MERIT SYSTEMS PROTECTION BOARD
Office of the Clerk of the Board
1615 M Street, N.W.
Washington, D.C. 20419-0002

Thomas F. Day	)
v.	)
Department of Homeland Security	)
	)

AMICUS BRIEF

Identification of Amicus: The United States Department of Veterans Affairs (VA) is a federal agency that has a significant presence before the Board and the Board affirms a disproportionate number of VA actions that are appealed.

VA is among the large federal agencies that, based on the Board's most recent numbers, accounts for almost one-seventh of all of the Board's Initial Appeals and over one-eighth of all Initial Appeals the Board adjudicated on the merits in fiscal year 2012.[1] VA also had the second-highest number of appeals adjudicated of any federal agency.[2] In addition to its size relative to other agencies appearing before the Board, VA had the third-best affirmance rate (76.8%) among agencies having more than fifteen Initial Appeals adjudicated by the Board on the merits.[3] Based on data Amicus has compiled, VA currently has over 60 appeals that either are pending before the Board or have been dismissed without prejudice at the Initial Appeal stage and are awaiting clarification of this question before the Board in this interlocutory appeal. While the VA takes no position on this appellant's current appeal, it does offer this amicus brief in hopes that the matters discussed herein will help the Board in its determination.

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[1] See United States Merit Systems Protection Board Annual Report for FY 2012 (January 31, 2013) at Table 3 (857 VA appeals/5881 total appeals) and Table 4 (112 VA/895 total).
[2] *Id.* at Table 4.
[3] *Id.*

Issue Presented: "[W]hether the provisions of the Whistleblower Protection Enhancement Act of 2012 (WPEA), 112 Public Law 199, may be applied retroactively to pending cases involving conduct occurring prior to its effective date."[4]

Amicus' brief is offered in response to the Board's notice announcing, "the opportunity to file amicus briefs in the matter of *Thomas F. Day* v. *Department of Homeland Security,* MSPB Docket Number SF–1221–12–0528–W–1 [sic, **DC**-1221-12-0528-W-1], currently pending before the Board on interlocutory appeal."[5] Amicus argues herein that the WPEA is not retroactive. Judicial precedent on the question of retroactivity supports this position. Congress did not intend for the WPEA to be retroactive. The practical effect of retroactive enforcement would create problems that Congress could not have intended to create. These points are discussed in further detail herein.

I. The Board will expose itself to reversal by the Court of Appeals if it decides to give retroactive effect to the WPEA[6] without acknowledging and finding a basis for distinguishing the Federal Circuit's holdings in *Caddell v. Department of Justice,*[7] inasmuch as the *Caddell* decision considered statutory language that is substantially similar to the WPEA and concluded that retroactive enforcement was not supported by law.

The Board should find that the WPEA is not retroactively enforceable because Congress did not intend it to be retroactive. The United States Court of Appeals for the Federal Circuit analyzed the same issue that is before the Board in this case in *Caddell* where the appellant in that case sought to impose retroactivity on a recently enacted whistleblower statute that also expanded the scope of whistleblower disclosures. In that case, the Federal Circuit concluded:

> the Board correctly held that this amendment did not apply to cases pending before the Board on the date of enactment.
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> The Act states that "the amendments made by this Act shall be effective on and after the date of the enactment of this Act," which was October 29, 1994. Pub.L. No. 103-424, § 14, 108 Stat. at 4368. The amendments clearly apply to conduct that occurs after the date of enactment. The conduct charged in this case occurred several years prior to that date. Thus the question raised

[4] 78 FR 9431 (February 8, 2013).
[5] *Id.*
[6] PL 112-199, November 27, 2012, 126 Stat 1465.
[7] *Caddell v. Department of Justice*, 96 F.3d 1367, 1370 (Fed. Cir. 1996).

is whether the Board should have applied the law in effect at the time the conduct occurred, or at the time of its decision in January 1995. The Board, citing *Landgraf v. USI Film Products,* 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), concluded that "the `traditional' presumption against applying a statute retroactively should be applied here." 66 M.S.P.R. at 354.

In *Landgraf,* the Supreme Court dealt with a provision of the Civil Rights Act of 1991, which amended Title VII of the Civil Rights Act of 1964, and that, like the amendments here, simply specified that the act shall take effect upon enactment, without addressing the question of retroactivity.[8]

As discussed in greater detail herein, the plain wording (and, lack of words related to retroactivity) of the Whistleblower Protection Enhancement Act of 2012 (WPEA or "Act") does not support application of retroactivity. The words in the statute must be given their plain meaning and the lack of specific language imposing retroactivity is controlling here. To the extent legislative history provides any insight, congressional statements concerning the WPEA do not provide clear guidance either in favor of or against retroactive enforcement of the Act. While making a law retroactive may pose significant political challenges, the words Congress must use to create a retroactive statute are easy to draft. Since those words are missing from the current law, the Board cannot ignore Congress' chosen language and omission of the words that would signal retroactivity. Finally, the VA concludes its amicus brief with a discussion of potential fiscal problems and unintended consequences if the WPEA is enforced retroactively.

II. In searching for "clear congressional intent",[9] the Board must first consider the WPEA's plain language before it considers whether legislative history provides any meaningful guidance to the question. In the case of the WPEA, the statutory language requires prospective-only enforcement.

Amicus begins with the oft-repeated axiom: "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.... Even where some substantial justification for retroactive

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[8] *Caddell*, 96 F.3d at 1370.

[9] *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994), quoting *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 837 (1990).

rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant."[10] The inquiry begins, therefore, with whether there is "an express statutory grant" in the WPEA.

A. The language Congress chose to include in the WPEA concerning the "Effective Date" informs the question whether the WPEA should be enforced solely prospectively.

The WPEA provides, "Except as otherwise provided in section 109, this Act shall take effect 30 days after the date of enactment of this Act."[11] Section 109 of the Act applies to the Transportation Security Administration (TSA) and those provisions were made effective "on the date of enactment".[12] As the Administrative Judge's Order notes, "The Act is silent regarding any retroactive operation of its terms."[13] In reaching its decision, therefore, the Board must grapple with these three facts: a forward-looking effective date with respect to most Federal agencies, an immediate effective date with respect to one agency, and no provision in the law that explicitly provides for retroactive enforcement with respect to any agency. Among the quandaries these three facts present is the question why Congress would take the trouble of carving out a population (TSA employees) for whom the Act would take effect earlier, but not make an explicit statement of retroactivity? VA submits here that the only plain reading of these three facts is to conclude that Congress did not intend retroactivity and, therefore, made a choice not to include in the WPEA an express statutory grant of retroactivity.

B. The WPEA's legislative history does not conclusively support a finding that WPEA contains a "clear statutory grant" of retroactivity and, further, determining the question of retroactivity may not even require consideration of legislative history in the face of clear statutory meaning.

1. Since the text of the WPEA is silent on the issue of retroactivity, there should be no reason for the Board to even consider legislative history.

When a statute's purpose or meaning is unclear, courts routinely look to legislative history in order to discern a Congress' intent. In the case of the WPEA, however, the VA suggests that examining

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[10] *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208-09 (1988) (citations omitted).
[11] PL 112-199, §202, 126 Stat 1465, 1476.
[12] PL 112-199, §109(c), 126 Stat at 1471.
[13] Order and Certification for Interlocutory Appeal at 6 (December 14, 2012) (December 2012 Order).

legislative history to discern that intent is not necessary. At the time Congress passed the WPEA, the state of the law on retroactivity was clear: clear congressional intent, through an express statutory grant, was required in order for a law to be enforced retroactively. Congress is presumed to have known this to be the state of Supreme Court guidance. "Congress easily could have modified the deleted provision to indicate that 'the Act shall control any administrative proceeding pending at the time such provision takes effect.' Congress failed to do that in this case and we will not read this language into the statute."[14] Congress also failed to do so in the case of the WPEA. The Board should not read retroactive language into the text of the Act where none otherwise exists.

2. Very little legislative history exists on the question of retroactivity and what does exist is inconclusive.

The WPEA is the law created by Senate Bill 743.[15] The December 2012 Order notes that the Senate Report[16] accompanying this Bill contains some statements from the Committee on Homeland Security and Governmental Affairs that express an interest in having the WPEA apply to "pending" cases.[17] While the Senate Bill eventually became the WPEA, the House of Representatives was concurrently considering legislation enhancing the Whistleblower Protection Act (WPA), and the House generated its own report regarding that legislation after the Senate Report was issued.[18] The Savings Provision in the House Bill contained the exact language contained in the Senate Bill and, finally, in the Public Law. Specifically, all three provide, "Nothing in this Act shall be construed to imply any limitation on any protections afforded by any other provision of law to employees and applicants."[19] Notwithstanding the identical language, the House Report in May 2012 interprets the Section-by-Section

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[14] *Caddell*, 96 F.3d at 1371.
[15] 126 Stat. at 1465.
[16] S. Rept. 112-155, Whistleblower Protection Enhancement Act of 2012, Report of the Committee on Homeland Security and Governmental Affairs (April 19, 2012) (Senate Report).
[17] *Id.* at 52.
[18] H.R. Rept. 112-508 Part I, Whistleblower Protection Enhancement Act of 2011 (May 30, 2012) (House Report).
[19] *Compare* PL 112-199, §201 (126 Stat. at 1475), S.743 §301 (introduced April 6, 2011), and H.R. 3289 §301 (introduced November 1, 2011).

analysis of the Savings Provision to mean, "Rights in this Act shall govern legal actions filed after its effective date."[20] The later-drafted report by the House includes a clear statement of intent to apply the WPEA prospectively only. The Senate Report provides a contrary statement. While the Senate Bill (743) became the WPEA, the fact that the exact same Savings Clause language is contained in both bills argues against affording precedence of the Senate comments over those of the House.

The issue of legislative interest and intent regarding retroactive enforcement was not born during the debate over the most recent iteration of the WPEA. As the Board is no doubt aware, Congress considered legislation in 2009 that was substantially similar to the current WPEA. At that time the issue of retroactivity was raised but not resolved. In fact, during hearings over the Act, the Administration was asked specifically about its view of whether the new provisions should be applied retroactively.

> Senator BURRIS. Yes, because I am looking at this, and in one of the testimonies of the persons who are coming on the second panel of witnesses, it called for reviewing past cases and trying to find ways to make amends for some of the unfortunate situations whistleblowers have endured in the past. [¶]What is the Administration's stand on some retroactive review of these cases?
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> Mr. [Rajesh] De [Deputy Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice]. As an initial matter, we believe that this bill is just one piece of the Administration's broader effort to ensure increased accountability in government, increased protections for whistleblowers, and increased transparency. Accordingly, we would hope that once this bill is—even as this bill is being moved through, we can start discussions on a range of fronts, whether it has to do with the MSPB, the Office of Special Counsel (OSC), or a range of other issues of interest to this community. [¶]With respect to the retroactive consideration of cases, that is certainly something that we think should be paid attention to, and we will take it under consideration.[21]

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[20] House Report at 12.

[21] S.Hrg. 111-299, S.372, The Whistleblower Protection Enhancement Act of 2009, *Hearing before the Oversight of Governmental Management, the Federal Workforce, and the District of Columbia of the Committee on Homeland Security and Governmental Affairs* (June 11, 2009) at 11.

Moreover, while the current WPEA was being considered by the House of Representatives, two members rose to express their views on the Act. First, Representative Platts (a co-sponsor of H.R. 3289) reiterated the Senate Report statement similarly endorsing application to "pending" cases.[22]

Representative Elijah Cummings also offered remarks in support of the WPEA. Representative Cummings' remarks make special mention of the compromise and political efforts that were necessary to get the WPEA passed. He also acknowledged that many provisions were not included in order to ready the legislation for passage.

> This bill does a lot of good things but I will be honest. The bill that we are considering today is not as strong as I hoped it would be. Even if this bill passes we will still have work to do. We need to provide meaningful rights to whistleblowers in the intelligence community and we need to amend the law to allow whistleblowers the ability to go to court and have their case heard by a jury. I know this bill represents a compromise based on the political realities of today. But the fight is not over. I will continue to fight for the protections that are not in this bill and hope that my colleagues on both sides of the aisle will join me in that fight. [¶]The journey of this legislation has been a long and frustrating one for the advocates of whistleblower protections who have been trying for almost a decade to get a strong bill enacted. We have been so close so many times only to have another roadblock get in the way.[23]

Representatives Platt's and Cummings' statements, the House Report, the Senate Report, the language (and lack of language) in the WPEA all indicate that retroactivity was not ignored but was also not resolved. No "clear congressional intent" in favor of retroactive application can be found in the WPEA's legislative history.

C. When Congress intends to create a law with retroactive application, it uses an express statutory grant to demonstrate its clear congressional intent.

Through the enactment of many laws, Congress has demonstrated how it includes language that leaves no doubt that the statute is intended to be applied retroactively. In 2010, Congress enacted the Veterans' Benefits Act of 2010, which expanded participation in an insurance program previously limited

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[22] Cong. Rec. September 28, 2012 at E1664.
[23] *Id.* at E1665.

only to veterans of Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF).[24] The 2010 law expanded coverage to all veterans whether or not their injuries were suffered in the OEF or OIF theaters. To express its clear intent to make the provision retroactive, Congress included a section titled, "Expansion of Individuals Qualifying for Retroactive Benefits From Traumatic Injury Protection Coverage Under Servicemembers' Group Life Insurance." Further, in the Senate Report for the earlier version of the passed Bill, Congress explained, "Section 103 of the Committee bill would amend section 501(b) of Public Law 109–233 so as to remove the requirement that limits retroactive TSGLI payments to those who served in the OIF or OEF theaters of operation. Thus, this section of the Committee bill would authorize retroactive TSGLI payments for qualifying traumatic injuries incurred on or after October 7, 2001, but before December 1, 2005, irrespective of where the injuries occurred."[25]

In another VA matter, when Congress authorized the Secretary of VA to waive payments of premiums for life insurance policies for mentally incompetent persons, it expressly stated the retroactive authority ,"[i]n mentally incompetent cases the waiver is to be made without application and retroactive when necessary."[26]

In authorizing the Secretary of the Treasury to prescribe rules and regulations Congress expressly provided, *inter alia*, that "The Secretary may provide that any regulation may take effect or apply retroactively to prevent abuse," and authorized the Secretary "to provide that any regulation may apply retroactively to correct a procedural defect in the issuance of a prior regulation."[27]

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[24] PL 111-275, 124 Stat. 2864 (October 13, 2010).
[25] S. Rept. 111-71 at 7 (September 2, 2009).
[26] 38 U.S.C. §1960
[27] 26 U.S.C. §7805(b)(3) and (4)

In authorizing retroactive Veterans benefits awards Congress expressly stated that, "such awards, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor."[28]

III. Congress could not have intended for the WPEA to be enforced retroactively because it could not have foreseen or intended the consequences retroactive enforcement would create.

To read a retroactive application into the WPEA would require that the Board disregard two significant, negative consequences that were nowhere addressed in the Act's text or its legislative history. First, there was no fiscal impact consideration given to WPEA's retroactive application. The absence of advance budget planning may well result in a lack of sufficient funds to satisfy large compensatory damages awards related to cases filed prior to the Act's effective date. Further, this lack of budgetary planning provides further evidence that the WPEA was not intended to result in the significant expense inherent in adding a significant number of "pending" cases to the possible recovery of WPEA damages. Finally, there is no consideration in the WPEA of the potential serious consequences to individuals who and agencies that, at the time of their actions, did not violate any law but due to the retroactive enforcement of the WPEA would be subject to serious and potential constitutional consequences.

A. Since Congress did not consider the fiscal impact of retroactivity, one would have to impute congressional fiscal irresponsibility to suggest it intended retroactive enforcement of the Act.

Further proof of Congress' lack of retroactive intent can be found in the Congressional Budget Office's Report on cost estimates to be incurred under the WPEA. The Congressional Budget Office (CBO) prepared a Cost Estimate Report for the WPEA.[29] The CBO Report provides no analysis of any potential impact that would result from retroactive enforcement of the Act. As previously noted,

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[28] 38 USC §5110(a)

[29] Congressional Budget Office Cost Estimate, S. 743 Whistleblower Protection Enhancement Act of 2011 (February 1, 2012), http://cbo.gov/sites/default/cbofiles/attachments/s743.pdf.

Congress has in numerous instances expressly stated its intent to give a statute retroactive effect. In those instances, the CBO specifically addressed the estimated cost of the law's retroactivity. For example, H.R. 36, 103rd Congress, sought to amend Title 38 of the U.S. Code to provide that remarriage of the surviving spouse of a deceased veteran after age 55 shall not result in termination of dependency and indemnity compensation otherwise payable to that surviving spouse. As with the drafted WPEA, the CBO prepared a report on the cost projections for H.R. 36.[30] Unlike its report on the WPEA, however, CBO's report on H.R. 36 specifically noted that bill's retroactivity and specifically calculated the anticipated costs of its retroactive application.[31]

Likewise, as discussed above, the Veterans' Benefits Enhancement Act of 2009[32] specifically addressed retroactivity of insurance programs for servicemembers not injured in OEF or OIF. Just as the statute explicitly addressed the retroactivity of the statute, so too did the CBO Report. "When the program was established, it provided retroactive coverage only to veterans who suffered such injuries as a result of their service in Operation Enduring Freedom or Operation Iraqi Freedom (OEF/OIF). Section 103 would extend that retroactive benefit to all veterans who suffered a qualifying traumatic injury during the period of October 7, 2001, to November 30, 2005."[33]

In both examples there are two similarities: the cost estimate reports took into account the intended retroactivity of the statutes at issue and created a corresponding cost estimate for retroactive application. The CBO Report for the WPEA did not interpret language of the WPEA to include a

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[30] Congressional Budget Office Cost Estimate, H.R. 36 A bill to amend title 38, United States Code, to provide that remarriage of the surviving spouse of a deceased veteran after age 55 shall not result in termination of dependency and indemnity compensation otherwise payable to that surviving spouse (March 28, 2003), http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/41xx/doc4137/hr36.pdf.

[31] *Id.* at 3.

[32] S.728 was later passed as the Veterans' Benefits Act of 2010 (PL 111-275, 124 Stat. 2864 (October 13, 2010), which was discussed above).

[33] Congressional Budget Office Cost Estimate, S. 728 Veterans' Benefits Enhancement Act of 2009 (August 29, 2009) at 7 http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/105xx/doc10541/s728.pdf

retroactivity provision. Accordingly, no such cost estimate was produced.[34] Further, in both retroactivity examples, the language of the respective statutes expressed clear congressional intent to apply these laws retroactively. It is reasonable to expect the CBO, an entity that exists to provide such cost estimates for proposed legislation, can recognize whether the provisions of a given statute are intended to be applied retroactively. There was no such clear congressional intent with the WPEA, evidenced by the *absence* of a corresponding CBO Cost Estimate that addressed the costs of retroactivity.

Consider further that just within the VA, as of February 26, 2013, there were over sixty applicable cases pending or that had been dismissed without prejudice by the respective administrative judge that were filed prior to the Act's effective date. The total potential compensatory damages at issue for this one federal agency – a small but significant fraction of the many more cases pending within all other federal agencies– could well exceed eight million dollars – a sum that was most assuredly not anticipated when creating VA's and other federal agencies' operating cost projections for the current fiscal year. This kind of unintended consequence – budgetary shortfalls rendering agencies unable to satisfy judgments - would be repeated throughout every federal agency that likewise did not anticipate retroactive enforcement costs when projecting *their* respective budgets.

Limiting application of the WPEA to future cases and those filed after the stated effective date will permit federal agencies to properly budget for the impact of such future compensatory damages. Retroactive application would likely result in unanticipated budget strains at a time when federal budgets are already stretched to capacity. When that happens, funds previously intended for other expenditures in furtherance of an agency's primary mission would have to be reallocated to satisfy a damages award. The absence of such budgetary considerations in the CBO Cost Estimate reflects CBO's conclusion that Congress did not intend the WPEA to be applied retroactively.

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[34] *See* fn. 32.

B. Retroactive application of the WPEA would have serious legal and Constitutional implications.

The issue of greatest Constitutional concern resulting from the retroactive application of the WPEA is that such action may result in depriving another class of federal employees of their constitutional due process right to pre-deprivation notice and ultimately, of their property right in their federal employment. Under the WPEA and its predecessor, managers are subject to individual liability insofar as it pertains to imposition of direct, administrative discipline if they are found to have retaliated against protected employees.[35]

The WPEA also extends protections to additional types of disclosures not previously afforded whistleblower coverage. Retroactive application of this expanded coverage may subject the manager to discipline after she, either with or without correct legal guidance from agency counsel or from OSC, failed to act on such a disclosure but later, and possibly unrelated to the earlier disclosure, imposed discipline against the disclosing employee. In short, managers who previously justifiably relied on the then-current state of the law regarding what constituted a protected disclosure could be disciplined up to and including being removed from federal employment. The Court's rule in *Landgraf,* made clear that retroactivity is disfavored due to the principles of "fair warning" and to avoid "arbitrary and potentially vindictive legislation."[36]

The WPEA not only broadened the definition of protected disclosures and increased the number of potential whistleblowers entitled to WPEA protection, it also increased the Board's discretion to impose more severe penalties against individual employees. The WPEA permits the Board to impose different types of discipline on a single individual where previously it was restricted from imposing more than one type of disciplinary action.[37] As a result, employees who previously relied upon the state of the law at the time a given action transpired can be severely penalized for that justifiable reliance. Congress

[35] PL 112-199 §106, 126 Stat. 1468-69.
[36] 511 U.S. at 266-67, *citing Weaver v Graham,* 450 U.S. 24 (1981).
[37] S. Rep. 112-155 at 14

did express its clear intent about its desire to protect the maximum number of employees from improper government action. The WPEA not only broadens the scope of available penalties that can be imposed on violators but it also lowered the applicable standard of proof required to discipline employees who violate the Act. Both aspects call for "fair warning" to potential violators.

Unlike the exceptions made to the general rule disfavoring retroactivity statutes, enforcing the WPEA retroactively would not "serve entirely benign and legitimate purposes."[38] On the contrary, retroactive application of WPEA's new substantive provisions would provide a back-door method to punish certain employees deemed to be WPEA violators who previously were not subject to discipline because their conduct did not violate then-existing law – hardly a benign action.

A federal employee has a constitutional due process right to maintain her employment at her current grade and step.[39] As such, any substantive changes to the law that could negatively impact said rights necessarily mandate an advance notice period, to allow agencies to train their employees and allow individuals to conform their conduct to the new law.

Retroactive application of an Act that permits imposition of enhanced discipline - up to and including removal from the federal service - is anathema to advance notice and long accepted notions of fundamental fairness. The Court in *Landgraf* highlighted the greatest source of its decisions disfavoring retroactivity. "The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance."[40] No one can contest that the WPEA contains new requirements that, if not followed, could lead to the loss or diminishment of a federal employee's individual property right.

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[38] 511 U.S. at 267-68.
[39] *Perry v Sindermann,* 408 U.S. 593 (1972).
[40] 511 U.S. at 271 (citations and footnote omitted).

Employees may well have relied on the then-current state of the law that a disclosure through normal channels or to an alleged wrongdoer was not protected under the WPA, as judicially interpreted in the *Willis*[41] and *Huffman*[42] line of cases. In another example, under the terms of the WPEA, and as discussed *infra,* OSC need no longer prove "but for" causation in order to demonstrate an agency (through its employees) violated the law. Instead, OSC may make a case to impose discipline against the agency employee by demonstrating that the protected disclosure made to the target employee was a significant motivating factor for later alleged retaliatory action. While the instant case involves an individual right of action (IRA) where only corrective remedies are possible,[43] versus a disciplinary proceeding, the decision on the issue of retroactivity at issue in such an appeal would apply beyond this specific case.

To apply these provisions retroactively would effectively result in depriving employees of their property right to retain their federal employment, a consequence Congress could not and should not have intended.

Respectfully submitted,

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[41] *Willis v. Department of Agriculture*, 141 F.3d 1139, 1143 (Fed. Cir. 1998).
[42] *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352 (Fed. Cir. 2001)
[43] 5 U.S.C. §1221(g)