inspector General, Congress, or any other designated agency official authorized to receive classified information.

Section 113—Special Counsel Amicus Curiae Appearance

This section amends 5 U.S.C. § 1212 to strengthen OSC's ability to protect whistleblowers and the integrity of the WPA, by authorizing OSC to appear as *amicus curiae* in any civil action brought in a court of the United States in connection with the WPA.

Section 114—Scope of Due Process

This section amends 5 U.S.C. §§ 1214(b)(4)(B)(ii) and 1221(e)(2) to specify that an agency may present its defense to a whistleblower case only *after* the whistleblower has first made a *prima facie* showing that a protected disclosure was a contributing factor in the personnel action.

Section 115—Nondisclosure Policies, Forms, and Agreements

Section 115(a) requires all federal nondisclosure policies, forms, and agreements to contain specified language preserving employee obligations, rights, and liabilities created by existing statute and Executive Order with respect to disclosure of information. Section 115(a) also requires agencies to post this language on their websites, accompanied by a list of controlling statutory provisions and Executive Orders. Nondisclosure policies, forms, and agreements without that statement may not be implemented or enforced in a manner inconsistent with the specified statement of rights. Additionally, it is not a prohibited personnel practice to enforce nondisclosure policies, forms, and agreements in effect before the date of enactment with respect to current employees if the agency provides the employees notice of the statement, and with respect to former employees if the agency posts notice of the statement on the agency website. (As discussed above, section 104(b) of the bill would generally make it a prohibited personnel practice to implement or enforce a nonconforming federal nondisclosure policy.)

Section 115(b) provides that a nondisclosure policy, form, or agreement for a person who is not a federal employee, but is connected with the conduct of intelligence or intelligence-related activity, shall contain appropriate provisions that require nondisclosure of classified information and make clear that the forms do not bar disclosures to Congress or to an authorized official that are essential to reporting a substantial violation of law. Of course, reporting a substantial violation of law is but one example where disclosure of classified information to Congress may be appropriate. Section 115(b) provides a minimum standard for any nondisclosure policy, form, or agreement for a person who is not a federal person, and this minimum requirement should not be construed to imply that such nondisclosure policy, form, or agreement may not provide fur-

ther information, consistent with the minimum requirement, about additional protections that may apply.

Section 116—Reporting Requirements

This section requires the GAO to report to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives on the implementation of this Act within 48 months, including an analysis of the number of cases filed with the MSPB under the WPA, their disposition, and the impact the process has on the MSPB and the Federal court system. The section also requires the MSPB to report on the number and outcome of WPA cases annually. In addition to WPA cases, these reports must also cover cases filed under 5 U.S.C. § 2302(b)(9), which makes it a prohibited personnel practice for an agency to take a personnel action in retaliation against an employee for exercising appeal or grievance rights, assisting another individual in exercising such rights, cooperating with an IG or the Special Counsel, or refusing to violate a law.

Section 117—Alternative Review

Section 117(a) amends 5 U.S.C. § 1221 to allow certain whistleblower and similar cases to be elevated to federal district court. Under the new provisions, an employee, former employee, or applicant who is before the MSPB to seek corrective action under 5 U.S.C. § 1221(a) or to appeal an adverse action under 5 U.S.C. § 7701(a), and whose claim is based on alleged retaliation for either a protected disclosure under 5 U.S.C. § 2302(b)(8), making a whistleblower-protection claim protected under § 2302(b)(9)(A), or an exercise of other rights protected under 5 U.S.C. § 2302(b)(9)(B), (C), or (D),¹⁵² may file an action for *de novo* review in district court if several additional conditions are satisfied. The individual may file only if the alleged retaliation consisted of a major personnel action covered under 5 U.S.C. §§ 7512 or 7542 (a removal from the civil service, a demotion, a suspension for more than 14 days, or a furlough of 30 days or less), and only if either—(i) no final order or decision is issued by the MSPB within 270 days after a request or appeal was submitted to the MSPB, or (ii) the MSPB certifies, upon motion from the employee, that the claim would survive a motion to dismiss and that any one of the following is true: the Board is not likely to dispose of the case within 270 days, or the case consists of multiple claims, requires complex or extensive discovery, arises out of the same set of facts as a civil action pending in a federal court, or involves a novel question of law.

A motion for certification may be submitted to the MSPB within 30 days after the original request or appeal, and the MSPB must rule on the motion within 90 days, and not later than 15 days before issuing a final decision on the merits of the case. If a whistle-

¹⁵²As noted above, 5 U.S.C. § 2302(b)(9) makes it a prohibited personnel practice for an agency to take a personnel action against an employee in retaliation for exercising certain appeal or grievance rights, for assisting another individual in exercising such rights, for cooperating with an IG or the Special Counsel, or for refusing to violate a law. Under the amendments made by section 117(a) of the bill, an employee may seek *de novo* review when the employee claims under § 2302(b)(9)(A) to have suffered retaliation for having sought a remedy for a whistleblower violation under § 2302(b)(8), but not when the employee claims to have suffered retaliation for trying to remedy a violation of any other law.

blower claim goes to district court under this provision, the MSPB must stay any other claims that arise out of the same set of operative facts until completion of the district court action and any appeals.

Section 117(a) also provides that, in cases removed to district court, the agency may prevail if it demonstrates by a preponderance of the evidence (rather than by clear and convincing evidence, which is the standard used within the MSPB process) that it would have taken the same personnel action in the absence of a protected disclosure or other protected activity. Section 117(a) also states that the Special Counsel may not represent the employee in district court. At the request of either party, the case shall be tried with a jury. The court may award damages, attorney's fees, and costs, but not punitive damages, and compensatory damages may not exceed \$300,000. An appeal from a final decision of a district court can be taken to either the Court of Appeals for Federal Circuit or the Court of Appeals for the circuit in which the district court sits.

Section 117(b) provides that the provisions of section 117(a) are subject to a five-year sunset. Any claim pending before the MSPB on the last day of the five-year period shall continue to be subject to the provisions of section 117(a).

Section 118—Merit Systems Protection Board Summary Judgment

Section 118(a) amends 5 U.S.C. § 1204(b) to authorize the MSPB to consider and grant summary judgment motions in WPA cases involving major personnel actions when the MSPB or an administrative law judge determines that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Section 118(b) provides that the MSPB's summary judgment authority is subject to a five-year sunset. The MSPB would maintain summary judgment authority for those claims pending, but not yet resolved, at the time of the sunset.

Section 119—Disclosures of Classified Information

This section amends 5 U.S.C. § 2302(b)(8) and section 8H of the Inspector General Act of 1978 (5 U.S.C. App.) to provide that employees protected under the WPA may make protected disclosures of classified information under the procedures set forth for disclosing classified information under the ICWPA. These protections do not in any way limit the right to communicate with Congress under the Lloyd-LaFollette Act, codified in 5 U.S.C. § 7211, or other provisions of law.

Section 120—Whistleblower Protection Ombudsman

This section amends section 3 of the Inspector General Act of 1978 (5 U.S.C. App.) to create a five-year pilot program to require that each agency IG designate a Whistleblower Protection Ombudsman. The Ombudsman would educate agency employees about prohibitions on retaliation, and rights and remedies against retaliation, for protected disclosures. The Ombudsman would not act as a legal representative, agent, or advocate of the employee or former employee. Agencies that are elements of the intelligence community—as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. § 401a(4)) or whose principal function is the conduct of

foreign intelligence and counter intelligence activities, as determined by the President—are not subject to this requirement.

TITLE II—INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTECTIONS

Section 201—Protection of Intelligence Community Whistleblowers

This section adds a new 5 U.S.C. § 2303A, modeled on the current protections for FBI employees in 5 U.S.C. § 2303. The new section would prohibit a personnel action against an intelligence community employee as a reprisal for making a protected whistleblower disclosure to the DNI, the head of the employing agency, or an employee designated by the DNI or the agency head for such purpose. The President would be directed to provide for enforcement of this section. To establish the scope of protection, the section defines the term “intelligence community element” to mean the CIA, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the ODNI, the National Reconnaissance Office, and any executive agency or unit thereof determined by the President under 5 U.S.C. § 2302(a)(2)(C)(ii) to have as its principal function the conduct of foreign intelligence or counterintelligence activities. The term “intelligence community element,” for the purposes of this section, does not include the FBI, which is already subject to the similar provisions of 5 U.S.C. § 2303, and the new section 2303A also states that it should not be construed to affect rights of FBI employees under existing provisions of § 2303.

Section 202—Review of Security Clearance or Access Determinations

Section 202(a) amends section 3001(b) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. § 435b) to require the promulgation within 180 days of policies and procedures to allow appeals of adverse security clearance and access determinations. The section directs that employees, to the extent practicable, should be allowed to retain government employment while such an appeal is pending. Section 202(a) also requires the policies and procedures to include due process protections comparable to those pertaining to WPA violations, including: an independent and impartial fact-finder; notice and the opportunity to be heard, with the opportunity to present relevant evidence and witness testimony; the right to be represented by counsel; a decision based on the record that is developed; and a decision within 180 days unless the employee or former employee and the agency agree to an extension, or unless the impartial fact-finder determines in writing that a greater time period is needed in the interest of fairness or national security. Classified information could be used in the process, in a manner consistent with national security, including through *ex parte* submissions if the agency determines that national security interests so warrant. The employee or former employee would have no right to compel the production of classified information except as necessary to establish that he or she made a protected disclosure.

Section 202(b) adds a new subsection (j) at the end of section 3001 of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. § 435b) to prohibit any personnel action against employees with respect to their security clearance or access deter-

mination because of a protected disclosure. (An “access determination,” as defined in section 202(c) and discussed below, is a determination whether an individual has access to classified information.) This section protects disclosures that an employee makes to the DNI (or designee), to the head of the employing agency (or designee), or to the IG of an agency if the employee reasonably believes that the disclosed information evidences the type of wrongdoing that may be the subject of disclosures protected under the WPA. In addition, this section protects any communication that the employee makes in compliance with one of the processes under the ICWPA (either the process for CIA employees or the process for certain other employees in the intelligence community) or the similar process under the FY10 IAA.¹⁵³

The provision further forbids taking an adverse security clearance decision because someone: (1) exercises an appeal, complaint, or grievance right; (2) testifies for or otherwise assists any individual in the exercise of their whistleblower rights; or (3) cooperates with, or discloses information to, an IG, provided that the employee or applicant does not unlawfully disclose classified information.

The amendment made by section 202(b) further establishes that an individual who believes that he or she has been subjected to prohibited reprisal may appeal that decision within 90 days, but may not appeal the suspension of a security clearance or access determination for purposes of conducting an investigation, if that suspension does not last longer than one year (or a longer period in accordance with agency certification that the longer period is needed to prevent imminent harm to the national security). If whistleblower retaliation is found, the agency would be required to take corrective action, which would include reasonable attorney’s fees and any other reasonable costs incurred, and could include back pay and related benefits, travel expenses, and compensatory damages not to exceed \$300,000. Corrective action shall not be ordered if the agency demonstrates by a preponderance of the evidence (rather than by clear and convincing evidence, which is the standard for WPA cases) that it would have taken the same personnel action absent the disclosure, giving the utmost deference to the agency’s assessment of the particular threat to United States national security interests.

Section 202(b) would also permit an employee or former employee to appeal the agency’s decision within 60 days to the appellate review board that is established within the ODNI under section 204 of S. 743. The appellate review board must, in consultation with the Attorney General, the DNI, and the Secretary of Defense, develop and implement policies and procedures for adjudicating such appeals, and the DNI and Secretary of Defense would jointly approve any rules, regulations, or guidance issued by the board concerning the use or handling of classified information. The board’s review would be *de novo* based on the complete agency record, and any portions of the record that were submitted *ex parte* shall remain *ex parte* during the appeal. The review board would not be permitted to hear witnesses or admit additional evidence,

¹⁵³Section 8H of the Inspector General Act of 1978 (5 U.S.C. App.); 50 U.S.C. § 403q; 50 U.S.C. § 403–3h(k)(5).

and if the board determines that further fact-finding is necessary, it would remand to the agency for additional proceedings.

If the appellate review board finds that an adverse security clearance or access determination violated this section, the board would order the agency to take corrective action to return the individual, as nearly as practicable and reasonable, to the position the individual would have held had the violation not occurred. Corrective action would also include reasonable attorney's fees and any other reasonable costs incurred, and could include back pay and related benefits, travel expenses, and compensatory damages not to exceed \$300,000. Corrective action must be taken within 90 days, unless the DNI, Secretary of Defense, or Secretary of Energy determines that doing so would endanger national security. The board would separately determine whether reinstating the security clearance or access determination is clearly consistent with national security, with any doubt resolved in favor of national security. It could recommend, but not order, the reinstatement of the security clearance or access determination, as well as the reinstatement of a former employee. The board also could order that the former employee be treated as though the employee were transferring from the most recent position held when seeking other positions within the executive branch. The board would be required to notify Congress of its orders, as would an agency that does not follow the board's recommendation to reinstate a clearance. This section does not authorize either judicial review or a private cause of action.

Section 202(c) further amends section 3001 of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. § 435b) to add a definition of the term "access determination," which will mean a determination whether an employee is eligible for access to classified information in accordance with Executive Order 12968, Executive Order 10865, or any successor of those executive orders and possesses the need to know under those orders.

Section 202(d) states that nothing in section 3001 of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. § 435b), as amended by this section, shall be construed to require the repeal or replacement of agency appeal procedures implementing Executive Order 12968 and Executive Order 10865, or any successor of those executive orders, that meet the requirements of Section 3001 of the Intelligence Reform and Terrorism Prevention Act of 2004, as amended by this section. These Executive Orders govern access to and safeguarding classified information.

Section 203—Revisions Relating to the Intelligence Community Whistleblower Act

This section amends section 8H of the Inspector General Act of 1978 and section 17(d)(5) of the Central Intelligence Agency Act of 1949 (50 U.S.C. § 403q), both of which were originally enacted by the ICWPA, to provide that, if an agency head determines that handling a disclosure under these procedures would create a conflict of interest, the agency head must notify the IG, who would then make the transmission to the DNI and, if the establishment is within the Department of Defense, to the Secretary of Defense. Each recipient of the IG's transmission would consult with the members of the appellate review board established by this bill regarding all transmissions. The amendments made by section 203

also permit individuals who submit a complaint or information to an IG under the ICWPA to notify a member of Congress or congressional staff member of that submission, and the date on which the submission was made.

Section 204—Regulations; Reporting Requirements; Nonapplicability to Certain Terminations

Section 204(a) defines the term “congressional oversight committees” to mean the Committee on Homeland Security and Governmental Affairs of the Senate, the Select Committee on Intelligence of the Senate, the Committee on Oversight and Government Reform of the House of Representatives, and the Permanent Select Committee on Intelligence of the House of Representatives. *Section 204(a)* also defines the term “intelligence community element,” to mean the CIA, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the ODNI, the National Reconnaissance Office, and any executive agency or unit thereof determined by the President under 5 U.S.C. § 2302(a)(2)(C)(ii), to have as its principal function the conduct of foreign intelligence or counterintelligence activities. The term “intelligence community element,” for the purposes of this section, does not include the FBI. This is the same definition of “intelligence community element” as is included in the amendment made by section 201 of this bill for the purposes of the intelligence community whistleblower protections created by that section.

Section 204(b) requires the DNI, in consultation with the Secretary of Defense, to prescribe regulations to ensure that personnel actions will not be taken against intelligence community employees as reprisal for making a disclosure that is protected under 5 U.S.C. § 2302A, which is the intelligence community whistleblower provision enacted by section 201 of this bill.

Section 204(b) also requires the DNI, in consultation with the Secretary of Defense, the Attorney General, and the heads of appropriate agencies, to establish the appellate review board to hear whistleblower appeals related to security clearance determinations under the amendments made by section 202(b) of this bill. The appellate review board would include a subpanel composed of intelligence community elements and inspectors general from intelligence community elements, including the Inspector General of the Intelligence Community and of the Department of Defense, to hear cases that arise in elements of the intelligence community.

Section 204(c) requires the DNI, not later than two years after the date of enactment, to submit a report on the status of the implementation of the regulations to the congressional oversight committees.

Section 204(d) provides that the protections of intelligence community whistleblowers established under section 201 of this bill and the protection from security clearance retaliation established under section 202 of this bill would *not* apply to security clearance determinations if the affected employee is concurrently terminated under any of several specific authorities listed in the bill. Under these listed authorities, considered together with conditions stated in the bill, an employee could not assert whistleblower rights to challenge an adverse security clearance determination if the employee is concurrently, personally terminated by the Secretary of

Defense, the DNI, the CIA Director, or the head of any other agency who determines that termination is in the interest of the United States and that summary termination is necessary because the procedures under other provisions of law cannot be followed consistent with national security, and who promptly notifies Congress of the termination.¹⁵⁴

TITLE III—SAVINGS CLAUSE; EFFECTIVE DATE

Section 301—Savings Clause

This section provides a savings clause stating that the legislation shall not be construed to imply any limitation on any protections afforded by any other provisions of law to employees and applicants.

Section 302—Effective Date

This section states the Act would take effect 30 days after the date of enactment. The Committee expects and intends that the Act's provisions shall be applied in OSC, MSPB, and judicial proceedings initiated by or on behalf of a whistleblower and pending on or after that effective date. Such application is expected and appropriate because the legislation generally corrects erroneous decisions by the MSPB and the courts; removes and compensates for burdens that were wrongfully imposed on individual whistleblowers exercising their rights in the public interest; and improves the rules of administrative and judicial procedure and jurisdiction applicable to the vindication of whistleblowers' rights.

V. ESTIMATED COST OF LEGISLATION

FEBRUARY 1, 2012.

Hon. JOSEPH I. LIEBERMAN,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 743, the Whistleblower Protection Enhancement Act of 2011.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

S. 743—Whistleblower Protection Enhancement Act of 2011

Summary: S. 743 would amend the Whistleblower Protection Act (WPA) to clarify current law and extend new legal protections to federal employees who report abuse, fraud, and waste related to government activities (such individuals are known as whistleblowers). The legislation also would affect activities of the Merit Systems Protection Board (MSPB) and the Office of Special Coun-

¹⁵⁴These authorities listed in the bill authorizing summary termination are: 10 U.S.C. § 1609, granting authority to the Secretary of Defense; section 102A(m) of the National Security Act of 1947 (50 U.S.C. § 403-1(m)), granting authority to the DNI; section 104A(e) of the National Security Act of 1947 (50 U.S.C. § 403-4a(e)), granting authority to the CIA Director; and 5 U.S.C. § 7532, granting authority to any other agency head.

sel (OSC). Finally, it would establish an oversight board within the intelligence community to review whistleblower claims.

CBO estimates that implementing S. 743 would cost \$24 million over the 2012–2017 period, assuming appropriation of the necessary amounts for awards to whistleblowers and additional administrative costs. Enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 743 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the federal government: The estimated budgetary impact of S. 743 is shown in the following table. The costs of this legislation primarily fall within budget functions 800 (general government) and 050 (national defense), as well as all other budget functions that include federal salaries and expenses.

	By fiscal year, in millions of dollars—						
	2012	2013	2014	2015	2016	2017	2012–2017
CHANGES IN SPENDING SUBJECT TO APPROPRIATION							
Cost of Corrective Actions:							
Estimated Authorization Level	*	1	1	1	1	1	5
Estimated Outlays	*	1	1	1	1	1	5
Intelligence Community Whistleblower Protection Board:							
Estimated Authorization Level	*	1	1	1	1	1	5
Estimated Outlays	*	1	1	1	1	1	5
MSPB and OSC:							
Estimated Authorization Level	*	2	2	2	2	2	10
Estimated Outlays	*	2	2	2	2	2	10
Other Provisions:							
Estimated Authorization Level	*	3	1	*	*	*	4
Estimated Outlays	*	3	1	*	*	*	4
Total Changes:							
Estimated Authorization Level	*	7	5	4	4	4	24
Estimated Outlays	*	7	5	4	4	4	24

Notes: MSPB = Merit Systems Protection Board; OSC = Office of Special Counsel.
* = less than \$500,000.

Basis of the estimate: For this estimate, CBO assumes that the bill will be enacted in fiscal year 2012, that the necessary amounts will be made available from appropriated funds, and that spending will follow historical patterns for similar programs.

Under current law, the OSC investigates complaints regarding reprisals against federal employees who inform authorities of fraud or other improprieties in the operation of federal programs. The OSC orders corrective action (such as job restoration, back pay, and reimbursement of attorneys' fees and medical costs) for valid complaints. If agencies fail to take corrective actions, the OSC or the employee can pursue a case through the MSPB for resolution. Whistleblower cases may also be reviewed by the U.S. Court of Appeals.

COST OF CORRECTIVE ACTIONS

When settling an employment dispute between the federal government and an employee regarding prohibited personnel practices, federal agencies are required to pay for an employee's attorney, any retroactive salary payments, and any travel and medical costs associated with the claim.

S. 743 would expand legal protections for whistleblowers and extend protections to passenger and baggage screeners working for the Transportation Security Administration and all federal employees working primarily on scientific research. The bill would authorize monetary awards to federal employees who suffered retaliation by their agency of up to \$300,000. In addition, the legislation would allow access to jury trials and would remove the exclusive jurisdiction of the U.S. Court of Appeals over whistleblower appeals.

According to the MSPB and OSC, approximately 450 whistleblower cases and around 2,000 complaints about prohibited personnel practices (including engaging in reprisals against whistleblowers) are filed against the federal government each year. CBO is unaware of comprehensive information on the current costs of corrective actions related to those cases. Damage awards depend on the particular circumstances of each case. Settlement amounts for whistleblowers have been as high as \$1 million, while the average settlement is around \$18,000 (most corrective action is nonmonetary, for example, amending performance appraisals). In addition, the Government Accountability Office has reported that about \$15 million is spent annually (from the Treasury's Judgment Fund) on equal employment opportunity and whistleblower cases. While it is uncertain how often damages would be awarded in such whistleblower situations, CBO expects that increasing the number of covered employees and legal protections under the bill would increase costs for such awards by about \$1 million each year.

INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTECTION BOARD

Section 204 would require the Director of National Intelligence, in consultation with the Secretary of Defense and the Attorney General, to establish an appellate review board. That board would adjudicate appeals from employees who believe that they have been denied security clearances or other types of authorizations to access restricted information in retaliation for revealing certain types of misconduct. Based on information from the Office of the Director of National Intelligence about the staffing needs for similar activities, CBO estimates that implementing this provision would cost \$1 million annually.

MSBP AND OSC

CBO expects that enacting the bill would increase the workload of the MSPB and the OSC. For fiscal year 2012, the MSPB received an appropriation of \$40 million, and the OSC received \$19 million. Based on information from those agencies, we estimate that when the legislation was fully implemented, those offices would spend about \$2 million a year to hire additional professional and administrative staff to handle additional cases.

OTHER PROVISIONS

S. 743 would require the Government Accountability Office to prepare two reports on whistleblowers. In addition, agencies would be required to make changes to their whistleblower training and nondisclosure policies governmentwide. Based on information from federal agencies on the costs of similar requirements, CBO estimates that implementing those provisions would cost \$4 million

over the 2012–2017 period assuming appropriation of the necessary amounts.

Previous CBO estimate: On January 25, 2012, CBO transmitted a cost estimate for H.R. 3289, the Platts-Van Hollen Whistleblower Protection Enhancement Act of 2011, as ordered reported by the House Committee on Oversight and Government Reform on November 15, 2011. Both S. 743 and H.R. 3289 would amend the Whistleblower Protection Act. Both bills have similar provisions and implementation costs, but the costs to implement H.R. 3289 would be higher primarily because it would impose additional responsibilities on Inspectors General.

Pay-as-you-go considerations: None.

Intergovernmental and private-sector impact: S. 743 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no significant costs on state, local, or tribal governments.

Estimate prepared by: Federal Costs: Matthew Pickford and Jason Wheelock; Impact on State, Local, and Tribal Governments: Elizabeth Cove Delisle; Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

VI. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill. The Committee agrees with CBO, which states that there are no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and no costs on state, local, or tribal governments. The legislation contains no other regulatory impact.

VII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic* and existing law, in which no change is proposed, is shown in roman):

TITLE 5, UNITED STATES CODE: GOVERNMENT ORGANIZATION AND EMPLOYEES

PART II—CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

CHAPTER 12—MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

Subchapter I—Merit Systems Protection Board

SEC. 1204. POWERS AND FUNCTIONS OF THE MERIT SYSTEMS PROTECTION BOARD.

* * * * *
(b) * * *

* * * * *
(3) With respect to a request for corrective action based on an alleged prohibited personnel practice described in section 2302(b)(8) or (9)(A)(i), (B)(i), (C), or (D) for which the associated personnel action is an action covered under section 7512 or 7542, the Board, any administrative law judge appointed by the Board under section 3105 of this title, or any employee of the Board designated by the Board may, with respect to any party, grant a motion for summary judgment when the Board or the administrative law judge determines that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

[(3)](4) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

* * * * *
(m)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case arising under section 1215, may require payment by the **[agency involved]** *agency where the prevailing party was employed or had applied for employment at the time of the events giving rise to the case* of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

Subchapter II—Office of Special Counsel

SEC. 1212. POWERS AND FUNCTIONS OF THE OFFICE OF SPECIAL COUNSEL.

* * * * *
(h)(1) The Special Counsel is authorized to appear as amicus curiae in any action brought in a court of the United States related

to section 2302(b)(8) or (9), or as otherwise authorized by law. In any such action, the Special Counsel is authorized to present the views of the Special Counsel with respect to compliance with section 2302(b)(8) or (9) and the impact court decisions would have on the enforcement of such provisions of law.

(2) A court of the United States shall grant the application of the Special Counsel to appear in any such action for the purposes described under subsection (a).

SEC. 1214. INVESTIGATION OF PROHIBITED PERSONNEL PRACTICES; CORRECTIVE ACTION.

(a) * * *

* * * * *

(3) Except in a case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee, former employee, or applicant shall seek corrective action from the Special Counsel before seeking corrective action from the Board. An employee, former employee, or applicant for employment may seek corrective action from the Board under section 1221, if such employee, former employee, or applicant seeks corrective action for a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) from the Special Counsel and—

(A)(i) the Special Counsel notifies such employee, former employee, or applicant that an investigation concerning such employee, former employee, or applicant has been terminated; and

(ii) no more than 60 days have elapsed since notification was provided to such employee, former employee, or applicant for employment that such investigation was terminated; or

(B) 120 days after seeking corrective action from the Special Counsel, such employee, former employee, or applicant has not been notified by the Special Counsel that the Special Counsel shall seek corrective action on behalf of such employee, former employee, or applicant.

(b) * * *

* * * * *

(4)(A) The Board shall order such corrective action as the Board considers appropriate, if the Board determines that the Special Counsel has demonstrated that a prohibited personnel practice, other than one described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), has occurred, exists, or is to be taken.

(B)(i) Subject to the provisions of clause (ii), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), the Board shall order such corrective action as the Board considers appropriate if the Special Counsel has demonstrated that a disclosure or protected activity described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) was a contributing factor in the personnel action which was taken or is to be taken against the individual.

(ii) Corrective action under clause (i) may not be ordered if, *after a finding that a protected disclosure was a contributing factor*, the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

* * * * *

(g) If the Board orders corrective action under this section, such corrective action may include—

(1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(2) reimbursement for attorney’s fees, back pay and related benefits, medical costs incurred, travel expenses, [and any other reasonable and foreseeable consequential damages] *any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs).*

* * * * *

(h) *Any corrective action ordered under this section to correct a prohibited personnel practice may include fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.*

SEC. 1215. DISCIPLINARY ACTION.

(a) * * *

* * * * *

[(3) A final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1,000.]

(3)(A) *A final order of the Board may impose—*

(i) disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, or reprimand;

(ii) an assessment of a civil penalty not to exceed \$1,000;

or

(iii) any combination of disciplinary actions described under clause (i) and an assessment described under clause (ii).

(B) *In any case brought under paragraph (1) in which the Board finds that an employee has committed a prohibited personnel practice under section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D), the Board may impose disciplinary action if the Board finds that the activity protected under section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D) was a significant motivating factor, even if other factors also motivated the decision, for the employee’s decision to take, fail to take, or threaten to take or fail to take a personnel action, unless that employee demonstrates, by preponderance of evidence, that the employee would have taken, failed to take, or threatened to take or fail*

to take the same personnel action, in the absence of such protected activity.

* * * * *

SEC. 1221. INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL CASES.

(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) seek corrective action from the Merit Systems Protection Board.

* * * * *

(e)(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure or *protected activity* described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure or *protected activity* was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—

(A) the official taking the personnel action knew of the disclosure or *protected activity*; and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or *protected activity* was a contributing factor in the personnel action.

(2) Corrective action under paragraph (1) may not be ordered if, after a finding that a *protected disclosure* was a contributing factor, the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

* * * * *

(g)(1)(A) If the Board orders corrective action under this section, such corrective action may include—

(i) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(ii) back pay and related benefits, medical costs incurred, travel expenses, [and any other reasonable and foreseeable consequential changes.] *any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs).*

(B) Corrective action shall include attorney's fees and costs as provided for under paragraphs (2) and (3).

* * * * *

(4) Any corrective action ordered under this section to correct a prohibited personnel practice may include fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

* * * * *

(i) Subsections (a) through (h) shall apply in any proceeding brought under section 7513(d) if, or to the extent that, a prohibited personnel practice as defined in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) is alleged.

* * * * *

(k)(1) In this subsection, the term “appropriate United States district court”, as used with respect to an alleged prohibited personnel practice, means the United States district court for the judicial district in which—

(A) the prohibited personnel practice is alleged to have been committed; or

(B) the employee, former employee, or applicant for employment allegedly affected by such practice resides.

(2)(A) An employee, former employee, or applicant for employment in any case to which paragraph (3) or (4) applies may file an action at law or equity or de novo review in the appropriate United States district court in accordance with this subsection.

(B) Upon initiation of any action under subparagraph (A), the Board shall stay any other claims of such employee, former employee, or applicant pending before the Board at that time which arise out of the same set of operative facts. Such claims shall be stayed pending completion of the action filed under subparagraph (A) before the appropriate United States district court and any associated appellate review.

(3) This paragraph applies in any case in which—

(A) an employee, former employee, or applicant for employment—

(i) seeks corrective action from the Merit Systems Protection Board under section 1221(a) based on an alleged prohibited personnel practice described in section 2302(b)(8) or (9)(A)(i), (B), (C), or (D) for which the associated personnel action is an action covered under section 7512 or 7542; or

(ii) files an appeal under section 7701(a) alleging as an affirmative defense the commission of a prohibited personnel practice described in section 2302(b)(8) or (9)(A)(i), (B), (C), or (D) for which the associated personnel action is an action covered under section 7512 or 7542;

(B) no final order or decision is issued by the Board within 270 days after the date on which a request for that corrective action or appeal has been duly submitted, unless the Board determines that the employee, former employee, or applicant for employment engaged in conduct intended to delay the issuance of a final order or decision by the Board; and

(C) such employee, former employee, or applicant provides written notice to the Board of filing an action under this subsection before the filing of that action.

(4) This paragraph applies in any case in which—

(A) an employee, former employee, or applicant for employment—

(i) seeks corrective action from the Merit Systems Protection Board under section 1221(a) based on an alleged prohibited personnel practice described in section 2302(b)(8) or (9)(A)(i), (B), (C), or (D) for which the associated personnel action is an action covered under section 7512 or 7542; or

(ii) files an appeal under section 7701(a) alleging as an affirmative defense the commission of a prohibited personnel practice described in section 2302(b)(8) or (9) (A)(i), (B), (C), or (D) for which the associated personnel action is an action covered under section 7512 or 7542;

(B)(i) within 30 days after the date on which the request for corrective action or appeal was duly submitted, such employee, former employee, or applicant for employment files a motion requesting a certification consistent with subparagraph (C) to the Board, any administrative law judge appointed by the Board under section 3105 of this title and assigned to the case, or any employee of the Board designated by the Board and assigned to the case; and

(ii) such employee has not previously filed a motion under clause (i) related to that request for corrective action or that appeal; and

(C) the Board, any administrative law judge appointed by the Board under section 3105 of this title and assigned to the case, or any employee of the Board designated by the Board and assigned to the case certifies that—

(i) under the standards applicable to the review of motions to dismiss under rule 12(b)(6) of the Federal Rules of Civil Procedure, including rule 12(d), the request for corrective action or the appeal (including any allegations made with the motion under subparagraph (B)) would not be subject to dismissal; and

(ii)(I) the Board is not likely to dispose of the case within 270 days after the date on which the request for corrective action or the appeal has been duly submitted; or

(II) the case—

(aa) consists of multiple claims;

(bb) requires complex or extensive discovery;

(cc) arises out of the same set of operative facts as any civil action against the Government filed by the employee, former employee, or applicant pending in a Federal court; or

(dd) involves a novel question of law.

(5) The Board shall grant or deny any motion requesting a certification described under paragraph (4)(ii) within 90 days after the submission of such motion and the Board may not issue a decision on the merits of a request for corrective action or appeal within 15 days after granting or denying a motion requesting certification.

(6)(A) Any decision of the Board, any administrative law judge appointed by the Board under section 3105 of this title and assigned to the case, or any employee of the Board designated by the Board and assigned to the case to grant or deny a certification described under paragraph (4)(ii) shall be reviewed on appeal of a final order or decision of the Board under section 7703 only if—

- (i) a motion requesting a certification was denied; and
- (ii) the reviewing court vacates the decision of the Board on the merits of the claim under the standards set forth in section 7703(c).

(B) The decision to deny the certification shall be overturned by the reviewing court, and an order granting certification shall be issued by the reviewing court, if such decision is found to be arbitrary, capricious, or an abuse of discretion.

(C) The reviewing court’s decision shall not be considered evidence of any determination by the Board, any administrative law judge appointed by the Board under section 3105 of this title, or any employee of the Board designated by the Board on the merits of the underlying allegations during the course of any action at law or equity for de novo review in the appropriate United States district court in accordance with this subsection.

(7) In any action filed under this subsection—

(A) the district court shall have jurisdiction without regard to the amount in controversy;

(B) at the request of either party, such action shall be tried by the court with a jury;

(C) the court—

(i) subject to clause (iii), shall apply the standards set forth in subsection (e); and

(ii) may award any relief which the court considers appropriate under subsection (g), except—

(I) relief for compensatory damages may not exceed \$300,000; and

(II) relief may not include punitive damages; and

(iii) notwithstanding subsection (e)(2), may not order relief if the agency demonstrates by a preponderance of the evidence that the agency would have taken the same personnel action in the absence of such disclosure; and

(D) the Special Counsel may not represent the employee, former employee, or applicant for employment.

(8) An appeal from a final decision of a district court in an action under this subsection shall be taken to the Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.

(9) This subsection applies with respect to any appeal, petition, or other request for corrective action duly submitted to the Board, whether under section 1214(b)(2), the preceding provisions of this section, section 7513(d), section 7701, or any otherwise applicable provisions of law, rule, or regulation.

PART III—EMPLOYEES

Subpart A—General Provisions

CHAPTER 23—MERIT SYSTEM PRINCIPLES

SEC. 2302. PROHIBITED PERSONNEL PRACTICES.

(a)(1) For the purpose of this title, “prohibited personnel practice” means any action described in subsection (b).

(2) For the purpose of this section—

(A) “personnel action” means—

* * * * *

- (x) a decision to order psychiatric testing or examination;
[and]
 (xi) *the implementation or enforcement of any nondisclosure policy, form, or agreement; and*
[(xi)] (xii) any other significant change in duties, responsibilities, or working conditions; with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;
- (B) “covered position” means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action—
- (i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or
 - (ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration; **[and]**
- (C) “agency” means an Executive agency and the Government Printing Office, but does not include—
- (i) a Government corporation, except in the case of an alleged prohibited personnel practice described under subsection (b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D);
[(ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or]
(ii)(I) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; and
(II) as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, provided that the determination be made prior to a personnel action; or
 - (iii) the General Accountability Office; and
- (D) “disclosure” means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences—
- (i) any violation of any law, rule, or regulation; or
 - (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

* * * * *

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) **【a violation】** *any violation* of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; **【or】**

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) **【a violation】** *any violation (other than a violation of this section)* of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; *or*

(C) *any communication that complies with subsection (a)(1), (d), and (h) of section 8H of the Inspector General Act of 1978 (5 U.S.C. App.);*

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) **【the exercise of any appeal, complaint, or grievance right granted by any law, rule or regulation】** *the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—*

(i) *with regard to remedying a violation of paragraph (8); or*

(ii) *other than with regard to remedying a violation paragraph (8);*

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

* * * * *

(11)(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement; **[or]**

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title**[.]**; or

(13) *implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."*

This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress. *For purposes of paragraph (8), (i) any presumption relating to the performance of a duty by an employee whose conduct is the subject of a disclosure as defined under subsection (a)(2)(D) may be rebutted by substantial evidence; and (ii) a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.*

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title, *including how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such disclosures.* Any individual to whom the head of an agency delegates authority for personnel

management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

* * * * *

(f)(1) A disclosure shall not be excluded from subsection (b)(8) because—

(A) the disclosure was made to a person, including a supervisor, who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(ii);

(B) the disclosure revealed information that had been previously disclosed;

(C) of the employee's or applicant's motive for making the disclosure;

(D) the disclosure was not made in writing;

(E) the disclosure was made while the employee was off duty; or (F) of the amount of time which has passed since the occurrence of the events described in the disclosure.

(2) If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.

SEC. 2303. PROHIBITED PERSONNEL PRACTICES IN THE FEDERAL BUREAU OF INVESTIGATION.

* * * * *

SEC. 2303A. PROHIBITED PERSONNEL PRACTICES IN THE INTELLIGENCE COMMUNITY.

(a) DEFINITIONS.—In this section—

(1) the term “agency” means an executive department or independent establishment, as defined under sections 101 and 104, that contains an intelligence community element, except the Federal Bureau of Investigation;

(2) the term “intelligence community element”—

(A) means—

(i) the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; and

(ii) any executive agency or unit thereof determined by the President under section 2302(a)(2)(C)(ii) of title 5, United States Code, to have as its principal function the conduct of foreign intelligence or counterintelligence activities; and

(B) does not include the Federal Bureau of Investigation; and

(3) the term “personnel action” means any action described in clauses (i) through (x) of section 2302(a)(2)(A) with respect to an employee in a position in an intelligence community element (other than a position of a confidential, policy-determining, policymaking, or policy-advocating character).

(b) *IN GENERAL.*—Any employee of an agency who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any employee of an intelligence community element as a reprisal for a disclosure of information by the employee to the Director of National Intelligence (or an employee designated by the Director of National Intelligence for such purpose), or to the head of the employing agency (or an employee designated by the head of that agency for such purpose), which the employee reasonably believes evidences—

(1) a violation of any law, rule, or regulation; or

(2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(c) *ENFORCEMENT.*—The President shall provide for the enforcement of this section in a manner consistent with applicable provisions of sections 1214 and 1221.

(d) *EXISTING RIGHTS PRESERVED.*—Nothing in this section shall be construed to—

(1) preempt or preclude any employee, or applicant for employment, at the Federal Bureau of Investigation from exercising rights currently provided under any other law, rule, or regulation, including section 2303;

(2) repeal section 2303; or

(3) provide the President or Director of National Intelligence the authority to revise regulations related to section 2303, codified in part 27 of the Code of Federal Regulations.

SEC. 2304. PROHIBITED PERSONNEL PRACTICES AFFECTING THE TRANSPORTATION SECURITY ADMINISTRATION.

(a) *IN GENERAL.*—Notwithstanding any other provisions of law, any individual holding or applying for a position within the Transportation Security Administration shall be covered by—

(1) the provisions of section 2302(b)(1), (8), and (9);

(2) any provision of law implementing section 2302(b) (1), (8), or (9) by providing any right or remedy available to an employee or applicant for employment in the civil service; and

(3) any rule or regulation prescribed under any provision of law referred to in paragraph (1) or (2).

(b) *RULE OF CONSTRUCTION.*—Nothing in this section shall be construed to affect any rights, apart from those described in subsection (a), to which an individual described in subsection (a) might otherwise be entitled under law.

SEC. [2304] 2305. RESPONSIBILITIES OF THE GOVERNMENT ACCOUNTABILITY OFFICE.

SEC. [2305] 2306. COORDINATION WITH CERTAIN OTHER PROVISIONS OF LAW.

Subpart F—Labor Management and Employee Relations

CHAPTER 77—APPEALS

SEC. 7703. JUDICIAL REVIEW OF DECISIONS OF THE MERIT SYSTEMS PROTECTION BOARD.

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Sys-

tems Protection Board may obtain judicial review of the order or decision.

* * * * *

[(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.]

(b)(1)(A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(B) During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2011, a petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction as provided under paragraph (2).

* * * * *

[(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.]

(d)(1) Except as provided under paragraph (2), this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management. The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy

directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

(2) During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2011, this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D). The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction as provided under subsection (b)(2) if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the court of appeals. The granting of the petition for judicial review shall be at the discretion of the court of appeals.

Inspector General Act of 1978

Public Law 95-452

(as codified at 5 U.S.C. App.)

SEC. 3. APPOINTMENT OF INSPECTOR GENERAL; SUPERVISION; REMOVAL; POLITICAL ACTIVITIES; APPOINTMENT OF ASSISTANT INSPECTOR GENERAL FOR AUDITING AND ASSISTANT INSPECTOR GENERAL FOR INVESTIGATIONS

* * * * *

[(d) Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service—

(1) appoint an Assistant Inspector General for Auditing who shall have the responsibility for supervising the performance of auditing activities relating to programs and operations of the establishment, and

(2) appoint an Assistant Inspector General for Investigations who shall have the responsibility for supervising the perform-

ance of investigative activities relating to such programs and operations.】

(d)(1) *Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service—*

(A) *appoint an Assistant Inspector General for Auditing who shall have the responsibility for supervising the performance of auditing activities relating to programs and operations of the establishment;*

(B) *appoint an Assistant Inspector General for Investigations who shall have the responsibility for supervising the performance of investigative activities relating to such programs and operations; and*

(C) *designate a Whistleblower Protection Ombudsman who shall educate agency employees—*

(i) *about prohibitions on retaliation for protected disclosures; and*

(ii) *who have made or are contemplating making a protected disclosure about the rights and remedies against retaliation for protected disclosures.*

(2) *The Whistleblower Protection Ombudsman shall not act as a legal representative, agent, or advocate of the employee or former employee.*

(3) *For the purposes of this section, the requirement of the designation of a Whistleblower Protection Ombudsman under paragraph (1)(C) shall not apply to—*

(A) *any agency that is an element of the intelligence community (as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))); or*

(B) *as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counter intelligence activities.*

SEC. 8D. SPECIAL PROVISIONS CONCERNING THE DEPARTMENT OF TREASURY.

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(j) An individual appointed to the position of Treasury Inspector General for Tax Administration, the Assistant Inspector General for Auditing of the Office of the Treasury Inspector General for Tax Administration under section 【3(d)(1)】 *3(d)(1)(A)*, the Assistant Inspector General for Investigations of the Office of the Treasury Inspector General for Tax Administration under section 【3(d)(2)】 *3(d)(1)(B)*, or any position of Deputy Inspector General of the Office of the Treasury Inspector General for Tax Administration may not be an employee of the Internal Revenue Service—

(1) during the 2-year period preceding the date of appointment to such position; or

(2) during the 5-year period following the date such individual ends service in such position.

SEC. 8H. ADDITIONAL PROVISIONS WITH RESPECT TO INSPECTORS GENERAL OF THE INTELLIGENCE COMMUNITY.

(a)(1)(A) * * *

(D) *An employee of any agency, as that term is defined under section 2302(a)(2)(C) of title 5, United States Code, who intends to report to Congress a complaint or information with respect to an urgent concern may report the complaint or information to the Inspec-*

tor General (or designee) of the agency at which that employee is employed;

* * * * *

(b)(1) Not later than the end of the 14-calendar day period beginning on the date of receipt of an employee complaint or information under subsection (a), the Inspector General shall determine whether the complaint or information appears credible. Upon making such a determination, the Inspector General shall transmit to the head of the establishment notice of that determination, together with the complaint or information.

(2) If the head of an establishment determines that a complaint or information transmitted under paragraph (1) would create a conflict of interest for the head of the establishment, the head of the establishment shall return the complaint or information to the Inspector General with that determination and the Inspector General shall make the transmission to the Director of National Intelligence and, if the establishment is within the Department of Defense, to the Secretary of Defense. In such a case, the requirements of this section for the head of the establishment apply to each recipient of the Inspector General's transmission. Each recipient shall consult with the members of the appellate review board established under section 204 of the Whistleblower Protection Enhancement Act of 2011 regarding all transmissions under this paragraph.

(c) Upon receipt of a transmittal from the Inspector General under subsection (b), the head of the establishment shall, within 7 calendar days of such receipt, forward such transmittal to the [intelligence committees] appropriate committees, together with any comments the head of the establishment considers appropriate.

* * * * *

(d)(1) If the Inspector General does not find credible under subsection (b) a complaint or information submitted to the Inspector General under subsection (a), or does not transmit the complaint or information to the head of the establishment in accurate form under subsection (b), the employee (subject to paragraph (2)) may submit the complaint or information to Congress by contacting [either or both of the intelligence committees] any of the appropriate committees directly.

(2) The employee may contact the intelligence committees directly as described in paragraph (1) only if the employee—

(A) before making such a contact, furnishes to the head of the establishment, through the Inspector General, a statement of the employee's complaint or information and notice of the employee's intent to contact the [intelligence committees] appropriate committees directly; and

(B) obtains and follows from the head of the establishment, through the Inspector General, direction on how to contact the [intelligence committees] appropriate committees in accordance with appropriate security practices.

(3) A member or employee of one of the [intelligence committees] appropriate committees who receives a complaint or information under paragraph (1) does so in that member or employee's official capacity as a member or employee of that committee.

* * * * *

(h) *An individual who has submitted a complaint or information to an Inspector General under this section may notify any member of Congress or congressional staff member of the fact that such individual has made a submission to that particular Inspector General, and of the date on which such submission was made.*

[(h)](i) In this section:

(1) The term “urgent concern” means any of the following:

(A) A serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operations of an [intelligence] activity involving classified information, but does not include differences of opinions concerning public policy matters.

(B) A false statement to Congress, or a willful withholding from Congress, on an issue of material fact relating to the funding, administration, or operation of an intelligence activity *or an activity involving classified information.*

(C) An action, including a personnel action described in section 2302(a)(2)(A) of title 5, constituting reprisal or threat of reprisal prohibited under section 7 (c) in response to an employee’s reporting an urgent concern in accordance with this section.

(2) [The term “intelligence committees” means the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate] *The term “appropriate committees” means the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, except that with respect to disclosures made by employees described in subsection (a)(1)(D), the term “appropriate committees” means the committees of appropriate jurisdiction.*

The Homeland Security Act of 2002

Public Law 107–296

(as codified at 6 U.S.C. 133)

SEC. 214. PROTECTION OF VOLUNTARILY SHARED CRITICAL INFRASTRUCTURE INFORMATION.

* * * * *

(c) INDEPENDENTLY OBTAINED INFORMATION.—Nothing in this section shall be construed to limit or otherwise affect the ability of a State, local, or Federal Government entity, agency, or authority, or any third party, under applicable law, to obtain critical infrastructure information in a manner not covered by subsection (a) of this section, including any information lawfully and properly disclosed generally or broadly to the public and to use such information in any manner permitted by law. *For purposes of this section a permissible use of independently obtained information includes the disclosure of such information under section 2302(b)(8) of title 5, United States Code.*

The Central Intelligence Agency Act of 1949

Public Law 81-110

(as codified at 50 U.S.C. 403q)

SEC. 17(e). INSPECTOR GENERAL FOR AGENCY.

* * * * *

(d) SEMIANNUAL REPORTS; IMMEDIATE REPORTS OF SERIOUS OR FLAGRANT PROBLEMS; REPORTS OF FUNCTIONAL PROBLEMS; REPORTS TO CONGRESS ON URGENT CONCERNS.—

* * * * *

(5)(A) An employee of the Agency, or of a contractor to the Agency, who intends to report to Congress a complaint or information with respect to an urgent concern may report such complaint or information to the Inspector General.

(B)(i) Not later than the end of the 14-calendar day period beginning on the date of receipt from an employee of a complaint or information under subparagraph (A), the Inspector General shall determine whether the complaint or information appears credible. Upon making such a determination, the Inspector General shall transmit to the Director notice of that determination, together with the complaint or information.

(ii) *If the Director determines that a complaint or information transmitted under paragraph (1) would create a conflict of interest for the Director, the Director shall return the complaint or information to the Inspector General with that determination and the Inspector General shall make the transmission to the Director of National Intelligence. In such a case, the requirements of this subsection for the Director apply to the Director of National Intelligence. The Director of National Intelligence shall consult with the members of the appellate review board established under section 204 of the Whistleblower Protection Enhancement Act of 2012 regarding all transmissions under this paragraph.*

* * * * *

(H) *An individual who has submitted a complaint or information to the Inspector General under this section may notify any member of Congress or congressional staff member of the fact that such individual has made a submission to the Inspector General, and of the date on which such submission was made.*

* * * * *

The Intelligence Reform and Terrorism Prevention Act of 2004

Public Law 108–458

(as codified at 50 U.S.C. 435b)

SEC. 3001. SECURITY CLEARANCES.

(a) DEFINITIONS.—

* * * * * *

(9) The term “access determination” means the process for determining whether an employee—

(A) is eligible for access to classified information in accordance with Executive Order 12968 (60 Fed. Reg. 40245; relating to classified information), or any successor thereto, and Executive Order 10865 (25 Fed. Reg. 1583; relating to safeguarding classified information with industry; and

(B) possesses a need to know under that Order.

* * * * * *

(b) SELECTION OF ENTITY.—~~Not~~ Except as otherwise provided, not later than 90 days after December 17, 2004, the President shall select a single department, agency, or element of the executive branch to be responsible for—

(1) directing day-to-day oversight of investigations and adjudications for personnel security clearances, including for highly sensitive programs, throughout the United States Government;

(2) developing and implementing uniform and consistent policies and procedures to ensure the effective, efficient, and timely completion of security clearances and determinations for access to highly sensitive programs, including the standardization of security questionnaires, financial disclosure requirements for security clearance applicants, and polygraph policies and procedures;

(3) serving as the final authority to designate an authorized investigative agency or authorized adjudicative agency;

(4) ensuring reciprocal recognition of access to classified information among the agencies of the United States Government, including acting as the final authority to arbitrate and resolve disputes involving the reciprocity of security clearances and access to highly sensitive programs pursuant to subsection (d) of this section;

(5) ensuring, to the maximum extent practicable, that sufficient resources are available in each agency to achieve clearance and investigative program goals; ~~and~~

(6) reviewing and coordinating the development of tools and techniques for enhancing the conduct of investigations and granting of clearances~~]; and~~

(7) not later than 180 days after the date of enactment of the Whistleblower Protection Enhancement Act of 2011—

(A) developing policies and procedures that permit, to the extent practicable, individuals who in good faith appeal a determination to suspend or revoke a security clearance or access to classified information to retain their government employment status while such challenge is pending; and

(B) developing and implementing uniform and consistent policies and procedures to ensure proper protections during the process for denying, suspending, or revoking a security clearance or access to classified information, including the provision of a right to appeal such a denial, suspension, or revocation, except that there shall be no appeal of an agency's suspension of a security clearance or access determination for purposes of conducting an investigation, if that suspension lasts no longer than 1 year or the head of the agency certifies that a longer suspension is needed before a final decision on denial or revocation to prevent imminent harm to the national security.

Any limitation period applicable to an agency appeal under paragraph (7) shall be tolled until the head of the agency (or in the case of any component of the Department of Defense, the Secretary of Defense) determines, with the concurrence of the Director of National Intelligence, that the policies and procedures described in paragraph (7) have been established for the agency or the Director of National Intelligence promulgates the policies and procedures under paragraph (7). The policies and procedures for appeals developed under paragraph (7) shall be comparable to the policies and procedures pertaining to prohibited personnel practices defined under section 2302(b)(8) of title 5, United States Code, and provide—

(A) for an independent and impartial fact-finder;

(B) for notice and the opportunity to be heard, including the opportunity to present relevant evidence, including witness testimony;

(C) that the employee or former employee may be represented by counsel;

(D) that the employee or former employee has a right to a decision based on the record developed during the appeal;

(E) that not more than 180 days shall pass from the filing of the appeal to the report of the impartial fact-finder to the agency head or the designee of the agency head, unless—

(i) the employee and the agency concerned agree to an extension; or

(ii) the impartial fact-finder determines in writing that a greater period of time is required in the interest of fairness or national security;

(F) for the use of information specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs in a manner consistent with the interests of national security, including ex parte submissions if the agency determines that the interests of national security so warrant; and

(G) that the employee or former employee shall have no right to compel the production of information specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs, except evidence necessary to establish that the employee made the disclosure or communication such employee al-

leges was protected by subparagraphs (A), (B), and (C) of subsection (j)(1).

* * * * *

(j) RETALIATORY REVOCATION OF SECURITY CLEARANCES AND ACCESS DETERMINATIONS.—

(1) IN GENERAL.—Agency personnel with authority over personnel security clearance or access determinations shall not take or fail to take, or threaten to take or fail to take, any action with respect to any employee's security clearance or access determination because of—

(A) any disclosure of information to the Director of National Intelligence (or an employee designated by the Director of National Intelligence for such purpose) or the head of the employing agency (or employee designated by the head of that agency for such purpose) by an employee that the employee reasonably believes evidences—

(i) a violation of any law, rule, or regulation; or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(B) any disclosure to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee reasonably believes evidences—

(i) a violation of any law, rule, or regulation; or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(C) any communication that complies with—

(i) subsection (a)(1), (d), and (h) of section 8H of the Inspector General Act of 1978 (5 U.S.C. App.);

(ii) subsection (d)(5)(A), (D), and (G) of section 17 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403q); or

(iii) subsection (k)(5)(A), (D), and (G), of section 103H of the National Security Act of 1947 (50 U.S.C. 403-3h);

(D) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(E) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (D); or

(F) cooperating with or disclosing information to the Inspector General of an agency, in accordance with applicable provisions of law in connection with an audit, inspection, or investigation conducted by the Inspector General, if the actions described under subparagraphs (D) through (F) do not result in the employee or applicant unlawfully disclosing information specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs.

(2) RULE OF CONSTRUCTION.—Consistent with the protection of sources and methods, nothing in paragraph (1) shall be construed to authorize the withholding of information from the

Congress or the taking of any personnel action against an employee who discloses information to the Congress.

(3) DISCLOSURES.—

(A) IN GENERAL.—*A disclosure shall not be excluded from paragraph (1) because—*

(i) the disclosure was made to a person, including a supervisor, who participated in an activity that the employee reasonably believed to be covered by paragraph (1)(A)(ii);

(ii) the disclosure revealed information that had been previously disclosed;

(iii) of the employee's motive for making the disclosure;

(iv) the disclosure was not made in writing;

(v) the disclosure was made while the employee was off duty; or

(vi) of the amount of time which has passed since the occurrence of the events described in the disclosure.

(B) REPRISALS.—*If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from paragraph (1) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.*

(4) AGENCY ADJUDICATION.—

(A) REMEDIAL PROCEDURE.—*An employee or former employee who believes that he or she has been subjected to a reprisal prohibited by paragraph (1) of this subsection may, within 90 days after the issuance of notice of such decision, appeal that decision within the agency of that employee or former employee through proceedings authorized by paragraph (7) of subsection (a), except that there shall be no appeal of an agency's suspension of a security clearance or access determination for purposes of conducting an investigation, if that suspension lasts not longer than 1 year (or a longer period in accordance with a certification made under subsection (b)(7)).*

(B) CORRECTIVE ACTION.—*If, in the course of proceedings authorized under subparagraph (A), it is determined that the adverse security clearance or access determination violated paragraph (1) of this subsection, the agency shall take specific corrective action to return the employee or former employee, as nearly as practicable and reasonable, to the position such employee or former employee would have held had the violation not occurred. Such corrective action shall include reasonable attorney's fees and any other reasonable costs incurred, and may include back pay and related benefits, travel expenses, and compensatory damages not to exceed \$300,000.*

(C) CONTRIBUTING FACTOR.—*In determining whether the adverse security clearance or access determination violated paragraph (1) of this subsection, the agency shall find that paragraph (1) of this subsection was violated if a disclosure*

described in paragraph (1) was a contributing factor in the adverse security clearance or access determination taken against the individual, unless the agency demonstrates by a preponderance of the evidence that it would have taken the same action in the absence of such disclosure, giving the utmost deference to the agency's assessment of the particular threat to the national security interests of the United States in the instant matter.

(5) APPELLATE REVIEW OF SECURITY CLEARANCE ACCESS DETERMINATIONS BY DIRECTOR OF NATIONAL INTELLIGENCE.—

(A) DEFINITION.—*In this paragraph, the term 'Board' means the appellate review board established under section 204 of the Whistleblower Protection Enhancement Act of 2011.*

(B) APPEAL.—*Within 60 days after receiving notice of an adverse final agency determination under a proceeding under paragraph (4), an employee or former employee may appeal that determination to the Board.*

(C) POLICIES AND PROCEDURES.—*The Board, in consultation with the Attorney General, Director of National Intelligence, and the Secretary of Defense, shall develop and implement policies and procedures for adjudicating the appeals authorized by subparagraph (B). The Director of National Intelligence and Secretary of Defense shall jointly approve any rules, regulations, or guidance issued by the Board concerning the procedures for the use or handling of classified information.*

(D) REVIEW.—*The Board's review shall be on the complete agency record, which shall be made available to the Board. The Board may not hear witnesses or admit additional evidence. Any portions of the record that were submitted ex parte during the agency proceedings shall be submitted ex parte to the Board.*

(E) FURTHER FACT-FINDING OR IMPROPER DENIAL.—*If the Board concludes that further fact-finding is necessary or finds that the agency improperly denied the employee or former employee the opportunity to present evidence that, if admitted, would have a substantial likelihood of altering the outcome, the Board shall remand the matter to the agency from which it originated for additional proceedings in accordance with the rules of procedure issued by the Board.*

(F) DE NOVO DETERMINATION.—*The Board shall make a de novo determination, based on the entire record and under the standards specified in paragraph (4), of whether the employee or former employee received an adverse security clearance or access determination in violation of paragraph (1). In considering the record, the Board may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact. In doing so, the Board may consider the prior fact-finder's opportunity to see and hear the witnesses.*

(G) ADVERSE SECURITY CLEARANCE OR ACCESS DETERMINATION.—*If the Board finds that the adverse security clearance or access determination violated paragraph (1), it*

shall then separately determine whether reinstating the security clearance or access determination is clearly consistent with the interests of national security, with any doubt resolved in favor of national security, under Executive Order 12968 (60 Fed. Reg. 40245; relating to access to classified information) or any successor thereto (including any adjudicative guidelines promulgated under such orders) or any subsequent Executive order, regulation, or policy concerning access to classified information.

(H) REMEDIES.—

(i) **CORRECTIVE ACTION.**—If the Board finds that the adverse security clearance or access determination violated paragraph (1), it shall order the agency head to take specific corrective action to return the employee or former employee, as nearly as practicable and reasonable, to the position such employee or former employee would have held had the violation not occurred. Such corrective action shall include reasonable attorney's fees and any other reasonable costs incurred, and may include back pay and related benefits, travel expenses, and compensatory damages not to exceed \$300,000. The Board may recommend, but may not order, reinstatement or hiring of a former employee. The Board may order that the former employee be treated as though the employee were transferring from the most recent position held when seeking other positions within the executive branch. Any corrective action shall not include the reinstating of any security clearance or access determination. The agency head shall take the actions so ordered within 90 days, unless the Director of National Intelligence, the Secretary of Energy, or the Secretary of Defense, in the case of any component of the Department of Defense, determines that doing so would endanger national security.

(ii) **RECOMMENDED ACTION.**—If the Board finds that reinstating the employee or former employee's security clearance or access determination is clearly consistent with the interests of national security, it shall recommend such action to the head of the entity selected under subsection (b) and the head of the affected agency.

(I) CONGRESSIONAL NOTIFICATION.—

(i) **ORDERS.**—Consistent with the protection of sources and methods, at the time the Board issues an order, the Chairperson of the Board shall notify—

(I) the Committee on Homeland Security and Government Affairs of the Senate;

(II) the Select Committee on Intelligence of the Senate;

(III) the Committee on Oversight and Government Reform of the House of Representatives;

(IV) the Permanent Select Committee on Intelligence of the House of Representatives; and

(V) the committees of the Senate and the House of Representatives that have jurisdiction over the

employing agency, including in the case of a final order or decision of the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, or the National Reconnaissance Office, the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives.

(ii) RECOMMENDATIONS.—If the agency head and the head of the entity selected under subsection (b) do not follow the Board’s recommendation to reinstate a clearance, the head of the entity selected under subsection (b) shall notify the committees described in subclauses (I) through (V) of clause (i).

(6) JUDICIAL REVIEW.—Nothing in this section shall be construed to permit or require judicial review of any—

(A) agency action under this section; or

(B) action of the appellate review board established under section 204 of the Whistleblower Protection Enhancement Act of 2011.

(7) PRIVATE CAUSE OF ACTION.—Nothing in this section shall be construed to permit, authorize, or require a private cause of action to challenge the merits of a security clearance determination.