

**AMENDMENT TO H.R. 5136, AS REPORTED**  
**OFFERED BY MR. VAN HOLLEN OF MARYLAND**

In title XI (before section 1101), insert the following (and make all necessary technical and conforming changes):

**1     **Subtitle A—General Provisions****

At the end of title XI, add the following (and make all necessary technical and conforming changes):

**2     **Subtitle B—Provisions Relating to****  
**3     **Protections for Whistleblowers****

**4     **SEC. 1121. SHORT TITLE.****

**5**This subtitle may be cited as the “Whistleblower Pro-  
**6**tection Enhancement Act of 2010”.

**7     **PART I—PROTECTION OF CERTAIN DISCLOSURES****  
**8     **OF INFORMATION BY FEDERAL EMPLOYEES****

**9     **SEC. 1131. CLARIFICATION OF DISCLOSURES COVERED.****

**10**(a) **IN GENERAL.**—Section 2302(b)(8) of title 5,  
**11**United States Code, is amended in subparagraphs (A)(i)  
**12**and (B)(i), by striking “a violation” and inserting “any  
**13**violation”.

**14**(b) **PROHIBITED PERSONNEL PRACTICES UNDER**  
**15****SECTION 2302(b)(9).**—

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

8           (B) Section 2302(a)(2)(C)(i) of title 5, United  
9           States Code, is amended by inserting “or subsection  
10          (b)(9)(B), (C), or (D)” after “subsection (b)(8)”.

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

15          (B) Section 2302 of title 5, United States Code,  
16          is amended by adding at the end the following:

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

19                 “(1) the disclosure was made during the normal  
20                 course of the duties of the employee;

21                 “(2) the disclosure was made to a person, in-  
22                 cluding a supervisor, who participated in an activity  
23                 that the employee or applicant reasonably believed to  
24                 be covered by subsection (b)(8);

1           “(3) the disclosure revealed information that  
2           had been previously disclosed;

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

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

6           “(6) the disclosure was made while the em-  
7           ployee was off duty; or

8           “(7) of the amount of time which has passed  
9           since the occurrence of the events described in the  
10          disclosure.”.

11 **SEC. 1132. DEFINITIONAL AMENDMENTS.**

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

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

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

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

19           “(D) ‘disclosure’ means a formal or infor-  
20           mal communication or transmission, but does  
21           not include a communication or transmission  
22           concerning policy decisions that lawfully exer-  
23           cise discretionary authority, unless the employee  
24           or applicant providing the disclosure reasonably  
25           believes that the disclosure evidences—

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

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

7           (b) CLEAR AND CONVINCING EVIDENCE.—Sections  
8 1214(b)(4)(B)(ii) and 1221(e)(2) of title 5, United States  
9 Code, are amended by adding at the end the following:  
10 “For purposes of the preceding sentence, ‘clear and con-  
11 vincing evidence’ means evidence indicating that the mat-  
12 ter to be proved is highly probable or reasonably certain.”.

13 **SEC. 1133. REBUTTABLE PRESUMPTION.**

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

17 “This subsection shall not be construed to authorize the  
18 withholding of information from Congress or the taking  
19 of any personnel action against an employee who discloses  
20 information to Congress. For purposes of paragraph (8),  
21 any presumption relating to the performance of a duty by  
22 an employee who has authority to take or direct others  
23 to take, recommend, or approve any personnel action may  
24 be rebutted by substantial evidence. For purposes of para-  
25 graph (8), a determination as to whether an employee or

1 applicant reasonably believes that such employee or appli-  
2 cant has disclosed information that evidences any violation  
3 of law, rule, regulation, gross mismanagement, a gross  
4 waste of funds, an abuse of authority, or a substantial  
5 and specific danger to public health or safety shall be  
6 made by determining whether a disinterested observer  
7 with knowledge of the essential facts known to or readily  
8 ascertainable by the employee could reasonably conclude  
9 that the actions of the Government evidence such viola-  
10 tions, mismanagement, waste, abuse, or danger.”.

11 **SEC. 1134. PERSONNEL ACTIONS AND PROHIBITED PER-**  
12 **SONNEL PRACTICES.**

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

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

17 (2) by redesignating clause (xi) as clause (xiii);  
18 and

19 (3) by inserting after clause (x) the following:

20 “(xi) the implementation or enforce-  
21 ment of any nondisclosure policy, form, or  
22 agreement;

23 “(xii) an investigation, other than a  
24 ministerial or nondiscretionary investiga-  
25 tion; and”.

1 (b) PROHIBITED PERSONNEL PRACTICE.—

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

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

6 (B) by redesignating paragraph (12) as  
7 paragraph (13);

8 (C) by inserting after paragraph (11) the  
9 following:

10 “(12) implement or enforce any nondisclosure  
11 policy, form, or agreement, if such policy, form, or  
12 agreement does not contain the following statement:  
13 “These provisions are consistent with and do not su-  
14 persede, conflict with, or otherwise alter the em-  
15 ployee obligations, rights, or liabilities created by  
16 Executive Order No. 12958; section 7211 of title 5,  
17 United States Code (governing disclosures to Con-  
18 gress); section 1034 of title 10, United States Code  
19 (governing disclosure to Congress by members of the  
20 military); section 2302(b)(8) of title 5, United  
21 States Code (governing disclosures of illegality,  
22 waste, fraud, abuse, or public health or safety  
23 threats); the Intelligence Identities Protection Act of  
24 1982 (50 U.S.C. 421 et seq.) (governing disclosures  
25 that could expose confidential Government agents);

1 and the statutes which protect against disclosures  
2 that could compromise national security, including  
3 sections 641, 793, 794, 798, and 952 of title 18,  
4 United States Code, and section 4(b) of the Subver-  
5 sive Activities Control Act of 1950 (50 U.S.C.  
6 783(b)). The definitions, requirements, obligations,  
7 rights, sanctions, and liabilities created by such Ex-  
8 ecutive order and such statutory provisions are in-  
9 corporated into this agreement and are controlling.’;  
10 or”.

11 (2) NONDISCLOSURE POLICY, FORM, OR AGREE-  
12 MENT IN EFFECT BEFORE THE DATE OF ENACT-  
13 MENT.—A nondisclosure policy, form, or agreement  
14 that was in effect before the date of enactment of  
15 this Act, but that does not contain the statement re-  
16 quired under section 2302(b)(12) of title 5, United  
17 States Code (as added by paragraph (1)(C)) for im-  
18 plementation or enforcement may be enforced—

19 (A) with regard to a current employee, if  
20 the agency gives such employee notice of the  
21 statement; and

22 (B) with regard to a former employee, if  
23 the agency posts notice of the statement on the  
24 agency website for 1 year following the date of  
25 enactment of this Act.

1 **SEC. 1135. EXCLUSION OF AGENCIES BY THE PRESIDENT.**

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

5 “(ii) an element of the intelligence  
6 community (as defined in section 3(4) of  
7 the National Security Act of 1947 (50  
8 U.S.C. 401a(4))), and, as determined by  
9 the President, any executive agency or unit  
10 thereof the principal function of which is  
11 the conduct of foreign intelligence or coun-  
12 terintelligence activities, if the determina-  
13 tion (as that determination relates to a  
14 personnel action) is made before that per-  
15 sonnel action; or”.

16 **SEC. 1136. DISCIPLINARY ACTION.**

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

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

20 “(i) disciplinary action consisting of removal,  
21 reduction in grade, debarment from Federal employ-  
22 ment for a period not to exceed 5 years, suspension,  
23 or reprimand;

24 “(ii) an assessment of a civil penalty not to ex-  
25 ceed \$1,000; or

1           “(iii) any combination of disciplinary actions  
2           described under clause (i) and an assessment de-  
3           scribed under clause (ii).

4           “(B) In any case brought under paragraph (1) in  
5           which the Board finds that an employee has committed  
6           a prohibited personnel practice under section 2302(b)(8)  
7           or 2302(b)(9)(B), (C), or (D), the Board shall impose dis-  
8           ciplinary action if the Board finds that the activity pro-  
9           tected under section 2302(b)(8) or 2302(b)(9)(B), (C), or  
10          (D), as the case may be, was a significant motivating fac-  
11          tor, even if other factors also motivated the decision, for  
12          the employee’s decision to take, fail to take, or threaten  
13          to take or fail to take a personnel action, unless that em-  
14          ployee demonstrates, by a preponderance of the evidence,  
15          that the employee would have taken, failed to take, or  
16          threatened to take or fail to take the same personnel ac-  
17          tion, in the absence of such protected activity.”.

18   **SEC. 1137. REMEDIES.**

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

23          (b)    **DAMAGES.**—Sections 1214(g)(2) and  
24          1221(g)(1)(A)(ii) of title 5, United States Code, are  
25          amended by striking all after “travel expenses,” and in-

1 serting “any other reasonable and foreseeable consequen-  
2 tial damages, and compensatory damages (including attor-  
3 ney’s fees, interest, reasonable expert witness fees, and  
4 costs).” each place it appears.

5 **SEC. 1138. JUDICIAL REVIEW.**

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

9 “(b)(1)(A) Except as provided in subparagraph (B)  
10 and paragraph (2), a petition to review a final order or  
11 final decision of the Board shall be filed in the United  
12 States Court of Appeals for the Federal Circuit. Notwith-  
13 standing any other provision of law, any petition for re-  
14 view shall be filed within 60 days after the date the Board  
15 issues notice of the final order or decision of the Board.

16 “(B) A petition to review a final order or final deci-  
17 sion of the Board that raises a challenge to the Board’s  
18 disposition of allegations of a prohibited personnel practice  
19 described in section 2302(b)(8) or 2302(b)(9)(B), (C), or  
20 (D) may be filed in the United States Court of Appeals  
21 for the Federal Circuit or any court of appeals of com-  
22 petent jurisdiction as provided under paragraph (2).”.

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

1       “(d)(1) Except as provided under paragraph (2), this  
2 paragraph shall apply to any review obtained by the Direc-  
3 tor of the Office of Personnel Management. The Director  
4 of the Office of Personnel Management may obtain review  
5 of any final order or decision of the Board by filing, within  
6 60 days after the date the Board issues notice of the final  
7 order or decision of the Board, a petition for judicial re-  
8 view in the United States Court of Appeals for the Federal  
9 Circuit if the Director determines, in the discretion of the  
10 Director, that the Board erred in interpreting a civil serv-  
11 ice law, rule, or regulation affecting personnel manage-  
12 ment and that the Board’s decision will have a substantial  
13 impact on a civil service law, rule, regulation, or policy  
14 directive. If the Director did not intervene in a matter be-  
15 fore the Board, the Director may not petition for review  
16 of a Board decision under this section unless the Director  
17 first petitions the Board for a reconsideration of its deci-  
18 sion, and such petition is denied. In addition to the named  
19 respondent, the Board and all other parties to the pro-  
20 ceedings before the Board shall have the right to appear  
21 in the proceeding before the Court of Appeals. The grant-  
22 ing of the petition for judicial review shall be at the discre-  
23 tion of the Court of Appeals.

24       “(2) This paragraph shall apply to any review ob-  
25 tained by the Director of the Office of Personnel Manage-

1 ment that raises a challenge to the Board's disposition of  
2 allegations of a prohibited personnel practice described in  
3 section 2302(b)(8) or 2302(b)(9)((B), (C), or (D). The  
4 Director of the Office of Personnel Management may ob-  
5 tain review of any final order or decision of the Board  
6 by filing, within 60 days after the date the Board issues  
7 notice of the final order or decision of the Board, a peti-  
8 tion for judicial review in the United States Court of Ap-  
9 peals for the Federal Circuit or any court of appeals of  
10 competent jurisdiction as provided under subsection (b)(2)  
11 if the Director determines, in the discretion of the Direc-  
12 tor, that the Board erred in interpreting a civil service  
13 law, rule, or regulation affecting personnel management  
14 and that the Board's decision will have a substantial im-  
15 pact on a civil service law, rule, regulation, or policy direc-  
16 tive. If the petition is filed with the United States Court  
17 of Appeals for the Federal Circuit, at the request of the  
18 employee, former employee, or applicant, the petition shall  
19 be moved to any court of appeals of competent jurisdiction  
20 as provided under subsection (b)(2). If the Director did  
21 not intervene in a matter before the Board, the Director  
22 may not petition for review of a Board decision under this  
23 section unless the Director first petitions the Board for  
24 a reconsideration of its decision, and such petition is de-  
25 nied. In addition to the named respondent, the Board and

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

5 **SEC. 1139. DISCLOSURE OF CENSORSHIP RELATED TO RE-**  
6 **SEARCH, ANALYSIS, OR TECHNICAL INFOR-**  
7 **MATION.**

8 (a) DEFINITIONS.—In this subsection—

9 (1) the term “applicant” means an applicant  
10 for a covered position;

11 (2) the term “censorship related to research,  
12 analysis, or technical information” means any effort  
13 to alter, misrepresent, or suppress research, anal-  
14 ysis, or technical information;

15 (3) the term “covered position” has the mean-  
16 ing given under section 2302(a)(2)(B) of title 5,  
17 United States Code;

18 (4) the term “employee” means an employee in  
19 a covered position; and

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

23 (b) PROTECTED DISCLOSURE.—

24 (1) IN GENERAL.—Any disclosure of informa-  
25 tion by an employee or applicant for employment

1 that the employee or applicant reasonably believes is  
2 evidence of censorship related to research, analysis,  
3 or technical information—

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

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

11 (I) any violation of law, rule, or  
12 regulation; or

13 (II) gross mismanagement, a  
14 gross waste of funds, an abuse of au-  
15 thority, or a substantial and specific  
16 danger to public health or safety; and

17 (ii) the disclosure and information  
18 satisfy the conditions stated in the matter  
19 following clause (ii) of section  
20 2302(b)(8)(A) of title 5, United States  
21 Code; and

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

1 (i) the conditions under subparagraph  
2 (A)(i) are satisfied; and

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

8 (2) APPLICATION.—Subsection (a) shall apply  
9 to any disclosure of information by an employee or  
10 applicant without restriction to time, place, form,  
11 motive, context, forum, or prior disclosure made to  
12 any person by an employee or applicant, including a  
13 disclosure made in the ordinary course of an employ-  
14 ee's duties.

15 (3) RULE OF CONSTRUCTION.—Nothing in this  
16 section shall be construed to imply any limitation on  
17 the protections of employees and applicants afforded  
18 by any other provision of law, including protections  
19 with respect to any disclosure of information be-  
20 lieved to be evidence of censorship related to re-  
21 search, analysis, or technical information.

22 **SEC. 1140. ADVISING EMPLOYEES OF RIGHTS.**

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

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

6 **SEC. 1141. SPECIAL COUNSEL AMICUS CURIAE APPEAR-**  
7 **ANCE.**

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

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

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

22 **SEC. 1142. SCOPE OF DUE PROCESS.**

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

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

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

7 **SEC. 1143. NONDISCLOSURE POLICIES, FORMS, AND AGREE-**  
8 **MENTS.**

9 (a) IN GENERAL.—

10 (1) REQUIREMENT.—Each agreement in Stand-  
11 ard Forms 312 and 4414 of the Government and  
12 any other nondisclosure policy, form, or agreement  
13 of the Government shall contain the following state-  
14 ment: “These restrictions are consistent with and do  
15 not supersede, conflict with, or otherwise alter the  
16 employee obligations, rights, or liabilities created by  
17 Executive Order No. 12958; section 7211 of title 5,  
18 United States Code (governing disclosures to Con-  
19 gress); section 1034 of title 10, United States Code  
20 (governing disclosure to Congress by members of the  
21 military); section 2302(b)(8) of title 5, United  
22 States Code (governing disclosures of illegality,  
23 waste, fraud, abuse, or public health or safety  
24 threats); the Intelligence Identities Protection Act of  
25 1982 (50 U.S.C. 421 et seq.) (governing disclosures

1 that could expose confidential Government agents);  
2 and the statutes which protect against disclosure  
3 that may compromise the national security, includ-  
4 ing sections 641, 793, 794, 798, and 952 of title 18,  
5 United States Code, and section 4(b) of the Subver-  
6 sive Activities Act of 1950 (50 U.S.C. 783(b)). The  
7 definitions, requirements, obligations, rights, sanc-  
8 tions, and liabilities created by such Executive order  
9 and such statutory provisions are incorporated into  
10 this agreement and are controlling.”.

11 (2) ENFORCEABILITY.—Any nondisclosure pol-  
12 icy, form, or agreement described under paragraph  
13 (1) that does not contain the statement required  
14 under paragraph (1) may not be implemented or en-  
15 forced to the extent such policy, form, or agreement  
16 is inconsistent with that statement. A nondisclosure  
17 policy, form, or agreement that was in effect before  
18 the date of enactment of this Act, but that does not  
19 contain that statement, may be enforced—

20 (A) with regard to a current employee, if  
21 the agency gives such employee notice of the  
22 statement; and

23 (B) with regard to a former employee, if  
24 the agency posts notice of the statement on its

1 web site for 1 year following the date of enact-  
2 ment of this Act.

3 (b) PERSONS OTHER THAN GOVERNMENT EMPLOY-  
4 EES.—Notwithstanding subsection (a), a nondisclosure  
5 policy, form, or agreement that is to be executed by a per-  
6 son connected with the conduct of an intelligence or intel-  
7 ligence-related activity, other than an employee or officer  
8 of the United States Government, may contain provisions  
9 appropriate to the particular activity for which such docu-  
10 ment is to be used. Such form or agreement shall, at a  
11 minimum, require that the person will not disclose any  
12 classified information received in the course of such activ-  
13 ity unless specifically authorized to do so by the United  
14 States Government. Such nondisclosure forms shall also  
15 make it clear that such forms do not bar disclosures to  
16 Congress or to an authorized official of an executive agen-  
17 cy or the Department of Justice that are essential to re-  
18 porting a substantial violation of law.

19 **SEC. 1144. REPORTING REQUIREMENTS.**

20 (a) GOVERNMENT ACCOUNTABILITY OFFICE.—

21 (1) REPORT.—Not later than 40 months after  
22 the date of enactment of this Act, the Comptroller  
23 General shall submit a report to the Committee on  
24 Homeland Security and Governmental Affairs of the  
25 Senate and the Committee on Oversight and Govern-

1       ment Reform of the House of Representatives on the  
2       implementation of this subtitle.

3           (2) CONTENTS.—The report under this sub-  
4       section shall include—

5           (A) an analysis of any changes in the num-  
6       ber of cases filed with the Merit Systems Pro-  
7       tection Board alleging violations of section  
8       2302(b)(8) or (9) of title 5, United States  
9       Code, since the effective date of this subtitle;

10          (B) the outcome of the cases described  
11       under subparagraph (A), including whether or  
12       not the Merit Systems Protection Board, the  
13       Federal Circuit Court of Appeals, or any other  
14       court determined the allegations to be frivolous  
15       or malicious;

16          (C) an analysis of the outcome of cases de-  
17       scribed under subparagraph (A) that were de-  
18       cided by a United States district court and the  
19       impact the process has on the Merit Systems  
20       Protection Board and the Federal court system;  
21       and

22          (D) any other matter as determined by the  
23       Comptroller General.

24       (b) STUDY ON REVOCATION OF SECURITY CLEAR-  
25       ANCES.—

1           (1) STUDY.—The Council of the Inspectors  
2           General on Integrity and Efficiency, including the  
3           Inspectors General of the Department of Justice, the  
4           Office of the Director of National Intelligence, and  
5           the Office of Personnel Management, shall conduct  
6           a study of security clearance revocations of Federal  
7           employees at a select sample of executive branch  
8           agencies. The study shall consist of an examination  
9           of the number of security clearances revoked, the  
10          process employed by each agency in revoking a clear-  
11          ance, the pay and employment status of agency em-  
12          ployees during the revocation process, how often  
13          such revocations result in termination of employ-  
14          ment or reassignment, how often such revocations  
15          are based on an improper disclosure of information,  
16          how often security clearances are reinstated fol-  
17          lowing an appeal, how often security clearances re-  
18          main revoked following a finding of retaliation for  
19          making a disclosure, and such other factors as the  
20          Inspectors General determine appropriate.

21          (2) REPORT.—Not later than 18 months after  
22          the date of enactment of this Act, the Inspectors  
23          General shall submit to the Committee on Homeland  
24          Security and Governmental Affairs of the Senate  
25          and the Committee on Oversight and Government

1 Reform of the House of Representatives a report on  
2 the results of the study required under this sub-  
3 section.

4 (c) MERIT SYSTEMS PROTECTION BOARD.—

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

10 (A) Information relating to the outcome of  
11 cases decided during the applicable year of the  
12 report in which violations of section 2302(b)(8)  
13 or (9) of title 5, United States Code, were al-  
14 leged.

15 (B) The number of such cases filed in the  
16 regional and field offices, the number of peti-  
17 tions for review filed in such cases, and the out-  
18 comes of such cases.

19 (2) FIRST REPORT.—The first report described  
20 under paragraph (1) submitted after the date of en-  
21 actment of this Act shall include an addendum re-  
22 quired under that subparagraph that covers the pe-  
23 riod beginning on January 1, 2010, through the end  
24 of the fiscal year 2010.

1 **SEC. 1145. ALTERNATIVE REVIEW.**

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

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

9 “(A) the prohibited personnel practice is alleged  
10 to have been committed;

11 “(B) the employment records relevant to such  
12 practice are maintained and administered; or

13 “(C) resides the employee, former employee, or  
14 applicant for employment allegedly affected by such  
15 practice.

16 “(2)(A) An employee, former employee, or applicant  
17 for employment to whom paragraph (3) or (4) applies may  
18 file an action at law or equity for de novo review in the  
19 appropriate United States district court in accordance  
20 with this subsection.

21 “(B) Upon initiation of any action under subpara-  
22 graph (A), the Board shall stay any other claims of such  
23 employee, former employee, or applicant pending before  
24 the Board at that time which arise out of the same set  
25 of operative facts. Such claims shall be stayed pending  
26 completion of the action filed under subparagraph (A) be-

1 fore the appropriate United States district court and any  
2 associated appellate review.

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

4 “(A) an employee, former employee, or appli-  
5 cant for employment—

6 “(i) seeks corrective action (or on behalf of  
7 whom corrective action is sought) from the  
8 Merit Systems Protection Board based on an  
9 alleged prohibited personnel practice described  
10 in section 2302(b)(8) or 2302(b)(9)(B), (C), or  
11 (D) for which the associated personnel action is  
12 an action covered under section 7512 or 7542,  
13 an action based on unacceptable performance  
14 under section 4303, or a personnel action under  
15 clause (iv) or (xiii) of section 2302(a)(2)(A); or

16 “(ii) files an appeal under section 7701(a)  
17 alleging as an affirmative defense the commis-  
18 sion of a prohibited personnel practice described  
19 in section 2302(b)(8) or 2302(b)(9)(B), (C), or  
20 (D) for which the associated personnel action is  
21 an action covered under section 7512 or 7542,  
22 an action based on unacceptable performance  
23 under section 4303, or a personnel action under  
24 clause (iv) or (xiii) of section 2302(a)(2)(A);

1           “(B) no final order or decision is issued by the  
2 Board within 210 days after the date on which a re-  
3 quest for that corrective action has been duly sub-  
4 mitted; and

5           “(C) such employee, former employee, or appli-  
6 cant provides written notice to the Board of filing an  
7 action under this subsection before the filing of that  
8 action.

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

10           “(A)(i) an employee, former employee, or appli-  
11 cant for employment—

12           “(I) seeks corrective action from the Merit  
13 Systems Protection Board based on an alleged  
14 prohibited personnel practice described in sec-  
15 tion 2302(b)(8) or 2302(b)(9)(B), (C), or (D)  
16 for which the associated personnel action is an  
17 action covered under section 7512 or 7542, an  
18 action based on unacceptable performance  
19 under section 4303, or a personnel action under  
20 clause (iv) or (xiii) of section 2302(a)(2)(A); or

21           “(II) files an appeal under section  
22 7701(a)(1) alleging as an affirmative defense  
23 the commission of a prohibited personnel prac-  
24 tice described in section 2302(b)(8) or  
25 2302(b)(9)(B), (C), or (D) for which the associ-

1           ated personnel action is an action covered under  
2           section 7512 or 7542, an action based on unac-  
3           ceptable performance under section 4303, or a  
4           personnel action under clause (iv) or (xiii) of  
5           section 2302(a)(2)(A);

6           “(ii) within 60 days after the date on which the  
7           request for corrective action was duly submitted,  
8           such employee, former employee, or applicant for  
9           employment files a motion requesting a certification  
10          consistent with clause (iii) to the Board, any admin-  
11          istrative law judge appointed by the Board under  
12          section 3105 and assigned to the case, or any em-  
13          ployee of the Board designated by the Board and as-  
14          signed to the case; and

15          “(iii) within 90 days after the submission of a  
16          motion under clause (ii), the Board, any administra-  
17          tive law judge appointed by the Board under section  
18          3105 and assigned to the case, or any employee of  
19          the Board designated by the Board and assigned to  
20          the case certifies that—

21                  “(I) the Board is not likely to dispose of  
22                  the case within 210 days after the date on  
23                  which a request for that corrective action has  
24                  been duly submitted;

25                  “(II) the case—

1                   “(aa) consists of multiple claims;

2                   “(bb) requires complex or extensive  
3                   discovery; or

4                   “(cc) arises out of the same set of op-  
5                   erative facts as any civil action against the  
6                   Government filed by the employee, former  
7                   employee, or applicant pending in a Fed-  
8                   eral court; or

9                   “(dd) involves a novel question of law;  
10                   or

11                   “(B) a request for certification under subpara-  
12                   graph (A) is denied, within 60 days after a final  
13                   order or decision is issued by the Board under sec-  
14                   tion 7703, and so long as such employee, former em-  
15                   ployee, or applicant has not filed a petition for judi-  
16                   cial review of such order or decision.

17                   “(5) In any action filed under this subsection—

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

20                   “(B) at the request of either party, such action  
21                   shall be tried de novo by the court with a jury;

22                   “(C) the court—

23                   “(i) shall apply the standards set forth in  
24                   subsection (e); and

1           “(ii) may award any relief which the court  
2           considers appropriate under subsection (g), ex-  
3           cept—

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

6                   “(II) relief may not include punitive  
7                   damages; and

8           “(D) the Special Counsel may not represent the  
9           employee, former employee, or applicant for employ-  
10          ment.

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

15          “(7) This subsection applies with respect to any ap-  
16          peal, petition, or other request for corrective action duly  
17          submitted to the Board, whether under section  
18          1214(b)(2), the preceding provisions of this section, sec-  
19          tion 7513(d), or any otherwise applicable provisions of  
20          law, rule, or regulation.”

1 **PART II—NATIONAL SECURITY WHISTLEBLOWER**  
2 **PROTECTIONS**

3 **SEC. 1151. PROTECTION OF NATIONAL SECURITY WHISTLE-**  
4 **BLOWERS.**

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

8 **“§ 2303a. Prohibited personnel practices in an ele-**  
9 **ment of the intelligence community**

10 “(a) IN GENERAL.—An employee of an element or  
11 agency identified in section 2302(a)(2)(C)(ii) who has au-  
12 thority to take, direct others to take, recommend, or ap-  
13 prove any personnel action, shall not, with respect to such  
14 authority, take or fail to take a personnel action with re-  
15 spect to any employee of, or applicant for employment  
16 with, such element or agency because of a disclosure of  
17 information which the employee or applicant reasonably  
18 believes evidences—

19 “(1) any violation of any law, rule, or regula-  
20 tion, or

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

24 For the purpose of this section, ‘personnel action’ means  
25 any action described in clauses (i) through (xiii) of section  
26 2302(a)(2)(A), including the suspension, revocation or

1 other determination related to a security clearance or ac-  
2 cess determination, with respect to an employee in, or ap-  
3 plicant for, a position in an element or agency identified  
4 in section 2302(a)(2)(C)(ii) (other than a position of a  
5 confidential, policy-determining, policymaking, or policy-  
6 advocating character).

7 “(b) IMPLEMENTATION AND REGULATIONS.—The  
8 President shall—

9 “(1) provide for enforcement of this section in  
10 a manner consistent with the provisions of sections  
11 1214 and 1221, except for section 1221(k); and

12 “(2) prescribe regulations that—

13 “(A) ensure that a personnel action shall  
14 not be taken against an employee because of  
15 any disclosure of information described in sub-  
16 section (a), including a disclosure of classified  
17 information, if such disclosure is made in a  
18 manner consistent with such regulations;

19 “(B) provide for an administrative law  
20 judge, appointed under section 3105, to preside  
21 over a hearing consistent with the provisions of  
22 section 1221; and

23 “(C) allow for the use of information spe-  
24 cifically required by Executive order to be kept  
25 secret in the interest of national defense or the

1           conduct of foreign affairs in a manner con-  
2           sistent with the interests of national security.

3           “(c) CONSTRUCTION.—Nothing in this section may  
4 be construed—

5           “(1) to authorize the discharge of, the demotion  
6 of, or discrimination against an employee or appli-  
7 cant for making a disclosure other than a disclosure  
8 protected by subsection (a) or to modify or derogate  
9 from a right or remedy otherwise available to an em-  
10 ployee or applicant; or

11           “(2) to preempt, modify, limit, or derogate any  
12 rights or remedies available to an employee or appli-  
13 cant under any other provision of law, rule, or regu-  
14 lation (including the Lloyd-La Follete Act); or

15           “(3) to authorize the withholding of information  
16 from the Congress or the taking of any personnel ac-  
17 tion against an employee who discloses information  
18 to the Congress.”.

19           (b) CLERICAL AMENDMENT.—The table of sections  
20 for chapter 23 of title 5, United States Code, is amended  
21 by inserting after the item relating to section 2303 the  
22 following:

“2303a. Prohibited personnel practices in an element of the intelligence commu-  
nity.”.

23           (c) EFFECTIVE DATE.—The amendments made by  
24 this section shall apply with respect to any personnel ac-

1 tion occurring on or after the last day of the 6-month pe-  
2 riod beginning on the date of enactment of this Act. The  
3 regulations prescribed under section 2303a(b) of title 5,  
4 United States Code, as amended by subsection (a), shall  
5 not affect any cases pending, under regulations prescribed  
6 under section 2303 of such title 5, as of the day before  
7 the last day of the 6-month period referred to in the pre-  
8 ceding sentence.

9 **SEC. 1152. SECURITY CLEARANCE OR ACCESS DETERMINA-**  
10 **TIONS.**

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

14 (1) in the matter preceding paragraph (1), by  
15 striking “Not” and inserting “Except as otherwise  
16 provided, not”;

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

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

21 (4) by inserting after paragraph (6) the fol-  
22 lowing:

23 “(7) not later than 30 days after the date of  
24 enactment of the Whistleblower Protection Enhance-  
25 ment Act of 2010—

1           “(A) developing policies and procedures  
2           that permit, to the extent practicable, individ-  
3           uals who challenge in good faith a determina-  
4           tion to suspend or revoke a security clearance  
5           or access to classified information to retain  
6           their government employment status while such  
7           challenge is pending; and

8           “(B) developing and implementing uniform  
9           and consistent policies and procedures to ensure  
10          proper protections during the process for deny-  
11          ing, suspending, or revoking a security clear-  
12          ance or access to classified information, includ-  
13          ing the provision of a right to appeal such a de-  
14          nial, suspension, or revocation, and that pro-  
15          vide—

16                 “(i) for a hearing before an inde-  
17                 pendent and impartial fact-finder;

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

22                 “(iii) that, prior to any hearing under  
23                 clause (i), the employee, applicant, or  
24                 former employee be given as comprehensive  
25                 and detailed a written explanation of the

1 basis for any determination under subpara-  
2 graph (A) as the national security interests  
3 of the United States and other applicable  
4 law permit;

5 “(iv) that within 30 days, upon re-  
6 quest by the employee, applicant, or former  
7 employee, and to the extent the documents  
8 would be provided if requested under the  
9 Freedom of Information Act (5 U.S.C.  
10 552) or the Privacy Act (5 U.S.C. 552a),  
11 as applicable, any documents, records, and  
12 reports upon which a denial or revocation  
13 is based;

14 “(v) that the employee has a right to  
15 request any documents, records, and re-  
16 ports as described in clause (iv) upon  
17 which a denial or revocation is based; and  
18 to request the entire investigative file, as  
19 permitted by the national security and  
20 other applicable law, which, if requested,  
21 shall be promptly provided;

22 “(vi) that the employee, applicant, or  
23 former employee may be represented by  
24 counsel;

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

5           “(viii) that, unless agreed to by the  
6 employee and the agency concerned, no  
7 more than 180 days shall pass from the fil-  
8 ing of the appeal to the report of the im-  
9 partial fact finder to the agency head or  
10 the designee of the agency head;

11           “(ix) for the use of information spe-  
12 cifically required by Executive order to be  
13 kept secret in the interest of national de-  
14 fense or the conduct of foreign affairs in a  
15 manner consistent with the interests of na-  
16 tional security.”.

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

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

24           “(1) IN GENERAL.—Agency personnel shall not  
25 take or fail to take, or threaten to take or fail to

1 take, any action with respect to any employee or ap-  
2 plicant's security clearance or access determination,  
3 or refer any information to agency personnel with  
4 authority over personnel security clearance or access  
5 determinations because of—

6 “(A) any disclosure of information pro-  
7 tected under section 2302(b)(8) of title 5;

8 “(B) any communication that complies  
9 with subsection (a)(1) or (d) of section 8H of  
10 the Inspector General Act of 1978 (5 U.S.C.  
11 App.) or that complies with subparagraph (A)  
12 or (D) of subsection (d)(5) of section 17 of the  
13 Central Intelligence Agency Act of 1949 (50  
14 U.S.C. 403q);

15 “(C) the exercise of any appeal, complaint,  
16 or grievance right granted by any law, rule, or  
17 regulation;

18 “(D) testifying for or otherwise lawfully  
19 assisting any individual in the exercise of any  
20 right referred to in subparagraph (C);

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

1           “(F) for refusing to obey an order that  
2           would require the individual to violate the law.  
3           Nothing in this paragraph shall be construed to au-  
4           thorize the withholding of information from the Con-  
5           gress or the taking of any personnel action against  
6           an employee who discloses information to the Con-  
7           gress.

8           “(2) AGENCY ADJUDICATION.—

9           “(A) APPEAL.—An employee, former em-  
10          ployee, or applicant for employment who be-  
11          lieves that he or she has been subjected to a re-  
12          prisal prohibited by paragraph (1) of this sub-  
13          section may appeal that decision within the  
14          agency of that employee, former employee, or  
15          applicant through proceedings authorized by  
16          paragraph (7) of subsection (b), except that  
17          there shall be no appeal of an agency’s suspen-  
18          sion of a security clearance or access determina-  
19          tion for purposes of conducting an investiga-  
20          tion, if that suspension lasts no longer than 1  
21          year and the employee or applicant does not  
22          suffer a reduction in or a loss of pay during  
23          such period.

24          “(B) CORRECTIVE ACTION.—If, in the  
25          course of proceedings authorized under sub-

1 paragraph (A), it is determined that the ad-  
2 verse security clearance or access determination  
3 violated paragraph (1) of this subsection, the  
4 agency shall take specific corrective action to  
5 return the employee, former employee, or appli-  
6 cant, as nearly as practicable and reasonable, to  
7 the position such employee, former employee, or  
8 applicant would have held had the violation not  
9 occurred. Such corrective action shall include  
10 reasonable attorney's fees and any other rea-  
11 sonable costs incurred, and may include back  
12 pay and related benefits, travel expenses, and  
13 compensatory damages.

14 “(C) CONTRIBUTING FACTOR.—In deter-  
15 mining whether the adverse security clearance  
16 or access determination violated paragraph (1)  
17 of this subsection, the agency shall find that  
18 paragraph (1) of this subsection was violated if  
19 a disclosure described in paragraph (1) was a  
20 contributing factor in the adverse security clear-  
21 ance or access determination taken against the  
22 individual, unless the agency demonstrates by  
23 clear and convincing evidence that it would have  
24 taken the same action in the absence of such  
25 disclosure.”

1 (c) MERIT SYSTEM REVIEW OF SECURITY CLEAR-  
2 ANCE DETERMINATIONS.—

3 (1) IN GENERAL.—Chapter 77 of title 5, United  
4 States Code, is amended by inserting after section  
5 7701 the following:

6 **“§ 7701a. MSPB review of security clearance deter-**  
7 **minations**

8 “(a) IN GENERAL.—For purposes of subsection (b),  
9 in the case of an alleged violation of section 2302(b)(8)  
10 or section 2302(b)(9)(B), (C), or (D), a suspension, rev-  
11 ocation, or other determination relating to a security clear-  
12 ance shall be considered to be a personnel action within  
13 the meaning of section 2302(a)(2)(A).

14 “(b) CONDITION FOR REVIEW.—The Merit Systems  
15 Protection Board may review a claim brought by an em-  
16 ployee, former employee, or applicant for employment al-  
17 leging a violation of section 2302(b)(8) or section  
18 2302(b)(9)(B), (C), or (D) in connection with a suspen-  
19 sion, revocation, or other determination described in sub-  
20 section (a)—

21 “(1) after such employee, former employee, or  
22 applicant has exhausted any process available to  
23 such employee, former employee, or applicant under  
24 section 3001(j) of the Intelligence Reform and Ter-  
25 rorism Prevention Act of 2004 (50 U.S.C. 435b); or

1           “(2) if the condition under paragraph (1) has  
2           not been satisfied, if the employee, former employee,  
3           or applicant has been placed on leave without pay  
4           pending the resolution of the suspension, revocation,  
5           or other determination (as the case may be) or ter-  
6           minated.

7           “(c) PROHIBITION RELATING TO SPECIAL COUN-  
8           SEL.—The Special Counsel may not receive or act on any  
9           allegation from an employee, former employee, or appli-  
10          cant, to the extent that it relates to any suspension, rev-  
11          ocation, or other determination described in subsection  
12          (a).

13          “(d) LIMITATION RELATING TO RELIEF.—In any ac-  
14          tion under this section, the Merit Systems Protection  
15          Board may not order restoration or reinstatement of a se-  
16          curity clearance or other access determination, but may  
17          order any other relief otherwise available section  
18          1221(g)(2).

19          “(e) NO JUDICIAL REVIEW.—A final order or deci-  
20          sion of the Merit Systems Protection Board under this  
21          section shall not be subject to judicial review.”.

22                 (2) CLERICAL AMENDMENT.—The table of sec-  
23                 tions for chapter 77 of title 5, United States Code,  
24                 is amended by inserting after the item relating to  
25                 section 7701 the following:

“7701a. MSPB review of security clearance determinations.”.

1 **PART III—PROTECTION OF CERTAIN DISCLO-**  
2 **SURES OF INFORMATION BY CONTRACTOR**  
3 **WHISTLEBLOWERS**

4 **SEC. 1161. PROTECTING CONTRACTOR WHISTLEBLOWERS.**

5 (a) ENHANCED PROTECTION FOR CONTRACTOR  
6 WHISTLEBLOWERS.—Section 315 of the Federal Property  
7 and Administrative Services Act of 1949 (41 U.S.C. 265)  
8 is amended to read as follows: :

9 **“SEC. 315. WHISTLEBLOWER PROTECTION FOR CON-**  
10 **TRACTOR WHISTLEBLOWERS.**

11 “(a) PROHIBITION OF REPRISALS.—An employee of  
12 any non-Federal employer receiving covered funds may not  
13 be discharged, demoted, or otherwise discriminated  
14 against as a reprisal for initiating or participating in any  
15 proceeding related to the misuse of any Federal funds, or  
16 for disclosing, including a disclosure made in the ordinary  
17 course of an employee’s duties, to an inspector general,  
18 the Comptroller General of the United States, the Attor-  
19 ney General, a member of Congress, a State or Federal  
20 regulatory or law enforcement agency, a person with su-  
21 pervisory authority over the employee (or such other per-  
22 son working for the employer who has the authority to  
23 investigate, discover, or terminate misconduct), a court or  
24 grand jury, the head of a Federal agency, or their rep-  
25 resentatives information that the employee reasonably be-  
26 lieves is evidence of—

1           “(1) gross mismanagement of an agency con-  
2           tract or grant relating to covered funds;

3           “(2) a gross waste of covered funds;

4           “(3) a substantial and specific danger to public  
5           health or safety related to the implementation or use  
6           of covered funds;

7           “(4) an abuse of authority related to the imple-  
8           mentation or use of covered funds; or

9           “(5) a violation of law, rule, or regulation re-  
10          lated to an agency contract (including the competi-  
11          tion for or negotiation of a contract), subcontract, or  
12          grant, awarded or issued relating to covered funds.

13          “(b) INVESTIGATION OF COMPLAINTS.—

14                 “(1) IN GENERAL.—A person who believes that  
15                 the person has been subjected to a reprisal prohib-  
16                 ited by subsection (a) may submit a complaint re-  
17                 garding the reprisal to the appropriate inspector  
18                 general. Except as provided under paragraph (3),  
19                 unless the inspector general determines that the  
20                 complaint is frivolous, does not relate to covered  
21                 funds, or another Federal or State judicial or ad-  
22                 ministrative proceeding has previously been invoked  
23                 to resolve such complaint, the inspector general shall  
24                 investigate the complaint and, upon completion of  
25                 such investigation, submit a report of the findings of

1 the investigation to the person, the person's em-  
2 ployer, and the head of the appropriate agency.

3 “(2) TIME LIMITATIONS FOR ACTIONS.—

4 “(A) IN GENERAL.—Except as provided  
5 under subparagraph (B), the inspector general  
6 shall, not later than 180 days after receiving a  
7 complaint under paragraph (1)—

8 “(i) make a determination that the  
9 complaint is frivolous, does not relate to  
10 covered funds, or another Federal or State  
11 judicial or administrative proceeding has  
12 previously been invoked to resolve such  
13 complaint; or

14 “(ii) submit a report under paragraph  
15 (1).

16 “(B) EXTENSIONS.—

17 “(i) VOLUNTARY EXTENSION AGREED  
18 TO BETWEEN INSPECTOR GENERAL AND  
19 COMPLAINANT.—If the inspector general is  
20 unable to complete an investigation under  
21 this section in time to submit a report  
22 within the 180-day period specified under  
23 subparagraph (A) and the person submit-  
24 ting the complaint agrees to an extension  
25 of time, the inspector general shall submit

1 a report under paragraph (1) within such  
2 additional period of time as shall be agreed  
3 upon between the inspector general and  
4 the person submitting the complaint.

5 “(ii) EXTENSION GRANTED BY IN-  
6 SPECTOR GENERAL.—If the inspector gen-  
7 eral is unable to complete an investigation  
8 under this section in time to submit a re-  
9 port within the 180-day period specified  
10 under subparagraph (A), the inspector  
11 general may extend the period for not  
12 more than 180 days without agreeing with  
13 the person submitting the complaint to  
14 such extension, provided that the inspector  
15 general provides a written explanation  
16 (subject to the authority to exclude infor-  
17 mation under paragraph (4)(C)) for the  
18 decision, which shall be provided to both  
19 the person submitting the complaint and  
20 the non-Federal employer.

21 “(3) DISCRETION NOT TO INVESTIGATE COM-  
22 PLAINTS.—

23 “(A) IN GENERAL.—The inspector general  
24 may decide not to conduct or continue an inves-  
25 tigation under this section upon providing to

1 the person submitting the complaint and the  
2 non-Federal employer a written explanation  
3 (subject to the authority to exclude information  
4 under paragraph (4)(C)) for such decision.

5 “(B) ASSUMPTION OF RIGHTS TO CIVIL  
6 REMEDY.—Upon receipt of an explanation of a  
7 decision not to conduct or continue an inves-  
8 tigation under subparagraph (A), the person  
9 submitting a complaint shall immediately as-  
10 sume the right to a civil remedy under sub-  
11 section (c)(3) as if the 210-day period specified  
12 under such subsection has already passed.

13 “(4) ACCESS TO INVESTIGATIVE FILE OF IN-  
14 SPECTOR GENERAL.—

15 “(A) IN GENERAL.—The person alleging a  
16 reprisal under this section shall have access to  
17 the investigation file of the appropriate inspec-  
18 tor general in accordance with section 552a of  
19 title 5, United States Code (commonly referred  
20 to as the ‘Privacy Act’). The investigation of  
21 the inspector general shall be deemed closed for  
22 purposes of disclosure under such section when  
23 an employee files an appeal to an agency head  
24 or a court of competent jurisdiction.

1           “(B) CIVIL ACTION.—In the event the per-  
2           son alleging the reprisal brings suit under sub-  
3           section (c)(3), the person alleging the reprisal  
4           and the non-Federal employer shall have access  
5           to the investigative file of the inspector general  
6           in accordance with the Privacy Act.

7           “(C) EXCEPTION.—

8           “(i) IN GENERAL.—The inspector gen-  
9           eral may exclude from disclosure—

10           “(I) information protected from  
11           disclosure by a provision of law; and

12           “(II) any additional information  
13           the inspector general determines dis-  
14           closure of which would impede a con-  
15           tinuing investigation, provided that  
16           such information is disclosed once  
17           such disclosure would no longer im-  
18           pede such investigation, unless the in-  
19           spector general determines that disclo-  
20           sure of law enforcement techniques,  
21           procedures, or information could rea-  
22           sonably be expected to risk circumven-  
23           tion of the law or disclose the identity  
24           of a confidential source.

1                   “(ii) LIMITATION.—Notwithstanding  
2                   clause (i)(II), the inspector general may  
3                   not withhold information from the em-  
4                   ployee which would otherwise be subject to  
5                   disclosure under section 552 of title 5,  
6                   United States Code (commonly referred to  
7                   as the Freedom of Information Act) or the  
8                   Privacy Act.

9                   “(5) PRIVACY OF INFORMATION.—An inspector  
10                  general investigating an alleged reprisal under this  
11                  section may not respond to any inquiry or disclose  
12                  any information from or about any person alleging  
13                  such reprisal, except in accordance with the provi-  
14                  sions of section 552a of title 5, United States Code,  
15                  or as required by any other applicable Federal law.

16                 “(c) REMEDY AND ENFORCEMENT AUTHORITY.—

17                 “(1) BURDEN OF PROOF.—

18                 “(A) DISCLOSURE AS CONTRIBUTING FAC-  
19                 TOR IN REPRISAL.—

20                 “(i) IN GENERAL.—A person alleging  
21                 a reprisal under this section shall be  
22                 deemed to have affirmatively established  
23                 the occurrence of the reprisal if the person  
24                 demonstrates that a disclosure described in

1 subsection (a) was a contributing factor in  
2 the reprisal.

3 “(ii) USE OF CIRCUMSTANTIAL EVIDENCE.—A disclosure may be dem-  
4 onstrated as a contributing factor in a re-  
5 prisal for purposes of this paragraph by  
6 circumstantial evidence, including—  
7

8 “(I) evidence that the official un-  
9 dertaking the reprisal knew of the dis-  
10 closure;

11 “(II) evidence that the reprisal  
12 occurred within a period of time after  
13 the disclosure such that a reasonable  
14 person could conclude that the dislo-  
15 sure was a contributing factor in the  
16 reprisal; or

17 “(III) evidence that the protected  
18 disclosure was well founded in fact or  
19 law.

20 “(B) OPPORTUNITY FOR REBUTTAL.—The  
21 head of an agency may not find the occurrence  
22 of a reprisal with respect to a reprisal that is  
23 affirmatively established under subparagraph  
24 (A) if the non-Federal employer demonstrates  
25 by clear and convincing evidence that the non-

1 Federal employer would have taken the action  
2 constituting the reprisal in the absence of the  
3 disclosure. An employee may rebut this affirma-  
4 tive defense by direct or circumstantial evi-  
5 dence, including the evidence described in sub-  
6 paragraph (A).

7 “(2) AGENCY ACTION.—Not later than 30 days  
8 after receiving an inspector general report under  
9 subsection (b), the head of the agency concerned  
10 shall determine whether there is sufficient basis to  
11 conclude that the non-Federal employer has sub-  
12 jected the complainant to a reprisal prohibited by  
13 subsection (a) and shall either issue an order deny-  
14 ing relief in whole or in part or shall take 1 or more  
15 of the following actions:

16 “(A) Order the employer to take affirma-  
17 tive action to abate the reprisal.

18 “(B) Order the employer to reinstate the  
19 person to the position that the person held be-  
20 fore the reprisal, together with the compensa-  
21 tion (including back pay), compensatory dam-  
22 ages, employment benefits, and other terms and  
23 conditions of employment that would apply to  
24 the person in that position if the reprisal had  
25 not been taken.

1           “(C) Order the employer to pay the com-  
2           plainant an amount equal to the aggregate  
3           amount of all costs and expenses (including at-  
4           torneys’ fees and expert witnesses’ fees) that  
5           were reasonably incurred by the complainant  
6           for, or in connection with, bringing the com-  
7           plaint regarding the reprisal, as determined by  
8           the head of the agency or a court of competent  
9           jurisdiction.

10           “(D) Where appropriate, order the posting  
11           of the decision of the inspector general in a  
12           manner in which every employee of the em-  
13           ployer will have notice of the decision and oth-  
14           erwise require a reasonable compliance program  
15           to ensure that no further retaliation is com-  
16           mitted by the employer.

17           “(E) In the case of a finding that the re-  
18           prisal was willful, wanton, or malicious, pay the  
19           employee no more than 10 times the amount of  
20           all lost wages and other compensatory damages.

21           “(3) CIVIL ACTION.—If the head of an agency  
22           issues an order denying relief in whole or in part  
23           under paragraph (1), has not issued an order within  
24           210 days after the submission of a complaint under  
25           subsection (b), or in the case of an extension of time

1 under subsection (b)(2)(B)(i), within 30 days after  
2 the expiration of the extension of time, or decides  
3 under subsection (b)(3) not to investigate or to dis-  
4 continue an investigation, and there is no showing  
5 that such delay or decision is due to the bad faith  
6 of the complainant, the complainant shall be deemed  
7 to have exhausted all administrative remedies with  
8 respect to the complaint, and the complainant may  
9 bring a de novo action at law or equity against the  
10 employer to seek compensatory damages and all  
11 other relief available under this section in the appro-  
12 priate district court of the United States, which  
13 shall have jurisdiction over such an action without  
14 regard to the amount in controversy. Such an action  
15 shall, at the request of either party to the action, be  
16 tried by the court with a jury.

17 “(4) JUDICIAL ENFORCEMENT OF ORDER.—  
18 Whenever a person fails to comply with an order  
19 issued under paragraph (2), the head of the agency  
20 shall file an action for enforcement of such order in  
21 the United States district court for a district in  
22 which the reprisal was found to have occurred. In  
23 any action brought under this paragraph, the court  
24 may grant appropriate relief, including injunctive re-  
25 lief, compensatory and exemplary damages, and at-

1       torneys' fees and costs. The person upon whose be-  
2       half an order was issued may also file such an action  
3       or join in an action filed by the head of the agency.

4               “(5) JUDICIAL REVIEW.—Any person adversely  
5       affected or aggrieved by an order issued under para-  
6       graph (2) may obtain review of the order's conform-  
7       ance with this subsection, and any regulations issued  
8       to carry out this section, in the United States court  
9       of appeals for a circuit in which the reprisal is al-  
10      leged in the order to have occurred. No petition  
11      seeking such review may be filed more than 60 days  
12      after issuance of the order by the head of the agen-  
13      cy. Review shall conform to chapter 7 of title 5,  
14      United States Code. Filing such an appeal shall not  
15      act to stay the enforcement of the order of a head  
16      of an agency or the judgment of a district court.

17              “(6) EXHAUSTION OF ADMINISTRATIVE REM-  
18      EDIES.—Regardless of any other time limit set forth  
19      in this Act, after 360 days an employee shall be  
20      deemed to have exhausted his or her administrative  
21      remedies and may file a civil action or amend a  
22      claim under this Act to any other pending civil ac-  
23      tion filed by the employee.

1       “(d) NONENFORCEABILITY OF CERTAIN PROVISIONS  
2 WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBI-  
3 TRATION OF DISPUTES.—

4           “(1) WAIVER OF RIGHTS AND REMEDIES.—Ex-  
5 cept as provided under paragraph (3), the rights and  
6 remedies provided for in this section may not be  
7 waived by any agreement, policy, form, or condition  
8 of employment, including by any predispute arbitra-  
9 tion agreement.

10          “(2) PREDISPUTE ARBITRATION AGREE-  
11 MENTS.—Except as provided under paragraph (3),  
12 no predispute arbitration agreement shall be valid or  
13 enforceable if it requires arbitration of a dispute  
14 arising under this section.

15          “(3) EXCEPTION FOR COLLECTIVE BARGAINING  
16 AGREEMENTS.—Notwithstanding paragraphs (1)  
17 and (2), an arbitration provision in a collective bar-  
18 gaining agreement shall be enforceable as to dis-  
19 putes arising under the collective bargaining agree-  
20 ment.

21       “(e) REQUIREMENT TO POST NOTICE OF RIGHTS  
22 AND REMEDIES.—Any employer receiving covered funds  
23 shall post notice of the rights and remedies provided under  
24 this section.

25       “(f) RULES OF CONSTRUCTION.—

1           “(1) NO IMPLIED AUTHORITY TO RETALIATE  
2           FOR NON-PROTECTED DISCLOSURES.—Nothing in  
3           this section may be construed to authorize the dis-  
4           charge of, demotion of, or discrimination against an  
5           employee for a disclosure other than a disclosure  
6           protected by subsection (a) or to modify or derogate  
7           from a right or remedy otherwise available to the  
8           employee.

9           “(2) RELATIONSHIP TO STATE LAWS.—Nothing  
10          in this section may be construed to preempt, pre-  
11          clude, or limit the protections provided for employees  
12          under State whistleblower laws.

13          “(g) DEFINITIONS.—In this section:

14               “(1) ABUSE OF AUTHORITY.—The term ‘abuse  
15               of authority’ means an arbitrary and capricious ex-  
16               ercise of authority by a contracting official or em-  
17               ployee that adversely affects the rights of any per-  
18               son, or that results in personal gain or advantage to  
19               the official or employee or to preferred other per-  
20               sons.

21               “(2) COVERED FUNDS.—The term ‘covered  
22               funds’ means any contract, grant, or other payment  
23               received by any non-Federal employer if the Federal  
24               Government provides any portion of the money or  
25               property that is provided, requested, or demanded.

1           “(3) EMPLOYEE.—The term ‘employee’—

2                   “(A) except as provided under subpara-  
3           graph (B), means an individual performing  
4           services on behalf of an employer or a con-  
5           tractor, subcontractor, or agent of an employer;  
6           and

7                   “(B) does not include any Federal em-  
8           ployee or member of the uniformed services (as  
9           that term is defined in section 101(a)(5) of title  
10          10, United States Code).

11          “(4) NON-FEDERAL EMPLOYER.—The term  
12          ‘non-Federal employer’—

13                   “(A) means—

14                           “(i) any employer—

15                                   “(I) with respect to covered  
16                           funds—

17   “(aa) the contractor, sub-  
18   contractor, grantee, or recipient,  
19   as the case may be, if the con-  
20   tractor, grantee, or recipient is  
21   an employer; and

22   “(bb) any professional mem-  
23   bership organization, certification  
24   or other professional body, any  
25   agent or licensee of the Federal

1 Government, or any person act-  
2 ing directly or indirectly in the  
3 interest of an employer receiving  
4 covered funds; or

5 “(II) with respect to covered  
6 funds received by a State or local gov-  
7 ernment, any contractor or subcon-  
8 tractor of the State or local govern-  
9 ment; and

10 “(ii) any corporation or person who  
11 receives any Federal funds; and

12 “(B) does not mean any department, agen-  
13 cy, or other entity of the Federal Government  
14 or of a State or local government.”.

15 (b) APPLICABILITY.—

16 (1) NEW CLAIMS.—Section 315 of the Federal  
17 Property and Administrative Services Act of 1949,  
18 as amended by subsection (b), shall apply to com-  
19 plaints submitted pursuant to such section on or  
20 after the date of the enactment of this Act.

21 (2) PENDING CLAIMS.—Section 315 of the Fed-  
22 eral Property and Administrative Services Act of  
23 1949, as in effect on the day before the date of the  
24 enactment of this Act, shall apply to claims sub-

1       mitted pursuant to such section before such date of  
2       enactment.

3                   **PART IV—EFFECTIVE DATE**

4   **SEC. 1171. EFFECTIVE DATE.**

5       Except as otherwise provided, this subtitle shall take  
6       effect 30 days after the date of enactment of this Act.

