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ONE HUNDRED NINTH CONGRESS

Congress of the United States

House of Representatives

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INDEPENDENT

MEMORANDUM

To: Members of the Subcommittee on National Security, Emerging Threats, and International Relations

From: Christopher Shays
Chairman 

Date: February 9, 2006

Subject: Briefing memo for the February 14th Subcommittee hearing

Attached find the briefing memo required by Committee rules for the hearing on Tuesday, February 14th entitled, *National Security Whistleblowers in the post-9/11 Era: Lost in a Labyrinth and Facing Subtle Retaliation*. The hearing will convene at 1:00 p.m., room 2154 Rayburn House Office Building, Washington, D.C.

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INDEPENDENT

MEMORANDUM

To: Members of the Subcommittee on National Security, Emerging Threats, and International Relations

From: Vincent Chase, Chief Investigator and Major Marc LaRoche

Date: February 9, 2006

Subject: Briefing memorandum for the hearing entitled, *National Security Whistleblowers in the post-9/11 Era: Lost in a Labyrinth and Facing Subtle Retaliation* scheduled for February 14, 2005 at 1:00 p.m. in room 2154 Rayburn House Office Building.

PURPOSE OF HEARING

The purpose of the hearing is to determine whether whistleblower protections sufficiently shield government employees in national security agencies against certain types of retaliation.

HEARING ISSUES

1. What procedures do departments and agencies with national security responsibilities follow when an employee reports alleged wrongdoing?
2. What safeguards are in place to protect national security whistleblowers against subtle forms of retaliation?

BACKGROUND

Civil Service Reform Act of 1978

Federal employees who report illegal or improper governmental practices, "whistleblowers," first received statutory protection from reprisal actions with the enactment of the Civil Service Reform Act of 1978 (CSRA).¹ The law was designed to encourage the disclosure of government illegality, waste, and corruption by protecting whistleblowers from punishment through personnel actions.

The CSRA created the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC) to investigate and adjudicate allegations of prohibited personnel practices (**Attachment 1**) or other violations of the merit system. Under the statute, employees subjected to adverse personnel actions, including removal, reduction-in-grade, reduction-in-pay, and suspensions of more than fourteen days, could appeal directly to the MSPB for redress, regardless of the agency's reason for taking the personnel action. For less significant personnel actions, such as transfers or denials of promotion, employees could not appeal to the MSPB directly, but could seek assistance from the OSC, if the action was based on a prohibited reason. Prohibited reasons include:

- reprisal for whistleblowing;
- reprisal for the exercise of appeal rights;
- engaging in discrimination;
- engaging in nepotism,
- willfully obstructing any person's right to compete for employment; or
- taking or failing to take a personnel action if the taking of or failure to take such action violated any law, rule, or regulation regarding merit systems principles.

If the OSC determined there were reasonable grounds to believe that a prohibited personnel practice occurred, it had authority to ask the MSPB to

¹ Civil Service Reform Act of 1978, P.L. 95-454, 92 Stat. 1114.

postpone adverse personnel actions. Moreover, if the OSC determined that corrective action was indicated, it could request the MSPB to consider the matter, The OSC did not, however, have litigating authority to appeal the MSPB's decision in federal court.

In 1984, the MSPB found that, in practice, the CSRA contributed little to the protection of whistleblowers. Statistics illustrated that no measurable progress had been made in overcoming federal employee resistance to reporting instances of fraud, waste, and abuse. The percentage of employees who did not report government wrongdoing due to fear of reprisal almost doubled between 1980 and 1983. **(Attachment 2)**

Congress studied the problem and determined OSC had viewed its primary role to be that of protector of the merit system rather than as protector of the employees. In addition, Congress found employees were distrustful of the OSC due to what was viewed as the OSC's apathetic and sometimes detrimental practices toward employees seeking assistance. Congress noted that restrictive MSPB and federal court decisions had hindered the ability of whistleblowers and other alleged victims of prohibited personnel practices to win redress. **(Attachment 3)** As a result, Congress passed the Whistleblower Protection Act of 1989.²

Whistleblower Protection Act of 1989 (Web Resource 1)

The purpose of the Whistleblower Protection Act of 1989 was to strengthen and improve protection for the rights of employees, to prevent reprisals, and to help eliminate wrongdoing within the government. During the four years following enactment, there was a 20% increase percent in the number of federal employees challenging fraud, waste, and abuse. Over that same period, retaliation resulting from those complaints rose from 24 percent to 37 percent; fewer than 10 percent of individuals exercising their legal remedies were helped; and 45 percent of individuals reported that exercising their new rights caused them even more trouble. **(Attachment 3)**

Congress strengthened and improved whistleblower rights and remedies with the passage of amendments to the Act in 1994. The Act was amended to:

² Whistleblower Protection Act of 1989, P.L. 101-12, 103 Stat. 16 (5 U.S.C § 1201 et seq.).

(1) allow the awarding of reasonable attorney fees by agencies to prevailing parties in certain cases;

(2) allow review of any agency decision in whistleblower cases to require psychiatric testing or examination of an employee or any other significant changes in duties, responsibilities, or working conditions made by the agency;

(3) make agency heads responsible for ensuring that their employees are informed of whistleblower rights and remedies;

(4) make compliance with merit systems principles a factor in Senior Executive Service performance appraisals;

(5) provide for the application of certain merit systems provisions to certain Department of Veterans Affairs personnel;

(6) allow corrective actions by the Merit Systems Protection Board to include placing the individual, as nearly as possible, in the position he or she would have been had the prohibited personnel practice not occurred, as well as reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages;

(7) provide aggrieved individuals with a choice of remedies with respect to certain prohibited personnel practices;

(8) revise the definition of "covered position"³ with respect to prohibited personnel practices.

Finally, the Act excludes certain agencies engaged in foreign intelligence or counterintelligence activities from whistleblower protections

³ 5 U.S.C. § 2302(a)(2)(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 excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or 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.

including the Federal Bureau of Investigation (FBI), the Central Intelligence Agency (CIA), the Defense Intelligence Agency (DIA), the National Security Agency (NSA) and any other agency the President determines primarily conducts foreign intelligence or counterintelligence activities.
(Attachment 4)

Intelligence Community Whistleblower Protection Act of 1998

The Intelligence Community Whistleblower Protection Act of 1998 **(Attachment 5)** amended the Central Intelligence Agency Act of 1949⁴ to authorize an employee or contractor of the Central Intelligence Agency (CIA) to notify the Inspector General (IG) of the CIA that the employee intends to report to the Congress an urgent concern.

In addition, the Act amended the Inspector General Act of 1978⁵ **(Attachment 6)** to authorize employees and contractors of the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Reconnaissance Office, and the National Security Agency to report an urgent concern to the IG of the Department of Defense. Employees and contractors of the Federal Bureau of Investigation were authorized to report an urgent concern to the IG of the Justice Department. Any other federal employees dealing with foreign intelligence or counterintelligence activities who intend to take such action are authorized to report to the appropriate IG.

The Act defined a matter of "urgent concern" as: (1) a serious or flagrant problem, abuse, violation of law or executive order, or deficiency relating to the administration or operation of an intelligence activity involving classified information; (2) a false statement to the Congress, or willful withholding from the Congress, on an issue of material fact relating to the administration or operation of an intelligence activity; or (3) an action constituting reprisal in response to an employee's reporting of an urgent concern.

⁴ 50 U.S.C. 403q

⁵ 5 U.S.C.

U.S. Office of the Special Counsel

The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. OSC authority was established by three federal statutes, the Civil Service Reform Act, the Whistleblower Protection Act, and the Hatch Act. (**Web Resource 2**)

OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices (PPP), especially for whistleblower reprisals. OSC receives, investigates, and prosecutes allegations of PPPs, with an emphasis on protecting federal government whistleblowers. (**Attachment 7**) OSC seeks corrective action remedies (such as back pay and reinstatement), by negotiation or from the Merit Systems Protection Board (MSPB), for injuries suffered by whistleblowers and other complainants. OSC is also authorized to file complaints at the MSPB to seek disciplinary action against individuals who commit PPPs. OSC does not have statutory authority to investigate reprisal complaints from employees at CIA, FBI, Defense Intelligence Agency and the National Security Agency.

Department of Justice (DOJ), Federal Bureau of Investigation (FBI)

Under the DOJ regulations for FBI whistleblowers, an FBI employee may seek protection from retaliation for making certain types of disclosures. The general procedure for handling FBI whistleblower complaints is as follows:

- An FBI employee must make a protected disclosure to the Department or FBI office for a violation of law, mismanagement, gross waste of funds, abuse of authority, or a danger to public health or safety.
- The FBI cannot take a reprisal action against the employee for making a protected disclosure. If the employee believes that the FBI has or will retaliate against the employee as a reprisal for a protected disclosure, the employee may report the alleged reprisal to either the DOJ IG or to the Office of Professional Responsibility⁶ (OPR).

- Either DOJ IG or the Office of Professional Responsibility will be designated to investigate the alleged reprisal to determine whether there are reasonable grounds to believe that there has been or will be a reprisal for a protected disclosure.
- If the designated office conducting the investigation terminates the investigation, that office must provide the complainant with a summary of the factual findings and the reasons for termination. The complainant may then comment on the findings. In addition, the employee can request the Office of Attorney Recruitment and Management to review the termination decision.
- If the designated office makes a determination of an improper reprisal, the findings then are sent to the Director, Office of Attorney Recruitment and Management (OARM). After reviewing the findings, comments from the complainant, and any response from the FBI, the OARM Director decides whether the protected disclosure was a contributing factor in any personnel action taken or to be taken against the complainant. If the Director determines that the protected disclosure was a contributing factor in the personnel action, the OARM Director will order corrective action. However, corrective action will not be ordered if the FBI can show by clear and convincing evidence that it would have taken the same personnel action in the absence of disclosure.

⁶ The Office of Professional Responsibility (OPR) in the Federal Bureau of Investigation (FBI) was created in 1976 and located in the FBI's Inspection Division. Unlike today's OPR, this entity was responsible only for investigating allegations of criminal action or other serious misconduct by FBI employees. Adjudication of these matters rested with the Administrative Summary Unit, housed in the Personnel Division and subsequently in the Administrative Services Division. In March 1997, the FBI Director implemented the structure of OPR as it largely exists today. The Director combined the two separate investigation and adjudication functions from the Inspection Division and Administrative Summary Unit into a new stand-alone OPR. This consolidation served multiple purposes. In part, the Director intended to enhance executive oversight of the entire disciplinary process by bringing the two functions together in an office that reports directly to the Deputy Director. By placing the units together and directly below the Deputy Director, the Director hoped to increase the independence and accountability of the office. In addition, the change was intended to produce more timely resolution of cases.

Department of Defense (DOD)

The Department of Defense, Office of the Inspector General (OIG) has separate offices for handling military and civilian reprisal complaints. **(Attachment 8)**

Military Reprisals Investigations

The Directorate for Military Reprisal Investigations has the primary authority and responsibility to conduct investigations concerning allegations of reprisal against military members, nonappropriated fund employees and Defense contractor employees. **(Web Resource 3)**

Military members have the option of directly contacting their Military Department Inspector General or reporting their complaints to the DOD IG, Directorate for Military Reprisal Investigations through the Defense Hotline.⁷

The October 1998 revision to the Military Whistleblower Protection Act⁸ contained significant changes in the processes used by the Military Department Inspectors General and the DOD IG in handling reprisal allegations. The most significant change gave the Military Department IGs the authority to extend protections for reprisal allegations. Military Department IGs must notify the DOD IG within ten working days of receiving reprisal allegations. The DOD IG Directorate for Military Reprisal Investigations maintains a system to track those notifications.

Military Department IGs will then conduct a preliminary inquiry to determine whether the allegations merit investigation. All decisions by Military Department IGs not to investigate allegations of military whistleblower reprisal are subject to the review and concurrence of the Director, DODIG Directorate for Military Reprisal Investigations. All final

⁷ Anyone, whether uniformed or civilian, who witnesses what he or she believes to be a violation of ethical standards and/or the law, including but not limited to fraud, waste, or abuse of authority, potential leaks of classified information, or potential acts of terrorism, should report such conduct through the chain of command or either directly to his or her respective service Inspector General or directly to the Inspector General of the Department of Defense Hotline at 800-424-9098.

⁸ Title X, USC, Section 1034 (10 USC 1034)

reports of investigation under Military Whistleblower Protection Act must be approved by the Director, DOD IG Directorate for Military Reprisal Investigations.

DOD component Inspectors General may accept reprisal allegations from nonappropriated fund employees. DOD requires component IGs to forward reprisal allegations to the DOD IG for resolution. Defense contractor employees seeking whistleblower reprisal protection can report allegations directly to the Directorate for Military Reprisal Investigations for resolution.

DOD Civilian Reprisals Investigations

The Directorate for Civilian Reprisal Investigations (CRI) was established in January 2004. The Directorate has the authority to conduct investigations concerning allegations of reprisal against DOD civilian employees⁹ *including personnel in DOD intelligence agencies* (emphasis added). However, the Directorate's jurisdiction for employee reprisal complaints is secondary and parallel to the U.S. Office of Special Counsel (OSC). OSC has primary jurisdiction for DOD civilian employee reprisal allegations. OSC has no authority to conduct reprisal investigation for whistleblowers in the intelligence community. **(Attachment 9)**

Department of Energy (DOE)

The Department of Energy, Office of the Inspector General (OIG) issued a policy directive February 1, 2000 establishing the procedure implementing the Intelligence Whistleblower Protection Act of 1998 for contract employees. **(Attachment 10)** According to the DOE OIG, contract employee reprisal complaints are usually investigated by the Office of Special Counsel.¹⁰ However, the DOE IG can also investigate reprisal complaints. Complaints received by the IG undergo extensive evaluation. Whistleblower complaints are processed and reviewed to determine appropriate action through the Complaints Coordination Committee, a group of senior level employees from all office disciplines. **(Attachment 11)**

⁹ 5 U.S.C. Appx. Section 7(a) & (c)

¹⁰ 10CFR part 708.

Currently, Congress is considering legislation to protect national security whistleblowers against subtle forms of retaliation, including suspension of security clearances:

The Federal Employee Protection of Disclosures Act (S.494)

S. 494 (**Attachment 12**) seeks to amend the Inspector General Act to clarify the range of disclosures protected from prohibited personnel practices. The legislation contains language on retaliation actions relating to security clearances. The legislation also codifies the legal standard for determining whether a whistleblower has a reasonable belief that a disclosure evidences governmental waste, fraud, or abuse, or a violation of law.

Specifically, the act requires federal agencies to instruct employees how to make a lawful disclosure of classified information to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such information. It further provides that the following actions may not be taken against whistleblowers for protected disclosures: (1) the implementation or enforcement of any nondisclosure policy, form, or agreement; (2) a security clearance suspension or revocation; and (3) an investigation (other than routine nondiscretionary agency investigations) of an employee or applicant for employment.

However, S.494 does not apply these protections to agencies engaged in foreign intelligence or counterintelligence activities including the Federal Bureau of Investigation (FBI), the Central Intelligence Agency (CIA), the Defense Intelligence Agency (DIA), the National Security Agency (NSA) and any other agency the President determines primarily conducts foreign intelligence or counterintelligence activities. (**Web Resource 4**)

The Federal Employee Protection of Disclosures Act (H.R.1317)

HR1317 clarifies the scope of protected disclosures by a federal employee to include any lawful disclosure an employee or applicant reasonably believes is credible evidence of waste, abuse, or gross mismanagement, without restriction as to time, place, form, motive, context, or prior disclosure. In addition, (1) the bill would give jury trials to federal

whistleblowers if the Office of Special Counsel does not take corrective action within 180 days on their retaliation complaints, (2) provides that a whistleblower can rebut the presumption that a public officer complained about was acting within the law, (3) includes Transportation Security Administration (TSA) baggage screeners to the list of covered employees, and (4) requires GAO to study security clearances revocations taking effect after 1996 with respect to personnel who filed claims in connection with such security clearance revocations.

DISCUSSION OF HEARING ISSUES

1. What procedures do departments and agencies with national security responsibilities follow when an employee reports alleged wrongdoing?

The Office of Inspector General

In accordance with statutes, federal departments and agencies have assigned the task of receiving and investigating reports of wrongdoing to their respective offices of Inspectors General. Thus, it is often the IG that bears the responsibility for educating the workforce and developing practices and procedures for dealing with whistleblower disclosure. The many and varied relationships that exist between the IGs and agency leadership has been at the center of criticism leveled against whistleblower protections.

Several advocacy organizations, including the Project on Government Oversight (POGO) and the Government Accountability Project (GAP), have commented on the institutional weaknesses and lack of independence of the various Inspectors General. Their criticism is focused on three areas.

The first deals with IGs' authority. The IG can investigate employee reports of alleged wrongdoing and make findings and recommendations. However, according to members of various advocacy groups, the IGs' findings and recommendations are non-binding and are frequently ignored by the agency in question. The second criticism addresses the alleged lack of confidentiality. The Inspector General Act of 1978 provides that IG's should keep their sources confidential unless he/she "determines such disclosure is unavoidable during the course of the investigation." This somewhat circular exception to a large extent leaves disclosure of an

employee's identity up to the discretion of the IG (an action for which the employee has no recourse.) According to POGO, among others, even if the IG does not disclose the employee's identity, the inquiry is often conducted in a way to make the identity of the complainant patently obvious. Finally, the third argument made by these groups is that IG investigations can actually be used to retaliate against whistleblowers. They claim that in certain agencies, management occasionally initiates IG investigations to both discredit and harass employees deemed troublesome. The resulting cloud of uncertainty is unsettling to the targeted employee and sends an unmistakable "don't get too close to this guy" message to co-workers.¹¹

The Burden of Proof

The employer must have knowledge of the disclosure and the disclosure must be a clear contributing factor to the subsequent personnel actions taken. Once the employee has established these requirements, the burden shifts to the government to show by clear and convincing evidence that the actions are not retaliatory and would have been taken regardless of the whistleblower's disclosure.¹²

Classified Information

Employees working with classified information or doing work that requires a security clearance must also operate under a wholly different set of rules from those of the civil servant. Classified material can be disclosed under very limited circumstances. Security clearances can be suspended or revoked for a range of behaviors, including personal habits or off-duty associations, which would not justify a disciplinary action against an ordinary civil servant.

Some argue government agencies and departments are accorded so much discretion in the area of security clearances that ordinary notions of due process have little application. Current law does not allow independent due process hearings to defend against security clearance reprisals. Those are governed by flexible in-house systems and procedures to enforce anti-

¹¹ *The Art of Anonymous Activism: Serving the Public While Surviving Public Service*; Chapter 3, Official Channel Swimming: Starting & Monitoring Agency Investigations, (November 2002) pp 20-21.

¹² *Ibid*, 48.

retaliation rights. Some believe these procedures are inconsistent and confusing. According to GAP, it is these internal processes and investigations that often serve as a form of punishment for making a whistleblower disclosure.

2. What safeguards are in place to protect national security whistleblowers against subtle forms of retaliation, including suspension of security clearances?

Agency whistleblowers operate within a system of mixed messages. On the one hand, the Code of Ethics adopted by Congress in 1958 directs all government employees to “expose corruption wherever discovered.”¹³ Over the years, agency employees have received credit for revealing problems of defense cost overruns, unsafe nuclear power plant conditions, questionable drugs approved for marketing, contract illegalities and improprieties, and regulatory corruption.¹⁴ On the other hand, exposing corruption can result in termination, transfers, reprimands, denial of promotion, or harassment.

Early on, loopholes developed in the original 1989 Whistleblower Protection Act. According to some, there are very limited opportunities for employees of the FBI, DOE, DOJ, among others, to seek redress when their security clearance is revoked. Each department and agency has been left to deal with issues of reprisals on its own. Many of the departments and agencies formalized their whistleblower procedures in the late 90’s and were on course to improving the relationships between their Inspectors General and employees. However, in the aftermath of 9/11, the ensuing shake-up of the intelligence and counterintelligence agencies, and the creation of the Department of Homeland Security, some believe there has been a general deterioration of whistleblower protections.¹⁵

Employees in the national security arena now work in an environment of heightened sensitivity and insecurity. When a department or agency’s

¹³ 72 Stat. B12 (1958) (H.Con.Res. 175).

¹⁴ *The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse, and Corruption*, prepared for the Senate Committee on Governmental Affairs, 95th Cong., 2nd sess. 1 (Comm. Print, Feb. 1978).

¹⁵ *Homeland Security and National Security Whistleblower Protections: The Unfinished Agenda*, Project On Government Oversight, April 28, 2005, Washington, D.C.

practices are called into question, the first impulse is one of self-preservation and damage control. The reorganization of the national security community appears to have significantly retarded progress made with respect to whistleblower rights over the last twenty five years. A subtle trend now observed in the area of personnel management with respect to employees who make disclosures about mismanagement is the revocation of an employee's security clearance. According to some, this type of reaction is characteristic of the post-9/11 era and argue that institutions have a duty not to tolerate or engage in retaliation against good-faith whistleblowers. This duty includes providing appropriate and timely relief to ameliorate the consequences of actual or threatened reprisals, and holding accountable those who retaliate. Whistleblowers and other witnesses to misconduct have a responsibility to raise their concerns honorably and with foundation.¹⁶

¹⁶ *The Whistleblower's Survival Guide: Courage Without Martyrdom*, Tom Devine, Government Accountability Project, Fund for Constitutional Government, Washington, D.C., 1997.

WITNESS TESTIMONY

PANEL ONE

SPC Samuel J. Provance will testify about the procedure he followed and difficulties he encountered after reporting a matter of urgent concern to the Department of the Army.

Mr. Michael German will testify about the procedure he followed and difficulties he encountered after reporting a matter of urgent concern to the Department of Justice, Office of the Inspector General.

Mr. Richard Levernier will testify about the procedure he followed and difficulties he encountered after reporting a matter of urgent concern to the Department of Energy, Office of the Inspector General.

Lt. Colonel Anthony Shaffer will testify about prohibited personnel practices and the suspension of his security clearance.

Mr. Russell Tice will testify about prohibited personnel practices and the suspension of his security clearance.

PANEL TWO

Mr. Mark S. Zaid, Esq. will testify about the legal assistance his law firm provides to government employees who experienced retaliation for reporting a matter of urgent concern and the problems he encountered.

Ms. Beth Daley, Senior Investigator, Project on Government Oversight (POGO) will testify about the results of POGO's review of whistleblower protection regulations.

Mr. Tom Devine, Legal Director, Government Accountability Project (GAP) will testify about the legal assistance GAP provides to government employees who experienced retaliation for reporting a matter of urgent concern and the problems he encountered.

Dr. William G. Weaver will testify about the lack of protection for national security whistleblowers.

PANEL THREE

Mr. James McVay, Deputy Special Counsel, U. S. Office of the Special Counsel will testify about whether whistleblower protection laws, regulations, policies and procedures sufficiently protect government employees in sensitive positions.

Mr. Glenn A. Fine, Inspector General, Office of the Inspector General, Department of Justice will testify about whether whistleblower protection laws, regulations, policies and procedures sufficiently protect Department of Justice employees in sensitive positions.

Mr. John L. Helgerson, Inspector General, Office of the Inspector General, Central Intelligence Agency (CIA) will testify about whether whistleblower protection laws, regulations, policies and procedures sufficiently protect CIA employees in sensitive positions.

Mr. Gregory H. Friedman, Inspector General, Office of the Inspector General, Department of Energy (DOE) will testify about whether whistleblower protection laws, regulations, policies and procedures sufficiently protect DOE employees in sensitive positions.

Mr. Thomas Gimble, Acting Inspector General, Office of the Inspector General, Department of Defense (DOD) will testify about whether whistleblower protection laws, regulations, policies and procedures sufficiently protect civilian and military DOD employees in sensitive positions.

ATTACHMENTS

1. General Accounting Office (GAO), *U.S. Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should Be Provided to Congress*, GAO-04-36, pg.5, March 2004.
2. Congressional Research Service, CRS Report for Congress, *Whistleblower Protections for Federal Employees*, L. Paige Whitaker, CRS Report 97-787 A, pgs. 2-3.
3. Congressional Research Service, CRS Report for Congress, *Whistleblower Protections for Federal Employees*, L. Paige Whitaker, CRS Report 97-787 A, pgs. 4-5.
4. Congressional Research Service, CRS Report for Congress, *Whistleblower Protections for Federal Employees*, L. Paige Whitaker, CRS Report 97-787 A, pg. 8.
5. *Intelligence Whistleblower Protection Act of 1998*, 5 U.S.C. Sec.701.
6. Congressional Research Service, CRS Report for Congress, *Statutory Offices of Inspector General: Past and Present*, Frederick M. Kaiser CRS Report 98-379, Updated September 28, 2005.
7. U.S. Office of Special Counsel, *Report to Congress*, Fiscal Year 2004.
8. Department of Defense, Office of the Inspector General, Memorandum for Civilian and Military Officers and Employees Assigned to the Office of the Inspector General, *Policy on Whistleblower Protection for DOD Employees, Standards Applied to Complaints*, Joseph E. Schmitz, January 7, 2005.
9. Department of Defense, Office of the Inspector General, Memorandum for Civilian and Military Officers and Employees Assigned to the Office of the Inspector General, *Policy on the Selection of Intakes to Process as Civilian Reprisal Investigations*, Joseph E. Schmitz, January 7, 2005.
10. Department of Energy (DOE), Office of Inspector (OIG), Policy Guideline, *Whistleblower Complaints*.

11. Department of Energy, Office of the Inspector General, Implementation of the "Intelligence Community Whistleblower Protection Act of 1998, IG-929, February 2, 2000.

12. *Federal Employee Protection of Disclosure Act* (Reported in Senate) (S.494.RS).

13. Federal Employee Protection of Disclosure Act, (H.R.1317).

WEB RESOURCES

1. CRS Report for Congress, CRS Report 97-787 A
Whistleblower Protections for Federal Employees
<http://www.congress.gov/erp/rl/pdf/97-787.pdf>

2. The Department of Defense, Office of the Inspector General (OIG),
The Directorate for Military Reprisal Investigations
<http://www.dodig.mil/INV/CRI/index.html>

3. U.S. Office of Special Counsel, OSC Online
<http://www.osc.gov/intro.htm>

4. CRS Report for Congress, CRS Report RL33215
National Security Whistleblower
<http://www.congress.gov/erp/rl/pdf/RL33215.pdf>

WITNESS LIST (Three Panels)

PANEL ONE

SPC Samuel J. Provance, USA
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Mr. Michael German
Arlington, Virginia

Mr. Richard Levernier
Goodyear, Arizona

Lt. Colonel Anthony Shaffer, USAR
Springfield, Virginia

Mr. Russell Tice
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PANEL TWO

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Ms. Beth Daley, Senior Investigator
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Mr. Tom Devine, Legal Director
Government Accountability Project

Dr. William G. Weaver
National Security Whistleblowers Coalition (NSWBC)

PANELTHREE

Mr. James McVay, Deputy Special Counsel
U. S. Office of the Special Counsel

Mr. Glenn A. Fine, Inspector General
Office of the Inspector General
Department of Justice

Mr. Gregory H. Friedman, Inspector General
Office of the Inspector General
Department of Energy

Mr. Thomas Gimble, Acting Inspector General
Office of the Inspector General
Department of Defense

accompanied by

Ms. Jane Deese, Director
Military Reprisal Investigations
Office of the Inspector General

Mr. Daniel Meyer, Director
Civilian Reprisal Investigations
Office of the Inspector General

Attachment 1

Figure 1: Prohibited Personnel Practices

Federal employees, with authority to take, direct others to take, recommend or approve any personnel action, may not:

- Discriminate for or against an employee or applicant based on race, color, religion, sex, national origin, age, handicap, marital status, or political affiliation;
- Solicit or consider employment recommendations based on factors other than personal knowledge or records of job related abilities or characteristics;
- Coerce the political activity of any person;
- Deceive or willfully obstruct any person from competing for employment;
- Influence any person to withdraw from competition for any position so as to improve or injure the employment prospects of any other person;
- Give an unauthorized preference or advantage to improve or injure the prospects of any person for employment;
- Engage in nepotism (that is, hire, promote, or advocate the hiring or promotion of relatives);
- Take or fail to take, or threaten to take or fail to take a personnel action because of whistleblowing;
- Take or fail to take, or threaten to take or fail to take a personnel action because of the exercise of a protected activity, including a lawful appeal, complaint, or grievance;
- Discriminate based on personal conduct which does not adversely affect the performance of the employee or other employees;
- Knowingly take or fail to take a personnel action in violation of veterans' preference laws; and
- Take or fail to take a personnel action, which would violate any law, rule or regulation implementing or directly concerning merit system principles.

Source: 5 USC 2302(b).

Attachment 2

CRS Report for Congress

Received through the CRS Web

Whistleblower Protections for Federal Employees

Updated May 18, 1998

L. Paige Whitaker
Legislative Attorney
American Law Division

Michael Schmerling
Law Clerk
American Law Division

certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.²

Among its provisions, the CSRA created the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC) to investigate and adjudicate allegations of prohibited personnel practices or other violation of the merit system. Under the statute, employees subjected to significant adverse personnel actions, including removal, reduction-in-grade, reduction-in-pay, and suspensions of more than fourteen days, could appeal directly to the MSPB for redress, regardless of the agency's reason for taking the personnel action.³ For less significant personnel actions, such as transfers or denials of promotions, employees could not appeal to the MSPB directly, but could seek assistance from the OSC, *if* the action was based on a "prohibited reason."⁴

Prohibited reasons included reprisal for whistleblowing; reprisal for the exercise of appeal rights; engaging in discrimination; engaging in nepotism, willfully obstructing any person's right to compete for employment; or taking or failing to take a personnel action if the taking of or failure to take such action violated any law, rule, or regulation regarding merit systems principles.⁵ Personnel actions based on prohibited reasons are called "prohibited personnel practices."⁶ Employees subjected to adverse personnel actions that were taken solely for prohibited reasons could simultaneously appeal to the MSPB⁷ and seek assistance from the OSC.⁸ If the OSC determined that there were reasonable grounds to believe that a prohibited personnel practice occurred, it had authority to seek a postponement or "stay" from the MSPB. Moreover, if the OSC determined that corrective action was indicated, it could request the MSPB to consider the matter; the OSC did not, however, have litigating authority to appeal the MSPB's decision in federal court.⁹

In 1984, the MSPB found that, in practice, the CSRA contributed little to the protection of whistleblowers. Statistics illustrated that no measurable progress had been made in overcoming federal employee resistance to reporting instances of fraud, waste, and abuse. Indeed, the percentage of employees who did not report

² S.Rept. 969, 95th Cong., 2d Sess. 8 (1978).

³ 5 U.S.C. § 7513(d).

⁴ 5 U.S.C. § 1206(a)(1982), repealed by Whistleblower Protection Act of 1989, P. L. 101-12, 92 Stat. 1114.

⁵ 5 U.S.C. § 2302(b).

⁶ 5 U.S.C. § 2302(a).

⁷ 5 U.S.C. § 7701(c)(2)(B) (affirmative defense).

⁸ 5 U.S.C. § 1206(a)(1).

⁹ For a detailed discussion of the original federal statutory protection of whistleblowers, see "Overview of Whistleblower Protections In Federal Law," by Jack H. Maskell, Legislative Attorney, (CRS Report 86-1018A, Nov. 26, 1986), which this report updates.

government wrongdoing due to fear of reprisal almost doubled between 1980 and 1983.¹⁰

Congress identified two major sources of concern. First, Senate and House committee studies indicated that the OSC had viewed its primary role to be that of protector of the merit system rather than as protector of the employees who comprise that system.¹¹ Further, they found that employees were distrustful of the OSC due to what was viewed as the OSC's apathetic and sometimes positively detrimental practices toward employees seeking its assistance.¹² Second, Congress noted that restrictive MSPB and federal court decisions had hindered the ability of whistleblowers and other alleged victims of prohibited personnel practices to win redress.¹³

Legislative Responses. In response to this perceived lack of whistleblower protection, in 1987, S. 508, the "Whistleblower Protection Act," was introduced.¹⁴ Similar to legislation that had been introduced but not enacted in the ninety-ninth Congress, S. 508, *inter alia*, would have granted the OSC litigating authority so that it could appeal decisions of the MSPB in federal court and would have eased the burden of proof to be met by an employee seeking to establish a claim that an adverse personnel action had been taken because of whistleblowing: an aggrieved employee would have been required to prove that retaliation against whistleblowing was merely "a factor" of a personnel action, rather than a "significant" or a "predominant" factor. Once the employee had made out a *prima facie* case of reprisal by proving that the whistleblowing was a factor in the personnel action, the agency would then have had the burden of proving by "clear and convincing evidence," which is a higher standard than the then-existing statute required, that the whistleblowing was not a "material factor" in the personnel action.

Reagan Veto. On October 26, 1988 President Reagan pocket vetoed S. 508, the "Whistleblower Protection Act," criticizing it for redesigning the whistleblower protection process in such a manner that "employees who are not genuine whistleblowers could manipulate the process to their advantage simply to delay or avoid appropriate adverse personnel actions."¹⁵ Specifically, he cited objection to reducing the employee's burden of proving that a whistleblowing disclosure was a substantial factor in the agency's personnel decision and to imposing a heavier burden upon the department or agency to prove by "clear and convincing" evidence that the

¹⁰ H.Rep. 413, 100th Cong., 2d Sess. 5 (1988).

¹¹ S.Rept. 413, 100th Cong., 2d Sess. (1988) [hereinafter Senate Report] (accompanying S. 508), at 7-10; H.Rept. 274, 100th Cong., 2d Sess. (1988) [hereinafter House Report] (accompanying H.R. 25), at 20-25.

¹² See Senate Report, at 7-11; House Report, at 19-21.

¹³ Senate Report at 11-16; House Report at 25-29.

¹⁴ S. 508, 100th Cong., 1st Sess. (1987).

¹⁵ 24 Weekly Comp. Pres. Doc. 1377 (Oct. 31, 1988).

Attachment 3

same personnel decision would have been made absent the disclosure.¹⁶ He concluded that these standards of proof inequitably favored the employees over management.

President Reagan also cited constitutional concerns with a provision that would have prohibited prior executive review of reports or testimony by the Special Counsel or his employees when requested by a congressional committee¹⁷ and with a provision that would have authorized the Special Counsel to appeal Merit System Protection Board decisions in federal court.¹⁸ Implementation of the latter provision, he asserted, would have resulted in two executive branch agencies litigating their disputes in federal court, thereby conflicting with the constitutional grant of Executive power authorizing the President to supervise and resolve disputes among subordinates.¹⁹

In a joint effort by Congress and the Bush Administration to reach a consensus on whistleblower legislation, without eviscerating provisions that would increase the protection of federal whistleblowers, S. 20, the "Whistleblower Protection Act of 1989," was signed into law on April 10, 1989.²⁰ A substantial change between S. 20 and earlier legislation was the deletion of provisions that would have enabled the Special Counsel to oppose other executive branch agencies in court. One proponent of the bill maintained that although the constitutional objections that had been raised concerning these provisions were "little more than legal window dressing on an essentially ideological argument," the Committee on Post Office and Civil Service agreed to the modification because it decreased the power of the Special Counsel, which the Committee perceived was in the best interest of whistleblowers.²¹

Effects of the Original 1989 Protections. Congress envisioned the Whistleblower Protection Act of 1989 as a comprehensively protective statute; however, a study of its operation during the four years following its enactment led to a congressional finding that the law was counterproductive.²² Passage of the law was followed by an increase from 30 to 50 percent, in the number of Federal employees challenging fraud, waste, and abuse. However, at the same time, retaliation resulting from these complaints rose from 24 percent to 37 percent; fewer than 10 percent of individuals exercising their legal remedies were helped; and 45 percent of individuals

¹⁶ Id. (Citing S. 508, 100th Cong., 2d Sess. § 1221(e) (1988)).

¹⁷ Id. (Citing S. 508, 100th Cong., 2d Sess. § 1217 (1988)).

¹⁸ Id. (Citing S. 508, 100th Cong., 2d Sess. § 1212(d)(3)(A) (1988)).

¹⁹ Cf. 135 Cong. Rec. S2782 (daily ed. March 16, 1989). Memorandum from the American Law Division of the Congressional Research Service to Senate and House Subcommittees, concluding that constitutional objections of the President to provisions in legislation would not likely be sustained by a reviewing court.

²⁰ Whistleblower Protection Act of 1989, P.L. 101-12, 103 Stat. 16 (5 U.S.C. § 1201 et seq.).

²¹ 135 Cong. Rec. H751 (daily ed. March 21, 1989). See generally Rosenberg, Congress's Prerogative Over Agencies And Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive, 57 Geo. Wash. L. Rev. 627 (1989).

²² H.Rept. 769, 103d Cong., 2d Sess. 12 (1994).

reported that exercising their new rights caused them even more trouble.²³ In addition, between 1989 and 1993, less than 20 percent of employees bringing cases to the MSPB were successful.²⁴ In the Federal Circuit, aggrieved employees fared even worse, prevailing only twice on the merits of the whistleblower defense between 1982 and 1993.²⁵

The vulnerability of whistleblowers' legal rights following the implementation of the 1989 Act is clearly illustrated in *Clark v. Department of the Army*.²⁶ In that case, a former Department of the Army employee claimed that her removal was in retaliation for whistleblowing. Her termination was upheld by the MSPB and on appeal, by the Federal Circuit. The court's actions, which contributed to the decision to amend the Act, were criticized in the report of the Committee on Post Office and Civil Service:

[T]he Court erased the Act's clear legislative intent that protected whistleblowing may not play any factor in personnel actions, unless the agency demonstrates by clear and convincing evidence that it was an immaterial factor.

Clark effectively canceled the whistleblower defense, by permitting an agency simultaneously to defeat a prima facie case through meeting the same burden of supporting its personnel action that exists under section 7701(c), whether or not the employee raises an affirmative defense.²⁷

Despite the documented lack of success with the original statute, Congress indicated the importance of whistleblower protections by strengthening and improving the provisions of the 1989 Act with the passage of the 1994 amendments.

The Whistleblower Protection Act of 1989, as Amended

The Whistleblower Protection Act of 1989, as amended in 1994, applies to a reprisal personnel action taken on or after July 9, 1989.²⁸ The Act amends federal law to: (1) allow the awarding of reasonable attorney fees by agencies to prevailing parties in certain cases;²⁹ (2) subject to review in whistleblower cases any agency decision to require psychiatric testing or examination of an employee or any other significant

²³ Id. At 13. See also Office of Policy and Evaluation, Merit Systems Protection Board, "Whistleblowing in the Federal Government: An Update" (1993).

²⁴ H.Rept. 769, 103d Cong., 2d Sess. 17 (1994).

²⁵ *Sullivan v. Dept. Of Navy*, 720 F.2d 1266 (Fed. Cir. 1983); *Marano v. Dept. Of Justice*, 2 F.3d 1137 (Fed. Cir. 1993).

²⁶ *Clark v. Dept. Of Army*, 977 F.2d 1466 (Fed. Cir. 1993), cert. Denied, 510 U.S. 1091 (1994).

²⁷ H.Rept. 769, 103d Cong., 2d Sess. 18 (1994).

²⁸ 5 U.S.C. § 2302.

²⁹ 5 U.S.C. § 1204.

Attachment 4

Covered Employees. Although anyone may disclose whistleblowing information to the Special Counsel for referral to the appropriate agency, the Special Counsel may order an investigation and require a report from the head of the agency only if the information is received from a covered employee. In addition, with few exceptions, prohibited personnel practices apply only to covered employees. Hence, as a threshold matter, it is important to note which federal employees are statutorily covered.

Generally, current employees, former employees, or applicants for employment to positions in the executive branch of government in both the competitive and the excepted service, as well as positions in the Senior Executive Service are considered covered employees.⁴⁰ However, those positions which are excepted from the competitive service because of their "confidential, policy-determining, policy-making, or policy-advocating character,"⁴¹ and any positions exempted by the President based on a determination that it is necessary and warranted by conditions of good administration,⁴² are not protected by the whistleblower statute. Moreover, the statute does not apply to federal workers employed by the Postal Service or the Postal Rate Commission,⁴³ the General Accounting Office, the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency,⁴⁴ the National Security Agency, and any other executive entity that the President determines primarily conducts foreign intelligence or counter-intelligence activities.⁴⁵ As a result of the 1994 whistleblower amendments, "Government corporations" are also exempt from coverage except in the case of an alleged prohibited personnel practice described under 5 U.S.C. § 2302(b)(8).⁴⁶

Protected Disclosures. "[A]ny disclosure of information" which the employee "reasonably believes" evidences "a violation of any law, rule, or regulation" or evidences "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" is protected on the condition that the disclosure is not prohibited by law nor required to be kept secret by Executive Order.⁴⁷ Moreover, "any disclosure" made 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, which the employee "reasonably believes" evidences "a violation of any law, rule, or regulation," or evidences "gross

⁴⁰ 5 U.S.C. § 2302(a)(2)(B).

⁴¹ 5 U.S.C. § 2302(a)(2)(B)(i).

⁴² 5 U.S.C. § 2302(a)(2)(B)(ii).

⁴³ 5 U.S.C. § 2105(e).

⁴⁴ The Central Imagery Office was exempted from coverage with the passage of the 1994 whistleblower amendments. The agency was renamed the "National Imagery and Mapping Agency" with the passage of the National Defense Authorization Act for Fiscal Year 1997, P.L. 104-201, § 1122(b)(1).

⁴⁵ 5 U.S.C. § 2302(a)(2)(C).

⁴⁶ *Id.*

⁴⁷ 5 U.S.C. § 2302(b)(8)(A).

Attachment 5

Chase, Vincent

From: L. Paige Whitaker [LWHITAKER@crs.loc.gov]
Sent: Tuesday, November 08, 2005 5:24 PM
To: Chase, Vincent
Subject: Intelligence Community Whistleblower Protection Act of 1998

Sec. 701. SHORT TITLE; FINDINGS.

(a) <5 USC app 1 note>

Short Title.--This title may be cited as the "Intelligence Community Whistleblower Protection Act of 1998".

(b) <5 USC app 8H note> Findings.--The Congress finds that--

- (1) national security is a shared responsibility, requiring joint efforts and mutual respect by Congress and the President;
- (2) the principles of comity between the branches of Government apply to the handling of national security information;
- (3) Congress, as a co-equal branch of Government, is empowered by the Constitution to serve as a check on the executive branch; in that capacity, it has a "need to know" of allegations of wrongdoing within the executive branch, including allegations of wrongdoing in the Intelligence Community;
- (4) no basis in law exists for requiring prior authorization of disclosures to the intelligence committees of Congress by [**2414] employees of the executive branch of classified information about wrongdoing within the Intelligence Community;
- (5) the risk of reprisal perceived by employees and contractors of the Intelligence Community for reporting serious or flagrant problems to Congress may have impaired the flow of information needed by the intelligence committees to carry out oversight responsibilities; and
- (6) to encourage such reporting, an additional procedure should be established that provides a means for such employees and contractors to report to Congress while safeguarding the classified information involved in such reporting.

[*702] Sec. 702. PROTECTION OF INTELLIGENCE COMMUNITY EMPLOYEES WHO REPORT URGENT CONCERNS TO CONGRESS.

(a) Inspector General of the Central Intelligence Agency.--

(1) In general.-- Subsection (d) of section 17 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403q) is amended by adding at the end the following new paragraph:

"(5)(A) An employee of the Agency, or of a contractor to the Agency, who intends to report to Congress a complaint or information with respect to an urgent concern may report such complaint or information to the Inspector General.

"(B) Not later than the end of the 14-calendar day period beginning on the date of receipt from an employee of a complaint or information under subparagraph (A), the Inspector General shall determine whether the complaint or information appears credible. If the Inspector General determines that the complaint or information appears credible, the Inspector General shall, before the end of such period, transmit the complaint or

information to the Director.

"(C) Upon receipt of a transmittal from the Inspector General under subparagraph (B), the Director shall, within 7 calendar days of such receipt, forward such transmittal to the intelligence committees, together with any comments the Director considers appropriate."(D)

(i) If the Inspector General does not transmit, or does not transmit in an accurate form, the complaint or information described in subparagraph (B), the employee (subject to clause (ii)) may submit the complaint or information to Congress by contacting either or both of the intelligence committees directly.

"(ii) The employee may contact the intelligence committees directly as described in clause (i) only if the employee--

"(I) before making such a contact, furnishes to the Director, through the Inspector General, a statement of the employee's complaint or information and notice of the employee's intent to contact the intelligence committees directly; and

"(II) obtains and follows from the Director, through the Inspector General, direction on how to contact the intelligence committees in accordance with appropriate security practices.

"(iii) A member or employee of one of the intelligence committees who receives a complaint or information under clause (i) does so in that member or employee's official capacity as a member or employee of that committee.

"(E) The Inspector General shall notify an employee who reports a complaint or information to the Inspector General under this paragraph of each action taken under this paragraph with respect [**2415] to the complaint or information. Such notice shall be provided not later than 3 days after any such action is taken.

"(F) An action taken by the Director or the Inspector General under this paragraph shall not be subject to judicial review.

"(G) In this paragraph:

"(i) The term 'urgent concern' means any of the following:

"(I) A serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information, but does not include differences of opinions concerning public policy matters.

"(II) A false statement to Congress, or a willful withholding from Congress, on an issue of material fact relating to the funding, administration, or operation of an intelligence activity.

"(III) An action, including a personnel action described in section 2302(a)(2)(A) of title 5, United States Code, constituting reprisal or threat of reprisal prohibited under subsection (e)(3)(B) in response to an employee's reporting an urgent concern in accordance with this paragraph.

"(ii) The term 'intelligence committees' means the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate."

(2) <50 USC 403q> Clerical amendment.-- The heading to subsection (d) of such section is amended by inserting "; Reports to Congress on Urgent Concerns" before the period.

(b) Additional Provisions With Respect to Inspectors General of the Intelligence Community.--

(1) In general.-- The Inspector General Act of 1978 (5 U.S.C. App.) is amended by redesignating section 8H as section 8I and by inserting after section 8G the following new section:

[*8H] "Sec. 8H.(a) (1)(A) An employee of the Defense Intelligence Agency, the National Imagery and Mapping

"(A) A serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information, but does not include differences of opinions concerning public policy matters.

"(B) A false statement to Congress, or a willful withholding from Congress, on an issue of material fact relating to the funding, administration, or operation of an intelligence activity.

[**2417] "(C) An action, including a personnel action described in section 2302(a)(2)(A) of title 5, United States Code, constituting reprisal or threat of reprisal prohibited under section 7(c) in response to an employee's reporting an urgent concern in accordance with this section.

"(2) The term 'intelligence committees' means the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate."

(2) <5 USC app> Conforming Amendment.-- Section 8I of such Act (as redesignated by paragraph (1)) is amended by striking out "or 8E" and inserting in lieu thereof "8E, or 8H".

DESCRIPTORS: NATIONAL SECURITY ACT; DAVID L. BOREN NATIONAL SECURITY EDUCATION ACT; CENTRAL INTELLIGENCE AGENCY ACT; CENTRAL INTELLIGENCE AGENCY RETIREMENT ACT; FOREIGN INTELLIGENCE SURVEILLANCE ACT; INSPECTOR GENERAL ACT; CENTRAL INTELLIGENCE AGENCY; COMMUNITY MANAGEMENT ACCOUNT; INTELLIGENCE SERVICES; DISABILITY INSURANCE; PENSIONS; DEPARTMENT OF DEFENSE; DEFENSE BUDGETS AND APPROPRIATIONS; MILITARY INTELLIGENCE; DEFENSE INTELLIGENCE AGENCY; NATIONAL SECURITY AGENCY; DEPARTMENT OF ARMY; DEPARTMENT OF NAVY; DEPARTMENT OF AIR FORCE; DEPARTMENT OF STATE; DEPARTMENT OF TREASURY; DEPARTMENT OF ENERGY; FEDERAL BUREAU OF INVESTIGATION; NATIONAL RECONNAISSANCE OFFICE; NATIONAL IMAGERY AND MAPPING AGENCY; INTERNATIONAL SANCTIONS; GOVERNMENT INVESTIGATIONS; PRESIDENTIAL POWERS; FAMILIES; PROTECTION OF GOVERNMENT PERSONNEL; INTELLIGENCE COMMUNITY WHISTLE BLOWER PROTECTION ACT; INTELLIGENCE SERVICES; CRIME AND CRIMINALS; CONGRESSIONAL-EXECUTIVE RELATIONS; GOVERNMENT INFORMATION AND INFORMATION SERVICES; FEDERAL EMPLOYEES

Agency, the National Reconnaissance Office, or the National Security Agency, or of a contractor of any of those Agencies, who intends to report to Congress a complaint or information with respect to an urgent concern may report the complaint or information to the Inspector General of the Department of Defense (or designee).

"(B) An employee of the Federal Bureau of Investigation, or of a contractor of the Bureau, who intends to report to Congress a complaint or information with respect to an urgent concern may report the complaint or information to the Inspector General of the Department of Justice (or designee).

"(C) Any other employee of, or contractor to, an executive agency, or element or unit thereof, determined by the President under section 2302(a)(2)(C)(ii) of title 5, United States Code, to have as its principal function the conduct of foreign intelligence or counterintelligence activities, who intends to report to Congress a complaint or information with respect to an urgent concern may report the complaint or information to the appropriate Inspector General (or designee) under this Act or section 17 of the Central Intelligence Agency Act of 1949.

"(2) If a designee of an Inspector General under this section receives a complaint or information of an employee with respect to an urgent concern, that designee shall report the complaint [**2416] or information to the Inspector General within 7 calendar days of receipt.

"(b) Not later than the end of the 14-calendar day period beginning on the date of receipt of an employee complaint or information under subsection (a), the Inspector General shall determine whether the complaint or information appears credible. If the Inspector General determines that the complaint or information appears credible, the Inspector General shall, before the end of such period, transmit the complaint or information to the head of the establishment.

"(c) Upon receipt of a transmittal from the Inspector General under subsection (b), the head of the establishment shall, within 7 calendar days of such receipt, forward such transmittal to the intelligence committees, together with any comments the head of the establishment considers appropriate.

"(d)(1) If the Inspector General does not transmit, or does not transmit in an accurate form, the complaint or information described in subsection (b), the employee (subject to paragraph (2)) may submit the complaint or information to Congress by contacting either or both of the intelligence committees directly.

"(2) The employee may contact the intelligence committees directly as described in paragraph (1) only if the employee--

"(A) before making such a contact, furnishes to the head of the establishment, through the Inspector General, a statement of the employee's complaint or information and notice of the employee's intent to contact the intelligence committees directly; and

"(B) obtains and follows from the head of the establishment, through the Inspector General, direction on how to contact the intelligence committees in accordance with appropriate security practices.

"(3) A member or employee of one of the intelligence committees who receives a complaint or information under paragraph (1) does so in that member or employee's official capacity as a member or employee of that committee.

"(e) The Inspector General shall notify an employee who reports a complaint or information under this section of each action taken under this section with respect to the complaint or information. Such notice shall be provided not later than 3 days after any such action is taken.

"(f) An action taken by the head of an establishment or an Inspector General under this section shall not be subject to judicial review.

"(g) In this section:

"(1) The term 'urgent concern' means any of the following:

Attachment 6

CRS Report for Congress

Received through the CRS Web

Statutory Offices of Inspector General: Past and Present

Frederick M. Kaiser
Specialist in American National Government
Government and Finance Division

Summary

Statutory offices of inspector general (OIGs) consolidate responsibility for audits and investigations within a federal agency. Established by public law as permanent, nonpartisan, independent offices, they are authorized in more than 60 establishments and entities, including all departments and largest agencies, along with numerous boards and commissions. Under two major enactments — the Inspector General Act of 1978 and amendments of 1988 — inspectors general (IGs) have been granted substantial independence and powers to carry out their mandate to combat waste, fraud, and abuse.¹ Recent laws have added offices in agencies, funding for special operations, and law enforcement powers to OIGs in establishments. Other initiatives call for a term of office for the IGs, removal only “for cause,” reporting to Congress on their initial budget request, and various mechanisms to oversee the Gulf Coast recovery and reconstruction programs. This report will be updated as events require.

Responsibilities. IGs have three principal responsibilities under the Inspector General Act of 1978:

- conducting and supervising audits and investigations relating to the programs and operations of the establishment;

¹ 5 U.S.C. Appendix directly covers all but six statutorily authorized OIGs, which operate under similar but distinct guidelines: Central Intelligence Agency (CIA); Office of the Director for National Intelligence (ODNI), where the Director has full discretion in setting it up; Special Inspector General for Iraq Reconstruction (SIGIR); along with three legislative branch entities (i.e., Government Printing Office (GPO), Library of Congress (LOC), and U.S. Capitol Police). See President’s Council on Integrity and Efficiency, *A Strategic Framework, 2005-2010* (2004) at [<http://www.ignet.gov>]; Frederick M. Kaiser, “The Watchers’ Watchdog: The CIA Inspector General,” *International Journal of Intelligence and Counterintelligence*, vol. 3, 1989, pp. 55-75; Paul C. Light, *Monitoring Government: Inspectors General and the Search for Accountability* (Washington: Brookings, 1993); Government Accountability Office, *Inspectors General: Office Consolidation and Related Issues*, GAO Report GAO-02-575 (August 2002); and U.S. Congress, House Subcommittee on Government Efficiency, *25th Anniversary of the Inspector General Act and Improving IG Functionality and Independence*, hearings (Washington: GPO, 2003 and 2004).

- providing leadership and coordination and recommending policies for activities designed to promote the economy, efficiency, and effectiveness of such programs and operations, and preventing and detecting waste, fraud, and abuse in such programs and operations; and
- providing a means for keeping the establishment head and Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations, and the necessity for and progress of corrective action.

Authority and Duties. To carry out these purposes, IGs have been granted broad authority to: conduct audits and investigations; access directly all records and information of the agency; request assistance from other federal, state, and local government agencies; subpoena information and documents; administer oaths when taking testimony; hire staff and manage their own resources; and receive and respond to complaints from agency employees, whose confidentiality is to be protected. In addition, the Homeland Security Act of 2002 gave law enforcement powers to criminal investigators in offices headed by presidential appointees. Following the terrorist attacks on September 11, 2001, moreover, some IG staff were redeployed to assist in airline security and in terrorist investigations.

Notwithstanding these powers and duties, IGs are *not* specifically authorized to take corrective action themselves. Along with this, the Inspector General Act prohibits the transfer of “program operating responsibilities” to an IG. The rationale here is that it would be difficult, if not impossible, for IGs to audit or investigate programs and operations impartially and objectively if they were directly involved in carrying them out.

Reporting Requirements. IGs also have reporting obligations with regard to findings, conclusions, and recommendations for corrective action. These include reporting: (1) suspected violations of federal criminal law directly and expeditiously to the Attorney General; (2) semiannually to the agency head, who must submit the IG report (along with his or her comments) to Congress within 30 days; and (3) “particularly serious or flagrant problems” immediately to the agency head, who must submit the IG report (with comments) to Congress within seven days. The CIA IG must also report to the Intelligence Committees if the Director or Acting Director of the CIA is the focus of an investigation or audit.

By means of these reports and “otherwise,” IGs are to keep the agency head and Congress fully and currently informed. Other means of communication include testifying at congressional hearings; meeting with Members and staff of Congress; and responding to congressional requests for information and reports.

Independence. In addition to having their own powers (e.g., to hire staff and issue subpoenas), the IGs’ independent status is reinforced in a number of other ways: protection of their budgets, qualifications on their appointment and removal, prohibitions on interference with their activities and operations, a proscription on operating responsibilities, and self-determination of their audits and investigations, except when required by law.

Appropriations. Presidentially appointed IGs in the larger federal agencies have a separate appropriations account (a separate budget account in the case of the CIA) for

their offices. This prevents agency administrators from limiting, transferring, or otherwise reducing IG funding once it has been specified in law.

Appointment and Removal. Under the Inspector General Act, IGs are to be selected without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial and management analysis, law, public administration, or investigations. The CIA IG, who operates under a different statute, is to be selected under these criteria as well as prior experience in the field of foreign intelligence and in compliance with the security standards of the agency. Presidentially nominated and Senate-confirmed IGs can be removed only by the President. When so doing, he must communicate the reasons to Congress. However, IGs in the (usually) smaller, designated federal entities are appointed by and can be removed by the agency head, who must notify Congress in writing when exercising the power. In the U.S. Postal Service, by comparison, the governors appoint the inspector general, one of only two IGs with a set term (7 years). The other is in the Capitol Police (5 years), who is appointed by and can be removed by the Capitol Police Board. The USPS inspector general is also the only one with the qualification that he or she can be removed only “for cause” and then only by the written concurrence of at least seven of the nine governors.

Supervision. IGs serve under the “general supervision” of the agency head, reporting exclusively to the head or to the officer next in rank if such authority is delegated. With but a few specified exceptions, neither the agency head nor the officer next in line “shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.”

Under the IG Act, the heads of only five agencies — the Departments of Defense, Homeland Security, Justice, and Treasury, plus the U.S. Postal Service — may prevent the IG from initiating, carrying out, or completing an audit or investigation, or issuing a subpoena and then only for specified reasons: to preserve national security interests or to protect on-going criminal investigations, among others. When exercising this power, the department head must transmit an explanatory statement for such action to the House Government Reform Committee, the Senate Homeland Security and Governmental Affairs Committee, and other appropriate congressional panels within 30 days. Under the CIA IG Act, the Director may similarly prohibit the inspector general from conducting investigations, audits, or inspections and then must notify the House and Senate Intelligence Committees of the reasons for such action within seven days.

Coordination and Controls. Several presidential orders have been issued to improve coordination among the IGs and provide a means for investigating charges of wrongdoing by the IGs themselves and other top echelon officers. In 1981, President Ronald Reagan established the President’s Council on Integrity and Efficiency (PCIE) to coordinate and enhance efforts at promoting integrity and efficiency in government programs and to combat waste, fraud, and abuse (E.O. 12301). Chaired by the Deputy Director of the Office of Management and Budget, the PCIE is composed of the existing statutory IGs plus other officials from relevant agencies. In 1992, the concept was extended to IGs in designated federal entities, through of a parallel Executive Council on Integrity and Efficiency (ECIE). Both PCIE and the ECIE now operate under E.O. 12805, issued by President George H.W. Bush in 1992. A separate Intelligence Community Inspectors General Forum — a coordinative body of the inspectors general from the IC

agencies along with observers from the FBI and several Defense units — has been instituted in the meantime.

Investigations of alleged wrongdoing by IGs themselves or other high-ranking officials in an office of inspector general (under the IG act) are conducted by a special Integrity Committee, composed of PCIE and ECIE members and chaired by the FBI representative (E.O. 12993, issued by President Clinton in 1996). If deemed warranted, the panel refers complaints to be investigated to an executive agency with appropriate jurisdiction, usually the FBI, or a special investigative unit composed of council members.

Establishment. Statutory offices of inspector general been authorized in 62 current federal establishments and entities, including all 15 cabinet departments; major executive branch agencies; independent regulatory commissions; various government corporations and boards; and three legislative branch agencies. All but six of the OIGs — in GPO, LOC, Capitol Police, CIA, ODNI, and the Special Inspector General for Iraq Reconstruction (SIGIR) — are directly and explicitly under the 1978 Inspector General Act. Each office is headed by an inspector general, who is appointed in one of two ways:

- (1) 30 are nominated by the President and confirmed by the Senate in the federal establishments, including all departments and the larger agencies (**Table 1**).
- (2) 32 are appointed by the head of the entity in the 27 designated federal entities — usually smaller boards and commissions — and in five other units, where the IGs operate under separate but parallel authority: SIGIR, ONDI, and three legislative agencies (i.e., GPO, LOC, and Capitol Police) (**Table 2**).

Table 1. Statutes Authorizing Inspectors General Nominated by the President and Confirmed by the Senate, 1976-Present
(current offices are in **bold**)^a

Year	Statute	Establishment
1976	P.L. 94-505	Health, Education, and Welfare (now Health and Human Services)
1977	P.L. 95-91	Energy
1978	P.L. 95-452	Agriculture, Commerce, Community Services Administration,^b Housing and Urban Development, Interior, Labor, Transportation, Environmental Protection Agency, General Services Administration, National Aeronautics and Space Administration, Small Business Administration, Veterans Administration (now the Veterans Affairs Department)
1979	P.L. 96-88	Education
1980	P.L. 96-294	U.S. Synthetic Fuels Corporation ^b
1980	P.L. 96-465	State^c
1981	P.L. 97-113	Agency for International Development^d
1982	P.L. 97-252	Defense
1983	P.L. 98-76	Railroad Retirement Board
1986	P.L. 99-399	U.S. Information Agency ^{b,c}
1987	P.L. 100-213	Arms Control and Disarmament Agency ^{b,c}
1988	P.L. 100-504	Justice,^e Treasury, Federal Emergency Management Administration,^{b,f} Nuclear Regulatory Commission, Office of Personnel Management
1989	P.L. 101-73	Resolution Trust Corporation ^b
1989	P.L. 101-193	Central Intelligence Agency^g

Year	Statute	Establishment
1993	P.L. 103-82	Corporation for National and Community Service
1993	P.L. 103-204	Federal Deposit Insurance Corporation
1994	P.L. 103-296	Social Security Administration
1994	P.L. 103-325	Community Development Financial Institutions Fund ^b
1998	P.L. 105-206	Treasury Inspector General for Tax Administration^g
2000	P.L. 106-422	Tennessee Valley Authority^h
2002	P.L. 107-189	Export-Import Bank
2002	P.L. 107-296	Homeland Security^f

- a. All except the CIA IG are directly under the 1978 Inspector General Act, as amended.
- b. CSA, Synfuels Corporation, USIA, ACDA, RTC, CDFIF, and FEMA have been abolished or transferred.
- c. The State Department IG had also served as the IG for ACDA. In 1998, P.L. 105-277 transferred the functions of ACDA and USIA to the State Department and placed the Broadcasting Board of Governors and the International Broadcasting Bureau under the jurisdiction of the State IG.
- d. The Inspector General in AID may also conduct reviews, investigations, and inspections of the Overseas Private Investment Corporation (22 U.S.C. 2199(e)).
- e. In 2002, P.L. 107-273 expanded the jurisdiction of the Justice OIG to cover all department components, including DEA and the FBI.
- f. P.L. 107-296, which established the Department of Homeland Security, transferred FEMA's functions to it and also granted law enforcement powers to OIG criminal investigators in establishments.
- g. The OIG for Tax Administration in Treasury now is the only case where a separate statutory OIG exists within an establishment or entity that is otherwise covered by its own statutory office.
- h. P.L. 106-422, which re-designated TVA as an establishment, also created, in the Treasury Department, a Criminal Investigator Academy to train IG staff and an Inspector General Forensic Laboratory.

Table 2. Designated Federal Entities and Other Agencies with Statutory IGs Appointed by the Head of the Entity or Agency
(current offices are in bold)^a

ACTION ^b	Interstate Commerce Commission ^f
Amtrak	Legal Services Corporation
Appalachian Regional Commission	Library of Congress ^{aj}
Board of Governors of the Federal Reserve System	National Archives and Records Administration
Board for International Broadcasting ^c	National Credit Union Administration
Coalition Provisional Authority (in Iraq) ^a	National Endowment for the Arts
Commodity Futures Trading Commission	National Endowment for the Humanities
Consumer Product Safety Commission	National Labor Relations Board
Corporation for Public Broadcasting	National Science Foundation
Equal Employment Opportunity Commission	Office of the Director of National Intelligence^{ak}
Farm Credit Administration	Panama Canal Commission ^b
Federal Communications Commission	Peace Corps
Federal Deposit Insurance Corporation ^d	Pension Benefit Guaranty Corporation
Federal Election Commission	Securities and Exchange Commission
Federal Home Loan Bank Board ^c	Smithsonian Institution
Federal Housing Finance Board ^c	Special Inspector General for Iraq Reconstruction^a
Federal Labor Relations Authority	Tennessee Valley Authority ^h
Federal Maritime Commission	United States Capitol Police^{aj}
Federal Trade Commission	United States International Trade Commission
Government Printing Office ^a	United States Postal Service^l

- a. All these agencies — except SIGIR, CIA, ODNI, GPO, LOC, and Capitol Police — are considered “designated federal entities” and placed directly under the 1978 IG Act by the 1988 Amendments and subsequent acts. The CPA was dissolved in mid-2004 and its IG was converted to SIGIR.
- b. In 1993, P.L. 103-82 merged ACTION into the new Corporation for National and Community Service.
- c. The BIB was abolished by P.L. 103-236 and its functions transferred to the International Broadcasting Bureau within USIA, which was later abolished and its functions transferred to the State Department.
- d. In 1993, P.L. 103-204 made the IG in FDIC a presidential appointee, subject to Senate confirmation.
- e. In 1989, P.L. 101-73 abolished the FHLBB and placed the new FHFB under the 1988 IG Act Amendments.
- f. The ICC was abolished in 1995 by P.L. 104-88.
- g. The Panama Canal Commission, replaced by the Panama Canal Commission Transition Authority, was phased out, when United States responsibility for the Canal was transferred to the Republic of Panama (22 U.S.C. 3611).
- h. P.L. 106-422 re-designated TVA as a federal establishment.
- i. In 1996, the U.S. Postal Service Inspector General was separated from the Chief Postal Inspector and now exists as an independent position. The IG is appointed by, and can be removed by, the governors.
- j. In 2005, the Legislative Branch Appropriations Act, 2006 (P.L. 109-55) added IGs to LOC, following closely the IG Act of 1978 as amended, and the Capitol Police, whose IG has specialized requirements.
- k. P.L. 108-458 grants the Director of National Intelligence full discretion in creating an OIG in his Office.

Table 3. Tabulation of Existing Federal Establishments, Entities, or Agencies with IGs Authorized in Law

Controlling statute	IGs nominated by President and confirmed by Senate	IGs appointed by head of entity or agency	Total
1978 IG Act, as amended	29	27	56
Other statutes	1 ^a	5 ^b	6
Total	30	32	62

a. CIA Inspector General.

b. SIGIR, GPO, LOC, U.S. Capitol Police, and ODNI inspectors general.

Recent Initiatives

Response to Gulf Coast Hurricanes. In the aftermath of Hurricane Katrina (and later Rita), various initiatives have arisen to increase OIG capacity and capabilities in overseeing the unprecedented funding for recovery and rebuilding efforts. Several are in effect: the President’s call, echoed by legislators, for a “team” of IGs or deputies from affected agencies to coordinate their efforts, an additional \$15 million for the OIG in Homeland Security (P.L. 109-62), and an official in the DHS office designated to direct its work. Other proposals, in addition to increasing funds for OIGs, are: setting up a long-term task force or coordinative mechanism of IGs from relevant agencies; expanding the jurisdiction of SIGIR (S. 1738, 109th Cong., approved by the Senate Committee on Homeland Security and Governmental Affairs, Sept 22, 2005); and creating a similar office of inspector general with jurisdiction for gulf recovery (H.R. 3737 and H.R. 3810, 109th Cong.).

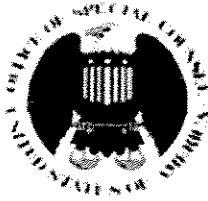
General Proposals. Separate ideas for change include consolidating DFE OIGs under one or more new presidentially-appointed IGs or under a related establishment office (GAO-02-575). Another is making the Postal Service IG a presidential appointment (H.R. 22, 109th Cong.). Other plans, advanced to increase the independence and powers of the IGs across the board, recommend: initial OIG budget submissions to Congress and OMB; removal of an IG only “for cause;” a set term of office for IGs; the statutory establishment of a Council of Inspectors General for Integrity and Efficiency, combining and replacing the PCIE and ECIE; and personnel flexibilities for IGs (H.R. 2489, 109th Cong.).

Attachment 7



Report to Congress

**U.S. Office of Special Counsel
Fiscal Year 2004**



U.S. Office of Special Counsel
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

The Special Counsel

The Honorable Richard B. Cheney
President of the Senate
Washington, D.C. 20510

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. President and Mr. Speaker:

I respectfully submit, in accordance with 5 U.S.C. § 1218, Fiscal Year 2004 Report to Congress from the U.S. Office of Special Counsel. A copy of this report will also be sent to each Member of Congress.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott J. Bloch".

Scott J. Bloch

Enclosure

INTRODUCTION

The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Its primary mission is to safeguard the merit system in federal employment, by protecting employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing. OSC also has jurisdiction under the Hatch Act to enforce restrictions on political activity by government employees. In addition, the agency operates as a secure channel for disclosures by federal whistleblowers of government wrongdoing. Finally, OSC enforces federal employment rights secured by the Uniformed Services Employment and Reemployment Rights Act.

OVERVIEW OF OSC OPERATIONS

Statutory Background

OSC was first established on January 1, 1979.¹ From then until 1989, it operated as an autonomous investigative and prosecutorial arm of the Merit Systems Protection Board (“the Board”). By law, OSC received and investigated complaints from current and former federal employees, and applicants for federal employment, alleging prohibited personnel practices by federal agencies; provided advice on restrictions imposed by the Hatch Act on political activity by covered federal, state, and local government employees; and received disclosures from federal whistleblowers (current and former employees, and applicants for employment) about wrongdoing in government agencies. The office was charged with enforcing restrictions against prohibited personnel practices and political activity by filing, where appropriate, petitions for corrective and/or disciplinary action with the Board.

In 1989, Congress enacted the Whistleblower Protection Act (WPA). The law made OSC an independent agency within the Executive

Branch, with continued responsibility for the functions described above. It also enhanced protections against reprisal for employees who disclose wrongdoing in the federal government, and strengthened OSC’s ability to enforce those protections.¹

In 1993, Congress passed legislation that significantly amended Hatch Act provisions applicable to federal and District of Columbia (D.C.) government employees, and enforced by OSC.² Provisions of the act enforced by OSC with respect to certain state and local government employees were unaffected by the 1993 amendments.

In 1994, the Uniformed Services Employment and Reemployment Rights Act (USERRA) became law. It defined employment-related rights of persons in connection with military service, prohibited discrimination against them because of that service, required reemployment after return from military service, and gave OSC new authority to pursue remedies for violations by federal agencies.³

OSC’s 1994 reauthorization act expanded protections for federal employees, and defined new responsibilities for OSC and other federal agencies. It provided that within 240 days after receiving a prohibited personnel practice complaint, OSC should determine whether there are reasonable grounds to believe that such a violation occurred, exists, or is to be taken. The act extended the protections of certain legal provisions enforced by OSC to approximately 60,000 employees of what was then known as the Veterans Administration (now the Department of Veterans Affairs), and to employees of certain government corporations. It also broadened the scope of personnel actions covered under these provisions. Finally, the act made federal agencies responsible for informing their employees of available rights and remedies under the Whistleblower Protection Act, and directed agencies to consult with OSC in that process.⁴

Mission

OSC's mission is to protect current and former federal employees, and applicants for federal employment, especially whistleblowers, from prohibited employment practices or other illegal employment practices under USERRA; promote and enforce compliance by government employees with legal restrictions on political activity, and facilitate disclosures by federal whistleblowers about government wrongdoing. OSC carries out this mission by:

- investigating complaints of prohibited personnel practices, especially reprisal for whistleblowing, and pursuing remedies for violations;
- providing advisory opinions on, and enforcing Hatch Act restrictions on political activity;
- operating an independent and secure channel for disclosures of wrongdoing in federal agencies;
- protecting reemployment and antidiscrimination rights of veterans under the Uniformed Services Employment and Reemployment Rights Act; and
- promoting greater understanding of the rights and responsibilities of federal employees under the laws enforced by OSC.

Budget and Staffing

During FY 2004, OSC operated with a budget of \$13,424,000, and a full-time equivalent personnel authorization of approximately 113 employees.

Organization and Functions

OSC maintains its headquarters office in Washington, D.C. Two field offices are located in Dallas, Texas, and Oakland, California (known as the San Francisco Bay Area Field Office).

Agency components during FY 2004 consisted of the Immediate Office of the Special Counsel; five operating divisions; and two administrative support branches: the Human and Administrative Resources Management Branch, and the Information Systems Branch. Functions and responsibilities of these units are as follows:

Immediate Office of the Special Counsel The Special Counsel and staff in this office are responsible for policymaking and overall management of OSC. They also manage the agency's congressional liaison and public affairs activities, and its outreach program, which includes promotion of compliance by other federal agencies with the employee information requirement at 5 U.S.C. § 2302(c).

Special Projects Unit The Special Counsel set up a new unit to focus on strategies to eliminate the backlog problems that plagued the agency, and study the processes and procedures used in the various OSC units. It was used as a laboratory for innovative and new ways to address the agency's problems. The SPU played a vital role in the backlog reduction efforts and was instrumental in procedural changes that are making OSC a more efficient agency. The unit will act as a mobile "SWAT Team" if and when backlogs arise in the future, and help prevent them in the investigative unit. Also, SPU will continue to perform special projects as assigned by the Special Counsel.

Complaints and Disclosure Analysis Division This division includes the two principal intake offices for new matters received by OSC – the Complaints Examining Unit and the Disclosure Unit.

Complaints Examining Unit This is the intake point for all complaints alleging prohibited personnel practices and other violations of civil service law, rule, or regulation within OSC's jurisdiction.¹ Attorneys and personnel management specialists conduct an initial review of complaints to determine if they are within OSC's jurisdiction, and if so, whether further investigation is warranted. The unit refers all matters stating a potentially valid claim to the Investigation and Prosecution Divisions for further investigation.²

Disclosure Unit This unit is responsible for receiving and reviewing disclosures received from federal whistleblowers. It advises the Special Counsel on the appropriate disposition of the information disclosed (including possible referral to the head of the agency involved for an investigation and report to OSC; referral to an agency Inspector General; or closure). The unit also reviews agency reports of investigation, to determine whether they appear to be reasonable and in compliance with statutory requirements before the Special Counsel sends them to the President and appropriate congressional oversight committees.

Investigation and Prosecution Divisions

These consist of three parallel units, staffed primarily by investigators and attorneys. Division I includes the Hatch Act Unit and the San Francisco Bay Area Field Office; Division II includes the Dallas Field Office; and Division III includes the Alternative Dispute Resolution Unit.

Each division conducts field investigations of matters referred after preliminary inquiry by the Complaints Examining Unit. Division attorneys conduct a legal analysis after investigations are completed, to determine whether the evidence is sufficient to establish that a prohibited personnel practice (or other violation within OSC's jurisdiction) has occurred. Investigators work with attorneys in evaluating whether a matter warrants corrective action, disciplinary action, or both.

If meritorious cases cannot be resolved through negotiation with the agency involved, division attorneys represent the Special Counsel in any litigation before the Merit Systems Protection Board. They also represent the Special Counsel when OSC intervenes, or otherwise participates, in other proceedings before the Board. Finally, division investigators and attorneys also investigate alleged violations of the Hatch Act and the Uniformed Services Employment and Reemployment Rights Act.

Alternative Dispute Resolution Unit In selected cases referred by the Complaints Examining Unit for further investigation, the Alternative Dispute Resolution Unit contacts the complainant and the agency involved, and invites them to participate in OSC's voluntary Mediation Program. If mediation resolves the complaint, the parties execute a written and binding settlement agreement; if not, the complaint is referred for further investigation.

Hatch Act Unit The unit issues advisory opinions to individuals seeking information about Hatch Act restrictions on political activity by federal, and certain state and local, government employees. The unit is also responsible for enforcing the act. It reviews complaints alleging a Hatch Act violation and, when warranted, investigates and prosecutes the matter (or refers the matter to an Investigation and Prosecution Division for further action).

Legal Counsel and Policy Division This unit provides general counsel and policy services to OSC, including legal advice and support on a wide range of issues; legal representation of OSC in litigation filed against the agency; policy planning and development; and management of the agency ethics, Freedom of Information/Privacy Act.

Human and Administrative Resources Management Branch This unit provides administrative and management support services to OSC, in furtherance of program, human capital, and budget decisions. Management services and administrative support are provided in connection with OSC human resource, financial management (including payroll), space acquisition, facilities management, and procurement responsibilities.

Information Systems Branch This unit is responsible for overall management and administration of OSC's information technology resources, in support of agency program and administrative operations. The branch chief serves as the agency's Chief Information Officer.

PROHIBITED PERSONNEL PRACTICE COMPLAINTS

Receipts and Investigations

OSC is authorized to receive and investigate complaints alleging any one or more of 12 prohibited personnel practices defined by law.¹ Table 1, below, contains summary data (with comparative data for the two previous fiscal years) on OSC's receipt and processing of such complaints during FY 2004.²

Table 1

Summary of Prohibited Personnel Practice (PPP) Complaints Activity – Receipts and Processing ^a			
	FY 2002	FY 2003	FY 2004
Pending complaints carried over from previous fiscal year	740	594	653
New complaints received (Intake Unit)	1,558	1,791	1,964
<i>Total complaints</i>	2,298	2,385	2,617
Complaints referred for field investigation	191	162	244
Complaints processed and closed	1,704	1,732	2,093
Processing times : <i>Less than 240 days</i>	1,284	1,471	1,799
: <i>More than 240 days</i>	420	261	294
Percentage processed in under 240 days	75%	85%	86%

^a The numbers in this table, as well as in other tables in this report, may vary somewhat from those in previous years' reports. This is due to the fact that in response to an audit by the General Accounting Office, OSC developed more sophisticated computer programs to more accurately track prohibited personnel practice and whistleblower disclosure matters. Use of the new programs has led to recalibration of some statistics from previous years.

Attachment 8



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-4704

JAN 7 2005

MEMORANDUM FOR CIVILIAN AND MILITARY OFFICERS AND EMPLOYEES
ASSIGNED TO THE OFFICE OF THE INSPECTOR
GENERAL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Policy on Whistleblower Protection for DoD Employees,
Standards Applied to Complaints

- References:
- (a) Inspector General Act of 1978, as amended
 - (b) Title 5, Sections 2301 and 2302 of the United States Code
 - (c) Intelligence Community Whistleblower Protection Act of 1998, as amended
 - (d) President's Council on Integrity and Efficiency, Quality Standards for Investigations (December 2003)
 - (e) DoD Directive 7050.6 "Military Whistleblower Protection" (June 23, 2000)
 - (f) DoD Directive 6490.1 "Mental Health Evaluations of Members of the Armed Forces" (October 1, 1997)
 - (g) IG Act, Section 7 Guidance Memorandum CRI-1 (November 23, 2004)
 - (h) IG Act, Section 7 Guidance Memorandum CRI-2 (May 26, 2004)

Purpose: To adopt standards for the receipt and disposition of whistleblower reprisal complaints or information received by either the Directorate of Civilian Reprisal Investigations or the Directorate of Military Reprisal Investigations within the Office of the Deputy Inspector General for Investigations.

Statutory Duty and Regulatory Responsibilities: The Inspector General Act of 1978 authorizes the Inspector General of the Department of Defense to "receive and investigate complaints or information" from Defense Department employees pursuant to Title 5, Appendix 3, Section 7 ("Section 7") of the United States Code. Reference (a). Standards are required to assess and review the performance of the Directorate, Civilian Reprisal Investigations and the Directorate, Military Reprisal Investigations. References (b), (c) and (d)(see, e.g. Section C on "Due Professional Care").

Policy Guidance: The language of Section 7 of the Inspector General Act of 1978 establishing legal protections for DOD whistleblowers parallels the merit system principle that protects government civilian employees "against reprisal for the lawful disclosure of information" that the employee reasonably believes is evidence of a violation of law. Through Section 7, the standards underlying 5 U.S.C. Section 2301(b)(9) provide a mechanism to review allegations of retaliation against a Department of Defense civilian employee. Reference (B) at Section 2302(b)(8) & (9).

Although Section 7 also applies whistleblower protections to members of the Armed Forces (5 U.S.C. Appendix 3, § 8(e)), primary authority for receiving and investigating

whistleblower reprisals against members of the Armed Services is derived from 10 U.S.C. Section 1034. References (e) and (f) implement 10 U.S.C. Section 1034.

The following standards shall apply:

(a) Complaints made by members of the Armed Forces. For Section 7 complaints filed by members of the Armed Services (including cadets and midshipmen at the military academies), DoDIG staff shall employ 10 U.S.C. Sections 1034, as implemented by References (e) and (f).

(b) Complaints made by Civilian Appropriated-Fund Employees (CAFEs). For Section 7 complaints filed by CAFEs, DoDIG staff shall employ title 5 standards as summarized in References (g) and (h), as amended from time to time.

(c) Complaints made by Non-Appropriated Fund Employees (NAFs). For Section 7 complaints filed by Non-Appropriated Fund Employees, DoDIG staff shall employ 10 U.S.C. Section 1587 and DoD Directive 1401.3 "Reprisal Protection for Non-Appropriated Fund Instrumentality Employees/Applicants" (October 16, 2001).

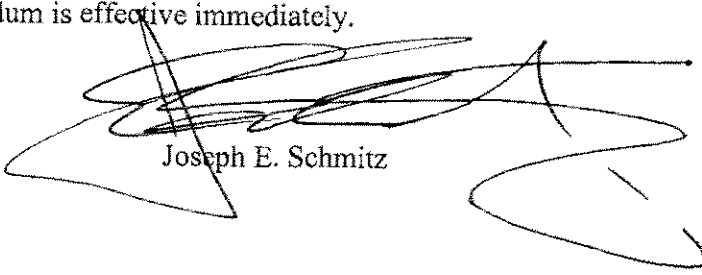
(d) Complaints made by Defense Contractor employees. For Section 7 complaints filed by Defense Contractor employees, DoDIG staff shall employ 10 U.S.C. Section 2409.

(e) Complaints made by Defense intelligence and counter-intelligence employees. For Section 7 complaints filed by CAFEs of the Defense intelligence agencies under the provisions of Reference (c), DoDIG staff shall employ Title 5 standards summarized in References (g) and (h). For Section 7 complaints filed by military members of the Defense intelligence agencies under Reference (c), DoDIG Staff shall employ References (e) and (f) as they implement Title 10, Section 1034, of the United States Code.

Pursuant to Section 7(b) of Reference (a), all whistleblower complaints will be reviewed and investigated with the utmost confidentiality. The identity of a whistleblower will not be disclosed without the consent of the whistleblower, unless a determination is made that the disclosure of the whistleblower is unavoidable during an investigation.

Copies of all standards cited herein are available from the Directorate, Civilian Reprisal Investigations and the Directorate, Military Reprisal Investigations. They are also available on the OIG Website at <http://www.dodig.osd.mil/INV/index.html>.

Effective Date: This Policy Memorandum is effective immediately.


Joseph E. Schmitz

Attachments: a/s

Attachment 9



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-4704

JAN - 7 2005

MEMORANDUM FOR CIVILIAN AND MILITARY OFFICERS AND EMPLOYEES
ASSIGNED TO THE OFFICE OF THE INSPECTOR
GENERAL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Policy on Selection of Intakes to Process as Civilian Reprisal
Investigations

References: (a) Inspector General Act of 1978, as amended
(b) Harvey v. Department of the Navy, 92 M.S.P.R. 51 (2002)
(c) Nafus v. Department of the Army, 57 M.S.P.R. 386, 395 (1993)

Purpose: To adopt criteria for prioritizing whistleblower reprisal complaints received by the Directorate, Civilian Reprisal Investigations (CRI) within the Office of the Deputy Inspector General for Investigations, OIG DoD.

Statutory Duty: The Inspector General Act of 1978, as amended, states that the Inspector General, Department of Defense "may receive and investigate complaints" from Defense Department employees. 5 U.S.C. Appendix 3, Section 7. The exercise of authority by the OIG DoD is discretionary when complaints are filed by Civilian Appropriated-Fund Employees (CAFEs). Triage criteria are required to prioritize the limited resources available to CRI.

Policy Guidance: While counseling potential complainants, CRI shall ensure that all DoD CAFEs understand that CRI's jurisdiction is secondary and parallel to the U.S. Office of Special Counsel ("OSC"). CAFEs shall be advised on the procedures for filing with OSC. In reviewing the DoD Hotline complaints filed by Civilian Appropriated-Fund Employees alleging reprisal for making a protected disclosure, the Director, CRI, shall accept intakes by giving priority to the cases impacting the following matters:

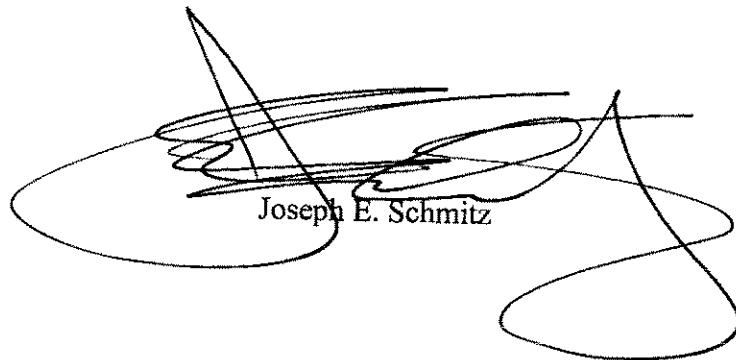
- (1) Cases originating in the intelligence community, to include the Defense Intelligence Agency (DIA), National Reconnaissance Office (NRO), National Security Agency (NSA), National Geospatial-Intelligence Agency (NGA), and including the intelligence and counter-intelligence components of the military services;
- (2) Cases with potential to implicate contractor fraud against the U.S. Government involving gross mismanagement. See Harvey v. Department of the Navy, 92 M.S.P.R. 51 (2002) at ¶ 9; see generally, Nafus v. Department of the Army, 57 M.S.P.R. 386, 395 (1993) (management

action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. It is more than de minimis wrongdoing or negligence and does not include management decisions that are merely debatable. It must also include an element of blatancy.").

- (3) Cases tied directly to the DoD mission in the Global War On Terrorism (GWOT);
- (4) Cases in which the employee is a source for either the Defense Criminal Investigative Service (DCIS) or Investigation of Senior Officials (ISO);
- (5) Cases in which the employee is facing a termination, and which are not covered by one of the categories, above.

Once CRI begins an investigation, the subsequent pulling of the complaint by the complainant will not terminate the investigation. In the recommendations resulting from such an investigation, CRI may take into account remedies received in other proceedings. However, CRI shall issue its findings independent of agreements made by the complainant in other proceedings.

Effective Date: This Policy Memorandum is effective immediately. It shall be reviewed annually and revised for criteria changes.



Joseph E. Schmitz

Attachment 10

E. WHISTLEBLOWER COMPLAINTS

The IG Act of 1978, as amended, specifically prohibits retaliation by managers against employees who make a complaint or provide information to the OIG (Title 5, U.S.C. App. 3, Section 7(c)). Various other Federal regulations prohibit a full range of whistleblower retaliation. Additionally, the Secretary of Energy has stated that DOE will have a zero tolerance to retaliation against whistleblowers. The OIG receives allegations of potential or actual retaliation for disclosure of information concerning danger to public or worker health or safety; substantial violations of law; for participation in Congressional proceedings, or for refusal to participate in dangerous activities.

As a general rule, the OIG does not investigate allegations of retaliation against Federal or contractor employees. Rather, the Office of Special Counsel has primary jurisdiction for investigating allegations of retaliation (adverse personnel actions) against Federal employees (Title 5, U.S.C. Section 1214), while the Office of Hearings and Appeals and/or local DOE employee concerns offices have primary jurisdiction over DOE contractor employees (5 CFR Part 708).

An OIG complaint form will be written regardless of the nature of the alleged retaliation—that is, as a result of cooperation with the OIG or unconnected to the OIG. The complaint will be processed in EIGPT. The complainant must be asked whether or not his/her identify may be disclosed, and the OIG confidentiality policy must be explained.

The complainant will be given contact information for the appropriate investigative authority in order for the employee to make direct contact

(i.e., Office of Special Counsel for Federal employees and the Office of Hearings and Appeals, and/or local employee concerns offices for contractors.) In cases where the complainant is alleging retaliation for cooperating with the OIG, the agent will ask the complainant if he/she would like OIG assistance in making the referral. The complainant will be told that a referral by the OIG may be done only if the complainant agrees to have his or her name released. If the complainant refuses, they should be advised that their allegation cannot be forwarded without their consent. Any referrals of retaliation complaints will be made via the OIG's "RS/RR" system. Generally, the OIG does not directly refer matters to Special Counsel, Office of Hearings and Appeals, etc., on non-OIG related retaliation allegations. The complainant should be advised to contact the appropriate authority directly.

By their very nature, retaliation allegations often include an underlying allegation of fraud, waste, abuse, or some other wrongdoing. Separate and apart from the retaliation, a case opening must be evaluated and considered.

For Federal employees, contact information for the Office of Special Counsel is:

U.S. Office of Special Counsel
1730 M Street, N.W.
Washington, D.C. 20036-4505
<http://www.osc.gov>

Special Agents are responsible for being familiar with the current telephone number.

For contractor employees, they will be advised that Title 10 of the Code of Federal Regulations (CFR), Part 708, addresses contractor employee retaliation. The lead DOE office for the "Contractor Employee Protection Program" is the Office of Hearings and Appeals. More information can be obtained at <http://www.oha.doe.gov/>, including applicable regulations and whistleblower protection information.

Note that these guidelines regarding whistleblower complaints apply during the course of an investigation. Specifically, individuals who allege retaliation to an agent during the course of an investigation must provide the above contact and referral information. Further, the discussion must be fully documented in the case file. Discretion must be exercised as to the completion of a separate, stand-alone complaint form.

Attachment 11

U.S. Department of Energy
Washington, D.C.

Office of Inspector General
DIRECTIVE

IG-929

Issued: 2-2-00

**SUBJECT: IMPLEMENTATION OF THE "INTELLIGENCE
COMMUNITY WHISTLEBLOWER
PROTECTION ACT OF 1998"**

1. **PURPOSE.** To assign responsibilities and establish procedures within the Office of Inspector General (OIG), Department of Energy (DOE), to implement the "Intelligence Community Whistleblower Protection Act of 1998" (Intelligence Whistleblower Act).
2. **SCOPE.** This Directive is applicable to all OIG employees and offices.
3. **BACKGROUND.** On October 20, 1998, Congress amended the Inspector General Act of 1978 to provide a process for DOE or contractor employees to report to Congress a complaint or information with respect to an "urgent concern."
4. **DEFINITIONS.**
 - a. The term "covered employee" means any employee of, or employee of a contractor to, an executive agency or element or unit thereof having as its principal function the conduct of foreign intelligence or counterintelligence activities.
 - b. The term "urgent concern" means any of the following:
 - (1) A serious or flagrant problem, abuse, violation of law or Executive Order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information, but does not include differences of opinions concerning public policy matters.
 - (2) A false statement to Congress, or a willful withholding from Congress, on an issue of material fact relating to the funding, administration, or operation of an intelligence activity.
 - (3) An action, including a personnel action described in 5 U.S.C. § 2302(a)(2)(A), constituting reprisal or threat of reprisal prohibited under section 7 (c) of the Inspector General Act in response to an employee's reporting an urgent concern in accordance with this section.
 - c. The term "intelligence committees" means the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence.

DISTRIBUTION: All OIG Employees

INITIATED BY: Office of Inspections

IG-F-1321.1
(3-87)

IG-929
(Add in date)

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5. REFERENCES.

- a. The Intelligence Authorization Act for Fiscal Year 1999 (Public Law 105-272), enacted October 20, 1998.
- b. The Inspector General Act of 1978.
- c. DOE M 475.1-1, Identifying Classified Information, dated 5/8/98.

6. PROCEDURES.

- a. The Assistant Inspector General for Inspections (AIGS) is the individual designated within the OIG for processing complaints or information regarding an urgent concern as defined by the Intelligence Whistleblower Act.
- b. An OIG employee receiving an oral complaint or information from an employee under the Intelligence Whistleblower Act will: (1) request that the employee submit all pertinent details in writing to the AIGS, and (2) through his/her supervisor, provide a brief notification memorandum to the AIGS documenting the contact.
- c. Upon receipt of a written complaint or information provided under the Intelligence Whistleblower Act, OIG employees will immediately (by fax, e-mail or overnight mail) forward the complaint or information to the AIGS. The OIG employee receiving the complaint or information will provide the originals of all documents received regarding the complaint or information to the AIGS. The AIGS will coordinate predication with the Office of Investigations. Complaints or information, if received by OIG employees in conjunction with Hotline activities, will be immediately forwarded to the AIGS. For Hotline purposes, the matter will be immediately predicated with action to Inspections (RI).
- d. Upon receipt of the complaint or information, the AIGS shall promptly determine whether the complaint or information is within the jurisdiction of the Intelligence Whistleblower Act. If a determination is made that the complaint or information meets the jurisdictional requirements, the AIGS will determine whether the complaint or information appears credible.
- e. The AIGS will promptly provide information regarding underlying issues, e.g. environment, safety and health, security, waste, fraud, or abuse concerns, to the Hotline Coordinator for notification purposes and for processing in accordance with Hotline procedures.
- f. Within 14 calendar days of receipt by the OIG of a complaint or information from an employee, the Inspector General shall determine whether the employee's complaint or information provided pursuant to the Intelligence Whistleblower Act appears credible and, if so, transmit the complaint or information to the Secretary.

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- g. Upon receipt of a complaint or information, the AIGS will notify the Inspector General. If the Office of Investigations has not already received a copy of the complaint or information, the AIGS will provide a copy to the Hotline Coordinator so the matter may be predicated in the investigative module of the OIG management information system with action to Inspections (RI). Typically, these matters, except for underlying issues such as those identified in paragraph e. above, will not be presented to the OIG Complaint Coordination Committee.
- h. Following completion of the analysis of the complaint or information, the AIGS shall prepare a memorandum to the file that contains (1) a summary of the complaint or information, (2) a jurisdictional determination, (3) a determination whether the complaint or information appears credible, and (4) a recommendation whether the complaint or information should be forwarded to the Secretary.
- i. If the AIGS recommends that the complaint or information be forwarded to the Secretary, the AIGS shall prepare a transmittal memorandum from the Inspector General.
- j. Within 3 days of the OIG's transmittal of the complaint or information to the Secretary or a determination by the OIG that the complaint or information does not appear credible, the AIGS shall notify the employee in writing regarding the actions taken by the OIG concerning the employee's complaint or information. The notification will also state that the underlying issues are under review. The employee will be provided an opportunity to review the complaint or information transmitted to the Secretary.
- k. Within 3 days of the transmittal of the complaint or information by the Secretary to the intelligence committees, the AIGS shall notify the employee in writing regarding the Secretary's transmittal to the intelligence committees.
- l. In the event the employee desires to contact the intelligence committees directly with his/her complaint or information, the employee must provide the Inspector General a written statement of the complaint or information and a notice of intent to contact the intelligence committees directly. Upon receipt by the OIG, the AIGS will prepare a transmittal memorandum from the Inspector General to the Secretary notifying the Secretary of the employee's intent to contact the intelligence committees directly.
- m. Following notification to the Secretary of the employee's intent to contact the intelligence committees directly, the AIGS will provide written direction to the employee on how to contact the intelligence committees in accordance with procedures established by the Secretary and appropriate DOE security practices.
- n. Supervisors will inform their staffs of these procedures and ensure their staffs are aware of their responsibility to immediately contact the AIGS upon receipt of a complaint or information filed under the Intelligence Whistleblower Act.

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- o. Information or complaints received by OIG employees will be appropriately safeguarded pending a determination of the level of classification of the material.


Gregory H. Friedman
Inspector General

Attachment 12

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S.494

Title: A bill to amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.

Sponsor: [Sen Akaka, Daniel K.](#) [HI] (introduced 3/2/2005) [Cosponsors](#) (14)

Latest Major Action: 5/25/2005 Placed on Senate Legislative Calendar under General Orders. Calendar No. 114.

Senate Reports: [109-72](#)

SUMMARY AS OF:

5/25/2005--Reported to Senate, without amendment. (There is 1 [other summary](#))

(This measure has not been amended since it was introduced. The summary has been expanded because action occurred on the measure.)

Federal Employee Protection of Disclosures Act - Includes as a protected disclosure by a Federal employee: (1) any lawful disclosure an employee or applicant reasonably believes is credible evidence of waste, abuse, or gross mismanagement, without restriction as to time, place, form, motive, context, or prior disclosure; and (2) the disclosure of information required to be kept secret in the interest of national defense or the conduct of foreign affairs that the employee or applicant reasonably believes is direct evidence of waste, abuse, or gross mismanagement if such disclosure is made to a Member or employee of Congress who is authorized to receive information of the type disclosed. Excludes disclosures pertaining to policy decisions that lawfully exercise discretionary authority unless the disclosing employee reasonably believes that there is evidence of a violation of law or government waste, fraud, or abuse. Provides for employee discipline for disclosures to congressional employees who are not authorized to receive such information.

Codifies the legal standard for determining whether a whistleblower has a reasonable belief that a disclosure evidences governmental waste, fraud, or abuse, or a violation of law.

Provides that the following actions may not be taken against whistleblowers for protected disclosures: (1) the implementation or enforcement of any nondisclosure policy, form, or agreement; (2) a security clearance suspension or revocation; and (3) an investigation (other than routine nondiscretionary agency investigations) of an employee or applicant for employment.

Authorizes the Merit Systems Protection Board (MSPB) to conduct an expedited review of cases charging retaliation for whistleblowing when the whistleblower's security clearance or access determination is suspended, revoked, or otherwise adversely affected.

Requires an agency that improperly revokes a whistleblower's security clearance to report to Congress explaining its actions. Exempts an agency from this requirement if

the agency can show by a preponderance of the evidence (currently, clear and convincing evidence required) that it would have taken the same personnel action in the absence of the whistleblower disclosure.

Authorizes the President to exclude certain agencies engaged in the conduct of foreign intelligence or counterintelligence activities from whistleblower protections if such exclusion is made prior to any personnel action against the whistleblower.

Expands the authority of the MSPB to impose disciplinary action for prohibited personnel practices.

Authorizes the Office of Special Counsel to appear as amicus curiae (friend of the court) in any civil action involving whistleblowers and the Hatch Act.

Permits petitions for review of whistleblower actions to be filed in any U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction (currently limited to the US Court of Appeals for the Federal Circuit), for five years after the date of enactment of this Act.

Requires all Federal agency nondisclosure policies, forms, and agreements to contain specified language preserving the right of Federal employees to disclose certain protected information.

Amends the Homeland Security Act of 2002 to provide that, for purposes of provisions regarding the protection of voluntarily shared critical infrastructure information, a permissible use of independently obtained critical infrastructure information includes any lawful disclosure an employee or applicant reasonably believes is credible evidence of waste, fraud, abuse, or gross mismanagement, without restriction as to time, place, form, motive, context, or prior disclosure.

Requires Federal agencies to instruct employee how to make a lawful disclosure of classified information to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such information.

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Attachment 13

Original
Text
Passed
by
VV

**AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 1317
OFFERED BY MR. PLATTS**

Strike all after the enacting clause and insert the following:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the "Federal Employee Pro-
3 tection of Disclosures Act".

4 SEC. 2. CLARIFICATION OF DISCLOSURES COVERED.

5 Section 2302(b)(8) of title 5, United States Code, is
6 amended—

7 (1) in subparagraph (A)—

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

17 (B) in clause (i), by striking "a violation"
18 and inserting "any violation"; and

19 (2) in subparagraph (B)—



1 (A) by striking “which the employee or ap-
2 plicant reasonably believes evidences” and in-
3 sserting “, without restriction as to time, place,
4 form, motive, context, or prior disclosure made
5 to any person by an employee or applicant, in-
6 cluding a disclosure made in the ordinary
7 course of an employee’s duties, of information
8 that the employee or applicant reasonably be-
9 lieves is evidence of”; and

10 (B) in clause (i), by striking “a violation”
11 and inserting “any violation (other than a viola-
12 tion of this section)”.

13 **SEC. 3. COVERED DISCLOSURES.**

14 Section 2302(a)(2) of title 5, United States Code, is
15 amended—

16 (1) in subparagraph (B)(ii), by striking “and”
17 at the end;

18 (2) in subparagraph (C)(iii), by striking the pe-
19 riod at the end and inserting “; and”; and

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

21 “(D) ‘disclosure’ means a formal or informal
22 communication, but does not include a communica-
23 tion concerning policy decisions that lawfully exer-
24 cise discretionary authority unless the employee pro-



1 viding the disclosure reasonably believes that the dis-
2 closure evidences—

3 “(i) any violation of any law, rule, or regu-
4 lation; or

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

8 **SEC. 4. REBUTTABLE PRESUMPTION.**

9 Section 2302(b) of title 5, United States Code, is
10 amended by adding at the end the following: “For pur-
11 poses of paragraph (8), any presumption relating to the
12 performance of a duty by an employee who has authority
13 to take, direct others to take, recommend, or approve any
14 personnel action may be rebutted by substantial evidence.
15 For purposes of paragraph (8), a determination as to
16 whether an employee or applicant reasonably believes that
17 such employee or applicant has disclosed information that
18 evidences any violation of law, rule, regulation, gross mis-
19 management, a gross waste of funds, an abuse of author-
20 ity, or a substantial and specific danger to public health
21 or safety shall be made by determining whether a disin-
22 terested observer with knowledge of the essential facts
23 known to or readily ascertainable by the employee or appli-
24 cant would reasonably conclude that the actions of the



1 Government evidence such violations, mismanagement,
2 waste, abuse, or danger.”.

3 **SEC. 5. NONDISCLOSURE POLICIES, FORMS, AND AGREE-**
4 **MENTS.**

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

7 (1) in clause (x), by striking “and” at the end;

8 (2) by redesignating clause (xi) as clause (xii);

9 and

10 (3) by inserting after clause (x) the following:

11 “(xi) the implementation or enforcement of
12 any nondisclosure policy, form, or agreement;
13 and”.

14 (b) **PROHIBITED PERSONNEL PRACTICE.**—Section
15 2302(b) of title 5, United States Code, is amended—

16 (1) in paragraph (11), by striking “or” at the
17 end;

18 (2) by redesignating paragraph (12) as para-
19 graph (14); and

20 (3) by inserting after paragraph (11) the fol-
21 lowing:

22 “(12) implement or enforce any nondisclosure
23 policy, form, or agreement, if such policy, form, or
24 agreement does not contain the following statement:



1 ““These provisions are consistent with and do not su-
2 persede, conflict with, or otherwise alter the employee obli-
3 gations, rights, or liabilities created by Executive Order
4 No. 12958; section 7211 of title 5, United States Code
5 (governing disclosures to Congress); section 1034 of title
6 10, United States Code (governing disclosures to Congress
7 by members of the military); section 2302(b)(8) of title
8 5, United States Code (governing disclosures of illegality,
9 waste, fraud, abuse, or public health or safety threats);
10 the Intelligence Identities Protection Act of 1982 (50
11 U.S.C. 421 and following) (governing disclosures that
12 could expose confidential Government agents); and the
13 statutes which protect against disclosures that could com-
14 promise national security, including sections 641, 793,
15 794, 798, and 952 of title 18, United States Code, and
16 section 4(b) of the Subversive Activities Control Act of
17 1950 (50 U.S.C. 783(b)). The definitions, requirements,
18 obligations, rights, sanctions, and liabilities created by
19 such Executive order and such statutory provisions are in-
20 corporated into this agreement and are controlling.’;

21 “(13) conduct, or cause to be conducted, an in-
22 vestigation, other than any ministerial or nondis-
23 cretionary factfinding activities necessary for the
24 agency to perform its mission, of an employee or ap-



1 plicant for employment because of any activity pro-
2 tected under this section; or”..

3 **SEC. 6. EXCLUSION OF AGENCIES BY THE PRESIDENT.**

4 Section 2302(a)(2)(C) of title 5, United States Code,
5 is amended by striking clause (ii) and inserting the fol-
6 lowing:

7 “(ii)(I) the Federal Bureau of Investiga-
8 tion, the Central Intelligence Agency, the De-
9 fense Intelligence Agency, the National
10 Geospatial-Intelligence Agency, or the National
11 Security Agency; or

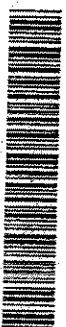
12 “(II) as determined by the President, any
13 Executive agency or unit thereof the principal
14 function of which is the conduct of foreign in-
15 telligence or counterintelligence activities, if the
16 determination (as that determination relates to
17 a personnel action) is made before that per-
18 sonnel action; or”.

19 **SEC. 7. DISCIPLINARY ACTION.**

20 Section 1215(a)(3) of title 5, United States Code, is
21 amended to read as follows:

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

23 “(i) disciplinary action consisting of removal,
24 reduction in grade, debarment from Federal employ-



1 ment for a period not to exceed 5 years, suspension,
2 or reprimand;

3 “(ii) an assessment of a civil penalty not to ex-
4 ceed \$1,000; or

5 “(iii) any combination of disciplinary actions
6 described under clause (i) and an assessment de-
7 scribed under clause (ii).

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

18 **SEC. 8. GOVERNMENT ACCOUNTABILITY OFFICE STUDY ON**
19 **REVOCATION OF SECURITY CLEARANCES.**

20 (a) **REQUIREMENT.**—The Comptroller General shall
21 conduct a study of security clearance revocations, taking
22 effect after 1996, with respect to personnel that filed
23 claims under chapter 12 of title 5, United States Code,
24 in connection therewith. The study shall consist of an ex-
25 amination of the number of such clearances revoked, the



1 number restored, and the relationship, if any, between the
2 resolution of claims filed under such chapter and the res-
3 toration of such clearances.

4 (b) REPORT.—Not later than June 30, 2006, the
5 Comptroller General shall submit to the Committee on
6 Government Reform of the House of Representatives and
7 the Committee on Homeland Security and Governmental
8 Affairs of the Senate a report on the results of the study
9 required by subsection (a).

10 **SEC. 9. ALTERNATIVE RECOURSE.**

11 Section 1221 of title 5, United States Code, is
12 amended by adding at the end the following:

13 “(k)(1) If an employee, former employee, or applicant
14 for employment—

15 “(A) seeks corrective action with respect to a
16 prohibited personnel practice described in section
17 2302(b)(8) by making an allegation (as described in
18 section 1214(a)(1)(A)) to the Special Counsel, and

19 “(B) within 180 days after so seeking such cor-
20 rective action, has neither—

21 “(i) been notified by the Special Counsel
22 that the Special Counsel intends to seek correc-
23 tive action in connection therewith, nor

24 “(ii) initiated any proceeding under sub-
25 section (a) to seek corrective action from the



1 Merit Systems Protection Board in connection
2 with the same matter,
3 such employee, former employee, or applicant may bring
4 an action against the United States at law or equity for
5 de novo review in the appropriate district court of the
6 United States, which shall have jurisdiction over such an
7 action without regard to the amount in controversy. In
8 any such action, the court may award such damages and
9 other relief as provided in subsection (g).

10 “(2) A petition to review a final decision under para-
11 graph (1) shall be filed in the United States Court of Ap-
12 peals for the Federal Circuit.

13 **SEC. 10. EFFECTIVE DATE.**

14 This Act shall take effect 30 days after the date of
15 enactment of this Act.

