

Calendar No. 219111TH CONGRESS
1ST SESSION**S. 372****[Report No. 111-101]**

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.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 3, 2009

Mr. AKAKA (for himself, Ms. COLLINS, Mr. GRASSLEY, Mr. LEVIN, Mr. LIEBERMAN, Mr. VOINOVICH, Mr. LEAHY, Mr. KENNEDY, Mr. CARPER, Mr. PRYOR, Ms. MIKULSKI, Mr. CARDIN, and Mr. BURRIS) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

DECEMBER 3, 2009

Reported by Mr. LIEBERMAN, with an amendment

[Strike out all after the enacting clause and insert the part printed in *italic*]

A BILL

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 disclo-

sure protections, provide certain authority for the Special Counsel, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. PROTECTION OF CERTAIN DISCLOSURES OF IN-**
 4 **FORMATION BY FEDERAL EMPLOYEES.**

5 (a) **SHORT TITLE.**—This Act may be cited as the
 6 “Whistleblower Protection Enhancement Act of 2009”.

7 (b) **CLARIFICATION OF DISCLOSURES COVERED.**—

8 (1) **IN GENERAL.**—Section 2302(b)(8) of title
 9 5, United States Code, is amended—

10 (A) in subparagraph (A)—

11 (i) by striking “which the employee or
 12 applicant reasonably believes evidences”
 13 and inserting “, without restriction to
 14 time, place, form, motive, context, forum,
 15 or prior disclosure made to any person by
 16 an employee or applicant, including a dis-
 17 closure made in the ordinary course of an
 18 employee’s duties, that the employee or ap-
 19 plicant reasonably believes is evidence of”;

20 (ii) in clause (i), by striking “a viola-
 21 tion” and inserting “any violation”; and

22 (iii) by striking “or” at the end;

23 (B) in subparagraph (B)—

1 (i) by striking “which the employee or
2 applicant reasonably believes evidences”
3 and inserting “, without restriction to
4 time, place, form, motive, context, forum,
5 or prior disclosure made to any person by
6 an employee or applicant, including a dis-
7 closure made in the ordinary course of an
8 employee’s duties, of information that the
9 employee or applicant reasonably believes
10 is evidence of”;

11 (ii) in clause (i), by striking “a viola-
12 tion” and inserting “any violation (other
13 than a violation of this section)”; and

14 (iii) in clause (ii), by adding “or” at
15 the end; and

16 (C) by adding at the end the following:

17 “(C) any disclosure that—

18 “(i) is made by an employee or appli-
19 cant of information required by law or Ex-
20 ecutive order to be kept secret in the inter-
21 est of national defense or the conduct of
22 foreign affairs that the employee or appli-
23 cant reasonably believes is direct and spe-
24 cific evidence of—

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

3 “(II) gross mismanagement, a
4 gross waste of funds, an abuse of au-
5 thority, or a substantial and specific
6 danger to public health or safety; or

7 “(III) a false statement to Con-
8 gress on an issue of material fact; and
9 “(ii) is made to—

10 “(I) a member of a committee of
11 Congress having a primary responsi-
12 bility for oversight of a department,
13 agency, or element of the Federal
14 Government to which the disclosed in-
15 formation relates and who is author-
16 ized to receive information of the type
17 disclosed;

18 “(II) any other Member of Con-
19 gress who is authorized to receive in-
20 formation of the type disclosed; or

21 “(III) an employee of Congress
22 who has the appropriate security
23 clearance and is authorized to receive
24 information of the type disclosed.”.

1 (2) PROHIBITED PERSONNEL PRACTICES
2 UNDER SECTION 2302(b)(9).—

3 (A) TECHNICAL AND CONFORMING AMEND-
4 MENTS.—Title 5, United States Code, is
5 amended in subsections (a)(3), (b)(4)(A), and
6 (b)(4)(B)(i) of section 1214, in subsections (a),
7 (e)(1) and (i) of section 1221, and in subsection
8 (a)(2)(C)(i) of 2302 by inserting “or
9 2302(b)(9) (B) through (D)” after “section
10 2302(b)(8)” or “(b)(8)” each place it appears.

11 (B) OTHER REFERENCES.—Title 5, United
12 States Code, is amended in subsection
13 (b)(4)(B)(i) of section 1214 and in subsection
14 (e)(1) of section 1221 by inserting “or pro-
15 tected activity” after “disclosure” each place it
16 appears.

17 (e) DEFINITIONAL AMENDMENTS.—

18 (1) DISCLOSURES.—Section 2302(a)(2) of title
19 5, United States Code, is amended—

20 (A) in subparagraph (B)(ii), by striking
21 “and” at the end;

22 (B) in subparagraph (C)(iii), by striking
23 the period at the end and inserting “; and”;
24 and

25 (C) by adding at the end the following:

1 “(D) ‘disclosure’ means a formal or informal
2 communication or transmission, but does not include
3 a communication concerning policy decisions that
4 lawfully exercise discretionary authority unless the
5 employee or applicant providing the disclosure rea-
6 sonably believes that the disclosure evidences—

7 “(i) any violation of any law, rule, or regula-
8 tion; or

9 “(ii) gross mismanagement, a gross waste
10 of funds, an abuse of authority, or a substantial
11 and specific danger to public health or safety.”.

12 (2) CLEAR AND CONVINCING EVIDENCE.—Sec-
13 tions 1214(b)(4)(B)(ii) and 1221(e)(2) of title 5,
14 United States Code, are amended by adding at the
15 end the following: “For purposes of the preceding
16 sentence, ‘clear and convincing evidence’ means evi-
17 dence indicating that the matter to be proved is
18 highly probable or reasonably certain.”.

19 (d) REBUTTABLE PRESUMPTION.—Section 2302(b)
20 of title 5, United States Code, is amended by amending
21 the matter following paragraph (12) to read as follows:
22 “‘This subsection shall not be construed to authorize the
23 withholding of information from Congress or the taking
24 of any personnel action against an employee who discloses
25 information to Congress. For purposes of paragraph (8),

1 any presumption relating to the performance of a duty by
 2 an employee who has authority to take, direct others to
 3 take, recommend, or approve any personnel action may be
 4 rebutted by substantial evidence. For purposes of para-
 5 graph (8), a determination as to whether an employee or
 6 applicant reasonably believes that they have disclosed in-
 7 formation that evidences any violation of law, rule, regula-
 8 tion, gross mismanagement, a gross waste of funds, an
 9 abuse of authority, or a substantial and specific danger
 10 to public health or safety shall be made by determining
 11 whether a disinterested observer with knowledge of the es-
 12 sential facts known to and readily ascertainable by the em-
 13 ployee could reasonably conclude that the actions of the
 14 Government evidence such violations, mismanagement,
 15 waste, abuse, or danger.”.

16 (e) PERSONNEL ACTIONS AND PROHIBITED PER-
 17 SONNEL PRACTICES.—

18 (1) PERSONNEL ACTION.—Section
 19 2302(a)(2)(A) of title 5, United States Code, is
 20 amended—

21 (A) in clause (x), by striking “and” after
 22 the semicolon; and

23 (B) by redesignating clause (xi) as clause
 24 (xiv) and inserting after clause (x) the fol-
 25 lowing:

1 “(xi) the implementation or enforce-
2 ment of any nondisclosure policy, form, or
3 agreement;

4 “(xii) a suspension, revocation, or
5 other determination relating to a security
6 clearance or any other access determina-
7 tion by a covered agency;

8 “(xiii) an investigation, other than
9 any ministerial or nondiscretionary fact
10 finding activities necessary for the agency
11 to perform its mission, of an employee or
12 applicant for employment because of any
13 activity protected under this section; and”

14 (2) PROHIBITED PERSONNEL PRACTICE.—See-
15 tion 2302(b) of title 5, United States Code, is
16 amended—

17 (A) in paragraph (11), by striking “or” at
18 the end;

19 (B) in paragraph (12), by striking the pe-
20 riod and inserting a semicolon; and

21 (C) by inserting after paragraph (12) the
22 following:

23 “(13) implement or enforce any nondisclosure
24 policy, form, or agreement, if such policy, form, or
25 agreement does not contain the following statement:

1 “These provisions are consistent with and do not su-
2 perse, conflict with, or otherwise alter the em-
3 ployee obligations, rights, or liabilities created by
4 Executive Order No. 12958; section 7211 of title 5,
5 United States Code (governing disclosures to Con-
6 gress); section 1034 of title 10, United States Code
7 (governing disclosure to Congress by members of the
8 military); section 2302(b)(8) of title 5, United
9 States Code (governing disclosures of illegality,
10 waste, fraud, abuse, or public health or safety
11 threats); the Intelligence Identities Protection Act of
12 1982 (50 U.S.C. 421 et seq.) (governing disclosures
13 that could expose confidential Government agents);
14 and the statutes which protect against disclosures
15 that could compromise national security, including
16 sections 641, 793, 794, 798, and 952 of title 18,
17 United States Code, and section 4(b) of the Subver-
18 sive Activities Control Act of 1950 (50 U.S.C.
19 783(b)). The definitions, requirements, obligations,
20 rights, sanctions, and liabilities created by such Ex-
21 ecutive order and such statutory provisions are in-
22 corporated into this agreement and are controlling’;
23 or

24 “(14) conduct, or cause to be conducted, an in-
25 vestigation, other than any ministerial or nondis-

1 cretionary fact finding activities necessary for the
 2 agency to perform its mission; of an employee or ap-
 3 plicant for employment because of any activity pro-
 4 tected under this section.”.

5 (f) EXCLUSION OF AGENCIES BY THE PRESIDENT.—
 6 Section 2302(a)(2)(C) of title 5, United States Code, is
 7 amended by striking clause (ii) and inserting the following:

8 “(ii)(I) the Federal Bureau of Investiga-
 9 tion, the Central Intelligence Agency, the De-
 10 fense Intelligence Agency, the National
 11 Geospatial-Intelligence Agency, the National Se-
 12 curity Agency; and

13 “(II) as determined by the President, any
 14 executive agency or unit thereof the principal
 15 function of which is the conduct of foreign in-
 16 telligence or counterintelligence activities; if the
 17 determination (as that determination relates to
 18 a personnel action) is made before that per-
 19 sonnel action; or”.

20 (g) DISCIPLINARY ACTION.—Section 1215(a)(3) of
 21 title 5, United States Code, is amended to read as follows:

22 “(3)(A) A final order of the Board may im-
 23 pose—

24 “(i) disciplinary action consisting of re-
 25 moval, reduction in grade, debarment from

1 Federal employment for a period not to exceed
2 5 years, suspension, or reprimand;

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

5 “(iii) any combination of disciplinary ac-
6 tions described under clause (i) and an assess-
7 ment described under clause (ii).

8 “(B) In any case in which the Board finds that
9 an employee has committed a prohibited personnel
10 practice under paragraph (8) or (9) of section
11 2302(b), the Board shall impose disciplinary action
12 if the Board finds that the activity protected under
13 paragraph (8) or (9) of section 2302(b) was a sig-
14 nificant motivating factor, even if other factors also
15 motivated the decision, for the employee’s decision to
16 take, fail to take, or threaten to take or fail to take
17 a personnel action, unless that employee dem-
18 onstrates, by preponderance of evidence, that the
19 employee would have taken, failed to take, or threat-
20 ened to take or fail to take the same personnel ac-
21 tion, in the absence of such protected activity.”.

22 (h) REMEDIES.—

23 (1) ATTORNEY FEES.—Section 1204(m)(1) of
24 title 5, United States Code, is amended by striking
25 “agency involved” and inserting “agency where the

1 prevailing party is employed or has applied for em-
2 ployment”.

3 (2) DAMAGES.—Sections 1214(g)(2) and
4 1221(g)(1)(A)(ii) of title 5, United States Code, are
5 amended by striking all after “travel expenses,” and
6 inserting “any other reasonable and foreseeable con-
7 sequential damages, and compensatory damages (in-
8 cluding attorney’s fees, interest, reasonable expert
9 witness fees, and costs).” each place it appears.

10 (i) JUDICIAL REVIEW.—

11 (1) IN GENERAL.—Section 7703(b)(1) of title
12 5, United States Code, is amended to read as fol-
13 lows:

14 “(b)(1)(A) Except as provided in subparagraph (B)
15 and paragraph (2), a petition to review a final order or
16 final decision of the Board shall be filed in the United
17 States Court of Appeals for the Federal Circuit. Notwith-
18 standing any other provision of law, any petition for re-
19 view must be filed within 60 days after the date the peti-
20 tioner received notice of the final order or decision of the
21 Board.

22 “(B) During the 5-year period beginning on the effec-
23 tive date of the Whistleblower Protection Enhancement
24 Act of 2009, a petition to review a final order or final
25 decision of the Board in a case alleging a violation of para-

1 graph (8) or (9) of section 2302(b) shall be filed in the
2 United States Court of Appeals for the Federal Circuit
3 or any court of appeals of competent jurisdiction as pro-
4 vided under subsection (b)(2).”.

5 (2) REVIEW OBTAINED BY OFFICE OF PER-
6 SONNEL MANAGEMENT.—Section 7703(d) of title 5,
7 United States Code, is amended to read as follows:
8 “(d)(1) Except as provided under paragraph (2), this
9 paragraph shall apply to any review obtained by the Direc-
10 tor of the Office of Personnel Management. The Director
11 of the Office of Personnel Management may obtain review
12 of any final order or decision of the Board by filing, within
13 60 days after the date the Director received notice of the
14 final order or decision of the Board, a petition for judicial
15 review in the United States Court of Appeals for the Fed-
16 eral Circuit if the Director determines, in his discretion,
17 that the Board erred in interpreting a civil service law,
18 rule, or regulation affecting personnel management and
19 that the Board’s decision will have a substantial impact
20 on a civil service law, rule, regulation, or policy directive.
21 If the Director did not intervene in a matter before the
22 Board, the Director may not petition for review of a Board
23 decision under this section unless the Director first peti-
24 tions the Board for a reconsideration of its decision, and
25 such petition is denied. In addition to the named respond-

1 ent, the Board and all other parties to the proceedings
2 before the Board shall have the right to appear in the pro-
3 ceeding before the Court of Appeals. The granting of the
4 petition for judicial review shall be at the discretion of the
5 Court of Appeals.

6 “(2) During the 5-year period beginning on the effec-
7 tive date of the Whistleblower Protection Enhancement
8 Act of 2009, this paragraph shall apply to any review re-
9 lating to paragraph (8) or (9) of section 2302(b) obtained
10 by the Director of the Office of Personnel Management.
11 The Director of the Office of Personnel Management may
12 obtain review of any final order or decision of the Board
13 by filing, within 60 days after the date the Director re-
14 ceived notice of the final order or decision of the Board,
15 a petition for judicial review in the United States Court
16 of Appeals for the Federal Circuit or any court of appeals
17 of competent jurisdiction as provided under subsection
18 (b)(2) if the Director determines, in his discretion, that
19 the Board erred in interpreting paragraph (8) or (9) of
20 section 2302(b). If the Director did not intervene in a
21 matter before the Board, the Director may not petition
22 for review of a Board decision under this section unless
23 the Director first petitions the Board for a reconsideration
24 of its decision, and such petition is denied. In addition
25 to the named respondent, the Board and all other parties

1 to the proceedings before the Board shall have the right
 2 to appear in the proceeding before the court of appeals.
 3 The granting of the petition for judicial review shall be
 4 at the discretion of the Court of Appeals.”.

5 (j) MERIT SYSTEM PROTECTION BOARD REVIEW OF
 6 SECURITY CLEARANCES.—

7 (1) IN GENERAL.—Chapter 77 of title 5, United
 8 States Code, is amended by inserting after section
 9 7702 the following:

10 **“§ 7702a. Actions relating to security clearances**

11 “(a) In any appeal relating to the suspension, revoca-
 12 tion, or other determination relating to a security clear-
 13 ance or access determination, the Merit Systems Protec-
 14 tion Board or any reviewing court—

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

17 “(2) may not order the President or the des-
 18 ignee of the President to restore a security clearance
 19 or otherwise reverse a determination of clearance
 20 status or reverse an access determination; and

21 “(3) subject to paragraph (2), may issue declar-
 22 atory relief and any other appropriate relief.

23 “(b)(1) If, in any final judgment, the Board or court
 24 declares that any suspension, revocation, or other deter-
 25 mination with regard to a security clearance or access de-

1 termination was made in violation of paragraph (8) or (9)
2 of section 2302(b), the affected agency shall conduct a re-
3 view of that suspension, revocation, access determination,
4 or other determination, giving great weight to the Board
5 or court judgment.

6 “(2) Not later than 30 days after any Board or court
7 judgment declaring that a security clearance suspension,
8 revocation, access determination, or other determination
9 was made in violation of paragraph (8) or (9) of section
10 2302(b), the affected agency shall issue an unclassified re-
11 port to the congressional committees of jurisdiction (with
12 a classified annex if necessary), detailing the cir-
13 cumstances of the agency’s security clearance suspension,
14 revocation, other determination, or access determination.
15 A report under this paragraph shall include any proposed
16 agency action with regard to the security clearance or ac-
17 cess determination.

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

23 “(d) For purposes of this section, corrective action
24 may not be ordered if the agency demonstrates by a pre-

1 ponderance of the evidence that it would have taken the
2 same personnel action in the absence of such disclosure.”.

3 (2) TECHNICAL AND CONFORMING AMEND-
4 MENT.—The table of sections for chapter 77 of title
5 5, United States Code, is amended by inserting after
6 the item relating to section 7702 the following:

“7702a. Actions relating to security clearances.”.

7 (k) PROHIBITED PERSONNEL PRACTICES AFFECT-
8 ING THE TRANSPORTATION SECURITY ADMINISTRA-
9 TION.—

10 (1) IN GENERAL.—Chapter 23 of title 5, United
11 States Code, is amended—

12 (A) by redesignating sections 2304 and
13 2305 as sections 2305 and 2306, respectively;
14 and

15 (B) by inserting after section 2303 the fol-
16 lowing:

17 “§ 2304. Prohibited personnel practices affecting the
18 Transportation Security Administration

19 “(a) IN GENERAL.—Notwithstanding any other pro-
20 vision of law, any individual holding or applying for a posi-
21 tion within the Transportation Security Administration
22 shall be covered by—

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

1 (A) the term “applicant” means an appli-
2 cant for a covered position;

3 (B) the term “censorship related to re-
4 search, analysis, or technical information”
5 means any effort to alter, misrepresent, or sup-
6 press research, analysis, or technical informa-
7 tion;

8 (C) the term “covered position” has the
9 meaning given under section 2302(a)(2)(B) of
10 title 5, United States Code;

11 (D) the term “employee” means an em-
12 ployee in a covered position; and

13 (E) the term “disclosure” has the meaning
14 given under section 2302(a)(2)(D) of title 5,
15 United States Code.

16 (2) PROTECTED DISCLOSURE.—

17 (A) IN GENERAL.—Any disclosure of infor-
18 mation by an employee or applicant for employ-
19 ment that the employee or applicant reasonably
20 believes is evidence of censorship related to re-
21 search, analysis, or technical information shall
22 come within the protections of section
23 2302(b)(8)(A) of title 5, United States Code,
24 if—

1 (i) the employee or applicant reason-
2 ably believes that the censorship related to
3 research, analysis, or technical information
4 is or will cause—

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

7 (II) gross mismanagement, a
8 gross waste of funds, an abuse of au-
9 thority, or a substantial and specific
10 danger to public health or safety;

11 (ii) the disclosure and information
12 satisfy the conditions stated in the matter
13 following clause (ii) of section
14 2302(b)(8)(A) of title 5, United States
15 Code; and

16 (iii) shall come within the protections
17 of section 2302(b)(8)(B) of title 5, United
18 States Code; if—

19 (I) the conditions under clause
20 (i) of this subparagraph are satisfied;
21 and

22 (II) the disclosure is made to an
23 individual referred to in the matter
24 preceding clause (i) of section
25 2302(b)(8)(B) of title 5, United

1 States Code, for the receipt of disclo-
2 sures.

3 (B) APPLICATION.—Paragraph (1) shall
4 apply to any disclosure of information by an
5 employee or applicant without restriction to
6 time, place, form, motive, context, forum, or
7 prior disclosure made to any person by an em-
8 ployee or applicant, including a disclosure made
9 in the ordinary course of an employee’s duties.

10 (C) RULE OF CONSTRUCTION.—Nothing in
11 this section shall be construed to imply any lim-
12 itation on the protections of employees and ap-
13 plicants afforded by any other provision of law,
14 including protections with respect to any disclo-
15 sure of information believed to be evidence of
16 censorship related to research, analysis, or tech-
17 nical information.

18 (m) CLARIFICATION OF WHISTLEBLOWER RIGHTS
19 FOR CRITICAL INFRASTRUCTURE INFORMATION.—Section
20 214(e) of the Homeland Security Act of 2002 (6 U.S.C.
21 133(e)) is amended by adding at the end the following:
22 “For purposes of this section a permissible use of inde-
23 pendently obtained information includes the disclosure of
24 such information under section 2302(b)(8) of title 5,
25 United States Code.”.

1 (n) **ADVISING EMPLOYEES OF RIGHTS.**—Section
 2 2302(e) of title 5, United States Code, is amended by in-
 3 serting “, including how to make a lawful disclosure of
 4 information that is specifically required by law or Execu-
 5 tive order to be kept secret in the interest of national de-
 6 fense or the conduct of foreign affairs to the Special Coun-
 7 sel, the Inspector General of an agency, Congress, or other
 8 agency employee designated to receive such disclosures”
 9 after “chapter 12 of this title”.

10 (o) **SPECIAL COUNSEL AMICUS CURIAE APPEAR-**
 11 **ANCE.**—Section 1212 of title 5, United States Code, is
 12 amended by adding at the end the following:

13 “(h)(1) The Special Counsel is authorized to appear
 14 as amicus curiae in any action brought in a court of the
 15 United States related to any civil action brought in con-
 16 nection with section 2302(b) (8) or (9), or subchapter III
 17 of chapter 73, or as otherwise authorized by law. In any
 18 such action, the Special Counsel is authorized to present
 19 the views of the Special Counsel with respect to compli-
 20 ance with section 2302(b) (8) or (9) or subchapter III of
 21 chapter 73 and the impact court decisions would have on
 22 the enforcement of such provisions of law.

23 “(2) A court of the United States shall grant the ap-
 24 plication of the Special Counsel to appear in any such ac-
 25 tion for the purposes described in subsection (a).”

1 (p) SCOPE OF DUE PROCESS.—

2 (1) SPECIAL COUNSEL.—Section
3 1214(b)(4)(B)(ii) of title 5, United States Code, is
4 amended by inserting “, after a finding that a pro-
5 tected disclosure was a contributing factor,” after
6 “ordered if”.

7 (2) INDIVIDUAL ACTION.—Section 1221(e)(2)
8 of title 5, United States Code, is amended by insert-
9 ing “, after a finding that a protected disclosure was
10 a contributing factor,” after “ordered if”.

11 (q) NONDISCLOSURE POLICIES, FORMS, AND AGREE-
12 MENTS.—

13 (1) IN GENERAL.—

14 (A) REQUIREMENT.—Each agreement in
15 Standard Forms 312 and 4414 of the Govern-
16 ment and any other nondisclosure policy, form,
17 or agreement of the Government shall contain
18 the following statement: “These restrictions are
19 consistent with and do not supersede, conflict
20 with, or otherwise alter the employee obliga-
21 tions, rights, or liabilities created by Executive
22 Order No. 12958; section 7211 of title 5,
23 United States Code (governing disclosures to
24 Congress); section 1034 of title 10, United
25 States Code (governing disclosure to Congress

1 by members of the military); section 2302(b)(8)
2 of title 5, United States Code (governing disclo-
3 sures of illegality, waste, fraud, abuse or public
4 health or safety threats); the Intelligence Iden-
5 tities Protection Act of 1982 (50 U.S.C. 421 et
6 seq.) (governing disclosures that could expose
7 confidential Government agents); and the stat-
8 utes which protect against disclosure that may
9 compromise the national security, including sec-
10 tions 641, 793, 794, 798, and 952 of title 18,
11 United States Code, and section 4(b) of the
12 Subversive Activities Act of 1950 (50 U.S.C.
13 783(b)). The definitions, requirements, obliga-
14 tions, rights, sanctions, and liabilities created
15 by such Executive order and such statutory
16 provisions are incorporated into this agreement
17 and are controlling.”.

18 (B) ENFORCEABILITY.—Any nondisclosure
19 policy, form, or agreement described under sub-
20 paragraph (A) that does not contain the state-
21 ment required under subparagraph (A) may not
22 be implemented or enforced to the extent such
23 policy, form, or agreement is inconsistent with
24 that statement.

1 (2) PERSONS OTHER THAN GOVERNMENT EM-
2 PLOYEES.—Notwithstanding paragraph (1), a non-
3 disclosure policy, form, or agreement that is to be
4 executed by a person connected with the conduct of
5 an intelligence or intelligence-related activity, other
6 than an employee or officer of the United States
7 Government, may contain provisions appropriate to
8 the particular activity for which such document is to
9 be used. Such form or agreement shall, at a min-
10 imum, require that the person will not disclose any
11 classified information received in the course of such
12 activity unless specifically authorized to do so by the
13 United States Government. Such nondisclosure
14 forms shall also make it clear that such forms do
15 not bar disclosures to Congress or to an authorized
16 official of an executive agency or the Department of
17 Justice that are essential to reporting a substantial
18 violation of law.

19 (†) REPORTING REQUIREMENTS.—

20 (1) GOVERNMENT ACCOUNTABILITY OFFICE.—

21 (A) IN GENERAL.—

22 (i) REPORT.—Not later than 40
23 months after the date of enactment of this
24 Act, the Comptroller General shall submit
25 a report to the Committee on Homeland

1 Security and Governmental Affairs of the
2 Senate and the Committee on Oversight
3 and Government Reform of the House of
4 Representatives on the implementation of
5 this Act.

6 (ii) CONTENTS.—The report under
7 this paragraph shall include—

8 (I) an analysis of any changes in
9 the number of cases filed with the
10 United States Merit Systems Protec-
11 tion Board alleging violations of sec-
12 tion 2302(b)(8) or (9) of title 5,
13 United States Code, since the effective
14 date of the Act;

15 (II) the outcome of the cases de-
16 scribed under clause (i), including
17 whether or not the United States
18 Merit Systems Protection Board, the
19 Federal Circuit Court of Appeals, or
20 any other court determined the allega-
21 tions to be frivolous or malicious; and

22 (III) any other matter as deter-
23 mined by the Comptroller General.

24 (B) STUDY ON REVOCATION OF SECURITY
25 CLEARANCES.—

1 (i) STUDY.—The Comptroller General
2 shall conduct a study of security clearance
3 revocations of Federal employees at a se-
4 lect sample of executive branch agencies.
5 The study shall consist of an examination
6 of the number of security clearances re-
7 voked; the process employed by each agen-
8 cy in revoking a clearance; the pay and
9 employment status of agency employees
10 during the revocation process; how often
11 such revocations result in termination of
12 employment or reassignment; how often
13 such revocations are based on an improper
14 disclosure of information; and such other
15 factors the Comptroller General deems ap-
16 propriate.

17 (ii) REPORT.—Not later than 18
18 months after the date of enactment of this
19 Act, the Comptroller General shall submit
20 to the Committee on Homeland Security
21 and Governmental Affairs of the Senate
22 and the Committee on Oversight and Gov-
23 ernment Reform of the House of Rep-
24 resentatives a report on the results of the
25 study required under this subparagraph.

1 ~~(2) MERIT SYSTEMS PROTECTION BOARD.—~~

2 ~~(A) IN GENERAL.—~~Each report submitted
3 annually by the Merit Systems Protection
4 Board under section 1116 of title 31, United
5 States Code, shall, with respect to the period
6 covered by such report, include as an addendum
7 the following:

8 ~~(i)~~ Information relating to the out-
9 come of cases decided during the applicable
10 year of the report in which violations of
11 section 2302(b)(8) or (9) of title 5, United
12 States Code, were alleged.

13 ~~(ii)~~ The number of such cases filed in
14 the regional and field offices, the number
15 of petitions for review filed in such cases,
16 and the outcomes of such cases.

17 ~~(B) FIRST REPORT.—~~The first report de-
18 scribed under subparagraph ~~(A)~~ submitted after
19 the date of enactment of this Act shall include
20 an addendum required under that subparagraph
21 that covers the period beginning on January 1,
22 2009 through the end of the fiscal year 2009.

23 ~~(S) EFFECTIVE DATE.—~~This Act shall take effect 30
24 days after the date of enactment of this Act.

1 **SECTION 1. SHORT TITLE.**

2 *This Act may be cited as the “Whistleblower Protection*
 3 *Enhancement Act of 2009”.*

4 **TITLE I—PROTECTION OF CER-**
 5 **TAIN DISCLOSURES OF IN-**
 6 **FORMATION BY FEDERAL EM-**
 7 **PLOYEES**

8 **SEC. 101. CLARIFICATION OF DISCLOSURES COVERED.**

9 (a) *IN GENERAL.*—Section 2302(b)(8) of title 5,
 10 *United States Code, is amended—*

11 (1) *in subparagraph (A)(i)—*

12 (A) *by striking “a violation” and inserting*
 13 *“any violation”; and*

14 (B) *by adding “except for an alleged viola-*
 15 *tion that is a minor, inadvertent violation, and*
 16 *occurs during the conscientious carrying out of*
 17 *official duties,” after “regulation,”; and*

18 (2) *in subparagraph (B)(i)—*

19 (A) *by striking “a violation” and inserting*
 20 *“any violation (other than a violation of this*
 21 *section)”; and*

22 (B) *by adding “except for an alleged viola-*
 23 *tion that is a minor, inadvertent violation, and*
 24 *occurs during the conscientious carrying out of*
 25 *official duties,” after regulation,”.*

1 **(b) PROHIBITED PERSONNEL PRACTICES UNDER SEC-**
 2 **TION 2302(B)(9).—**

3 **(1) TECHNICAL AND CONFORMING AMEND-**
 4 **MENTS.—***Title 5, United States Code, is amended in*
 5 *subsections (a)(3), (b)(4)(A), and (b)(4)(B)(i) of sec-*
 6 *tion 1214, in subsections (a), (e)(1), and (i) of section*
 7 *1221, and in subsection (a)(2)(C)(i) of section 2302,*
 8 *by inserting “or section 2302(b)(9)(A)(i), (B)(i), (C),*
 9 *or (D)” after “section 2302(b)(8)” or “(b)(8)” each*
 10 *place it appears.*

11 **(2) OTHER REFERENCES.—***(A) Title 5, United*
 12 *States Code, is amended in subsection (b)(4)(B)(i) of*
 13 *section 1214 and in subsection (e)(1) of section 1221,*
 14 *by inserting “or protected activity” after “disclosure”*
 15 *each place it appears.*

16 **(B) Section 2302(b)(9) of title 5, United States**
 17 **Code, is amended—**

18 **(i) by striking subparagraph (A) and insert-**
 19 **ing the following:**

20 **“(A) the exercise of any appeal, complaint,**
 21 **or grievance right granted by any law, rule, or**
 22 **regulation—**

23 **“(i) with regard to remedying a viola-**
 24 **tion of paragraph (8); or**

1 “(ii) with regard to remedying a viola-
2 tion of any other law, rule, or regulation;”;

3 and

4 (ii) in subparagraph (B), by inserting “(i)
5 or (ii)” after “subparagraph (A)”.

6 (C) Section 2302 of title 5, United States Code,
7 is amended by adding at the end the following:

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

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

12 “(2) the disclosure was made to a person, includ-
13 ing a supervisor, who participated in an activity that
14 the employee or applicant reasonably believed to be
15 covered by subsection (b)(8)(A)(ii);

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

18 “(4) of the employee or applicant’s motive for
19 making the disclosure;

20 “(5) the disclosure was not made in writing;

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

23 “(7) of the amount of time which has passed
24 since the occurrence of the events described in the dis-
25 closure.”.

1 **SEC. 102. DEFINITIONAL AMENDMENTS.**

2 (a) *DISCLOSURES.*—Section 2302(a)(2) of title 5,
3 *United States Code*, is amended—

4 (1) in subparagraph (B)(ii), by striking “and”
5 at the end;

6 (2) in subparagraph (C)(iii), by striking the pe-
7 riod at the end and inserting “; and”; and

8 (3) by adding at the end the following:

9 “(D) ‘disclosure’ means a formal or informal
10 communication or transmission, but does not include
11 a communication concerning policy decisions that
12 lawfully exercise discretionary authority unless the
13 employee or applicant providing the disclosure rea-
14 sonably believes that the disclosure evidences—

15 “(i) any violation of any law, rule, or regu-
16 lation, except for an alleged violation that is a
17 minor, inadvertent violation, and occurs during
18 the conscientious carrying out of official duties;
19 or

20 “(ii) gross mismanagement, a gross waste of
21 funds, an abuse of authority, or a substantial
22 and specific danger to public health or safety.”.

23 (b) *CLEAR AND CONVINCING EVIDENCE.*—Sections
24 1214(b)(4)(B)(ii) and 1221(e)(2) of title 5, *United States*
25 *Code*, are amended by adding at the end the following: “For
26 purposes of the preceding sentence, ‘clear and convincing

1 *evidence' means the degree of proof that produces in the*
2 *mind of the trier of fact a firm belief as to the allegations*
3 *sought to be established.”.*

4 **SEC. 103. REBUTTABLE PRESUMPTION.**

5 *Section 2302(b) of title 5, United States Code, is*
6 *amended by amending the matter following paragraph (12)*
7 *to read as follows:*

8 *“This subsection shall not be construed to authorize the*
9 *withholding of information from Congress or the taking of*
10 *any personnel action against an employee who discloses in-*
11 *formation to Congress. For purposes of paragraph (8), any*
12 *presumption relating to the performance of a duty by an*
13 *employee who has authority to take or direct others to take,*
14 *recommend, or approve any personnel action may be rebut-*
15 *ted by substantial evidence. For purposes of paragraph (8),*
16 *a determination as to whether an employee or applicant*
17 *reasonably believes that such employee or applicant has dis-*
18 *closed information that evidences any violation of law, rule,*
19 *regulation, gross mismanagement, a gross waste of funds,*
20 *an abuse of authority, or a substantial and specific danger*
21 *to public health or safety shall be made by determining*
22 *whether a disinterested observer with knowledge of the essen-*
23 *tial facts known to and readily ascertainable by the em-*
24 *ployee could reasonably conclude that the actions of the*

1 *Government evidence such violations, mismanagement,*
 2 *waste, abuse, or danger.”.*

3 **SEC. 104. PERSONNEL ACTIONS AND PROHIBITED PER-**
 4 **SONNEL PRACTICES.**

5 (a) *PERSONNEL ACTION.*—Section 2302(a)(2)(A) of
 6 *title 5, United States Code, is amended—*

7 (1) *in clause (x), by striking “and” after the*
 8 *semicolon; and*

9 (2) *by redesignating clause (xi) as clause (xii)*
 10 *and inserting after clause (x) the following:*

11 “(xi) *the implementation or enforce-*
 12 *ment of any nondisclosure policy, form, or*
 13 *agreement; and”.*

14 (b) *PROHIBITED PERSONNEL PRACTICE.*—

15 (1) *IN GENERAL.*—Section 2302(b) of title 5,
 16 *United States Code, is amended—*

17 (A) *in paragraph (11), by striking “or” at*
 18 *the end;*

19 (B) *in paragraph (12), by striking the pe-*
 20 *riod and inserting “; or”; and*

21 (C) *by inserting after paragraph (12) the*
 22 *following:*

23 “(13) *implement or enforce any nondisclosure*
 24 *policy, form, or agreement, if such policy, form, or*
 25 *agreement does not contain the following statement:*

1 *‘These provisions are consistent with and do not su-*
2 *persede, conflict with, or otherwise alter the employee*
3 *obligations, rights, or liabilities created by Executive*
4 *Order No. 12958; section 7211 of title 5, United*
5 *States Code (governing disclosures to Congress); sec-*
6 *tion 1034 of title 10, United States Code (governing*
7 *disclosure to Congress by members of the military);*
8 *section 2302(b)(8) of title 5, United States Code (gov-*
9 *erning disclosures of illegality, waste, fraud, abuse, or*
10 *public health or safety threats); the Intelligence Iden-*
11 *tities Protection Act of 1982 (50 U.S.C. 421 et seq.)*
12 *(governing disclosures that could expose confidential*
13 *Government agents); and the statutes which protect*
14 *against disclosures that could compromise national*
15 *security, including sections 641, 793, 794, 798, and*
16 *952 of title 18, United States Code, and section 4(b)*
17 *of the Subversive Activities Control Act of 1950 (50*
18 *U.S.C. 783(b)). The definitions, requirements, obliga-*
19 *tions, rights, sanctions, and liabilities created by such*
20 *Executive order and such statutory provisions are in-*
21 *corporated into this agreement and are controlling.’”.*

22 (2) *NONDISCLOSURE POLICY, FORM, OR AGREE-*
23 *MENT IN EFFECT BEFORE THE DATE OF ENACT-*
24 *MENT.—A nondisclosure policy, form, or agreement*
25 *that was in effect before the date of enactment of this*

1 *Act, but that does not contain the statement required*
2 *under section 2302(b)(13) of title 5, United States*
3 *Code, (as added by this Act) for implementation or*
4 *enforcement—*

5 *(A) may be enforced with regard to a cur-*
6 *rent employee if the agency gives such employee*
7 *notice of the statement; and*

8 *(B) may continue to be enforced after the ef-*
9 *fective date of this Act with regard to a former*
10 *employee if the agency posts notice of the state-*
11 *ment on the agency website for the 1-year period*
12 *following that effective date.*

13 *(c) RETALIATORY INVESTIGATIONS.—*

14 *(1) AGENCY INVESTIGATION.—Section 1214 of*
15 *title 5, United States Code, is amended by adding at*
16 *the end the following:*

17 *“(h) Any corrective action ordered under this section*
18 *to correct a prohibited personnel practice may include fees,*
19 *costs, or damages reasonably incurred due to an agency in-*
20 *vestigation of the employee, if such investigation was com-*
21 *menced, expanded, or extended in retaliation for the disclo-*
22 *sure or protected activity that formed the basis of the correc-*
23 *tive action.”.*

1 (2) *DAMAGES.*—Section 1221(g) of title 5,
2 *United States Code*, is amended by adding at the end
3 *the following*:

4 “(4) *Any corrective action ordered under this*
5 *section to correct a prohibited personnel practice may*
6 *include fees, costs, or damages reasonably incurred*
7 *due to an agency investigation of the employee, if*
8 *such investigation was commenced, expanded, or ex-*
9 *tended in retaliation for the disclosure or protected*
10 *activity that formed the basis of the corrective ac-*
11 *tion.*”.

12 **SEC. 105. EXCLUSION OF AGENCIES BY THE PRESIDENT.**

13 Section 2302(a)(2)(C) of title 5, *United States Code*,
14 is amended by striking clause (ii) and inserting the fol-
15 *lowing*:

16 “(i)(I) *the Federal Bureau of Inves-*
17 *tigation, the Central Intelligence Agency,*
18 *the Defense Intelligence Agency, the Na-*
19 *tional Geospatial-Intelligence Agency, the*
20 *National Security Agency, the Office of the*
21 *Director of National Intelligence, and the*
22 *National Reconnaissance Office; and*

23 “(II) *as determined by the President,*
24 *any executive agency or unit thereof the*
25 *principal function of which is the conduct*

1 *of foreign intelligence or counterintelligence*
 2 *activities, if the determination (as that de-*
 3 *termination relates to a personnel action) is*
 4 *made before that personnel action; or”.*

5 **SEC. 106. DISCIPLINARY ACTION.**

6 *Section 1215(a)(3) of title 5, United States Code, is*
 7 *amended to read as follows:*

8 “(3)(A) *A final order of the Board may im-*
 9 *pose—*

10 “(i) *disciplinary action consisting of re-*
 11 *moval, reduction in grade, debarment from Fed-*
 12 *eral employment for a period not to exceed 5*
 13 *years, suspension, or reprimand;*

14 “(ii) *an assessment of a civil penalty not to*
 15 *exceed \$1,000; or*

16 “(iii) *any combination of disciplinary ac-*
 17 *tions described under clause (i) and an assess-*
 18 *ment described under clause (ii).*

19 “(B) *In any case brought under paragraph (1)*
 20 *in which the Board finds that an employee has com-*
 21 *mitted a prohibited personnel practice under section*
 22 *2302(b)(8), or 2302(b)(9)(A)(i), (B)(i), (C) , or (D),*
 23 *the Board shall impose disciplinary action if the*
 24 *Board finds that the activity protected under section*
 25 *2302(b)(8), or 2302(b)(9)(A)(i), (B)(i), (C), or (D)*

1 *was a significant motivating factor, even if other fac-*
2 *tors also motivated the decision, for the employee’s de-*
3 *cision to take, fail to take, or threaten to take or fail*
4 *to take a personnel action, unless that employee dem-*
5 *onstrates, by preponderance of evidence, that the em-*
6 *ployee would have taken, failed to take, or threatened*
7 *to take or fail to take the same personnel action, in*
8 *the absence of such protected activity.”.*

9 **SEC. 107. REMEDIES.**

10 *(a) ATTORNEY FEES.—Section 1204(m)(1) of title 5,*
11 *United States Code, is amended by striking “agency in-*
12 *volved” and inserting “agency where the prevailing party*
13 *is employed or has applied for employment”.*

14 *(b) DAMAGES.—Sections 1214(g)(2) and*
15 *1221(g)(1)(A)(ii) of title 5, United States Code, are amend-*
16 *ed by striking all after “travel expenses,” and inserting*
17 *“any other reasonable and foreseeable consequential dam-*
18 *ages, and compensatory damages (including interest, rea-*
19 *sonable expert witness fees, and costs).” each place it ap-*
20 *pears.*

21 **SEC. 108. JUDICIAL REVIEW.**

22 *(a) IN GENERAL.—Section 7703(b) of title 5, United*
23 *States Code, is amended by striking the matter preceding*
24 *paragraph (2) and inserting the following:*

1 “(b)(1)(A) *Except as provided in subparagraph (B)*
2 *and paragraph (2) of this subsection, a petition to review*
3 *a final order or final decision of the Board shall be filed*
4 *in the United States Court of Appeals for the Federal Cir-*
5 *cuit. Notwithstanding any other provision of law, any peti-*
6 *tion for review shall be filed within 60 days after the Board*
7 *issues notice of the final order or decision of the Board.*

8 “(B) *During the 5-year period beginning on the effec-*
9 *tive date of the Whistleblower Protection Enhancement Act*
10 *of 2009, a petition to review a final order or final decision*
11 *of the Board that raises no challenge to the Board’s disposi-*
12 *tion of allegations of a prohibited personnel practice de-*
13 *scribed in section 2302(b) other than practices described in*
14 *section 2302(b)(8), or 2302(b)(9)(A)(i), (B)(i), (C), or (D)*
15 *shall be filed in the United States Court of Appeals for the*
16 *Federal Circuit or any court of appeals of competent juris-*
17 *isdiction as provided under paragraph (2).”.*

18 (b) *REVIEW OBTAINED BY OFFICE OF PERSONNEL*
19 *MANAGEMENT.—Section 7703(d) of title 5, United States*
20 *Code, is amended to read as follows:*

21 “(d)(1) *Except as provided under paragraph (2), this*
22 *paragraph shall apply to any review obtained by the Direc-*
23 *tor of the Office of Personnel Management. The Director of*
24 *the Office of Personnel Management may obtain review of*
25 *any final order or decision of the Board by filing, within*

1 60 days after the Board issues notice of the final order or
2 decision of the Board, a petition for judicial review in the
3 United States Court of Appeals for the Federal Circuit if
4 the Director determines, in the discretion of the Director,
5 that the Board erred in interpreting a civil service law,
6 rule, or regulation affecting personnel management and
7 that the Board's decision will have a substantial impact
8 on a civil service law, rule, regulation, or policy directive.
9 If the Director did not intervene in a matter before the
10 Board, the Director may not petition for review of a Board
11 decision under this section unless the Director first petitions
12 the Board for a reconsideration of its decision, and such
13 petition is denied. In addition to the named respondent,
14 the Board and all other parties to the proceedings before
15 the Board shall have the right to appear in the proceeding
16 before the Court of Appeals.

17 “(2) During the 5-year period beginning on the effec-
18 tive date of the Whistleblower Protection Enhancement Act
19 of 2009, this paragraph shall apply to any review obtained
20 by the Director of the Office of Personnel Management that
21 raises no challenge to the Board's disposition of allegations
22 of a prohibited personnel practice described in section
23 2302(b) other than practices described in section 2302(b)(8),
24 or 2302(b)(9)(A)(i), (B)(i), (C), or (D). The Director of the
25 Office of Personnel Management may obtain review of any

1 *final order or decision of the Board by filing, within 60*
2 *days after the Board issues notice of the final order or deci-*
3 *sion of the Board, a petition for judicial review in the*
4 *United States Court of Appeals for the Federal Circuit or*
5 *any court of appeals of competent jurisdiction as provided*
6 *under subsection (b)(2) if the Director determines, in the*
7 *discretion of the Director, that the Board erred in inter-*
8 *preting a civil service law, rule, or regulation affecting per-*
9 *sonnel management and that the Board's decision will have*
10 *a substantial impact on a civil service law, rule, regulation,*
11 *or policy directive. If the Director did not intervene in a*
12 *matter before the Board, the Director may not petition for*
13 *review of a Board decision under this section unless the Di-*
14 *rector first petitions the Board for a reconsideration of its*
15 *decision, and such petition is denied. In addition to the*
16 *named respondent, the Board and all other parties to the*
17 *proceedings before the Board shall have the right to appear*
18 *in the proceeding before the court of appeals."*

19 **SEC. 109. PROHIBITED PERSONNEL PRACTICES AFFECTING**
20 **THE TRANSPORTATION SECURITY ADMINIS-**
21 **TRATION.**

22 (a) *IN GENERAL.*—Chapter 23 of title 5, United States
23 Code, is amended—

24 (1) *by redesignating sections 2304 and 2305 as*
25 *sections 2305 and 2306, respectively; and*

“2305. Responsibility of the Government Accountability Office.

“2306. Coordination with certain other provisions of law.”.

1 (c) *EFFECTIVE DATE.*—*The amendments made by this*
 2 *section shall take effect on the date of enactment of this sec-*
 3 *tion.*

4 **SEC. 110. DISCLOSURE OF CENSORSHIP RELATED TO RE-**
 5 **SEARCH, ANALYSIS, OR TECHNICAL INFORMA-**
 6 **TION.**

7 (a) *DEFINITIONS.*—*In this subsection—*

8 (1) *the term “agency” has the meaning given*
 9 *under section 2302(a)(2)(C) of title 5, United States*
 10 *Code;*

11 (2) *the term “applicant” means an applicant for*
 12 *a covered position;*

13 (3) *the term “censorship related to research,*
 14 *analysis, or technical information” means any effort*
 15 *to distort, misrepresent, or suppress research, anal-*
 16 *ysis, or technical information;*

17 (4) *the term “covered position” has the meaning*
 18 *given under section 2302(a)(2)(B) of title 5, United*
 19 *States Code;*

20 (5) *the term “employee” means an employee in*
 21 *a covered position in an agency; and*

22 (6) *the term “disclosure” has the meaning given*
 23 *under section 2302(a)(2)(D) of title 5, United States*
 24 *Code.*

1 **(b) PROTECTED DISCLOSURE.**—

2 **(1) IN GENERAL.**—*Any disclosure of information*
3 *by an employee or applicant for employment that the*
4 *employee or applicant reasonably believes is evidence*
5 *of censorship related to research, analysis, or tech-*
6 *nical information shall come within the protections of*
7 *section 2302(b)(8)(A) of title 5, United States Code,*
8 *if—*

9 **(A)** *the employee or applicant reasonably*
10 *believes that the censorship related to research,*
11 *analysis, or technical information is or will*
12 *cause—*

13 **(i)** *any violation of any law, rule, or*
14 *regulation, except for an alleged violation*
15 *that is a minor, inadvertent violation, and*
16 *occurs during the conscientious carrying out*
17 *of official duties; or*

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

22 **(B)** *the disclosure and information satisfy*
23 *the conditions stated in the matter following*
24 *clause (i) of section 2302(b)(8)(A) of title 5,*
25 *United States Code; and*

1 (C) shall come within the protections of sec-
2 tion 2302(b)(8)(B) of title 5, United States Code,
3 if—

4 (i) the conditions under subparagraph
5 (A) of this paragraph are satisfied; and

6 (ii) the disclosure is made to an indi-
7 vidual referred to in the matter preceding
8 clause (i) of section 2302(b)(8)(B) of title 5,
9 United States Code, for the receipt of disclo-
10 sures.

11 (2) *APPLICATION.*—Subsection (a) shall apply to
12 any disclosure of information by an employee or ap-
13 plicant without restriction to time, place, form, mo-
14 tive, context, forum, or prior disclosure made to any
15 person by an employee or applicant, including a dis-
16 closure made in the ordinary course of an employee’s
17 duties.

18 (3) *RULE OF CONSTRUCTION.*—Nothing in this
19 section shall be construed to imply any limitation on
20 the protections of employees and applicants afforded
21 by any other provision of law, including protections
22 with respect to any disclosure of information believed
23 to be evidence of censorship related to research, anal-
24 ysis, or technical information.

1 **SEC. 111. CLARIFICATION OF WHISTLEBLOWER RIGHTS FOR**
2 **CRITICAL INFRASTRUCTURE INFORMATION.**

3 *Section 214(c) of the Homeland Security Act of 2002*
4 *(6 U.S.C. 133(c)) is amended by adding at the end the fol-*
5 *lowing: “For purposes of this section a permissible use of*
6 *independently obtained information includes the disclosure*
7 *of such information under section 2302(b)(8) of title 5,*
8 *United States Code.”.*

9 **SEC. 112. ADVISING EMPLOYEES OF RIGHTS.**

10 *Section 2302(c) of title 5, United States Code, is*
11 *amended by inserting “, including how to make a lawful*
12 *disclosure of information that is specifically required by*
13 *law or Executive order to be kept secret in the interest of*
14 *national defense or the conduct of foreign affairs to the Spe-*
15 *cial Counsel, the Inspector General of an agency, Congress,*
16 *or other agency employee designated to receive such disclo-*
17 *tures” after “chapter 12 of this title”.*

18 **SEC. 113. SPECIAL COUNSEL AMICUS CURIAE APPEARANCE.**

19 *Section 1212 of title 5, United States Code, is amended*
20 *by adding at the end the following:*

21 *“(h)(1) The Special Counsel is authorized to appear*
22 *as amicus curiae in any action brought in a court of the*
23 *United States related to any civil action brought in connec-*
24 *tion with section 2302(b) (8) or (9), or as otherwise author-*
25 *ized by law. In any such action, the Special Counsel is au-*
26 *thorized to present the views of the Special Counsel with*

1 *respect to compliance with section 2302(b) (8) or (9) and*
2 *the impact court decisions would have on the enforcement*
3 *of such provisions of law.*

4 “(2) *A court of the United States shall grant the appli-*
5 *cation of the Special Counsel to appear in any such action*
6 *for the purposes described under subsection (a).”.*

7 **SEC. 114. SCOPE OF DUE PROCESS.**

8 (a) *SPECIAL COUNSEL.*—Section 1214(b)(4)(B)(vi) of
9 *title 5, United States Code, is amended by inserting “, after*
10 *a finding that a protected disclosure was a contributing fac-*
11 *tor,” after “ordered if”.*

12 (b) *INDIVIDUAL ACTION.*—Section 1221(e)(2) of title 5,
13 *United States Code, is amended by inserting “, after a find-*
14 *ing that a protected disclosure was a contributing factor,”*
15 *after “ordered if”.*

16 **SEC. 115. NONDISCLOSURE POLICIES, FORMS, AND AGREE-**
17 **MENTS.**

18 (a) *IN GENERAL.*—

19 (1) *REQUIREMENT.*—*Each agreement in Stand-*
20 *ard Forms 312 and 4414 of the Government and any*
21 *other nondisclosure policy, form, or agreement of the*
22 *Government shall contain the following statement:*
23 *“These restrictions are consistent with and do not su-*
24 *persede, conflict with, or otherwise alter the employee*
25 *obligations, rights, or liabilities created by Executive*

1 *Order No. 12958; section 7211 of title 5, United*
2 *States Code (governing disclosures to Congress); sec-*
3 *tion 1034 of title 10, United States Code (governing*
4 *disclosure to Congress by members of the military);*
5 *section 2302(b)(8) of title 5, United States Code (gov-*
6 *erning disclosures of illegality, waste, fraud, abuse, or*
7 *public health or safety threats); the Intelligence Iden-*
8 *tities Protection Act of 1982 (50 U.S.C. 421 et seq.)*
9 *(governing disclosures that could expose confidential*
10 *Government agents); and the statutes which protect*
11 *against disclosure that may compromise the national*
12 *security, including sections 641, 793, 794, 798, and*
13 *952 of title 18, United States Code, and section 4(b)*
14 *of the Subversive Activities Act of 1950 (50 U.S.C.*
15 *783(b)). The definitions, requirements, obligations,*
16 *rights, sanctions, and liabilities created by such Exec-*
17 *utive order and such statutory provisions are incor-*
18 *porated into this agreement and are controlling.”.*

19 (2) *ENFORCEABILITY.—*

20 (A) *IN GENERAL.—Any nondisclosure pol-*
21 *icy, form, or agreement described under para-*
22 *graph (1) that does not contain the statement re-*
23 *quired under paragraph (1) may not be imple-*
24 *mented or enforced to the extent such policy,*

1 *form, or agreement is inconsistent with that*
2 *statement.*

3 (B) *NONDISCLOSURE POLICY, FORM, OR*
4 *AGREEMENT IN EFFECT BEFORE THE DATE OF*
5 *ENACTMENT.—A nondisclosure policy, form, or*
6 *agreement that was in effect before the date of*
7 *enactment of this Act, but that does not contain*
8 *the statement required under paragraph (1)—*

9 (i) *may be enforced with regard to a*
10 *current employee if the agency gives such*
11 *employee notice of the statement; and*

12 (ii) *may continue to be enforced after*
13 *the effective date of this Act with regard to*
14 *a former employee if the agency posts notice*
15 *of the statement on the agency website for*
16 *the 1-year period following that effective*
17 *date.*

18 (b) *PERSONS OTHER THAN GOVERNMENT EMPLOY-*
19 *EES.—Notwithstanding subsection (a), a nondisclosure pol-*
20 *icy, form, or agreement that is to be executed by a person*
21 *connected with the conduct of an intelligence or intelligence-*
22 *related activity, other than an employee or officer of the*
23 *United States Government, may contain provisions appro-*
24 *priate to the particular activity for which such document*
25 *is to be used. Such policy, form, or agreement shall, at a*

1 *minimum, require that the person will not disclose any*
2 *classified information received in the course of such activity*
3 *unless specifically authorized to do so by the United States*
4 *Government. Such nondisclosure policy, form, or agreement*
5 *shall also make it clear that such forms do not bar disclo-*
6 *tures to Congress or to an authorized official of an executive*
7 *agency or the Department of Justice that are essential to*
8 *reporting a substantial violation of law.*

9 **SEC. 116. REPORTING REQUIREMENTS.**

10 (a) *GOVERNMENT ACCOUNTABILITY OFFICE.—*

11 (1) *REPORT.—Not later than 40 months after the*
12 *date of enactment of this Act, the Comptroller General*
13 *shall submit a report to the Committee on Homeland*
14 *Security and Governmental Affairs of the Senate and*
15 *the Committee on Oversight and Government Reform*
16 *of the House of Representatives on the implementa-*
17 *tion of this Act.*

18 (2) *CONTENTS.—The report under this para-*
19 *graph shall include—*

20 (A) *an analysis of any changes in the num-*
21 *ber of cases filed with the United States Merit*
22 *Systems Protection Board alleging violations of*
23 *section 2302(b)(8) or (9) of title 5, United States*
24 *Code, since the effective date of this Act;*

1 (B) the outcome of the cases described under
2 subparagraph (A), including whether or not the
3 United States Merit Systems Protection Board,
4 the Federal Circuit Court of Appeals, or any
5 other court determined the allegations to be frivo-
6 lous or malicious;

7 (C) an analysis of the outcome of cases de-
8 scribed under subparagraph (A) that were de-
9 cided by a United States District Court and the
10 impact the process has on the Merit Systems
11 Protection Board and the Federal court system;
12 and

13 (D) any other matter as determined by the
14 Comptroller General.

15 (b) *STUDY ON REVOCATION OF SECURITY CLEAR-*
16 *ANCES.*—

17 (1) *STUDY.*—*The Council of the Inspectors Gen-*
18 *eral on Integrity and Efficiency, including the In-*
19 *spectors General of the Department of Justice, the Of-*
20 *fice of the Director of National Intelligence, and the*
21 *Office of Personnel Management, shall conduct a*
22 *study of security clearance revocations of Federal em-*
23 *ployees at a select sample of executive branch agencies*
24 *and the appeals process in place at those agencies and*
25 *at the Intelligence Community Whistleblower Protec-*

1 *tion Board. The study shall consist of an examination*
2 *of the number of security clearances revoked, the proc-*
3 *ess employed by each agency in revoking a clearance,*
4 *the pay and employment status of agency employees*
5 *during the revocation process, how often such revoca-*
6 *tions result in termination of employment or reas-*
7 *signment, how often such revocations are based on an*
8 *improper disclosure of information, how often secu-*
9 *rity clearances are reinstated following an appeal,*
10 *how often security clearances remain revoked fol-*
11 *lowing a finding of retaliation for making a disclo-*
12 *sure, and such other factors the Inspectors General de-*
13 *termine appropriate.*

14 *(2) REPORT.—Not later than 18 months after the*
15 *date of enactment of this Act, the Inspectors General*
16 *shall submit to the Committee on Homeland Security*
17 *and Governmental Affairs of the Senate and the Com-*
18 *mittee on Oversight and Government Reform of the*
19 *House of Representatives a report on the results of the*
20 *study required under this paragraph.*

21 *(c) MERIT SYSTEMS PROTECTION BOARD.—*

22 *(1) IN GENERAL.—Each report submitted annu-*
23 *ally by the Merit Systems Protection Board under*
24 *section 1116 of title 31, United States Code, shall,*

1 *with respect to the period covered by such report, in-*
2 *clude as an addendum the following:*

3 *(A) Information relating to the outcome of*
4 *cases decided during the applicable year of the*
5 *report in which violations of section 2302(b)(8)*
6 *or (9) of title 5, United States Code, were al-*
7 *leged.*

8 *(B) The number of such cases filed in the*
9 *regional and field offices, the number of petitions*
10 *for review filed in such cases, and the outcomes*
11 *of such cases.*

12 *(2) FIRST REPORT.—The first report described*
13 *under paragraph (1) submitted after the date of en-*
14 *actment of this Act shall include an addendum re-*
15 *quired under that subparagraph that covers the pe-*
16 *riod beginning on January 1, 2009 through the end*
17 *of the fiscal year 2009.*

18 **SEC. 117. ALTERNATIVE REVIEW.**

19 *(a) IN GENERAL.—Section 1221 of title 5, United*
20 *States Code, is amended by adding at the end the following:*

21 *“(k)(1) In this subsection, the term ‘appropriate*
22 *United States district court’, as used with respect to an al-*
23 *leged prohibited personnel practice, means the United*
24 *States district court for the judicial district in which—*

1 “(A) *the prohibited personnel practice is alleged*
2 *to have been committed;*

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

5 “(C) *the employee, former employee, or applicant*
6 *for employment allegedly affected by such practice re-*
7 *sides.*

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

13 “(B) *Upon initiation of any action under subpara-*
14 *graph (A), the Board shall stay any other claims of such*
15 *employee, former employee, or applicant pending before the*
16 *Board at that time which arise out of the same set of opera-*
17 *tive facts. Such claims shall be stayed pending completion*
18 *of the action filed under subparagraph (A) before the appro-*
19 *priate United States district court and any associated ap-*
20 *pellate review.*

21 “(3) *This paragraph applies in any case that—*

22 “(A) *an employee, former employee, or applicant*
23 *for employment—*

24 “(i) *seeks corrective action from the Merit*
25 *Systems Protection Board under section 1221(a)*

1 *based on an alleged prohibited personnel practice*
2 *described in section 2302(b)(8) for which the as-*
3 *sociated personnel action is an action covered*
4 *under section 7512 or 7542; or*

5 *“(i) files an appeal under section*
6 *7701(a)(1) alleging as an affirmative defense the*
7 *commission of a prohibited personnel practice*
8 *described in section 2302(b)(8) or (9)(A)(i),*
9 *(B)(i), (C), or (D) for which the associated per-*
10 *sonnel action is an action covered under section*
11 *7512 or 7542;*

12 *“(B) no final order or decision is issued by the*
13 *Board within 270 days after the date on which a re-*
14 *quest for that corrective action or appeal has been*
15 *duly submitted; and*

16 *“(C) such employee, former employee, or appli-*
17 *cant provides written notice to the Board of filing an*
18 *action under this subsection before the filing of that*
19 *action.*

20 *“(4) This paragraph applies in any case in which—*

21 *“(A) an employee, former employee, or applicant for*
22 *employment —*

23 *“(i) seeks corrective action from the Merit Sys-*
24 *tems Protection Board under section 1221(a) based on*
25 *an alleged prohibited personnel practice described in*

1 *section 2302(b) (8) or (9) (A)(i), (B)(i), (C), or (D)*
2 *for which the associated personnel action is an action*
3 *covered under section 7512 or 7542; or*

4 *“(ii) files an appeal under section 7701(a)(1) al-*
5 *leging as an affirmative defense the commission of a*
6 *prohibited personnel practice described in section*
7 *2302(b) (8) or (9) (A)(i), (B)(i), (C), or (D) for which*
8 *the associated personnel action is an action covered*
9 *under section 7512 or 7542;*

10 *“(B)(i) within 30 days after the date on which the re-*
11 *quest for corrective action or appeal was duly submitted,*
12 *such employee, former employee, or applicant for employ-*
13 *ment files a motion requesting a certification consistent*
14 *with subparagraph (C) to the Board, any administrative*
15 *law judge appointed by the Board under section 3105 of*
16 *this title and assigned to the case, or any employee of the*
17 *Board designated by the Board and assigned to the case;*
18 *and*

19 *“(ii) such employee has not previously filed a motion*
20 *under clause (i) related to that request for corrective action;*
21 *and*

22 *“(C) the Board, any administrative law judge ap-*
23 *pointed by the Board under section 3105 of this title and*
24 *assigned to the case, or any employee of the Board des-*

1 *ignated by the Board and assigned to the case certifies*
2 *that—*

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

6 “(ii) *the case—*

7 “(I) *consists of multiple claims;*

8 “(II) *requires complex or extensive dis-*
9 *covery;*

10 “(III) *arises out of the same set of operative*
11 *facts as any civil action against the Government*
12 *filed by the employee, former employee, or appli-*
13 *cant pending in a Federal court; or*

14 “(IV) *involves a novel question of law; or*

15 “(iii) *under standards applicable to the review of*
16 *motions to dismiss under rule 12(b)(6) of the Federal*
17 *Rules of Civil Procedure, including rule 12(d), the re-*
18 *quest for corrective action (including any allegations*
19 *made with the motion under subparagraph (B))*
20 *would not be subject to dismissal.*

21 “(5) *The Board shall grant or deny any motion re-*
22 *questing a certification described under paragraph (4)(ii)*
23 *within 90 days after the submission of such motion and,*
24 *in any event, not later than 15 days before issuing a deci-*
25 *sion on the merits of a request for corrective action.*

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

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

13 “(B) *the decision to deny the certification shall be over-*
14 *turned by the reviewing court if such decision is found to*
15 *be arbitrary, capricious, or an abuse of discretion; and*

16 “(C) *shall not be considered evidence of any determina-*
17 *tion by the Board, any administrative law judge appointed*
18 *by the Board under section 3105 of this title, or any em-*
19 *ployee of the Board designated by the Board on the merits*
20 *of the underlying allegations during the course of any ac-*
21 *tion at law or equity for de novo review in the appropriate*
22 *United States district court in accordance with this sub-*
23 *section.*

24 “(7) *In any action filed under this subsection—*

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

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

5 “(C) the court—

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

8 “(ii) may award any relief which the court
9 considers appropriate under subsection (g), ex-
10 cept—

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

13 “(II) relief may not include punitive
14 damages; and

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

20 “(D) the Special Counsel may not represent the
21 employee, former employee, or applicant for employ-
22 ment.

23 “(8) An appeal from a final decision of a district court
24 in an action under this subsection shall be taken to the

1 *Court of Appeals for the Federal Circuit or any court of*
2 *appeals of competent jurisdiction.*

3 “(9) *This subsection applies with respect to any ap-*
4 *peal, petition, or other request for corrective action duly*
5 *submitted to the Board, whether under section 1214(b)(2),*
6 *the preceding provisions of this section, section 7513(d), sec-*
7 *tion 7701, or any otherwise applicable provisions of law,*
8 *rule, or regulation.”.*

9 (b) *SUNSET.—*

10 (1) *IN GENERAL.—Except as provided under*
11 *paragraph (2), the amendments made by this section*
12 *shall cease to have effect 5 years after the effective*
13 *date of this Act.*

14 (2) *PENDING CLAIMS.—The amendments made*
15 *by this section shall continue to apply with respect to*
16 *any claim pending before the Board on the last day*
17 *of the 5-year period described under paragraph (1).*

18 **SEC. 118. MERIT SYSTEMS PROTECTION BOARD SUMMARY**

19 **JUDGMENT.**

20 (a) *IN GENERAL.—Section 1204(b) of title 5, United*
21 *States Code, is amended—*

22 (1) *by redesignating paragraph (3) as para-*
23 *graph (4);*

24 (2) *by inserting after paragraph (2) the fol-*
25 *lowing:*

1 “(3) *With respect to a request for corrective ac-*
2 *tion based on an alleged prohibited personnel practice*
3 *described in section 2302(b)(8) or (9)(A)(i), (B)(i),*
4 *(C), or (D) for which the associated personnel action*
5 *is an action covered under section 7512 or 7542, the*
6 *Board, any administrative law judge appointed by*
7 *the Board under section 3105 of this title, or any em-*
8 *ployee of the Board designated by the Board may,*
9 *with respect to any party, grant a motion for sum-*
10 *mary judgment when the Board or the administrative*
11 *law judge determines that there is no genuine issue as*
12 *to any material fact and that the moving party is en-*
13 *titled to a judgment as a matter of law.”.*

14 **(b) SUNSET.—**

15 **(1) IN GENERAL.—***Except as provided under*
16 *paragraph (2), the amendments made by this section*
17 *shall cease to have effect 5 years after the effective*
18 *date of this Act.*

19 **(2) PENDING CLAIMS.—***The amendments made*
20 *by this section shall continue to apply with respect to*
21 *any claim pending before the Board on the last day*
22 *of the 5-year period described under paragraph (1).*

23 **SEC. 119. DISCLOSURES OF CLASSIFIED INFORMATION.**

24 **(a) PROHIBITED PERSONNEL PRACTICES.—***Section*
25 *2302(b)(8) of title 5, United States Code, is amended—*

1 (1) *in subparagraph (A), by striking “or” after*
2 *the semicolon;*

3 (2) *in subparagraph (B), by adding “or” after*
4 *the semicolon; and*

5 (3) *by adding at the end the following:*

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

9 (b) *INSPECTOR GENERAL ACT OF 1978.—Section 8H*
10 *of the Inspector General Act of 1978 (5 U.S.C. App) is*
11 *amended—*

12 (1) *in subsection (a)(1), by adding at the end the*
13 *following:*

14 “(D) *An employee of any agency, as that*
15 *term is defined under section 2302(a)(2)(C) of*
16 *title 5, United States Code, who intends to report*
17 *to Congress a complaint or information with re-*
18 *spect to an urgent concern may report the com-*
19 *plaint or information to the Inspector General,*
20 *or designee, of the agency of which that employee*
21 *is employed;”;* *and*

22 (2) *in subsection (h), by striking paragraph (2),*
23 *and inserting the following:*

24 “(2) *The term ‘intelligence committees’ means*
25 *the Permanent Select Committee on Intelligence of the*

1 *House of Representatives and the Select Committee on*
2 *Intelligence of the Senate, except that with respect to*
3 *disclosures made by employees described in subsection*
4 *(a)(1)(D), the term ‘intelligence committees’ means*
5 *the committees of appropriate jurisdiction.’’.*

6 **SEC. 120. WHISTLEBLOWER PROTECTION OMBUDSMAN.**

7 *(a) IN GENERAL.—Section 3(d) of the Inspector Gen-*
8 *eral Act of 1978 (5 U.S.C. App.) is amended—*

9 *(1) in paragraph (1), by striking ‘‘and’’ after the*
10 *semicolon;*

11 *(2) in paragraph (2), by striking the period and*
12 *inserting ‘‘; and’’; and*

13 *(3) by adding at the end the following:*

14 *‘‘(3) designate a Whistleblower Protection Om-*
15 *budsman who shall advocate for the interests of agen-*
16 *cy employees or applicants who make protected disclo-*
17 *tures of information, educate agency personnel about*
18 *prohibitions on retaliation for protected disclosures,*
19 *and advise agency employees, applicants, or former*
20 *employees who have made or are contemplating mak-*
21 *ing a protected disclosure.’’.*

22 *(b) CENTRAL INTELLIGENCE AGENCY.—Section 17(e)*
23 *of the Central Intelligence Agency Act of 1949 (50 U.S.C.*
24 *403q(e)) is amended by adding at the end the following:*

1 “(9) *The Inspector General shall designate a Whistle-*
 2 *blower Protection Ombudsman who shall advocate for the*
 3 *interests of agency employees or applicants who make pro-*
 4 *ected disclosures of information, educate agency personnel*
 5 *about prohibitions on retaliation for protected disclosures,*
 6 *and advise agency employees, applicants, or former employ-*
 7 *ees who have made or are contemplating making a protected*
 8 *disclosure.”.*

9 (c) *APPLICATION TO INTELLIGENCE COMMUNITY.—*
 10 *Notwithstanding section 8K of the Inspector General Act*
 11 *of 1978 (5 U.S.C. App.) or any other provision of law, the*
 12 *amendment made by subsection (a) shall apply to each Of-*
 13 *fice of Inspector General of an element of the intelligence*
 14 *community (as defined in section 3(4) of the National Secu-*
 15 *rity Act of 1947 (50 U.S.C. 401a(4))).*

16 **TITLE II—INTELLIGENCE COM-**
 17 **MUNITY WHISTLEBLOWER**
 18 **PROTECTIONS**

19 **SEC. 201. PROTECTION OF INTELLIGENCE COMMUNITY**
 20 **WHISTLEBLOWERS.**

21 (a) *IN GENERAL.—Title I of the National Security Act*
 22 *of 1947 (50 U.S.C. 402 et seq.) is amended by adding at*
 23 *the end the following:*

1 **“SEC. 120. INTELLIGENCE COMMUNITY WHISTLEBLOWER**
2 **PROTECTION BOARD.**

3 “(a) *ESTABLISHMENT.*—*There is established within*
4 *the Office of the Director of National Intelligence the Intel-*
5 *ligence Community Whistleblower Protection Board (in this*
6 *section referred to as the ‘Board’).*

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

8 “(A) *a Chairperson who shall be appointed by*
9 *the President, by and with the advice and consent of*
10 *the Senate (in this section referred to as the ‘Chair-*
11 *person’);*

12 “(B) *2 members who shall be designated by the*
13 *President—*

14 “(i) *from individuals serving as an inspec-*
15 *tors general of any agency or department of the*
16 *United States who have been appointed by the*
17 *President, by and with the advice and consent of*
18 *the Senate; and*

19 “(ii) *after consultation with members of the*
20 *Council of Inspectors General on Integrity and*
21 *Efficiency; and*

22 “(C) *2 members who shall be appointed by the*
23 *President, by and with the advice and consent of the*
24 *Senate, after consultation with the Attorney General,*
25 *the Director of National Intelligence, and the Sec-*
26 *retary of Defense.*

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

7 “(2) *The President shall designate 2 alternate members*
8 *of the Board from individuals serving as an inspector gen-*
9 *eral of an agency or department of the United States. If*
10 *a member of the Board recuses themselves from a matter*
11 *pending before the Board, an alternate shall serve in place*
12 *of that member for that matter.*

13 “(3) *The members of the Board shall be individuals*
14 *of sound and independent judgment who shall collectively*
15 *possess substantial experience in national security and per-*
16 *sonnel matters.*

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

24 “(B) *The members designated under paragraph (1)(B)*
25 *and alternate members designated under paragraph (2)*

1 *shall serve without compensation in addition to that re-*
2 *ceived for their services as inspectors general.*

3 “(C) *The members appointed under paragraph (1)(C)*
4 *shall—*

5 “(i) *perform their duties for a period not to*
6 *exceed 130 days during any period of 365 con-*
7 *secutive days; and*

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

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

13 “(I) *the Chairperson shall have a term of 6*
14 *years;*

15 “(II) *2 members shall have a term of 5*
16 *years; and*

17 “(III) *2 members shall have a term of 4*
18 *years.*

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

23 “(iii) *A member of the Board may serve on the*
24 *Board after the expiration of the term of that member*

1 *until a successor for that member has taken office as*
2 *a member of the Board.*

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

7 “(5) *Three members shall constitute a quorum of the*
8 *Board.*

9 “(c) *RESOURCES AND AUTHORITY.—(1) The Office of*
10 *the Director of National Intelligence shall provide the Board*
11 *with appropriate and adequate office space, together with*
12 *such equipment, office supplies, and communications facili-*
13 *ties and services as may be necessary for the operation of*
14 *the Board, and shall provide necessary maintenance serv-*
15 *ices for the Board and the equipment and facilities located*
16 *therein.*

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

22 “(B) *In transmitting a proposed budget to the Presi-*
23 *dent for approval, the Director of National Intelligence shall*
24 *include—*

1 “(i) the amount requested by the Chairperson;
2 and

3 “(ii) any comments of the Chairperson with re-
4 spect to the amount requested.

5 “(3) Subject to applicable law and the policies of the
6 Director of National Intelligence, the Chairperson, for the
7 purposes of enabling the Board to fulfill its statutorily as-
8 signed functions, is authorized to select, appoint, and em-
9 ploy such officers and employees as may be necessary for
10 carrying out the functions, powers, and duties of the Office.

11 “(4) In consultation with the Attorney General, the
12 Director of National Intelligence, and the Secretary of De-
13 fense, the Board may promulgate rules, regulations, and
14 guidance and issue orders to fulfill its functions. The Direc-
15 tor of National Intelligence, Secretary of Defense, and At-
16 torney General shall jointly approve any rules, regulations,
17 or guidance issued under section 121(c)(1)(B).

18 “(5) The number of individuals employed by or on de-
19 tail to the Board shall not be counted against any limita-
20 tion on the number of personnel, positions, or full-time
21 equivalents in the Office of the Director of National Intel-
22 ligence.

23 **“SEC. 121. INTELLIGENCE COMMUNITY WHISTLEBLOWER**
24 **PROTECTIONS.**

25 “(a) **DEFINITIONS.**—In this section:

1 “(1) *The term ‘agency’ means an Executive de-*
2 *partment or independent establishment, as defined*
3 *under sections 101 and 104 of title 5, United States*
4 *Code, that contains an intelligence community ele-*
5 *ment.*

6 “(2) *The term ‘intelligence community element’*
7 *means—*

8 “(A) *the Federal Bureau of Investigation,*
9 *the Central Intelligence Agency, the Defense In-*
10 *telligence Agency, the National Geospatial-Intel-*
11 *ligence Agency, the National Security Agency,*
12 *the Office of the Director of National Intel-*
13 *ligence, and the National Reconnaissance Office;*
14 *and*

15 “(B) *any executive agency or unit thereof*
16 *determined by the President under section*
17 *2302(a)(2)(C)(ii) of title 5, United States Code,*
18 *to have as its principal function the conduct of*
19 *foreign intelligence or counterintelligence activi-*
20 *ties, if the determination (as that determination*
21 *relates to a personnel action) is made before that*
22 *personnel action.*

23 “(3) *The term ‘personnel action’—*

24 “(A) *means any action taken against an*
25 *employee of an intelligence community element*

1 *that would be considered a personnel action, as*
2 *defined in section 2302(a)(2)(A) of title 5,*
3 *United States Code, if taken against an employee*
4 *subject to such section 2302; and*

5 *“(B) shall not include the denial, suspen-*
6 *sion, or revocation of a security clearance or de-*
7 *nying access to classified or sensitive informa-*
8 *tion or a suspension with pay pending an inves-*
9 *tigation.*

10 *“(4) The term ‘prohibited personnel practice’*
11 *means any action prohibited by subsection (b) of this*
12 *section.*

13 *“(b) PROHIBITED PERSONNEL PRACTICES.—(1) No*
14 *person who has authority to take, direct others to take, rec-*
15 *ommend, or approve any personnel action, shall, with re-*
16 *spect to such authority—*

17 *“(A) take or fail to take, or threaten to take or*
18 *fail to take, a personnel action with respect to any in-*
19 *telligence community element employee or applicant*
20 *for employment because of—*

21 *“(i) any disclosure of information to an of-*
22 *ficial of an agency by an employee or applicant*
23 *which the employee or applicant reasonably be-*
24 *lieves evidences—*

1 “(I) any violation of law, rule, or reg-
2 ulation except for an alleged violation that
3 is a minor, inadvertent violation, and oc-
4 curs during the conscientious carrying out
5 of official duties; or

6 “(II) gross mismanagement, a gross
7 waste of funds, an abuse of authority, or a
8 substantial and specific danger to public
9 health or safety,

10 if such disclosure is not specifically prohibited by
11 law and if such information is not specifically
12 required by Executive order to be kept secret in
13 the interest of national defense or the conduct of
14 foreign affairs;

15 “(ii) any disclosure to the inspector general
16 of an agency or another employee designated by
17 the head of the agency to receive such disclosures,
18 of information which the employee or applicant
19 reasonably believes evidences—

20 “(I) any violation of law, rule, or reg-
21 ulation, except for an alleged violation that
22 is a minor, inadvertent violation, and oc-
23 curs during the conscientious carrying out
24 of official duties; or

1 “(II) gross mismanagement, a gross
2 waste of funds, an abuse of authority, or a
3 substantial and specific danger to public
4 health or safety; or

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

12 “(B) take or fail to take, or threaten to take or
13 fail to take, any personnel action against any intel-
14 ligence community element employee or applicant for
15 employment because of—

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

18 “(ii) testifying for or otherwise lawfully as-
19 sisting any individual in the exercise of any
20 right referred to in clause (i); or

21 “(iii) cooperating with or disclosing infor-
22 mation to the inspector general of an agency in
23 connection with an audit, inspection, or inves-
24 tigation conducted by the inspector general, in
25 accordance with applicable provisions of law,

1 *if the actions described under clauses (i), (ii), and*
2 *(iii) do not result in the employee or applicant un-*
3 *lawfully disclosing information specifically required*
4 *by Executive order to be kept secret in the interest of*
5 *national defense or the conduct of foreign affairs or*
6 *any other information the disclosure of which is spe-*
7 *cifically prohibited by law.*

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

10 “(A) the disclosure was made during the normal
11 *course of the duties of the employee;*

12 “(B) the disclosure was made to a person, in-
13 *cluding a supervisor, who participated in an activity*
14 *that the employee or applicant reasonably believed to*
15 *be covered by paragraph (1)(A)(ii);*

16 “(C) the disclosure revealed information that had
17 *been previously disclosed;*

18 “(D) of the employee or applicant’s motive for
19 *making the disclosure;*

20 “(E) the disclosure was not made in writing;

21 “(F) the disclosure was made while the employee
22 *was off duty; or*

23 “(G) of the amount of time which has passed
24 *since the occurrence of the events described in the dis-*
25 *closure.*

1 “(3) *Nothing in this subsection shall be construed to*
2 *authorize the withholding of information from the Congress*
3 *or the taking of any personnel action against an employee*
4 *who discloses information to the Congress.*

5 “(c) *REMEDIAL PROCEDURE.—(1)(A) An employee,*
6 *applicant, or former employee of an intelligence community*
7 *element who believes that such employee, applicant, or*
8 *former employee has been subjected to a prohibited per-*
9 *sonnel practice may petition for an appeal of the personnel*
10 *action to the agency head or the designee of the agency head*
11 *within 60 days after discovery of the alleged adverse per-*
12 *sonnel action.*

13 “(B) *The appeal shall be conducted within the agency*
14 *according to rules of procedure issued by the Intelligence*
15 *Community Whistleblower Protection Board under section*
16 *120(c)(4). Those rules shall be based on those pertaining*
17 *to prohibited personnel practices defined under section*
18 *2302(b)(8) of title 5, United States Code, and provide—*

19 “(i) *for an independent and impartial fact-find-*
20 *er;*

21 “(ii) *for notice and the opportunity to be heard,*
22 *including the opportunity to present relevant evi-*
23 *dence, including witness testimony;*

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

1 “(iv) that the employee, applicant, or former em-
2 ployee has a right to a decision based on the record
3 developed during the appeal;

4 “(v) that, unless agreed to by the employee and
5 the agency concerned, not more than 180 days shall
6 pass from the filing of the appeal to the report of the
7 impartial fact-finder to the agency head or the des-
8 ignee of the agency head;

9 “(vi) for the use of information specifically re-
10 quired by Executive order to be kept secret in the in-
11 terest of national defense or the conduct of foreign af-
12 fairs in a manner consistent with the interests of na-
13 tional security, including *ex parte* submissions where
14 the agency determines that the interests of national
15 security so warrant; and

16 “(vii) that the employee, applicant, or former
17 employee shall have no right to compel the production
18 of information specifically required by Executive
19 order to be kept secret in the interest of national de-
20 fense or the conduct of foreign affairs, except evidence
21 necessary to establish that the employee made the dis-
22 closure or communication such employee alleges was
23 protected by subsection (b)(1)(A).

24 “(C) If the Board certifies that agency procedures in
25 effect on the date of enactment of this section, including pro-

1 *cedures promulgated under section 2303 of title 5, United*
2 *States Code, before that date, adequately provide guaranties*
3 *required under subparagraph (B)(i) through (vi), the ap-*
4 *peal may be conducted according to those procedures.*

5 “(2) *On the basis of the record developed during the*
6 *appeal, the impartial fact-finder shall prepare a report to*
7 *the agency head or the designee of the agency head setting*
8 *forth findings, conclusions, and, if applicable, recommended*
9 *corrective action. After reviewing the record and the impar-*
10 *tial fact-finder’s report, the agency head or the designee of*
11 *the agency head shall determine whether the employee,*
12 *former employee, or applicant has been subjected to a pro-*
13 *hibited personnel practice, and shall either issue an order*
14 *denying relief or shall implement corrective action to return*
15 *the employee, former employee, or applicant, as nearly as*
16 *practicable and reasonable, to the position such employee,*
17 *former employee, or applicant would have held had the pro-*
18 *hibited personnel practice not occurred. Such corrective ac-*
19 *tion shall include reasonable attorney’s fees and any other*
20 *reasonable costs incurred, and may include back pay and*
21 *related benefits, travel expenses, and compensatory damages*
22 *not to exceed \$300,000. Unless the employee, former em-*
23 *ployee, or applicant consents, no more than 60 days shall*
24 *pass from the submission of the report by the impartial fact-*

1 *finder to the agency head and the final decision by the agen-*
2 *cy head or the designee of the agency head.*

3 “(3) *In determining whether the employee, former em-*
4 *ployee, or applicant has been subjected to a prohibited per-*
5 *sonnel practice, the agency head or the designee of the agen-*
6 *cy head shall find that a prohibited personnel practice oc-*
7 *curred if a disclosure described in subsection (b) was a con-*
8 *tributing factor in the personnel action which was taken*
9 *against the individual, unless the agency demonstrates by*
10 *clear and convincing evidence that it would have taken the*
11 *same personnel action in the absence of such disclosure.*

12 “(4)(A) *Any employee, former employee, or applicant*
13 *adversely affected or aggrieved by a final order or decision*
14 *of the agency head or the designee of the agency head under*
15 *paragraph (1) may appeal that decision to the Intelligence*
16 *Community Whistleblower Protection Board within 60 days*
17 *after the issuance of such order. Such appeal shall be con-*
18 *ducted under rules of procedure issued by the Board under*
19 *section 120(c)(4).*

20 “(B) *The Board’s review shall be on the agency record.*
21 *The Board may not hear witnesses or admit additional evi-*
22 *dence. Any portions of the record that were submitted ex*
23 *parte during the agency proceedings shall not be disclosed*
24 *to the employee, former employee, or applicant during pro-*
25 *ceedings before the Board.*

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

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

9 “(ii) refer the matter to another agency for addi-
10 tional proceedings in accordance with the rules of
11 procedure issued by the Board.

12 “(D) The Board shall make a *de novo* determination,
13 based on the entire record, of whether the employee, former
14 employee, or applicant suffered a prohibited personnel prac-
15 tice. In considering the record, the Board may weigh the
16 evidence, judge the credibility of witnesses, and determine
17 controverted questions of fact; in doing so, the Board may
18 consider the prior fact-finder’s opportunity to see and hear
19 the witnesses.

20 “(E) On the basis of the agency record, the Board shall
21 determine whether the employee, former employee, or appli-
22 cant has been subjected to a prohibited personnel practice,
23 and shall either issue an order denying relief or shall order
24 the agency head to take specific corrective action to return
25 the employee, former employee, or applicant, as nearly as

1 *practicable and reasonable, to the position such employee,*
2 *former employee, or applicant would have held had the pro-*
3 *hibited personnel practice not occurred. Such corrective ac-*
4 *tion shall include reasonable attorney's fees and any other*
5 *reasonable costs incurred, and may include back pay and*
6 *related benefits, travel expenses, and compensatory damages*
7 *not to exceed \$300,000. The Board may recommend, but*
8 *may not order, reinstatement or hiring of a former em-*
9 *ployee or applicant. The agency head shall take the actions*
10 *so ordered, unless the President determines that doing so*
11 *would endanger national security. Unless the employee,*
12 *former employee, or applicant consents, no more than 180*
13 *days shall pass from the filing of the appeal with the Board*
14 *to the final decision by the Board. Any period of time dur-*
15 *ing which the Board lacks a sufficient number of members*
16 *to undertake a review shall be excluded from the 180-day*
17 *period.*

18 “(F) *In determining whether the employee, former em-*
19 *ployee, or applicant has been subjected to a prohibited per-*
20 *sonnel practice, the agency head or the designee of the agen-*
21 *cy head shall find that a prohibited personnel practice oc-*
22 *curred if a disclosure described in subsection (b) of this sec-*
23 *tion was a contributing factor in the personnel action which*
24 *was taken against the individual, unless the agency dem-*
25 *onstrates by clear and convincing evidence that it would*

1 *have taken the same personnel action in the absence of such*
2 *disclosure.*

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

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

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

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

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

24 “(iii) *unsupported by substantial evidence.*

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

4 “(D) At the time the Board issues an order, the Chair-
5 person shall notify the chairpersons and ranking members
6 of—

7 “(i) the Committee on Homeland Security and
8 Government Affairs of the Senate;

9 “(ii) the Select Committee on Intelligence of the
10 Senate;

11 “(iii) the Committee on Oversight and Govern-
12 ment Reform of the House of Representatives; and

13 “(iv) the Permanent Select Committee on Intel-
14 ligence of the House of Representatives.

15 “(d) Except as expressly provided in this section, there
16 shall be no judicial review of agency actions under this sec-
17 tion.

18 “(e) This section shall not apply to terminations exe-
19 cuted under—

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

21 “(2) the authority of the Director of National In-
22 telligence under section 102A(m) of this Act, if—

23 “(A) the Director personally summarily ter-
24 minates the individual; and

25 “(B) the Director—

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

3 “(ii) determines that the procedures
4 prescribed in other provisions of law that
5 authorize the termination of the employ-
6 ment of such employee cannot be invoked in
7 a manner consistent with the national secu-
8 rity; and

9 “(iii) notifies the congressional over-
10 sight committees of such termination within
11 5 days after the termination;

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

15 “(A) the Director personally summarily ter-
16 minates the individual; and

17 “(B) the Director—

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

20 “(ii) determines that the procedures
21 prescribed in other provisions of law that
22 authorize the termination of the employ-
23 ment of such employee cannot be invoked in
24 a manner consistent with the national secu-
25 rity; and

1 “(iii) notifies the congressional over-
2 sight committees of such termination within
3 5 days after the termination; or

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

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

8 “(B) the agency head—

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

11 “(ii) determines that the procedures
12 prescribed in other provisions of law that
13 authorize the termination of the employ-
14 ment of such employee cannot be invoked in
15 a manner consistent with the national secu-
16 rity; and

17 “(iii) notifies the congressional over-
18 sight committees of such termination within
19 5 days after the termination.

20 “(f) If an employee, former employee, or applicant
21 seeks to challenge both a prohibited personnel practice under
22 this section and an adverse security clearance or access de-
23 termination under section 3001(j) of the Intelligence Reform
24 and Terrorism Prevention Act of 2004 (50 U.S.C. 435b(j)),
25 the employee shall bring both claims under the procedure

1 *set forth in 3001(j) of that Act for challenging an adverse*
2 *security clearance or access determination. If the Board*
3 *awards compensatory damages for such claim or claims, the*
4 *total amount of compensatory damages ordered shall not*
5 *exceed \$300,000.”.*

6 *(b) REPEAL OF SECTION 2303.—*

7 *(1) IN GENERAL.—Title 5, United States Code is*
8 *amended—*

9 *(A) by striking section 2303; and*

10 *(B) by striking the item relating to section*
11 *2303 in the table of sections for chapter 23 of*
12 *that title.*

13 *(2) EFFECTIVE DATE.—This paragraph shall*
14 *take effect on the date on which rules are issued as*
15 *required under section 121(c)(1)(B) of the National*
16 *Security Act of 1947 (as added by this Act).*

17 *(c) TECHNICAL AND CONFORMING AMENDMENT.—The*
18 *table of contents for the National Security Act of 1947 (50*
19 *U.S.C. 401 note) is amended by inserting after the item*
20 *relating to section 119B the following:*

“Sec. 120. Intelligence Community Whistleblower Protection Board.

“Sec. 121. Intelligence community whistleblower protections.”.

1 **SEC. 202. REVIEW OF SECURITY CLEARANCE OR ACCESS DE-**
2 **TERMINATIONS.**

3 (a) *IN GENERAL.*—Section 3001(b) of the Intelligence
4 Reform and Terrorism Prevention Act of 2004 (50 U.S.C.
5 435b(b)) is amended—

6 (1) in the matter preceding paragraph (1), by
7 striking “Not” and inserting “Except as otherwise
8 provided, not”;

9 (2) in paragraph (5), by striking “and” after the
10 semicolon;

11 (3) in paragraph (6), by striking the period at
12 the end and inserting “; and”; and

13 (4) by inserting after paragraph (6) the fol-
14 lowing:

15 “(7) not later than 30 days after the date of en-
16 actment of the Whistleblower Protection Enhancement
17 Act of 2009—

18 “(A) developing policies and procedures that
19 permit, to the extent practicable, individuals who
20 challenge in good faith a determination to sus-
21 pend or revoke a security clearance or access to
22 classified information to retain their government
23 employment status while such challenge is pend-
24 ing; and

25 “(B) developing and implementing uniform
26 and consistent policies and procedures to ensure

1 *proper protections during the process for deny-*
2 *ing, suspending, or revoking a security clearance*
3 *or access to classified information, including the*
4 *provision of a right to appeal such a denial, sus-*
5 *pension, or revocation, except that there shall be*
6 *no appeal of an agency’s suspension of a security*
7 *clearance or access determination for purposes of*
8 *conducting an investigation, if that suspension*
9 *lasts no longer than 1 year, including such poli-*
10 *cies and procedures for appeals based on those*
11 *pertaining to prohibited personnel practices de-*
12 *finied under section 2302(b)(8) of title 5, United*
13 *States Code, and that provide—*

14 *“(i) for an independent and impartial*
15 *fact-finder;*

16 *“(ii) for notice and the opportunity to*
17 *be heard, including the opportunity to*
18 *present relevant evidence, including witness*
19 *testimony;*

20 *“(iii) that the employee, applicant, or*
21 *former employee may be represented by*
22 *counsel;*

23 *“(iv) that the employee, applicant, or*
24 *former employee has a right to a decision*

1 *based on the record developed during the*
2 *appeal;*

3 “(v) *that, unless agreed to by the em-*
4 *ployee and the agency concerned, no more*
5 *than 180 days shall pass from the filing of*
6 *the appeal to the report of the impartial*
7 *fact finder to the agency head or the des-*
8 *ignee of the agency head;*

9 “(vi) *for the use of information specifi-*
10 *cally required by Executive order to be kept*
11 *secret in the interest of national defense or*
12 *the conduct of foreign affairs in a manner*
13 *consistent with the interests of national se-*
14 *curity, including ex parte submissions if the*
15 *agency determines that the interests of na-*
16 *tional security so warrant; and*

17 “(vii) *that the employee, applicant, or*
18 *former employee shall have no right to com-*
19 *pel the production of information specifi-*
20 *cally required by Executive order to be kept*
21 *secret in the interest of national defense or*
22 *the conduct of foreign affairs, except evi-*
23 *dence necessary to establish that the em-*
24 *ployee made the disclosure or communica-*
25 *tion such employee alleges was protected by*

1 subparagraphs (A), (B), and (C) of sub-
2 section (j)(1).”.

3 (b) *RETALIATORY REVOCATION OF SECURITY CLEAR-*
4 *ANCES AND ACCESS DETERMINATIONS.*—Section 3001 of
5 *the Intelligence Reform and Terrorism Prevention Act of*
6 *2004 (50 U.S.C. 435b) is amended by adding at the end*
7 *the following:*

8 “(j) *RETALIATORY REVOCATION OF SECURITY CLEAR-*
9 *ANCES AND ACCESS DETERMINATIONS.*—

10 “(1) *IN GENERAL.*—Agency personnel with au-
11 thority over personnel security clearance or access de-
12 terminations shall not take or fail to take, or threaten
13 to take or fail to take, any action with respect to any
14 employee or applicant’s security clearance or access
15 determination because of—

16 “(A) any disclosure of information to an of-
17 ficial of an Executive agency by an employee or
18 applicant which the employee or applicant rea-
19 sonably believes evidences—

20 “(i) a violation of any law, rule, or
21 regulation, except for an alleged violation
22 that is a minor, inadvertent violation, and
23 occurs during the conscientious carrying out
24 of official duties; or

1 “(i) gross mismanagement, a gross
2 waste of funds, an abuse of authority, or a
3 substantial and specific danger to public
4 health or safety,
5 if such disclosure is not specifically prohibited by
6 law and if such disclosure does not reveal infor-
7 mation specifically authorized under criteria es-
8 tablished by statute, Executive Order, Presi-
9 dential directive, or Presidential memorandum
10 to be kept secret in the interest of national de-
11 fense or the conduct of foreign affairs;

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

17 “(i) a violation of any law, rule, or
18 regulation, except for an alleged violation
19 that is a minor, inadvertent violation, and
20 occurs during the conscientious carrying out
21 of official duties; or

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

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

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

10 “(E) testifying for or otherwise lawfully as-
11 sisting any individual in the exercise of any
12 right referred to in subparagraph (D); or

13 “(F) cooperating with or disclosing infor-
14 mation to the inspector general of an agency, in
15 accordance with applicable provisions of law in
16 connection with an audit, inspection, or inves-
17 tigation conducted by the inspector general,
18 if the actions described under subparagraphs (D)
19 through (F) do not result in the employee or appli-
20 cant unlawfully disclosing information specifically
21 authorized under criteria established by Executive
22 Order, statute, Presidential Directive, or Presidential
23 memorandum to be kept secret in the interest of na-
24 tional defense or the conduct of foreign affairs.

1 *Nothing in this paragraph shall be construed to au-*
2 *thorize the withholding of information from the Con-*
3 *gress or the taking of any personnel action against an*
4 *employee who discloses information to the Congress.*

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

7 *“(A) the disclosure was made during the*
8 *normal course of the duties of the employee;*

9 *“(B) the disclosure was made to a person,*
10 *including a supervisor, who participated in an*
11 *activity that the employee or applicant reason-*
12 *ably believed to be covered by paragraph*
13 *(1)(A)(ii);*

14 *“(C) the disclosure revealed information*
15 *that had been previously disclosed;*

16 *“(D) of the employee or applicant’s motive*
17 *for making the disclosure;*

18 *“(E) the disclosure was not made in writ-*
19 *ing;*

20 *“(F) the disclosure was made while the em-*
21 *ployee was off duty; or*

22 *“(G) of the amount of time which has*
23 *passed since the occurrence of the events de-*
24 *scribed in the disclosure.*

25 *“(3) AGENCY ADJUDICATION.—*

1 “(A) *APPEAL.*—An employee, former em-
2 ployee, or applicant for employment who believes
3 that he or she has been subjected to a reprisal
4 prohibited by paragraph (1) of this subsection
5 may, within 60 days after the issuance of notice
6 of such decision, appeal that decision within the
7 agency of that employee, former employee, or ap-
8 plicant through proceedings authorized by para-
9 graph (8) of subsection (b), except that there
10 shall be no appeal of an agency’s suspension of
11 a security clearance or access determination for
12 purposes of conducting an investigation, if that
13 suspension lasts no longer than 1 year.

14 “(B) *CORRECTIVE ACTION.*—If, in the
15 course of proceedings authorized under subpara-
16 graph (A), it is determined that the adverse secu-
17 rity clearance or access determination violated
18 paragraph (1) of this subsection, the agency shall
19 take specific corrective action to return the em-
20 ployee, former employee, or applicant, as nearly
21 as practicable and reasonable, to the position
22 such employee, former employee, or applicant
23 would have held had the violation not occurred.
24 Such corrective action shall include reasonable
25 attorney’s fees and any other reasonable costs in-

1 *curred, and may include back pay and related*
2 *benefits, travel expenses, and compensatory dam-*
3 *ages not to exceed \$300,000.*

4 “(C) *CONTRIBUTING FACTOR.*—*In deter-*
5 *mining whether the adverse security clearance or*
6 *access determination violated paragraph (1) of*
7 *this subsection, the agency shall find that para-*
8 *graph (1) of this subsection was violated if a dis-*
9 *closure described in paragraph (1) was a con-*
10 *tributing factor in the adverse security clearance*
11 *or access determination taken against the indi-*
12 *vidual, unless the agency demonstrates by a pre-*
13 *ponderance of the evidence that it would have*
14 *taken the same action in the absence of such dis-*
15 *closure, giving the utmost deference to the agen-*
16 *cy’s assessment of the particular threat to the na-*
17 *tional security interests of the United States in*
18 *the instant matter.*

19 “(4) *REVIEW BY THE INTELLIGENCE COMMUNITY*
20 *WHISTLEBLOWER PROTECTION BOARD.*—

21 “(A) *APPEAL.*—*Within 60 days after receiv-*
22 *ing notice of an adverse final agency determina-*
23 *tion under a proceeding under paragraph (3),*
24 *an employee, former employee, or applicant for*
25 *employment may appeal that determination to*

1 *the Intelligence Community Whistleblower Pro-*
2 *tection Board.*

3 “(B) *POLICIES AND PROCEDURES.*—*The*
4 *Board, in consultation with the Attorney Gen-*
5 *eral, Director of National Intelligence, and the*
6 *Secretary of Defense, shall develop and imple-*
7 *ment policies and procedures for adjudicating*
8 *the appeals authorized by subparagraph (A). The*
9 *Director of National Intelligence and Secretary*
10 *of Defense shall jointly approve any rules, regu-*
11 *lations, or guidance issued by the Board con-*
12 *cerning the procedures for the use or handling of*
13 *classified information.*

14 “(C) *REVIEW.*—*The Board’s review shall be*
15 *on the complete agency record, which shall be*
16 *made available to the Board. The Board may not*
17 *hear witnesses or admit additional evidence. Any*
18 *portions of the record that were submitted ex*
19 *parte during the agency proceedings shall be sub-*
20 *mitted ex parte to the Board.*

21 “(D) *FURTHER FACT-FINDING OR IMPROPER*
22 *DENIAL.*—*If the Board concludes that further*
23 *fact-finding is necessary or finds that the agency*
24 *improperly denied the employee or former em-*
25 *ployee the opportunity to present evidence that,*

1 *if admitted, would have a substantial likelihood*
2 *of altering the outcome, the Board shall—*

3 “(i) *remand the matter to the agency*
4 *from which it originated for additional pro-*
5 *ceedings in accordance with the rules of*
6 *procedure issued by the Board; or*

7 “(ii) *refer the case to an intelligence*
8 *community agency for additional pro-*
9 *ceedings in accordance with the rules of*
10 *procedure issued by the Board.*

11 “(E) *DE NOVO DETERMINATION.—The*
12 *Board shall make a de novo determination, based*
13 *on the entire record, of whether the employee,*
14 *former employee, or applicant received an ad-*
15 *verse security clearance or access determination*
16 *in violation of paragraph (1). In considering the*
17 *record, the Board may weigh the evidence, judge*
18 *the credibility of witnesses, and determine con-*
19 *troverted questions of fact. In doing so, the*
20 *Board may consider the prior fact-finder’s op-*
21 *portunity to see and hear the witnesses.*

22 “(F) *ADVERSE SECURITY CLEARANCE OR*
23 *ACCESS DETERMINATION.—If the Board finds*
24 *that the adverse security clearance or access de-*
25 *termination violated paragraph (1), it shall then*

1 *separately determine whether reinstating the se-*
2 *curity clearance or access determination is clear-*
3 *ly consistent with the interests of national secu-*
4 *rity, with any doubt resolved in favor of na-*
5 *tional security, under Executive Order 12968*
6 *(including any adjudicative guidelines promul-*
7 *gated under such orders) or any subsequent Ex-*
8 *ecutive order, regulation, or policy concerning*
9 *access to classified information.*

10 “(G) *REMEDIES.*—

11 “(i) *CORRECTIVE ACTION.*—*If the*
12 *Board finds that the adverse security clear-*
13 *ance or access determination violated para-*
14 *graph (1), it shall order the agency head to*
15 *take specific corrective action to return the*
16 *employee, former employee, or applicant, as*
17 *nearly as practicable and reasonable, to the*
18 *position such employee, former employee, or*
19 *applicant would have held had the violation*
20 *not occurred. Such corrective action shall*
21 *include reasonable attorney’s fees and any*
22 *other reasonable costs incurred, and may*
23 *include back pay and related benefits, travel*
24 *expenses, and compensatory damages not to*
25 *exceed \$300,000. The Board may rec-*

1 commend, but may not order, reinstatement
2 or hiring of a former employee or applicant,
3 and any relief shall not include the rein-
4 stating of any security clearance or access
5 determination. The agency head shall take
6 the actions so ordered, unless the President
7 determines that doing so would endanger
8 national security.

9 “(ii) *RECOMMENDED ACTION.*—If the
10 Board finds that reinstating the employee,
11 former employee, or applicant’s security
12 clearance or access determination is clearly
13 consistent with the interests of national se-
14 curity, it shall recommend such action to
15 the head of the entity selected under sub-
16 section (b) and the head of the affected
17 agency.

18 “(H) *CONGRESSIONAL NOTIFICATION.*—

19 “(i) *ORDERS.*—At the time the Board
20 issues an order, the Chairperson of the
21 Board shall notify the chairpersons and
22 ranking members of—

23 “(I) *the Committee on Homeland*
24 *Security and Government Affairs of*
25 *the Senate;*

1 “(II) *the Select Committee on In-*
2 *telligence of the Senate;*

3 “(III) *the Committee on Oversight*
4 *and Government Reform of the House*
5 *of Representatives; and*

6 “(IV) *the Permanent Select Com-*
7 *mittee on Intelligence of the House of*
8 *Representatives.*

9 “(ii) *RECOMMENDATIONS.—If the*
10 *agency head and the head of the entity se-*
11 *lected under subsection (b) do not follow the*
12 *Board’s recommendation to reinstate a*
13 *clearance, the head of the entity selected*
14 *under subsection (b) shall notify the chair-*
15 *persons and ranking members of the com-*
16 *mittees described in subclauses (I) through*
17 *(IV) of clause (i).*

18 “(5) *JUDICIAL REVIEW.—Nothing in this section*
19 *should be construed to permit or require judicial re-*
20 *view of agency or Board actions under this section.*

21 “(6) *NONAPPLICABILITY TO CERTAIN TERMI-*
22 *NATIONS.—This section shall not apply to adverse se-*
23 *curity clearance or access determinations if the af-*
24 *ected employee is concurrently terminated under—*

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

3 “(B) the authority of the Director of Na-
4 tional Intelligence under section 102A(m) of the
5 National Security Act of 1947 (50 U.S.C. 403-
6 1(m)), if—

7 “(i) the Director personally summarily
8 terminates the individual; and

9 “(ii) the Director—

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

12 “(II) determines that the proce-
13 dures prescribed in other provisions of
14 law that authorize the termination of
15 the employment of such employee can-
16 not be invoked in a manner consistent
17 with the national security, and

18 “(III) notifies the congressional
19 oversight committees of such termi-
20 nation within 5 days after the termi-
21 nation;

22 “(C) the authority of the Director of the
23 Central Intelligence Agency under section
24 104A(e) of the National Security Act of 1947 (50
25 U.S.C. 403-4a(e)), if—

1 “(i) the Director personally summarily
2 terminates the individual; and

3 “(ii) the Director—

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

6 “(II) determines that the proce-
7 dures prescribed in other provisions of
8 law that authorize the termination of
9 the employment of such employee can-
10 not be invoked in a manner consistent
11 with the national security; and

12 “(III) notifies the congressional
13 oversight committees of such termi-
14 nation within 5 days after the termi-
15 nation; or

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

18 “(i) the agency head personally sum-
19 marily terminates the individual; and

20 “(ii) the agency head—

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

23 “(II) determines that the proce-
24 dures prescribed in other provisions of
25 law that authorize the termination of

1 *the employment of such employee can-*
 2 *not be invoked in a manner consistent*
 3 *with the national security; and*

4 “(III) notifies the congressional
 5 oversight committees of such termi-
 6 nation within 5 days after the termi-
 7 nation.”.

8 **SEC. 203. REVISIONS RELATING TO THE INTELLIGENCE**
 9 **COMMUNITY WHISTLEBLOWER PROTECTION**
 10 **ACT.**

11 *(a) IN GENERAL.—Section 8H of the Inspector Gen-*
 12 *eral Act of 1978 (5 U.S.C. App.) is amended—*

13 *(1) in subsection (b)—*

14 *(A) by inserting “(1)” after “(b)”;* and

15 *(B) by adding at the end the following:*

16 “(2) *If the head of an establishment determines that*
 17 *a complaint or information transmitted under paragraph*
 18 *(1) would create a conflict of interest for the head of the*
 19 *establishment, the head of the establishment shall return the*
 20 *complaint or information to the Inspector General with*
 21 *that determination and the Inspector General shall make*
 22 *the transmission to the Chair of the Intelligence Community*
 23 *Whistleblower Protection Board. In such a case, the require-*
 24 *ments of this section for the head of the establishment apply*
 25 *to the recipient of the Inspector General’s transmission. The*

1 *Chair shall consult with the other members of the Intel-*
2 *ligence Community Whistleblower Protection Board regard-*
3 *ing all transmissions under this paragraph.”;*

4 (2) *by designating subsection (h) as subsection*
5 *(i); and*

6 (3) *by inserting after subsection (g), the fol-*
7 *lowing:*

8 “(h) *An individual who has submitted a complaint or*
9 *information to an inspector general under this section may*
10 *notify any member of Congress or congressional staff mem-*
11 *ber of the fact that such individual has made a submission*
12 *to that particular inspector general, and of the date on*
13 *which such submission was made.”.*

14 (b) *CENTRAL INTELLIGENCE AGENCY.—Section*
15 *17(d)(5) of the Central Intelligence Agency Act of 1949 (50*
16 *U.S.C. 403q) is amended—*

17 (1) *in subparagraph (B)—*

18 (A) *by inserting “(i)” after “(B)”;* and

19 (B) *by adding at the end the following:*

20 “(ii) *If the Director determines that a complaint or*
21 *information transmitted under paragraph (1) would create*
22 *a conflict of interest for the Director, the Director shall re-*
23 *turn the complaint or information to the Inspector General*
24 *with that determination and the Inspector General shall*

1 *make the transmission to the Chair of the Intelligence Com-*
2 *munity Whistleblower Protection Board. In such a case—*

3 “(I) *the requirements of this subsection for the*
4 *Director apply to the recipient of the Inspector Gen-*
5 *eral’s submission; and*

6 “(II) *the Chairperson shall consult with the other*
7 *members of the Intelligence Community Whistleblower*
8 *Protection Board regarding all submissions under*
9 *this section.”; and*

10 (2) *by adding at the end the following:*

11 “(H) *An individual who has submitted a complaint*
12 *or information to the Inspector General under this section*
13 *may notify any member of Congress or congressional staff*
14 *member of the fact that such individual has made a submis-*
15 *sion to the Inspector General, and of the date on which such*
16 *submission was made.”.*

17 **TITLE III—EFFECTIVE DATE**

18 **SEC. 301. EFFECTIVE DATE.**

19 *This Act shall take effect 30 days after the date of en-*
20 *actment of this Act.*

Calendar No. 219

111TH CONGRESS
1ST Session

S. 372

[Report No. 111-101]

A BILL

To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.

DECEMBER 3, 2009

Reported with an amendment