

Union Calendar No. 504

112TH CONGRESS
2^D SESSION

H. R. 3289

[Report No. 112-508, Part I]

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

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 1, 2011

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

MAY 30, 2012

Reported from the Committee on Oversight and Government Reform with amendments

[Omit the part struck through and insert the part printed in italic]

MAY 30, 2012

Referral to the Select Committee on Intelligence (Permanent Select) and Homeland Security extended for a period ending not later than October 1, 2012

OCTOBER 1, 2012

Additional sponsors: Mr. GOSAR and Mr. PEARCE

OCTOBER 1, 2012

The Committees on Select Committee on Intelligence (Permanent Select) and Homeland Security discharged; committed to the Committee of the Whole House on the State of the Union and ordered to be printed

A BILL

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

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

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

4 (a) SHORT TITLE.—This Act may be cited as the
 5 “~~Whistleblower Protection Enhancement Act of 2011~~
 6 *Platts-Van Hollen Whistleblower Protection Enhancement*
 7 *Act of 2011*”.

8 (b) TABLE OF CONTENTS.—The table of contents of
 9 this Act is as follows:

Sec. 1. Short title; table of contents.

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

Sec. 101. Clarification of disclosures covered.

Sec. 102. Disclosure defined.

Sec. 103. Rebuttable presumption.

Sec. 104. Personnel actions and prohibited personnel practices.

Sec. 105. Exclusion of agencies by the President.

Sec. 106. Disciplinary action.

Sec. 107. Remedies.

Sec. 108. Judicial review.

Sec. 109. Prohibited personnel practices affecting the Transportation Security
 Administration.

Sec. 110. Disclosure of censorship related to research, analysis, or technical in-
 formation.

Sec. 111. Clarification of whistleblower rights for critical infrastructure infor-
 mation.

Sec. 112. Advising employees of rights.

Sec. 113. Special Counsel amicus curiae appearance.

Sec. 114. Scope of due process.

Sec. 115. Nondisclosure policies, forms, and agreements.

Sec. 116. Reporting requirements.

Sec. 117. Alternative review.

Sec. 118. Merit Systems Protection Board summary judgment.

Sec. 119. Disclosures of classified information.

Sec. 120. Whistleblower protection ombudsman.

Sec. 121. Pilot program for enhancement of contractor employee whistleblower
 protections.

Sec. 122. *Study.*

TITLE II—INTELLIGENCE COMMUNITY WHISTLEBLOWER
 PROTECTIONS

Sec. 201. Protection of intelligence community whistleblowers.

Sec. 202. Review of security clearance or access determinations.

Sec. 203. Revisions relating to the Intelligence Community Whistleblower Protection Act.

Sec. 204. Regulations; reporting requirements; nonapplicability to certain terminations.

TITLE III—EFFECTIVE DATE; SAVINGS PROVISION

Sec. 301. Effective date.

Sec. 302. Savings provision.

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

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

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

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

10 (2) in subparagraph (B)(i)—

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

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

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

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

1 (A) in subsections (a)(3), (b)(4)(A), and
2 (b)(4)(B)(i) of section 1214 and subsections
3 (a), (e)(1), and (i) of section 1221, by inserting
4 “or subparagraph (A)(i), (B), (C), or (D) of
5 section 2302(b)(9)” after “section 2302(b)(8)”
6 each place it appears; and

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

10 (2) OTHER REFERENCES.—(A) Title 5, United
11 States Code, is amended, in sections
12 1214(b)(4)(B)(i) and 1221(e), by inserting “or pro-
13 tected activity” after “disclosure” each place it ap-
14 pears.

15 (B) Subparagraph (A) of section 2302(b)(9) of
16 title 5, United States Code, is amended to read as
17 follows:

18 “(A) the exercise of any appeal, complaint,
19 or grievance right granted by any law, rule, or
20 regulation—

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

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

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

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

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

12 “(B) the disclosure revealed information that
13 had been previously disclosed;

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

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

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

19 “(F) of the amount of time which has passed
20 since the occurrence of the events described in the
21 disclosure.

22 “(2) If a disclosure is made during the normal course
23 of duties of an employee, the disclosure shall not be ex-
24 cluded from subsection (b)(8) if any employee who has au-
25 thority to take, direct others to take, recommend, or ap-

1 prove any personnel action with respect to the employee
2 making the disclosure, took, failed to take, or threatened
3 to take or fail to take a personnel action with respect to
4 that employee in reprisal for the disclosure.”.

5 **SEC. 102. DISCLOSURE DEFINED.**

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

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

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

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

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

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

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

1 **SEC. 103. REBUTTABLE PRESUMPTION.**

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

5 “This subsection shall not be construed to authorize the
6 withholding of information from Congress or the taking
7 of any personnel action against an employee who discloses
8 information to Congress. For purposes of paragraph (8),
9 any presumption relating to the performance of a duty by
10 an employee whose conduct is the subject of a protected
11 disclosure under this section may be rebutted by substan-
12 tial evidence. For purposes of paragraph (8), a determina-
13 tion as to whether an employee or applicant reasonably
14 believes that such employee or applicant has disclosed in-
15 formation that evidences any violation of law, rule, regula-
16 tion, gross mismanagement, a gross waste of funds, an
17 abuse of authority, or a substantial and specific danger
18 to public health or safety shall be made by determining
19 whether a disinterested observer with knowledge of the es-
20 sential facts known to or readily ascertainable by the em-
21 ployee could reasonably conclude that the actions of the
22 Government evidence such a violation, mismanagement,
23 waste, abuse, or danger.”.

1 **SEC. 104. PERSONNEL ACTIONS AND PROHIBITED PER-**
2 **SONNEL PRACTICES.**

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

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

7 (2) by redesignating clause (xi) as clause (xii);
8 and

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

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

14 (b) **PROHIBITED PERSONNEL PRACTICE.**—

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

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

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

21 (C) by inserting after paragraph (12) the
22 following:

23 “(13) implement or enforce any nondisclosure
24 policy, form, or agreement, if such policy, form, or
25 agreement does not contain the following statement:

26 “These provisions are consistent with and do not su-

1 persede, conflict with, or otherwise alter the em-
2 ployee obligations, rights, or liabilities created by
3 Executive Order 13526 (75 Fed. Reg. 707, relating
4 to classified national security information), or any
5 successor thereto; Executive Order 12968 (60 Fed.
6 Reg. 40245, relating to access to classified informa-
7 tion), or any successor thereto; section 7211 (gov-
8 erning disclosures to Congress); section 1034 of title
9 10 (governing disclosure to Congress by members of
10 the military); subsection (b)(8) (governing disclo-
11 sures of illegality, waste, fraud, abuse, or public
12 health or safety threats); the Intelligence Identities
13 Protection Act of 1982 (50 U.S.C. 421 et seq., gov-
14 erning disclosures that could expose confidential
15 Government agents); and the statutes which protect
16 against disclosures that could compromise national
17 security, including sections 641, 793, 794, 798, and
18 952 of title 18 and section 4(b) of the Subversive
19 Activities Control Act of 1950 (50 U.S.C. 783(b)).
20 The definitions, requirements, obligations, rights,
21 sanctions, and liabilities created by such Executive
22 orders and such statutory provisions are incor-
23 porated into this agreement and are controlling.’’.

24 (2) NONDISCLOSURE POLICY, FORM, OR AGREE-
25 MENT IN EFFECT BEFORE THE DATE OF ENACT-

1 MENT.—A nondisclosure policy, form, or agreement
2 that was in effect before the effective date of this
3 Act, but that does not contain the statement re-
4 quired under section 2302(b)(13) of title 5, United
5 States Code (as added by paragraph (1)(C)) for im-
6 plementation or enforcement—

7 (A) may be enforced with regard to a cur-
8 rent employee if the employing agency gives
9 such employee notice of the statement before
10 the employee makes the disclosure with respect
11 to which the enforcement relates; and

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

21 (c) RETALIATORY INVESTIGATIONS.—

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

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

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

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

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

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

22 “(ii)(I) the Federal Bureau of Investiga-
23 tion, the Central Intelligence Agency, the De-
24 fense Intelligence Agency, the National
25 Geospatial-Intelligence Agency, the National Se-

1 security Agency, the Office of the Director of Na-
2 tional Intelligence, and the National Reconnaissance
3 Office; and

4 “(II) as determined by the President, any
5 Executive agency or unit thereof the principal
6 function of which is the conduct of foreign in-
7 telligence or counterintelligence activities, pro-
8 vided that the determination be made prior to
9 the personnel action involved; or”.

10 **SEC. 106. DISCIPLINARY ACTION.**

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

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

14 “(i) disciplinary action consisting of removal,
15 reduction in grade, debarment from Federal employ-
16 ment for a period not to exceed 5 years, suspension,
17 or reprimand;

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

20 “(iii) any combination of disciplinary actions
21 described under clause (i) and an assessment de-
22 scribed under clause (ii).

23 “(B) In any case brought under paragraph (1) in
24 which the Board finds that an employee has committed
25 a prohibited personnel practice under section 2302(b)(8),

1 or subparagraph (A)(i), (B), (C), or (D) of section
2 2302(b)(9), the Board may impose disciplinary action if
3 the Board finds that the activity protected under section
4 2302(b)(8) or subparagraph (A)(i), (B), (C), or (D) of
5 section 2302(b)(9) was a significant motivating factor,
6 even if other factors also motivated the decision, for the
7 employee's decision to take, fail to take, or threaten to
8 take or fail to take a personnel action, unless that em-
9 ployee demonstrates, by a preponderance of the evidence,
10 that the employee would have taken, failed to take, or
11 threatened to take or fail to take the same personnel ac-
12 tion, in the absence of such protected activity.”.

13 **SEC. 107. REMEDIES.**

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

20 (b) **DAMAGES.**—Sections 1214(g)(2) and
21 1221(g)(1)(A)(ii) of title 5, United States Code, are
22 amended by striking all after “travel expenses,” and in-
23 serting “any other reasonable and foreseeable consequen-
24 tial damages, and compensatory damages (including inter-

1 est, reasonable expert witness fees, and costs).” each place
2 it appears.

3 **SEC. 108. JUDICIAL REVIEW.**

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

6 (1) by striking “(b)(1) Except as provided in
7 paragraph (2) of this subsection,” and inserting
8 “(b)(1)(A) Except as provided in subparagraph (B)
9 or paragraph (2),”; and

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

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

22 (b) REVIEW OBTAINED BY OFFICE OF PERSONNEL
23 MANAGEMENT.—Section 7703(d) of title 5, United States
24 Code, is amended by inserting “or the United States Court

1 of Appeals for the District of Columbia Circuit” after “the
2 United States Court of Appeals for the Federal Circuit”.

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

6 **SEC. 109. PROHIBITED PERSONNEL PRACTICES AFFECTING**
7 **THE TRANSPORTATION SECURITY ADMINIS-**
8 **TRATION.**

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

11 (1) by redesignating sections 2304 and 2305 as
12 sections 2305 and 2306, respectively; and

13 (2) by inserting after section 2303 the fol-
14 lowing:

15 **“§ 2304. Prohibited personnel practices affecting the**
16 **Transportation Security Administration**

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

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

23 “(2) any provision of law implementing para-
24 graph (1), (8), or (9) of section 2302(b) by making

1 any right or remedy available to an employee or ap-
2 plicant for employment in the civil service; and

3 “(3) any rule or regulation prescribed under
4 any provision of law referred to in paragraph (1) or
5 (2).

6 “(b) **RULE OF CONSTRUCTION.**—Nothing in this sec-
7 tion shall be construed to affect any rights, apart from
8 those described in subsection (a), to which an individual
9 described in subsection (a) might otherwise be entitled
10 under law.”.

11 (b) **CLERICAL AMENDMENT.**—The table of sections
12 for chapter 23 of title 5, United States Code, is amended
13 by striking the items relating to sections 2304 and 2305,
14 respectively, and inserting the following:

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

“2305. Responsibility of the Government Accountability Office.

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

15 (c) **EFFECTIVE DATE.**—The amendments made by
16 this section shall take effect on the date of enactment of
17 this Act.

18 **SEC. 110. DISCLOSURE OF CENSORSHIP RELATED TO RE-**
19 **SEARCH, ANALYSIS, OR TECHNICAL INFOR-**
20 **MATION.**

21 (a) **DEFINITIONS.**—In this subsection—

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

4 (2) the term “applicant” means an applicant
5 for a covered position;

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

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

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

15 (6) the term “disclosure” has the meaning
16 given such term under section 2302(a)(2)(D) of title
17 5, United States Code (as amended by section
18 102(3)).

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—

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

4 (i) the employee or applicant reason-
5 ably believes that such censorship is or will
6 cause—

7 (I) any violation of law, rule, or
8 regulation, and occurs during the con-
9 scientious carrying out of official du-
10 ties; or

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

15 (ii) such disclosure is not specifically
16 prohibited by law or such information is
17 not specifically required by Executive order
18 to be kept classified in the interest of na-
19 tional defense or the conduct of foreign af-
20 fairs; and

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

1 (i) the employee or applicant reason-
2 ably believes that such censorship is or will
3 cause—

4 (I) any violation of law, rule, or
5 regulation, and occurs during the con-
6 scientious carrying out of official du-
7 ties; or

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

12 (ii) the disclosure is made to the Spe-
13 cial Counsel, or to the Inspector General of
14 an agency or another person designated by
15 the head of the agency to receive such dis-
16 closures, consistent with the protection of
17 sources and methods.

18 (2) DISCLOSURES NOT EXCLUDED.—A dislo-
19 sure shall not be excluded from paragraph (1) for
20 any reason described under paragraph (1) or (2) of
21 section 2302(f) of title 5, United States Code (as
22 amended by section 101(b)(2)(C)).

23 (3) RULE OF CONSTRUCTION.—Nothing in this
24 section shall be construed to imply any limitation on
25 the protections of employees and applicants afforded

1 by any other provision of law, including protections
2 with respect to any disclosure of information be-
3 lieved to be evidence of censorship related to re-
4 search, analysis, or technical information.

5 **SEC. 111. CLARIFICATION OF WHISTLEBLOWER RIGHTS**
6 **FOR CRITICAL INFRASTRUCTURE INFORMA-**
7 **TION.**

8 Section 214(c) of the Homeland Security Act of 2002
9 (6 U.S.C. 133(c)) is amended by adding at the end the
10 following: “For purposes of this section, a permissible use
11 of independently obtained information includes the disclo-
12 sure of such information under section 2302(b)(8) of title
13 5, United States Code.”.

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

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

1 **SEC. 113. SPECIAL COUNSEL AMICUS CURIAE APPEAR-**
2 **ANCE.**

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

5 “(h)(1) The Special Counsel may appear as amicus
6 curiae in any action brought in a court of the United
7 States related to any civil action brought in connection
8 with paragraph (8) or (9) of section 2302(b), or as other-
9 wise authorized by law. In any such action, the Special
10 Counsel may present the views of the Special Counsel with
11 respect to compliance with the provisions of paragraph (8)
12 or (9) of section 2302(b) and the impact court decisions
13 would have on the enforcement of such provisions.

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

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

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

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

1 **SEC. 115. NONDISCLOSURE POLICIES, FORMS, AND AGREE-**
2 **MENTS.**

3 (a) IN GENERAL.—

4 (1) REQUIREMENT.—Each agreement in Stand-
5 ard Forms 312 and 4414 of the Government and
6 any other nondisclosure policy, form, or agreement
7 of the Government shall contain the following state-
8 ment: “These restrictions are consistent with and do
9 not supersede, conflict with, or otherwise alter the
10 employee obligations, rights, or liabilities created by
11 Executive Order 13526 (75 Fed. Reg. 707, relating
12 to classified national security information), or any
13 successor thereto; Executive Order 12968 (60 Fed.
14 Reg. 40245, relating to access to classified informa-
15 tion), or any successor thereto; section 7211 of title
16 5, United States Code (governing disclosures to Con-
17 gress); section 1034 of title 10, United States Code
18 (governing disclosure to Congress by members of the
19 military); section 2302(b)(8) of title 5, United
20 States Code (governing disclosures of illegality,
21 waste, fraud, abuse, or public health or safety
22 threats); the Intelligence Identities Protection Act of
23 1982 (50 U.S.C. 421 et seq., governing disclosures
24 that could expose confidential Government agents);
25 and the statutes which protect against disclosure
26 that may compromise the national security, includ-

1 ing sections 641, 793, 794, 798, and 952 of title 18,
2 United States Code, and section 4(b) of the Subver-
3 sive Activities Act of 1950 (50 U.S.C. 783(b)). The
4 definitions, requirements, obligations, rights, sanc-
5 tions, and liabilities created by such Executive or-
6 ders and such statutory provisions are incorporated
7 into this agreement and are controlling.”.

8 (2) ENFORCEABILITY.—

9 (A) IN GENERAL.—Any nondisclosure pol-
10 icy, form, or agreement described under para-
11 graph (1) that does not contain the statement
12 required under paragraph (1) may not be im-
13 plemented or enforced to the extent such policy,
14 form, or agreement is inconsistent with that
15 statement.

16 (B) NONDISCLOSURE POLICY, FORM, OR
17 AGREEMENT IN EFFECT BEFORE THE DATE OF
18 ENACTMENT.—A nondisclosure policy, form, or
19 agreement that was in effect before the date of
20 enactment of this Act, but that does not con-
21 tain the statement required under paragraph
22 (1)—

23 (i) may be enforced with regard to a
24 current employee if the agency gives such
25 employee notice of the statement; and

1 (ii) may continue to be enforced after
2 the effective date of this Act with regard
3 to a former employee if the agency posts
4 notice of the statement on the agency
5 website for the 1-year period following that
6 effective date, except that such notice shall
7 not be required as a condition for contin-
8 ued enforcement if the condition under
9 clause (i) has been satisfied with respect to
10 such former employee.

11 (b) PERSONS OTHER THAN GOVERNMENT EMPLOY-
12 EES.—Notwithstanding subsection (a), a nondisclosure
13 policy, form, or agreement that is to be executed by a per-
14 son connected with the conduct of an intelligence or intel-
15 ligence-related activity, other than an employee or officer
16 of the United States Government, may contain provisions
17 appropriate to the particular activity for which such docu-
18 ment is to be used. Such policy, form, or agreement shall,
19 at a minimum, require that the person will not disclose
20 any classified information received in the course of such
21 activity unless specifically authorized to do so by the
22 United States Government. Such nondisclosure policy,
23 form, or agreement shall also make it clear that such
24 forms do not bar disclosures to Congress or to an author-
25 ized official of an Executive agency or the Department of

1 Justice to report a substantial violation of law, consistent
2 with the protection of sources and methods, pursuant to
3 the requirements of section 2302(b)(8) of title 5, United
4 States Code.

5 **SEC. 116. REPORTING REQUIREMENTS.**

6 (a) GOVERNMENT ACCOUNTABILITY OFFICE.—

7 (1) REPORT.—Not later than 40 months after
8 the date of enactment of this Act, the Comptroller
9 General shall submit a report to the Committee on
10 Homeland Security and Governmental Affairs of the
11 Senate and the Committee on Oversight and Govern-
12 ment Reform of the House of Representatives on the
13 implementation of this title.

14 (2) CONTENTS.—The report under this sub-
15 section shall include—

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

21 (B) the outcome of the cases described
22 under subparagraph (A), including whether or
23 not the Merit Systems Protection Board, the
24 Federal Circuit Court of Appeals, or any other

1 court determined the allegations to be frivolous
2 or malicious;

3 (C) an analysis of the outcome of cases de-
4 scribed under subparagraph (A) that were de-
5 cided by the United States Court of Appeals for
6 the District of Columbia Circuit and the impact
7 the process has on the Merit Systems Protec-
8 tion Board and the Federal court system; and

9 (D) any other matter as determined by the
10 Comptroller General.

11 (b) MERIT SYSTEMS PROTECTION BOARD.—

12 (1) IN GENERAL.—Each report submitted by
13 the Merit Systems Protection Board under section
14 1116 of title 31, United States Code, shall, with re-
15 spect to the period covered by such report, include
16 as an addendum the following:

17 (A) Information relating to the outcome of
18 cases decided during the applicable year of the
19 report in which violations of section 2302(b)(8)
20 or subparagraph (A)(i), (B)(i), (C), or (D) of
21 section 2302(b)(9) of title 5, United States
22 Code, were alleged.

23 (B) The number of such cases filed in the
24 regional and field offices, the number of peti-

1 tions for review filed in such cases, and the out-
2 comes of such cases.

3 (2) FIRST REPORT.—The first report described
4 under paragraph (1) submitted after the date of en-
5 actment of this Act shall include an addendum re-
6 quired under that paragraph that covers the period
7 beginning on the first day of the calendar year in
8 which occurs the date of enactment of this Act and
9 ending on the last day of the fiscal year in which
10 such date of enactment occurs.

11 **SEC. 117. ALTERNATIVE REVIEW.**

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

14 “(k)(1) For purposes of this subsection, the term ‘ap-
15 propriate United States district court’, as used with re-
16 spect to an alleged prohibited personnel practice, means
17 the United States district court for the judicial district
18 in which—

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

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

24 “(2) An employee, former employee, or applicant for
25 employment in any case to which paragraph (4) or (5)

1 applies may file an action at law or equity for de novo
2 review in the appropriate United States district court.

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

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

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

13 “(i) seeks corrective action from the Merit
14 Systems Protection Board under section
15 1221(a) based on an alleged prohibited per-
16 sonnel practice, described in section 2302(b)(8)
17 or subparagraph (A)(i), (B), (C), or (D) of sec-
18 tion 2302(b)(9), for which the associated per-
19 sonnel action is an action covered under section
20 7512 or 7542; or

21 “(ii) files an appeal under section 7701(a)
22 alleging as an affirmative defense the commis-
23 sion of a prohibited personnel practice, de-
24 scribed in section 2302(b)(8) or subparagraph
25 (A)(i), (B), (C), or (D) of section 2302(b)(9),

1 for which the associated personnel action is an
2 action covered under section 7512 or 7542;

3 “(B) no final order or decision is issued by the
4 Board within 270 days after the date on which a re-
5 quest for that corrective action or appeal has been
6 duly submitted, unless the Board determines that
7 the employee, former employee, or applicant for em-
8 ployment engaged in conduct intended to delay the
9 issuance of a final order or decision by the Board;
10 and

11 “(C) such employee, former employee, or appli-
12 cant provides written notice to the Board of filing an
13 action under this subsection before the filing of that
14 action.

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

16 “(A) an employee, former employee, or appli-
17 cant for employment—

18 “(i) seeks corrective action from the Merit
19 Systems Protection Board under section
20 1221(a) based on an alleged prohibited per-
21 sonnel practice, described in section 2302(b)(8)
22 or subparagraph (A)(i), (B), (C), or (D) of sec-
23 tion 2302(b)(9), for which the associated per-
24 sonnel action is an action covered under section
25 7512 or 7542; or

1 “(ii) files an appeal under section
2 7701(a)(1) alleging as an affirmative defense
3 the commission of a prohibited personnel prac-
4 tice, described in section 2302(b)(8) or sub-
5 paragraph (A)(i), (B), (C), or (D) of section
6 2302(b)(9), for which the associated personnel
7 action is an action covered under section 7512
8 or 7542;

9 “(B)(i) within 30 days after the date on which
10 the request for corrective action or appeal was duly
11 submitted, such employee, former employee, or appli-
12 cant for employment files a motion requesting a cer-
13 tification consistent with subparagraph (C) to the
14 Board or an administrative law judge or other em-
15 ployee of the Board designated to hear the case; and

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

19 “(C) the Board or an administrative law judge
20 or other employee of the Board designated to hear
21 the case certifies that—

22 “(i) under standards applicable to the re-
23 view of motions to dismiss under rule 12(b)(6)
24 of the Federal Rules of Civil Procedure, includ-
25 ing rule 12(d) thereof, the request for corrective

1 action (including any allegations made with the
2 motion under subparagraph (B)) would not be
3 subject to dismissal; and

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

8 “(II) the case—

9 “(aa) consists of multiple claims;

10 “(bb) requires complex or extensive
11 discovery;

12 “(cc) arises out of the same set of op-
13 erative facts as any civil action against the
14 Government filed by the employee, former
15 employee, or applicant pending in a court
16 of the United States; or

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

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

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

7 “(i) a motion requesting a certification was de-
8 nied; and

9 “(ii) the reviewing court vacates the decision of
10 the Board on the merits of the claim under the
11 standards set forth in section 7703(c).

12 “(B) The decision to deny the certification shall be
13 overturned by the reviewing court, and an order granting
14 certification shall be issued by the reviewing court, if such
15 decision is found to be arbitrary, capricious, or an abuse
16 of discretion.

17 “(C) The reviewing court’s decision shall not be con-
18 sidered evidence of any determination by the Board, any
19 administrative law judge appointed by the Board under
20 section 3105, or any employee of the Board designated
21 by the Board on the merits of the underlying allegations
22 during the course of any action at law or equity for de
23 novo review in the appropriate United States district court
24 in accordance with this subsection.

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

1 “(A) the appropriate United States district
2 court shall have jurisdiction without regard to the
3 amount in controversy;

4 “(B) the court—

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

7 “(ii) may award any relief which the court
8 considers appropriate under subsection (g), ex-
9 cept that—

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

12 “(II) relief may not include punitive
13 damages; and

14 “(iii) notwithstanding subsection (e)(2),
15 may not order relief if the agency demonstrates
16 by clear and convincing evidence that the agen-
17 cy would have taken the same personnel action
18 in the absence of such disclosure; and

19 “(C) the Special Counsel may not represent the
20 employee, former employee, or applicant for employ-
21 ment.

22 “(9) A petition to review a final order or final deci-
23 sion of a United States district court under this subsection
24 that raises no challenge to the district court’s disposition
25 of allegations of a prohibited personnel practice described

1 in section 2302(b) other than practices described in sec-
2 tion 2302(b)(8) or subparagraph (A)(i), (B), (C), or (D)
3 of section 2302(b)(9) shall be filed in the United States
4 Court of Appeals for the District of Columbia Circuit. All
5 other petitions to review any final order or final decision
6 of a United States district court in an action brought
7 under this subsection shall be filed in the United States
8 Court of Appeals for the Federal Circuit. Notwithstanding
9 any other provision of law, any petition for review under
10 this paragraph must be filed within 60 days after the date
11 the petitioner received notice of the final order or final
12 decision of the United States district court.

13 “(10) This subsection applies with respect to any ap-
14 peal, petition, or other request for corrective action duly
15 submitted to the Board, whether under section
16 1214(b)(2), the preceding provisions of this section, sec-
17 tion 7513(d), section 7701, or any otherwise applicable
18 provision of law, rule, or regulation.”.

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

20 **JUDGMENT.**

21 Section 1204(b) of title 5, United States Code, is
22 amended—

23 (1) by redesignating paragraph (3) as para-
24 graph (4);

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

3 “(3) With respect to a request for corrective action
4 based on an alleged prohibited personnel practice de-
5 scribed in section 2302(b)(8) or subparagraph (A)(i), (B),
6 (C), or (D) of section 2302(b)(9) for which the associated
7 personnel action is an action covered under section 7512
8 or 7542, the Board, any administrative law judge ap-
9 pointed by the Board under ~~section 3105 TM~~, *section*
10 *3105*, or any employee of the Board designated by the
11 Board may, with respect to any party, grant a motion for
12 summary judgment.”.

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

14 (a) PROHIBITED PERSONNEL PRACTICES.—Section
15 2302(b)(8) of title 5, United States Code, is amended—

16 (1) in subparagraph (A), by striking “or” after
17 the semicolon *at the end*;

18 (2) in subparagraph (B), by adding “or” after
19 the semicolon *at the end*; and

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

21 “(C) any communication that complies
22 with subsection (a)(1), (d), and (h) of section
23 8H of the Inspector General Act of 1978 (5
24 U.S.C. App.);”.

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

4 (1) in subsection (a)(1), by adding at the end
5 the following:

6 “(D) An employee of any agency, as that term is de-
7 fined under section 2302(a)(2)(C) of title 5, United States
8 Code, who intends to report to Congress a complaint or
9 information with respect to an urgent concern may report
10 the complaint or information to the Inspector General (or
11 designee) of the agency of which that employee is em-
12 ployed.”;

13 (2) in subsection (c), by striking “intelligence
14 committees” and inserting “appropriate commit-
15 tees”;

16 (3) in subsection (d)—

17 (A) in paragraph (1), by striking “either
18 or both of the intelligence committees” and in-
19 serting “any of the appropriate committees”;
20 and

21 (B) in paragraphs (2) and (3), by striking
22 “intelligence committees” each place it appears
23 and inserting “appropriate committees”; and

24 (4) in subsection (h)—

25 (A) in paragraph (1)—

1 (i) in subparagraph (A), by striking
2 “intelligence”; and

3 (ii) in subparagraph (B), by inserting
4 “or an activity involving classified informa-
5 tion” after “an intelligence activity”; and

6 (B) by striking paragraph (2) and insert-
7 ing the following:

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

16 **SEC. 120. WHISTLEBLOWER PROTECTION OMBUDSMAN.**

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

20 “(d)(1) Each Inspector General shall, in accordance
21 with applicable laws and regulations governing the civil
22 service—

23 “(A) appoint an Assistant Inspector General for
24 Auditing, who shall have the responsibility for super-

1 vising the performance of auditing activities relating
2 to programs and operations of the establishment;

3 “(B) appoint an Assistant Inspector General for
4 Investigations, who shall have the responsibility for
5 supervising the performance of investigative activi-
6 ties relating to such programs and operations; and

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

9 “(i) about prohibitions on retaliation for
10 protected disclosures; and

11 “(ii) who have made or are contemplating
12 making a protected disclosure about the rights
13 and remedies against retaliation for protected
14 disclosures.

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

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

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

1 “(B) as determined by the President, any execu-
2 tive agency or unit thereof the principal function of
3 which is the conduct of foreign intelligence or
4 counter intelligence activities.”.

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

8 (1) by striking “section 3(d)(1)” and inserting
9 “section 3(d)(1)(A)”; and

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

12 **SEC. 121. PILOT PROGRAM FOR ENHANCEMENT OF CON-**
13 **TRACTOR EMPLOYEE WHISTLEBLOWER PRO-**
14 **TECTIONS.**

15 (a) PILOT PROGRAM.—

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

19 **“§4705a. Pilot program for enhancement of protec-**
20 **tion of contractor employees from re-**
21 **prisal for disclosure of certain informa-**
22 **tion**

23 “(a) DEFINITIONS.—In this section:

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

4 “(2) CONTRACTOR.—The term ‘contractor’
5 means a person awarded a contract or a grant with
6 an executive agency.

7 “(3) INSPECTOR GENERAL.—The term ‘Inspec-
8 tor General’ means an Inspector General appointed
9 under the Inspector General Act of 1978 (5 U.S.C.
10 App.) and any Inspector General that receives fund-
11 ing from, or has oversight over contracts awarded
12 for or on behalf of, an executive agency.

13 “(b) PROHIBITION OF REPRISALS.—An employee of
14 a contractor may not be discharged, demoted, or otherwise
15 discriminated against as a reprisal for disclosing to a
16 Member of Congress, a representative of a committee of
17 Congress, an Inspector General, the Government Account-
18 ability Office, an agency employee responsible for contract
19 oversight or management, an authorized official of an ex-
20 ecutive agency or the Department of Justice information
21 that the employee reasonably believes is evidence of gross
22 mismanagement of a contract or grant, a gross waste of
23 agency funds, a substantial and specific danger to public
24 health or safety, or a violation of a law related to a con-

1 tract (including the competition for or negotiation of a
2 contract) or grant.

3 “(c) INVESTIGATION OF COMPLAINTS.—

4 “(1) INVESTIGATION.—An individual who be-
5 lieves that the individual has been subjected to a re-
6 prisal prohibited by subsection (b) may submit a
7 complaint to the Inspector General of the executive
8 agency. Unless the Inspector General determines
9 that the complaint is frivolous, the Inspector General
10 shall investigate the complaint and, on completion of
11 the investigation, submit a report of the findings of
12 the investigation to the individual, the contractor
13 concerned, and the head of the agency. If the execu-
14 tive agency does not have an Inspector General, the
15 duties of the Inspector General under this section
16 shall be performed by an official designated by the
17 head of the executive agency.

18 “(2) DEADLINE.—(A) Except as provided
19 under subparagraph (B), the Inspector General shall
20 make a determination that a complaint is frivolous
21 or submit a report under paragraph (1) within 180
22 days after receiving the complaint.

23 “(B) If the Inspector General is unable to com-
24 plete an investigation in time to submit a report
25 within the 180-day period specified in subparagraph

1 (A) and the person submitting the complaint agrees
2 to an extension of time, the Inspector General shall
3 submit a report under paragraph (1) within such ad-
4 ditional period of time as shall be agreed upon be-
5 tween the Inspector General and the person submit-
6 ting the complaint.

7 “(d) REMEDY AND ENFORCEMENT AUTHORITY.—

8 “(1) ACTIONS CONTRACTOR MAY BE ORDERED
9 TO TAKE.—Not later than 30 days after receiving an
10 Inspector General report pursuant to subsection (c),
11 the head of the agency concerned shall determine
12 whether there is sufficient basis to conclude that the
13 contractor concerned has subjected the complainant
14 to a reprisal prohibited by subsection (b) and shall
15 either issue an order denying relief or shall take one
16 or more of the following actions:

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

19 “(B) REINSTATEMENT.—Order the con-
20 tractor to reinstate the individual to the posi-
21 tion that the individual held before the reprisal,
22 together with the compensation (including back
23 pay), employment benefits, and other terms and
24 conditions of employment that would apply to

1 the individual in that position if the reprisal
2 had not been taken.

3 “(C) PAYMENT.—Order the contractor to
4 pay the complainant an amount equal to the
5 aggregate amount of all costs and expenses (in-
6 cluding attorneys’ fees and expert witnesses’
7 fees) that the complainant reasonably incurred
8 for, or in connection with, bringing the com-
9 plaint regarding the reprisal, as determined by
10 the head of the executive agency.

11 “(2) DE NOVO ACTION.—If the head of an execu-
12 tive agency issues an order denying relief under
13 paragraph (1) or has not issued an order within 210
14 days after the submission of a complaint under sub-
15 section (c), or in the case of an extension of time
16 under paragraph (c)(2)(B), not later than 30 days
17 after the expiration of the extension of time, and
18 there is no showing that such delay is due to the bad
19 faith of the complainant, the complainant shall be
20 deemed to have exhausted all administrative rem-
21 edies with respect to the complaint, and the com-
22 plainant may bring a de novo action at law or equity
23 against the contractor to seek compensatory dam-
24 ages and other relief available under this section in
25 the appropriate district court of the United States,

1 which shall have jurisdiction over such an action
2 without regard to the amount in controversy. Such
3 an action shall, at the request of either party to the
4 action, be tried by the court with a jury.

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

10 “(4) ENFORCEMENT ORDER.—When a con-
11 tractor fails to comply with an order issued under
12 paragraph (1), the head of the executive agency
13 shall file an action for enforcement of the order in
14 the United States district court for a district in
15 which the reprisal was found to have occurred. In an
16 action brought under this paragraph, the court may
17 grant appropriate relief, including injunctive relief
18 and compensatory and exemplary damages.

19 “(5) REVIEW OF ENFORCEMENT ORDER.—A
20 person adversely affected or aggrieved by an order
21 issued under paragraph (1) may obtain review of the
22 order’s conformance with this subsection, and regu-
23 lations issued to carry out this section, in the United
24 States court of appeals for a circuit in which the re-
25 prisal is alleged in the order to have occurred. A pe-

1 tition seeking review must be filed no more than 60
 2 days after the head of the agency issues the order.
 3 Review shall conform to chapter 7 of title 5.

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

5 “(1) authorize the discharge of, demotion of, or
 6 discrimination against an employee for a disclosure
 7 other than a disclosure protected by subsection (b);
 8 or

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

11 “(f) DURATION OF SECTION.—This section shall be
 12 in effect for the two-year period beginning on the date of
 13 the enactment of the ~~Whistleblower Protection Enhance-~~
 14 ~~ment Act of 2011~~ *Platts-Van Hollen Whistleblower Protec-*
 15 *tion Enhancement Act of 2011.*”.

16 (2) CLERICAL AMENDMENT.—The table of sec-
 17 tions at the beginning of chapter 47 of title 41,
 18 United States Code, is amended by inserting after
 19 the item relating to section 4705 the following new
 20 item:

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

21 (b) SUSPENSION OF EFFECTIVENESS OF SECTION
 22 4705 WHILE PILOT PROGRAM IN EFFECT.—Section 4705
 23 of title 41, United States Code, is amended by adding at
 24 the end the following new subsection:

1 “(f) TWO-YEAR SUSPENSION OF EFFECTIVENESS
2 WHILE PILOT PROGRAM IN EFFECT.—While section
3 4705a of this title is in effect, this section shall not be
4 in effect.”.

5 (c) GOVERNMENT ACCOUNTABILITY OFFICE STUDY
6 AND REPORT.—

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

12 (2) REPORT.—Not later than 18 months after
13 the date of the enactment of this Act, the Comp-
14 troller General shall submit to Congress a report on
15 the results of the study required by paragraph (1),
16 with such findings and recommendations as the
17 Comptroller General considers appropriate.

18 **SEC. 122. STUDY.**

19 (a) *IN GENERAL.*—*The Government Accountability*
20 *Office shall study and, not later than 1 year after the date*
21 *of enactment of this Act, submit to the appropriate commit-*
22 *tees of Congress a report on whistleblower hotlines of Fed-*
23 *eral agencies. Such study and report shall address the fol-*
24 *lowing:*

1 (1) *The days and hours the hotline is staffed by*
2 *trained personnel.*

3 (2) *The level of training which operators who are*
4 *designated to receive calls for the hotline possess, in-*
5 *cluding academic credentials and additional training.*

6 (3) *Whether the hotline is staffed by sufficient*
7 *personnel.*

8 (4) *Whether the hotline is operated in a manner*
9 *consistent with the requirements established by the*
10 *Sarbanes-Oxley Act of 2002 relating to whistleblower*
11 *protections which apply with respect to publicly trad-*
12 *ed companies.*

13 (5) *Whether the hotline is operated independent*
14 *of conflicts of interest.*

15 (6) *Whether the hotline is accessible through mul-*
16 *tiple methods of communication, such as electronic*
17 *mail, personal interview, and confidential mail de-*
18 *posit.*

19 (7) *Whether sufficient protections from retali-*
20 *ation are provided for employees reporting illegal or*
21 *unethical conduct or behavior.*

22 (8) *Whether the hotline is operated in a manner*
23 *that ensures sufficient confidentiality of disclosures*
24 *made using such hotline.*

1 (9) *Whether employees of the agency are encour-*
2 *aged and made aware of their ability to submit dis-*
3 *closures of perceived misconduct that they reasonably*
4 *believe evidence a violation of law, rule, or regulation,*
5 *gross waste, gross mismanagement, abuse of author-*
6 *ity, or a substantial and specific violation of public*
7 *health or safety.*

8 (10) *Any other issues which the Government Ac-*
9 *countability Office may determine.*

10 (b) *DEFINITIONS.—For purposes of this section—*

11 (1) *the term “appropriate committees of Con-*
12 *gress” means the Committee on Oversight and Gov-*
13 *ernment Reform of the House of Representatives and*
14 *the Committee on Homeland Security and Govern-*
15 *mental Affairs of the Senate; and*

16 (2) *the term “Federal agency” means an agency,*
17 *as defined by section 2302(a)(2)(C) of title 5, United*
18 *States Code.*

1 **TITLE II—INTELLIGENCE COM-**
2 **MUNITY WHISTLEBLOWER**
3 **PROTECTIONS**

4 **SEC. 201. PROTECTION OF INTELLIGENCE COMMUNITY**
5 **WHISTLEBLOWERS.**

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

9 **“§ 2303a. Prohibited personnel practices in the intel-**
10 **ligence community**

11 “(a) DEFINITIONS.—In this section—

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

17 “(2) the term ‘intelligence community ele-
18 ment’—

19 “(A) means—

20 “(i) the Central Intelligence Agency,
21 the Defense Intelligence Agency, the Na-
22 tional Geospatial-Intelligence Agency, the
23 National Security Agency, the Office of the
24 Director of National Intelligence, and the
25 National Reconnaissance Office; and

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

7 “(B) does not include the Federal Bureau
8 of Investigation; and

9 “(3) the term ‘personnel action’ means any ac-
10 tion described in clauses (i) through (x) of section
11 2302(a)(2)(A) with respect to an employee in a posi-
12 tion in an intelligence community element (other
13 than a position of a confidential, policy-determining,
14 policymaking, or policy-advocating character).

15 “(b) IN GENERAL.—Any employee of an agency who
16 has authority to take, direct others to take, recommend,
17 or approve any personnel action, shall not, with respect
18 to such authority, take or fail to take a personnel action
19 with respect to any employee of an intelligence community
20 element as a reprisal for a disclosure of information by
21 the employee to the Director of National Intelligence (or
22 an employee designated by the Director of National Intel-
23 ligence for such purpose), ~~or to the head~~ *to the head* of
24 the employing agency (or an employee designated by the
25 head of that agency for such purpose), *or to a supervisor*

1 *in the chain of authority of such employee who is authorized*
2 *to access such information* which the employee reasonably
3 believes evidences—

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

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

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

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

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

20 “(2) repeal section 2303; or

21 “(3) provide the President or Director of Na-
22 tional Intelligence the authority to revise regulations
23 related to section 2303, codified in part 27 of the
24 Code of Federal Regulations.”.

1 (b) TECHNICAL AND CONFORMING AMENDMENT.—
 2 The table of sections for chapter 23 of title 5, United
 3 States Code, is amended by inserting after the item relat-
 4 ing to section 2303 the following:

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

5 **SEC. 202. REVIEW OF SECURITY CLEARANCE OR ACCESS**
 6 **DETERMINATIONS.**

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

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

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

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

17 (4) by inserting after paragraph (6) the fol-
 18 lowing:

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

22 “(A) developing policies and procedures
 23 that permit, to the extent practicable, individ-
 24 uals who challenge in good faith a determina-
 25 tion to suspend or revoke a security clearance

1 or access to classified information to retain
2 their government employment status while such
3 challenge is pending; and

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

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

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

7 “(i) for an independent and impartial fact-find-
8 er;

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

12 “(iii) that the employee or former employee
13 may be represented by counsel;

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

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

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

23 “(II) the impartial fact-finder determines
24 in writing that a greater period of time is re-

1 required in the interest of fairness or national se-
2 curity;

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

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

19 (a) *IN GENERAL.*—*Section 3001 of the Intelligence Re-*
20 *form and Terrorism Prevention Act of 2004 (50 U.S.C.*
21 *435b) is amended—*

22 (1) *by redesignating subsection (i) as subsection*
23 *(k); and*

24 (2) *by inserting after subsection (h) the following*
25 *new subsection:*

1 “(i) *REVIEW OF SECURITY CLEARANCE OR ACCESS*
2 *DETERMINATIONS.*—

3 “(1) *IN GENERAL.*—Not later than 180 days
4 after the date of enactment of the *Platts-Van Hollen*
5 *Whistleblower Protection Enhancement Act of 2011,*
6 *the head of the entity selected pursuant to subsection*
7 *(b) shall—*

8 “(A) *develop policies and procedures that*
9 *permit, to the extent practicable, individuals who*
10 *challenge in good faith a determination to sus-*
11 *pend or revoke a security clearance or access to*
12 *classified information to retain their government*
13 *employment status while such challenge is pend-*
14 *ing; and*

15 “(B) *develop and implement uniform and*
16 *consistent policies and procedures to ensure*
17 *proper protections during the process for deny-*
18 *ing, suspending, or revoking a security clearance*
19 *or access to classified information, including the*
20 *provision of a right to appeal such a denial, sus-*
21 *pension, or revocation, except that there shall be*
22 *no appeal of an agency’s suspension of a security*
23 *clearance or access determination for purposes of*
24 *conducting an investigation, if that suspension*
25 *lasts no longer than 1 year or the head of the*

1 *agency certifies that a longer suspension is need-*
2 *ed before a final decision on denial or revocation*
3 *to prevent imminent harm to the national secu-*
4 *rity.*

5 “(2) *LIMITATION PERIOD.*—*Any limitation pe-*
6 *riod applicable to an agency appeal under paragraph*
7 *(1) shall be tolled until the head of the agency (or in*
8 *the case of any component of the Department of De-*
9 *fense, the Secretary of Defense) determines, with the*
10 *concurrence of the Director of National Intelligence,*
11 *that the policies and procedures described in para-*
12 *graph (1) have been established for the agency or the*
13 *Director of National Intelligence promulgates the*
14 *policies and procedures under paragraph (1). The*
15 *policies and procedures for appeals developed under*
16 *paragraph (1) shall be comparable to the policies and*
17 *procedures pertaining to prohibited personnel prac-*
18 *tices defined under section 2302(b)(8) of title 5,*
19 *United States Code, and provide—*

20 “(A) *for an independent and impartial*
21 *fact-finder;*

22 “(B) *for notice and the opportunity to be*
23 *heard, including the opportunity to present rel-*
24 *evant evidence, including witness testimony;*

1 “(C) that the employee or former employee
2 may be represented by counsel;

3 “(D) that the employee or former employee
4 has a right to a decision based on the record de-
5 veloped during the appeal;

6 “(E) that not more than 180 days shall
7 pass from the filing of the appeal to the report
8 of the impartial fact-finder to the agency head or
9 the designee of the agency head, unless—

10 “(i) the employee and the agency con-
11 cerned agree to an extension; or

12 “(ii) the impartial fact-finder deter-
13 mines in writing that a greater period of
14 time is required in the interest of fairness
15 or national security;

16 “(F) for the use of information specifically
17 required by Executive order to be kept classified
18 in the interest of national defense or the conduct
19 of foreign affairs in a manner consistent with
20 the interests of national security, including ex
21 parte submissions if the agency determines that
22 the interests of national security so warrant; and

23 “(G) that the employee or former employee
24 shall have no right to compel the production of
25 information specifically required by Executive

1 *order to be kept classified in the interest of na-*
2 *tional defense or the conduct of foreign affairs,*
3 *except evidence necessary to establish that the*
4 *employee made the disclosure or communication*
5 *such employee alleges was protected by subpara-*
6 *graphs (A), (B), and (C) of subsection (j)(1).”.*

7 (b) RETALIATORY REVOCATION OF SECURITY
8 CLEARANCES AND ACCESS DETERMINATIONS.—Section
9 3001 of the Intelligence Reform and Terrorism Prevention
10 Act of 2004 (50 U.S.C. 435b) is amended by adding at
11 ~~the end~~, as amended by subsection (a) of this section, is
12 further amended by inserting after subsection (i) the fol-
13 lowing:

14 “(j) RETALIATORY REVOCATION OF SECURITY
15 CLEARANCES AND ACCESS DETERMINATIONS.—

16 “(1) IN GENERAL.—Agency personnel with au-
17 thority over personnel security clearance or access
18 determinations shall not take or fail to take, or
19 threaten to take or fail to take, any action with re-
20 spect to any employee’s security clearance or access
21 determination because of—

22 “(A) any disclosure of information to the
23 Director of National Intelligence (or an em-
24 ployee designated by the Director of National
25 Intelligence for such purpose) or the head of

1 the employing agency (or employee designated
2 by the head of that agency for such purpose) by
3 an employee that the employee reasonably be-
4 lieves evidences—

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

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

12 “(B) any disclosure to the Inspector Gen-
13 eral of an agency or another employee des-
14 ignated by the head of the agency to receive
15 such disclosures, of information which the em-
16 ployee reasonably believes evidences—

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

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

24 “(C) any communication that complies
25 with—

1 “(i) subsection (a)(1), (d), or (h) of
2 section 8H of the Inspector General Act of
3 1978 (5 U.S.C. App.);

4 “(ii) subsection (d)(5) (A), (D), or
5 (G) of section 17 of the Central Intel-
6 ligence Agency Act of 1949 (50 U.S.C.
7 403q); or

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

11 “(D) the exercise of any appeal, complaint,
12 or grievance right granted by any law, rule, or
13 regulation;

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

17 “(F) cooperating with or disclosing infor-
18 mation to the Inspector General of an agency,
19 in accordance with applicable provisions of law
20 in connection with an audit, inspection, or in-
21 vestigation conducted by the Inspector General,
22 if the actions described under subparagraphs (D)
23 through (F) do not result in the employee or appli-
24 cant unlawfully disclosing information specifically re-
25 quired by Executive order to be kept classified in the

1 interest of national defense or the conduct of foreign
2 affairs.

3 “(2) RULE OF CONSTRUCTION.—Consistent
4 with the protection of sources and methods, nothing
5 in paragraph (1) shall be construed to authorize the
6 withholding of information from the Congress or the
7 taking of any personnel action against an employee
8 who discloses information to the Congress.

9 “(3) DISCLOSURES.—

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

12 “(i) the disclosure was made to a per-
13 son, including a supervisor, who partici-
14 pated in an activity that the employee rea-
15 sonably believed to be covered by para-
16 graph (1)(A)(ii);

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

19 “(iii) of the employee’s motive for
20 making the disclosure;

21 “(iv) the disclosure was not made in
22 writing;

23 “(v) the disclosure was made while
24 the employee was off duty; or

1 “(vi) of the amount of time which has
2 passed since the occurrence of the events
3 described in the disclosure.

4 “(B) REPRISALS.—If a disclosure is made
5 during the normal course of duties of an em-
6 ployee, the disclosure shall not be excluded from
7 paragraph (1) if any employee who has author-
8 ity to take, direct others to take, recommend, or
9 approve any personnel action with respect to
10 the employee making the disclosure, took, failed
11 to take, or threatened to take or fail to take a
12 personnel action with respect to that employee
13 in reprisal for the disclosure.

14 “(4) AGENCY ADJUDICATION.—

15 “(A) REMEDIAL PROCEDURE.—An em-
16 ployee or former employee who believes that he
17 or she has been subjected to a reprisal prohib-
18 ited by paragraph (1) of this subsection may,
19 within 90 days after the issuance of notice of
20 such decision, appeal that decision within the
21 agency of that employee or former employee
22 through proceedings authorized by paragraph
23 (7) of subsection (a), except that there shall be
24 no appeal of an agency’s suspension of a secu-
25 rity clearance or access determination for pur-

1 poses of conducting an investigation, if that
2 suspension lasts not longer than 1 year (or a
3 longer period in accordance with a certification
4 made under subsection (b)(7)).

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

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

1 contributing factor in the adverse security clear-
2 ance or access determination taken against the
3 individual, unless the agency demonstrates by
4 clear and convincing evidence that it would have
5 taken the same action in the absence of such
6 disclosure, giving the utmost deference to the
7 agency's assessment of the particular threat to
8 the national security interests of the United
9 States in the instant matter.

10 “(5) APPELLATE REVIEW OF SECURITY CLEAR-
11 ANCE ACCESS DETERMINATIONS BY DIRECTOR OF
12 NATIONAL INTELLIGENCE.—

13 “(A) DEFINITION.—In this paragraph, the
14 term ‘Board’ means the appellate review board
15 established under section 204 of the ~~Whistle-~~
16 ~~blower Protection Enhancement Act of 2011~~
17 *Platts-Van Hollen Whistleblower Protection En-*
18 *hancement Act of 2011.*

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

24 “(C) POLICIES AND PROCEDURES.—The
25 Board, in consultation with the Attorney Gen-

1 eral, Director of National Intelligence, and the
2 Secretary of Defense, shall develop and imple-
3 ment policies and procedures for adjudicating
4 the appeals authorized by subparagraph (B).
5 The Director of National Intelligence and Sec-
6 retary of Defense shall jointly approve any
7 rules, regulations, or guidance issued by the
8 Board concerning the procedures for the use or
9 handling of classified information.

10 “(D) REVIEW.—The Board’s review shall
11 be on the complete agency record, which shall
12 be made available to the Board. The Board may
13 not hear witnesses or admit additional evidence.
14 Any portions of the record that were submitted
15 ex parte during the agency proceedings shall be
16 submitted ex parte to the Board.

17 “(E) FURTHER FACT-FINDING OR IM-
18 PROPER DENIAL.—If the Board concludes that
19 further fact-finding is necessary or finds that
20 the agency improperly denied the employee or
21 former employee the opportunity to present evi-
22 dence that, if admitted, would have a substan-
23 tial likelihood of altering the outcome, the
24 Board shall remand the matter to the agency
25 from which it originated for additional pro-

1 proceedings in accordance with the rules of proce-
2 dure issued by the Board.

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

15 “(G) 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 (60 Fed. Reg. 40245; relating to access to clas-
25 sified information) or any successor thereto (in-

1 including any adjudicative guidelines promulgated
2 under such orders) or any subsequent Executive
3 order, regulation, or policy concerning access to
4 classified information.

5 “(H) REMEDIES.—

6 “(i) CORRECTIVE ACTION.—If the
7 Board finds that the adverse security
8 clearance or access determination violated
9 paragraph (1), it shall order the agency
10 head to take specific corrective action to
11 return the employee or former employee,
12 as nearly as practicable and reasonable, to
13 the position such employee or former em-
14 ployee would have held had the violation
15 not occurred. Such corrective action shall
16 include reasonable attorney’s fees and any
17 other reasonable costs incurred, and may
18 include compensatory damages not to ex-
19 ceed \$300,000 and back pay and related
20 benefits. The Board may recommend, but
21 may not order, reinstatement or hiring of
22 a former employee. The Board may order
23 that the former employee be treated as
24 though the employee were transferring
25 from the most recent position held when

1 seeking other positions within the executive
2 branch. Any corrective action shall not in-
3 clude the reinstating of any security clear-
4 ance or access determination. The agency
5 head shall take the actions so ordered
6 within 90 days, unless the Director of Na-
7 tional Intelligence, the Secretary of En-
8 ergy, or the Secretary of Defense, in the
9 case of any component of the Department
10 of Defense, determines that doing so would
11 endanger national security.

12 “(ii) RECOMMENDED ACTION.—If the
13 Board finds that reinstating the employee
14 or former employee’s security clearance or
15 access determination is clearly consistent
16 with the interests of national security, it
17 shall recommend such action to the head of
18 the entity selected under subsection (b)
19 and the head of the affected agency.

20 “(I) CONGRESSIONAL NOTIFICATION.—

21 “(i) ORDERS.—Consistent with the
22 protection of sources and methods, at the
23 time the Board issues an order, the Chair-
24 person of the Board shall notify—

1 “(I) the Committee on Homeland
2 Security and Government Affairs of
3 the Senate;

4 “(II) the Select Committee on In-
5 telligence of the Senate;

6 “(III) the Committee on Over-
7 sight and Government Reform of the
8 House of Representatives;

9 “(IV) the Permanent Select Com-
10 mittee on Intelligence of the House of
11 Representatives; and

12 “(V) the committees of the Sen-
13 ate and the House of Representatives
14 that have jurisdiction over the employ-
15 ing agency, including in the case of a
16 final order or decision of the Defense
17 Intelligence Agency, the National
18 Geospatial-Intelligence Agency, the
19 National Security Agency, or the Na-
20 tional Reconnaissance Office, the
21 Committee on Armed Services of the
22 Senate and the Committee on Armed
23 Services of the House of Representa-
24 tives.

1 “(ii) RECOMMENDATIONS.—If the
2 agency head and the head of the entity se-
3 lected under subsection (b) do not follow
4 the Board’s recommendation to reinstate a
5 clearance, the head of the entity selected
6 under subsection (b) shall notify the com-
7 mittees described in subclauses (I) through
8 (V) of clause (i).

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

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

13 “(B) action of the appellate review board
14 established under section 204 of the ~~Whistle-~~
15 ~~blower Protection Enhancement Act of 2011~~
16 *Platts-Van Hollen Whistleblower Protection En-*
17 *hancement Act of 2011.*

18 “(7) PRIVATE CAUSE OF ACTION.—Nothing in
19 this section shall be construed to permit, authorize,
20 or require a private cause of action to challenge the
21 merits of a security clearance determination.”.

22 (c) ACCESS DETERMINATION DEFINED.—Section
23 3001(a) of the Intelligence Reform and Terrorism Preven-
24 tion Act of 2004 (50 U.S.C. 435b(a)) is amended by add-
25 ing at the end the following:

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

3 “(A) is eligible for access to classified in-
4 formation in accordance with Executive Order
5 12968 (60 Fed. Reg. 40245; relating to access
6 to classified information), or any successor
7 thereto, and Executive Order 10865 (25 Fed.
8 Reg. 1583; relating to safeguarding classified
9 information with industry); and

10 “(B) possesses a need to know under that
11 Order.”.

12 (d) RULE OF CONSTRUCTION.—Nothing in section
13 3001 of the Intelligence Reform and Terrorism Prevention
14 Act of 2004 (50 U.S.C. 435b), as amended by this Act,
15 shall be construed to require the repeal or replacement of
16 agency appeal procedures implementing Executive Order
17 12968 (60 Fed. Reg. 40245; relating to classified national
18 security information), or any successor thereto, and Exec-
19 utive Order 10865 (25 Fed. Reg. 1583; relating to safe-
20 guarding classified information with industry), or any suc-
21 cessor thereto, that meet the requirements of section
22 3001(b)(7) of such Act, as so amended.

1 **SEC. 203. REVISIONS RELATING TO THE INTELLIGENCE**
2 **COMMUNITY WHISTLEBLOWER PROTECTION**
3 **ACT.**

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

6 (1) in subsection (b)—

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

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

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

24 (2) by ~~designating~~ *redesignating* subsection (h)
25 as subsection (i); and

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

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

9 (b) CENTRAL INTELLIGENCE AGENCY.—Section
10 17(d)(5) of the Central Intelligence Agency Act of 1949
11 (50 U.S.C. 403q) is amended—

12 (1) in subparagraph (B)—

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

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

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

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

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

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

10 (a) DEFINITIONS.—In this section—

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

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

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

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

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

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

25 (A) means—

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

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

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

15 (b) REGULATIONS.—

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

23 (2) APPELLATE REVIEW BOARD.—Not later
24 than 180 days after the date of enactment of this
25 Act, the Director of National Intelligence, in con-

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

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

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

20 (c) REPORT ON THE STATUS OF IMPLEMENTATION
21 OF REGULATIONS.—Not later than 2 years after the date
22 of enactment of this Act, the Director of National Intel-
23 ligence shall submit a report on the status of the imple-
24 mentation of the regulations promulgated under sub-
25 section (b) to the congressional oversight committees.

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

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

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

13 (A) the Director personally summarily ter-
14 minates the individual; and

15 (B) the Director—

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

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

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

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

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

10 (B) the Director—

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

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

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

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

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

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

13 **TITLE III—EFFECTIVE DATE;**

14 **SAVINGS PROVISION**

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

16 Except as otherwise provided in this Act, this Act

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

18 this Act.

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

20 Nothing in this Act shall be construed to imply any

21 limitation on any protections afforded by any other provi-

22 sion of law to employees and applicants.

Union Calendar No. 504

112TH CONGRESS
2^D SESSION

H. R. 3289

[Report No. 112-508, Part I]

A BILL

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

OCTOBER 1, 2012

The Committees on Select Committee on Intelligence (Permanent Select) and Homeland Security discharged; committed to the Committee of the Whole House on the State of the Union and ordered to be printed