

# Calendar No. 358

112<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# S. 743

[Report No. 112-155]

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.

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## IN THE SENATE OF THE UNITED STATES

APRIL 6 (legislative day, APRIL 5), 2011

Mr. AKAKA (for himself, Ms. COLLINS, Mr. GRASSLEY, Mr. LIEBERMAN, Mr. LEVIN, Mr. CARPER, Mr. LEAHY, Mr. HARKIN, Mr. PRYOR, Ms. LANDRIEU, Mrs. MCCASKILL, Mr. TESTER, Mr. BEGICH, Mr. CARDIN, and Mr. COONS) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

APRIL 19, 2012

Reported by Mr. LIEBERMAN, with amendments

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## 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. SHORT TITLE.**

4 This Act may be cited as the “Whistleblower Protec-  
5 tion Enhancement Act of ~~2011~~ 2012”.

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

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

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

13 (1) in subparagraph (A)(i), by striking “a viola-  
14 tion” and inserting “any violation”; and

15 (2) in subparagraph (B)(i), by striking “a viola-  
16 tion” and inserting “any violation (other than a vio-  
17 lation of this section)”.

18 (b) PROHIBITED PERSONNEL PRACTICES UNDER  
19 SECTION 2302(b)(9).—

20 (1) TECHNICAL AND CONFORMING AMEND-  
21 MENTS.—Title 5, United States Code, is amended in  
22 subsections (a)(3), (b)(4)(A), and (b)(4)(B)(i) of  
23 section 1214, in subsections (a), (e)(1), and (i) of  
24 section 1221, and in subsection (a)(2)(C)(i) of sec-

1 tion 2302, by inserting “or section 2302(b)(9)  
 2 (A)(i), (B), (C), or (D)” after “section 2302(b)(8)”  
 3 or “(b)(8)” each place it appears.

4 (2) OTHER REFERENCES.—(A) Title 5, United  
 5 States Code, is amended in subsection (b)(4)(B)(i)  
 6 of section 1214 and in subsection (e)(1) of section  
 7 1221, by inserting “or protected activity” after “dis-  
 8 closure” each place it appears.

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

11 (i) by striking subparagraph (A) and in-  
 12 serting the following:

13 “(A) the exercise of any appeal, complaint,  
 14 or grievance right granted by any law, rule, or  
 15 regulation—

16 “(i) with regard to remedying a viola-  
 17 tion of paragraph (8); or

18 “(ii) *other than* with regard to rem-  
 19 edying a violation of *paragraph (8) any*  
 20 ~~other law, rule, or regulation;~~” and

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

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

1       “(f)(1) A disclosure shall not be excluded from sub-  
2 section (b)(8) because—

3           “(A) the disclosure was made to a person, in-  
4 cluding a supervisor, who participated in an activity  
5 that the employee or applicant reasonably believed to  
6 be covered by subsection (b)(8)(A)(ii);

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

9           “(C) of the employee’s or applicant’s motive for  
10 making the disclosure;

11          “(D) the disclosure was not made in writing;

12          “(E) the disclosure was made while the em-  
13 ployee was off duty; or

14          “(F) of the amount of time which has passed  
15 since the occurrence of the events described in the  
16 disclosure.

17       “(2) If a disclosure is made during the normal course  
18 of duties of an employee, the disclosure shall not be ex-  
19 cluded from subsection (b)(8) if any employee who has au-  
20 thority to take, direct others to take, recommend, or ap-  
21 prove any personnel action with respect to the employee  
22 making the disclosure, took, failed to take, or threatened  
23 to take or fail to take a personnel action with respect to  
24 that employee in reprisal for the disclosure.”.

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

2 Section 2302(a)(2) of title 5, United States Code, is  
3 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, ~~and occurs during the conscientious ear-~~  
17 ~~rying out of official duties;~~ or

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

21 **SEC. 103. REBUTTABLE PRESUMPTION.**

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

25 “This subsection shall not be construed to authorize the  
26 withholding of information from Congress or the taking

1 of any personnel action against an employee who discloses  
 2 information to Congress. For purposes of paragraph (8),  
 3 (i) any presumption relating to the performance of a duty  
 4 by an employee whose conduct is the subject of a disclo-  
 5 sure as defined under subsection (a)(2)(D) may be rebut-  
 6 ted by substantial evidence, *and* (ii) ~~For purposes of~~  
 7 ~~paragraph (8)~~, a determination as to whether an employee  
 8 or applicant reasonably believes that such employee or ap-  
 9 plicant has disclosed information that evidences any viola-  
 10 tion of law, rule, regulation, gross mismanagement, a  
 11 gross waste of funds, an abuse of authority, or a substan-  
 12 tial and specific danger to public health or safety shall  
 13 be made by determining whether a disinterested observer  
 14 with knowledge of the essential facts known to and readily  
 15 ascertainable by the employee *or applicant* could reason-  
 16 ably conclude that the actions of the Government evidence  
 17 such violations, mismanagement, waste, abuse, or dan-  
 18 ger.”.

19 **SEC. 104. PERSONNEL ACTIONS AND PROHIBITED PER-**  
 20 **SONNEL PRACTICES.**

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

23 (1) in clause (x), by striking “and” after the  
 24 semicolon; and

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

3                   “(xi) the implementation or enforce-  
4                   ment of any nondisclosure policy, form, or  
5                   agreement; and”.

6 (b) PROHIBITED PERSONNEL PRACTICE.—

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

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

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

13                   (C) by inserting after paragraph (12) the  
14                   following:

15                   ~~“(13) implement or enforce any nondisclosure~~  
16                   ~~policy, form, or agreement, if such policy, form, or~~  
17                   ~~agreement does not contain the following statement:~~  
18                   ~~“These provisions are consistent with and do not su-~~  
19                   ~~persede, conflict with, or otherwise alter the em-~~  
20                   ~~ployee obligations, rights, or liabilities created by~~  
21                   ~~Executive Order 13526 (75 Fed. Reg. 707; relating~~  
22                   ~~to classified national security information), or any~~  
23                   ~~successor thereto; Executive Order 12968 (60 Fed.~~  
24                   ~~Reg. 40245; relating to access to classified informa-~~  
25                   ~~tion), or any successor thereto; section 7211 of title~~

1 5, United States Code (governing disclosures to Con-  
2 gress); section 1034 of title 10, United States Code  
3 (governing disclosure to Congress by members of the  
4 military); section 2302(b)(8) of title 5, United  
5 States Code (governing disclosures of illegality,  
6 waste, fraud, abuse, or public health or safety  
7 threats); the Intelligence Identities Protection Act of  
8 1982 (50 U.S.C. 421 et seq.) (governing disclosures  
9 that could expose confidential Government agents);  
10 and the statutes which protect against disclosures  
11 that could compromise national security, including  
12 sections 641, 793, 794, 798, and 952 of title 18,  
13 United States Code, and section 4(b) of the Subver-  
14 sive Activities Control Act of 1950 (50 U.S.C.  
15 783(b)). The definitions, requirements, obligations,  
16 rights, sanctions, and liabilities created by such Ex-  
17 ecutive order and such statutory provisions are in-  
18 corporated into this agreement and are control-  
19 ling.’’.

20 (2) NONDISCLOSURE POLICY, FORM, OR AGREE-  
21 MENT IN EFFECT BEFORE THE DATE OF ENACT-  
22 MENT.—A nondisclosure policy, form, or agreement  
23 that was in effect before the date of enactment of  
24 this Act, but that does not contain the statement re-  
25 quired under section 2302(b)(13) of title 5, United

1 States Code, (as added by this Act) for implementa-  
2 tion or enforcement—

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

6 (B) may continue to be enforced after the  
7 effective date of this Act with regard to a  
8 former employee if the agency posts notice of  
9 the statement on the agency website for the 1-  
10 year period following that effective date.

11 “(13) *implement or enforce any nondisclosure*  
12 *policy, form, or agreement, if such policy, form, or*  
13 *agreement does not contain the following statement:*  
14 *‘These provisions are consistent with and do not su-*  
15 *persede, conflict with, or otherwise alter the employee*  
16 *obligations, rights, or liabilities created by existing*  
17 *statute or Executive order relating to (1) classified in-*  
18 *formation, (2) communications to Congress, (3) the*  
19 *reporting to an Inspector General of a violation of*  
20 *any law, rule, or regulation, or mismanagement, a*  
21 *gross waste of funds, an abuse of authority, or a sub-*  
22 *stantial and specific danger to public health or safety,*  
23 *or (4) any other whistleblower protection. The defini-*  
24 *tions, requirements, obligations, rights, sanctions, and*  
25 *liabilities created by controlling Executive orders and*

1 *statutory provisions are incorporated into this agree-*  
2 *ment and are controlling.’”.*

3 (2) *AGENCY WEBSITES.—Agencies making use of*  
4 *any nondisclosure policy, form, or agreement shall*  
5 *also post the statement required under section*  
6 *2302(b)(13) of title 5, United States Code, (as added*  
7 *by this Act) on the agency website, accompanied by*  
8 *the specific list of controlling Executive orders and*  
9 *statutory provisions.*

10 (3) *NONDISCLOSURE POLICY, FORM, OR AGREE-*  
11 *MENT IN EFFECT BEFORE THE EFFECTIVE DATE.—*  
12 *With respect to a nondisclosure policy, form, or agree-*  
13 *ment that was in effect before the effective date of this*  
14 *Act, but that does not contain the statement required*  
15 *under section 2302(b)(13) of title 5, United States*  
16 *Code, (as added by this Act) for implementation or*  
17 *enforcement—*

18 (A) *it shall not be a prohibited personnel*  
19 *practice to enforce that policy, form, or agree-*  
20 *ment with regard to a current employee if the*  
21 *agency gives such employee notice of the state-*  
22 *ment; and*

23 (B) *it shall not be a prohibited personnel*  
24 *practice to enforce that policy, form, or agree-*  
25 *ment after the effective date of this Act with re-*

1           *gard to a former employee if the agency complies*  
2           *with paragraph (2).*

3           (c) RETALIATORY INVESTIGATIONS.—

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

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

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

17          “(4) Any corrective action ordered under this  
18          section to correct a prohibited personnel practice  
19          may include fees, costs, or damages reasonably in-  
20          curred due to an agency investigation of the em-  
21          ployee, if such investigation was commenced, ex-  
22          panded, or extended in retaliation for the disclosure  
23          or protected activity that formed the basis of the  
24          corrective action.”.

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

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

5 “(ii)(I) the Federal Bureau of Inves-  
6 tigation, the Central Intelligence Agency,  
7 the Defense Intelligence Agency, the Na-  
8 tional Geospatial-Intelligence Agency, the  
9 National Security Agency, the Office of the  
10 Director of National Intelligence, and the  
11 National Reconnaissance Office; and

12 “(II) as determined by the President,  
13 any executive agency or unit thereof the  
14 principal function of which is the conduct  
15 of foreign intelligence or counterintel-  
16 ligence activities, provided that the deter-  
17 mination be made prior to a personnel ac-  
18 tion; or”.

19 **SEC. 106. DISCIPLINARY ACTION.**

20 Section 1215(a)(3) of title 5, United States Code, is  
21 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 brought under paragraph (1)  
9 in which the Board finds that an employee has com-  
10 mitted a prohibited personnel practice under section  
11 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D),  
12 the Board may impose disciplinary action if the  
13 Board finds that the activity protected under section  
14 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D)  
15 was a significant motivating factor, even if other fac-  
16 tors also motivated the decision, for the employee’s  
17 decision to take, fail to take, or threaten to take or  
18 fail to take a personnel action, unless that employee  
19 demonstrates, by preponderance of evidence, that  
20 the employee would have taken, failed to take, or  
21 threatened to take or fail to take the same personnel  
22 action, in the absence of such protected activity.”.

23 **SEC. 107. REMEDIES.**

24 (a) ATTORNEY FEES.—Section 1204(m)(1) of title 5,  
25 United States Code, is amended by striking “agency in-

1 volved” and inserting “agency where the prevailing party  
2 was employed or had applied for employment at the time  
3 of the events giving rise to the case”.

4 (b) DAMAGES.—Sections 1214(g)(2) and  
5 1221(g)(1)(A)(ii) of title 5, United States Code, are  
6 amended by striking all after “travel expenses,” and in-  
7 serting “any other reasonable and foreseeable consequen-  
8 tial damages, and compensatory damages (including inter-  
9 est, reasonable expert witness fees, and costs).” each place  
10 it appears.

11 **SEC. 108. JUDICIAL REVIEW.**

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

15 “(b)(1)(A) Except as provided in subparagraph (B)  
16 and paragraph (2) of this subsection, a petition to review  
17 a final order or final decision of the Board shall be filed  
18 in the United States Court of Appeals for the Federal Cir-  
19 cuit. Notwithstanding any other provision of law, any peti-  
20 tion for review shall be filed within 60 days after the  
21 Board issues notice of the final order or decision of the  
22 Board.

23 “(B) During the 5-year period beginning on the effec-  
24 tive date of the Whistleblower Protection Enhancement  
25 Act of ~~2011~~ 2012, a petition to review a final order or

1 final decision of the Board that raises no challenge to the  
2 Board’s disposition of allegations of a prohibited personnel  
3 practice described in section 2302(b) other than practices  
4 described in section 2302(b)(8), or 2302(b)(9) (A)(i), (B),  
5 (C), or (D) shall be filed in the United States Court of  
6 Appeals for the Federal Circuit or any court of appeals  
7 of competent jurisdiction as provided under paragraph  
8 (2).”.

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

12 “(d)(1) Except as provided under paragraph (2), this  
13 paragraph shall apply to any review obtained by the Direc-  
14 tor of the Office of Personnel Management. The Director  
15 of the Office of Personnel Management may obtain review  
16 of any final order or decision of the Board by filing, within  
17 60 days after the Board issues notice of the final order  
18 or decision of the Board, a petition for judicial review in  
19 the United States Court of Appeals for the Federal Circuit  
20 if the Director determines, in the discretion of the Direc-  
21 tor, that the Board erred in interpreting a civil service  
22 law, rule, or regulation affecting personnel management  
23 and that the Board’s decision will have a substantial im-  
24 pact on a civil service law, rule, regulation, or policy direc-  
25 tive. If the Director did not intervene in a matter before

1 the Board, the Director may not petition for review of a  
2 Board decision under this section unless the Director first  
3 petitions the Board for a reconsideration of its decision,  
4 and such petition is denied. In addition to the named re-  
5 spondent, the Board and all other parties to the pro-  
6 ceedings before the Board shall have the right to appear  
7 in the proceeding before the Court of Appeals. The grant-  
8 ing of the petition for judicial review shall be at the discre-  
9 tion of the Court of Appeals.

10       “(2) During the 5-year period beginning on the effec-  
11 tive date of the Whistleblower Protection Enhancement  
12 Act of ~~2011~~ 2012, this paragraph shall apply to any review  
13 obtained by the Director of the Office of Personnel Man-  
14 agement that raises no challenge to the Board’s disposi-  
15 tion of allegations of a prohibited personnel practice de-  
16 scribed in section 2302(b) other than practices described  
17 in section 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or  
18 (D). The Director of the Office of Personnel Management  
19 may obtain review of any final order or decision of the  
20 Board by filing, within 60 days after the Board issues no-  
21 tice of the final order or decision of the Board, a petition  
22 for judicial review in the United States Court of Appeals  
23 for the Federal Circuit or any court of appeals of com-  
24 petent jurisdiction as provided under subsection (b)(2) if  
25 the Director determines, in the discretion of the Director,

1 that the Board erred in interpreting a civil service law,  
 2 rule, or regulation affecting personnel management and  
 3 that the Board's decision will have a substantial impact  
 4 on a civil service law, rule, regulation, or policy directive.  
 5 If the Director did not intervene in a matter before the  
 6 Board, the Director may not petition for review of a Board  
 7 decision under this section unless the Director first peti-  
 8 tions the Board for a reconsideration of its decision, and  
 9 such petition is denied. In addition to the named respond-  
 10 ent, the Board and all other parties to the proceedings  
 11 before the Board shall have the right to appear in the pro-  
 12 ceeding before the court of appeals. The granting of the  
 13 petition for judicial review shall be at the discretion of the  
 14 court of appeals.”.

15 **SEC. 109. PROHIBITED PERSONNEL PRACTICES AFFECTING**  
 16 **THE TRANSPORTATION SECURITY ADMINIS-**  
 17 **TRATION.**

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

20 (1) by redesignating sections 2304 and 2305 as  
 21 sections 2305 and 2306, respectively; and

22 (2) by inserting after section 2303 the fol-  
 23 lowing:

1 **“§ 2304. Prohibited personnel practices affecting the**  
2 **Transportation Security Administration**

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

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

9 “(2) any provision of law implementing section  
10 2302(b) (1), (8), or (9) by providing any right or  
11 remedy available to an employee or applicant for em-  
12 ployment in the civil service; and

13 “(3) any rule or regulation prescribed under  
14 any provision of law referred to in paragraph (1) or  
15 (2).

16 “(b) RULE OF CONSTRUCTION.—Nothing in this sec-  
17 tion shall be construed to affect any rights, apart from  
18 those described in subsection (a), to which an individual  
19 described in subsection (a) might otherwise be entitled  
20 under law.”.

21 (b) TECHNICAL AND CONFORMING AMENDMENT.—  
22 The table of sections for chapter 23 of title 5, United  
23 States Code, is amended by striking the items relating to  
24 sections 2304 and 2305, respectively, and by inserting the  
25 following:

“2304. Prohibited personnel practices affecting the Transportation Security Administration.

“2305. Responsibility of the Government Accountability Office.

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

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

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

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  
12 for 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 mean-  
18 ing given under section 2302(a)(2)(B) of title 5,  
19 United States Code;

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

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

4 (b) PROTECTED DISCLOSURE.—

5           (1) IN GENERAL.—Any disclosure of informa-  
6 tion by an employee or applicant for employment  
7 that the employee or applicant reasonably believes is  
8 evidence of censorship related to research, analysis,  
9 or technical information—

10           (A) shall come within the protections of  
11 section 2302(b)(8)(A) of title 5, United States  
12 Code, if—

13           (i) the employee or applicant reason-  
14 ably believes that the censorship related to  
15 research, analysis, or technical information  
16 is or will cause—

17           (I) any violation of law, rule, or  
18 regulation; ~~and occurs during the con-~~  
19 ~~scientious carrying out of official du-~~  
20 ~~ties; or~~

21           (II) gross mismanagement, a  
22 gross waste of funds, an abuse of au-  
23 thority, or a substantial and specific  
24 danger to public health or safety; and

1 (ii) such disclosure is not specifically  
2 prohibited by law or such information is  
3 not specifically required by Executive order  
4 to be kept classified in the interest of na-  
5 tional defense or the conduct of foreign af-  
6 fairs; and

7 (B) shall come within the protections of  
8 section 2302(b)(8)(B) of title 5, United States  
9 Code, if—

10 (i) the employee or applicant reason-  
11 ably believes that the censorship related to  
12 research, analysis, or technical information  
13 is or will cause—

14 (I) any violation of law, rule, or  
15 regulation; ~~and occurs during the con-~~  
16 ~~scientious carrying out of official du-~~  
17 ~~ties; or~~

18 (II) gross mismanagement, a  
19 gross waste of funds, an abuse of au-  
20 thority, or a substantial and specific  
21 danger to public health or safety; and

22 (ii) the disclosure is made to the Spe-  
23 cial Counsel, or to the Inspector General of  
24 an agency or another person designated by  
25 the head of the agency to receive such dis-

1 closures, consistent with the protection of  
2 sources and methods.

3 (2) DISCLOSURES NOT EXCLUDED.—A disclo-  
4 sure shall not be excluded from paragraph (1) for  
5 any reason described under section 2302(f)(1) or (2)  
6 of title 5, United States Code.

7 (3) RULE OF CONSTRUCTION.—Nothing in this  
8 section shall be construed to imply any limitation on  
9 the protections of employees and applicants afforded  
10 by any other provision of law, including protections  
11 with respect to any disclosure of information be-  
12 lieved to be evidence of censorship related to re-  
13 search, analysis, or technical information.

14 **SEC. 111. CLARIFICATION OF WHISTLEBLOWER RIGHTS**  
15 **FOR CRITICAL INFRASTRUCTURE INFORMA-**  
16 **TION.**

17 Section 214(c) of the Homeland Security Act of 2002  
18 (6 U.S.C. 133(c)) is amended by adding at the end the  
19 following: “For purposes of this section a permissible use  
20 of independently obtained information includes the disclo-  
21 sure of such information under section 2302(b)(8) of title  
22 5, United States Code.”.

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

24 Section 2302(c) of title 5, United States Code, is  
25 amended by inserting “, including how to make a lawful

1 disclosure of information that is specifically required by  
 2 law or Executive order to be kept classified in the interest  
 3 of national defense or the conduct of foreign affairs to the  
 4 Special Counsel, the Inspector General of an agency, Con-  
 5 gress, or other agency employee designated to receive such  
 6 disclosures” after “chapter 12 of this title”.

7 **SEC. 113. SPECIAL COUNSEL AMICUS CURIAE APPEAR-**  
 8 **ANCE.**

9 Section 1212 of title 5, United States Code, is  
 10 amended by adding at the end the following:

11 “(h)(1) The Special Counsel is authorized to appear  
 12 as amicus curiae in any action brought in a court of the  
 13 United States related to ~~any civil action brought in con-~~  
 14 ~~nection with~~ section 2302(b) (8) or (9), or as otherwise  
 15 authorized by law. In any such action, the Special Counsel  
 16 is authorized to present the views of the Special Counsel  
 17 with respect to compliance with section 2302(b) (8) or (9)  
 18 and the impact court decisions would have on the enforce-  
 19 ment of such provisions of law.

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

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

24 (a) SPECIAL COUNSEL.—Section 1214(b)(4)(B)(ii) of  
 25 title 5, United States Code, is amended by inserting “,

1 after a finding that a protected disclosure was a contrib-  
2 uting factor,” after “ordered if”.

3 (b) INDIVIDUAL ACTION.—Section 1221(e)(2) of title  
4 5, United States Code, is amended by inserting “, after  
5 a finding that a protected disclosure was a contributing  
6 factor,” after “ordered if”.

7 **SEC. 115. NONDISCLOSURE POLICIES, FORMS, AND AGREE-**  
8 **MENTS.**

9 (a) IN GENERAL.—

10 (1) REQUIREMENT.—Each agreement in Stand-  
11 ard Forms 312 and 4414 of the Government and  
12 any other nondisclosure policy, form, or agreement  
13 of the Government shall contain the following state-  
14 ment: “These restrictions are consistent with and do  
15 not supersede, conflict with, or otherwise alter the  
16 employee obligations, rights, or liabilities created by  
17 Executive Order 13526 (75 Fed. Reg. 707; relating  
18 to classified national security information), or any  
19 successor thereto; Executive Order 12968 (60 Fed.  
20 Reg. 40245; relating to access to classified informa-  
21 tion); or any successor thereto; section 7211 of title  
22 5, United States Code (governing disclosures to Con-  
23 gress); section 1034 of title 10, United States Code  
24 (governing disclosure to Congress by members of the  
25 military); section 2302(b)(8) of title 5, United

1 States Code (governing disclosures of illegality,  
2 waste, fraud, abuse, or public health or safety  
3 threats); the Intelligence Identities Protection Act of  
4 1982 (50 U.S.C. 421 et seq.) (governing disclosures  
5 that could expose confidential Government agents);  
6 and the statutes which protect against disclosure  
7 that may compromise the national security, includ-  
8 ing sections 641, 793, 794, 798, and 952 of title 18,  
9 United States Code, and section 4(b) of the Subver-  
10 sive Activities Act of 1950 (50 U.S.C. 783(b)). The  
11 definitions, requirements, obligations, rights, sanc-  
12 tions, and liabilities created by such Executive order  
13 and such statutory provisions are incorporated into  
14 this agreement and are controlling.”

15 (2) ENFORCEABILITY.—

16 (A) IN GENERAL.—Any nondisclosure pol-  
17 icy, form, or agreement described under para-  
18 graph (1) that does not contain the statement  
19 required under paragraph (1) may not be im-  
20 plemented or enforced to the extent such policy,  
21 form, or agreement is inconsistent with that  
22 statement.

23 (B) NONDISCLOSURE POLICY, FORM, OR  
24 AGREEMENT IN EFFECT BEFORE THE DATE OF  
25 ENACTMENT.—A nondisclosure policy, form, or

1 agreement that was in effect before the date of  
 2 enactment of this Act, but that does not con-  
 3 tain the statement required under paragraph  
 4 (1)—

5 (i) may be enforced with regard to a  
 6 current employee if the agency gives such  
 7 employee notice of the statement; and

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

14 (a) *IN GENERAL.*—

15 (1) *REQUIREMENT.*—*Each agreement in Stand-*  
 16 *ard Forms 312 and 4414 of the Government and any*  
 17 *other nondisclosure policy, form, or agreement of the*  
 18 *Government shall contain the following statement:*  
 19 *“These provisions are consistent with and do not su-*  
 20 *persede, conflict with, or otherwise alter the employee*  
 21 *obligations, rights, or liabilities created by existing*  
 22 *statute or Executive order relating to (1) classified in-*  
 23 *formation, (2) communications to Congress, (3) the*  
 24 *reporting to an Inspector General of a violation of*  
 25 *any law, rule, or regulation, or mismanagement, a*

1 *gross waste of funds, an abuse of authority, or a sub-*  
2 *stantial and specific danger to public health or safety,*  
3 *or (4) any other whistleblower protection. The defini-*  
4 *tions, requirements, obligations, rights, sanctions, and*  
5 *liabilities created by controlling Executive orders and*  
6 *statutory provisions are incorporated into this agree-*  
7 *ment and are controlling.”.*

8 (2) *AGENCY WEBSITES.—Agencies making use of*  
9 *any nondisclosure policy, form, or agreement shall*  
10 *also post the statement required under paragraph (1)*  
11 *on the agency website, accompanied by the specific*  
12 *list of controlling Executive orders and statutory pro-*  
13 *visions.*

14 (3) *ENFORCEABILITY.—*

15 (A) *IN GENERAL.—Any nondisclosure pol-*  
16 *icy, form, or agreement described under para-*  
17 *graph (1) that does not contain the statement re-*  
18 *quired under paragraph (1) may not be imple-*  
19 *mented or enforced to the extent such policy,*  
20 *form, or agreement is inconsistent with that*  
21 *statement.*

22 (B) *NONDISCLOSURE POLICY, FORM, OR*  
23 *AGREEMENT IN EFFECT BEFORE THE EFFECTIVE*  
24 *DATE.—With respect to a nondisclosure policy,*  
25 *form, or agreement that was in effect before the*

1           *effective date of this Act, but that does not con-*  
2           *tain the statement required under paragraph (1)*  
3           *for implementation or enforcement—*

4                     *(i) it shall not be a prohibited per-*  
5                     *sonnel practice to enforce that policy, form,*  
6                     *or agreement with regard to a current em-*  
7                     *ployee if the agency gives such employee no-*  
8                     *tice of the statement; and*

9                     *(ii) it shall not be a prohibited per-*  
10                    *sonnel practice to enforce that policy, form,*  
11                    *or agreement after the effective date of this*  
12                    *Act with regard to a former employee if the*  
13                    *agency complies with paragraph (2).*

14           (b) PERSONS OTHER THAN GOVERNMENT EMPLOY-  
15 EES.—Notwithstanding subsection (a), a nondisclosure  
16 policy, form, or agreement that is to be executed by a per-  
17 son connected with the conduct of an intelligence or intel-  
18 ligence-related activity, other than an employee or officer  
19 of the United States Government, may contain provisions  
20 appropriate to the particular activity for which such docu-  
21 ment is to be used. Such policy, form, or agreement shall,  
22 at a minimum, require that the person will not disclose  
23 any classified information received in the course of such  
24 activity unless specifically authorized to do so by the  
25 United States Government. Such nondisclosure policy,

1 form, or agreement shall also make it clear that such  
2 forms do not bar disclosures to Congress or to an author-  
3 ized official of an executive agency or the Department of  
4 Justice that are essential to reporting a substantial viola-  
5 tion of law, consistent with the protection of sources and  
6 methods.

7 **SEC. 116. REPORTING REQUIREMENTS.**

8 (a) GOVERNMENT ACCOUNTABILITY OFFICE.—

9 (1) REPORT.—Not later than ~~40 months~~ *48*  
10 *months* after the date of enactment of this Act, the  
11 Comptroller General shall submit a report to the  
12 Committee on Homeland Security and Governmental  
13 Affairs of the Senate and the Committee on Over-  
14 sight and Government Reform of the House of Rep-  
15 resentatives on the implementation of this title.

16 (2) CONTENTS.—The report under this para-  
17 graph shall include—

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

23 (B) the outcome of the cases described  
24 under subparagraph (A), including whether or  
25 not the United States Merit Systems Protection

1 Board, the Federal Circuit Court of Appeals, or  
2 any other court determined the allegations to be  
3 frivolous or malicious;

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

10 (D) any other matter as determined by the  
11 Comptroller General.

12 (b) MERIT SYSTEMS PROTECTION BOARD.—

13 (1) IN GENERAL.—Each report submitted an-  
14 nually by the Merit Systems Protection Board under  
15 section 1116 of title 31, United States Code, shall,  
16 with respect to the period covered by such report, in-  
17 clude as an addendum the following:

18 (A) Information relating to the outcome of  
19 cases decided during the applicable year of the  
20 report in which violations of section 2302(b) (8)  
21 or (9) (A)(i), (B)(i), (C), or (D) of title 5,  
22 United States Code, were alleged.

23 (B) The number of such cases filed in the  
24 regional and field offices, the number of peti-

1           tions for review filed in such cases, and the out-  
2           comes of such cases.

3           (2) FIRST REPORT.—The first report described  
4           under paragraph (1) submitted after the date of en-  
5           actment of this Act shall include an addendum re-  
6           quired under that subparagraph that covers the pe-  
7           riod beginning on ~~January 1, 2009~~ *through the effec-*  
8           *tive date of this Act and ending at* the end of the fis-  
9           cal year ~~2009~~ *in which such effective date occurs.*

10 **SEC. 117. ALTERNATIVE REVIEW.**

11           (a) IN GENERAL.—Section 1221 of title 5, United  
12 States Code, is amended by adding at the end the fol-  
13 lowing:

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

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

20           “(B) the employee, former employee, or appli-  
21 cant for employment allegedly affected by such prac-  
22 tice resides.

23           “(2)(A) An employee, former employee, or applicant  
24 for employment in any case to which paragraph (3) or (4)  
25 applies may file an action at law or equity for de novo

1 review in the appropriate United States district court in  
2 accordance with this subsection.

3       “(B) Upon initiation of any action under subpara-  
4 graph (A), the Board shall stay any other claims of such  
5 employee, former employee, or applicant pending before  
6 the Board at that time which arise out of the same set  
7 of operative facts. Such claims shall be stayed pending  
8 completion of the action filed under subparagraph (A) be-  
9 fore the appropriate United States district court and any  
10 associated appellate review.

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

12               “(A) an employee, former employee, or appli-  
13 cant for employment—

14                       “(i) seeks corrective action from the Merit  
15 Systems Protection Board under section  
16 1221(a) based on an alleged prohibited per-  
17 sonnel practice described in section 2302(b) (8)  
18 or (9) (A)(i), (B), (C), or (D) for which the as-  
19 sociated personnel action is an action covered  
20 under section 7512 or 7542; or

21                       “(ii) files an appeal under section 7701(a)  
22 alleging as an affirmative defense the commis-  
23 sion of a prohibited personnel practice described  
24 in section 2302(b) (8) or (9) (A)(i), (B), (C),  
25 or (D) for which the associated personnel action

1 is an action covered under section 7512 or  
2 7542;

3 “(B) no final order or decision is issued by the  
4 Board within 270 days after the date on which a re-  
5 quest for that corrective action or appeal has been  
6 duly submitted, unless the Board determines that  
7 the employee, former employee, or applicant for em-  
8 ployment engaged in conduct intended to delay the  
9 issuance of a final order or decision by the Board;  
10 and

11 “(C) such employee, former employee, or appli-  
12 cant provides written notice to the Board of filing an  
13 action under this subsection before the filing of that  
14 action.

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

16 “(A) an employee, former employee, or appli-  
17 cant for employment—

18 “(i) seeks corrective action from the Merit  
19 Systems Protection Board under section  
20 1221(a) based on an alleged prohibited per-  
21 sonnel practice described in section 2302(b) (8)  
22 or (9) (A)(i), (B), (C), or (D) for which the as-  
23 sociated personnel action is an action covered  
24 under section 7512 or 7542; or

1           “(ii) files an appeal under section 7701(a)  
2           ~~(1)~~ alleging as an affirmative defense the com-  
3           mission of a prohibited personnel practice de-  
4           scribed in section 2302(b) (8) or (9) (A)(i),  
5           (B), (C), or (D) for which the associated per-  
6           sonnel action is an action covered under section  
7           7512 or 7542;

8           “(B)(i) within 30 days after the date on which  
9           the request for corrective action or appeal was duly  
10          submitted, such employee, former employee, or appli-  
11          cant for employment files a motion requesting a cer-  
12          tification consistent with subparagraph (C) to the  
13          Board, any administrative law judge appointed by  
14          the Board under section 3105 of this title and as-  
15          signed to the case, or any employee of the Board  
16          designated by the Board and assigned to the case;  
17          and

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

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

1           “(i) under *the standards* ~~standard~~ applica-  
2 ble to the review of motions to dismiss under  
3 rule 12(b)(6) of the Federal Rules of Civil Pro-  
4 cedure, including rule 12(d), the request for  
5 corrective action *or the appeal* (including any  
6 allegations made with the motion under sub-  
7 paragraph (B)) would not be subject to dis-  
8 missal; and

9           “(ii)(I) the Board is not likely to dispose  
10 of the case within 270 days after the date on  
11 which ~~at~~ the request for ~~that~~ corrective action *or*  
12 *the appeal* has been duly submitted; or

13           “(II) the case—

14           “(aa) consists of multiple claims;

15           “(bb) requires complex or extensive  
16 discovery;

17           “(cc) arises out of the same set of op-  
18 erative facts as any civil action against the  
19 Government filed by the employee, former  
20 employee, or applicant pending in a Fed-  
21 eral court; or

22           “(dd) involves a novel question of law.

23           “(5) The Board shall grant or deny any motion re-  
24 questing a certification described under paragraph (4)(ii)  
25 within 90 days after the submission of such motion and

1 the Board may not issue a decision on the merits of a  
2 request for corrective action within 15 days after granting  
3 or denying a motion requesting certification.

4 “(6)(A) Any decision of the Board, any administra-  
5 tive law judge appointed by the Board under section 3105  
6 of this title and assigned to the case, or any employee of  
7 the Board designated by the Board and assigned to the  
8 case to grant or deny a certification described under para-  
9 graph (4)(ii) shall be reviewed on appeal of a final order  
10 or decision of the Board under section 7703 only if—

11 “(i) a motion requesting a certification was de-  
12 nied; and

13 “(ii) the reviewing court vacates the decision of  
14 the Board on the merits of the claim under the  
15 standards set forth in section 7703(c).

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

21 “(C) The reviewing court’s decision shall not be con-  
22 sidered evidence of any determination by the Board, any  
23 administrative law judge appointed by the Board under  
24 section 3105 of this title, or any employee of the Board  
25 designated by the Board on the merits of the underlying

1 allegations during the course of any action at law or equity  
2 for de novo review in the appropriate United States dis-  
3 trict court in accordance with this subsection.

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

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

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

9 “(C) the court—

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

12 “(ii) may award any relief which the court  
13 considers appropriate under subsection (g), ex-  
14 cept—

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

17 “(II) relief may not include punitive  
18 damages; and

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

1           “(D) the Special Counsel may not represent the  
2           employee, former employee, or applicant for employ-  
3           ment.

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

8           “(9) This subsection applies with respect to any ap-  
9           peal, petition, or other request for corrective action duly  
10          submitted to the Board, whether under section  
11          1214(b)(2), the preceding provisions of this section, sec-  
12          tion 7513(d), section 7701, or any otherwise applicable  
13          provisions of law, rule, or regulation.”.

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  
21                 to any claim pending before the Board on the last  
22                 day of the 5-year period described under paragraph  
23                 (1).

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

2 **JUDGMENT.**

3 (a) IN GENERAL.—Section 1204(b) of title 5, United  
4 States Code, is amended—

5 (1) by redesignating paragraph (3) as para-  
6 graph (4);

7 (2) by inserting after paragraph (2) the fol-  
8 lowing:

9 “(3) With respect to a request for corrective ac-  
10 tion based on an alleged prohibited personnel prac-  
11 tice described in section 2302(b) (8) or (9) (A)(i),  
12 (B), (C), or (D) for which the associated personnel  
13 action is an action covered under section 7512 or  
14 7542, the Board, any administrative law judge ap-  
15 pointed by the Board under section 3105 of this  
16 title, or any employee of the Board designated by  
17 the Board may, with respect to any party, grant a  
18 motion for summary judgment when the Board or  
19 the administrative law judge determines that there is  
20 no genuine issue as to any material fact and that  
21 the moving party is entitled to a judgment as a mat-  
22 ter of law.”.

23 (b) SUNSET.—

24 (1) IN GENERAL.—Except as provided under  
25 paragraph (2), the amendments made by this section

1 shall cease to have effect 5 years after the effective  
2 date of this Act.

3 (2) PENDING CLAIMS.—The amendments made  
4 by this section shall continue to apply with respect  
5 to any claim pending before the Board on the last  
6 day of the 5-year period described under paragraph  
7 (1).

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

9 (a) PROHIBITED PERSONNEL PRACTICES.—Section  
10 2302(b)(8) of title 5, United States Code, is amended—

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

13 (2) in subparagraph (B), by adding “or” after  
14 the semicolon; and

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

16 “(C) any communication that complies  
17 with subsection (a)(1), (d), ~~or~~ and (h) of sec-  
18 tion 8H of the Inspector General Act of 1978  
19 (5 U.S.C. App.);”.

20 (b) INSPECTOR GENERAL ACT OF 1978.—Section 8H  
21 of the Inspector General Act of 1978 (5 U.S.C. App.) is  
22 amended—

23 (1) in subsection (a)(1), by adding at the end  
24 the following:

1           “(D) An employee of any agency, as that  
2 term is defined under section 2302(a)(2)(C) of  
3 title 5, United States Code, who intends to re-  
4 port to Congress a complaint or information  
5 with respect to an urgent concern may report  
6 the complaint or information to the Inspector  
7 General (or designee) of the agency *at* which  
8 that employee is employed.”;

9           (2) in subsection (c), by striking “intelligence  
10 committees” and inserting “appropriate commit-  
11 tees”;

12           (3) in subsection (d)—

13           (A) in paragraph (1), by striking “either  
14 or both of the intelligence committees” and in-  
15 serting “any of the appropriate committees”;  
16 and

17           (B) in paragraphs (2) and (3), by striking  
18 “intelligence committees” each place that term  
19 appears and inserting “appropriate commit-  
20 tees”;

21           (4) in subsection (h)—

22           (A) in paragraph (1)—

23           (i) in subparagraph (A), by striking  
24 “intelligence”; and

1 (ii) in subparagraph (B), by inserting  
2 “or an activity involving classified informa-  
3 tion” after “an intelligence activity”; and  
4 (B) by striking paragraph (2), and insert-  
5 ing the following:

6 “(2) The term ‘appropriate committees’ means  
7 the Permanent Select Committee on Intelligence of  
8 the House of Representatives and the Select Com-  
9 mittee on Intelligence of the Senate, except that with  
10 respect to disclosures made by employees described  
11 in subsection (a)(1)(D), the term ‘appropriate com-  
12 mittees’ means the committees of appropriate juris-  
13 diction.”.

14 **SEC. 120. WHISTLEBLOWER PROTECTION OMBUDSMAN.**

15 (a) IN GENERAL.—Section 3 of the Inspector General  
16 Act of 1978 (5 U.S.C. App.) is amended by striking sub-  
17 section (d) and inserting the following:

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

21 “(A) appoint an Assistant Inspector General for  
22 Auditing who shall have the responsibility for super-  
23 vising the performance of auditing activities relating  
24 to programs and operations of the establishment;

1           “(B) appoint an Assistant Inspector General for  
2           Investigations who shall have the responsibility for  
3           supervising the performance of investigative activi-  
4           ties relating to such programs and operations; and

5           “(C) designate a Whistleblower Protection Om-  
6           budsman who shall educate agency employees—

7                   “(i) about prohibitions on retaliation for  
8                   protected disclosures; and

9                   “(ii) who have made or are contemplating  
10                  making a protected disclosure about the rights  
11                  and remedies against retaliation for protected  
12                  disclosures.

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

16          “(3) For the purposes of this section, the requirement  
17          of the designation of a Whistleblower Protection Ombuds-  
18          man under paragraph (1)(C) shall not apply to—

19                  “(A) any agency that is an element of the intel-  
20                  ligence community (as defined in section 3(4) of the  
21                  National Security Act of 1947 (50 U.S.C. 401a(4)));  
22                  or

23                  “(B) as determined by the President, any exec-  
24                  utive agency or unit thereof the principal function of

1       which is the conduct of foreign intelligence or  
2       counter intelligence activities.”.

3       (b) TECHNICAL AND CONFORMING AMENDMENT.—  
4 Section 8D(j) of the Inspector General Act of 1978 (5  
5 U.S.C. App.) is amended—

6           (1) by striking “section 3(d)(1)” and inserting  
7       “section 3(d)(1)(A)”; and

8           (2) by striking “section 3(d)(2)” and inserting  
9       “section 3(d)(1)(B)”.

10      (c) SUNSET.—

11           (1) IN GENERAL.—The amendments made by  
12 this section shall cease to have effect on the date  
13 that is 5 years after the date of enactment of this  
14 Act.

15           (2) RETURN TO PRIOR AUTHORITY.—Upon the  
16 date described in paragraph (1), section 3(d) and  
17 section 8D(j) of the Inspector General Act of 1978  
18 (5 U.S.C. App.) shall read as such sections read on  
19 the day before the date of enactment of this Act.

1 **TITLE II—INTELLIGENCE COM-**  
2 **MUNITY WHISTLEBLOWER**  
3 **PROTECTIONS**

4 **SEC. 201. PROTECTION OF INTELLIGENCE COMMUNITY**  
5 **WHISTLEBLOWERS.**

6 (a) IN GENERAL.—Chapter 23 of title 5, United  
7 States Code, is amended by inserting after section 2303  
8 the following:

9 **“§ 2303A. Prohibited personnel practices in the intel-**  
10 **ligence community**

11 “(a) DEFINITIONS.—In this section—

12 “(1) the term ‘agency’ means an executive de-  
13 partment or independent establishment, as defined  
14 under sections 101 and 104, that contains an intel-  
15 ligence community element, except the Federal Bu-  
16 reau of Investigation;

17 “(2) the term ‘intelligence community ele-  
18 ment’—

19 “(A) means—

20 “(i) the Central Intelligence Agency,  
21 the Defense Intelligence Agency, the Na-  
22 tional Geospatial-Intelligence Agency, the  
23 National Security Agency, the Office of the  
24 Director of National Intelligence, and the  
25 National Reconnaissance Office; and

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

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

9           “(3) the term ‘personnel action’ means any ac-  
10          tion described in clauses (i) through (x) of section  
11          2302(a)(2)(A) with respect to an employee in a posi-  
12          tion in an intelligence community element (other  
13          than a position of a confidential, policy-determining,  
14          policymaking, or policy-advocating character).

15          “(b) IN GENERAL.—Any employee of an agency who  
16          has authority to take, direct others to take, recommend,  
17          or approve any personnel action, shall not, with respect  
18          to such authority, take or fail to take a personnel action  
19          with respect to any employee of an intelligence community  
20          element as a reprisal for a disclosure of information by  
21          the employee to the Director of National Intelligence (or  
22          an employee designated by the Director of National Intel-  
23          ligence for such purpose), or to the head of the employing  
24          agency (or an employee designated by the head of that

1 agency for such purpose), which the employee reasonably  
2 believes evidences—

3 “(1) a violation of any law, rule, or regulation;  
4 ~~except for an alleged violation that occurs during the~~  
5 ~~conscientious carrying out of official duties; or~~

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

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

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

14 “(1) preempt or preclude any employee, or ap-  
15 plicant for employment, at the Federal Bureau of  
16 Investigation from exercising rights currently pro-  
17 vided under any other law, rule, or regulation, in-  
18 cluding section 2303;

19 “(2) repeal section 2303; or

20 “(3) provide the President or Director of Na-  
21 tional Intelligence the authority to revise regulations  
22 related to section 2303, codified in part 27 of the  
23 Code of Federal Regulations.”.

24 (b) TECHNICAL AND CONFORMING AMENDMENT.—  
25 The table of sections for chapter 23 of title 5, United

1 States Code, is amended by inserting after the item relat-  
 2 ing to section 2303 the following:

“2303A. Prohibited personnel practices in the intelligence community.”.

3 **SEC. 202. REVIEW OF SECURITY CLEARANCE OR ACCESS**  
 4 **DETERMINATIONS.**

5 (a) IN GENERAL.—Section 3001(b) of the Intel-  
 6 ligence Reform and Terrorism Prevention Act of 2004 (50  
 7 U.S.C. 435b(b)) is amended—

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

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

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

15 (4) by inserting after paragraph (6) the fol-  
 16 lowing:

17 “(7) not later than 180 days after the date of  
 18 enactment of the Whistleblower Protection Enhance-  
 19 ment Act of 2011—

20 “(A) developing policies and procedures  
 21 that permit, to the extent practicable, individ-  
 22 uals who ~~challenge~~ in good faith *appeal* a deter-  
 23 mination to suspend or revoke a security clear-  
 24 ance or access to classified information to re-

1           tain their government employment status while  
2           such challenge is pending; and

3                   “(B) developing and implementing uniform  
4           and consistent policies and procedures to ensure  
5           proper protections during the process for deny-  
6           ing, suspending, or revoking a security clear-  
7           ance or access to classified information, includ-  
8           ing the provision of a right to appeal such a de-  
9           nial, suspension, or revocation, except that  
10          there shall be no appeal of an agency’s suspen-  
11          sion of a security clearance or access determina-  
12          tion for purposes of conducting an investiga-  
13          tion, if that suspension lasts no longer than 1  
14          year or the head of the agency certifies that a  
15          longer suspension is needed before a final deci-  
16          sion on denial or revocation to prevent immi-  
17          nent harm to the national security.

18          “Any limitation period applicable to an agency appeal  
19          under paragraph (7) shall be tolled until the head of the  
20          agency (or in the case of any component of the Depart-  
21          ment of Defense, the Secretary of Defense) determines,  
22          with the concurrence of the Director of National Intel-  
23          ligence, that the policies and procedures described in para-  
24          graph (7) have been established for the agency or the Di-  
25          rector of National Intelligence promulgates the policies

1 and procedures under paragraph (7). The policies and pro-  
2 cedures for appeals developed under paragraph (7) shall  
3 be comparable to the policies and procedures pertaining  
4 to prohibited personnel practices defined under section  
5 2302(b)(8) of title 5, United States Code, and provide—

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

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

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

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

16           “(E) that not more than 180 days shall pass  
17 from the filing of the appeal to the report of the im-  
18 partial fact-finder to the agency head or the des-  
19 ignee of the agency head, unless—

20                   “(i) the employee and the agency con-  
21 cerned agree to an extension; or

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

1           “(F) for the use of information specifically re-  
 2           quired by Executive order to be kept classified in the  
 3           interest of national defense or the conduct of foreign  
 4           affairs in a manner consistent with the interests of  
 5           national security, including ex parte submissions if  
 6           the agency determines that the interests of national  
 7           security so warrant; and

8           “(G) that the employee or former employee  
 9           shall have no right to compel the production of in-  
 10          formation specifically required by Executive order to  
 11          be kept classified in the interest of national defense  
 12          or the conduct of foreign affairs, except evidence  
 13          necessary to establish that the employee made the  
 14          disclosure or communication such employee alleges  
 15          was protected by subparagraphs (A), (B), and (C) of  
 16          subsection (j)(1).”.

17          (b) RETALIATORY REVOCATION OF SECURITY  
 18          CLEARANCES AND ACCESS DETERMINATIONS.—Section  
 19          3001 of the Intelligence Reform and Terrorism Prevention  
 20          Act of 2004 (50 U.S.C. 435b) is amended by adding at  
 21          the end the following:

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

24                 “(1) IN GENERAL.—Agency personnel with au-  
 25                 thority over personnel security clearance or access

1 determinations shall not take or fail to take, or  
2 threaten to take or fail to take, any action with re-  
3 spect to any employee's security clearance or access  
4 determination because of—

5 “(A) any disclosure of information to the  
6 Director of National Intelligence (or an em-  
7 ployee designated by the Director of National  
8 Intelligence for such purpose) or the head of  
9 the employing agency (or employee designated  
10 by the head of that agency for such purpose) by  
11 an employee that the employee reasonably be-  
12 lieves evidences—

13 “(i) a violation of any law, rule, or  
14 regulation, ~~and occurs during the conscien-~~  
15 ~~tious carrying out of official duties; or~~

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

20 “(B) any disclosure to the Inspector Gen-  
21 eral of an agency or another employee des-  
22 ignated by the head of the agency to receive  
23 such disclosures, of information which the em-  
24 ployee reasonably believes evidences—

1           “(i) a violation of any law, rule, or  
2           regulation, ~~and occurs during the conscien-~~  
3           ~~tious carrying out of official duties;~~ or

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

8           “(C) any communication that complies  
9           with—

10           “(i) subsection (a)(1), (d), ~~or~~ *and* (h)  
11           of section 8H of the Inspector General Act  
12           of 1978 (5 U.S.C. App.);

13           “(ii) subsection (d)(5)(A), (D), ~~or~~ *and*  
14           (G) of section 17 of the Central Intel-  
15           ligence Agency Act of 1949 (50 U.S.C.  
16           403q); or

17           “(iii) subsection (k)(5)(A), (D), ~~or~~  
18           *and* (G), of section 103H of the National  
19           Security Act of 1947 (50 U.S.C. 403–3h);

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

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

1           “(F) cooperating with or disclosing infor-  
2           mation to the Inspector General of an agency,  
3           in accordance with applicable provisions of law  
4           in connection with an audit, inspection, or in-  
5           vestigation conducted by the Inspector General,  
6           if the actions described under subparagraphs (D)  
7           through (F) do not result in the employee or appli-  
8           cant unlawfully disclosing information specifically re-  
9           quired by Executive order to be kept classified in the  
10          interest of national defense or the conduct of foreign  
11          affairs.

12           “(2) RULE OF CONSTRUCTION.—Consistent  
13          with the protection of sources and methods, nothing  
14          in paragraph (1) shall be construed to authorize the  
15          withholding of information from the Congress or the  
16          taking of any personnel action against an employee  
17          who discloses information to the Congress.

18           “(3) DISCLOSURES.—

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

21                   “(i) the disclosure was made to a per-  
22                   son, including a supervisor, who partici-  
23                   pated in an activity that the employee rea-  
24                   sonably believed to be covered by para-  
25                   graph (1)(A)(ii);

1           “(ii) the disclosure revealed informa-  
2           tion that had been previously disclosed;

3           “(iii) of the employee’s motive for  
4           making the disclosure;

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

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

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

12          “(B) REPRISALS.—If a disclosure is made  
13          during the normal course of duties of an em-  
14          ployee, the disclosure shall not be excluded from  
15          paragraph (1) if any employee who has author-  
16          ity to take, direct others to take, recommend, or  
17          approve any personnel action with respect to  
18          the employee making the disclosure, took, failed  
19          to take, or threatened to take or fail to take a  
20          personnel action with respect to that employee  
21          in reprisal for the disclosure.

22          “(4) AGENCY ADJUDICATION.—

23          “(A) REMEDIAL PROCEDURE.—An em-  
24          ployee or former employee who believes that he  
25          or she has been subjected to a reprisal prohib-

1           ited by paragraph (1) of this subsection may,  
2           within 90 days after the issuance of notice of  
3           such decision, appeal that decision within the  
4           agency of that employee or former employee  
5           through proceedings authorized by paragraph  
6           (7) of subsection (a), except that there shall be  
7           no appeal of an agency's suspension of a secu-  
8           rity clearance or access determination for pur-  
9           poses of conducting an investigation, if that  
10          suspension lasts not longer than 1 year (or a  
11          longer period in accordance with a certification  
12          made under subsection (b)(7)).

13           “(B) CORRECTIVE ACTION.—If, in the  
14          course of proceedings authorized under sub-  
15          paragraph (A), it is determined that the ad-  
16          verse security clearance or access determination  
17          violated paragraph (1) of this subsection, the  
18          agency shall take specific corrective action to  
19          return the employee or former employee, as  
20          nearly as practicable and reasonable, to the po-  
21          sition such employee or former employee would  
22          have held had the violation not occurred. Such  
23          corrective action shall include reasonable attor-  
24          ney's fees and any other reasonable costs in-  
25          curred, and may include back pay and related

1 benefits, travel expenses, and compensatory  
2 damages not to exceed \$300,000.

3 “(C) CONTRIBUTING FACTOR.—In deter-  
4 mining whether the adverse security clearance  
5 or access determination violated paragraph (1)  
6 of this subsection, the agency shall find that  
7 paragraph (1) of this subsection was violated if  
8 a disclosure described in paragraph (1) was a  
9 contributing factor in the adverse security clear-  
10 ance or access determination taken against the  
11 individual, unless the agency demonstrates by a  
12 preponderance of the evidence that it would  
13 have taken the same action in the absence of  
14 such disclosure, giving the utmost deference to  
15 the agency’s assessment of the particular threat  
16 to the national security interests of the United  
17 States in the instant matter.

18 “(5) APPELLATE REVIEW OF SECURITY CLEAR-  
19 ANCE ACCESS DETERMINATIONS BY DIRECTOR OF  
20 NATIONAL INTELLIGENCE.—

21 “(A) DEFINITION.—In this paragraph, the  
22 term ‘Board’ means the appellate review board  
23 established under section 204 of the Whistle-  
24 blower Protection Enhancement Act of ~~2011~~  
25 *2012*.

1           “(B) APPEAL.—Within 60 days after re-  
2           ceiving notice of an adverse final agency deter-  
3           mination under a proceeding under paragraph  
4           (4), an employee or former employee may ap-  
5           peal that determination to the Board.

6           “(C) POLICIES AND PROCEDURES.—The  
7           Board, in consultation with the Attorney Gen-  
8           eral, Director of National Intelligence, and the  
9           Secretary of Defense, shall develop and imple-  
10          ment policies and procedures for adjudicating  
11          the appeals authorized by subparagraph (B).  
12          The Director of National Intelligence and Sec-  
13          retary of Defense shall jointly approve any  
14          rules, regulations, or guidance issued by the  
15          Board concerning the procedures for the use or  
16          handling of classified information.

17          “(D) REVIEW.—The Board’s review shall  
18          be on the complete agency record, which shall  
19          be made available to the Board. The Board may  
20          not hear witnesses or admit additional evidence.  
21          Any portions of the record that were submitted  
22          ex parte during the agency proceedings shall be  
23          submitted ex parte to the Board.

24          “(E) FURTHER FACT-FINDING OR IM-  
25          PROPER DENIAL.—If the Board concludes that

1 further fact-finding is necessary or finds that  
2 the agency improperly denied the employee or  
3 former employee the opportunity to present evi-  
4 dence that, if admitted, would have a substan-  
5 tial likelihood of altering the outcome, the  
6 Board shall remand the matter to the agency  
7 from which it originated for additional pro-  
8 ceedings in accordance with the rules of proce-  
9 dure issued by the Board.

10 “(F) DE NOVO DETERMINATION.—The  
11 Board shall make a de novo determination,  
12 based on the entire record and under the stand-  
13 ards specified in paragraph (4), of whether the  
14 employee or former employee 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,  
18 judge the credibility of witnesses, and determine  
19 controverted 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 “(G) 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  
3 clearly consistent with the interests of national  
4 security, with any doubt resolved in favor of na-  
5 tional security, under Executive Order 12968  
6 (60 Fed. Reg. 40245; relating to access to clas-  
7 sified information) or any successor thereto (in-  
8 cluding any adjudicative guidelines promulgated  
9 under such orders) or any subsequent Executive  
10 order, regulation, or policy concerning access to  
11 classified information.

12 “(H) REMEDIES.—

13 “(i) CORRECTIVE ACTION.—If the  
14 Board finds that the adverse security  
15 clearance or access determination violated  
16 paragraph (1), it shall order the agency  
17 head to take specific corrective action to  
18 return the employee or former employee,  
19 as nearly as practicable and reasonable, to  
20 the position such employee or former em-  
21 ployee would have held had the violation  
22 not occurred. Such corrective action shall  
23 include reasonable attorney’s fees and any  
24 other reasonable costs incurred, and may  
25 include back pay and related benefits, trav-

1 el expenses, and compensatory damages  
2 not to exceed \$300,000. The Board may  
3 recommend, but may not order, reinstatement  
4 or hiring of a former employee. The  
5 Board may order that the former employee  
6 be treated as though the employee were  
7 transferring from the most recent position  
8 held when seeking other positions within  
9 the executive branch. Any corrective action  
10 shall not include the reinstating of any security  
11 clearance or access determination.  
12 The agency head shall take the actions so  
13 ordered within 90 days, unless the Director  
14 of National Intelligence, the Secretary of  
15 Energy, or the Secretary of Defense, in the  
16 case of any component of the Department  
17 of Defense, determines that doing so would  
18 endanger national security.

19 “(ii) RECOMMENDED ACTION.—If the  
20 Board finds that reinstating the employee  
21 or former employee’s security clearance or  
22 access determination is clearly consistent  
23 with the interests of national security, it  
24 shall recommend such action to the head of

1 the entity selected under subsection (b)  
2 and the head of the affected agency.

3 “(I) CONGRESSIONAL NOTIFICATION.—

4 “(i) ORDERS.—Consistent with the  
5 protection of sources and methods, at the  
6 time the Board issues an order, the Chair-  
7 person of the Board shall notify—

8 “(I) the Committee on Homeland  
9 Security and Government Affairs of  
10 the Senate;

11 “(II) the Select Committee on In-  
12 telligence of the Senate;

13 “(III) the Committee on Over-  
14 sight and Government Reform of the  
15 House of Representatives;

16 “(IV) the Permanent Select Com-  
17 mittee on Intelligence of the House of  
18 Representatives; and

19 “(V) the committees of the Sen-  
20 ate and the House of Representatives  
21 that have jurisdiction over the employ-  
22 ing agency, including in the case of a  
23 final order or decision of the Defense  
24 Intelligence Agency, the National  
25 Geospatial-Intelligence Agency, the

1 National Security Agency, or the Na-  
2 tional Reconnaissance Office, the  
3 Committee on Armed Services of the  
4 Senate and the Committee on Armed  
5 Services of the House of Representa-  
6 tives.

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

15 “(6) JUDICIAL REVIEW.—Nothing in this sec-  
16 tion shall be construed to permit or require judicial  
17 review of any—

18 “(A) agency action under this section; or

19 “(B) action of the appellate review board  
20 established under section 204 of the Whistle-  
21 blower Protection Enhancement Act of ~~2011~~  
22 *2012*.

23 “(7) PRIVATE CAUSE OF ACTION.—Nothing in  
24 this section shall be construed to permit, authorize,

1 or require a private cause of action to challenge the  
2 merits of a security clearance determination.”.

3 (c) ACCESS DETERMINATION DEFINED.—Section  
4 3001(a) of the Intelligence Reform and Terrorism Preven-  
5 tion Act of 2004 (50 U.S.C. 435b(a)) is amended by add-  
6 ing at the end the following:

7 “(9) The term ‘access determination’ means the  
8 ~~process for determining~~ *determination regarding*  
9 whether an employee—

10 “(A) is eligible for access to classified in-  
11 formation in accordance with Executive Order  
12 12968 (60 Fed. Reg. 40245; relating to access  
13 to classified information), or any successor  
14 thereto, and Executive Order 10865 (25 Fed.  
15 Reg. 1583; relating to safeguarding classified  
16 information with industry); and

17 “(B) possesses a need to know under that  
18 Order.”.

19 (d) RULE OF CONSTRUCTION.—Nothing in section  
20 3001 of the Intelligence Reform and Terrorism Prevention  
21 Act of 2004 (50 U.S.C. 435b), as amended by this Act,  
22 shall be construed to require the repeal or replacement of  
23 agency appeal procedures implementing Executive Order  
24 12968 (60 Fed. Reg. 40245; relating to classified national  
25 security information), or any successor thereto, and Exec-

1 utive Order 10865 (25 Fed. Reg. 1583; relating to safe-  
 2 guarding classified information with industry), or any suc-  
 3 cessor thereto, that meet the requirements of section  
 4 3001(b)(7) of such Act, as so amended.

5 **SEC. 203. REVISIONS RELATING TO THE INTELLIGENCE**  
 6 **COMMUNITY WHISTLEBLOWER PROTECTION**  
 7 **ACT.**

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

10 (1) in subsection (b)—

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

12 (B) by adding at the end the following:

13 “(2) If the head of an establishment determines that  
 14 a complaint or information transmitted under paragraph  
 15 (1) would create a conflict of interest for the head of the  
 16 establishment, the head of the establishment shall return  
 17 the complaint or information to the Inspector General with  
 18 that determination and the Inspector General shall make  
 19 the transmission to the Director of National Intelligence  
 20 *and, if the establishment is within the Department of De-*  
 21 *fense, to the Secretary of Defense.* In such a case, the re-  
 22 quirements of this section for the head of the establish-  
 23 ment apply to ~~the recipient~~ *each recipient* of the Inspector  
 24 General’s transmission. ~~The Director of National Intel-~~  
 25 ~~ligence~~ *Each recipient of the Inspector General’s trans-*

1 *mission* shall consult with the members of the appellate  
2 review board established under section 204 of the Whistle-  
3 blower Protection Enhancement ~~Review~~ Act of ~~2011~~ 2012  
4 regarding all transmissions under this paragraph.”;

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

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

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

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

18 (1) in subparagraph (B)—

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

20 (B) by adding at the end the following:

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

1 shall make the transmission to the Director of National  
 2 Intelligence. In such a case, the requirements of this sub-  
 3 section for the Director apply to the ~~recipient of the In-~~  
 4 ~~spector General's submission;~~ and *Director of National In-*  
 5 *telligence. The Director of National Intelligence shall con-*  
 6 *sult with the members of the appellate review board estab-*  
 7 *lished under section 204 of the Whistleblower Protection En-*  
 8 *hancement Act of 2012 regarding all transmissions under*  
 9 *this clause.*”; 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 sub-  
 15 mission to the Inspector General, and of the date on which  
 16 such submission was made.”.

17 **SEC. 204. REGULATIONS; REPORTING REQUIREMENTS;**

18 **NONAPPLICABILITY TO CERTAIN TERMI-**

19 **NATIONS.**

20 (a) DEFINITIONS.—In this section—

21 (1) the term “congressional oversight commit-  
 22 tees” means—

23 (A) the Committee on Homeland Security  
 24 and Government Affairs of the Senate;

1 (B) the Select Committee on Intelligence  
2 of the Senate;

3 (C) the Committee on Oversight and Gov-  
4 ernment Reform of the House of Representa-  
5 tives; and

6 (D) the Permanent Select Committee on  
7 Intelligence of the House of Representatives;  
8 and

9 (2) the term “intelligence community ele-  
10 ment”—

11 (A) means—

12 (i) the Central Intelligence Agency,  
13 the Defense Intelligence Agency, the Na-  
14 tional Geospatial-Intelligence Agency, the  
15 National Security Agency, the Office of the  
16 Director of National Intelligence, and the  
17 National Reconnaissance Office; and

18 (ii) any executive agency or unit  
19 thereof determined by the President under  
20 section 2302(a)(2)(C)(ii) of title 5, United  
21 States Code, to have as its principal func-  
22 tion the conduct of foreign intelligence or  
23 counterintelligence activities; and

24 (B) does not include the Federal Bureau of  
25 Investigation.

1 (b) REGULATIONS.—

2 (1) IN GENERAL.—~~The~~ *In consultation with the*  
3 *Secretary of Defense, the* Director of National Intel-  
4 ligence shall prescribe regulations to ensure that a  
5 personnel action shall not be taken against an em-  
6 ployee of an intelligence community element as a re-  
7 prisal for any disclosure of information described in  
8 section 2303A(b) of title 5, United States Code, as  
9 added by this Act.

10 (2) APPELLATE REVIEW BOARD.—Not later  
11 than 180 days after the date of enactment of this  
12 Act, the Director of National Intelligence, in con-  
13 sultation with the Secretary of Defense, the Attor-  
14 ney General, and the heads of appropriate agencies,  
15 shall establish an appellate review board that is  
16 broadly representative of affected Departments and  
17 agencies and is made up of individuals with expertise  
18 in merit systems principles and national security  
19 issues—

20 (A) to hear whistleblower appeals related  
21 to security clearance access determinations de-  
22 scribed in section 3001(j) of the Intelligence  
23 Reform and Terrorism Prevention Act of 2004  
24 (50 U.S.C. 435b), as added by this Act; and

1           ~~(B)~~ that shall include a subpanel that re-  
2           flects the composition of the intelligence com-  
3           mittee, which shall be composed of intelligence  
4           community elements and inspectors general  
5           from intelligence community elements, for the  
6           purpose of hearing cases that arise in elements  
7           of the intelligence community.

8           *(B) that shall include a subpanel that re-*  
9           *fects the composition of the intelligence commu-*  
10          *nity, which shall—*

11                 *(i) be composed of intelligence commu-*  
12                 *nity elements and inspectors general from*  
13                 *intelligence community elements, for the*  
14                 *purpose of hearing cases that arise in ele-*  
15                 *ments of the intelligence community; and*

16                 *(ii) include the Inspector General of*  
17                 *the Intelligence Community and the Inspec-*  
18                 *tor General of the Department of Defense.*

19           (c) REPORT ON THE STATUS OF IMPLEMENTATION  
20 OF REGULATIONS.—Not later than 2 years after the date  
21 of enactment of this Act, the Director of National Intel-  
22 ligence shall submit a report on the status of the imple-  
23 mentation of the regulations promulgated under sub-  
24 section (b) to the congressional oversight committees.

1 (d) NONAPPLICABILITY TO CERTAIN TERMI-  
2 NATIONS.—Section 2303A of title 5, United States Code,  
3 as added by this Act, and section 3001 of the Intelligence  
4 Reform and Terrorism Prevention Act of 2004 (50 U.S.C.  
5 435b), as amended by this Act, shall not apply to adverse  
6 security clearance or access determinations if the affected  
7 employee is concurrently terminated under—

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

10 (2) the authority of the Director of National In-  
11 telligence under section 102A(m) of the National Se-  
12 curity Act of 1947 (50 U.S.C. 403–1(m)), if—

13 (A) the Director personally summarily ter-  
14 minates the individual; and

15 (B) the Director—

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

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

1 (iii) not later than 5 days after such  
2 termination, notifies the congressional  
3 oversight committees of the termination;

4 (3) the authority of the Director of the Central  
5 Intelligence Agency under section 104A(e) of the  
6 National Security Act of 1947 (50 U.S.C. 403–  
7 4a(e)), if—

8 (A) the Director personally summarily ter-  
9 minates the individual; and

10 (B) the Director—

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

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

19 (iii) not later than 5 days after such  
20 termination, notifies the congressional  
21 oversight committees of the termination; or

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

24 (A) the agency head personally terminates  
25 the individual; and

- 1 (B) the agency head—
- 2 (i) determines the termination to be in
- 3 the interest of the United States;
- 4 (ii) determines that the procedures
- 5 prescribed in other provisions of law that
- 6 authorize the termination of the employ-
- 7 ment of such employee cannot be invoked
- 8 in a manner consistent with the national
- 9 security; and
- 10 (iii) not later than 5 days after such
- 11 termination, notifies the congressional
- 12 oversight committees of the termination.

13 **TITLE III—SAVINGS CLAUSE;**

14 **EFFECTIVE DATE**

15 **SEC. 301. SAVINGS CLAUSE.**

16 Nothing in this Act shall be construed to imply any

17 limitation on any protections afforded by any other provi-

18 sion of law to employees and applicants.

19 **SEC. 302. EFFECTIVE DATE.**

20 This Act shall take effect 30 days after the date of

21 enactment of this Act.

Calendar No. 358

112<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

**S. 743**

[Report No. 112-155]

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## **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.

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APRIL 19, 2012

Reported with amendments