

LEXSEE 103 S. RPT. 358

Copyright 1994 Congressional Information Service, Inc.  
Committee Reports

103d Congress, 2nd Session

Senate Rept. 103-358

103 S. Rpt. 358

AUTHORIZING APPROPRIATIONS FOR THE UNITED STATES OFFICE OF  
SPECIAL COUNSEL, THE MERIT SYSTEMS PROTECTION BOARD, AND FOR  
OTHER PURPOSES

**DATE:** August 23, 1994. Ordered to be printed

**SPONSOR:** Mr. Glenn, from the Committee on Governmental Affairs, submitted the following

REPORT

(To accompany S. 622)

**TEXT:**

The Committee on Governmental Affairs, to which was referred the bill (S. 622) to authorize appropriations for the United States Office of Special Counsel, and for other purposes, reports favorably thereon and recommends the bill as amended do pass.

I. Summary and Purpose

The Office of Special Counsel (OSC) was created by the Civil Service Reform Act of 1978 and made an independent agency by the Whistleblower Protection Act in 1989. The purpose of S. 622 is to reauthorize OSC for three years and to ensure that OSC functions, as intended, to protect federal employee whistleblowers from on-the-job harassment, negative job ratings, unfavorable transfers, denial of promotions and other retaliation for their efforts to uncover waste and mismanagement in their agencies.

S. 622 would accomplish this purpose by clarifying the rules governing OSC disclosure of information about whistleblowers; requiring OSC to provide appropriate information to whistleblowers whose cases have been closed; establishing a fixed time limit for OSC to take action on whistleblower cases; and ensuring that whistleblowers have access to relevant evidence in the event that they bring their own cases to the Merit Systems Protection Board (MSPB).

II. Background and Need for Legislation

The Whistleblower Protection Act was passed in 1989, in large part because the Office of Special Counsel was perceived as being ineffectual. At that time, OSC had not brought a single corrective action case since 1979 to the Merit Systems Protection Board on behalf of a whistleblower. A former Special Counsel had been quoted in the press advising whistleblowers "Dont put your head up, because it will get blown off." Whistleblowers told the Governmental Affairs Committee that they thought of the OSC as an adversary, rather than an ally, and urged the Committee to abolish the office altogether.

The Committee chose to strengthen the office instead, giving it another chance to act aggressively on behalf of whistleblowers. The Whistleblower Protection Act gave the OSC a new charter: "to protect employees, especially whistleblowers, from prohibited personnel practices" and to "act in the interests of employees" who seek its assistance. Congress believes that OSC should not act contrary to those employees interests. The Whistleblower Protection Act offered whistleblowers substantial new job protections that were not previously available:

First, the Act established a simpler and fairer standard for whistleblowers in proving retaliation by their agencies.

Second, it gave whistleblowers the right, for the first time, to appeal their own cases to the Merit Systems Protection Board.

Third, the Act enhanced the independence of the Office of Special Counsel and required OSC to work in the interest of whistleblowers.

Finally, the Act gave whistleblowers increased procedural protections and important guarantees of confidentiality.

Since the enactment of the Whistleblower Protection Act of 1989, OSC experienced a significant increase in the number of new complaints it receives. In FY 1989, OSC received 1,239 complaints; in FY 1993, the number of complaints received by OSC had risen to 2,256. Reprisal for whistleblowing accounted for 16% of the total allegations received in FY 1993, the most frequently cited claim of a prohibited personnel practice. In FY 1993, OSC obtained 97 corrective actions in 87 cases, obtained 21 stays of personnel actions through direct request to the agencies, and secured two stays of personnel actions from the MSPB in two cases. In addition, OSC filed one disciplinary action complaint concerning reprisal.

At a May 13, 1992, hearing of the Subcommittee on Federal Services, Post Office, and Civil Service, a witness representing the Government Accountability Project (GAP), a nonprofit advocacy group working on behalf of whistleblowers, presented the results of a GAP survey of federal employees who had sought assistance from OSC. Of 33 people alleging reprisal for whistleblowing, GAP testified:

Eleven said that OSC had disclosed information without their consent;

Only two said that OSC contacted the supporting witnesses named in their complaints; and

Only one said that OSC complied in good faith with the requirement to provide an explanation for the termination of its investigation.

1

1

S. Hearing 102-7478 "Reauthorization of the Office of Special Counsel," before the Subcommittee on Federal Services, Post Office, and Civil Service of the Committee on Governmental Affairs, 66-94 (May 13, 1992) (hereafter, "Hearing Record").

In November, 1993, the General Accounting Office released a report entitled, "Reasons for Whistleblower Complainants Dissatisfaction Need to be Explored."

2

The report focused on how federal employees who have sought whistleblower reprisal protection from OSC viewed OSCs handling of their cases. Of the complainants surveyed by GAO, 81% gave OSC a generally low to very low rating for overall effectiveness. 83% said they received a generally unfavorable to very unfavorable resolution of their complaints from OSC. The Committee notes that OSC provided GAO with a list of complainants whose cases resulted in corrective actions. According to GAO, while these complainants were "more satisfied with the process, many of them still gave OSC low marks."

2

GAO/GGD-94-21

GAO recommended that OSC explore the reasons for this dissatisfaction. GAO also recommended that Congress require agencies to develop policies and procedures for implementing the WPA and inform employees of their right to protection from reprisals and where to report misconduct. Those recommendations have been incorporated in S. 622.

In October of 1993, the MSPB, in its role of reviewing federal personnel policy, released a report entitled "Whistleblowing in the Federal Government: An Update." The MSPB reported that 18% of the employees surveyed claimed that

they had personally observed or obtained direct evidence of illegal or wasteful activities. Half of the employees who witnessed such illegal or wasteful acts said they had reported it. Of those who chose not to report the activity, 33% cited fear of reprisal as a reasons for not acting. S. 622 is intended to further strengthen the provisions of the Whistleblower Protection Act to make it easier for employees to report illegal or wasteful acts without fear of reprisal.

The statistics on OSCs overall performance, the cases reviewed by the Committee, and they allegations raised by GAP raise serious concerns about the extent to which OSC is aggressively acting to protect whistleblowers from prohibited personnel practices.

The Committee has been encouraged by the strongly stated intent of the Special Counsel, Kathleen Day Koch, to improve the operations of the Office and work more aggressively to protect whistleblowers. In a September 14, 1992, letter to Senator Levin, the author of the Whistleblower Protection Act, Ms. Koch stated:

I share your commitment to the protection of federal employees who blow the whistle on fraud, waste and mismanagement in the government. \* \* \* Like you, I believe that the OSCs review of whistleblower matters should be conducted in a timely manner, and with due regard to the legitimate interests of federal employees complainant. \* \* \* (Y)ou and your colleagues can be assured that this agency will implement the provisions of S. 2853 fully for the benefit of whistleblowers, if this legislation is adopted by the Congress.

### III. Legislative History

On November 18, 1991, Senator Roth introduced S. 1981, at the request of the Bush Administration, to extend the authorization of the Office of Special Counsel for five years, through fiscal year 1997. On May 13, 1992, the Governmental Affairs Subcommittee on Federal Services, Post Office and Civil Service held a hearing on S. 1981. The witnesses included Thomas Devine and Jeff Ruch of the Government Accountability Project, Kathleen Day Koch and William E. Reukauf of OSC, and Daniel R. Levinson, the Chairman of the Merit Systems Protection Board.

Senators Levin and Cohen responded to the concerns raised at this hearing by introducing S. 2853, a revised version of the OSC reauthorization bill, on June 16, 1992. S. 2853, as introduced, differed from S. 1981 in that it would have extended the authorization of the Office of Special Counsel for only two years, to put the office on notice that the Committee intended to monitor OSCs performance closely in the expectation that it will become more aggressive in its efforts to protect whistleblowers from unlawful retaliation.

On September 14, 1992, S. 2853 and a substitute amendment offered by the Chairman of the Federal Services Subcommittee, Senator Pryor, were polled out of the Subcommittee on Federal Services, Post Office and Civil Service, on a 5-0 vote. On September 16, 1992, the Committee on Governmental Affairs adopted the Pryor substitute, and reported favorably on S. 2853 by voice vote. The Committee also adopted amendments offered by Senator Levin and Senator Roth to the substitute bill.

S. 2853, as amended, passed the Senate on September 25, 1992. No action was taken by the House of Representatives on S. 2853.

S. 622, incorporating most of the changes made to S. 2853 in the 102nd Congress, was introduced by Senator Levin, Cohen, and Pryor on March 19, 1993. The bill reauthorized the Office of Special Counsel for 3 years and reauthorized the Merit Systems Protection Board for another year to place both agencies on the same reauthorization schedule. S. 622 also:

- (1) Extends the coverage of the Whistleblower Protect Act to employees of Federal corporations;
- (2) Clarifies the rules governing OSC disclosure of information about whistleblowers;
- (3) Requires OSC to debrief, upon request, whistleblowers whose cases have been terminated;
- (4) Establishes a fixed time limit for OSC to take action on whistleblower cases; and;
- (5) Makes several other minor changes to the Act.

S. 623, the Whistleblower Protection for DVA Employees Act of 1993, was introduced on March 19, 1993, by Senators Conrad and Akaka. This bill would have extended Title 5 whistleblower protection to Title 38 health care employees of the Department of Veterans Affairs (DVA). In a letter to the Chairman of the Federal Services Subcommittee, Secretary Brown of the Department of Veterans Affairs, stated "VA concurs with the purpose of this legislation."

After discussing S. 622 with interested parties and after consulting with Senators Levin and Cohen, Senator Pryor proposed an amendment modifying the bill to:

- (1) Incorporate S. 623 to extent whistleblower protection coverage to certain employees of the Department of Veterans Affairs;
- (2) Allow employees prevailing before the MSPB under cases brought under section 1215 to recover reasonable attorneys fees;
- (3) Further define how an employee can prove that a disclosure is a contributing factor in a personnel action; and
- (4) Clarify the definition of retaliation or harassment.

The Pryor substitute amendment and S. 622 were polled out of the Subcommittee on Federal Services by a 5-0 vote on February 10, 1994. The Governmental Affairs Committee adopted the Pryor substitute and reported favorably on S. 622 by voice vote on April 26, 1994.

#### IV. Section-by-Section Analysis

Section 1(a) authorizes the Merit Systems Protection Board (MSPB) for 1993, 1994, and 1995. This adds an additional year to MSPBs authorization and places it on the same authorization cycle as the Office of Special Counsel (OSC). Section 1(b) would extend the authorization of OSC for three years, ending in 1995. This limited period of reauthorization is intended to maintain close congressional oversight over OSC and the MSPB and ensure that improvements in the operations of both agencies in fact take place.

Section 2 amends Section 1204 of Title 5, U.S. Code, to make employees who prevail after prosecution by OSC before the MSPB under section 1215 eligible to recoup their attorneys fees. Employees who prevail before the MSPB when the matter arises under MSPBs appellate jurisdiction are currently eligible to receive attorneys fees under Section 7701(g) (1) and (2). However, if OSC brings a disciplinary action under section 1215 and prosecutes the employee before the MSPB and the employee prevails, there is currently no authority for the employee to recover attorneys fees. Section grants that authority.

Section 3 amends Chapter 12, Subchapter II, of Title 5 which establishes the duties and responsibilities of OSC. Subsection (a) allows the Special Counsel to serve beyond the five year term, if necessary to prevent a vacancy in the Office.

Subsection (b) clarifies Section 1212(g) which outlines the information that OSC may or may not release about a person alleging a prohibited personnel practice. Section 1212(g)(1) currently prohibits OSC from releasing any information about a whistleblowers case, except in accordance with the Privacy Act. Subsection (b)(1) explains that Section 1212(g)(1) applies to any disclosure of information by OSC regarding a whistleblower, regardless who provides the information, when the disclosure occurs, and how the disclosure is characterized.

Many whistleblowers believe that despite Section 1212(g)(1), OSC routinely releases information about whistleblowers to their employing agencies. OSC has denied any improper disclosures and stated that it appreciates the sensitivity of information provided by whistleblowers. However, OSC has also insisted that Section 1212(g) does not restrict its authority to "utilize" information about whistleblowers during the course of an investigation in any way it pleases. For example, in a July 17, 1992, letter to Senator Pryor, OSC stated: "The OSC believes that Section 1212(g) has no applicability or relevance to its use of information obtained from complainants necessary for the conduct of its investigations."

The Committee agrees that OSC needs flexibility to use information during investigations, and that in some cases, utilization necessarily requires disclosure. However, the Committee disagrees with OSCs contention that Section 1212(g)(1) does not apply to the "utilization" of information "during (OSC) investigations" or to the disclosure of "information obtained from complainants." These statements are flatly inconsistent with the language of Section 1212(g)(1), which makes no distinction as to either the timing of a disclosure by OSC or the source of the information disclosed.

In fact, the Joint Explanatory Statement of the House and Senate floor managers of the Whistleblower Protection Act expressly states that:

Under no circumstances may the Special Counsel engage in ex parte contacts with the agency or supply information to agency management which would serve as the basis for agency action against an employee. \* \* \* The restrictions

on the disclosure of information cover both the period during which the investigation is occurring and the period after the investigation is complete.

3

3

135 Cong. Rec. p. S. 2783 (March 16, 1989) (emphasis added).

For these reasons, S. 622 would clarify that Section 1212(g)(1) applies to any disclosure of information by OSC concerning a whistleblower, regardless who provides the information, when the disclosure occurs, and how the disclosure is characterized. The disclosure occurs, and how the disclosure is characterized. The disclosure that OSC needs to conduct investigations is provided by the Privacy Act; this is why Section 1212(g)(1) expressly provides that information about whistleblowers may be disclosed, provided that the disclosure is made in accordance with the requirements of the Privacy Act. In addition, Section 9 of S. 622 specifically addresses the circumstances under which information may or may not be communicated to agency officials for investigatory purposes.

Subsection (b)(2) clarifies Section 1212(g)(2) which prohibits OSC from responding to any personnel inquiry about a person alleging a prohibited personnel practices, except under specified circumstances. Subsection (b)(2) removes a cross-reference to Section 2302 of Title 5 and inserts a description of the personnel inquiries to which OSC may not respond without the individuals consent.

Subsection (c) establishes a timetable for OSC to make determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred. Such a determination, like termination letters issued under Section 1214(a)(2), would not be admissible in individual right of action cases before the MSPB or other judicial or administrative proceedings without the consent of the individual concerned.

On this point, Section 1214(b)(2)(A) of the statute currently states that if OSC finds reasonable grounds to believe that a prohibited personnel practice has occurred, it must notify the agency and give it an opportunity to correct the problem. Instead of using the statutory mechanism, OSC routinely chooses to pursue open-ended negotiations with the agency, leaving the whistleblower hanging. The bill would address this situation by requiring OSC to make a statutory determination within 240 days after the date of receiving an allegation of a prohibited personnel practice. This period should be reasonable, in light of OSCs testimony that:

One hundred twenty days is \* \* \* a reasonable amount of time to do a lengthy, very complicated investigation in a matter \* \* \* outside of Washington requiring travel, requiring trips back and forth because we have to keep having to verify further information.

4

4

Hearing Record, p. 38.

The period for making a determination could be extended with the consent of the employee making the allegations, but subsection (d) would require OSC to include information about any such extensions in its annual report to Congress.

Section 4(a) conforms the discovery standard in whistleblower cases to the standard in the Federal Rules of Civil Procedure. This ensures that admissible evidence is reasonably available to whistleblowers who pursue individual right of action cases.

Section 4(b) addresses the evidence an individual may use to prove that a disclosure was a contributing factor in the personnel action taken against him/her. This provision reverses the holding of *Clark v. Department of Army*, decided July 1, 1993, by the U.S. Court of Appeals for the Federal Circuit.

Prior to the *Clark* case, the Merit Systems Protection Board interpreted Section 1221(e)(1) to incorporate a knowledge/timing test that allowed a petitioner to prove that whistleblowing was a contributing factor by showing that "the official taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time

that a reasonable person could conclude that the disclosure was a factor in the personnel action." This test was taken from the Senate Report on the Whistleblower Protection Act, which expressly stated Congress intent to incorporate such a standard.

5

5

See *Clark v. Department of the Army*, slip op. at 12.

In *Clark*, the Federal Circuit held that the Whistleblower Protection Act did not incorporate a per se knowledge/timing test. The court reasoned that the Senate report cited by the MSPB in creating the test referred to S. 508, the Whistleblower Protection Act of 1987, which was pocket vetoed by President Reagan and was never enacted. The court noted that S. 20, the bill which was ultimately enacted by the Congress in 1989, "lacks the language of S. 508 which provided for the knowledge/timing test."

6

6

*Id.* at 14.

In fact, however, the joint explanatory statement that accompanied both S. 508 and S. 20 expressly stated that the managers intended the per se test to apply to that bill. The joint statement states:

One of many possible ways to show that the whistleblowing was a factor in the personnel action is to show that the official taking the action knew (or had constructive knowledge) of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.

7

7

Cong. Rec. p. 2784 (March 16, 1989).

The Federal Circuit rejected the applicability of this statement, concluding that it must have been intended to apply to S. 508, but not to S. 20, because the relevant bill language was changed prior to the enactment of S. 20.

The Federal Circuit was incorrect in its construction of the legislative history. In fact, the language change cited by the court took place prior to the passage of the final version of S. 508 by the Senate and the House

8

, and was considered by Congress at the time the Joint Explanatory Statement was first written. As the Joint Explanatory Statement makes clear, the per se rule was placed in report language at that time not because Congress did not have a per se rule to apply, but because Congress wanted to make it clear that proof of knowledge and timing was only "one of many possible ways" that a whistleblower could use to establish a prima facies case.

8

See Cong. Rec. p. 15333 (October 7, 1988).

Accordingly, the amendment in Section 4(b) would restore the balance intended in the Whistleblower Protection Act, by permitting a whistleblower to prove his/her prima facie case by showing that the "official taking that action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could

conclude that the disclosure was a factor in the personnel action." As stated in the Joint Explanatory Statement, this would be only one of many possible ways that a whistleblower could use to establish a prima facie case.

The Committee also notes that the Whistleblower Protection Act creates a clear division between a whistleblowers prima facie case, which must be proven by a preponderance of the evidence, and an agency's affirmative defense, which must be proven by clear and convincing evidence. The Committee amendment reaffirms that Congress intends for a agency's evidence of reasons why it may have acted (other than retaliation) to be presented as part of the affirmative defense and subject to the higher burden of proof.

Section 4(c) requires MSPB to refer possible prohibited personnel practices identified in independent right of action cases to OSC to take appropriate action.

Section 4(d) clarifies that a prevailing whistleblower is entitled to attorneys fee and any other reasonable costs incurred directly or indirectly by the whistleblower in connection with the litigation. This provision overrules the MSPB's ruling in the case of *Wiatr v. Department of the Air Force* that whistleblowers are entitled to recover reasonable costs incurred by their attorneys, but not costs that they incur themselves. The Committee recognizes that, in October of 1993, the MSPB itself has over-ruled this holding of *Wiatr* in *Bonggat v. Department of the Navy*.

Section 5(a) clarifies that an agency decision to order psychiatric testing or examination of employees is a personnel action, subject to review in a whistleblower case.

Section 5(b) limits the exclusion of confidential, policy making positions from coverage under the Whistleblower Protection Act to those employees that are not designated prior to the personnel action taken against the individual. This section addresses the situation faced by a Justice Department employee who was designated as a confidential policy-making, policy-advocating, or policy-determining employee over a year after the employee was terminated, a month after the employee filed a Whistleblower Protection Act Individual Right of Action, and less than three weeks before the administrative judge ruled on the employee's case. Section 5(b) will ensure that employee receive the protection of the Whistleblower Protection Act unless they were designated as policy-making employees before making the otherwise protected disclosure.

Section 5(c) extends whistleblower protection coverage to employees of federal corporations. The Chairman of the Governmental Affairs Committee received a November 16, 1993, letter from John Adair, the Inspector General of the Resolution Trust Corporation (RTC) supporting this provision. Mr. Adair noted, "Currently, RTC employees who believe they have been subjected to inappropriate reprisals or retaliation are limited to using RTC's internal grievance procedures or filing civil action against the Corporation in Federal court. We believe that RTC employee(s) should be afforded the same protections in the Whistleblower Protection Act available to other federal employees."

The Committee would note that currently Section 1222 states that "except as provided in section 1221(i), nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a provision of statute which is outside of both this chapter and chapter 23." Therefore, if employees of government corporations have other avenues available to them, S. 622 would not be construed so as to extinguish those rights.

Section 5(d) address the narrow construction of the Whistleblower Protection Act with regard to the types of retaliatory action for which remedies are available. Under Section 2302(b)(8), retaliation against a whistleblower constitutes a prohibited personnel practice only if it takes the form of a "personnel action." Unfortunately, there are many retaliatory actions that do not fall into the definition of personnel actions.

In one case reviewed by the Committee, for example, a whistleblower who testified before Congress about management problems in the U.S. Customs Service alleged that his superiors retaliated against him by, among other actions, relieving him of his high-profile assignments. Despite the allegation of direct retaliation of whistleblowing, the Office of Special Counsel closed out this case without investigation. In its "close out" letter to the whistleblower, OSC took the position that this particular form of retaliation was not covered by the statute. The letter stated:

The decision to assign you low profile and Civil Division cases does not appear to adversely affect your grade or pay. Thus, those actions would not constitute an inconsistent change in duties and responsibilities and are not personnel actions within the meaning of 5 U.S.C. Section 2302(a).

In another case, the OSC found that an employee's loss of a security clearance was due to protected disclosures made to Congress regarding misconduct in a defense program. However, OSC found that nothing could be done to defend against that type of retaliation. OSC stated:

Reprisals were taken against \* \* \* by officials of the United States Army \* \* \*, however, since the agency fashioned the action taken as a security clearance matter, the Office of Special Counsel has not jurisdiction to review the substance of the underlying reasons associated with the action.

The intent of the Whistleblower Protection Act was to create a clear remedy for all cases of retaliation or discrimination against whistleblowers. The Committee believes that such retaliation must be prohibited regardless what form it may take. For this reason, Section 5(d) would amend the Act to cover any action taken to discriminate or retaliate against a whistleblower because of his/her protected conduct, regardless of the form that discrimination or retaliation may take.

The Committee has heard allegations that OSC has taken the position that statements criticizing agency practices through normal agency channels or within the chain of command are not "protected disclosures" under the Whistleblower Protection Act. The Office of Special Counsel expressly denied these allegations in response to pre-hearing questions from Senator Levin, stating:

The OSC does not take the position that an otherwise protected disclosure of information loses that protection because the disclosure was made through normal agency channels or within the chain of command.

The Committee applauds this statement and reaffirms the plain language of the Whistleblower Protection Act, which covers, by its terms, "any disclosure", of violations of law, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. The Committee stands by that language, as explained in its 1988 report on the Whistleblower Protection Act. That report states:

The Committee intends that disclosures be encouraged. The OSC, the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue. S. 508 emphasizes this point by changing the phrase disclosure to any disclosure in the statutory definition. This is simply to stress that any disclosure is protected (if it meets the requisite reasonable belief test and is not required to be kept confidential).

9

9

Senate Report 100-413, Report of the Committee on Governmental Affairs to Accompany S. 508, p. 13 (July 6, 1988).

In response to post-hearing questions from Senator Pryor, OSC indicated that some administrative judges of the Merit System Protection Board may still not understand the law on this point. The OSC letter states:

I assume that this question is concerned with whether or not an employee can be considered a whistleblower when the employee, in the course of doing his job, passes along certain information to his regular supervisors; for example, a government auditor whose report shows a waste of funds turns in his report to his supervisor, who accepts it for routine processing. In this example the law is unclear whether the employee has made a protected disclosure. At least two administrative judges of the Merit Systems Protection Board (MSPB) have ruled that such activity is not protected whistleblowing. Nonetheless, the MSPB to the best of our knowledge has not yet issued a final decision on this issue.

10

10

Hearing Record, p. 137.

As indicated above, the plain language of the Whistleblower Protection Act extends to retaliation for "any disclosure", regardless of the setting of the disclosure, the form of the disclosure, or the person to whom the disclosure is made.

Section 5(e) requires agency heads throughout the Federal government to take steps, in consultation with the OSC, to inform federal employees of the rights and remedies available to them under the Whistleblower Protection Act.

Section 6 makes compliance with merit systems principles a consideration in performance appraisals of federal managers.

Section 7 extends whistleblower protection coverage to Department of Veterans Affairs personnel employed under chapters 73 or 74 of Title 38. This section incorporates S. 627, a bill introduced by Senator Conrad to grant VA medical personnel whistleblower protection.

Section 8 allows the Board to order corrective action that will make, as nearly as possible, the individual "whole."

Section 9(a) requires the Special Counsel to issue a policy statement regarding the implementation of the WPA to be made available to any person alleging a prohibited personnel practice. Subsection 9(a) also addresses the disclosure of information to agency officials during the course of an investigation.

As explained above, the Committee recognizes that there are circumstances under which information from or about whistleblowers must be disclosed to conduct a successful investigation. In other cases, however, disclosure may be seriously detrimental to the interest of a whistleblower. The lack of clear guidelines as to what types of information may be disclosed, to whom, and under what circumstances it is likely to be disclosed, creates uncertainty in the minds of many whistleblowers and may undermine confidence in the Office of Special Counsel.

For these reasons, the bill requires OSC to issue detailed guidelines identifying specific categories of information that may (or may not) be communicated to agency officials for an investigative purpose, or for the purpose of obtaining corrective action or disciplinary action, and the circumstances under which such information is likely to be communicated to agency officials. The Committee intends the guidelines promulgated in accordance with this Section to be consistent with the purposes of the Whistleblower Protection Act, which expressly states that "the Office of Special Counsel shall act in the interests of employees who seek (its) assistance." In general, the new guidelines should be designed to preclude any disclosure of information that would be detrimental to the interest of the employee seeking the assistance of the Office of Special Counsel.

Subsection 9(b) requires OSC to provide, in each close-out letter terminating an investigation of a prohibited personnel practice, the name and telephone number of an OSC employee who can respond to reasonable questions from the individual who initiated the investigation.

Subsection 9(b) also requires OSC to respond to reasonable questions from whistleblowers whose cases have been terminated by the Special Counsel. The statute currently requires OSC to provide a "close-out" letter to whistleblowers whose cases are terminated. Each such letter is statutorily required to include a summary of the relevant facts ascertained by the Special Counsel, including the facts that support, and the facts that do not support, the whistleblowers' allegations.

However, many whistleblowers complain that OSCs' close-out letters are perfunctory and give little information about OSCs' investigation or the facts of the case. Some have sought to remedy this problem by gaining access to the OSCs' investigative files.

Giving whistleblowers a right of access to OSC investigative files may not be appropriate, because such files might contain confidential information about persons other than the whistleblower. Also, witnesses might be less candid with OSC investigators if they knew that OSC files would be open to the whistleblower. On the other hand, OSC is statutorily required to assist whistleblowers, and should not treat them the same way as a federal agency would treat any routine FOIA request.

S. 622 would address this problem by requiring OSC to provide, in each close-out letter terminating an investigation of a prohibited personnel practice, the name and telephone number of an OSC employee who will be available to respond to reasonable questions from the person who initiated the investigation regarding OSCs' investigation, the relevant facts ascertained, and the law applicable to the persons' allegations. This approach should provide whistleblowers with information necessary for them to make informed decisions about how to proceed with their cases.

Section 10 requires the OSC to conduct an annual survey of individuals who contact the OSC for assistance. This survey builds on the GAO survey referenced above. The Committee hopes that the survey will enable OSC to better assist complaints.

Section 11 provides that the amendments made by the bill become effective on and after the date of enactment.

#### V. Estimated Cost of Legislation

U.S. Congress,  
 Congressional Budget Office,  
 Washington, DC, July 20, 1994.  
 Hon. John Glenn,  
 Chairman, Committee on Governmental Affairs,  
 U.S. Senate, Washington, DC.

Dear Mr. Chairman:

The Congressional Budget Office has prepared the enclosed cost estimate for S. 622, a bill to authorize appropriations for the United States Office of Special Counsel, the Merit Systems Protection Board, and for other purposes.

Enactment of S. 622 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,  
 James L. Blum  
 (For Robert D. Reischauer, Director).

Enclosure.

#### CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 622.

2. Bill title: a bill to authorize appropriations for the United State Office of Special Counsel, the Merit systems Protection Board, and for other purposes.

3. Bill status: As ordered reported by the Senate Committee on Governmental Affairs on April 26, 1994.

4. Bill purpose: S. 622 would authorize the appropriation of such sums as may be necessary to fund the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC) for fiscal year 1995. The 1994 appropriations for the MSPB and the OSC are \$25 million and \$8 million, respectively. The President has requested \$25 million for the MSPB and \$8 million for the OSC for 1995.

The bill also would make several changes to the current laws governing the OSC, the MSPB, and the cases that these offices handle.

5. Estimated cost to the Federal Government:

-- (PLEASE REFER TO ORIGINAL SOURCE FOR TABLE) --

The costs of this bill fall within budget function 800.

Basis of estimate: CBO assumes that the necessary funds will be appropriated and estimates that spending will occur at historical rates. The authorization amounts in the above table are CBOs baseline projections for these programs that is, the 1994 appropriations adjusted for inflation. The 1995 appropriations, however, are likely to be lower than the total authorization estimate of \$34 million for the MSPB and the OSC. Both the House- and Senate-passed versions of the Treasury, Postal Service, and General Government Appropriation Bill for 1995 include a total of about \$33 million for the two offices.

Other provisions of the bill would not result in significant costs to the federal government.

6. Pay-as-you-go considerations: Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 1998. CBO estimates that enactment of S. 622 would not affect direct through 1998. CBO estimates that enactment of S. 622 would not affect direct spending or receipts. Thus, pay-as-you-go procedures would not apply to the bill.

7. Estimated cost to State and local governments: None.

8. Estimate comparison: None.

9. Previous CBO estimate: None.

10. Estimate prepared by: Mark Grabowicz.

11. Estimate approved by: C.G. Nuckols, Assistant Director for Budget Analysis.

#### VI. Regulatory Impact of Legislation

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of S. 622.

S. 622 would have very limited regulatory impact. The Whistleblower Protection Act already provides the Office of Special Counsel with the authority to prescribe regulations necessary to carry out its functions. It is possible that the OSC may modify existing regulations slightly to accommodate the changes required by S. 622. Section 9 of S. 622 requires OSC to issue a policy statement regarding the implementation of the Whistleblower Protection Act. However, the policy statement and any changes to existing regulations are expected to address OSCs internal operating procedures and should have little regulatory impact, if any, on the public.

#### VII. Changes to Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 622, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

##### Whistleblower Protection Act of 1989

(5 U.S.C. 5509 note, Public Law 101-12; 103 Stat. 34)

\* \* \* \* \*

#### SEC. 8. AUTHORIZATION OF APPROPRIATIONS; RESTRICTION RELATING TO APPROPRIATIONS UNDER THE CIVIL SERVICE REFORM ACT OF 1978; TRANSFER OF FUNDS.

(a) Authorization of Appropriations. There are authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated

(1) for each of fiscal years 1989, 1990, 1991, 1992, 1993, and 1994 1993, 1994, 1995, such sums as necessary to carry out subchapter I of chapter 12 of title % United States Code (as amended by this Act); and

(2) for each of fiscal years 1989, 1990, 1991, and 1992 1993, 1994, and 1995, such sums as necessary to carry out subchapter II of chapter 12 of title 5, United States Code (as amended by this Act).

\* \* \* \* \*

#### TITLE 5, UNITED STATES CODE: GOVERNMENT ORGANIZATION AND EMPLOYEES

\* \* \* \* \*

##### Subchapter I Merit Systems Protection Board

##### 1204. Powers and functions of the Merit Systems Protection Board

(1) \* \* \*

(m)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case arising under section 1215, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party of a case arising under section 1215 and the decision is based on a finding of discrimination prohibited under section 2303(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 200e-5(k)).

\* \* \* \* \*

Subchapter II Office of Special Counsel

1211. Establishment

\* \* \* \* \*

(b) The Special Counsel shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The Special Counsel may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that the Special Counsel may not continue to serve for more than one year after the date on which the term of the Special Counsel would otherwise expire under this subsection. \* \* \*

\* \* \* \* \*

1212. Powers and functions of the Office of Special Counsel

\* \* \* \* \*

(g)(1) The Special Counsel may not respond to any inquiry or provide information concerning disclose any information from or about any person making an allegation under section 1214(a), except in accordance with the provisions of section 552a of title 5, United States Code, or as required by any other applicable Federal law.

(2) Notwithstanding the exception under paragraph (1), the Special Counsel may not respond to any inquiry concerning a matter described in subparagraph (A) or (B) of section 2302(b)(2) in connection with a an evaluation of the work performance, ability, aptitude, general qualifications, character, loyalty, or suitability for any personnel action of any person described in paragraph (1)

\* \* \* \* \*

1214. Investigation of prohibited personnel practices; corrective action

\* \* \* \* \*

(b) \* \* \*

(2) (A)(i) Except as provided under clause (ii), no later than 240 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(ii) If the Special Counsel is unable to make the required determination within the 240-day period specified under clause (i) and the person submitting the allegation of a prohibited personnel practice agrees to an extension of time, the determination shall be made within such additional period of time as shall be agreed upon between the Special Counsel and the person submitting the allegation.

(A) (B) If, in connection with any investigation, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved and to the Office of Personnel Management, and may report such determination, findings, and recommendations to the President. The Special Counsel may include in the report recommendations for corrective action to be taken.

(B) (C) If, after a reasonable period of time, the agency does not act to correct the prohibited personnel practice, the Special counsel may petition the Board for corrective action.

(C) (D) If the Special Counsel finds, in consultation with the individual subject to the prohibited personnel practice, that the agency has acted to correct the prohibited personnel practice, the Special Counsel shall file such finding with the Board, together with any written comments which the individual may provide.

(E) A determination by the Special Counsel under this paragraph may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person submitting the allegation of a prohibited personnel practice.

\* \* \* \* \*

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

(1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(2) reimbursement for attorneys fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages.

\* \* \* \* \*

1218. Annual Report

The Special Counsel shall submit an annual report to the Congress on the activities of the Special Counsel, including the number, types, and disposition of allegations of prohibited personnel practices filed with it, investigations conducted by it, cases in which it did not make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken within the 240-day period specified in section 1214(b)(2)(A)(i), and actions initiated by it before the Merit Systems Protection Board \* \* \*

\* \* \* \* \*

Subchapter III Individual Right of Action in Certain Reprisal Cases

1221. Individual right of action in certain reprisal cases

\* \* \* \* \*

(d)(1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board may issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that such subpoena is necessary for the development of relevant evidence. (1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board shall issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that the testimony or production requested is not unduly burdensome and appears reasonably calculated to lead to the discovery of admissible evidence.

\* \* \* \* \*

(e)(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that

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

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a factor in the personnel action.

\* \* \* \* \*

(f)(2) \* \* \*

(3) If, based on evidence presented to it under this section, the Merit Systems Protection Board determines that there is reason to believe that a current employee may have committed a prohibited personnel practice, the Board shall refer the matter to the Special Counsel to investigate and take appropriate action under section 1215.

\* \* \* \* \*

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

(i) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(ii) back pay and related benefit, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential changes.

(B) Corrective action shall include attorneys fees and costs provided for under paragraphs (2) and (3).

(1) (2) If an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorneys fees and any other reasonable costs incurred and any other reasonable costs incurred directly or indirectly by the employee, former employee, or applicant.

(2) (3) If an employee, former employee, or applicant for employment is the prevailing party in an appeal from the Merit Systems Protection Board, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorneys fees and and any other reasonable costs incurred and any other reasonable costs incurred directly or indirectly by the employee, former employee, or applicant, regardless of basis of the decision.

\* \* \* \* \*

CHAPTER 21 DEFINITIONS

\* \* \* \* \*

2105. Employee

(a) \* \* \*

(f) For purposes of sections 1212, 1213, 1214, 1215, 1216, 1221, 1222, 2302, and 7701, employees appointed under chapter 73 or 74 of title 38 shall be employees.

\* \* \* \* \*

CHAPTER 23 MERIT SYSTEMS PRINCIPLES

\* \* \* \* \*

2302. Prohibited personnel practices

(a)(1) \* \* \*

(2) For the purpose of this section

(A) "personnel action" means

\* \* \* \* \*

(ix) a decision concerning pay, benefits, or awards concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and

(x) a decision to order psychiatric testing or examination; and

(x) (xi) any other significant change in duties or responsibilities which is inconsistent with the employees salary or grade level, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31.

\* \* \* \* \*

(B) overed 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

(i) a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) any position 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.

\* \* \* \* \*

(C) gency means an Executive agency and the Government Printing Office, but does not include

(i) a Government corporation, except in the case of alleged prohibited personnel practice described under subsection (b)(8);

(ii) \* \* \*  
\* \* \* \* \*

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil services laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

\* \* \* \* \*

CHAPTER 43 PERFORMANCE APPRAISAL

\* \* \* \* \*

4313. Criteria for performance appraisals

Appraisals of performance \* \* \*

(5) meeting affirmative action goals, and achievement of equal employment opportunity requirements., and compliance with the merit systems principles set forth under section 2301 of this title.

**SUBJECT:** APPROPRIATIONS (90%); LEGISLATION (79%); US FEDERAL GOVERNMENT (79%); LEGISLATIVE BODIES (79%); PUBLIC POLICY (59%); POLLS & SURVEYS (59%); CIVIL SERVICES (59%); INVESTIGATIONS (59%); BURDENS OF PROOF (59%); EVIDENCE (59%);

**LOAD-DATE:** August 31, 1994