

115TH CONGRESS
1ST SESSION

S. 2002

To amend the National Security Act of 1947 to provide whistleblower protections for employees of contractors of elements of the intelligence community, and for other purposes.

IN THE SENATE OF THE UNITED STATES

OCTOBER 24, 2017

Mrs. McCASKILL introduced the following bill; which was read twice and referred to the Select Committee on Intelligence

A BILL

To amend the National Security Act of 1947 to provide whistleblower protections for employees of contractors of elements of the intelligence community, and for other purposes.

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Ensuring Protections
5 for Intelligence Community Contractor Whistleblowers Act
6 of 2017”.

1 **SEC. 2. WHISTLEBLOWER PROTECTIONS FOR CONTRAC-**
2 **TORS AND GRANTEES OF THE INTELLIGENCE**
3 **COMMUNITY.**

4 (a) IN GENERAL.—Title XI of the National Security
5 Act of 1947 (50 U.S.C. 3231 et seq.) is amended by add-
6 ing at the end the following:

7 **“SEC. 1105. WHISTLEBLOWER PROTECTIONS FOR CON-**
8 **TRACTORS AND GRANTEES OF THE INTEL-**
9 **LIGENCE COMMUNITY.**

10 “(a) DEFINITIONS.—In this section:

11 “(1) AGENCY.—The term ‘agency’ means an
12 executive department or independent establishment
13 (as such terms are defined in sections 101 and 104
14 of title 5, United States Code) that contains an in-
15 telligence community element, except for the Federal
16 Bureau of Investigation.

17 “(2) APPLICANT.—The term ‘applicant’ means
18 an individual who is applying to be an employee of
19 a contractor, subcontractor, grantee or subgrantee.

20 “(3) CONTRACT.—The term ‘contract’ means a
21 contract, including a personal services contract,
22 awarded by the head of an agency.

23 “(4) CONTRACTOR.—The term ‘contractor’
24 means an entity awarded a contract.

25 “(5) COVERED INTELLIGENCE COMMUNITY
26 ELEMENT.—The term ‘covered intelligence commu-

nity element' means the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office.

“(6) EMPLOYEE.—The term ‘employee’ means an individual who is an officer or an employee of a contractor, subcontractor, grantee, or subgrantee.

“(7) FORMER EMPLOYEE.—The term ‘former employee’ means an individual who previously worked as an employee for a contractor, subcontractor, grantee, or subgrantee.

“(8) GRANT.—The term ‘grant’ means a grant awarded by the head of an agency.

“(9) GRANTEE.—The term ‘grantee’ means an entity that is awarded a grant.

“(10) INSPECTOR GENERAL.—Except as otherwise specifically provided, the term ‘Inspector General’ means the Inspector General of the Intelligence Community appointed under section 103H or an Inspector General appointed under the Inspector General Act of 1978 (5 U.S.C. App.) or section 17 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 3517).

1 “(11) PROTECTED DISCLOSURE.—The term
2 ‘protected disclosure’ means—

3 “(A) any lawful disclosure of information
4 to an individual listed under subsection (b)(2)
5 by an employee that the employee believes evi-
6 dences—

7 “(i) a violation of any Federal law,
8 rule, or regulation; or

9 “(ii) gross mismanagement, including
10 of a contract or grant, a gross waste of
11 funds, an abuse of authority, or a substan-
12 tial and specific danger to public health or
13 safety; and

14 “(B) if the actions do not result in the em-
15 ployee unlawfully disclosing information specifi-
16 cally required by Executive order to be kept
17 classified in the interest of national defense or
18 the conduct of foreign affairs, any lawful disclo-
19 sure in conjunction with—

20 “(i) the exercise of any appeal, com-
21 plaint, or grievance right granted by any
22 law, rule, or regulation;

23 “(ii) testimony for or otherwise law-
24 fully assisting any individual in the exer-

1 cise of any right referred to in clause (i);
2 or

3 “(iii) cooperation with or disclosing
4 information to the Inspector General of an
5 agency, in accordance with applicable pro-
6 visions of law in connection with an audit,
7 inspection, or investigation conducted by
8 the Inspector General.

9 “(12) PERSONAL SERVICES CONTRACTOR.—The
10 term ‘personal services contractor’ means an indi-
11 vidual awarded a contract with an agency.

12 “(13) SUBCONTRACTOR.—The term ‘subcon-
13 tractor’ means an entity that reaches an agreement
14 with a contractor to fulfill any element of a contract.

15 “(14) SUBGRANTEE.—The term ‘subgrantee’
16 means an entity that reaches an agreement with a
17 grantee to fulfill any element of a grant.

18 “(b) PROHIBITION OF REPRISALS.—

19 “(1) IN GENERAL.—An employee, applicant,
20 former employee, or personal services contractor car-
21 rying out a contract, subcontract, grant, or subgrant
22 for an agency that contains a covered intelligence
23 community element may not be discharged, demoted,
24 or otherwise discriminated against because the em-
25 ployee, applicant, former employee, or personal serv-

1 ice contractor was perceived as making or about to
 2 make—

3 “(A) a protected disclosure; or

4 “(B) any lawful disclosure that complies
 5 with—

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

9 “(ii) subparagraphs (A), (D), or (H)
 10 of section 17(d)(5) of the Central Intel-
 11 ligence Agency Act of 1949 (50 U.S.C.
 12 3517(d)(5)); or

13 “(iii) subparagraphs (A), (D), or (I)
 14 of section 103H(k)(5).

15 “(2) INDIVIDUALS DESCRIBED.—The individ-
 16 uals described in this paragraph are as follows:

17 “(A) An Inspector General.

18 “(B) An authorized official of the Depart-
 19 ment of Justice or other Federal law enforce-
 20 ment agency.

21 “(C) A corporate management official or
 22 other individual who has the authority to inves-
 23 tigate, discover, or address misconduct.

24 “(D) The Director of National Intelligence.

1 “(E) The head of the agency containing
2 the covered intelligence community element that
3 awarded the contract or grant.

4 “(c) INVESTIGATION OF COMPLAINTS.—

5 “(1) SUBMISSION OF COMPLAINT.—An em-
6 ployee, applicant, former employee, or personal serv-
7 ices contractor who believes that he or she has been
8 subjected to a reprisal prohibited by subsection (b)
9 may submit a complaint of such reprisal—

10 “(A) to the Inspector General of the agen-
11 cy that awarded the contract or grant;

12 “(B) in the case of a complaint—

13 “(i) regarding a covered intelligence
14 community element in the Department of
15 Defense, to the Inspector General of the
16 Department of Defense; or

17 “(ii) submitted by an employee, appli-
18 cant, former employee, or personal services
19 contractor who is a National Intelligence
20 Program funded billet of a covered intel-
21 ligence community element in the Depart-
22 ment of Defense, to—

23 “(I) the Inspector General of the
24 Department of Defense; and

1 “(II)(aa) the head of the agency
2 containing the covered intelligence
3 community element that awarded the
4 contract or grant; or

5 “(bb) the Investigator General of
6 the Intelligence Community; or

7 “(C) to the Inspector General of the Intel-
8 ligence Community.

9 “(2) DETERMINATIONS.—

10 “(A) IN GENERAL.—Except as provided
11 under subparagraph (B), the Inspector General
12 who receives a complaint referred to in para-
13 graph (1) shall—

14 “(i) make a determination that the
15 complaint—

16 “(I) is frivolous;

17 “(II) fails to allege a violation of
18 the prohibition in subsection (b); or

19 “(III) has previously been ad-
20 dressed in another Federal or State
21 judicial or administrative proceeding
22 initiated by the complainant; or

23 “(ii) shall investigate the complaint
24 and, upon completion of such investigation,
25 submit a report of the findings of the in-

1 vestigation to the employee, applicant,
2 former employee, or personal services con-
3 tractor who submitted the complaint, and
4 the contractor, subcontractor, grantee, or
5 subgrantee concerned, and the head of the
6 agency that awarded the contract or grant
7 not later than 180 days after receiving the
8 complaint.

9 “(B) EXTENSION OF TIME.—If the Inspec-
10 tor General is unable to complete an investiga-
11 tion in time to submit a determination within
12 the 180-day period specified in subparagraph
13 (A)(ii) and the employee, applicant, former em-
14 ployee, or personal services contractor who sub-
15 mitted the complaint agrees to an extension of
16 time, the Inspector General shall submit a re-
17 port under subparagraph (A)(ii) within such ad-
18 ditional period of time, up to 180 days, as shall
19 be agreed upon between the Inspector General
20 and the individual submitting the complaint.

21 “(3) BURDENS OF PROOF.—Consistent with
22 Executive orders protecting information specifically
23 required by Executive order to be kept classified in
24 the interest of national defense or the conduct of
25 foreign affairs, the legal burdens of proof specified

1 in section 1221(e) of title 5, United States Code,
2 shall, to the greatest extent possible, be controlling
3 for the purposes of any investigation conducted by
4 an Inspector General, or a decision by the head of
5 an agency to determine whether a reprisal prohibited
6 by subsection (b) has occurred.

7 “(4) SUBMISSION TO CONGRESS.—

8 “(A) IN GENERAL.—If the employee, appli-
9 cant, former employee, or personal services con-
10 tractor wishes to submit to Congress their com-
11 plaint submitted under paragraph (1) or if such
12 a complaint is an urgent concern, the Inspector
13 General who receives the complaint shall, within
14 7 calendar days of receipt of the complaint, for-
15 ward such transmittal to the congressional in-
16 telligence committees, together with any com-
17 ments the Inspector General considers appro-
18 priate.

19 “(B) SUBMISSION BY THE EMPLOYEE.—If
20 the Inspector General does not forward the
21 complaint as required by subparagraph (A), the
22 employee, applicant, former employee, or per-
23 sonal services contractor (subject to subpara-
24 graph (C)) may submit the complaint to Con-

1 gress by contacting either or both of the con-
2 gressional intelligence committees directly.

3 “(C) CONDITIONS.—The employee, appli-
4 cant, former employee, or personal services con-
5 tractor may contact the congressional intel-
6 ligence committees directly as described in sub-
7 paragraph (B) only if the employee, applicant,
8 former employee, or personal services con-
9 tractor—

10 “(i) before making such a contact,
11 furnishes to the head of the agency in-
12 volved, through an Inspector General, a
13 statement of the complaint and notice of
14 the intent to contact the intelligence com-
15 mittees directly; and

16 “(ii) obtains and follows from the
17 head of the agency involved, through the
18 Inspector General, direction on how to con-
19 tact the congressional intelligence commit-
20 tees in accordance with appropriate secu-
21 rity practices.

22 “(D) OFFICIAL CAPACITY.—A member or
23 employee of one of the congressional intelligence
24 committees who receives a complaint under this
25 paragraph does so in that member or employ-

1 ee's official capacity as a member or employee
2 of that committee.

3 “(E) URGENT CONCERN DEFINED.—In
4 this paragraph, the term ‘urgent concern’ has
5 the meaning given that term in section 8H of
6 the Inspector General Act of 1978 (5 U.S.C.
7 App).

8 “(d) REMEDY AND ENFORCEMENT AUTHORITY.—

9 “(1) IN GENERAL.—Not later than 30 days
10 after receiving an Inspector General report pursuant
11 to subsection (c)(2)(A)(ii), the head of the agency
12 concerned shall determine whether there is sufficient
13 basis to conclude that the employee, applicant,
14 former employee, or personal services contractor
15 submitting the complaint was subject to a reprisal
16 prohibited by subsection (b) and shall—

17 “(A) issue an order denying relief; or

18 “(B) order the agency concerned and the
19 contractor, subcontractor, grantee, or sub-
20 grantee—

21 “(i) to take affirmative action to
22 abate the reprisal;

23 “(ii) to reinstate the employee, appli-
24 cant, former employee, or personal services
25 contractor to the position that the em-

1 employee, applicant, former employee, or per-
2 sonal services contractor held before the
3 reprisal, together with compensatory dam-
4 ages (including back pay), employment
5 benefits, and other terms and conditions of
6 employment that would apply to the em-
7 ployee, applicant, former employee, or per-
8 sonal services contractor in that position if
9 the reprisal had not been taken; or

10 “(C) to pay the employee, applicant,
11 former employee, or personal services contractor
12 an amount equal to the aggregate amount of all
13 costs and expenses (including attorneys’ fees
14 and expert witnesses’ fees) that were reasonably
15 incurred by the employee, applicant, former em-
16 ployee, or personal services contractor for, or in
17 connection with, bringing the complaint regard-
18 ing the reprisal, as determined by the head of
19 the agency.

20 “(e) NOTIFICATION.—The head of each agency con-
21 taining a covered intelligence community element shall—

22 “(1) inform each contractor, subcontractor,
23 grantee, and subgrantee of such agency, in writing,
24 of the remedies provided by this section; and

1 “(2) ensure that each contractor, subcontractor,
 2 grantee, and subgrantee of such agency inform their
 3 employees and personal services contractors, in writ-
 4 ing, of the remedies provided under this section.

5 “(f) NO PRIVATE CAUSE OF ACTION.—Nothing in
 6 this section shall be construed to permit, authorize, or re-
 7 quire a private cause of action to challenge the merits of
 8 a determination by an Inspector General under this sec-
 9 tion.

10 “(g) PROHIBITION ON WAIVER.—The remedies pro-
 11 vided for in this section may not be waived by any agree-
 12 ment, policy, form, or condition of employment.”.

13 (b) TABLE OF CONTENTS AMENDMENT.—The table
 14 of contents in the first section of the National Security
 15 Act of 1947 is amended by adding at the end the fol-
 16 lowing:

“Sec. 1105. Whistleblower protections for contractors and grantees of the intel-
 ligence community.”.

