

AMENDMENT NO. _____ Calendar No. _____

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—111th Cong., 1st Sess.

S. 372

To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in non-disclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended
to be proposed by Mr. AKAKA (for himself, Ms. COLLINS,
Mr. LIEBERMAN, and Mr. VOINOVICH)

Viz:

- 1 Strike all after the enacting clause and insert the fol-
- 2 lowing:
- 3 **SECTION 1. SHORT TITLE.**
- 4 This Act may be cited as the “Whistleblower Protec-
- 5 tion Enhancement Act of 2009”.

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)—

9 (A) in clause (i), by striking “a violation”
10 and inserting “any violation”; and

11 (B) in clause (i), by adding “except for a
12 minor, inadvertent violation that occurs during
13 the conscientious carrying out of the violator’s
14 assigned duties,” after “regulation,”; and

15 (2) in subparagraph (B)(i), by striking “a viola-
16 tion” and inserting “any violation (other than a vio-
17 lation of this section)”.

18 (b) PROHIBITED PERSONNEL PRACTICES UNDER
19 SECTION 2302(B)(9).—

20 (1) TECHNICAL AND CONFORMING AMEND-
21 MENTS.—Title 5, United States Code, is amended in
22 subsections (a)(3), (b)(4)(A), and (b)(4)(B)(i) of
23 section 1214, in subsections (a), (e)(1), and (i) of
24 section 1221, and in subsection (a)(2)(C)(i) of sec-
25 tion 2302, by inserting “or section 2302(b)(9)(A)(i),

1 (B)(i), (C), or (D)” after “section 2302(b)(8)” or
2 “(b)(8)” each place it appears.

3 (2) OTHER REFERENCES.—(A) Title 5, United
4 States Code, is amended in subsection (b)(4)(B)(i)
5 of section 1214 and in subsection (e)(1) of section
6 1221, by inserting “or protected activity” after “dis-
7 closure” each place it appears.

8 (B) Section 2302(b)(9) of title 5, United States
9 Code, is amended—

10 (i) by striking subparagraph (A) and insert-
11 ing the following:

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

15 “(i) with regard to remedying a viola-
16 tion of paragraph (8); or

17 “(ii) with regard to remedying a viola-
18 tion of any other law, rule, or regulation;”;

19 and

20 (ii) in subparagraph (B), by inserting “(i)
21 or (ii)” after “subparagraph (A)”.

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

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

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

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

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

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

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

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

17 **SEC. 102. DEFINITIONAL AMENDMENTS.**

18 (a) DISCLOSURES.—Section 2302(a)(2) of title 5,
19 United States Code, is amended—

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

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

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

1 “(D) ‘disclosure’ means a formal or informal
2 communication or transmission, but does not include
3 a communication concerning policy decisions that
4 lawfully exercise discretionary authority unless the
5 employee or applicant providing the disclosure rea-
6 sonably believes that the disclosure evidences—

7 “(i) any violation of any law, rule, or regu-
8 lation; or

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

12 (b) **CLEAR AND CONVINCING EVIDENCE.**—Sections
13 1214(b)(4)(B)(ii) and 1221(e)(2) of title 5, United States
14 Code, are amended by adding at the end the following:
15 “For purposes of the preceding sentence, ‘clear and con-
16 vincing evidence’ means the degree of proof that produces
17 in the mind of the trier of fact a firm belief as to the
18 allegations sought to be established.”.

19 **SEC. 103. REBUTTABLE PRESUMPTION.**

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

23 “‘This subsection shall not be construed to authorize the
24 withholding of information from Congress or the taking
25 of any personnel action against an employee who discloses

1 information to Congress. For purposes of paragraph (8),
2 any presumption relating to the performance of a duty by
3 an employee who has authority to take or direct others
4 to take, recommend, or approve any personnel action may
5 be rebutted by substantial evidence. For purposes of para-
6 graph (8), a determination as to whether an employee or
7 applicant reasonably believes that such employee or appli-
8 cant has disclosed information that evidences any violation
9 of law, rule, regulation, gross mismanagement, a gross
10 waste of funds, an abuse of authority, or a substantial
11 and specific danger to public health or safety shall be
12 made by determining whether a disinterested observer
13 with knowledge of the essential facts known to and readily
14 ascertainable by the employee could reasonably conclude
15 that the actions of the Government evidence such viola-
16 tions, mismanagement, waste, abuse, or danger.”.

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

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

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

23 (2) by redesignating clause (xi) as clause (xii)
24 and inserting after clause (x) the following:

1 “(xi) the implementation or enforce-
2 ment of any nondisclosure policy, form, or
3 agreement; and”.

4 (b) PROHIBITED PERSONNEL PRACTICE.—

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

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

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

11 (C) by inserting after paragraph (12) the
12 following:

13 “(13) implement or enforce any written non-
14 disclosure policy, form, or agreement, if such policy,
15 form, or agreement does not contain the following
16 statement: ‘These provisions are consistent with and
17 do not supersede, conflict with, or otherwise alter
18 the employee obligations, rights, or liabilities created
19 by Executive Order No. 12958; section 7211 of title
20 5, United States Code (governing disclosures to Con-
21 gress); section 1034 of title 10, United States Code
22 (governing disclosure to Congress by members of the
23 military); section 2302(b)(8) of title 5, United
24 States Code (governing disclosures of illegality,
25 waste, fraud, abuse, or public health or safety

1 threats); the Intelligence Identities Protection Act of
2 1982 (50 U.S.C. 421 et seq.) (governing disclosures
3 that could expose confidential Government agents);
4 and the statutes which protect against disclosures
5 that could compromise national security, including
6 sections 641, 793, 794, 798, and 952 of title 18,
7 United States Code, and section 4(b) of the Subver-
8 sive Activities Control Act of 1950 (50 U.S.C.
9 783(b)). The definitions, requirements, obligations,
10 rights, sanctions, and liabilities created by such Ex-
11 ecutive order and such statutory provisions are in-
12 corporated into this agreement and are control-
13 ling.’”.

14 (2) NONDISCLOSURE POLICY, FORM, OR AGREE-
15 MENT IN EFFECT BEFORE THE DATE OF ENACT-
16 MENT.—A nondisclosure policy, form, or agreement
17 that was in effect before the date of enactment of
18 this Act, but that does not contain the statement re-
19 quired under section 2302(b)(13) of title 5, United
20 States Code, (as added by this Act) for implementa-
21 tion or enforcement, may be enforced with regard to
22 a current employee if the agency gives such em-
23 ployee notice of the statement, and may be enforced
24 with regard to a former employee if the agency posts

1 notice of the statement on the agency website for 1
2 year following the date of enactment of this Act.

3 (c) RETALIATORY INVESTIGATIONS.—

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

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

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

17 “(4) Any corrective action ordered under this
18 section to correct a prohibited personnel practice
19 may include fees, costs, or damages reasonably in-
20 curred due to an agency investigation of the em-
21 ployee, if such investigation was commenced, ex-
22 panded, or extended in retaliation for the disclosure
23 or protected activity that formed the basis of the
24 corrective action.”.

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

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

5 “(i)(I) the Federal Bureau of Inves-
6 tigation, the Central Intelligence Agency,
7 the Defense Intelligence Agency, the Na-
8 tional Geospatial-Intelligence Agency, the
9 National Security Agency, the Office of the
10 Director of National Intelligence, and the
11 National Reconnaissance Office; and

12 “(II) as determined by the President,
13 any executive agency or unit thereof the
14 principal function of which is the conduct
15 of foreign intelligence or counterintel-
16 ligence activities, if the determination (as
17 that determination relates to a personnel
18 action) is made before that personnel ac-
19 tion; or”.

20 **SEC. 106. DISCIPLINARY ACTION.**

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

23 “(3)(A) A final order of the Board may im-
24 pose—

25 “(i) disciplinary action consisting of re-
26 moval, reduction in grade, debarment from

1 Federal employment for a period not to exceed
2 5 years, suspension, or reprimand;

3 “(ii) an assessment of a civil penalty not to
4 exceed \$1,000; or

5 “(iii) any combination of disciplinary ac-
6 tions described under clause (i) and an assess-
7 ment described under clause (ii).

8 “(B) In any case brought under paragraph (1)
9 in which the Board finds that an employee has com-
10 mitted a prohibited personnel practice under section
11 2302(b)(8), or 2302(b)(9)(A)(i), (B)(i), (C) , or (D),
12 the Board shall impose disciplinary action if the
13 Board finds that the activity protected under section
14 2302(b)(8), or 2302(b)(9)(A)(i), (B)(i), (C), or (D)
15 was a significant motivating factor, even if other fac-
16 tors also motivated the decision, for the employee’s
17 decision to take, fail to take, or threaten to take or
18 fail to take a personnel action, unless that employee
19 demonstrates, by preponderance of evidence, that
20 the employee would have taken, failed to take, or
21 threatened to take or fail to take the same personnel
22 action, in the absence of such protected activity.”.

23 **SEC. 107. REMEDIES.**

24 (a) ATTORNEY FEES.—Section 1204(m)(1) of title 5,
25 United States Code, is amended by striking “agency in-

1 volved” and inserting “agency where the prevailing party
2 is employed or has applied for employment”.

3 (b) DAMAGES.—Sections 1214(g)(2) and
4 1221(g)(1)(A)(ii) of title 5, United States Code, are
5 amended by striking all after “travel expenses,” and in-
6 serting “any other reasonable and foreseeable consequen-
7 tial damages, and compensatory damages (including attor-
8 ney’s fees, interest, reasonable expert witness fees, and
9 costs).” each place it appears.

10 **SEC. 108. JUDICIAL REVIEW.**

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

14 “(b)(1)(A) Except as provided in subparagraph (B)
15 and paragraph (2) of this subsection, a petition to review
16 a final order or final decision of the Board shall be filed
17 in the United States Court of Appeals for the Federal Cir-
18 cuit. Notwithstanding any other provision of law, any peti-
19 tion for review shall be filed within 60 days after the
20 Board issues notice of the final order or decision of the
21 Board.

22 “(B) During the 5-year period beginning on the effec-
23 tive date of the Whistleblower Protection Enhancement
24 Act of 2009, a petition to review a final order or final
25 decision of the Board that raises no challenge to the

1 Board’s disposition of allegations of a prohibited personnel
2 practice described in section 2302(b) other than practices
3 described in section 2302(b)(8), or 2302(b)(9)(A)(i),
4 (B)(i), (C), or (D) shall be filed in the United States Court
5 of Appeals for the Federal Circuit or any court of appeals
6 of competent jurisdiction as provided under paragraph
7 (2).”.

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

11 “(d)(1) Except as provided under paragraph (2), this
12 paragraph shall apply to any review obtained by the Direc-
13 tor of the Office of Personnel Management. The Director
14 of the Office of Personnel Management may obtain review
15 of any final order or decision of the Board by filing, within
16 60 days after the Board issues notice of the final order
17 or decision of the Board, a petition for judicial review in
18 the United States Court of Appeals for the Federal Circuit
19 if the Director determines, in the discretion of the Direc-
20 tor, that the Board erred in interpreting a civil service
21 law, rule, or regulation affecting personnel management
22 and that the Board’s decision will have a substantial im-
23 pact on a civil service law, rule, regulation, or policy direc-
24 tive. If the Director did not intervene in a matter before
25 the Board, the Director may not petition for review of a

1 Board decision under this section unless the Director first
2 petitions the Board for a reconsideration of its decision,
3 and such petition is denied. In addition to the named re-
4 spondent, the Board and all other parties to the pro-
5 ceedings before the Board shall have the right to appear
6 in the proceeding before the Court of Appeals.

7 “(2) During the 5-year period beginning on the effec-
8 tive date of the Whistleblower Protection Enhancement
9 Act of 2009, this paragraph shall apply to any review ob-
10 tained by the Director of the Office of Personnel Manage-
11 ment that raises no challenge to the Board’s disposition
12 of allegations of a prohibited personnel practice described
13 in section 2302(b) other than practices described in sec-
14 tion 2302(b)(8), or 2302(b)(9)(A)(i), (B)(i), (C), or (D).
15 The Director of the Office of Personnel Management may
16 obtain review of any final order or decision of the Board
17 by filing, within 60 days after the Board issues notice of
18 the final order or decision of the Board, a petition for judi-
19 cial review in the United States Court of Appeals for the
20 Federal Circuit or any court of appeals of competent juris-
21 diction as provided under subsection (b)(2) if the Director
22 determines, in the discretion of the Director, that the
23 Board erred in interpreting a civil service law, rule, or reg-
24 ulation affecting personnel management and that the
25 Board’s decision will have a substantial impact on a civil

1 service law, rule, regulation, or policy directive. If the Di-
2 rector did not intervene in a matter before the Board, the
3 Director may not petition for review of a Board decision
4 under this section unless the Director first petitions the
5 Board for a reconsideration of its decision, and such peti-
6 tion is denied. In addition to the named respondent, the
7 Board and all other parties to the proceedings before the
8 Board shall have the right to appear in the proceeding
9 before the court of appeals.”.

10 **SEC. 109. PROHIBITED PERSONNEL PRACTICES AFFECTING**
11 **THE TRANSPORTATION SECURITY ADMINIS-**
12 **TRATION.**

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

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

17 (2) by inserting after section 2303 the fol-
18 lowing:

19 **“§ 2304. Prohibited personnel practices affecting the**
20 **Transportation Security Administration**

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

1 **SEC. 110. DISCLOSURE OF CENSORSHIP RELATED TO RE-**
2 **SEARCH, ANALYSIS, OR TECHNICAL INFOR-**
3 **MATION.**

4 (a) DEFINITIONS.—In this subsection—

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

7 (2) the term “censorship related to research,
8 analysis, or technical information” means any effort
9 to alter, misrepresent, or suppress research, anal-
10 ysis, or technical information;

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

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

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

19 (b) PROTECTED DISCLOSURE.—

20 (1) IN GENERAL.—Any disclosure of informa-
21 tion by an employee or applicant for employment
22 that the employee or applicant reasonably believes is
23 evidence of censorship related to research, analysis,
24 or technical information shall come within the pro-
25 tections of section 2302(b)(8)(A) of title 5, United
26 States Code, if—

1 (A) the employee or applicant reasonably
2 believes that the censorship related to research,
3 analysis, or technical information is or will
4 cause—

5 (i) any violation of law, rule, or regu-
6 lation; 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 (B) the disclosure and information satisfy
12 the conditions stated in the matter following
13 clause (ii) of section 2302(b)(8)(A) of title 5,
14 United States Code; and

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

18 (i) the conditions under subparagraph
19 (A) of this paragraph are satisfied; and

20 (ii) the disclosure is made to an indi-
21 vidual referred to in the matter preceding
22 clause (i) of section 2302(b)(8)(B) of title
23 5, United States Code, for the receipt of
24 disclosures.

1 (2) APPLICATION.—Subsection (a) shall apply
2 to any disclosure of information by an employee or
3 applicant without restriction to time, place, form,
4 motive, context, forum, or prior disclosure made to
5 any person by an employee or applicant, including a
6 disclosure made in the ordinary course of an employ-
7 ee’s duties.

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

15 **SEC. 111. CLARIFICATION OF WHISTLEBLOWER RIGHTS**
16 **FOR CRITICAL INFRASTRUCTURE INFORMA-**
17 **TION.**

18 Section 214(c) of the Homeland Security Act of 2002
19 (6 U.S.C. 133(c)) is amended by adding at the end the
20 following: “For purposes of this section a permissible use
21 of independently obtained information includes the dislo-
22 sure of such information under section 2302(b)(8) of title
23 5, United States Code.”.

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

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

10 **SEC. 113. SPECIAL COUNSEL AMICUS CURIAE APPEAR-**
11 **ANCE.**

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

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

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

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

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

6 (b) INDIVIDUAL ACTION.—Section 1221(e)(2) of title
7 5, United States Code, is amended by inserting “, after
8 a finding that a protected disclosure was a contributing
9 factor,” after “ordered if”.

10 **SEC. 115. NONDISCLOSURE POLICIES, FORMS, AND AGREE-**
11 **MENTS.**

12 (a) IN GENERAL.—

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

1 threats); the Intelligence Identities Protection Act of
2 1982 (50 U.S.C. 421 et seq.) (governing disclosures
3 that could expose confidential Government agents);
4 and the statutes which protect against disclosure
5 that may compromise the national security, includ-
6 ing sections 641, 793, 794, 798, and 952 of title 18,
7 United States Code, and section 4(b) of the Subver-
8 sive Activities Act of 1950 (50 U.S.C. 783(b)). The
9 definitions, requirements, obligations, rights, sanc-
10 tions, and liabilities created by such Executive order
11 and such statutory provisions are incorporated into
12 this agreement and are controlling.”.

13 (2) ENFORCEABILITY.—Any written nondisclo-
14 sure policy, form, or agreement described under
15 paragraph (1) that does not contain the statement
16 required under paragraph (1) may not be imple-
17 mented or enforced to the extent such policy, form,
18 or agreement is inconsistent with that statement. A
19 nondisclosure policy, form, or agreement that was in
20 effect before the date enactment of this Act, but
21 that does not contain that statement, may be en-
22 forced with regard to a current employee if the agen-
23 cy gives such employee notice of the statement, and
24 may be enforced with regard to a former employee
25 if the agency posts notice of the statement on its

1 web site for 1 year following the date of enactment
2 of this Act.

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

19 **SEC. 116. REPORTING REQUIREMENTS.**

20 (a) GOVERNMENT ACCOUNTABILITY OFFICE.—

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

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

3 (2) CONTENTS.—The report under this para-
4 graph shall include—

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

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

16 (C) an analysis of the outcome of cases de-
17 scribed under clause (i) that were decided by a
18 United States District Court and the impact
19 the process has on the Merit Systems Protec-
20 tion Board and the Federal court system; and

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

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

1 (1) STUDY.—The Council of the Inspectors
2 General on Integrity and Efficiency, including the
3 Inspectors General of the Department of Justice, the
4 Office of the Director of National Intelligence, and
5 the Office of Personnel Management, shall conduct
6 a study of security clearance revocations of Federal
7 employees at a select sample of executive branch
8 agencies and the appeals process in place at those
9 agencies and at the Intelligence Community Whistle-
10 blower Protection Board. The study shall consist of
11 an examination of the number of security clearances
12 revoked, the process employed by each agency in re-
13 voking a clearance, the pay and employment status
14 of agency employees during the revocation process,
15 how often such revocations result in termination of
16 employment or reassignment, how often such revoca-
17 tions are based on an improper disclosure of infor-
18 mation, how often security clearances are reinstated
19 following an appeal, how often security clearances
20 remain revoked following a finding of retaliation for
21 making a disclosure, and such other factors the In-
22 spectors General determines appropriate.

23 (2) REPORT.—Not later than 18 months after
24 the date of enactment of this Act, the Inspectors
25 General shall submit to the Committee on Homeland

1 Security and Governmental Affairs of the Senate
2 and the Committee on Oversight and Government
3 Reform of the House of Representatives a report on
4 the results of the study required under this para-
5 graph.

6 (c) MERIT SYSTEMS PROTECTION BOARD.—

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

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

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

21 (2) FIRST REPORT.—The first report described
22 under paragraph (1) submitted after the date of en-
23 actment of this Act shall include an addendum re-
24 quired under that subparagraph that covers the pe-

1 riod beginning on January 1, 2009 through the end
2 of the fiscal year 2009.

3 **SEC. 117. ALTERNATIVE REVIEW.**

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

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

11 “(A) the prohibited personnel practice is alleged
12 to have been committed;

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

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

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

23 “(B) Upon initiation of any action under subpara-
24 graph (A), the Board shall stay any other claims of such
25 employee, former employee, or applicant pending before

1 the Board at that time which arise out of the same set
2 of operative facts. Such claims shall be stayed pending
3 completion of the action filed under subparagraph (A) be-
4 fore the appropriate United States district court and any
5 associated appellate review.

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

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

9 “(i) seeks corrective action from the Merit
10 Systems Protection Board under section
11 1221(a) based on an alleged prohibited per-
12 sonnel practice described in section 2302(b)(8)
13 for which the associated personnel action is an
14 action covered under section 7512; or

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

22 “(B) no final order or decision is issued by the
23 Board within 270 days after the date on which a re-
24 quest for that corrective action or appeal has been
25 duly submitted; 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 “(4)(A) This paragraph applies in any case that—

6 “(i) an employee, former employee, or applicant
7 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 for which the associated personnel action is an
13 action covered under section 7512; or

14 “(II) files an appeal under section
15 7701(a)(1) alleging as an affirmative defense
16 the commission of a prohibited personnel prac-
17 tice described in section 2302(b)(8) or (9)
18 (A)(i), (B)(i), (C), or (D) for which the associ-
19 ated personnel action is an action covered under
20 section 7512;

21 “(ii)(I) within 30 days after the date on which
22 the request for corrective action or appeal was duly
23 submitted, such employee, former employee, or appli-
24 cant for employment files a motion requesting a cer-
25 tification consistent with clause (iii) to the Board,

1 any administrative law judge appointed by the
2 Board under section 3105 of this title and assigned
3 to the case, or any employee of the Board designated
4 by the Board and assigned to the case; and

5 “(II) such employee has not previously filed a
6 motion under subclause (I) related to that request
7 for correction action; and

8 “(iii) within 90 days of the submission of a mo-
9 tion under clause (ii) and, in any event, not later
10 than 15 days before issuing a decision on the merits
11 of a request for corrective action the Board, the
12 Board, any administrative law judge appointed by
13 the Board under section 3105 of this title and as-
14 signed to the case, or any employee of the Board
15 designated by the Board and assigned to the case
16 certifies that—

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

21 “(II) the case—

22 “(aa) consists of multiple claims;

23 “(bb) requires complex or extensive
24 discovery;

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

6 “(dd) involves a novel question of law;
7 or

8 “(III) under standards applicable to the
9 review of motions to dismiss under rule
10 12(b)(6) of the Federal Rules of Civil Proce-
11 dure, including rule 12(d), the request for cor-
12 rective action (including any allegations made
13 with the motion under clause (ii)) would not be
14 subject to dismissal.

15 “(B) Any decision of the Board, any administrative
16 law judge appointed by the Board under section 3105 of
17 this title and assigned to the case, or any employee of the
18 Board designated by the Board and assigned to the case
19 to grant or deny a certification under this paragraph shall
20 be reviewed only on appeal of a final order or decision
21 of the Board under section 7703, if—

22 “(i) the reviewing court determines that the de-
23 cision by the Board on the merits of the alleged pro-
24 hibited personnel described in section 2302(b)(8) or

1 (9) (A)(i), (B)(i), (C), or (D) failed to meet the
2 standards of section 7703(e); and

3 “(ii) the decision to deny the certification shall
4 be overturned by the reviewing court if such decision
5 is found to be arbitrary, capricious, or an abuse of
6 discretion; and

7 “(iii) shall not be considered evidence of any de-
8 termination by the Board, any administrative law
9 judge appointed by the Board under section 3105 of
10 this title, or any employee of the Board designated
11 by the Board on the merits of the underlying allega-
12 tions during the course of any action at law or eq-
13 uity for de novo review in the appropriate United
14 States district court in accordance with this sub-
15 section.

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

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

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

21 “(C) 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—

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 section (e)(2), may
9 not order relief if the agency demonstrates by
10 a preponderance of the evidence that the agency
11 would have taken the same personnel action in
12 the absence of such disclosure; and

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

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

20 “(7) This subsection applies with respect to any ap-
21 peal, petition, or other request for corrective action duly
22 submitted to the Board, whether under section
23 1214(b)(2), the preceding provisions of this section, sec-
24 tion 7513(d), section 7701, or any otherwise applicable
25 provisions of law, rule, or regulation.”.

1 (b) SUNSET.—

2 (1) IN GENERAL.—Except as provided under
3 paragraph (2), the amendments made by this section
4 shall cease to have effect 5 years after the effective
5 date of this Act.

6 (2) PENDING CLAIMS.—The amendments made
7 by this section shall continue to apply with respect
8 to any claim pending before the Board on the last
9 day of the 5-year period described under paragraph
10 (1).

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

12 **JUDGMENT.**

13 (a) IN GENERAL.—Section 1204(b) of title 5, United
14 States Code, is amended—

15 (1) by redesignating paragraph (3) as para-
16 graph (4);

17 (2) by inserting after paragraph (2) the fol-
18 lowing:

19 “(3) With respect to a request for corrective ac-
20 tion based on an alleged prohibited personnel prac-
21 tice described in section 2302(b)(8) or (9)(A)(i),
22 (B)(i), (C), or (D) for which the associated per-
23 sonnel action is an action covered under section
24 7512, the Board, any administrative law judge ap-
25 pointed by the Board under section 3105 of this

1 title, or any employee of the Board designated by
2 the Board may, with respect to any party, grant a
3 motion for summary judgment when the Board or
4 the administrative law judge determines that there is
5 no genuine issue as to any material fact and that
6 the moving party is entitled to a judgment as a mat-
7 ter of law.”.

8 (b) SUNSET.—

9 (1) IN GENERAL.—Except as provided under
10 paragraph (2), the amendments made by this section
11 shall cease to have effect 5 years after the effective
12 date of this Act.

13 (2) PENDING CLAIMS.—The amendments made
14 by this section shall continue to apply with respect
15 to any claim pending before the Board on the last
16 day of the 5-year period described under paragraph
17 (1).

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

19 (a) PROHIBITED PERSONNEL PRACTICES.—Section
20 2302(b)(8) of title 5, United States Code, is amended—

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

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

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

1 “(C) any communication that complies
2 with subsection (a)(1), (d), or (i) of section 8H
3 of the Inspector General Act of 1978 (5 U.S.C.
4 App);”.

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

8 (1) in subsection (a)(1), by adding at the end
9 the following:

10 “(D) An employee of any agency, as that
11 term is defined under section 2302(a)(2)(C) of
12 title 5, United States Code, who intends to re-
13 port to Congress a complaint or information
14 with respect to an urgent concern may report
15 the complaint or information to the Inspector
16 General, or designee, of the agency of which
17 that employee is employed;” and

18 (2) in subsection (h), by striking paragraph (2),
19 and inserting the following:

20 “(2) The term ‘intelligence committees’ means
21 the Permanent Select Committee on Intelligence of
22 the House of Representatives and the Select Com-
23 mittee on Intelligence of the Senate, except that with
24 respect to disclosures made by employees described
25 in subsection (a)(1)(D), the term ‘intelligence com-

1 mittees’ means the committees of appropriate juris-
2 diction.”.

3 **SEC. 120. WHISTLEBLOWER PROTECTION OMBUDSMAN.**

4 (a) IN GENERAL.—Section 3(d) of the Inspector Gen-
5 eral Act of 1978 (5 U.S.C. App.) is amended—

6 (1) in paragraph (1), by striking “and” after
7 the semicolon;

8 (2) in paragraph (2), by striking the period and
9 inserting “; and”; and

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

11 “(3) designate a Whistleblower Protection Om-
12 budsman who shall advocate for the interests of
13 agency employees or applicants who make protected
14 disclosures of information, educate agency personnel
15 about prohibitions on retaliation for protected disclo-
16 sures, and advise agency employees, applicants, or
17 former employees who have made or are contem-
18 plating making a protected disclosure.”.

19 (b) CENTRAL INTELLIGENCE AGENCY.—Section
20 17(e) of the Central Intelligence Agency Act of 1949 (50
21 U.S.C. 430q(e)) is amended by adding at the end the fol-
22 lowing:

23 “(9) The Inspector General shall designate a Whistle-
24 blower Protection Ombudsman who shall advocate for the
25 interests of agency employees or applicants who make pro-

1 tected disclosures of information, educate agency per-
2 sonnel about prohibitions on retaliation for protected dis-
3 closures, and advise agency employees, applicants, or
4 former employees who have made or are contemplating
5 making a protected disclosure.”.

6 (c) APPLICATION TO INTELLIGENCE COMMUNITY.—
7 Notwithstanding section 8K of the Inspector General Act
8 of 1978 (5 U.S.C. App.) or any other provision of law,
9 the amendment made by subsection (a) shall apply to each
10 Office of Inspector General of an element of the intel-
11 ligence community (as defined in section 3(4) of the Na-
12 tional Security Act of 1947 (50 U.S.C. 401a(4))).

13 **TITLE II—INTELLIGENCE COM-**
14 **MUNITY WHISTLEBLOWER**
15 **PROTECTIONS**

16 **SEC. 201. PROTECTION OF INTELLIGENCE COMMUNITY**
17 **WHISTLEBLOWERS.**

18 (a) IN GENERAL.—Title I of the National Security
19 Act of 1947 (50 U.S.C. 402 et seq.) is amended by adding
20 at the end the following:

21 **“SEC. 120. INTELLIGENCE COMMUNITY WHISTLEBLOWER**
22 **PROTECTION BOARD.**

23 “(a) ESTABLISHMENT.—There is established within
24 the Office of the Director of National Intelligence the In-

1 telligence Community Whistleblower Protection Board (in
2 this section referred to as the ‘Board’) .

3 “(b) MEMBERSHIP.—(1) The Board shall consist
4 of—

5 “(A) a Chairperson who shall be appointed by
6 the President, by and with the advice and consent
7 of the Senate (in this section referred to as the
8 ‘Chairperson’);

9 “(B) 2 members who shall be designated by the
10 President—

11 “(i) from individuals serving as an inspec-
12 tors general of any agency or department of the
13 United States who have been appointed by the
14 President, by and with the advice and consent
15 of the Senate; and

16 “(ii) after consultation with members of
17 the Council of Inspectors General on Integrity
18 and Efficiency; and

19 “(C) 2 members who shall be appointed by the
20 President, by and with the advice and consent of the
21 Senate, after consultation with the Attorney Gen-
22 eral, the Director of National Intelligence, and the
23 Secretary of Defense.

24 “(D)(i) A member of the Board who serves as
25 the inspector general of an agency or department

1 shall recuse themselves from any matter brought to
2 the Board by a former employee, employee, or appli-
3 cant of the agency or department for which that
4 member serves as inspector general.

5 “(2) The President shall designate 2 alternate mem-
6 bers of the Board from individuals serving as an inspector
7 general of an agency or department of the United States.
8 If a member of the Board recuses themselves from a mat-
9 ter pending before the Board, an alternate shall serve in
10 place of that member for that matter.

11 “(3) The members of the Board shall be individuals
12 of sound and independent judgment who shall collectively
13 possess substantial experience in national security and
14 personnel matters.

15 “(4)(A) The annual rate of basic pay for the Chair-
16 person shall be the rate payable for level III of the Execu-
17 tive Schedule under section 5314 of title 5, United States
18 Code, plus 3 percent.

19 “(B) The members appointed under paragraph
20 (1)(C) shall—

21 “(i) perform their duties for a period not
22 to exceed 130 days during any period of 365
23 consecutive days; and

24 “(ii) shall be compensated at the rate of
25 pay for the Chairperson specified in paragraph

1 (A) on a pro rata basis for the time spent on
2 Board activities.

3 “(C)(i) The members of the Board shall serve
4 4-year terms at the pleasure of the President, except
5 that of the members first appointed or designated—

6 “(I) the Chairperson shall have a term of
7 6 years;

8 “(II) 2 members shall have a term of 5
9 years; and

10 “(III) 2 members shall have a term of 4
11 years.

12 “(ii) A member designated under paragraph
13 (1)(B) shall be ineligible to serve on the Board if
14 that member ceases to serve as an inspector general
15 for an agency or department of the United States.

16 “(iii) A member of the Board may serve on the
17 Board after the expiration of the term of that mem-
18 ber until a successor for that member has taken of-
19 fice as a member of the Board.

20 “(iv) An individual appointed to fill a vacancy
21 occurring, other than by the expiration of a term of
22 office, shall be appointed only for the unexpired term
23 of the member that individual succeeds.

24 “(5) Three members shall constitute a quorum of the
25 Board.

1 “(c) RESOURCES AND AUTHORITY.—(1) The Office
2 of the Director of National Intelligence shall provide the
3 Board with appropriate and adequate office space, to-
4 gether with such equipment, office supplies, and commu-
5 nications facilities and services as may be necessary for
6 the operation of the Board, and shall provide necessary
7 maintenance services for the Board and the equipment
8 and facilities located therein.

9 “(2)(A) For each fiscal year, the Chairperson shall
10 transmit a budget estimate and request to the Director
11 of National Intelligence. The budget request shall specify
12 the aggregate amount of funds requested for such fiscal
13 year for the operations of the Board.

14 “(B) In transmitting a proposed budget to the Presi-
15 dent for approval, the Director of National Intelligence
16 shall include—

17 “(i) the amount requested by the Chairperson;
18 and

19 “(ii) any comments of the Chairperson with re-
20 spect to the amount requested.

21 “(3) Subject to the applicable law and policies of the
22 Director of National Intelligence, the Chairperson, for the
23 purposes of enabling the Board to fulfill its statutorily as-
24 signed functions, is authorized to select, appoint, and em-
25 ploy such officers and employees as may be necessary for

1 carrying out the functions, powers, and duties of the Of-
2 fice.

3 “(4) In consultation with the Attorney General, the
4 Director of National Intelligence, and the Secretary of De-
5 fense, the Board may promulgate rules, regulations, and
6 guidance and issue orders to fulfill its functions. The Di-
7 rector of National Intelligence, Secretary of Defense, and
8 Attorney General shall jointly approve any rules, regula-
9 tions, or guidance issued under section 121(c)(B).

10 “(5) The number of individuals employed by or on
11 detail to the Board shall not be counted against any limi-
12 tation on the number of personnel, positions, or full-time
13 equivalents in the Office of the Director of National Intel-
14 ligence.

15 **“SEC. 121. INTELLIGENCE COMMUNITY WHISTLEBLOWER**
16 **PROTECTIONS.**

17 “(a) DEFINITIONS.—In this section:

18 “(1) The term ‘agency’ means an Executive de-
19 partment or independent establishment, as defined
20 under sections 101 and 104 of title 5, United States
21 Code, that contains an intelligence community ele-
22 ment.

23 “(2) The term ‘intelligence community element’
24 means—

1 “(A) the Federal Bureau of Investigation,
2 the Central Intelligence Agency, the Defense In-
3 telligence Agency, the National Geospatial-In-
4 telligence Agency, the National Security Agen-
5 cy, the Office of the Director of National Intel-
6 ligence; and the National Reconnaissance Of-
7 fice; and

8 “(B) as determined by the President, any
9 executive agency or unit thereof the principal
10 function of which is the conduct of foreign in-
11 telligence or counterintelligence activities, if the
12 determination (as that determination relates to
13 a personnel action) is made before that per-
14 sonnel action.

15 “(3) The term ‘personnel action’—

16 “(A) means any action taken against an
17 employee of an intelligence community element
18 that would be considered a personnel action, as
19 defined in section 2302(a)(2)(A) of title 5,
20 United States Code, if taken against an em-
21 ployee subject to such section 2302; and

22 “(B) shall not include the denial, suspen-
23 sion, or revocation of a security clearance or de-
24 nying access to classified or sensitive informa-

1 tion or a suspension with pay pending an inves-
2 tigation.

3 “(4) The term ‘prohibited personnel action
4 ’means any action prohibited by subsection (b) of
5 this section.

6 “(b) PROHIBITED PERSONNEL ACTIONS.—(1) No
7 person who has authority to take, direct others to take,
8 recommend, or approve any personnel action, shall, with
9 respect to such authority—

10 “(A) take or fail to take, or threaten to take or
11 fail to take, a personnel action with respect to any
12 intelligence community element employee or appli-
13 cant for employment because of—

14 “(i) any disclosure of information to an of-
15 ficial of an agency by an employee or applicant
16 which the employee or applicant reasonably be-
17 lieves evidences—

18 “(I) a violation of any law, rule, or
19 regulation; 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 if such disclosure is not specifically prohibited
25 by law and if such information is not specifi-

1 cally required by Executive order to be kept se-
2 cret in the interest of national defense or the
3 conduct of foreign affairs;

4 “(ii) any disclosure to the inspector general
5 of an agency or another employee designated by
6 the head of the agency to receive such dislo-
7 cures, of information which the employee or ap-
8 plicant reasonably believes evidences—

9 “(I) a violation of any law, rule, or
10 regulation; or

11 “(II) gross mismanagement, a gross
12 waste of funds, an abuse of authority, or
13 a substantial and specific danger to public
14 health or safety; or

15 “(iii) any communication that complies
16 with subsection (a)(1), (d), or (i) of section 8H
17 of the Inspector General Act of 1978 (5 U.S.C.
18 App.) or that complies with subparagraphs (A),
19 (D), or (H) of section 17(d)(5) of the Central
20 Intelligence Agency Act of 1949 (50 U.S.C.
21 403q); or

22 “(B) take or fail to take, or threaten to take or
23 fail to take, any personnel action against any intel-
24 ligence community element employee or applicant for
25 employment because of—

1 “(i) the exercise of any appeal, complaint,
2 or grievance right granted by subsection (c);

3 “(ii) testifying for or otherwise lawfully as-
4 sisting any individual in the exercise of any
5 right referred to in clause (i); or

6 “(iii) cooperating with or disclosing infor-
7 mation to the inspector general of an agency in
8 connection with an audit, inspection, or inves-
9 tigation conducted by the inspector general, in
10 accordance with applicable provisions of law,

11 if the actions described under clauses (i), (ii), and
12 (iii) do not result in the employee or applicant un-
13 lawfully disclosing information specifically required
14 by Executive order to be kept secret in the interest
15 of national defense or the conduct of foreign affairs
16 or any other information the disclosure of which is
17 specifically prohibited by law.

18 “(2) A disclosure shall not be excluded from para-
19 graph (1) because—

20 “(A) the disclosure was made during the nor-
21 mal course of the duties of the employee;

22 “(B) the disclosure was made to a person, in-
23 cluding a supervisor, who participated in an activity
24 that the employee or applicant reasonably believed to
25 be covered by paragraph (1)(A)(ii);

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

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

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

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

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

11 “(3) Nothing in this subsection shall be construed to
12 authorize the withholding of information from the Con-
13 gress or the taking of any personnel action against an em-
14 ployee who discloses information to the Congress.

15 “(c) REMEDIAL PROCEDURE.—(1)(A) An employee,
16 applicant, or former employee of an intelligence commu-
17 nity element who believes that such employee, applicant
18 or former employee has been subjected to a prohibited per-
19 sonnel action may petition for an appeal of the personnel
20 action to the agency head or the designee of the agency
21 head within 60 days after discovery of the alleged adverse
22 personnel action.

23 “(B) The appeal shall be conducted within the agency
24 according to rules of procedure issued by the Intelligence
25 Community Whistleblower Protection Board under section

1 120(c)(4). Those rules shall be based on those pertaining
2 to prohibited personnel actions defined under section
3 2302(b)(8) of title 5, United States Code, and provide—

4 “(i) for an independent and impartial fact-find-
5 er;

6 “(ii) for notice and the opportunity to be heard,
7 including the opportunity to present relevant evi-
8 dence, including witness testimony;

9 “(iii) that the employee, applicant, or former
10 employee may be represented by counsel;

11 “(iv) that the employee, applicant, or former
12 employee has a right to a decision based on the
13 record developed during the appeal;

14 “(v) that, unless agreed to by the employee and
15 the agency concerned, not more than 180 days shall
16 pass from the filing of the appeal to the report of
17 the impartial fact finder to the agency head or the
18 designee of the agency head;

19 “(vi) for the use of information specifically re-
20 quired by Executive order to be kept secret in the
21 interest of national defense or the conduct of foreign
22 affairs in a manner consistent with the interests of
23 national security, including ex parte submissions
24 where the agency determines that the interests of
25 national security so warrant; and

1 “(vii) that the employee, applicant, or former
2 employee shall have no right to compel the produc-
3 tion of information specifically required by Executive
4 order to be kept secret in the interest of national de-
5 fense or the conduct of foreign affairs, except evi-
6 dence necessary to establish that the employee made
7 the disclosure or communication such employee al-
8 leges was protected by subsection (b)(1)(A) through
9 (C).

10 “(C) If the Board certifies that agency procedures in
11 effect on the date of enactment of this section, including
12 procedures promulgated under section 2303 of title 5,
13 United States Code, adequately provide guaranties in re-
14 quired under subparagraph (B)(i) through (vi), the appeal
15 may be conducted according to those procedures.

16 “(2) On the basis of the record developed during the
17 appeal, the impartial factfinder shall prepare a report to
18 the agency head or the designee of the agency head setting
19 forth findings, conclusions, and, if applicable, rec-
20 ommended corrective action. After reviewing the record
21 and the impartial factfinder’s report, the agency head or
22 the designee of the agency head shall determine whether
23 the employee, former employee, or applicant has been sub-
24 jected to a prohibited personnel action, and shall either
25 issue an order denying relief or shall implement corrective

1 action to return the employee, former employee, or appli-
2 cant, as nearly as practicable and reasonable, to the posi-
3 tion such employee, former employee, or applicant would
4 have held had the prohibited personnel action not oc-
5 curred. Such corrective action shall include reasonable at-
6 torney's fees and any other reasonable costs incurred, and
7 may include back pay and related benefits, travel ex-
8 penses, and compensatory damages not to exceed
9 \$300,000. Unless the employee, former employee, or appli-
10 cant consents, no more than 60 days shall pass from the
11 submission of the report by the impartial factfinder to the
12 agency head and the final decision by the agency head or
13 the designee of the agency head.

14 “(3) In determining whether the employee, former
15 employee, or applicant has been subjected to a prohibited
16 personnel action, the agency head or the designee of the
17 agency head shall find that a prohibited personnel action
18 occurred if a disclosure described in subsection (b) was
19 a contributing factor in the personnel action which was
20 taken against the individual, unless the agency dem-
21 onstrates by clear and convincing evidence that it would
22 have taken the same personnel action in the absence of
23 such disclosure.

24 “(4)(A) Any employee, former employee, or applicant
25 adversely affected or aggrieved by a final order or decision

1 of the agency head or the designee of the agency head
2 under paragraph (1) may appeal that decision to the Intel-
3 ligence Community Whistleblower Protection Board within
4 60 days after the issuance of such order. Such appeal shall
5 be conducted under rules of procedure issued by the Board
6 under section 120(c)(4).

7 “(B) The Board’s review shall be on the agency
8 record. The Board may not hear witnesses or admit addi-
9 tional evidence. Any portions of the record that were sub-
10 mitted ex parte during the agency proceedings shall not
11 be disclosed to the employee, former employee, or appli-
12 cant during proceedings before the Board.

13 “(C) If the Board concludes that further fact-finding
14 is necessary or finds that the agency improperly denied
15 the employee, former employee, or applicant the oppor-
16 tunity to present evidence that, if admitted, would have
17 a substantial likelihood of altering the outcome, the Board
18 shall—

19 “(i) remand the matter to the agency from
20 which it originated for additional proceedings in ac-
21 cordance with the rules of procedure issued by the
22 Board; or

23 “(ii) refer the matter to another agency for ad-
24 ditional proceedings in accordance with the rules of
25 procedure issued by the Board.

1 “(D) The Board shall make a de novo determination,
2 based on the entire record, of whether the employee,
3 former employee, or applicant suffered a prohibited per-
4 sonnel action. In considering the record, the Board may
5 weigh the evidence, judge the credibility of witnesses, and
6 determine controverted questions of fact; in doing so, the
7 Board may consider the prior fact-finder’s opportunity to
8 see and hear the witnesses.

9 “(E) On the basis of the agency record, the Board
10 shall determine whether the employee, former employee,
11 or applicant has been subjected to a prohibited personnel
12 action, and shall either issue an order denying relief or
13 shall order the agency head to take specific corrective ac-
14 tion to return the employee, former employee, or appli-
15 cant, as nearly as practicable and reasonable, to the posi-
16 tion such employee, former employee, or applicant would
17 have held had the prohibited personnel action not oc-
18 curred. Such corrective action shall include reasonable at-
19 torney’s fees and any other reasonable costs incurred, and
20 may include back pay and related benefits, travel ex-
21 penses, and compensatory damages not to exceed
22 \$300,000. The Board may recommend, but may not order,
23 reinstatement or hiring of a former employee or applicant.
24 The agency head shall take the actions so ordered, unless
25 the President determines that doing so would endanger

1 national security. Unless the employee, former employee,
2 or applicant consents, no more than 180 days shall pass
3 from the filing of the appeal with the Board to the final
4 decision by the Board. Any period of time during which
5 the Board lacks a sufficient number of members to under-
6 take a review shall be excluded from the 180-day period.

7 “(F) In determining whether the employee, former
8 employee, or applicant has been subjected to a prohibited
9 personnel action, the agency head or the designee of the
10 agency head shall find that a prohibited personnel action
11 occurred if a disclosure described in subsection (b) of this
12 section was a contributing factor in the personnel action
13 which was taken against the individual, unless the agency
14 demonstrates by clear and convincing evidence that it
15 would have taken the same personnel action in the absence
16 of such disclosure.

17 “(5)(A)(i) During the 5-year period beginning on the
18 effective date of the Whistleblower Protection Enhance-
19 ment Act of 2009, an employee, former employee, appli-
20 cant, or an agency may file a petition to review a final
21 order of the Board in the United States Court of Appeals
22 for the Federal Circuit or the United States court of ap-
23 peals for a circuit in which the reprisal is alleged in the
24 order to have occurred. Notwithstanding any other provi-
25 sion of law, any petition for review shall be filed within

1 60 days after the date of issuance of the final order of
2 the Board.

3 “(ii) After the 5-year period described under clause
4 (i), a petition to review a final order described under that
5 clause shall be filed in the United States Court of Appeals
6 for the Federal Circuit.

7 “(B) The court of appeals shall review the record and
8 hold unlawful and set aside any agency action, findings,
9 or conclusions found to be—

10 “(i) arbitrary, capricious, an abuse of discre-
11 tion, or otherwise not in accordance with law;

12 “(ii) obtained without procedures required by
13 law, rule, or regulation having been followed; or

14 “(iii) unsupported by substantial evidence.

15 “(C) Any portions of the record that were submitted
16 ex parte during the agency proceedings shall not be dis-
17 closed to the employee, former employee, or applicant dur-
18 ing proceedings conducted under this paragraph.

19 “(D) At the time the Board issues an order, the
20 Chairperson shall notify the chairpersons and ranking
21 members of—

22 “(i) the Committee on Homeland Security and
23 Government Affairs of the Senate;

24 “(ii) the Select Committee on Intelligence of the
25 Senate;

1 “(iii) the Committee on Oversight and Govern-
2 ment Reform of the House of Representatives; and

3 “(iv) the Permanent Select Committee on Intel-
4 ligence of the House of Representatives.

5 “(d) Except as expressly provided in this section,
6 there shall be no judicial review of agency actions under
7 this section.

8 “(e) This section shall not apply to terminations exe-
9 cuted under—

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

12 “(2) the authority of the Director of National
13 Intelligence under section 102A(m) of this Act, if—

14 “(A) the Director personally summarily
15 terminates the individual; and

16 “(B) the Director—

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

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

1 “(iii) notifies the congressional over-
2 sight committees of such termination with-
3 in 5 days after the termination;

4 “(3) the authority of the Director of the Cen-
5 tral Intelligence Agency under section 104A(e) of
6 this Act, if—

7 “(A) the Director personally summarily
8 terminates the individual; and

9 “(B) the Director—

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

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

18 “(iii) notifies the congressional over-
19 sight committees of such termination with-
20 in 5 days after the termination; or

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

23 “(A) the agency head personally summarily
24 terminates the individual; and

25 “(B) the agency head—

1 “(i) determines the termination to be
2 in the interest of the United States,

3 “(ii) determines that the procedures
4 prescribed in other provisions of law that
5 authorize the termination of the employ-
6 ment of such employee cannot be invoked
7 in a manner consistent with the national
8 security; and

9 “(iii) notifies the congressional over-
10 sight committees of such termination with-
11 in 5 days after the termination.

12 “(f) If an employee, former employee, or applicant
13 seeks to challenge both a prohibited personnel action
14 under this section and an adverse security clearance or
15 access determination under section 3001(j) of the Intel-
16 ligence Reform and Terrorism Prevention Act of 2004 (50
17 U.S.C. 435b(j)), the employee shall bring both claims
18 under the procedure set forth in 3001(j) of that Act for
19 challenging an adverse security clearance or access deter-
20 mination. If the Board awards compensatory damages for
21 such claim or claims, the total amount of compensatory
22 damages ordered shall not exceed \$300,000.”.

23 (b) REPEAL OF SECTION 2303.—

24 (1) IN GENERAL.—Title 5, United States Code
25 is amended—

1 (A) by striking section 2303; and

2 (B) by striking the item relating to section
3 2303 in the table of sections for chapter 23 of
4 that title.

5 (2) EFFECTIVE DATE.—This paragraph shall
6 take effect on the date on which rules are issued as
7 required under section 121(c)(1)(B) of the National
8 Security Act of 1947 (as added by this Act).

9 (c) TECHNICAL AND CONFORMING AMENDMENT.—
10 The table of contents for the National Security Act of
11 1947 (50 U.S.C. 401 note) is amended by inserting after
12 the item relating to section 119B the following:

“Sec. 120. Intelligence Community Whistleblower Protection Board.
“Sec. 121. Intelligence community whistleblower protections.”.

13 **SEC. 202. REVIEW OF SECURITY CLEARANCE OR ACCESS**
14 **DETERMINATIONS.**

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

18 (1) in the matter preceding paragraph (1), by
19 striking “Not” and inserting “Except as otherwise
20 provided, not”;

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

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

1 (4) by inserting after paragraph (6) the fol-
2 lowing:

3 “(7) not later than 30 days after the date of
4 enactment of the Whistleblower Protection Enhance-
5 ment Act of 2009—

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

13 “(B) developing and implementing uniform
14 and consistent policies and procedures to ensure
15 proper protections during the process for deny-
16 ing, suspending, or revoking a security clear-
17 ance or access to classified information, includ-
18 ing the provision of a right to appeal such a de-
19 nial, suspension, or revocation, except that
20 there shall be no appeal of an agency’s suspen-
21 sion of a security clearance or access determina-
22 tion for purposes of conducting an investiga-
23 tion, if that suspension lasts no longer than 1
24 year, including such policies and procedures for
25 appeals based on those pertaining to prohibited

1 personnel actions defined under section
2 2302(b)(8) of title 5, United States Code, and
3 that provide—

4 “(i) for an independent and impartial
5 fact-finder;

6 “(ii) for notice and the opportunity to
7 be heard, including the opportunity to
8 present relevant evidence, including witness
9 testimony;

10 “(iii) that the employee, applicant, or
11 former employee may be represented by
12 counsel;

13 “(iv) that the employee, applicant, or
14 former employee has a right to a decision
15 based on the record developed during the
16 appeal;

17 “(v) that, unless agreed to by the em-
18 ployee and the agency concerned, no more
19 than 180 days shall pass from the filing of
20 the appeal to the report of the impartial
21 fact finder to the agency head or the des-
22 ignee of the agency head;

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

1 fense or the conduct of foreign affairs in a
2 manner consistent with the interests of na-
3 tional security, including ex parte submis-
4 sions if the agency determines that the in-
5 terests of national security so warrant; and
6 “(vii) that the employee, applicant, or
7 former employee shall have no right to
8 compel the production of information spe-
9 cifically required by Executive order to be
10 kept secret in the interest of national de-
11 fense or the conduct of foreign affairs, ex-
12 cept evidence necessary to establish that
13 the employee made the disclosure or com-
14 munication such employee alleges was pro-
15 tected by subparagraphs (A), (B), and (C)
16 of subsection (j)(1).”.

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

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

24 “(1) IN GENERAL.—Agency personnel with au-
25 thority over personnel security clearance or access

1 determinations shall not take or fail to take, or
2 threaten to take or fail to take, any action with re-
3 spect to any employee or applicant's security clear-
4 ance or access determination because of—

5 “(A) any disclosure of information to an
6 official of an Executive agency by an employee
7 or applicant which the employee or applicant
8 reasonably believes evidences—

9 “(i) a violation of any law, rule, or
10 regulation; or

11 “(ii) gross mismanagement, a gross
12 waste of funds, an abuse of authority, or
13 a substantial and specific danger to public
14 health or safety,

15 if such disclosure is not specifically prohibited
16 by law and if such disclosure does not reveal in-
17 formation specifically authorized under criteria
18 established by statute, Executive Order, Presi-
19 dential directive, or Presidential memorandum
20 to be kept secret in the interest of national de-
21 fense or the conduct of foreign affairs;

22 “(B) any disclosure to the Inspector Gen-
23 eral of an agency or another employee des-
24 ignated by the head of the agency to receive
25 such disclosures, of information which the em-

1 ployee or applicant reasonably believes evi-
2 dences—

3 “(i) a violation of any law, rule, or
4 regulation; or

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

9 “(C) any communication that complies
10 with subsection (a)(1) or (d) of section 8H of
11 the Inspector General Act of 1978 (5 U.S.C.
12 App.) or that complies with subsection
13 (d)(5)(A) or (D) of section 17 of the Central
14 Intelligence Agency Act of 1949 (50 U.S.C.
15 403q);

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

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

22 “(F) cooperating with or disclosing infor-
23 mation to the inspector general of an agency, in
24 accordance with applicable provisions of law in

1 connection with an audit, inspection, or inves-
2 tigation conducted by the inspector general,
3 if the actions described under subparagraphs (D)
4 through (F) do not result in the employee or appli-
5 cant unlawfully disclosing information specifically
6 authorized under criteria established by Executive
7 Order, statute, Presidential Directive, or Presi-
8 dential memorandum to be kept secret in the inter-
9 est of national defense or the conduct of foreign af-
10 fairs.

11 Nothing in this paragraph shall be construed to au-
12 thorize the withholding of information from the Con-
13 gress or the taking of any personnel action against
14 an employee who discloses information to the Con-
15 gress.

16 “(2) DISCLOSURES.—A disclosure shall not be
17 excluded from paragraph (1) because—

18 “(A) the disclosure was made during the
19 normal course of the duties of the employee;

20 “(B) the disclosure was made to a person,
21 including a supervisor, who participated in an
22 activity that the employee or applicant reason-
23 ably believed to be covered by paragraph
24 (1)(A)(ii);

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

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

5 “(E) the disclosure was not made in writ-
6 ing;

7 “(F) the disclosure was made while the
8 employee was off duty; or

9 “(G) of the amount of time which has
10 passed since the occurrence of the events de-
11 scribed in the disclosure.

12 “(3) AGENCY ADJUDICATION.—

13 “(A) APPEAL.—An employee, former em-
14 ployee, or applicant for employment who be-
15 lieves that he or she has been subjected to a re-
16 prisal prohibited by paragraph (1) of this sub-
17 section may, within 60 days after the issuance
18 of notice of such decision, appeal that decision
19 within the agency of that employee, former em-
20 ployee, or applicant through proceedings au-
21 thorized by paragraph (8) of subsection (b), ex-
22 cept that there shall be no appeal of an agen-
23 cy’s suspension of a security clearance or access
24 determination for purposes of conducting an in-

1 vestigation, if that suspension lasts no longer
2 than 1 year.

3 “(B) CORRECTIVE ACTION.—If, in the
4 course of proceedings authorized under sub-
5 paragraph (A), it is determined that the ad-
6 verse security clearance or access determination
7 violated paragraph (1) of this subsection, the
8 agency shall take specific corrective action to
9 return the employee, former employee, or appli-
10 cant, as nearly as practicable and reasonable, to
11 the position such employee, former employee, or
12 applicant would have held had the violation not
13 occurred. Such corrective action shall include
14 reasonable attorney’s fees and any other rea-
15 sonable costs incurred, and may include back
16 pay and related benefits, travel expenses, and
17 compensatory damages not to exceed \$300,000.

18 “(C) CONTRIBUTING FACTOR.—In deter-
19 mining whether the adverse security clearance
20 or access determination violated paragraph (1)
21 of this subsection, the agency shall find that
22 paragraph (1) of this subsection was violated if
23 a disclosure described in paragraph (1) was a
24 contributing factor in the adverse security clear-
25 ance or access determination taken against the

1 individual, unless the agency demonstrates by a
2 preponderance of the evidence that it would
3 have taken the same action in the absence of
4 such disclosure, giving the utmost deference to
5 the agency's assessment of the particular threat
6 to the national security interests of the United
7 States in the instant matter.

8 “(4) REVIEW BY THE INTELLIGENCE COMMU-
9 NITY WHISTLEBLOWER PROTECTION BOARD.—

10 “(A) APPEAL.—Within 60 days after re-
11 ceiving notice of an adverse final agency deter-
12 mination under a proceeding under paragraph
13 (3), an employee, former employee, or applicant
14 for employment may appeal that determination
15 to the Intelligence Community Whistleblower
16 Protection Board.

17 “(B) POLICIES AND PROCEDURES.—The
18 Board, in consultation with the Attorney Gen-
19 eral, Director of National Intelligence, and the
20 Secretary of Defense, shall develop and imple-
21 ment policies and procedures for adjudicating
22 the appeals authorized by subparagraph (A).
23 The Director of National Intelligence and Sec-
24 retary of Defense shall jointly approve any
25 rules, regulations, or guidance issued by the

1 Board concerning the procedures for the use or
2 handling of classified information.

3 “(C) REVIEW.—The Board’s review shall
4 be on the complete agency record, which shall
5 be made available to the Board. The Board may
6 not hear witnesses or admit additional evidence.
7 Any portions of the record that were submitted
8 ex parte during the agency proceedings shall
9 not be disclosed to the employee, former em-
10 ployee, or applicant during the proceedings be-
11 fore the Board.

12 “(D) FURTHER FACT-FINDING OR IM-
13 PROPER DENIAL.—If the Board concludes that
14 further fact-finding is necessary or finds that
15 the agency improperly denied the employee or
16 former employee the opportunity to present evi-
17 dence that, if admitted, would have a substan-
18 tial likelihood of altering the outcome, the
19 Board shall—

20 “(i) remand the matter to the agency
21 from which it originated for additional pro-
22 ceedings in accordance with the rules of
23 procedure issued by the Board; or

24 “(ii) refer the case to an intelligence
25 community agency for additional pro-

1 ceedings in accordance with the rules of
2 procedure issued by the Board.

3 “(E) DE NOVO DETERMINATION.—The
4 Board shall make a de novo determination,
5 based on the entire record, of whether the em-
6 ployee, former employee, or applicant received
7 an adverse security clearance or access deter-
8 mination in violation of paragraph (1). In con-
9 sidering the record, the Board may weigh the
10 evidence, judge the credibility of witnesses, and
11 determine controverted questions of fact. In
12 doing so, the Board may consider the prior
13 fact-finder’s opportunity to see and hear the
14 witnesses.

15 “(F) ADVERSE SECURITY CLEARANCE OR
16 ACCESS DETERMINATION.—If the Board finds
17 that the adverse security clearance or access de-
18 termination violated paragraph (1), it shall then
19 separately determine whether reinstating the se-
20 curity clearance or access determination is
21 clearly consistent with the interests of national
22 security, with any doubt resolved in favor of na-
23 tional security, under Executive Order 12968
24 (including any adjudicative guidelines promul-
25 gated under such orders) or any subsequent Ex-

1 executive Order, regulation, or policy concerning
2 access to classified information.

3 “(G) REMEDIES.—

4 “(i) CORRECTIVE ACTION.—If the
5 Board finds that the adverse security
6 clearance or access determination violated
7 paragraph (1), it shall order the agency
8 head to take specific corrective action to
9 return the employee, former employee, or
10 applicant, as nearly as practicable and rea-
11 sonable, to the position such employee,
12 former employee, or applicant would have
13 held had the violation not occurred. Such
14 corrective action shall include reasonable
15 attorney’s fees and any other reasonable
16 costs incurred, and may include back pay
17 and related benefits, travel expenses, and
18 compensatory damages not to exceed
19 \$300,000. The Board may recommend, but
20 may not order, reinstatement or hiring of
21 a former employee or applicant, and any
22 relief shall not include the reinstating of
23 any security clearance or access determina-
24 tion. The agency head shall take the ac-
25 tions so ordered, unless the President de-

1 termines that doing so would endanger na-
2 tional security.

3 “(ii) RECOMMENDED ACTION.—If the
4 Board finds that reinstating the employee,
5 former employee, or applicant’s security
6 clearance or access determination is clearly
7 consistent with the interests of national se-
8 curity, it shall recommend such action to
9 the head of the entity selected under sub-
10 section (b) and the head of the affected
11 agency.

12 “(H) CONGRESSIONAL NOTIFICATION.—

13 “(i) ORDERS.—At the time the Board
14 issues an order, the Chairperson of the
15 Board shall notify the chairpersons and
16 ranking members of—

17 “(I) the Committee on Homeland
18 Security and Government Affairs of
19 the Senate;

20 “(II) the Select Committee on In-
21 telligence of the Senate;

22 “(III) the Committee on Over-
23 sight and Government Reform of the
24 House of Representatives; and

1 “(IV) the Permanent Select Com-
2 mittee on Intelligence of the House of
3 Representatives.

4 “(ii) RECOMMENDATIONS.—If the
5 agency head and the head of the entity se-
6 lected under subsection (b) do not follow
7 the Board’s recommendation to reinstate a
8 clearance, the head of the entity selected
9 under subsection (b) shall notify the chair-
10 persons and ranking members of the com-
11 mittees described in subclauses (I), (II),
12 (III), and (IV) of clause (i).

13 “(5) JUDICIAL REVIEW.—Nothing in this sec-
14 tion should be construed to permit or require judicial
15 review of agency or Board actions under this section.

16 “(6) NONAPPLICABILITY TO CERTAIN TERMI-
17 NATIONS.—This section shall not apply to adverse
18 security clearance or access determinations if the af-
19 fected employee is concurrently terminated under—

20 “(A) section 1609 of title 10, United
21 States Code;

22 “(B) the authority of the Director of Na-
23 tional Intelligence under section 102A(m) of the
24 National Security Act of 1947 (50 U.S.C. 403-
25 1(m)), if—

1 “(i) the Director personally summarily
2 terminates the individual; and

3 “(ii) the Director—

4 “(I) determines the termination
5 to be in the interest of the United
6 States;

7 “(II) determines that the proce-
8 dures prescribed in other provisions of
9 law that authorize the termination of
10 the employment of such employee can-
11 not be invoked in a manner consistent
12 with the national security, and

13 “(III) notifies the congressional
14 oversight committees of such termi-
15 nation within 5 days after the termi-
16 nation;

17 “(C) the authority of the Director of the
18 Central Intelligence Agency under section
19 104A(e) of the National Security Act of 1947
20 (50 U.S.C. 403–4a(e)), if—

21 “(i) the Director personally summarily
22 terminates the individual; and

23 “(ii) the Director—

1 “(I) determines the termination
2 to be in the interest of the United
3 States;

4 “(II) determines that the proce-
5 dures prescribed in other provisions of
6 law that authorize the termination of
7 the employment of such employee can-
8 not be invoked in a manner consistent
9 with the national security; and

10 “(III) notifies the congressional
11 oversight committees of such termi-
12 nation within 5 days after the termi-
13 nation; or

14 “(D) section 7532 of title 5, United States
15 Code, if—

16 “(i) the agency head personally sum-
17 marily terminates the individual; and

18 “(ii) the agency head—

19 “(I) determines the termination
20 to be in the interest of the United
21 States;

22 “(II) determines that the proce-
23 dures prescribed in other provisions of
24 law that authorize the termination of
25 the employment of such employee can-

1 not be invoked in a manner consistent
2 with the national security; and

3 “(III) notifies the congressional
4 oversight committees of such termi-
5 nation within 5 days after the termi-
6 nation.”.

7 **SEC. 203. REVISIONS RELATING TO THE INTELLIGENCE**
8 **COMMUNITY WHISTLEBLOWER PROTECTION.**

9 (a) IN GENERAL.—Section 8H of the Inspector Gen-
10 eral Act of 1978 (5 U.S.C. App.) (as amended by section
11 119 of this Act) is further amended—

12 (1) in subsection (b), by adding “If, in the
13 judgment of the Inspector General, submission of
14 the complaint or information to the head of the es-
15 tablishment would create a conflict of interest for
16 the head of the establishment, the Inspector General
17 shall make the submission to the Chair of the Intel-
18 ligence Community Whistleblower Protection Board.
19 In such a case, the requirements of this section for
20 the head of the establishment apply to the recipient
21 of the Inspector General’s submission. The Chair
22 shall consult with the other members of the Intel-
23 ligence Community Whistleblower Protection Board
24 regarding all submissions under this section.” at the
25 end; and

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 may
7 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, in the judgment of the Inspector General,
18 submission of the complaint or information to the Director
19 would create a conflict of interest for the Director, the
20 Inspector General shall make the submission to the Chair-
21 person of the Intelligence Community Whistleblower Pro-
22 tection Board. In such a case—

23 “(I) the requirements of this subsection for the
24 Director apply to the recipient of the Inspector Gen-
25 eral’s submission; and

1 “(II) the Chairperson shall consult with the
2 other members of the Intelligence Community Whis-
3 tleblower Protection Board regarding all submissions
4 under this section.”; and

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

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

12 **TITLE III—EFFECTIVE DATE**

13 **SEC. 301. EFFECTIVE DATE.**

14 This Act shall take effect 30 days after the date of
15 enactment of this Act.