

112<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

# H. R. 3289

To amend title 5, United States Code, to provide clarification relating to disclosures of information protected from prohibited personnel practices; to require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements are in conformance with certain protections; to provide certain additional authorities to the Office of Special Counsel; and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 1, 2011

Mr. ISSA (for himself, Mr. CUMMINGS, Mr. PLATTS, and Mr. VAN HOLLEN) introduced the following bill; which was referred to the Committee on Oversight and Government Reform, and in addition to the Select Committee on Intelligence (Permanent Select) and 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

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## A BILL

To amend title 5, United States Code, to provide clarification relating to disclosures of information protected from prohibited personnel practices; to require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements are in conformance with certain protections; to provide certain additional authorities to the Office of Special Counsel; and for other purposes.

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

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

4 (a) **SHORT TITLE.**—This Act may be cited as the  
 5 “Whistleblower Protection Enhancement Act of 2011”.

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

Sec. 1. Short title; table of contents.

**TITLE I—PROTECTION OF CERTAIN DISCLOSURES OF  
 INFORMATION BY FEDERAL EMPLOYEES**

- Sec. 101. Clarification of disclosures covered.
- Sec. 102. Disclosure defined.
- Sec. 103. Rebuttable presumption.
- Sec. 104. Personnel actions and prohibited personnel practices.
- Sec. 105. Exclusion of agencies by the President.
- Sec. 106. Disciplinary action.
- Sec. 107. Remedies.
- Sec. 108. Judicial review.
- Sec. 109. Prohibited personnel practices affecting the Transportation Security Administration.
- Sec. 110. Disclosure of censorship related to research, analysis, or technical information.
- Sec. 111. Clarification of whistleblower rights for critical infrastructure information.
- Sec. 112. Advising employees of rights.
- Sec. 113. Special Counsel amicus curiae appearance.
- Sec. 114. Scope of due process.
- Sec. 115. Nondisclosure policies, forms, and agreements.
- Sec. 116. Reporting requirements.
- Sec. 117. Alternative review.
- Sec. 118. Merit Systems Protection Board summary judgment.
- Sec. 119. Disclosures of classified information.
- Sec. 120. Whistleblower protection ombudsman.
- Sec. 121. Pilot program for enhancement of contractor employee whistleblower protections.

**TITLE II—INTELLIGENCE COMMUNITY WHISTLEBLOWER  
 PROTECTIONS**

- Sec. 201. Protection of intelligence community whistleblowers.
- Sec. 202. Review of security clearance or access determinations.
- Sec. 203. Revisions relating to the Intelligence Community Whistleblower Protection Act.
- Sec. 204. Regulations; reporting requirements; nonapplicability to certain terminations.

## TITLE III—EFFECTIVE DATE; SAVINGS PROVISION

Sec. 301. Effective date.

Sec. 302. Savings provision.

1 **TITLE I—PROTECTION OF CER-**  
2 **TAIN DISCLOSURES OF IN-**  
3 **FORMATION BY FEDERAL EM-**  
4 **PLOYEES**

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

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

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

10 (2) in subparagraph (B)(i)—

11 (A) by striking “a violation” and inserting  
12 “any violation”; and

13 (B) by striking “regulation,” and inserting  
14 “regulation (other than this section or any rule  
15 or regulation prescribed under this section)”.

16 (b) PROHIBITED PERSONNEL PRACTICES UNDER  
17 SECTION 2302(b)(9).—

18 (1) TECHNICAL AND CONFORMING AMEND-  
19 MENTS.—Title 5, United States Code, is amended—

20 (A) in subsections (a)(3), (b)(4)(A), and  
21 (b)(4)(B)(i) of section 1214 and subsections

22 (a), (e)(1), and (i) of section 1221, by inserting  
23 “or subparagraph (A)(i), (B), (C), or (D) of

1 section 2302(b)(9)” after “section 2302(b)(8)”  
2 each place it appears; and

3 (B) in section 2302(a)(2)(C)(i), by insert-  
4 ing “or subsection (b)(9) (other than subpara-  
5 graph (A)(ii) thereof)” after “(b)(8)”.

6 (2) OTHER REFERENCES.—(A) Title 5, United  
7 States Code, is amended, in sections  
8 1214(b)(4)(B)(i) and 1221(e), by inserting “or pro-  
9 tected activity” after “disclosure” each place it ap-  
10 pears.

11 (B) Subparagraph (A) of section 2302(b)(9) of  
12 title 5, United States Code, is amended to read as  
13 follows:

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

17 “(i) with regard to remedying a viola-  
18 tion of paragraph (8) or any rule or regu-  
19 lation prescribed under such paragraph; or

20 “(ii) with regard to remedying a viola-  
21 tion of any law, rule, or regulation not de-  
22 scribed in clause (i);”.

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

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

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

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

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

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

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

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

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

1 **SEC. 102. DISCLOSURE DEFINED.**

2 Section 2302(a)(2) of title 5, United States Code, is  
3 amended—

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

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

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

9 “(D) ‘disclosure’ means a formal or informal  
10 communication or transmission, but does not include  
11 a communication concerning policy decisions that  
12 lawfully exercise discretionary authority, unless the  
13 employee or applicant providing the disclosure rea-  
14 sonably believes that the disclosure evidences—

15 “(i) any violation of any law, rule, or regu-  
16 lation, and occurs during the conscientious car-  
17 rying out of official duties; or

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

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

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

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

1 of any personnel action against an employee who discloses  
2 information to Congress. For purposes of paragraph (8),  
3 any presumption relating to the performance of a duty by  
4 an employee whose conduct is the subject of a protected  
5 disclosure under this section may be rebutted by substan-  
6 tial evidence. For purposes of paragraph (8), a determina-  
7 tion as to whether an employee or applicant reasonably  
8 believes that such employee or applicant has disclosed in-  
9 formation that evidences any violation of law, rule, regula-  
10 tion, gross mismanagement, a gross waste of funds, an  
11 abuse of authority, or a substantial and specific danger  
12 to public health or safety shall be made by determining  
13 whether a disinterested observer with knowledge of the es-  
14 sential facts known to or readily ascertainable by the em-  
15 ployee could reasonably conclude that the actions of the  
16 Government evidence such a violation, mismanagement,  
17 waste, abuse, or danger.”.

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

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

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

24 (2) by redesignating clause (xi) as clause (xii);

25 and

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

2 “(xi) the implementation or enforcement of  
3 any nondisclosure policy, form, or agreement  
4 that does not contain the statement required  
5 under subsection (b)(13); and”.

6 (b) PROHIBITED PERSONNEL PRACTICE.—

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

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

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

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

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



1 erning disclosures to Congress); section 1034 of title  
2 10 (governing disclosure to Congress by members of  
3 the military); subsection (b)(8) (governing disclo-  
4 sures of illegality, waste, fraud, abuse, or public  
5 health or safety threats); the Intelligence Identities  
6 Protection Act of 1982 (50 U.S.C. 421 et seq., gov-  
7 erning disclosures that could expose confidential  
8 Government agents); and the statutes which protect  
9 against disclosures that could compromise national  
10 security, including sections 641, 793, 794, 798, and  
11 952 of title 18 and section 4(b) of the Subversive  
12 Activities Control Act of 1950 (50 U.S.C. 783(b)).  
13 The definitions, requirements, obligations, rights,  
14 sanctions, and liabilities created by such Executive  
15 orders and such statutory provisions are incor-  
16 porated into this agreement and are controlling.’’.

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

1           (A) may be enforced with regard to a cur-  
2           rent employee if the employing agency gives  
3           such employee notice of the statement before  
4           the employee makes the disclosure with respect  
5           to which the enforcement relates; and

6           (B) may continue to be enforced after the  
7           effective date of this Act with regard to a  
8           former employee if the agency posts notice of  
9           the statement on the agency website for the 1-  
10          year period following that effective date, except  
11          that such notice shall not be required as a con-  
12          dition for continued enforcement if the condi-  
13          tion under subparagraph (A) has been satisfied  
14          with respect to such former employee.

15          (c) RETALIATORY INVESTIGATIONS.—

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

19           “(h) Any corrective action ordered under this section  
20          to correct a prohibited personnel practice may include fees,  
21          costs, or damages reasonably incurred due to an agency  
22          investigation of the employee, if such investigation was  
23          commenced, expanded, or extended in retaliation for the  
24          disclosure or protected activity that formed the basis of  
25          the corrective action.”.

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

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

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

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

15                       “(ii)(I) the Federal Bureau of Inves-  
16                       tigation, the Central Intelligence Agency,  
17                       the Defense Intelligence Agency, the Na-  
18                       tional Geospatial-Intelligence Agency, the  
19                       National Security Agency, the Office of the  
20                       Director of National Intelligence, and the  
21                       National Reconnaissance Office; and

22                       “(II) as determined by the President,  
23                       any Executive agency or unit thereof the  
24                       principal function of which is the conduct  
25                       of foreign intelligence or counterintel-

1           ligence activities, provided that the deter-  
2           mination be made prior to the personnel  
3           action involved; or”.

4 **SEC. 106. DISCIPLINARY ACTION.**

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

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

8               “(i) disciplinary action consisting of removal,  
9               reduction in grade, debarment from Federal employ-  
10              ment for a period not to exceed 5 years, suspension,  
11              or reprimand;

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

14               “(iii) any combination of disciplinary actions  
15              described under clause (i) and an assessment de-  
16              scribed under clause (ii).

17           “(B) In any case brought under paragraph (1) in  
18 which the Board finds that an employee has committed  
19 a prohibited personnel practice under section 2302(b)(8),  
20 or subparagraph (A)(i), (B), (C), or (D) of section  
21 2302(b)(9), the Board may impose disciplinary action if  
22 the Board finds that the activity protected under section  
23 2302(b)(8) or subparagraph (A)(i), (B), (C), or (D) of  
24 section 2302(b)(9) was a significant motivating factor,  
25 even if other factors also motivated the decision, for the

1 employee’s decision to take, fail to take, or threaten to  
2 take or fail to take a personnel action, unless that em-  
3 ployee demonstrates, by a preponderance of the evidence,  
4 that the employee would have taken, failed to take, or  
5 threatened to take or fail to take the same personnel ac-  
6 tion, in the absence of such protected activity.”.

7 **SEC. 107. REMEDIES.**

8 (a) **ATTORNEY FEES.**—Section 1204(m)(1) of title 5,  
9 United States Code, is amended by striking “agency in-  
10 volved” and inserting “agency in which the prevailing  
11 party was employed or with which the prevailing party had  
12 applied for employment at the time of the events giving  
13 rise to the case”.

14 (b) **DAMAGES.**—Sections 1214(g)(2) and  
15 1221(g)(1)(A)(ii) of title 5, United States Code, are  
16 amended by striking all after “travel expenses,” and in-  
17 serting “any other reasonable and foreseeable consequen-  
18 tial damages, and compensatory damages (including inter-  
19 est, reasonable expert witness fees, and costs).” each place  
20 it appears.

21 **SEC. 108. JUDICIAL REVIEW.**

22 (a) **IN GENERAL.**—Section 7703(b)(1) of title 5,  
23 United States Code, is amended—

24 (1) by striking “(b)(1) Except as provided in  
25 paragraph (2) of this subsection,” and inserting

1 “(b)(1)(A) Except as provided in subparagraph (B)  
2 or paragraph (2),”; and

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

4 “(B) A petition to review a final order or final deci-  
5 sion of the Board that raises no challenge to the Board’s  
6 disposition of allegations of a prohibited personnel practice  
7 described in section 2302(b) other than practices de-  
8 scribed in section 2302(b)(8) or subparagraph (A)(i), (B),  
9 (C), or (D) of section 2302(b)(9) shall be filed in the  
10 United States Court of Appeals for the District of Colum-  
11 bia Circuit. Notwithstanding any other provision of law,  
12 any petition for review under this subparagraph must be  
13 filed within 60 days after the date the petitioner received  
14 notice of the final order or decision of the Board.”.

15 (b) REVIEW OBTAINED BY OFFICE OF PERSONNEL  
16 MANAGEMENT.—Section 7703(d) of title 5, United States  
17 Code, is amended by inserting “or the United States Court  
18 of Appeals for the District of Columbia Circuit” after “the  
19 United States Court of Appeals for the Federal Circuit”.

20 (c) EFFECTIVE DATE.—The amendments made by  
21 this section shall apply with respect to any final order or  
22 decision rendered on or after the effective date of this Act.

1 **SEC. 109. PROHIBITED PERSONNEL PRACTICES AFFECTING**  
2 **THE TRANSPORTATION SECURITY ADMINIS-**  
3 **TRATION.**

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

6 (1) by redesignating sections 2304 and 2305 as  
7 sections 2305 and 2306, respectively; and

8 (2) by inserting after section 2303 the fol-  
9 lowing:

10 **“§ 2304. Prohibited personnel practices affecting the**  
11 **Transportation Security Administration**

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

16 “(1) the provisions of paragraph (1), (8), or (9)  
17 of section 2302(b);

18 “(2) any provision of law implementing para-  
19 graph (1), (8), or (9) of section 2302(b) by making  
20 any right or remedy available to an employee or ap-  
21 plicant for employment in the civil service; and

22 “(3) any rule or regulation prescribed under  
23 any provision of law referred to in paragraph (1) or  
24 (2).

25 “(b) RULE OF CONSTRUCTION.—Nothing in this sec-  
26 tion shall be construed to affect any rights, apart from

1 those described in subsection (a), to which an individual  
 2 described in subsection (a) might otherwise be entitled  
 3 under law.”.

4 (b) CLERICAL AMENDMENT.—The table of sections  
 5 for chapter 23 of title 5, United States Code, is amended  
 6 by striking the items relating to sections 2304 and 2305,  
 7 respectively, and 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.”.

8 (c) EFFECTIVE DATE.—The amendments made by  
 9 this section shall take effect on the date of enactment of  
 10 this Act.

11 **SEC. 110. DISCLOSURE OF CENSORSHIP RELATED TO RE-**  
 12 **SEARCH, ANALYSIS, OR TECHNICAL INFOR-**  
 13 **MATION.**

14 (a) DEFINITIONS.—In this subsection—

15 (1) the term “agency” has the meaning given  
 16 such term under section 2302(a)(2)(C) of title 5,  
 17 United States Code;

18 (2) the term “applicant” means an applicant  
 19 for a covered position;

20 (3) the term “censorship related to research,  
 21 analysis, or technical information” means any effort  
 22 to distort, misrepresent, or suppress research, anal-  
 23 ysis, or technical information;



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

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

6 (6) the term “disclosure” has the meaning  
7 given such term under section 2302(a)(2)(D) of title  
8 5, United States Code (as amended by section  
9 102(3)).

10 (b) PROTECTED DISCLOSURE.—

11 (1) IN GENERAL.—Any disclosure of informa-  
12 tion by an employee or applicant for employment  
13 that the employee or applicant reasonably believes is  
14 evidence of censorship related to research, analysis,  
15 or technical information—

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

19 (i) the employee or applicant reason-  
20 ably believes that such censorship is or will  
21 cause—

22 (I) any violation of law, rule, or  
23 regulation, and occurs during the con-  
24 scientious carrying out of official du-  
25 ties; or

1 (II) gross mismanagement, a  
2 gross waste of funds, an abuse of au-  
3 thority, or a substantial and specific  
4 danger to public health or safety; and  
5 (ii) such disclosure is not specifically  
6 prohibited by law or such information is  
7 not specifically required by Executive order  
8 to be kept classified in the interest of na-  
9 tional defense or the conduct of foreign af-  
10 fairs; and

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

14 (i) the employee or applicant reason-  
15 ably believes that such censorship is or will  
16 cause—

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

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

1 (ii) the disclosure is made to the Spe-  
2 cial Counsel, or to the Inspector General of  
3 an agency or another person designated by  
4 the head of the agency to receive such dis-  
5 closures, consistent with the protection of  
6 sources and methods.

7 (2) DISCLOSURES NOT EXCLUDED.—A disclo-  
8 sure shall not be excluded from paragraph (1) for  
9 any reason described under paragraph (1) or (2) of  
10 section 2302(f) of title 5, United States Code (as  
11 amended by section 101(b)(2)(C)).

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

19 **SEC. 111. CLARIFICATION OF WHISTLEBLOWER RIGHTS**  
20 **FOR CRITICAL INFRASTRUCTURE INFORMA-**  
21 **TION.**

22 Section 214(c) of the Homeland Security Act of 2002  
23 (6 U.S.C. 133(c)) is amended by adding at the end the  
24 following: “For purposes of this section, a permissible use  
25 of independently obtained information includes the disclo-

1 sure of such information under section 2302(b)(8) of title  
2 5, United States Code.”.

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

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

12 **SEC. 113. SPECIAL COUNSEL AMICUS CURIAE APPEAR-**  
13 **ANCE.**

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

16 “(h)(1) The Special Counsel may appear as amicus  
17 curiae in any action brought in a court of the United  
18 States related to any civil action brought in connection  
19 with paragraph (8) or (9) of section 2302(b), or as other-  
20 wise authorized by law. In any such action, the Special  
21 Counsel may present the views of the Special Counsel with  
22 respect to compliance with the provisions of paragraph (8)  
23 or (9) of section 2302(b) and the impact court decisions  
24 would have on the enforcement of such provisions.

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

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

5 (a) SPECIAL COUNSEL.—Section 1214(b)(4)(B)(ii) of  
6 title 5, United States Code, is amended by inserting “,  
7 after a finding by the Board that a protected disclosure  
8 was a contributing factor,” after “ordered if”.

9 (b) INDIVIDUAL ACTION.—Section 1221(e)(2) of title  
10 5, United States Code, is amended by inserting “, after  
11 a finding that a protected disclosure was a contributing  
12 factor,” after “ordered if”.

13 **SEC. 115. NONDISCLOSURE POLICIES, FORMS, AND AGREE-**  
14 **MENTS.**

15 (a) IN GENERAL.—

16 (1) REQUIREMENT.—Each agreement in Stand-  
17 ard Forms 312 and 4414 of the Government and  
18 any other nondisclosure policy, form, or agreement  
19 of the Government shall contain the following state-  
20 ment: “These restrictions are consistent with and do  
21 not supersede, conflict with, or otherwise alter the  
22 employee obligations, rights, or liabilities created by  
23 Executive Order 13526 (75 Fed. Reg. 707, relating  
24 to classified national security information), or any  
25 successor thereto; Executive Order 12968 (60 Fed.

1 Reg. 40245, relating to access to classified informa-  
2 tion), or any successor thereto; section 7211 of title  
3 5, United States Code (governing disclosures to Con-  
4 gress); section 1034 of title 10, United States Code  
5 (governing disclosure to Congress by members of the  
6 military); section 2302(b)(8) of title 5, United  
7 States Code (governing disclosures of illegality,  
8 waste, fraud, abuse, or public health or safety  
9 threats); the Intelligence Identities Protection Act of  
10 1982 (50 U.S.C. 421 et seq., governing disclosures  
11 that could expose confidential Government agents);  
12 and the statutes which protect against disclosure  
13 that may compromise the national security, includ-  
14 ing sections 641, 793, 794, 798, and 952 of title 18,  
15 United States Code, and section 4(b) of the Subver-  
16 sive Activities Act of 1950 (50 U.S.C. 783(b)). The  
17 definitions, requirements, obligations, rights, sanc-  
18 tions, and liabilities created by such Executive or-  
19 ders and such statutory provisions are incorporated  
20 into this agreement and are controlling.”.

21 (2) ENFORCEABILITY.—

22 (A) IN GENERAL.—Any nondisclosure pol-  
23 icy, form, or agreement described under para-  
24 graph (1) that does not contain the statement  
25 required under paragraph (1) may not be im-

1           plemented or enforced to the extent such policy,  
2           form, or agreement is inconsistent with that  
3           statement.

4           (B) NONDISCLOSURE POLICY, FORM, OR  
5           AGREEMENT IN EFFECT BEFORE THE DATE OF  
6           ENACTMENT.—A nondisclosure policy, form, or  
7           agreement that was in effect before the date of  
8           enactment of this Act, but that does not con-  
9           tain the statement required under paragraph  
10          (1)—

11                   (i) may be enforced with regard to a  
12                   current employee if the agency gives such  
13                   employee notice of the statement; and

14                   (ii) may continue to be enforced after  
15                   the effective date of this Act with regard  
16                   to a former employee if the agency posts  
17                   notice of the statement on the agency  
18                   website for the 1-year period following that  
19                   effective date, except that such notice shall  
20                   not be required as a condition for contin-  
21                   ued enforcement if the condition under  
22                   clause (i) has been satisfied with respect to  
23                   such former employee.

24          (b) PERSONS OTHER THAN GOVERNMENT EMPLOY-  
25          EES.—Notwithstanding subsection (a), a nondisclosure

1 policy, form, or agreement that is to be executed by a per-  
2 son connected with the conduct of an intelligence or intel-  
3 ligence-related activity, other than an employee or officer  
4 of the United States Government, may contain provisions  
5 appropriate to the particular activity for which such docu-  
6 ment is to be used. Such policy, form, or agreement shall,  
7 at a minimum, require that the person will not disclose  
8 any classified information received in the course of such  
9 activity unless specifically authorized to do so by the  
10 United States Government. Such nondisclosure policy,  
11 form, or agreement shall also make it clear that such  
12 forms do not bar disclosures to Congress or to an author-  
13 ized official of an Executive agency or the Department of  
14 Justice to report a substantial violation of law, consistent  
15 with the protection of sources and methods, pursuant to  
16 the requirements of section 2302(b)(8) of title 5, United  
17 States Code.

18 **SEC. 116. REPORTING REQUIREMENTS.**

19 (a) GOVERNMENT ACCOUNTABILITY OFFICE.—

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



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

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 paragraph  
8       (8) or (9) of section 2302(b) of title 5, United  
9       States Code, since the effective date of this Act;

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 the United States Court of Appeals for  
19       the District of Columbia Circuit and the impact  
20       the process has on the Merit Systems Protec-  
21       tion Board and the Federal court system; and

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

24       (b) MERIT SYSTEMS PROTECTION BOARD.—

1           (1) IN GENERAL.—Each report submitted by  
2 the Merit Systems Protection Board under section  
3 1116 of title 31, United States Code, shall, with re-  
4 spect to the period covered by such report, include  
5 as an addendum the following:

6           (A) Information relating to the outcome of  
7 cases decided during the applicable year of the  
8 report in which violations of section 2302(b)(8)  
9 or subparagraph (A)(i), (B)(i), (C), or (D) of  
10 section 2302(b)(9) of title 5, United States  
11 Code, were alleged.

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

16           (2) FIRST REPORT.—The first report described  
17 under paragraph (1) submitted after the date of en-  
18 actment of this Act shall include an addendum re-  
19 quired under that paragraph that covers the period  
20 beginning on the first day of the calendar year in  
21 which occurs the date of enactment of this Act and  
22 ending on the last day of the fiscal year in which  
23 such date of enactment occurs.

1 **SEC. 117. ALTERNATIVE REVIEW.**

2 Section 1221 of title 5, United States Code, is  
3 amended by adding at the end the following:

4 “(k)(1) For purposes of this subsection, the term ‘ap-  
5 propriate United States district court’, as used with re-  
6 spect to an alleged prohibited personnel practice, means  
7 the United States district court for the judicial district  
8 in which—

9 “(A) such prohibited personnel practice is al-  
10 leged to have been committed; or

11 “(B) the employee, former employee, or appli-  
12 cant for employment allegedly affected by such pro-  
13 hibited personnel practice resides.

14 “(2) An employee, former employee, or applicant for  
15 employment in any case to which paragraph (4) or (5)  
16 applies may file an action at law or equity for de novo  
17 review in the appropriate United States district court.

18 “(3) Upon initiation of any action under paragraph  
19 (2), the Board shall stay any other claims of such em-  
20 ployee, former employee, or applicant pending before the  
21 Board at that time which arise out of the same set of oper-  
22 ative facts. Such claims shall be stayed pending completion  
23 of the action filed under paragraph (2) before the appro-  
24 priate United States district court.

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

1           “(A) an employee, former employee, or appli-  
2           cant for employment—

3                   “(i) seeks corrective action from the Merit  
4           Systems Protection Board under section  
5           1221(a) based on an alleged prohibited per-  
6           sonnel practice, described in section 2302(b)(8)  
7           or subparagraph (A)(i), (B), (C), or (D) of sec-  
8           tion 2302(b)(9), for which the associated per-  
9           sonnel action is an action covered under section  
10          7512 or 7542; or

11                   “(ii) files an appeal under section 7701(a)  
12          alleging as an affirmative defense the commis-  
13          sion of a prohibited personnel practice, de-  
14          scribed in section 2302(b)(8) or subparagraph  
15          (A)(i), (B), (C), or (D) of section 2302(b)(9),  
16          for which the associated personnel action is an  
17          action covered under section 7512 or 7542;

18           “(B) no final order or decision is issued by the  
19          Board within 270 days after the date on which a re-  
20          quest for that corrective action or appeal has been  
21          duly submitted, unless the Board determines that  
22          the employee, former employee, or applicant for em-  
23          ployment engaged in conduct intended to delay the  
24          issuance of a final order or decision by the Board;  
25          and

1           “(C) such employee, former employee, or appli-  
2           cant provides written notice to the Board of filing an  
3           action under this subsection before the filing of that  
4           action.

5           “(5) This paragraph applies in any case in which—

6           “(A) an employee, former employee, or appli-  
7           cant for employment—

8           “(i) seeks corrective action from the Merit  
9           Systems Protection Board under section  
10           1221(a) based on an alleged prohibited per-  
11           sonnel practice, described in section 2302(b)(8)  
12           or subparagraph (A)(i), (B), (C), or (D) of sec-  
13           tion 2302(b)(9), for which the associated per-  
14           sonnel action is an action covered under section  
15           7512 or 7542; or

16           “(ii) files an appeal under section  
17           7701(a)(1) alleging as an affirmative defense  
18           the commission of a prohibited personnel prac-  
19           tice, described in section 2302(b)(8) or sub-  
20           paragraph (A)(i), (B), (C), or (D) of section  
21           2302(b)(9), for which the associated personnel  
22           action is an action covered under section 7512  
23           or 7542;

24           “(B)(i) within 30 days after the date on which  
25           the request for corrective action or appeal was duly

1 submitted, such employee, former employee, or appli-  
2 cant for employment files a motion requesting a cer-  
3 tification consistent with subparagraph (C) to the  
4 Board or an administrative law judge or other em-  
5 ployee of the Board designated to hear the case; and

6 “(ii) such employee has not previously filed a  
7 motion under clause (i) related to that request for  
8 corrective action; and

9 “(C) the Board or an administrative law judge  
10 or other employee of the Board designated to hear  
11 the case certifies that—

12 “(i) under standards applicable to the re-  
13 view of motions to dismiss under rule 12(b)(6)  
14 of the Federal Rules of Civil Procedure, includ-  
15 ing rule 12(d) thereof, the request for corrective  
16 action (including any allegations made with the  
17 motion under subparagraph (B)) would not be  
18 subject to dismissal; and

19 “(ii)(I) the Board is not likely to dispose  
20 of the case within 270 days after the date on  
21 which a request for that corrective action has  
22 been duly submitted; or

23 “(II) the case—

24 “(aa) consists of multiple claims;

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

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

8                   “(dd) involves a question of law for  
9                   which there is no controlling precedent.

10           “(6) The Board shall grant or deny any motion re-  
11           questing a certification described under paragraph  
12           (5)(C)(ii) within 90 days after the submission of such mo-  
13           tion and the Board may not issue a decision on the merits  
14           of a request for corrective action within 15 days after  
15           granting or denying a motion requesting certification.

16           “(7)(A) Any decision of the Board or an administra-  
17           tive law judge or other employee of the Board designated  
18           to hear the case to grant or deny a certification described  
19           under paragraph (5)(C)(ii) shall be reviewed on appeal of  
20           a final order or decision of the Board under section 7703  
21           only if—

22                   “(i) a motion requesting a certification was de-  
23                   nied; and

1           “(ii) the reviewing court vacates the decision of  
2           the Board on the merits of the claim under the  
3           standards set forth in section 7703(e).

4           “(B) The decision to deny the certification shall be  
5           overturned by the reviewing court, and an order granting  
6           certification shall be issued by the reviewing court, if such  
7           decision is found to be arbitrary, capricious, or an abuse  
8           of discretion.

9           “(C) The reviewing court’s decision shall not be con-  
10          sidered evidence of any determination by the Board, any  
11          administrative law judge appointed by the Board under  
12          section 3105, or any employee of the Board designated  
13          by the Board on the merits of the underlying allegations  
14          during the course of any action at law or equity for de  
15          novo review in the appropriate United States district court  
16          in accordance with this subsection.

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

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

21                 “(B) the court—

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



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

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

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

8                   “(iii) notwithstanding subsection (e)(2),  
9                   may not order relief if the agency demonstrates  
10                  by clear and convincing evidence that the agen-  
11                  cy would have taken the same personnel action  
12                  in the absence of such disclosure; and

13                  “(C) the Special Counsel may not represent the  
14                  employee, former employee, or applicant for employ-  
15                  ment.

16                  “(9) A petition to review a final order or final deci-  
17                  sion of a United States district court under this subsection  
18                  that raises no challenge to the district court’s disposition  
19                  of allegations of a prohibited personnel practice described  
20                  in section 2302(b) other than practices described in sec-  
21                  tion 2302(b)(8) or subparagraph (A)(i), (B), (C), or (D)  
22                  of section 2302(b)(9) shall be filed in the United States  
23                  Court of Appeals for the District of Columbia Circuit. All  
24                  other petitions to review any final order or final decision  
25                  of a United States district court in an action brought

1 under this subsection shall be filed in the United States  
2 Court of Appeals for the Federal Circuit. Notwithstanding  
3 any other provision of law, any petition for review under  
4 this paragraph must be filed within 60 days after the date  
5 the petitioner received notice of the final order or final  
6 decision of the United States district court.

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

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

14 **JUDGMENT.**

15 Section 1204(b) of title 5, United States Code, is  
16 amended—

17 (1) by redesignating paragraph (3) as para-  
18 graph (4);

19 (2) by inserting after paragraph (2) the fol-  
20 lowing:

21 “(3) With respect to a request for corrective action  
22 based on an alleged prohibited personnel practice de-  
23 scribed in section 2302(b)(8) or subparagraph (A)(i), (B),  
24 (C), or (D) of section 2302(b)(9) for which the associated  
25 personnel action is an action covered under section 7512

1 or 7542, the Board, any administrative law judge ap-  
2 pointed by the Board under section 3105<sup>TM</sup>, or any em-  
3 ployee of the Board designated by the Board may, with  
4 respect to any party, grant a motion for summary judg-  
5 ment.”.

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

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

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

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

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

14 “(C) any communication that complies  
15 with subsection (a)(1), (d), and (h) of section  
16 8H of the Inspector General Act of 1978 (5  
17 U.S.C. App.);”.

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

21 (1) in subsection (a)(1), by adding at the end  
22 the following:

23 “(D) An employee of any agency, as that term is de-  
24 fined under section 2302(a)(2)(C) of title 5, United States  
25 Code, who intends to report to Congress a complaint or

1 information with respect to an urgent concern may report  
2 the complaint or information to the Inspector General (or  
3 designee) of the agency of which that employee is em-  
4 ployed.”;

5 (2) in subsection (c), by striking “intelligence  
6 committees” and inserting “appropriate commit-  
7 tees”;

8 (3) in subsection (d)—

9 (A) in paragraph (1), by striking “either  
10 or both of the intelligence committees” and in-  
11 serting “any of the appropriate committees”;  
12 and

13 (B) in paragraphs (2) and (3), by striking  
14 “intelligence committees” each place it appears  
15 and inserting “appropriate committees”; and

16 (4) in subsection (h)—

17 (A) in paragraph (1)—

18 (i) in subparagraph (A), by striking  
19 “intelligence”; and

20 (ii) in subparagraph (B), by inserting  
21 “or an activity involving classified informa-  
22 tion” after “an intelligence activity”; and

23 (B) by striking paragraph (2) and insert-  
24 ing the following:

1           “(2) The term ‘appropriate committees’ means  
2           the Permanent Select Committee on Intelligence of  
3           the House of Representatives and the Select Com-  
4           mittee on Intelligence of the Senate, except that,  
5           with respect to disclosures made by employees de-  
6           scribed in subsection (a)(1)(D), the term ‘appro-  
7           priate committees’ means the committees of appro-  
8           priate jurisdiction.”.

9   **SEC. 120. WHISTLEBLOWER PROTECTION OMBUDSMAN.**

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

13          “(d)(1) Each Inspector General shall, in accordance  
14   with applicable laws and regulations governing the civil  
15   service—

16                 “(A) appoint an Assistant Inspector General for  
17   Auditing, who shall have the responsibility for super-  
18   vising the performance of auditing activities relating  
19   to programs and operations of the establishment;

20                 “(B) appoint an Assistant Inspector General for  
21   Investigations, who shall have the responsibility for  
22   supervising the performance of investigative activi-  
23   ties relating to such programs and operations; and

24                 “(C) designate a Whistleblower Protection Om-  
25   budsman, who shall educate agency employees—

1           “(i) about prohibitions on retaliation for  
2           protected disclosures; and

3           “(ii) who have made or are contemplating  
4           making a protected disclosure about the rights  
5           and remedies against retaliation for protected  
6           disclosures.

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

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

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

17                 “(B) as determined by the President, any execu-  
18                 tive agency or unit thereof the principal function of  
19                 which is the conduct of foreign intelligence or  
20                 counter intelligence activities.”.

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

24                 (1) by striking “section 3(d)(1)” and inserting  
25                 “section 3(d)(1)(A)”; and

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

3 **SEC. 121. PILOT PROGRAM FOR ENHANCEMENT OF CON-**  
4 **TRACTOR EMPLOYEE WHISTLEBLOWER PRO-**  
5 **TECTIONS.**

6 (a) PILOT PROGRAM.—

7 (1) IN GENERAL.—Chapter 47 of title 41,  
8 United States Code, is amended by inserting after  
9 section 4705 the following new section:

10 **“§4705a. Pilot program for enhancement of protec-**  
11 **tion of contractor employees from re-**  
12 **prisal for disclosure of certain informa-**  
13 **tion**

14 “(a) DEFINITIONS.—In this section:

15 “(1) CONTRACT.—The term ‘contract’ means a  
16 contract awarded by the head of an executive agen-  
17 cy.

18 “(2) CONTRACTOR.—The term ‘contractor’  
19 means a person awarded a contract or a grant with  
20 an executive agency.

21 “(3) INSPECTOR GENERAL.—The term ‘Inspec-  
22 tor General’ means an Inspector General appointed  
23 under the Inspector General Act of 1978 (5 U.S.C.  
24 App.) and any Inspector General that receives fund-

1       ing from, or has oversight over contracts awarded  
2       for or on behalf of, an executive agency.

3       “(b) PROHIBITION OF REPRISALS.—An employee of  
4 a contractor may not be discharged, demoted, or otherwise  
5 discriminated against as a reprisal for disclosing to a  
6 Member of Congress, a representative of a committee of  
7 Congress, an Inspector General, the Government Account-  
8 ability Office, an agency employee responsible for contract  
9 oversight or management, an authorized official of an ex-  
10 ecutive agency or the Department of Justice information  
11 that the employee reasonably believes is evidence of gross  
12 mismanagement of a contract or grant, a gross waste of  
13 agency funds, a substantial and specific danger to public  
14 health or safety, or a violation of a law related to a con-  
15 tract (including the competition for or negotiation of a  
16 contract) or grant.

17       “(c) INVESTIGATION OF COMPLAINTS.—

18               “(1) INVESTIGATION.—An individual who be-  
19 lieves that the individual has been subjected to a re-  
20 prisal prohibited by subsection (b) may submit a  
21 complaint to the Inspector General of the executive  
22 agency. Unless the Inspector General determines  
23 that the complaint is frivolous, the Inspector General  
24 shall investigate the complaint and, on completion of  
25 the investigation, submit a report of the findings of



1 the investigation to the individual, the contractor  
2 concerned, and the head of the agency. If the execu-  
3 tive agency does not have an Inspector General, the  
4 duties of the Inspector General under this section  
5 shall be performed by an official designated by the  
6 head of the executive agency.

7 “(2) DEADLINE.—(A) Except as provided  
8 under subparagraph (B), the Inspector General shall  
9 make a determination that a complaint is frivolous  
10 or submit a report under paragraph (1) within 180  
11 days after receiving the complaint.

12 “(B) If the Inspector General is unable to com-  
13 plete an investigation in time to submit a report  
14 within the 180-day period specified in subparagraph  
15 (A) and the person submitting the complaint agrees  
16 to an extension of time, the Inspector General shall  
17 submit a report under paragraph (1) within such ad-  
18 ditional period of time as shall be agreed upon be-  
19 tween the Inspector General and the person submit-  
20 ting the complaint.

21 “(d) REMEDY AND ENFORCEMENT AUTHORITY.—

22 “(1) ACTIONS CONTRACTOR MAY BE ORDERED  
23 TO TAKE.—Not later than 30 days after receiving an  
24 Inspector General report pursuant to subsection (c),  
25 the head of the agency concerned shall determine

1       whether there is sufficient basis to conclude that the  
2       contractor concerned has subjected the complainant  
3       to a reprisal prohibited by subsection (b) and shall  
4       either issue an order denying relief or shall take one  
5       or more of the following actions:

6               “(A) ABATEMENT.—Order the contractor  
7               to take affirmative action to abate the reprisal.

8               “(B) REINSTATEMENT.—Order the con-  
9               tractor to reinstate the individual to the posi-  
10              tion that the individual held before the reprisal,  
11              together with the compensation (including back  
12              pay), employment benefits, and other terms and  
13              conditions of employment that would apply to  
14              the individual in that position if the reprisal  
15              had not been taken.

16              “(C) PAYMENT.—Order the contractor to  
17              pay the complainant an amount equal to the  
18              aggregate amount of all costs and expenses (in-  
19              cluding attorneys’ fees and expert witnesses’  
20              fees) that the complainant reasonably incurred  
21              for, or in connection with, bringing the com-  
22              plaint regarding the reprisal, as determined by  
23              the head of the executive agency.

24              “(2) DE NOVO ACTION.—If the head of an exec-  
25              utive agency issues an order denying relief under

1 paragraph (1) or has not issued an order within 210  
2 days after the submission of a complaint under sub-  
3 section (c), or in the case of an extension of time  
4 under paragraph (c)(2)(B), not later than 30 days  
5 after the expiration of the extension of time, and  
6 there is no showing that such delay is due to the bad  
7 faith of the complainant, the complainant shall be  
8 deemed to have exhausted all administrative rem-  
9 edies with respect to the complaint, and the com-  
10 plainant may bring a de novo action at law or equity  
11 against the contractor to seek compensatory dam-  
12 ages and other relief available under this section in  
13 the appropriate district court of the United States,  
14 which shall have jurisdiction over such an action  
15 without regard to the amount in controversy. Such  
16 an action shall, at the request of either party to the  
17 action, be tried by the court with a jury.

18 “(3) EVIDENCE.—An Inspector General deter-  
19 mination and an agency head order denying relief  
20 under paragraph (2) shall be admissible in evidence  
21 in any de novo action at law or equity brought pur-  
22 suant to this subsection.

23 “(4) ENFORCEMENT ORDER.—When a con-  
24 tractor fails to comply with an order issued under  
25 paragraph (1), the head of the executive agency

1 shall file an action for enforcement of the order in  
2 the United States district court for a district in  
3 which the reprisal was found to have occurred. In an  
4 action brought under this paragraph, the court may  
5 grant appropriate relief, including injunctive relief  
6 and compensatory and exemplary damages.

7 “(5) REVIEW OF ENFORCEMENT ORDER.—A  
8 person adversely affected or aggrieved by an order  
9 issued under paragraph (1) may obtain review of the  
10 order’s conformance with this subsection, and regu-  
11 lations issued to carry out this section, in the United  
12 States court of appeals for a circuit in which the re-  
13 prisal is alleged in the order to have occurred. A pe-  
14 tition seeking review must be filed no more than 60  
15 days after the head of the agency issues the order.  
16 Review shall conform to chapter 7 of title 5.

17 “(e) SCOPE OF SECTION.—This section does not—

18 “(1) authorize the discharge of, demotion of, or  
19 discrimination against an employee for a disclosure  
20 other than a disclosure protected by subsection (b);  
21 or

22 “(2) modify or derogate from a right or remedy  
23 otherwise available to the employee.

24 “(f) DURATION OF SECTION.—This section shall be  
25 in effect for the two-year period beginning on the date of

1 the enactment of the Whistleblower Protection Enhance-  
2 ment Act of 2011.”.

3           (2) CLERICAL AMENDMENT.—The table of sec-  
4 tions at the beginning of chapter 47 of title 41,  
5 United States Code, is amended by inserting after  
6 the item relating to section 4705 the following new  
7 item:

“4705a. Pilot program for enhancement of protection of contractor employees  
from reprisal for disclosure of certain information.”.

8           (b) SUSPENSION OF EFFECTIVENESS OF SECTION  
9 4705 WHILE PILOT PROGRAM IN EFFECT.—Section 4705  
10 of title 41, United States Code, is amended by adding at  
11 the end the following new subsection:

12           “(f) TWO-YEAR SUSPENSION OF EFFECTIVENESS  
13 WHILE PILOT PROGRAM IN EFFECT.—While section  
14 4705a of this title is in effect, this section shall not be  
15 in effect.”.

16           (c) GOVERNMENT ACCOUNTABILITY OFFICE STUDY  
17 AND REPORT.—

18           (1) STUDY.—Not later than one year after the  
19 date of the enactment of this Act, the Comptroller  
20 General shall begin conducting a study to evaluate  
21 the implementation of section 4705a of title 41,  
22 United States Code, as added by subsection (a).

23           (2) REPORT.—Not later than 18 months after  
24 the date of the enactment of this Act, the Comp-

1 troller General shall submit to Congress a report on  
 2 the results of the study required by paragraph (1),  
 3 with such findings and recommendations as the  
 4 Comptroller General considers appropriate.

5 **TITLE II—INTELLIGENCE COM-**  
 6 **MUNITY WHISTLEBLOWER**  
 7 **PROTECTIONS**

8 **SEC. 201. PROTECTION OF INTELLIGENCE COMMUNITY**  
 9 **WHISTLEBLOWERS.**

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

13 **“§ 2303a. Prohibited personnel practices in the intel-**  
 14 **ligence community**

15 “(a) DEFINITIONS.—In this section—

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

21 “(2) the term ‘intelligence community ele-  
 22 ment’—

23 “(A) means—

24 “(i) the Central Intelligence Agency,  
 25 the Defense Intelligence Agency, the Na-

1            tional Geospatial-Intelligence Agency, the  
2            National Security Agency, the Office of the  
3            Director of National Intelligence, and the  
4            National Reconnaissance Office; and

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

11           “(B) does not include the Federal Bureau  
12           of Investigation; and

13           “(3) the term ‘personnel action’ means any ac-  
14           tion described in clauses (i) through (x) of section  
15           2302(a)(2)(A) with respect to an employee in a posi-  
16           tion in an intelligence community element (other  
17           than a position of a confidential, policy-determining,  
18           policymaking, or policy-advocating character).

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

1 an employee designated by the Director of National Intel-  
2 ligence for such purpose), or to the head of the employing  
3 agency (or an employee designated by the head of that  
4 agency for such purpose), which the employee reasonably  
5 believes evidences—

6           “(1) a violation of any law, rule, or regulation,  
7           except for an alleged violation that occurs during the  
8           conscientious carrying out of official duties; or

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

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

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

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

22               “(2) repeal section 2303; or

23               “(3) provide the President or Director of Na-  
24               tional Intelligence the authority to revise regulations



1 related to section 2303, codified in part 27 of the  
2 Code of Federal Regulations.”.

3 (b) TECHNICAL AND CONFORMING AMENDMENT.—

4 The table of sections for chapter 23 of title 5, United  
5 States Code, is amended by inserting after the item relat-  
6 ing to section 2303 the following:

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

7 **SEC. 202. REVIEW OF SECURITY CLEARANCE OR ACCESS**  
8 **DETERMINATIONS.**

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

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

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

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

19 (4) by inserting after paragraph (6) the fol-  
20 lowing:

21 “(7) not later than 180 days after the date of  
22 enactment of the Whistleblower Protection Enhance-  
23 ment Act of 2011—

24 “(A) developing policies and procedures  
25 that permit, to the extent practicable, individ-

1 uals who challenge in good faith a determina-  
2 tion to suspend or revoke a security clearance  
3 or access to classified information to retain  
4 their government employment status while such  
5 challenge is pending; and

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

21 Any limitation period applicable to an agency appeal under  
22 paragraph (7) shall be tolled until the head of the agency  
23 (or in the case of any component of the Department of  
24 Defense, the Secretary of Defense) determines, with the  
25 concurrence of the Director of National Intelligence, that

1 the policies and procedures described in paragraph (7)  
2 have been established for the agency or the Director of  
3 National Intelligence promulgates the policies and proce-  
4 dures under paragraph (7). The policies and procedures  
5 for appeals developed under paragraph (7) shall be com-  
6 parable to the policies and procedures pertaining to pro-  
7 hibited personnel practices defined under section  
8 2302(b)(8) of title 5, United States Code, and provide—

9           “(i) for an independent and impartial fact-find-  
10 er;

11           “(ii) for notice and the opportunity to be heard,  
12 including the opportunity to present relevant evi-  
13 dence, including witness testimony;

14           “(iii) that the employee or former employee  
15 may be represented by counsel;

16           “(iv) that the employee or former employee has  
17 a right to a decision based on the record developed  
18 during the appeal;

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

23           “(I) the employee and the agency con-  
24 cerned agree to an extension; or

1           “(II) the impartial fact-finder determines  
2           in writing that a greater period of time is re-  
3           quired in the interest of fairness or national se-  
4           curity;

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

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

21          (b) RETALIATORY REVOCATION OF SECURITY  
22          CLEARANCES AND ACCESS DETERMINATIONS.—Section  
23          3001 of the Intelligence Reform and Terrorism Prevention  
24          Act of 2004 (50 U.S.C. 435b) is amended by adding at  
25          the end the following:

1       “(j) RETALIATORY REVOCATION OF SECURITY  
2 CLEARANCES AND ACCESS DETERMINATIONS.—

3               “(1) IN GENERAL.—Agency personnel with au-  
4 thority over personnel security clearance or access  
5 determinations shall not take or fail to take, or  
6 threaten to take or fail to take, any action with re-  
7 spect to any employee’s security clearance or access  
8 determination because of—

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

17               “(i) a violation of any law, rule, or  
18 regulation, and occurs during the conscien-  
19 tious carrying out of official duties; or

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

24               “(B) any disclosure to the Inspector Gen-  
25 eral of an agency or another employee des-

1           ignated by the head of the agency to receive  
2           such disclosures, of information which the em-  
3           ployee reasonably believes evidences—

4                   “(i) a violation of any law, rule, or  
5                   regulation, and occurs during the conscien-  
6                   tious carrying out of official duties; or

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

11                  “(C) any communication that complies  
12                  with—

13                          “(i) subsection (a)(1), (d), or (h) of  
14                          section 8H of the Inspector General Act of  
15                          1978 (5 U.S.C. App.);

16                          “(ii) subsection (d)(5) (A), (D), or  
17                          (G) of section 17 of the Central Intel-  
18                          ligence Agency Act of 1949 (50 U.S.C.  
19                          403q); or

20                          “(iii) subsection (k)(5) (A), (D), or  
21                          (G), of section 103H of the National Secu-  
22                          rity Act of 1947 (50 U.S.C. 403–3h);

23                  “(D) the exercise of any appeal, complaint,  
24                  or grievance right granted by any law, rule, or  
25                  regulation;

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

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

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

21          “(3) DISCLOSURES.—

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

24                          “(i) the disclosure was made to a per-  
25                          son, including a supervisor, who partici-

1           pated in an activity that the employee rea-  
2           sonably believed to be covered by para-  
3           graph (1)(A)(ii);

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

6           “(iii) of the employee’s motive for  
7           making the disclosure;

8           “(iv) the disclosure was not made in  
9           writing;

10          “(v) the disclosure was made while  
11          the employee was off duty; or

12          “(vi) of the amount of time which has  
13          passed since the occurrence of the events  
14          described in the disclosure.

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

25          “(4) AGENCY ADJUDICATION.—



1           “(A) REMEDIAL PROCEDURE.—An em-  
2           ployee or former employee who believes that he  
3           or she has been subjected to a reprisal prohib-  
4           ited by paragraph (1) of this subsection may,  
5           within 90 days after the issuance of notice of  
6           such decision, appeal that decision within the  
7           agency of that employee or former employee  
8           through proceedings authorized by paragraph  
9           (7) of subsection (a), except that there shall be  
10          no appeal of an agency’s suspension of a secu-  
11          rity clearance or access determination for pur-  
12          poses of conducting an investigation, if that  
13          suspension lasts not longer than 1 year (or a  
14          longer period in accordance with a certification  
15          made under subsection (b)(7)).

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

1           corrective action shall include reasonable attor-  
2           ney’s fees and any other reasonable costs in-  
3           curred, and may include compensatory damages  
4           not to exceed \$300,000, back pay and related  
5           benefits, and travel expenses.

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

21          “(5) APPELLATE REVIEW OF SECURITY CLEAR-  
22          ANCE ACCESS DETERMINATIONS BY DIRECTOR OF  
23          NATIONAL INTELLIGENCE.—

24          “(A) DEFINITION.—In this paragraph, the  
25          term ‘Board’ means the appellate review board

1 established under section 204 of the Whistle-  
2 blower Protection Enhancement Act of 2011.

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

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

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

1           “(E) FURTHER FACT-FINDING OR IM-  
2           PROPER DENIAL.—If the Board concludes that  
3           further fact-finding is necessary or finds that  
4           the agency improperly denied the employee or  
5           former employee the opportunity to present evi-  
6           dence that, if admitted, would have a substan-  
7           tial likelihood of altering the outcome, the  
8           Board shall remand the matter to the agency  
9           from which it originated for additional pro-  
10          ceedings in accordance with the rules of proce-  
11          dure issued by the Board.

12          “(F) DE NOVO DETERMINATION.—The  
13          Board shall make a de novo determination,  
14          based on the entire record and under the stand-  
15          ards specified in paragraph (4), of whether the  
16          employee or former employee received an ad-  
17          verse security clearance or access determination  
18          in violation of paragraph (1). In considering the  
19          record, the Board may weigh the evidence,  
20          judge the credibility of witnesses, and determine  
21          controverted questions of fact. In doing so, the  
22          Board may consider the prior fact-finder’s op-  
23          portunity to see and hear the witnesses.

24          “(G) ADVERSE SECURITY CLEARANCE OR  
25          ACCESS DETERMINATION.—If the Board finds

1 that the adverse security clearance or access de-  
2 termination violated paragraph (1), it shall then  
3 separately determine whether reinstating the se-  
4 curity clearance or access determination is  
5 clearly consistent with the interests of national  
6 security, with any doubt resolved in favor of na-  
7 tional security, under Executive Order 12968  
8 (60 Fed. Reg. 40245; relating to access to clas-  
9 sified information) or any successor thereto (in-  
10 cluding any adjudicative guidelines promulgated  
11 under such orders) or any subsequent Executive  
12 order, regulation, or policy concerning access to  
13 classified information.

14 “(H) REMEDIES.—

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

1 other reasonable costs incurred, and may  
2 include compensatory damages not to ex-  
3 ceed \$300,000 and back pay and related  
4 benefits. The Board may recommend, but  
5 may not order, reinstatement or hiring of  
6 a former employee. The Board may order  
7 that the former employee be treated as  
8 though the employee were transferring  
9 from the most recent position held when  
10 seeking other positions within the executive  
11 branch. Any corrective action shall not in-  
12 clude the reinstating of any security clear-  
13 ance or access determination. The agency  
14 head shall take the actions so ordered  
15 within 90 days, unless the Director of Na-  
16 tional Intelligence, the Secretary of En-  
17 ergy, or the Secretary of Defense, in the  
18 case of any component of the Department  
19 of Defense, determines that doing so would  
20 endanger national security.

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

1 shall recommend such action to the head of  
2 the entity selected under subsection (b)  
3 and the head of the affected agency.

4 “(I) CONGRESSIONAL NOTIFICATION.—

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

18 (d) RULE OF CONSTRUCTION.—Nothing in section  
19 3001 of the Intelligence Reform and Terrorism Prevention  
20 Act of 2004 (50 U.S.C. 435b), as amended by this Act,  
21 shall be construed to require the repeal or replacement of  
22 agency appeal procedures implementing Executive Order  
23 12968 (60 Fed. Reg. 40245; relating to classified national  
24 security information), or any successor thereto, and Exec-  
25 utive Order 10865 (25 Fed. Reg. 1583; relating to safe-

1 guarding classified information with industry), or any suc-  
2 cessor thereto, that meet the requirements of section  
3 3001(b)(7) of such Act, as so amended.

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

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

9 (1) in subsection (b)—

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

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

12 “(2) If the head of an establishment determines that  
13 a complaint or information transmitted under paragraph  
14 (1) would create a conflict of interest for the head of the  
15 establishment, the head of the establishment shall return  
16 the complaint or information to the Inspector General with  
17 that determination and the Inspector General shall make  
18 the transmission to the Director of National Intelligence.  
19 In such a case, the requirements of this section for the  
20 head of the establishment apply to the recipient of the In-  
21 spector General’s transmission. The Director of National  
22 Intelligence shall consult with the members of the appel-  
23 late review board established under section 204 of the  
24 Whistleblower Protection Enhancement Review Act of  
25 2011 regarding all transmissions under this paragraph.”;

1           (2) by designating subsection (h) as subsection  
2           (i); and

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

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

11          (b) CENTRAL INTELLIGENCE AGENCY.—Section  
12 17(d)(5) of the Central Intelligence Agency Act of 1949  
13 (50 U.S.C. 403q) is amended—

14           (1) in subparagraph (B)—

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

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

17           “(ii) If the Director determines that a complaint or  
18 information transmitted under paragraph (1) would create  
19 a conflict of interest for the Director, the Director shall  
20 return the complaint or information to the Inspector Gen-  
21 eral with that determination and the Inspector General  
22 shall make the transmission to the Director of National  
23 Intelligence. In such a case the requirements of this sub-  
24 section for the Director apply to the recipient of the In-  
25 spector General’s submission; and”;

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

2 “(H) An individual who has submitted a complaint  
3 or information to the Inspector General under this section  
4 may notify any member of Congress or congressional staff  
5 member of the fact that such individual has made a sub-  
6 mission to the Inspector General, and of the date on which  
7 such submission was made.”.

8 **SEC. 204. REGULATIONS; REPORTING REQUIREMENTS;**  
9 **NONAPPLICABILITY TO CERTAIN TERMI-**  
10 **NATIONS.**

11 (a) DEFINITIONS.—In this section—

12 (1) the term “congressional oversight commit-  
13 tees” means—

14 (A) the Committee on Homeland Security  
15 and Government Affairs of the Senate;

16 (B) the Select Committee on Intelligence  
17 of the Senate;

18 (C) the Committee on Oversight and Gov-  
19 ernment Reform of the House of Representa-  
20 tives; and

21 (D) the Permanent Select Committee on  
22 Intelligence of the House of Representatives;  
23 and

24 (2) the term “intelligence community ele-  
25 ment”—

1 (A) means—

2 (i) the Central Intelligence Agency,  
3 the Defense Intelligence Agency, the Na-  
4 tional Geospatial-Intelligence Agency, the  
5 National Security Agency, the Office of the  
6 Director of National Intelligence, and the  
7 National Reconnaissance Office; and

8 (ii) any executive agency or unit  
9 thereof determined by the President under  
10 section 2302(a)(2)(C)(ii) of title 5, United  
11 States Code, to have as its principal func-  
12 tion the conduct of foreign intelligence or  
13 counterintelligence activities; and

14 (B) does not include the Federal Bureau of  
15 Investigation.

16 (b) REGULATIONS.—

17 (1) IN GENERAL.—The Director of National In-  
18 telligence shall prescribe regulations to ensure that  
19 a personnel action shall not be taken against an em-  
20 ployee of an intelligence community element as a re-  
21 prisal for any disclosure of information described in  
22 section 2303a(b) of title 5, United States Code, as  
23 added by this Act.

24 (2) APPELLATE REVIEW BOARD.—Not later  
25 than 180 days after the date of enactment of this

1 Act, the Director of National Intelligence, in con-  
2 sultation with the Secretary of Defense, the Attor-  
3 ney General, and the heads of appropriate agencies,  
4 shall establish an appellate review board that is  
5 broadly representative of affected Departments and  
6 agencies and is made up of individuals with expertise  
7 in merit systems principles and national security  
8 issues—

9 (A) to hear whistleblower appeals related  
10 to security clearance access determinations de-  
11 scribed in section 3001(j) of the Intelligence  
12 Reform and Terrorism Prevention Act of 2004  
13 (50 U.S.C. 435b), as added by this Act; and

14 (B) that shall include a subpanel that re-  
15 flects the composition of the intelligence com-  
16 mittee, which shall be composed of intelligence  
17 community elements and inspectors general  
18 from intelligence community elements, for the  
19 purpose of hearing cases that arise in elements  
20 of the intelligence community.

21 (c) REPORT ON THE STATUS OF IMPLEMENTATION  
22 OF REGULATIONS.—Not later than 2 years after the date  
23 of enactment of this Act, the Director of National Intel-  
24 ligence shall submit a report on the status of the imple-

1 mentation of the regulations promulgated under sub-  
2 section (b) to the congressional oversight committees.

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

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

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

15 (A) the Director personally summarily ter-  
16 minates the individual; and

17 (B) the Director—

18 (i) determines the termination to be in  
19 the interest of the United States;

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

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

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

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

10 (B) the Director—

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

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

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

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

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



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

13 **TITLE III—EFFECTIVE DATE;**

14 **SAVINGS PROVISION**

15 **SEC. 301. EFFECTIVE DATE.**

16 Except as otherwise provided in this Act, this Act

17 shall take effect 30 days after the date of enactment of

18 this Act.

19 **SEC. 302. SAVINGS PROVISION.**

20 Nothing in this Act shall be construed to imply any

21 limitation on any protections afforded by any other provi-

22 sion of law to employees and applicants.

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