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HOUSE OF REPRESENTATIVES

REPT. 110–42
Part 1

WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2007

MARCH 9, 2007.—Ordered to be printed

Mr. WAXMAN, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

[To accompany H.R. 985]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 985) to amend title 5, United States Code, to clarify which disclosures of information are protected from prohibited personnel practices; to require a statement in nondisclosure policies, forms, and agreements to the effect that such policies, forms, and agreements are consistent with certain disclosure protections, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

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59–006

The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 4, line 4, strike "employee" and insert "employee or applicant".

Page 10, line 12, strike "controversy;" and insert "controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury;".

Page 10, after line 18, insert as a flush left sentence the following:

> An appeal from a final decision of a district court in an action under this paragraph may, at the election of the appellant, be taken to the Court of Appeals for the Federal Circuit (which shall have jurisdiction of such appeal), in lieu of the United States court of appeals for the circuit embracing the district in which the action was brought.

Page 11, line 20, strike "Circuit." and insert "Circuit, except that in the case of a prohibited personnel practice described in section 2302(b)(8) (other than a case that, disregarding this paragraph, would otherwise be subject to paragraph (2)), such term means the United States Court of Appeals for the Federal Circuit and any United States court of appeals having jurisdiction over appeals from any United States district court which, under section 1221(k)(2), would be an appropriate United States district court for purposes of such prohibited personnel practice.".

Page 11, after line 20, insert the following (and redesignate the succeeding subsection accordingly):

> (c) COMPENSATORY DAMAGES.—Section 1221(g)(1)(A)(ii) of such title 5 is amended by striking all after "travel expenses," and inserting "any other reasonable and foreseeable consequential damages, and compensatory damages (including attorney's fees, interest, reasonable expert witness fees, and costs).".

Page 14, line 22, strike all after "travel expenses," through the period on line 24, and insert "any other reasonable and foreseeable consequential damages, and compensatory damages (including attorney's fees, interest, reasonable expert witness fees, and costs).".

Page 16, line 21, strike "controversy." and insert "controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.".

Page 16, line 21, strike "A petition" and all that follows through line 24, and insert the following: "An appeal from a final decision of a district court in an action under this paragraph may, at the election of the appellant, be taken to the Court of Appeals for the Federal Circuit (which shall have jurisdiction of such appeal), in lieu of the United States court of appeals for the circuit embracing the district in which the action was brought.".

Page 17, line 7, strike "Circuit." and insert "Circuit or any United States court of appeals having jurisdiction over appeals from any United States district court which, under section 1221(k)(2), would be an appropriate United States district court.".

Page 17, lines 18 and 21, strike "plaintiff" and insert "employee, former employee, or applicant".

Page 17, lines 19 and 24, strike "plaintiff's" and insert "employee's, former employee's, or applicant's".

Page 19, line 7, strike "employee" and insert "employee, former employee, or applicant for employment".

Page 23, beginning on line 11, strike "controversy." and insert "controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.".

Page 24, line 14, strike "controversy." and insert "controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.".

PURPOSE AND SUMMARY

H.R. 985, the Whistleblower Protection Enhancement Act, was introduced February 12, 2007, by Reps. Henry A. Waxman, Todd Platts, Chris Van Hollen, and Tom Davis. The legislation clarifies and expands federal employee and contractor whistleblower protection laws.

The bill extends whistleblower protections to federal employees who work on national security issues; strengthens whistleblower rights for federal contractors; ensures that employees of the Transportation Security Agency (TSA), in particular its baggage screeners, have whistleblower rights; provides explicit protections for federal employees who report instances where federal research is suppressed or distorted for political reasons; overrides several court and administrative decisions that undermined existing whistleblower protections; and provides whistleblowers access to federal district courts if the Merit Systems Protection Board (MSPB) or the Inspector General (IG) does not take action on their claims within 180 days.

BACKGROUND AND NEED FOR LEGISLATION

A key component of government accountability is whistleblower protection. Federal employees are on the inside. They can see when taxpayer dollars are wasted and are often the first to see the signals of corrupt or incompetent management.

Unfortunately, whistleblowers too often receive retaliation rather than recognition for their courage. They need adequate protections so they are not deterred from stepping forward to blow the whistle.

There are many federal government workers who deserve whistleblower protection, but perhaps none more than national security officials. These are federal government employees who have undergone extensive background investigations, obtained security clearances, and handled classified information on a routine basis. Our government has concluded that they can be trusted to work on the most sensitive law enforcement and intelligence projects, yet these officials receive no protection when they come forward to identify abuses that are undermining our national security efforts. The Committee has documented numerous cases of retaliation against national security officials seeking to expose wrongdoing. This bill seeks to give these national security officials needed whistleblower protections.

In addition, employees of federal contractors can also be subject to retaliation. Under current law, contract employees can protest

company retaliation but have no remedy if the agency refuses to act. This bill gives them an avenue to seek a remedy in court.

TSA baggage screeners currently do not have whistleblower rights. In Schott v. Department of Homeland Security, the MSPB ruled on August 12, 2004, that the "Board jurisdiction over Screeners . . . is not found in the HSA [Homeland Security Act]." To remedy this situation, this bill extends to screeners the same protections that all other Department of Homeland Security employees enjoy. TSA workers could, with full whistleblower protections of this bill, report violations of law, mismanagement, waste, abuse of authority, or dangers to public health and safety, including those regarding or relating solely to homeland or national security.

The Committee has documented numerous examples of the political manipulation of science in federal agencies, including suppression of research or data that is perceived to conflict with Administration policy; appointment of advisory committee members on the basis of political affiliation or views; and the dissemination of false or misleading scientific information. While an employee may reasonably believe such actions to constitute "abuse of authority," already a protected disclosure category, the Office of Special Counsel (OSC) has consistently denied whistleblower protections to employees attempting to draw attention to political interference with science. This bill clarifies that "abuse of authority" should be interpreted to include actions that compromise the validity and integrity of federal science.

This bill also responds to decisions by the U.S. Court of Appeals for the Federal Circuit and the MSPB limiting the scope of disclosures covered under the federal whistleblower protection statute. Specifically, it clarifies that "any" disclosure means "without restriction as to time, place, form, motive, context, or prior disclosure" and includes formal or informal communication. In addition, the bill provides that a whistleblower could rebut the presumption that a federal official performed his or her duties in accordance with the law by providing substantial evidence to the contrary. Some prior court decisions have required a higher standard, irrefutable proof, to rebut this presumption. Furthermore, the bill requires every nondisclosure policy, form, or agreement of the government to contain the specific addendum set forth in the legislation informing employees of their rights, and makes it a prohibited personnel practice for any manager to implement or enforce any nondisclosure policy, form, or agreement that does not contain the specific statement mandated in the bill.

Too often, a whistleblower brings his or her case to the OSC or the MSPB and the case lingers in limbo or a determination occurs so long after the alleged prohibited practice occurred that the fired employee has been without a paycheck for years. This bill allows whistleblowers access to federal district courts for a trial by jury if the MSPB (or the IG for cases involving national security officials or contractor whistleblowers) does not take action on their claims within 180 days.

Finally, this bill permits the Federal Circuit or any other circuit court to hear whistleblower cases, ending the Federal Circuit's exclusive jurisdiction over whistleblower appeals. It is the decisions of the Federal Circuit that have created the need for many of the provisions of this bill. There is no reason that whistleblower cases

need one specialized court as in patent law cases. To the contrary, whistleblower protection law should benefit from consideration in all circuits. This bill allows employees to have their cases heard in places were they live and increases opportunities for those cases to be heard eventually by the Supreme Court.

LEGISLATIVE HISTORY

H.R. 985, legislation to strengthen the federal employee whistleblower protection laws, was introduced on February 12, 2007, and referred to the Committee on Oversight and Government Reform. Similar legislation, H.R. 1317 and section 8 of H.R. 5112, was introduced in the 109th Congress and unanimously reported by the Committee. H.R. 985 builds on that legislation as well on earlier versions introduced in the 106th, 107th, and 108th Congresses.

The Committee held a hearing on February 13, 2007, on H.R. 985. The witnesses were William G. Weaver, PhD, Associate Professor, University of Texas at El Paso, representing the National Security Whistleblower Coalition; Nick Schwellenbach, Investigator, Project on Government Oversight; Tom Devine, Legal Director, Government Accountability Project; and Mark Zaid, Attorney at Law, Krieger and Zaid, PLLC. Chairman McPhie of the MSPB and Stephen Kohn of the National Whistleblower Center submitted testimony for the record.

The Committee held a markup to consider H.R. 985 on February 15, 2007, and ordered the bill to be reported, as amended, by a roll call vote of 280.

SECTION-BY-SECTION

Section 1. Short title

This section provides that the short title of H.R. 985 is the "Whistleblower Protection Enhancement Act of 2007."

Section 2. Clarification of disclosures covered

This section clarifies current law to state that it applies to any disclosure, whether made as part of the duties of an employee, former employee, or applicant (hereinafter collectively referred to as "employee"); concerns consequences of policy or individual misconduct; is oral or written; or is made to any audience inside or outside an agency; and without restriction to time, form, motive, context, or prior disclosure. These changes are intended as a response to Federal Circuit decisions that have limited the scope of disclosures permitted by law.

Section 3. Covered disclosures

This section defines "disclosure" to include both formal and informal communications where the employee reasonably believes that the disclosure evidences any violation of law, rule, or regulation or gross mismanagement, waste, abuse of authority, or specific danger to public health or safety. However, a simple policy disagreement would not be considered a disclosure. This change is intended as a response to Federal Circuit decisions suggesting that only a formal communication may qualify as a disclosure.

Section 4. Rebuttable presumption

This section codifies the reasonable belief test for all whistleblower disclosures: "whether a disinterested observer with knowledge of the essential facts known to or readily ascertainable by the employee, former employee or applicant could reasonably conclude that the actions of the government evidence such violations, mismanagement, waste, abuse, or danger." In addition, this section provides that any presumption that the public official whose misconduct has been disclosed by the whistleblower acted in good faith may be rebutted by "substantial evidence" rather than "irrefragable proof." The Federal Circuit had required the standard "irrefragable proof" in a previous decision.

Section 5. Nondisclosure policies, forms, and agreements

Subsection (a) states that implementation or enforcement of any nondisclosure policy, form, or agreement is a prohibited personnel practice.

Subsection (b) prohibits any agency from implementing or enforcing any nondisclosure policy, form, or agreement, if the policy, form, or agreement does not contain specified language notifying the employee of his or her rights. Also, this subsection prohibits investigation, other than any ministerial or nondiscretionary fact-finding activities necessary for the agency to perform its mission, of any employee because of any activity protected under section 2302.

Section 6. Exclusion of agencies by the President

This section requires the removal of any agency or unit by the President from whistleblower protection coverage be made prior to any personnel action being taken against a whistleblower at that agency.

Section 7. Disciplinary action

This section states that the MSPB can discipline an employee if it finds that the protected activity was a "primary motivating factor" in the employee's action. Under current MSPB case law, in order for the MSPB to discipline an employee, the OSC has to demonstrate that an adverse personnel action would not have occurred "but for" the whistleblower's protected activity.

Section 8. GAO study on revocation of security clearances

Subsection (a) requires GAO to conduct a study of security clearance revocations.

Subsection (b) requires that GAO report to the Committee and the Committee on Homeland Security and Governmental Affairs of the Senate within 270 days of the bill's enactment.

Section 9. Alternative recourse

Subsection (a) provides that an employee who seeks corrective action (or on behalf of whom corrective action is sought) from the MSPB with respect to a prohibited personnel practice described in section 2302(b)(8) may bring an action in federal district court for a trial by jury (1) if the MSPB does not take final action on the claims within 180 days or (2) within 90 days of final action by the MSPB. The employee could file his or her action in the United

States district court for the district where the alleged prohibited personnel practice occurred, the district in which employment records are maintained and administered, or the district in which the whistleblower resides. The district court is to apply the standards and award the relief in the same manner as the MSPB. The district court decision may be appealed to the U.S. court of appeals having jurisdiction over appeals from the district court in which the case was brought.

Subsection (b) allows a whistleblower to seek review of a final order or decision of the MSPB in the Federal Circuit or the circuit of appeals for the circuit where the alleged prohibited personnel practice occurred, the circuit in which the employment records are maintained and administered, or the circuit in which the whistleblower resides.

Subsection (c) provides that the MSPB can award compensatory damages including interest and expert witness fees.

Subsection (d) prohibits an employee who has filed a case in district court under subsection (a) from also appealing an order or decision of the MSPB directly to a court of appeals.

Section 10. National security whistleblower rights

Subsection (a) provides that, in addition to rights he or she may already have, an employee of a covered agency may not be discharged or discriminated against, including by denying, suspending, or revoking a security clearance or otherwise restricting access to classified or sensitive information, as a reprisal for disclosing covered information to an authorized Member of Congress, authorized executive official, or the IG of the covered agency. A disclosure means any disclosure, whether that disclosure is made as part of an employee's, former employee's, or applicant's duties, concerns consequences of policy or individual misconduct, is oral or written, or is made to any audience inside or outside an agency, without restriction to time, form, motive, context, or prior disclosure.

Subsection (b) provides that an employee, former employee, or applicant who believes he or she has been the subject of a reprisal prohibited by subsection (a) may submit a complaint to the IG and the agency head. The IG will investigate the complaint and report findings to the employee and the agency head within 120 days.

Subsection (c) provides that within 180 days of filing of the complaint, the agency head, taking into account the IG report, will determine whether the employee has been subjected to a reprisal prohibited by subsection (a) and will either issue an order denying relief or implement corrective action to return the employee, as nearly as possible, to his pre-reprisal condition, including voiding any action denying, suspending, or revoking a security clearance or other access to classified or sensitive information, ordering back pay, benefits, medical costs, and travel expenses and paying consequential damages and compensatory damages including attorney's fees, interest, reasonable expert fees, and costs. If the agency head issues an order denying relief, he is required to issue a report to the employee detailing the reasons for the denial.

The subsection further provides that where corrective action by an agency head involves voiding a suspension or revocation of a security clearance or other access to sensitive or classified informa-

tion, the agency head may re-initiate procedures to suspend the clearance or restrict access only if the new actions are based exclusively on national security concerns and not related to the original reprisal. In this case, the agency head is required to issue a report to the IG and authorized members of Congress explaining how the actions are based exclusively on national security concerns, provide periodic updates on the actions, and respond promptly to inquiries from authorized members of Congress on the procedure status.

The subsection also provides that an employee may seek corrective action, in federal district court for a trial by jury, if (1) the agency head has not made a determination within 180 days or (2) within 90 days of the order issuance. The employee could file his or her action in the United States district court for the district where the alleged prohibited personnel practice occurred, for the district in which the employment records are maintained and administered, or for the district in which the whistleblower resides. The district court decision may be appealed to the U.S. court of appeals having jurisdiction over appeals from the district court in which the case was brought.

In addition, the employee may, within 60 days, have any order issued under this section reviewed by the Federal Circuit or court of appeals for the circuit where the alleged prohibited personnel practice occurred, the circuit in which the employment records are maintained and administered, or the circuit in which the whistleblower resides.

Also, this subsection contains limitations on the executive agency's assertion of the so-called "state secrets privilege" in actions for damages or relief under this section. Specifically, if the assertion of this privilege prevents the employee from establishing an element in support of his or her claim, the court will resolve the disputed issue of fact of law in favor of the employee. When the privilege is asserted, the agency head must issue a report to authorized Members of Congress describing why it was asserted and why the court cannot protect the classified information in order to hear the issue.

Subsection (d) provides that an employee in a non-covered agency should, for the purpose of disclosing covered classified or sensitive information, be entitled to the same protections as if the agency were a covered agency. The intention of this section is to provide whistleblower rights to those individuals whose job functions make them eligible for the protections of this section even though their agencies are not specified such as intelligence analysts and information sharing employees with access to classified information within the Department of Homeland Security's Office of Intelligence and Analysis or Foreign Service Diplomatic Security Special Agents at the Department of State.

Subsection (e) provides that nothing in this section is to be construed to authorize discharge, demotion, or discrimination against an employee for a disclosure other than one protected by this section or to limit a right or remedy otherwise available to the employee, former employee, or applicant, including any rights or remedies available under the Lloyd-La Follette Act.

Subsection (f) contains definitions.

The term "covered information" means information, including classified or sensitive information, that an employee, former em-

ployee, or applicant, reasonably believes provides evidence of any violation of any law, rule, or regulation, or gross mismanagement, or waste of funds, abuse of authority, or substantial and specific danger to public health or safety.

The term "covered agencies" means the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, National Security Agency, the National Reconnaissance Office and any other agency or element thereof involved in foreign intelligence or counterintelligence activities as determined by the President.

The term "authorized Member of Congress" means a member of the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs and the committees of the House or Senate that have oversight over the program about which the information is disclosed. Members of Congress often receive communications through their staff. A communication to a staff member of an authorized Member should be considered a communication with the authorized Member if the staff has the appropriate clearances and the purpose of the communication is to convey information to the authorized Member.

The term "authorized office of an executive agency" is to be defined by the Office of Personnel Management. However, this definition will include the immediate supervisor of the employee or former employee and each successive supervisor (immediately above such immediate supervisor) in the chain of authority as well as the head, general counsel, and ombudsman of the agency.

The term "authorized official of the Department of Justice" means any employee of the Department of Justice whose duties include the investigation, enforcement, or prosecution of any law or regulation.

Section 11. Enhancement of contractor employee whistleblower protections

Subsection (a) requires that the head of a civilian executive agency make a determination, within 180 days after the submission of a complaint by a contractor employee, about whether the contractor concerned has subjected the contractor employee to a reprisal. The agency head will either issue an order denying relief or take corrective action. If the head of the executive agency fails to issue an order or take correction action within 180 days, the contractor employee may bring an action in district court to seek compensatory and other relief.

Subsection (b) applies the requirements of subsection (a) to contractor employees under the Department of Defense and National Aeronautics and Space Administration contracts.

Section 12. Prohibited personnel practices affecting employees of the Transportation Security Administration

This section grants employees at TSA, including those carrying out screener functions, the same whistleblower protections as other federal employees. This section is intended to be a response to the MSPB decision in Schott v. Department of Homeland Security

where the MSPB ruled TSA screeners did not have whistleblower rights.

Section 13. Clarification of whistleblower rights relating to scientific and other research

This section clarifies that the term "abuse of authority" includes political interference with science, such as actions that compromise the validity or accuracy of federally funded research or analysis and the dissemination of false or misleading scientific, medical, or technical information. The Committee is aware of OSC determinations denying whistleblower protections to employees attempting to disclose political interference with science. This change is intended to confirm that these disclosures are to be protected.

Section 14. Effective date

This section provides that the provisions of H.R. 985 takes effect 30 days after date of enactment of the Act.

EXPLANATION OF AMENDMENTS

The following amendments were adopted in Committee:

Mr. Van Hollen and Mr. Platts offered an amendment, passed by voice vote, to allow a whistleblower to file an appeal of a whistleblower case in the Federal Circuit or the court of appeals for the circuit where the alleged prohibited personnel practice occurred, where the employment records are maintained and administered, or where the whistleblower resides. Mr. Issa raised a point of order against this amendment claiming it was not germane because it regarded issues in the jurisdiction of the Committee on the Judiciary. After consulting the House Parliamentarian, the Chair ruled against Mr. Issa's point of order explaining that the entire bill deals with rights of redress and appeal and the amendment does not amend title 18 of the U.S. Code but only grants a right to appeal.

Mr. Braley offered an amendment, which passed by voice vote, clarifying that the bill allows for jury trials at the district court level.

Mr. Braley offered an amendment, which passed by voice vote, clarifying what types of damages a whistleblower can recover if the MSPB or a district court rules in his or her favor. Under the original text, the words "compensatory damages" were used in one section but not in another. The Braley amendment clarifies that compensatory damages are available to all federal employees and contractors. Further, it details some of the items the MSPB or a district court could award including interest and expert witness fees.

COMMITTEE CONSIDERATION

On Wednesday, February 14, 2007, the Committee ordered the bill reported to the House by a recorded vote.

ROLLCALL VOTES

Roll Call

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
110TH CONGRESS
ROLL CALL

Passed by Roll Call

No: H.R. 985, the Whistleblower Date: 2/14/07

DESCRIPTION: protection Enhancement Act of 2007
Amendment offered by Mr. Van Hollen and Mr. Platts

Democrats	Aye	No	Present	Republicans	Aye	No	Present
MR. WAXMAN *Chairman)*	✓			MR. DAVIS (VA) *(Ranking)*	✓		
MR. LANTOS				MR. BURTON	✓		
MR. TOWNS	✓			MR. SHAYS	✓		
MR. KANJORSKI	✓			MR. McHUGH	✓		
MS. MALONEY	✓			MR. MICA			
MR. CUMMINGS	✓			MR. SOUDER			
MR. KUCINICH	✓			MR. PLATTS			
MR. DAVIS (IL)	✓			MR. CANNON			
MR. TIERNEY	✓			MR. DUNCAN	✓		
MR. CLAY	✓			MR. TURNER	✓		
MS. WATSON	✓			MR. ISSA	✓		
MR. LYNCH	✓			MR. MARCHANT	✓		
MR. HIGGINS				MR. WESTMORELAND			
MR. YARMUTH	✓			MR. McHENRY			
MR. BRALEY	✓			MS. FOXX			
MS. NORTON	✓			MR. BILBRAY			
MS. McCOLLUM	✓			MR. SALI			
MR. COOPER	✓			(Vacancy)			
MR. Van HOLLEN	✓						
MR. HODES	✓						
MR. MURPHY (CT)	✓						
MR. SARBANES							
MR. WELCH	✓						

Totals: Ayes 28 Nays 0 Present 0

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill provides enhanced transparency to the operations of the executive branch. As such this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress to enact the law proposed by H.R. 985. Article I, Section 8, Clause 18 of the Constitution of the United States grants the Congress the power to enact this law.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement whether the provisions of the reported bill include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

H.R. 1255 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 985. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report

a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 985 from the Director of Congressional Budget Office:

MARCH 9, 2007.

Hon. HENRY A. WAXMAN,
Chairman, Committee on Oversight and Government Reform, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 985, the Whistleblower Protection Enhancement Act of 2007.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

PETER R. ORSZAG.

Enclosure.

H.R. 985—Whistleblower Protection Enhancement Act of 2007

H.R. 985 would amend the Whistleblower Protection Act (WPA), clarify current law, and give new protections to federal employees and contractors who report abuse, fraud, and waste involving government activities. The legislation also would make several changes to the laws governing the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC). In addition, the legislation would require a study by the Government Accountability Office (GAO) regarding the revocation of security clearances.

CBO estimates that implementing H.R. 985 would cost $5 million a year and about $25 million over the 2008–2012 period, assuming appropriation of the necessary amounts. Enacting the legislation could affect direct spending, but we estimate any amounts would not be significant in any year. Enacting the bill would not affect revenues. H.R. 985 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

Under current law, the OSC investigates complaints regarding reprisals against federal employees that inform authorities of fraud or other improprieties in the operation of federal programs (such individuals are known as whistleblowers). The OSC seeks corrective action for valid complaints. If agencies fail to take corrective action, the OSC or the employee can pursue a case through the MSPB for resolution. Whistleblower cases may also be reviewed by the U.S. Court of Appeals.

According to the MSPB and OSC, there generally are between 400 and 500 whistleblower cases per year. Major provisions of H.R. 985 would expand the definition of protected whistleblowing, and

extend employee protections to federal contractors, Transportation Security Administration passenger and baggage screeners, and federal employees working on scientific research or national security issues. The bill would allow for access to jury trials for federal employees and contractors in whistleblower cases, authorize the payment of compensatory damages for employees involved in such cases, and remove the exclusive jurisdiction of the U.S. Court of Appeals over whistleblower appeals.

In 2007, the MSPB received an appropriation of $36 million, and the OSC received $15 million. CBO expects that the bill's changes in whistleblower laws would increase the workload of the MSPB and OSC. Based on information from those agencies, we estimate that implementing this bill would cost up to $3 million a year to cover additional staffing, travel, and security clearance reviews.

When implementing corrective actions to settle an employment dispute between the federal government and its employees regarding prohibited personnel practices, federal agencies are required to spend appropriated funds to pay for an employee's attorney, back pay, and any associated travel and medical costs. Under H.R. 985, federal employees and contractors could also receive compensatory damages for employment disputes.

CBO cannot estimate the cost of compensatory damage awards in such cases because the amount awarded would depend on the particular circumstances of each case and the frequency of cases involving such damages. Recent settlement amounts under the Whistleblower Protection Act have ranged from $20,000 to $200,000. While it is uncertain how often compensatory damages would be awarded in such cases, OSC and MSPB believe such awards could more than double the cost of some settlements. Hence, CBO expects that this provision would add a few million dollars each year to the cost of agency settlements, which are paid from individual agency appropriations.

In addition, the legislation would require the GAO to prepare a study within nine months on security clearance revocations since 1996. Based on the cost of similar reports, CBO estimates that preparing the report would cost less than $500,000 over the 2007–2008 period, assuming the availability of appropriated funds.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

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PART II—CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

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CHAPTER 12—MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

* * * * * * *

SUBCHAPTER II—OFFICE OF SPECIAL COUNSEL

* * * * * * *

§ 1215. Disciplinary action

(a)(1) * * *

* * * * * * *

[(3) A final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000.]

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

(i) disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, or reprimand;

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

(iii) any combination of disciplinary actions described under clause (i) and an assessment described under clause (ii).

(B) In any case in which the Board finds that an employee has committed a prohibited personnel practice under paragraph (8) or (9) of section 2302(b), the Board shall impose disciplinary action if the Board finds that the activity protected under such paragraph (8) or (9) (as the case may be) was the primary motivating factor, unless that employee demonstrates, by a preponderance of the evidence, that the employee would have taken, failed to take, or threatened to take or fail to take the same personnel action, in the absence of such protected activity.

* * * * * * *

SUBCHAPTER III—INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL CASES

§ 1221. Individual right of action in certain reprisal cases

(a) * * *

* * * * * * *

(g)(1)(A) If the Board orders corrective action under this section, such corrective action may include—

(i) * * *

(ii) back pay and related benefits, medical costs incurred, travel expenses, [and any other reasonable and foreseeable consequential changes.] *any other reasonable and foreseeable consequential damages, and compensatory damages (including*

attorney's fees, interest, reasonable expert witness fees, and costs).

* * * * * * *

(h)(1) * * *

* * * * * * *

(3) Judicial review under this subsection shall not be available with respect to any decision or order as to which the employee, former employee, or applicant has filed a petition for judicial review under subsection (k).

* * * * * * *

(k)(1) If, in the case of an employee, former employee, or applicant for employment who seeks corrective action (or on behalf of whom corrective action is sought) from the Merit Systems Protection Board based on an alleged prohibited personnel practice described in section 2302(b)(8), no final order or decision is issued by the Board within 180 days after the date on which a request for such corrective action has been duly submitted (or, in the event that a final order or decision is issued by the Board, whether within that 180-day period or thereafter, then, within 90 days after such final order or decision is issued, and so long as such employee, former employee, or applicant has not filed a petition for judicial review of such order or decision under subsection (h))—

(A) such employee, former employee, or applicant may, after providing written notice to the Board, bring an action at law or equity for de novo review in the appropriate United States district court, which shall have jurisdiction over such action without regard to the amount incontroversy, and which action shall, at the request of either party to such action, be tried by the court with a jury; and

(B) in any such action, the court—

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

(ii) may award any relief which the court considers appropriate, including any relief described in subsection (g).

An appeal from a final decision of a district court in an action under this paragraph may, at the election of the appellant, be taken to the Court of Appeals for the Federal Circuit (which shall have jurisdiction of such appeal), in lieu of the United States court of appeals for the circuit embracing the district in which the action was brought.

(2) For purposes of this subsection, the term "appropriate United States district court", as used with respect to an alleged prohibited personnel practice, means the United States district court for the district in which the prohibited personnel practice is alleged to have been committed, the judicial district in which the employment records relevant to such practice are maintained and administered, or the judicial district in which resides the employee, former employee, or applicant for employment allegedly affected by such practice.

(3) This subsection applies with respect to any appeal, petition, or other request for corrective action duly submitted to the Board, whether pursuant to section 1214(b)(2), the preceding provisions of

this section, section 7513(d), or any otherwise applicable provisions of law, rule, or regulation.

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PART III—EMPLOYEES

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Subpart A—General Provisions

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CHAPTER 23—MERIT SYSTEM PRINCIPLES

Sec.
2301. Merit system principles.
* * * * * * *
[2304. Responsibility of the Government Accountability Office.
[2305. Coordination with certain other provisions of law.]
2303a. National security whistleblower rights.
2304. Prohibited personnel practices affecting the Transportation Security Administration.
2305. Responsibility of the Government Accountability Office.
2306. Coordination with certain other provisions of law.
* * * * * * *

§ 2302. Prohibited personnel practices

(a)(1) * * *

(2) For the purpose of this section—

(A) "personnel action" means—

(i) * * *

* * * * * * *

(x) a decision to order psychiatric testing or examination; [and]

(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and

[(xi)] *(xii)* any other significant change in duties, responsibilities, or working conditions;

* * * * * * *

(B) "covered position" means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action—

(i) * * *

(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration; [and]

(C) "agency" means an Executive agency and the Government Printing Office, but does not include—

(i) * * *

[(ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Se-

curity Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or]

(ii)(I) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, or the National Security Agency; or

(II) as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, if the determination (as that determination relates to a personnel action) is made before that personnel action; or

(iii) the Government Accountability Office[.]*; and*

(D) "disclosure" means a formal or informal communication, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences—

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

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

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) * * *

* * * * * * *

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant [which the employee or applicant reasonably believes evidences]*, without restriction as to time, place, form, motive, context, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties, that the employee or applicant reasonably believes is evidence of—*

(i) [a violation] *any violation* of any law, rule, or regulation, or

* * * * * * *

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information [which the employee or applicant reasonably believes evidences]*, without restriction as to time, place, form, motive, context, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties, of information that the employee or applicant reasonably believes is evidence of—*

(i) [a violation] *any violation (other than a violation of this section)* of any law, rule, or regulation, or

* * * * * * *

(11)(A) * * *

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement; [or]

(12) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code (governing disclosures to Congress by members of the military); section 2302(b)(8) of title 5, United States Code (governing disclosures of illegality, waste, fraud, abuse, or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 and following) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosures that could compromise national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by such Executive order and such statutory provisions are incorporated into this agreement and are controlling.";

(13) conduct, or cause to be conducted, an investigation, other than any ministerial or nondiscretionary factfinding activities necessary for the agency to perform its mission, of an employee or applicant for employment because of any activity protected under this section; or

[(12)] *(14)* take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress. *For purposes of paragraph (8), any presumption relating to the performance of a duty by an employee who has authority to take, direct others to take, recommend, or approve any personnel action may be rebutted by substantial evidence. For purposes of paragraph (8), a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to or readily ascertainable by the employee or applicant could reasonably conclude that the actions of*

the Government evidence such violations, mismanagement, waste, abuse, or danger.

* * * * * * *

(f) As used in section 2302(b)(8), the term "abuse of authority" includes—

(1) any action that compromises the validity or accuracy of federally funded research or analysis; and

(2) the dissemination of false or misleading scientific, medical, or technical information.

* * * * * * *

§ 2303a. National security whistleblower rights

(a) PROHIBITION OF REPRISALS.—

(1) IN GENERAL.—In addition to any rights provided in section 2303 of this title, title VII of Public Law 105–272, or any other provision of law, an employee, former employee, or applicant for employment in a covered agency may not be discharged, demoted, or otherwise discriminated against (including by denying, suspending, or revoking a security clearance, or by otherwise restricting access to classified or sensitive information) as a reprisal for making a disclosure described in paragraph (2).

(2) DISCLOSURES DESCRIBED.—A disclosure described in this paragraph is any disclosure of covered information which is made—

(A) by an employee, former employee, or applicant for employment in a covered agency (without restriction as to time, place, form, motive, context, or prior disclosure made to any person by an employee, former employee, or applicant, including a disclosure made in the course of an employee's duties); and

(B) to an authorized Member of Congress, an authorized official of an Executive agency, an authorized official of the Department of Justice, or the Inspector General of the covered agency in which such employee is employed, such former employee was employed, or such applicant seeks employment.

(b) INVESTIGATION OF COMPLAINTS.—An employee, former employee, or applicant for employment in a covered agency who believes that such employee, former employee, or applicant has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General and the head of the covered agency. The Inspector General shall investigate the complaint and, unless the Inspector General determines that the complaint is frivolous, submit a report of the findings of the investigation within 120 days to the employee, former employee, or applicant and to the head of the covered agency.

(c) REMEDY.—

(1) Within 180 days of the filing of the complaint, the head of the covered agency shall, taking into consideration the report of the Inspector General under subsection (b) (if any), determine whether the employee, former employee, or applicant has been subjected to a reprisal prohibited by subsection (a), and shall either issue an order denying relief or shall implement correc-

tive action to return the employee, former employee, or applicant, as nearly as possible, to the position he would have held had the reprisal not occurred, including voiding any directive or order denying, suspending, or revoking a security clearance or otherwise restricting access to classified or sensitive information that constituted a reprisal, as well as providing back pay and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, and compensatory damages (including attorney's fees, interest, reasonable expert witness fees, and costs). If the head of the covered agency issues an order denying relief, he shall issue a report to the employee, former employee, or applicant detailing the reasons for the denial.

(2)(A) If the head of the covered agency, in the process of implementing corrective action under paragraph (1), voids a directive or order denying, suspending, or revoking a security clearance or otherwise restricting access to classified or sensitive information that constituted a reprisal, the head of the covered agency may re-initiate procedures to issue a directive or order denying, suspending, or revoking a security clearance or otherwise restricting access to classified or sensitive information only if those re-initiated procedures are based exclusively on national security concerns and are unrelated to the actions constituting the original reprisal.

(B) In any case in which the head of a covered agency re-initiates procedures under subparagraph (A), the head of the covered agency shall issue an unclassified report to its Inspector General and to authorized Members of Congress (with a classified annex, if necessary), detailing the circumstances of the agency's re-initiated procedures and describing the manner in which those procedures are based exclusively on national security concerns and are unrelated to the actions constituting the original reprisal. The head of the covered agency shall also provide periodic updates to the Inspector General and authorized Members of Congress detailing any significant actions taken as a result of those procedures, and shall respond promptly to inquiries from authorized Members of Congress regarding the status of those procedures.

(3) If the head of the covered agency has not made a determination under paragraph (1) within 180 days of the filing of the complaint (or he has issued an order denying relief, in whole or in part, whether within that 180-day period or thereafter, then, within 90 days after such order is issued), the employee, former employee, or applicant for employment may bring an action at law or equity for de novo review to seek any corrective action described in paragraph (1) in the appropriate United States district court (as defined by section 1221(k)(2)), which shall have jurisdiction over such action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury. An appeal from a final decision of a district court in an action under this paragraph may, at the election of the appellant, be taken to the Court of Appeals for the Federal Circuit (which shall have jurisdiction of such appeal), in lieu of the United

States court of appeals for the circuit embracing the district in which the action was brought.

(4) An employee, former employee, or applicant adversely affected or aggrieved by an order issued under paragraph (1), or who seeks review of any corrective action determined under paragraph (1), may obtain judicial review of such order or determination in the United States Court of Appeals for the Federal Circuit or any United States court of appeals having jurisdiction over appeals from any United States district court which, under section 1221(k)(2), would be an appropriate United States district court. No petition seeking such review may be filed more than 60 days after issuance of the order or the determination to implement corrective action by the head of the agency. Review shall conform to chapter 7.

(5)(A) If, in any action for damages or relief under paragraph (3) or (4), an Executive agency moves to withhold information from discovery based on a claim that disclosure would be inimical to national security by asserting the privilege commonly referred to as the "state secrets privilege", and if the assertion of such privilege prevents the employee, former employee, or applicant from establishing an element in support of the employee's, former employee's, or applicant's claim, the court shall resolve the disputed issue of fact or law in favor of the employee, former employee, or applicant, provided that an Inspector General investigation under subsection (b) has resulted in substantial confirmation of that element, or those elements, of the employee's, former employee's, or applicant's claim.

(B) In any case in which an Executive agency asserts the privilege commonly referred to as the "state secrets privilege", whether or not an Inspector General has conducted an investigation under subsection (b), the head of that agency shall, at the same time it asserts the privilege, issue a report to authorized Members of Congress, accompanied by a classified annex if necessary, describing the reasons for the assertion, explaining why the court hearing the matter does not have the ability to maintain the protection of classified information related to the assertion, detailing the steps the agency has taken to arrive at a mutually agreeable settlement with the employee, former employee, or applicant for employment, setting forth the date on which the classified information at issue will be declassified, and providing all relevant information about the underlying substantive matter.

(d) APPLICABILITY TO NON-COVERED AGENCIES.—An employee, former employee, or applicant for employment in an Executive agency (or element or unit thereof) that is not a covered agency shall, for purposes of any disclosure of covered information (as described in subsection (a)(2)) which consists in whole or in part of classified or sensitive information, be entitled to the same protections, rights, and remedies under this section as if that Executive agency (or element or unit thereof) were a covered agency.

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

(1) to authorize the discharge of, demotion of, or discrimination against an employee, former employee, or applicant for employment for a disclosure other than a disclosure protected by subsection (a) or (d) of this section or to modify or derogate

from a right or remedy otherwise available to an employee, former employee, or applicant for employment; or

(2) to preempt, modify, limit, or derogate any rights or remedies available to an employee, former employee, or applicant for employment under any other provision of law, rule, or regulation (including the Lloyd-La Follette Act).

No court or administrative agency may require the exhaustion of any right or remedy under this section as a condition for pursuing any other right or remedy otherwise available to an employee, former employee, or applicant under any other provision of law, rule, or regulation (as referred to in paragraph (2)).

(f) DEFINITIONS.—For purposes of this section—

(1) the term "covered information", as used with respect to an employee, former employee, or applicant for employment, means any information (including classified or sensitive information) which the employee, former employee, or applicant reasonably believes evidences—

(A) any violation of any law, rule, or regulation; or

(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(2) the term "covered agency" means—

(A) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and the National Reconnaissance Office; and

(B) any other Executive agency, or element or unit thereof, determined by the President under section 2302(a)(2)(C)(ii)(II) to have as its principal function the conduct of foreign intelligence or counterintelligence activities;

(3) the term "authorized Member of Congress" means a member of the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the committees of the House of Representatives or the Senate that have oversight over the program about which the covered information is disclosed;

(4) the term "authorized official of an Executive agency" shall have such meaning as the Office of Personnel Management shall by regulation prescribe, except that such term shall, with respect to any employee, former employee, or applicant for employment in an agency, include—

(A) the immediate supervisor of the employee or former employee and each successive supervisor (immediately above such immediate supervisor) within the employee's or former employee's chain of authority (as determined under such regulations); and

(B) the head, general counsel, and ombudsman of such agency; and

(5) the term "authorized official of the Department of Justice" means any employee of the Department of Justice, the duties of whose position include the investigation, enforcement, or prosecution of any law, rule, or regulation.

§ 2304. Prohibited personnel practices affecting the Transportation Security Administration

(a) IN GENERAL.—Notwithstanding any other provision of law, any individual holding or applying for a position within the Transportation Security Administration shall be covered by—

(1) the provisions of section 2302(b)(1), (8), and (9);

(2) any provision of law implementing section 2302(b)(1), (8), or (9) by providing any right or remedy available to an employee or applicant for employment in the civil service; and

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

(b) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to affect any rights, apart from those described in subsection (a), to which an individual described in subsection (a) might otherwise be entitled under law.

(c) EFFECTIVE DATE.—This section shall take effect as of the date of the enactment of this section.

§ [2304.] *2305.* Responsibility of the Government Accountability Office

If requested by either House of the Congress (or any committee thereof), or if considered necessary by the Comptroller General, the Government Accountability Office shall conduct audits and reviews to assure compliance with the laws, rules, and regulations governing employment in the executive branch and in the competitive service and to assess the effectiveness and soundness of Federal personnel management.

§ [2305.] *2306.* Coordination with certain other provisions of law

No provision of this chapter, or action taken under this chapter, shall be construed to impair the authorities and responsibilities set forth in section 102 of the National Security Act of 1947 (61 Stat. 495; 50 U.S.C. 403), the Central Intelligence Agency Act of 1949 (63 Stat. 208; 50 U.S.C. 403a and following), the Act entitled "An Act to provide certain administrative authorities for the National Security Agency, and for other purposes", approved May 29, 1959 (73 Stat. 63; 50 U.S.C. 402 note), and the Act entitled "An Act to amend the Internal Security Act of 1950", approved March 26, 1964 (78 Stat. 168; 50 U.S.C. 831-835).

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Subpart F—Labor-Management and Employee Relations

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CHAPTER 77—APPEALS

* * * * * * *

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a) * * *

* * * * * * *

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in [the United States Court of Appeals for the Federal Circuit] *the appropriate United States court of appeals*. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

* * * * * * *

(3) For purposes of the first sentence of paragraph (1), the term "appropriate United States court of appeals" means the United States Court of Appeals for the Federal Circuit, except that in the case of a prohibited personnel practice described in section 2302(b)(8) (other than a case that, disregarding this paragraph, would otherwise be subject to paragraph (2)), such term means the United States Court of Appeals for the Federal Circuit and any United States court of appeals having jurisdiction over appeals from any United States district court which, under section 1221(k)(2), would be an appropriate United States district court for purposes of such prohibited personnel practice.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing [court.] *court, and in the case of a prohibited personnel practice described in section 2302(b)(8) brought under any provision of law, rule, or regulation described in section 1221(k)(3), the employee or applicant shall have the right to de novo review in accordance with section 1221(k).*

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FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949

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TITLE III—PROCUREMENT PROCEDURE

* * * * * * *

SEC. 315. CONTRACTOR EMPLOYEES: PROTECTION FROM REPRISAL FOR DISCLOSURE OF CERTAIN INFORMATION.

(a) * * *

* * * * * * *

(c) REMEDY AND ENFORCEMENT AUTHORITY.—(1) [If the head of an executive agency determines that a contractor has subjected a person to a reprisal prohibited by subsection (a), the head of the executive agency may take one or more of the following actions:] *Not later than 180 days after submission of a complaint under subsection (b), the head of the executive agency concerned shall determine whether the contractor concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:*

(A) * * *

* * * * * * *

(3) If the head of an executive agency has not issued an order within 180 days after the submission of a complaint under subsection (b) and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted his administrative remedies with respect to the complaint, and the complainant may bring an action at law or equity for de novo review to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

[(3)] *(4)* Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5, United States Code.

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TITLE 10, UNITED STATES CODE

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Subtitle A—General Military Law

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PART IV—SERVICE, SUPPLY, AND PROCUREMENT

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CHAPTER 141—MISCELLANEOUS PROCUREMENT PROVISIONS

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§ 2409. Contractor employees: protection from reprisal for disclosure of certain information

(a) * * *

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(c) REMEDY AND ENFORCEMENT AUTHORITY.—(1) [If the head of the agency determines that a contractor has subjected a person to a reprisal prohibited by subsection (a), the head of the agency may take one or more of the following actions:] *Not later than 180 days after submission of a complaint under subsection (b), the head of the agency concerned shall determine whether the contractor concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:*

(A) * * *

* * * * * * *

(3) If the head of an agency has not issued an order within 180 days after the submission of a complaint under subsection (b) and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted his administrative remedies with respect to the complaint, and the complainant may bring an action at law or equity for de novo review to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

[(3)] *(4)* Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Review shall conform to chapter 7 of title 5.

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