

Calendar No. 771

107TH CONGRESS
2^D SESSION**S. 3070****[Report No. 107-349]**

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

IN THE SENATE OF THE UNITED STATES

OCTOBER 8, 2002

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

NOVEMBER 19, 2002

Reported by Mr. LIEBERMAN, without amendment

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

1 U.S.C. 5509 note) is amended by striking “1998, 1999,
 2 2000, 2001 and 2002” and inserting “2003, 2004, 2005,
 3 2006, and 2007”.

4 (b) OFFICE OF SPECIAL COUNSEL.—Section 8(a)(2)
 5 of the Whistleblower Protection Act of 1989 (5 U.S.C.
 6 5509 note) is amended by striking “1993, 1994, 1995,
 7 1996, and 1997,” and inserting “2003, 2004, 2005, 2006,
 8 and 2007”.

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

11 **SEC. 2. DISCLOSURE OF VIOLATIONS OF LAW; RETURN OF**
 12 **DOCUMENTS.**

13 Section 1213(g) of title 5, United States Code, is
 14 amended—

15 (1) in paragraph (1), by striking the last sen-
 16 tence; and

17 (2) by striking paragraph (3) and inserting the
 18 following:

19 “(3) If the Special Counsel does not transmit
 20 the information to the head of the agency under
 21 paragraph (2), the Special Counsel shall inform the
 22 individual of—

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

1 “(B) other offices available for receiving
 2 disclosures, should the individual wish to pursue
 3 the matter further.”.

4 **SEC. 3. PROTECTION OF CERTAIN DISCLOSURES OF INFOR-**
 5 **MATION BY FEDERAL EMPLOYEES.**

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

9 (1) in subparagraph (A)—

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

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

21 (2) in subparagraph (B)—

22 (A) by striking “which the employee or ap-
 23 plicant reasonably believes evidences” and in-
 24 serting “, without restriction to time, place,
 25 form, motive, context, or prior disclosure made

1 to any person by an employee or applicant, in-
2 cluding a disclosure made in the ordinary
3 course of an employee's duties, to the Special
4 Counsel, or to the Inspector General of an
5 agency or another employee designated by the
6 head of the agency to receive such disclosures,
7 of information that the employee or applicant
8 reasonably believes is evidence of"; and

9 (B) in clause (i), by striking "a violation"
10 and inserting "any violation (other than a viola-
11 tion of this section)"; and

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

13 "(C) a disclosure that—

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

21 "(I) any violation of any law,
22 rule, or regulation;

23 "(II) gross mismanagement, a
24 gross waste of funds, an abuse of au-

1 thority, or a substantial and specific
2 danger to public health or safety; or

3 “(III) a false statement to Con-
4 gress on an issue of material fact; and
5 “(ii) is made to—

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

14 “(II) any other Member of Con-
15 gress who is authorized to receive in-
16 formation of the type disclosed; or

17 “(III) an employee of Congress
18 who has the appropriate security
19 clearance and is authorized to receive
20 the information disclosed.”.

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

23 (1) in the matter following paragraph (12), by
24 striking “This subsection” and inserting the fol-
25 lowing: “This subsection”; and

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

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

4 (c) REBUTTABLE PRESUMPTION.—Section 2302(b)
5 of title 5, United States Code, is amended by adding after
6 the matter following paragraph (12) (as amended by sub-
7 section (b) of this section) the following:

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

13 (d) NONDISCLOSURE POLICIES, FORMS, AND AGREE-
14 MENTS; SECURITY CLEARANCES; AND RETALIATORY IN-
15 VESTIGATIONS.—

16 (1) PERSONNEL ACTION.—Section
17 2302(a)(2)(A) of title 5, United States Code, is
18 amended—

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

21 (B) by redesignating clause (xi) as clause
22 (xiv) and inserting after clause (x) the fol-
23 lowing:

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

4 “(xii) a suspension, revocation, or de-
 5 termination relating to a security clear-
 6 ance;

7 “(xiii) an investigation of an employee
 8 or applicant for employment because of
 9 any activity protected under this section;
 10 and”.

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

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

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

18 (C) by inserting after paragraph (12) the
 19 following:

20 “(13) implement or enforce any nondisclosure
 21 policy, form, or agreement, if such policy, form, or
 22 agreement does not contain the following statement:
 23 ““These provisions are consistent with and do not
 24 supersede, conflict with, or otherwise alter the em-
 25 ployee obligations, rights, or liabilities created by

1 Executive Order No. 12958; section 7211 of title 5,
2 United States Code (governing disclosures to Con-
3 gress); section 1034 of title 10, United States Code
4 (governing disclosure to Congress by members of the
5 military); section 2302(b)(8) of title 5, United
6 States Code (governing disclosures of illegality,
7 waste, fraud, abuse, or public health or safety
8 threats); the Intelligence Identities Protection Act of
9 1982 (50 U.S.C. 421 et seq.) (governing disclosures
10 that could expose confidential Government agents);
11 and the statutes which protect against disclosures
12 that could compromise national security, including
13 sections 641, 793, 794, 798, and 952 of title 18,
14 United States Code, and section 4(b) of the Subver-
15 sive Activities Control Act of 1950 (50 U.S.C.
16 783(b)). The definitions, requirements, obligations,
17 rights, sanctions, and liabilities created by such Ex-
18 ecutive order and such statutory provisions are in-
19 corporated into this agreement and are controlling.’;
20 or

21 “(14) conduct, or cause to be conducted, an in-
22 vestigation of an employee or applicant for employ-
23 ment because of any activity protected under this
24 section.”.

1 (3) BOARD AND COURT REVIEW OF ACTIONS
2 RELATING TO SECURITY CLEARANCES.—

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

6 **“§ 7702a. Actions relating to security clearances**

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

10 “(1) shall determine whether section 2302 was
11 violated;

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

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

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

23 “(2) Not later than 30 days after any Board or court
24 judgment declaring that a security clearance suspension,
25 revocation, or other determination was made in violation

1 of section 2302, the affected agency shall issue an unclas-
 2 sified report to the congressional committees of jurisdic-
 3 tion (with a classified annex if necessary), detailing the
 4 circumstances of the agency's security clearance suspen-
 5 sion, revocation, or other determination. A report under
 6 this paragraph shall include any proposed agency action
 7 with regards to the security clearance.

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

13 (B) TECHNICAL AND CONFORMING AMEND-
 14 MENT.—The table of sections for chapter 77 of
 15 title 5, United States Code, is amended by in-
 16 serting after the item relating to section 7702
 17 the following:

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

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

21 “(ii)(I) the Federal Bureau of Inves-
 22 tigation, the Central Intelligence Agency,
 23 the Defense Intelligence Agency, the Na-
 24 tional Imagery and Mapping Agency, the
 25 National Security Agency; and

1 “(II) as determined by the President,
2 any Executive agency or unit thereof the
3 principal function of which is the conduct
4 of foreign intelligence or counterintel-
5 ligence activities, if the determination (as
6 that determination relate to a personnel
7 action) is made before that personnel ac-
8 tion; or”.

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

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

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

19 “(3)(A) A final order of the Board may impose
20 disciplinary action consisting of removal, reduction
21 in grade, debarment from Federal employment for a
22 period not to exceed 5 years, suspension, reprimand,
23 or an assessment of a civil penalty not to exceed
24 \$1000.

1 “(B) In any case in which the Board finds that
2 an employee has committed a prohibited personnel
3 practice under section 2303(b)(8) or (9), the Board
4 shall impose disciplinary action if the Board finds
5 that protected activity was a significant motivating
6 factor in the decision to take, fail to take, or threat-
7 en to take or fail to take a personnel action, unless
8 that employee demonstrates, by preponderance of
9 evidence, that the employee would have taken, failed
10 to take, or threatened to take or fail to take the
11 same personnel action, in the absence of such pro-
12 tected activity.”.

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

16 “(f) Each agency shall establish a process that pro-
17 vides confidential advice to employees on making a lawful
18 disclosure to Congress of information that is specifically
19 required by law or Executive order to be kept secret in
20 the interest of national defense or the conduct of foreign
21 affairs.”.

22 (j) AUTHORITY OF SPECIAL COUNSEL RELATING TO
23 CIVIL ACTIONS.—

1 (1) REPRESENTATION OF SPECIAL COUNSEL.—

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

4 “(h) Except as provided in section 518 of title 28,
5 relating to litigation before the Supreme Court, attorneys
6 designated by the Special Counsel may appear for the Spe-
7 cial Counsel and represent the Special Counsel in any civil
8 action brought in connection with section 2302(b)(8) or
9 subchapter III of chapter 73, or as otherwise authorized
10 by law.”.

11 (2) JUDICIAL REVIEW OF MERIT SYSTEMS PRO-
12 TECTION BOARD DECISIONS.—Section 7703 of title
13 5, United States Code, is amended by adding at the
14 end the following:

15 “(e)(1) Except as provided under paragraph (2), this
16 paragraph shall apply to any review obtained by the Spe-
17 cial Counsel. The Special Counsel may obtain review of
18 any final order or decision of the Board by filing a petition
19 for judicial review in the United States Court of Appeals
20 for the Federal Circuit if the Special Counsel determines,
21 in the discretion of the Special Counsel, that the Board
22 erred in deciding a case arising under section 2302(b)(8)
23 or subchapter III of chapter 73 and that the Board’s deci-
24 sion will have a substantial impact on the enforcement of
25 section 2302(b)(8) or subchapter III of chapter 73. If the

1 Special Counsel was not a party or did not intervene in
2 a matter before the Board, the Special Counsel may not
3 petition for review of a Board decision under this section
4 unless the Special Counsel first petitions the Board for
5 reconsideration of its decision, and such petition is denied.
6 In addition to the named respondent, the Board and all
7 other parties to the proceedings before the Board shall
8 have the right to appear in the proceedings before the
9 Court of Appeals. The granting of the petition for judicial
10 review shall be at the discretion of the Court of Appeals.

11 “(2) During the 5-year period beginning on February
12 1, 2003, this paragraph shall apply to any review obtained
13 by the Special Counsel. The Special Counsel may obtain
14 review of any final order or decision of the Board by filing
15 a petition for judicial review in the United States Court
16 of Appeals for the Federal Circuit or any court of appeals
17 of competent jurisdiction if the Special Counsel deter-
18 mines, in the discretion of the Special Counsel, that the
19 Board erred in deciding a case arising under section
20 2302(b)(8) or subchapter III of chapter 73 and that the
21 Board’s decision will have a substantial impact on the en-
22 forcement of section 2302(b)(8) or subchapter III of chap-
23 ter 73. If the Special Counsel was not a party or did not
24 intervene in a matter before the Board, the Special Coun-
25 sel may not petition for review of a Board decision under

1 this section unless the Special Counsel first petitions the
 2 Board for reconsideration of its decision, and such petition
 3 is denied. In addition to the named respondent, the Board
 4 and all other parties to the proceedings before the Board
 5 shall have the right to appear in the proceedings before
 6 the court of appeals. The granting of the petition for judi-
 7 cial review shall be at the discretion of the court of ap-
 8 peals.”.

9 (k) JUDICIAL REVIEW.—

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

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

21 “(B) During the 5-year period beginning on February
 22 1, 2003, a petition to review a final order or final decision
 23 of the Board shall be filed in the United States Court of
 24 Appeals for the Federal Circuit or the United States Court
 25 of Appeals for the circuit in which the petitioner resides.

1 Notwithstanding any other provision of law, any petition
2 for review must be filed within 60 days after the date the
3 petitioner received notice of the final order or decision of
4 the Board.”.

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

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

1 such petition is denied. In addition to the named respond-
2 ent, the Board and all other parties to the proceedings
3 before the Board shall have the right to appear in the pro-
4 ceeding before the Court of Appeals. The granting of the
5 petition for judicial review shall be at the discretion of the
6 Court of Appeals.

7 “(2) During the 5-year period beginning on February
8 1, 2003, this paragraph shall apply to any review obtained
9 by the Director of the Office of Personnel Management.
10 The Director of the Office of Personnel Management may
11 obtain review of any final order or decision of the Board
12 by filing, within 60 days after the date the Director re-
13 ceived notice of the final order or decision of the Board,
14 a petition for judicial review in any appellate court of com-
15 petent jurisdiction as provided under subsection (b)(2) if
16 the Director determines, in his discretion, that the Board
17 erred in interpreting a civil service law, rule, or regulation
18 affecting personnel management and that the Board’s de-
19 cision will have a substantial impact on a civil service law,
20 rule, regulation, or policy directive. If the Director did not
21 intervene in a matter before the Board, the Director may
22 not petition for review of a Board decision under this sec-
23 tion unless the Director first petitions the Board for a re-
24 consideration of its decision, and such petition is denied.
25 In addition to the named respondent, the Board and all

1 other parties to the proceedings before the Board shall
 2 have the right to appear in the proceeding before the court
 3 of appeals. The granting of the petition for judicial review
 4 shall be at the discretion of the Court of Appeals.”.

5 (l) NONDISCLOSURE POLICIES, FORMS, AND AGREE-
 6 MENTS.—

7 (1) IN GENERAL.—

8 (A) REQUIREMENT.—Each agreement in
 9 Standard Forms 312 and 4414 of the Govern-
 10 ment and any other nondisclosure policy, form,
 11 or agreement of the Government shall contain
 12 the following statement: “These restrictions are
 13 consistent with and do not supersede, conflict
 14 with, or otherwise alter the employee obliga-
 15 tions, rights, or liabilities created by Executive
 16 Order No. 12958; section 7211 of title 5,
 17 United States Code (governing disclosures to
 18 Congress); section 1034 of title 10, United
 19 States Code (governing disclosure to Congress
 20 by members of the military); section 2302(b)(8)
 21 of title 5, United States Code (governing disclo-
 22 sures of illegality, waste, fraud, abuse or public
 23 health or safety threats); the Intelligence Iden-
 24 tities Protection Act of 1982 (50 U.S.C. 421 et
 25 seq.) (governing disclosures that could expose

1 confidential Government agents); and the stat-
2 utes which protect against disclosure that may
3 compromise the national security, including sec-
4 tions 641, 793, 794, 798, and 952 of title 18,
5 United States Code, and section 4(b) of the
6 Subversive Activities Act of 1950 (50 U.S.C.
7 783(b)). The definitions, requirements, obliga-
8 tions, rights, sanctions, and liabilities created
9 by such Executive order and such statutory
10 provisions are incorporated into this agreement
11 and are controlling.”

12 (B) ENFORCEABILITY.—Any nondisclosure
13 policy, form, or agreement described under sub-
14 paragraph (A) that does not contain the state-
15 ment required under subparagraph (A) may not
16 be implemented or enforced to the extent such
17 policy, form, or agreement is inconsistent with
18 that statement.

19 (2) PERSONS OTHER THAN FEDERAL EMPLOY-
20 EES.—Notwithstanding paragraph (1), a nondisclo-
21 sure policy, form, or agreement that is to be exe-
22 cuted by a person connected with the conduct of an
23 intelligence or intelligence-related activity, other
24 than an employee or officer of the United States
25 Government, may contain provisions appropriate to

1 the particular activity for which such document is to
2 be used. Such form or agreement shall, at a min-
3 imum, require that the person will not disclose any
4 classified information received in the course of such
5 activity unless specifically authorized to do so by the
6 United States Government. Such nondisclosure
7 forms shall also make it clear that such forms do
8 not bar disclosures to Congress or to an authorized
9 official of an executive agency or the Department of
10 Justice that are essential to reporting a substantial
11 violation of law.

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[Report No. 107-349]

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