

ALL CIRCUIT REVIEW ACT

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R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE

TO ACCOMPANY

H.R. 2229

TO AMEND TITLE 5, UNITED STATES CODE, TO PROVIDE  
PERMANENT AUTHORITY FOR JUDICIAL REVIEW OF CERTAIN  
MERIT SYSTEMS PROTECTION BOARD DECISIONS RELATING  
TO WHISTLEBLOWERS, AND FOR OTHER PURPOSES



APRIL 12, 2018.—Ordered to be printed

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115TH CONGRESS }  
2d Session }

SENATE

{ REPORT  
{ 115-229

ALL CIRCUIT REVIEW ACT

APRIL 12, 2018.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and Governmental Affairs, submitted the following

**R E P O R T**

[To accompany H.R. 2229]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (H.R. 2229) to amend title 5, United States Code, to provide permanent authority for judicial review of certain Merit Systems Protection Board decisions relating to whistleblowers, and for other purposes, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The purpose of H.R. 2229, the All Circuit Review Act, is to make permanent the authority to appeal final orders or final decisions of the Merit Systems Protection Board (MSPB) regarding whistleblower retaliation complaints to any U.S. Court of Appeals of competent jurisdiction.

II. BACKGROUND AND THE NEED FOR LEGISLATION

In 2012, Congress passed the Whistleblower Protection Enhancement Act (WPEA) to “strengthen the rights of and protections for federal whistleblowers so that they can more effectively help root

out waste, fraud, and abuse in the federal government.”<sup>1</sup> A primary reason for the enactment of WPEA was that “federal whistleblowers have seen their protections diminish in recent years, largely as a result of a series of decisions by the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over many cases brought under the Whistleblower Protection Act.”<sup>2</sup> While the Civil Service Reform Act of 1978 originally provided review of all Federal employee claims in any appropriate federal appeals court, including whistleblower claims, the Federal Courts Improvement Act of 1981 granted the Federal Circuit exclusive jurisdiction of appeals of MSPB final orders.<sup>3</sup> The WPEA reinstated “all-circuit review”, authorizing Federal employee whistleblowers to file petitions for review of the final order or decision of the MSPB in the Federal Circuit or in any court of appeals of competent jurisdiction.<sup>4</sup>

Congress considered multiple reasons for authorizing all-circuit review for Federal employee whistleblower claims in WPEA. First, Congress agreed with the argument “In the Federal Circuit no other judges critically review the decisions of the Court, no ‘split in the circuits’ can ever occur, and thus, federal employees are denied the most important single procedure which holds appeals court judges reviewable and accountable.”<sup>5</sup> Congress also noted that “a number of federal statutes already allow cases involving rights and protections of federal employees, or involving whistleblowers, to appeal to courts of appeals across the country.”<sup>6</sup> Congress further considered that other types of whistleblower claims enjoy a multi-circuit appellate review process, including claims under the False Claims Act, the Resolution Trust Corporation Completion Act, the Federal Deposit Insurance Corporation Improvement Act, the Clean Air Act, the Sarbanes-Oxley Act, and the American Recovery and Reinvestment Act.<sup>7</sup> Congress concluded that “the rationale for the Federal Circuit’s subject matter-based jurisdiction—the need for specialization in a particular area of law—does not apply in whistleblower jurisprudence.”<sup>8</sup>

WPEA authorized the all-circuit review for Federal whistleblower claims for two years. In 2014, before the expiration, Congress extended the all-circuit review authority for an additional three years.<sup>9</sup> Since few cases had yet to be resolved under the all-circuit review authority of WPEA, Congress extended the authority “to effectively assess its impact.”<sup>10</sup> That authority expired on November 27, 2017.

WPEA also authorized all-circuit review for petitions for review filed by the Director of the Office of Personnel Management (OPM)

<sup>1</sup>S. Rep. No. 112–155 at 1 (2012). *See also* Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112–199, 126 Stat. 1465 (2012).

<sup>2</sup>*Id.* at 1–2.

<sup>3</sup>Civil Service Reform Act of 1978, Pub. L. No. 95–454, § 205, 92 Stat. 1111, 1143 (1978); Federal Courts Improvements Act of 1981, Pub. L. No. 97–164, § 127, 96 Stat. 25, 45 (1982).

<sup>4</sup>Whistleblower Protection Enhancement Act, *supra* note 1, at § 108.

<sup>5</sup>S. Rep. No. 112–155 at 11 (citing *The Federal Employee Protection of Disclosures Act: Amendments to the Whistleblower Protection Act: Hearing Before the S. Comm. on Governmental Affairs*, 108th Cong. 108–414 (2003) (statement of Stephen Kohn, Chairman, National Whistleblower Center)).

<sup>6</sup>S. Rep. No. 112–155 at 11.

<sup>7</sup>*Id.* at 12.

<sup>8</sup>*Id.*

<sup>9</sup>All Circuit Review Extension Act, Pub. L. No. 113–170, 128 Stat. 1894 (2014).

<sup>10</sup>H. Rep. No. 113–519 (2014).

of MSPB decisions regarding Federal employee whistleblower retaliation complaints.<sup>11</sup> The Civil Service Reform Act of 1978 first authorized the OPM Director to petition to the U.S. Court of Appeals for the District of Columbia for review of a MSPB decision or order if the OPM Director determined “the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board’s decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.”<sup>12</sup> The OPM Director could only petition for review if the OPM Director intervened in the matter when it was before MSPB or if the OPM Director petitioned MSPB for reconsideration of its decision and was denied.<sup>13</sup> These petitions for review by the OPM Director were also transferred to the jurisdiction of the Federal Circuit under the Federal Courts Improvement Act of 1981.<sup>14</sup> WPEA authorized all-circuit review for the OPM Director to petition for review of a MSPB order or decision regarding a Federal employee whistleblower retaliation complaint.<sup>15</sup>

From October 1994 until WPEA’s enactment in 2012, the Federal Circuit ruled favorably for Federal employee whistleblowers on only three out of 243 appeals considered.<sup>16</sup> Between enactment of all-circuit review authority in WPEA in 2012 and March 11, 2018, the Federal Circuit heard 31 appeals of Federal employee whistleblowers and ruled favorably for the whistleblower in just one of those appeals.<sup>17</sup> With all-circuit review authority, other circuits heard six appeals from Federal employee whistleblowers, ruling favorably for the whistleblower in two of those appeals.<sup>18</sup> The other circuits’ rulings under the all-circuit review authority demonstrate that there is no need for one court—the Federal Circuit—to specialize in whistleblower protection laws for Federal employees.

In one case under all-circuit review authority, the Seventh Circuit differed from the Federal Circuit in the interpretation of a requirement for appeal under the Whistleblower Protection Act.<sup>19</sup> This opinion by the Seventh Circuit provides a “split in the circuit” of an interpretation of a statutory requirement under Federal whistleblower protection laws. Such a “split in the circuit” was intended to occur with all-circuit review authority, allowing courts to critically review each other’s decisions on Federal employee whistleblower protection laws and increase accountability in their interpretations of the laws.

This Act would permanently authorize the all-circuit review authority provided by WPEA for Federal employee whistleblower claims. The Act would also permanently authorize the all-circuit review authority for the OPM Director to petition for review of a MSPB final order concerning a Federal employee whistleblower retaliation complaint. Although the authority expired on November

<sup>11</sup> Whistleblower Protection Enhancement Act, *supra* note 1, at § 108.

<sup>12</sup> Civil Service Reform Act, *supra* note 4, at § 205.

<sup>13</sup> *Id.*

<sup>14</sup> Federal Courts Improvements Act, *supra* note 4.

<sup>15</sup> Whistleblower Protection Enhancement Act, *supra* note 1, at § 108.

<sup>16</sup> Memorandum from Tom Devine, Government Accountability Project, on Federal Circuit Whistleblower Decisions Since Passage of 1994 Amendments (Jan. 30, 2017).

<sup>17</sup> *Id.*

<sup>18</sup> Memorandum from Tom Devine, Government Accountability Project, on All Circuits Whistleblower Decisions Since WPEA Passage (Aug. 26, 2017).

<sup>19</sup> *Delgado v. Merit Sys. Prot. Bd.*, 880 F. 3d 913 (7th Cir. 2018).

27, 2017, this Act would apply retroactively, as if enacted on November 27, 2017.

### III. LEGISLATIVE HISTORY

H.R. 2229 was introduced on April 28, 2017, by Representatives Elijah Cummings (D–MD–7) and Blake Farenthold (R–TX–27). The Act was passed by the House of Representatives on October 11, 2017, by voice vote. The Act was received in the Senate and referred to the Committee on Homeland Security and Governmental Affairs on October 16, 2017.

The Committee considered H.R. 2229 at a business meeting on February 14, 2018. During the business meeting, an amendment offered by Chairman Johnson was adopted. The amendment retroactively applied the effective date of the Act to November 27, 2017, when the authority expired. Both the amendment and the legislation as modified by the amendment were passed by voice vote *en bloc* with Senators Johnson, Portman, Paul, Lankford, Enzi, Hoeven, Daines, McCaskill, Heitkamp, Peters, Hassan, Harris, and Jones present.

### IV. SECTION-BY-SECTION ANALYSIS OF THE ACT, AS REPORTED

#### *Section 1. Short title*

This section establishes the short title of the Act as the “All Circuit Review Act”.

#### *Section 2. Judicial review of Merit Systems Protection Board decisions relating to whistleblowers*

Subsection (a) makes permanent the authority to appeal MSPB final orders or final decisions regarding whistleblower complaints to any U.S. Court of Appeals of competent jurisdiction.

Subsection (b) makes permanent the authority for the Director of the Office of Personnel Management to appeal the MSPB final disposition of a whistleblower complaint to a U.S. Court of Appeals. The Director can only make such an appeal if the Director believes MSPB erred in its interpretation of civil service law, rule, regulation, or policy directive, and if the Director believes the MSPB disposition will have a substantial impact on a civil service law, rule, regulation, or policy directive.

### V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this Act and determined that the Act will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office’s statement that the Act contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

## VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,  
 CONGRESSIONAL BUDGET OFFICE,  
 Washington, DC, February 22, 2018.

Hon. ROB JOHNSON,  
 Chairman, Committee on Homeland Security and Governmental Affairs,  
 U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2229, the All Circuit Review Act.

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

Sincerely,

KEITH HALL,  
 Director.

Enclosure.

*H.R. 2229—All Circuit Review Act*

H.R. 2229 would permanently extend (and retroactively apply) the authority for federal employees to appeal Merit Systems Protection Board (MSPB) decisions regarding whistleblower cases in any federal court, instead of only the U.S. Court of Appeals in Washington, D.C. Under current law, the authority to file an appeal in any federal court expired in December of 2017.

Using information from the MSPB and the Administrative Office of the U.S. Courts, CBO expects that permanently allowing appeals to be filed in any federal circuit would lead to a small increase in the administrative burden of those and other federal agencies. Because many agency offices are located in or near Washington, D.C., that would include attorneys' travel costs and costs associated with researching regional circuit courts' rules and procedures. However, based on the number of such cases in recent years, CBO estimates that those costs would not be significant.

Enacting H.R. 2229 could affect direct spending by agencies that are not funded through annual appropriations; therefore, pay-as-you-go procedures apply. However, CBO estimates that the net effects would be insignificant for each year. Enacting the bill would not affect revenues.

CBO estimates that enacting H.R. 2229 would not significantly increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 2229 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

On July 18, 2017, CBO transmitted a cost estimate for H.R. 2229, the All Circuit Review Act, as ordered reported by the House Committee on Oversight and Government Reform on May 2, 2017. The bills are similar and CBO's estimates of their budgetary effects are the same.

The CBO staff contact for this estimate is Janani Shankaran. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

## VII. CHANGES IN EXISTING LAW MADE BY THE ACT, AS REPORTED

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

**UNITED STATES CODE**

\* \* \* \* \*

**TITLE 5—GOVERNMENT ORGANIZATION  
AND EMPLOYEES**

\* \* \* \* \*

**PART III—EMPLOYEES**

\* \* \* \* \*

**Subpart F—Labor-Management and Employee  
Relations**

\* \* \* \* \*

**CHAPTER 77—APPEALS**

\* \* \* \* \*

**SEC. 7703. JUDICIAL REVIEW OF DECISIONS OF THE MERIT SYSTEMS  
PROTECTION BOARD**(a) \* \* \*  
(b) \* \* \*

(1) \* \* \*

(A) \* \* \*

(B) **[(During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, a petition]** *A petition* to review the final order or final decision of the Board that raises no challenges to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(2) \* \* \*

(c) \* \* \*

(d) \* \* \*

(1) \* \* \*

(2) **[(During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, this**



paragraph] *This paragraph* shall apply to any review obtained by the Director of the Office of Personnel Management that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b), or 2302(b)(9)(A)(i), (B), (C), or (D). The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the court of appeals. The granting of the petition for judicial review shall be at the discretion of the court of appeals.

\* \* \* \* \*

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