

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

THOMAS F. DAY,
Appellant,

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DOCKET NUMBER
DC-1221-12-0528-W-1

**BRIEF ON BEHALF OF THE UNITED STATES OFFICE OF SPECIAL COUNSEL AS
AMICUS CURIAE**

IDENTITY OF THE AMICUS

Amicus, the United States Office of Special Counsel (OSC), is an independent federal agency charged with, *inter alia*, protecting federal employees, former federal employees and applicants for federal employment from “prohibited personnel practices,” as defined in 5 U.S.C. § 2302(b). In particular, OSC is responsible for protecting federal employees against retaliation when they disclose “any information” that they reasonably believe evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety, unless such disclosure is specifically prohibited by law. *See* 5 U.S.C. § 2302(b)(8).

On January 16, 2013, the Board invited OSC to file an amicus brief in light of OSC’s expertise with respect to whistleblower reprisal. MSPB Order dated January 16, 2013, at 2; 5 C.F.R. § 1201.34(e)(1). It set a filing deadline of February 15, 2013. In a subsequent order, the Board set a new filing deadline for all amicus briefs of March 1, 2013. MSPB Order dated

February 5, 2013, at 1.¹ Although OSC has authority to participate in this appeal as an intervenor, 5 U.S.C. § 1221(c); 5 C.F.R. § 1201.34, OSC has determined that it is sufficient for purposes of advising the Board on the legal issues in this case that we participate as amicus curiae.

STATEMENT OF THE ISSUE

Whether the Board should apply Federal Circuit decisions that Congress legislatively overturned in the Whistleblower Protection Enhancement Act of 2012 (WPEA) to individual right of action (IRA) appeals that are pending with the Board on the WPEA's effective date?

INTRODUCTION AND SUMMARY

On December 14, 2012, Administrative Judge [REDACTED] certified for interlocutory appeal a finding that appellant's IRA, which was pending on the effective date of the WPEA, should be governed by the Federal Circuit's decision in *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001). Although the WPEA reversed *Huffman*, the AJ declined to apply the statute retroactively, relying on the Supreme Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). According to the AJ, Congress failed to provide adequate evidence of its intent to give retroactive effect to the WPEA. Accordingly, the WPEA, which would purportedly attach new legal consequences to personnel actions taken before its enactment, could not be applied retroactively under *Landgraf*. AJ Order at 10. The parties requested that the AJ certify the issue for interlocutory review, and the AJ agreed relying on criteria set forth at 5 C.F.R. § 1201.92. He stayed all other proceedings in the case pending the Board's review. AJ Order at 12.

¹ In the Order, the Board stated it would serve OSC's brief on the parties. MSPB Order dated February 5, 2013, at 1. Thus, OSC has not served this brief on the parties.

OSC respectfully submits that the AJ's decision was erroneous. Under *Landgraf*, the WPEA must be given retroactive effect, when a clear expression of congressional intent endorses that result. With respect to the WPEA, such an endorsement is plain and unmistakable. Congress explicitly stated that the WPEA would apply to all "pending" Board cases. In finding ambiguity, where none existed, the AJ mistakenly relied on a statement casting doubt on the retroactivity of a wholly different statute from the WPEA, indeed, a statute Congress never enacted.

Landgraf does not support a refusal to apply the WPEA to the present case. The clarification of existing law does not constitute a retroactive application of law. All that is at stake here is the application of specific provisions of the WPEA that expressly overrule *Huffman*'s erroneous interpretation of what constitutes protected whistleblowing.

Additionally, the Board is an administrative, adjudicatory body. As such, under Supreme Court precedent, it should apply the law that exists when it issues its decision. In rendering such a decision on the legality of a personnel action, the Board acts in the present. It takes the final action on the propriety of a personnel action. In doing so, it must follow the law then existing, in this case, the WPEA.

In any event, the AJ erred in holding that *Landgraf* poses an obstacle to the application of the WPEA to IRAs pending on its effective date. *Landgraf* only cautions against applying existing law retroactively when to do so would undermine important values. As will be seen, retroactive application of the WPEA to insure that all federal whistleblowers receive the same rights and protections from their government cannot, in any reasonable manner, be construed as either harmful or unfair. To the contrary, retroactivity will promote the common interests shared

by the public, the government and federal managers and employees in promoting greater efficiency and transparency through whistleblower protection.

STATEMENT OF FACTS

Thomas Day is an employee of the U.S. Coast Guard. In his IRA appeal, he challenges various personnel actions as whistleblower retaliation under the Whistleblower Protection Act (WPA). He alleges that on July 1, 2010, he provided his manager information that showed unallowable costs in the agency's acquisition of an aircraft. He alleges that this information evinced a violation of law. He further alleges that because of his disclosure, his supervisory chain retaliated against him. He filed an OSC complaint and, subsequently, an IRA appeal under the WPA. AJ Order at 1-2.

In the IRA appeal, the AJ concluded that his alleged disclosures appear to be excluded from protection under the WPA based on the principles set forth in *Huffman*. *Id.* Specifically, the AJ found based on prehearing submissions that appellant made his disclosures in the normal course of his duties and possibly to an alleged wrongdoer. The AJ concluded that disclosures made in the normal course of duties were not protected under *Huffman*. *Id.* at 3. Nonetheless, the AJ addressed whether the result might be different under the WPEA reforms that were soon to take effect. The AJ anticipated the Act's potential applicability because, as he noted, the WPEA would overturn decisions like *Huffman*.² Relying on the retroactivity doctrine in *Landgraf*, he concluded that the new provisions of the WPEA could not save appellant's IRA. *Id.* at 10. Nevertheless, he found good cause for interlocutory review. *Id.* at 12.

² Congress did not specifically identify *Huffman* as a decision that it intended to overturn in the WPEA. It did overturn by name *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998), an earlier Federal Circuit decision that the *Huffman* court relied upon. Both cases stand for the proposition that disclosures that occur in the performance of an employee's normal duties through normal channels or that are made to the alleged wrongdoer are not protected by the WPA. Therefore, we agree with the AJ's determination that the WPEA effectively overturns *Huffman*.

ARGUMENT

I. CONGRESS MADE ITS INTENT CLEAR THAT THE WPEA APPLIES TO ALL PENDING CASES

A. Absent limited constitutional restrictions, Congress may enact laws that have a retroactive effect. *Landgraf*, 511 U.S. at 267-68. To accomplish this, Congress is required to make its intentions clear so that reviewing courts can be assured that Congress “itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.” *Id.* at 272-73.

In S. 743, Congress has met its burden. The WPEA’s principal authors state clearly and unambiguously that the law applies to “proceedings . . . pending on [the Act’s effective date].”

S. Rep. No. 112-155, at 52 (2012). The Senate authors’ complete statement reads as follows:

The Committee expects and intends that the Act’s provisions shall be applied in OSC, MSPB, and judicial proceedings initiated by or on behalf of a whistleblower and pending on or after that effective date. Such application is expected and appropriate because the legislation generally corrects erroneous decisions by the MSPB and the courts; removes and compensates for burdens that were wrongfully imposed on individual whistleblowers exercising their rights in the public interest; and improves the rules of administrative and judicial procedure and jurisdiction applicable to the vindication of whistleblowers’ rights.

Id. The Senate Report reflects the views of the Senate Committee on Homeland Security and Governmental Affairs, which has approved a version of this legislation in every Congress since 2002. *Id.* at 40. The Report was filed by the Committee without any dissenting views on April 19, 2012. 158 Cong. Rec. S2545 (2012).³ Every Senator had the opportunity to review the statement of intent in the Report prior to the bill’s unanimous approval by the Senate on May 8, 2012. See “Rule 6: Committee Reporting Procedures” included in *Rules of Procedure of the Committee on Homeland Security and Governmental Affairs*, S. Prt. 112-11, at 18 (Mar. 2011).

³ It is important to note that under the Committee’s rules, any Member that wishes to file an alternative or dissenting view may do so and those views are included in the Committee Report. “Rule 6: Committee Reporting Procedures” included in *Rules of Procedure of the Committee on Homeland Security and Governmental Affairs*, S. Prt. 112-11, at 18-19 (Mar. 2011).

The House affirmed and adopted the Senate's statement of intent to apply the WPEA to pending cases. Although overlooked by the AJ, two pieces of positive evidence confirm the House shared the Senate's intent. First, immediately before the House considered S. 743, Congressman Todd Platts, one of the principal sponsors of whistleblower reform in that chamber, told his colleagues from the floor of the House that the new law they were about to pass would apply to "pending" Board cases. In fact, he read verbatim the Senate Report's statement of intent into the record. 158 Cong. Rec. E1664 (2012). Second, although the House struck the section of S. 743 entitled, "Intelligence Community Whistleblower Protections," from the bill, it left untouched the portions of Title 1 of S. 743 that concerned protected disclosures by federal employees. S. 743, 112th Cong. § 1 (as passed by House, Sept. 28, 2012). Included in Title I are the provisions that overturned erroneous court decisions interpreting the WPA that are the subject of the Senate's statement of intent. *Id.*

There is no evidence that the application of the WPEA to pending cases caused any comment or reaction from House members in the five months that they had to review S. 743 before passing it. On September 28, 2012, the House adopted S. 743 by unanimous consent. S. 743, 112th Cong. (as passed by House, Sept. 28, 2012). When S. 743 returned to the Senate with the House amendment striking the intelligence community provision, the Senate passed for a second time S. 743 without dissent. S. 743, 112th Cong. (as passed by Senate, Nov. 13, 2012). OSC has found no evidence in the legislative history to S. 743 that suggests a contrary intention to the one expressly provided by the bill's authors. Therefore, the Board should apply the law to pending cases as Congress clearly intends.

B. Notwithstanding the clarity with which OSC sees evidence of congressional intent, the AJ is not persuaded by this evidence. To reach his conclusion that congressional

intent is unclear, he creates an artificial conflict where none exists. His artifice for inferring conflict is a contrary statement that he found in a House Committee Report to different bill, H.R. 3289. That statement indicates that H.R. 3289, if passed, would apply only to legal actions (e.g., Board appeals) filed after the law's effective date. AJ Order at 9. But the AJ overlooks the fact that H.R. 3289 failed to pass in either chamber, making its relevance questionable. H.R. 3289, 112th Cong. (discharged by H.R. Comm. on Intelligence, Oct. 1, 2012). Rather than rely on evidence from a report to a failed bill in the House, the AJ should have credited positive evidence of the House members' support for applying S. 743 to pending cases.

For good reason, all legislative history cannot be weighed equally. The Supreme Court has noted, "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[ts] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). "Failed legislative proposals," the Court has observed, are "a particularly dangerous ground on which to rest an interpretation of a prior statute" *United States v. Craft*, 535 U.S. 274, 287 (2002) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)). "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction," the Court has explained. *Id.* (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994)).

The Supreme Court's distrust of the history of failed bills is instructive here. Both houses of Congress passed S. 743, not H.R. 3289, by unanimous consent. 158 Cong. Rec. S6737 (2012); 158 Cong. Rec. S6761 (2012). In doing so, Congress provided clear evidence of its

intent that “the Act’s provisions shall be applied . . . in proceedings pending on or after [the effective date].” S. Rep. No. 112-115, at 52 (2012). In light of this undisputed evidence in the legislative record of S. 743, the contrary House Report to H.R. 3289 has no probative value in determining the legislature’s intent.

C. In a footnote to his opinion, the AJ identifies a second piece of evidence that he believes demonstrates ambiguity in Congress’s intentions. He notes that while almost all of the provisions of the WPEA take effect thirty days after the President’s signature, the Act provides whistleblower protection rights to TSA screeners thirty days earlier: on the date of the President’s signature. AJ Order at 10 n.1. The AJ speculates that if Congress intended the WPEA to apply to all pending appeals, “there was seemingly no reason to include a separate provision making it effective in TSA cases 30 days sooner than other cases.” *Id.* The AJ does not elaborate on this point beyond citing to a Board decision that held a statute should be construed so that nothing in it “shall be superfluous, void, or insignificant.” *Id.* (citing *Special Counsel v. Wilkinson*, 104 M.S.P.R. 253, 261 (2006)). Thus we are left to speculate on its meaning. Apparently, the AJ believes that if the Act applied to all pending cases – as even he acknowledges the legislative history to S. 743 indicates – there would have been no reason for Congress to hasten the Act’s effective date for only TSA cases. Although unstated, the implication from this footnote is that Congress could not have intended to apply the WPEA to pending cases because if it had, it would have had no reason to provide protection sooner for just one class of employees.

This point, however, trades on fallacy. When the WPEA was being considered, TSA employees had been excluded from the protections of the WPA. *See Schott v. Dep’t of Homeland Sec.*, 97 M.S.P.R. 35, 40-47 (2004) (discussing history of excluding screeners from

whistleblower protection laws). One of the remedial purposes of the WPEA was to correct this oversight. S. Rep. No. 112-115, at 2 (2012). Congress therefore had rational grounds to treat TSA employees differently because unlike most federal employees, TSA employees had been without WPA coverage.

It is not uncommon for Congress to provide a 30-day grace period prior to a new statute's effective date. This allows some time for an orderly implementation of the new law. And while the government would reasonably benefit from having a grace period to implement many of the WPEA's new provisions, it is difficult to see why it would require any grace period to prepare for the extension of the WPA to TSA employees when it already has in place established procedures for non-TSA federal employees. Furthermore, it would have been reasonable for Congress to accelerate coverage for TSA employees in order to protect them from managers who might be tempted to exploit a delayed effective date by hurrying personnel actions before their employees' rights vest. *See Landgraf*, 511 U.S. at 267-68 (noting that retroactivity provisions often serve legitimate purposes including preventing circumvention of new statute in interval immediately preceding passage). Thus the AJ's conclusion that there was "seemingly no reason" to make the TSA provisions effective thirty days sooner is incorrect. There were rational reasons, even if Congress failed to expressly state them.

Congress took over a decade to pass legislation to overturn the erroneous court decisions that have constricted the protections of the WPA for a generation of whistleblowers. In the Board's first opportunity to apply the WPEA, these protections still appear to be in jeopardy. We believe that the AJ's argument in a footnote is too slender a reed upon which to justify depriving appellant the benefit of the WPEA's restored protections. Rather than engage in

speculation in order to construct ambiguity where none exists, the Board should follow the straightforward directions Congress provides and allow this appeal.

II. EVEN IF CONGRESS FAILED TO MAKE ITS INTENTIONS CLEAR, APPLYING THE WPEA TO PENDING CASES WOULD NOT CONFLICT WITH *LANDGRAF*

A. Assuming that the Board concludes that Congress failed to evince a clear intent to apply the new law to pending cases – a conclusion that we believe has been disproved – the Board still should not apply the *Landgraf* retroactivity doctrine to forbid the WPEA’s application to this appeal. Congress did not create new rights and liabilities in the WPEA when it overruled the flawed decisions of the Federal Circuit. Rather, Congress, as it explicitly states, clarified existing law by restoring earlier protections granted by the WPA that were eliminated by erroneous court decisions. When Congress acts to clarify existing law, retroactivity is not at issue. *See, Republic of Iraq v. Beatty*, 556 U.S. 848, 864 (2009); *Brown v. Thompson*, 374 F.3d 253 (4th Cir. 2004); *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999).

The courts “have long recognized that clarifying language is not subject to any presumption against retroactivity and is applied to all cases pending as of the date of enactment.” *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689 (9th Cir. 2000). In determining whether an amendment clarifies or changes an existing law, a court looks to several factors, including statements of intent made by the legislature that enacted the amendment. *See, e.g., Piamba Cortes*, 177 F.3d at 1284 (“[C]ourts may rely upon a declaration by the enacting body that its intent is to clarify [a] prior enactment.”); *Liquilux Gas Corp. v. Martin Gas Sales*, 979 F.2d 887, 890 (1st Cir. 1992) (using the “legislature’s expression of what it understood itself to be doing” to determine whether an amendment is a clarification).

When enacting the WPEA, Congress repeatedly said that its purpose was to clarify existing law. For example, the title of section 101 is “Clarification of Disclosures Covered.” Pub. L. No. 112-199, 126 Stat. 1465 (2012). The Senate Report states, “Section 101 of S. 743 amends the WPA to overturn decisions narrowing the scope of protected disclosures by *clarifying* that a whistleblower is not deprived of protection” S. Rep. No. 112-155, at 5 (2012) (emphasis added). It also states, “Section 101(b) also *clarifies* that a disclosure is not excluded from protection because it was made during the employee’s normal course of duties” *Id.* at 41 (emphasis added).

“The Supreme Court has long instructed that ... ‘subsequent legislation declaring the intent of an earlier statute’ be accorded ‘great weight in statutory construction.’” *Brown v. Thompson*, 374 F.3d 252, 260 (4th Cir. 2004) (citing *Loving v. United States*, 517 U.S. 748, 770 (1996)). The Board should similarly give great weight to Congress’s repeated declarations that the WPEA clarifies the WPA and apply the Act’s clarifications to this case.

Furthermore, as the WPEA is clearly a remedial statute, it should be liberally construed to achieve its ends. If a retroactive interpretation “will promote the ends of justice,” the Court has stated, the statute should “receive such construction.” *Landgraf*, 511 U.S. at 264 n.16 (citing Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules of Canons About How Statutes are to be Construed*, 3 Vand. L. Rev. 395, 402 (1950)).

B. The AJ relied on the Federal Circuit’s decision in *Caddell v. Department of Justice* to presume that Congress did not intend to apply the WPEA to appellant’s appeal. 96 F.3d 1367 (Fed. Cir. 1996); AJ Order at 10. The facts in *Caddell*, however, are distinguishable from the facts in this case. In *Caddell*, an employee sought the benefit of the 1994 Amendments to the WPA which recognized psychiatric testing as a new actionable personnel action under the

whistleblower protection law. Prior to the 1994 Amendments, the WPA omitted psychiatric examinations as a basis for a whistleblower retaliation claim. *Caddell*, 96 F.3d at 1371. Clearly, the court in *Caddell* confronted a provision that conferred new rights on federal whistleblowers. In contrast, this case concerns only the restoration of whistleblower rights that were erroneously denied by the court. While the 1994 Amendments created new rights where none existed, the WPEA merely clarifies that rights created under the WPA, once denied by court decision, must be respected again. Therefore, the AJ's reliance on *Caddell* to deny appellant his IRA is misplaced.⁴

C. The *Landgraf* doctrine is also not applicable to this appeal for another reason. Unlike the role played by an Article III court (as in *Landgraf*), the Board plays a wholly different role. It serves as an adjudicatory body in an administrative appeal. It is "taking final action" on a matter under its administrative jurisdiction. 5 U.S.C. § 1204(a). The Supreme Court has found that, under these circumstances, the Board is to apply the new provisions of the WPEA. *See, Ziffirin, Inc. v. United States*, 318 U.S. 73 (1943). "We are convinced that the [Interstate Commerce] Commission was required to act under the law as it existed when its order ... was entered ... [A] change of law pending an administrative hearing must be followed in relation to permits for future acts. Otherwise the administrative body would issue orders contrary to the existing legislation." *Id.* at 78. *Accord, Aero Mayflower Transit Co., Inc. v. Interstate Commerce Comm'n*, 686 F.2d 1 (D.C. Cir. 1982). *See also, Pentheny Ltd. v. Gov't of Virgin Islands*, 360 F.2d 786, 790 (an administrative "agency is required to act under the law as it stands when its order is entered. A change in law pending an administrative determination must be followed."); *Fassilis v. Esperdy*, 301 F.2d 429, 432 (2nd Cir. 1962) (statutory change between

⁴ The AJ's reliance on *Lapuh v. Merit Systems Protection Board*, 284 F.3d 1277 (Fed. Cir. 2002), and *Styslinger v. Department of the Army*, 105 M.S.P.R. 223 (2007), for the same proposition is similarly misplaced. AJ Order at 11.

the time of filing the application and the decision required the Immigration Service to apply the new amendment).

This authority is consistent with the Board's mission and function. In this case, the Board must determine whether the employer's personnel actions against appellant violated the WPA. The Board is performing an administrative function for the Executive Branch, not the Judicial Branch. To perform that function, Congress empowered the Board to "order any Federal agency or employee" to comply with its determination. 5 U.S.C. § 1204(a). And when the Board makes its decision, that decision will be the government's "final action" on the matter. Only then will the matter be ripe for judicial review. 5 U.S.C. § 1221(h).

Thus, the issue of retroactivity cannot be viewed solely through the lens that the Court employed in *Landgraf*. Instead, the Board should look to the Court's decision in *Ziffirin* to determine which law to apply. The Board is not merely adjudicating a past dispute between the appellant and his employer. Although the personnel actions at issue have already occurred, the government's final administrative determination of whether those actions should stand has yet to occur. The final resolution of these actions must await the Board's final administrative decision, and that certainly will occur after the effective date of the WPEA.

Federal agencies "do not have the authority to repeal or make ineffective Congressional statutes regulating conduct in a comprehensive fashion which are passed separately from the agency's enabling or organic act." *United States v. Maes*, 2007 WL 611246 (E.D. Cal. 2007). The Constitution grants to the legislature the power to enact laws and to the executive the responsibility to implement them. "The Constitution's grant of executive authority does not include the right to nullify legislative acts or ignore directives." *Olegario v. United States*, 629 F.2d 204, 224 (2nd Cir. 1980).

We believe that irrespective of the clear evidence of Congress's intent as discussed in Part I *supra*, the Board, as the final decisional authority for the government in this administrative appeal, must apply the WPEA to administrative decisions made after the WPEA's effective date. Unlike the Court's decision in *Landgraf*, the Board's decision in this appeal will not require a retroactive application of new laws to already completed transactions. Because the government did not complete its legal task of making a final decision before the effective date of the WPEA, its final decision must be made under the provisions of the new Act. Thus, even if Congress had not specifically instructed the Board to apply the WPEA to pending cases, the timing of the Board's decision on whether it has jurisdiction over appellant's IRA appeal requires it to apply the new provisions to this appeal. *Cf. Landgraf*, 511 U.S. at 293 (“[T]he purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power – so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised.”) (Scalia, J., concurring).

D. *Willis* and *Huffman* have wrongly denied WPA protection to whistleblowers for more than a decade.⁵ In response, Congress has spent the last eleven years trying to legislatively overrule these decisions; and finally it has succeeded. S. Rep. No. 112-155, at 40 (2012). Evidence of clear intent to overrule the court's erroneous decisions appears throughout the WPEA's legislative record. Section 101 of the WPEA states: “A disclosure shall not be excluded from [the whistleblower protection statute] because (A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant

⁵ Prior to the WPEA, the Board mitigated the effect of the Federal Circuit's criticized decisions to allow some disclosures that might otherwise have been excluded from coverage under those decisions to be protected by the WPA. *See, e.g., Stolarczyk v. Dep't of Homeland Sec.*, 2012 MSPB 112, 2012 WL 4372992 (Sept. 26, 2012) (holding that investigating misuses was outside of employee's normal duties); *Farrington v. Dep't of Transp.*, 118 M.S.P.R. 331 (2012); *Ontivero v. Dep't of Homeland Sec.*, 117 M.S.P.R. 600 (2012) (holding that disclosure to upper management was not within normal channels); *Tullis v. Dep't of the Army*, 117 M.S.P.R. 236 (2012) (holding that employee's position did not require reporting of wrongdoing and therefore was not part of the employee's normal duties).

reasonably believed to be covered by [the whistleblower statute].” Pub. L. No. 112-199, § 101, 126 Stat. 1465, 1466 (2012). Concerning protected disclosures made in the normal course of duties, the same section provides:

If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.

Id.; see also S. Rep. No. 112-155, at 5 (2012) (“Section 101 of S. 743 overturns several court decisions that narrowed the scope of protected disclosures.”); S. Rep. No. 112-155, at 4 (“Unfortunately, in the years since Congress passed the WPA, the MSPB and the Federal Circuit narrowed the statute’s protection [T]his Committee explained that the 1994 amendments were intended to reaffirm the . . . long-held view that the WPA’s plain language covers *any* disclosure.”). The Senate Report further explains:

Section 101 of S. 743 amends the WPA to overturn decisions narrowing the scope of protected disclosures by clarifying that a whistleblower is not deprived of protection just because the disclosure was made to an individual, including a supervisor, who participated in the wrongdoing

Finally, an employee is not deprived of protection merely because the employee made the disclosure in the normal course of the employee’s duties, provided that actual reprisal occurred

S. Rep. No. 112-155, at 5.

Thus there can be no doubt based upon this record that Congress intends for whistleblowers to receive the full range of WPA protections including protections for disclosures made to the wrongdoer or in the normal course of duties. We believe that the Board must apply the WPEA to decisions made after the Act’s effective date.

III. GRANTING APPELLANT AN IRA RIGHT WOULD NOT CONSTITUTE AN IMPERMISSIBLE RETROACTIVE APPLICATION OF LAW UNDER *LANDGRAF*

A. Assuming, *arguendo*, that the Board determines that *Landgraf* does apply to post-WPEA decisions, a retroactive application of the Act to these facts would nevertheless be permissible under *Landgraf*.

The Board must choose between two canons of statutory construction on retroactivity. “The first,” as explained by the Court in *Landgraf*, “is the rule that ‘a court is to apply the law in effect at the time it renders its decision.’” *Landgraf*, 511 U.S. at 264, 277 (citing *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974)). The second is simply a judicial presumption against retroactivity. *Id.* at 265.

The Constitution prohibits the enactment of particular laws that have a retroactive effect: e.g., the *Ex Post Facto* Clause concerning retroactive criminal punishment; Article I, § 10, cl. 1, concerning state laws impairing the obligation of contracts; the Fifth Amendment, concerning the deprivation of a person’s property rights without due process or just compensation; and Art. I, §§ 9-10, concerning Bills of Attainder. *Id.* at 266. Otherwise, the Constitution imposes only “modest” impediments to the enactment of retroactive laws that fall outside these clearly cabined areas. *Id.* at 267, 272.

The Court’s rule in *Landgraf* that disfavors retroactivity derives not from the words of the Constitution but from the values underlying it. Thus, from the *Ex Post Facto* Clause, Justice Thurgood Marshall found support for the principles that individuals should receive “fair warning” and that “arbitrary and potentially vindictive legislation” should be restrained. *Id.* (citing *Weaver v. Graham*, 450 U.S. 24 (1981)). However, “the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its

intended scope.” *Id.* at 267. As the Court noted in *Landgraf*, “Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary.” *Id.* at 267-68.

The Court observed further in *Landgraf* that “[a]ny test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity.” *Id.* at 270. By applying “familiar considerations of fair notice, reasonable reliance, and settled expectations,” the Court explained, judges would be able to exercise sound guidance in making these difficult decisions. *Id.*

B. A common thread in civil retroactivity cases that fail the Court’s criteria for “fair notice, reasonable reliance, and settled expectations” is evidence that a private party would be disadvantaged economically or otherwise deprived of a significant personal right by the law’s retroactive application. *See Landgraf*, 511 U.S. at 269-74 (discussing cases). In *Landgraf*, an employee attempted to benefit from provisions in the Civil Rights Act of 1991 that offered the prospects of compensatory and punitive damages in sexual harassment claims. The new law, however, did not take effect until after the employee’s claim for equitable relief under the existing law, the Civil Rights Act of 1964, had been rejected by the district court. Seizing on the basic unfairness of retroactively applying new economic penalties to the nation’s unsuspecting employers for past deeds, the Court denied the employee’s appeal.

The prospect for unfairness in *Landgraf* is easily grasped. The consequences of applying the 1991 reforms retroactively to virtually every employer in the nation were enormous and the potential for unfair surprise was undeniable. As the Court stated in *Landgraf*, “Elementary

considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly” *Id.* at 265.

C. The concerns that were persuasive in *Landgraf*, however, are not sufficiently evident here to forego application of “the first rule” of construction – application of the law that is in effect at the time of decision. As we noted earlier, the government is not a private employer and its interests cannot be equated with the interests of the nations’ employers in *Landgraf*.⁶ The government’s primary interest here, as expressed in the WPA and the WPEA, is to create a work environment that makes it safe for employees to blow the whistle, even in the course of their duties and even to the wrongdoer. In order to further this important interest, Congress determined over three decades ago that the government will protect whistleblowers and make them whole if officials, acting beyond the limits of their legal authority, cause them harm because of whistleblowing activity. If this remedial process causes minor disturbances to personnel management, they are more than offset by savings to the taxpayers from increased government efficiency and accountability through an effective whistleblower protection program. The WPA assigned to the head of every agency the responsibility to prevent prohibited personnel practices and ensure their agency complies with applicable civil service laws, rules and regulations, including the very whistleblower protections at stake in this appeal. 5 U.S.C. § 2302(c).

⁶ The differences between imposing liabilities on the government and imposing liabilities on individuals was discussed in *Lyons v. United States*, 99 Fed. Cl. 552, 556-60 (Fed. Cl. 2011). In *Lyons*, the Court of Federal Claims stated that Supreme Court precedent on retroactivity focused on private parties and, therefore, was inapposite as to Congressional changes to government liability. *Id.* at 556 (comparing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 271 n.25 (1994), with *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004)). The *Lyons* Court applied the three-factor test established by the Federal Circuit in *Princess Cruises v. United States*, 397 F.3d 1358, 1362-63 (Fed. Cir. 2005), to determine whether the Justice for All Act had retroactive effect. *Id.* at 558. First, the court held that the increase in the government’s liability did not impose any new duties or create new prohibitions since the government had accepted liability before and after the enactment of the statute. *Id.* Second, the court held that government officials would not have refrained from committing violations if they had been aware of the impending changes in the statute. *Id.* at 559. Third, the court stated that the third factor focused on individual rights, and because the government bore the burden, no burden on individual rights was implicated. *Id.*

Unlike the circumstances confronting the Court in *Landgraf*, where notions of fairness caused the Court to spare private employers the consequences of new economic remedies, the circumstances here offer a distinct situation in which the interests of employer, employee and citizen are all one and the same. All share a common interest in protecting federal employees under the WPA, and thereby promoting government efficiency and accountability.

Denying the appellant the benefit of Congress's restorative law would therefore undermine, rather than promote, the very governmental interest that Congress advances in the WPEA. That interest is so fundamental to good government that it easily outweighs competing interests, e.g., potential administrative costs, or liability for back pay or attorneys' fees. The WPEA is intended to strengthen the protections for whistleblowers "so that they can more effectively help root out waste, fraud, and abuse in the federal government." S. Rep. No. 112-155, at 1 (2012). Acknowledging appellant's IRA right here would only further that legislative purpose.

D. Arguably, one potential interest cited by the Court in *Landgraf* might weigh against retroactive application – that managers should have the opportunity to know that *Willis* and *Huffman* have been overruled before they can be deemed responsible for retaliation. But to embrace this position would be to sanction whistleblower retaliation on the dubious and cynical ground that a retaliator knew that Federal Circuit decisions made the WPA remedies unavailable to his victim.

Clearly this case presents a different set of equities from those facing the Court in *Landgraf*. First, the individuals responsible for the retaliation here will suffer no harm or penalty if an application of the WPEA to their conduct results in a finding of retaliation. In an IRA, only corrective remedies are available. 5 U.S.C. § 1221(g). If this were a disciplinary proceeding,

considerations of fairness to the individual managers might carry more weight, but that is not at issue here. Second, assuming that the individual managers were aware that erroneous court decisions insulated their acts of retaliation from WPA remedies, they were nonetheless expected to know that retaliation against any subordinate because of disclosures of wrongdoing was still wrong.

Regardless of whether the courts erroneously excluded such activities from WPA protection, other civil service law and merit system principles regulate supervisory conduct. For example, all federal managers know that vindictive retaliation based on a subordinate employee's disclosure of wrongdoing, regardless of the circumstances, could not satisfy the efficiency of the service standard that governs their personnel decision-making authority. 5 U.S.C. § 7513.⁷ Additionally, managers are expected to know that they should act with high standards of integrity, conduct and concern for the public interest, and that they should strive to protect their employees from arbitrary action. 5 U.S.C. §§ 2301(b)(4), (b)(8)(A). Retaliation against a public servant for exposing waste, fraud, abuse or corruption is an arbitrary use of authority and can never serve the interests of the public or advance the efficiency of the service.

Thus, it cannot be said that a "retroactive" application of the WPEA to the personnel actions in this appeal would alter the legitimate expectations of managers who might assert that they relied on those decisions to retaliate. Even though the Federal Circuit majority weakened whistleblower protections such that the WPA was construed not to restrict certain retaliatory conduct, fundamental rules and policies governing the exercise of supervisory authority restrained federal supervisors from using their authority to punish whistleblowers for reporting wrongdoing in the course of duty or to the wrongdoer. The WPEA did not "sweep away settled

⁷ Under regulations prescribed by the Office of Personnel Management, an agency may take actions "only for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513.

expectations suddenly,” *Landgraf*, 511 U.S. at 266, nor did it “attach new legal consequences” to otherwise legal actions. *Id.* at 269. The WPEA did nothing to unsettle the settled expectations of federal supervisors; it merely reinforced the expectation that supervisors exercise their discretionary authority in compliance with existing civil service law and merit system principles.⁸ See *Watkins v. United States Postal Serv.*, 85 M.S.P.R. 141, 144 (2000) (applying final rule retroactively to prevent certain disadvantaging employee if interim rule applied; finding final rule did materially alter duties, liabilities or rights of employer).

IV. AFFIRMING THE AJ’S OPINION WOULD REQUIRE OSC TO FLOUT THE EXPRESS WILL OF CONGRESS

On the eve of the WPEA’s effective date, OSC confronted the same issue presented in this appeal: whether to apply overruled court decisions to pending OSC complaints. If expediency were the sole criterion, there is no question that applying *Willis* and *Huffman* would help OSC to close complaints more quickly. Prior to the WPEA, OSC – as it was required to do – applied *Willis* and *Huffman* and the other overturned court decisions to close potentially valid whistleblower claims.

OSC considered whether the *Landgraf* presumption against retroactivity required it to continue closing pending complaints that arose from pre-Act personnel decisions. Because Congress expressed its intent so clearly, we concluded that to continue to apply the overturned decisions to OSC complaints would flout the express will of Congress. Federal whistleblowers had waited long enough to have their rights under the WPA restored.

On November 27, 2012, OSC announced publicly that the new legislation would take effect on December 27, 2012. And on the effective date, we instructed our staff to begin

⁸ See *Scott v. Dep’t of Justice*, 69 M.S.P.R. 211, 239-40 (1995) (finding no retroactive effect in applying new knowledge-timing presumption to pending appeal; new presumption does not impair rights party possessed when he acted).

evaluating all pending whistleblower retaliation complaints without regard to the overturned decisions. We believe this was the right decision, the one intended by Congress.

CONCLUSION

Based on the foregoing, the Special Counsel urges the Board to remand this case to the AJ with instructions to allow appellant's IRA to proceed in accordance with the WPEA.

Respectfully submitted,

Carolyn Lerner
Special Counsel

Bruce D. Fong*
Associate Special Counsel



Rachel A. Venier
Supervisory Attorney



Malvina Hryniewicz
Attorney

U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036
Fax: (202) 653-5151
mhryniewicz@osc.gov

U.S. Office of Special Counsel*
S.F. Bay Area Field Office
1301 Clay Street, Suite 1220N
Oakland, CA 94612
(510) 637-3464
Fax: (510) 637-3474