

107TH CONGRESS  
2D SESSION

# S. 3070

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

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IN THE SENATE OF THE UNITED STATES

OCTOBER 8, 2002

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

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## A BILL

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

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

3 **SECTION 1. AUTHORIZATION OF APPROPRIATIONS.**

4 (a) MERIT SYSTEMS PROTECTION BOARD.—Section  
5 8(a)(1) of the Whistleblower Protection Act of 1989 (5  
6 U.S.C. 5509 note) is amended by striking “1998, 1999,  
7 2000, 2001 and 2002” and inserting “2003, 2004, 2005,  
8 2006, and 2007”.

9 (b) OFFICE OF SPECIAL COUNSEL.—Section 8(a)(2)  
10 of the Whistleblower Protection Act of 1989 (5 U.S.C.

1 5509 note) is amended by striking “1993, 1994, 1995,  
2 1996, and 1997,” and inserting “2003, 2004, 2005, 2006,  
3 and 2007”.

4 (c) EFFECTIVE DATE.—This section shall take effect  
5 on October 1, 2002.

6 **SEC. 2. DISCLOSURE OF VIOLATIONS OF LAW; RETURN OF**  
7 **DOCUMENTS.**

8 Section 1213(g) of title 5, United States Code, is  
9 amended—

10 (1) in paragraph (1), by striking the last sen-  
11 tence; and

12 (2) by striking paragraph (3) and inserting the  
13 following:

14 “(3) If the Special Counsel does not transmit  
15 the information to the head of the agency under  
16 paragraph (2), the Special Counsel shall inform the  
17 individual of—

18 “(A) the reasons why the disclosure may  
19 not be further acted on under this chapter; and

20 “(B) other offices available for receiving  
21 disclosures, should the individual wish to pursue  
22 the matter further.”.

1 **SEC. 3. PROTECTION OF CERTAIN DISCLOSURES OF INFOR-**  
2 **MATION BY FEDERAL EMPLOYEES.**

3 (a) CLARIFICATION OF DISCLOSURES COVERED.—  
4 Section 2302(b)(8) of title 5, United States Code, is  
5 amended—

6 (1) in subparagraph (A)—

7 (A) by striking “which the employee or ap-  
8 plicant reasonably believes evidences” and in-  
9 serting “, without restriction to time, place,  
10 form, motive, context, or prior disclosure made  
11 to any person by an employee or applicant, in-  
12 cluding a disclosure made in the ordinary  
13 course of an employee’s duties, that the em-  
14 ployee or applicant reasonably believes is evi-  
15 dence of”; and

16 (B) in clause (i), by striking “a violation”  
17 and inserting “any violation”;

18 (2) in subparagraph (B)—

19 (A) by striking “which the employee or ap-  
20 plicant reasonably believes evidences” and in-  
21 serting “, without restriction to time, place,  
22 form, motive, context, or prior disclosure made  
23 to any person by an employee or applicant, in-  
24 cluding a disclosure made in the ordinary  
25 course of an employee’s duties, to the Special  
26 Counsel, or to the Inspector General of an

1 agency or another employee designated by the  
2 head of the agency to receive such disclosures,  
3 of information that the employee or applicant  
4 reasonably believes is evidence of”; and

5 (B) in clause (i), by striking “a violation”  
6 and inserting “any violation (other than a viola-  
7 tion of this section)”; and

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

9 “(C) a disclosure that—

10 “(i) is made by an employee or appli-  
11 cant of information required by law or Ex-  
12 ecutive order to be kept secret in the inter-  
13 est of national defense or the conduct of  
14 foreign affairs that the employee or appli-  
15 cant reasonably believes is direct and spe-  
16 cific evidence of—

17 “(I) any violation of any law,  
18 rule, or regulation;

19 “(II) gross mismanagement, a  
20 gross waste of funds, an abuse of au-  
21 thority, or a substantial and specific  
22 danger to public health or safety; or

23 “(III) a false statement to Con-  
24 gress on an issue of material fact; and

25 “(ii) is made to—

1                   “(I) a member of a committee of  
2                   Congress having a primary responsi-  
3                   bility for oversight of a department,  
4                   agency, or element of the Federal  
5                   Government to which the disclosed in-  
6                   formation relates and who is author-  
7                   ized to receive information of the type  
8                   disclosed;

9                   “(II) any other Member of Con-  
10                  gress who is authorized to receive in-  
11                  formation of the type disclosed; or

12                  “(III) an employee of Congress  
13                  who has the appropriate security  
14                  clearance and is authorized to receive  
15                  the information disclosed.”.

16           (b) COVERED DISCLOSURES.—Section 2302(b) of  
17 title 5, United States Code, is amended—

18                   (1) in the matter following paragraph (12), by  
19                   striking “This subsection” and inserting the fol-  
20                   lowing: “This subsection”; and

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

22                   “‘In this subsection, the term ‘disclosure’ means a  
23                   formal or informal communication or transmission.’”.

24           (c) REBUTTABLE PRESUMPTION.—Section 2302(b)  
25 of title 5, United States Code, is amended by adding after

1 the matter following paragraph (12) (as amended by sub-  
2 section (b) of this section) the following:

3 “For purposes of paragraph (8), any presumption relating  
4 to the performance of a duty by an employee who has au-  
5 thority to take, direct others to take, recommend, or ap-  
6 prove any personnel action may be rebutted by substantial  
7 evidence.”.

8 (d) NONDISCLOSURE POLICIES, FORMS, AND AGREE-  
9 MENTS; SECURITY CLEARANCES; AND RETALIATORY IN-  
10 VESTIGATIONS.—

11 (1) PERSONNEL ACTION.—Section  
12 2302(a)(2)(A) of title 5, United States Code, is  
13 amended—

14 (A) in clause (x), by striking “and” after  
15 the semicolon; and

16 (B) by redesignating clause (xi) as clause  
17 (xiv) and inserting after clause (x) the fol-  
18 lowing:

19 “(xi) the implementation or enforce-  
20 ment of any nondisclosure policy, form, or  
21 agreement;

22 “(xii) a suspension, revocation, or de-  
23 termination relating to a security clear-  
24 ance;

1           “(xiii) an investigation of an employee  
2           or applicant for employment because of  
3           any activity protected under this section;  
4           and”.

5           (2) PROHIBITED PERSONNEL PRACTICE.—Sec-  
6           tion 2302(b) of title 5, United States Code, is  
7           amended—

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

10          (B) in paragraph (12), by striking the pe-  
11          riod and inserting a semicolon; and

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

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

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

15 “(14) conduct, or cause to be conducted, an in-  
16 vestigation of an employee or applicant for employ-  
17 ment because of any activity protected under this  
18 section.”.

19 (3) BOARD AND COURT REVIEW OF ACTIONS  
20 RELATING TO SECURITY CLEARANCES.—

21 (A) IN GENERAL.—Chapter 77 of title 5,  
22 United States Code, is amended by inserting  
23 after section 7702 the following:

1 **“§ 7702a. Actions relating to security clearances**

2 “(a) In any appeal relating to the suspension, revoca-  
3 tion, or other determination relating to a security clear-  
4 ance, the Merit Systems Protection Board or a court—

5 “(1) shall determine whether section 2302 was  
6 violated;

7 “(2) may not order the President to restore a  
8 security clearance; and

9 “(3) subject to paragraph (2), may issue declar-  
10 atory relief and any other appropriate relief.

11 “(b)(1) If, any final judgment, the Board or court  
12 declares that any suspension, revocation, or other deter-  
13 mination with regards to a security clearance was made  
14 in violation of section 2302, the affected agency shall con-  
15 duct a review of that suspension, revocation, or other de-  
16 termination, giving great weight to the Board or court  
17 judgment.

18 “(2) Not later than 30 days after any Board or court  
19 judgment declaring that a security clearance suspension,  
20 revocation, or other determination was made in violation  
21 of section 2302, the affected agency shall issue an unclas-  
22 sified report to the congressional committees of jurisdic-  
23 tion (with a classified annex if necessary), detailing the  
24 circumstances of the agency’s security clearance suspen-  
25 sion, revocation, or other determination. A report under

1 this paragraph shall include any proposed agency action  
2 with regards to the security clearance.

3 “(c) An allegation that a security clearance was re-  
4 voked or suspended in retaliation for a protected disclo-  
5 sure shall receive expedited review by the Office of Special  
6 Counsel, the Merit Systems Protection Board, and any re-  
7 viewing court.”.

8 (B) TECHNICAL AND CONFORMING AMEND-  
9 MENT.—The table of sections for chapter 77 of  
10 title 5, United States Code, is amended by in-  
11 sserting after the item relating to section 7702  
12 the following:

“7702a. Actions relating to security clearances.”.

13 (e) EXCLUSION OF AGENCIES BY THE PRESIDENT.—  
14 Section 2302(a)(2)(C) of title 5, United States Code, is  
15 amended by striking clause (ii) and inserting the following:

16 “(ii)(I) the Federal Bureau of Inves-  
17 tigation, the Central Intelligence Agency,  
18 the Defense Intelligence Agency, the Na-  
19 tional Imagery and Mapping Agency, the  
20 National Security Agency; and

21 “(II) as determined by the President,  
22 any Executive agency or unit thereof the  
23 principal function of which is the conduct  
24 of foreign intelligence or counterintel-  
25 ligence activities, if the determination (as

1                   that determination relate to a personnel  
2                   action) is made before that personnel ac-  
3                   tion; or”.

4           (f) ATTORNEY FEES.—Section 1204(m)(1) of title 5,  
5 United States Code, is amended by striking “agency in-  
6 volved” and inserting “agency where the prevailing party  
7 is employed or has applied for employment”.

8           (g) COMPENSATORY DAMAGES.—Section 1214(g)(2)  
9 of title 5, United States Code, is amended by inserting  
10 “compensatory or” after “foreseeable”.

11          (h) DISCIPLINARY ACTION.—Section 1215 of title 5,  
12 United States Code, is amended by subsection (a), by  
13 striking paragraph (3) and inserting the following:

14                   “(3)(A) A final order of the Board may impose  
15                   disciplinary action consisting of removal, reduction  
16                   in grade, debarment from Federal employment for a  
17                   period not to exceed 5 years, suspension, reprimand,  
18                   or an assessment of a civil penalty not to exceed  
19                   \$1000.

20                   “(B) In any case in which the Board finds that  
21                   an employee has committed a prohibited personnel  
22                   practice under section 2303(b)(8) or (9), the Board  
23                   shall impose disciplinary action if the Board finds  
24                   that protected activity was a significant motivating  
25                   factor in the decision to take, fail to take, or threat-

1       en to take or fail to take a personnel action, unless  
2       that employee demonstrates, by preponderance of  
3       evidence, that the employee would have taken, failed  
4       to take, or threatened to take or fail to take the  
5       same personnel action, in the absence of such pro-  
6       tected activity.”.

7       (i) DISCLOSURES TO CONGRESS.—Section 2302 of  
8       title 5, United States Code, is amended by adding at the  
9       end the following:

10       “(f) Each agency shall establish a process that pro-  
11       vides confidential advice to employees on making a lawful  
12       disclosure to Congress of information that is specifically  
13       required by law or Executive order to be kept secret in  
14       the interest of national defense or the conduct of foreign  
15       affairs.”.

16       (j) AUTHORITY OF SPECIAL COUNSEL RELATING TO  
17       CIVIL ACTIONS.—

18       (1) REPRESENTATION OF SPECIAL COUNSEL.—  
19       Section 1212 of title 5, United States Code, is  
20       amended by adding at the end the following:

21       “(h) Except as provided in section 518 of title 28,  
22       relating to litigation before the Supreme Court, attorneys  
23       designated by the Special Counsel may appear for the Spe-  
24       cial Counsel and represent the Special Counsel in any civil  
25       action brought in connection with section 2302(b)(8) or

1 subchapter III of chapter 73, or as otherwise authorized  
2 by law.”.

3 (2) JUDICIAL REVIEW OF MERIT SYSTEMS PRO-  
4 TECTION BOARD DECISIONS.—Section 7703 of title  
5 5, United States Code, is amended by adding at the  
6 end the following:

7 “(e)(1) Except as provided under paragraph (2), this  
8 paragraph shall apply to any review obtained by the Spe-  
9 cial Counsel. The Special Counsel may obtain review of  
10 any final order or decision of the Board by filing a petition  
11 for judicial review in the United States Court of Appeals  
12 for the Federal Circuit if the Special Counsel determines,  
13 in the discretion of the Special Counsel, that the Board  
14 erred in deciding a case arising under section 2302(b)(8)  
15 or subchapter III of chapter 73 and that the Board’s deci-  
16 sion will have a substantial impact on the enforcement of  
17 section 2302(b)(8) or subchapter III of chapter 73. If the  
18 Special Counsel was not a party or did not intervene in  
19 a matter before the Board, the Special Counsel may not  
20 petition for review of a Board decision under this section  
21 unless the Special Counsel first petitions the Board for  
22 reconsideration of its decision, and such petition is denied.  
23 In addition to the named respondent, the Board and all  
24 other parties to the proceedings before the Board shall  
25 have the right to appear in the proceedings before the

1 Court of Appeals. The granting of the petition for judicial  
2 review shall be at the discretion of the Court of Appeals.

3       “(2) During the 5-year period beginning on February  
4 1, 2003, this paragraph shall apply to any review obtained  
5 by the Special Counsel. The Special Counsel may obtain  
6 review of any final order or decision of the Board by filing  
7 a petition for judicial review in the United States Court  
8 of Appeals for the Federal Circuit or any court of appeals  
9 of competent jurisdiction if the Special Counsel deter-  
10 mines, in the discretion of the Special Counsel, that the  
11 Board erred in deciding a case arising under section  
12 2302(b)(8) or subchapter III of chapter 73 and that the  
13 Board’s decision will have a substantial impact on the en-  
14 forcement of section 2302(b)(8) or subchapter III of chap-  
15 ter 73. If the Special Counsel was not a party or did not  
16 intervene in a matter before the Board, the Special Coun-  
17 sel may not petition for review of a Board decision under  
18 this section unless the Special Counsel first petitions the  
19 Board for reconsideration of its decision, and such petition  
20 is denied. In addition to the named respondent, the Board  
21 and all other parties to the proceedings before the Board  
22 shall have the right to appear in the proceedings before  
23 the court of appeals. The granting of the petition for judi-  
24 cial review shall be at the discretion of the court of ap-  
25 peals.”.

1 (k) JUDICIAL REVIEW.—

2 (1) IN GENERAL.—Section 7703(b) of title 5,  
3 United States Code, is amended by striking para-  
4 graph (1) and inserting the following:

5 “(b)(1)(A) Except as provided in subparagraph (B)  
6 and paragraph (2) of this subsection, a petition to review  
7 a final order or final decision of the Board shall be filed  
8 in the United States Court of Appeals for the Federal Cir-  
9 cuit. Notwithstanding any other provision of law, any peti-  
10 tion for review must be filed within 60 days after the date  
11 the petitioner received notice of the final order or decision  
12 of the Board.

13 “(B) During the 5-year period beginning on February  
14 1, 2003, a petition to review a final order or final decision  
15 of the Board shall be filed in the United States Court of  
16 Appeals for the Federal Circuit or the United States Court  
17 of Appeals for the circuit in which the petitioner resides.  
18 Notwithstanding any other provision of law, any petition  
19 for review must be filed within 60 days after the date the  
20 petitioner received notice of the final order or decision of  
21 the Board.”.

22 (2) REVIEW OBTAINED BY OFFICE OF PER-  
23 SONNEL MANAGEMENT.—Section 7703 of title 5,  
24 United States Code, is amended by striking sub-  
25 section (d) and inserting the following:

1           “(d)(1) Except as provided under paragraph (2), this  
2 paragraph shall apply to any review obtained by the Direc-  
3 tor of the Office of Personnel Management. The Director  
4 of the Office of Personnel Management may obtain review  
5 of any final order or decision of the Board by filing, within  
6 60 days after the date the Director received notice of the  
7 final order or decision of the Board, a petition for judicial  
8 review in the United States Court of Appeals for the Fed-  
9 eral Circuit if the Director determines, in his discretion,  
10 that the Board erred in interpreting a civil service law,  
11 rule, or regulation affecting personnel management and  
12 that the Board’s decision will have a substantial impact  
13 on a civil service law, rule, regulation, or policy directive.  
14 If the Director did not intervene in a matter before the  
15 Board, the Director may not petition for review of a Board  
16 decision under this section unless the Director first peti-  
17 tions the Board for a reconsideration of its decision, and  
18 such petition is denied. In addition to the named respond-  
19 ent, the Board and all other parties to the proceedings  
20 before the Board shall have the right to appear in the pro-  
21 ceeding before the Court of Appeals. The granting of the  
22 petition for judicial review shall be at the discretion of the  
23 Court of Appeals.

24           “(2) During the 5-year period beginning on February  
25 1, 2003, this paragraph shall apply to any review obtained

1 by the Director of the Office of Personnel Management.  
2 The Director of the Office of Personnel Management may  
3 obtain review of any final order or decision of the Board  
4 by filing, within 60 days after the date the Director re-  
5 ceived notice of the final order or decision of the Board,  
6 a petition for judicial review in any appellate court of com-  
7 petent jurisdiction as provided under subsection (b)(2) if  
8 the Director determines, in his discretion, that the Board  
9 erred in interpreting a civil service law, rule, or regulation  
10 affecting personnel management and that the Board's de-  
11 cision will have a substantial impact on a civil service law,  
12 rule, regulation, or policy directive. If the Director did not  
13 intervene in a matter before the Board, the Director may  
14 not petition for review of a Board decision under this sec-  
15 tion unless the Director first petitions the Board for a re-  
16 consideration of its decision, and such petition is denied.  
17 In addition to the named respondent, the Board and all  
18 other parties to the proceedings before the Board shall  
19 have the right to appear in the proceeding before the court  
20 of appeals. The granting of the petition for judicial review  
21 shall be at the discretion of the Court of Appeals.”.

22 (l) NONDISCLOSURE POLICIES, FORMS, AND AGREE-  
23 MENTS.—

24 (1) IN GENERAL.—

1           (A) REQUIREMENT.—Each agreement in  
2 Standard Forms 312 and 4414 of the Govern-  
3 ment and any other nondisclosure policy, form,  
4 or agreement of the Government shall contain  
5 the following statement: “These restrictions are  
6 consistent with and do not supersede, conflict  
7 with, or otherwise alter the employee obliga-  
8 tions, rights, or liabilities created by Executive  
9 Order No. 12958; section 7211 of title 5,  
10 United States Code (governing disclosures to  
11 Congress); section 1034 of title 10, United  
12 States Code (governing disclosure to Congress  
13 by members of the military); section 2302(b)(8)  
14 of title 5, United States Code (governing disclo-  
15 sures of illegality, waste, fraud, abuse or public  
16 health or safety threats); the Intelligence Iden-  
17 tities Protection Act of 1982 (50 U.S.C. 421 et  
18 seq.) (governing disclosures that could expose  
19 confidential Government agents); and the stat-  
20 utes which protect against disclosure that may  
21 compromise the national security, including sec-  
22 tions 641, 793, 794, 798, and 952 of title 18,  
23 United States Code, and section 4(b) of the  
24 Subversive Activities Act of 1950 (50 U.S.C.  
25 783(b)). The definitions, requirements, obliga-

1           tions, rights, sanctions, and liabilities created  
2           by such Executive order and such statutory  
3           provisions are incorporated into this agreement  
4           and are controlling.”

5           (B) ENFORCEABILITY.—Any nondisclosure  
6           policy, form, or agreement described under sub-  
7           paragraph (A) that does not contain the state-  
8           ment required under subparagraph (A) may not  
9           be implemented or enforced to the extent such  
10          policy, form, or agreement is inconsistent with  
11          that statement.

12          (2) PERSONS OTHER THAN FEDERAL EMPLOY-  
13          EES.—Notwithstanding paragraph (1), a nondisclo-  
14          sure policy, form, or agreement that is to be exe-  
15          cuted by a person connected with the conduct of an  
16          intelligence or intelligence-related activity, other  
17          than an employee or officer of the United States  
18          Government, may contain provisions appropriate to  
19          the particular activity for which such document is to  
20          be used. Such form or agreement shall, at a min-  
21          imum, require that the person will not disclose any  
22          classified information received in the course of such  
23          activity unless specifically authorized to do so by the  
24          United States Government. Such nondisclosure  
25          forms shall also make it clear that such forms do

1 not bar disclosures to Congress or to an authorized  
2 official of an executive agency or the Department of  
3 Justice that are essential to reporting a substantial  
4 violation of law.

○