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111–101

WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2009

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 372

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 NONDISCLOSURE 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

DECEMBER 3, 2009.—Ordered to be printed

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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. 372]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 372) 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 nondisclosure 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 an amendment and recommends that the bill do pass.

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I. PURPOSE AND SUMMARY

The Whistleblower Protection Enhancement Act (WPA) is designed to strengthen the rights of and protections for federal whistleblowers and to help root out waste, fraud, and abuse in federal programs. Whistleblowers have long played a critical role in keeping our government honest and efficient, and the events of September 11, 2001 made even clearer the fact that our citizens' safety depends upon our ensuring 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 employees seeking to blow the whistle on wrongdoing have seen their protections diminish in recent years, largely as a result of a series of decisions of the U.S. Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over many WPA cases. The Federal Circuit has narrowly defined who qualifies as a whistleblower and what types of disclosures qualify those whistleblowers for protection. Just as problematically, the lack of remedies for most whistleblowers in the intelligence community leaves unprotected those who disclose wrongdoing that could undermine our national security.

S. 372 would address these problems by restoring the original congressional intent of the WPA and strengthening it and the Intelligence Community Whistleblower Protection Act (ICWPA).[1] It would, among other things: clarify the broad meaning of "any" disclosure of waste, fraud, and abuse that, under the WPA, a covered employee may make with impunity; expand the availability of a protected channel to make disclosures of classified information to appropriate committees of Congress; codify an anti-gag provision to allow employees to come forward with disclosures of illegality; 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 whistleblowers protected under the ICWPA with a forum to challenge retaliation, with the right to appeal decisions to a federal court of appeals; and provide whistleblowers under both the ICWPA and the WPA with a forum for challenging retaliatory security clearance determinations.

II. BACKGROUND

The Civil Service Reform Act of 1978 (CSRA) 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 billions of dollars in cost overruns, the GSA employee who

[1] Whistleblower Protection Act of 1989, Public Law No. 101–12, 103 Stat. 16 (1989); Intelligence Community Whistleblower Protection Act of 1998, enacted as title VII of the Intelligence Authorization Act for FY 1999, Public Law No. 105–272, 112 Stat. 2396 (1998).

> 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 federal employees continued to fear 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 federal employees who disclose what they reasonably believe to be evidence of illegal or other seriously improper government activity. 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 protection for the rights of federal employees, to prevent reprisals, and to help eliminate wrongdoing within the government by (1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and (2) establishing that, while disciplining those who commit prohibited personnel practices may be used as a means to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.[5]

Congress substantially amended the WPA in 1994, as part of legislation to reauthorize the OSC and the MSPB. 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. Now, fifteen years after the last major revision of the WPA, it is again necessary for Congress to reform and strengthen several aspects of the whistleblower protection statutes in order to achieve the original intent and purpose of the laws.

Clarification of what constitutes a protected disclosure under the WPA

Both the House and Senate committee reports accompanying the 1994 amendments criticized decisions of the MSPB and the Federal

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[2] S. Rep. No. 95–969, at 8 (1978).
[3] *See* Merit Systems Protection Board, *Blowing the Whistle in the Federal Government: A Comparative Analysis of 1980 and 1983 Survey Findings* (October 1984).
[4] S. Rep. No. 100–413, at 6–16 (1988).
[5] *Id*. at 9, 23.

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."[6]

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.[7]

Despite the clear legislative history and the plain, intended language of the 1994 amendments, the Federal Circuit and the MSPB have continued to undermine the WPA's intended meaning by imposing limitations on the kinds of disclosures by whistleblowers that are protected under the WPA. For example, in *Horton* v. *Department of the Navy*,[8] the court ruled that disclosures to co-workers or to the wrongdoer are not protected, because the disclosures are not made to persons in a position to redress wrongdoing. In *Willis* v. *Department of Agriculture*,[9] the court stated in dictum that a disclosure made as part of an employee's normal job duties is not protected. And in *Meuwissen* v. *Department of Interior*,[10] the court held that disclosures of information already known are not protected.[11]

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[6] S. Rep. No. 103–358 (1994), at 10 (quoting S. Rep. No. 100–413 (1988) at 13).
[7] H. Rep. No. 103–769, at 18 (1994).
[8] 66 F.3d 279, 283 (Fed. Cir. 1995).
[9] 141 F.3d 1139, 1144 (Fed. Cir. 1998).
[10] 234 F.3d 9, 13–14 (Fed. Cir. 2000).
[11] *See, e.g., Johnson* v. *Department of Health and Human Services*, 87 M.S.P.R. 204, 210 (2000) (limiting *Willis* to its factual context and rejecting claim that *Willis* stood for the broad proposition that had been rejected by both the MSPB and the Federal Circuit); *accord 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"); *Sood* v. *Department of Veteran Affairs*, 88 M.S.P.R. 214, 220 (2001); *Czarkowski* v. *Department of the Navy*, 87 M.S.P.R. 107 (2000).

S. 372 accordingly amends the WPA to clarify that a whistleblower is not deprived of protection because the disclosure was made during the normal course of the employee's duties; was made to a person, including a supervisor, who participated in the wrongdoing; revealed information that had been previously disclosed; was not made in writing; or was made while the employee was off duty. The bill also makes clear that disclosures may not be declared unprotected simply because of the employee's motive for making the disclosure, or because of the amount of time that has passed since the events described in the disclosure. By clarifying the broad scope of protected disclosures, S. 372 effectively restores Congress's original intent to the WPA.

The evident difficulty in settling on a precise scope of protection 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.[12] 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 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 have under no burden to present an affirmative defense.[13] 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.[14] S. 372 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 or other items 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).[15] The Committee believes it is prudent to codify that objective test in the whistleblower statute, and has done so in S. 372. Thus, in screening out frivolous claims, the focus for the MSPB and the courts would properly shift to whether the employee's belief was objectively reasonable, rather than whether the em-

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[12] *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).

[13] *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).

[14] *See* 5 C.F.R. §§ 1201.43 & 1201.55(d).

[15] *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).

ployee'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. And in cases not so filtered, the agency may still be able to prevail on its defense if it can demonstrate that it would have taken the same personnel action against the employee even absent the disclosure.

Moreover, to further address the expressed 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. 372 requires the Government Accountability Office (GAO) to evaluate the implementation of the Act, including any trends in the number of cases filed and the disposition of those cases and any patterns of abuse. S. 372 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.

The Committee does believe that there should be two narrow, reasonable limitations on the scope of protected disclosures, and it has included those limitations in S. 372. The first emerged during the hearing on this bill's predecessor, S. 1358, during the 108th Congress. The Senior Executives Association testified that they believed that an unrestricted scope of protected disclosure could be construed to include lawful policy decisions of a supervisor or manager, and recommended that the bill be clarified to deny protection relating to policy disagreements.[16] Put another way, disclosures must be specific and factual, not general, philosophical, or policy disagreements. S. 372 incorporates that limitation by excluding communications concerning policy decisions that lawfully exercise discretionary authority. This exclusion reflects congressional intent at the inception of statutory whistleblower protection.[17] At the same time, the Committee recognizes the need to curb a disturbing trend to hold that the WPA does not cover disclosures of tangible misconduct arguably flowing from a policy decision. As a result, S. 372 provides balance by codifying that an employee is still protected 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 improperly implemented. This language is consistent with Federal Circuit precedent.[18]

Second, to address concerns that minor, accidental violations of law committed in good faith would become the basis for protected disclosures and legal claims, S. 372 excludes disclosures of "an al-

[16] S. 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).

[17] *See* 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.).

[18] *Gilbert* v. *Dept. of Commerce,* 194 F.3d 1332 (Fed. Cir. 1999).

leged violation that is minor, inadvertent, and occurs during conscientious carrying out of official duties." The agency would need to prove the employee disclosed alleged wrongdoing that is minor or insignificant and that was done inadvertently or accidentally in the course of the alleged violator's duties. As an illustrative example, suppose an agency regulation requires employees to turn off their office lights at night, someone forgets to do so occasionally, and an employee reports that violation. That is the type of disclosure of a minor, accidental violation that the Committee does not intend should be the basis for a WPA claim. Of course, this provision has no effect on whether, in taking a personnel action affecting an employee, the agency may, or may not, consider that the employee made such a disclosure of a minor and inadvertent violation; the only effect of the provision is that the protections and procedures of the WPA may not be invoked in this situation. The language of this provision derives from case law finding that disclosures of trivial or *de minimis* violations are not protected under the WPA [19] and is not intended to expand the current scope of that exception.

The intentionally broad scope of protected disclosures should be clear. With respect to "any violation of any law, rule, or regulation," the Committee emphasizes that "any" means "any," except where an agency proves that one of these two narrow exceptions applies. With respect to a disclosure of "gross mismanagement" or a "gross waste" of funds, more than *de minimis* wrongdoing must be alleged. The Board used an appropriate definition of "gross mismanagement" in *Swanson* v. *General Services Administration.*[20] 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."

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. 372, is an objective one. However, in a very troubling decision ten years ago, the Federal Circuit imposed on the whistleblower the burden of "irrefragable proof." Under this court-imposed standard, in order to prove that the whistleblower's belief in the disclosed wrongdoing was reasonable, the whistleblower also had to present irrefragable proof that the wrongdoing actually occurred, in order to rebut what the court considered to be the standard presumption that the government acts in good faith.[21] The MSPB and the Federal Circuit have, in subsequent decisions, disavowed this requirement of "irrefragable proof," and S. 372

[19] *See Drake* v. *Agency for International Development,* 543 F.3d 1377, 1381 (Fed. Cir. 2008).
[20] 110 M.S.P.R. 278, 284–85 (2008), *citing Shriver* v. *Department of Veterans Affairs,* 89 M.S.P.R. 239 (2001).
[21] *Lachance* v. *White,* 174 F.3d 1378, 1381 (Fed. Cir. 1999).

would codify the removal of the "irrefragable proof" requirement from whistleblower jurisprudence.

In *Lachance* v. *White,* the Office of Personnel Management (OPM) sought review of an order by the Board that found that White made protected disclosures resulting in a downgrade in position. OPM argued that White's belief that he disclosed gross mismanagement (an allegedly wasteful Air Force education program) was inadequate to support a violation of the WPA without an independent review by the MSPB of the reasonableness of White's belief.

The Federal Circuit agreed, and stated that the MSPB must have an objective test to determine whether it was reasonable to believe that the disclosures revealed misbehavior by the Air Force covered by 5 U.S.C. §2302(b)(8). 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?"[22] However, the court then added that the review of whether White reasonably believed he disclosed wrongdoing 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."[23] In other words, in the court's view, the disinterested observer weighing whether the employee disclosed wrongdoing would start with the presumption that the government acted properly unless there is presented irrefragable proof to the contrary. "Irrefragable" means impossible to refute.[24] Read literally, therefore, the holding required employees to establish that they reasonably believed they disclosed wrongdoing by offering *indisputable proof* that the public official or officials acted in bad faith or violated the law. 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 inconsistent 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 "ir-

[22] *Id.*

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

[24] 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).

> refragable proof" burden on appellants in cases decided after *White* . . . and has, in fact, stated that the "proper test" is the objective, "disinterested observer" standard.[25]

On December 15, 2004, the Federal Circuit, ruling on this case on appeal from the MSPB, rejected the government's argument and 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.[26]

To definitely disavow the "irrefragable proof" requirement and to ensure that it is not revived in future case decisions, S. 372 codifies the objective reasonable-belief test in *Lachance* for all whistleblower disclosures. The bill also provides that any presumption that a public official (*i.e.,* the official whose misconduct the whistleblower is disclosing) acted in good faith 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."[27] It consists of "more than a mere scintilla of evidence but may be somewhat less than a preponderance."[28] By establishing a substantial evidence test, the Committee intends to provide a standard that will not be a higher burden than the preponderance of the evidence standard that employees must meet to prove their case on the merits. This standard is consistent with the legislative history of the 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 is evidence of misconduct listed in section 2302(b)(8).[29] The Committee emphasizes that there should be no additional burdens imposed on the employee beyond those provided by the statute, and that the statutory definition must be applied consistently to each protected speech category in section 2302(b)(8).[30]

The Committee notes that the two narrow exceptions to the definition of protected disclosures must be applied within the framework of the objective reasonableness test. In other words, if an employee has a reasonable belief that the information disclosed evidences misconduct listed in section 2302(b)(8), rather than conduct excepted from that definition, the disclosure is protected. The agency, for example, may not prevail by demonstrating that the *actual* misconduct meets the minor, inadvertent exception; what matters

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[25] *White* v. *Dept. Air Force,* 95 M.S.P.R. 1, 7–8 (2003).
[26] *White* v. *Dept. Air Force,* 391 F. 3d 1377, 1381 (Fed. Cir. 2004).
[27] *Richardson* v. *Perales,* 402 U.S. 389, 401 (1971).
[28] *Hays* v. *Sullivan,* 907 F. 2d 1453, 1456 (4th Cir. 1990) (quoting *Laws* v. *Celebrezze,* 368 F. 2d 640, 642 (4th Cir. 1966)).
[29] *Ramos* v. *FAA,* 4 M.S.P.R. 388 (1980).
[30] 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.*

is the objective reasonableness of the employee's belief with regard to his or her disclosure.

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.[31] 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.[32]

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 and no "split in the circuits" can ever occur. 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.[33]

The Committee believes that this argument raises valid points about the current arrangement for judicial review.

Furthermore, unlike federal employee whistleblower cases, 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. State or local government employees affected by the MSPB's Hatch Act decisions also may obtain review in the U.S. district courts.[34] 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 court of appeals for the circuit where the petitioner resides, transacts business, or to the D.C. Circuit.[35]

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[31] Public Law No. 95–454, 92 Stat. 1143, § 205 (1978) (adding 5 U.S.C. § 7703).
[32] Public Law No. 97–164, 96 Stat. 49, § 144 (1982); *see also* 5 U.S.C. §§ 7702, 7703(b)(2).
[33] S. 1358 Hearing *supra* note 16, (statement of Stephen Kohn, Chairman, Board of Directors, National Whistleblower Center) at 136.
[34] 5 U.S.C. § 1508.
[35] 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 can file a case in district court and appeal to the appropriate federal court of appeals.[36] 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.[37] In 1991, Congress passed the Federal Deposit Insurance Corporation Improvement Act which provides district court review with regular avenues of appeal for whistleblowers in federal credit unions.[38] Whistleblower laws passed as part of the Energy Reorganization Act, as amended in 1992,[39] and the Clean Air Act, as amended in 1977,[40] 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),[41] passed 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 makes a claim of 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.[42] 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.[43]

Subject to a five-year sunset, S. 372 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 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.

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 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."[44] The primary mission of the OSC is to protect

[36] 31 U.S.C. § 3730(h).
[37] 12 U.S.C. § 1441a(q).
[38] 12 U.S.C. § 1790b(b).
[39] 42 U.S.C. § 5851(c).
[40] 42 U.S.C. § 7622(c).
[41] 49 U.S.C. § 42121(b)(4).
[42] 18 U.S.C. § 1514A.
[43] Public Law No. 111–5, § 1552, 123 Stat. 115 (2009).
[44] 5 U.S.C. § 1211(b).

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 that allege that federal officials have committed prohibited personnel practices.

When such a claim is filed by a federal employee, 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.[45] If an agency does not do so, the OSC is authorized to file a petition for corrective action with the MSPB.[46] 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, 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. These cases usually involve agency officials' efforts to reverse Board decisions that have granted a petition by the OSC to impose discipline for retaliating against a whistleblower. Because the OSC lacks independent litigating authority, it must be represented by the Justice Department, rather than its own attorneys, in such cases. 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.

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.

[45] U.S. Office of Special Counsel, Annual Report for Fiscal Year 2003, at 7.
[46] 5 U.S.C. § 1214(b)(2)(C).

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 court of appeals. Therefore, S. 372 provides the Special Counsel with authority to file its own *amicus curiae* (or, "friend of the court") briefs with the federal courts, represented by its own lawyers, not by DOJ, thereby presenting the OSC's views on the law in whistleblower cases or other matters designated in the bill.

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),[47] 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.[48]

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.

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.[49]

However, under MSPB case law, 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, if the whistleblowing activity had not occurred, then that manager would not have taken the adverse personnel action.[50] This can be a heavy burden to meet. In 1989, Congress lowered the burden of proof for whistleblowers to win corrective action against retaliation. The 1989 Act eliminated the relevance of employer motives, eased the standard to establish a *prima facie* case (showing that the protected speech was a contributing factor in the action), and raised the burden for agencies, which must now provide independent justification for the personnel action at issue by clear and convincing evidence.[51] However, the 1989 statutory language only established burdens for defending against retaliation. It failed to address disciplinary actions. As a result, the Board has on many occasions

[47] Public Law No. 96–354, 94 Stat. 1164 (1980).
[48] 5 U.S.C. § 612(c).
[49] 5 U.S.C. § 1215.
[50] S*pecial Counsel* v. *Santella*, 65 M.S.P.R. 452 (1994).
[51] 5 U.S.C. §§ 1214 and 1221. *See also* 135 Cong. Rec. 4509, 4517, 5033 (1989).

ruled that whistleblower reprisal had been proven for purposes of providing relief to the employees, but rejected the OSC's claim for disciplinary action against the managers in the same case.[52]

The bill addresses the burden of proof problem in OSC disciplinary action cases by employing the same burden of proof the Supreme Court set forth in *Mt. Healthy* v. *Doyle*,[53] in which a public school teacher claimed he was unlawfully terminated from his employment for exercising his First Amendment freedom of speech. Under this test, the OSC would have to show that protected whistleblowing was a "significant motivating factor" in the 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 MSPB would order appropriate discipline unless the official shows, 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.

OSC attorney 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 fees could have an impact on 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. 372's solution is *Santella* v. *Special Counsel*.[54] In a 2–1 decision, the MSPB held that the OSC could be held liable to pay attorney 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 Board majority further ruled that two supervisors in the Internal Revenue Service (IRS) were "substantially innocent" of retaliation, notwithstanding an earlier finding by an MSPB administrative law judge that their subordinates' whistleblowing was a contributing factor in four personnel actions the supervisors took against them.

The OSC argued that, because its decision to prosecute the supervisors was a reasonable one and based upon then-existing law, an award of fees would not be in the interests of justice. In fact, the OSC contended, sanctioning an award of fees under these 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 fees, then their employing agency, the IRS, should be found liable.

The Board majority rejected the OSC's arguments. It held that the OSC, and not the IRS, should be liable for any award of fees.

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[52] 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.").

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

[54] 86 M.S.P.R. 48 (May 9, 2000).

It further found that—because the supervisors had ultimately prevailed in the case under the Board's more stringent burden of proof—they were "substantially innocent" of the charges, and reimbursement of their fees would be in the interests of justice.[55]

Vice Chair Slavet dissented. She observed that the OSC had presented "direct evidence of retaliatory animus on the part of one of the [supervisors] and circumstantial evidence of retaliation supporting all the charges." Further, she noted that the OSC had proven its charges to the satisfaction of the ALJ under the law as it existed when the action was commenced, but lost when the test was revised and made harder to meet in the course of the litigation. Under these circumstances, then-Vice Chair Slavet observed that the OSC's pursuit of the case was reasonable and an award of fees was not in the interests of justice.[56]

The Committee believes that the OSC's disciplinary action authority is a powerful weapon to deter whistleblowing retaliation. 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 (and even predict the unpredictable: changes in the law that might affect the OSC's original assessment of a case's merit) before bringing a disciplinary action. Because the OSC is a small agency with a limited budget, this burden would hinder the OSC's use of disciplinary action as an enforcement mechanism and threaten the OSC's ability to implement and enforce the WPA. To correct this problem, S. 372 would require the employing agency, rather than the OSC, to reimburse the manager's attorney fees.

Anti-gag provisions

In 1988, Senator Grassley sponsored an amendment to the Treasury, Postal and General Government Appropriations bill, which was and continues to be referred to as the "anti-gag" provision.[57] 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,[58] and to make appropriate disclosures under other particular laws specified in the statement.

S. 372 would institutionalize the anti-gag provision by codifying it and making it enforceable. Specifically, the bill would require every nondisclosure policy, form, or agreement of the Government to contain specific language set forth in the legislation informing employees of their rights. A nondisclosure policy, form, or agreement may not be implemented or enforced in a manner that is inconsistent with the required statement of rights or the underlying statutory protections. The bill also specifically makes it a prohibited personnel practice for any manager to implement or enforce a

[55] *Id.* at 64–65.
[56] *Id.* at 69–76.
[57] Public Law No. 105–277, 112 Stat. 2681–526 (1998), the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, § 636.
[58] The 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.

nondisclosure policy, form, or agreement that does not contain the specific statement mandated in the bill, 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.

S. 372 provides that a nondisclosure policy, form, or agreement in effect before the date of enactment may be enforced with regard to a current employee if the agency gives the employee notice of the statement of rights, and may be enforced with regard to a former employee if the agency posts notice on the agency website for one year following the date of enactment of the Act.[59] The Committee concludes these provisions strike the appropriate balance between allowing existing nondisclosure agreements to remain in force while also ensuring that employees are aware of their rights under the law.

Ex post facto exemption of agencies from whistleblower protection obligations

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.[60]

Certain agencies are also excluded from the Act. They include GAO, the Federal Bureau of Investigation (FBI), the Central Intelligence Agency, the National Security Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, and other agencies determined by the President to have the principal function of conducting foreign intelligence or counterintelligence activities.[61] S. 372 would add two intelligence community entities that clearly have the principal function of conducting intelligence activities to the list of statutorily excluded intelligence agencies that are covered under the Intelligence Community Whistleblower Protection Act[62] rather than the WPA: the Office of the Director of National Intelligence (ODNI) and the National Reconnaissance Office. ODNI was created in 2004 by the Intelligence Reform and Terrorism Prevention Act of 2004[63] and did not exist the last time the WPA was amended.

In 1994, Congress amended the WPA to block agencies from depriving an employee of protection under the WPA by designating the employee's particular position as a confidential policy-making position after retaliating against the employee for having blown the whistle. To accomplish this, Congress restricted the jurisdictional loophole to positions designated as exceptions "prior to the person-

[59] Such agreements may be enforced during the notice period provided the agency posts notice by the effective date of the Act.
[60] 5 U.S.C. § 2302(a)(2)(B).
[61] 5 U.S.C. § 2302(a)(2)(C).
[62] The ICWPA was enacted as title VII of the Intelligence Authorization Act for FY 1999, Public Law No. 105–272, 112 Stat. 2396 (1998). It provides intelligence community employees excluded from the WPA a protected path to disclose classified information to Congress.
[63] Public Law No. 108–458, 118 Stat. 3638 (2004).

nel action."[64] Unfortunately, a similar practice has occurred again, in a context with far broader consequences. An agency argued that the President had implicitly exempted the agency from the WPA by delegating certain intelligence functions to the agency over a year after an employee at the agency had filed a whistleblower protection complaint, and after the Board had overturned an Administrative Judge's decision to order a hearing.[65]

S. 372 would close the loophole for entire agencies in the same manner as Congress did for individual positions in 1994, by specifying that an employee of an agency loses whistleblower rights only if the agency is excluded under the Act prior to the occurrence of any personnel action against a whistleblower. The Committee believes that it is important for employees to know their rights and protections under the WPA, including if they have no rights, before they make any whistleblowing disclosure in reliance on the protections of the WPA. By eliminating the potential for post-disclosure exclusion from the WPA, this provision encourages employees to disclose waste, fraud, abuse, and illegal activity, and will aid them in determining the appropriate way to do so.

Whistleblower protection for Transportation Security Administration employees

As noted above,[66] the WPA generally provides whistleblowers the opportunity to file a request for corrective action known as an individual right of action, or IRA, before the Board. However, in *Schott* v. *Department of Homeland Security*, the MSPB ruled that it had no jurisdiction over whistleblower cases brought by employees of the Transportation Security Administration (TSA). The Board reasoned that the Aviation and Transportation Security Act (ATSA), which created TSA and gave the TSA Administrator authority to establish a personnel system outside of title 5 of the United States Code, provides the Administrator with "final authority" over TSA personnel actions.[67] The Board held that the Administrator's "exclusive personnel authority" encompasses an exclusion from the whistleblower protections found in title 5 and is not subject to Board review.

In May 2002, TSA and the OSC entered into a memorandum of understanding that provided the OSC the authority to investigate whistleblower retaliation complaints and recommend to TSA that it take corrective and/or disciplinary action.[68] In February 2008, TSA and the Board announced an agreement to provide TSA employees with a limited right to bring WPA claims before the Board;[69] and in July 2008, TSA and the Board announced that

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[64] Public 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)(C).

[65] *See Czarkowski* v. *Merit Systems Protection Board*, 390 F.3d 1347, 1350–51 (Fed. Cir. 2004) (rejecting the argument for implicit exemption from the WPA). The agency sought to invoke the exemption after the Board had rejected its previous defense on a different basis and ordered a hearing. *See Czarkowski* v. *Dept. of the Navy*, 87 M.S.P.R. 107 (2000).

[66] *See* the section entitled "Office of Special Counsel—Amicas Curiae Authority," *supra.*

[67] 97 M.S.P.R. 35 (2004).

[68] *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.

[69] *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.

they had implemented that agreement.[70] Under the agreement, TSA employees are permitted to file an appeal with the Board after the OSC has reviewed and closed a matter involving a whistleblower complaint. Whistleblowers may not appeal Board orders, and Board hearings for whistleblowers are closed to the public absent 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.

The Committee concludes that there is no basis for excluding TSA employees from the full protections of the WPA. Employees of all other components of the Department of Homeland Security are protected by the WPA, 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 S. 372:

> 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 other employees of the Department of Homeland Security.[71]

Therefore, consistent with the Administration's view that TSA employees should be protected by the WPA, the Committee determined that S. 372 should extend full WPA protections to TSA employees. S. 372 also would make the provisions prohibiting certain personnel practices under 5 U.S.C. § 2302(b)(1) applicable to TSA employees. Section 2302(b)(1) classifies certain unlawful actions as prohibited personnel practices, including 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; on the basis of age as prohibited by the Age Discrimination in Employment Act of 1967; on the basis of sex under the Fair Labor Standards Act of 1938 (which, as amended, includes the Equal Pay Act); on the basis of handicapping condition under the Rehabilitation Act of 1973; and on the basis of marital status or political affiliation as prohibited by any law, rule, or regulation.

Penalties for retaliatory investigations

In the legislative history to the 1994 amendments, House Civil Service Subcommittee Chairman Frank McCloskey highlighted that retaliatory investigation of whistleblowers is a form of harassment and discrimination, and can have a chilling effect on pro-

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[70] *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).

[71] 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).

tected disclosures, thereby undermining the merit system.[72] In 1997, the Board held, in *Russell* v. *Department of Justice*, that the WPA protects employees from retaliatory investigations under certain circumstances.[73] Specifically, in this case where an employee asserted a WPA violation as a defense against a proposed personnel action, 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."

As noted above, 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. However, agency investigations of employees are not explicitly covered under the statutory definition of a "personnel action." Instead, such investigations can come within that definition only when they result in a significant change in job duties, responsibilities, or working conditions or meet certain other criteria.[74] Therefore, even if a whistleblower can demonstrate that an investigation was undertaken in retaliation for a protected disclosure, the whistleblower has no remedy under the WPA unless the whistleblower can also show that the investigation amounts to a significant change in job duties, responsibilities, or working conditions.

S. 372, as introduced, and its predecessors, would have explicitly and specifically recognized retaliatory investigations as a prohibited personnel practice. However, the Administration expressed concerns with that provision. Specifically, the Administration wanted to ensure that legitimate agency inquiries—including criminal investigations, routine background investigations for initial employment, investigations for determining eligibility for a security clearance, Inspector General investigations, and management inquiries of potential wrongdoing in the workplace—are not chilled by fear of challenge and litigation.[75]

To address this concern, while still increasing whistleblowers' protection from retaliatory investigations, the Committee agreed in the substitute amendment to S. 372 to alter S. 372's original provision on retaliatory investigations. As amended, the provision leaves *Russell* as the governing law for prohibited personnel practices, but 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 would not change 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, but, once an employee is able to prove a claim under the WPA, the provision of S. 372 would create an additional avenue for financial relief if

[72] 140 Cong. Rec. 29,353 (1994) and H.R. Rep. No. 103–769, at 15.
[73] 76 M.S.P.R. 317, 323–24 (1997).
[74] 5 U.S.C. § 2302(a)(2). Certain other types of actions, such as disciplinary action, transfers, and decisions affecting pay also would be considered personnel actions.
[75] S. 1358 Hearing *supra* note 16 at 60.

the employee can further demonstrate that an investigation was undertaken in retaliation for the protected disclosure.

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.[76] To encourage submission of this information, the HSA stipulates that voluntarily submitted critical infrastructure information is to be treated as exempt under the Freedom of Information Act.[77] 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.

At the same time, the Act criminalizes the unauthorized disclosure of this type of information, 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).
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> 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).
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> 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.[78]

When DHS issued proposed regulations implementing section 214 of the HSA, it received comments expressing concern that whistleblowers could be treated unfairly and be subject to termination, fines, and imprisonment if they disclosed critical infrastructure information. This would discourage the accurate reporting of

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[76] Public Law No. 107–296, § 214, 116 Stat. 2135 (2002).
[77] *See* 5 U.S.C. § 552.
[78] Letter from Elaine Kaplan, Special Counsel, Office of Special Counsel, to Sen. Charles Grassley (March 10, 2003).

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.[79] However, as stated in DHS's final regulations, published in September 2006, the "refer[ence] to the Whistleblower Protection Act [ ] has been omitted because . . . [it] merely restates the law of the land."[80]

The regulations clearly intend to ensure that disclosures of independently obtained critical infrastructure information are not exempt from the WPA. S. 372 would codify that regulatory intent and make clear that disclosures of this type are free from criminal penalties and are fully covered by the whistleblower provisions in 5 U.S.C. § 2302(b)(8).

Right to a full hearing

Board case law has created a disturbing trend of denying the employees' right to a due process hearing and a public record to resolve their WPA claims. The prevailing practice at the Board now is to deny employees the opportunity to present whistleblower claims if the agency first prevails in its affirmative defense of proving, by clear and convincing evidence, that the agency would have taken the same personnel action for lawful reasons independent of retaliation against the employee for protected whistleblowing.[81]

Taking away whistleblowers' opportunity to present their cases undermines key purposes of the WPA. The order in which parties get to present their cases may influence the fact-finders' perception of the merits and, therefore, potentially the outcome, and 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. Thus, employees may be disadvantaged under the MSPB practice by not being permitted 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 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, the current procedure 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."[82] The Board's merit system oversight duty is so significant that under the 1994 amendments to the Act, the Board must refer managers for

[79] *See* 69 Fed. Reg. 8074.
[80] *See* 71 Fed. Reg. 52262, and 6 CFR § 29.8(f).
[81] *See, e.g., Rusin* v. *Dept. of Treasury*, 92 M.S.P.R. 298 (2002).
[82] *Reprinted in* 135 Cong. Rec. 5033 (1989).

OSC disciplinary investigation whenever there is a finding that reprisal for a protected disclosure was a contributing factor in a decision to take a personnel action, even if the agency ultimately prevails on its affirmative defense of independent justification.[83] The current procedure relieves the Board of these oversight responsibilities, as long as the agency has an acceptable overall affirmative defense.

S. 372 resolves this problem by requiring that, before the agency may present its defense, the employee must have had an opportunity to present his or her evidence first and must have succeeded in presenting a *prima facie* case that the protected activity was a contributing factor in the personnel action. If the employee fails to do that, then the case is dismissed; if the employee succeeds, then the agency gets its turn to present its defense.

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 related to 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, S. 372 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 protected disclosures that do not relate to censorship.μ 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.

Reporting requirements

In order to assist Congress in evaluating the effects of this legislation, S. 372 would require three reports. S. 372 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 would 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. 372 would require the Council of Inspectors General on Integrity and Efficiency to conduct a study on security clearance revocations and the appeals processes available. Finally, it will 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

[83] 140 Cong. Rec. H11422 (daily ed. Oct 7, 1994) (statement of Rep. McCloskey).

Committee believes that these provisions will enable Congress to examine closely how this bill is implemented and to evaluate whether provisions subject to the five-year sunset should be extended and to consider additional steps if needed in the interim.

Alternative review

The duration of the MSPB process often leaves whistleblowers, many of whom have been terminated from federal employment, without resolution of their claims for far too long. To address this problem, the bill as reported establishes an alternative review procedure for certain whistleblower retaliation cases. Subject to a five-year sunset, the bill would allow claims involving major personnel actions to go to federal district court if at least one of the following conditions is met: the MSPB does not issue a final order or decision within 270 days after the request for corrective action was submitted; or if the MSPB certifies, upon motion from the employee, that the Board is not likely to dispose of the case within 270 days or that 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, involves a novel question of law, or states a claim upon which relief can be granted. With respect to the last condition, 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 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 considered on appeal only 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 major personnel actions under 5 U.S.C. §§ 7512 and 7542. Second, alternative review is limited to cases that take more than 270 days to resolve, or are certified for district court because they are likely to take more than 270 days or they involve complex or multiple claims, novel questions of law, or state a claim upon which relief can be granted. 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 Fed-

eral Circuit Court of Appeals that narrowly interpret the WPA have undermined employees' confidence in the Board process.[84] 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.[85]

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.[86] 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.[87] 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."[88] 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.

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.[89] 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.[90] 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.[91]

As discussed in the section above regarding all circuit review, numerous whistleblower statutes provide access to district court to

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[84] *See* Statement of Thomas Devine, Legal Director, Government Accountability Project, S. 372 Hearing *supra* note 71.

[85] *Id.*

[86] *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 71, at 12–13.

[87] *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).

[88] *Id.*

[89] *See id.; see also* Devine Statement, S. 372 Hearing *supra* note 71.

[90] Vaughn Statement, S. 372 Hearing *supra* note 71, at 14.

[91] *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* is 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.

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 in district court.

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. 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.[92] 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, "we would suggest that Congress consider adopting damages caps analogous to the Title VII context to ensure that incentives are properly aligned and to alleviate concerns about runaway juries."[93]

To address the concern that fear of litigation could chill needed discipline of problem employees, and to ensure that there is no financial incentive to bring less significant WPA cases in district court, the alterative 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 at the hearing on S. 372 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.[94] The Committee concludes 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, 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 included in the substitute amendment adopted by the Committee are subject to a five-year sunset, in order to allow Congress to evaluate the impact of this

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[92] Statement of William L. Bransford, General Counsel, Senior Executives Association, S. 372 Hearing *supra* note 71.
[93] De Statement, S. 372 Hearing *supra* note 71.
[94] *Id.*

provision on federal whistleblower protections, the MSPB, and the federal district courts.

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.[95] To assist the Board with prompt adjudication of WPA claims, the Committee included in the substitute amendment to S. 372 a provision authorizing 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 MPSB may examine evidence and pleadings before it and shall determine, 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.

Classified disclosures to Congress for employees under the WPA

In order to clarify a procedure under the WPA by which federal employees may disclose to Congress classified information that evidences waste, fraud, and abuse, S. 372 amends 5 U.S.C. § 2302(b)(8) to allow all federal employees to take advantage of the procedures that have already been set forth for disclosing classified information to Congress in the Intelligence Community Whistleblower Protection Act.

As introduced, S. 372 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 is direct and specific evidence of 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), which contained very similar provisions to S. 372 as introduced, although that bill would have applied only to the intelligence community. The Executive Branch 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 impermis-

[95] *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.

sible encroachment on the President's ability to carry out core executive functions."[96] In its report, 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 assigned functions, and it was justified by an overriding need to promote the objectives within the constitutional authority of Congress.[97]

Nonetheless, in order to address the Administration's concerns, the House and Senate agreed to modify the Senate proposal and enacted the ICWPA, which provides a secure process by which a whistleblower in the intelligence community may disclose wrongdoing to Congress.[98] Specifically, the ICWPA requires an employee to first inform the inspector general for his or her agency, who determines if the employee's complaint is credible. If the inspector general determines the complaint is credible, he or she must transmit the information to the House and Senate Intelligence Committees. The employee may also transmit the information to those committees if the inspector general does not determine the complaint to be credible, but the employee must first notify the inspector general that he or she will take such action. Thereafter, the agency has the ability to provide the employee with appropriate instructions regarding how to transmit classified information to the Congress and an opportunity to review the disclosure of this information. However, as the House and Senate agreed in the conference report for the ICWPA, the ICWPA "establishes *an additional* process to accommodate the disclosure of classified information of interest to Congress." 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."[99]

The current Administration likewise objected to S. 372's provisions explicitly protecting classified disclosures to Congress. Mr. De, on behalf of the Administration, testified at the hearing on S. 372:

> 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 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.[100]

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[96] *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).

[97] S. Rep. No. 105–165 (1998).

[98] Intelligence Authorization Act for FY 1999, Public Law No. 105–272, 112 Stat. 2396, title VII (1998) ("Intelligence Community Whistleblower Protection Act of 1998").

[99] H.R. Rep. No. 105–780 (1998) (emphasis added).

[100] *See* De Statement, S. 372 Hearing *supra* note 71, at 11.

The Committee believes that the original provision of S.372, as introduced, is consistent with Congress's constitutional role; however, to accommodate the concerns expressed by the Administration, the Committee agreed to alter this provision. The substitute amendment to S. 372 adopted by the Committee strikes the original provision described above and adds provisions that would provide federal employees covered under the WPA with protection under the WPA if they disclose classified information to Congress using the procedures that now apply under the ICWPA only to employees at certain intelligence agencies. This provision in S. 372, as amended, is intended to ensure that employees who witness waste, fraud, and abuse are not inhibited from disclosing it appropriately, and thereby seeking to end it, simply because it involves classified information, and to ensure that Congress receives the information necessary to fulfill its oversight responsibilities, while protecting all federal employees from retaliation for disclosing wrongdoing to Congress. In addition, this provision seeks to ensure the proper handling of classified documents and information in the process of reporting wrongdoing, consistent with the requirements under the ICWPA, and will extend WPA protection to employees who come forward under this process with information about prohibited practices and waste, fraud, and abuse in the federal government.

The Committee emphasizes that this new process is but *one* way for federal employees to disclose classified information to Congress. 5 U.S.C. § 2302(b) currently states that it is not to be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to the Congress. The new process does not in any way limit the right to communicate with Congress under the Lloyd-La Follette Act[101] (which codifies federal employees' right to petition or provide information to Congress) or any other provision of law.

Whistleblower Protection Ombudsman

To ensure that employees are aware of their rights under the WPA and avenues of redress, the Committee agreed to include a provision in the substitute amendment to S. 372 adopted by the Committee that requires each agency inspector general to designate a Whistleblower Protection Ombudsman within the Office of the Inspector General. This Ombudsman would advocate for agency employees, educate agency personnel about prohibited personnel practices on retaliation for protected disclosures, and advise agency employees on how to make a protected disclosure and help those who have made a protected disclosure. This applies to all inspectors general, whether the employees are covered by the WPA or ICWPA.

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.

[101] Public Law No. 336, 37 Stat. 539, 555 (1912); 5 U.S.C. § 7211.

Establishment of Intelligence Community Whistleblower Protection Board

As discussed above, numerous elements of the intelligence community are excluded from the WPA, under 5 U.S.C. § 2302(a)(2)(C)(ii) because the intelligence community handles highly classified programs and information that must be closely guarded from public disclosure. These whistleblowers are provided a secure channel under the ICWPA by which to disclose sensitive information, first to the appropriate inspector general and then to the Intelligence Committees of Congress. However, the ICWPA does not offer redress if the employee suffers retaliation because of the disclosure.[102]

As Mr. De testified on behalf of the Administration at the hearing on S. 372, establishing a scheme to provide redress would be desirable:

> 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."[103]

Specifically, in order to reconcile the competing interests of providing more robust protections for whistleblowers in the intelligence community and ensuring that classified information vital to national security remains protected, Mr. De, on behalf of the Administration, recommended that a central element of such a remedial process would be the creation of an Intelligence Community Whistleblower Protection Board. According to Mr. De:

> This Board could be composed of senior presidentially-appointed officials from key agencies within and outside of the intelligence community, including inspectors general, to provide a safe and effective means for intelligence community employees to obtain redress if they suffer retaliation for disclosing waste, fraud, or abuse.[104]

The Committee concluded that providing additional protections for intelligence community employees to expose waste, fraud, abuse, and illegal activities, would help protect this country's interests and strengthen its national security. Providing an effective av-

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[102] 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. Although S. 372 creates a consolidated process for all employees in the intelligence community who allege retaliation for protected whistleblower disclosures to seek redress under the ICWPA, the committee does not intend that this legislation would interfere in any way with the ability of Congress and various committees of Congress to exercise oversight of the treatment of Executive branch whistleblowers.

[103] De Statement, S. 372 Hearing *supra* note 71, at 6–7.

[104] *Id.* at 7.

enue for intelligence community employees to obtain redress outside of their employing agencies if they suffer retaliation for disclosing agency waste, fraud or abuse would encourage intelligence community whistleblowers to come forward. Protecting disclosures made according to a specified, protected channel additionally would likely better protect national security information, as Mr. De testified, by removing the incentive to leak information publicly.

Accordingly, the substitute amendment to S. 372 that was agreed to by the Committee adds a second title to S. 372, establishing the Intelligence Community Whistleblower Protection Board (ICWPB) to hear appeals of intelligence community whistleblower cases.[105] The ICWPB would act in many respects as the MSPB does for whistleblowers outside the intelligence community, and would be located within the Office of the Director for National Intelligence to ensure that it has the expertise and resources needed to appropriately protect highly sensitive information that may be involved in intelligence-community whistleblower cases. The ICWPB would consist of a Chairperson appointed by the President and four other members, all of whom would be confirmed by the Senate. Two of the four members would be designated by the President from individuals serving as an Inspector General of any agency. The designation of these members is intended to ensure that there is strong representation of members who have a firm understanding of the importance of and mechanisms for oversight and accountability. The President would appoint the other two members, in consultation with the Secretary of Defense, Director of National Intelligence, and the Attorney General. The designation of these members is intended to ensure that the Board contains members with a firm understanding of the importance of and mechanisms for protecting national security information. The members would serve four-year terms, except for the initial terms, which vary from four to six years so that future terms will be staggered.

The Chairman of the ICWPB would be paid at level III of the executive schedule on a pro rata basis for time spent on Board activities. The members appointed in consultation with the Secretary of Defense, Director of National Intelligence, and the Attorney General would be compensated at the same rate for time spent on ICWPB activities, up to 130 days per year. The inspectors general appointed to the ICWPB would not receive additional compensation.

S. 372 provides the ICWPB with the authority, in consultation with the Attorney General, the Director of National Intelligence, and the Secretary of Defense, to promulgate rules, regulations and guidance and issue orders to fulfill its functions.

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[105] The intelligence community elements under the jurisdiction of the ICWPB are the same elements that are excluded from the WPA and under the ICWPA, discussed above. These do not include (unless designated by the President) all of the elements of the intelligence community as it typically is defined in law, which is having the same meaning as set forth in section 3(4) of the National Security Act of 1947 (50 U.S.C. § 401a(4)). The agencies excluded from the WPAs protections and within the scope of the ICWPA always have been narrower than the intelligence community as defined by the National Security Act. Although there may be some value to a consistent definition in law, the Committee has determined that consistency is not a sufficient basis to exclude additional entities from the more robust protections of the WPA. The Committee does note that the President has the authority to exclude other elements of the intelligence community.

Prohibited personnel practices against employees under the ICWPA

Under the substitute amendment agreed to by the Committee, S. 372 would make it a "prohibited personnel practice" for a supervisor to take or fail to take, or threaten to take or fail to take, a personnel action, as defined under the WPA, against an employee under the ICWPA. Additionally, like the WPA, S. 372 would make it a prohibited personnel practice for a supervisor to take or fail to take, or threaten to take or fail to take, any personnel action against any employee because he or she—(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 agency Inspector General. The denial, suspension, or revocation of a security clearance or denying access to classified or sensitive information or a suspension with pay pending an investigation would be subject to challenge under separate government-wide provisions on security clearances, discussed below. If an ICWPA employee seeks to challenge both a security clearance determination and other alleged retaliation, the employee would bring both claims jointly under the security clearance process.

These provisions afford employees under the ICWPA protections against most of the same forms of retaliatory personnel actions that are forbidden under the WPA. The exception is that it cannot be considered unlawful retaliation to withdraw an employee's security clearance, to deny an employee's access to classified or sensitive information, or to suspend an employee with pay pending the conclusion of an investigation. This exception recognizes that intelligence entities may need to take quick action to protect national security while an investigation of an employee is pending.

Protected disclosures by employees under the ICWPA

As under the WPA, protected disclosures under S. 372 would include information the employee reasonably believes 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. However, employees could seek protection through the ICWPB appeals process only if they made their disclosures to certain officials in certain ways, due to the sensitive information involved and limits on which officials have security clearances and access to certain information. Any disclosure to an agency official would be protected if disclosure is not specifically prohibited by law or executive order. The Committee intends to treat information that would reveal classified information the same as classified information. This restriction does not apply to disclosure to Inspectors General or agency officials designated to receive such disclosures, because these officials have procedures in place for handling classified disclosures of wrongdoing. Additionally, disclosures to Congress that comply with the ICWPA procedures, described above, or with the process for disclosing information under the Central Intelligence Agency Act [106] are protected within this appeals process.

[106] Public Law No. 81–110, 63 Stat. 208 (1949). The relevant procedures are codified at 50 U.S.C. § 403q.

The provisions governing protected disclosures by employees under the ICWPA include the same clarifications that S. 372 would add to the WPA regarding the nature and circumstances of disclosures that are protected under the WPA. As described above, employees' disclosures are protected under S. 372 if the disclosure was made during the normal course of the employee's duties; made to a person, including a supervisor, who participated in the wrongdoing; revealed information that had been previously disclosed; was not made in writing; or was 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.

Remedial procedures for employees under the ICWPA

A. Appeals to the agency head or designee

For employees, applicants, or former employees under the ICWPA who allege a prohibited personnel practice, as described above, S. 372 would provide a process for review. First, an affected individual would file an appeal with the head of his or her employing agency or the agency head's designee. An individual who is not satisfied with the agency head's or designee's decision, could appeal that decision to the ICWPB. Finally, the individual could file a petition for review of the ICWPB's decision in a federal court of appeal.

Regarding the first level of review, S. 372 would provide employees, applicants, or former employees of an intelligence community element with the right to appeal a prohibited personnel practice to the head of his or her employing agency, or the agency head's designee. S. 372 provides flexibility for agencies within larger Departments, such as the National Security Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, and the National Reconnaissance Office within the Department of Defense, to determine how best to allocate responsibility for this function. Such intra-agency appeals would be conducted according to rules of procedures issued by the ICWPB, unless the ICWPB determines that agency procedures in effect on the date of enactment of S. 372, including existing rules for employees of the Federal Bureau of Investigation promulgated under 5 U.S.C. §2303, adequately provide certain procedural guarantees.

With respect to these procedural guarantees, S. 372 would require that agency rules of procedure be based on those pertaining to prohibited personnel practices under 5 U.S.C. §2302(b)(8) and provide: (1) An independent and impartial fact-finder; (2) notice and the opportunity to be heard and present evidence, including witness testimony; (3) that the individual may be represented by counsel; (4) that the individual has a right to a decision based on the record developed during the appeal; (5) that the impartial fact-finder shall provide the agency head, or designee, a report within 180 days of the appeal, unless agreed to by the employee and the agency; (6) for the use of classified information in a manner consistent with the interests of national security, including *ex parte* submissions where the agency determines they are warranted; and (7) that the individual shall have no right to compel the production of classified information, except evidence needed to establish that

the employee made the disclosure or communication at issue. The fact-finder is required to prepare a written report with findings, conclusions, and if applicable, recommended corrective action that should be taken by the agency. The agency would issue an order implementing corrective action or denying relief within 60 days of the fact-finder issuing the report, unless the employee consents to additional time. These procedures are intended to ensure that agencies establish robust processes to allow full, fair, and prompt adjudication of ICWPA whistleblower claims, while appropriately protecting classified information.

As under the WPA, if an employee demonstrates that a protected disclosure or the exercise of other protected whistleblower rights was a contributing factor in a personnel action, the agency can prevail if it demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure. Prevailing employees subjected to a prohibited personnel practice would be entitled to corrective action including damages, attorney's fees, and costs, but compensatory damages would be capped at $300,000, as under the WPA alternative review process.

B. Appeals to the ICWPB and Courts of Appeal

Employees may appeal the agency's order to the ICWPB within 60 days. The ICWPB's review is *de novo* based on the agency record, and the Board will not admit any additional evidence, although it can remand to the agency for further fact-finding, if needed. S. 372 requires the ICWPB to issue a final decision no later than 180 days after the appeal is filed unless the employee consents to a longer period of time. If the ICWPB determines that an employee has been subjected to a prohibited personnel practice, it shall order the agency head to take corrective action, of the same types and with the same limits as apply to the agency appeal process. The ICWPB may also recommend, but cannot order, the reinstatement or hiring of a former employee or applicant. S. 372 requires that the agency head take the actions ordered by the ICWPB, unless the President determines that doing so would endanger national security. These procedures are intended to ensure independent and prompt review of agency determinations. Moreover, to facilitate congressional oversight of the ICWPB and the implementation of S. 372, Congress would be notified of ICWPB orders.

As under the WPA, employees may file a petition for review of a final ICWPB order with the Court of Appeals for the Federal Circuit or the Federal Court of Appeals for a circuit in which the retaliation is alleged to have occurred. In order to maintain consistency with the WPA, the right to appeal to a circuit court other than the Federal Circuit is subject to a five-year sunset.

Review of security clearance or access determinations

Whistleblowers covered by the WPA, as well as those who fall under the ICWPA, have sometimes found themselves inadequately protected when they allege government waste, fraud, and abuse 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 nei-

ther the WPA nor the ICWPA currently provides any protection: the revocation of their security clearance.[107] 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.[108] It 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.

As a result of this decision, if an employee's security clearance or access to classified information is suspended or revoked in retaliation for making protected disclosures—even if the employee is terminated from his or her federal government job because of the suspended or revoked clearance—the MSPB may not review the suspension or revocation. This is so, even though a supervisor may have recommended revocation of the employee's security clearance in retaliation for the whistleblowing, and with the intent that the employee lose his or her job as a result. At the hearing during the 107th Congress on S. 995, one of the predecessor bills to S. 372, 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.[109]

In light of the heightened need to ensure that federal employees can come forward with information vital to preserving our national security, 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, 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.[110]

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[107] *See, e.g.*, Mark Hertsgaard, Nuclear Insecurity, *Vanity Fair*, Nov. 2003, at 175.

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

[109] 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).

[110] De Statement, S. 372 Hearing *supra* note 71, at 7.

As introduced, S. 372 would have provided for an MSPB review of security clearance revocations under the WPA. The Administration, however, objected to the MSPB conducting the review. During the hearing on S. 372, Mr. De, on behalf of the Administration, testified:

> The current bill would allow an employee who alleges that his security clearance was revoked in retaliation for whistleblowing to challenge that determination before the MSPB. The bill provides that the MSPB, or any reviewing court, may grant 'declaratory relief and any other appropriate relief' except for the restoration of a security clearance. That limitation quite properly recognizes this function to be the prerogative of the Executive Branch.[111]

The Administration recommended that the proposed ICWPB, rather than the MSPB, review security clearance revocations, because this Board already would be reviewing retaliation against IC employees in a forum that would provide robust, independent protections and also careful protection of national security information. As Mr. De testified:

> The [Administration's] proposed [Intelligence Community Whistleblower Protection] 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.[112]

The Committee concluded that the Administration's proposal would allow more comprehensive relief for whistleblowers, by expanding the review to include employees under the ICWPA in addition to those covered by the WPA. Accordingly, the substitute amendment adopted by the Committee gives review of security clearance revocations to the ICWPB rather than the MSPB.

S. 372 would require that, to the extent practicable, agencies continue to employ individuals who challenge a security clearance suspension or revocation while the challenge is pending. It also would require the development and implementation of uniform and consistent policies and procedures for challenging a security clearance determination, although it would not authorize challenges to suspensions of one year or less for an investigation.[113] The same procedural protections for appealing prohibited personnel practices under the ICWPB, discussed above in the section on remedial procedures for ICWPB agency-level appeals, would be incorporated

[111] *Id.* at 8–9.
[112] *Id.* at 8–9.
[113] If an employee seeks to challenge both an alleged prohibited personnel practice and an adverse security clearance determination, the employee must bring both claims under the procedures for security clearance revocations.

into the ICWPB procedures for challenging security clearance revocations.

The Committee concluded that the process to review allegedly retaliatory security clearance and access determinations should be structured like the process for challenging prohibited personnel practices against employees covered under the ICWPA, both in the interest of consistency and because the balance between encouraging whistleblowing and protecting classified information is the same in both cases. Accordingly, the provisions for reviewing security clearance or access determinations define protected disclosures in the same way they are defined for challenging other types of retaliation under the ICWPB process. Likewise, as with the other redress provisions under the ICWPB, security clearance determinations made in retaliation for exercising a right of appeal, complaint, or grievance; assisting another in the exercise of a whistleblower right; or cooperating with an inspector general is prohibited.

Procedures for review of security clearance decisions

A. Agency Adjudication

S. 372 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 file an appeal within the agency in the same manner as employees covered under the ICWPA, alleging a prohibited personnel practice based on a protected disclosure. Employees who prevail in their claims would be entitled to the same types of damages as apply to cases involving prohibited personnel practices under the ICWPA, with a $300,000 cap on compensatory damages.[114]

The Committee, however, determined that it is appropriate to alter the burden of proof for security clearance retaliation claims. During the 108th Congress, in testimony before the Committee on S. 2682, one of the predecessor bills to S. 372, DOJ argued that the burden of proof in whistleblower cases is fundamentally incompatible with the standard for granting security clearances, which only permits granting access to classified information where clearly consistent with the interests of national security.[115]

S. 372's objective in this section is to prohibit retaliation from serving as a factor in decisions that should be grounded solely in national security considerations. That means it also is essential that S. 372 not disrupt or undermine the preexisting, imperative national security objectives of the security clearance process or impose any chilling effect upon officials making these sensitive determinations for legitimate reasons. The Committee's purpose is to deter retaliation against whistleblowers and to close the loophole that security clearance revocations have opened. However, the conventional burden of proof in whistleblower cases may not fairly integrate into the security clearance determination process, because a security clearance may be granted "only where facts and circumstances indicate access to classified information is clearly con-

[114] In addition to the separate caps of $300,000 for compensatory damages for prohibited personnel practices and for security clearance decisions, an employee who raises both claims may not be awarded more than $300,000 in total compensatory damages.

[115] S. 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).

sistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security."[116] In the especially sensitive area of security clearance and classified access determinations, requiring clear and convincing evidence to justify the denial or revocation when the employee has made a *prima facie* whistleblower case may not be appropriate.

Therefore, the substitute amendment to S. 372 adopted by the Committee provides that if an employee shows that a protected disclosure was a contributing factor in a security clearance determination, the agency will 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."[117] This unique deference to national security interests is one element in the factors to be considered when determining if the agency would have taken the same security clearance action. It does not apply when considering the existence and strength of the affirmative case made by the employee, including any proof of motive to retaliate on the part of the agency officials involved in the decision. Moreover, if either the agency or the Board finds retaliation, the unique deference to national security applied to security clearance decisions does not limit other corrective action, including damages.

B. Review by the ICWPB

For cases alleging a retaliatory security clearance determination, S. 372 also allows for the appeal of a final agency decision to the ICWPB within 60 days. As with other ICWPB appeals, the Board's review is *de novo* 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 ICWPB finds that the agency's determination was retaliatory, employees are entitled to the same types of damages as discussed above, and the Board may recommend 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."[118] The ICWPB may also recommend, but not order, reinstatement or hiring of a former employee or applicant. S. 372 requires the ICWPB to notify Congress of any orders it issues, and an agency must notify Congress if it does not follow the ICWPB's recommendation to reinstate a clearance.

Unlike in cases where prohibited personnel practices are alleged, S. 372 does not provide for judicial review of agency or ICWPB actions on appeals taken in connection with the revocation of an employee's security clearance or access to classified information. The Administration takes the position that providing a judicial remedy, even one that does not mandate restoration of the clearance, is inconsistent with the traditional deference afforded to the Executive Branch in this area.[119]

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[116] *See* Executive Order 12968—Access to Classified Information (August 2, 1995).

[117] New section 3001(j)(3)(C) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. § 435b(j)(3)(C)), as added by section 202(b) of S. 372, as reported.

[118] New section 3001(j)(4)(F) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. § 435b(j)(4)(F)), as added by section 202(b) of S. 372, as reported.

[119] De Statement, S. 372 Hearing *supra* note 71, at 7.

As with the broader issue of control of classified information, the Congress long has held a different view of the authorities of the Executive Branch and Congress with respect to security clearances. Executive Branch authority in this area is not exclusive and Congress properly plays a role. 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 would be 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 concludes that the ICWPB can provide adequate review of security clearance retaliation. Given the national security and institutional concerns the Administration raised, the Committee agreed, in the substitute amendment adopted by the Committee, to accommodate the Administration's request not to provide judicial review of security clearance determinations. However, S. 372 will require congressional notification of ICWPB orders and certain agency actions that will facilitate oversight of the security clearance redress process created by this legislation, which will provide a check against implementation inconsistent with congressional intent.

ICWPA revisions

An employee covered under either the WPA or ICWPA who has submitted a complaint or information to an inspector general under the ICWPA procedures would be permitted to inform Congress that he or she made a submission to that particular inspector general, and of the date on which the submission was made. Additionally, S. 372 allows an inspector general to submit a complaint or information under the ICWPA or the Central Intelligence Agency Act of 1949 directly to the Chair of the ICWPB if the inspector general determines that submission to the agency head would create a conflict of interest.

III. Legislative History

S. 372 was introduced by Senators Akaka, Collins, Grassley, Levin, Lieberman, Voinovich, Leahy, Kennedy, Carper, Pryor, and Mikulski on February 3, 2009, and was referred to the Committee on Homeland Security and Governmental Affairs. Senators Cardin and Burris have since joined as cosponsors. The bill was referred to the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia (OGM) on March 20, 2009.

This legislation is the culmination of nearly 10 years of work by Senator Akaka, other sponsors, and the Committee. S. 372 is similar to S. 274, introduced in the 110th Congress as the Federal Employee Protection of Disclosures Act on January 11, 2007. The Committee reported S. 274 favorably on June 13, 2007, and S. 274 passed the Senate on December 17, 2007. Additionally, S. 372 is similar to S. 494, introduced in the 109th Congress on March 2, 2005, and favorably reported by the Committee on April 13, 2005. S. 494 passed the Senate as an amendment (S. Amdt. 4351) to the John Warner National Defense Authorization Act for Fiscal Year 2007, H.R. 5122, on June 22, 2006.

S. 494 was identical to S. 2628, introduced in the 108th Congress on July 8, 2004, and favorably reported by the Committee on July 21, 2004, both of which were similar to S. 1358, introduced on June 26, 2003. These bills follow previous versions of the legislation: S. 3190, introduced on October 12, 2000; S. 995, introduced on June 7, 2001; and S. 3070, introduced on October 8, 2002, and favorably reported by the Committee on November 19, 2002.

The Committee and its subcommittees have held three hearings on S. 372 and predecessor bills. Most recently, S. 372 was the subject of a hearing before the OGM Subcommittee on June 11, 2009. Witnesses included Mr. Rajesh De, Deputy Assistant Attorney General, Office of Legal Policy, at the U.S. Department of Justice; Mr. William L. Bransford, General Counsel of the Senior Executives Association; Ms. Danielle Brian, Executive Director of the Project on Government Oversight; Mr. Thomas Devine, Legal Director of the Government Accountability Project; and Professor Robert G. Vaughn, Professor of Law, Washington College of Law at American University.

On November 12, 2003, the Committee held a hearing on S. 1358. Witnesses included Senator Charles Grassley (R–IA); Mr. Peter Keisler, Assistant Attorney General, Civil Division, U.S. Department of Justice; Ms. Elaine Kaplan, attorney and former U.S. Special Counsel; Mr. Thomas Devine, Legal Director, Government Accountability Project; Mr. Stephen Kohn, Chairman, Board of Directors, National Whistleblower Center; and Mr. William Bransford, Partner, Shaw, Bransford, Veilleux & Roth, P.C., and General Counsel to the Senior Executives Association. The Committee also received written testimony from Ms. Susanne Marshall, then-Chairman of the MSPB. Additionally, on July 25, 2001, the Subcommittee on International Security, Proliferation, and Federal Services held a hearing on S. 995.

On July 28, 2009, OGM favorably polled out S. 372, and the Committee considered S. 372 on July 29, 2009. Senators Akaka, Collins, Lieberman, and Voinovich offered a substitute amendment, which was agreed to by voice vote. The amendment allows the claimant to move certain WPA cases to federal district court, creates a process for employees under the ICWPA to seek redress for whistleblower retaliation, and creates a process for all employees to seek redress for security clearance decisions made in retaliation for protected whistleblowing, among other provisions. The bill, as amended, was ordered reported favorably en bloc by voice vote. Members present were Senators Lieberman, Akaka, Carper, Pryor, McCaskill, Burris, Collins, Coburn, and Voinovich.

IV. SECTION-BY-SECTION ANALYSIS

Section 1 titles the bill as the Whistleblower Protection Enhancement Act of 2009.

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

Section 101

Section 101(a) clarifies congressional intent that the law covers a whistleblowing disclosure of "any" violation, except a minor, inad-

vertent violation of law that occurs during the conscientious carrying out of official duties.

Section 101(b) makes technical and conforming amendments and clarifies that a disclosure shall not be excluded from protection because it is made during the normal course of an employee's duties; was made to a person, including a supervisor, who participated in the wrongdoing; revealed information that had been previously disclosed; was not made in writing; was made while the employee was off duty; because of the employee or applicant's motive for making the disclosure; or because of the amount of time since the occurrence of the events described in the disclosure.

Section 102

Section 102(a) 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 illegal activity, gross mismanagement, a gross waste of funds, an abuse of authority or specific danger to public health or safety.

Section 102(b) provides a definition of "clear and convincing evidence"—that is, the degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established—for the purposes of determining whether corrective action is warranted.

Section 103 provides that any presumption relating to a public officer's performance of a duty can be overcome with substantial evidence. It also codifies the objective test for reasonable belief as 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

Section 104(a) adds to the list of prohibited personnel practices that may not be taken against whistleblowers in retaliation for protected disclosures the enforcement of a nondisclosure policy, form or agreement.

Section 104(b) bars agencies from implementing or enforcing against whistleblowers any nondisclosure policy, form or agreement that fails to contain specified language preserving the right of federal employees to disclose certain protected information. A non-disclosure policy, form, or agreement in effect before the date of enactment could be enforced after public notice of this specified language.

Section 104(c) leaves *Russell* as the governing law for demonstrating that retaliatory investigations are prohibited personnel practices and additionally permits corrective action awarded to whistleblowers to 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.

Section 105 adds the Office of the Director of National Intelligence and the National Reconnaissance Office to the list of intelligence community entities excluded from WPA coverage, and pro-

vides that a whistleblower at an agency cannot be deprived of coverage under the WPA unless the President removes the agency from WPA coverage prior to a challenged personnel action taken against the whistleblower.

Section 106 modifies the proof in disciplinary actions by requiring the OSC to demonstrate that the whistleblower's protected disclosure was a "significant motivating factor" in the decision by the manager 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 107 requires that, in disciplinary actions, any attorney fees would be reimbursed by the manager's employing agency rather than the OSC, and permits recovery of reasonable and foreseeable compensatory damages.

Section 108

Section 108(a) creates a five-year pilot program that suspends the exclusive jurisdiction of the U.S. Court of Appeals for the Federal Circuit over whistleblower appeals and allows petitions for review to be filed either in the federal circuit or in any other federal circuit court of competent jurisdiction for a period of five years.

Section 108(b): During this five-year period, the Office of Personnel Management's existing authority to file petitions of review of the MSPB orders interpreting civil service law would be expanded to permit the filing 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 establishes that employees of the Transportation Security Administration are covered by section 5 U.S.C. 2302(b)(1), (8), and (9), which includes 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, and the Rehabilitation Act of 1973.

Section 110 clarifies that an employee is protected from reprisal for disclosing information which an employee reasonably believes is evidence of censorship related to research, analysis, or technical information if the employee reasonably believes the censorship is or will cause gross government waste or mismanagement, a substantial and specific danger to public health or safety, or any violation of law.

Section 111 clarifies that section 214(c) of the Homeland Security Act (HSA) maintains existing WPA rights for independently obtained information that may also qualify as voluntarily submitted critical infrastructure information under the HSA.

Section 112 requires agencies, as part of their education requirements under 5 U.S.C. § 2302(c), to advise employees of their rights and protections and to educate employees on how to lawfully make a protected disclosure of classified information to the Special Counsel, the Inspector General, Congress, or other designated agency official authorized to receive classified information.

Section 113 strengthens the OSC's ability to protect whistleblowers and the integrity of the WPA and the Hatch Act by authorizing the OSC to appear as *amicus curiae* in any civil action brought in connection with the WPA and the Hatch Act and

present its views with respect to compliance with the law and the impact court decisions would have on the enforcement of such provisions of the law.

Section 114 specifies that an agency may present its defense to a whistleblower case only after the whistleblower has first made a *prima facie* showing that protected activity was a contributing factor in the personnel action.

Section 115

Section 115(a) requires all federal nondisclosure policies, forms, and agreements to contain specified language preserving the right of federal employees to disclose certain protected information. Nondisclosure policies, forms, and agreements without that statement may not be implemented or enforced in a manner inconsistent with the specified statement of rights. Nondisclosure policies, forms, and agreements in effect before the date of enactment may continue to be enforced with respect to current employees if the agency provides the employees notice of the statement, and may continue to be enforced against past employees if the agency posts notice of the statement on the agency website for one year.

Section 115(b) provides that a nondisclosure policy, form, or agreement for a person who is not a federal employee, but who is connected with the conduct of intelligence or intelligence-related activity, shall contain appropriate provisions that require nondisclosure of classified information and make clear the forms do not bar disclosures to Congress or to an authorized official that are essential to reporting a substantial violation of law.

Section 116

Section 116(a) requires the GAO to report on the implementation of this Act within 40 months, including an analysis of the number of cases filed with the MSPB under 5 U.S.C. §§ 2302 (b)(8) and (b)(9), their disposition, and any resulting trends.

Section 116(b) requires the Council of Inspectors General on Integrity and Efficiency to report on security clearance revocations at a select sample of executive branch agencies and on the appeals process in place at those agencies and under the Intelligence Community Whistleblower Protection Board within 18 months.

Section 116(c) requires the MSPB to report on the number and outcome of cases filed under 5 U.S.C. §§ 2302(b)(8) and (b)(9) on a yearly basis.

Section 117 creates a five-year pilot program that permits an employee who has been subjected to a major personnel action to file for a *de novo* review in U.S. district court if the employee seeks corrective action or files an appeal with the MSPB under certain circumstances. More specifically, the employee may file in district court if no final order or decision is issued by the MSPB within 270 days after the request was submitted; or upon certification by the MSPB that the Board is not likely to dispose of the case within 270 days after the request was submitted or that 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, involves a novel question of law, or states a claim upon which relief can be granted. Under this section, an employee may submit a motion for certification to the MSPB within 30 days of the original re-

quest for corrective action or appeal. The MSPB shall rule on the motion within 90 days, and not later than 15 days before issuing a final decision on the merits of the case, and shall stay any other claims while the district court case is pending. In 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 the agency would have taken the same personnel action in the absence of a protected disclosure. In district court, the employee may not be represented by the Special Counsel. 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 compensatory damages may not exceed $300,000 and punitive damages are not permitted. An appeal from a final decision of a district court can be taken to the Federal Circuit in the district in which the action was filed.

Section 118

Section 118(a) authorizes the MSPB to consider and grant summary judgment motions in WPA cases involving major personnel actions 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 judgment as a matter of law.

Section 118(b) provides that this 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 provides that employees protected under the WPA may make protected classified disclosures 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-La Follette Act, codified in 5 U.S.C. § 7211, or other provisions of law.

Section 120 requires that agency inspectors general, including the Inspector General of the Central Intelligence Agency and each other inspector general within the intelligence community, designate a Whistleblower Protection Ombudsman within the Office of the Inspector General. The Ombudsman would advocate for the interests of agency employees who make disclosures of information, educate agency personnel about prohibited personnel practices on retaliation for protected disclosures, and advise agency employees who have made a protected disclosure or are contemplating making a disclosure.

TITLE I—INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTECTIONS

Section 201 establishes protections for certain intelligence community whistleblowers.

Section 201(a) would amend Title I of the National Security Act of 1947 by adding two sections to the Act, Section 120 and Section 121:

Section 120(a) of the National Security Act, as amended, establishes the Intelligence Community Whistleblower Protection Board (ICWPB).

Section 120(b) of the National Security Act, as amended, establishes the membership of the ICWPB. The ICWPB would consist of a Chairperson; two members designated by the President from in-

dividuals serving as Presidentially-appointed, Senate-confirmed inspectors general of any agencies; and two members appointed by the President after consultation with the Attorney General, the Director of National Intelligence, and the Secretary of Defense. Two alternate Board members would also be designated by the President and would serve if a Board member recuses himself or herself from a matter. The Chairperson would be paid at the annual rate of basic pay payable for level III of the Executive Schedule under 5 U.S.C. § 5324, and Board members would be paid at the same rate of pay on a pro rata basis for time spent on Board activities, except that inspectors general would not receive any additional pay. The Board members would serve four-year terms, except that the first Chairperson appointed by the President would serve six years, two of the original Board members would serve five years, and the other two original Board members would serve four years, in order to create staggered terms in the future.

Section 120(c) of the National Security Act, as amended, establishes the resources and authority of the ICWPB. The Office of the Director of National Intelligence would provide the Board with adequate office space, equipment, supplies and communications facilities, and services necessary for the operation of the Board. The Chairperson would transmit a budget to the Director of National Intelligence specifying the aggregate amount of funds required for the fiscal year. The Director of National Intelligence would then transmit a proposed budget to the President for approval. The Chairperson would be authorized to select, appoint, and employ officers and employees of the Board as necessary. Section 120(c) provides the Board authority to promulgate rules, regulations, and guidance, and issue orders, although any Board rule, regulation, or guidance must be jointly approved by the Director of National Intelligence, Secretary of Defense, and Attorney General.

Section 121(a) of the National Security Act, as amended, specifies that the intelligence community elements under the jurisdiction of the ICWPB will be the same as those intelligence entities excluded from the WPA by 5 U.S.C. § 2302(a)(2)(C) and covered under the ICWPA, specifically, 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, the National Reconnaissance Office, and, as determined by President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, if that determination is made before the challenged personnel action. Section 121(a) also defines "personnel action" as an action taken against an employee under the ICWPA that would be considered a personnel action as defined in 5 U.S.C. § 2302(a)(2)(A), but would not include the denial, suspension, or revocation of a security clearance or the denial of access to classified information or a suspension with pay pending an investigation.

Section 121(b) of the National Security Act, as amended, prohibits taking any personnel action against employees under this section because of a protected disclosure. Disclosures protected under this section are the same types of disclosure of wrongdoing as are protected under the WPA in 5 U.S.C. § 2302(b)(8). Disclosures to agency officials are protected if not specifically prohibited

by law or executive order. Disclosures that comply with section 8H of the Inspector General Act of 1978 (5 U.S.C. App.) or with section 17(d)(5) of the Central Intelligence Agency Act of 1949 (50 U.S.C. § 403q(d)(5)), as well as disclosures of wrongdoing to inspectors general and designated agency officials, are also protected. A prohibited personnel practice would include taking action against someone because he or she—(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 inspector general. Disclosures would not be excluded from protection under the intelligence community whistleblower protections under the same circumstances as disclosures are not excluded from WPA coverage, as set forth in Section 101(b). Section 121(b) does not authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress.

Section 121(c)(1) of the National Security Act, as amended, establishes a remedial procedure for employees under the ICWPA who believe they have been subjected to a prohibited personnel practice. Employees would have the right to appeal an alleged prohibited personnel practice to the agency head, and applicable rules of procedure, based on those pertaining to prohibited personnel practices under 5. U.S.C. § 2302(b)(8), would provide: (1) for an independent and impartial fact-finder; (2) for notice and the opportunity to be heard and present evidence, including witness testimony; (3) that the individual may be represented by counsel; (4) that the individual has a right to a decision based on the record developed during the appeal; (5) that the impartial fact-finder shall provide the agency head, or designee, a report within 180 days, unless agreed to by the employee and the agency; (6) for the use of the classified information in a manner consistent with the interests of national security, including *ex parte* submissions; and (7) that the individual shall have no right to compel the production of classified information, except evidence to establish that the employee made the disclosure alleged to be protected.

Section 121(c)(2) of the National Security Act, as amended, requires the impartial fact-finder to prepare a report with findings, conclusions, and if necessary, recommended corrective action. After reviewing the record and the fact-finder's report, the agency head would determine whether the individual has been subjected to a prohibited personnel practice and either issue an order denying relief or implement corrective action. This decision would be made within 60 days, unless the employee consents to additional time. Corrective action would include the employee's reasonable attorney's fees and costs, and may include back pay and related benefits, travel expenses, and compensatory damages no greater than $300,000.

Section 121(c)(3) of the National Security Act, as amended, requires the agency head to find that a prohibited personnel practice occurred if a protected disclosure was a "contributing factor" in the personnel action unless the agency can demonstrate by clear and convincing evidence that it would have taken the same action in the absence of the employee's protected disclosure.

Section 121(c)(4) of the National Security Act, as amended, allows an employee to appeal an agency head's final order to the In-

telligence Community Whistleblower Protection Board within 60 days. The ICWPB's review of the record would be *de novo*, and its determination would be based on the entire record. The appeal would be conducted under the rules of procedure issued by the ICWPB, described in Section 121(c)(1). The ICWPB could not admit additional evidence, but it would have authority to remand to the agency for further fact-finding if necessary or if the agency improperly denied the employee or applicant the ability to present evidence. Unless the employee consents, the Board would be required to issue a decision within 180 days. The Board shall order the agency to take corrective action if it determines that a prohibited personnel practice has occurred. Corrective action would include the employee's reasonable attorney's fees and costs, and might include back pay and related benefits, travel expenses, and compensatory damages no greater than $300,000. The Board could recommend, but not order, the reinstatement or hiring of a former employee or applicant. The Agency head would be required to take the actions ordered by the Board unless the President determines that doing so would endanger national security.

Section 121(c)(5) of the National Security Act, as amended, allows for judicial review of a final order. For a five-year trial period, an employee would be permitted to file a petition for review in the Court of Appeals for the Federal Circuit or the court of appeals of a circuit in which the reprisal is alleged in the order to have occurred. After that period, appeals would be filed in the Court of Appeals for the Federal Circuit. Any portions of the record that were submitted *ex parte* during agency proceedings would be submitted *ex parte* to the ICWPB and any reviewing court. Section 121(d) limits judicial review to the express provisions of this section. This section also requires the ICWPB to notify Congress when it issues final orders.

Section 121(d) of the National Security Act, as amended, limits judicial review to the express provisions of this section.

Section 121(e) of the National Security Act, as amended, provides that the legislation affords no protections for certain terminations of employment: (1) Those under 10 U.S.C. § 1609; and (2) those personally and summarily carried out by the Director of National Intelligence, the Director of the Central Intelligence Agency, or an agency head under 5 U.S.C. § 7532, if the Director or agency head determines the termination to be in the interest of the United States, determines that the procedures prescribed in other provisions of law that authorize the termination of the employee's employment cannot be invoked in a manner consistent with national security, and notifies Congress.

Section 121(f) of the National Security Act, as amended, requires employees challenging both a prohibited personnel practice under this section and an adverse security clearance determination to bring both claims under the procedures set forth for security clearances. The total amount of compensatory damages for such claims may not exceed $300,000.

Section 201(b) strikes 5 U.S.C. § 2303.

Section 201(c) makes technical and conforming amendments.

Section 202

Section 202(a) amends Section 3001(b) of the Intelligence Reform and Terrorism Prevention Act of 2004 by requiring the development of policies and procedures that permit, to the extent practicable, individuals covered under both the WPA and ICWPA who, in good faith, challenge a security clearance determination to remain employed while the challenge is pending; and the development and implementation of uniform and consistent policies and procedures to ensure protections to allow review of security clearance determinations alleged to be in retaliation for whistleblowing. Those procedures would be required to include the same guarantees as are described under the new Section 121(c)(1) of the National Security Act, as added by Section 201(a) of the bill.

Section 202(b) prohibits revoking a security clearance in retaliation for a protected disclosure. Disclosures would not be excluded from protection under this section under the same circumstances as disclosures are not excluded from WPA coverage, as set forth in Section 101(b). Section 202(b) provides similar remedial procedures to employees who seek to appeal the revocation of their security clearance determinations as employees who are covered under the ICWPA and who seek to appeal alleged prohibited personnel practices, although it does not allow for an appeal of a suspension for purposes of conducting an investigation that lasts no longer than one year. An employee who believes his or her security clearance was revoked because of a protected disclosure would be permitted to file an appeal within the agency in the same manner as employees alleging a prohibited personnel practice based on a disclosure. If the agency determines that the adverse security clearance determination was retaliatory, it would be required to take corrective action. The same types of damages are available, and with the same limits, as for prohibited personnel practice agency appeals for intelligence employees. The standard of review, however, differs from other whistleblower retaliation claims. The agency would be required to find that a security clearance determination was retaliatory if a protected disclosure was a "contributing factor" in the determination, unless the agency can demonstrate by a preponderance of the evidence that it would have taken the same action in the absence of the 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.

Section 202(b) also allows an employee to appeal an agency head's final order or decision to the ICWPB within 60 days. The Board, in consultation with the Attorney General, the Director of National Intelligence, and the Secretary of Defense, would develop and implement policies and procedures for such appeals. The ICWPB could not admit additional evidence, but it would have authority to remand to the agency for further fact-finding, if necessary, or if the agency improperly denied the employee or applicant the ability to present evidence. The Board's review would be *de novo*, and its determination would be based on the entire record.

Section 202(b) further requires the ICWPB to order corrective action, including damages, attorney's fees, and costs, with compensatory damages capped at $300,000, if the ICWPB determines that an adverse security clearance determination was retaliatory. The Agency head would be required to take the actions ordered by the

Board unless the President determines that doing so would endanger national security. Section 202(b) also allows the Board to recommend, but not order, the reinstatement or hiring of a former employee or applicant, as well as to recommend the reinstatement of a security clearance if it determines that doing so is clearly consistent with the interests of national security. Section 202(b) requires the Board to notify Congress of any orders it issues and requires the agency to notify Congress if an agency does not follow the Board's recommendation to reinstate a security clearance. Judicial review of agency or Board actions under this section is not permitted. Section 202(b) does not apply to adverse security clearance determinations if the employee was terminated under the circumstances described in Section 201(a) under the new Section 121(e) of the National Security Act.

Section 203 allows the inspector general to submit a complaint or information submitted under the ICWPA or the Central Intelligence Agency Act of 1949 directly to the Chair of the ICWPB if the inspector general determines that submission to the agency head would create a conflict of interest. Section 203 also would allow an individual who has submitted a complaint or information to an inspector general to notify any member of Congress, or congressional staff members, of the submission made under the ICWPA or the Central Intelligence Agency Act of 1949.

Section 301 states that the Act would take effect 30 days after the date of enactment.

V. ESTIMATED COST OF LEGISLATION

SEPTEMBER 8, 2009.

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. 372, the Whistleblower Protection Enhancement Act of 2009.

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. 372—Whistleblower Protection Enhancement Act of 2009

Summary: S. 372 would amend the Whistleblower Protection Act (WPA) to clarify current law and give new protections to federal employees including those who report abuse, fraud, and waste involving government activities. The legislation also would affect activities of the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC). Finally, it would establish an oversight board within the intelligence community to review whistleblower claims.

CBO estimates that implementing S. 372 would cost $54 million over the 2010–2014 period, assuming appropriation of the necessary amounts for awards to whistleblowers and additional staffing and reporting requirements. Enacting the bill would not affect direct spending or revenues.

S. 372 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. 372 is shown in the following table. The costs of this legislation fall within budget function 800 (general government) and all other budget functions that include federal salaries and expenses.

	By fiscal year, in millions of dollars—					
	2010	2011	2012	2013	2014	2010–2014
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Whistleblower Awards:						
Estimated Authorization Level	5	5	5	5	5	25
Estimated Outlays	5	5	5	5	5	25
Intelligence Community Whistleblower Protection Board:						
Estimated Authorization Level	3	3	3	3	3	15
Estimated Outlays	3	3	3	3	3	15
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	13	11	10	10	10	54
Estimated Outlays	13	11	10	10	10	54

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 near the start of fiscal year 2010 and that spending will follow historical patterns for similar programs.

Under current law, the OSC investigates complaints regarding reprisals against federal employees that inform authorities of fraud or other improprieties in the operation of federal programs (such individuals are known as whistleblowers). The OSC takes corrective action 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.

Whistleblower awards

When implementing corrective actions to settle an employment dispute between the federal government and its employees regarding prohibited personnel practices, federal agencies are required to spend appropriated funds (some are paid by the Judgment Fund and reimbursed by each individual agency) to pay for an employee's attorney, back pay, and any associated travel and medical costs.

S. 372 would expand protections for whistleblowers and extend protections to Transportation Security Administration passenger and baggage screeners and federal employees working on research, analysis, or technical information. This would include additional awards to employees who suffered from retaliation by their agency and compensatory damages 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, there are generally between 400 and 500 whistleblower cases each year and around 2,000 prohibited personnel practice complaints. CBO is unaware of any comprehensive information on the current costs of corrective actions related to those cases. Damage awards in each case depend on the particular circumstances of each case. Recent settlements amounts under the Whistleblower Protection Act have ranged from $20,000 to $300,000. In addition, the Government Accountability Office has reported that the Judgment Fund spends about $15 million annually on equal employment opportunity and whistleblower cases. While it is uncertain how often damages would be awarded in such cases, CBO expects that the added protections under the bill would increase costs for such awards by about $5 million each year.

Intelligence Community Whistleblower Protection Board

Section 201 would establish the Intelligence Community Whistleblower Protection Board. The new board, which would have five members, would be responsible for issuing guidance on the procedures intelligence agencies should use when reviewing the claims of intelligence community employees who believe that they have experienced an adverse personnel action, such as termination of employment or denial of a promotion, or security clearance determination in retaliation for such employee revealing certain types of misconduct. Based on information from the Office of the Director of National Intelligence about the board's staff requirements and the costs of similar government boards, CBO estimates that implementing that this provision would cost $3 million annually.

MSBP and OSC

CBO expects that the bill's changes to existing laws would increase the workload of the MSPB and the OSC. For fiscal year 2009, the MSPB received an appropriation of $39 million, and the OSC received $17 million. Based on information from those agencies, we estimate that implementing this bill would cost about $2 million a year to hire additional professional and administrative staff.

Other provisions

The bill would require a report by the Government Accountability Office on whistleblowers and the Council of Inspectors General on the security clearance revocations, as well as changes to training and nondisclosure policies governmentwide. Based on information from agencies and on the costs of similar existing requirements, CBO estimates that implementing those provisions would cost $4 million over the 2010–2014 period.

Intergovernmental and private-sector impact: S. 372 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: Peter H. Fontaine, 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. CBO 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 is employed or has applied for employment* 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

* * * * * * *

(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 any civil action brought in connection with 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)(i), (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)(i), (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)(i), (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)(i), (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. *For purposes of the preceding sentence, 'clear and convincing evidence' means the degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established.*

* * * * * * *

(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)(i), (C) , or (D), the Board shall impose disciplinary action if the Board finds that the activity protected under section 2302(b)(8), or 2302(b)(9)(A)(i), (B)(i), (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)(i), (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)(i), (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)(i), (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. *For purposes of the preceding sentence, 'clear and convincing evidence' means the degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established.*

* * * * * * *

(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)(i), (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;

(B) the employment records relevant to such practice are maintained and administered; or

(C) 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 that—

(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) for which the associated personnel action is an action covered under section 7512 or 7542; or

(ii) files an appeal under section 7701(a)(1) alleging as an affirmative defense the commission of a 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;

(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; 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)(i), (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)(1) alleging as an affirmative defense the commission of a 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;

(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 correction action; 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) the Board is not likely to dispose of the case within 270 days after the date on which a request for that corrective action has been duly submitted;

(ii) the case—

(I) consists of multiple claims;

(II) requires complex or extensive discovery;

(III) 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

(IV) involves a novel question of law; or

(iii) under 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 (including any allegations made with the motion under subparagraph (B)) would not be subject to dismissal.

(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, in any event, not later than 15 days before issuing a decision on the merits of a request for corrective action.

(6) 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 under this paragraph shall be reviewed only on appeal of a final order or decision of the Board under section 7703, if—

(A) the reviewing court determines that the decision by the Board on the merits of the alleged prohibited personnel described in section 2302(b)(8) or (9)(A)(i), (B)(i), (C), or (D) failed to meet the standards of section 7703(c); and

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

(C) 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 section (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)(i), (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, if the determination (as that determination relates to a personnel action) is made before that 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, except for an alleged violation that is a minor, inadvertent violation, and occurs during the conscientious carrying out of official duties; 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 *except for an alleged violation that is a minor, inadvertent violation, and occurs during the conscientious carrying out of official duties*; 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, *except for an alleged violation that is a minor, inadvertent*

violation, and occurs during the conscientious carrying out of official duties, 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), or (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) with regard to remedying a violation of any other law, rule, or regulation;

(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 Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Code (governing disclosures of illegality, waste, fraud, abuse, or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosures that could compromise national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(b)).

The definitions, requirements, obligations, rights, sanctions, and liabilities created by such Executive order and such 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), any presumption relating to the performance of a duty by an employee who has authority to take or direct others to take, recommend, or approve any personnel action may be rebutted by substantial evidence. For purposes of paragraph (8), 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 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 secret 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) A disclosure shall not be excluded from subsection (b)(8) because—

(1) the disclosure was made during the normal course of the duties of the employee;

(2) 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);

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

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

(5) the disclosure was not made in writing;

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

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

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

[(a) Any employee of the Federal Bureau of Investigation 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 the Bureau as a reprisal for a disclosure of information by the employee to the Attorney General (or an employee designated by the Attorney General for such purpose) which the employee or applicant 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.

For the purpose of this subsection, "personnel action" means any action described in clauses (i) through (x) of section 2302(a)(2)(A) of this title with respect to an employee in, or applicant for, a position in the Bureau (other than a position of a confidential, policy-determining, policymaking, or policy-advocating character).

[(b) The Attorney General shall prescribe regulations to ensure that such a personnel action shall not be taken against an employee of the Bureau as a reprisal for any disclosure of information described in subsection (a) of this section.

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

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 2009, 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)(i), (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.

(2) During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2009, 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)(i), (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.

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 performance of investigative activities relating to such programs and operations**[**.**]***; and*

(3) designate a Whistleblower Protection Ombudsman who shall advocate for the interests of agency employees or appli-

cants who make protected disclosures of information, educate agency personnel about prohibitions on retaliation for protected disclosures, and advise agency employees, applicants, or former employees who have made or are contemplating making a protected disclosure.

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 Inspector General, or designee, of the agency of 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 Chair of the Intelligence Community Whistleblower Protection Board. In such a case, the requirements of this section for the head of the establishment apply to the recipient of the Inspector General's transmission. The Chair shall consult with the other members of the Intelligence Community Whistleblower Protection Board regarding all submissions under this section.

* * * * * * *

(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—

* * * * * * *

[(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.**]**

(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, except that with respect to disclosures made by employees described in subsection (a)(1)(D), the term "intelligence 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 National Security Act of 1947

Public Law 81–110

(as codified at 50 U.S.C. 402 et seq.)

SEC. 120. INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTECTION BOARD.

(a) ESTABLISHMENT.—There is established within the Office of the Director of National Intelligence the Intelligence Community Whistleblower Protection Board (in this section referred to as the "Board").

(b) MEMBERSHIP.—(1) The Board shall consist of—

(A) a Chairperson who shall be appointed by the President, by and with the advice and consent of the Senate (in this section referred to as the "Chairperson");

(B) 2 members who shall be designated by the President—

(i) from individuals serving as inspectors general of any agency or department of the United States who have been appointed by the President, by and with the advice and consent of the Senate; and

(ii) after consultation with members of the Council of Inspectors General on Integrity and Efficiency; and

(C) 2 members who shall be appointed by the President, by and with the advice and consent of the Senate, after consultation with the Attorney General, the Director of National Intelligence, and the Secretary of Defense.

(D)(i) A member of the Board who serves as the inspector general of an agency or department shall recuse themselves from any matter brought to the Board by a former employee, employee, or applicant of the agency or department for which that member serves as inspector general.

(2) The President shall designate 2 alternate members of the Board from individuals serving as an inspector general of an agency or department of the United States. If a member of the Board

recuses themselves from a matter pending before the Board, an alternate shall serve in place of that member for that matter.

(3) The members of the Board shall be individuals of sound and independent judgment who shall collectively possess substantial experience in national security and personnel matters.

(4)(A) The Chairperson shall be compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for level III of the Executive Schedule under section 5314 of title 5, United States Code, plus 3 percent for each day (including travel time) during which the Chairperson is engaged in the performance of the duties of the Board.

(B) The members appointed under paragraph (1)(B) and alternate members designated under paragraph (2) shall serve without compensation in addition to that received for their services as inspectors general.

(C) The members appointed under paragraph 1(C) shall—

(i) perform their duties for a period not to exceed 130 days during any period of 365 consecutive days; and

(ii) shall be compensated at the rate of pay for the Chairperson specified in paragraph (A).

(D)(i) The members of the Board shall serve 4-year terms at the pleasure of the President, except that of the members first appointed or designated—

(I) the Chairperson shall have a term of 6 years;

(II) 2 members shall have a term of 5 years; and

(III) 2 members shall have a term of 4 years.

(ii) A member designated under paragraph (1)(B) shall be ineligible to serve on the Board if that member ceases to serve as an inspector general for an agency or department of the United States.

(iii) A member of the Board may serve on the Board after the expiration of the term of that member until a successor for that member has taken office as a member of the Board.

(iv) An individual appointed to fill a vacancy occurring, other than by the expiration of a term of office, shall be appointed only for the unexpired term of the member that individual succeeds.

(5) Three members shall constitute a quorum of the Board.

(c) RESOURCES AND AUTHORITY.—(1) The Office of the Director of National Intelligence shall provide the Board with appropriate and adequate office space, together with such equipment, office supplies, and communications facilities and services as may be necessary for the operation of the Board, and shall provide necessary maintenance services for the Board and the equipment and facilities located therein.

(2)(A) For each fiscal year, the Chairperson shall transmit a budget estimate and request to the Director of National Intelligence. The budget request shall specify the aggregate amount of funds requested for such fiscal year for the operations of the Board.

(B) In transmitting a proposed budget to the President for approval, the Director of National Intelligence shall include—

(i) the amount requested by the Chairperson; and

(ii) any comments of the Chairperson with respect to the amount requested.

(3) Subject to applicable law and policies of the Director of National Intelligence, the Chairperson, for the purposes of enabling the Board to fulfill its statutorily assigned functions, is authorized to

select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office.

(4) In consultation with the Attorney General, the Director of National Intelligence, and the Secretary of Defense, the Board may promulgate rules, regulations, and guidance and issue orders to fulfill its functions. The Director of National Intelligence, Secretary of Defense, and Attorney General shall jointly approve any rules, regulations, or guidance issued under section 121(c)(1)(B).

(5) The number of individuals employed by or on detail to the Board shall not be counted against any limitation on the number of personnel, positions, or full-time equivalents in the Office of the Director of National Intelligence.

SEC. 121. INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTECTIONS.

(a) DEFINITIONS.—In this section:

(1) The term "agency" means an Executive department or independent establishment, as defined under sections 101 and 104 of title 5, United States Code, that contains an intelligence community element.

(2) The term "intelligence community element" means—

(A) 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

(B) 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, if the determination (as that determination relates to a personnel action) is made before that personnel action.

(3) The term "personnel action"—

(A) means any action taken against an employee of an intelligence community element that would be considered a personnel action, as defined in section 2302(a)(2)(A) of title 5, United States Code, if taken against an employee subject to such section 2302; and

(B) shall not include the denial, suspension, or revocation of a security clearance or denying access to classified or sensitive information or a suspension with pay pending an investigation.

(4) The term "prohibited personnel practice" means any action prohibited by subsection (b) of this section.

(b) PROHIBITED PERSONNEL PRACTICES.—(1) No person who has authority to take, direct others to take, recommend, or approve any personnel action, shall, with respect to such authority—

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

(i) any disclosure of information to an official of an agency by an employee or applicant which the employee or applicant reasonably believes evidences—

(I) any violation of law, rule, or regulation except for an alleged violation that is a minor, inadvertent viola-

tion, and occurs during the conscientious carrying out of official duties; 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;

(ii) 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 or applicant reasonably believes evidences—

(I) a violation of any law, rule, or regulation except for an alleged violation that is a minor, inadvertent violation, and occurs during the conscientious carrying out of official duties; 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

(iii) any communication that complies with subsection (a)(1), (d), or (h) of section 8H of the Inspector General Act of 1978 (5 U.S.C. App.) or that complies with subparagraphs (A), (D), or (H) of section 17(d)(5) of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403q); or

(B) take or fail to take, or threaten to take or fail to take, any personnel action against any intelligence community element employee or applicant for employment because of—

(i) the exercise of any appeal, complaint, or grievance right granted by subsection (c);

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

(iii) cooperating with or disclosing information to the inspector general of an agency in connection with an audit, inspection, or investigation conducted by the inspector general, in accordance with applicable provisions of law, if the actions described under clauses (i), (ii), and (iii) do not result in the employee or applicant unlawfully disclosing information specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs or any other information the disclosure of which is specifically prohibited by law.

(2) A disclosure shall not be excluded from paragraph (1) because—

(A) the disclosure was made during the normal course of the duties of the employee;

(B) 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 paragraph (1)(A)(ii);

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

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

(E) the disclosure was not made in writing;

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

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

(3) Nothing in this subsection 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.

(c) REMEDIAL PROCEDURE.—(1)(A) An employee, applicant, or former employee of an intelligence community element who believes that such employee, applicant, or former employee has been subjected to a prohibited personnel practice may petition for an appeal of the personnel action to the agency head or the designee of the agency head within 60 days after discovery of the alleged adverse personnel action.

(B) The appeal shall be conducted within the agency according to rules of procedure issued by the Intelligence Community Whistleblower Protection Board under section 120(c)(4). Those rules shall be based on those pertaining to prohibited personnel practices defined under section 2302(b)(8) of title 5, United States Code, and provide—

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

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

(iii) that the employee, applicant, or former employee may be represented by counsel;

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

(v) that, unless agreed to by the employee and the agency concerned, 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;

(vi) for the use of information specifically required by Executive order to be kept secret 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 where the agency determines that the interests of national security so warrant; and

(vii) that the employee, applicant, or former employee shall have no right to compel the production of information specifically required by Executive order to be kept secret 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 alleges was protected by subsection (b)(1)(A) through (C).

(C) If the Board certifies that agency procedures in effect on the date of enactment of this section, including procedures promulgated under section 2303 of title 5, United States Code, before that date, adequately provide guaranties required under subparagraph (B)(i) through (vi), the appeal may be conducted according to those procedures.

(2) On the basis of the record developed during the appeal, the impartial fact-finder shall prepare a report to the agency head or the designee of the agency head setting forth findings, conclusions, and, if applicable, recommended corrective action. After reviewing the record and the impartial fact-finder's report, the agency head or the designee of the agency head shall determine whether the employee, former employee, or applicant has been subjected to a prohibited personnel practice, and shall either issue an order denying relief or shall implement corrective action to return the employee, former employee, or applicant, as nearly as practicable and reasonable, to the position such employee, former employee, or applicant would have held had the prohibited personnel practice 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. Unless the employee, former employee, or applicant consents, no more than 60 days shall pass from the submission of the report by the impartial fact-finder to the agency head and the final decision by the agency head or the designee of the agency head.

(3) In determining whether the employee, former employee, or applicant has been subjected to a prohibited personnel practice, the agency head or the designee of the agency head shall find that a prohibited personnel practice occurred if a disclosure described in subsection (b) was a contributing factor in the personnel action which was taken against the individual, unless the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(4)(A) Any employee, former employee, or applicant adversely affected or aggrieved by a final order or decision of the agency head or the designee of the agency head under paragraph (1) may appeal that decision to the Intelligence Community Whistleblower Protection Board within 60 days after the issuance of such order. Such appeal shall be conducted under rules of procedure issued by the Board under section 120(c)(4).

(B) The Board's review shall be on the agency record. 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 not be disclosed to the employee, former employee, or applicant during proceedings before the Board.

(C) If the Board concludes that further fact-finding is necessary or finds that the agency improperly denied the employee, former employee, or applicant the opportunity to present evidence that, if admitted, would have a substantial likelihood of altering the outcome, the Board shall—

(i) remand the matter to the agency from which it originated for additional proceedings in accordance with the rules of procedure issued by the Board; or

(ii) refer the matter to another agency for additional proceedings in accordance with the rules of procedure issued by the Board.

(D) The Board shall make a de novo determination, based on the entire record, of whether the employee, former employee, or applicant suffered a prohibited personnel practice. 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.

(E) On the basis of the agency record, the Board shall determine whether the employee, former employee, or applicant has been subjected to a prohibited personnel practice, and shall either issue an order denying relief or shall order the agency head to take specific corrective action to return the employee, former employee, or applicant, as nearly as practicable and reasonable, to the position such employee, former employee, or applicant would have held had the prohibited personnel practice 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 or applicant. The agency head shall take the actions so ordered, unless the President determines that doing so would endanger national security. Unless the employee, former employee, or applicant consents, no more than 180 days shall pass from the filing of the appeal with the Board to the final decision by the Board. Any period of time during which the Board lacks a sufficient number of members to undertake a review shall be excluded from the 180-day period.

(F) In determining whether the employee, former employee, or applicant has been subjected to a prohibited personnel practice, the agency head or the designee of the agency head shall find that a prohibited personnel practice occurred if a disclosure described in subsection (b) of this section was a contributing factor in the personnel action which was taken against the individual, unless the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(5)(A)(i) During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2009, an employee, former employee, applicant, or an agency may file a petition to review a final order of the Board in the United States Court of Appeals for the Federal Circuit or the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the date of issuance of the final order of the Board.

(ii) After the 5-year period described under clause (i), a petition to review a final order described under that clause shall be filed in the United States Court of Appeals for the Federal Circuit.

(B) The court of appeals shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(i) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(ii) obtained without procedures required by law, rule, or regulation having been followed; or

(iii) unsupported by substantial evidence.

(C) Any portions of the record that were submitted ex parte during the agency proceedings shall be submitted ex parte to the Board and any reviewing court.

(D) At the time the Board issues an order, the Chairperson shall notify the chairpersons and ranking members of—

(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; and

(iv) the Permanent Select Committee on Intelligence of the House of Representatives.

(d) Except as expressly provided in this section, there shall be no judicial review of agency actions under this section.

(e) This section shall not apply to terminations executed under—

(1) section 1609 of title 10, United States Code;

(2) the authority of the Director of National Intelligence under section 102A(m) of this Act, if—

(A) the Director personally summarily terminates the individual; and

(B) the Director—

(i) determines the termination to be in the interest of the United States;

(ii) determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of such employee cannot be invoked in a manner consistent with the national security; and

(iii) notifies the congressional oversight committees of such termination within 5 days after the termination;

(3) the authority of the Director of the Central Intelligence Agency under section 104A(e) of this Act, if—

(A) the Director personally summarily terminates the individual; and

(B) the Director—

(i) determines the termination to be in the interest of the United States;

(ii) determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of such employee cannot be invoked in a manner consistent with the national security; and

(iii) notifies the congressional oversight committees of such termination within 5 days after the termination; or

(4) section 7532 of title 5, United States Code, if—

(A) the agency head personally summarily terminates the individual; and

(B) the agency head—

(i) determines the termination to be in the interest of the United States,

(ii) determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of such employee cannot be invoked in a manner consistent with the national security; and

(iii) notifies the congressional oversight committees of such termination within 5 days after the termination.

(f) If an employee, former employee, or applicant seeks to challenge both a prohibited personnel practice under this section and an adverse security clearance or access determination under section

3001(j) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. 435b(j)), the employee shall bring both claims under the procedure set forth in 3001(j) of that Act for challenging an adverse security clearance or access determination. If the Board awards compensatory damages for such claim or claims, the total amount of compensatory damages ordered shall not exceed $300,000.

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 Chair of the Intelligence Community Whistleblower Protection Board. In such a case—

(I) the requirements of this subsection for the Director apply to the recipient of the Inspector General's submission; and

(II) the Chairperson shall consult with the other members of the Intelligence Community Whistleblower Protection Board regarding all submissions under this section.

* * * * * * *

(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.

* * * * * * *

(e) AUTHORITIES OF THE INSPECTOR GENERAL * * *.

* * * * * * *

(9) The Inspector General shall designate a Whistleblower Protection Ombudsman who shall advocate for the interests of agency employees or applicants who make protected disclosures of information, educate agency personnel about prohibitions on retaliation for protected disclosures, and advise agency employees, applicants, or former employees who have made or are contemplating making a protected disclosure.

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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.

* * * * * * *

(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 30 days after the date of enactment of the Whistleblower Protection Enhancement Act of 2009—

(A) developing policies and procedures that permit, to the extent practicable, individuals who challenge in good faith a determination to suspend or revoke a security clearance or access to classified information to retain their govern-

ment 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, including such policies and procedures for appeals based on those pertaining to prohibited personnel pactices defined under section 2302(b)(8) of title 5, United States Code, and that provide—

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

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

(iii) that the employee, applicant, or former employee may be represented by counsel;

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

(v) that, unless agreed to by the employee and the agency concerned, no 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;

(vi) for the use of information specifically required by Executive order to be kept secret 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

(vii) that the employee, applicant, or former employee shall have no right to compel the production of information specifically required by Executive order to be kept secret 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 alleges 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 or applicant's security clearance or access determination because of—

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

(i) a violation of any law, rule, or regulation, except for an alleged violation that is a minor, inadvertent violation, and occurs during the conscientious carrying out of official duties; 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 disclosure does not reveal information specifically authorized under criteria established by statute, Executive Order, Presidential directive, or Presidential memorandum to be kept secret in the interest of national defense or the conduct of foreign affairs;

(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 or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, except for an alleged violation that is a minor, inadvertent violation, and occurs during the conscientious carrying out of official duties; 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 subsection (a)(1), (d), or (h) of section 8H of the Inspector General Act of 1978 (5 U.S.C. App.) or that complies with subsection (d)(5)(A), (D), or (H) of section 17 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403q);

(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 authorized under criteria established by Executive Order, statute, Presidential Directive, or Presidential memorandum to be kept secret in the interest of national defense or the conduct of foreign affairs. Nothing in this paragraph 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.

(2) DISCLOSURES.—A disclosure shall not be excluded from paragraph (1) because—

(A) the disclosure was made during the normal course of the duties of the employee;

(B) 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 paragraph (1)(A)(ii);

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

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

(E) the disclosure was not made in writing;

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

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

(3) AGENCY ADJUDICATION.—

(A) APPEAL.—An employee, former employee, or applicant for employment who believes that he or she has been subjected to a reprisal prohibited by paragraph (1) of this subsection may, within 60 days after the issuance of notice of such decision, appeal that decision within the agency of that employee, former employee, or applicant through proceedings authorized by paragraph (8) of subsection (b), 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.

(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, former employee, or applicant, as nearly as practicable and reasonable, to the position such employee, former employee, or applicant 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.

(4) REVIEW BY THE INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTECTION BOARD.—

(A) APPEAL.—Within 60 days after receiving notice of an adverse final agency determination under a proceeding under paragraph (3), an employee, former employee, or applicant for employment may appeal that determination to the Intelligence Community Whistleblower Protection Board.

(B) 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 (A). 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.

(C) 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.

(D) 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—

(i) remand the matter to the agency from which it originated for additional proceedings in accordance with the rules of procedure issued by the Board; or

(ii) refer the case to an intelligence community agency for additional proceedings in accordance with the rules of procedure issued by the Board.

(E) DE NOVO DETERMINATION.—The Board shall make a de novo determination, based on the entire record, of whether the employee, former employee, or applicant 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.

(F) 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 (including any adjudicative guidelines promulgated under such orders) or any subsequent Executive order, regulation, or policy concerning access to classified information.

(G) 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, former employee, or applicant, as nearly as practicable and reasonable, to the position such employee, former employee, or applicant would have held had the viola-

tion 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 or applicant, and any relief shall not include the reinstating of any security clearance or access determination. The agency head shall take the actions so ordered, unless the President determines that doing so would endanger national security.

(ii) RECOMMENDED ACTION.—If the Board finds that reinstating the employee, former employee, or applicant'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.

(H) CONGRESSIONAL NOTIFICATION.—

(i) ORDERS.—At the time the Board issues an order, the Chairperson of the Board shall notify the chairpersons and ranking members of—

(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; and

(IV) the Permanent Select Committee on Intelligence 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 chairpersons and ranking members of the committees described in subclauses (I) through (IV) of clause (i).

(5) JUDICIAL REVIEW.—Nothing in this section should be construed to permit or require judicial review of agency or Board actions under this section.

(6) NONAPPLICABILITY TO CERTAIN TERMINATIONS.—This section shall not apply to adverse security clearance or access determinations if the affected employee is concurrently terminated under—

(A) section 1609 of title 10, United States Code;

(B) the authority of the Director of National Intelligence under section 102A(m) of the National Security Act of 1947 (50 U.S.C. 403–1(m)), if—

(i) the Director personally summarily terminates the individual; and

(ii) the Director—

(I) determines the termination to be in the interest of the United States;

(II) determines that the procedures prescribed in other provisions of law that authorize the termi-

nation of the employment of such employee cannot be invoked in a manner consistent with the national security, and

(III) notifies the congressional oversight committees of such termination within 5 days after the termination;

(C) the authority of the Director of the Central Intelligence Agency under section 104A(e) of the National Security Act of 1947 (50 U.S.C. 403–4a(e)), if—

(i) the Director personally summarily terminates the individual; and

(ii) the Director—

(I) determines the termination to be in the interest of the United States;

(II) determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of such employee cannot be invoked in a manner consistent with the national security; and

(III) notifies the congressional oversight committees of such termination within 5 days after the termination; or

(D) section 7532 of title 5, United States Code, if—

(i) the agency head personally summarily terminates the individual; and

(ii) the agency head—

(I) determines the termination to be in the interest of the United States;

(II) determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of such employee cannot be invoked in a manner consistent with the national security; and

(III) notifies the congressional oversight committees of such termination within 5 days after the termination.

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