

LEGAL JUSTICE FOR SERVICEMEMBERS ACT SECTION-BY-SECTION

SECTION 1 – SHORT TITLE.

This section designates the Act as the *Legal Justice for Servicemembers Act of 2015*.

SECTION 2 – IMPROVEMENTS TO WHISTLEBLOWER PROTECTION PROCEDURES.

Amends Title 10, United States Code, Section 1034 (*The Military Whistleblower Protection Act*) to:

- **Strengthen the definition of prohibited personnel actions related to retaliation**
Background: Current law does not protect military whistleblowers from retaliatory investigations and allows supervisors to knowingly stand by without taking action when a subordinate is being retaliated against. This section amends the personnel action definition to prohibit these acts of retaliation.
- **Give servicemembers the option to have DODIG or the relevant military department IG investigate whistleblower claims**
Background: Most whistleblower complaints reported to the Department of Defense Office of the Inspector General (DODIG) are automatically passed to the relevant military branch IG to investigate the claims. DODIG typically only keeps cases involving high-ranking DOD officials, subject matter of a sensitive nature or cases involving more than one military branch. This section would allow the servicemember to opt-out of the military department investigation in favor of a higher-level DODIG investigation.
- **Allow the investigating IG to grant a 90-day temporary stay of a personnel action**
Background: Contrary to many civilian whistleblower statutes, the MWPA contains no protection for military whistleblowers while an investigation is being completed. A servicemember may only be granted relief after an investigation is completed and the case is brought to a Board for Correction of Military Records – a process that can take many years. This section would provide protections while an investigation is underway by granting authority to the IG to temporarily suspend the action being investigated as whistleblower reprisal for up to 90 days (or longer with the consent of the Secretary) if the IG determines the action would result in immediate hardship to the servicemember.
- **Strengthen notice requirements for the untimely completion of whistleblower investigations**
Background: Current law requires investigations to be completed within 180 days and notice to be provided if an investigation is not completed within that timeframe. Yet in 2014, DODIG whistleblower reprisal investigations took an average of 438 days to close. This

section would require a progress report after 180 days and after each subsequent 90-day period.

- **Require the investigating IG to provide disciplinary recommendations in their report to a military correction board**

Background: Current law contains no specific requirement for issuing corrective action against an individual that retaliates against a servicemember for whistleblowing. Unfortunately, this has resulted in perpetrators receiving little to no punishment for taking action to silence whistleblowers. This section would require the investigating IG, in consultation with JAG, to recommend appropriate corrective action that should be taken against an individual found guilty of whistleblower retaliation.

- **Send finalized whistleblower investigations to the appropriate Board for Correction of Military Records**

Background: A 2012 GAO report found that less than 20% of servicemembers with substantiated whistleblower cases applied to correct their records with a Board for Correction of Military Records. This section would help reduce the number of uncorrected records by requiring the investigating IG to automatically submit substantiated cases to the appropriate correction board instead of requiring action from the affected servicemember.

- **Provide whistleblowers with the right to request a correction board hearing in certain circumstances**

Background: While current law allows military correction boards to hold hearings, very few have been held since the boards were created by Congress in 1956. This section would give servicemembers the right to request a correction board hearing in whistleblower cases that have been fully investigated by an IG (~30% of cases) and in any whistleblower case where an IG investigation has not been completed within one year (the statutory deadline is 180 days).

- **Strengthen the burden of proof from a “preponderance of evidence” to “clear and convincing evidence”**

Background: In military whistleblower investigations, the evidentiary standard is a preponderance of evidence, meaning that the evidence that the investigator must determine is of greater weight or more convincing than the evidence presented in opposition to it. In civilian cases, management must prove by clear and convincing evidence that it would have taken a personnel action regardless of a protected disclosure. Clear and convincing evidence requires a degree of proof more demanding than preponderance. This difference in the burden of proof makes it easier for military services to prove they were not retaliating against whistleblowers than it is for civilian government agencies to prove the same thing. This section brings the burden of proof standard in line with civilian federal agencies.

- **Require DODIG and military department IGs to develop uniform procedures for conducting military whistleblower investigations and training staff**

Background: A 2009 Department of Justice review found that whistleblower cases investigated by military department IGs were of a lower quality than those conducted by DODIG. The study found that this quality deficiency was due, in part, to a lack of consistent standards. This section would authorize DODIG to create clear standards for conducting whistleblower reprisal investigations and training IG staff.

SECTION 3 – IMPROVEMENTS TO AUTHORITIES AND PROCEDURES FOR THE CORRECTION OF MILITARY RECORDS.

Amends Title 10, United States Code, Section 1552 (*Correction of Military Records*) to:

- **Change existing language from “The Secretary of a military department *may* correct...” to “The Secretary of a military department *shall* correct...”**
Background: Board decisions are subject to very limited judicial review due to an interpretation by the courts that gives “unusual deference” to decisions made by the military correction boards. This section would clarify the statutory language to bring the standard of review in line with how federal courts review other types of agency action.
- **Place an Administrative Judge as the presiding officer at all meetings held by military correction boards**
Background: Board members serve as the final backstop for legal justice in the military, but often lack any background in law. This provision would require an Administrative Judge to serve as the presiding officer at board meetings to bridge that knowledge gap and bring additional legal expertise into board proceedings.
- **Make correction board membership full-time with a 5-year term limit**
Background: Despite caseloads in the tens of thousands, board members currently serve in part-time, volunteer positions. The Army received 16,480 cases in FY14, yet board members only meet twice a week to decide those cases. To address the high case volume with appropriate resources, this provision requires board members to serve in full-time positions, with 5-year terms of service.
- **Ensure that when boards return incomplete applications back to servicemembers, the guidance indicates the materials missing from the applications**
Background: Current military department regulations ask servicemembers to submit relevant materials to support their applications. The standard used for relevancy is vague and applications are often returned as incomplete even when applicants submit extensive documentation. This section would require military correction boards to specifically indicate to servicemembers what information is lacking in an application that the board finds incomplete.
- **Require boards to make reasonable efforts to obtain medical or personnel records if a servicemember is unable to obtain them**

Background: Correction boards currently require the applicant to procure all personnel or medical information relevant to their case. This can include requiring the servicemember to submit multiple Freedom of Information Act requests for this information. Since an applicant may lack the specific knowledge on how to obtain relevant records, this section requires the boards to step in and help if a servicemember has shown that they cannot procure the records themselves.

- **Remove the one-year statute of limitations for reconsideration of board decisions**

Background: Currently, the Army Board for Correction of Military Records sets a one-year deadline for reconsideration of any board decisions. This restriction bans reconsideration even when new evidence that may not have been available at the time of first filing is presented. This section removes the one-year restriction and allows an applicant to request reconsideration at any time if presenting the board with new materials not previously considered.

- **Require the Boards for Correction of Military Records to hold a hearing in any case that presents a genuine issue of material fact**

Background: While current law allows correction boards to hold hearings, very few have been held since the boards were created by Congress in 1956. This section establishes that cases involving a genuine issue of material fact – a disagreement between the parties concerning the legally relevant facts in the case – should be the standard used to determine whether applications should receive a board hearing. This provision mirrors procedural requirements in federal court used to determine whether a trial should be held or a summary judgment should be issued.

- **Make final board decisions publically available to assist servicemembers and to build military administrative case law**

Background: While most board decisions are currently accessible online, the information is not kept in a standardized format and the boards do not consult past decisions when processing applications. This provision would require decisions be made publically available with personally identifiable information stricken (except for the names of senior officials in whistleblower investigations) and would require military department Secretaries to establish procedures for determining when decisions should be precedential and therefore be used to build a body of military administrative case law.

- **Clarify that servicemembers have the right to seek judicial review of board decisions in federal court**

Background: While board decisions are already appealable to federal court, the threshold for judicial review is extremely high, giving “unusual deference” to a decision made by the military. This provision reinforces Congress’s intent to allow decisions made by the military correction boards to be reviewed by the courts.

- **Establish a uniform training curriculum for board members and require retraining every 2 years**

Background: Currently, training practices at each of the correction boards are developed independently of one another, and as such, standards differ significantly from service to service. This provision requires the Secretaries of the military departments to establish a uniform training curriculum for board members and to report to Congress within one year on the progress made to implement the curriculum. Additionally, the provision requires that board members are trained within 90 days of starting employment and at least every two years thereafter.

SECTION 5 – INCLUSIONS OF INSPECTORS GENERAL OF THE MILITARY DEPARTMENTS AND CERTAIN OTHER INSPECTORS GENERAL IN COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY.

Amends section 11(b)(1) of Title 5, United States Code, App. (*The Inspector General Act of 1978*) to:

- **Include military department IGs in the Council of the Inspectors General on Integrity and Efficiency**

Background: Current law only allows DODIG, and not military department IGs, to be a part of the Council of the Inspectors General on Integrity and Efficiency (CIGIE). To help address the lack of consistent standards between whistleblower investigations conducted by DODIG and the military department IGs, this section requires the military department IGs to be included in CIGIE. The Council conducts trainings and promotes quality and consistency in IG investigations.

SUPPORTING ORGANIZATIONS

The bill is supported by the Government Accountability Project (GAP), Project on Government Oversight (POGO), Protect Our Defenders (POD), Service Women’s Action Network (SWAN), American Civil Liberties Union (ACLU), Sunlight Foundation, Human Rights Watch, TechFreedom, Public Citizen, National Veterans Legal Services Program, National Whistleblowers Center, International Association of Whistleblowers, Whistleblower Support Fund, OpenTheGovernment.org, National Forum On Judicial Accountability, Federal Ethics Center, Liberty Coalition, National Taxpayers Union, Taxpayer Protection Alliance, American Library Association and the Union of Concerned Scientists.