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107TH CONGRESS *2d Session*	SENATE	REPORT 107–349

TO AUTHORIZE APPROPRIATIONS FOR THE MERIT SYSTEMS PROTECTION BOARD AND THE OFFICE OF SPECIAL COUNSEL, AND FOR OTHER PURPOSES

R E P O R T

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 3070

TO AUTHORIZE APPROPRIATIONS FOR THE MERIT SYSTEMS PROTECTION BOARD AND THE OFFICE OF SPECIAL COUNSEL, AND FOR OTHER PURPOSES



NOVEMBER 19, 2002.—Ordered to be printed

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NOVEMBER 19, 2002.—Ordered to be printed

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

R E P O R T

[To accompany S. 3070]

The Committee on Governmental Affairs, to which was referred the bill (S. 3070) to authorize appropriations for the Merit Systems Protection Board and the Office of Special Counsel, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

I. PURPOSE AND SUMMARY

The purposes of S. 3070 are to reauthorize appropriations for the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB) for five years, and to make clarifications and changes to strengthen the Whistleblower Protection Act (WPA). S. 3070 was introduced on October 9, 2002, by Senators Akaka and Levin, building on earlier versions, S. 2829, introduced by Senator Akaka, and S. 995, introduced by Senators Akaka, Levin, and Grassley.[1]

The OSC and MSPB administer programs and procedures to safeguard the federal government's merit-based system of employment and protect federal employees against improper personnel practices, particularly those federal employees who step forward to disclose government waste, fraud, and abuse. The OSC's responsibilities include receiving and seeking resolution of allegations by employees of wrongdoing in federal agencies; investigating claims of improper personnel actions, including reprisal against whistle-

[1] Senator Leahy was added as a cosponsor of both S. 3070 and S. 995, and Senator Durbin and Senator Bob Smith were added as cosponsors of S. 995.

blowers; and applying to the MSPB for appropriate remedies for improper personnel actions. The MSPB's responsibilities include hearing and deciding appeals brought by federal employees from agency personnel actions, hearing and deciding cases brought by the OSC, and conducting studies and oversight of the civil service system.

The sponsors, in introducing the predecessor bills, summarized the purposes of this legislation.[2] As to reauthorizing appropriations for the OSC and MSPB, Senator Akaka explained: "These two agencies safeguard the merit system principles and protect Federal employees who step forward to disclose government waste, fraud, and abuse. * * * Together, OSC and MSPB act as stalwarts of justice for the dedicated men and women who serve the public."[3]

Senator Akaka also explained why provisions clarifying and strengthening the WPA are needed: "The right of federal employees to be free from workplace retaliation * * * has been diminished by a pattern of court rulings that have narrowly defined who qualifies as a whistleblower under the WPA, and what statements are considered protected disclosures. These rulings are inconsistent with congressional intent. * * * The bill we introduce today will restore congressional intent regarding who is entitled to relief under the WPA, and what disclosures are protected."[4]

Senator Levin also emphasized the role of Congress in whistleblower protection: "We want Federal employees to identify problems in our programs so we can fix them, and if they fear reprisal for doing so, then we are not only failing to protect the whistleblower, but we are also failing to protect the taxpayer." He explained how the bill would clarify the law to prevent future misinterpretation, and also noted that the bill "adds a provision to the Whistleblower Protection Act that provides specific protection to a whistleblower who discloses evidence of fraud, waste, and abuse involving classified information if that disclosure is made to the appropriate committee of Congress * * *"[5]

S. 3070 would strengthen the WPA by, among other things, clarifying the unrestricted meaning of "any" disclosure covered by the WPA, codifying an anti-gag provision to allow employees to come forward with disclosures of illegality, providing independent litigating authority for the OSC, and allowing whistleblower cases to be heard by all United States Courts of Appeals for a period of five years.

II. Background and Need for the Legislation

A. Background on the Office of Special Counsel[6]

History and purpose

The position of Special Counsel was established on January 1, 1979, by Reorganization Plan Number 2 of 1978.[7] The Civil Service Reform Act (CSRA) of 1978, effective on January 11, 1979, enlarged

[2] 2147 Cong. Rec. S5970–S5975 (daily ed. June 7, 2001) (Statements of Senators Akaka, Levin, and Grassley) and 148 Cong. Rec. S7746 (daily ed. July 31, 2002) (Statement of Senator Akaka).
[3] 3148 Cong. Rec. S7746 (daily ed. July 31, 2002) (Statement of Senator Akaka).
[4] 4147 Cong. Rec. S5970 (daily ed. June 7, 2001) (Statement of Senator Akaka).
[5] 5147 Cong. Rec. S5973 (daily ed. June 7, 2001) (Statement of Senator Levin).
[6] This description of the history of OSC and the developments since OSC's last reauthorization is based largely on briefings and documents provided by OSC to the Committee.
[7] 43 F.R. 36037, 92 Stat. 3783, § 204 (June 19, 1978) (5 U.S.C. App.).

its functions and powers.[8] The Special Counsel operated as the autonomous investigative and prosecutorial arm of the Merit Systems Protection Board (MSPB) until 1989, enforcing the laws concerning prohibited personnel practices, as well as the restrictions on the political activity of federal employees as governed by the Hatch Act.

In March of 1989, Congress enacted the Whistleblower Protection Act (WPA) of 1989.[9] The WPA established the Office of Special Counsel (OSC) as an independent agency within the Executive Branch, separate from the MSPB. Under the WPA, OSC kept its basic investigative and prosecutorial functions and its role in litigating cases before the MSPB. The WPA also substantially amended the CSRA to enhance protections against retaliation for those employees who disclose wrongdoing in the federal government and to improve the ability of OSC to enforce those protections.

Five years after passage of the WPA, Congress enacted the Office of Special Counsel Reauthorization Act of 1994.[10] In response to widespread criticism concerning inordinate delays in the processing of complaints by OSC, Congress imposed a 240-day time limit on agency action, within which OSC is required to determine whether there are reasonable grounds for believing that a prohibited personnel practice has been committed. The 1994 legislation also added approximately 160,000 employees of the Veterans Administration and certain government corporations to coverage under the statutes administered by OSC and significantly broadened the definitions of the types of personnel actions covered under these statutes. Lastly, the 1994 legislation made federal agencies explicitly responsible for informing their employees of available rights and remedies under the WPA, and directed that OSC play a consultative role in that process.[11]

The mission of OSC is to protect federal employees and applicants, especially whistleblowers, from prohibited employment practices; to promote compliance by government employees with legal restrictions on political activity; and to facilitate disclosures of wrongdoing in the federal government. OSC carries out this mission by:

- Investigating complaints of prohibited employment practices, especially reprisal for whistleblowing and pursuing remedies for violations;
- Operating an independent and secure channel for disclosure and investigation of wrongdoing in federal agencies;
- Providing advisory opinions on and enforcing the Hatch Act;
- Protecting the reemployment rights of veterans under the Uniformed Services Employment and Reemployment Rights Act (USERRA) by investigating alleged violations of the Act by federal executive agencies and prosecuting meritorious claims before the MSPB on behalf of the aggrieved person; and

[8] Pub. L. No. 95–454, 92 Stat. 1111 (1978).
[9] Pub. L. No. 101–12, 103 Stat. 16 (1989).
[10] Pub. L. No. 103–424, 108 Stat. 4361 (1994).
[11] See 5 U.S.C. § 2302(c).

• Promoting greater understanding of the rights and responsibilities of government employees under the statutes enforced by OSC through public outreach and education programs.[12]

OSC maintains its headquarters in Washington, DC and has field offices in Texas and California. The Special Counsel and the Immediate Office of the Special Counsel (IOSC) are responsible for policy making and overall management of the agency. IOSC responsibilities include congressional relations, public affairs, and outreach. The outreach program director develops and coordinates proactive educational efforts by OSC and promotes compliance by federal agencies with the employee information requirement at § 2302(c), as amended. Until June 2001, OSC was organized into four operating divisions: Complaint and Disclosure Analysis, Investigation, Prosecution, and Planning and Advice. A restructuring in early June of that year led to the consolidation of OSC's investigative and prosecutorial functions and the creation of three parallel Investigation and Prosecution Divisions. Since that reorganization, agency functions are organized as follows:

• The Complaints and Disclosure Analysis Division consists of OSC's two intake units for new matters received by the agency—the Complaints Examining Unit (CEU) and the Disclosure Unit (DU).

The CEU serves as the intake point for all complaints alleging prohibited personnel practices and other violations of civil service law, rule, or regulation. The attorneys and personnel management specialists in CEU conduct an initial review of complaints to determine whether they are within OSC's jurisdiction and whether further investigation is warranted. CEU refers any such matter to one of the Investigation and Prosecution Divisions.

The DU is responsible for reviewing information submitted by federal whistleblowers and for advising the Special Counsel on the appropriate disposition of the matter (including possible referral to the head of the relevant agency for investigation and a report to OSC, referral to the agency Inspector General, or closure). DU attorneys also analyze agency reports of investigation to determine whether they appear reasonable and meet statutory requirements before the Special Counsel sends them to the President and appropriate congressional oversight committees.

• The Investigation and Prosecution Divisions (IPDs) consist of three parallel investigative and prosecutorial units—IPD I, II, and III. These divisions investigate complaints referred after a preliminary inquiry by CEU. Each unit conducts investigations to review pertinent records and to interview complainants and witnesses with knowledge of the matters alleged. Matters not resolved during the investigative phase undergo legal review and analysis to determine whether the matter warrants corrective action, disciplinary action, or both. If a negotiated resolution with the agency involved cannot be reached, division attorneys conduct the litigation of any enforcement proceedings filed by OSC with the U.S. Merit Systems Protection Board. They also represent the Special Counsel when OSC intervenes or otherwise participates in other proceedings before the MSPB.

[12] U.S. Office of Special Counsel, FY 2001 Annual Report, at 4.

• The Hatch Act Unit (HAU), located in IPD I, is responsible for enforcing Hatch Act restrictions on the political activities of federal and certain state and local government employees. HAU attorneys receive and review complaints alleging Hatch Act violations and, when warranted, prosecute violations before the MSPB. The unit also issues advisory opinions to individuals seeking information about the provisions of the Act.

• The Alternative Dispute Resolution (ADR) Unit was established by the Special Counsel in FY 2000. It is located in IPD III and operates OSC's Mediation Program. In selected cases that have been referred for further investigation, it contacts the complainant and the employing agency to invite their participation in voluntary mediation. If both parties agree, OSC conducts a mediation session, led by OSC staff who have extensive training in mediation and experience in federal personnel law. When mediation resolves the complaint, the parties execute a written and binding settlement agreement. If mediation does not result in a resolution, the case is referred for further investigation, as it would have been had the parties not tried mediation.

• The Planning and Advice Division provides legal advice and support on general management and administrative matters; engages in planning and policy development; conducts the statutorily required annual survey program; and manages the agency's Freedom of Information/Privacy Act and ethics programs. OSC also has two administrative support units: the Human and Administrative Resources Management Branch and the Information Systems Branch. Their functions include administrative operations, personnel, procurement, information technology, and records management services.[13]

OSC developments

For years, the backlog of prohibited personnel practice cases has been a significant problem for the OSC. To address this problem, Congress amended the WPA in 1994 to set a 240-day deadline for OSC to make a determination as to whether a prohibited personnel practice occurred.[14] To meet this statutory requirement, OSC has sought and Congress has granted the agency additional resources. During FY 2000 and 2001, Congress appropriated funds for 15 additional full-time employees. OSC also redirected two full-time-equivalents (FTEs) to program functions as a result of internal reforms. The provision of additional resources seemed to help. On June 1, 2001, there were 477 prohibited personnel cases more than 240 days old. Just one year later, the number of cases was reduced nearly 53 percent with only 226 cases more than 240 days old.

In addition to the increase in staff, OSC implemented its most significant reorganization in over 15 years by merging investigative and prosecutorial functions that had been housed in two separate divisions. The reorganization joined investigators and attorneys in three teams (IPDs—Investigation and Prosecution Divisions), each of which reports to a single Associate Special Counsel. The reorganization eliminated several layers of management review to which cases referred for investigation had previously been subject. It also

[13] U.S. Office of Special Counsel, FY 2001 Annual Performance Report, at 2–4.
[14] 5 U.S.C. § 1214(b)(2)(A)(i).

permits closer, more effective, and more efficient coordination of strategy between investigators and attorneys. This enhanced coordination is expected to reduce case processing times, permit OSC to make better decisions about allocation of investigative resources, and improve the quality of OSC's investigative and legal work.[15]

As a result of the FY 2001 reorganization, the number of cases pending at the end of the fiscal year was 733, down substantially from the 1,114 cases that were pending at the end of FY 2000. There were also significant gains in the number of cases referred for investigation that OSC resolved. Thus, in FY 2001, OSC resolved 410 cases that were referred for investigation, which represented a 79 percent increase over FY 2000's 228 cases resolved. Productivity also increased at OSC by 38 percent as a result of the reorganization.

In addition to the backlog problem, OSC continues to face a public information problem as many employees in the federal government are unaware of the role of the OSC and the laws it enforces.[16] To address this problem, the Special Counsel hired an Outreach Specialist and has established an outreach and training program. The Outreach Program was established to assist agencies in meeting their statutory mandate under 5 U.S.C. § 2302(c), which Congress imposed in 1994. Under that provision, federal agencies are responsible "for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them" under chapters 12 and 23 of title 5. Because of this clear statutory mandate, OSC considers outreach to federal managers and employees to be an essential part of its mission.[17]

A chief focus of the Outreach Program is to work proactively with federal agencies to design employee education programs. A significant step towards achieving that goal came in FY 2000 with an OSC survey of federal agency efforts to comply with § 2302(c). The results of that survey found that the majority of federal agencies do not comprehensively inform or educate their employees regarding prohibited personnel practices or whistleblower retaliation. Half of the responding agencies did not provide any type of in person training on prohibited personnel practices.[18] However, the survey caused many agencies to implement stepped-up measures to inform their employees of their rights.[19]

During FY 2000, OSC also established its Alternative Dispute Resolution Unit, which directs OSC's Mediation Program. As the program matured during the second half of FY 2001, two significant program design modifications were implemented. First, the scope of cases in which OSC offers mediation was substantially broadened. Among the factors that determine "mediation-appropriate" cases are the relationship of the parties, the complexity of the issues, and the relief sought by the complainant. Consequently, the rate at which OSC offers mediation to parties doubled from 15 percent in FY 2000 to 30 percent in FY 2001.

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[15] U.S. Office of Special Counsel, supra note 13 at 8.
[16] See OPM Merit System Principles Questionnaire, FY 2002 Governmentwide Results.
[17] U.S. Office of Special Counsel, FY 2000 Annual Report, at 26.
[18] Summary of Findings from 2000 OSC Survey on Implementation of 5 U.S.C. § 2302(c).
[19] U.S. Office of Special Counsel, supra note 17.

SUMMARY OF OSC ACTION FOR 1997–2001 [20]

	1997	1998	1999	2000	2001
Prohibited personnel practices:					
Favorable actions	56	42	52	75	74
Negotiated stays	12	8	12	7	13
Litigated stays	0	8	3	2	1
Hatch Act:					
Advisory opinions issued	1,700	2,124	2,063	2,810	2,806
Warning letters issued	24	20	21	21	59
Enforcement actions filed	3	0	3	4	8
Disciplinary actions obtained	3	5	1	2	8
Disclosure Unit:					
Matters referred to agency head for investigation	14	2	15	8	15
Matters referred to IGs for investigation	72	65	71	106	119

BUDGET AND STAFFING

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002
Budget	$8,116,000	$8,450,000	$8,720,000	$9,740,000	$11,147,000	$11,891,000
FTEs	83.5	87.17	87.80	90.86	104.66	105.5

B. BACKGROUND ON THE MERIT SYSTEMS PROTECTION BOARD [21]

History and purpose

The U.S. Merit Systems Protection Board is an independent, quasi-judicial agency in the Executive Branch that serves as the guardian of Federal merit system principles. The MSPB was established by Reorganization Plan No. 2 of 1978, which was codified by the Civil Service Reform Act of 1978 (CSRA).[22] The CSRA, which became effective January 11, 1979, replaced the Civil Service Commission with three new independent agencies: the Office of Personnel Management (OPM), which manages the federal work force; the Federal Labor Relations Authority, which oversees Federal labor-management relations; and the MSPB.

The Board assumed the employee appeals function of the Civil Service Commission and was given the new responsibilities to perform merit systems studies and to review the significant actions of OPM. The MSPB carries out its statutory mission principally by:

- Adjudicating employee appeals of personnel actions over which the Board has jurisdiction, such as removals, suspensions, furloughs, and demotions;
- Adjudicating employee complaints filed under the Whistleblower Protection Act, the Uniformed Services Employment & Reemployment Rights Act (USERRA), and the Veterans Employment Opportunities Act;
- Adjudicating cases brought by the Special Counsel, principally complaints of prohibited personnel practices and Hatch Act violations;
- Adjudicating requests to review regulations of the Office of Personnel Management (OPM) that are alleged to require or result in the commission of a prohibited personnel practice or reviewing such regulations on the Board's own motion;

[20] FY 2002 information not yet available from OSC.

[21] This description of the history of MSPB and the developments since MSPB's last reauthorization is based largely on briefings and documents provided by MSPB to the Committee.

[22] Pub. L. No. 95–454, 92 Stat. 1111 (1978).

- Ordering compliance with final Board orders where appropriate; and
- Conducting studies of the federal civil service and other merit systems in the Executive Branch to determine whether they are free from prohibited personnel practices.[23]

The Board is composed of a Chairman, Vice Chairman, and Member who adjudicate the cases brought to the Board. The Chairman, by statute, is the chief executive and administrative officer of the Board. Office heads report to the Chairman through the Chief of Staff. The MSPB consists of the following offices:

- The Office of Regional Operations oversees the five MSPB regional offices (including five field offices), which receive and process initial appeals and related cases. Administrative judges in the regional and field offices are responsible for adjudicating assigned cases and for issuing fair and well-reasoned initial decisions.
- The Office of the Administrative Law Judge adjudicates and issues initial decisions in Hatch Act cases, corrective and disciplinary action complaints brought by the Special Counsel, proposed agency actions against administrative law judges, MSPB employee appeals, and other cases assigned by the Board.
- The Office of Appeals Counsel conducts legal research and prepares proposed decisions for the Board in cases where a party petitions for review of a judge's initial decision and in all other cases decided by the three-member Board, except for those cases assigned to the Office of the General Counsel. The office also conducts the Board's petition for review settlement program, processes interlocutory appeals of rulings made by judges, makes recommendations on reopening cases on the Board's own motion, and provides research and policy memoranda to the Board on legal issues.
- The Office of the Clerk of the Board receives and processes cases filed at Board headquarters, rules on certain procedural matters, and issues the Board's Opinions and Orders. The office serves as the Board's public information center, coordinates media relations, produces public information publications, operates the Board's library and on-line information services, and administers the Freedom of Information Act and Privacy Act programs. The office also certifies official records to the courts and federal administrative agencies, and manages the Board's records and directives system, legal research programs, and the Government in the Sunshine Act program.
- The Office of the General Counsel, as legal counsel to the Board, provides advice to the Board and MSPB offices on matters of law arising in day-to-day operations. The office represents the Board in litigation, prepares proposed decisions for the Board on assigned cases, and coordinates the Board's legislative policy and congressional relations functions. The office also conducts the Board's ethics program and plans and directs audits and investigations.
- The Office of Policy and Evaluation carries out the Board's statutory responsibility to conduct special studies of the civil service and other merit systems. Reports of these studies are directed to the President and the Congress and are distributed to a national audience. The office also conducts an outreach program and re-

[23] U.S. Merit Systems Protection Board, FY 2001 Annual Performance Report, at 5.

sponds to requests from federal agencies for information, advice, and assistance on issues that have been the subject of Board studies.

• The Office of Equal Employment Opportunity plans, implements, and evaluates the Board's equal employment opportunity (EEO) programs. It processes complaints of alleged discrimination and furnishes advice and assistance on affirmative action initiatives to the Board's managers and supervisors.

• The Office of Financial and Administrative Management administers the budget, procurement, property management, physical security, and general services functions of the Board. It develops and coordinates internal management programs and projects, including review of internal controls agency-wide. It also administers the agency's cross-servicing arrangements with the U.S. Department of Agriculture's National Finance Center (NFC) for accounting and payroll services and with ABS (APHIS Business Services) for human resources management services.

• The Office of Information Resources Management develops, implements, and maintains the Board's automated information systems in order to help the Board manage its caseload efficiently and carry out its administrative and research responsibilities.

MSPB developments

Over the past five years, the Board made a number of amendments to its regulations governing the processing of cases, most of them aimed at assisting parties in pursuing their cases before the Board. Perhaps the most significant was the issuance of a new Part 1208 of 5 CFR, setting forth the requirements for processing USERRA and Veterans Employment Opportunities Act (VEOA) appeals.[24] The Board also finalized two proposed rules it had issued in 1999. To assist appellants in obtaining adequate legal representation, it amended its regulations on an award of attorney fees to permit reimbursement at the attorney's customary billing rate in the community where the attorney normally practices.[25] In order to assist appellants in understanding the consequences of an election between appealing to MSPB or filing a grievance, the Board amended its requirements for the notice an agency must give when it takes an appealable action against an employee who has both a right to appeal to MSPB and a right to grieve the matter under a negotiated grievance procedure.[26]

Other amendments to the regulations in FY 2000 clarified the procedures for obtaining copies of hearing tapes and transcripts,[27] made address changes to reflect the relocation of the MSPB headquarters office,[28] and corrected a citation in the rules governing the Board's review of regulations of the Office of Personnel Management.[29]

In FY 2001, the Board also launched two pilot projects aimed at improving case processing. In November 1999, the Board imple-

[24] Interim rule at 65 Fed. Reg. 5410, February 4, 2000; final rule at 65 Fed. Reg. 49895, August 16, 2000; conforming amendment to 5 CFR Part 1201 at 65 Fed. Reg. 5409, February 4, 2000.
[25] 65 Fed. Reg. 24381, April 26, 2000.
[26] 65 Fed. Reg. 25623, May 3, 2000.
[27] 65 Fed. Reg. 19293, April 11, 2000.
[28] 65 Fed. Reg. 48885–48886, August 10, 2000.
[29] 65 Fed. Reg. 57939, September 27, 2000.

mented its suspended case pilot project, which allows appellants and agencies up to 60 days additional time to pursue discovery and settlement efforts in their pending appeals. If the parties mutually request a 30-day suspension, the presiding administrative judge will grant it, without requiring the parties to provide evidence and argument to support the request. A second 30-day suspension will be granted if the parties agree that further time is necessary. By the end of FY 2000, judges had granted 319 initial 30-day suspensions and 98 additional 30-day suspensions.[30]

In June 2000, the Board also launched an expanded pilot program at headquarters to expedite the processing of certain petitions for review (PFRs) of administrative judges' initial decisions. The purpose of the program is to identify non-meritorious PFRs that can be disposed of quickly so that the three-member Board can focus its resources on complex and precedential cases.[31] If a PFR meets one of the eight criteria established for expedited processing (e.g., clearly not within the Board's purview, no attempt to meet the criteria for Board review), the Office of the Clerk prepares a proposed decision and forwards it to the Board, rather than transferring the case to the Office of Appeals Counsel for preparation of a decision. A senior attorney detailed from the Office of Appeals Counsel to the Office of the Clerk of the Board conducts the reviews. In the first six months of the expedited PFR pilot program, approximately eight percent of the 724 PFRs reviewed were expedited. The average time for processing the expedited cases—from receipt of the PFR to issuance of the decision—was 60 days.

In a further effort to improve case processing times at headquarters, the Board targeted its enforcement cases during the latter half of FY 2000. These cases arise after the Board issues a final order in a case and a party subsequently petitions the Board to enforce its order. If the judge to whom the petition for enforcement is assigned determines that there is noncompliance with the Board's order, the case is referred to the 3-member Board for enforcement. Because enforcement cases cannot be closed until compliance is achieved, they frequently take longer to complete than other cases. By focusing on enforcement cases that had been pending at headquarters for more than 300 days, the Board was able to reduce the number of such cases substantially. One of the methods employed to reduce the processing time was to hold meetings with agencies that process the payment of judgments, such as the Defense Finance & Accounting Service (DFAS), the National Finance Center, and the U.S. Postal Service, to develop mutually beneficial systems for achieving full compliance with Board orders in a timely manner. One of the impediments identified was that responsible agency managers and personnel officials thought they had taken the steps necessary to comply with a Board order, but the payroll office lacked all the information necessary to process payments required by the order. As a result of those meetings, the agencies have developed checklists and other tools that advise agencies and appellants of the information required to process payments agreed upon in settlements or as ordered by the Board. The

[30] U.S. Merit Systems Protection Board, FY 2001 Annual Report, at 3.
[31] Id.

DFAS and NFC checklists are available on the MSPB Web site. The USPS is developing a compliance handbook.

In addition, the MSPB has accomplished the following over the past five years:

- Made Office of Policy and Evaluation study reports available on the Internet;
- Began a major initiative to design and develop an integrated document management and workflow system that will include support and maintenance of imaged and electronic case records;
- Saved money through the significant increase in the number of video conferences used for hearings, settlements and conferences related to cases before MSPB, focus groups and related studies activities, and for other activities related to MSPB business; and
- Developed an Alternative Dispute Resolution (ADR) Working Group.

The Civil Service Reform Act also authorized the Board to conduct studies of the civil service and other merit systems in the Executive Branch and report to the President and Congress on whether the public interest in a civil service free of prohibited personnel practices is being adequately protected.[32] Since 1997, the Board has published 15 reports by the Office of Program and Evaluation (OPE) staff as well as 20 editions of the Issues of Merit newsletter.[33]

The OPE staff also serves as a valuable resource for the Board in meeting internal agency research needs. For example, during FY 2001, OPE conducted a survey of appellants and their representatives, agency representatives, and MSPB administrative judges who participated in the pilot projects testing the use of video conferencing for hearings and the issuance of bench decisions by MSPB judges. The subsequent report of the survey results provided information that the Board and senior managers can use to evaluate these projects.

In addition, as the following two tables show, the Board has issued an average of 9,000 decisions (regions and headquarters) annually for the past five years while maintaining an average case processing time of less than 100 days. The percentage of Board decisions affirmed or otherwise left unchanged by the Court of Appeals for the Federal Circuit, which has sole jurisdiction over MSPB appeals, has exceeded 90 percent.[34]

CASES DECIDED

Fiscal year	Regional & field offices	HQ appellate jurisdiction	HQ original jurisdiction	Total
1997	8,314	1,740	100	10,154
1998	8,442	1,887	47	10,376
1999	7,670	2,037	106	9,813
2000	7,489	1,827	58	9,374
2001	7,174	1,357	28	8,559

[32] 5 U.S.C. § 1204(a)(3).

[33] Merit Systems Protection Board (visited Nov. 4, 2002) <http://www.mspb.gov/studies/studies.html>.

[34] Merit Systems Protection Board (visited Nov. 4, 2002) <http://www.mspb.gov/offices/famd/2001__budget.html>.

SELECTED CASE PROCESSING STATISTICS [35]

Fiscal year	Percent of final decisions left unchanged upon review	Average processing time for initial decisions	Average processing time for petitions for review	Average processing time for enforcement cases in the OGC
1997	96	108	183	202
1998	92	108	205	163
1999	92	100	222	206
2000	96	89	176	206
2001	96	92	214	224

The time for case processing has been an issue at the MSPB. While the case processing time for initial decisions has decreased over the past five years, the processing time for decisions on petitions for review issued by the Board has once again increased. In addition, the processing time for enforcement cases in the Office of General Counsel has increased. From 1995 to 2000, the average processing time for enforcement cases in OGC ranged from 163 days to 206 days, with results at the high end of that range in both FY 1999 and FY 2000. MSPB explains that the increase from 206 to 224 reflects a significant achievement by OGC in closing a substantial number of overage enforcement cases during the fiscal year.[36]

BUDGET AND STAFFING

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002
Budget	$23,923,000	$27,720,000	$25,780,000	$27,481,000	$29,372,000	$33,075,000
FTE	259	238	237	226	222	228

C. PAST REAUTHORIZATIONS FOR OSC AND MSPB

When the Civil Service Reform Act created the MSPB and the OSC in 1979, the MSPB, of which OSC was a part, was granted a permanent authorization of appropriations.[37] With enactment of the WPA in 1989, appropriations for the OSC and the MSPB were for the first time authorized for a limited time period. MSPB was authorized for the fiscal years 1989–1994, while the OSC was authorized for fiscal years 1989–1992.[38] According to the Senate committee report, this was done to require Congress to take affirmative action to continue funding for the two agencies.[39] Legislative history on the Act suggests that the shorter authorization for OSC resulted from the negative perception many in Congress had of the agency.[40]

The OSC was reauthorized for fiscal years 1993–1997 with enactment of the Office of Special Counsel Reauthorization Act [41] on Oc-

[35] Id.

[36] Merit Systems Protection Board, FY 2001 Performance Report, <http://www.mspb.gov/foia/forms-pubs/2001__performance-rpt.html>.

[37] Civil Service Reform Act, Pub. L. No. 95–454, 92 Stat. 1111 § 903 (1978) (stating "There are authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, such sums as may be necessary to carry out the provisions of this Act.").

[38] Pub. L. No. 101–12, 103 Stat. 16 (1989).

[39] S. Rep. No. 100–413, at 36 (1988).

[40] See Whistleblower Protection Act of 1987: Hearing on S. 508 before the Subcomm. on Federal Services, Post Office and Civil Service of the Senate Comm. on Governmental Affairs, 100th Cong., at 234–35, 260–64 (1987); Hearings on Whistleblower Protection Act of 1986 Before the House Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service, 99th Cong 151 (1986).

[41] Pub. L. No. 103–424 (1994).

tober 29, 1994—two years after the agency's authorization had expired. At the same time, the MSPB was reauthorized through 1997. A 1994 committee report stated that the change was necessary to place the two agencies on the same authorization cycle and to maintain close congressional oversight over OSC and the MSPB and ensure that improvements in the operations of both agencies in fact take place.[42] The Omnibus Consolidated Appropriations Act for FY 1997 extended the authorization of appropriations for the OSC and the MSPB through FY 2002.[43] (Although the conference report stated that Congress intended to extend the authorization of appropriations for both MSPB and OSC, a drafting error caused the OSC's reauthorization not to be actually enacted into statute.) As the authorization for these two agencies expired on October 1, 2002, S. 3070 reauthorizes OSC and MSPB for five additional years, through the end of the 2007 fiscal year.

D. AMENDMENTS TO CLARIFY AND STRENGTHEN THE WHISTLEBLOWER PROTECTION ACT

Background

The Civil Service Reform Act of 1978 (CSRA) created statutory protections for federal employees to encourage disclosure of government illegality, waste, fraud, and abuse. As stated in the Senate Report concerning the whistleblowing provisions of the civil service reform legislation:

> 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 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.[44]

The CSRA established the Office of Special Counsel to investigate and prosecute allegations of prohibited personnel practices or other violations of the merit system and the Merit Systems Protection Board to adjudicate such cases. However, in 1984, the MSPB reported that in practice the Act had no effect on the number of whistleblowers and that federal employees continued to fear reprisals. The Senate Governmental Affairs Committee subsequently re-

[42] S. Rep. No. 103–358 (1994).
[43] Pub. L. No. 104–208 (1996).
[44] S. Rep. No. 95–969, at 8 (1978).

ported that employees felt that OSC engaged in apathetic and sometimes detrimental practices toward employees seeking its assistance. The Committee also found that restrictive MSPB and federal court decisions had hindered the ability of whistleblowers to win redress.[45]

In response, Congress in 1989 unanimously passed the Whistleblower Protection Act, Public Law No. 101–12. 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.[46]

Congress substantially amended the WPA in 1994, as part of legislation to reauthorize OSC and MSPB. The amendment was designed, in part, to address a series of actions by the OSC and decisions by the MSPB and the Federal Circuit that were found to be inconsistent with congressional intent of the 1989 Act. Both the House and Senate committee reports accompanying the 1994 amendments specifically criticized these decisions, particularly those limiting the types of disclosures covered by the WPA.

Specifically, this Committee explained that the 1994 amendments were intended to reaffirm its long-held view that the plain meaning language of the Whistleblower Protection Act 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" * * *[47]

Similarly, the House stated:

> Perhaps the most troubling precedents involve the Board'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 spe-

[45] S. Rep. No. 100–413, at 6–16 (1988).
[46] Whistleblower Protection Act of 1989 § 2(b), Pub. L. No. 101–12, 103 Stat. 16 (1989).
[47] S. Rep. No. 103–358 (1994), at 10 (quoting S. Rep. No. 100–413, at 13 (1988)).

> cifically prohibited by statute. Employees must disclose that type of information through confidential channels to maintain protection; otherwise there are no exceptions.[48]

Clarification of what constitutes protected disclosure under the WPA

Despite the clearly stated intent of the 1994 amendments, it is necessary once again to state legislatively what constitutes protected disclosure under the WPA, because the Federal Circuit has continued to misinterpret the law, creating new hurdles for whistleblowers along the way. For example, in *Horton* v. *Department of the Navy,*[49] the Federal Circuit ruled that disclosures to co-workers or to the wrong-doer, or disclosures to a supervisor are not protected by the Act. In *Willis* v. *Department of Agriculture,*[50] the court ruled that disclosures to officials in the agency chain of command or those made in the course of normal job duties are not protected. And in *Meuwissen* v. *Department of Interior,*[51] the Federal Circuit held that disclosures of information previously known do not qualify as "disclosures" under the WPA.

As both House and Senate reports explicitly noted, the plain language of the WPA extends to retaliation for "any disclosure," regardless of the setting of the disclosure, the form of the disclosure, or the person to whom the disclosure is made. S. 3070 would further clarify the definition of "any disclosure." The bill amends the WPA to cover any disclosure of information "without restriction to time, place, form, motive or context, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties."

It is also necessary to clarify the test that must be met to show that a Federal employee reasonably believed that his or her disclosure was evidence of wrongdoing. Under the WPA, an employee or applicant is protected for disclosures of information he or she 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, Senator Levin explained:

> [T]he Federal Circuit * * * impose[d] a clearly erroneous and excessive standard on the employee in proving "reasonable belief," requiring "irrefragable" proof that there was gross mismanagement. * * * The employee, under the clear language of the statute, need only have "a reasonable belief" that there is fraud, waste or abuse occurring before making a protected disclosure. This bill will clarify the law so this misinterpretation will not happen again.[52]

This case that Senator Levin referenced was *Lachance* v. *White,*[53] in which the Office of Personnel Management (OPM) sought review of an MSPB order that found that White made protected disclosures resulting in a downgrade in position. OPM argued that

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[48] H. Rep. No. 103–769, at 18 (1994).
[49] *Horton* v. *Dept. of Navy,* 66 F. 3d 279 (Fed. Cir. 1995).
[50] *Willis* v. *Dept. of Agriculture,* 141 F. 3d 1139 (Fed. Cir. 1998).
[51] *Meuwissen* v. *Dept. of Interior,* 234 F. 3d 9 (Fed. Cir. 2000).
[52] 147 Cong. Rec. S5973 (daily ed. June 7, 2001) (Statement of Senator Levin upon introduction of S. 995).
[53] *Lachance* v. *White,* 174 F. 3d 1378 (Fed. Cir. 1999).

White's belief that he uncovered gross mismanagement (an allegedly wasteful Air Force education program) was inadequate to support a violation of the WPA without an independent review of the reasonableness of the belief by MSPB. The Federal Circuit agreed and stated that MSPB must look for evidence that it was reasonable to believe that the disclosures revealed misbehavior by the Air Force described 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? A purely subjective perspective of an employee is not sufficient even if shared by other employees."[54]

However, the court went further in holding that the reasonableness review 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.[55]

By definition, irrefragable means impossible to refute.[56] This imposes an impossible evidentiary burden on whistleblowers, and there is nothing in the law or legislative history that even suggests such a standard under the WPA.

To assure this misinterpretation does not happen again, S. 3070 provides that any presumption that a public employee (i.e., the official whose misconduct the whistleblower is disclosing) acted in good faith may be rebutted by "substantial evidence." Substantial evidence has been defined by the Supreme Court as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[57] It consists of "more than a mere scintilla of evidence but may be somewhat less than a preponderance."[58] By establishing a substantial evidence test, the Committee intends to provide a standard that is consistent with the legislative history of the Act and will protect whistleblowers instead of creating a higher bar to protection as the Federal Circuit did in *Lachance* v. *White.*

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 a petition to be filed in either 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.[59] In 1982, when the Federal Circuit was created, Congress established that petitions for review of an MSPB order could be filed with the Federal Circuit only.[60] (An exception applies to cases of discrimination before the MSPB, which are filed in district court under the applicable anti-discrimination law.[61])

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[54] Id. at 1381.
[55] Id. at 1381 (quoting *Alaska Airlines, Inc.* v. *Johnson,* 8 F. 3d 791, 795 (Fed. Cir. 1993)).
[56] Merriam-Webster's Collegiate Dictionary (10th ed. 1999).
[57] *Richardson* v. *Perales,* 402 U.S. 389, 401 (1971).
[58] *Hays* v. *Sullivan*, 907 F. 2d 1453, 1456 (4th Cir. 1990) (quoting *Laws* v. *Celebrezze,* 368 F. 2d 640, 642 (4th Cir. 1966)).
[59] Public Law No. 95–454, § 205, 92 Stat. 1143 (Oct. 13, 1978) (adding 5 U.S.C. § 7703).
[60] Public Law No. 97–164, § 144 (April 2, 1982).
[61] 5 U.S.C. §§ 7702, 7703(b)(2).

Subject to a five year sunset, S. 3070 suspends the Federal Circuit's exclusive jurisdiction over whistleblower appeals. The *Lachance* v. *White* case is one in a long series of cases decided by the Federal Circuit that have misinterpreted the provisions of the WPA. Also, this bill represents the third time Congress has had to clarify the language of the WPA to overturn these misinterpretations. 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 and guide Congressional efforts to clarify the law if necessary.

A number of Federal statutes already allow cases involving rights and protections of Federal employees, or involving whistleblowers, to be subject to multi-circuit review, i.e., they may be appealed to Courts of Appeals across the country. Decisions of the Federal Labor Relations Authority (FLRA) may be appealed to Court of Appeals for the Circuit where the petitioner resides or to the D.C. Circuit.[62] In addition, 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 may also obtain review in the U.S. District Courts.[63] Appeal from decisions of the District Courts in these cases may then be brought in the appropriate Court of Appeals for the appropriate Circuit.

Moreover, a multi-circuit appellate review process of whistleblower claims already exists in many cases.

- 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.[64]
- 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.[65]
- 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.[66]
- Department of Labor corporate whistleblower laws passed as part of the Energy Reorganization Act, as amended in 1992,[67] and the Clean Air Act, as amended in 1977,[68] 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),[69] passed in 2000, allows whistleblowers to obtain review of their cases in the appropriate Federal Court of Appeals.

Accordingly, subject to the five year sunset, the bill amends 5 U.S.C. § 7703 to provide that a petition to review a final order or

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[62] 5 U.S.C. § 7123.
[63] 5 U.S.C. §1508.
[64] 31 U.S.C. § 3730(h).
[65] 12 U.S.C. § 1441a(q).
[66] 12 U.S.C. § 1790b(b).
[67] 42 U.S.C. § 5851(c).
[68] 42 U.S.C. § 7622(c).
[69] 49 U.S.C. § 42121(b)(4).

final decision of the MSPB may be filed in the United States Court of Appeals for the Federal Circuit or the U.S. Court of Appeals for the circuit where the petitioner resides.

Office of Special Counsel—Litigating authority and right to seek review

The bill would grant OSC authority to represent itself in court through its own lawyers and to seek judicial review of MSPB decisions in certain situations if the case will have an impact on the enforcement of the whistleblower statute. Senator Akaka explained:

> The measure also provides the Special Counsel with greater litigating authority for merit system principles that the office is responsible to protect. Under current law, the OSC plays a central role as public prosecutor in cases before the MSPB, but cannot choose to defend the merit system in court. Our legislation recognizes that providing the Special Counsel this authority to seek such review, in precedential cases, is crucial to ensuring the promotion of the public interest furthered by these statutes.[70]

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 "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office."[71] The primary mission of OSC is to protect federal employees and applicants from prohibited employment practices, with a particular focus on protecting whistleblowers from retaliation. 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, 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, a report is sent to the head of the employing agency, outlining OSC's findings and requesting that the agency remedy the illegal action. In the majority of cases in which the Special Counsel has found a violation, the agencies voluntarily take corrective action. If an agency does not do so, OSC is authorized to file a petition for corrective action with the MSPB.[72]

If the OSC does not send the whistleblower's disclosures 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). At proceedings before the MSPB, OSC is represented by its

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[70] 147 Cong. Rec. S5971 (daily ed. June 7, 2001) (Statement of Senator Akaka upon introduction of S. 995).
[71] 5 U.S.C. § 1211(b).
[72] 5 U.S.C. § 1214(b)(2)(C).

own attorneys while the employing agency is represented by the agency's counsel. In IRAs, OSC may not intervene unless it has the consent of the whistleblower.

Under this system, however, OSC's ability to effectively enforce and defend whistleblower laws is limited. For example, the law provides the OSC with no authority to request that the MSPB reconsider its decision or to seek review of an MSPB decision by the Federal Circuit. Even when another party with authority to petition for a review of a MSPB decision does so, OSC has historically been denied the right to participate in those proceedings. Further, OPM, which typically is not a party to the case, can request that the MSPB reconsider its rulings, while OSC cannot. The problem with OSC's effectiveness is exacerbated since the majority of the MSPB's decisions arise in IRA cases where OSC is not a party. S. 3070 would remedy this situation by providing explicit authority for OSC to participate in such matters.

Furthermore, the Department of Justice (DOJ) has recognized OSC's right to appear as an intervenor only in those few cases where 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 OSC to impose discipline for retaliating against a whistleblower. Because 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 an independent agency like OSC is a significant impediment to the effective enforcement of the WPA because DOJ routinely represents employing agencies and their officers or OPM on appeal in IRA cases. Indeed, DOJ itself could be the respondent in such cases.

On July 25, 2001, the Subcommittee on International Security, Proliferation and Federal Services held a hearing on S. 995. DOJ submitted testimony opposing provisions that would grant OSC the authority to represent itself in litigation and to prosecute appeals. DOJ argued that granting independent litigating authority would "erode centralized control over personnel litigation." According to DOJ's testimony, such centralized control furthers the goals of enabling the government to present uniform legal positions, providing for "objective" litigation by attorneys unaffected by a single agency's concerns, and "the facilitation of presidential supervision over Executive Branch policies." Authorizing OSC to prosecute appeals, according to the testimony, "would disrupt this carefully crafted scheme" under which the various appeal rights, if any, of employees, agencies, the Office of Personnel Management, and OSC are carefully delineated. "Moreover," argued the DOJ, granting independent litigating authority "could result in the Special Counsel litigating against other Executive Branch agencies."[73]

On balance, however, granting OSC these additional litigation authorities is justified. For example, in several kinds of cases that arise under the civil service laws, it is routine for there to be more

[73] S. 955—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).

than one government party in the federal courts. Both the MSPB [74] and the FLRA [75] possess the authority to represent themselves in the courts of appeals, often against other federal agencies that are represented by the Justice Department.

Further, the OSC, like the MSPB and the FLRA, occupies a unique role in the Executive Branch because part of its job is to police other federal agencies' compliance with the civil service laws. Even under current law, OSC's mission routinely requires it to take positions adverse to other federal government agencies, albeit before an administrative agency, the MSPB. Denying OSC independent litigating authority in the context of the civil service scheme creates an exception to what is otherwise the rule, under which DOJ provides representation to employing agencies defending themselves against the independent litigating agencies (the FLRA, the MSPB) who are represented by their own counsel.

Without independent litigating authority, OSC is blocked from participating in the forum in which the law is largely shaped: the U.S. Court of Appeals for the Federal Circuit (and, if this legislation were passed, the other Circuits). Should the OSC conclude that MSPB misinterprets one of the laws within OSC's jurisdiction, the OSC has no right to appeal that decision, even if it was a party before the MSPB. The limitation undermines both OSC's ability to protect whistleblowers and the integrity of the whistleblower law.

Precedent exists for independent litigating authority for independent agencies. In the area of employment law, both the Equal Employment Opportunity Commission [76] and the National Labor Relations Board,[77] in addition to the MSPB and the FLRA, have such authority. OSC itself has the authority to appear before the Court of Appeals and represent complainants alleging that the MSPB has wrongfully rejected their complaints under the Uniformed Services Employment Restoration Rights Act (USERRA).[78]

For these reasons, S. 3070 provides explicit authority for the Special Counsel to appear, through attorneys that he or she may designate, in any civil action brought in connection with the WPA. In addition, the bill provides OSC the authority to obtain court review of any MSPB order in a whistleblowing case if the OSC determines the Board erred and the case will have an impact on the enforcement of the whistleblower statute. According to Special Counsel Elaine Kaplan, these changes are "necessary, not only to ensure OSC's effectiveness, but to address continuing concerns about the whittling away of the WPA's protections by narrow judicial interpretations of the law." [79]

Burden of proof in OSC disciplinary actions

Current law authorizes the OSC to pursue disciplinary action against managers who retaliate against whistleblowers. More generally, if the Special Counsel determines that disciplinary action should be taken against an employee for having committed a prohibited personnel practice or other misconduct within OSC's pur-

[74] 5 U.S.C. §§ 1201–1206.
[75] 5 U.S.C. §§ 7104 and 7105(d)–(e).
[76] 42 U.S.C. §§ 2000e–4, 2000e–5(f)(2).
[77] 29 U.S.C. §§ 154(a) and 160(e).
[78] 38 U.S.C. § 4324(d)(2).
[79] Letter from Elaine Kaplan, Special Counsel, Office of Special Counsel, to Senator Carl Levin, (Sept. 11, 2002).

view, the Special Counsel shall present a written complaint to the MSPB, and then the Board may issue an order taking disciplinary action against the employee.[80]

However, under MSPB case law, 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.[81] This is a heavy burden to meet. In 1989, Congress had lowered the burden of proof for whistleblowers to win corrective action when they were retaliated against. 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 reversed the burden for agencies who must now provide independent justification for the personnel action at issue by clear and convincing evidence.[82] 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 ruled that whistleblower reprisal had been proven for purposes of providing relief to the employees, but rejected OSC's claim for disciplinary action against the managers in the same case.

The Special Counsel has written that MSPB case law relating to OSC's disciplinary authority should be overturned. She explained: "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."[83]

The bill addresses the burden of proof problem in OSC disciplinary action cases by employing the same burden-of-proof as was set forth by the Supreme Court in *Mt. Healthy* v. *Doyle*.[84] Under the *Mt. Healthy* test, if it were made applicable in a disciplinary case, 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. If OSC made such a showing, the MSPB would order appropriate discipline unless the official showed, "by a preponderance of 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.

Other provisions

Anti-gag provisions

In 1988, Senator Grassley attached an appropriations rider to the Treasury, Postal and General Government bill, which has been referred to as the "anti-gag" provision. This provision has been included in spending 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 commu-

[80] 5 U.S.C. § 1215.
[81] *Special Counsel* v. *Santella,* 65 M.S.P.R. 452 (1994).
[82] 5 U.S.C. §§ 1214 and 1221. See also 135 Cong. Rec. 4509, 4517, 5033 (1989).
[83] Kaplan, supra note 79.
[84] *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977).

nicate with Congress under the Lloyd Lafollette Act, and to make appropriate disclosures under other particular laws specified in the addendum. This bill would institutionalize the anti-gag provision by codifying it and making it enforceable.

Specifically, S. 3070 would require that every "nondisclosure policy, form, or agreement of the Government shall contain" the specific addendum set forth in the legislation informing employees of their rights. A nondisclosure policy, form or agreement that does not contain the required statement "may not be implemented or enforced to the extent * * * inconsistent with that statement."

Furthermore, the bill makes it a prohibited personnel practice for any manager to "implement or enforce any nondisclosure policy, form, or agreement" that does not contain the specific statement mandated in the bill. Making it a prohibited personnel practice means that the anti-gag requirement is enforceable by the OSC and the MSPB, and any employee can seek protection from these agencies against a personnel action taken in violation of the anti-gag requirement.

Board review of actions relating to security clearance

At the Subcommittee's hearing on S. 955, Senator Grassley testified about his concern that a whistleblower's security clearance can be used as a means of retaliation. He stated:

> I am aware of several instances where a whistleblower's security clearance has been pulled as a means of retaliation. The pulling of a security clearance effectively fires employees. A whistleblower does not have rights to a third-party proceeding in these instances. I think this matter needs to be reviewed and it should be possible to find a balance between the legitimate security concerns of the government and ensuring that pulling a security clearance is not used as a back door to get whistleblowers.[85]

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.[86] 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, an employee's security clearance can be suspended or revoked in retaliation for making protected disclosures, the employee with a suspended or revoked clearance can be terminated from his or her federal government job, and MSPB may not review the revocation. According to the OSC, revocation of a security clearance is a way to camouflage retaliation. At the hearing on S. 955, Senator Levin asked the Special Counsel 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." The Special Counsel, as part of her response, said:

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[85] Hearing, supra note 73.
[86] *Hesse* v. *State*, 217 F. 3d 1372 (Fed. Cir. 2000).

> 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.[87]

To address this situation, S. 3070 makes it a prohibited personnel practice for a manager to suspend, revoke or take other action with respect to an employee's security clearance in retaliation for the employee blowing the whistle. The bill specifies that the MSPB, or a reviewing court, may issue declaratory and other appropriate relief. But the legislation is clear that the MSPB or a reviewing court may not direct the President to restore a security clearance.

Appropriate relief may include back pay, an order to reassign the employee, attorney fees, and any other relief the Board or court is authorized to provide for other prohibited personnel practices. In addition, if the Board finds the action illegal, it may bar the agency from directly or indirectly taking any other personnel action based on the illegal security clearance action. The bill also requires agencies to issue a report to Congress detailing the circumstances of the agency's security clearance decision and provides for expedited review of whistleblower cases by the OSC, the MSPB and the reviewing court where a security clearance was revoked or suspended. The latter is important because a person whose clearance has been suspended or revoked, and whose job responsibilities require clearance, may be unable to work while his or her case is being considered.

In drafting this provision, the Committee has worked with the Administration to produce a fair and balanced approach to solving this problem. Despite the Committee's efforts, the Administration still has some concerns over this provision. In particular, the Administration asserts that this provision is a substantial intrusion into Executive Branch prerogatives to control national security information and those who have access to it. It is important to note, however, that in *Department of Navy* v. *Egan*, the Supreme Court, while expressing a reluctance to intrude on its own initiative upon military and national security affairs, explicitly acknowledged the role of the Congress in national security issues, stating that "unless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."[88]

The Administration has also averred that inclusion of this protection would induce more employees to challenge and litigate security clearance determinations and, as a result, will deter managers from making their best judgments on these sensitive issues.

The Committee, however, believes that the language in this provision strikes the right balance and would not chill a manager's willingness to deny or revoke a clearance. It bears repeating that, under this bill, the Executive Branch retains the authority to ignore the MSPB's recommendations—there is no authority under this bill to direct that a security clearance be restored.

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[87] Hearing, supra note 73, at 24 (testimony of Hon. Elaine Kaplan).
[88] *Dept. of Navy* v. *Egan*, 484 U.S. 518, 530 (1988) (citations omitted).

The Administration has also claimed that MSPB has no expertise in making decisions on clearances. However, under this bill, the MSPB would not be making decisions relative to clearances. Rather, the decisions would relate to whether a disclosure is protected and whether there exists the proper nexus between the disclosure and the personnel action of denying or revoking a clearance. Such a determination is analogous to MSPB's current duties and is squarely within its expertise. For this reason, the provision is also consistent with U.S. Supreme Court precedent in *Department of Navy* v. *Egan*, which held that the Board does not have statutory authority to review the substance of an underlying security-clearance determination in the course of reviewing an adverse action, and that such review cannot be presumed merely because the statute does not expressly preclude it.[89]

Compensatory damages

When the Board imposes corrective action, the statute now expressly authorizes "reimbursement * * * for reasonable and foreseeable consequential damages," but it does not make express reference to "compensatory damages."[90] The 1978 Civil Service Reform Act gives the Board broad authority to impose appropriate corrective action, but the law does not specify traditional terms such as compensatory damages, which are explicit in equivalent civil rights remedial statutes providing "make whole" relief.[91] This was not a particular problem, because the 1978 legislative history made clear the statute provides for a comprehensive "make whole" remedy: A prevailing employee is entitled "to be made whole for any of the losses found to have been suffered by the employee."[92] The Board also reaffirmed its authority to order that an employee be "made whole" for any damages incurred as a result of a prohibited personnel practice.[93]

A dispute arose, however, concerning litigation costs for prevailing appellants. The Federal Circuit and Board permitted reimbursement for items like attorney time and photocopying, but not deposition transcript costs, printing costs and witness fees. In addition, reimbursement for telephone charges for witnesses depended on whether the attorney or the client made the call.[94] In the 1994 amendments, Congress sought to close remaining loopholes and provide relief for "back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential changes."[95] The legislative history for this provision again stressed that employees are to be made whole. During debate over the 1994 amendments, Congressman Frank McCloskey said that "the expanded provisions for consequential damages and attorney fees are intended to provide a realistic expectation that employees who prevail will recover their costs, the same as if a merit

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[89] Id.
[90] 5 U.S.C. § 1214(g).
[91] See, e.g., 42 U.S.C. § 1981a.
[92] S. Rep. No. 95–969, at 114–15 (1978), reprinted in 1978 USCCAN 2723, 2837.
[93] *In re Frazier,* 1 M.S.P.R. 259, 268 and n.4 (1979) (stating "Clearly, the Board ultimately has the power under its broad corrective action authority to order a federal employee made whole if it is found on appeal that the employee has been subject to a prohibited personnel practice. See 5 U.S.C. § 1206(c)(1)(B)).
[94] See *Bennett* v. *Dept of Navy,* 699 F.2d 1140 (Fed. Cir. 1983); *O'Donnell* v. *Dept. of Interior,* 2 M.S.P.R. 445 (1980); and *Wiatr* v. *Dept. of Air Force,* 50 M.S.P.R. 441 (1991).
[95] 5 U.S.C. § 1221(g)(1)(A)(ii).

system reprisal had not occurred. Too many employees who win their cases find their victories to be pyrrhic."[96] In addition, the Senate Report accompanying the 1994 amendments stated that "the Board [could] order corrective action [to] make, as nearly as possible, the individual whole."[97] Despite Congressional intent, MSPB and the Federal Circuit have narrowed the scope of relief—finding that nonpecuniary damages, such as pain and suffering or emotional distress are not included.[98] However, compensatory damages are already authorized for federal employees under the civil rights acts[99] and for environmental and nuclear whistleblowers, among others, under other federal statutes.[100] Accordingly, the bill would clarify that whistleblowers are eligible to receive "compensatory" damages, as well as the consequential damages that are already stated in the statute.

Classified disclosures to Congress

The bill amends 5 U.S.C. §2302(b)(8) to provide whistleblower protections for certain disclosures of classified information to Congress. A whistleblower must limit the disclosure 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 a disclosure of classified information to be protected, the employee must possess a reasonable belief that the disclosure is direct and specific evidence of a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, a substantial and specific danger to public health or safety, or a false statement to Congress on an issue of material fact.

The language in this bill is very similar to a provision ordered reported by the Senate Armed Services Committee in 1997 as section 1068 of S. 924, the National Defense Authorization bill for FY 1998. In 1998, another similar measure, containing provisions affecting the Intelligence Community, was reported by the Intelligence Committee and passed the Senate by a vote of 93 to 1, as section 501 of S. 2052, the Intelligence Authorization bill for FY 1999. The Senate provision was not contained in the enacted legislation, which instead incorporated a modified version of provisions that passed the House. Those enacted provisions established a secure process by which a whistleblower in the Intelligence Community intending to disclose wrongdoing to Congress may initially report to the appropriate inspector general, and then, if the information is not transmitted to the Intelligence Committees through that process, may contact the Intelligence Committees directly.[101] The conferees explained that this measure "establishes *an additional* process to accommodate the disclosure of classified information of interest to Congress," and emphasized that the new provision "is

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[96] 140 Cong. Rec. H11421 (daily ed. Oct. 7, 1994).
[97] S. Rep. No. 103–358, at 11 (1994).
[98] *Kinney* v. *Dept. of Agriculture,* 82 M.S.P.R. 338 (1999). See also *Bohac* v. *Dept. of Agriculture,* No. 99–3306 (Fed. Cir. 2001).
[99] See the Civil Rights Act of 1991 42 U.S.C. §1981a; *Fitzgerald* v. *VA,* 121 F.3d 203, 207 (5th Cir. 1997); *Martin* v. *Department of Air Force,* 73 M.S.P.R. 590, 594–96 (1997); *Callagan* v. *Dept. of Agriculture,* 74 M.S.P.R. 4, 6 (1997).
[100] See the Clean Air Act, 42 U.S.C. §7622(b)(2)(B); Safe Drinking Water Act, 42 U.S.C. §300j–9(ii); and Toxic Substances Control Act, 15 U.S.C. §2622(b)(2)(B).
[101] Intelligence Authorization Act for FY 1999, Pub. L. No. 105–272, title VII (1998) ("Intelligence Community Whistleblower Protection Act of 1998").

not the exclusive process by which an Intelligence Community employee may make a report to Congress." [102]

The Senate Intelligence Committee had held hearings and reported out legislation in 1998 containing these same provisions, S. 1668. In its report, the Intelligence Committee described its consideration of constitutional and other ramifications of the legislation. That Committee was persuaded that the regulation of national security information, while implicit in the command authority of the President, is equally implicit in the national security and foreign affairs authorities vested in Congress by the Constitution. The Intelligence Committee was further persuaded that the provision was constitutional because it did not prevent the President from accomplishing his constitutionally assigned functions, and because any intrusion upon his authority is justified by an overriding need to promote objectives within the constitutional authority of Congress.[103]

The provision in S. 3070 is intended to ensure that Congress receives the information necessary to fulfill its constitutional oversight responsibilities, while protecting employees from adverse actions based on what was considered an unauthorized disclosure to Congress, and also retaining appropriate security-related restrictions in defining the individuals to whom classified information may be disclosed.

Ex post facto agency loophole amendment

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.[104] Certain agencies are also excluded from the Act. They include the General Accounting Office, the Federal Bureau of Investigation the Central Intelligence Agency, the National Security Agency, and other agencies determined by the President to have the principal function of conducting foreign intelligence or counterintelligence activities.[105]

In 1994 Congress amended the WPA to block agencies from designating particular positions as confidential policymaker exceptions after the employees filed prohibited personnel practice complaints. As a result, Congress restricted this jurisdictional loophole to positions designated as exceptions "prior to the personnel action." [106] Unfortunately, a similar practice has occurred again, in a context with far broader consequences. An agency was exempted from the Act over a year into whistleblower litigation, and only after the Board had overturned an Administrative Judge's decision to order a hearing.[107] S. 3070 would close the loophole for agencies in the same manner as Congress did for positions in 1994, by specifying

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[102] H.R. Rep. No. 105–760 (1998) (emphasis added).
[103] S. Rep. No. 105–165 (1998).
[104] 5 U.S.C. § 2302(a)(2)(B).
[105] Id.
[106] Id.
[107] See *Czarkowski* v. *Dept. of Navy,* Docket No. DC–1221–99–0547–B–1. The agency invoked the exemption after the Board rejected an earlier effort to avoid litigation on a different basis and ordered a hearing, *Czarkowski* v. *Dept. of the Navy,* 87 M.S.P.R. 107 (2000).

that an agency may be excluded under the Act only prior to the personnel action taking place.

III. Legislative History

S. 3070 was introduced by Senator Daniel Akaka and Senator Carl Levin on October 8, 2002, and was referred to the Committee on Governmental Affairs. The bill builds on provisions of S. 2829, which was introduced by Senator Akaka on July 31, 2002, to reauthorize appropriations for the MSPB and OSC and make changes to the WPA, and of S. 995, which was introduced by Senators Akaka, Levin, and Grassley on June 7, 2001, to make amendments to the WPA. S. 2829 and S. 995 were referred to the Subcommittee on International Security, Proliferation and Federal Services. A hearing on S. 995 was held before the Subcommittee on July 25, 2001. The witnesses included Senator Grassley, Special Counsel Elaine Kaplan, Merit Systems Protection Board Chair Beth Slavet, and Thomas Devine of the Government Accountability Project. The Department of Justice was invited to testify, but declined. Written testimony was submitted by the Department.

On September 23, 2002, representatives from the MSPB and OSC met with Governmental Affairs Committee staff to discuss the reauthorization of OSC and MSPB. Tim Hannapel, Deputy Special Counsel, and Jane McFarland, Director of Congressional and Public Affairs, represented the OSC. MSPB was represented by Chief of Staff Richard Banchoff, General Counsel Lynn Jennings, Legislative Counsel Rosalyn Wilcots, Budget Officer Doug Wade, and Steve Nelson, the Director of the Office of Policy and Evaluation.

On October 8, 2002, the Subcommittee on International Security, Proliferation, and Federal Services favorably polled out the language of S. 3070. On October 9, 2002, the Committee met in open session and ordered favorably reported the bill, S. 3070, without amendment unanimously by rollcall vote. Present and voting in the affirmative were Senators Akaka, Levin, Durbin, Torricelli, Cleland, Carnahan, Carper, Dayton, and Lieberman.

IV. Regulatory Impact Statement

Paragraph 11(b)(1) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate the "regulatory impact which would be incurred in carrying out this bill." The Committee has determined that the enactment of this legislation will not have significant regulatory impact.

V. Congressional Budget Office Cost Estimate

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and with section 403 of the Congressional Budget Act of 1974, 2 U.S.C. § 653, the Committee sets forth the following cost estimate with respect to S. 3070 submitted to the Committee by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 18, 2002.

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

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 3070, a bill to authorize appropriations for the Merit Systems Protection Board and the Office of Special Counsel, and for other purposes.

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

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 3070—A bill to authorize appropriations for the Merit Systems Protection Board and the Office of Special Counsel, and for other purposes

Summary: S. 3070 would authorize appropriations for the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC) for fiscal years 2003 through 2007. The bill also would make several amendments to the laws governing the MSPB and the OSC and would clarify the employment protections and rules that apply to employees who disclose government waste, fraud, and abuse.

Based on the amounts appropriated for these agencies in 2002 and assuming adjustments for anticipated inflation, CBO estimates that implementing this legislation would cost $242 million over the 2003–2007 period. Enacting S. 3070 would not affect direct spending or revenues. The bill 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. 3070 is shown in the following table. The costs of this legislation fall within budget function 800 (general government).

	By fiscal year, in millions of dollars—				
	2003	2004	2005	2006	2007
CHANGES IN SPENDING SUBJECT TO APPROPRIATION [1]					
Merit Systems Protection Board:					
Estimated Authorization Level	32	33	34	34	37
Estimated Outlays	31	31	33	34	36
Office of Special Counsel:					
Estimated Authorization Level	12	13	13	14	14
Estimated Outlays	12	13	13	14	14
Compensatory Damage Awards:					
Estimated Authorization Level	1	2	2	2	2
Estimated Outlays	1	2	2	2	2
Total Changes:					
Estimated Authorization Level	45	48	49	50	53
Estimated Outlays	44	48	48	50	52

[1] A full-year appropriation has not yet been enacted for the MSPB and the OSC. In fiscal year 2002, MSPB received an appropriation of $31 million and OSC received an appropriation of $12 million.

Basis of Estimate: For this estimate, CBO assumes that the bill will be enacted in fiscal year 2003 and that the amounts necessary to operate the MSPB and OSC at the same level provided in 2002 will be appropriated for each fiscal year, including adjustments for anticipated inflation. Outlay estimates are based on historical spending patterns for the agencies.

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 to pay for an employee's attorney's fees, back pay, and any associated travel and medical costs. Under S. 3070, federal employees would be authorized to receive additional compensatory damages, including pain and suffering, for employment disputes brought under the Whistleblower Protection Act.

CBO cannot estimate the cost of compensatory damage awards in such cases because the amount awarded would depend on the particular circumstances of each case and the frequency of cases involving such damages. The OSC is involved in settling an average of 75 disputes under the Whistleblower Protection Act each year. Settlement amounts range from about $20,000 to $200,000. While it is uncertain how often compensatory damages would be awarded in such cases, the OSC expects such awards could more than double the cost of some settlements. Hence, CBO expects this provision would add a few million dollars each year to the cost of agency settlements, which are paid from individual agency appropriations.

Intergovernmental and private-sector impact: The bill contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal Costs: Matthew Pickford; Impact on State, Local, and Tribal Governments: Susan Sieg Tompkins; and Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VI. Section-by-Section Analysis and Discussion

SECTION 1

Reauthorizes appropriations for the Office of Special Counsel and the Merit Systems Protection Board through fiscal year 2007.

SECTION 2

Removes the requirement for OSC to return all documents to the whistleblower in all disclosure cases that are closed without referral to an agency head. OSC currently devotes 85 hours of monthly full-time-equivalent employee time to meet this statutory requirement which could otherwise be devoted to processing. In addition, OSC spends almost $5,000 a year on paper and mailing costs associated with the requirement. Added to the salary costs, this provision would save more than $20,000 annually. OSC would still be required to return all documentation provided by the whistleblower, if requested, under the Freedom of Information Act.

SECTION 3

Clarification of disclosures covered

The bill reaffirms and codifies the WPA's fundamental principle that "any" lawful disclosure that the employee or applicant reasonably believes is credible evidence of waste, fraud, abuse, or gross mismanagement is covered by the WPA. The bill amends 5 U.S.C. §§ 2302(b)(8)(A) and 2302(b)(8)(B) to cover any disclosure of information "without restriction to time, place, form, motive or context, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties that the employee or applicant reasonably believes is credible evidence of any violation of any law, rule, or regulation, or other misconduct specified in section 2302(b)(8)."

This section also amends 5 U.S.C. § 2302(b)(8) to subject certain disclosures of classified information to whistleblower protections. In order for a disclosure of classified information to be protected, the employee must possess a reasonable belief that the disclosure is evidence of a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, a substantial and specific danger to public health or safety, or a false statement to Congress on an issue of material fact. A whistleblower must also limit the disclosure to a member of Congress or staff holding the appropriate security clearance who is authorized to receive the information disclosed.

Covered disclosures

This section clarifies the meaning of "disclosure" to mean a formal or informal communication or transmission.

Rebuttable presumption

The U.S. Court of Appeals for the Federal Circuit has imposed a clearly erroneous standard on federal whistleblowers. Under the clear language of the statute, an employee need only have "a reasonable belief" that he or she is providing evidence of fraud, waste or abuse before making a protected disclosure. However, the Court of Appeals for the Federal Circuit ruled that reasonable belief was insufficient and held that "irrefragable proof" was needed for a whistleblower to overcome the "presumption that a public officer performed their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations."[108] Irrefragable means "undeniable, incontestable, incontrovertible, incapable of being overthrown." The irrefragable standard is nearly impossible to meet. Further, there is nothing in the law or the legislative history that suggests such a standard with respect to the WPA. The amendment to 2302(b) provides that a whistleblower can rebut the presumption with "substantial evidence."

Nondisclosure policies, security clearances, and retaliatory investigations

Personnel actions

This section amends 5 U.S.C. § 2302(a)(2)(A) to add three new personnel actions. The amendment makes—

[108] *Lachance* v. *White,* 174 F.3d 1378 (Fed. Cir. 1999).

> the enforcement of any nondisclosure policy, form or agreement; the suspension, revocation, or other determination relating to a security clearance; and an investigation of an employee or applicant for employment—

illegal if taken because a whistleblower makes a protected disclosure.

Prohibited personnel practice

This section amends 2302(b), adding two prohibited personnel practices to the whistleblower law. Congress repeatedly has reaffirmed its intent that employees should not be forced to sign disclosure agreements or be subjected to nondisclosure rules or policies that supercede an employee's rights under good government statutes. Moreover, Congress has consistently supported the concept that federal employees should not be subject to prior restraint from disclosing wrongdoing nor suffer retaliation for speaking out. This section first codifies an "anti-gag" provision that Congress has passed annually since 1988 as part of the appropriations process. It bans agencies from implementing or enforcing any nondisclosure policy, form or agreement that does not contain specified language preserving open government statutes such as the WPA, the Military Whistleblower Protection Act, and the Lloyd Lafollette Act, which prohibits discrimination against government employees who communicate with Congress.

Second, this section makes it illegal for a manager to initiate an investigation of an employee or applicant for employment because they engaged in a protected activity (including whistleblowing) under the statute.

Board and court review of actions relating to security clearance

By adding "the suspension, revocation, or other determination relating to a security clearance" to the list of personnel actions in 2302(a)(2)(A), the amendment makes it a prohibited personnel practice for a manager to suspend, revoke or take other action with respect to an employee's security clearance in retaliation for the employee blowing the whistle. However, the amendment limits the relief that the MSPB and reviewing court can order if it is demonstrated that such retaliation has occurred. The amendment adds a new section after 5 U.S.C. §7702 stating that the MSPB or the reviewing court may issue declaratory and other appropriate relief, but may not direct the President to restore a security clearance. In cases where the MSPB or court declares that a security clearance decision was made in retaliation for an employee blowing the whistle, the agency must issue a report to Congress detailing the circumstances of the agency's security clearance decision. The amendment also provides for expedited review of whistleblower cases where a security clearance was revoked or suspended.

Exclusion of agencies by the President

Certain employees are not covered by the WPA, including those who hold "confidential policy-making positions." In 1994 Congress amended the WPA to stop agencies from designating employees confidential policymakers after the employees filed whistleblower complaints. Under the WPA, the President has the authority to

designate agencies that are outside WPA protections. Section 2302(a)(2)(C) allows the President to exclude from WPA jurisdiction "any agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities." The amendment maintains that authority but clarifies that the designation must be made prior to a personnel action being taken against a whistleblower. This ensures that agencies cannot argue that an employee is exempt from whistleblower protections after the employee files a claim that they were retaliated against.

Attorney fees

The amendment would require the employing agency, not the OSC, to reimburse the prevailing party for attorney fees in a disciplinary proceeding brought by the OSC.

Compensatory damages

In the 1994 WPA amendments, Congress attempted to expand relief for whistleblowers by providing that whistleblowers could receive all direct or indirect consequential damages. Despite Congressional intent, the Board and the Federal Circuit have narrowed the scope of relief. The amendment would clarify 5 U.S.C. §1214(g)(2) to provide whistleblowers relief for "compensatory or consequential damages."

Disciplinary action

The WPA authorizes the OSC to pursue disciplinary action against managers who retaliate against whistleblowers. This section establishes a reasonable burden of proof for such actions. It amends 5 U.S.C. §1215 to require the OSC to demonstrate in disciplinary cases that the whistleblower's protected disclosure was a "significant motivating factor" in the decision by a manager to take or threaten to take a personnel action against them. If OSC makes such a showing, appropriate disciplinary action could be ordered unless the official showed, 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 disclosure.

Disclosures to Congress

This section amends 5 U.S.C. § 2302 to require agencies to establish a process to provide confidential advice to employees on how to lawfully make a protected disclosure of classified information to Congress.

Authority of Special Counsel relating to civil actions

Representation of Special Counsel

Current law provides the Office of Special Counsel with no authority to request the MSPB to reconsider one of its decisions or to seek review of an MSPB decision by the U.S. Court of Appeals for the Federal Circuit. Even when another party with authority to petition for a review of a MSPB decision does so, OSC has historically been denied the right to participate in those proceedings. This section amends 5 U.S.C. §1212 to provide explicit authority for the Office of Special Counsel to appear in any civil action brought in connection with the whistleblower law.

Judicial review of Merit Systems Protection Board decisions

When the OSC believes that MSPB misinterprets one of the laws within OSC's jurisdiction, the OSC has no right to appeal that decision, even if it was one of the parties before the MSPB. Under current law, while the OPM can request that the MSPB reconsider its rulings, OSC cannot. The limitation undermines both OSC's ability to protect whistleblowers and the integrity of the whistleblower law. This section provides OSC with the authority to obtain review in the U.S. Court of Appeals for the Federal Circuit or a court of competent jurisdiction of any MSPB order in a whistleblowing case where the OSC determines the MSPB erred and the case will have an impact on the enforcement of the whistleblower statute.

Judicial review

Subject to a five year sunset, this section suspends the exclusive jurisdiction of the U.S. Court of Appeals for the Federal Circuit over whistleblower appeals. It amends 5 U.S.C. §7703 to provide that a petition to review a final order or final decision of the MSPB may be filed in the U.S. Court of Appeals for the Federal Circuit or the United States Court of Appeals where the petitioner resides.

NONDISCLOSURE POLICIES, FORMS, AND AGREEMENTS

This section requires agencies to include in their nondisclosure policies, forms and agreements a statement that informs employees of their statutory obligations and rights with regards to disclosing information. It also institutes a government-wide ban on agency implementation or enforcement of any nondisclosure policy, form or agreement that does not contain the specified language preserving open government statutes such as the WPA, the Military Whistleblower Protection Act, and the Lloyd Lafollette Act, which prohibit discrimination against government employees who communicate with Congress. The ban is limited to those instances where the implementation or enforcement conflicts with the enumerated open government statutes. This section also requires that nondisclosure agreements with persons who are not federal employees but who are connected with intelligence related activities must contain language barring the person from disclosing any classified information unless they are specifically authorized to do so by the United States Government. The nondisclosure agreements must also make it clear that the agreement does not bar disclosures of a substantial violation of law to Congress, an authorized executive agency, or the Department of Justice.

VII. Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 12 of rule XXVI of the Rules of the United States 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 italics, existing law in which no change is proposed is shown in roman):

WHISTLEBLOWER PROTECTION ACT OF 1989

* * * * * * *

(5 U.S.C. 5509 note, Public Law 101–12; 103 Stat. 34)

* * * * * * *

SEC. 8. AUTHORIZATION of APPROPRIATIONS; RESTRICTION RELATING TO APPROPRIATIONS UNDER THE CIVIL SERVICE REFORM ACT OF 1978; TRANSFER OF FUNDS

(a) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated—

(1) for each of fiscal years [1998, 1999, 2000, 2001, and 2002] *2003, 2004, 2005, 2006, and 2007* such sums as necessary to carry out subchapter I of chapter 12 of title 5 United States Code (as amended by this Act); and

(2) for each of fiscal years [1993, 1994, 1995, 1996, and 1997] *2003, 2004, 2005, 2006, and 2007* such sums as necessary to carry out subchapter II of chapter 12 of title 5, United States Code (as amended by this Act).

* * * * * * *

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.

* * * * * * *

(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

SEC. 1213. PROVISIONS RELATING TO DISCLOSURES OF VIOLATIONS OF LAW, GROSS MISMANAGEMENT, AND CERTAIN OTHER MATTERS.

* * * * * * *

(g)(1) If the Special Counsel receives information of a type described in subsection (a) from an individual other than an individual described in subparagraph (A) or (B) of subsection (c)(2), the Special Counsel may transmit the information to the head of the agency which the information concerns. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action shall be completed. The Special Counsel shall inform the individual of the report of the agency head. [If the Special Counsel does not transmit the information to the head of the agency, the Special Counsel shall return any documents and other matter provided by the individual who made the disclosure.]

(2) If the Special Counsel receives information of a type described in subsection (a) from an individual described in subparagraph (A) or (B) of subsection (c)(2), but does not make a positive determination under subsection (b), the Special Counsel may transmit the information to the head of the agency which the information concerns, except that the information may not be transmitted to the head of the agency without the consent of the individual. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action will be completed. The Special Counsel shall inform the individual of the report of the agency head.

[(3) If the Special Counsel does not transmit the information to the head of the agency under paragraph (2), the Special Counsel shall—(A) return any documents and other matter provided by the individual who made the disclosure; and (B) inform the individual of—(i) the reasons why the disclosure may not be further acted on under this chapter; and (ii) other offices available for receiving disclosures, should the individual wish to pursue the matter further.]

(3) If the Special Counsel does not transmit the information to the head of the agency under paragraph (2), the Special Counsel shall inform the individual of—

(A) the reasons why the disclosure may not be further acted on under this chapter; and

(B) other offices available for receiving disclosures, should the individual wish to pursue the matter further.

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

(a) The Office of Special Counsel shall—

* * * * * * *

(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Special Counsel may appear for the Special Counsel and represent the Special Counsel in any civil action brought in connection with section 2302(b)(8) or subchapter III of chapter 73, or as otherwise authorized by law.

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

* * * * * * *

(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 *compensatory* or consequential damages.

SEC. 1215. DISCIPLINARY ACTION.

* * * * * * *

[(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 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 $1000.

(B) In any case in which the Board finds that an employee has committed a prohibited personnel practice under section 2303(b) (8) or (9), the Board shall impose disciplinary action if the Board finds that protected activity was a significant motivating factor in the 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.

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—

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment,

promotion, performance evaluation, or other action described in this subparagraph;

(x) a decision to order psychiatric testing or examination; [and]

(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement;

(xii) a suspension, revocation, or determination relating to a security clearance;

(xiii) an investigation of an employee or applicant for employment because of any activity protected under this section; and

[(xi)] *(xiv)* 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;

* * * * * * *

(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);

[(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 Imagery and Mapping Agency, the National Security Agency; 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 Accounting Office.

(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,] *without restriction to time, place, form, motive, context, or prior disclosure made to any person by an employee or applicant, including a disclosure made in*

the ordinary course of an employee's duties, that the employee or applicant reasonably believes is evidence of—

(i) [a violation] *any violation* of any law, rule, or regulation, or

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

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information [which the employee or applicant reasonably believes evidences,] *without restriction to time, place, form motive, context, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties, 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 that the employee or applicant reasonably believes is evidence of—*

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

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

(C) a disclosure that—

(i) is made by an employee or applicant of information required by law or Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs that the employee or applicant reasonably believes is direct and specific evidence of—

(I) any violation of any law, rule, or regulation;

(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) a false statement to Congress on an issue of material fact; and

(ii) is made to—

(I) a member of a committee of Congress having primary responsibility for oversight of a department, agency, or element of the Federal Government to which the disclosed information relates and who is authorized to receive information of the type disclosed;

(II) any other Member of Congress who is authorized to received information of the type disclosed; or

(III) an employee of Congress who has the appropriate security clearance and is authorized to receive the information disclosed.

* * * * * * *

(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[.]*;*

(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."; or

(14) conduct, or cause to be conducted, an investigation of an employee or applicant for employment because of any activity protected under this section.

[This subsection] *This subsection* shall not 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. *In this subsection, the term "disclosure" means a formal or informal communication or transmission.*

For purposes of paragraph (8), any presumption relating to the performance of a duty by an employee who has authority to take, direct others to take, recommend, or approve any personnel action may be rebutted by substantial evidence.

* * * * * * *

(f) Each agency shall establish a process that provides confidential advice to employees on making a lawful disclosure to Congress 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.

Subpart F—Labor Management and Employee Relations

CHAPTER 77—APPEALS

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SEC. 7702A. ACTIONS RELATING TO SECURITY CLEARANCES.

(a) In any appeal relating to the suspension, revocation, or other determination relating to a security clearance, the Merit Systems Protection Board or a court—

(1) shall determine whether section 2302 was violated;

(2) may not order the President to restore a security clearance; and

(3) subject to paragraph (2), may issue declaratory relief and any other appropriate relief.

(b)(1) If, in any final judgment, the Board or court declares that any suspension, revocation, or other determination with regards to a security clearance was made in violation of section 2302, the affected agency shall conduct a review of that suspension, revocation, or other determination, giving great weight to the Board or court judgment.

(2) Not later than 30 days after any Board or court judgment declaring that a security clearance suspension, revocation, or other determination was made in violation of section 2302, the affected agency shall issue an unclassified report to the congressional committees of jurisdiction (with a classified annex if necessary), detailing the circumstances of the agency's security clearance suspension, revocation, or other determination. A report under this paragraph shall include any proposed agency action with regards to the security clearance.

(c) An allegation that a security clearance was revoked or suspended in retaliation for a protected disclosure shall receive expedited review by the Office of Special Counsel, the Merit Systems Protection Board, and any reviewing court.

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 Systems 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 must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(B) During the 5-year period beginning on February 1, 2003, 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 or the United States Court of Appeals for the circuit in which the petitioner resides. 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.

* * * * * * *

[(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 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.

(2) During the 5-year period beginning on February 1, 2003, 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 date the Director received notice of the final order or decision of the Board, a petition for judicial review in any appellate court of competent jurisdiction as provided under subsection (b)(2) 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.

(e)(1) Except as provided under paragraph (2), this paragraph shall apply to any review obtained by the Special Counsel. The Special Counsel may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Special Counsel determines, in the discretion of the Special Counsel, that the Board erred in deciding a case arising under section 2302(b)(8) or subchapter III of chapter 73 and that the Board's decision will have a substantial impact on the enforcement of section 2302(b)(8) or subchapter III of chapter 73. If the Special Counsel was not a party or did not intervene in a matter before the Board, the Special Counsel may not petition for review of a Board decision under this section unless the Special Counsel first petitions the Board for 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 proceedings before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

(2) During the 5-year period beginning on February 1, 2003, this paragraph shall apply to any review obtained by the Special Counsel. The Special Counsel may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction if the Special Counsel determines, in the discretion of the Special Counsel, that the Board erred in deciding a case arising under section 2302(b)(8) or subchapter III of chapter 73 and that the Board's decision will have a substantial impact on the enforcement of section 2302(b)(8) or subchapter III of chapter 73. If the Special Counsel was not a party or did not intervene in a matter before the Board, the Special Counsel may not petition for review of a Board decision under this section unless the Special Counsel first petitions the Board for 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 proceedings before the court of appeals. The granting of the petition for judicial review shall be at the discretion of the court of appeals.

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