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108TH CONGRESS, 2d Session | SENATE | REPORT 108–392

FEDERAL EMPLOYEE PROTECTION OF DISCLOSURES ACT

R E P O R T

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 2628

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

OCTOBER 8, 2004.—Ordered to be printed

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OCTOBER 8, 2004.—Ordered to be printed

Ms. COLLINS, from the Committee on Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 2628]

The Committee on Governmental Affairs, to which was referred the bill (S. 2628) to amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes, having considered the same reports favorably thereon and recommends that the bill do pass.

I. PURPOSE AND SUMMARY

S. 2628, the Federal Employee Protection of Disclosures Act, is a bipartisan bill to make clarifications and changes to strengthen the Whistleblower Protection Act (WPA). S. 2628 was introduced on July 8, 2004, by Senators Akaka, Collins, Grassley, Levin, Leahy, Durbin, Fitzgerald, Pryor, Voinovich, Johnson, Dayton, Lieberman and Lautenberg, and is also cosponsored by Senators Carper and Coleman. The bill builds on an earlier version of the legislation, S. 1358, introduced by Senators Akaka, Grassley, Levin, Leahy, and Durbin, on June 26, 2003, and cosponsored by Senators Dayton, Pryor, Johnson, and Lautenberg.

Since passage of the Civil Service Reform Act (CSRA) in 1978, Federal employees have been encouraged to disclose information of government waste, fraud, and abuse by the promise of protection from retaliation based on those disclosures. More recently, President Bush issued a memorandum for the heads of executive departments and agencies on the standards of official conduct. This

memorandum specifically stated that employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.[1]

The Federal Employee Protection of Disclosures Act is designed to strengthen the rights and protections of federal whistleblowers and to help root out waste, fraud, and abuse. Although the events of September 11, 2001, have brought renewed attention to those who disclose information regarding security lapses at the Nation's airports, borders, law enforcement agencies, and nuclear facilities, the right of federal employees to be free from workplace retaliation has been diminished as a result of a series of decisions of the Federal Circuit Court of Appeals that have narrowly defined who qualifies as a whistleblower under the WPA and what statements are considered protected disclosures. The Committee is concerned that inadequate protection for whistleblowing creates a disincentive for civil servants to disclose government waste, fraud, and abuse, and information related to the public's health and safety.

S. 2628 would restore congressional intent and strengthen the WPA by, among other things, clarifying the broad meaning of "any" disclosure covered by the WPA; clarifying that disclosures of classified information to appropriate committees of Congress are protected; codifying an anti-gag provision to allow employees to come forward with disclosures of illegality; providing independent amicus brief authority for the Office of Special Counsel (OSC), the agency charged with protecting whistleblowers and the WPA; and allowing whistleblower cases to be heard by all United States Courts of Appeals for a period of five years.

II. BACKGROUND

The Civil Service Reform Act of 1978 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 whistleblowers 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 con-

[1] Memorandum from President George W. Bush to the Heads of Executive Departments and Agencies on Standards of Official Conduct (Jan. 20, 2001).

scientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.[2]

The CSRA established OSC to investigate and prosecute allegations of prohibited personnel practices or other violations of the merit system and the Merit Systems Protection Board (MSPB) 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 reported 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.[3]

In response, Congress in 1989 unanimously passed the Whistleblower Protection Act.[4] The stated congressional intent of the WPA was to strengthen and improve protection for the rights of federal employees, to prevent reprisals, and to help eliminate wrongdoing within the government by (1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and (2) establishing that while disciplining those who commit prohibited personnel practices may be used as a means to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.[5]

Congress substantially amended the WPA in 1994, as part of legislation to reauthorize 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 deemed inconsistent with the congressional intent of the 1989 Act. Both the House and Senate committee reports accompanying the 1994 amendments 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 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."[6]

Similarly, the House stated:

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[2] S. Rep. No. 95–969, at 8 (1978).
[3] S. Rep. No. 100–413, at 6–16 (1988).
[4] Whistleblower Protection Act of 1989, Public Law No. 101–12, 103 Stat. 16 (1989).
[5] Id. at § 2(b).
[6] S. Rep. No. 103–358 (1994), at 10 (quoting S. Rep. No. 100–413 (1988) at 13).

> 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 specifically prohibited by statute. Employees must disclose that type of information through confidential channels to maintain protection; otherwise there are no exceptions.[7]

Clarification of what constitutes a protected disclosure under the WPA

Despite the intended clarification of the 1994 amendments, it is necessary again to state legislatively what constitutes a protected disclosure under the WPA. Judicial reluctance to apply an expansive definition of protected disclosures as Congress intended has been manifest in several Federal Circuit cases.[8]

In some cases, the MSPB has undertaken a careful examination of broad language in Federal Circuit decisions, and limited the holding to its facts—thus blunting what might have been reckless precedent.[9] In *Askew* v. *Department of the Army*, the MSPB additionally concluded that loose language in *Meuwissen* [10] was broader than necessary to decide the case and sensibly limited the holding to its factual context.[11]

In other cases, the Federal Circuit itself has acknowledged that its holdings have generated confusion, and attempted to eliminate some of that confusion by narrowing some overbroad loopholes that (a) disclosures must be made to a person with actual authority to correct the wrong, and (b) disclosures made in the normal course of employment duties are not protected.[12]

The evident judicial difficulty in settling upon a precise scope of protection appears to be driven, at least in part, by concern that management of the federal workforce may become unduly burdensome if it is too easy to claim whistleblower status in ordinary employment disputes.[13] Certainly the Department of Justice has voiced this concern with the broad scope of whistleblower protection. It is a concern that the Committee takes seriously. However, the purpose of S. 2628 is, in part, to resolve this particular policy tension in favor of greater whistleblower protection. We can take other steps to deter and weed out frivolous whistleblower claims, but we cannot begin to calculate the potential damage to the nation

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[7] H. Rep. No. 103–769, at 18 (1994).

[8] See, e.g., *Horton* v. *Department of the Navy*, 66 F.3d 279 (Fed. Cir. 1995) (disclosures to coworker or wrongdoer not protected because not disclosed to person in position to redress wrong); *Willis* v. *Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998) (stating in dictum that disclosure made as part of normal job duties not protected); *Meuwissen* v. *Department of Interior*, 234 F.3d 9 (Fed. Cir. 2000) (disclosure of information already known not protected).

[9] See, e.g., *Johnson* v. *Department of Health and Human Services*, 87 M.S.P.R. 204, 210 (2000) (limiting *Willis* to its factual context and rejecting claim that *Willis* stood for the broad proposition that had been rejected by both the MSPB and the Federal Circuit); accord *Askew* v. *Department of the Army*, 88 M.S.P.R. 674, 679–80 (2001) (cautioning that *Willis* ought not be read too broadly and rejecting the proposition that *Willis* held that "disclosure of information in the course of an employee's performance of her normal duties cannot be protected whistleblowing"); *Sood* v. *Department of Veterans Affairs*, 88 M.S.P.R. 214, 220 (2001); *Czarkowski* v. *Department of the Navy*, 87 M.S.P.R. 107 (2000).

[10] 234 F.3d 9 (Fed. Cir. 2000).

[11] 88 M.S.P.R. 674, 681–82 (2001).

[12] See *Huffman* v. *Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001).

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

should good-faith whistleblowing become chilled by a hostile process on the threshold question of what constitutes a "disclosure."

S. 2628 accordingly 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."

While S. 2628 definitively resolves the scope of protected disclosures in favor of the broadest protection—and effectively restores Congress' original intent—we note that a prima facie whistleblower case additionally requires a showing that the employee reasonably believe that the disclosure evidences a violation of law or other enumerated items in 5 U.S.C. § 2302(b)(8). As detailed further below, the Federal Circuit has held that the reasonable belief test is an objective one, viz., whether a disinterested observer with knowledge of the facts known to and readily ascertainable by the employee could reasonably conclude that the conduct evidences a violation of law, gross mismanagement, or other matters identified in 5 U.S.C. § 2302(b)(8).[14] The Committee deems it prudent to codify that objective test in the whistleblower statute, and has done so in S. 2628. Thus, in screening frivolous claims, the focus would properly shift to the objective reasonableness of the employee's belief rather than the semantics of "disclosure." In our view, potential mischief with an expanded scope of protection may be countered by careful application of this objective reasonable belief test. Failing this filter, the agency may still prevail on its defense that it would have taken the same action even absent the disclosure. But in this latter scenario, there may still be some collateral benefit from ventilating the underlying claim.

Finally, the Committee does acknowledge one reasonable limitation on the scope of protected disclosures that emerged during the hearing on this bill's predecessor, S. 1358. The Senior Executives Association testified that they believed that an unrestricted scope of protected disclosure could be construed to include lawful policy decisions of a supervisor or manager, and recommended that the bill be clarified to deny protection for disclosures that relate only to agency policy decisions that a reasonable employee should follow.[15] Put another way, disclosures must be specific and factual, not general, philosophical, or policy disagreements. S. 2628 incorporates that limitation, which reflects congressional intent at the inception of statutory whisteblower protection.[16]

At the same time, the Committee recognizes the need to curb a disturbing trend that the WPA does not cover disclosures of tangible misconduct arguably flowing from a policy decision. As a result, S. 2628 provides balance by codifying that an employee is still protected for disclosing evidence of illegality, gross waste, gross mismanagement, abuse of authority or a substantial and specific

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

[15] S. 1358—The Federal Employee Protection of Disclosures Act: Amendments to the Whistleblower Protection Act: Hearing on S. 1358 Before the Committee on Governmental Affairs, S. Hrg. 108–414, at 163 (2003).

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

danger to public health or safety, if it is evidence of empirical consequences arguably resulting from a policy decision, whether properly or improperly implemented. This language is consistent with Federal Circuit precedent.[17]

Reasonable belief—Irrefragable proof

As noted above, a prima facie whistleblower case entails a showing that the employee reasonably believes that the disclosure evidences a violation of law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. The test for reasonable belief, as developed in case law and prospectively codified in S. 2628, is an objective one. However, again with loose language, if not actual application, the Federal Circuit added the ungainly burden of "irrefragable proof" to rebut the standard presumption that the government acts in good faith.[18] S. 2628 would purge the word "irrefragable" from whistleblower jurisprudence.

In *Lachance* v. *White,* 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 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."[19]

However, the court then added 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."[20] Irrefragable means impossible to refute.[21] Read literally, therefore, the holding would have required employees to establish the reasonableness of their belief at the threshold by offering indisputable proof that the public official or officials acted in bad faith or violated the law. Such an evidentiary burden is contrary to logic and clear congressional intent. Fortunately, the MSPB recognized the misstep on remand.

In 2003, on remand from the Federal Circuit, the MSPB sensibly ruled that:

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

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

[19] Id.

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

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

> The WPA clearly does not place a burden on an appellant to submit "irrefragable proof" to rebut a presumption that federal officials act in good faith and in accordance with law. There is no suggestion in the legislative history of the WPA that Congress intended such a burden be placed on an appellant. When Congress amended the WPA in 1994, it did nothing to indicate that the objective test, which had been articulated by the Board by that time, was inconsistent with the statute. The dictionary definition of "irrefragable" suggests that a putative whistleblower would literally have to show that the agency actually engaged in gross mismanagement, even though the WPA states that he need only have a reasonable belief as to that matter. The Federal Circuit itself has not imposed an "irrefragable proof" burden on appellants in cases decided after *White* * * * and has, in fact, stated that the "proper test" is the objective, "disinterested observer" standard.
>
> As the objective test contemplates, the Board can presume that "public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations," which is the portion of *Alaska Airlines, Inc.* v. *Johnson* quoted by the court in *White* * * * That presumption is merely one consideration in deciding whether a reasonable person in the appellant's situation could have believed that the agency engaged in gross mismanagement. For all of the above reasons, we conclude that the part of the quote from *Alaska Airlines* dealing with a rebuttal of that presumption by irrefragable proof has to be dictum which was simply added to the end of the quotation from *Alaska Airlines,* a case which had nothing to do with the WPA or the case law that had developed on the objective test for reasonable belief under that statute.[22]

Although the MSPB rejected the "irrefragable proof" burden, there is some evidence that the message has not reached everyone. For example, in an order denying a stay request, the MSPB administrative judge in *Chambers* v. *Department of the Interior* quoted the Federal Circuit's "irrefragable proof" language.[23] While the decision did not actually employ the "irrefragable proof" standard, as it was irrelevant to the limited procedural disposition at issue—and while it seems unlikely that such an unwieldy burden would ever actually be applied—the concept of "irrefragable proof" has no place in whistleblower jurisprudence.

S. 2628 codifies the objective test in *Lachance,* but provides that any presumption that a public official (i.e., the official whose misconduct the whistleblower is disclosing) acted in good faith may be rebutted by "substantial evidence" rather than "irrefragable proof." 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."[24] It consists of "more than a mere scintilla of evidence but may be somewhat less than a preponder-

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[22] *White* v. *Dept. Air Force,* DE–1221–92–0491–M–4 at 7–8 (MSPB September 11, 2003).

[23] *Chambers* v. *Dept.* Interior, DC–1221–04–0616–S–1 and DC–0752–04–0642–S–1, at 4 (MSPB July 27, 2004).

[24] *Richardson* v. *Perales,* 402 U.S. 389, 401 (1971).

ance."[25] By establishing a substantial evidence test, the Committee intends to provide a standard that will not be a higher burden than the preponderance of the evidence standard that employees must meet to prove their case on the merits, which is consistent with the legislative history of the Act. Indeed, a cornerstone of 5 U.S.C. § 2302(b)(8) since its initial passage in 1978 has been that an employee need not ultimately prove any misconduct to qualify for whistleblower protection. All that is necessary is for the employee to have a reasonable belief that the information is evidence of misconduct listed in section 2302(b)(8).[26]

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.[27] In 1982, when the Federal Circuit was created, Congress established that petitions for review of an MSPB order could be filed only with the Federal Circuit.[28] (An exception applies to cases of discrimination before the MSPB, which are filed in district court under the applicable anti-discrimination law.)[29]

During the hearing on S. 1358, attorney Stephen Kohn, Chairman of the National Whistleblower Center, testified that:

> Restricting appeals to one judicial circuit undermines the basic principle of appellate review applicable to all other whistleblower laws. That principle is based on an informed peer review process which holds all circuit judges accountable. * * * [As appeals courts disagree with each other,] courts either reconsider prior decisions and/or the case is heard by the Supreme Court, which resolves the dispute.
>
> By segregating federal employee whistleblowers into one judicial circuit, the WPA avoids this peer review process and no "split in the circuits" can ever occur. In the Federal Circuit no other judges critically review the decisions of the Court, no "split in the circuits" can ever occur, and thus federal employees are denied the most important single procedure which holds appeals court judges reviewable and accountable. A "split in the circuits" is the primary method in which the U.S. Supreme Court reviews wrongly decided appeals court decisions.
>
> Employees cannot obtain meaningful Supreme Court review of cases decided against whistleblowers, but the government-employers can. The second method for which an appeals court decision is subject to Supreme Court review, is when the Solicitor of the United States asserts that the case raises a significant question of law. In the case of the WPA, the Solicitor represents the employer-agency. That

[25] *Hays* v. *Sullivan,* 907 F.2d 1453, 1456 (4th Cir. 1990) (quoting *Laws* v. *Celebrezze,* 368 F.2d 640, 642 (4th Cir. 1966)).
[26] *Ramos* v. *FAA,* 4 M.S.P.R. 388 (1980).
[27] Public Law No. 95–454, Sec. 205, 92 Stat. 1143 (Oct. 13, 1978) (adding 5 U.S.C. 7703).
[28] Public Law No. 97–164, Sec. 144 (April 2, 1982).
[29] 5 U.S.C. § 7702, 7703(b)(2).

authority has never (and most likely can never) been exercised in support of an employee-whistleblower.[30]

The Committee believes that this argument raises valid points about the current arrangement for judicial review. Moreover, unlike Federal employee whistleblower cases, a number of Federal statutes already allow cases involving rights and protections of Federal employees, or involving whistleblowers, to be 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.[31]

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.[32] 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 is available under existing law for several kinds of whistleblower claims. For example, 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.[33] 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.[34] 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.[35]

Department of Labor corporate whistleblower laws passed as part of the Energy Reorganization Act, as amended in 1992,[36] and the Clean Air Act, as amended in 1977,[37] 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),[38] passed in 2000, allows whistleblowers to obtain review of their cases in the appropriate Federal Court of Appeals.

Subject to a five-year sunset, S. 2628 would conform the system for judicial review of Federal whistleblower cases to that established for private sector whistleblower cases and certain other Federal employee appeal systems by suspending the Federal Circuit's exclusive jurisdiction over whistleblower appeals. The five year period will allow Congress to evaluate whether decisions of other appellate courts in whistleblower cases are consistent with the Federal Circuit's interpretation of WPA protections, guide Congres-

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[30] Hearing supra note 15, (statement of Stephen Kohn, Chairman, Board of Directors, National Whistleblower Center) at 136.
[31] 5 U.S.C. § 7123.
[32] 5 U.S.C. § 1508.
[33] 31 U.S.C. § 3730(h).
[34] 12 U.S.C. § 1441a(q).
[35] 12 U.S.C. § 1790b(b).
[36] 42 U.S.C. § 5851(c).
[37] 42 U.S.C. § 7622(c).
[38] 49 U.S.C. § 42121(b)(4).

sional efforts to clarify the law if necessary, and determine if this structural reform should be made permanent.

Office of Special Counsel—Amicus Curiae Authority

The OSC, initially established in 1979 as the investigative and prosecutorial arm of the MSPB, became an independent agency within the Executive Branch, separate from the MSPB, with passage of the WPA in 1989. The Special Counsel does not serve at the President's pleasure, but "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office."[39] 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 believes that a prohibited personnel practice has occurred, the agencies voluntarily take corrective action."[40] If an agency does not do so, OSC is authorized to file a petition for corrective action with the MSPB."[41]

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 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 an 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. OSC's handicap is especially acute because the majority of the MSPB's whistleblower decisions arise in IRA cases where OSC is not a party.

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

[39] 5 U.S.C. § 1211(b).
[40] U.S. Office of Special Counsel, Annual Report for Fiscal Year 2003, at 7.
[41] 5 U.S.C. § 1214(b)(2)(C).

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 OSC could be 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.

As a result of the current structure, OSC is blocked from participating in the forum in which the law is largely shaped: the U.S. Court of Appeals for the Federal Circuit (and, if this legislation is enacted, the other Circuits). 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. This limitation undermines both OSC's ability to protect whistleblowers and the integrity of the whistleblower law.

The Committee believes that OSC should play a role in whistleblower cases before the Federal Circuit. As such, S. 2628 provides the Special Counsel with authority to file amicus briefs with the federal courts on matters relating to whistleblower cases or other matters designated in the bill. This authority is similar to that granted to the Chief Counsel for Advocacy of the Small Business Administration. Under section 612 of the Regulatory Flexibility Act (RFA),[42] the Chief Counsel for Advocacy has the authority to appear as amicus curiae (i.e., "friend of the court") in any court action to review a government rule. Specifically, the Chief Counsel is authorized to present views with respect to compliance with the RFA, the adequacy of a rulemaking record pertaining to small entities, and the effect of rules on small entities. Federal courts are bound to grant the amicus curiae application of the Chief Counsel.[43]

Before passage of the Small Business Regulatory Enforcement Fairness Act (SBREFA) in 1988,[44] there was no judicial review of RFA actions, and the Chief Counsel's amicus authority was frequently challenged. However, merely the threat of exercising the authority could achieve corrective action.

For example, in 1994, the Chief Counsel prepared an amicus curiae brief in *Time Warner Entertainment Company* v. *FCC*[45] The Chief Counsel argued, among other things, that noncompliance with the RFA was arbitrary and capricious under the Administrative Procedure Act. After last-minute negotiations, the FCC agreed to alter its policy and the Chief Counsel withdrew its notice of intent to file. Furthermore, in *Southern Offshore Fishing Association* v. *Daley,*[46] the Chief Counsel withdrew its notice of intent to file after it was able to obtain an agreement from the Department of Justice (DOJ) that the proper standard of review in RFA cases is the "arbitrary and capricious" standard. This acknowledgment from DOJ was significant—not only because it conceded the use of the appropriate standard, but also because it implicitly accepted the

[42] Public Law No. 96–354.
[43] 5 U.S.C. § 612(c).
[44] Public Law No. 104–121.
[45] 56 F.3d 151 (D.C. Cir. 1995), cert. denied, 516 US 112 (1996).
[46] 995 F. Supp. 1411 (M.D. Fla. 1998).

Chief Counsel's authority to file amicus briefs. This concession was important as DOJ had always objected to Advocacy's right to file such briefs in the past.

The Committee believes that granting this authority to OSC is necessary, not only to ensure OSC's effectiveness, but also to address continuing concerns about the whittling away of the WPA's protections by narrow judicial interpretations of the law.

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 purview, 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.[47]

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.[48] This can be a heavy burden to meet. In 1989, Congress lowered the burden of proof for whistleblowers to win corrective action against retaliation. The 1989 Act eliminated the relevance of employer motives, eased the standard to establish a prima facie case (showing that the protected speech was a contributing factor in the action), and raised the burden for agencies, who must now provide independent justification for the personnel action at issue by clear and convincing evidence.[49] 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.[50]

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*.[51] Under the *Mt. Healthy* test, OSC would have to show that protected whistleblowing was a "significant, motivating factor" in the decision to take or threaten to take a personnel action, even if other factors were considered in the decision. If 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.

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[47] 5 U.S.C. § 1215.

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

[49] 5 U.S.C. §§ 1214 and 1221. See also 135 Cong. Rec. 4509, 4517, 5033 (1989).

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

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

OSC attorney fees

OSC has authority to pursue disciplinary action against managers who retaliate against whistleblowers. Currently, if OSC loses a disciplinary case, it must pay the legal fees of those against whom it initiated the action. Because the amounts involved could significantly deplete OSC's limited resources, requiring OSC to pay attorney fees can have a chilling effect on OSC's aggressive protection of the WPA and whistleblowers.

Illustrative of the problem and the importance of S. 2628's solution is *Santella* v. *Special Counsel.*[52] In a 2–1 decision, the Board held that OSC could be held liable to pay attorney fees, even in cases where its decision to prosecute was a reasonable one, if the accused agency officials were ultimately found "substantially innocent" of the charges brought against them. The Board majority further ruled that two supervisors in the Internal Revenue Service (IRS) were "substantially innocent" of retaliation, notwithstanding an earlier finding by an MSPB administrative law judge that their subordinates' whistleblowing was a contributing factor in four personnel actions the supervisors took against them.

OSC argued that because its decision to prosecute the supervisors was a reasonable one and based upon then-existing law, an award of fees would not be in the interests of justice. In fact, OSC contended, sanctioning an award of fees under these circumstances would be counter to the public interest and contrary to congressional intent that OSC vigorously enforce the Whistleblower Protection Act by seeking the discipline of supervisors who violate the Act. OSC also argued that, in the alternative, if the supervisors were entitled to be reimbursed for their attorney fees, then their employing agency, the IRS, should be found liable.

The Board majority rejected OSC's arguments. It held that OSC, and not IRS should be liable for any award of fees. It further found that—because the supervisors had ultimately prevailed in the case under the Board's more stringent burden of proof—they were "substantially innocent" of the charges, and reimbursement of their fees would be in the interests of justice.

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

The Committee believes that OSC's disciplinary action authority is a powerful weapon to deter whistleblowing retaliation. However, OSC is a small agency with a relatively limited budget. Should the *Santella* case remain valid law, OSC would be required to predict to a certainty that it will prevail and even predict the unpredictable: changes in the law that might affect OSC's original assessment of a case's merit. This burden would hinder OSC's discipli-

[52] 86 M.S.P.R. 48 (May 9, 2000).

nary action weapon and threaten its ability to protect the WPA. To correct this problem, S. 2628 would require the employing agency, rather than OSC, to reimburse the manager's attorney fees.

Anti-gag provisions

In 1988, Senator Grassley attached an amendment to the Treasury, Postal and General Government Appropriations bill, which was and continues to be referred to as the "anti-gag" provision.[53] This provision has been included in appropriations legislation every year since then. The annual anti-gag provision states that no appropriated funds may be used to implement or enforce agency nondisclosure policies or agreements unless there is a specific, express statement informing employees that the disclosure restrictions do not override their right to disclose waste, fraud, and abuse under the WPA, to communicate with Congress under the Lloyd 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. 2628 would require every nondisclosure policy, form, or agreement of the Government to 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 that an employee can seek protection against a personnel action taken in violation of the anti-gag requirement.

Board review of actions relating to security clearance

Since the terrorist attacks of September 11, 2001, whistleblowers in several high profile cases have come forward to disclose government waste, fraud, and abuse that posed a risk to national security. However, several of these individuals faced retaliatory action through means against which the employees lacked protection—the removal of their security clearance.[54] When an individual's security clearance is revoked or his or her access to classified information is denied as a means of retaliation, the effective result is typically employment termination without recourse to an independent third-party proceeding. In light of the heightened need to ensure that federal employees can come forward with information vital to preserving our national security, the Committee supports strengthening protections for whistleblowers, including those whose security clearance or access to classified information is the retaliatory vehicle.

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.[55] It held that the MSPB

[53] Public Law No. 105–277, The Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, 636.

[54] See Mark Hertsgaard, Nuclear Insecurity, Vanity Fair, Nov. 2003, at 175.

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

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 or access to classified information can be suspended or revoked in retaliation for making protected disclosures, the employee can be terminated from his or her federal government job because of the suspended or revoked clearance, and MSPB may not review the suspension or revocation. According to the former Special Counsel Elaine Kaplan, revocation of a security clearance is a way to camouflage retaliation. At the hearing during the 107th Congress on S. 995, one of the predecessor bills to S. 2628, Senator Levin asked Ms. Kaplan, then 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." Ms. Kaplan responded:

> It is sort of Kafkaesque. If you are complaining about being fired, and then one can go back and say, "Well, you are fired because you do not have your security clearance and we cannot look at why you do not have your security clearance," it can be a basis for camouflaging retaliation.[56]

S. 2628 makes it a prohibited personnel practice for a manager to suspend, revoke, or take other action with respect to an employee's security clearance or access to classified information 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 or the President's designee to restore or take other action with a security clearance or access to classified information.

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 or access determination action. The bill also requires agencies to issue a report to Congress detailing the circumstances of the agency's security clearance or access decision. This report should include a summary of relevant facts ascertained by the agency, including the facts in support and those that do not support the allegations of the whistleblowers, the reasons for the agency action, and a response to any comments or findings by the MSPB or reviewing court. If necessary, the report may contain a classified addendum.

S. 2628 also provides for expedited review of whistleblower cases by the OSC, the MSPB and the reviewing court where a security clearance was revoked or suspended. A person whose clearance has been suspended or revoked, and whose job responsibilities require

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

clearance, may be unable to work while his or her case is being considered.

In drafting this provision for previous whistleblower legislation in the 107th Congress, the bill's sponsors and others from the Committee worked with the Administration to produce a fair and balanced approach to resolving this matter.[57] Despite these efforts, the Administration still has expressed concerns over this provision. In particular, DOJ asserts that this provision is a substantial intrusion into Executive Branch prerogative to control national security information and those who have access to it.[58] We note again that the proceedings contemplated by this provision do not intrude upon any agency's authority to revoke a security clearance. The focus of the contemplated proceedings is *not* whether the national interest is served by granting or revoking a security clearance, but whether an agency has unlawfully retaliated against a whistleblower. We note further that Executive Branch authority is not exclusive, and that Congress properly plays a role.[59]

The Department of Justice has also argued that inclusion of this protection would induce more employees to challenge and litigate security clearance determinations and, as a result, deter managers from making their best judgments on these sensitive issues.[60] The Committee, however, believes that the language in this provision strikes an appropriate balance. It bears repeating that, under this bill, the Executive Branch retains the authority to ignore the MSPB's recommendations on the restoration of a clearance of access. There is no authority under this bill to direct that a security clearance or access to classified information be restored.

The Committee recognizes that it seeks both a full and fair examination of whistleblower claims as well as unfettered agency authority to make sensitive security clearance determinations—and that some tension between these important goals may be inevitable. For example, the Board has considerable latitude in fashioning relief for retaliation, short of ordering restoration of the security clearance, but, consistent with the standard principles for providing relief, an agency might successfully resist relief that was so onerous or costly as to be tantamount to ordering restoration. This provision should not become an elevation of form over substance such that agencies experience any diminution of their authority to act in the national interest.

The Department has also claimed that the provision is unnecessary, as all agencies are required to establish an internal review board to consider appeals of security clearance revocations, and cited the expertise of internal agency boards, in contrast to the lack of MSPB expertise in making decisions on clearances.[61] However, the Committee is persuaded by the testimony of Thomas Devine of the Government Accountability Project, that the internal agency boards have a conflict of interest in adjudicating such matters as the board judging the dispute is also the adverse party. Moreover,

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[57] Hearing supra note 15, at 172 (testimony of Sen. Charles Grassley).

[58] "Letter from William Moschella, Department of Justice, to Sen. Fitzgerald on S. 1358" (Nov. 10, 2003) (see supra note 15, at 56).

[59] See *Department of Navy* v. *Egan*, 484 U.S. 518, 530 (1988) ("*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) (emphasis added, citations omitted).

[60] Moschella letter supra note 58.

[61] Id.

internal review boards often lack rudimentary procedural protections. Whistleblowers may wait up to three years before even hearing the accusations against them. Then, at the review itself, whistleblowers are not allowed to present witnesses or evidence.[62]

Regarding the expertise of the MSPB in adjudicating security clearance determinations, S. 2628 would permit the MSPB to determine 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 or access to classified information, but would not permit the MSPB to make decisions relative to clearances. S. 2628 does not authorize Board review of the substance of a security clearance determination, because Board review under S. 2628 would evaluate whether there was unlawful retaliation not whether the clearance determination was otherwise proper. Such a determination is analogous to MSPB's current duties and is squarely within its expertise.

In testimony before the Committee, the Department of Justice argued that the burden of proof in whistleblower cases is fundamentally incompatible with the standard for granting security clearances. DOJ pointed out that under the WPA, a putative whistleblower establishes a prima facie case of whistleblower retaliation by showing that there was a protected disclosure and that a personnel action was taken within a certain period of time following the disclosure. Once the employee meets that burden, the burden shifts to the agency to establish by clear and convincing evidence that it would have taken the action absent the protected disclosure.

According to DOJ, the bill would require, in the security clearance context, that where individuals make protected disclosures, the agency must justify its security clearance decision by the standard of clear and convincing evidence. Thus, rather than awarding security clearances or granting access to classified information only where clearly consistent with the interests of national security—which is the standard for granting or revoking security clearances and making access determinations—agencies would be permitted to deny or revoke them only upon the basis of clear and convincing evidence.[63]

The Department of Justice has raised a valid concern over the appropriate burden of proof. The Committee emphasizes that it does not intend any disruption of the security clearance process, any chilling effect upon officials making these sensitive determinations, or any creation of "entitlement" to a security clearance. Our narrow purpose is to deter unlawful retaliation against whistleblowers by revoking a security clearance or denying access to classified materials, and thus to close the loophole that security clearance revocations have opened.

The Committee acknowledges that the conventional burden of proof in whistleblower cases may not fairly integrate into the security clearance determination process. Given the relative ease with which putative whistleblowers may make a prima facie showing, these cases are often decided based upon the agency's showing that it would have taken the action regardless of the whistleblowing.

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[62] Hearing supra note 15 at 17–18 (testimony of Thomas Devine, Legal Director, Government Accountability Project).

[63] Hearing supra note 15 (testimony of Mr. Peter Keisler, Assistant Attorney General, Civil Division, U.S. Department of Justice).

The agency's burden at this stage, however, is clear and convincing evidence. The Committee concludes that in the especially sensitive area of security clearance and classified access determinations—where the threshold presumption is that an individual is not entitled to such a privilege—requiring "clear and convincing" evidence to justify revocation might distort such determinations. Thus, S. 2628, unlike its predecessor S. 1358, changes the agency's burden to mere preponderance. We believe that such a change better preserves an agency's discretion with respect to security clearance determinations, and may also be less intrusive into the agency's security clearance or classified access process.

Classified disclosures to Congress

Section 2302(b) of Title 5, United States Code, states that nothing in this subsection shall be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to the Congress. However, to clarify that employees should not face retaliation for the disclosure of classified information that evidences waste, fraud, and abuse, S. 2628 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 have 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 § 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 Senate Intelligence Committee and passed the Senate by a vote of 93 to 1, as § 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.[64] 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 not the exclusive process by which an Intelligence Community employee may make a report to Congress."[65]

[64] Intelligence Authorization Act for FY 1999, Pub. L. No. 105–272, title VII (1998) ("Intelligence Community Whistleblower Protection Act of 1998").
[65] H.R. Rep. No. 105–760 (1998) (emphasis added).

The Senate Intelligence Committee had held hearings and reported out S. 1668 which contained these same provisions in 1998. 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 convinced 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.[66]

The provision in S. 2628 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.

In addition, out of concerns that individuals might transmit classified information to unauthorized individuals, S. 2628 reaffirms that those who give classified information to persons not authorized to receive it, specifically individuals not listed in 5 U.S.C. 2302(b)(8), could face criminal penalties. Generally, federal law prescribes a prison sentence of no more than a year and/or a $1,000 fine for officers and employees of the federal government who knowingly remove classified material without the authority to do so and with the intention of keeping that material at an unauthorized location.[67] Stiffer penalties—fines of up to $10,000 and imprisonment for up to ten years—attach when a federal employee transmits classified information to anyone who the employee has reason to believe is an agent of a foreign government.[68] Anyone who publishes, makes available to an unauthorized person, or otherwise uses to the United States' detriment classified information regarding the codes, cryptography, and communications intelligence utilized by the United States or a foreign government faces fines and a ten-year prison sentence.[69]

To help ensure that employees are aware of those Members of Congress and their staff who are authorized to receive disclosures of classified information, S. 2628 also requires that agencies, as part of their educational requirements under 5 U.S.C. § 2302(c) to inform employees of their whistleblower rights and remedies, to inform employees how to make a disclosure of classified information. Such education could include appropriate questions to ask Members of Congress and their staff to ensure that they have the appropriate clearance and authorization, secure locations for disclosing and transmitting classified information, and other information that

[66] S. Rep. No. 105–165 (1998).

[67] 18 U.S.C. § 1924. Agencies often require employees to sign non-disclosure agreements prior to obtaining access to classified information, the validity of which was upheld by the Supreme Court in *Snepp* v. *United States,* 444 U.S. 507 (1980).

[68] 50 U.S.C. § 783.

[69] 18 U.S.C. § 798. This provision is part of the Espionage Act (codified at 18 U.S.C. 792–799), which generally protects against the unauthorized transmission of a much broader category of "national defense" information, prescribing fines and a prison term of up to ten years.

would assist potential whistleblowers in making a protected disclosure without violating federal law and subjecting themselves to criminal penalties.

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.[70] Certain agencies are also excluded from the Act. They include the Government Accountability 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."[71]

In 1994 Congress amended the WPA to block agencies from designating particular positions as confidential policymaker exceptions after the employees in those positions filed prohibited personnel practice complaints. As a result, Congress restricted this jurisdictional loophole to positions designated as exceptions "prior to the personnel action."[72] 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.[73] S. 2628 would close the loophole for agencies in the same manner as Congress did for positions in 1994, by specifying that an agency may be excluded under the Act only prior to the occurrence of any personnel action against a whistleblower to which the exclusion of the agency relates. The Committee believes that it is important for employees to know their rights and protections under the WPA, including if they have no rights under section 2302 before they make any whistleblowing disclosure in reliance on the protections of the WPA, and that this provision will aid in helping employees determining the appropriate way to disclose waste, fraud, and abuse.

Prohibition on retaliatory investigations

S. 2628 codifies that an investigation of any employee can constitute retaliation for making a whistleblowing disclosure. This provision is already implicit in the catch-all provision in 5 U.S.C. 2302(c)(2)(A)(xi). In the legislative history to the 1994 Amendments, House Civil Service Subcommittee Chairman Frank McCloskey highlighted retaliatory investigations as a personnel action and noted that the primary criterion for a prohibited threat is that alleged harassment is discriminatory, or could have a chilling effect on merit system duties and responsibilities.[74] In 1997 the Board upheld this legislative history in *Russell* v. *Department of*

[70] 5 U.S.C. § 2302(a)(2)(B).
[71] 5 U.S.C. § 2302(a)(2)(B).
[72] Id.
[73] "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).
[74] 140 Cong. Rec. 29,353 (1994) and H.R. Rep. No. 103–769, at 15.

Justice and affirmed that the WPA protects employees from retaliatory investigations.[75] Specifically, the Board held that "[w]hen . . . an investigation is so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate, and the agency does not show by clear and convincing evidence that the evidence would have been gathered absent the protected disclosure, then the appellant will prevail on his affirmative defense of retaliation for whistleblowing."

However, DOJ expressed concerns with earlier versions of this provision claiming that the term investigation is undefined and that the breadth of the term could adversely impact the ability of agencies to function. Specifically, DOJ claimed that any type of inquiry by any agency—including criminal investigations, routine background investigations for initial employment, investigations for determining eligibility for a security clearance, Inspector General investigations, and management inquiries of potential wrongdoing in the workplace—could be subject to challenge and litigation.[76]

To address this concern, S. 2628 provides that protection for retaliatory investigations does not extend to ministerial or nondiscretionary fact finding activities necessary for the agency to perform its mission.

Clarification of whistleblower rights for critical infrastructure information

The Homeland Security Act encouraged corporations to submit critical infrastructure information voluntarily to the Department of Homeland Security (DHS) so that the Department could assess potential security threats.[77] To encourage submission, the Act specifically stipulates that voluntarily submitted critical infrastructure information is to be treated as exempt under the Freedom of Information Act.[78] According to section 214(c) of the Act, nothing in the Act shall be construed to limit or otherwise affect the ability of a State, local, or Federal government entity or third parties to independently obtain critical infrastructure information in a manner not covered by this provision. However, the Act also criminalizes the unauthorized disclosure of this type of information. As such, the provision could be read to limit a whistleblower's disclosure of independently obtained critical information. According to former Special Counsel Elaine Kaplan:

> [T]he statutory language is very ambiguous in several respects. The rights preserved under section 214(c) extend to government entities, agencies, authorities and "third parties." It is unclear whether employees of the United States would be considered "third parties." Elsewhere in section 214, the statute uses the phrase "officer or employee of the United States" when it refers to disclosures by federal employees. See, section 214(a)(1)(D).
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> Similarly, the phrase to "use" the information "in any manner permitted by law," does not clearly encompass "disclosures" of information. Elsewhere, in section 214(a)(1)(D), the statute states that an officer or employee

[75] 76 M.S.P.R. 317, 323–24 (1997).
[76] Hearing supra note 15 at 60.
[77] Pub. L. No. 107–296, § 214.
[78] See 5 U.S.C. § 552.

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

These ambiguities become especially troublesome in the context of the tendency of the judiciary to narrowly construe the scope of protection afforded under the WPA.[79]

When DHS issued proposed regulations it received comments expressing concern that whistleblowers could be treated unfairly and subject to termination, fines, and imprisonment which would discourage the accurate reporting of information vital to the public. In its interim regulations published in February 2004, DHS specifically referenced the WPA to ensure full protections for whistleblowers.[80] Although interim regulations implementing section 214 of Public Law 107–296 appear to ensure that disclosures of independently obtained critical infrastructure information are permitted, S. 2628 would codify, consistent with those regulations, that disclosures of this type are free from criminal penalties and does not cancel whisleblower rights in 5 U.S.C. § 2302(b)(8).

Right to a full hearing

Recent Board case law has created a highly disturbing trend by canceling the employee's right to a due process hearing and a public record to resolve disputes whether a whistleblower validly disclosed information evidencing betrayal of the public trust, and whether the disclosure in part contributed to ensuing retaliation. The prevailing practice at the Board now is to deny a forum on those issues if the agency first prevails in its affirmative defense of proving by clear and convincing evidence that it would have taken the same action for lawful reasons independent of protected whistleblowing.[81]

While more efficient, this undermines two primary purposes of the WPA. First, it provides whistleblowers with no guaranteed forum to air grievances—some of which may be legitimate and important even though the agency fairly and independently took the disputed personnel action. Lost in this procedure are an employee's: (1) opportunity to present evidence that the dissent alleging misconduct was reasonable, (2) opportunity to present evidence of illegal harassment; and (3) opportunity to confront those responsible through cross-examination on the record in a public hearing under oath.

Second, the current procedure which allows the agency to present its evidence first precludes the Board from exercising some of its most significant merit system oversight duties. These include creating a record of both parties' positions on alleged, serious misconduct that could threaten or harm citizens. Similarly, it pre-

[79] Letter from Elaine Kaplan, Special Counsel, Office of Special Counsel, to Sen. Charles Grassley (March 10, 2003).
[80] 6 C.F.R. 29.8(f) (2004).
[81] *Rusin* v. *Dept. of Treasury,* 92 M.S.P.R. 298 (2002).

cludes the Board from a significant merit system oversight function that Congress emphasized when it passed the 1994 amendments to the Act. As the Joint Explanatory statement for the WPA explained, "Whistleblowing should never be a factor that contributes in any way to an adverse personnel action."[82] The duty is so significant that under the 1994 amendments to the Act, the Board must refer managers for OSC disciplinary investigation whenever there is a finding that reprisal was a contributing factor in a personnel action, even if the agency ultimately prevails on its affirmative defense of independent justification.[83] The current procedure relieves the Board of these oversight responsibilities, as long as the agency has an acceptable net excuse for actions that may include attacks on the merit system.

S. 2628 resolves this problem by making it a prerequisite for presentation of the agency's defense that the employee has first established a prima facie case that the protected activity was a contributing factor in the personnel action.

III. Legislative History

S. 2628 was introduced by Senators Akaka, Collins, Grassley, Levin, Leahy, Durbin,

Fitzgerald, Pryor, Voinovich, Johnson, Dayton, Lieberman, and Lautenberg on July 8, 2004, and was referred to the Committee on Governmental Affairs. The bill was referred to the Subcommittee on Financial Management, the Budget, and International Security (FMBIS) on July 9, 2004. Senators Carper and Coleman are also cosponsors of the legislation. The bill builds on provisions of S. 1358, which was introduced by Senators Akaka, Grassley, Levin, Leahy, and Durbin on June 6, 2004, and also cosponsored by Senators Dayton, Pryor, Johnson, and Lautenberg.

On October 8, FMBIS polled out S. 1358 and on November 12, 2003, the Committee held a hearing on the bill. Witnesses included Senator Charles Grassley (R–IA); Mr. Peter Keisler, Assistant Attorney General, Civil Division, U.S. Department of Justice; Ms. Elaine Kaplan, attorney and former U.S. Special Counsel; Mr. Thomas Devine, Legal Director, Government Accountability Project; Mr. Stephen Kohn, Chairman, Board of Directors, National Whistleblower Center; and Mr. William Bransford, Partner, Shaw, Bransford, Veilleux & Roth, P.C., on behalf of the Senior Executives Association. The Committee also received written testimony from Ms. Susanne Marshall, Chairman, U.S. Merit Systems Protection Board.

Both S. 2628 and S. 1358 follow previous versions of the legislation: S. 995, introduced on June 7, 2001, and S. 3070, introduced on October 8, 2002, and favorably reported by the Committee on November 19, 2002. A hearing on S. 995 was held before the Subcommittee on International Security, Proliferation, and Federal Services on July 25, 2001.

On July 20, 2004, the Subcommittee favorably polled out S. 2628 and on July 21, 2004, the Committee considered S. 2628 and ordered the bill reported without amendment by voice vote. Members

[82] Reprinted in 135 Cong. Rec. 5033 (1989).
[83] 140 Cong. Rec. H11422 (daily ed. Oct 7, 1994) (statement of Rep. McCloskey).

present were Senators Akaka, Carper, Collins, Durbin, Fitzgerald, Lautenberg, Lieberman, Specter, and Voinovich.

IV. SECTION-BY-SECTION ANALYSIS

Section 1(a) titles the bill as the Federal Employee Protection of Disclosures Act.

Section 1(b) would clarify congressional intent that the law covers "any" whistleblowing disclosure, whether that disclosure is made as part of an employee's job duties, concerns consequences of policy or individual misconduct, is oral or written, or is made to any audience inside or outside an agency, and without restriction to time, place, motive or context. This section would also protect certain disclosures of classified information to Congress, but only when the disclosure is to a Member or legislative staff holding an appropriate security clearance and authorized to receive the type of information disclosed.

Section 1(c) would clarify the definition of "disclosure" to include a formal or informal communication or transmission, but not to include legitimate policy decisions that lawfully exercise discretionary agency authority unless the employee reasonably believes the disclosure evidences government waste, fraud, or abuse.

Section 1(d) addresses the reasonable belief test set forth by the U.S. Court of Appeals for the Federal Circuit in *Lachance* v. *White.* The court articulated an objective test for determining whether a whistleblower had a reasonable belief that the disclosed information evidenced waste, fraud, abuse, or other violations or safety issues: would 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 government waste, fraud, or abuse? However, in the case of gross mismanagement the court further required "irrefragable proof"—literally meaning undeniable and incontestable proof—to overcome the presumption that a public officer performs his or her duties fairly, lawfully, and in good faith. This section would codify the objective test for reasonable belief, but would replace the burden of irrefragable proof with substantial evidence.

The provision also states that employees may be disciplined for disclosing classified information to a Member of Congress or congressional staff who is not authorized to receive such information.

Section 1(e)(1) would add three actions to the list of prohibited personnel actions that may not be taken against whistleblowers for protected disclosures: enforcement of a nondisclosure policy, form or agreement; suspension, revocation, or other determination relating to an employee's security clearance or access determination; and investigation (other than routine, non discretionary agency investigations) of an employee or applicant for employment.

Section 1(e)(2) would bar agencies from implementing or enforcing against whistleblowers any nondisclosure policy, form or agreement that fails to contain specified language preserving the right of Federal employees to disclose certain protected information. It would also prohibit a manager from initiating a discretionary or non-routine investigation of an employee or applicant for employment because the employee engaged in protected activity.

Section 1(e)(3) would authorize the Merit Systems Protection Board (MSPB) to conduct an expedited review of cases charging re-

taliation under 5 U.S.C. § 2302(b)(8) and (b)(9) when an employee's security clearance or access determination is suspended, revoked, or otherwise adversely affected. The MSPB would be authorized to issue declaratory and other appropriate relief, but would not be able to restore a security clearance. If MSPB or a reviewing court were to find that a security clearance or access determination decision was retaliatory, the agency involved would be required to review its security clearance decision and issue a report to Congress explaining its decision. This section also states that for the sole purposes of determining whether a security clearance or access determination was made in retaliation for whistleblowing, the agency must demonstrate by a preponderance of the evidence, rather than clear and convincing evidence, that it would have taken the action even absent the whistleblowing.

Section 1(f) would require that removal of an agency by the President from WPA coverage be made prior to any personnel action, to which the exclusion relates, being taken against a whistleblower at that agency.

Section 1(g) would require that, in disciplinary actions, any attorney fees would be reimbursed by the manager's employing agency rather than OSC.

Section 1(h) would establish a more reasonable burden of proof in disciplinary actions by requiring OSC to demonstrate that the whistleblower's protected disclosure was a "significant motivating factor" in the decision by the manager to take the adverse action, even if other factors also motivated the decision. Current law requires OSC to demonstrate that an adverse personnel action would not have occurred "but for" the whistleblower's protected activity.

Section 1(i) would strengthen OSC's ability to protect whistleblowers and the integrity of the WPA and the Hatch Act by authorizing OSC to appear as amicus curiae in any civil action brought in connection with the WPA and the Hatch Act and present its views with respect to compliance with the law and the impact court decisions would have on the enforcement of such provisions of the law.

Section 1(j) would suspend the U.S. Court of Appeals for the Federal Circuit's exclusive jurisdiction over whistleblower appeals and allow petitions for review to be filed either in the Federal Circuit or any other Federal circuit court of competent jurisdiction for a period of five years.

Section 1(k) would require all Federal nondisclosure policies, forms, and agreements to contain specified language preserving the right of Federal employees to disclose certain protected information.

Section 1(l) would clarify that section 214(c) of the Homeland Security Act (HSA) maintains existing WPA rights for independently obtained information that may also qualify as voluntarily submitted critical infrastructure information under the HSA.

Section 1(m) would require agencies, as part of their education requirements under 5 U.S.C. 2302(c), to advise employees of their rights and protections and to educate employees on how to lawfully make a protected disclosure of classified information to the Special Counsel, the Inspector General, Congress, or other designated agency official authorized to receive classified information.

Section 1(n) would specify that an agency may present its defense to a whistleblower case only after the whistleblower has first made a prima facie showing that protected activity was a contributing factor in the personnel action.

Section 1(o) states that the Act would take effect 30 days after the date of enactment.

V. Estimated Cost of Legislation

S. 2628—Federal Employee Protection of Disclosures Act

S. 2628 would amend the Whistleblower Protection Act (WPA). The bill would clarify current law and give new protections to federal employees who report abuse, fraud, and waste involving government activities. The legislation also would make several changes to the laws governing the Merit System Protection Board (MSPB) and the Office of Special Counsel (OSC), which implement provisions of the WPA.

CBO estimates that implementing S. 2628 would cost $2 million a year and $10 million over the 2005–2009 period, assuming appropriation of the necessary amounts. Enacting the legislation would not affect direct spending or revenues. S. 2628 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

Under current law, the OSC investigates complaints regarding reprisal against federal employees that inform authorities of fraud or other improprieties in the operation of federal programs (such individuals are known as whistleblowers). The OSC seeks corrective action for valid complaints. If agencies fail to take corrective action, the OSC or the employee can pursue a case through the MSPB for resolution. Whistleblower cases may also be reviewed by the U.S. Court of Appeals.

According to the MSPB and OSC, there are between 400 to 500 whistleblower cases per year. S. 2628 would expand the definition of protected whistleblowing, create new avenues of appeal for employees who lose their security clearances in retaliation for whistleblowing, increase the authority of the OSC, and suspend the U.S. Court of Appeals exclusive jurisdiction over whistleblower appeals for five years. In 2004, the MSPB received an appropriation of $33 million, and the OSC received $13 million.

CBO expects that S. 2628's changes in whistleblower laws would increase the workload of the MSPB and OSC. Based on information from those agencies, we estimate that implementing this bill would cost up to $2 million a year to cover additional staffing, travel, and security clearance reviews.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VI. Evaluation of Regulatory Impact

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill. CBO states that there are no intergovernmental or private-sector mandates as defined in the Un-

funded Mandates Reform Act and no costs on state, local, or tribal governments. The legislation contains no other regulatory impact.

VII. Changes in Existing Law

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

TITLE 5, UNITED STATES CODE: GOVERNMENT ORGANIZATION AND EMPLOYEES

PART II—CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

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

Subchapter I—Merit Systems Protection Board

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

* * * * * * *

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

(a) The Office of Special Counsel shall—

* * * * * * *

(h)(1) The Special Counsel is authorized to appear as amicus curiae in any action brought in a court of the United States related to any civil action brought in connection with section 2302(b) (8) or (9), or subchapter III of chapter 73, or as otherwise authorized by law. In any such action, the Special Counsel is authorized to present the views of the Special Counsel with respect to compliance with section 2302(b) (8) or (9) or subchapter III of chapter 77 and the impact court decisions would have on the enforcement of such provisions of law.

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

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

* * * * * * *

(b) * * *

* * * * * * *

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

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

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

SEC. 1215. DISCIPLINARY ACTION.

(a) * * *

* * * * * * *

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

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

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

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

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

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

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

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

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

(A) the official taking the personnel action knew of the disclosure; and

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

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

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 other determination relating to a security clearance or any other access determination by a covered agency;

(xiii) an investigation, other than any ministerial or nondiscretionary fact finding activities necessary for the agency to perform its mission, 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;

(B) "covered position" means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action—

(i) excepted from the competitive service because of its confidential, policy determining, policy-making, or policy-advocating character; or

(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration; [and]

(C) "agency" means an Executive agency and the Government Printing Office, but does not include—

(i) a Government corporation, except in the case of an alleged prohibited personnel practice described under subsection (b)(8);

[(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[.]

(D) "disclosure" means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee providing the disclosure reasonably believes that the disclosure evidences—

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

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

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

* * * * * * *

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

(A) any disclosure of information by an employee or applicant [which the employee or applicant reasonably believes evidences], *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, 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 receive 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, other than any ministerial or nondiscretionary fact finding activities necessary for the agency to perform its mission, of an employee or applicant for employment because of any activity protected under this section.

This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress**[**.**]***, except that an employee or applicant may be disciplined for the disclosure of information described in paragraph (8)(C)(i) to a Member or employee of Congress who is not authorized to receive such informa-*

tion. 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. For purposes of paragraph (8), a determination as to whether an employee or applicant reasonably believes that they have disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee would reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.

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

Subpart F—Labor Management and Employee Relations

CHAPTER 77—APPEALS

SEC. 7702a. ACTIONS RELATING TO SECURITY CLEARANCES.

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

(1) shall determine whether paragraph (8) or (9) of section 2302(b) was violated;

(2) may not order the President or the designee of the President to restore a security clearance or otherwise reverse a determination of clearance status or reverse an access determination; 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 or access determination was made in violation of paragraph (8) or (9) of section 2302(b), the affected agency shall conduct a review of that suspension, revocation, access determination, 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, access determination, or other determination was made in violation of paragraph (8) or (9) of section 2302(b), 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, other determination, or access determination. A report under this paragraph shall include any proposed agency action with regards to the security clearance or access determination.

(c) An allegation that a security clearance or access determination 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.

(d) For purposes of this section, corrective action may not be ordered if the agency demonstrates by a preponderance of the evidence that it would have taken the same personnel action in the absence of such disclosure.

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)*(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 the effective date of the Federal Employee Protection of Disclosures Act, a petition to review a final order or final decision of the Board in a case alleging a violation of paragraph (8) or (9) of section 2302(b) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction as provided under subsection (b)(2).

* * * * * * *

(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 the effective date of the Federal Employee Protection of Disclosures Act, this paragraph shall apply to any review relating to paragraph (8) or (9) of section 2302(b) 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 or any court of appeals of competent jurisdiction as provided under subsection (b)(2) if the Director determines, in his discretion, that the Board erred in interpreting paragraph (8) or (9) of section 2302(b). 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.

THE HOMELAND SECURITY ACT OF 2002

PUBLIC LAW 107–296 (AS CODIFIED AT 6 U.S.C. 133)

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

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

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