

111TH CONGRESS
1ST SESSION

H. R. 1507

To amend chapter 23 of title 5, United States Code, relating to disclosures of information protected from prohibited personnel practices, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 12, 2009

Mr. VAN HOLLEN (for himself, Mr. WAXMAN, Mr. TOWNS, Mr. BRALEY of Iowa, and Mr. PLATTS) introduced the following bill; which was referred to the Committee on Oversight and Government Reform, and in addition to the Committee on Homeland Security, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend chapter 23 of title 5, United States Code, relating to disclosures of information protected from prohibited personnel practices, and for other purposes.

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

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

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

6 (b) **TABLE OF CONTENTS.**—The table of contents of
7 this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Clarification of disclosures covered.
- Sec. 3. Definitional amendments.
- Sec. 4. Rebuttable presumption.
- Sec. 5. Nondisclosure policies, forms, and agreements; security clearances; and retaliatory investigations.
- Sec. 6. Exclusion of agencies by the president.
- Sec. 7. Disciplinary action.
- Sec. 8. Government Accountability Office study on revocation of security clearances.
- Sec. 9. Alternative recourse.
- Sec. 10. National security whistleblower rights.
- Sec. 11. Enhancement of contractor employee whistleblower protections.
- Sec. 12. Prohibited personnel practices affecting the Transportation Security Administration.
- Sec. 13. Disclosure of censorship related to Federal research or technical information.
- Sec. 14. Security clearances.
- Sec. 15. Scope of due process.
- Sec. 16. Clarification of whistleblower rights for critical infrastructure information.
- Sec. 17. Advising employees of rights.
- Sec. 18. Special counsel amicus curiae appearance.
- Sec. 19. Attorney fees.
- Sec. 20. Effective date.

1 SEC. 2. CLARIFICATION OF DISCLOSURES COVERED.

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

4 (1) in subparagraph (A)—

5 (A) by striking “which the employee or ap-
 6 plicant reasonably believes evidences” and in-
 7 serting “, without restriction as to time, place,
 8 form, motive, context, forum, or prior disclosure
 9 made to any person by an employee or appli-
 10 cant, including a disclosure made in the ordi-
 11 nary course of an employee’s duties, that the
 12 employee or applicant reasonably believes is evi-
 13 dence of”; and

1 (B) in clause (i), by striking “a violation”
2 and inserting “any violation”; and
3 (2) in subparagraph (B)—

4 (A) by striking “which the employee or ap-
5 plicant reasonably believes evidences” and in-
6 serting “, without restriction as to time, place,
7 form, motive, context, forum, or prior disclosure
8 made to any person by an employee or appli-
9 cant, including a disclosure made in the ordi-
10 nary course of an employee’s duties, of informa-
11 tion that the employee or applicant reasonably
12 believes is evidence of”; and

13 (B) in clause (i), by striking “a violation”
14 and inserting “any violation (other than a viola-
15 tion of this section)”.

16 (b) PROHIBITED PERSONNEL PRACTICES UNDER
17 SECTION 2302(b)(9).—Title 5, United States Code, is
18 amended in subsections (a)(3), (b)(4)(A), and (b)(4)(B)(i)
19 of section 1214 and in subsections (a) and (e)(1) of sec-
20 tion 1221 by inserting “or 2302(b)(9)(B)–(D)” after “sec-
21 tion 2302(b)(8)” each place it appears.

22 **SEC. 3. DEFINITIONAL AMENDMENTS.**

23 (a) DISCLOSURE.—Section 2302(a)(2) of title 5,
24 United States Code, is amended—

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

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

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

6 “(D) ‘disclosure’ means a formal or infor-
7 mal communication, but does not include a
8 communication concerning policy decisions that
9 lawfully exercise discretionary authority unless
10 the employee or applicant providing the disclo-
11 sure reasonably believes that the disclosure evi-
12 dences—

13 “(i) any violation of any law, rule, or
14 regulation; or

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

19 (b) CLEAR AND CONVINCING EVIDENCE.—Sections
20 1214(b)(4)(B)(ii) and 1221(e)(2) of title 5, United States
21 Code, are amended by adding at the end the following:
22 “For purposes of the preceding sentence, ‘clear and con-
23 vincing evidence’ means evidence indicating that the mat-
24 ter to be proved is highly probable or reasonably certain.”.

1 **SEC. 4. REBUTTABLE PRESUMPTION.**

2 Section 2302(b) of title 5, United States Code, is
3 amended by adding at the end the following: “For pur-
4 poses of paragraph (8), any presumption relating to the
5 performance of a duty by an employee who has authority
6 to take, direct others to take, recommend, or approve any
7 personnel action may be rebutted by substantial evidence.
8 For purposes of paragraph (8), a determination as to
9 whether an employee or applicant reasonably believes that
10 such employee or applicant has disclosed information that
11 evidences any violation of law, rule, regulation, gross mis-
12 management, a gross waste of funds, an abuse of author-
13 ity, or a substantial and specific danger to public health
14 or safety shall be made by determining whether a disin-
15 terested observer with knowledge of the essential facts
16 known to or readily ascertainable by the employee or appli-
17 cant could reasonably conclude that the actions of the
18 Government evidence such violations, mismanagement,
19 waste, abuse, or danger.”.

20 **SEC. 5. NONDISCLOSURE POLICIES, FORMS, AND AGREE-**
21 **MENTS; SECURITY CLEARANCES; AND RETAL-**
22 **IATORY INVESTIGATIONS.**

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

25 (1) in clause (x), by striking “and” at the end;

1 (2) by redesignating clause (xi) as clause (xiv);

2 and

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

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

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

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

17 (b) PROHIBITED PERSONNEL PRACTICE.—Section
18 2302(b) of title 5, United States Code, is amended—

19 (1) in paragraph (11), by striking “or” at the
20 end;

21 (2) by redesignating paragraph (12) as para-
22 graph (14); and

23 (3) by inserting after paragraph (11) the fol-
24 lowing:

1 “(12) implement or enforce any nondisclosure
2 policy, form, or agreement, if such policy, form, or
3 agreement does not contain the following statement:
4 ‘These provisions are consistent with and do not su-
5 percede, conflict with, or otherwise alter the em-
6 ployee obligations, rights, or liabilities created by
7 Executive Order No. 12958; section 7211 of title 5,
8 United States Code (governing disclosures to Con-
9 gress); section 1034 of title 10, United States Code
10 (governing disclosures to Congress by members of
11 the military); section 2302(b)(8) of title 5, United
12 States Code (governing disclosures of illegality,
13 waste, fraud, abuse, or public health or safety
14 threats); title VI of the National Security Act of
15 1947 (50 U.S.C. 421 et seq.) (governing disclosures
16 that could expose confidential Government agents);
17 and the statutes which protect against disclosures
18 that could compromise national security, including
19 sections 641, 793, 794, 798, and 952 of title 18,
20 United States Code, and section 4(b) of the Subver-
21 sive Activities Control Act of 1950 (50 U.S.C.
22 783(b)). The definitions, requirements, obligations,
23 rights, sanctions, and liabilities created by such Ex-
24 ecutive order and such statutory provisions are in-
25 corporated into this agreement and are controlling.’.

1 “(13) conduct, or cause to be conducted, an in-
2 vestigation, other than any ministerial or nondis-
3 cretionary fact-finding activities necessary for the
4 agency to perform its mission, of an employee or ap-
5 plicant for employment because of any activity pro-
6 tected under this section; or”.

7 **SEC. 6. EXCLUSION OF AGENCIES BY THE PRESIDENT.**

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

11 “(i)(I) the Federal Bureau of Inves-
12 tigation; or

13 “(II) an element of the intelligence
14 community (as defined in section 3(4) of
15 the National Security Act of 1947 (50
16 U.S.C. 401a(4))); or”.

17 **SEC. 7. DISCIPLINARY ACTION.**

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

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

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

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

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

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

19 **SEC. 8. GOVERNMENT ACCOUNTABILITY OFFICE STUDY ON**
20 **REVOCAION OF SECURITY CLEARANCES.**

21 (a) STUDY.—The Comptroller General shall conduct
22 a study of security clearance revocations of Federal em-
23 ployees at a select sample of executive branch agencies.
24 The study shall consist of an examination of the number
25 of security clearances revoked, the process employed by

1 each agency in revoking a clearance, the pay and employ-
2 ment status of agency employees during the revocation
3 process, how often such revocations result in termination
4 of employment or reassignment, how often such revoca-
5 tions are based on an improper disclosure of information,
6 and such other factors the Comptroller General deems ap-
7 propriate.

8 (b) REPORT.—Not later than 18 months after the
9 date of enactment of this Act, the Comptroller General
10 shall submit to the Committee on Homeland Security and
11 Governmental Affairs of the Senate and the Committee
12 on Oversight and Government Reform of the House of
13 Representatives a report on the results of the study re-
14 quired under this section.

15 **SEC. 9. ALTERNATIVE RECOURSE.**

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

19 “(k)(1) If, in the case of an employee, former em-
20 ployee, or applicant for employment who seeks corrective
21 action (or on behalf of whom corrective action is sought)
22 from the Merit Systems Protection Board based on an al-
23 leged prohibited personnel practice described in section
24 2302(b)(8) or 2302(b)(9)(B)–(D), no final order or deci-
25 sion is issued by the Board within 180 days after the date

1 on which a request for such corrective action has been duly
2 submitted (or, in the event that a final order or decision
3 is issued by the Board, whether within that 180-day period
4 or thereafter, then, within 90 days after such final order
5 or decision is issued, and so long as such employee, former
6 employee, or applicant has not filed a petition for judicial
7 review of such order or decision under subsection (h))—

8 “(A) such employee, former employee, or appli-
9 cant may, after providing written notice to the
10 Board, bring an action at law or equity for de novo
11 review in the appropriate United States district
12 court, which shall have jurisdiction over such action
13 without regard to the amount in controversy, and
14 which action shall, at the request of either party to
15 such action, be tried by the court with a jury; and

16 “(B) in any such action, the court—

17 “(i) shall apply the standards set forth in
18 subsection (e); and

19 “(ii) may award any relief which the court
20 considers appropriate, including any relief de-
21 scribed in subsection (g).

22 An appeal from a final decision of a district court
23 in an action under this paragraph may, at the elec-
24 tion of the appellant, be taken to the Court of Ap-
25 peals for the Federal Circuit (which shall have juris-

1 diction of such appeal), in lieu of the United States
2 court of appeals for the circuit embracing the dis-
3 trict in which the action was brought.

4 “(2) For purposes of this subsection, the term ‘appro-
5 priate United States district court’, as used with respect
6 to an alleged prohibited personnel practice, means the
7 United States district court for the district in which the
8 prohibited personnel practice is alleged to have been com-
9 mitted, the judicial district in which the employment
10 records relevant to such practice are maintained and ad-
11 ministered, or the judicial district in which resides the em-
12 ployee, former employee, or applicant for employment al-
13 legedly affected by such practice.

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

20 (b) REVIEW OF MSB DECISIONS.—Section 7703(b)
21 of such title 5 is amended—

22 (1) in the first sentence of paragraph (1), by
23 striking “the United States Court of Appeals for the
24 Federal Circuit” and inserting “the appropriate
25 United States court of appeals”; and

1 (2) by adding at the end the following:

2 “(3) For purposes of this section, the term ‘appro-
3 priate United States court of appeals’ means the United
4 States Court of Appeals for the Federal Circuit, except
5 that in the case of a prohibited personnel practice de-
6 scribed in section 2302(b)(8) or 2302(b)(9)(B)–(D) (other
7 than a case that, disregarding this paragraph, would oth-
8 erwise be subject to paragraph (2)), such term means the
9 United States Court of Appeals for the Federal Circuit
10 and any United States court of appeals having jurisdiction
11 over appeals from any United States district court which,
12 under section 1221(k)(2), would be an appropriate United
13 States district court for purposes of such prohibited per-
14 sonnel practice.”.

15 (c) CHOICE OF FORUM.—Section 7703(d) of such
16 title 5 is amended by inserting after “policy directive.” the
17 following: “The petition shall be moved to an appropriate
18 United States Court of Appeals other than the Federal
19 Circuit at the request of the Director or of the employee.”.

20 (d) COMPENSATORY DAMAGES.—Sections 1214(g)(2)
21 and 1221(g)(1)(A)(ii) of such title 5 are amended by strik-
22 ing all after “travel expenses,” and inserting “any other
23 reasonable and foreseeable consequential damages, and
24 compensatory damages (including attorney’s fees, interest,
25 reasonable expert witness fees, and costs).”.

1 (e) CONFORMING AMENDMENTS.—

2 (1) Section 1221(h) of such title 5 is amended
3 by adding at the end the following:

4 “(3) Judicial review under this subsection shall
5 not be available with respect to any decision or order
6 as to which the employee, former employee, or appli-
7 cant has filed a petition for judicial review under
8 subsection (k).”.

9 (2) Section 7703(c) of such title 5 is amended
10 by striking “the United States Court of Appeals for
11 the Federal Circuit” and inserting “the appropriate
12 United States Court of Appeals” and by striking
13 “court.” and inserting “court, and in the case of a
14 prohibited personnel practice described in section
15 2302(b)(8) or 2302(b)(9)(B)–(D) brought under any
16 provision of law, rule, or regulation described in sec-
17 tion 1221(k)(3), the employee or applicant shall
18 have the right to de novo review in accordance with
19 section 1221(k).”.

20 **SEC. 10. NATIONAL SECURITY WHISTLEBLOWER RIGHTS.**

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

1 **“SEC. 2303a. NATIONAL SECURITY WHISTLEBLOWER**
2 **RIGHTS.**

3 “(a) PROHIBITION OF REPRISALS.—

4 “(1) IN GENERAL.—In addition to any rights
5 provided under section 2303 of this title, section
6 17(d)(5) of the Central Intelligence Agency Act of
7 1949 (50 U.S.C. 403q(d)(5)), section 8H of the In-
8 spector General Act of 1978 (5 U.S.C. App.), or any
9 other provision of law, an employee or former em-
10 ployee of a covered agency may not be discharged,
11 demoted, or otherwise discriminated against (includ-
12 ing by denying, suspending, or revoking a security
13 clearance, or by otherwise restricting access to clas-
14 sified or sensitive information) as a reprisal for mak-
15 ing a disclosure described in paragraph (2).

16 “(2) DISCLOSURES DESCRIBED.—A disclosure
17 described in this paragraph is a disclosure of covered
18 information that is made—

19 “(A) by an employee or former employee of
20 a covered agency, without restriction as to time,
21 place, form, motive, context, or prior disclosure
22 made to any person by an employee or former
23 employee, including a disclosure made in the
24 course of an employee’s duties; and

25 “(B) to an authorized Member of Con-
26 gress, an authorized official of an Executive

1 agency, or the Inspector General of the covered
2 agency of which such employee or former em-
3 ployee is or was employed.

4 “(b) INVESTIGATION OF COMPLAINTS.—An employee
5 or former employee of a covered agency who believes that
6 such employee or former employee has been subjected to
7 a reprisal prohibited by subsection (a) may submit a com-
8 plaint to the Inspector General and the head of the cov-
9 ered agency. The Inspector General shall investigate the
10 complaint and, unless the Inspector General determines
11 that the complaint is frivolous, submit a report of the find-
12 ings of the investigation within 120 days to the employee
13 or former employee (as the case may be) and to the head
14 of the covered agency.

15 “(c) REMEDY.—

16 “(1) Within 180 days of the filing of a com-
17 plaint under subsection (b), the head of the covered
18 agency shall, taking into consideration the report of
19 the Inspector General under such subsection (if
20 any), determine whether the employee or former em-
21 ployee has been subjected to a reprisal prohibited by
22 subsection (a), and shall either issue an order deny-
23 ing relief or shall implement corrective action to re-
24 turn the employee or former employee, as nearly as
25 possible, to the position such employee or former

1 employee would have held had the reprisal not oc-
2 curred, including providing back pay and related
3 benefits, medical costs incurred, travel expenses, any
4 other reasonable and foreseeable consequential dam-
5 ages, and compensatory damages (including attor-
6 ney’s fees, interest, reasonable expert witness fees,
7 and costs). If the head of the covered agency issues
8 an order denying relief, such head shall issue a re-
9 port to the employee or former employee detailing
10 the reasons for the denial.

11 “(2)(A) If the head of a covered agency, in the
12 process of implementing corrective action under
13 paragraph (1), voids a directive or order denying,
14 suspending, or revoking a security clearance or oth-
15 erwise restricting access to classified or sensitive in-
16 formation that constituted a reprisal, the head of
17 such covered agency may re-initiate procedures to
18 issue a directive or order denying, suspending, or re-
19 voking a security clearance or otherwise restricting
20 access to classified or sensitive information only if
21 those re-initiated procedures are based exclusively on
22 national security concerns and are unrelated to the
23 actions constituting the original reprisal.

24 “(B) In any case in which the head of a covered
25 agency re-initiates procedures under subparagraph

1 (A), the head of the covered agency shall issue an
2 unclassified report (that may include a classified
3 annex, if necessary) to the Inspector General of such
4 covered agency and to authorized Members of Con-
5 gress, detailing the circumstances of such covered
6 agency's re-initiated procedures and describing the
7 manner in which those procedures are based exclu-
8 sively on national security concerns and are unre-
9 lated to the actions constituting the original reprisal.

10 “(3) If the head of a covered agency has not
11 made a determination under paragraph (1) within
12 180 days of the filing of a complaint under sub-
13 section (b) (or such head has issued an order deny-
14 ing relief, in whole or in part, whether within that
15 180-day period or thereafter, then, within 90 days
16 after such order is issued), the employee or former
17 employee may bring an action at law or equity for
18 de novo review to seek any corrective action referred
19 to in paragraph (1) in the appropriate United States
20 district court (as defined by section 1221(k)(2)),
21 which shall have jurisdiction over such action with-
22 out regard to the amount in controversy.

23 “(4) An employee or former employee adversely
24 affected or aggrieved by an order issued under para-
25 graph (1), or who seeks review of any corrective ac-

1 tion determined under paragraph (1), may obtain ju-
2 dicial review of such order or determination in the
3 United States Court of Appeals for the Federal Cir-
4 cuit or any United States court of appeals having ju-
5 risdiction over appeals from any United States dis-
6 trict court that, under section 1221(k)(2), would be
7 an appropriate United States district court. No peti-
8 tion seeking such review may be filed more than 60
9 days after issuance of the order or the determination
10 to implement corrective action by the head of a cov-
11 ered agency. Review shall conform to chapter 7.

12 “(5)(A) If, in any action for damages or relief
13 under paragraph (3) or (4), an Executive agency
14 moves to withhold information from discovery based
15 on a claim that disclosure would be inimical to na-
16 tional security by asserting the privilege commonly
17 referred to as the ‘state secrets privilege’, and if the
18 assertion of such privilege prevents the employee or
19 former employee from establishing an element in
20 support of the employee’s or former employee’s
21 claim, the court shall resolve the disputed issue of
22 fact or law in favor of the employee or former em-
23 ployee, provided that an Inspector General investiga-
24 tion under subsection (b) has resulted in substantial

1 confirmation of that element, or those elements, of
2 the employee's or former employee's claim.

3 “(B) In any case in which an Executive agency
4 asserts the privilege commonly referred to as the
5 ‘state secrets privilege’, whether or not an Inspector
6 General has conducted an investigation under sub-
7 section (b), the head of that agency shall, at the
8 same time it asserts the privilege, issue a report to
9 authorized Members of Congress, accompanied by a
10 classified annex if necessary, describing the reasons
11 for the assertion, explaining why the court hearing
12 the matter does not have the ability to maintain the
13 protection of classified information related to the as-
14 sertion, detailing the steps the agency has taken to
15 arrive at a mutually agreeable settlement with the
16 employee or former employee, setting forth the date
17 on which the classified information at issue will be
18 declassified, and providing all relevant information
19 about the underlying substantive matter.

20 “(d) APPLICABILITY TO NON-COVERED AGENCIES.—
21 An employee or former employee of an Executive agency
22 (or element or unit thereof) that is not a covered agency
23 shall, for purposes of any disclosure of covered information
24 (as described in subsection (a)(2)) that consists in whole
25 or in part of classified or sensitive information, be entitled

1 to the same protections, rights, and remedies under this
2 section as if that Executive agency (or element or unit
3 thereof) were a covered agency.

4 “(e) CONSTRUCTION.—Nothing in this section may
5 be construed—

6 “(1) to authorize the discharge of, demotion of,
7 or discrimination against an employee or former em-
8 ployee for a disclosure other than a disclosure pro-
9 tected by subsection (a) or (d) or to modify or dero-
10 gate from a right or remedy otherwise available to
11 an employee or former employee; or

12 “(2) to preempt, modify, limit, or derogate any
13 rights or remedies available to an employee or
14 former employee under any other provision of law,
15 rule, or regulation (including the Lloyd-La Failed
16 Act).

17 No court or administrative agency may require the ex-
18 haustion of any right or remedy under this section as a
19 condition for pursuing any other right or remedy otherwise
20 available to an employee or former employee under any
21 other provision of law, rule, or regulation (as referred to
22 in paragraph (2)).

23 “(f) DEFINITIONS.—In this section:

24 “(1) The term ‘covered information’, as used
25 with respect to an employee or former employee,

1 means any information (including classified or sen-
2 sitive information) which the employee or former
3 employee reasonably believes evidences—

4 “(A) any violation of any law, rule, or reg-
5 ulation; or

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

9 “(2) The term ‘covered agency’ means—

10 “(A) the Federal Bureau of Investigation;

11 and

12 “(B) an element of the intelligence commu-
13 nity (as defined in section 3(4) of the National
14 Security Act of 1947 (50 U.S.C. 401a(4))).

15 “(3) The term ‘authorized Member of Congress’
16 means—

17 “(A) with respect to covered information
18 about sources, methods, and intelligence activi-
19 ties (as that term is defined in Executive Order
20 12333) of an element of the intelligence com-
21 munity (as defined in section 3(4) of the Na-
22 tional Security Act of 1947 (50 U.S.C.
23 401a(4))), a member of the Permanent Select
24 Committee on Intelligence of the House of Rep-
25 resentatives, the Select Committee on Intel-

1 ligence of the Senate, or any other committees
2 of the House of Representatives or Senate to
3 which this type of information is customarily
4 provided;

5 “(B) with respect to special access pro-
6 grams specified in section 119 of title 10, an
7 appropriate member of the Congressional de-
8 fense committees (as defined in such section);
9 and

10 “(C) with respect to other covered informa-
11 tion, a member of the Permanent Select Com-
12 mittee on Intelligence or the Committee on
13 Oversight and Government Reform of the
14 House of Representatives, the Select Committee
15 on Intelligence or the Committee on Homeland
16 Security and Governmental Affairs of the Sen-
17 ate, or any other committees of the House of
18 Representatives or the Senate that have over-
19 sight over the program which the covered infor-
20 mation concerns.

21 “(4) The term ‘authorized official of an Execu-
22 tive agency’ shall have such meaning as the Office
23 of Personnel Management shall by regulation pre-
24 scribe, except that such term shall, with respect to
25 any employee or former employee in an agency, in-

1 include the head, the general counsel, and the ombuds-
2 man of such agency.”

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

“2303a. National security whistleblower rights.”.

7 **SEC. 11. ENHANCEMENT OF CONTRACTOR EMPLOYEE**
8 **WHISTLEBLOWER PROTECTIONS.**

9 (a) INCREASED PROTECTION FROM REPRISAL.—Sec-
10 tion 315(a) of the Federal Property and Administrative
11 Services Act of 1949 (41 U.S.C. 265) is amended by strik-
12 ing “disclosing to a Member of Congress” and all that fol-
13 lows through the end of the subsection and inserting the
14 following: “disclosing, including a disclosure in the ordi-
15 nary course of an employee’s duties, to a Member of Con-
16 gress, a representative of a committee of Congress, an In-
17 spector General, the Government Accountability Office, an
18 agency employee responsible for contract oversight or
19 management, an authorized official of an executive agency
20 or the Department of Justice or other Federal regulatory
21 or law enforcement agency, or a person with supervisory
22 authority over the employee (or any other person who has
23 the authority to investigate or act on misconduct, a court,
24 or a grand jury) information that the employee reasonably
25 believes is evidence of gross mismanagement of a contract

1 or grant, gross waste of agency funds, an abuse of author-
2 ity related to the implementation of a contract or grant,
3 a substantial and specific danger to public health or safe-
4 ty, or a violation of a law, rule, or regulation related to
5 a contract (including the competition for or negotiation
6 of a contract) or grant.”.

7 (b) CLARIFICATION OF INSPECTOR GENERAL DE-
8 TERMINATION.—Subsection (b) of section 315 of such Act
9 is amended—

10 (1) by inserting “(1)” after “INVESTIGATION
11 OF COMPLAINTS.—”;

12 (2) by adding at the end the following new
13 paragraphs:

14 “(2)(A) Except as provided under subparagraph (B),
15 the Inspector General shall make a determination that a
16 complaint is frivolous or submit a report under paragraph
17 (1) within 180 days after receiving the complaint.

18 “(B) If the Inspector General is unable to complete
19 an investigation in time to submit a report within the 180-
20 day period specified in subparagraph (A) and the person
21 submitting the complaint agrees to an extension of time,
22 the Inspector General shall submit a report under para-
23 graph (1) within such additional period of time as shall
24 be agreed upon between the Inspector General and the
25 person submitting the complaint.

1 “(3)(A) A person alleging a reprisal under this sec-
2 tion shall affirmatively establish the occurrence of the re-
3 prisal if the person demonstrates that a disclosure de-
4 scribed in subsection (a) was a contributing factor in the
5 reprisal. A disclosure may be demonstrated as a contrib-
6 uting factor for purposes of this paragraph by circumstan-
7 tial evidence, including evidence as follows:

8 “(i) Evidence that the official undertaking the
9 reprisal knew of the disclosure.

10 “(ii) Evidence that the reprisal occurred within
11 a period of time after the disclosure such that a rea-
12 sonable person could conclude that the disclosure
13 was a contributing factor in the reprisal.

14 “(B) Except as provided in subparagraph (C), if a
15 reprisal is affirmatively established under subparagraph
16 (A), the Inspector General shall recommend in the report
17 under paragraph (1) that corrective action be taken under
18 subsection (c).

19 “(C) The Inspector General may not recommend cor-
20 rective action under subparagraph (B) with respect to a
21 reprisal that is affirmatively established under subpara-
22 graph (A) if the contractor demonstrates by clear and con-
23 vincing evidence that the contractor would have taken the
24 action constituting the reprisal in the absence of the dis-
25 closure.

1 “(4) The person alleging the reprisal shall have ac-
2 cess to the complete investigation file of the Inspector
3 General in accordance with section 552a of title 5, United
4 States Code (popularly referred to as the ‘Privacy Act’).
5 The investigation of the Inspector General shall be deemed
6 closed for purposes of disclosure under such section when
7 an employee files an appeal to an agency head or a court
8 of competent jurisdiction.”.

9 (c) ACCELERATION OF SCHEDULE FOR DENYING RE-
10 LIEF OR PROVIDING REMEDY.—Subsection (c) of such
11 section is amended—

12 (1) in paragraph (1), by striking “If the head
13 of the agency determines that a contractor has sub-
14 jected a person to a reprisal prohibited by subsection
15 (a), the head of the agency may” and inserting the
16 following: “Not later than 30 days after receiving an
17 Inspector General report pursuant to subsection (b),
18 the head of the agency concerned shall determine
19 whether there is sufficient basis to conclude that the
20 contractor concerned has subjected the complainant
21 to a reprisal prohibited by subsection (a) and shall
22 either issue an order denying relief or shall”;

23 (2) in paragraph (1)(B), by inserting after “to-
24 gether with” the following: “compensatory damages
25 and”;

1 (3) in paragraph (1)(C), by inserting at the end
2 before the period the following: “or a court of com-
3 petent jurisdiction”;

4 (4) by redesignating paragraphs (2) and (3) as
5 paragraphs (3) and (4), respectively; and

6 (5) by inserting after paragraph (1) the fol-
7 lowing new paragraph:

8 “(2)(A) If the head of an executive agency issues an
9 order denying relief under paragraph (1) or has not issued
10 an order within 210 days after the submission of a com-
11 plaint under subsection (b), or in the case of an extension
12 of time under paragraph (b)(2)(B), not later than 30 days
13 after the expiration of the extension of time, and there
14 is no showing that such delay is due to the bad faith of
15 the complainant, the complainant shall be deemed to have
16 exhausted all administrative remedies with respect to the
17 complaint, and the complainant may bring a de novo ac-
18 tion at law or equity against the contractor to seek com-
19 pensatory damages and other relief available under this
20 section in the appropriate district court of the United
21 States, which shall have jurisdiction over such an action
22 without regard to the amount in controversy. Such an ac-
23 tion shall, at the request of either party to the action, be
24 tried by the court with a jury.

1 “(B) In any action under subparagraph (A), the es-
2 tablishment of the occurrence of a reprisal shall be gov-
3 erned by the provisions of subsection (b)(3)(A), including
4 the burden of proof in that subsection, and the establish-
5 ment that an action alleged to constitute a reprisal did
6 not constitute a reprisal shall be subject to the burden
7 of proof specified in subsection (b)(3)(C).”; and

8 (6) in paragraph (4), as so redesignated, by in-
9 serting at the end before the period the following:
10 “and attorneys fees and costs”.

11 (d) PROHIBITION ON CONDITIONS OF EMPLOY-
12 MENT.—Section 315 of such Act is further amended by
13 redesignating subsection (e) as subsection (f) and insert-
14 ing after subsection (d) the following new subsection (e):

15 “(e) PROHIBITION.—Notwithstanding any other pro-
16 vision of law—

17 “(1) subject to paragraph (3), the rights and
18 remedies provided for in this section may not be
19 waived by any agreement, policy, form, or condition
20 of employment, including by any predispute arbitra-
21 tion agreement;

22 “(2) subject to paragraph (3), no predispute ar-
23 bitration agreement shall be valid or enforceable if
24 it requires arbitration of a dispute arising under this
25 section; and

1 “(3) an arbitration provision in a collective bar-
 2 gaining agreement shall be enforceable as to dis-
 3 putes arising under the collective bargaining agree-
 4 ment.”.

5 (e) DEFINITIONS.—Subsection (f) of such section, as
 6 redesignated by subsection (d), is amended by inserting
 7 before the period at the end the following: “and any In-
 8 specter General that receives funding from, or has over-
 9 sight over contracts awarded for or on behalf of, an execu-
 10 tive agency”.

11 **SEC. 12. PROHIBITED PERSONNEL PRACTICES AFFECTING**
 12 **THE TRANSPORTATION SECURITY ADMINIS-**
 13 **TRATION.**

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

16 (1) by redesignating sections 2304 and 2305 as
 17 sections 2305 and 2306, respectively; and

18 (2) by inserting after section 2303a (as inserted
 19 by section 10) the following:

20 **“SEC. 2304. PROHIBITED PERSONNEL PRACTICES AFFECT-**
 21 **ING THE TRANSPORTATION SECURITY AD-**
 22 **MINISTRATION.**

23 “(a) IN GENERAL.—Notwithstanding any other pro-
 24 vision of law, any individual holding or applying for a posi-

1 tion within the Transportation Security Administration
2 shall be covered by—

3 “(1) the provisions of paragraphs (1), (8), and
4 (9) of section 2302(b);

5 “(2) any provision of law implementing para-
6 graph (1), (8), or (9) of section 2302(b) by pro-
7 viding any right or remedy available to an employee
8 or applicant for employment in the civil service; and

9 “(3) any rule or regulation prescribed under
10 any provision of law referred to in paragraph (1) or
11 (2).

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

17 “(c) EFFECTIVE DATE.—This section shall take ef-
18 fect as of the date of the enactment of this section.”.

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

“2304. Prohibited personnel practices affecting the Transportation Security Ad-
ministration.

“2305. Responsibility of the Government Accountability Office.

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

1 **SEC. 13. DISCLOSURE OF CENSORSHIP RELATED TO FED-**
2 **ERAL RESEARCH OR TECHNICAL INFORMA-**
3 **TION.**

4 (a) DEFINITIONS.—In this section—

5 (1) the term “applicant” means an applicant
6 for a covered position;

7 (2) the term “censorship related to Federal re-
8 search or technical information” means any effort to
9 alter, misrepresent, or suppress—

10 (A) Federal research; or

11 (B) technical information;

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

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

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

20 (b) PROTECTED DISCLOSURE.—

21 (1) IN GENERAL.—Any disclosure of informa-
22 tion by an employee or applicant for employment
23 that the employee or applicant reasonably believes is
24 evidence of censorship related to Federal research or
25 technical information—

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

4 (i) the employee or applicant reason-
5 ably believes that the censorship related to
6 Federal research or technical information
7 is or will cause—

8 (I) any violation of law, rule, or
9 regulation; or

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

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

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

22 (i) the conditions under subparagraph
23 (A)(i) are satisfied; and

24 (ii) the disclosure is made to an indi-
25 vidual referred to in the matter preceding

1 clause (i) of section 2302(b)(8)(B) of title
2 5, United States Code, for the receipt of
3 disclosures.

4 (2) APPLICATION.—Paragraph (1) shall apply
5 to any disclosure of information by an employee or
6 applicant without restriction to time, place, form,
7 motive, context, or prior disclosure made to any per-
8 son by an employee or applicant, including a disclo-
9 sure made in the ordinary course of an employee’s
10 duties.

11 (3) RULE OF CONSTRUCTION.—Nothing in this
12 section shall be construed to imply any limitation on
13 the protections of employees and applicants afforded
14 by any other provision of law, including protections
15 with respect to any disclosure of information be-
16 lieved to be evidence of censorship related to Federal
17 research or technical information.

18 **SEC. 14. SECURITY CLEARANCES.**

19 (a) IN GENERAL.—Chapter 77 of title 5, United
20 States Code, is amended by inserting after section 7702
21 the following:

22 **“SEC. 7702a. ACTIONS RELATING TO SECURITY CLEAR-**
23 **ANCES.**

24 “(a) In any appeal relating to the suspension, revoca-
25 tion, or other determination relating to a security clear-

1 ance or access determination, the Merit Systems Protec-
2 tion Board or any reviewing court—

3 “(1) shall determine whether paragraph (8) or
4 (9) of section 2302(b) was violated; and

5 “(2) may issue declaratory relief and any other
6 appropriate relief.

7 “(b)(1) If, in any final judgment, the Board or court
8 declares that any suspension, revocation, or other deter-
9 mination with regard to a security clearance or access de-
10 termination was made in violation of paragraph (8) or (9)
11 of section 2302(b), the affected agency shall conduct a re-
12 view of that suspension, revocation, access determination,
13 or other determination, giving great weight to the Board
14 or court judgment.

15 “(2) Not later than 30 days after any Board or court
16 judgment declaring that a security clearance suspension,
17 revocation, access determination, or other determination
18 was made in violation of paragraph (8) or (9) of section
19 2302(b), the affected agency shall issue an unclassified re-
20 port to the congressional committees of jurisdiction (with
21 a classified annex if necessary), detailing the cir-
22 cumstances of the agency’s security clearance suspension,
23 revocation, other determination, or access determination.
24 A report under this paragraph shall include any proposed

1 agency action with regard to the security clearance or ac-
2 cess determination.

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

8 “(d) For purposes of this section, corrective action
9 may not be ordered if the agency demonstrates by a pre-
10 ponderance of the evidence that it would have taken the
11 same personnel action in the absence of such disclosure.”.

12 (b) TECHNICAL AND CONFORMING AMENDMENT.—
13 The table of sections for chapter 77 of title 5, United
14 States Code, is amended by inserting after the item relat-
15 ing to section 7702 the following:

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

16 **SEC. 15. SCOPE OF DUE PROCESS.**

17 (a) SPECIAL COUNSEL.—Section 1214(b)(4)(B)(ii) of
18 title 5, United States Code, is amended by inserting “,
19 after a finding that a protected disclosure was a contrib-
20 uting factor,” after “ordered if”.

21 (b) INDIVIDUAL ACTION.—Section 1221(e)(2) of title
22 5, United States Code, is amended by inserting “, after
23 a finding that a protected disclosure was a contributing
24 factor,” after “ordered if”.

1 **SEC. 16. CLARIFICATION OF WHISTLEBLOWER RIGHTS FOR**
2 **CRITICAL INFRASTRUCTURE INFORMATION.**

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

9 **SEC. 17. ADVISING EMPLOYEES OF RIGHTS.**

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

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

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

21 “(h) The Special Counsel may appear as amicus cu-
22 riae in any action brought in a court of the United States
23 related to any civil action brought in connection with para-
24 graph (8) or (9) of section 2302(b) or subchapter III of
25 chapter 73, or as otherwise authorized by law. In any such
26 action, the Special Counsel may present the views of the

1 Special Counsel with respect to compliance with paragraph
2 (8) or (9) of section 2302(b) or subchapter III of chapter
3 73 and the impact court decisions would have on the en-
4 forcement of those provisions of law.”.

5 **SEC. 19. ATTORNEY FEES.**

6 Section 1204(m)(1) of title 5, United States Code,
7 is amended by striking “agency involved” and inserting
8 “agency where the prevailing party is employed or has ap-
9 plied for employment”.

10 **SEC. 20. EFFECTIVE DATE.**

11 This Act shall take effect 30 days after the date of
12 the enactment of this Act, except as provided in the
13 amendment made by section 12(a)(2).

○