

**Calendar No. 599**

103<sup>D</sup> CONGRESS  
2<sup>D</sup> SESSION

**S. 622**

**[Report No. 103-358]**

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**A BILL**

To authorize appropriations for the United States Office of Special Counsel, the Merit Systems Protection Board, and for other purposes.

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AUGUST 23 (legislative day, AUGUST 18), 1994

Reported with an amendment

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**[Report No. 103-358]**

To authorize appropriations for the United States Office of Special Counsel, the Merit Systems Protection Board, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

MARCH 19 (legislative day, MARCH 3), 1993

Mr. LEVIN (for himself, Mr. COHEN, and Mr. PRYOR) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

AUGUST 23 (legislative day, AUGUST 18), 1994

Reported by Mr. GLENN, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

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## A BILL

To authorize appropriations for the United States Office of Special Counsel, the Merit Systems Protection Board, 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. AUTHORIZATION OF APPROPRIATIONS.**

4       ~~(a) MERIT SYSTEMS PROTECTION BOARD.—Section~~  
5       ~~8(a)(1) of the Whistleblower Protection Act of 1989 (5~~

1 U.S.C. 5509 note; Public Law 101–12; 103 Stat. 34) is  
2 amended by striking out “1989, 1990, 1991, 1992, 1993,  
3 and 1994” and inserting in lieu thereof “1993, 1994, and  
4 1995”.

5 (b) OFFICE OF SPECIAL COUNSEL.—Section 8(a)(2)  
6 of the Whistleblower Protection Act of 1989 (5 U.S.C.  
7 5509 note; Public Law 101–12; 103 Stat. 34) is amended  
8 by striking out “1989, 1990, 1991, and 1992” and insert-  
9 ing in lieu thereof “1993, 1994, and 1995”.

10 **SEC. 2. OFFICE OF SPECIAL COUNSEL.**

11 (a) SUCCESSION.—Section 1211(b) of title 5, United  
12 States Code, is amended by inserting after the first sen-  
13 tence: “The Special Counsel may continue to serve beyond  
14 the expiration of the term until a successor is appointed  
15 and has qualified, except that the Special Counsel may not  
16 continue to serve for more than one year after the date  
17 on which the term of the Special Counsel would otherwise  
18 expire under this subsection.”.

19 (b) LIMITATIONS ON DISCLOSURES.—Section  
20 1212(g) of title 5, United States Code, is amended—

21 (1) in paragraph (1), by striking out “provide  
22 information concerning” and inserting in lieu thereof  
23 “disclose any information from or about”; and

24 (2) in paragraph (2), by striking out “a matter  
25 described in subparagraph (A) or (B) of section

1       2302(b)(2) in connection with a” and inserting in  
2       lieu thereof “an evaluation of the work performance,  
3       ability, aptitude, general qualifications, character,  
4       loyalty, or suitability for any personnel action of  
5       any”.

6       (c) DETERMINATIONS.—Section 1214(b)(2) of title 5,  
7       United States Code, is amended—

8               (1) by redesignating subparagraphs (A), (B)  
9       and (C) as subparagraphs (B), (C) and (D), respec-  
10       tively;

11              (2) by inserting before subparagraph (B) (as  
12       redesignated by paragraph (1) of this subsection)  
13       the following:

14                       “(A)(i) Except as provided under clause  
15       (ii), no later than 240 days after the date of re-  
16       ceiving an allegation of a prohibited personnel  
17       practice under paragraph (1), the Special Coun-  
18       sel shall make a determination whether there  
19       are reasonable grounds to believe that a prohib-  
20       ited personnel practice has occurred, exists, or  
21       is to be taken.

22                       “(ii) If the Special Counsel is unable to  
23       make the required determination within the  
24       240-day period specified under clause (i) and  
25       the person submitting the allegation of a pro-

1           hibited personnel practice agrees to an exten-  
2           sion of time, the determination shall be made  
3           within such additional period of time as shall be  
4           agreed upon between the Special Counsel and  
5           the person submitting the allegation.”; and

6           (3) by inserting after subparagraph (D) (as re-  
7           designated by paragraph (1) of this subsection) the  
8           following new subparagraph:

9                   “(E) A determination by the Special Coun-  
10                  sel under this paragraph may not be admissible  
11                  as evidence in any judicial or administrative  
12                  proceeding, without the consent of the person  
13                  submitting the allegation of a prohibited per-  
14                  sonnel practice.”.

15          (d) REPORTS.—Section 1218 of title 5, United States  
16 Code, is amended by inserting “cases in which it did not  
17 make a determination whether there are reasonable  
18 grounds to believe that a prohibited personnel practice has  
19 occurred, exists, or is to be taken within the 240-day pe-  
20 riod specified in section 1214(b)(2)(A)(i),” after “inves-  
21 tigation conducted by it.”.

22 **SEC. 3. INDEPENDENT RIGHT OF ACTION.**

23          (a) SUBPOENAS.—Section 1221(d) of title 5, United  
24 States Code, is amended by striking out paragraph (1)  
25 and inserting in lieu thereof the following:

1           “(1) At the request of an employee, former em-  
2           ployee, or applicant for employment seeking correc-  
3           tive action under subsection (a), the Board shall  
4           issue a subpoena for the attendance and testimony  
5           of any person or the production of documentary or  
6           other evidence from any person if the Board finds  
7           that the testimony or production requested is not  
8           unduly burdensome and appears reasonably cal-  
9           culated to lead to the discovery of admissible evi-  
10          dence.”.

11          (b) REFERRALS.—Section 1221(f) of title 5, United  
12 States Code, is amended by adding after paragraph (2)  
13 the following new paragraph:

14           “(3) If, based on evidence presented to it under  
15           this section, the Merit Systems Protection Board de-  
16           termines that there is reason to believe that a cur-  
17           rent employee may have committed a prohibited per-  
18           sonnel practice, the Board shall refer the matter to  
19           the Special Counsel to investigate and take appro-  
20           priate action under section 1215.”.

21          (c) ATTORNEYS’ FEES.—Section 1221(g) of title 5,  
22 United States Code, is amended—

23           (1) in paragraph (1), by striking out “and any  
24           other reasonable costs incurred” and inserting in  
25           lieu thereof “and any other reasonable costs in-

1 incurred directly or indirectly by the employee, former  
2 employee, or applicant.”; and

3 (2) in paragraph (2), by striking out “and any  
4 other reasonable costs incurred,” and inserting in  
5 lieu thereof “and any other reasonable costs in-  
6 curred directly or indirectly by the employee, former  
7 employee, or applicant.”.

8 **SEC. 4. PROHIBITED PERSONNEL PRACTICES.**

9 (a) PERSONNEL ACTIONS.—Section 2302(a)(2)(A) of  
10 title 5, United States Code, is amended—

11 (1) in clause (ix) by striking out “and” after  
12 the semicolon;

13 (2) by redesignating clause (x) as clause (xi)  
14 and inserting before such clause the following:

15 “(x) a decision to order psychiatric testing or  
16 examination; and”;

17 (3) in the matter following designated clause  
18 (xi) (as redesignated by paragraph (2) of this sub-  
19 section) by inserting before the semicolon the follow-  
20 ing: “, and in the case of an alleged prohibited per-  
21 sonnel practice described in subsection (b)(8), an  
22 employee or applicant for employment in a Govern-  
23 ment corporation as defined in section 9101 of title  
24 31, United States Code”.

1       (b) COVERED POSITIONS.—Section 2302(a)(2)(B) of  
2 title 5, United States Code, is amended to read as follows:

3           “(B) ‘covered position’ means, with respect to  
4 any personnel action, any position in the competitive  
5 service, a career appointee position in the Senior Ex-  
6 ecutive Service, or a position in the excepted service,  
7 but does not include any position which is, prior to  
8 the personnel action—

9           “(i) excepted from the competitive service  
10 because of its confidential, policy-determining,  
11 policy-making, or policy-advocating character;  
12 or

13           “(ii) excluded from the coverage of this  
14 section by the President based on a determina-  
15 tion by the President that it is necessary and  
16 warranted by conditions of good administra-  
17 tion.”.

18       (c) AGENCIES.—Section 2302(a)(2)(C) of title 5,  
19 United States Code, is amended in clause (i) by inserting  
20 before the semicolon: “, except in the case of an alleged  
21 prohibited personnel practice described in subsection  
22 (b)(8)”.

23       (d) INFORMATIONAL PROGRAM.—Section 2302(c) of  
24 title 5, United States Code, is amended in the first sen-  
25 tence by inserting before the period “, and for ensuring

1 (in consultation with the Office of Special Counsel) that  
2 agency employees are informed of the rights and remedies  
3 available to them under this chapter and chapter 12 of  
4 this title”.

5 **SEC. 5. PERFORMANCE APPRAISALS.**

6 Section 4313(5) of title 5, United States Code, is  
7 amended to read as follows:

8 “(5) meeting affirmative action goals, achieve-  
9 ment of equal employment opportunity requirements,  
10 and compliance with the merit systems principles set  
11 forth in section 2301 of this title.”.

12 **SEC. 6. IMPLEMENTATION.**

13 (a) **POLICY STATEMENT.**—No later than 6 months  
14 after the date of enactment of this Act, the Special Coun-  
15 sel shall issue a policy statement regarding the implemen-  
16 tation of the Whistleblower Protection Act of 1989. Such  
17 policy statement shall be made available to each person  
18 alleging a prohibited personnel practice described under  
19 section 2302(b)(8) of title 5, United States Code, and  
20 shall include detailed guidelines identifying specific cat-  
21 egories of information that may (or may not) be commu-  
22 nicated to agency officials for an investigative purpose, or  
23 for the purpose of obtaining corrective action under sec-  
24 tion 1214 of title 5, United States Code, or disciplinary  
25 action under section 1215 of such title, the circumstances

1 under which such information is likely to be disclosed, and  
2 whether or not the consent of any person is required in  
3 advance of any such communication.

4 (b) ~~TERMINATION STATEMENT.~~—The Special Coun-  
5 sel shall include in any letter terminating an investigation  
6 under section 1214(a)(2) of title 5, United States Code,  
7 the name and telephone number of an employee of the  
8 Special Counsel who is available to respond to reasonable  
9 questions from the person regarding the investigation or  
10 review conducted by the Special Counsel, the relevant facts  
11 ascertained by the Special Counsel, and the law applicable  
12 to the person's allegations.

13 **SEC. 7. EFFECTIVE DATE.**

14 The provisions of this Act and the amendments made  
15 by this Act shall be effective on and after the date of the  
16 enactment of this Act.

17 **SECTION 1. AUTHORIZATION OF APPROPRIATIONS.**

18 (a) *MERIT SYSTEMS PROTECTION BOARD.*—Section  
19 8(a)(1) of the Whistleblower Protection Act of 1989 (5  
20 U.S.C. 5509 note; Public Law 101-12; 103 Stat. 34) is  
21 amended by striking out “1989, 1990, 1991, 1992, 1993,  
22 and 1994” and inserting in lieu thereof “1993, 1994, and  
23 1995”.

24 (b) *OFFICE OF SPECIAL COUNSEL.*—Section 8(a)(2) of  
25 the Whistleblower Protection Act of 1989 (5 U.S.C. 5509

1 *note; Public Law 101-12; 103 Stat. 34) is amended by*  
2 *striking out “1989, 1990, 1991, and 1992” and inserting*  
3 *in lieu thereof “1993, 1994, and 1995”.*

4 ***SEC. 2. REASONABLE ATTORNEY FEES IN CERTAIN CASES.***

5 *Section 1204 of title 5, United States Code, is amended*  
6 *by adding at the end thereof the following new subsection:*

7 *“(m)(1) Except as provided in paragraph (2) of this*  
8 *subsection, the Board, or an administrative law judge or*  
9 *other employee of the Board designated to hear a case aris-*  
10 *ing under section 1215, may require payment by the agency*  
11 *involved of reasonable attorney fees incurred by an em-*  
12 *ployee or applicant for employment if the employee or ap-*  
13 *plicant is the prevailing party and the Board, administra-*  
14 *tive law judge, or other employee (as the case may be) deter-*  
15 *mines that payment by the agency is warranted in the in-*  
16 *terest of justice, including any case in which a prohibited*  
17 *personnel practice was engaged in by the agency or any*  
18 *case in which the agency’s action was clearly without merit.*

19 *“(2) If an employee or applicant for employment is*  
20 *the prevailing party of a case arising under section 1215*  
21 *and the decision is based on a finding of discrimination*  
22 *prohibited under section 2302(b)(1) of this title, the pay-*  
23 *ment of attorney fees shall be in accordance with the stand-*  
24 *ards prescribed under section 706(k) of the Civil Rights Act*  
25 *of 1964 (42 U.S.C. 2000e-5(k)).”.*

1 **SEC. 3. OFFICE OF SPECIAL COUNSEL.**

2 (a) *SUCCESSION.*—Section 1211(b) of title 5, United  
3 States Code, is amended by inserting after the first sentence:  
4 “The Special Counsel may continue to serve beyond the ex-  
5 piration of the term until a successor is appointed and has  
6 qualified, except that the Special Counsel may not continue  
7 to serve for more than one year after the date on which  
8 the term of the Special Counsel would otherwise expire  
9 under this subsection.”.

10 (b) *LIMITATIONS ON DISCLOSURES.*—Section 1212(g)  
11 of title 5, United States Code, is amended—

12 (1) in paragraph (1), by striking out “provide  
13 information concerning” and inserting in lieu thereof  
14 “disclose any information from or about”; and

15 (2) in paragraph (2), by striking out “a matter  
16 described in subparagraph (A) or (B) of section  
17 2302(b)(2) in connection with a” and inserting in  
18 lieu thereof “an evaluation of the work performance,  
19 ability, aptitude, general qualifications, character,  
20 loyalty, or suitability for any personnel action of  
21 any”.

22 (c) *DETERMINATIONS.*—Section 1214(b)(2) of title 5,  
23 United States Code, is amended—

24 (1) by redesignating subparagraphs (A), (B) and  
25 (C) as subparagraphs (B), (C) and (D), respectively;

1           (2) by inserting before subparagraph (B) (as re-  
2           designated by paragraph (1) of this subsection) the  
3           following:

4                   “(A)(i) Except as provided under clause  
5                   (ii), no later than 240 days after the date of re-  
6                   ceiving an allegation of a prohibited personnel  
7                   practice under paragraph (1), the Special Coun-  
8                   sel shall make a determination whether there are  
9                   reasonable grounds to believe that a prohibited  
10                  personnel practice has occurred, exists, or is to  
11                  be taken.

12                   “(ii) If the Special Counsel is unable to  
13                   make the required determination within the 240-  
14                   day period specified under clause (i) and the  
15                   person submitting the allegation of a prohibited  
16                   personnel practice agrees to an extension of time,  
17                   the determination shall be made within such ad-  
18                   ditional period of time as shall be agreed upon  
19                   between the Special Counsel and the person sub-  
20                   mitting the allegation.”; and

21           (3) by inserting after subparagraph (D) (as re-  
22           designated by paragraph (1) of this subsection) the  
23           following new subparagraph:

24                   “(E) A determination by the Special Coun-  
25                   sel under this paragraph may not be admissible

1           *as evidence in any judicial or administrative*  
2           *proceeding, without the consent of the person*  
3           *submitting the allegation of a prohibited person-*  
4           *nel practice.”.*

5           *(d) REPORTS.—Section 1218 of title 5, United States*  
6           *Code, is amended by inserting “cases in which it did not*  
7           *make a determination whether there are reasonable grounds*  
8           *to believe that a prohibited personnel practice has occurred,*  
9           *exists, or is to be taken within the 240-day period specified*  
10           *in section 1214(b)(2)(A)(i),” after “investigations con-*  
11           *ducted by it,”.*

12           **SEC. 4. INDEPENDENT RIGHT OF ACTION.**

13           *(a) SUBPOENAS.—Section 1221(d) of title 5, United*  
14           *States Code, is amended by striking out paragraph (1) and*  
15           *inserting in lieu thereof the following:*

16                   *“(1) At the request of an employee, former em-*  
17                   *ployee, or applicant for employment seeking corrective*  
18                   *action under subsection (a), the Board shall issue a*  
19                   *subpoena for the attendance and testimony of any*  
20                   *person or the production of documentary or other evi-*  
21                   *dence from any person if the Board finds that the tes-*  
22                   *timony or production requested is not unduly burden-*  
23                   *some and appears reasonably calculated to lead to the*  
24                   *discovery of admissible evidence.”.*

1       (b) *CORRECTIVE ACTIONS.*—Section 1221(e)(1) is  
2 amended by adding after the last sentence: “The employee  
3 may demonstrate that the disclosure was a contributing fac-  
4 tor in the personnel action through circumstantial evidence,  
5 such as evidence that—

6           “(A) the official taking the personnel action  
7 knew of the disclosure; and

8           “(B) the personnel action occurred within a pe-  
9 riod of time such that a reasonable person could con-  
10 clude that the disclosure was a factor in the personnel  
11 action.”.

12       (c) *REFERRALS.*—Section 1221(f) of title 5, United  
13 States Code, is amended by adding after paragraph (2) the  
14 following new paragraph:

15           “(3) If, based on evidence presented to it under  
16 this section, the Merit Systems Protection Board de-  
17 termines that there is reason to believe that a current  
18 employee may have committed a prohibited personnel  
19 practice, the Board shall refer the matter to the Spe-  
20 cial Counsel to investigate and take appropriate ac-  
21 tion under section 1215.”.

22       (d) *ATTORNEYS’ FEES.*—Section 1221(g) of title 5,  
23 United States Code, is amended—

24           (1) in paragraph (1), by striking out “and any  
25 other reasonable costs incurred” and inserting in lieu

1       *thereof “and any other reasonable costs incurred di-*  
2       *rectly or indirectly by the employee, former employee,*  
3       *or applicant.”; and*

4               *(2) in paragraph (2), by striking out “and any*  
5       *other reasonable costs incurred,” and inserting in lieu*  
6       *thereof “and any other reasonable costs incurred di-*  
7       *rectly or indirectly by the employee, former employee,*  
8       *or applicant.”.*

9       **SEC. 5. PROHIBITED PERSONNEL PRACTICES.**

10       *(a) PERSONNEL ACTIONS.—Section 2302(a)(2)(A) of*  
11       *title 5, United States Code, is amended—*

12               *(1) in clause (ix) by striking out “and” after the*  
13       *semicolon;*

14               *(2) by redesignating clause (x) as clause (xi) and*  
15       *inserting before such clause the following:*

16               *“(x) a decision to order psychiatric testing or ex-*  
17       *amination; and”;* and

18               *(3) in the matter following designated clause (xi)*  
19       *(as redesignated by paragraph (2) of this subsection)*  
20       *by inserting before the semicolon the following: “, and*  
21       *in the case of an alleged prohibited personnel practice*  
22       *described in subsection (b)(8), an employee or appli-*  
23       *cant for employment in a Government corporation as*  
24       *defined in section 9101 of title 31”.*

1       (b) *COVERED POSITIONS.*—Section 2302(a)(2)(B) of  
2 title 5, United States Code, is amended to read as follows:

3           “(B) ‘covered position’ means, with respect to  
4 any personnel action, any position in the competitive  
5 service, a career appointee position in the Senior Ex-  
6 ecutive Service, or a position in the excepted service,  
7 but does not include any position which is, prior to  
8 the personnel action—

9           “(i) excepted from the competitive service  
10 because of its confidential, policy-determining,  
11 policy-making, or policy-advocating character; or

12           “(ii) excluded from the coverage of this sec-  
13 tion by the President based on a determination  
14 by the President that it is necessary and war-  
15 ranted by conditions of good administration.”.

16       (c) *AGENCIES.*—Section 2302(a)(2)(C) of title 5,  
17 United States Code, is amended in clause (i) by inserting  
18 before the semicolon: “, except in the case of an alleged pro-  
19 hibited personnel practice described under subsection  
20 (b)(8)”.

21       (d) *DISCRIMINATION AND RETALIATION.*—Section  
22 2302(b)(8) of title 5, United States Code, is amended by  
23 inserting “or otherwise discriminate or retaliate against,”  
24 after “a personnel action”.



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

3               “(1) that the individual be placed, as nearly as  
4 possible, in the position the individual would have  
5 been in had the prohibited personnel practice not oc-  
6 curred; and

7               “(2) reimbursement for attorney’s fees, back pay  
8 and related benefits, medical costs incurred, travel ex-  
9 penses, and any other reasonable and foreseeable con-  
10 sequential damages.”.

11       (b) CERTAIN REPRISAL CASES.—Section 1221(g) of  
12 title 5, United States Code (as amended by section 4(d) of  
13 this Act) is further amended—

14               (1) by redesignating paragraphs (1) and (2) as  
15 paragraphs (2) and (3), respectively; and

16               (2) by inserting before paragraph (2) (as redesign-  
17 ated by paragraph (1) of this subsection) the follow-  
18 ing new paragraph:

19               “(1)(A) If the Board orders corrective action  
20 under this section, such corrective action may in-  
21 clude—

22               “(i) that the individual be placed, as nearly  
23 as possible, in the position the individual would  
24 have been in had the prohibited personnel prac-  
25 tice not occurred; and

1           “(ii) back pay and related benefits, medical  
2           costs incurred, travel expenses, and any other  
3           reasonable and foreseeable consequential changes.

4           “(B) Corrective action shall include attorney’s  
5           fees and costs as provided for under paragraphs (2)  
6           and (3).”.

7   **SEC. 9. IMPLEMENTATION.**

8           (a) *POLICY STATEMENT.*—No later than 6 months  
9           after the date of enactment of this Act, the Special Counsel  
10          shall issue a policy statement regarding the implementation  
11          of the Whistleblower Protection Act of 1989. Such policy  
12          statement shall be made available to each person alleging  
13          a prohibited personnel practice described under section  
14          2302(b)(8) of title 5, United States Code, and shall include  
15          detailed guidelines identifying specific categories of infor-  
16          mation that may (or may not) be communicated to agency  
17          officials for an investigative purpose, or for the purpose of  
18          obtaining corrective action under section 1214 of title 5,  
19          United States Code, or disciplinary action under section  
20          1215 of such title, the circumstances under which such in-  
21          formation is likely to be disclosed, and whether or not the  
22          consent of any person is required in advance of any such  
23          communication.

24          (b) *TERMINATION STATEMENT.*—The Special Counsel  
25          shall include in any letter terminating an investigation

1 *under section 1214(a)(2) of title 5, United States Code, the*  
2 *name and telephone number of an employee of the Special*  
3 *Counsel who is available to respond to reasonable questions*  
4 *from the person regarding the investigation or review con-*  
5 *ducted by the Special Counsel, the relevant facts ascertained*  
6 *by the Special Counsel, and the law applicable to the per-*  
7 *son's allegations.*

8 **SEC. 10. ANNUAL SURVEY OF INDIVIDUALS SEEKING AS-**  
9 **SISTANCE.**

10 *(a) IN GENERAL.—The Office of Special Counsel shall,*  
11 *after consulting with the Office of Policy and Evaluation*  
12 *of the Merit Systems Protection Board, conduct an annual*  
13 *survey of all individuals who contact the Office of Special*  
14 *Counsel for assistance. The survey shall—*

15 *(1) determine if the individual seeking assistance*  
16 *was fully apprised of their rights;*

17 *(2) determine whether the individual was suc-*  
18 *cessful either at the Office of Special Counsel or the*  
19 *Merit Systems Protection Board; and*

20 *(3) determine if the individual, whether success-*  
21 *ful or not, was satisfied with the treatment received*  
22 *from the Office of Special Counsel.*

23 *(b) REPORT.—The results of the survey conducted*  
24 *under subsection (a) shall be published in the annual report*  
25 *of the Office of Special Counsel.*

1 **SEC. 11. EFFECTIVE DATE.**

2       *The provisions of this Act and the amendments made*  
3 *by this Act shall be effective on and after the date of the*  
4 *enactment of this Act.*

S 622 RS—2