

**TO REAUTHORIZE THE OFFICE OF SPECIAL COUNSEL (Senate - October 07, 1994)**

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Mr. BREAUX. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of H.R. 2970, a bill to reauthorize the Office of Special Counsel, received from the House and at the desk.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

**A BILL (H.R. 2970) TO REAUTHORIZE THE OFFICE OF SPECIAL COUNSEL, AND FOR OTHER PURPOSES.)**

The PRESIDING OFFICER. Is there objection to the immediate consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

**AMENDMENT NO. 2641**

**(PURPOSE: TO AUTHORIZE APPROPRIATIONS FOR THE UNITED STATES OFFICE OF SPECIAL COUNSEL, THE MERIT SYSTEMS PROTECTION BOARD, AND FOR OTHER PURPOSES)**

Mr. BREAUX. Mr. President, on behalf of Senators **Levin** and **Cohen**, I send a substitute to the amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report the amendment.

The legislative clerk read as follows:

The Senator from Louisiana [Mr. **Breaux**] for Mr. **Levin** proposes an amendment numbered 2641.

Mr. BREAUX. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

**SECTION 1. AUTHORIZATION OF APPROPRIATIONS.**

(a) **Merit Systems Protection Board:** Section 8(a)(1) of the Whistleblower Protection Act of 1989 (5 U.S.C. 5509 note; Public Law 101-12; 103 Stat. 34) is amended by striking out `1989, 1990, 1991, 1992, 1993, and 1994' and inserting in lieu thereof `1993, 1994, 1995, 1996, and 1997'.

(b) **Office of Special Counsel:** Section 8(a)(2) of the Whistleblower Protection Act of 1989 (5 U.S.C. 5509 note; Public Law 101-12; 103 Stat. 34) is amended by striking out `1989, 1990, 1991, and 1992' and inserting in lieu thereof `1993, 1994, 1995, 1996, and 1997'.

**SEC. 2. REASONABLE ATTORNEY FEES IN CERTAIN CASES.**

Section 1204 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

`(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 2302(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. 2000e-5(k)).'

### SEC. 3. OFFICE OF SPECIAL COUNSEL.

(a) **Succession:** Section 1211(b) of title 5, United States Code, is amended by inserting after the first sentence: '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.'

(b) **Limitations on Disclosures:** Section 1212(g) of title 5, United States Code, is amended--

(1) in paragraph (1), by striking out 'provide information concerning' and inserting in lieu thereof 'disclose any information from or about'; and

(2) in paragraph (2), by striking out 'a matter described in subparagraph (A) or (B) of section 2302(b)(2) in connection with a' and inserting in lieu thereof 'an evaluation of the work performance, ability, aptitude, general qualifications, character, loyalty, or suitability for any personnel action of any'.

(c) **Status Report Before Termination of Investigation:** Section 1214(a) of title 5, United States Code, is amended--

(1) in paragraph (1) by adding at the end thereof the following new subparagraph:

'(D) No later than 10 days before the Special Counsel terminates any investigation of a prohibited personnel practice, the Special Counsel shall provide a written status report to the person who made the allegation of the proposed findings of fact and legal conclusions. The person may submit written comments about the report to the Special Counsel. The Special Counsel shall not be required to provide a subsequent written status report under this subparagraph after the submission of such written comments.'; and

(2) in paragraph (2)(A)--

(A) in clause (ii) by striking out 'and' after the semicolon;

(B) in clause (iii) by striking out the period and inserting in lieu thereof a semicolon and 'and'; and

(C) by adding at the end thereof the following new clause:

'(iv) a response to any comments submitted under paragraph (1)(D).'

(d) **Determinations:** Section 1214(b)(2) of title 5, United States Code, is amended--

(1) by redesignating subparagraphs (A), (B) and (C) as subparagraphs (B), (C) and (D), respectively;

(2) by inserting before subparagraph (B) (as redesignated by paragraph (1) of this subsection) the following:

'(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.'; and

(3) by inserting after subparagraph (D) (as redesignated by paragraph (1) of this subsection) the following new subparagraph:

'(E) A determination by the Special Counsel under this paragraph shall not be cited or referred to in any proceeding under this paragraph or any other administrative or judicial proceeding for any purpose, without the consent of the person submitting the allegation of a prohibited personnel practice.'

(e) **Reports:** Section 1218 of title 5, United States Code, is amended by inserting '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),' after 'investigations conducted by it,'.

#### SEC. 4. INDEPENDENT RIGHT OF ACTION.

(a) **Subpoenas:** Section 1221(d) of title 5, United States Code, is amended by striking out paragraph (1) and inserting in lieu thereof the following:

`(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.'.

(b) **Corrective Actions:** Section 1221(e)(1) is amended by adding after the last sentence: `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 contributing factor in the personnel action.'.

(c) **Referrals:** Section 1221(f) of title 5, United States Code, is amended by adding after paragraph (2) the following new paragraph:

`(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.'.

#### SEC. 5. PROHIBITED PERSONNEL PRACTICES.

(a) **Personnel Actions:** Section 2302(a)(2)(A) of title 5, United States Code, is amended--

(1) in clause (ix) by striking out `and' after the semicolon;

(2) by striking out clause (x) and inserting in lieu thereof the following:

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

`(xi) any other significant change in duties, responsibilities, or working conditions;'; and

(3) in the matter following designated clause (xi) (as added by paragraph (2) of this subsection) by inserting before the semicolon the following: `, 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) **Covered Positions:** Section 2302(a)(2)(B) of title 5, United States Code, is amended to read as follows:

`(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--

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

`(ii) 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; and'.

(c) **Agencies:** Section 2302(a)(2)(C) of title 5, United States Code, is amended in clause (i) by inserting before the semicolon: `, except in the case of an alleged prohibited personnel practice described under subsection (b)(8)'.

(d) **Informational Program:** Section 2302(c) of title 5, United States Code, is amended in the first sentence by inserting before the period `, 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'.

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#### SEC. 6. PERFORMANCE APPRAISALS.

Section 4313(5) of title 5, United States Code, is amended to read as follows:

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

SEC. 7. MERIT SYSTEMS APPLICATION TO CERTAIN VETERANS AFFAIRS PERSONNEL.

Section 2105 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

`(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.'

SEC. 8. CORRECTIVE ACTIONS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD.

(a) **In General:** Section 1214 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

`(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 attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages.'

(b) **Certain Reprisal Cases:** Section 1221(g) of title 5, United States Code (as amended by section 4(d) of this Act) is further amended--

(1) by redesignating paragraphs (1) and (2) as paragraphs (2) and (3), respectively; and  
(2) by inserting before paragraph (2) (as redesignated by paragraph (1) of this subsection) the following new paragraph:

`(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 benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential changes.

`(B) Corrective action shall include attorney's fees and costs as provided for under paragraphs (2) and (3).'

SEC. 9. AUTHORITIES RELATING TO ARBITRATORS AND CHOICE OF REMEDIES NOT INVOLVING JUDICIAL REVIEW.

(a) **Authorities Which May Be Extended to Arbitrators:** Section 7121(b) of title 5, United States Code, is amended--

(1) by redesignating subparagraphs (A) through (C) of paragraph (3) as clauses (i) through (iii), respectively;

(2) by redesignating paragraphs (1) through (3) as subparagraphs (A) through (C), respectively;

(3) by striking `(b)' and inserting `(b)(1)'; and

(4) by adding at the end the following:

`(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order--

`(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and

`(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

`(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.'

(b) **Choice of Remedies Provision Not Involving Judicial Review:** Section 7121 of title 5, United States Code, is amended by adding at the end the following:

`(g)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.

`(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).

`(3) The remedies described in this paragraph are as follows:

`(A) An appeal to the Merit Systems Protection Board under section 7701.

`(B) A negotiated grievance procedure under this section.

`(C) Procedures for seeking corrective action under subchapters II and III of chapter 12.

`(4) For the purpose of this subsection, a person shall be considered to have elected--

`(A) the remedy described in paragraph (3)(A) if such person has timely filed a notice of appeal under the applicable appellate procedures;

`(B) the remedy described in paragraph (3)(B) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

`(C) the remedy described in paragraph (3)(C) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section

1214(a)(1).'

(c) **Technical and Conforming Amendments:** Section 7121(a)(1) of title 5, United States Code, is amended--

(1) by striking `(d) and (e)' and inserting `(d), (e), and (g)'; and

(2) by inserting `administrative' after `exclusive'.

SEC. 10. EXPENSES RELATED TO FEDERAL RETIREMENT APPEALS.

Section 8348(a) of title 5, United States Code, is amended--

(1) in paragraph (1)(B) by striking out `and' at the end thereof;

(2) in paragraph (2) by striking out the period and inserting in lieu thereof a semicolon and `and'; and

(3) by adding at the end thereof the following new paragraph:

`(3) is made available, subject to such annual limitation as the Congress may prescribe, for any expenses incurred by the Merit Systems Protection Board in the administration of appeals authorized under sections 8347(d) and 8461(e) of this title.'

SEC. 11. ELECTION OF APPLICATION OF LAWS BY EMPLOYEES OF THE RESOLUTION TRUST CORPORATION AND THRIFT DEPOSITOR PROTECTION OVERSIGHT BOARD.

(a) **Election of Provisions of Title 5, United States Code:** If an individual who believes he has been discharged or discriminated against in violation of section 21a(q)(1) of the Federal Home Loan Bank Act (12 U.S.C. 1441a(q)(1)) seeks an administrative corrective action or judicial remedy for such violation under the provisions of chapters 12 and 23 of title 5, United States Code, the provisions of section 21a(q) of such Act shall not apply to such alleged violation.

(b) **Election of Provisions of Federal Home Loan Bank Act:** If an individual files a civil action under section 21a(q)(2) of the Federal Home Loan Bank Act (12 U.S.C. 1441a(q)(2)), the provisions of chapters 12 and 23 of title 5, United States Code, shall not apply to any alleged violation of section 21a(q)(1) of such Act.

SEC. 12. IMPLEMENTATION.

(a) **Policy Statement:** No later than 6 months after the date of enactment of this Act, the Special Counsel shall issue a policy statement regarding the implementation of the Whistleblower Protection Act of 1989. Such policy statement shall be made available to each person alleging a prohibited personnel practice described under section 2302(b)(8) of title 5, United States Code, and shall include 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 under section 1214 of title 5, United States Code, or disciplinary action under section 1215 of such title, the circumstances under which such information is likely to be disclosed, and whether or not the consent of any person is required in advance of any such communication.

(b) **Termination Statement:** The Special Counsel shall include in any letter terminating an investigation under section 1214(a)(2) of title 5, United States Code, the name and

telephone number of an employee of the Special Counsel who is available to respond to reasonable questions from the person regarding the investigation or review conducted by the Special Counsel, the relevant facts ascertained by the Special Counsel, and the law applicable to the person's allegations.

#### SEC. 13. ANNUAL SURVEY OF INDIVIDUALS SEEKING ASSISTANCE.

(a) **In General:** The Office of Special Counsel shall, after consulting with the Office of Policy and Evaluation of the Merit Systems Protection Board, conduct an annual survey of all individuals who contact the Office of Special Counsel for assistance. The survey shall--

- (1) determine if the individual seeking assistance was fully apprised of their rights;
- (2) determine whether the individual was successful either at the Office of Special Counsel or the Merit Systems Protection Board; and
- (3) determine if the individual, whether successful or not, was satisfied with the treatment received from the Office of Special Counsel.

(b) **Report:** The results of the survey conducted under subsection (a) shall be published in the annual report of the Office of Special Counsel.

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#### SEC. 14. EFFECTIVE DATE.

The provisions of this Act and the amendments made by this Act shall be effective on and after the date of the enactment of this Act.

Mr. DORGAN. Mr. President, I rise in support of the conference report on H.R. 2970, the proposed act to authorize appropriations for the United States Office of Special Counsel, the Merit Systems Protection Board [MSPB], and for other purposes.

One of the persistent complaints that surveys, conducted by both GAO and the Merit Systems Protection Board itself, of Federal civil servants reveals is the frustration people feel about the lack of communication on the part of the Office of Special Counsel.

The Office of Special Counsel is supposed to be the policeman of the merit system. The OSC is supposed to punish the perpetrator and help the victims of personnel crime. But, a policeman must be able to communicate with those he is trying to help.

Federal employees who have suffered retaliation for blowing the whistle on waste, fraud, or abuse are supposed to report first to the Office of Special Counsel. In the vast majority of cases, OSC has exclusive jurisdiction--a monopoly, if you will--of these cases. OSC typically waits for months before they take any action on a case. All too often cases are closed out by OSC well before critical witnesses have been interviewed or documents reviewed.

All the employee knows is that the fate of his or her career has entered a black box known as the OSC and that after an undetermined amount of time his or her case is spit out of the black box with a little note--called a close out memo--that says, in effect, 'Sorry, you're out of luck.'

It should be noted that, in one survey, over a third of cases closed out by the OSC were later won by the employees on appeal. Obviously, the OSC is missing something.

What this amendment says is that 10 days before the OSC rejects a case the OSC must tell the employee why. The employee then has one last chance to highlight a key fact or make sure that a critical witness is interviewed. At least the employee will have some idea why the agency charged with protecting his rights is not going to stand up for him. There should not be any confusion that this status report is solely for the complainant's benefit. Like an OSC closeout letter, the Special Counsel's final status report with proposed findings of fact and legal conclusions may not be admitted into any administrative or judicial forum without the complainant's consent.

This amendment will open the lines of communication at an early stage of the process. This will help prevent the MSPB from being clogged with appeals that could have been avoided if the OSC had simply talked to the employee.

The notion that Federal agencies should serve their customers should not be limited to agencies that deal with the general public. Agencies that are supposed to help the employees of the people should also treat these employees as people. That means

leveling with them, letting them know the score. That is what this amendment accomplishes.

Mr. HATCH. Mr. President, law enforcement agencies and representatives of the telecommunications industry have worked with members of the Judiciary and Commerce Committees for several years to draft legislation intended to clarify the responsibilities of telecommunications companies when assisting law enforcement in conducting court authorized wiretaps and traces. The proposed legislation, S. 2375, is the result of their labors. I commend the efforts of Senator **Leahy** for shepherding this bill through the Senate. I also applaud FBI Director Louis Freeh and his staff for their dogged determination in fighting for this important legislation.

The Fourth Amendment to our Constitution underscores the careful balance that must be struck between the right of the people to private communications and the legitimate needs of law enforcement. Unfortunately, that balance has shifted in recent years. Law enforcement agencies have seen rapid advancements in telecommunications technology seriously undermining their ability to conduct court-authorized wiretaps. In the not too distant future, law enforcement may find that it will be unable to execute wiretaps. While we must applaud the telecommunications industry for developing extraordinary new means of communicating, we must be ever watchful that those who prey upon society's innocents will not be able to pervert those revolutionary technologies and use them for criminal gain. Who can forget the bombing of the World Trade Center in New York City? But how many of us remember that the FBI was able to thwart additional terrorist attacks in New York because of the Bureau's capability to intercept criminal conversations. Law enforcement's ability to conduct court-authorized electronic surveillance simply cannot be compromised.

American's concern about crime has never been greater than it is today. Court authorized electronic surveillance is one of the most important and effective tools that State and Federal law enforcement agencies have to fight and to prevent crime. The proposed legislation is essential to effective law enforcement. It preserves law enforcement's ability to conduct court-authorized wiretaps while maintaining the overall security and integrity of the communications network.

The bill requires telephone companies, when served with a court order, to continue to assist law enforcement as they have for the past 50 years by having the capability to identify, segregate, and provide access to the conversations of specific criminals and target numbers, to the exclusion of all others, regardless of the technology, services, or features offered. This bill is not requiring industry to do anything new; rather it simply requires industry to continue to take into account the needs of law enforcement as new communications technologies are designed and deployed. This bill strikes a careful balance between the legitimate needs of law enforcement and the right of the people to private communications. It also strengthens the cooperative relationship that industry and law enforcement have shared for the past 50 years. On this account, I am delighted to cosponsor this legislation and urge my colleagues to give it their wholehearted support.

Mr. BREAUX. Mr. President, I ask unanimous consent that amendment be agreed to and that the motion to reconsider be laid upon the table; that the bill, as amended, be deemed read three times, passed, the title amendment be agreed to, and the motions to reconsider be laid upon the table, en bloc, and that any statements be inserted in the **Record** at the appropriate place as if read.

The amendment (No. 2641) was agreed to.

So the bill (H.R. 2970), as amended, was deemed read three times and passed.

The title was amended so as to read: `An Act to authorize appropriations for the United States Office of Special Counsel, the Merit Systems Protection Board, and for other purposes.'

*END*