CIVIL SERVICE REFORM ACT OF 1978
P.L. 95–454

CIVIL SERVICE REFORM ACT OF 1978
P.L. 95–454, see page 91 Stat. 1111 –
Senate Report (Governmental Affairs Committee) No. 95–969,
July 10, 1978 [To accompany S. 2640]
House Report (Post Office and Civil Service Committee)
No. 95–1403, July 31, 1978 [To accompany H.R. 11280]
House Conference Report No. 95–1717, Oct. 5, 1978
[To accompany S. 2640]
Senate Conference Report No. 95–1272, Oct. 4, 1978
[To accompany S. 2640]
Cong. Record Vol. 124 (1978)

DATES OF CONSIDERATION AND PASSAGE
Senate August 24, October 4, 1978
House September 13, October 6, 1978

The Senate bill was passed in lieu of the House bill. The Senate
Report (this page) and the House Conference
Report (p. 2860) are set out.

SENATE REPORT NO. 95–969

PAGE III

CONTENTS

I. Background................................................................. 1
II. Brief summary of bill.................................................. 2
III. The need for reform................................................... 4
IV. Major provisions........................................................ 13
V. History of legislation................................................... 17
VI. Section-by-section analysis........................................... 18
   Title I—Merit system principles......................................
   Title II—Civil service functions; performance appraisals; ad-
   verse actions............................................................ 24
   Title III—Staffing ..................................................... 65
   Title IV—Senior executive service ................................... 67
   Title V—Merit pay ..................................................... 88
   Title VI—Research, demonstration, and other programs........ 92
   Title VII—Labor-management relations ............................. 96
   Title VIII—Miscellaneous ............................................ 115
VII. Evaluation of Regulatory impact ................................ 117
VIII. Cost estimate ....................................................... 117
IX. Record vote of committee .......................................... 124
X. Additional and minority views .................................... 126
XI. Changes in existing law ............................................. 139

The Committee on Governmental Affairs, to which was referred the
bill (S. 2640) to reform the civil service laws, having considered the
same, reports favorably thereon with an amendment in the nature of a
substitute and recommends that the bill as amended do pass.

I. BACKGROUND

The changes in law which are proposed in S. 2640 will constitute the
most comprehensive reform of the Federal work force since passage
of the Pendleton Act in 1883. Since that time total civilian employment

2723
Subsection (b) provides that the delegated authority to conduct competitive examinations must be in accord with any standards issued by the Office of Personnel Management, to assure that the merit system principles apply fully to such examinations and any subsequent selections of employees.

Subsection (c) provides that any personnel action taken by an agency pursuant to delegated authority is subject to cancellation by the Office of Personnel Management if contrary to any law, regulation, or standard issued by the Office.

Subsection (d) specifies that any delegation by the Office does not relieve the Director of his responsibility to assure compliance with civil service laws and regulations.

Subsection 201(b) amends pertinent sections of Title V, United States Code, to provide that the Director of the Office of Personnel Management is to be compensated at Level II of the Executive Schedule, the Deputy Director at Level III, and Associate Directors at Level IV.

Subsection 201(c) conforms the provisions of Title V, United States Code, to the provisions of this section.

SECTION 202

This section adds a new Chapter 12 to Title V, United States Code, entitled “Merit Systems Protection Board and Special Counsel.” Chapter 12 is subdivided as follows: Section 1201—Appointment of Members of the Merit Systems Protection Board; Section 1202—Term of Office; Filling Vacancies; Removal; Section 1203—Chairman; Vice Chairman; Section 1204—Special Counsel; Appointment and Removal; Section 1205—Powers and Functions of the Merit Systems Protection Board; Subpoenas; Section 1206—Authority and Responsibilities of the Special Counsel; Section 1207—Hearings and Decisions on Complaints Filed by the Special Counsel.

Section 1201. Appointment of members of the Merit System Protection Board

This section provides that the Merit System Protection Board is to be a bipartisan body, consisting of three members appointed by the President and confirmed by the Senate. To assure their independence, the section prohibits the members of the Board from holding other offices or positions in the U.S. Government. This prohibition is intended to apply only to civilian offices. It does not bar a Board member from retaining positions in the military reserves. The Board is to have an official seal, and have its principal office in the District of Columbia metropolitan area, with field offices in other appropriate locations.

In order to insure that the members of the Board are fully qualified to carry out the functions and duties of the Board, the Committee added a provision requiring that persons appointed to the Board be individuals having background, training, experience, or demonstrated ability that makes them particularly qualified to carry out the Board’s function of protecting the civil service merit system from abuse. This requirement that Board members be affirmatively qualified for their positions is consistent with recent actions by Congress with respect

2748
to independent agencies. A similar provision was adopted last year by Congress for the newly-created Federal Energy Regulatory Commission (PL 95-91).

Section 1202. Term of office; filling vacancies; removal

Subsection (a) provides for a seven year term for members of the Merit Systems Protection Board.

Subsection (b) provides that in the event of any vacancy on the Board, a member appointed to fill the vacancy serves only until the expiration of the term remaining. Any appointment to fill a vacancy is subject to the provisions of section 1201.

Subsection (c) provides that Board members may not be reappointed if they have been appointed to a full term, but may serve for up to one year beyond the expiration of the term if a successor has not been appointed and qualified.

Subsection (d) provides that a board member may only be removed by the President for inefficiency, neglect of duty, or malfeasance in office. This provision, which applies to membership on most independent regulatory agencies, ensures that the Merit Systems Protection Board will be independent of the direction and control of the President.

Subsection (e) provides that individuals currently serving on the Civil Service Commission, who will become members of the Merit Systems Protection Board by virtue of Reorganization Plan No. 2 of 1978, will continue to hold their positions on the Board until their terms would otherwise have expired as members of the Civil Service Commission (commissioners currently serve for six-year terms). If an individual now serving as a Civil Service Commissioner does not serve out the remainder of his present term, an individual appointed to fill the vacancy will only serve for the remainder of the six-year term established under the old law. Since the present terms of the Commission are staggered, this procedure will assure that the new terms of the members of the Board will continue to be staggered.

Section 1203. Chairman; Vice Chairman

Subsection (a) authorizes the President to appoint one of the members of the Board as Chairman. Appointment as Chairman is subject to Senate confirmation.

The Chairman is to be the chief executive and administrative officer of the Board, and may continue to serve as Chairman until a successor is appointed and qualified.

Subsection (b) authorizes the President to designate one of the Board members as Vice Chairman. The Vice Chairman is authorized to perform the functions of the Chairman whenever the Chairman is absent or disabled, or whenever the office of Chairman is vacant.

Subsection (c) authorizes the remaining Board member to perform the functions of the Chairman whenever both the Chairman and Vice Chairman are absent or disabled, or whenever both offices are vacant.

Section 1204. Special Counsel; appointment and removal

Subsection (a) provides that the Special Counsel of the Merit Systems Protection Board is to be appointed by the President, subject to Senate confirmation. The Special Counsel is to be an attorney.
Because the Special Counsel may be called upon to investigate prohibited personnel practices in the Executive branch, and to bring disciplinary actions against Executive branch officials, the Committee believed it is essential that the Special Counsel be independent of Presidential direction and control. Accordingly, subsection (b) was added by the Committee to provide that the Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

The Committee believed, however, that a term of seven years for the Special Counsel, as provided in the original version of S. 2640, was too long. Accordingly, subsection (a) has been amended to provide that the term of the Special Counsel is to be four years, and is to be coterminous with that of the President.

It is expected that the Special Counsel will have regional representatives to enable him to carry out his function.

Section 1906. Powers and functions of the Merit Systems Protection Board; subpoenas

Subsection (a) sets forth the general authority of the Merit Systems Protection Board to hear and adjudicate matters within its jurisdiction, to enforce its orders, to conduct special studies, and to issue stays.

Paragraph (1) of the subsection authorizes the Board to hear and adjudicate all matters within the jurisdiction of the Board, including matters falling under this title, under Section 2302 of Title 38 (relating to veterans' reemployment rights), and under any other law, rule, or regulation. Action by the Merit Systems Protection Board, following any hearing or adjudication on any matter falling within its jurisdiction, constitutes final agency action for the purposes of judicial review.

The committee included a provision (in subparagraph (B) of this subsection) making explicit the Board's enforcement authority. The Board is authorized to order any Federal agency or employee to comply with any order or decision issued by the Board pursuant to any matter within its jurisdiction, and to take appropriate steps to enforce compliance with its order.

The Board is also authorized to conduct special studies relating to the civil service and other merit systems in the Executive Branch, and to report to the President and the Congress on the conduct of the merit system, and on whether the civil service is being adequately protected against prohibited personnel practices.

In paragraph (a)(2), the Committee adopted a provision authorizing the Board to stay certain agency personnel actions. The stay is authorized whenever an employee complains of a reprisal arising out of whistle blowing, exercise of an appeal right or political activity (under Section 2302(b)(5) or (3)), or arising out of the exercise of a legitimate appeal right (under Section 2302(b)(9)), and the Special Counsel demonstrates that there is a reasonable basis for the complaint. Under subparagraph (a)(2)(A), the stay may be issued by a member of the Board for up to 15 days. The proceeding may take place on an ex parte basis, and the agency is not required to either be notified or given an opportunity to present its views.
The Board is further authorized to extend the stay for an additional 30 days whenever the Special Counsel asks it to do so and demonstrates that a reprisal arising out of whistleblowing or political activity, or the exercise of an appeal right, has probably occurred or probably will occur. Before the extension may be issued, however, the agency must be given an opportunity to oppose the extension. If the agency demands a hearing, the Board is required to provide one.

The Board is authorized to issue a permanent stay of the agency personnel action when requested to do so by the Special Counsel, after a hearing in which the Special Counsel, the employee involved, and the agency have an opportunity to present all relevant and material evidence. The hearing may take place before the Board, or before an employee whom the Board designates to conduct the hearing. On a showing that the personnel action resulted from a reprisal arising out of whistleblowing or political activity, or the exercise of an appeal right, the Board is authorized to grant a permanent stay of the agency personnel action.

The Board is also authorized to grant appropriate interim relief during the period of time that the request for a permanent stay is pending.

S. 2640, as introduced, had provided that the Special Counsel would have the authority to issue a stay of agency personnel actions in whistleblowing cases. The Committee believes that this function is inappropriate for the Special Counsel, since the Special Counsel is primarily an investigative and enforcement officer. The power to issue a stay is more appropriately vested in the Board, since this power is consistent with the Board's quasi-judicial role. It is expected, however, that the Board will give great weight to the decision by the Special Counsel, after conducting whatever preliminary investigation the Special Counsel determines is appropriate, to apply to the Board for a stay in such cases.

Paragraph (a) (3) provides that in conducting any hearing or adjudication on any matter falling within its jurisdiction, or in the course of rendering any decision on any matter falling within its jurisdiction, any member of the Board may request from the Director of the Office of Personnel Management an advisory opinion on the interpretation of any OPM rule, regulation, or policy directive. Whenever an Office rule, regulation, or policy directive is an issue in such a proceeding, the Board is required to notify promptly the Director, and he is authorized to intervene in such a proceeding, as long as he does so as early in the proceeding as practicable.

Paragraph (a) (4) provides that as one means of enforcing its orders, the Board is authorized to designate an employee to be responsible for carrying out the order, and to direct where an employee (other than a Presidential appointee as described in Section 1206(1)) is in noncompliance with an order of the Board, he is not entitled to receive any salary until the order is complied with. The Board is authorized to certify its order to the Comptroller General. Once such a certification is made, no payment may be made from the Treasury to the employee while the order is pending. Before certifying the matter to the Comptroller General the Board should provide the employee some oppor-
CIVIL SERVICE REFORM ACT OF 1978  
P.L. 95-454  
[page 31]

tunity to be heard on whether he has failed to comply with the order of the Board:

Paragraph (a)(5) provides that in conducting any studies on the merit system or on the protections against prohibited personnel practices, the Board will determine which inquiries are necessary and shall have full access, unless otherwise prohibited by law, to the personnel records, or information collected by the Office of Personnel Management. In addition, the Board may require whatever additional reports from Executive Branch agencies it determines are needed.

Subsection (b) authorizes the Chairman of the Merit Systems Protection Board to designate individuals to chair boards of review established under Section 3388(b) of this title (relating to involuntary separation of air traffic controllers).

Subsection (c) authorizes the Board to delegate performance of any of its administrative functions to any officer or employee of the Board.

Subsection (d) authorizes the Board to issue whatever rules and regulations it deems necessary to perform its functions. The regulations may include rules which define the Board’s review procedures, may set time limits during which an appeal may be filed, and may define the rights and responsibilities of parties to an appeal. Any such regulations issued under this subsection are required to be published in the Federal Register. The Board is not authorized to issue advisory opinions.

Subsection (e) provides that the Board is to be represented by its own attorneys whenever the Board is a party to any proceeding in court, except that the Board is to be represented by the Solicitor General of the United States in any proceeding before the Supreme Court. This will include instances where the Board is involved in court proceeding under any provision of this title, including defending disciplinary actions it has taken under section 1207, intervening in appellate proceedings brought by the Board or other parties pursuant to section 7702, or any enforcement actions it brings under sections 1205 (a)(1) or 1205(i).

This subsection is consistent with similar provisions adopted for other recently-created independent commissions, such as the Federal Energy Regulatory Commission (Public Law 95-91).

Subsection (f) authorizes the Chairman to appoint whatever personnel are necessary to perform the Board's functions. Any appointment to a position in the Senior Executive Service, or to a confidential or policy-making position, must comply with the provisions of this title. However, such appointments are not subject to the specific approval or general supervision of the Office of Personnel Management or the Executive Office of the President.

Subsection (g) requires the Board to prepare an annual budget, which is to be submitted simultaneously to the President and to the appropriate committees of Congress. In any subsequent budget submitted by the President to the Congress, the President is required to list is revised proposed budget for the Board as a separate item.

Subsection (h) provides that any recommendation on legislation that the Board may have shall be simultaneously transmitted to the appropriate committees of Congress and to the President.
LEGISLATIVE HISTORY
P.L. 95-454
[page 32]

The Board is also required to submit an annual report to the President and to Congress on its activities, including a description of all significant actions taken by the Board in connection with carrying out its functions. The annual report will also include a review and analysis of the actions of the Office of Personnel Management, as to whether or not the actions taken by the Office during the year covered by the report are in accord with merit system principles, and whether the Office is adequately preventing prohibited personnel practices. The type of report on OPM activities intended by this subsection is a general review of the policies and effectiveness of OPM. It is not expected that the Board will, in connection with each annual report, conduct an investigation of the internal operation of the OPM and its employees.

Subsection (i) authorizes the Board, the Special Counsel, an Administrative Law Judge appointed to the Board, or any member or employee of the Board designated by the Board, to issue subpoenas, administer oaths, take or order the taking of depositions, issue interrogatories, examine witnesses, and receive evidence, in connection with any matter within the Board's jurisdiction. In the event that the Board or Special Counsel finds it necessary to issue a subpoena to a cabinet officer or other high-ranking Executive Branch official, the Board or Counsel should make every effort to minimize any potential disruption to the functioning of the agency which is involved.

Subpoenas are to be enforced by the Board or the Special Counsel in the United States District Court for the judicial district in which the person to whom the subpoena is addressed either resides or is served. Any failure to obey an order of the court is punishable by contempt. Any witnesses appearing under this subsection are to be paid the same fee and mileage allowances paid to subpoenaed witnesses in the Federal courts.

Section 1206. Authority and responsibilities of the Special Counsel

Section 1206 specifies the authority and responsibilities of the Special Counsel. Subsection (a) authorizes the Special Counsel to receive and investigate allegations of prohibited personnel practices. The Special Counsel may, on his own, initiate such investigations as well. The Special Counsel should not passively await employee complaints, but rather vigorously pursue merit system abuses in a systematic fashion. He should seek action by the Merit Board to eliminate both individual instances of merit abuse and patterns of prohibited personnel practices.

Subsection (b) requires the Special Counsel to conduct an investigation requested by any person if the Special Counsel has reason to believe that a personnel action was taken, or is to be taken, as a result of a prohibited personnel practice. The Special Counsel need not conduct an investigation of a charge which appears groundless or frivolous on its face. Some preliminary inquiry will likely be necessary, though, to determine whether a charge warrants a thorough inquiry. The Special Counsel would not require information amounting to "probable cause" to conduct an investigation. Only a reasonable belief that a violation has occurred or will occur is sufficient basis for an investigation.
CIVIL SERVICE REFORM ACT OF 1978
P.L. 95-454

It is expected that the Special Counsel will develop a systematic means of screening employee complaints and allegations. Investigation and resolution of these complaints should be made on a timely basis.

Subsection (c) specifies certain procedures for the Special Counsel to follow in cases involving alleged reprisal or threat of reprisal for the disclosure of information described in section 2302(b)(8) or exercise of an appeal right under 2302(b)(9) of the title. In addition, an amendment by the Committee makes this subsection applicable to Hatch Act-type violations prohibited under section 2302(b)(3). Paragraph (1) prohibits the Special Counsel from disclosing the identity of the complainant without the consent of the complainant. Protection of the complainant's identity is essential not only to prevent retaliation against the employee, but to assure a free flow of information to the Special Counsel. The Special Counsel may only disclose the identity of the complainant without the complainant's consent if such disclosure is unavoidable. It is expected that disclosure of a complainant's identity will be necessary only in the rarest of circumstances.

Paragraph (2) authorizes the Special Counsel to seek a stay of a personnel action. As discussed earlier, this is a change from S. 2640, as introduced, which would have permitted the Special Counsel to issue a stay on his own initiative. The duration of the stay and the conditions for obtaining a stay are set forth in section 1205(a)(2) of this title. This subsection makes it clear that refusal by an agency official to comply with the stay ordered by the Board or a member of the Board is cause for disciplinary action under subsection (j).

Subsection (d) requires a report by the Special Counsel, containing findings and recommendations, based on his determination that there are prohibited personnel practices which require corrective action. The report must be made to the Merit Systems Protection Board, the agency affected, and the Office of Personnel Management. The Special Counsel may, at his discretion, report his findings to the President and Congress. The reports outlined in this subsection are not required where the Special Counsel initiates an action before the Board to correct or remedy the prohibited personnel practice since the Special Counsel's findings and recommendations would presumably be contained in any complaint the Special Counsel pursued before the Board. Even in these cases, however, the Special Counsel would still be authorized to report to the Office of Personnel Management, the agency affected, the President, and Congress.

Although the Special Counsel may include suggestions as to what corrective action should be taken, the final decision on the corrective action to be taken in those cases which are not before the Merit Board will be made by the agency involved, subject to guidance and instruction from the Office of Personnel Management. It is expected that the agency decision on what corrective action to be taken will be made on a timely basis with notification to all interested parties, including the Special Counsel.

Subsection (e) sets forth the procedures to be followed if, during the course of an investigation authorized by the bill or transferred to the Board or Special Counsel by Reorganization Plan No. 2 of 1978, the Special Counsel determines that there is reasonable cause to believe a
LEGISLATIVE HISTORY
P.L. 95-454
[page 34]

law has been violated. If the Special Counsel determines that there is reasonable cause to believe a criminal law has been violated, he must report that determination to the Attorney General and to the head of the agency involved. The Special Counsel must also submit a copy of such report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget.

If the Special Counsel determines that there is reason to believe a violation of a civil statute, or a rule or regulation has occurred, the Special Counsel must report that determination to the head of the agency involved.

This subsection differs from subsection (f) because the latter subsection is specifically intended to provide a channel for allegations concerning improper government activity. Referral of a report under subsection (e) is at the Special Counsel's initiative, based on a determination made by the Special Counsel. Subsection (e) differs from subsection (d) in that reports made under subsection (d) involve only personnel matters. Reports under subsection (e) may involve violations of any criminal or civil law. This provision does not authorize the Special Counsel to conduct investigations of non-personnel related laws. It provides for an appropriate referral system for further investigation of possible non-personnel or criminal violations which the Special Counsel may discover during the course of his authorized investigations.

The Special Counsel may require an agency head who receives a report by the Special Counsel to certify in writing that (1) the agency head has personally reviewed the report, and (2) what action has been, or is to be taken, and when such action will be completed. Only a good faith estimate of when the action will be completed is required, but some estimate should be made. The certification should be in writing and must be completed and referred to the Special Counsel within 30 days of receipt of the Special Counsel's report.

This subsection requires the Special Counsel to maintain and make available to the public a list of noncriminal matters referred to agency heads under the subsection as well as the agency head's certifications of actions taken. The requirement that the Special Counsel maintain a public list of noncriminal matters referred to him is not intended to authorize the Special Counsel to disclose information that is classified or protected against disclosure by statute. If the Special Counsel has reason to believe that information that could be contained in a public list might be classified or protected against disclosure by statute, the Special Counsel, prior to including such information in a public list, should consult with the head of the agency involved to determine if any classified or protected information is involved. He shall accept the determination of the agency head as to whether the information is classified. In exercising his responsibilities under this subsection, the Special Counsel should also consider the extent to which it is necessary in the public interest to disclose the name of any individual employee involved.

Subsection (f) is an amendment adopted by the Committee to address another problem faced by whistleblowers. Often, after an employee discloses an illegal or improper activity he becomes enmeshed in a personnel controversy: what should be done about him? The
CIVIL SERVICE REFORM ACT OF 1978
P.L. 95-454
[page 35]

underlying substantive allegation made by the employee, however, is frequently ignored or forgotten. This subsection is intended to provide a mechanism to ensure that responsible government officials are made aware of, and given the opportunity to act upon, the employee’s allegation of government misconduct.

Paragraph (1) requires the Special Counsel to transmit information concerning any improper or illegal conduct as described in subsection 2302(b)(2) of this title to the appropriate agency head. It is assumed, however that before such allegations are brought to the attention of the Special Counsel, an employee will first exhaust whatever internal procedures are available for bringing such allegations to the attention of agency officials. In addition, the Special Counsel is not authorized to receive information which is protected from disclosure by subsection 2302(b)(8), and he need not transmit such information if he does come into possession of such information.

The Special Counsel is required to transmit all related matters to the agency head, such as documents supporting the allegation. In contrast to subsection (e), the information received by the Special Counsel under this subsection need not be obtained during the course of an investigation into a personnel matter. Moreover, in referring the information, the Special Counsel is to make no determination concerning the substance of the charge. The Special Counsel must refer the information to the appropriate agency head, who will in most cases be the head of the agency which the information involves.

An agency head who receives information referred to him by the Special Counsel is not required to fully investigate the allegations. Nevertheless, if the agency head determines that the allegations are clearly substantial and he, or another appropriate official in the agency, conducts an investigation, the agency head must report the findings of the investigation along with the reasons supporting those findings to the Comptroller General. The subsection makes clear that the agency head is under no obligation to conduct an investigation concerning allegations made by an employee of another agency. Of course, the agency head has the discretion to conduct such an investigation if it is deemed desirable. The special obligation of an agency to consider allegations made by its own employees is intended to include allegations made by any one who has been an employee of the agency at some time within the past several years, but who subsequently resigned or left the agency for any reason.

Paragraph (2) requires the agency head to provide a summary of his activities in connection with the allegations to the Special Counsel. The summary, which should be transmitted on a periodic basis, should provide sufficient detail to enable the Special Counsel to inform the individual who brought the matter to the Special Counsel about the disposition of his allegation.

Paragraph (3) authorizes the Comptroller General to examine the agency’s findings to determine whether the agency investigation is adequate and whether any corrective action taken by the agency is adequate. The Comptroller General has discretion to make as complete an investigation as he deems necessary to determine the adequacy of the agency action. The Comptroller General may report his exami-
LEGISLATIVE HISTORY
P.L. 95-454

[page 36]

nation of the agency action to the Congress if the agency investigation or its proposed corrective action is inadequate. That the Comptroller General may also inform Congress when an agency investigation or corrective action is inadequate.

Paragraph (g) requires the Special Counsel to keep confidential the identity of the person who discloses information under this subsection, in accordance with the provision in subsection (c) (1).

Under paragraph (g), the General Accounting Office and the Special Counsel are required to report to Congress on their experience in handling disclosures under section 2302(b) (8) and investigations authorized by this subsection. The reports should include but not be limited to, an evaluation of the procedures established in this section.

In addition to the Special Counsel's power to conduct investigations under subsections (a) and (b), to bring disciplinary actions under subsection (l), and to institute corrective actions under subsection (j), subsection (g) (4) provides authority to conduct investigations in other areas. The Special Counsel is specifically authorized to investigate certain other practices as specified below:

(A) Political activity which is prohibited under subchapter III of Chapter 73 of this title (Hatch Act violations);
(B) Political activity by any state or local officer or employee which is prohibited under chapter 15 of this title;
(C) Arbitrary or capricious withholding of information under section 552 of this title (the Freedom of Information Act); and
(D) Involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action.

Clause (C) refers to 5 U.S.C. 552(a) (4) (F) which relates to court findings that information may have been withheld arbitrarily or capriciously. The Special Counsel may investigate on the basis of such findings, and make recommendations to the opening involved, but it not given independent authority under this subparagraph to review the basis for withholding information from disclosure under the Freedom of Information Act. The Special Counsel has the authority under section 552(a) (4) (F) to investigate and enforce the law against an employee who has withheld information arbitrarily or capriciously.

Clause (D) authorizes the Special Counsel to investigate, preliminary to bringing disciplinary action, employees who have been found to be involved in any prohibited discrimination. In acting under this provision, disciplinary action against an individual employee should not take place until there has been an appropriate finding by an administrative agency or court.

Paragraph (2) provides that the Special Counsel shall not make an investigation of any allegation involving Hatch Act violations or discrimination under paragraph (1) if the Special Counsel determines that the allegation may be more appropriately resolved under an administrative appeals procedure.

Subsection (h) provides that no disciplinary action may be taken by an agency against any employee for any alleged prohibited activity when that activity or related activity is under investigation by the Special Counsel, unless the Special Counsel approves such disciplinary action. This subsection will assure that the Special Counsel's investi-
CIVIL SERVICE REFORM ACT OF 1978
P.L. 95-454
[page 37]

Subsection (i) requires the Special Counsel to bring a disciplinary action against an employee who commits a prohibited personnel practice. If the Special Counsel determines, after an investigation under this section, that disciplinary action should be taken against an employee because the employee has allegedly committed a prohibited personnel practice, the Special Counsel must prepare a written complaint against the employee. The complaint must contain a determination by the Special Counsel that the employee may have committed a prohibited personnel practice. The Special Counsel must present the complaint containing the determination, together with a statement of supporting facts, to the Merit Systems Protection Board or to an administrative law judge appointed under section 3105 of this title, and designated by the Board, for hearing and decision pursuant to section 1207. Under subsection (i)(2), this provision does not apply to an employee in a confidential, policy-making, policy-determining, or policy-advisory position who was appointed by the President by and with the advice and consent of the Senate. If the Special Counsel makes a determination that disciplinary action should be taken against such a presidential appointee because of a prohibited personnel practice by the employee, the Special Counsel must present a complaint and statement, including the Special Counsel’s determination that disciplinary action should be taken, to the President in lieu of the Board or administrative law judge. This statement and complaint should also include any response by the employee who is the subject of such complaint.

Subsection (j), paragraph (1), authorizes the Special Counsel to bring disciplinary action against any employee who knowingly and willfully refuses or fails to comply with an order of the Merit Systems Protection Board. In a case involving an employee described in subsection (i)(2), the Special Counsel must submit to the President, in lieu of the Board, a report on the actions of the employee which must include the information described in subsection (i)(2). Any disciplinary action taken under this subsection must be in accordance with the procedures set forth in section 1207 of this title.

Paragraph (2) of subsection (j) is a Committee amendment which authorizes the Special Counsel to seek corrective action of any pattern of prohibited personnel practice arising out of any of the subparagraphs under section 2302(b), which is committed by an agency or employee or permitted by an agency or employee to occur. Such corrective action would be initiated by filing a written complaint with the Board against the agency or such employee. Typically, this kind of complaint would be made if the practice involved matters which are not otherwise appealable to the Board under this title. For example, there may be hiring or promotion practices which violate merit system principles but which may not give rise to an appealable action under this title. Similarly, competitive examinations may be administered in such a way as to constitute a violation of section 2302. Under this paragraph, the Special Counsel would have authority to seek corrective action, and the Board is empowered to order such corrective action as it finds necessary.
LEGISLATIVE HISTORY
P.L. 95-454

[page 38]

An amendment in Committee added subsection (k) which authorizes the Special Counsel to intervene as a matter of right or otherwise participate in any proceeding before the Merit Systems Protection Board. In doing so, the Special Counsel is required to comply with the rules of the Board. The Special Counsel will not have any right of appeal to the courts in connection with his intervention before the Board.

Under subsection (1), the Special Counsel is authorized to appoint legal, administrative and support personnel to perform the functions of the Special Counsel. The Committee added a provision excluding the qualifications of a particular individual for any appointment made under this subsection from the approval or supervision of the Office of Personnel Management or the Executive Office of the President.

Subsection (m) authorizes the Special Counsel to prescribe such regulations as may be necessary for investigations under this section. Those regulations must be published in the Federal Register.

Subsection (n) prohibits the Special Counsel from issuing any advisory opinion concerning any law, rule or regulation. The prohibition does not apply to chapter 15 and subchapter 3 of chapter 73 of this title (political activity provisions) or any rule or regulation issued under those provisions.

Subsection (o) requires the Special Counsel to submit an annual report to Congress concerning his activities. The annual report must describe the work of the Special Counsel, including the number, types, and disposition of allegations of prohibited personnel practices filed with him, investigations conducted by him, and actions initiated by him before the Board. The report must also describe the recommendations and reports made by the Special Counsel to other agencies pursuant to subsections (d) and (e) of this section, and the actions taken by the agencies as a result of the reports or recommendations. It is authorized to include a discussion of reports and recommendations concerning presidential appointees under subsections (i) and (j). The report will also include recommendations for legislation or other action by Congress the Special Counsel deems appropriate.

Section 1207. Hearings and decisions on complaints filed by the special counsel

Section 1207 sets forth the hearing procedures for complaints presented under section 1206 of this title. It provides that any employee against whom a complaint has been presented to the Merit Systems Protection Board or to an administrative law judge under section 1206 is entitled to a hearing. That hearing will be on the record before the Board or before an administrative law judge appointed under section 3105 and designated by the Board. Hearings involving a state or local officer or employee under chapter 15 of this title (political activity provisions) must be conducted in accordance with section 1505. There may be no administrative appeal from a final order of the Board.

A final order of the Board may impose disciplinary action including removal, demotion, debarment from Federal employment for not to exceed 5 years, reprimand, suspension, or a civil penalty not to exceed $1,000. In the case of a state or local officer or employee under chapter 15 of this title, the Board is required to act in accordance with section 1506. An employee subject to a final disciplinary order may obtain

2760
judicial review in the United States Court of Appeals for the circuit in which the employee was employed at the time the disciplinary action was initiated.

Section 201(b) of the bill contains various conforming and technical amendments. Paragraph (1) amends section 5314 of title 5 of the United States Code to include the Chairman of the Merit Systems Protection Board in the list of positions at level III of the Executive Schedule. Paragraph (2) similarly sets the members of the MSPB at level IV of the Executive Schedule. The positions of Chairman and Commissioners of the Civil Service Commission are deleted from the Executive Schedule. The Special Counsel of the MSPB also is to be compensated at level IV of the Executive Schedule. Paragraph (4) deletes the position of Executive Director of the Civil Service Commission from the Executive Schedule.

Section 201(c) of the bill provides that the term of office of the first individual appointed and confirmed as the Special Counsel shall expire on the last day of the term of the President during which he was appointed. This section will allow each subsequent term of a Special Counsel to be coterminous with that of the President, in keeping with the Committee's amendment to section 1104(a) of this title.

Section 201(d) conforms the table of chapters to include a provision for the Merit Systems Protection Board and the Special Counsel.

SECTION 203. PERFORMANCE APPRAISAL AND ACTIONS BASED ON UNACCEPTABLE PERFORMANCE

The purpose of section 203 is to provide for new systems of appraising employee work performance. The principal changes it makes in chapter 43 of title 5, United States Code, are the following:

—Abolishment of present requirements for summary adjective ratings and appeals for performance ratings;
—Establishment of revised performance appraisal system to be used as a basis for developing, rewarding, reassigning, demoting, promoting, retaining and removing employees; and
—Establishment of new procedures for taking actions based on unacceptable performance.

Under present law, all employees are rated under plans which provide for at least three summary adjective ratings—satisfactory, unsatisfactory, and outstanding. The present performance appraisal system is the source of frequent complaints by both managers and employees. The complaints concern 1) the requirement for assignment of summary adjective ratings, 2) the procedures for appeal of ratings, and 3) the lack of importance attached to the ratings since they are not used as the basis for administrative action.

Since 1950, a number of changes have occurred which have diminished the importance of the summary adjective performance rating. Entitlement to within-grade increases for General Schedule employees is now based on a separate acceptable level of competence determination. As a result of court decisions, an agency must follow adverse action procedures if an employee with an unsatisfactory rating is to be reduced in grade, rank, or pay, or removed from the service.