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VA ACCOUNTABILITY ACT OF 2015

JULY 23, 2015.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MILLER of Florida, from the Committee on Veterans' Affairs, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1994]

[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 1994) to amend title 38, United States Code, to provide for the removal or demotion of employees of the Department of Veterans Affairs based on performance or misconduct, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "VA Accountability Act of 2015".

SEC. 2. REMOVAL OR DEMOTION OF EMPLOYEES BASED ON PERFORMANCE OR MISCONDUCT.

(a) IN GENERAL.—Chapter 7 of title 38, United States Code, is amended by adding at the end the following new section:

"§ 715. Employees: removal or demotion based on performance or misconduct

"(a) IN GENERAL.—The Secretary may remove or demote an individual who is an employee of the Department if the Secretary determines the performance or misconduct of the individual warrants such removal or demotion. If the Secretary so removes or demotes such an individual, the Secretary may—

"(1) remove the individual from the civil service (as defined in section 2101 of title 5); or

"(2) demote the individual by means of—

"(A) a reduction in grade for which the individual is qualified and that the Secretary determines is appropriate; or

"(B) a reduction in annual rate of pay that the Secretary determines is appropriate.

"(b) PAY OF CERTAIN DEMOTED INDIVIDUALS.—(1) Notwithstanding any other provision of law, any individual subject to a demotion under subsection (a)(2)(A) shall, beginning on the date of such demotion, receive the annual rate of pay applicable to such grade.

"(2) An individual so demoted may not be placed on administrative leave or any other category of paid leave during the period during which an appeal (if any) under this section is ongoing, and may only receive pay if the individual reports for duty. If an individual so demoted does not report for duty, such individual shall not receive pay or other benefits pursuant to subsection (e)(5).

"(c) NOTICE TO CONGRESS.—Not later than 30 days after removing or demoting an individual under subsection (a), the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives notice in writing of such removal or demotion and the reason for such removal or demotion.

"(d) PROCEDURE.—(1) The procedures under section 7513(b) of title 5 and chapter 43 of such title shall not apply to a removal or demotion under this section.

"(2)(A) Subject to subparagraph (B) and subsection (e), any removal or demotion under subsection (a) may be appealed to the Merit Systems Protection Board under section 7701 of title 5.

"(B) An appeal under subparagraph (A) of a removal or demotion may only be made if such appeal is made not later than seven days after the date of such removal or demotion.

"(e) EXPEDITED REVIEW BY ADMINISTRATIVE JUDGE.—(1) Upon receipt of an appeal under subsection (d)(2)(A), the Merit Systems Protection Board shall refer such appeal to an administrative judge pursuant to section 7701(b)(1) of title 5. The administrative judge shall expedite any such appeal under such section and, in any such case, shall issue a decision not later than 45 days after the date of the appeal.

"(2) Notwithstanding any other provision of law, including section 7703 of title 5, the decision of an administrative judge under paragraph (1) shall be final and shall not be subject to any further appeal.

"(3) In any case in which the administrative judge cannot issue a decision in accordance with the 45-day requirement under paragraph (1), the removal or demotion is final. In such a case, the Merit Systems Protection Board shall, within 14 days after the date that such removal or demotion is final, submit to Congress and the Committees on Veterans' Affairs of the Senate and House of Representatives a report that explains the reasons why a decision was not issued in accordance with such requirement.

"(4) The Merit Systems Protection Board or administrative judge may not stay any removal or demotion under this section.

"(5) During the period beginning on the date on which an individual appeals a removal from the civil service under subsection (d) and ending on the date that the administrative judge issues a final decision on such appeal, such individual may not receive any pay, awards, bonuses, incentives, allowances, differentials, student loan repayments, special payments, or benefits.

"(6) To the maximum extent practicable, the Secretary shall provide to the Merit Systems Protection Board, and to any administrative judge to whom an appeal under this section is referred, such information and assistance as may be necessary to ensure an appeal under this subsection is expedited.

"(f) WHISTLEBLOWER PROTECTION.—(1) In the case of an individual seeking corrective action (or on behalf of whom corrective action is sought) from the Office of Special Counsel based on an alleged prohibited personnel practice described in section 2302(b) of title 5, the Secretary may not remove or demote such individual under subsection (a) without the approval of the Special Counsel under section 1214(f) of title 5.

"(2) In the case of an individual who has filed a whistleblower complaint, as such term is defined in section 731 of this title, the Secretary may not remove or demote such individual under subsection (a) until the central whistleblower office under section 732(h) of this title has made a final decision with respect to the whistleblower complaint.

"(g) TERMINATION OF INVESTIGATIONS BY OFFICE OF SPECIAL COUNSEL.—Notwithstanding any other provision of law, the Special Counsel (established by section 1211 of title 5) may terminate an investigation of a prohibited personnel practice alleged by an employee or former employee of the Department after the Special Counsel provides to the employee or former employee a written statement of the reasons for the termination of the investigation. Such statement may not be admissible as evidence in any judicial or administrative proceeding without the consent of such employee or former employee.

"(h) RELATION TO TITLE 5.—The authority provided by this section is in addition to the authority provided by subchapter V of chapter 75 of title 5 and chapter 43 of such title.

"(i) DEFINITIONS.—In this section:

"(1) The term 'individual' means an individual occupying a position at the Department but does not include—

"(A) an individual, as that term is defined in section 713(g)(1); or

"(B) a political appointee.

"(2) The term 'grade' has the meaning given such term in section 7511(a) of title 5.

"(3) The term 'misconduct' includes neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

"(4) The term 'political appointee' means an individual who is—

"(A) employed in a position described under sections 5312 through 5316 of title 5 (relating to the Executive Schedule);

"(B) a limited term appointee, limited emergency appointee, or noncareer appointee in the Senior Executive Service, as defined under paragraphs (5), (6), and (7), respectively, of section 3132(a) of title 5; or

"(C) employed in a position of a confidential or policy-determining character under schedule C of subpart C of part 213 of title 5 of the Code of Federal Regulations.".

(b) CLERICAL AND CONFORMING AMENDMENTS.—

(1) CLERICAL.—The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"715. Employees: removal or demotion based on performance or misconduct.".

(2) CONFORMING.—Section 4303(f) of title 5, United States Code, is amended—

(A) by striking "or" at the end of paragraph (2);

(B) by striking the period at the end of paragraph (3) and inserting ", or"; and

(C) by adding at the end the following:

"(4) any removal or demotion under section 715 of title 38.".

SEC. 3. REQUIRED PROBATIONARY PERIOD FOR NEW EMPLOYEES OF DEPARTMENT OF VETERANS AFFAIRS.

(a) PROBATIONARY PERIOD.—

(1) IN GENERAL.—Chapter 7 of title 38, United States Code, as amended by section 2, is further amended by adding at the end the following new section:

"§ 717. Probationary period for employees

"(a) IN GENERAL.—Notwithstanding sections 3321 and 3393(d) of title 5, the appointment of a covered employee shall become final only after such employee has served a probationary period of 18 months. The Secretary may extend a probationary period under this subsection at the discretion of the Secretary.

"(b) COVERED EMPLOYEE.—In this section, the term 'covered employee'—

"(1) means any individual—

"(A) appointed to a permanent position within the competitive service at the Department; or

"(B) appointed as a career appointee (as that term is defined in section 3132(a)(4) of title 5) within the Senior Executive Service at the Department; and

"(2) does not include any individual with a probationary period prescribed by section 7403 of this title.

"(c) PERMANENT HIRES.—Upon the expiration of a covered employee's probationary period under subsection (a), the supervisor of the employee shall determine whether the appointment becomes final based on regulations prescribed for such purpose by the Secretary.".

(2) CLERICAL AND CONFORMING AMENDMENTS.—

(A) CLERICAL.—The table of sections at the beginning of such chapter, as amended by section 2, is further amended by adding at the end the following new item:

"717. Probationary period for employees.".

(B) CONFORMING.—Title 5, United States Code, is amended—

(i) in section 3321(c)—

(I) by striking "Service or" and inserting "Service,"; and

(II) by inserting at the end before the period the following: ", or any individual covered by section 717 of title 38"; and

(ii) in section 3393(d), by adding at the end after the period the following: "The preceding sentence shall not apply to any individual covered by section 717 of title 38.".

(b) APPLICATION.—Section 717 of title 38, United States Code, as added by subsection (a)(1), shall apply to any covered employee (as that term is defined in subsection (b) of such section 717, as so added) appointed after the date of the enactment of this Act.

SEC. 4. TREATMENT OF WHISTLEBLOWER COMPLAINTS IN DEPARTMENT OF VETERANS AFFAIRS.

(a) IN GENERAL.—Chapter 7 of title 38, United States Code, is further amended by adding at the end the following new subchapter:

"SUBCHAPTER II—WHISTLEBLOWER COMPLAINTS

"§ 731. Whistleblower complaint defined

"In this subchapter, the term 'whistleblower complaint' means a complaint by an employee of the Department disclosing, or assisting another employee to disclose, a potential violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety.

"§ 732. Treatment of whistleblower complaints

"(a) FILING.—(1) In addition to any other method established by law in which an employee may file a whistleblower complaint, an employee of the Department may file a whistleblower complaint in accordance with subsection (g) with a supervisor of the employee.

"(2) Except as provided by subsection (d)(1), in making a whistleblower complaint under paragraph (1), an employee shall file the initial complaint with the immediate supervisor of the employee.

"(b) NOTIFICATION.—(1) Not later than four business days after the date on which a supervisor receives a whistleblower complaint by an employee under this section, the supervisor shall notify, in writing, the employee of whether the supervisor determines that there is a reasonable likelihood that the complaint discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety. The supervisor shall retain written documentation regarding the whistleblower complaint and shall submit to the next-level supervisor and the central whistleblower office described in subsection (h) a written report on the complaint.

"(2) On a monthly basis, the supervisor shall submit to the appropriate director or other official who is superior to the supervisor a written report that includes the

number of whistleblower complaints received by the supervisor under this section during the month covered by the report, the disposition of such complaints, and any actions taken because of such complaints pursuant to subsection (c). In the case in which such a director or official carries out this paragraph, the director or official shall submit such monthly report to the supervisor of the director or official and to the central whistleblower office described in subsection (h).

"(c) POSITIVE DETERMINATION.—If a supervisor makes a positive determination under subsection (b)(1) regarding a whistleblower complaint of an employee, the supervisor shall include in the notification to the employee under such subsection the specific actions that the supervisor will take to address the complaint.

"(d) FILING COMPLAINT WITH NEXT-LEVEL SUPERVISORS.—(1) If any circumstance described in paragraph (3) is met, an employee may file a whistleblower complaint in accordance with subsection (g) with the next-level supervisor who shall treat such complaint in accordance with this section.

"(2) An employee may file a whistleblower complaint with the Secretary if the employee has filed the whistleblower complaint to each level of supervisors between the employee and the Secretary in accordance with paragraph (1).

"(3) A circumstance described in this paragraph are any of the following circumstances:

"(A) A supervisor does not make a timely determination under subsection (b)(1) regarding a whistleblower complaint.

"(B) The employee who made a whistleblower complaint determines that the supervisor did not adequately address the complaint pursuant to subsection (c).

"(C) The immediate supervisor of the employee is the basis of the whistleblower complaint.

"(e) TRANSFER OF EMPLOYEE WHO FILES WHISTLEBLOWER COMPLAINT.—If a supervisor makes a positive determination under subsection (b)(1) regarding a whistleblower complaint filed by an employee, the Secretary shall—

"(1) inform the employee of the ability to volunteer for a transfer in accordance with section 3352 of title 5; and

"(2) give preference to the employee for such a transfer in accordance with such section.

"(f) PROHIBITION ON EXEMPTION.—The Secretary may not exempt any employee of the Department from being covered by this section.

"(g) WHISTLEBLOWER COMPLAINT FORM.—(1) A whistleblower complaint filed by an employee under subsection (a) or (d) shall consist of the form described in paragraph (2) and any supporting materials or documentation the employee determines necessary.

"(2) The form described in this paragraph is a form developed by the Secretary, in consultation with the Special Counsel, that includes the following:

"(A) An explanation of the purpose of the whistleblower complaint form.

"(B) Instructions for filing a whistleblower complaint as described in this section.

"(C) An explanation that filing a whistleblower complaint under this section does not preclude the employee from any other method established by law in which an employee may file a whistleblower complaint.

"(D) A statement directing the employee to information accessible on the Internet website of the Department as described in section 735(c).

"(E) Fields for the employee to provide—

"(i) the date that the form is submitted;

"(ii) the name of the employee;

"(iii) the contact information of the employee;

"(iv) a summary of the whistleblower complaint (including the option to append supporting documents pursuant to paragraph (1)); and

"(v) proposed solutions to complaint.

"(F) Any other information or fields that the Secretary determines appropriate.

"(3) The Secretary, in consultation with the Special Counsel, shall develop the form described in paragraph (2) by not later than 60 days after the date of the enactment of this section.

"(h) CENTRAL WHISTLEBLOWER OFFICE.—(1) The Secretary shall ensure that the central whistleblower office—

"(A) is not an element of the Office of the General Counsel;

"(B) is not headed by an official who reports to the General Counsel;

"(C) does not provide, or receive from, the General Counsel any information regarding a whistleblower complaint except pursuant to an action regarding the complaint before an administrative body or court; and

"(D) does not provide advice to the General Counsel.

"(2) The central whistleblower office shall be responsible for investigating all whistleblower complaints of the Department, regardless of whether such complaints are made by or against an employee who is not a member of the Senior Executive Service.

"(3) The Secretary shall ensure that the central whistleblower office maintains a toll-free hotline to anonymously receive whistleblower complaints.

"(4) In this subsection, the term 'central whistleblower office' means the Office of Accountability Review or a successor office that is established or designated by the Secretary to investigate whistleblower complaints filed under this section or any other method established by law.

"§ 733. Adverse actions against supervisory employees who commit prohibited personnel actions relating to whistleblower complaints

"(a) IN GENERAL.—(1) In accordance with paragraph (2), the Secretary shall carry out the following adverse actions against supervisory employees whom the Secretary, an administrative judge, the Merit Systems Protection Board, the Office of Special Counsel, an adjudicating body provided under a union contract, a Federal judge, or the Inspector General of the Department determines committed a prohibited personnel action described in subsection (c):

"(A) With respect to the first offense, an adverse action that is not less than a 14-day suspension and not more than removal.

"(B) With respect to the second offense, removal.

"(2)(A) Except as provided by subparagraph (B), and notwithstanding subsections (b) and (c) of section 7513 and section 7543 of title 5, the provisions of subsections (d) and (e) of section 713 of this title shall apply with respect to an adverse action carried out under paragraph (1).

"(B) An employee who is notified of being the subject of a proposed adverse action under paragraph (1) may not be given more than five days following such notification to provide evidence to dispute such proposed adverse action. If the employee does not provide any such evidence, or if the Secretary determines that such evidence is not sufficient to reverse the determination to propose the adverse action, the Secretary shall carry out the adverse action following such five-day period.

"(b) LIMITATION ON OTHER ADVERSE ACTIONS.—With respect to a prohibited personnel action described in subsection (c), if the Secretary carries out an adverse action against a supervisory employee, the Secretary may carry out an additional adverse action under this section based on the same prohibited personnel action if the total severity of the adverse actions do not exceed the level specified in subsection (a).

"(c) PROHIBITED PERSONNEL ACTION DESCRIBED.—A prohibited personnel action described in this subsection is any of the following actions:

"(1) Taking or failing to take a personnel action in violation of section 2302 of title 5 against an employee relating to the employee—

"(A) filing a whistleblower complaint in accordance with section 732 of this title;

"(B) filing a whistleblower complaint with the Inspector General of the Department, the Special Counsel, or Congress;

"(C) providing information or participating as a witness in an investigation of a whistleblower complaint in accordance with section 732 or with the Inspector General of the Department, the Special Counsel, or Congress;

"(D) participating in an audit or investigation by the Comptroller General of the United States;

"(E) refusing to perform an action that is unlawful or prohibited by the Department; or

"(F) engaging in communications that are related to the duties of the position or are otherwise protected.

"(2) Preventing or restricting an employee from making an action described in any of subparagraphs (A) through (F) of paragraph (1).

"(3) Conducting a peer review or opening a retaliatory investigation relating to an activity of an employee that is protected by section 2302 of title 5.

"(4) Requesting a contractor to carry out an action that is prohibited by section 4705(b) or section 4712(a)(1) of title 41, as the case may be.

"§ 734. Evaluation criteria of supervisors and treatment of bonuses

"(a) EVALUATION CRITERIA.—(1) In evaluating the performance of supervisors of the Department, the Secretary shall include the criteria described in paragraph (2).

"(2) The criteria described in this subsection are the following:

"(A) Whether the supervisor treats whistleblower complaints in accordance with section 732.

"(B) Whether the appropriate deciding official, performance review board, or performance review committee determines that the supervisor was found to

have committed a prohibited personnel action described in section 733(b) by an administrative judge, the Merit Systems Protection Board, the Office of Special Counsel, an adjudicating body provided under a union contract, a Federal judge, or, in the case of a settlement of a whistleblower complaint (regardless of whether any fault was assigned under such settlement), the Secretary.

"(b) BONUSES.—(1) The Secretary may not pay to a supervisor described in subsection (a)(2)(B) an award or bonus under this title or title 5, including under chapter 45 or 53 of such title, during the one-year period beginning on the date on which the determination was made under such subsection.

"(2) Notwithstanding any other provision of law, the Secretary shall issue an order directing a supervisor described in subsection (a)(2)(B) to repay the amount of any award or bonus paid under this title or title 5, including under chapter 45 or 53 of such title, if—

"(A) such award or bonus was paid for performance during a period in which the supervisor committed a prohibited personnel action as determined pursuant to such subsection (a)(2)(B);

"(B) the Secretary determines such repayment appropriate pursuant to regulations prescribed by the Secretary to carry out this section; and

"(C) the supervisor is afforded notice and an opportunity for a hearing before making such repayment.

"§ 735. Training regarding whistleblower complaints

"(a) TRAINING.—The Secretary, in coordination with the Whistleblower Protection Ombudsman designated under section 3(d)(1)(C) of the Inspector General Act of 1978 (5 U.S.C. App.), shall annually provide to each employee of the Department training regarding whistleblower complaints, including—

"(1) an explanation of each method established by law in which an employee may file a whistleblower complaint;

"(2) an explanation of prohibited personnel actions described by section 733(c) of this title;

"(3) with respect to supervisors, how to treat whistleblower complaints in accordance with section 732 of this title;

"(4) the right of the employee to petition Congress regarding a whistleblower complaint in accordance with section 7211 of title 5;

"(5) an explanation that the employee may not be prosecuted or reprised against for disclosing information to Congress in instances where such disclosure is permitted by law, including under sections 5701, 5705, and 7732 of this title, under section 552a of title 5 (commonly referred to as the Privacy Act), under chapter 93 of title 18, and pursuant to regulations promulgated under section 264(c) of the Health Insurance Portability and Accountability Act of 1996 (Public Law 104–191);

"(6) an explanation of the language that is required to be included in all nondisclosure policies, forms, and agreements pursuant to section 115(a)(1) of the Whistleblower Protection Enhancement Act of 2012 (5 U.S.C. 2302 note); and

"(7) the right of contractors to be protected from reprisal for the disclosure of certain information under section 4705 or 4712 of title 41.

"(b) CERTIFICATION.—The Secretary shall annually provide training on merit system protection in a manner that the Special Counsel certifies as being satisfactory.

"(c) PUBLICATION.—(1) The Secretary shall publish on the Internet website of the Department, and display prominently at each facility of the Department, the rights of an employee to file a whistleblower complaint, including the information described in paragraphs (1) through (7) of subsection (a).

"(2) The Secretary shall publish on the Internet website of the Department, the whistleblower complaint form described in section 732(g)(2).

"§ 736. Reports to Congress

"(a) ANNUAL REPORTS.—The Secretary shall annually submit to the Committees on Veterans' Affairs of the House of Representatives and the Senate, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate a report that includes—

"(1) with respect to whistleblower complaints filed under section 732 during the year covered by the report—

"(A) the number of such complaints filed;

"(B) the disposition of such complaints; and

"(C) the ways in which the Secretary addressed such complaints in which a positive determination was made by a supervisor under subsection (b)(1) of such section;

"(2) the number of whistleblower complaints filed during the year covered by the report that are not included under paragraph (1), including—

"(A) the method in which such complaints were filed;
"(B) the disposition of such complaints; and
"(C) the ways in which the Secretary addressed such complaints; and
"(3) with respect to disclosures made by a contractor under section 4705 or 4712 of title 41—
"(A) the number of complaints relating to such disclosures that were investigated by the Inspector General of the Department of Veterans Affairs during the year covered by the report;
"(B) the disposition of such complaints; and
"(C) the ways in which the Secretary addressed such complaints.

"(b) NOTICE OF OFFICE OF SPECIAL COUNSEL DETERMINATIONS.—Not later than 30 days after the date on which the Secretary receives from the Special Counsel information relating to a whistleblower complaint pursuant to section 1213 of title 5, the Secretary shall notify the Committees on Veterans' Affairs of the House of Representatives and the Senate, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate of such information, including the determination made by the Special Counsel.".

(b) CONFORMING AND CLERICAL AMENDMENTS.—

(1) CONFORMING AMENDMENT.—Such chapter is further amended by inserting before section 701 the following:

"SUBCHAPTER I—GENERAL EMPLOYEE MATTERS".

(2) CLERICAL AMENDMENTS.—The table of sections at the beginning of such chapter is amended—

(A) by inserting before the item relating to section 701 the following new item:

"SUBCHAPTER I—GENERAL EMPLOYEE MATTERS";

and

(B) by adding at the end the following new items:

"SUBCHAPTER II—WHISTLEBLOWER COMPLAINTS

"731. Whistleblower complaint defined.
"732. Treatment of whistleblower complaints.
"733. Adverse actions against supervisory employees who commit prohibited personnel actions relating to whistleblower complaints.
"734. Evaluation criteria of supervisors and treatment of bonuses.
"735. Training regarding whistleblower complaints.
"736. Reports to Congress.".

SEC. 5. REFORM OF PERFORMANCE APPRAISAL SYSTEM FOR SENIOR EXECUTIVE SERVICE EMPLOYEES OF THE DEPARTMENT OF VETERANS AFFAIRS.

(a) PERFORMANCE APPRAISAL SYSTEM.—

(1) IN GENERAL.—Chapter 7 of title 38, United States Code, is further amended by inserting after section 717, as added by section 3, the following new section:

"§ 719. Senior executives: performance appraisal

"(a) PERFORMANCE APPRAISAL SYSTEM.—(1) The performance appraisal system for individuals employed in senior executive positions in the Department required by section 4312 of title 5 shall provide, in addition to the requirements of such section, for five annual summary ratings of levels of performance as follows:
"(A) One outstanding level.
"(B) One exceeds fully successful level.
"(C) One fully successful level.
"(D) One minimally satisfactory level.
"(E) One unsatisfactory level.

"(2) The following limitations apply to the rating of the performance of such individuals:
"(A) For any year, not more than 10 percent of such individuals who receive a performance rating during that year may receive the outstanding level under paragraph (1)(A).
"(B) For any year, not more than 20 percent of such individuals who receive a performance rating during that year may receive the exceeds fully successful level under paragraph (1)(B).

"(3) In evaluating the performance of an individual under the performance appraisal system, the Secretary shall take into consideration—
"(A) any complaint or report (including any pending or published report) submitted by the Inspector General of the Department, the Comptroller General of the United States, the Equal Employment Opportunity Commission, or any

other appropriate person or entity, related to any facility or program managed by the individual, as determined by the Secretary;

"(B) efforts made by the individual to maintain high levels of satisfaction and commitment among the employees supervised by the individual; and

"(C) the criteria described in section 734(a)(2) of this title.

"(b) CHANGE OF POSITION.—(1) At least once every five years, the Secretary shall reassign each individual employed in a senior executive position to a position at a different location that does not include the supervision of the same personnel or programs. The Secretary shall make such reassignments on a rolling basis based on the date on which an individual was originally assigned to a position.

"(2) The Secretary may waive the requirement under paragraph (1) for any such individual, if the Secretary submits to the Committees on Veterans' Affairs of the Senate and House of Representatives notice of the waiver and an explanation of the reasons for the waiver.

"(c) REPORT.—Not later than March 1 of each year, the Secretary shall submit to the Committees on Veterans' Affairs and Homeland Security and Governmental Affairs of the Senate and the Committees on Veterans' Affairs and Oversight and Government Reform of the House of Representatives a report on the performance appraisal system of the Department under subsection (a). Each such report shall include, for the year preceding the year during which the report is submitted, each of the following:

"(1) All documentation concerning each of the following for each individual employed in a senior executive position in the Department:

"(A) The initial performance appraisal.

"(B) The higher level review, if requested.

"(C) The recommendations of the performance review board.

"(D) The final summary review.

"(E) The number of initial performance ratings raised as a result of the recommendations of the performance review board.

"(F) The number of initial performance ratings lowered as a result of the recommendations of the performance review board.

"(G) Any adverse action taken against any such individual who receives a performance rating of less than fully successful.

"(2) The review of the Inspector General of the Department of the information described in subparagraphs (A) through (D) of paragraph (1).

"(3) A summary of the documentation provided under paragraph (1).

"(d) DEFINITION OF SENIOR EXECUTIVE POSITION.—In this section, the term 'senior executive position' has the meaning given that term in section 713(g)(3) of this title.".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter, as amended by section 3, is further amended by inserting after the item relating to section 717 the following new item:

"719. Senior executives: performance appraisal.".

(3) CONFORMING AMENDMENT.—Section 4312(b) of title 5, United States Code, is amended—

(A) in paragraph (2), by striking "and" at the end;

(B) in paragraph (3), by striking the period at the end and inserting "; and"; and

(C) by adding at the end the following:

"(4) that, in the case of the Department of Veterans Affairs, the performance appraisal system meets the requirements of section 719 of title 38.".

(b) REVIEW OF SES MANAGEMENT TRAINING.—

(1) REVIEW.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Veterans Affairs shall enter into a contract with a nongovernmental entity to review the management training program for individuals employed in senior executive positions (as such term is defined in section 713(g)(3) of title 38, United States Code) of the Department of Veterans Affairs that is being provided as of the date of the enactment of this Act. Such review shall include a comparison of the training provided by the Department of Veterans Affairs to the management training provided for senior executives of other Federal departments and agencies and to the management training provided to senior executives in the private sector. The contract shall provide that the nongovernmental entity must complete and submit to the Secretary a report containing the findings and conclusions of the review by not later than 180 days after the date on which the Secretary and the nongovernmental entity enter into the contract.

(2) REPORT TO CONGRESS.—Not later than 60 days after the date on which the Secretary receives the report under paragraph (1), the Secretary shall submit

to the Committees on Veterans' Affairs of the Senate and House of Representatives the report together with a plan for carrying out the recommendations contained in the report.

SEC. 6. REDUCTION OF BENEFITS FOR MEMBERS OF THE SENIOR EXECUTIVE SERVICE WITHIN THE DEPARTMENT OF VETERANS AFFAIRS CONVICTED OF CERTAIN CRIMES.

(a) REDUCTION OF BENEFITS.—

(1) IN GENERAL.—Chapter 7 of title 38, United States Code, is further amended by inserting after section 719, as added by section 5, the following new section:

"§ 721. Senior executives: reduction of benefits of individuals convicted of certain crimes

"(a) REDUCTION OF ANNUITY FOR REMOVED EMPLOYEE.—The Secretary shall order that the covered service of an individual removed from a senior executive position under section 713 of this title shall not be taken into account for purposes of calculating an annuity with respect to such individual under chapter 83 or chapter 84 of title 5, if—

"(1) the individual is convicted of a felony that influenced the individual's performance while employed in the senior executive position; and

"(2) before such order is made, the individual is afforded notice and an opportunity for a hearing conducted by another department or agency of the Federal Government.

"(b) REDUCTION OF ANNUITY FOR RETIRED EMPLOYEE.—(1) The Secretary may order that the covered service of an individual who is subject to a removal or transfer action under section 713 of this title but who leaves employment at the Department prior to the issuance of a final decision with respect to such action shall not be taken into account for purposes of calculating an annuity with respect to such individual under chapter 83 or chapter 84 of title 5, if—

"(A) the individual is convicted of a felony that influenced the individual's performance while employed in the senior executive position; and

"(B) before such order is made, the individual is afforded notice and an opportunity for a hearing conducted by another department or agency of the Federal Government.

"(2) The Secretary shall make such an order not later than seven days after the date of the conclusion of a hearing referred to in paragraph (1)(B) that determines that such order is lawful.

"(c) ADMINISTRATIVE REQUIREMENTS.—(1) Not later than 30 days after the Secretary issues an order under subsection (a) or (b), the Director of the Office of Personnel Management shall recalculate the annuity of the individual.

"(2) A decision regarding whether the covered service of an individual shall be taken into account for purposes of calculating an annuity under subsection (a) or (b) is final and may not be reviewed by any department or agency or any court.

"(d) LUMP-SUM ANNUITY CREDIT.—Any individual with respect to whom an annuity is reduced under subsection (a) or (b) shall be entitled to be paid so much of such individual's lump-sum credit as is attributable to the period of covered service.

"(e) DEFINITIONS.—In this section:

"(1) The term 'covered service' means, with respect to an individual subject to a removal or transfer action under section 713 of this title, the period of service beginning on the date that the Secretary determines under such section that such individual engaged in activity that gave rise to such action and ending on the date that such individual is removed from the civil service or leaves employment at the Department prior to the issuance of a final decision with respect to such action, as the case may be.

"(2) The term 'lump-sum credit' has the meaning given such term in section 8331(8) or section 8401(19) of title 5, as the case may be.

"(3) The term 'senior executive position' has the meaning given such term in section 713(g)(3) of this title.

"(4) The term 'service' has the meaning given such term in section 8331(12) or section 8401(26) of title 5, as the case may be.".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 7 of such title is amended by inserting after the item relating to section 719, as added by section 5, the following new item:

"721. Senior executives: reduction of benefits of individuals convicted of certain crimes.".

(b) APPLICATION.—Section 721 of title 38, United States Code, as added by subsection (a)(1), shall apply to any action of removal or transfer under section 713 of title 38, United States Code, commencing on or after the date of the enactment of this Act.

SEC. 7. LIMITATION ON ADMINISTRATIVE LEAVE FOR EMPLOYEES DEPARTMENT OF VETERANS AFFAIRS.

(a) LIMITATION.—

(1) IN GENERAL.—Chapter 7 of title 38, United States Code, is further amended by inserting after section 721, as added by section 6, the following new section:

"§ 723. Limitation on administrative leave

"(a) IN GENERAL.—Except as provided in subsection (b), the Secretary may not place any covered individual on administrative leave, or any other type of paid non-duty status without charge to leave, for more than a total of 14 days during any 365-day period.

"(b) WAIVER.—The Secretary may waive the limitation under subsection (a) and extend the administrative leave or other paid non-duty status without charge to leave of a covered individual placed on such leave or status under subsection (a) if the Secretary submits to the Committees on Veterans' Affairs of the Senate and House of Representatives a detailed explanation of the reasons the individual was placed on administrative leave or other paid non-duty status without charge to leave and the reasons for the extension of such leave or status. Such explanation shall include the name of the covered individual, the location where the individual is employed, and the individual's job title.

"(c) COVERED INDIVIDUAL.—In this subsection, the term 'covered individual' means an employee of the Department—

"(1) who is subject to an investigation for purposes of determining whether such individual should be subject to any disciplinary action under this title or title 5; or

"(2) against whom any disciplinary action is proposed or initiated under this title or title 5.".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter, as amended by section 6, is further amended by inserting after the item relating to section 721 the following new item:

"723. Limitation on administrative leave.".

(b) APPLICATION.—Section 723 of title 38, United States Code, as added by subsection (a)(1), shall apply with respect to any 365-day period beginning on or after the date of enactment of this Act.

SEC. 8. TREATMENT OF CONGRESSIONAL TESTIMONY BY DEPARTMENT OF VETERANS AFFAIRS EMPLOYEES AS OFFICIAL DUTY.

(a) IN GENERAL.—Chapter 7 of title 38, United States Code, is further amended by inserting after section 723, as added by section 7, the following new section:

"§ 725. Congressional testimony by employees: treatment as official duty

"(a) CONGRESSIONAL TESTIMONY.—An employee of the Department is performing official duty during the period with respect to which the employee is testifying in an official capacity in front of either House of Congress, a committee of either House of Congress, or a joint or select committee of Congress.

"(b) TRAVEL EXPENSES.—The Secretary shall provide travel expenses, including per diem in lieu of subsistence, in accordance with applicable provisions under subchapter I of chapter 57 of title 5, to any employee of the Department of Veterans Affairs performing official duty described under subsection (a).".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is further amended by inserting after the item relating to section 723, as added by section 7, the following new item:

"725. Congressional testimony by employees: treatment as official duty.".

SEC. 9. LIMITATION ON AWARDS AND BONUSES PAID TO EMPLOYEES OF DEPARTMENT OF VETERANS AFFAIRS.

Section 705 of the Veterans Access, Choice, and Accountability Act of 2014 (Public Law 113–146; 38 U.S.C. 703 note) is amended to read as follows:

"SEC. 705. LIMITATION ON AWARDS AND BONUSES PAID TO EMPLOYEES OF DEPARTMENT OF VETERANS AFFAIRS.

"The Secretary of Veterans Affairs shall ensure that the aggregate amount of awards and bonuses paid by the Secretary in a fiscal year under chapter 45 or 53 of title 5, United States Code, or any other awards or bonuses authorized under such title or title 38, United States Code, does not exceed the following amounts:

"(1) With respect to each of fiscal years 2015 through 2018, $300,000,000.

"(2) With respect to each of fiscal years 2019 through 2024, $360,000,000.".

SEC. 10. COMPTROLLER GENERAL STUDY OF DEPARTMENT TIME AND SPACE USED FOR LABOR ORGANIZATION ACTIVITY.

(a) STUDY REQUIRED.—Not later than 180 days after the date of the enactment of this Act, the Comptroller General of the United States shall conduct a study on the amount of time spent by Department of Veterans Affairs employees carrying out organizing activities relating to labor organizations and the amount of space in Department facilities used for such activities. The study shall include a cost-benefit analysis of the use of such time and space for such activities.

(b) REPORT TO CONGRESS.—Not later than 90 days after the completion of the study required under subsection (a), the Comptroller General shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the results of the study.

PURPOSE AND SUMMARY

H.R. 1994, as amended, the "VA Accountability Act of 2015," was ordered to be favorably reported to the full House on July 15, 2015. H.R. 1994, as amended, incorporates the text of H.R. 1994, introduced by Representative Jeff Miller of Florida on April 23, 2015; H.R. 2981 introduced by Representative Tim Huelskamp of Kansas on July 8, 2015; and H.R. 571, as amended. H.R. 571, as amended, includes the text of H.R. 571, introduced by Representative Jeff Miller of Florida on January 27, 2015 and H.R. 473, also introduced by Representative Jeff Miller of Florida, on January 22, 2015. Together, these provisions would improve Congressional oversight of the Department of Veterans Affairs (VA) by providing the Secretary of VA another tool to expeditiously remove poor performing employees and by improving protections provided to whistleblowers, as well as ensuring whistleblowers are considered to be on official duty for travel pay purposes when testifying before Congress. The bill would also strengthen accountability and performance measures for Senior Executive Service (SES) employees and would restrict bonus awards for supervisors who retaliate against whistleblowers.

BACKGROUND AND NEED FOR LEGISLATION

Section 2. Removal or demotion of employees based on performance or misconduct

On April 9, 2014, at a full Committee oversight hearing on patient safety, Chairman Miller stated that based on information received by the Committee, forty patients at the Phoenix VA Health Care System may have died while awaiting medical care. The Chairman also revealed that Committee staff had evidence from whistleblowers that the Phoenix VA Health Care System kept multiple sets of records to conceal prolonged wait times for appointments. The allegations of several whistleblowers, including Drs. Samuel Foote and Kathleen Mitchell from Phoenix, shed light on these issues and improper practices, which resulted in one of the largest scandals VA had ever endured. Subsequently, on August 7, 2014, in part to address the problems related to the scandal exposed by the Committee, the Veterans Access, Choice and Accountability Act ("Choice Act") was signed into law by President Obama, which, among many other provisions, gave the Secretary the authority to remove SES employees for performance or misconduct.

Following the enactment of the Choice Act, Deputy VA Secretary Sloan Gibson commented on October 6, 2014, that "VA will actively and aggressively pursue disciplinary action against those who vio-

late our values[.] There should be no doubt that when we discover evidence of wrongdoing, we will hold employees accountable."[1] Since the passage of the Choice Act, the Committee has continued to uncover many instances of mismanagement or misconduct by VA employees. Some of these instances include: allegations of manipulation of disability claims data at the Philadelphia Regional Benefit Office;[2] the continued construction failures of a new medical center in Aurora, Colorado that is now many years and hundreds of millions of dollars over budget;[3] VA's alleged $2.5 billion shortfall for FY 2015;[4] allegations of illegal use of government purchase cards resulting in the waste of billions of dollars annually;[5] and many other examples of poor performance or misconduct. Throughout all of these incidents, it has become clear that VA often does not hold individuals appropriately accountable for their actions, and in the instances that they have tried to take disciplinary action against an employee, the process is so difficult and lengthy that such action rarely occurs.

A recent study done by the U.S. Government Accountability Office (GAO) found that on average, it takes six months to a year, if not longer, to remove a permanent civil servant in the Federal Government.[6] This problem is epitomized by an example from 2014 where a VA peer-support specialist took a veteran who was an inpatient at the substance abuse clinic of the Central Alabama Veterans Health Care System to an off-campus location where he helped the veteran purchase illegal drugs and paid for the veteran to partake in other illicit behaviors.[7] It took VA over a year to even begin removal procedures for this employee.[8] Furthermore, a recent study by Vanderbilt University's Center for the Study of Democratic Institutions found that when they surveyed non-management federal workers across the government, and asked them how often under-performing, non-management employees are reassigned or dismissed, 70% said it "rarely or never happens."[9]

Senior VA officials have also stated that the process for removing employees is too difficult and lengthy. At a full Committee oversight hearing on May 13, 2015, entitled, "Assessing the Promise and Progress of the Choice Program," VA Deputy Secretary Sloan

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[1] VA Moves to Fire 4 Senior Executives Due to Scandal, CBS News, October 6, 2014. *http://www.cbsnews.com/news/va-moves-to-fire-4-senior-executives-due-to-scandal/*.

[2] After 10-month probe, report slams Phila. VA, Philly.com, April 17, 2015 *http://articles.philly.com/2015-04-17/news/61222505__1__allison-hickey-veterans-affairs-benefits-office-diana-rubens*.

[3] Aurora VA official: No line-by-line account of where $1 billion went, *The Denver Post*, July 1, 2015 *http://www.denverpost.com/news/ci__28415366/va-deputy-secretary-making-eighth-trip-denver-hospital*.

[4] VA says it may shut down hospitals to close $2.5B budget gap, *Associated Press*, July 13, 2015 *http://www.stripes.com/news/veterans/va-says-it-may-shut-down-hospitals-to-close-2-5b-budget-gap-1.357810*.

[5] VA Put Vets at Risk by Spending Billions Unlawfully, Whistleblower Says, *Government Executive*, May 14, 2015 *http://www.govexec.com/contracting/2015/05/va-put-vets-risk-spending-billions-unlawfully-whistleblower-says/112828/*.

[6] U.S. Government Accountability Office, *Federal Workforce: Improved Supervision and Better Use of Probationary Periods are Needed to Address Substandard Employee Performance http://www.gao.gov/assets/670/668339.pdf*.

[7] Report: VA employee took recovering vet to crack house, *Montgomery Advertiser*, August 16, 2014. *http://www.montgomeryadvertiser.com/story/news/local/alabama/2014/08/17/report-va-employee-took-recovering-vet-crack-house/14190573/*.

[8] A VA employee, a crack house, and a lengthy firing process, *The Washington Post*, August 29, 2014. *http://www.washingtonpost.com/blogs/federal-eye/wp/2014/08/29/a-va-employee-a-crack-house-and-a-lengthy-firing-process/*.

[9] The Fiscal Times, *Federal Employees: Can't Hire the Best, Can't Fire the Worst*, July 17, 2015. *http://www.thefiscaltimes.com/2015/07/17/Federal-Employees-Can-t-Hire-Best-Can-t-Fire-Worst*.

Gibson admitted that is was too hard to fire bad employees at VA.[10] The Committee agrees with Deputy Secretary Gibson, particularly that changes need to be made to the civil service procedures at VA to ensure true accountability for all employees while also maintaining an employee's due process rights.

Further illustrating the ongoing personnel issues within VA, is a report issued on June 27, 2014 by Robert L. Nabors, the former White House Deputy Chief of Staff,[11] after he conducted a review to examine the issues impacting access to timely care at VA medical facilities, at the request of the President. He quoted in the report that there was "a history of retaliation toward employees raising issues, and a lack of accountability across all grade levels," and that there "is a tendency to transfer problems rather than solve problems. This is part due to the difficulty of hiring and firing in the Federal government." [12] His report made it clear that the personnel issues within VA and the lack of accountability weren't just isolated to a few facilities across the country, but were instead an inherent problem within the culture of the Department as a whole. The Committee believes that this report further supports the need for change and the need for the Secretary to have the authority to remove employees who are not meeting the standard of quality care and services to veterans.

Therefore, section 2 would amend title 38, U.S.C., and create section 715, to expand the SES removal authority provided under the Choice Act to all VA employees. Under this section, employees would have seven days after VA's final decision to appeal their removal or demotion to the Merit Systems Protection Board (MSPB). An administrative judge from the MSPB would then have 45 days to complete an expedited appeal and render a final decision on the case. The outcome of this appeal would not be reviewable by any other entity or court. If the MSPB is not able to complete the appeal within 45 days, the Secretary's decision would be final, and the MSPB would have 14 days to submit to Congress a report explaining why it was unable to reach a decision on the case within this allotted timeframe.

To prevent retaliation, the bill would also protect whistleblowers by not allowing the Secretary to use this authority to fire employees who have filed a complaint with the Office of Special Counsel (OSC), or that have filed a complaint under the new whistleblower process created by section four of this bill, until such complaints are resolved and/or finalized. The Committee believes that providing these protections is critically important as whistleblowers continue to be vital to this Committee's oversight role.

Further, the Committee believes that the demotion and removal authority that would be provided by this section provides constitutionally adequate and appropriate levels of due process for employees while still providing the Secretary with yet another tool to remove any VA employee for poor performance or misconduct. This section would also give the Secretary the authority to remedy an-

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[10] VA to Congress: It's Still Too Hard to Fire Bad Employees, Defense One, May 14, 2015 *http://www.defenseone.com/management/2015/05/va-congress-its-still-too-hard-fire-bad-employees/112831/*.

[11] Mr. Nabors currently serves as Chief of Staff of the VA.

[12] Rob Nabors Review of the Department of Veterans Affairs to assess issues impacting access to timely care at VA medical facilities, June 27, 2014. *http://blogs.rollcall.com/white-house/wp-content/uploads/sites/16/2014/06/ROBNABORSVAREVIEW.pdf*.

other negative observation made in Nabors' report, which stated that "the Department must take swift and appropriate accountability actions. There must be recognition of how true accountability works."

Section 3. Required probationary period for new employees of Department of Veteran Affairs

The federal hiring process is very complex and can take several months. The probationary period for Federal employees is intended to be the last step in the employee screening process. When an individual enters into competitive service at VA, and across the federal government, he or she is put on a probationary period at the beginning of their employment for one year.[13] Physicians at VA are considered a part of the excepted service and are required to undergo a two-year probationary period. An employee's appeal rights are greatly diminished during their probationary period, as it is meant to be a period of time during which supervisors can fully assess the employee's capabilities and appropriateness for the position before that employee becomes a full-time employee of the agency. According to a MSPB report entitled, "*A Call to Action: Improving First-Level Supervision of Federal Employees*," individuals need to demonstrate during their probationary period "why it is in the public interest for the government to finalize an appointment to the civil service."[14] The C ommittee believes that this probationary period is vital to ensuring that VA is hiring only the most well-equipped employees. Many reports have illustrated this as an issue across the federal government, as supervisors do not use this time to thoroughly review an individual's performance or assess an employee's potential future success at the Department.

The Committee also believes that the current standard of a one year probationary period is not long enough to accurately track and review a new employee's performance and outcomes. According to a February 2015 GAO report, the supervisor often "has not had enough time to observe the individual's performance in all critical areas of the job."[15] The Committee believes that this small window to fully assess a new employee's potential can lead to underperformance in the future which can affect services provided to veterans. Training for accurate claims processing and customer service to veterans can take two to three years, and attempting to accurately measure an employee's ability within one annual performance assessment cycle is nearly unobtainable. The GAO report also found that many agencies have utilized extended probationary periods for their employees beyond the OPM-required year to address these issues and to enhance the quality of their workforce. Similarly, the Committee believes that VA needs to have a longer probationary period to ensure only highly qualified and motivated employees continue within the Department, while ensuring it utilizes

[13] Probationary periods are required by statute in section 3321(a)(1) of title 5 U.S.C. By regulation, OPM has provided for a one year probationary period in 5 C.F.R. § 315.801(a).

[14] U.S. Merit Systems Protection Board, *A Call to Action: Improving First-Level Supervision of Federal Employees* (Washington, D.C.: May 2010).

[15] U.S. Government Accountability Office, *Federal Workforce: Improved Supervision and Better Use of Probationary Periods are Needed to Address Substandard Employee Performance http://www.gao.gov/assets/670/668339.pdf.*

this extended time to properly manage performance outcomes and the employee's potential within VA.

In addition to the need for a longer probationary period, it is essential that VA supervisors are aware of when an employee's probationary period is about to conclude, and when they will then be considered a full-time employee, therefore accruing additional protections and appeal rights. The GAO report discussed the need for, and some agencies have already instituted, an employee's supervisor to make an affirmative decision to retain the employee beyond their probationary period. The Partnership for Public Service, a smart government, nonpartisan think-tank, articulated the need for a supervisor's affirmative decision on an employee's continued employment to the Committee in numerous meetings. Additionally, they provided support for this need in their testimony before the Senate Veterans' Affairs Committee by stating, "As an employee's probationary period is coming to a close, we believe managers should be required to make an affirmative decision as to whether the individual has demonstrated successful performance and should continue on past the probationary period."[16] Due to the fact that it is much more difficult to remove an underperforming employee once they have completed their probationary period, the Committee believes that it is important that a supervisor perform a final review at the end of this period, and make a decision on the individual's performance and capability for continued employment within VA.

Section 3, therefore, would amend chapter 7 of title 38, U.S.C., to extend the probationary period for all new competitive service employees within VA to 18 months, and would also allow the Secretary to extend this period beyond 18 months when he/she sees fit. This section would also require an employee's supervisor to make an affirmative decision at the end of the employee's probationary period as to whether the individual's appointment within VA should become permanent. The Committee believes this will further hold the Department's employees and supervisors accountable, as well as ensure a more qualified and highly performing workforce.

Section 4. Treatment of whistleblower complaints in the Department of Veterans Affairs

Essential to the Committee's oversight efforts is information it receives from veterans and VA employees who bring problems and concerns regarding the Department to the Committee's attention. Unfortunately, in conjunction with anonymous or public allegations of wrongdoing, many conscientious VA employees report retaliation at the hands of supervisors, senior managers, and other VA employees. This retaliation discourages employees from stepping forward to bring problems and concerns to light, leading to a pernicious and toxic environment where problems are disguised and not fully addressed. As a result, veterans suffer. Employees are guaranteed the right to communicate with Congress, and it is against the law to deny or interfere with their rights to furnish in-

[16] Testimony of Max Stier, President and CEO Partnership for Public Service, during a hearing entitled, "Pending Healthcare and Benefits Legislation," before the Senate Committee on Veterans' Affairs, June 24, 2015. *http://www.veterans.senate.gov/imo/media/doc/PPS%20Stier%20Testimony%206.24.15.pdf.*

formation to Congress.[17] The Committee believes that it is essential to provide real protections to these employees who step forward and attempt to right wrongs and improve the manner in which VA provides benefits and services to veterans.

According to data provided by OSC prior to an April 2015 Subcommittee on Oversight and Investigations hearing, VA employees have filed the largest number of complaints received by the OSC compared to any other executive branch agency. In fact, OSC has approximately 150 more open cases than the Department of Defense, which has nearly twice as many civilian employees as VA. Therefore, the Committee believes that VA employees need whistleblower protections in addition to federal whistleblower protections currently in place to address this epidemic of complaints. These additional protections are contained in section four of this legislation.

First, section four would provide employees an additional method to report complaints and provide supervisors with the opportunity to address possible problems at the lowest level. The new process does not preclude other established methods or processes for filing complaints. The Committee has found that many of the complaints it receives from whistleblowers are routinely ignored or inadequately addressed by supervisors. In too many instances, supervisors have retaliated against employees for filing complaints. Section four would provide a process to ensure, as far as practicable, that supervisors respond to issues raised by employees. By mandating a written record of each step in the process and granting supervisors a fixed period within which to address complaints, the Committee seeks to balance the interests of whistleblowers and complaint resolution with the day-to-day operation of the Department. Section four would also provide employees with the ability to take their complaints to their immediate supervisor and report to higher-level supervisors if needed. Section four would require supervisors to provide written responses and brief reports to ensure that complaints are properly noted, recorded, and addressed. Section four would also require VA to provide annual training on complaint reporting and impermissible retaliatory actions to all employees and supervisors.

Second, this section would establish the VA's Office of Accountability Review, or a successor office, as the central whistleblower office. The central whistleblower office must remain separate from VA's Office of General Counsel to prevent conflicts of interest and is responsible for investigating all VA whistleblower complaints. The central whistleblower office must also maintain a toll-free anonymous hotline for reporting whistleblower complaints. VA is required to notify all employees of their rights as whistleblowers by posting the hotline number and website for reporting complaints in every VA facility and on the VA website.

Third, this section would hold supervisors accountable for retaliation against employees by mandating suspension, termination, and bonus prohibition and recoupment for supervisors found to have retaliated against employees. This is in response to Committee hearings that have confirmed retaliation against VA whistleblowers by supervisors, and in some instances by coworkers, where no adverse agency action was taken against the retaliating individuals. This

[17] 5 U.S.C. § 7211.

has contributed to a culture that VA Secretary McDonald has vowed to change,[18] yet VA cannot or has not provided evidence of any VA supervisors who have been terminated for whistleblower retaliation, despite repeated requests made by the Committee for such evidence.

Fourth, section four would require VA to provide annual reports to Congress on the status and disposition of whistleblower complaints and to notify Congress within thirty days of receiving a letter from the OSC. The Committee believes this would improve the flow of information between the Department and Congress and allow congressional inquiries as to the status and disposition of cases in order to increase transparency and ensure that whistleblower complaints are taken seriously by the Department.

Finally, the provisions in this section seek to strike the proper balance between protecting legitimate whistleblowers from retaliation and deterring poor-performing employees from falsely asserting whistleblower status to avoid appropriate disciplinary and adverse actions.

Section 5. Reform of performance appraisal system for Senior Executive Service employees of the Department of Veterans Affairs

VA annually uses performance evaluation forms, known as "Senior Executive Performance Agreements," to track SES employees' performance, and determines bonuses based on the outcomes of these evaluations. Performance evaluations go through several stages before reaching the Secretary for signature, with opportunities for the employee to review the rating official's and performance review board's comments. VA currently has five rating levels, ranging from "unsatisfactory" to "outstanding." Reviewing officials are required to quantify various outcomes and elements of an employee's work performance for the prior year and summarize the decision to place an employee in one of the five levels. Executives are only eligible for performance awards if they receive one of the top two rating levels.

Following the patient access scandal, the Committee began a thorough review of Performance Agreements for each SES employee at VA. For fiscal years 2010 through 2013, not a single executive had been placed in a level lower than one of the top three levels and most were placed in the top two levels, thereby making them eligible for a performance award. Management failures over the past year have convinced the Committee that this lack of distribution across all performance levels is evidence that the performance evaluation system within VA does not reflect reality and that the Department is unable to objectively and fairly examine its senior management on their merits. Time and time again VA senior managers receive glowing assessments and substantial performance awards, while these same managers have overseen systemic failures and performance that, when looked at objectively, could only be termed as unsatisfactory.

For example, the VA Office of the Inspector General (OIG) issued a report following the patient access scandal that found that many of the 93 medical facilities it investigated had used various "wait

[18] See, e.g. Veterans Affairs Chief Calls Culture Change Key to Improving System's Health Care, *New York Times*, November 6, 2014. *http://www.nytimes.com/2014/11/07/us/politics/veterans-affairs-chief-calls-culture-change-key-to-improving-systems-health-care.html.*

time manipulations."[19] Yet those senior executives' performance was classified as "exceed[ing] fully successful" or "outstanding." It is clear to the Committee that such performance should be classified as neither, and that the performance measurement system needs to reflect the normal variation in performance among large groups of employees.

Additionally, the SES was intended to be a mobile workforce, capable of assignments across the entire federal government.[20] However, in practice, this mobility has not been realized with many VA SES employees remaining, not only within VA, but in the same location and position for significant portions of their careers. The Committee believes that not only is this detrimental to VA, as best practices and ideas at one location are not being spread throughout the agency, but it is also detrimental to the professional growth of the employee.

Therefore, section 5 of H.R. 1994, as amended, would amend chapter 7 of title 38, U.S.C., to require the Secretary to reassign SES employees at least once in every five year period. Reassignment would occur on a rolling basis to prevent a mass movement of all SES employees at the same time. Additionally, this section would limit to ten percent the number of VA SES employees that could be placed in the top performance tier and limit the second performance tier to twenty percent. While it is the ultimate goal that every VA senior executive be capable to perform at the highest level, the Committee believes that limiting the number of executives that could be ranked in the top two levels, and hence qualify for performance awards, is necessary in order to force VA to take a hard and thorough look at the performance of its senior employees and the effectiveness of its performance evaluation system.

Section 5 would also require the Secretary to take into account any OIG investigations or Equal Employment Opportunity (EEO) complaints regarding a senior executive when evaluating that employee, and would require the Secretary to evaluate the executive's engagement with subordinates on performance improvement. It is important for the Secretary to get a full and accurate picture of the effectiveness of senior managers, to include any negative factors of their performance over the prior year. This section would also require the Secretary to contract with an outside non-governmental entity to review how well VA's senior managers are being trained and to make recommendations on ways to strengthen its senior management's performance for the future. The Committee believes that requiring the Secretary to accurately rank VA's leaders and managers would encourage a climate of greater accountability, while also producing positive outcomes for veterans and the rest of VA's employees.

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[19] Department of Veterans Affairs Office of Inspector General Report, "Veterans Health Administration: Review of Alleged Patient Deaths, Patient Wait Times, and Scheduling Practices at the Phoenix VA Health Care System," August 24, 2014. *http://www.va.gov/oig/pubs/VAOIG-14-02603-267.pdf*

[20] The Senior Executive Service: Background and Option for Reform, The Congressional Research Service, September 6, 2012 *https://www.fas.org/sgp/crs/misc/R41801.pdf.*

Section 6. Reduction of benefits for members of the Senior Executive Service within the Department of Veterans Affairs convicted of certain crimes

As a result of the wait list scandal referenced throughout this report, new focus was placed on holding SES employees accountable. Following passage of the Choice Act on August 7, 2014, VA subsequently implemented a five-day waiting period prior to removal for senior executives to respond to their proposed removal.[21] As of April 9, 2015, exactly one year since the Committee's public disclosure of the allegations concerning the Phoenix VA, the Department had removed only six SES employees. Of these six, two retired in lieu of removal with full benefits and pensions, and none were successfully removed for manipulation of data concerning patient wait times. One of these six employees was the Director of the Carl Vinson VA Medical Center (VAMC) in Georgia, where an investigation revealed that employees admitted to falsifying wait times and hiding long patient wait times.[22] The second manager who retired in lieu of removal was the Veterans Health Administration's (VHA) Deputy Chief Procurement officer, who was the subject of an OIG report containing allegations of preferential treatment toward particular companies bidding for VA contracts and misusing her position and VA resources.[23]

The Committee believes that VA's-creation of the five-day pre-removal waiting period, which may often last for a much longer period of time, can enable an SES employee to elude punishment and an adverse record of conduct on the employee's employment file. The Committee believes senior employees identified for removal due to misconduct or performance should not be able to retire or resign without any consequence. Once employees retire, current law does not permit retroactive actions against retirement pensions and benefits except in rare and the most extreme circumstances.

In 1954, Congress enacted what is commonly known as the "Hiss Act," which prohibited the distribution of any federal retirement pension to federal government employees, as well as Members of Congress, who were convicted of offenses "relating to disloyalty, the national defense and national security, conflicts of interest, bribery and graft, or for federal offenses relating generally to the exercise of one's 'authority, influence, power, or privileges as an officer or employee of the Government.'"[24] In 1961, Congress amended the statute to narrow this authority, so that a federal employee's pension could only be reduced for more serious offenses that could harm the protection of the United States such as treason and acts of terrorism.[25] While the Committee understands the congressional

[21] The VA testified that such a pre-termination waiting period was necessary in order to meet due process concerns relating to federal employment and the Supreme Court decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) and its progeny. See "Assessing the Implementation of the Veterans Access, Choice, and Accountability Act of 2014" hearing of the Committee on Veterans' Affairs, U.S. House of Representatives, November 13, 2014.

[22] See, e.g. VA Manipulated Vets' Appointment Data, Audit finds, *USA Today,* July 30, 2014 *http://www.usatoday.com/story/news/usanow/2014/07/29/va-veterans-healthcare-delay-fraud/13321571/*.

[23] Review of Allegations Regarding the Technical Acquisition Center's Award of Sole-source Contracts to Tridec for the Virtual Office of Acquisition, VAOIG, December 8, 2014. *http://www.va.gov/oig/pubs/VAOIG-12-02387-59.pdf*.

[24] Congressional Research Service Report No. 96–530, Sept. 12, 2013, page 1, *https://www.fas.org/sgp/crs/misc/96-530.pdf* (*citing* P.L. 83–769, 68 Stat. 1142 (Sept. 1, 1954), see now 5 U.S.C. §§ 8311 et seq).

[25] P.L. 87–299, 75 Stat. 640 (Sept. 26, 1961), see now 5 U.S.C. § 8312.

intent behind setting such a high bar for recouping an employee's pension, the Committee believes the VA patient access scandal and VA's demonstrated inability to hold senior management accountable warrants a change in current civil service laws to ensure that VA employees do not personally benefit from felonious activity.

Therefore, this section would amend chapter 7 of title 38, U.S.C., to allow the Secretary to reduce the retirement pay for an SES employee, or a title 38 equivalent, upon conviction of a felony that had an effect upon the purported work performance of that employee. The Secretary would have the authority to reduce the accrued years of credible service counted towards an employee's pension by the number of years in which the employee was found to have committed acts leading to the felony conviction. Any contributions made by that employee toward his or her pension during this period would be returned to the employee in a lump sum. This section would not, however, allow the Secretary to reduce any accrued Federal health benefits, and the employee would have the right to have an appeal of the Secretary's decision heard by another department or federal agency. The Committee believes that this change would still leave most protections afforded to senior executives intact by targeting only instances of felonies influencing work performance.

Section 7. Limitation on administrative leave for employees of the Department of Veterans Affairs

Prior to the expedited removal authority provided to the Secretary in the Choice Act for SES employees, and prior to H.R. 1994, as amended, to expand this removal authority to all VA employees, the Secretary (along with the rest of the federal government) was required to follow sections 75 and 43 of title 5, U.S.C., and other Office of Personnel Management guidelines, to remove any employee of the Department. These requirements led to a process that takes, on average, six months to a year, or more, to remove an employee.[26] The Committee has found that in some instances, perhaps in response to the length of the process, VA often relies on placing employees on extended paid administrative leave instead of initiating personnel actions or beginning the removal process. The Committee has uncovered several cases of employees being put on paid administrative leave for a year or more during investigations. For instance, Ms. Sharon Helman, the former director of the Phoenix VA Health Care System, who was at the center of the VA patient access scandal, was placed on paid administrative leave for more than six months before she was removed under the removal authority provided by the Choice Act. In fact, two other employees from the Phoenix VA have been on paid administrative leave since April 2014. There were also instances of a VA employee taking a veteran who was a recovering drug addict to a location to purchase illegal drugs (mentioned above), and an employee inappropriately spending over $30,000 of government money as well as engaging in sexually illicit conversations on government mobile devices. Both of these employees were also placed on paid administrative leave for extended periods of time.

[26] Government Accountability Office Report, "Federal Workforce: Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance," 2015. *http://gao.gov/assets/670/668339.pdf.*

Committee staff has been told in briefings with VA that they are often unwilling to place an employee on unpaid administrative leave while that employee is under investigation due to the fact that placing an employee on unpaid administrative leave for longer than 14 days is considered to be an adverse personnel action, affording the employee more leeway during an appeal to the MSPB. While paid administrative leave can be a useful tool when dealing with certain personnel issues or during the process of removing an employee from the workplace while an investigation is underway, it is clear that VA uses this authority instead as the preferred alternative to making necessary personnel decisions in an expedited manner.

Section 7 would amend chapter 7 of title 38, U.S.C., by mandating that the Secretary may not place any VA employee on paid administrative leave, or any other type of a paid non-duty status, for longer than 14 days during any 365 day period. The Secretary would have the ability to waive this authority, but would have to submit to Congress a detailed explanation of the reason for granting the extension. VA's unwillingness to use the current tools available to the agency in managing its workforce and make efficient decisions concerning employment actions, has led to long, and often unfounded, paid administrative leave times. This hinders VA's mission, is detrimental to taxpayers, and is unfair to employees. The Committee believes that this section is vital to changing the culture at VA and instilling greater accountability and transparency within the agency.

Section 8. Treatment of congressional testimony by Department of Veterans Affairs employees as official duty

Currently, when whistleblowers from the Department testify before Congress, they must use personal leave time and pay out of their own pocket for travel, hotel, and other related costs. Additionally, if an employee tells his or her supervisor that he or she will be testifying as a whistleblower, that opens the door to potential retaliation or attempts to stop the employee from testifying. Conversely, if VA employees testify on behalf of the Department, they are considered to be on work-related travel, so VA pays for these expenses and provides these employees with a per diem. Unlike the whistleblower, this VA employee is not required to take personal vacation time.

Section 8 would amend chapter 7 of title 38, U.S.C., to designate all VA employees who testify before Congress, in whatever capacity, as being on official duty. This change would ensure that all employees would have their travel expenses paid by the Department, whether they are testifying on behalf of VA or whether they are testifying as a whistleblower regarding problems they have encountered in their official employment capacity.

Section 9. Limitation on awards and bonuses paid to employees of the Department of Veterans Affairs

Documents provided to the Committee have shown that VA had been annually paying out approximately $400 million in performance bonuses to employees for several years. Committee investigations and a Government Accountability Office report found monetary incentives did not necessarily result in higher performance

outcomes, and many providers who received performance awards had open personnel actions against them.[27] This has led the Committee to conclude that VA does not correctly utilize performance awards that are intended for exceptional performance, further diminishing accountability within VA.

Section 705 of the Choice Act limited the aggregate amount of awards and bonuses paid to VA employees each fiscal year to no more than $360,000,000. Section 9 would amend the Choice Act to limit the amount VA can pay in bonuses for fiscal years 2015 through 2018 to $300,000,000 annually, and for fiscal years 2019 through 2024, to $360,000,000 annually.

Section 10. Comptroller General study of Department time and space used for labor organizations

VA currently has five Master Collective Bargaining Agreements with labor unions, and the Department has additional agreements to these contracts at the local level as well. It is not uncommon for most medical centers and regional offices to have at least one employee who spends 100% of their time on union activities even if there is not a current personnel issue or grievance between management and an employee represented by the union. In many cases, VA also provides office space within its facilities, office furniture, and computers and copier equipment to the unions. As the Committee examined union activities within VA more, it was clear that there has not be any real studies done on the Department's labor relations office or the overall value that these expenditures provide to VA and most importantly the veterans.

The Committee believes it is important to review VA's relationship with the unions with which they have bargaining agreements, while also doing a thorough overview of how these union agreements positively or negatively affect the daily functions and mission of the Department. Section 10 would require the Comptroller General of the United States to conduct a study on the amount of time VA employees spend involved in labor union activities. The study would also require them to do a cost-benefit analysis of the use of VA time and space spent on these activities. The study would be required to begin no later than 180 days after enactment, and GAO would be required to provide the results of the study to the House and Senate Committees on Veterans' Affairs. The Committee wants to ensure there is no predisposition as to the results of the review and would expect that this study be completed in an impartial way to provide VA and stakeholders with a true picture of union activity across the Department.

HEARINGS

On March 19, 2015, the Subcommittee on Oversight and Investigations conducted a legislative hearing on various bills introduced during the 114th Congress, including H.R. 571 (from which section 4 of H.R. 1994, as amended, is derived). The following witnesses testified:

[27] Government Accountability Office Report, "VA Health Care: Actions Needed to Improve Administration of the Provider Performance Pay and Award Systems," July 2013. *http://gao.gov/assets/660/656185.pdf.*

The Honorable Jeff Miller, U.S. House of Representatives, 1st District, Florida; Ms. Meghan Flanz, Director, Office of Accountability Review, U.S. Department of Veterans Affairs accompanied by Dr. Michael Icardi, National Director of Pathology and Laboratory Medicine Services, Veterans Health Administration, U.S. Department of Veterans Affairs, Mr. Stanley Lowe, Deputy Assistant Secretary for Information Security and Chief Information Security Officer, U.S. Department of Veteran Affairs, Mr. Dennis Milsten, CCM, Associate Executive Director, Office of Operations, Office of Construction and Facilities Management, U.S. Department of Veterans Affairs; Ms. Diane Zumatto, National Legislative Director, AMVETS; Mr. Frank Wilton, Chief Executive Officer, American Association of Tissue Banks; and Mr. Daimon Geopfert, National Leader, Security and Privacy Consulting, McGladrey, LLP.

A statement for the record was submitted by the following:

The American Legion.

On March 24, 2015, the Subcommittee on Economic Opportunity conducted a legislative hearing on various bills introduced during the 114th Congress, including H.R. 473 (from which sections 5, 6, and 7 of H.R. 1994, as amended, are derived). The following witnesses testified:

The Honorable Jeff Miller, U.S. House of Representatives, 1st District, Florida; The Honorable Patrick Murphy, U.S. House of Representatives, 18th District, Florida; Mr. Aleks Morosky, Deputy Director, National Legislative Service, Veterans of Foreign Wars of the United States; Mr. Christopher Neiweem, Legislative Associate, Iraq and Afghanistan Veterans of America; Mr. Steve Gonzalez, Assistant Director, National Veteran Employment & Education Division, The American Legion; Dr. Joseph W. Wescott, President, National Association of State Approving Agencies; MG Robert M. Worley II USAF (Ret.), Director, Education Service, Veterans Benefit Administration, U.S. Department of Veterans Affairs accompanied by Mr. Tom Leney, Executive Director, Small and Veteran Business Programs, U.S. Department of Veterans Affairs Ms. Kimberly McLeod, Deputy Assistant General Counsel, and Mr. John Brizzi, Deputy Assistant General Counsel, U.S. Department of Veterans Affairs; and Ms. Teresa W. Gerton, Deputy Assistant Secretary, Veterans' Employment and Training Service, U.S. Department of Labor.

Statements for the Record were submitted by the following:

U.S. Department of Defense; School Advocates for Veterans' Education and Success; Paralyzed Veterans of America; Easter Seals, Inc.; and National Association of Veterans' Program Administrators.

On June 2, 2015, the Subcommittee on Economic Opportunity conducted a legislative hearing on various bills introduced during the 114th Congress, including H.R. 1994 (from which sections 2, 3, and 9 of H.R. 1994, as amended, are derived). The following witnesses testified:

The Honorable Jeff Miller, U.S. House of Representatives, 1st District of Florida; The Honorable Bill Flores, U.S. House of Representatives, 17th District of Texas; The Honorable Paul Cook, U.S. House of Representatives, 8th District of California; The Honorable Sean Patrick Maloney, U.S. House of Representatives, 18th District of New York; Mr. Paul R. Varela, Assistant National Legislative

Director, Disabled American Veterans; Mr. Brendon Gehrke, Senior Legislative Associate of the National Legislative Service, Veterans of Foreign Wars of the United States; Mr. Steve Gonzalez, Assistant Director of the Veterans Employment and Education Division, The American Legion; Mr. David Borer, General Counsel, American Federation of Government Employees, AFL–CIO; Mr. Christopher Neiweem, Legislative Associate, Iraq and Afghanistan Veterans of America; Mr. Rick Weidman, Executive Director of Government Affairs, Vietnam Veterans of America; Mr. Curtis L. Coy, Deputy Under Secretary for Economic Opportunity of the Veterans Benefits Administration, U.S. Department of Veterans Affairs who was accompanied by Ms. Cathy Mitrano, Deputy Assistant Secretary for the Office of Resource Management of the Human Resources and Administration, U.S. Department of Veterans Affairs; Ms. Teresa W. Gerton, Acting Assistant Secretary of the Veterans' Employment and Training Service, U.S. Department of Labor; and Dr. Susan S. Kelly, Director of the Transition to Veterans Program Office at the Office of the Under Secretary of Defense for Personnel and Readiness, U.S. Department of Defense.

A statement for the record was submitted by the following:

Paralyzed Veterans of America.

SUBCOMMITTEE CONSIDERATION

On April 16, 2015, the Subcommittee on Economic Opportunity met in an open markup session, a quorum being present, and favorably forwarded H.R. 473, as amended, to the full Committee. During consideration of H.R. 473, the following amendment was considered and agreed to by voice vote:

An amendment in the nature of a substitute offered by Mr. Wenstrup of Ohio, which made minor changes to the pension rescission in section 2 of H.R. 473 to better address VA's legal and procedural concerns, adjusted section 3(a) of H.R. 473 to ensure that movement of SES employees was done on a rolling basis, and added a new requirement that when VA is evaluating an SES employee's performance measures, they must also take into account that individual's ability to engage with his/her employees.

On April 21, 2015, the Subcommittee on Oversight and Investigations met in an open markup session, a quorum being present, and favorably forwarded H.R. 571, as amended, to the full Committee. During consideration of the bill, the following amendment was considered and agreed to by voice vote:

An amendment in the nature of a substitute offered by Mr. Coffman of Colorado, which would require that VA's central whistleblower office be entirely separate from its Office of General Counsel, removed the issuance of fees to recoup the cost to the government for supervisor retaliation, and other technical changes to ensure proper application of the bill by VA.

On June 25, 2015, the Subcommittee on Economic Opportunity met in an open markup session, a quorum being present, and favorably forwarded H.R. 1994, as amended, to the full Committee. During consideration of the bill, the following amendments were considered:

An amendment in the nature of a substitute offered by Mr. Wenstrup of Ohio, which made minor changes to the whistleblower protection section of the bill which gave the Office of Special Coun-

sel additional flexibility to quickly adjudicate whistleblower claims made by VA employees, was agreed to by a record vote of 5–4.

An amendment to the amendment in the nature of a substitute offered by Miss Rice of New York to shield whistleblowers and employees of the department who are veterans from the removal procedure was rejected by a record vote of 4–5.

A substitute amendment to the amendment in the nature of a substitute offered by Mr. Takano of California to provide the Secretary with the authority to immediately suspend without pay any employee whose performance was a threat to health or safety was rejected by record vote, 4–5.

COMMITTEE CONSIDERATION

On May 21, 2015, the full Committee met in an open markup session, a quorum being present, and ordered H.R. 571, as amended, reported favorably to the House of Representatives. During consideration of the bill, the following amendment was considered and agreed to by voice vote:

An amendment in the nature of a substitute by Chairman Jeff Miller of Florida, which, in addition to incorporating provisions of H.R. 473, added to the original language of H.R. 571, as amended, provisions which would require the Secretary to create a whistleblower complaint form for use in filing complaints, allow increased time for supervisors to respond with solutions to complaints, and ensure all appropriate complaint-related information and materials are easily accessible to all employees.

On July 15, 2015, the full Committee met in an open markup session, a quorum being present, and ordered H.R. 1994, as amended, reported favorably to the House of Representatives. During consideration of the bill, the following amendments were considered:

An Amendment in the Nature of a Substitute offered by Chairman Jeff Miller of Florida, which incorporated provisions of H.R. 571, as amended, which was reported to the House of Representatives on May 21, 2015. The amendment also adjusted the section on administrative leave to apply to all VA employees and required that the Secretary may not use the new authority that would be provided by section two of the amendment if the employee had made a whistleblower complaint, was agreed to by record vote, 14–10.

An amendment to the Amendment in the Nature of a Substitute was offered by Mr. Huelskamp of Kansas, which incorporated provisions of H.R. 2981 to authorize official duty status for all employees of the department who testify before Congress. This amendment to the Amendment in the Nature of a Substitute was agreed to by voice vote.

A substitute amendment to the amendment in the nature of a substitute was offered by Mr. Takano of California based on H.R. 2999 was rejected by a record vote of 10–14.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the recorded votes on the motion to report the legislation and amendments thereto. At the full

Committee markup of the bill on July 15, 2015 three recorded votes were taken:

An Amendment in the Nature of a Substitute to H.R. 1994, as amended, offered by Chairman Jeff Miller of Florida was agreed to by a record vote of 14 yeas and 10 nays. The names of the Members who voted for and against are as follows:

Name	Yea	Nay	Present
Mr. Miller	X		
Mr. Lamborn	X		
Mr. Bilirakis	X		
Mr. Roe	X		
Mr. Benishek	X		
Mr. Huelskamp	X		
Mr. Coffman	X		
Mr. Wenstrup	X		
Mrs. Walorski	X		
Mr. Abraham	X		
Mr. Zeldin	X		
Mr. Costello	X		
Mrs. Radewagen	X		
Mr. Bost	X		
Ms. Brown		X	
Mr. Takano		X	
Ms. Brownley		X	
Ms. Titus		X	
Mr. Ruiz		X	
Ms. Kuster		X	
Mr. O'Rourke		X	
Miss Rice		X	
Mr. Walz		X	
Mr. McNerney		X	
Total	14	10	

A substitute to the Amendment in the Nature of a Substitute to H.R. 1994, as amended offered by Mr. Takano of California was not agreed to by a record vote of 10 yeas and 14 nays. The names of the Members who voted for and against are as follows:

Name	Yea	Nay	Present
Mr. Miller		X	
Mr. Lamborn		X	
Mr. Bilirakis		X	
Mr. Roe		X	
Mr. Benishek		X	
Mr. Huelskamp		X	
Mr. Coffman		X	
Mr. Wenstrup		X	
Mrs. Walorski		X	
Mr. Abraham		X	
Mr. Zeldin		X	
Mr. Costello		X	
Mrs. Radewagen		X	
Mr. Bost		X	
Ms. Brown	X		
Mr. Takano	X		
Ms. Brownley	X		
Ms. Titus	X		
Mr. Ruiz	X		
Ms. Kuster	X		
Mr. O'Rourke	X		
Miss Rice	X		
Mr. Walz	X		
Mr. McNerney	X		

Name	Yea	Nay	Present
Total	10	14	

H.R. 1994, as amended, was agreed to by a record vote of 14 yeas and 10 nays. The names of the Members who voted for and against are as follows:

Name	Yea	Nay	Present
Mr. Miller		X	
Mr. Lamborn		X	
Mr. Bilirakis		X	
Mr. Roe		X	
Mr. Benishek		X	
Mr. Huelskamp		X	
Mr. Coffman		X	
Mr. Wenstrup		X	
Mrs. Walorski		X	
Mr. Abraham		X	
Mr. Zeldin		X	
Mr. Costello		X	
Mrs. Radewagen		X	
Mr. Bost		X	
Ms. Brown	X		
Mr. Takano	X		
Ms. Brownley	X		
Ms. Titus	X		
Mr. Ruiz	X		
Ms. Kuster	X		
Mr. O'Rourke	X		
Miss Rice	X		
Mr. Walz	X		
Mr. McNerney	X		
Total	10	14	

A motion by Mr. Lamborn of Colorado to report H.R. 1994, as amended, favorably to the House of Representatives was agreed to by voice vote.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

Statement of General Performance Goals and Objectives

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report.

New Budget Authority, Entitlement Authority, and Tax Expenditures

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

EARMARKS AND TAX AND TARIFF BENEFITS

H.R. 1994, as amended, does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI of the Rules of the House of Representatives.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate on H.R. 1994, as amended, prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate for H.R. 1994, as amended, provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 20, 2015.

Hon. JEFF MILLER,
Chairman, Committee on Veterans' Affairs,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1994, the VA Accountability Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CB0 staff contact is Dwayne M. Wright.

Sincerely,

ROBERT A. SUNSHINE
(For Keith Hall, Director).

Enclosure.

H.R. 1994—VA Accountability Act of 2015

Summary: H.R. 1994 would limit the amount of awards and bonuses paid to employees of the Department of Veterans Affairs (VA) and would modify several of the department's personnel policies. In addition, the bill would prescribe a comprehensive process for handling complaints by whistleblowers. CBO estimates that implementing H.R. 1994 would, on net, decrease costs by $145 million over the 2016–2020 period, assuming appropriation levels are reduced by those amounts.

Enacting the bill would have an insignificant effect on direct spending over the 2016–2025 period; therefore, pay-as-you-go procedures apply. Enacting H.R. 1994 would not affect revenues.

H.R. 1994 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

Estimated cost to the Federal Government: The estimated budgetary effect of H.R. 1994 is shown in the following table. The costs of this legislation fall within budget function 700 (veterans benefits and services).

	By fiscal year, in millions of dollars—					
	2016	2017	2018	2019	2020	2016–2020
CHANGES IN SPENDING SUBJECT TO APPROPRIATION [a]						
Limitations on Awards and Bonuses for Employees:						
Estimated Authorization Level	−60	−60	−60	0	0	−180
Estimated Outlays	−60	−60	−60	0	0	−180
Performance Appraisal System for SES Employees:						
Estimated Authorization Level	8	2	1	1	1	14
Estimated Outlays	8	2	1	1	1	14
Required Transfers of SES Employees:						
Estimated Authorization Level	2	2	2	2	2	10
Estimated Outlays	2	2	2	2	2	10
Treatment of Whistleblower Complaints:						
Estimated Authorization Level	2	2	2	2	2	10
Estimated Outlays	2	2	2	2	2	10
Other Provisions:						
Estimated Authorization Level	1	*	*	*	*	1
Estimated Outlays	1	*	*	*	*	1
Total:						
Estimated Authorization Level	−47	−54	−55	5	5	−145
Estimated Outlays	−47	−54	−55	5	5	−145

Notes: Components may not sum to totals because of rounding.
* = −$500,000 to $500,000; SES = Senior Executive Service.
[a] In addition to the discretionary estimated costs and savings from enacting H.R. 1994 shown above, enacting section 6 would decrease direct spending by less than $500,000 in every year and over the 2016–2025 period.

Basis of estimate: For this estimate, CBO assumes that H.R. 1994 will be enacted near the beginning of fiscal year 2016, that appropriations will reflect the estimated changes each year, and that outlays will follow historical spending patterns for the affected programs.

Spending subject to appropriation

H.R. 1994 would affect discretionary costs by limiting bonuses for employees of VA, reforming the performance appraisal system for Senior Executive Service (SES) employees within the department, revising the treatment of whistleblower complaints, reforming employee pay and hiring procedures, and requiring GAO to complete a report. CBO estimates that implementing H.R. 1994 would reduce net costs for personnel by $145 million over the 2016–2020 period, assuming appropriation actions consistent with the bill.

Limitations on Awards and Bonuses for Employees. Section 9 would limit the total amount that VA could pay in awards and bonuses to $300 million a year over the 2016–2018 period. Under current law, awards and bonuses for VA employees are capped at $360 million a year through 2024. Based on historical information from VA regarding pay and bonuses, CBO expects that VA will spend that full capped amount each year. Therefore, CBO estimates that implementing this provision would reduce costs for compensation by $180 million over the 2016–2020 period, assuming appropriation levels are reduced by that amount.

Performance Appraisal System for SES Employees. Section 5 would modify VA's system of evaluating the job performance of SES employees by increasing the number of rating levels, limiting the number of employees who can be rated at the higher levels, increasing the required documentation, and requiring an annual report to the Congress that would include a detailed description of the interim and ultimate evaluation of each SES employee. The provision also would require VA to hire a nongovernmental entity to conduct a review of VA's training program for SES employees and then to submit a report to the Congress with the findings and a plan to carry out the recommendations of the report.

Based on information from VA, CBO estimates that updating VA's information technology systems to implement the new SES appraisal system would cost $7 million, hiring a nongovernmental entity to review the SES training would cost $2 million, and submitting reports to the Congress would cost $5 million over the 2016–2020 period. In total, CBO estimates that implementing section 5 would cost about $14 million over the 2016–2020 period, subject to appropriation of the necessary amounts.

Required Transfers of SES Employees. Section 5 also would require VA to reassign SES employees to new positions within the department every five years. The new assignments would have to include moves to different locations and involve supervision of different personnel and programs. VA has about 340 SES employees, and about 40 percent of those employees are located in Washington, D.C. The remainder are assigned to various VA facilities throughout the nation.

Because VA would be required to rotate SES employees every five years, we expect that about 70 of the 340 SES employees would be reassigned each year. Over the past two years, VA relocated about 40 SES employees per year and CBO expects this trend will continue. Therefore, CBO anticipates that VA would relocate about 30 additional SES employees per year under section 5, CBO expects that 80 percent of the reassignments would involve a move to a different part of the country and the remainder (mostly in Washington, D.C.) would entail a move from one facility to another in the same general area.

According to VA, the average cost to relocate an employee in 2014 was $61,300. In addition, VA offers a reassignment incentive of about $21,500 to employees and CBO expects that this practice would continue. Thus, we estimate the cost to relocate a VA employee to another region would be about $82,800 in 2016 and the cost to move someone within a region would be $21,500. Both of those costs would increase annually with inflation.

Therefore, CBO estimates that implementing this provision would increase personnel costs by about $10 million over the 2016–2020 period, subject to appropriation of the necessary amounts.

Treatment of Whistleblower Complaints. Section 4 would require VA to put new procedures in place to address complaints submitted by whistleblowers regarding violations of laws and regulations, and instances of fraud, waste, and abuse. Under the new system:

- Employees would be required to file whistleblower complaints with their immediate supervisor, who would then be required to maintain written documentation and file monthly re-

ports with his or her immediate supervisor on what actions have been taken to address each complaint;

- Employees could move their complaint up the chain of command should the immediate supervisor not adequately address the claim;
- Employees who filed whistleblower complaints would be allowed to transfer to another position within the department under certain conditions;
- VA would be required to discipline supervisors who are found to have taken prohibited personnel actions that adversely affect an employee who files or participates in actions related to a whistleblower complaint;
- VA would be required to recoup bonuses paid to supervisors who took prohibited personal actions against whistleblowers;
- Criteria for evaluating the performance of supervisors at VA would include the actions taken by those employees to address whistleblower complaints;
- VA would be required to provide department-wide training to employees on their rights as whistleblowers and the procedures that are in place to protect those who do file complaints; and
- VA would be required to submit annual reports to the Congress detailing the number of whistleblower complaints filed and how they were addressed by VA.

Based on information from VA, CBO estimates that the new reports to the Congress as well as the mandatory training on whistleblower rights would cost about $2 million per year over the 2016–2020 period. Also, CBO estimates that very few supervisors would be required to repay bonuses; therefore, section 4 would have an insignificant effect on spending for compensation. In total, CBO estimates that implementing section 4 would have a net cost of $10 million over the 2016–2020 period, subject to appropriation of the necessary amounts.

Other Provisions. Other provisions in the bill would increase or decrease discretionary costs by insignificant amounts, generally because very few people would be affected. In total, CBO estimates that implementing these provisions would have a net cost of $1 million over the 2016–2020 period.

GAO Report. Section 10 would require the Government Accountability Office to conduct a study and report on the amount of time VA employees spend carrying out activities related to labor organizations and the amount of space in VA facilities used for such activities.

Congressional Testimony by VA Employees. Section 8 would require VA to treat time spent testifying before the Congress as official duty and to pay travel expenses and per diem for all employees called to testify. Generally, when Congress requests employees of VA to testify before any committee, travel expenses and per diem are paid by the department. However, if an employee contacts the committee and offers to testify, as is often the case with whistleblowers, the travel and per diem are not covered by VA. Based on information from the relevant Congressional committees, roughly 10 such individuals a year are called to testify before committees in either the House of Representatives or the Senate.

Limitation on Administrative Leave for SES Employees. Section 7 would limit the length of time an employee being investigated for potential disciplinary action could be placed on administrative leave to 14 days during any 365-day period. That requirement could be waived if an explanation was provided to the Congress as to why the employee should be placed on leave for a longer time.

Removal or Demotion of VA Employees. Section 2 would expedite the process for VA to remove or demote employees whose performance or misconduct warrants such an action. CBO expects that the demotion or removal of those employees would have no net budgetary effect because it would result in the promotion or hiring of other employees.

Probationary Period for New VA Employees. Section 3 would require VA to implement an 18-month probationary period for all new employees. After that time VA could: extend the probationary period, make an offer of permanent employment, or terminate the employment. VA currently employs a 12-month probationary period for new employees to the competitive service or career SES employees of the department.

Direct spending

Section 6 would reduce the retirement annuity payments for SES employees of VA who are removed from employment because of a felony conviction or who retire from VA before being removed because of a felony conviction. The amount of the reduction would reflect a loss of credit for the time period starting when the employee first engaged in the unlawful activity and ending with the employee's removal from service. Because of the small number of VA's SES employees who are likely to be removed from service because of a felony conviction, CBO estimates that enacting section 6 would reduce direct spending by less than $500,000 over the 2016–2025 period.

Increase in long-term direct spending: CBO estimates that enacting the legislation would not increase net direct spending by at least $5 billion in at least one of the four consecutive 10-year periods beginning in 2026.

Intergovernmental and private-sector impact: H.R. 1994 contains no intergovernmental or private-sector mandates as defined in UMRA.

Previous CBO estimate: On July 15, 2015, CBO transmitted a cost estimate for H.R. 571, the Veterans Affairs Retaliation Prevention Act of 2015, as ordered reported by the House Committee on Veterans Affairs on May 21, 2015. Sections 4 through 8 of H.R. 1994 are similar to sections 2 through 6 of H.R. 571, and differences in estimated costs or savings reflect differences in the bills' language.

Estimate prepared by: Federal Costs: Dwayne M. Wright; Impact on State, Local, and Tribal Governments: Jon Sperl; Impact on the Private Sector: Paige Piper-Bach.

Estimate approved by: H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates regarding H.R. 1994, as amended, prepared by the Director

of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act would be created by H.R. 1994, as amended.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to Article I, section 8 of the United States Constitution, the reported bill is authorized by Congress' power to "provide for the common Defense and general Welfare of the United States."

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

STATEMENT ON DUPLICATION OF FEDERAL PROGRAMS

Pursuant to section 3(g) of H. Res. 5, 114th Cong. (2015), the Committee finds that no provision of H.R. 1994, as amended, establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULEMAKING

Pursuant to section 3(i) of H. Res. 5, 114th Cong. (2015), the Committee estimates that H.R. 1994, as amended, contains limited directed rule making under section three that would require the Secretary to prescribe regulations on how to assess if the employee performance during their probationary period warrants final appointment to the civil service.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

Section 1 cites the short title of H.R. 1994, as amended, to be the "VA Accountability Act of 2015"

Section 2. Removal or demotion of employees based on performance or misconduct

Section 2(a) would amend chapter 7 of title 38, U.S.C., to create a new chapter 715 entitled, "Employees: removal or demotion based on performance or misconduct."

Sec. 715(a) would provide the Secretary with the authority to remove, or demote to a lower paygrade, any VA employee for poor performance or misconduct.

Sec. 715(b) would require that if an individual has been demoted under section 715(a), that the new annual rate of pay begins on the

date of their demotion. The section would further require that if an individual appeals their demotion or removal, he or she would not be allowed to remain on any category of paid leave during this appeal.

Sec. 715(c) would require the Secretary, by no later than thirty days after removing or demoting an individual under section 715(a), to submit a written notification to Congress on the reasons for the removal or demotion of the individual.

Sec. 715(d) would require that the procedures set up by section 7513(b) and chapter 43 of title 5, U.S.C., shall not apply to any removal or demotion under this section. This section would also authorize individuals to appeal their removal or demotion to the MSPB under 7701 of title 5, U.S.C., only if they file such appeal within seven days of their removal or demotion.

Sec. 715(e) would set up an expedited process for reviewing appeals made by employees, who are removed or demoted under this section, to the MSPB. Under this procedure an administrative judge of the MSPB would have 45 days to issue a decision after an appeal has been filed. Notwithstanding any other provision of law, this decision would be final and would not be subject to any further appeal. When a decision is not issued by the MSPB in 45 days, the Secretary's decision to remove or demote the employee is final. In these cases, the MSPB would be required to submit a report to Congress within 14 days explaining why a decision on the appeal was not issued within 45 days. Under this section, the MSPB or administrative judge may not stay any removal or demotion. Additionally, an individual who is removed or demoted under section 715(a) would not be able to receive any type of pay, bonuses, student loan repayment, or benefits during the appeal process that would be set up by this section. Finally, this section would require VA, to the maximum extent possible, to provide information to assist the MSPB in an expedited appeal.

Sec. 715(f) would preclude VA from demoting or removing an individual under this section until any whistleblower complaint filed by the individual to OSC or the VA central whistleblower office set up by section 732(h) of this title has been resolved and finalized.

Sec. 715(g) would, notwithstanding any other provision of law, authorize OSC to terminate an investigation of a prohibited personnel practice alleged by a VA employee or former VA employee once they provide a written statement explaining the reasons for the termination of the investigation. Such written statement would not be admissible as evidence in any judicial or administrative proceeding without the consent of the employee or former employee.

Sec. 715(h) would clarify that the authority to remove or demote an individual is in addition to the authority provided by subchapter V of chapter 75 and chapter 43 of title 5, U.S.C.

Sec. 715(i) would provide definitions of terms used in the new section 715. An "individual" would be defined as someone who holds a position at VA, but would not include members of the Senior Executive Service or a political appointee. The term "grade" would be defined as the meaning given to that term by 7511(a) of title 5, U.S.C. The term "misconduct" would include neglect of duty, malfeasance, or failure to accept a direct reassignment of to accompany a position in a transfer or function. The term "political appointee" would include: employees in a position described by sec-

tion 5312 through 5316 of title 5, U.S.C; a limited appointee: a limited emergency appointee: or non-career appointee in the Senior Executive Service defined by paragraphs five, six, and seven of section 3132(a) of title 5, U.S.C.; or an individual who is employed in a position of a confidential or policy-determining character under schedule C of subpart C of part 213 of title 5 of the Code of Federal Regulations.

Section 3. Required probationary period for new employees of Department of Veteran Affairs

Section 3(a) would amend chapter 7 of title 38, U.S.C., by creating a new section 717 entitled, "Probationary period for employees."

Sec. 717(a) would require, notwithstanding sections 3321 and 2293(d) of title 5, U.S.C., that the appointment of a covered employee would only become final after the employee has completed a probationary period of 18 months. Under this section, this period could be extended at the discretion of the Secretary.

Sec. 717(b) would define the term "covered individual" as any employee who is appointed to a permanent position within the Department or is appointed as a career SES employee. Medical professionals appointed to the Department by section 7403 of title 38, U.S.C., would not be subject to this section.

Sec. 717(c) would authorize that at the end of the probationary period set forth by 717(a) the employee's supervisor would make the final determination if the employee's appointment shall become final based on regulations prescribed by the Secretary.

Section 3(b) would clarify that the new section 717 of title 38, U.S.C., would apply only to employees who were appointed after the date of enactment of this act.

Section 4. Treatment of whistleblower complaints in the Department of Veterans Affairs

Section 4(a) would amend chapter 7 of title 38, U.S.C., to create a new subchapter II on Whistleblower Complaints. Sec. 731 of this new subchapter would define the term "whistleblower complaint" similar to a "disclosure" defined by section 2302 of title 5, U.S.C.

Sec. 732(a) would provide VA employees with another method to file complaints, in addition to any other method established by law, where an employee would begin by filing the complaint with the first-level supervisor of that employee.

Sec. 732(b) would require a supervisor who receives a complaint to respond in writing to an employee who filed that complaint within four business days whether the supervisor reasonably believes the complaint likely disclosed an issue described in the definition of a whistleblower complaint. This section would also require the supervisor to retain written documentation on the complaint and submit a written report to the supervisor's next level supervisor, as well as the VA central whistleblower office. Additionally, each supervisor would be required to submit a monthly written report to the director of the facility in which the supervisor works, as well as to the VA central whistleblower office, outlining the number of complaints received and actions taken to correct them.

Sec. 732(c) would require a supervisor who makes a determination that a whistleblower complaint has merit to include, in the

written response required, within the same four day period, the actions the supervisor will take to correct the problems described in the complaint.

Sec. 732(d) would allow employees to make complaints to their next-level supervisor, and with each level supervisor thereafter, if the previous-level supervisor does not make a timely determination, the employee determines that supervisor did not adequately address the complaint, or if the first-level supervisor is the basis of the complaint.

Sec. 732(e) would require the Secretary to inform an employee who makes a complaint, and where the supervisor determines it has merit, of the ability to voluntarily transfer to another position according to section 3352 of title 5, U.S.C., and the Secretary must give that employee preference for such transfer.

Sec. 732(f) would prohibit the Secretary from exempting any VA employee from being covered by these protections.

Sec. 732(g) would require the Secretary to create, in coordination with the Office of Special Counsel, a whistleblower complaint form within sixty days of enactment to be used with the process created by this section of the bill. The form must contain specific fields for the employee to fill out related to an his/her complaint as well as: the purpose of the form, instructions for filling out the form, an explanation that filing in this manner does not preclude the employee from filing a complaint in any other manner established by law, and a statement directing the employee to the VA website which must contain relevant information for complaints.

Sec. 732(h) would require the Secretary to ensure that VA's central whistleblower complaint office (currently the Office of Accountability Review, but also including any successor offices) will be responsible for investigating whistleblower complaints from any and all VA employees and cannot be an element of VA's General Counsel Office or headed by an official who reports to that office. This office must maintain a toll-free anonymous hotline for reporting whistleblower complaints. Further, the central whistleblower complaint office must not provide, or receive from the General Counsel Office information related to any whistleblower complaint, except if the complaint is currently before an administrative body or court.

Sec. 733(a) would require a supervisor who is found to have committed a prohibited personnel action against an employee for filing a whistleblower complaint to face adverse actions ranging from a 14-day suspension to termination for a first offense, and termination for a second offense. Further, the expedited merit system process provisions found in subsection (d) and (e) of section 713 of title 38, U.S.C., shall apply to all such effectuated adverse actions. A supervisor who is subject to an adverse employment action will have five days to respond to a notification of proposed action, and if the supervisor's response is inadequate or untimely, the adverse employee action will take effect.

Sec. 733(b) would dictate that, if the Secretary carries out an adverse action against a supervisory employee, the Secretary may carry out an additional adverse action under this section based on the same prohibited personnel action if the total severity of the adverse actions does not exceed the levels prescribed in this section.

Sec. 733(c) would define the different actions that would be deemed a "prohibited personnel action" if undertaken by a super-

visory employee, including taking or failing to take an employment action against an employee for filing a whistleblower complaint in accordance with Sec 732, filing a complaint with, providing information to, or participating as a witness for the Office of Inspector General, Office of Special Counsel, Government Accountability Office, or Congress, refusing to perform an unlawful or prohibited act, or engaging in communications related to the employee's work. A prohibited personnel action under this section also includes preventing another employee from filing a complaint, conducting a sham peer review or retaliatory investigation, or requesting a contractor carry out an action prohibited under sections 4705 or 4712 of title 41, U.S.C.

Sec. 734(a) would require that the criteria used to evaluate the performance of a supervisor include whether the supervisor treats whistleblower complaints appropriately under Section 2 or whether the supervisor committed any prohibited personnel actions.

Sec. 734(b) would prohibit the Secretary from paying a supervisor any award or bonus for a one-year period, and would require the Secretary to recoup any award or bonus from that supervisor received during the subject period, if that supervisor was found to have committed a prohibited personnel action described in Sec. 733. Recoupment of bonuses will be subject to the Secretary's discretion as to appropriateness, and the subject supervisor must be provided notice and an opportunity for a hearing.

Sec. 735(a) would require the Secretary to coordinate with the Whistleblower Protection Ombudsman of the VA OIG to provide annual training to all VA employees regarding each method established by law by which they can file whistleblower complaints, what types of actions are deemed prohibited personnel actions, how supervisors must treat complaints, and various additional rights employees have when making complaints.

Sec. 735(b) would require annual training regarding whistleblower complaints to be in compliance with OSC training standards.

Sec. 735(c) would require the Secretary to publish on VA's website, and display at each VA facility, employees' rights to file complaints and all information required to be provided to employees in the annual training. Additionally, the Secretary would be required to make the whistleblower complaint form available on VA's website.

Sec. 736(a) would require VA provide the House and Senate Committees on Veterans' Affairs, the House Committee on Oversight and Government Reform, and the Senate Committee on Homeland Security and Government Affairs with annual reports regarding whistleblower complaints, including: the number of complaints filed that year, the method of filing those complaints, the disposition of the complaints, and the ways the Secretary addressed those complaints.

Sec. 736(b) would require the Secretary to notify the House and Senate Committees on Veterans' Affairs, the House Committee on Oversight and Government Reform, and the Senate Committee on Homeland Security and Government Affairs within thirty days of receiving information from the OSC relating to a whistleblower complaint.

Section 4(b) would provide conforming and clerical amendments.

Section 5. Reform of performance appraisal system for Senior Executive Service employees of the Department of Veterans Affairs

Section 5(a) would amend chapter 7 of title 38, U.S.C., to require the Secretary to provide five annual summary ratings of levels of performance for SES employees as follows: (1) an "outstanding" level; (2) an "exceeds fully successful" level; (3) a "fully successful" level; (4) a "minimally satisfactory" level; and (5) an "unsatisfactory" level. This section would also require the Secretary to place not more than 10 percent of SES employees in the "outstanding" level and not more than 20 percent of SES employees in the "exceeds fully successful" level. The Secretary would also be required to take into consideration the results of any OIG investigations or EEO complaints filed against the employee, or related to any facility or program managed by the employee, when evaluating their performance. Section 5(a) would also require the Secretary to take into consideration a SES employee's efforts to maintain his or her employees' levels of satisfaction and performance when evaluating their performance. This section would also require the Secretary to reassign SES employees to other locations throughout VA at least once every five years and would require the Secretary to do so on a rolling basis. The Secretary would be given authority to waive the requirement for SES employees to be reassigned if the Secretary submits a report to the House and Senate Committees on Veterans' Affairs explaining the need for such waiver. Finally, section 5(a) would require the Secretary to annually provide to the House and Senate Committees on Veterans' Affairs, the House Committee on Oversight and Government Reform, and the Senate Committee on Homeland Security and Government Affairs, a report on all SES performance evaluations from the prior year, including the following: (1) the initial performance appraisal; (2) the higher level review; (3) the recommendations given by the performance review board; (4) the final summary; (5) the amount of initial performance ratings that were increased to a higher rating following the recommendations of the performance review board; (6) the amount of initial performance ratings that were decreased to a lower rating following the recommendations of the performance review board; and (7) any adverse actions made against an employee who earns a less than fully successful performance rating.

Section 5(b) would require the Secretary to enter into a contract with a non-governmental entity to review management training programs that are currently in place for SES employees. This section would require the Secretary to enter into this contract no later than 180 days following enactment and would require the review to compare these VA management training courses to other Federal agencies and private sector executive training programs. This section would also require the Secretary to provide, to the House and Senate Committees on Veterans' Affairs, the final report from the nongovernmental entity no later than 60 days after the Secretary receives it, as well as a plan for carrying out recommendations made in the final report.

Section 6. Reduction of benefits for members of the Senior Executive Service within the Department of Veterans Affairs convicted of certain crimes

Section 6(a) would amend chapter 7 of title 38, U.S.C., to allow the Secretary to reduce an SES employee's retirement benefits upon the employee's conviction of a felony that influenced their work performance by reducing that period of service creditable to their pension. The Secretary's authority would be limited to the reduction of the time that is creditable to the employees' service based on the dates and time of the actions that led to the conviction and removal. Section 6(a) would also require that any contributions made by the individual to their pension during the period for which they would not receive credit towards their pensions be refunded to them in a lump sum.

Section 6(b) would apply the authority provided by section 6(a) to any action of removal or transfer made under section 713 of title 38, U.S.C., made on or after the date of enactment.

Section 6(c) would create the following at the beginning of chapter 7 of title 38, U.S.C., in the table of sections, "715, Senior executives reduction of benefits of individuals convicted of certain crimes."

Section 7. Limitation on administrative leave for employees Department of Veteran Affairs

Section 7(a) would amend chapter 7 of title 38, U.S.C., and create a new section, 719, which would prescribe that the Secretary may not place any employee on paid administrative leave, or any other type of a paid non-duty status, for longer than 14 days during any 365 day period. This section would allow the Secretary to waive this authority, but would require that he or she submit to the House and Senate Committees on Veterans' Affairs, a detailed explanation of why he or she extended this period beyond the 14-day mark. This section would only apply to employees who are subject to an investigation to determine if disciplinary action is warranted.

Section 7(b) would make the authority provided in section 7(a) applicable to any removal or transfer under section 713 of title 38, U.S.C., or under title 5, U.S.C., commencing on or after the date of enactment.

Section 8. Treatment of congressional testimony by Department of veteran affairs employees as official duty

Section 8(a) would amend chapter 7 of title 38, U.S.C., by creating a new section, 725. Sec. 725(a) would state that any VA employee who is testifying in front of either house of Congress, a committee of either House of Congress, or a joint or select committee of Congress would be considered to be on official duty for providing such testimony.

Sec. 725(b) would require the Secretary to provide any VA employee performing official duty described in Section 725(a) with travel expenses, including per diem in lieu of subsistence, in accordance with applicable provisions under subchapter I of chapter 57 of title 5, U.S.C.

Section 9. Limitation on awards and bonuses paid to employees of the Department of Veterans Affairs

Section 9 would amend section 705 of P.L. 113–146, to cap the amount of money paid by the Secretary for any bonuses or awards paid to employees under chapters 45 or 53 of title 5, U.S.C., or any awards or bonuses authorized in title 38, U.S.C. Under this section, the cap for each fiscal year between 2015 and 2018 shall not exceed $300,000,000 and for each fiscal year between 2019–2024, the amount shall not exceed $360,000,000.

Section 10. Comptroller General study on Department of time and space used for labor organizational activity

Section 10(a) would require that no later than 180 days after the date of enactment of this section that the U.S. Comptroller General completes a study on the amount of time spent by VA employees in carrying out organizing activities relating to labor organizations and amount of space in VA facilities used for such activities. The study would also include a cost-benefit analysis of such time and space used for such activities.

Section 10(b) would require that, not later than 90 days after the completion of the study required under section 10(a), the U.S. Comptroller General submit a report on the results of the study to Congress.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

TITLE 38, UNITED STATES CODE

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PART I—GENERAL PROVISIONS

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CHAPTER 7—EMPLOYEES

Sec.

SUBCHAPTER I—GENERAL EMPLOYEE MATTERS

701. Placement of employees in military installations.

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715. Employees: removal or demotion based on performance or misconduct.
717. Probationary period for employees.
719. Senior executives: performance appraisal.
721. Senior executives: reduction of benefits of individuals convicted of certain crimes.
723. Limitation on administrative leave.
725. Congressional testimony by employees: treatment as official duty.

SUBCHAPTER II—WHISTLEBLOWER COMPLAINTS

731. Whistleblower complaint defined.

732. Treatment of whistleblower complaints.
733. Adverse actions against supervisory employees who commit prohibited personnel actions relating to whistleblower complaints.
734. Evaluation criteria of supervisors and treatment of bonuses.
735. Training regarding whistleblower complaints.
736. Reports to Congress.

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SUBCHAPTER I—GENEARL EMPLOYEE MATTERS

§ 701. Placement of employees in military installations

The Secretary may place employees of the Department in such Army, Navy, and Air Force installations as may be considered advisable for the purpose of adjudicating disability claims of, and giving aid and advice to, members of the Armed Forces who are about to be discharged or released from active military, naval, or air service.

* * * * * * *

§ 715. Employees: removal or demotion based on performance or misconduct

(a) IN GENERAL.—The Secretary may remove or demote an individual who is an employee of the Department if the Secretary determines the performance or misconduct of the individual warrants such removal or demotion. If the Secretary so removes or demotes such an individual, the Secretary may—

(1) remove the individual from the civil service (as defined in section 2101 of title 5); or

(2) demote the individual by means of—

(A) a reduction in grade for which the individual is qualified and that the Secretary determines is appropriate; or

(B) a reduction in annual rate of pay that the Secretary determines is appropriate.

(b) PAY OF CERTAIN DEMOTED INDIVIDUALS.—(1) Notwithstanding any other provision of law, any individual subject to a demotion under subsection (a)(2)(A) shall, beginning on the date of such demotion, receive the annual rate of pay applicable to such grade.

(2) An individual so demoted may not be placed on administrative leave or any other category of paid leave during the period during which an appeal (if any) under this section is ongoing, and may only receive pay if the individual reports for duty. If an individual so demoted does not report for duty, such individual shall not receive pay or other benefits pursuant to subsection (e)(5).

(c) NOTICE TO CONGRESS.—Not later than 30 days after removing or demoting an individual under subsection (a), the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives notice in writing of such removal or demotion and the reason for such removal or demotion.

(d) PROCEDURE.—(1) The procedures under section 7513(b) of title 5 and chapter 43 of such title shall not apply to a removal or demotion under this section.

(2)(A) Subject to subparagraph (B) and subsection (e), any removal or demotion under subsection (a) may be appealed to the Merit Systems Protection Board under section 7701 of title 5.

(B) An appeal under subparagraph (A) of a removal or demotion may only be made if such appeal is made not later than seven days after the date of such removal or demotion.

(e) EXPEDITED REVIEW BY ADMINISTRATIVE JUDGE.—(1) Upon receipt of an appeal under subsection (d)(2)(A), the Merit Systems Protection Board shall refer such appeal to an administrative judge pursuant to section 7701(b)(1) of title 5. The administrative judge shall expedite any such appeal under such section and, in any such case, shall issue a decision not later than 45 days after the date of the appeal.

(2) Notwithstanding any other provision of law, including section 7703 of title 5, the decision of an administrative judge under paragraph (1) shall be final and shall not be subject to any further appeal.

(3) In any case in which the administrative judge cannot issue a decision in accordance with the 45-day requirement under paragraph (1), the removal or demotion is final. In such a case, the Merit Systems Protection Board shall, within 14 days after the date that such removal or demotion is final, submit to Congress and the Committees on Veterans' Affairs of the Senate and House of Representatives a report that explains the reasons why a decision was not issued in accordance with such requirement.

(4) The Merit Systems Protection Board or administrative judge may not stay any removal or demotion under this section.

(5) During the period beginning on the date on which an individual appeals a removal from the civil service under subsection (d) and ending on the date that the administrative judge issues a final decision on such appeal, such individual may not receive any pay, awards, bonuses, incentives, allowances, differentials, student loan repayments, special payments, or benefits.

(6) To the maximum extent practicable, the Secretary shall provide to the Merit Systems Protection Board, and to any administrative judge to whom an appeal under this section is referred, such information and assistance as may be necessary to ensure an appeal under this subsection is expedited.

(f) WHISTLEBLOWER PROTECTION.—(1) In the case of an individual seeking corrective action (or on behalf of whom corrective action is sought) from the Office of Special Counsel based on an alleged prohibited personnel practice described in section 2302(b) of title 5, the Secretary may not remove or demote such individual under subsection (a) without the approval of the Special Counsel under section 1214(f) of title 5.

(2) In the case of an individual who has filed a whistleblower complaint, as such term is defined in section 731 of this title, the Secretary may not remove or demote such individual under subsection (a) until the central whistleblower office under section 732(h) of this title has made a final decision with respect to the whistleblower complaint.

(g) TERMINATION OF INVESTIGATIONS BY OFFICE OF SPECIAL COUNSEL.—Notwithstanding any other provision of law, the Special Counsel (established by section 1211 of title 5) may terminate an investigation of a prohibited personnel practice alleged by an employee or former employee of the Department after the Special Counsel provides to the employee or former employee a written statement of the reasons for the termination of the investigation. Such statement may

not be admissible as evidence in any judicial or administrative proceeding without the consent of such employee or former employee.

(h) RELATION TO TITLE 5.—The authority provided by this section is in addition to the authority provided by subchapter V of chapter 75 of title 5 and chapter 43 of such title.

(i) DEFINITIONS.—In this section:

(1) The term "individual" means an individual occupying a position at the Department but does not include—

(A) an individual, as that term is defined in section 713(g)(1); or

(B) a political appointee.

(2) The term "grade" has the meaning given such term in section 7511(a) of title 5.

(3) The term "misconduct" includes neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

(4) The term "political appointee" means an individual who is—

(A) employed in a position described under sections 5312 through 5316 of title 5 (relating to the Executive Schedule);

(B) a limited term appointee, limited emergency appointee, or noncareer appointee in the Senior Executive Service, as defined under paragraphs (5), (6), and (7), respectively, of section 3132(a) of title 5; or

(C) employed in a position of a confidential or policy-determining character under schedule C of subpart C of part 213 of title 5 of the Code of Federal Regulations.

§ 717. Probationary period for employees

(a) IN GENERAL.—Notwithstanding sections 3321 and 3393(d) of title 5, the appointment of a covered employee shall become final only after such employee has served a probationary period of 18 months. The Secretary may extend a probationary period under this subsection at the discretion of the Secretary.

(b) COVERED EMPLOYEE.—In this section, the term "covered employee"—

(1) means any individual—

(A) appointed to a permanent position within the competitive service at the Department; or

(B) appointed as a career appointee (as that term is defined in section 3132(a)(4) of title 5) within the Senior Executive Service at the Department; and

(2) does not include any individual with a probationary period prescribed by section 7403 of this title.

(c) PERMANENT HIRES.—Upon the expiration of a covered employee's probationary period under subsection (a), the supervisor of the employee shall determine whether the appointment becomes final based on regulations prescribed for such purpose by the Secretary.

§ 719. Senior executives: performance appraisal

(a) PERFORMANCE APPRAISAL SYSTEM.—(1) The performance appraisal system for individuals employed in senior executive positions in the Department required by section 4312 of title 5 shall provide, in addition to the requirements of such section, for five annual summary ratings of levels of performance as follows:

(A) One outstanding level.

(B) One exceeds fully successful level.

(C) One fully successful level.

(D) One minimally satisfactory level.

(E) One unsatisfactory level.

(2) The following limitations apply to the rating of the performance of such individuals:

(A) For any year, not more than 10 percent of such individuals who receive a performance rating during that year may receive the outstanding level under paragraph (1)(A).

(B) For any year, not more than 20 percent of such individuals who receive a performance rating during that year may receive the exceeds fully successful level under paragraph (1)(B).

(3) In evaluating the performance of an individual under the performance appraisal system, the Secretary shall take into consideration—

(A) any complaint or report (including any pending or published report) submitted by the Inspector General of the Department, the Comptroller General of the United States, the Equal Employment Opportunity Commission, or any other appropriate person or entity, related to any facility or program managed by the individual, as determined by the Secretary;

(B) efforts made by the individual to maintain high levels of satisfaction and commitment among the employees supervised by the individual; and

(C) the criteria described in section 734(a)(2) of this title.

(b) CHANGE OF POSITION.—(1) At least once every five years, the Secretary shall reassign each individual employed in a senior executive position to a position at a different location that does not include the supervision of the same personnel or programs. The Secretary shall make such reassignments on a rolling basis based on the date on which an individual was originally assigned to a position.

(2) The Secretary may waive the requirement under paragraph (1) for any such individual, if the Secretary submits to the Committees on Veterans' Affairs of the Senate and House of Representatives notice of the waiver and an explanation of the reasons for the waiver.

(c) REPORT.—Not later than March 1 of each year, the Secretary shall submit to the Committees on Veterans' Affairs and Homeland Security and Governmental Affairs of the Senate and the Committees on Veterans' Affairs and Oversight and Government Reform of the House of Representatives a report on the performance appraisal system of the Department under subsection (a). Each such report shall include, for the year preceding the year during which the report is submitted, each of the following:

(1) All documentation concerning each of the following for each individual employed in a senior executive position in the Department:

(A) The initial performance appraisal.

(B) The higher level review, if requested.

(C) The recommendations of the performance review board.

(D) The final summary review.

(E) The number of initial performance ratings raised as a result of the recommendations of the performance review board.

(F) The number of initial performance ratings lowered as a result of the recommendations of the performance review board.

(G) Any adverse action taken against any such individual who receives a performance rating of less than fully successful.

(2) The review of the Inspector General of the Department of the information described in subparagraphs (A) through (D) of paragraph (1).

(3) A summary of the documentation provided under paragraph (1).

(d) DEFINITION OF SENIOR EXECUTIVE POSITION.—In this section, the term "senior executive position" has the meaning given that term in section 713(g)(3) of this title.

§ 721. Senior executives: reduction of benefits of individuals convicted of certain crimes

(a) REDUCTION OF ANNUITY FOR REMOVED EMPLOYEE.—The Secretary shall order that the covered service of an individual removed from a senior executive position under section 713 of this title shall not be taken into account for purposes of calculating an annuity with respect to such individual under chapter 83 or chapter 84 of title 5, if—

(1) the individual is convicted of a felony that influenced the individual's performance while employed in the senior executive position; and

(2) before such order is made, the individual is afforded notice and an opportunity for a hearing conducted by another department or agency of the Federal Government.

(b) REDUCTION OF ANNUITY FOR RETIRED EMPLOYEE.—(1) The Secretary may order that the covered service of an individual who is subject to a removal or transfer action under section 713 of this title but who leaves employment at the Department prior to the issuance of a final decision with respect to such action shall not be taken into account for purposes of calculating an annuity with respect to such individual under chapter 83 or chapter 84 of title 5, if—

(A) the individual is convicted of a felony that influenced the individual's performance while employed in the senior executive position; and

(B) before such order is made, the individual is afforded notice and an opportunity for a hearing conducted by another department or agency of the Federal Government.

(2) The Secretary shall make such an order not later than seven days after the date of the conclusion of a hearing referred to in paragraph (1)(B) that determines that such order is lawful.

(c) ADMINISTRATIVE REQUIREMENTS.—(1) Not later than 30 days after the Secretary issues an order under subsection (a) or (b), the Director of the Office of Personnel Management shall recalculate the annuity of the individual.

(2) A decision regarding whether the covered service of an individual shall be taken into account for purposes of calculating an an-

nuity under subsection (a) or (b) is final and may not be reviewed by any department or agency or any court.

(d) LUMP-SUM ANNUITY CREDIT.—Any individual with respect to whom an annuity is reduced under subsection (a) or (b) shall be entitled to be paid so much of such individual's lump-sum credit as is attributable to the period of covered service.

(e) DEFINITIONS.—In this section:

(1) The term "covered service" means, with respect to an individual subject to a removal or transfer action under section 713 of this title, the period of service beginning on the date that the Secretary determines under such section that such individual engaged in activity that gave rise to such action and ending on the date that such individual is removed from the civil service or leaves employment at the Department prior to the issuance of a final decision with respect to such action, as the case may be.

(2) The term "lump-sum credit" has the meaning given such term in section 8331(8) or section 8401(19) of title 5, as the case may be.

(3) The term "senior executive position" has the meaning given such term in section 713(g)(3) of this title.

(4) The term "service" has the meaning given such term in section 8331(12) or section 8401(26) of title 5, as the case may be.

§ 723. Limitation on administrative leave

(a) IN GENERAL.—Except as provided in subsection (b), the Secretary may not place any covered individual on administrative leave, or any other type of paid non-duty status without charge to leave, for more than a total of 14 days during any 365-day period.

(b) WAIVER.—The Secretary may waive the limitation under subsection (a) and extend the administrative leave or other paid non-duty status without charge to leave of a covered individual placed on such leave or status under subsection (a) if the Secretary submits to the Committees on Veterans' Affairs of the Senate and House of Representatives a detailed explanation of the reasons the individual was placed on administrative leave or other paid non-duty status without charge to leave and the reasons for the extension of such leave or status. Such explanation shall include the name of the covered individual, the location where the individual is employed, and the individual's job title.

(c) COVERED INDIVIDUAL.—In this subsection, the term "covered individual" means an employee of the Department—

(1) who is subject to an investigation for purposes of determining whether such individual should be subject to any disciplinary action under this title or title 5; or

(2) against whom any disciplinary action is proposed or initiated under this title or title 5.

§ 725. Congressional testimony by employees: treatment as official duty

(a) CONGRESSIONAL TESTIMONY.—An employee of the Department is performing official duty during the period with respect to which the employee is testifying in an official capacity in front of either

House of Congress, a committee of either House of Congress, or a joint or select committee of Congress.

(b) TRAVEL EXPENSES.—The Secretary shall provide travel expenses, including per diem in lieu of subsistence, in accordance with applicable provisions under subchapter I of chapter 57 of title 5, to any employee of the Department of Veterans Affairs performing official duty described under subsection (a).

SUBCHAPTER II—WHISTLEBLOWER COMPLAINTS

§ 731. Whistleblower complaint defined

In this subchapter, the term "whistleblower complaint" means a complaint by an employee of the Department disclosing, or assisting another employee to disclose, a potential violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety.

§ 732. Treatment of whistleblower complaints

(a) FILING.—(1) In addition to any other method established by law in which an employee may file a whistleblower complaint, an employee of the Department may file a whistleblower complaint in accordance with subsection (g) with a supervisor of the employee.

(2) Except as provided by subsection (d)(1), in making a whistleblower complaint under paragraph (1), an employee shall file the initial complaint with the immediate supervisor of the employee.

(b) NOTIFICATION.—(1) Not later than four business days after the date on which a supervisor receives a whistleblower complaint by an employee under this section, the supervisor shall notify, in writing, the employee of whether the supervisor determines that there is a reasonable likelihood that the complaint discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety. The supervisor shall retain written documentation regarding the whistleblower complaint and shall submit to the next-level supervisor and the central whistleblower office described in subsection (h) a written report on the complaint.

(2) On a monthly basis, the supervisor shall submit to the appropriate director or other official who is superior to the supervisor a written report that includes the number of whistleblower complaints received by the supervisor under this section during the month covered by the report, the disposition of such complaints, and any actions taken because of such complaints pursuant to subsection (c). In the case in which such a director or official carries out this paragraph, the director or official shall submit such monthly report to the supervisor of the director or official and to the central whistleblower office described in subsection (h).

(c) POSITIVE DETERMINATION.—If a supervisor makes a positive determination under subsection (b)(1) regarding a whistleblower complaint of an employee, the supervisor shall include in the notification to the employee under such subsection the specific actions that the supervisor will take to address the complaint.

(d) FILING COMPLAINT WITH NEXT-LEVEL SUPERVISORS.—(1) If any circumstance described in paragraph (3) is met, an employee may file a whistleblower complaint in accordance with subsection

(g) with the next-level supervisor who shall treat such complaint in accordance with this section.

(2) An employee may file a whistleblower complaint with the Secretary if the employee has filed the whistleblower complaint to each level of supervisors between the employee and the Secretary in accordance with paragraph (1).

(3) A circumstance described in this paragraph are any of the following circumstances:

(A) A supervisor does not make a timely determination under subsection (b)(1) regarding a whistleblower complaint.

(B) The employee who made a whistleblower complaint determines that the supervisor did not adequately address the complaint pursuant to subsection (c).

(C) The immediate supervisor of the employee is the basis of the whistleblower complaint.

(e) TRANSFER OF EMPLOYEE WHO FILES WHISTLEBLOWER COMPLAINT.—If a supervisor makes a positive determination under subsection (b)(1) regarding a whistleblower complaint filed by an employee, the Secretary shall—

(1) inform the employee of the ability to volunteer for a transfer in accordance with section 3352 of title 5; and

(2) give preference to the employee for such a transfer in accordance with such section.

(f) PROHIBITION ON EXEMPTION.—The Secretary may not exempt any employee of the Department from being covered by this section.

(g) WHISTLEBLOWER COMPLAINT FORM.—(1) A whistleblower complaint filed by an employee under subsection (a) or (d) shall consist of the form described in paragraph (2) and any supporting materials or documentation the employee determines necessary.

(2) The form described in this paragraph is a form developed by the Secretary, in consultation with the Special Counsel, that includes the following:

(A) An explanation of the purpose of the whistleblower complaint form.

(B) Instructions for filing a whistleblower complaint as described in this section.

(C) An explanation that filing a whistleblower complaint under this section does not preclude the employee from any other method established by law in which an employee may file a whistleblower complaint.

(D) A statement directing the employee to information accessible on the Internet website of the Department as described in section 735(c).

(E) Fields for the employee to provide—

(i) the date that the form is submitted;

(ii) the name of the employee;

(iii) the contact information of the employee;

(iv) a summary of the whistleblower complaint (including the option to append supporting documents pursuant to paragraph (1)); and

(v) proposed solutions to complaint.

(F) Any other information or fields that the Secretary determines appropriate.

(3) The Secretary, in consultation with the Special Counsel, shall develop the form described in paragraph (2) by not later than 60 days after the date of the enactment of this section.

(h) CENTRAL WHISTLEBLOWER OFFICE.—(1) The Secretary shall ensure that the central whistleblower office—

(A) is not an element of the Office of the General Counsel;

(B) is not headed by an official who reports to the General Counsel;

(C) does not provide, or receive from, the General Counsel any information regarding a whistleblower complaint except pursuant to an action regarding the complaint before an administrative body or court; and

(D) does not provide advice to the General Counsel.

(2) The central whistleblower office shall be responsible for investigating all whistleblower complaints of the Department, regardless of whether such complaints are made by or against an employee who is not a member of the Senior Executive Service.

(3) The Secretary shall ensure that the central whistleblower office maintains a toll-free hotline to anonymously receive whistleblower complaints.

(4) In this subsection, the term "central whistleblower office" means the Office of Accountability Review or a successor office that is established or designated by the Secretary to investigate whistleblower complaints filed under this section or any other method established by law.

§ 733. Adverse actions against supervisory employees who commit prohibited personnel actions relating to whistleblower complaints

(a) IN GENERAL.—(1) In accordance with paragraph (2), the Secretary shall carry out the following adverse actions against supervisory employees whom the Secretary, an administrative judge, the Merit Systems Protection Board, the Office of Special Counsel, an adjudicating body provided under a union contract, a Federal judge, or the Inspector General of the Department determines committed a prohibited personnel action described in subsection (c):

(A) With respect to the first offense, an adverse action that is not less than a 14-day suspension and not more than removal.

(B) With respect to the second offense, removal.

(2)(A) Except as provided by subparagraph (B), and notwithstanding subsections (b) and (c) of section 7513 and section 7543 of title 5, the provisions of subsections (d) and (e) of section 713 of this title shall apply with respect to an adverse action carried out under paragraph (1).

(B) An employee who is notified of being the subject of a proposed adverse action under paragraph (1) may not be given more than five days following such notification to provide evidence to dispute such proposed adverse action. If the employee does not provide any such evidence, or if the Secretary determines that such evidence is not sufficient to reverse the determination to propose the adverse action, the Secretary shall carry out the adverse action following such five-day period.

(b) LIMITATION ON OTHER ADVERSE ACTIONS.—With respect to a prohibited personnel action described in subsection (c), if the Secretary carries out an adverse action against a supervisory employee,

the Secretary may carry out an additional adverse action under this section based on the same prohibited personnel action if the total severity of the adverse actions do not exceed the level specified in subsection (a).

(c) PROHIBITED PERSONNEL ACTION DESCRIBED.—A prohibited personnel action described in this subsection is any of the following actions:

(1) Taking or failing to take a personnel action in violation of section 2302 of title 5 against an employee relating to the employee—

(A) filing a whistleblower complaint in accordance with section 732 of this title;

(B) filing a whistleblower complaint with the Inspector General of the Department, the Special Counsel, or Congress;

(C) providing information or participating as a witness in an investigation of a whistleblower complaint in accordance with section 732 or with the Inspector General of the Department, the Special Counsel, or Congress;

(D) participating in an audit or investigation by the Comptroller General of the United States;

(E) refusing to perform an action that is unlawful or prohibited by the Department; or

(F) engaging in communications that are related to the duties of the position or are otherwise protected.

(2) Preventing or restricting an employee from making an action described in any of subparagraphs (A) through (F) of paragraph (1).

(3) Conducting a peer review or opening a retaliatory investigation relating to an activity of an employee that is protected by section 2302 of title 5.

(4) Requesting a contractor to carry out an action that is prohibited by section 4705(b) or section 4712(a)(1) of title 41, as the case may be.

§ 734. Evaluation criteria of supervisors and treatment of bonuses

(a) EVALUATION CRITERIA.—(1) In evaluating the performance of supervisors of the Department, the Secretary shall include the criteria described in paragraph (2).

(2) The criteria described in this subsection are the following:

(A) Whether the supervisor treats whistleblower complaints in accordance with section 732.

(B) Whether the appropriate deciding official, performance review board, or performance review committee determines that the supervisor was found to have committed a prohibited personnel action described in section 733(b) by an administrative judge, the Merit Systems Protection Board, the Office of Special Counsel, an adjudicating body provided under a union contract, a Federal judge, or, in the case of a settlement of a whistleblower complaint (regardless of whether any fault was assigned under such settlement), the Secretary.

(b) BONUSES.—(1) The Secretary may not pay to a supervisor described in subsection (a)(2)(B) an award or bonus under this title or title 5, including under chapter 45 or 53 of such title, during the

one-year period beginning on the date on which the determination was made under such subsection.

(2) Notwithstanding any other provision of law, the Secretary shall issue an order directing a supervisor described in subsection (a)(2)(B) to repay the amount of any award or bonus paid under this title or title 5, including under chapter 45 or 53 of such title, if—

(A) such award or bonus was paid for performance during a period in which the supervisor committed a prohibited personnel action as determined pursuant to such subsection (a)(2)(B);

(B) the Secretary determines such repayment appropriate pursuant to regulations prescribed by the Secretary to carry out this section; and

(C) the supervisor is afforded notice and an opportunity for a hearing before making such repayment.

§ 735. Training regarding whistleblower complaints

(a) TRAINING.—The Secretary, in coordination with the Whistleblower Protection Ombudsman designated under section 3(d)(1)(C) of the Inspector General Act of 1978 (5 U.S.C. App.), shall annually provide to each employee of the Department training regarding whistleblower complaints, including—

(1) an explanation of each method established by law in which an employee may file a whistleblower complaint;

(2) an explanation of prohibited personnel actions described by section 733(c) of this title;

(3) with respect to supervisors, how to treat whistleblower complaints in accordance with section 732 of this title;

(4) the right of the employee to petition Congress regarding a whistleblower complaint in accordance with section 7211 of title 5;

(5) an explanation that the employee may not be prosecuted or reprised against for disclosing information to Congress in instances where such disclosure is permitted by law, including under sections 5701, 5705, and 7732 of this title, under section 552a of title 5 (commonly referred to as the Privacy Act), under chapter 93 of title 18, and pursuant to regulations promulgated under section 264(c) of the Health Insurance Portability and Accountability Act of 1996 (Public Law 104–191);

(6) an explanation of the language that is required to be included in all nondisclosure policies, forms, and agreements pursuant to section 115(a)(1) of the Whistleblower Protection Enhancement Act of 2012 (5 U.S.C. 2302 note); and

(7) the right of contractors to be protected from reprisal for the disclosure of certain information under section 4705 or 4712 of title 41.

(b) CERTIFICATION.—The Secretary shall annually provide training on merit system protection in a manner that the Special Counsel certifies as being satisfactory.

(c) PUBLICATION.—(1) The Secretary shall publish on the Internet website of the Department, and display prominently at each facility of the Department, the rights of an employee to file a whistleblower complaint, including the information described in paragraphs (1) through (7) of subsection (a).

(2) The Secretary shall publish on the Internet website of the Department, the whistleblower complaint form described in section 732(g)(2).

§ 736. Reports to Congress

(a) ANNUAL REPORTS.—The Secretary shall annually submit to the Committees on Veterans' Affairs of the House of Representatives and the Senate, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate a report that includes—

(1) with respect to whistleblower complaints filed under section 732 during the year covered by the report—

(A) the number of such complaints filed;

(B) the disposition of such complaints; and

(C) the ways in which the Secretary addressed such complaints in which a positive determination was made by a supervisor under subsection (b)(1) of such section;

(2) the number of whistleblower complaints filed during the year covered by the report that are not included under paragraph (1), including—

(A) the method in which such complaints were filed;

(B) the disposition of such complaints; and

(C) the ways in which the Secretary addressed such complaints; and

(3) with respect to disclosures made by a contractor under section 4705 or 4712 of title 41—

(A) the number of complaints relating to such disclosures that were investigated by the Inspector General of the Department of Veterans Affairs during the year covered by the report;

(B) the disposition of such complaints; and

(C) the ways in which the Secretary addressed such complaints.

(b) NOTICE OF OFFICE OF SPECIAL COUNSEL DETERMINATIONS.—Not later than 30 days after the date on which the Secretary receives from the Special Counsel information relating to a whistleblower complaint pursuant to section 1213 of title 5, the Secretary shall notify the Committees on Veterans' Affairs of the House of Representatives and the Senate, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate of such information, including the determination made by the Special Counsel.

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TITLE 5, UNITED STATES CODE

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PART III—EMPLOYEES

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SUBPART B—EMPLOYMENT AND RETENTION

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CHAPTER 33—EXAMINATION, SELECTION, AND PLACEMENT

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SUBCHAPTER I—EXAMINATION, CERTIFICATION, AND APPOINTMENT

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§ 3321. Competitive service; probationary period

(a) The President may take such action, including the issuance of rules, regulations, and directives, as shall provide as nearly as conditions of good administration warrant for a period of probation—

(1) before an appointment in the competitive service becomes final; and

(2) before initial appointment as a supervisor or manager becomes final.

(b) An individual—

(1) who has been transferred, assigned, or promoted from a position to a supervisory or managerial position, and

(2) who does not satisfactorily complete the probationary period under subsection (a)(2) of this section,

shall be returned to a position of no lower grade and pay than the position from which the individual was transferred, assigned, or promoted. Nothing in this section prohibits an agency from taking an action against an individual serving a probationary period under subsection (a)(2) of this section for cause unrelated to supervisory or managerial performance.

(c) Subsections (a) and (b) of this section shall not apply with respect to appointments in the Senior Executive [Service or] *Service,* the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service*, or any individual covered by section 717 of title 38* .

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SUBCHAPTER VIII—APPOINTMENT, REASSIGNMENT, TRANSFER, AND DEVELOPMENT IN THE SENIOR EXECUTIVE SERVICE

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§ 3393. Career appointments

(a) Each agency shall establish a recruitment program, in accordance with guidelines which shall be issued by the Office of Personnel Management, which provides for recruitment of career appointees from—

(1) all groups of qualified individuals within the civil service; or

(2) all groups of qualified individuals whether or not within the civil service.

(b) Each agency shall establish one or more executive resources boards, as appropriate, the members of which shall be appointed by the head of the agency from among employees of the agency or commissioned officers of the uniformed services serving on active duty in such agency. The boards shall, in accordance with merit staffing requirements established by the Office, conduct the merit staffing process for career appointees, including—

(1) reviewing the executive qualifications of each candidate for a position to be filled by a career appointee; and

(2) making written recommendations to the appropriate appointing authority concerning such candidates.

(c)(1) The Office shall establish one or more qualifications review boards, as appropriate. It is the function of the boards to certify the executive qualifications of candidates for initial appointment as career appointees in accordance with regulations prescribed by the Office. Of the members of each board more than one-half shall be appointed from among career appointees. Appointments to such boards shall be made on a non-partisan basis, the sole selection criterion being the professional knowledge of public management and knowledge of the appropriate occupational fields of the intended appointee.

(2) The Office shall, in consultation with the various qualification review boards, prescribe criteria for establishing executive qualifications for appointment of career appointees. The criteria shall provide for—

(A) consideration of demonstrated executive experience;

(B) consideration of successful participation in a career executive development program which is approved by the Office; and

(C) sufficient flexibility to allow for the appointment of individuals who have special or unique qualities which indicate a likelihood of executive success and who would not otherwise be eligible for appointment.

(d) An individual's initial appointment as a career appointee shall become final only after the individual has served a 1-year probationary period as a career appointee. *The preceding sentence shall not apply to any individual covered by section 717 of title 38.*

(e) Each career appointee shall meet the executive qualifications of the position to which appointed, as determined in writing by the appointing authority.

(f) The title of each career reserved position shall be published in the Federal Register.

(g) A career appointee may not be removed from the Senior Executive Service or civil service except in accordance with the applicable provisions of sections 1215, 3592, 3595, 7532, or 7543 of this title.

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SUBPART C—EMPLOYEE PERFORMANCE

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CHAPTER 43—PERFORMANCE APPRAISAL

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SUBCHAPTER I—GENERAL PROVISIONS

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§ 4303. Actions based on unacceptable performance

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

(A) 30 days' advance written notice of the proposed action which identifies—

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which—

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee—

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is—

(1) a preference eligible;

(2) in the competitive service; or

(3) in the excepted service and covered by subchapter II of chapter 75,

and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701.

(f) This section does not apply to—

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title,

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, **[**or**]**

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions**[**.**]***, or*

(4) any removal or demotion under section 715 of title 38.

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SUBCHAPTER II—PERFORMANCE APPRAISAL IN THE SENIOR EXECUTIVE SERVICE

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§ 4312. Senior Executive Service performance appraisal systems

(a) Each agency shall, in accordance with standards established by the Office of Personnel Management, develop one or more performance appraisal systems designed to—

(1) permit the accurate evaluation of performance in any position on the basis of criteria which are related to the position and which specify the critical elements of the position;

(2) provide for systematic appraisals of performance of senior executives;

(3) encourage excellence in performance by senior executives; and

(4) provide a basis for making eligibility determinations for retention in the Senior Executive Service and for Senior Executive Service performance awards.

(b) Each performance appraisal system established by an agency under subsection (a) of this section shall provide—

(1) that, on or before the beginning of each rating period, performance requirements for each senior executive in the agency are established in consultation with the senior executive and communicated to the senior executive;

(2) that written appraisals of performance are based on the individual and organizational performance requirements established for the rating period involved; **[**and**]**

(3) that each senior executive in the agency is provided a copy of the appraisal and rating under section 4314 of this title and is given an opportunity to respond in writing and have the rating reviewed by an employee, or (with the consent of the senior executive) a commissioned officer in the uniformed services serving on active duty, in a higher level in the agency before the rating becomes final**[**.**]***; and*

(4) that, in the case of the Department of Veterans Affairs, the performance appraisal system meets the requirements of section 719 of title 38.

(c)(1) The Office shall review each agency's performance appraisal system under this section, and determine whether the agency performance appraisal system meets the requirements of this subchapter.

(2) The Comptroller General shall from time to time review performance appraisal systems under this section to determine the extent to which any such system meets the requirements under this subchapter and shall periodically report its findings to the Office and to each House of the Congress.

(3) If the Office determines that an agency performance appraisal system does not meet the requirements under this subchapter (including regulations prescribed under section 4315), the agency shall take such corrective action as may be required by the Office.

(d) A senior executive may not appeal any appraisal and rating under any performance appraisal system under this section.

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VETERANS ACCESS, CHOICE, AND ACCOUNTABILITY ACT OF 2014

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TITLE VII—OTHER VETERANS MATTERS

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[SEC. 705. LIMITATION ON AWARDS AND BONUSES PAID TO EMPLOYEES OF DEPARTMENT OF VETERANS AFFAIRS.

[In each of fiscal years 2015 through 2024, the Secretary of Veterans Affairs shall ensure that the aggregate amount of awards and bonuses paid by the Secretary in a fiscal year under chapter 45 or 53 of title 5, United States Code, or any other awards or bonuses authorized under such title does not exceed $360,000,000.]

SEC. 705. LIMITATION ON AWARDS AND BONUSES PAID TO EMPLOYEES OF DEPARTMENT OF VETERANS AFFAIRS.

The Secretary of Veterans Affairs shall ensure that the aggregate amount of awards and bonuses paid by the Secretary in a fiscal year under chapter 45 or 53 of title 5, United States Code, or any other awards or bonuses authorized under such title or title 38, United States Code, does not exceed the following amounts:

(1) With respect to each of fiscal years 2015 through 2018, $300,000,000.

(2) With respect to each of fiscal years 2019 through 2024, $360,000,000.

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DISSENTING VIEWS

We have serious concerns over section 2 of H.R. 1994, as amended. We believe that this section, although claiming to provide an additional means of adding accountability to the Department of Veterans Affairs (VA) would, in practice, make it more difficult to achieve substantive accountability while exacerbating the VA's culture of whistleblower retaliation. We believe that section 2 lacks the modicum of due process that we suspect our courts to require. And we believe that section 2, by turning VA employees into at-will employees subject to the whims of VA managers and political appointees, would destroy the merit-based civil service at the VA.

There is no question that there is a need for greater accountability at the VA. There is no question that employees and managers who are not doing their jobs should be removed. There is no question that the VA seems to have a difficult time following the necessary steps it must take to discipline employees under current authorities. However, we should question whether destroying the due process rights of VA employees out of frustration that the VA is not using the authorities it currently possesses is necessary in order to achieve accountability. We should also question the belief that all of VA's accountability concerns would vanish because under the operation of section 2 the Secretary would not have to provide any predetermination due process and only nominal post-determination due process to fire an employee. We would note that the authority provided to VA in section 2 is based upon section 707 of the Veterans Access, Choice, and Accountability Act of 2014[1] and has been used only a handful of times since it was enacted last year; those cases are winding through our legal system, and there has not been a noticeable improvement in accountability at the VA.

Based upon the weight of case law, we are concerned that if section 2 were to be enacted that a court would determine that providing no pre-determination and limited post-determination due process does not afford a VA employee with adequate due process protections. This has the potential of granting employees removed under this authority the ability to return to the VA and to their old jobs. Once they return, they will be especially difficult to remove. We also believe that if VA were to be the only federal agency with at-will employment VA would find it ever-more difficult to recruit and retain the qualified and effective employees it needs to provide benefits and services to our veterans. This could unintentionally add to the very problems of accountability that section 2 should supposedly remedy: poor performing employees would essentially be given life-tenure and VA would have little to offer employees who could make a difference for veterans.

[1] P.L. 113–146, 128 Stat. 1754, 1798–1801.

Section 4 of H.R. 1994, as amended, includes whistleblower provisions drawn from H.R. 571, as amended, that was ordered reported to the full House by the Committee in May, 2015. Section 2 includes language that that would shield employees who have filed a whistleblower complaint under the process outlined in section 4 or with the Office of Special Counsel from removal. This could have the unintended consequence of encouraging false whistleblower allegations by employees who fear removal, even if these employees have nothing substantive upon which to blow the whistle. A real consequence of this would be to substantially increase the workload of an already strained OSC while taking important attention and resources away from real whistleblowers.

The treatment of whistleblowers at the VA is abhorrent. A New York Times article from 2014 described a long history of retaliation against whistleblowers and a "culture of silence and intimidation within the department[.][2] We believe that if enacted section 2 would add another tool of intimidation and retaliation for the use of bad managers against good employees. As the American Federation of Government Employees states:

> Under H.R. 1994, every whistleblower, along with every other VA employee, would become at-will employees. Without due process rights, no VA employee who wishes to keep his or her job should ever again become a whistleblower in the workplace or at the Congressional witness table. The only difference between the way the H.R. 1994 treats whistleblowers and other VA employees is that after the Secretary exercises his broad discretion to terminate or demote a whistleblower, the OSC would have to approve the action. This unworkable provision would add a completely new function to the OSC, deluging it with a surge of new cases from VA employees forced to invoke whistleblower status because it will be the only safe harbor from their new at-will employee status.[3]

We do not believe that section 2 provides the necessary due process protections that are consistent with Constitutional protections of life, liberty, and property. Section 2 would provide only an abbreviated level of post-determination due process.[4] The Supreme Court has stated that "[t]he right to due process is conferred not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."'[5] It is for this reason that we believe that ultimately the modicum of due process afforded by section 2 will be found to be

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[2] Eric Lichtblau, V.A. Punished Critics on Staff, Doctors Assert, N.Y. Times, June 15, 2014, available at *http://www.nytimes.com/2014/06/16/us/va-punished-critics-on-staff-doctors-assert.html?hpw&rref=us&_r=0*.

[3] Letter from the American Federation of Government Employees to Members of the Committee on Veterans' Affairs in opposition to H.R. 1994, July 14, 2015.

[4] As stated previously, section 2 of H.R. 1994, as amended, is modeled after section 707 of the Choice Act, *supra*. It should be noted that section 707 also provided no pre-determination due process. The five-day pre-determination notice was provided by the VA in an attempt to satisfy due process requirements, an action taken by the VA and opposed by some of our Majority counterparts.

[5] *Cleveland Bd. of Educ. V. Loudermill,* 470 U.S. 532, 541 (1985) (quoting *Arnett v. Kennedy,* 416 U.S. 134, 167 (1974).

lacking, and this failure may provide the grounds by which courts overturn disciplinary actions taken by the VA under color of this authority.

Section 2 provides us with a classic example of legislative language that is almost guaranteed to be used improperly while running counter to the stated intentions of its supporters. Even if used under the best of intentions and motives it could ultimately lead to decisions that would undermine these stated intentions. Depriving VA employees of due process rights and firing the opening salvo on an attempt to deprive VA employees of their employment protections is not the solution to anger and dissatisfaction with the VA's culture of silence, intimidation, and lack of accountability. There are more important issues at stake, including protecting our veterans and providing them with the benefits and services their sacrifices have earned. Fairness and due process is not necessarily efficient, but are effective in preserving constitutional protections afforded to our citizens. At-will government employment may be a goal of some, but we believe that unless we steer a course where only profit is the goal of our government then such a step is myopic. We should remember that civil service reforms of a century ago were instituted to remove the political patronage and nepotism then present throughout government, patronage and nepotism that afforded no real accountability. Due process and fairness is essential to protect the employees that we have asked to assist and help our veterans:

> Due process is available for the whistleblower, the employee who belongs to the 'wrong' political party, the reservist whose periods of military service are inconvenient to the boss, the scapegoat, and the person who has been misjudged based on faulty information. Due process is a constitutional requirement and a small price to pay to ensure the American people receive a merit-based civil service rather than a corrupt spoils system.[6]

We believe that VA must use its current authorities to effectively provide a level of accountability while ensuring that VA employees are provided a level of fairness and due process. Our impatience with the VA's actions in this regard should not cause us to throw out the concept of a merit-based civil service in our attempt to encourage VA to provide the level of accountability that we all demand. We supported an amendment that was offered during the full Committee markup that we believe would have provided a sensible additional tool to the Secretary to immediately discipline employees determined to be a threat to health and safety while providing what we believed to be a sufficient level of post-determination due process. This would have provided another accountability tool to the department while protecting the health and safety of veterans and the rights of VA employees. We are disappointed that this amendment was not agreed to.

[6] From "What is Due Process in Federal Civil Service Employment?" a Report to the President and Congress of the United States by the U.S. Merit Systems Protection Board, May, 2015.

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