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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-90011-J

THASHA A. BOYD,

Petitioner,

versus

U.S. DEPARTMENT OF VETERANS AFFAIRS,
U.S. MERIT SYSTEMS PROTECTION BOARD,

Respondents.

Petition for Permission to Appeal from the
United States District Court for the
Northern District of Georgia

(Filed Sep. 8, 2020)

Before: GRANT, LUCK and LAGOA, Circuit Judges.

BY THE COURT:

Petitioner Thasha A. Boyd's "Petition for Permission to Appeal," in which Boyd seeks to obtain review of the Merit Systems Protection Board's November 2017 decision, which became final in December 2017, is DENIED. We first note that the proper procedure for seeking review of such a decision is to file a petition for

review in the appropriate court of appeals. *See* Fed. R. App. P. 15; 5 U.S.C. § 7703(b)(1)(B). To the extent Boyd seeks to petition us for permission to file a petition for review of the Board's decision pursuant to 5 U.S.C. § 7703(b)(1)(B), and to the extent that decision is reviewable under that provision, her June 2020 petition was filed well outside the 60-day period for seeking review of that order and, accordingly, we would lack jurisdiction over the petition. *See H Brown v. Dir., Office of Workers' Compensation Programs*, 864 F.2d 120, 123-24 (11th Cir. 1989) (noting that statutory time limitations for seeking review of agency decisions are jurisdictional). Thus, Boyd's petition is denied. All pending motions are DENIED as moot.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-90011-J

THASHA A. BOYD,

Petitioner,

versus

U.S. DEPARTMENT OF VETERANS AFFAIRS,
U.S. MERIT SYSTEMS PROTECTION BOARD,

Respondents.

Petition for Permission to Appeal from the
United States District Court for the
Northern District of Georgia

(Filed Nov. 17, 2020)

Before: GRANT, LUCK and LAGOA, Circuit Judges.

BY THE COURT:

Thasha A. Boyd's construed motion for reconsideration of our September 8, 2020 order denying her "Petition for Permission to Appeal" is DENIED. We originally denied Boyd's petition after noting that, to the extent she sought permission to file a petition for review of the Merit Systems Protection Board's

decision, her June 2020 petition was filed outside the 60-day period for doing so. In our order, we noted that we would have lacked jurisdiction over Boyd's untimely petition. In Boyd's construed motion for reconsideration of this order, she disputes the jurisdictional nature of our order denying her petition.[1] Regardless of whether this 60-day period is jurisdictional or a claims processing rule, the government objected to Boyd's untimely petition in its response. Accordingly, we were required to deny her petition regardless of whether the 60-day deadline is jurisdictional. *See, e.g.*, *United States v. Lopez*, 562 F.3d 1309, 1312-14 (11th Cir. 2009) (discussing how, although the time to appeal in a criminal case is not jurisdictional, this Court will dismiss such an untimely appeal if the government objects to the issue).

[1] Boyd also appears to argue that the All Circuit Review Act, Pub. L. No. 115-195, 132 Stat. 1510 (2018), created a special exception such that the 60-day period does not apply to her. There is no basis in the statute's, or the amendment's, text suggesting this extraordinary exception.

APPENDIX C

5 U.S.C. § 7703

§ 7703. Judicial review of decision of the Merit Systems Protection Board

Effective: July 7, 2018

(a)

(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)

(1)

(A) Except as provided in subparagraph B and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(B) A petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d)

(1) Except as provided under paragraph (2), this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management. The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The

granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

(2) This paragraph shall apply to any review obtained by the Director of the Office of Personnel Management that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D). The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the court of appeals. The granting of the petition for judicial review shall be at the discretion of the court of appeals.

Fed. R. App. P. 4

Appeal as of Right—When Taken

[Text of subdivision (a) effective until December 1, 2016, absent contrary Congressional action.]

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

separate document, or

• 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.

Fed. R. App. P. 15

Review or Enforcement of an Agency Order – How Obtained; Intervention

[Text of subdivision (a) effective until December 1, 2016, absent contrary Congressional action.]

(a) Petition for Review; Joint Petition.

(1) Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order. If their interests make joinder practicable, two or more persons may join in a petition to the same court to review the same order.

(2) The petition must:

(A) name each party seeking review either in the caption or the body of the petition—using such terms as "et al.," "petitioners," or "respondents" does not effectively name the parties;

(B) name the agency as a respondent (even though not named in the petition, the United States is a respondent if required by statute); and

(C) specify the order or part thereof to be reviewed.

(3) Form 3 in the Appendix of Forms is a suggested form of a petition for review.

(4) In this rule "agency" includes an agency, board, commission, or officer; "petition for review"

includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute.

(b) Application or Cross-Application to Enforce an Order; Answer; Default.

(1) An application to enforce an agency order must be filed with the clerk of a court of appeals authorized to enforce the order. If a petition is filed to review an agency order that the court may enforce, a party opposing the petition may file a cross-application for enforcement.

(2) Within 21 days after the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested.

(3) The application must contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief requested.

(c) Service of the Petition or Application. The circuit clerk must serve a copy of the petition for review, or an application or cross-application to enforce an agency order, on each respondent as prescribed by Rule 3(d), unless a different manner of service is prescribed by statute. At the time of filing, the petitioner must:

(1) serve, or have served, a copy on each party admitted to participate in the agency proceedings, except for the respondents;

(2) file with the clerk a list of those so served; and

(3) give the clerk enough copies of the petition or application to serve each respondent.

(d) Intervention. Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion—or other notice of intervention authorized by statute—must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.

(e) Payment of Fees. When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the circuit clerk all required fees.

APPENDIX D

132 STAT. 1510 PUBLIC LAW 115–195—JULY 7, 2018

An Act

To amend title 5, United States Code, to provide permanent authority for judicial review of certain Merit Systems Protection Board decisions relating to whistleblowers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "All Circuit Review Act".

SEC. 2. JUDICIAL REVIEW OF MERIT SYSTEMS PROTECTION BOARD DECISIONS RELATING TO WHISTLEBLOWERS.

(a) IN GENERAL.—Section 7703(b)(1)(B) of title 5, United States Code, is amended by striking "During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, a petition" and inserting "A petition".

(b) DIRECTOR REVIEW.—Section 7703(d)(2) of such title is amended by striking "During the 5-year period beginning on the effective date of the

Whistleblower Protection Enhancement Act of 2012, this paragraph" and inserting "This paragraph".

(c) RETROACTIVE EFFECTIVE DATE.—The amendments made by this section shall take effect as if enacted on November 26, 2017.

Approved July 7, 2018.

LEGISLATIVE HISTORY—H.R. 2229:

HOUSE REPORTS: No. 115–337, Pt. 1 (Comm. on Oversight and Government Reform).

SENATE REPORTS: No. 115–229 (Comm. on Homeland Security and Governmental Affairs).

CONGRESSIONAL RECORD:

Vol. 163 (2017): Oct. 11, considered and passed House.

Vol. 164 (2018): June 12, considered and passed Senate, amended.
June 22, House concurred in Senate amendment.

APPENDIX E

Calendar No. 377

115TH CONGRESS } SENATE { REPORT
2d Session } { 115–229

ALL CIRCUIT REVIEW ACT REPORT

REPORT

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

H.R. 2229

TO AMEND TITLE 5, UNITED STATES CODE, TO PROVIDE PERMANENT AUTHORITY FOR JUDICIAL REVIEW OF CERTAIN MERIT SYSTEMS PROTECTION BOARD DECISIONS RELATING TO WHISTLEBLOWERS, AND FOR OTHER PURPOSES

[SEAL]

APRIL 12, 2018.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE
79-010 WASHINGTON : 2018

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AND GOVERNMENTAL AFFAIRS

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Calendar No. 377

115TH CONGRESS } SENATE { REPORT
2d Session } { 115–229

ALL CIRCUIT REVIEW ACT

APRIL 12, 2018.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and Governmental Affairs, submitted the following

REPORT

[To accompany H.R. 2229]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (H.R. 2229) to amend title 5, United States Code, to provide permanent authority for judicial review of certain Merit Systems Protection Board decisions relating to whistleblowers, and for other purposes, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

CONTENTS

I. Purpose and Summary

The purpose of H.R. 2229, the All Circuit Review Act, is to make permanent the authority to appeal final orders or final decisions of the Merit Systems Protection Board (MSPB) regarding whistleblower retaliation complaints to any U.S. Court of Appeals of competent jurisdiction.

II. Background and the Need for Legislation

In 2012, Congress passed the Whistleblower Protection Enhancement Act (WPEA) to "strengthen the rights of and protections for federal whistleblowers so that they can more effectively help root out waste, fraud, and abuse in the federal government."[1] A primary reason for the enactment of WPEA was that "federal whistleblowers have seen their protections diminish in recent years, largely as a result of a series of decisions by the United States Court of Appeals for

[1] S. Rep. No. 112–155 at 1 (2012). *See also* Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112–199, 126 Stat. 1465 (2012).

the Federal Circuit, which has exclusive jurisdiction over many cases brought under the Whistleblower Protection Act."[2] While the Civil Service Reform Act of 1978 originally provided review of all Federal employee claims in any appropriate federal appeals court, including whistleblower claims, the Federal Courts Improvement Act of 1981 granted the Federal Circuit exclusive jurisdiction of appeals of MSPB final orders.[3] The WPEA reinstated "all-circuit review", authorizing Federal employee whistleblowers to file petitions for review of the final order or decision of the MSPB in the Federal Circuit or in any court of appeals of competent jurisdiction.[4]

Congress considered multiple reasons for authorizing all-circuit review for Federal employee whistleblower claims in WPEA. First, Congress agreed with the argument "In the Federal Circuit no other judges critically review the decisions of the Court, no 'split in the circuits' can ever occur, and thus, federal employees are denied the most important single procedure which holds appeals court judges reviewable and accountable."[5] Congress also noted that "a number of

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[2] *Id.* at 1–2.

[3] Civil Service Reform Act of 1978, Pub. L. No. 95–454, §205, 92 Stat. 1111, 1143 (1978); Federal Courts Improvements Act of 1981, Pub. L. No. 97–164, § 127, 96 Stat. 25, 45 (1982).

[4] Whistleblower Protection Enhancement Act, *supra* note 1, at § 108.

[5] S. Rep. No. 112–155 at 11 (citing *The Federal Employee Protection of Disclosures Act: Amendments to the Whistleblower Protection Act: Hearing Before the S. Comm. on Governmental*

federal statutes already allow cases involving rights and protections of federal employees, or involving whistleblowers, to appeal to courts of appeals across the country."[6] Congress further considered that other types of whistleblower claims enjoy a multi-circuit appellate review process, including claims under the False Claims Act, the Resolution Trust Corporation Completion Act, the Federal Deposit Insurance Corporation Improvement Act, the Clean Air Act, the Sarbanes-Oxley Act, and the American Recovery and Reinvestment Act.[7] Congress concluded that "the rationale for the Federal Circuit's subject matter-based jurisdiction—the need for specialization in a particular area of law—does not apply in whistleblower jurisprudence."[8]

WPEA authorized the all-circuit review for Federal whistleblower claims for two years. In 2014, before the expiration, Congress extended the all-circuit review authority for an additional three years.[9] Since few cases had yet to be resolved under the all-circuit review authority of WPEA, Congress extended the

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Affairs, 108th Cong. 108–414 (2003) (statement of Stephen Kohn, Chairman, National Whistleblower Center)).

[6] S. Rep. No. 112–155 at 11.

[7] *Id.* at 12.

[8] *Id.*

[9] All Circuit Review Extension Act, Pub. L. No. 113–170, 128 Stat. 1894 (2014).

authority "to effectively assess its impact."[10] That authority expired on November 27, 2017.

WPEA also authorized all-circuit review for petitions for review filed by the Director of the Office of Personnel Management (OPM) of MSPB decisions regarding Federal employee whistleblower retaliation complaints.[11] The Civil Service Reform Act of 1978 first authorized the OPM Director to petition to the U.S. Court of Appeals for the District of Columbia for review of a MSPB decision or order if the OPM Director determined "the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive."[12] The OPM Director could only petition for review if the OPM Director intervened in the matter when it was before MSPB or if the OPM Director petitioned MSPB for reconsideration of its decision and was denied.[13] These petitions for review by the OPM Director were also transferred to the jurisdiction of the Federal Circuit under the Federal Courts Improvement Act of 1981.[14] WPEA authorized all-circuit review for the OPM Director to petition for review

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[10] H. Rep. No. 113–519 (2014).

[11] Whistleblower Protection Enhancement Act, *supra* note 1, at § 108.

[12] Civil Service Reform Act, *supra* note 4, at § 205.

[13] *Id.*

[14] Federal Courts Improvements Act, *supra* note 4.

of a MSPB order or decision regarding a Federal employee whistleblower retaliation complaint.[15]

From October 1994 until WPEA's enactment in 2012, the Federal Circuit ruled favorably for Federal employee whistleblowers on only three out of 243 appeals considered.[16] Between enactment of all-circuit review authority in WPEA in 2012 and March 11, 2018, the Federal Circuit heard 31 appeals of Federal employee whistleblowers and ruled favorably for the whistleblower in just one of those appeals.[17] With all-circuit review authority, other circuits heard six appeals from Federal employee whistleblowers, ruling favorably for the whistleblower in two of those appeals.[18] The other circuits' rulings under the all-circuit review authority demonstrate that there is no need for one court—the Federal Circuit—to specialize in whistleblower protection laws for Federal employees.

In one case under all-circuit review authority, the Seventh Circuit differed from the Federal Circuit in the interpretation of a requirement for appeal under

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[15] Whistleblower Protection Enhancement Act, *supra* note 1, at § 108.

[16] Memorandurn from Tom Devine, Government Accountability Project, on Federal Circuit Whistleblower Decisions Since Passage of 1994 Amendments (Jan. 30, 2017).

[17] *Id.*

[18] Memorandum from Tom Devine, Government Accountability Project, on All Circuits Whistleblower Decisions Since WPEA Passage (Aug. 26, 2017).

the Whistleblower Protection Act.[19] This opinion by the Seventh Circuit provides a "split in the circuit" of an interpretation of a statutory requirement under Federal whistleblower protection laws. Such a "split in the circuit" was intended to occur with all-circuit review authority, allowing courts to critically review each other's decisions on Federal employee whistleblower protection laws and increase accountability in their interpretations of the laws.

This Act would permanently authorize the all-circuit review authority provided by WPEA for Federal employee whistleblower claims. The Act would also permanently authorize the all-circuit review authority for the OPM Director to petition for review of a MSPB final order concerning a Federal employee whistleblower retaliation complaint. Although the authority expired on November 27, 2017, this Act would apply retroactively, as if enacted on November 27, 2017.

III. LEGISLATIVE HISTORY

H.R. 2229 was introduced on April 28, 2017, by Representatives Elijah Cummings (D–MD–7) and Blake Farenthold (R–TX–27). The Act was passed by the House of Representatives on October 11, 2017, by voice vote. The Act was received in the Senate and referred to the Committee on Homeland Security and Governmental Affairs on October 16, 2017.

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[19] *Delgado v. Merit Sys. Prot. Bd.*, 880 F. 3d 913 (7th Cir. 2018).

The Committee considered H.R. 2229 at a business meeting on February 14, 2018. During the business meeting, an amendment offered by Chairman Johnson was adopted. The amendment retroactively applied the effective date of the Act to November 27, 2017, when the authority expired. Both the amendment and the legislation as modified by the amendment were passed by voice vote *en bloc* with Senators Johnson, Portman, Paul, Lankford, Enzi, Hoeven, Daines, McCaskill, Heitkamp, Peters, Hassan, Harris, and Jones present.

IV. SECTION-BY-SECTION ANALYSIS OF THE ACT, AS REPORTED

Section 1. Short title

This section establishes the short title of the Act as the "All Circuit Review Act".

Section 2. Judicial review of Merit Systems Protection Board decisions relating to whistleblowers

Subsection *(a)* makes permanent the authority to appeal MSPB final orders or final decisions regarding whistleblower complaints to any U.S. Court of Appeals of competent jurisdiction.

Subsection (b) makes permanent the authority for the Director of the Office of Personnel Management to appeal the MSPB final disposition of a whistleblower complaint to a U.S. Court of Appeals. The Director can only make such an appeal if the Director believes

MSPB erred in its interpretation of civil service law, rule, regulation, or policy directive, and if the Director believes the MSPB disposition will have a substantial impact on a civil service law, rule, regulation, or policy directive.

V. Evaluation of Regulatory Impact

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 this Act and determined that the Act will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the Act contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. Congressional Budget Office Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, February 22, 2018.

Hon. Rob Johnson,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2229, the All Circuit Review Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Janani Shankaran.

Sincerely,

KEITH HALL,
Director.

Enclosure.

H.R. 2229–All Circuit Review Act

H.R. 2229 would permanently extend (and retroactively apply) the authority for federal employees to appeal Merit Systems Protection Board (MSPB) decisions regarding whistleblower cases in any federal court, instead of only the U.S. Court of Appeals in Washington, D.C. Under current law, the authority to file an appeal in any federal court expired in December of 2017.

Using information from the MSPB and the Administrative Office of the U.S. Courts, CBO expects that permanently allowing appeals to be filed in any federal circuit would lead to a small increase in the administrative burden of those and other federal agencies. Because many agency offices are located in or near Washington, D.C., that would include attorneys' travel costs and costs associated with researching regional circuit courts' rules and procedures. However, based on the number of such cases in recent years, CBO estimates that those costs would not be significant.

Enacting H.R. 2229 could affect direct spending by agencies that are not funded through annual appropriations; therefore, pay-as-you-go procedures apply.

However, CBO estimates that the net effects would be insignificant for each year. Enacting the bill would not affect revenues.

CBO estimates that enacting H.R. 2229 would not significantly increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 2229 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

On July 18, 2017, CBO transmitted a cost estimate for H.R. 2229, the All Circuit Review Act, as ordered reported by the House Committee on Oversight and Government Reform on May 2, 2017. The bills are similar and CBO's estimates of their budgetary effects are the same.

The CBO staff contact for this estimate is Janani Shankaran. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

VII. Changes in Existing Law Made by the Act, as Reported

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

UNITED STATES CODE

* * * * * * *

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

* * * * * * *

PART III—EMPLOYEES

* * * * * * *

Subpart F—Labor-Management and Employee Relations

* * * * * * *

CHAPTER 77—APPEALS

* * * * * * *

SEC. 7703. JUDICIAL REVIEW OF DECISIONS OF THE MERIT SYSTEMS PROTECTION BOARD

(a) * * *

(b) * * *

(1) * * *

(A) * * *

(B) [During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, a petition] *A petition* to review the final order or final decision of the Board that raises no challenges to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B),

(C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(2) * * *

(c) * * *

(d) * * *

(1) * * *

(2) [During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, this paragraph] *This paragraph* shall apply to any review obtained by the Director of the Office of Personnel Management that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b), or 2302(b)(9)(A)(i), (B), (C), or (D). The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service

law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the court of appeals. The granting of the petition for judicial review shall be at the discretion of the court of appeals.

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APPENDIX F

115TH CONGRESS } HOUSE OF { REPT. 115–337
1st Session } REPRESENTATIVES { Part 1

ALL CIRCUIT REVIEW ACT

OCTOBER 2, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. GOWDY, from the Committee on Oversight and Government Reform, submitted the following

REPORT

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 2229) to amend title 5, United States Code, to provide permanent authority for judicial review of certain Merit Systems Protection Board decisions relating to whistleblowers, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

H.R. 2229, the All Circuit Review Act, makes permanent the all circuit review pilot program, which allows whistleblowers to appeal decisions of the Merit Systems Protection Board (MSPB) to any Federal Circuit.

BACKGROUND AND NEED FOR LEGISLATION

On November 27, 2012, the Whistleblower Protection Enhancement Act of 2012 (WPEA) became law.[1] This landmark whistleblower law was the first major update to the Whistleblower Protection Act since 1994.

Among the many changes established by the WPEA was the creation of a two-year pilot program to allow the appeal of whistleblower cases from the Merit Systems Protection Board (MSPB) to any federal circuit court of appeals.[2] Prior to the WPEA, exclusive jurisdiction over all appeals from the MSPB resided with the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), which was created in 1982, three-and-a-half years after the Civil Service Reform Act of 1978 (CSRA) established the MSPB.[3]

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[1] Whistleblower Prot. Enhancement Act of 2012, Pub. L. No. 112–199, 126 Stat. 1465 (2012).

[2] Whistleblower Prot. Enhancement Act of 2012, Pub. L. No. 112–199 § 108, 126 Stat. 1465, 1469 (2012).

[3] The Federal Courts Improvement Act of 1982 merged the U.S. Court of Customs and Patent Appeals with the U.S. Court of Claims to create the U.S. Court of Appeals for the Federal Circuit,

Congress has repeatedly criticized both the MSPB and the Federal Circuit's interpretation of the whistleblower protections implemented by and subsequent to the CSRA. As part of the groundwork that ultimately resulted in the Whistleblower Protection Act of 1989 (WPA), the House Committee on Post Office and Civil Service noted in 1987: "The Special Counsel's ability to secure relief for individuals who have been victims of prohibited personnel practices has been limited because the MSPB has construed the law relating to the protection of Federal employees quite narrowly."[4] The report noted the Federal Circuit provided little better recourse: "Despite the heavy MSPB caseload, Federal Circuit judges have a general inexperience with federal employee case law."[5] Several of the changes and clarifications in the WPA as ultimately passed were directly intended to reverse MSPB and Federal Circuit actions Congress considered inconsistent with the CSRA.

Five years later, Congress made additional clarifications as part of reauthorizing the MSPB and the Office of Special Counsel.[6] The Senate report

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and gave the Federal Circuit jurisdiction over all appeals from the MSPB except anti–discrimination appeals. Fed. Courts Improvement Act of 1982, Pub. L. No. 97–164 § 127, 96 Stat. 25, 38 (1982); *see also* Civil Serv. Reform Act of 1978, Pub. L. No. 95–454, 92 Stat. 1111 (1978).

[4] H. COMM. ON POST OFFICE & CIV. SERV., WHISTLEBLOWER PROTECTION ACT OF 1987 25, 100th Cong. (1987) (H. Rep. 100–274).

[5] *Id.* at 26.

[6] Pub. L. No. 103–424, 108 Stat. 4361 (1994).

accompanying the 1994 reauthorization noted the Federal Circuit's failure to interpret the legislative history of the WPA correctly.[7] The corresponding bill report from the House Committee on Post Office and Civil Service, which was reorganized as part of this Committee the next year, further stated:

> [T]he statistical record indicates that the MSPB and Federal Circuit Court of Appeals have not been favorable to Federal whistleblowers. In the first two years after the Act's passage, whistleblowers won approximately 20% of Merit Systems Protection Board decisions on the merits. Since FY 1991, however, that rate has dropped to 5%, far lower than analogous statutes with tougher burdens of proof administered by the Department of Labor. Instead of restoring balance, the U.S. Court of Appeals for the Federal Circuit has been more hostile than the Board. Since its 1982 creation, in reported decisions employees have prevailed only twice on the merits with the whistleblower defense. The committee received extensive testimony at hearings that the MSPB and Federal Circuit have lost credibility with the practicing bar for civil service cases. Due to the MSPB's failure to consistently enforce standards in the Federal Rules of Procedure or the Federal Rules of

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[7] S. COMM. ON GOVERNMENTAL AFFAIRS, TO AUTHORIZE APPROPRIATIONS FOR THE UNITED STATES OFFICE OF SPECIAL COUNSEL, THE MERIT SYSTEMS PROTECTION BOARD, AND FOR OTHER PURPOSES 8, 103rd Cong. (1994) (S. Rep. 103–358).

> Evidence, the Board has not earned respect as a fair forum even on procedural grounds.[8]

The report identified a wide variety of areas where the MSPB and Federal Circuit had violate[d] the WPA's clear mandate [established] through statutory provisions or legislative intent."[9]

Although Congress updated the law in 1989 and 1994 in response to erroneous MSPB and Federal Circuit decisions, the 1994 House report noted: "The committee recognizes that realistically it is impossible to overturn destructive precedents as fast as they are issued by the MSPB or Federal Circuit."[10] That prediction proved prescient, as Congress did not make any substantive clarifications for nearly twenty years regarding the WPA. The bill reports accompanying the WPEA in 2012 made clear this was not due to a lack of erroneous MSPB and Federal Circuit decisions in the interim. The Senate Committee on Homeland Security and Governmental Affairs report stated:

> Unfortunately, federal whistleblowers have seen their protections diminish in recent years, largely as a result of a series of decisions by the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over many cases brought under the Whistleblower Protection Act (WPA). . . .

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[8] H. COMM. ON POST OFFICE & CIV. SERV., REAUTHORIZATION OF THE OFFICE OF SPECIAL COUNSEL 17, 103rd Cong. (1994) (H. Rep. 103–769).

[9] *Id.* at 18.

[10] *Id.*

> Despite the clear legislative history and the plain language of the 1994 amendments, the Federal Circuit and the MSPB have continued to undermine the WPA's intended meaning by imposing limitations on the kinds of disclosures by whistleblowers that are protected under the WPA.[11]

This Committee concurred that "the Federal Circuit has often times misinterpreted Congressional intent when it comes to whistleblowers."[12] The Committee's WPEA bill report noted: "Unfortunately, . . . the U.S. Court of Appeals for the Federal District has eroded whistleblower protections over the years through a series of decisions. This has adversely impacted well-intentioned whistleblowers and led to an unwillingness by many to step forward."[13] Subsequent Committee reports noted the Federal Circuit's "overwhelming record of ruling against whistleblowers—a record that included a series of questionable interpretations of the law."[14]

This experience since the CSRA, particularly from 1994 to 2012, informed Congress's decision to establish the all circuit review pilot program with the WPEA.

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[11] S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2012 1–2, 4–5 112th Cong. (2012) (S. Rep. 112–155).

[12] H. COMM. ON OVERSIGHT & GOV'T REFORM, WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2011 6, 112th Cong. (2012) (H. Rep. 112–508).

[13] *Id.* at 6.

[14] H. COMM. ON OVERSIGHT & GOV'T REFORM, ALL CIRCUIT REVIEW EXTENSION ACT 2, 113th Cong. (2014) (H. Rep. 113–519).

Despite innumerable significant public policy priorities which routinely compete for the attention of policymakers, Congress has repeatedly sent a consistent message regarding its intent that the WPA protect federal employees who blow the whistle. However, relying on regular clarifying revisions is unrealistic. Despite thousands of man-hours that may go into bringing particular legislation to the floor of the House or Senate, a number of obstacles may preclude enactment into law in any given Congress. Thus, just as courts rely on the doctrines of ripeness and exhaustion of remedies to conserve judicial resources, so too Congress often conserves its resources by allowing statutory questions to play out in the court system. Eliminating the Federal Circuit's monopoly on whistleblower cases makes it possible for more courts to hear these important issues and for the Supreme Court to consider provisions of the WPA in the event of a circuit split.

On September 26, 2014, Congress passed the All Circuit Review Extension Act, introduced by Ranking Member Elijah Cummings (D–MD) with then-Chairman Darrell Issa (R–CA) and Representatives Blake Farenthold (R–TX), Gerald Connolly (D–VA), and Chris Van Hollen (D–MD) as original cosponsors.[15] The bill extended the initial two-year pilot program by

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[15] All Circuit Review Extension Act, Pub. L. No. 113–170, 128 Stat. 1894 (2014).

three years, allowing additional time to assess the pilot program's impact.[16]

During a December 2015 hearing to reauthorize the MSPB, thenMSPB Chairman Susan Grundmann stated: "The MSPB is not aware of any 'significant problems' resulting from all-circuit review."[17] As of February 2016, the MSPB indicated there had been six decisions in whistleblower cases issued by federal appeals courts other than the Federal Circuit.[18] By February 2017, there had only been 29 such cases, according to data provided by the MSPB.

LEGISLATIVE HISTORY

On April 28, 2017, Ranking Member Elijah Cummings (D–MD) introduced H.R. 2229, with Representative Blake Farenthold (R–TX). H.R. 2229 was referred to the Committee on Oversight and Government Reform, as well as the Committee on the Judiciary. The Committee on Oversight and Government Reform considered H.R. 2229 at a business meeting on May 2, 2017 and ordered the bill favorably reported by voice vote.

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[16] *See* H. COMM. ON OVERSIGHT & GOV'T REFORM, ALL CIRCUIT REVIEW EXTENSION ACT, 113th Cong. (2014) (H. Rep. 113–519).

[17] *Merit Sys. Prot. Bd., Office of Gov't Ethics, & Office of Special Counsel Reauthorization: Hearing before the H. Subcomm. on Gov't Operations*, 114th Cong. (2015) (Merit Sys. Prot. Bd. responses to Questions for the Record, at 1).

[18] *Id.*

SECTION-BY-SECTION

Section 1. Short title

This short title is the "All Circuit Review Act."

Section 2. Judicial review of merit systems protection board decisions relating to whistleblowers

This section makes permanent the five-year pilot program allowing all circuit review.

Specifically, subsection (a) allows any petitioner to appeal to any court of appeals of competent jurisdiction so long as the appeal raises no challenge to a Merit Systems Protection Board decision other than its disposition of reprisal allegations.

Similarly, subsection (b) allows the Director of the Office of Personnel Management to do the same.

EXPLANATION OF AMENDMENTS

No amendments to H.R. 2229 were offered or adopted during Full Committee consideration of the bill.

COMMITTEE CONSIDERATION

On May 2, 2017, the Committee met in open session and ordered reported favorably the bill, H.R. 2229, by voice vote, a quorum being present.

ROLL CALL VOTES

No roll call votes were requested or conducted during Full Committee consideration of H.R. 2229.

CORRESPONDENCE
ONE HUNDRED FIFTEENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6216
(202) 225-3951
http?//www.house.gov/judiciary

[Names Omitted In Printing]

September 22, 2017

The Honorable Trey Gowdy
Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Gowdy,

I write with respect to HR. 2229, the "All Circuit Review Act." As a result of your having consulted with us on provisions within H.R. 2229 that fall within the Rule X jurisdiction of the Committee on the Judiciary, I forego any further consideration of this bill so that it may proceed expeditiously to the House floor for consideration.

The Judiciary Committee takes this action with our mutual understanding that by foregoing consideration of H.R. 2229 at this time, we do not waive any jurisdiction over subject matter contained in this or similar legislation and that our committee will be appropriately consulted and involved as this bill or similar legislation moves forward so that we may address any remaining issues in our jurisdiction. Our committee also reserves the right to seek appointment of an appropriate number of conferees to any House-Senate conference involving this or similar legislation, and asks that you support any such request.

I would appreciate a response to this letter confirming this understanding with respect to H.R. 2229 and would ask that a copy of our exchange of letters on this matter be included in the *Congressional Record* during floor consideration of H.R. 2229.

Sincerely,

/s/ Bob Goodlatte
Bob Goodlatte Chairman

cc: The Honorable John Conyers, Jr.
The Honorable Elijah Cummings
The Honorable Paul Ryan, Speaker
The Honorable Thomas Wickham, Jr.,
Parliamentarian

ONE HUNDRED FIFTEENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND
GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6143
MAJORITY (202) 225-5074
MINORITY (202) 225-5051
http://www.oversight.house.gov

[Names Omitted In Printing]

September 22, 2017

The Honorable Bob Goodlatte
Chairman, Committee on Armed Services
U.S. House of Representatives

Dear Mr. Chairman:

Thank you for your letter regarding H.R. 2229, the *All Circuit Review Act.* As you noted, certain provisions of the bill fall within the jurisdiction of the Committee on the Judiciary. I appreciate your willingness to forego action on the bill in the interest of expediting this legislation for floor consideration. I agree that foregoing consideration of the bill in no way diminishes or alters the jurisdiction of the Committee on the Judiciary with respect to the appointment of conferees or to any future jurisdictional claim over the subject matters contained in the bill or any similar legislation.

I will include a copy of our letter exchange on H.R. 2229 in the bill report filed by the Committee on Oversight and Government Reform, as well as in the

Congressional Record during floor consideration, to memorialize our understanding.

Thank you for your assistance with this matter.

Sincerely,

/s/ Trey Gowdy
Trey Gowdy

cc: The Honorable Paul D. Ryan, Speaker

The Honorable Elijah E. Cummings, Ranking Member, Committee on Oversight and Government Reform

The Honorable John Conyers, Jr., Ranking Member, Committee on the Judiciary

The Honorable Thomas J. Wickham, Parliamentarian

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill amends title 5, United States Code, to provide permanent authority for judicial review of certain Merit Systems Protection Board decisions relating to whistleblowers. As such, this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goal or objective of this bill is to amend title 5, United States Code, to provide permanent authority for judicial review of certain Merit Systems Protection Board decisions relating to whistleblowers.

DUPLICATION OF FEDERAL PROGRAMS

No provision of this bill establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting this bill does not direct the completion of any specific rule makings within the meaning of section 551 or title 5, United States Code.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of Section 5(b) of the appendix to title 5, United States Code.

UNFUNDED MANDATES STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104–4) requires a statement as to whether the provisions of the reported include unfunded mandates. In compliance with this requirement, the Committee has included below a letter received from the Congressional Budget Office.

EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a

comparison by the Committee of the costs that would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974, which the Committee has included below.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 18, 2017.

Hon. TREY GOWDY,
Chairman, Committee on Oversight and Government Reform, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2229, the All Circuit Review Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Janani Shankaran.

Sincerely,

MARK P. HADLEY,
(For Keith Hall).

Enclosure.

H.R. 2229–All Circuit Review Act

H.R. 2229 would permanently extend the authority for federal employees to appeal a Merit Systems Protection Board (MSPB) decision regarding whistleblower cases at any federal court, instead of only at the U.S. Court of Appeals in Washington, D.C. Under current law, the authority to appeal at any federal court expires in December 2017.

Based on information from the MSPB and the Administrative Office of the U.S. Courts, CBO expects that allowing appeals to be filed in any federal circuit on a permanent basis would lead to a small increase in the administrative burden of those and other federal agencies. Because many agency offices are located in the Washington, D.C. area, this would include attorney travel costs and costs associated with researching regional circuit courts' rules and procedures. However, based upon the number of such cases in 2016, CBO estimates that those costs would not be significant.

Enacting H.R. 2229 could affect direct spending by agencies not funded through the annual appropriations (such as the Tennessee Valley Authority);

therefore, pay-as-you-go procedures apply. However, CBO estimates that the net effects would be insignificant for each year. Enacting the bill would not affect revenues.

CBO estimates that enacting H.R. 2229 would not significantly increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 2229 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Janani Shankaran. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

* * * * * * *

PART III—EMPLOYEES

* * * * * * *

SUBPART F—LABOR-MANAGEMENT AND EMPLOYEE RELATIONS

* * * * * * *

CHAPTER 77—APPEALS

* * * * * * *

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1)(A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60

days after the Board issues notice of the final order or decision of the Board.

(B) [During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, a petition] A *petition* to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review

the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d)(1) Except as provided under paragraph (2), this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management. The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition

to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

(2) [During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, this paragraph] *This paragraph* shall apply to any review obtained by the Director of the Office of Personnel Management that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D). The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other

parties to the proceedings before the Board shall have the right to appear in the proceeding before the court of appeals. The granting of the petition for judicial review shall be at the discretion of the court of appeals.

* * * * * * *