

WHISTLEBLOWER PROTECTION IMPROVEMENT ACT OF
 2021

MAY 17, 2022.—Committed to the Committee of the Whole House on the State of
 the Union and ordered to be printed

Mrs. CAROLYN B. MALONEY of New York, from the Committee on
 Oversight and Reform, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 2988]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Reform, to whom was referred the bill (H.R. 2988) to amend title 5, United States Code, to modify and enhance protections for Federal Government whistleblowers, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Whistleblower Protection Improvement Act of 2021”.

SEC. 2. ADDITIONAL WHISTLEBLOWER PROTECTIONS.

(a) INVESTIGATIONS AS PERSONNEL ACTIONS.—

(1) IN GENERAL.—Section 2302(a)(2)(A) of title 5, United States Code, is amended—

- (A) in clause (xi), by striking “and” at the end;
- (B) by redesignating clause (xii) as clause (xiii); and
- (C) by inserting after the clause (xi) the following:

“(xii) for purposes of subsection (b)(8)—

“(I) the commencement, expansion, or extension of an investigation, but not including any investigation that is ministerial or nondiscretionary (including a ministerial or nondiscretionary investigation described in section 1213) or any investigation that is conducted by an Inspector General of an entity of the Government of an employee not employed by the office of that Inspector General; and

“(II) a referral to an Inspector General of an entity of the Government, except for a referral that is ministerial or nondiscretionary; and”.

(2) APPLICATION.—The amendment made by paragraph (1) shall apply to any investigation opened, or referral made, as described under clause (xii) of section 2302(a)(2)(A) of title 5, United States Code, as added by such paragraph, on or after the date of enactment of this Act.

(b) RIGHT TO PETITION CONGRESS.—

(1) IN GENERAL.—Section 2302(b)(9) of title 5, United States Code, is amended—

- (A) in subparagraph (C), by striking “or” at the end;
- (B) in subparagraph (D), by adding “or” after the semicolon at the end;

and

(C) by adding at the end the following:

“(E) the exercise of any right protected under section 7211;”.

(2) APPLICATION.—The amendment made by paragraph (1) shall apply to the exercise of any right described in section 2302(b)(9)(E) of title 5, United States Code, as added by paragraph (1), occurring on or after the date of enactment of this Act.

(c) PROHIBITION ON DISCLOSURE OF WHISTLEBLOWER IDENTITY.—

(1) IN GENERAL.—Section 2302 of title 5, United States Code, is amended by adding at the end the following:

“(g)(1) No employee of an agency may willfully communicate or transmit to any individual who is not an officer or employee of the Government the identity of, or personally identifiable information about, any other employee because that other employee has made, or is suspected to have made, a disclosure protected by subsection (b)(8), unless—

“(A) the other employee provides express written consent prior to the communication or transmission of their identity or personally identifiable information;

“(B) the communication or transmission is made in accordance with the provisions of section 552a;

“(C) the communication or transmission is made to a lawyer for the sole purpose of providing legal advice to an employee accused of whistleblower retaliation; or

“(D) the communication or transmission is required or permitted by any other provision of law.

“(2) In this subsection, the term ‘officer or employee of the Government’ means—

“(A) the President;

“(B) a Member of Congress;

“(C) a member of the uniformed services;

“(D) an employee as that term is defined in section 2105, including an employee of the United States Postal Service, the Postal Regulatory Commission, or the Department of Veterans Affairs (including any employee appointed pursuant to chapter 73 or 74 of title 38); and

“(E) any other officer or employee in any branch of the Government of the United States.”

(2) APPLICATION.—The amendment made by paragraph (1) shall apply to any transmission or communication described in subsection (g) of section 2302 of title 5, United States Code, as added by paragraph (1), made on or after the date of enactment of this Act.

(d) RIGHT TO PETITION CONGRESS.—

(1) IN GENERAL.—Section 7211 of title 5, United States Code, is amended to read as follows:

“§ 7211. Employees’ right to petition or furnish information or respond to Congress

“(a) IN GENERAL.—Each officer or employee of the Federal Government, individually or collectively, has a right to—

“(1) petition Congress or a Member of Congress;

“(2) furnish information, documents, or testimony to either House of Congress, any Member of Congress, or any committee or subcommittee of the Congress; or

“(3) respond to any request for information, documents, or testimony from either House of Congress or any Committee or subcommittee of Congress.

“(b) PROHIBITED ACTIONS.—No officer or employee of the Federal Government may interfere with or deny the right set forth in subsection (a), including by—

“(1) prohibiting or preventing, or attempting or threatening to prohibit or prevent, any other officer or employee of the Federal Government from engaging in activity protected in subsection (a); or

“(2) removing, suspending from duty without pay, demoting, reducing in rank, seniority, status, pay, or performance or efficiency rating, denying promotion to, relocating, reassigning, transferring, disciplining, or discriminating in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any other officer or employee of the Federal Government or attempting or threatening to commit any of the foregoing actions protected in subsection (a).

“(c) APPLICATION.—This section shall not be construed to authorize disclosure of any information that is—

“(1) specifically prohibited from disclosure by any other provision of Federal law; or

“(2) specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs, unless disclosure is otherwise authorized by law.

“(d) DEFINITION OF OFFICER OR EMPLOYEE OF THE FEDERAL GOVERNMENT.—For purposes of this section, the term ‘officer or employee of the Federal Government’ includes—

“(1) the President;

“(2) a Member of Congress;

“(3) a member of the uniformed services;

“(4) an employee (as that term is defined in section 2105);

“(5) an employee of the United States Postal Service or the Postal Regulatory Commission; and

“(6) an employee appointed under chapter 73 or 74 of title 38.”

(2) CLERICAL AMENDMENT.—The table of sections for subchapter II of chapter 72 of title 5, United States Code, is amended by striking the item related to section 7211 and inserting the following:

“7211. Employees’ right to petition or furnish information or respond to Congress.”

SEC. 3. ENHANCEMENT OF WHISTLEBLOWER PROTECTIONS.

(a) DISCLOSURES RELATING TO OFFICERS OR EMPLOYEES OF AN OFFICE OF INSPECTOR GENERAL.—Section 1213(c) of title 5, United States Code, is amended by adding at the end the following:

“(3) If the information transmitted under this subsection disclosed a violation of law, rule, or regulation, or gross waste, gross mismanagement, abuse of authority, or a substantial and specific danger to public health or safety, by any officer or employee of an Office of Inspector General, the Special Counsel may refer the matter to the Council of the Inspectors General on Integrity and Efficiency, which shall comply with the standards and procedures applicable to investigations and reports under subsection (c).”

(b) RETALIATORY REFERRALS TO INSPECTORS GENERAL.—Section 1214(d) of title 5, United States Code, is amended by adding at the end the following:

“(3) In any case in which the Special Counsel determines that a referral to an Inspector General of an entity of the Federal Government was in retaliation for a

disclosure or protected activity described in section 2302(b)(8) or in retaliation for exercising a right described in section 2302(b)(9)(A)(i), the Special Counsel shall transmit that finding in writing to the Inspector General within seven days of making the finding. The Inspector General shall consider that finding and make a determination on whether to initiate an investigation or continue an investigation based on the referral that the Special Counsel found to be retaliatory.”.

(c) ENSURING TIMELY RELIEF.—

(1) INDIVIDUAL RIGHT OF ACTION.—Section 1221 of title 5, United States Code, is amended by striking “section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D),” each place it appears and inserting “section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g).”.

(2) STAYS.—Section 1221(c)(2) of title 5, United States Code, is amended to read as follows:

“(2) Any stay requested under paragraph (1) shall be granted within 10 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date the request is made, if the Board determines—

“(A) that there is a substantial likelihood that protected activity was a contributing factor to the personnel action involved; or

“(B) the Board otherwise determines that such a stay would be appropriate.”.

(3) APPEAL OF STAY.—Section 1221(c) of title 5, United States Code, is amended by adding at the end the following:

“(4) If any stay requested under paragraph (1) is denied, the employee, former employee, or applicant may, within 7 days after receiving notice of the denial, file an appeal for expedited review by the Board. The agency shall have 7 days thereafter to respond. The Board shall provide a decision not later than 21 days after receiving the appeal. During the period of appeal, both parties may supplement the record with information unavailable to them at the time the stay was first requested.”.

(4) ACCESS TO DISTRICT COURT; JURY TRIALS.—

(A) IN GENERAL.—Section 1221(i) of title 5, United States Code, is amended—

- (i) by striking “(i) Subsections” and inserting “(i)(1) Subsections”; and
- (ii) by adding at the end the following:

“(2)(A) If, in the case of an employee, former employee, or applicant for employment who seeks corrective action from the Merit Systems Protection Board based on an alleged prohibited personnel practice described in section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g), no final order or decision is issued by the Board within 180 days after the date on which a request for such corrective action has been duly submitted to the Board, such employee, former employee, or applicant may, after providing written notice to the Special Counsel and the Board and only within 20 days after providing such notice, bring an action for review de novo before the appropriate United States district court, and such action shall, at the request of either party to such action, be tried before a jury. Upon filing of an action with the appropriate United States district court, any proceedings before the Board shall cease and the employee, former employee, or applicant for employment waives any right to refile with the Board.

“(B) If the Board certifies (in writing) to the parties of a case that the complexity of such case requires a longer period of review, subparagraph (A) shall be applied by substituting ‘240 days’ for ‘180 days’.

“(C) In any such action brought before a United States district court under subparagraph (A), the court—

“(i) shall apply the standards set forth in subsection (e); and

“(ii) may award any relief which the court considers appropriate, including any relief described in subsection (g).”.

(B) APPLICATION.—

(i) The amendments made by subparagraph (A) shall apply to any corrective action duly submitted to the Merit Systems Protection Board, during the five-year period preceding the date of enactment of this Act, by an employee, former employee, or applicant for employment based on an alleged prohibited personnel practice described in section 2302(b)(8), 2302(b)(9)(A)(i), (B), (C), or (D), or 2302(b)(13) of title 5, United States Code, with respect to which no final order or decision has been issued by the Board.

(ii) In the case of an individual described in clause (i) whose duly submitted claim to the Board was made not later than 180 days before the date of enactment of this Act, such individual may only bring an action before a United States district court as described in section 1221(i)(2) of title 5, United States Code, (as added by subparagraph (A) if that individual—

(I) provides written notice to the Office of Special Counsel and the Merit Systems Protection Board not later than 90 days after the date of enactment of this Act; and

(II) brings such action not later than 20 days after providing such notice.

(d) **RECIPIENTS OF WHISTLEBLOWER DISCLOSURES.**—Section 2302(b)(8)(B) of title 5, United States Code, is amended by striking “or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures” and inserting “the Inspector General of an agency, a supervisor in the employee’s direct chain of command up to and including the head of the employing agency, or to an employee designated by any of the aforementioned individuals for the purpose of receiving such disclosures”.

(e) **ATTORNEY FEES.**—

(1) **IN GENERAL.**—Section 7703(a) of title 5, United States Code, is amended by adding at the end the following:

“(3) If an employee, former employee, or applicant for employment is the prevailing party under a proceeding brought under this section, the employee, former employee, or applicant for employment shall be entitled to attorney fees for all representation carried out pursuant to this section. In such an action for attorney fees, the agency responsible for taking the personnel action shall be the respondent and shall be responsible for paying the fees.”

(2) **APPLICATION.**—In addition to any proceeding brought by an employee, former employee, or applicant for employment on or after the date of enactment of this Act to a Federal court under section 7703 of title 5, United States Code, the amendment made by paragraph (1) shall apply to any proceeding brought by an employee, former employee, or applicant for employment under such section before the date of enactment of this Act with respect to which the applicable Federal court has not issued a final decision.

(f) **EXTENDING WHISTLEBLOWER PROTECTION ACT TO CERTAIN EMPLOYEES.**—

(1) **IN GENERAL.**—Section 2302(a)(2)(A) of title 5, United States Code, is amended in the matter following clause (xiii)—

(A) by inserting “subsection (b)(9)(A)(i), (B), (C), (D), or (E), subsection (b)(13), or subsection (g),” after “subsection (b)(8).”; and

(B) by inserting after “title 31” the following: “, a commissioned officer or applicant for employment in the Public Health Service, an officer or applicant for employment in the commissioned officer corps of the National Oceanic and Atmospheric Administration, and a noncareer appointee in the Senior Executive Service”.

(2) **CONFORMING AMENDMENTS.**—Section 261 of the National Oceanic and Atmospheric Administration Commissioned Officer Corps Act of 2002 (33 U.S.C. 3071) is amended—

(A) in subsection (a)—

(i) by striking paragraph (8); and

(ii) by redesignating paragraphs (9) through (26) as paragraphs (8) through (25), respectively; and

(B) in subsection (b), by striking the second sentence.

(3) **APPLICATION.**—

(A) **IN GENERAL.**—With respect to an officer or applicant for employment in the commissioned officer corps of the National Oceanic and Atmospheric Administration, the amendments made by paragraphs (1) and (2) shall apply to any personnel action taken against such officer or applicant on or after the date of enactment of the National Oceanic and Atmospheric Administration Commissioned Officer Corps Amendments Act of 2020 (Public Law 116–259) for making any disclosure protected under section 2302(8) of title 5, United States Code.

(B) **EXCEPTION.**—Subparagraph (A) shall not apply to any personnel action with respect to which a complaint has been filed pursuant to section 1034 of title 10, United States Code, and a final decision has been rendered regarding such complaint.

(g) **RELIEF.**—

(1) **IN GENERAL.**—Section 7701(b)(2)(A) of title 5, United States Code, is amended by striking “upon the making of the decision” and inserting “upon making of the decision, necessary to make the employee whole as if there had been no prohibited personnel practice, including training, seniority and promotions consistent with the employee’s prior record”.

(2) **APPLICATION.**—In addition to any appeal made on or after the date of enactment of this Act to the Merit Systems Protection Board under section 7701 of title 5, United States Code, the amendment made by paragraph (1) shall

apply to any appeal made under such section before the date of enactment of this Act with respect to which the Board has not issued a final decision.

SEC. 4. CLASSIFYING CERTAIN FURLOUGHS AS ADVERSE PERSONNEL ACTIONS.

- (a) IN GENERAL.—Section 7512 of title 5, United States Code, is amended—
- (1) in paragraph (4), by striking “and” at the end; and
 - (2) by striking paragraph (5) and inserting the following:
 - “(5) a furlough of more than 14 days but less than 30 days; and
 - “(6) a furlough of 13 days or less that is not due to a lapse in appropriations;”.
- (b) APPLICATION.—The amendment made by subsection (a) shall apply to any furlough covered by such section 7512(5) or (6) (as amended by such subsection) occurring on or after the date of enactment of this Act.

SEC. 5. CODIFICATION OF PROTECTIONS FOR DISCLOSURES OF CENSORSHIP RELATED TO RESEARCH, ANALYSIS, OR TECHNICAL INFORMATION.

(a) IN GENERAL.—Section 2302 of title 5, United States Code, as amended by section 2(c)(1), is further amended by adding at the end the following:

- “(h)(1) In this subsection—
- “(A) the term ‘applicant’ means an applicant for a covered position;
 - “(B) the term ‘censorship related to research, analysis, or technical information’ means any effort to distort, misrepresent, or suppress research, analysis, or technical information; and
 - “(C) the term ‘employee’ means an employee in a covered position in an agency.
- “(2)(A) Any disclosure of information by an employee or applicant for employment that the employee or applicant reasonably believes is evidence of censorship related to research, analysis, or technical information—
- “(i) shall come within the protections of subsection (b)(8)(A) if—
 - “(I) the employee or applicant reasonably believes that the censorship related to research, analysis, or technical information is or will cause—
 - “(aa) any violation of law, rule, or regulation; or
 - “(bb) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; and
 - “(II) such disclosure is not specifically prohibited by law or such information is not specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs; and
 - “(ii) shall come within the protections of subsection (b)(8)(B) if—
 - “(I) the employee or applicant reasonably believes that the censorship related to research, analysis, or technical information is or will cause—
 - “(aa) any violation of law, rule, or regulation; or
 - “(bb) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; and
 - “(II) the disclosure is made to the Special Counsel, or to the Inspector General of an agency or another person designated by the head of the agency to receive such disclosures, consistent with the protection of sources and methods.
- “(3) A disclosure shall not be excluded from paragraph (2) for any reason described under subsection (f)(1) or (2).
- “(4) Nothing in this subsection shall be construed to imply any limitation on the protections of employees and applicants afforded by any other provision of law, including protections with respect to any disclosure of information believed to be evidence of censorship related to research, analysis, or technical information.”.

(b) REPEAL.—

(1) IN GENERAL.—Section 110 of the Whistleblower Protection Enhancement Act of 2012 (Public Law 112–199) is hereby repealed.

(2) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to limit or otherwise affect any action under such section 110 commenced before the date of enactment of this Act or any protections afforded by such section with respect to such action.

SEC. 6. TITLE 5 TECHNICAL AND CONFORMING AMENDMENTS.

Title 5, United States Code, is amended—

- (1) in section 1212(h), by striking “or (9)” each place it appears and inserting “, (b)(9), (b)(13), or (g)”;
- (2) in section 1214—
 - (A) in subsections (a) and (b), by striking “section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D)” each place it appears and inserting “section

2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g)”; and

(B) in subsection (i), by striking “section 2302(b)(8) or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9)” and inserting “section 2302(b)(8), subparagraph (A)(i), (B), (C), (D), or (E) of section 2302(b)(9), section 2302(b)(13), or section 2302(g)”;

(3) in section 1215(a)(3)(B), by striking “section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)” each place it appears and inserting “section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g)”;

(4) in section 2302—

(A) in subsection (a)—

(i) in paragraph (1), by inserting “or (g)” after “subsection (b)”;

(ii) in paragraph (2)(C)(i), by striking “subsection (b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D)” and inserting “section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g)”;

(B) in subsection (c)(1)(B), by striking “paragraph (8) or subparagraph (A)(i), (B), (C), or (D) of paragraph (9) of subsection (b)” and inserting “paragraph (8), subparagraph (A)(i), (B), (C), or (D) of paragraph (9), or paragraph (13) of subsection (b) or subsection (g)”;

(5) in section 7515(a)(2), by striking “paragraph (8), (9), or (14) of section 2302(b)” and inserting “paragraph (8), (9), (13), or (14) of section 2302(b) or section 2302(g)”;

(6) in section 7701(c)(2)(B), by inserting “or section 2302(g)” after “section 2302(b)”;

(7) in section 7703(b)(1)(B), by striking “section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)” and inserting “section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g)”.

SUMMARY AND PURPOSE OF LEGISLATION

The Whistleblower Protection Improvement Act of 2021, H.R. 2988, would create new federal whistleblower protections, including strengthened protections against retaliatory investigations and protections for disclosures to Congress; expand and clarify existing protections, including protections against the disclosure of a whistleblower’s identity; establish new procedures to ensure that employees receive timely relief for their retaliation claims; and extend protections to noncareer Senior Executive Service employees, Public Health Service officers or applicants, and the Commissioned Officer Corps of the National Oceanic and Atmospheric Administration (NOAA).

BACKGROUND AND NEED FOR LEGISLATION

Federal whistleblowers are an integral part of our constitutional system of checks and balances. However, whistleblowers act at great personal risk and often face retaliation. Being a whistleblower often means risking one’s career. The Government Accountability Office (GAO) recently found that federal employees who filed whistleblower complaints were terminated at a higher rate than other employees.¹ Since our country’s founding, Congress has recognized the need to provide statutory protections to these brave public servants—America’s first whistleblower protection law was enacted by the Continental Congress in July 1778.²

Federal whistleblowers provide critical information to Congress and the executive branch on government corruption and wrong-

¹Government Accountability Office, *Whistleblowers: Office of Special Counsel Should Require Information on the Probationary Status of Whistleblowers* (May 28, 2020) (GAO-20-436) (online at www.gao.gov/assets/gao-20-436.pdf).

²Stephen M. Kohn, *The Whistle-Blowers of 1777*, *New York Times* (June 12, 2011) (online at www.nytimes.com/2011/06/13/opinion/13kohn.html).

doing. Whistleblower disclosures have saved lives, exposed corruption, and recovered untold amounts of taxpayer dollars. For example, a former scientist at the Department of Health and Human Services shared his concerns about the strategy for addressing the coronavirus pandemic³ and federal and private company whistleblowers provided information that helped the Committee on Oversight and Reform obtain a \$16.1 million refund to the Department of Defense from a defense contractor that overcharged the government for spare military aircraft parts.⁴

The Committee considered H.R. 2988 at a hearing on May 3, 2021 and heard testimony from multiple nonpartisan experts on the need for additional whistleblower protections. Elizabeth Hempowicz, Director of Public Policy at the Project on Government Oversight, testified about the need to enact H.R. 2988:

I couldn't encourage Congress to pass it more. I think it's critically necessary, and I think it really does address some of the biggest loopholes and most consequential loopholes in our whistleblower laws today.⁵

In a written statement for the hearing record, Thomas Devine, Legal Director of the Government Accountability Project, stated:

This legislation is desperately needed, because the structures to defend the non-partisan, professional merit system are dormant when needed most as our nation prepares for unprecedented spending to meet unprecedented challenges. . . .

The Whistleblower Protection Improvement Act directly addresses the structural weaknesses that doomed previous mandates in principle. When we need America's federal whistleblowers most, it will upgrade their protection from a mirage to global best practices against workplace harassment.⁶

Measures enhancing whistleblower protections against retaliation have received strong bipartisan support over the years and have historically passed Congress with near unanimity. For example, every Republican Member of the 114th Congress joined a unanimous vote to increase penalties for retaliation against whistleblowers.⁷ During the 116th Congress, Rep. Mark Meadows advocated for enhanced whistleblower rights on the House floor: "Whistleblowers in the Federal Government should be able to tell their supervisor when something is going wrong. That is the truth, no matter what."⁸

H.R. 2988 has also received bipartisan support. Rep. Nancy Mace urged her Republican colleagues to support the bill:

³ Committee on Oversight and Reform, *Press Release: Select Subcommittee Releases New Evidence of Trump Administration's Failure to Address Supply Shortages* (Mar. 31, 2021) (online at <https://oversight.house.gov/news/press-releases/select-subcommittee-releases-new-evidence-of-trump-administration-s-failure-to>).

⁴ See Committee on Oversight and Reform, *Press Release: TransDigm to Refund \$16.1 Million as a Result of Committee Investigation* (May 24, 2019) (online at <https://oversight.house.gov/news/press-releases/transdigm-to-refund-161-million-to-dod-as-a-result-of-committee-investigation>).

⁵ Committee on Oversight and Reform, *Hearing on Improving Government Accountability and Transparency* (May 3, 2021) (online at <https://oversight.house.gov/legislation/hearings/improving-government-accountability-and-transparency>).

⁶ Government Accountability Project, *Written Testimony of Thomas Devine, Legal Director* (May 3, 2021) (online at <https://docs.house.gov/meetings/GO/GO00/20210503/112523/HHRG-117-GO00-20210503-SD008.pdf>).

⁷ H.R. 5790, 114th Cong. (2016).

⁸ U.S. House of Representatives, Debate on H.R. 1064 (Feb. 1, 2019) (online at www.congress.gov/congressional-record/2019/02/11/house-section/article/H1499-1).

When Americans alert the nation to waste, fraud, and abuse by the federal government, they take immense personal, professional, and emotional risks. Right now, these brave citizens are vulnerable to vicious campaigns of intimidation and retaliation which put their ability to provide for their families in jeopardy. Whistleblowers help root out corruption and we must ensure they aren't victimized or silenced by those who seek to abuse their power.⁹

A group of 267 organizations that represent diverse viewpoints encouraged President Biden and congressional leaders to improve whistleblower protections on April 1, 2021:

We urge your leadership now to expeditiously implement what Congress intended when it passed the WPEA [Whistleblower Protection Enhancement Act of 2012], and to expand best practice rights where needed most—for the integrity of pandemic relief legislation along with other public health work, for honest law enforcement officers challenging police abuses of power, and for all congressional witnesses.¹⁰

H.R. 2988 has also received support from the Make It Safe Coalition, a bi-partisan, trans-ideological coalition of individuals and 75 non-governmental organizations. The coalition's steering committee comprises organizations spanning the ideological spectrum, including the Government Accountability Project, the National Taxpayers Union, the Project on Government Oversight, the Taxpayer Protection Alliance, and Whistleblowers of America.¹¹

NEW AND EXPANDED WHISTLEBLOWER PROTECTIONS

H.R. 2988 would establish several new protections for whistleblowers. Section 2(a) would prohibit investigations or referrals to inspectors general in retaliation against protected whistleblower activity. This change fills a critical hole created by a 2020 Federal Circuit Court decision that held that current whistleblower laws only prohibit a retaliatory investigation if the investigation ultimately resulted in a "significant change" in the employee's working conditions.¹²

Section 2(c) would prohibit federal employees from publicly disclosing the identity of an employee because of that employee's whistleblowing activity. Public disclosure of a whistleblower's identity can lead to threats against a whistleblower's career, well-being, and even life. Attempts to out whistleblowers also deter other potential whistleblowers from coming forward.

Section 2(d) would amend the Lloyd-La Follette Act, 5 U.S.C. § 7211, to make clear that no officer or employee of the federal government—including the president or vice president—may interfere with or retaliate against a federal employee for sharing information

⁹ Representative Nancy Mace, *Press Release: Rep. Mace Cosponsor Bipartisan Whistleblower Protection Bill* (May 4, 2021) (online at <https://mace.house.gov/media/press-releases/rep-mace-cosponsors-bipartisan-whistleblower-protection-bill>).

¹⁰ Government Accountability Project, *Press Release: Government Accountability Project and 266 Advocacy Organizations Call on President Biden and Congress to Pass Stronger Whistleblower Protections* (Apr. 1, 2020) (online at www.whistleblower.org/press-release/press-release-government-accountability-project-and-264-advocacy-organizations-call-on-president-biden-and-congress-to-pass-stronger-whistleblower-protections/).

¹¹ Letter from Steering Committee, Make It Safe Coalition, to Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform (May 3, 2021) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/MISC%20WPIA%20Support%20Letter.pdf>).

¹² *Sistek v. Department of Veterans Affairs*, 955 F.3d 948 (Fed. Cir. 2020).

with Congress. This subsection also clarifies that federal officers and employees have the right to petition Congress, provide information to Congress, and respond to congressional requests for information.

The new protections in this bill will help prevent the retaliation some whistleblowers have historically faced, such as retaliation for cooperating with congressional requests for documents and testimony.

In another example, Transportation Security Administration officials moved employees to new duty stations because the employees alerted Congress about their concerns with security at the airports where they worked. These supervisors used involuntary reassignments as a reprisal tactic to punish these whistleblowers, forcing them to move their families hundreds of miles away.¹³

Section 3(d) would expand existing whistleblower protections. It would strengthen whistleblower protections to cover disclosures to an employee's supervisor or others in an employee's supervisory chain of command, closing a loophole in current law. One recent example of this "chain-of-command" retaliation was when a White House supervisor moved files beyond the reach of an employee who reported concerns to her supervisor, and to the Committee, about White House security clearance practices in 2019.¹⁴

Section 3(f) of H.R. 2988 would extend existing whistleblower protections to noncareer Senior Executive Service employees, Public Health Service officers or applicants, and the Commissioned Officer Corps of NOAA. On January 25, 2021, Rep. Eddie Bernice Johnson, Chairwoman of the House Committee on Science, Space, and Technology, wrote a letter to Chairwoman Maloney emphasizing the importance of extending these protections to the NOAA Corps to ensure that they have the same protections as other NOAA employees.¹⁵

PROCEDURAL IMPROVEMENTS

H.R. 2988 includes several procedural improvements to ensure that whistleblowers have rights to effective process and equitable relief.

Section 3(a) would enable the Office of Special Counsel to refer disclosures of alleged misconduct by an officer or employee of an Office of Inspector General (OIG) to the Integrity Committee of the Council of the Inspectors General on Integrity and Efficiency. This change would allow for a more efficient process to ensure allegations involving OIGs are promptly investigated by the Integrity Committee, the body that Congress has tasked with investigating this kind of misconduct.

Section 3(c) would require timely consideration and appeals of employees' requests for stays of personnel actions and would establish a more permissive legal standard for such requests. It also

¹³ Minority Staff, Committee on Oversight and Reform, *Urgent Reforms Needed at TSA*, 115th Cong. (Sept. 2018) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Democratic%20Staff%20Report%20on%20TSA%20Investigation.pdf>).

¹⁴ *White House Whistleblower Says She Felt Humiliated After Retaliation from Boss*, NBC News (Apr. 2, 2019) (online at www.nbcnews.com/politics/white-house/white-house-whistleblower-says-she-felt-humiliated-after-retaliation-boss-n990171).

¹⁵ Letter from Chairwoman Eddie Bernice Johnson, Committee on Science, Space, and Technology, to Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform (Jan. 25, 2021) (online at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/NOAA%20CORPS%20WPA%20Chair%20to%20Chair%20Letter_.pdf).

would expand employees' rights to challenge executive branch non-disclosure agreements that limit the employees' ability to share information with Congress, report violations of law to an inspector general, or engage in any other protected whistleblowing activity.

This subsection would empower an employee to file an action directly with the appropriate United States district court if the Merit Systems Protection Board (MSPB) fails to issue a final order or decision within 180 days (or 240 days for complex cases) of receiving the employee's request for corrective action. MSPB lacked a quorum between January 2017 and March 2022.¹⁶ Vacancies at MSPB resulted in a historic backlog of more than 770 whistleblower cases.¹⁷ This provision, which is retroactive for a period of five years, would provide a new avenue for relief for employees whose claims have been stymied by MSPB's lack of a quorum.

This subsection would also require that the case in district court be tried before a jury upon request by either party. Access to jury trials has been a longtime priority of whistleblower advocates. In 2012, then-Ranking Member Elijah Cummings said on passage of the Whistleblower Protection Enhancement Act:

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. . . . [W]e need to amend the law to allow whistleblowers the ability to go to court and have their case heard by a jury.¹⁸

Section 3(e) would make clear that an employee would also be entitled to recover attorney fees if the employee prevails in judicial review of a decision by MSPB, bringing the remedy for this procedural right in line with other protections of employee rights. Section 3(g) would also make clear that an employee who prevails in an appeal to MSPB is entitled to the relief necessary to make the employee whole, including training, seniority, and promotions consistent with the employee's record.

SECTION-BY-SECTION ANALYSIS

Sec. 1. Short title

The short title is the "Whistleblower Protection Improvement Act of 2021."

Sec. 2. Additional whistleblower protections

Subsection (a)—Investigations as Personnel Actions

Paragraph (1) amends subsection (a) of section 2302 of title 5, United States Code, to prohibit retaliatory investigations against any covered employee who engages in whistleblowing activity pro-

¹⁶ Merit Systems Protection Board, *Frequently Asked Questions About the Lack of Board Quorum and Lack of Board Members* (Mar. 4, 2022) (online at www.mspb.gov/FAQs_Absence_of_Board_Quorum_March_4_2022.pdf).

¹⁷ *MSPB Confirms Backlog of 3118 Federal Employment Cases*, Whistleblower News Network (Jan. 29, 2021) (online at www.whistleblowersblog.org/2021/01/articles/exclusives/wnn-exclusive-mspb-confirms-backlog-of-3118-federal-employment-cases/).

¹⁸ Committee on Oversight and Reform, *Press Release: Cummings Lauds House Passage of "Whistleblower Protection Enhancement Act of 2012"* (Sept. 28, 2012) (online at <https://oversight.house.gov/news/press-releases/cummings-lauds-house-passage-of-whistleblower-protection-enhancement-act-of-2012>).

tected by 5 U.S.C. § 2302(b)(8). This prohibition covers the commencement, expansion, or extension of any investigation, or a retaliatory referral to an inspector general, but does not include investigations or referrals that are ministerial or nondiscretionary.

Paragraph (2) applies the amendment made by paragraph (1) to investigations opened or referrals made on or after the date of enactment of the Act.

Subsection (b)—Right to Petition Congress

Paragraph (1) amends subsection (b) of section 2302 of title 5, United States Code, to prohibit retaliation against any covered employee for sharing information with Congress, as protected by section 7211 of title 5, United States Code.

Paragraph (2) applies the amendment made by paragraph (1) to conduct occurring on or after the date of enactment of the Act.

Subsection (c)—Prohibition on Disclosure of Whistleblower Identity

Paragraph (1) amends section 2302 of title 5, United States Code, by adding a new subsection (g), which limits public disclosure of the identity of an employee who engages in whistleblowing activity protected by section 2302. Specifically, the provision prohibits disclosure outside the federal government of an employee's identity or personally identifiable information, because of that individual's protected whistleblower activity or suspicion that the individual engaged in protected activity. Public disclosure of the individual's identity or identifying information is allowed only if: (1) the individual provides written consent; (2) the disclosure is made pursuant to federal records requirements in section 552a of title 5, United States Code; (3) the disclosure is to a lawyer for the sole purpose of providing legal advice for an employee accused of retaliation; or (4) if the disclosure is otherwise required or expressly permitted by law.

Paragraph (2) applies the amendment made by paragraph (1) to disclosures occurring on or after the date of enactment of the Act.

Subsection (d)—Right to Petition Congress

Paragraph (1) amends section 7211 of title 5, United States Code, to clarify that no officer or employee of the federal government—including the president or vice president—may interfere with or retaliate against a federal employee for sharing information with Congress. The provision also clarifies current law to expressly provide federal officers and employees the right to petition Congress; furnish information, documents, or testimony to Congress; and respond to any congressional request for information, documents, or testimony.

Paragraph (2) makes a conforming technical change to the table of sections for subchapter II of chapter 72 of title 5, United States Code.

Sec. 3. Enhancement of whistleblower protections

Subsection (a)—Disclosures Relating to Officers or Employees of an Office of Inspector General

Subsection (a) amends subsection (c) of section 1213 of title 5, United States Code, to permit the Office of Special Counsel to refer disclosures of misconduct by an officer or employee of an Office of Inspector General to the Council of the Inspectors General on Integrity and Efficiency.

Subsection (b)—Retaliatory Referrals to Inspectors General

Subsection (b) amends subsection (d) of section 1214 of title 5, United States Code, to require that, if the Special Counsel determines that a referral to an inspector general was made in retaliation for protected whistleblowing activity, the Special Counsel shall transmit that finding in writing to that inspector general within seven days of making the finding, and the inspector general shall consider that finding in determining whether to initiate or continue the investigation based on that retaliatory referral.

Subsection (c)—Ensuring Timely Referral

Paragraph (1) amends various subsections of section 1221 of title 5, United States Code, to allow an employee to bring an individual right of action to challenge an executive branch nondisclosure agreement that limits the employee's ability to share information with Congress, report violations of law to an inspector general, or engage in any other protected whistleblowing activity.

Paragraph (2) amends subsection (c) of section 1221 to provide for timely consideration of an employee's request to the Merit Systems Protection Board for a stay of a personnel action and provides that the Board shall issue a stay if it determines that there is a substantial likelihood that the employee's protected activity was a contributing factor to the personnel action, or if a stay is otherwise appropriate.

Paragraph (3) amends subsection (c) of section 1221 to provide for prompt consideration of an employee's appeal of a decision to deny a stay of a personnel action, requiring the Merit Systems Protection Board to provide a decision on the appeal within 21 days of receiving the appeal.

Paragraph (4) amends subsection (i) of section 1221 to empower an employee to file an action directly with the appropriate United States district court if the Merit Systems Protection Board fails to issue a final order or decision within 180 days (or 240 days for cases that the board certifies in writing require a longer period due to complexity) of receiving the employee's request for corrective action. These amendments apply to any request submitted to the Board during the five-year period preceding the date of enactment of the Act.

Subsection (d)—Recipients of Whistleblower Disclosures

Subsection (d) amends subsection (b) of section 2302 of title 5, United States Code, to clarify that an employee's disclosures to a "supervisor in the employee's direct chain of command" are protected disclosures for the purposes of federal whistleblower protec-

tions, in addition to disclosures to the Special Counsel, the inspector general, or other designated entities.

Subsection (e)—Attorney Fees

Paragraph (1) amends subsection (a) of section 7703 of title 5, United States Code, to clarify that an employee is entitled to recover attorney fees if the employee prevails in judicial review of a decision by the Merit Systems Protection Board.

Paragraph (2) applies the amendment made by paragraph (1) to any proceeding brought before the date of enactment of the Act with respect to any action in which the applicable court has not issued a final decision, in addition to proceedings brought after the date of enactment.

Subsection (f)—Extending Whistleblower Protection Act to Certain Employees

Paragraph (1) amends subsection (a) of section 2302 of title 5, United States Code, to extend protections under the Whistleblower Protection Act to all noncareer appointees in the Senior Executive Service, to officers or applicants of the Public Health Service, and to the commissioned officer corps of the National Oceanic and Atmospheric Administration.

Paragraph (2) makes conforming technical changes to section 3071 of title 33, United States Code.

Paragraph (3) applies the amendments made by paragraphs (1) and (2) to personnel actions taken after the date of enactment of the Act.

Subsection (g)—Relief

Paragraph (1) amends subsection (b) of section 7701 of title 5, United States Code, to clarify that when an employee is the prevailing party in an appeal to the Merit Systems Protection Board, the employee shall be granted relief necessary to make the employee whole, including training, seniority, and promotions consistent with the employee's record.

Paragraph (2) applies the amendment made by paragraph (1) to any appeal made before the date of enactment of the Act for which the Board has not issued a final decision, in addition to any appeal made after the date of enactment.

Sec. 4. Clarifying certain furloughs as adverse personnel actions

Subsection (a)—In General

Subsection (a) amends section 7512 of title 5, United States Code, to specify that furloughs of 13 days or less caused by a lapse in appropriations are not adverse actions for the purposes of the procedures set forth in sections 7513, 7514, and 7515 of title 5, United States Code.

Subsection (b)—Application

Subsection (b) makes the amendment made by subsection (a) applicable to furloughs on or after the date of enactment of the Act.

Sec. 5. Codification of protections for disclosures of censorship related to research, analysis, or technical information

Subsection (a)—In General

Subsection (a) amends section 2302 of title 5, United States Code, to add a new subsection (h) to codify protections previously enacted in Section 110 of the Whistleblower Protection Enhancement Act of 2012, which prohibit retaliation against a covered employee for disclosures the employee reasonably believes show evidence of censorship of research, analysis, or technical information.

Subsection (b)—Repeal

Subsection (b) repeals language from the Whistleblower Protection Enhancement Act of 2012 made redundant by the amendment made by subsection (a).

Sec. 6. Title 5 technical and conforming amendments

This section makes technical and conforming changes to various sections of title 5, United States Code, to account for changes made throughout the Act.

LEGISLATIVE HISTORY

During the 117th Congress, on May 4, 2021, Representatives Carolyn B. Maloney (D-NY), Chairwoman of the Committee; Nancy Mace (R-SC); Eddie Bernice Johnson (D-TX), Chair of the Committee on Science, Space, and Technology; Gerald E. Connolly (D-VA), Chairman of the Subcommittee on Government Operations; Jackie Speier (D-CA); and Kathleen M. Rice (D-NY) introduced H.R. 2988, the Whistleblower Protection Improvement Act. H.R. 2988 was referred to the Committee on Oversight and Reform.

On May 3, 2021, the Committee held a hearing to consider proposals in H.R. 2988. The Committee heard testimony from James-Christian Blockwood, Executive Vice President of the Partnership for Public Service; Elizabeth Hempowicz, Director of Public Policy for the Project on Government Oversight; Rudy Mehrbani, Senior Advisor of the Democracy Fund; and Zack Smith, Legal Fellow of the Heritage Foundation.

On June 29, 2021, the Committee considered H.R. 2988 at a business meeting with a quorum present. The Committee ordered the bill reported favorably, as amended, by voice vote.

Also during the 117th Congress, on September 21, 2021, Representative Adam Schiff introduced H.R. 5314, the Protecting Our Democracy Act, with Chairwoman Maloney and several other committee chairs and Members. Subtitle A of title VIII of H.R. 5314 is substantially the same text as the Whistleblower Protection Improvement Act, as reported favorably by the Committee in the 117th Congress. On December 9, 2021, H.R. 5314 was passed by the House of Representatives by a bipartisan vote of 220–208.

During the 116th Congress, on August 4, 2020, Representatives Carolyn B. Maloney (D-NY), Chairwoman of the Committee; Gerald E. Connolly (D-VA), Chairman of the Subcommittee on Government Operations; and Jackie Speier (D-CA) introduced H.R. 7935, the Whistleblower Protection Improvement Act, with substantially the same text as the version in the 117th Congress. H.R. 7935 was referred to the Committee on Oversight and Reform.

On September 23, 2020, Representative Adam Schiff introduced H.R. 8363, the Protecting Our Democracy Act, with Chairwoman Maloney and several other committee chairs and Members. Subtitle A of title VIII of H.R. 8363 is the same text as the Whistleblower Protection Improvement Act as introduced in the 116th Congress.

Also during the 116th Congress, on February 7, 2019, Representative Katie Hill (D-CA) and Representative Mark Meadows (R-NC), then-Ranking Member of the Subcommittee on Government Operations, introduced H.R. 1064, a bill containing substantially the same text as subsection (c) of section 3 of the Whistleblower Protection Improvement Act, as introduced in both the 116th and 117th Congresses. On February 11, 2019, H.R. 1064 was passed by the House of Representatives by voice vote.

COMMITTEE CONSIDERATION

On June 29, 2021, the Committee considered H.R. 2988 at a business meeting. Chairwoman Maloney offered an amendment in the nature of a substitute (ANS), and the Committee ordered the bill as amended favorably reported by voice vote.

ROLL CALL VOTES

There were no roll call votes during consideration of H.R. 2988.

EXPLANATION OF AMENDMENTS

Chairwoman Maloney offered an ANS that modified the bill to: (1) clarify the definition of a retaliatory investigation and retaliatory referral to an OIG; (2) add a causation requirement to the prohibition on public disclosure of a whistleblower's identity, prohibiting such disclosure because of actual or suspected whistleblowing activity; (3) add a requirement that, if the Special Counsel determines that a referral to an OIG was in retaliation for protected whistleblowing activity, the Special Counsel must communicate that finding in writing to the relevant OIG within seven days; (4) make the provision granting whistleblowers the right to a jury trial retroactive for claims filed to MSPB for up to five years prior to the date of enactment; and (5) provide other technical and conforming changes. The ANS passed by voice vote.

LIST OF RELATED COMMITTEE HEARINGS

In accordance with section 103(i) of H. Res. 6, the Committee considered the proposals set forth in H.R. 2988 on May 3, 2021, as part of a hearing to consider various government accountability and transparency legislative proposals.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee finds that expanded substantive and procedural protections for federal whistleblowers are necessary to protect civil servants who act with great personal risk to uncover waste, fraud, abuse, and misconduct in the government, such that the Committee recommends the adoption of this bill (H.R. 2988) to ensure that whis-

tleblowers can continue serving a critical accountability function and be protected from retaliation for exposing wrongdoing.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goal or objective of this bill is to amend title 5, United States Code, to modify and enhance protections for federal government whistleblowers, and for other purposes.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104-1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill amends title 5, United States Code, to modify and enhance protections for federal government whistleblowers, and for other purposes. As such, this bill does not relate to terms and conditions of employment or access to public services or accommodations.

DUPLICATION OF FEDERAL PROGRAMS

In accordance with clause 3(c)(5) of rule XIII, no provision of this bill establishes or reauthorizes a program of the federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

This bill does not direct the completion of any specific rule makings within the meaning of section 551 of title 5, United States Code.

FEDERAL ADVISORY COMMITTEE ACT STATEMENT

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

UNFUNDED MANDATES REFORM ACT STATEMENT

Pursuant to section 423 of the Congressional Budget Act of 1974, the Committee has included a letter received from the Congressional Budget Office below.

EARMARK IDENTIFICATION

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

COMMITTEE COST ESTIMATE

Pursuant to clause 3(d)(2)(B) of rule XIII of the Rules of the House of Representatives, the Committee includes below a cost es-

estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

NEW BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE
COST ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the House of Representatives, the cost estimate prepared by the Congressional Budget Office and submitted pursuant to section 402 of the Congressional Budget Act of 1974 is as follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 27, 2022.

Hon. CAROLYN B. MALONEY,
*Chairwoman, Committee on Oversight and Reform,
House of Representatives, Washington, DC.*

DEAR MADAM CHAIRWOMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2988, the Whistleblower Protection Improvement Act of 2021.

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

Sincerely,

PHILLIP L. SWAGEL,
Director.

Enclosure.

H.R. 2988, Whistleblower Protection Improvement Act of 2021			
As ordered reported by the House Committee on Oversight and Reform on June 29, 2021			
By Fiscal Year, Millions of Dollars	2022	2022-2026	2022-2031
Direct Spending (Outlays)	0	4	9
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	4	9
Spending Subject to Appropriation (Outlays)	0	15	not estimated
Statutory pay-as-you-go procedures apply?	Yes	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2032?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No

H.R. 2988 would create new protections for federal employees who report fraud or other improprieties, expand and clarify existing protections, and establish new procedures to ensure that employees receive timely relief if their claims of retaliation are affirmed. The bill also would extend whistleblower protections to noncareer appointees in the Senior Executive Service, Public Health Service officers or applicants, and members of the National Oceanic and Atmospheric Administration's commissioned officer corps.

Specifically, the bill would:

- Prohibit federal employees from disclosing a whistleblower’s identity,
- Grant whistleblowers the right to furnish information to the Congress,
- Permit whistleblowers to seek a review in district court if a retaliation claim is not adjudicated within 180 days,
- Require federal agencies to pay attorneys’ fees for employees or former employees who prevail in proceedings before the Merit Systems Protection Board (MSPB), and
- Establish protections for federal employees who disclose censorship of research or technical information.

The costs of the legislation, detailed in Table 1, fall within budget function 800 (general government).

TABLE 1.—ESTIMATED BUDGETARY EFFECTS OF H.R. 2988

	By fiscal year, millions of dollars—											
	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2022–2026	2022–2031
Increases in Direct Spending ^a												
Estimated Budget Authority	0	1	1	1	1	1	1	1	1	1	4	9
Estimated Outlays	0	1	1	1	1	1	1	1	1	1	4	9
Increases in Spending Subject to Appropriation												
Estimated Authorization	0	3	4	4	4	n.e.	n.e.	n.e.	n.e.	n.e.	15	n.e.
Estimated Outlays	0	3	4	4	4	n.e.	n.e.	n.e.	n.e.	n.e.	15	n.e.

^a Components may not sum to totals because of rounding; n.e. = not estimated.
^a Payments for successful whistleblower claims and related attorney fees would be paid from the Judgment Fund (a permanent indefinite appropriation). Under the No Fear Act (Public Law 107–174), spending from the Judgment Fund would be reimbursed from discretionary funds appropriated to the federal agency where the claim arose. Those reimbursements are not counted as reductions in direct spending because they are dependent on future appropriations.

For this estimate, CBO assumes that the bill will be enacted late in fiscal year 2022.

H.R. 2988 would allow some whistleblowers who prevail in an action before the MSPB to be reimbursed for attorneys’ fees. Some awards could be significant and initially would be paid from the Judgment Fund (a permanent, indefinite appropriation used to pay claims against the government), which would be reimbursed by the federal agency involved. Using a historical analysis of whistleblower cases and information from the Office of Special Counsel (OSC) and the MSPB, CBO estimates that enacting H.R. 2988 would increase direct spending by \$9 million over the 2022–2031 period for payments to whistleblowers and for attorneys’ fees.

Over the 2015–2020 period, OSC received about 1,500 new cases annually for investigation. Using information from OSC and the MSPB, CBO expects that the bill would increase costs for those agencies by \$3 million annually (or about a 5 percent increase in their costs) for investigation and administration. Additionally, all federal agencies would incur some new costs for training and employee education and some federal agencies would be required to reimburse the Judgment Fund for successful claims. Those reimbursements would generally be made one year after an award was paid. In total, CBO estimates that implementing H.R. 2988 would cost \$15 million over the 2022–2026 period; any spending would be subject to the availability of appropriated funds.

The CBO staff contacts for this estimate are Matthew Pickford and Sofia Guo. The estimate was reviewed by H. Samuel Papanfuss, Deputy Director of Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

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

TITLE 5, UNITED STATES CODE

* * * * *

PART II—CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

* * * * *

CHAPTER 12—MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

* * * * *

SUBCHAPTER II—OFFICE OF SPECIAL COUNSEL

* * * * *

§ 1212. Powers and functions of the Office of Special Counsel

- (a) The Office of Special Counsel shall—
 - (1) in accordance with section 1214(a) and other applicable provisions of this subchapter, protect employees, former employees, and applicants for employment from prohibited personnel practices;
 - (2) receive and investigate allegations of prohibited personnel practices, and, where appropriate—
 - (A) bring petitions for stays, and petitions for corrective action, under section 1214; and
 - (B) file a complaint or make recommendations for disciplinary action under section 1215;
 - (3) receive, review, and, where appropriate, forward to the Attorney General or an agency head under section 1213, disclosures of violations 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 or safety;
 - (4) review rules and regulations issued by the Director of the Office of Personnel Management in carrying out functions under section 1103 and, where the Special Counsel finds that any such rule or regulation would, on its face or as implemented, require the commission of a prohibited personnel practice, file a written complaint with the Board; and
 - (5) investigate and, where appropriate, bring actions concerning allegations of violations of other laws within the jurisdiction of the Office of Special Counsel (as referred to in section 1216).

(b)(1) The Special Counsel and any employee of the Office of Special Counsel designated by the Special Counsel may administer oaths, examine witnesses, take depositions, and receive evidence.

(2) The Special Counsel may—

(A) issue subpoenas; and

(B) order the taking of depositions and order responses to written interrogatories;

in the same manner as provided under section 1204.

(3)(A) In the case of contumacy or failure to obey a subpoena issued under paragraph (2)(A), the Special Counsel may apply to the Merit Systems Protection Board to enforce the subpoena in court pursuant to section 1204(c).

(B) A subpoena under paragraph (2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in the manner referred to in subsection (d) of section 1204, and the United States District Court for the District of Columbia may, with respect to any such individual, compel compliance in accordance with such subsection.

(4) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

(5)(A) Except as provided in subparagraph (B), the Special Counsel, in carrying out this subchapter, is authorized to—

(i) have timely access to all records, data, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable agency that relate to an investigation, review, or inquiry conducted under—

(I) section 1213, 1214, 1215, or 1216 of this title; or

(II) section 4324(a) of title 38;

(ii) request from any agency the information or assistance that may be necessary for the Special Counsel to carry out the duties and responsibilities of the Special Counsel under this subchapter; and

(iii) require, during an investigation, review, or inquiry of an agency, the agency to provide to the Special Counsel any record or other information that relates to an investigation, review, or inquiry conducted under—

(I) section 1213, 1214, 1215, or 1216 of this title; or

(II) section 4324(a) of title 38.

(B)(i) The authorization of the Special Counsel under subparagraph (A) shall not apply with respect to any entity that is an element of the intelligence community, as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 3003), unless the Special Counsel is investigating, or otherwise carrying out activities relating to the enforcement of, an action under subchapter III of chapter 73.

(ii) An Inspector General may withhold from the Special Counsel material described in subparagraph (A) if the Inspector General determines that the material contains information derived from, or pertaining to, intelligence activities.

(iii) The Attorney General or an Inspector General may withhold from the Special Counsel material described in subparagraph (A) if—

(I)(aa) disclosing the material could reasonably be expected to interfere with a criminal investigation or prosecution that is

ongoing as of the date on which the Special Counsel submits a request for the material; or

(bb) the material—

(AA) may not be disclosed pursuant to a court order; or

(BB) has been filed under seal under section 3730 of title 31; and

(II) the Attorney General or the Inspector General, as applicable, submits to the Special Counsel a written report that describes—

(aa) the material being withheld; and

(bb) the reason that the material is being withheld.

(C)(i) A claim of common law privilege by an agency, or an officer or employee of an agency, shall not prevent the Special Counsel from obtaining any material described in subparagraph (A)(i) with respect to the agency.

(ii) The submission of material described in subparagraph (A)(i) by an agency to the Special Counsel may not be deemed to waive any assertion of privilege by the agency against a non-Federal entity or against an individual in any other proceeding.

(iii) With respect to any record or other information made available to the Special Counsel by an agency under subparagraph (A), the Special Counsel may only disclose the record or information for a purpose that is in furtherance of any authority provided to the Special Counsel under this subchapter.

(6) The Special Counsel shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate, the Committee on Oversight and Government Reform of the House of Representatives, and each committee of Congress with jurisdiction over the applicable agency a report regarding any case of contumacy or failure to comply with a request submitted by the Special Counsel under paragraph (5)(A).

(c)(1) Except as provided in paragraph (2), the Special Counsel may as a matter of right intervene or otherwise participate in any proceeding before the Merit Systems Protection Board, except that the Special Counsel shall comply with the rules of the Board.

(2) The Special Counsel may not intervene in an action brought by an individual under section 1221, or in an appeal brought by an individual under section 7701, without the consent of such individual.

(d)(1) The Special Counsel may appoint the legal, administrative, and support personnel necessary to perform the functions of the Special Counsel.

(2) Any appointment made under this subsection shall be made in accordance with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33).

(e) The Special Counsel may prescribe such regulations as may be necessary to perform the functions of the Special Counsel. Such regulations shall be published in the Federal Register.

(f) The Special Counsel may not issue any advisory opinion concerning any law, rule, or regulation (other than an advisory opinion concerning chapter 15 or subchapter III of chapter 73).

(g)(1) The Special Counsel may not respond to any inquiry or disclose any information from or about any person making an allegation under section 1214(a), except in accordance with the provisions of section 552a of title 5, United States Code, or as required by any other applicable Federal law.

(2) Notwithstanding the exception under paragraph (1), the Special Counsel may not respond to any inquiry concerning an evaluation of the work performance, ability, aptitude, general qualifications, character, loyalty, or suitability for any personnel action of any person described in paragraph (1)—

(A) unless the consent of the individual as to whom the information pertains is obtained in advance; or

(B) except upon request of an agency which requires such information in order to make a determination concerning an individual's having access to the information unauthorized disclosure of which could be expected to cause exceptionally grave damage to the national security.

(h)(1) The Special Counsel is authorized to appear as amicus curiae in any action brought in a court of the United States related to section 2302(b)(8) **【or (9)】**, (b)(9), (b)(13), or (g), or as otherwise authorized by law. In any such action, the Special Counsel is authorized to present the views of the Special Counsel with respect to compliance with section 2302(b)(8) **【or (9)】**, (b)(9), (b)(13), or (g) and the impact court decisions would have on the enforcement of such provisions of law.

(2) A court of the United States shall grant the application of the Special Counsel to appear in any such action for the purposes described under subsection (a).

(i) The Special Counsel shall enter into at least 1 agreement with the Inspector General of an agency under which—

(1) the Inspector General shall—

(A) receive, review, and investigate allegations of prohibited personnel practices or wrongdoing filed by employees of the Office of Special Counsel; and

(B) develop a method for an employee of the Office of Special Counsel to communicate directly with the Inspector General; and

(2) the Special Counsel—

(A) may not require an employee of the Office of Special Counsel to seek authorization or approval before directly contacting the Inspector General in accordance with the agreement; and

(B) may reimburse the Inspector General for services provided under the agreement.

§ 1213. Provisions relating to disclosures of violations of law, gross mismanagement, and certain other matters

(a) This section applies with respect to—

(1) any disclosure of information by an employee, former employee, or applicant for employment which the employee, former employee, or applicant reasonably believes evidences—

(A) a violation of any law, rule, or regulation; or

(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; and

(2) any disclosure by an employee, former employee, or applicant for employment to the Special Counsel or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures of information which the employee, former employee, or applicant reasonably believes evidences—

(A) a violation of any law, rule, or regulation; or

(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(b) Whenever the Special Counsel receives information of a type described in subsection (a) of this section, the Special Counsel shall review such information and, within 45 days after receiving the information, determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety.

(c)(1) Subject to paragraph (2), if the Special Counsel makes a positive determination under subsection (b) of this section, the Special Counsel shall promptly transmit the information with respect to which the determination was made to the appropriate agency head and require that the agency head—

(A) conduct an investigation with respect to the information and any related matters transmitted by the Special Counsel to the agency head; and

(B) submit a written report setting forth the findings of the agency head within 60 days after the date on which the information is transmitted to the agency head or within any longer period of time agreed to in writing by the Special Counsel.

(2) The Special Counsel may require an agency head to conduct an investigation and submit a written report under paragraph (1) only if the information was transmitted to the Special Counsel by—

(A) an employee, former employee, or applicant for employment in the agency which the information concerns; or

(B) an employee who obtained the information in connection with the performance of the employee's duties and responsibilities.

(3) *If the information transmitted under this subsection disclosed a violation of law, rule, or regulation, or gross waste, gross mismanagement, abuse of authority, or a substantial and specific danger to public health or safety, by any officer or employee of an Office of Inspector General, the Special Counsel may refer the matter to the Council of the Inspectors General on Integrity and Efficiency, which shall comply with the standards and procedures applicable to investigations and reports under subsection (c).*

(d) Any report required under subsection (c) shall be reviewed and signed by the head of the agency and shall include—

(1) a summary of the information with respect to which the investigation was initiated;

(2) a description of the conduct of the investigation;

(3) a summary of any evidence obtained from the investigation;

(4) a listing of any violation or apparent violation of any law, rule, or regulation; and

(5) a description of any action taken or planned as a result of the investigation, such as—

(A) changes in agency rules, regulations, or practices;

(B) the restoration of any aggrieved employee;

(C) disciplinary action against any employee; and

(D) referral to the Attorney General of any evidence of a criminal violation.

(e)(1) Any report required under subsection (c) or paragraph (5) of this subsection shall be submitted to the Special Counsel, and the Special Counsel shall transmit a copy to the complainant, except as provided under subsection (f) of this section. The complainant may submit comments to the Special Counsel on the agency report within 15 days of having received a copy of the report.

(2) Upon receipt of any report that the head of an agency is required to submit under subsection (c), the Special Counsel shall review the report and determine whether—

(A) the findings of the head of the agency appear reasonable; and

(B) if the Special Counsel requires the head of the agency to submit a supplemental report under paragraph (5), the reports submitted by the head of the agency collectively contain the information required under subsection (d).

(3) The Special Counsel shall transmit any report submitted to the Special Counsel by the head of an agency under subsection (c) or paragraph (5) of this subsection, any comments provided by the complainant pursuant to subsection (e)(1), and any appropriate comments or recommendations by the Special Counsel to the President and the congressional committees with jurisdiction over the agency which the disclosure involves.

(4) Whenever the Special Counsel does not receive the report of the agency within the time prescribed in subsection (c)(2) of this section, the Special Counsel shall transmit a copy of the information which was transmitted to the agency head to the President and the congressional committees with jurisdiction over the agency which the disclosure involves together with a statement noting the failure of the head of the agency to file the required report.

(5) If, after conducting a review of a report under paragraph (2), the Special Counsel concludes that the Special Counsel requires additional information or documentation to determine whether the report submitted by the head of an agency is reasonable and sufficient, the Special Counsel may request that the head of the agency submit a supplemental report—

(A) containing the additional information or documentation identified by the Special Counsel; and

(B) that the head of the agency shall submit to the Special Counsel within a period of time specified by the Special Counsel.

(f) In any case in which evidence of a criminal violation obtained by an agency in an investigation under subsection (c) of this section is referred to the Attorney General—

(1) the report shall not be transmitted to the complainant; and

(2) the agency shall notify the Office of Personnel Management and the Office of Management and Budget of the referral.

(g)(1) If the Special Counsel receives information of a type described in subsection (a) from an individual other than an individual described in subparagraph (A) or (B) of subsection (c)(2), the Special Counsel may transmit the information to the head of the agency which the information concerns. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action shall be completed. The Special Counsel shall inform the individual of the report of the agency head.

(2) If the Special Counsel receives information of a type described in subsection (a) from an individual described in subparagraph (A) or (B) of subsection (c)(2), but does not make a positive determination under subsection (b), the Special Counsel may transmit the information to the head of the agency which the information concerns, except that the information may not be transmitted to the head of the agency without the consent of the individual. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action will be completed. The Special Counsel shall inform the individual of the report of the agency head.

(3) If the Special Counsel does not transmit the information to the head of the agency under paragraph (2), the Special Counsel shall inform the individual of—

(A) the reasons why the disclosure may not be further acted on under this chapter; and

(B) other offices available for receiving disclosures, should the individual wish to pursue the matter further.

(h) The identity of any individual who makes a disclosure described in subsection (a) may not be disclosed by the Special Counsel without such individual's consent unless the Special Counsel determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.

(i) Except as specifically authorized under this section, the provisions of this section shall not be considered to authorize disclosure of any information by any agency or any person which is—

(1) specifically prohibited from disclosure by any other provision of law; or

(2) specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

(j) With respect to any disclosure of information described in subsection (a) which involves foreign intelligence or counterintelligence information, if the disclosure is specifically prohibited by law or by Executive order, the Special Counsel shall transmit such information to the National Security Advisor, the Permanent Select Committee on Intelligence of the House of Representatives, and the Select Committee on Intelligence of the Senate.

§ 1214. Investigation of prohibited personnel practices; corrective action

(a)(1)(A) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(B) Within 15 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall provide written notice to the person who made the allegation that—

(i) the allegation has been received by the Special Counsel; and

(ii) shall include the name of a person at the Office of Special Counsel who shall serve as a contact with the person making the allegation.

(C) Unless an investigation is terminated under paragraph (2), the Special Counsel shall—

(i) within 90 days after notice is provided under subparagraph (B), notify the person who made the allegation of the status of the investigation and any action taken by the Office of the Special Counsel since the filing of the allegation;

(ii) notify such person of the status of the investigation and any action taken by the Office of the Special Counsel since the last notice, at least every 60 days after notice is given under clause (i); and

(iii) notify such person of the status of the investigation and any action taken by the Special Counsel at such time as determined appropriate by the Special Counsel.

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

(2)(A) If the Special Counsel terminates any investigation under paragraph (1), the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of—

(i) the termination of the investigation;

(ii) a summary of relevant facts ascertained by the Special Counsel, including the facts that support, and the facts that do not support, the allegations of such person;

(iii) the reasons for terminating the investigation; and

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

(B) A written statement under subparagraph (A) may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person who received such statement under subparagraph (A).

(3) Except in a case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation,

any such employee, former employee, or applicant shall seek corrective action from the Special Counsel before seeking corrective action from the Board. An employee, former employee, or applicant for employment may seek corrective action from the Board under section 1221, if such employee, former employee, or applicant seeks corrective action for a prohibited personnel practice described in **section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D)** *section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g)* from the Special Counsel and—

(A)(i) the Special Counsel notifies such employee, former employee, or applicant that an investigation concerning such employee, former employee, or applicant has been terminated; and

(ii) no more than 60 days have elapsed since notification was provided to such employee, former employee, or applicant for employment that such investigation was terminated; or

(B) 120 days after seeking corrective action from the Special Counsel, such employee, former employee, or applicant has not been notified by the Special Counsel that the Special Counsel shall seek corrective action on behalf of such employee, former employee, or applicant.

(4) If an employee, former employee, or applicant seeks a corrective action from the Board under section 1221, pursuant to the provisions of paragraph (3)(B), the Special Counsel may continue to seek corrective action personal to such employee, former employee, or applicant only with the consent of such employee, former employee, or applicant.

(5) In addition to any authority granted under paragraph (1), the Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice (or a pattern of prohibited personnel practices) has occurred, exists, or is to be taken.

(6)(A) Notwithstanding any other provision of this section, not later than 30 days after the date on which the Special Counsel receives an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel may terminate an investigation of the allegation without further inquiry if the Special Counsel determines that—

(i) the same allegation, based on the same set of facts and circumstances, had previously been—

(I)(aa) made by the individual; and

(bb) investigated by the Special Counsel; or

(II) filed by the individual with the Merit Systems Protection Board;

(ii) the Special Counsel does not have jurisdiction to investigate the allegation; or

(iii) the individual knew or should have known of the alleged prohibited personnel practice on or before the date that is 3 years before the date on which the Special Counsel received the allegation.

(B) Not later than 30 days after the date on which the Special Counsel terminates an investigation under subparagraph (A), the Special Counsel shall provide a written notification to the individual who submitted the allegation of a prohibited personnel prac-

tice that states the basis of the Special Counsel for terminating the investigation.

(b)(1)(A)(i) The Special Counsel may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 45 days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice.

(ii) Any member of the Board requested by the Special Counsel to order a stay under clause (i) shall order such stay unless the member determines that, under the facts and circumstances involved, such a stay would not be appropriate.

(iii) Unless denied under clause (ii), any stay under this subparagraph shall be granted within 3 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date of the request for the stay by the Special Counsel.

(B)(i) The Board may extend the period of any stay granted under subparagraph (A) for any period which the Board considers appropriate.

(ii) If the Board lacks the number of members appointed under section 1201 required to constitute a quorum, any remaining member of the Board may, upon request by the Special Counsel, extend the period of any stay granted under subparagraph (A).

(C) The Board shall allow any agency which is the subject of a stay to comment to the Board on any extension of stay proposed under subparagraph (B).

(D) A stay may be terminated by the Board at any time, except that a stay may not be terminated by the Board—

(i) on its own motion or on the motion of an agency, unless notice and opportunity for oral or written comments are first provided to the Special Counsel and the individual on whose behalf the stay was ordered; or

(ii) on motion of the Special Counsel, unless notice and opportunity for oral or written comments are first provided to the individual on whose behalf the stay was ordered.

(E) If the Board grants a stay under subparagraph (A), the head of the agency employing the employee who is the subject of the action shall give priority to a request for a transfer submitted by the employee.

(2)(A)(i) Except as provided under clause (ii), no later than 240 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(ii) If the Special Counsel is unable to make the required determination within the 240-day period specified under clause (i) and the person submitting the allegation of a prohibited personnel practice agrees to an extension of time, the determination shall be made within such additional period of time as shall be agreed upon between the Special Counsel and the person submitting the allegation.

(B) If, in connection with any investigation, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report

the determination together with any findings or recommendations to the Board, the agency involved and to the Office of Personnel Management, and may report such determination, findings and recommendations to the President. The Special Counsel may include in the report recommendations for corrective action to be taken.

(C) If, after a reasonable period of time, the agency does not act to correct the prohibited personnel practice, the Special Counsel may petition the Board for corrective action.

(D) If the Special Counsel finds, in consultation with the individual subject to the prohibited personnel practice, that the agency has acted to correct the prohibited personnel practice, the Special Counsel shall file such finding with the Board, together with any written comments which the individual may provide.

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

(3) Whenever the Special Counsel petitions the Board for corrective action, the Board shall provide an opportunity for—

(A) oral or written comments by the Special Counsel, the agency involved, and the Office of Personnel Management; and

(B) written comments by any individual who alleges to be the subject of the prohibited personnel practice.

(4)(A) The Board shall order such corrective action as the Board considers appropriate, if the Board determines that the Special Counsel has demonstrated that a prohibited personnel practice, other than one described in **section 2302(b)(8)** or **section 2302(b)(9)(A)(i), (B), (C), or (D)** *section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g)*, has occurred, exists, or is to be taken.

(B)(i) Subject to the provisions of clause (ii), in any case involving an alleged prohibited personnel practice as described under **section 2302(b)(8)** or **section 2302(b)(9)(A)(i), (B), (C), or (D)** *section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g)*, the Board shall order such corrective action as the Board considers appropriate if the Special Counsel has demonstrated that a disclosure or protected activity described under **section 2302(b)(8)** or **section 2302(b)(9)(A)(i), (B), (C), or (D)** *section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g)* was a contributing factor in the personnel action which was taken or is to be taken against the individual.

(ii) Corrective action under clause (i) may not be ordered if, after a finding that a protected disclosure was a contributing factor, the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(c)(1) Judicial review of any final order or decision of the Board under this section may be obtained by any employee, former employee, or applicant for employment adversely affected by such order or decision.

(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under **section 7703(b)**.

(d)(1) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that a criminal violation has occurred, the Special Counsel shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget.

(2) In any case in which the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, the Special Counsel shall proceed with any investigation or proceeding unless—

(A) the alleged violation has been reported to the Attorney General; and

(B) the Attorney General is pursuing an investigation, in which case the Special Counsel, after consultation with the Attorney General, has discretion as to whether to proceed.

(3) *In any case in which the Special Counsel determines that a referral to an Inspector General of an entity of the Federal Government was in retaliation for a disclosure or protected activity described in section 2302(b)(8) or in retaliation for exercising a right described in section 2302(b)(9)(A)(i), the Special Counsel shall transmit that finding in writing to the Inspector General within seven days of making the finding. The Inspector General shall consider that finding and make a determination on whether to initiate an investigation or continue an investigation based on the referral that the Special Counsel found to be retaliatory.*

(e) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred to in subsection (b) or (d), the Special Counsel shall report such violation to the head of the agency involved. The Special Counsel shall require, within 30 days after the receipt of the report by the agency, a certification by the head of the agency which states—

(1) that the head of the agency has personally reviewed the report; and

(2) what action has been or is to be taken, and when the action will be completed.

(f) During any investigation initiated under this subchapter, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.

(g) If the Board orders corrective action under this section, such corrective action may include—

(1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(2) reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs).

(h) Any corrective action ordered under this section to correct a prohibited personnel practice may include fees, costs, or damages reasonably incurred due to an agency investigation of the em-

ployee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

(i) The Special Counsel may petition the Board to order corrective action, including fees, costs, or damages reasonably incurred by an employee due to an investigation of the employee by an agency, if the investigation by an agency was commenced, expanded, or extended in retaliation for a disclosure or protected activity described in [section 2302(b)(8) or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9)] *section 2302(b)(8), subparagraph (A)(i), (B), (C), (D), or (E) of section 2302(b)(9), section 2302(b)(13), or section 2302(g)*, without regard to whether a personnel action, as defined in section 2302(a)(2)(A), is taken.

§ 1215. Disciplinary action

(a)(1) Except as provided in subsection (b), if the Special Counsel determines that disciplinary action should be taken against any employee for having—

(A) committed a prohibited personnel practice,

(B) violated the provisions of any law, rule, or regulation, or engaged in any other conduct within the jurisdiction of the Special Counsel as described in section 1216, or

(C) knowingly and willfully refused or failed to comply with an order of the Merit Systems Protection Board,

the Special Counsel shall prepare a written complaint against the employee containing the Special Counsel's determination, together with a statement of supporting facts, and present the complaint and statement to the employee and the Board, in accordance with this subsection.

(2) Any employee against whom a complaint has been presented to the Merit Systems Protection Board under paragraph (1) is entitled to—

(A) a reasonable time to answer orally and in writing, and to furnish affidavits and other documentary evidence in support of the answer;

(B) be represented by an attorney or other representative;

(C) a hearing before the Board or an administrative law judge appointed under section 3105 and designated by the Board;

(D) have a transcript kept of any hearing under subparagraph (C); and

(E) a written decision and reasons therefor at the earliest practicable date, including a copy of any final order imposing disciplinary action.

(3)(A) A final order of the Board may impose—

(i) disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, or reprimand;

(ii) an assessment of a civil penalty not to exceed \$1,000; or

(iii) any combination of disciplinary actions described under clause (i) and an assessment described under clause (ii).

(B) In any case brought under paragraph (1) in which the Board finds that an employee has committed a prohibited personnel practice under [section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)] *section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), sec-*

tion 2302(b)(13), or section 2302(g), the Board may impose disciplinary action if the Board finds that the activity protected under [section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)] section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g) was a significant motivating factor, even if other factors also motivated the decision, for the employee's decision to take, fail to take, or threaten to take or fail to take a personnel action, unless that employee demonstrates, by a preponderance of the evidence, that the employee would have taken, failed to take, or threatened to take or fail to take the same personnel action, in the absence of such protected activity.

(4) There may be no administrative appeal from an order of the Board. An employee subject to a final order imposing disciplinary action under this subsection may obtain judicial review of the order by filing a petition therefor with such court, and within such time, as provided for under section 7703(b).

(5) In the case of any State or local officer or employee under chapter 15, the Board shall consider the case in accordance with the provisions of such chapter.

(b) In the case of an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate (other than an individual in the Foreign Service of the United States), the complaint and statement referred to in subsection (a)(1), together with any response of the employee, shall be presented to the President for appropriate action in lieu of being presented under subsection (a).

(c)(1) In the case of members of the uniformed services and individuals employed by any person under contract with an agency to provide goods or services, the Special Counsel may transmit recommendations for disciplinary or other appropriate action (including the evidence on which such recommendations are based) to the head of the agency concerned.

(2) In any case in which the Special Counsel transmits recommendations to an agency head under paragraph (1), the agency head shall, within 60 days after receiving such recommendations, transmit a report to the Special Counsel on each recommendation and the action taken, or proposed to be taken, with respect to each such recommendation.

* * * * *

SUBCHAPTER III—INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL CASES

§ 1221. Individual right of action in certain reprisal cases

(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in [section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D),] *section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g)*, seek corrective action from the Merit Systems Protection Board.

(b) This section may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the Special Counsel, if such employee, former employee, or applicant for employment has the right to appeal directly to the Board under any law, rule, or regulation.

(c)(1) Any employee, former employee, or applicant for employment seeking corrective action under subsection (a) may request that the Board order a stay of the personnel action involved.

【(2) Any stay requested under paragraph (1) shall be granted within 10 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date the request is made, if the Board determines that such a stay would be appropriate.】

(2) Any stay requested under paragraph (1) shall be granted within 10 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date the request is made, if the Board determines—

(A) that there is a substantial likelihood that protected activity was a contributing factor to the personnel action involved;
or

(B) the Board otherwise determines that such a stay would be appropriate.

(3)(A) The Board shall allow any agency which would be subject to a stay under this subsection to comment to the Board on such stay request.

(B) Except as provided in subparagraph (C), a stay granted under this subsection shall remain in effect for such period as the Board determines to be appropriate.

(C) The Board may modify or dissolve a stay under this subsection at any time, if the Board determines that such a modification or dissolution is appropriate.

(4) If any stay requested under paragraph (1) is denied, the employee, former employee, or applicant may, within 7 days after receiving notice of the denial, file an appeal for expedited review by the Board. The agency shall have 7 days thereafter to respond. The Board shall provide a decision not later than 21 days after receiving the appeal. During the period of appeal, both parties may supplement the record with information unavailable to them at the time the stay was first requested.

(d)(1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board shall issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that the testimony or production requested is not unduly burdensome and appears reasonably calculated to lead to the discovery of admissible evidence.

(2) A subpoena under this subsection may be issued, and shall be enforced, in the same manner as applies in the case of subpoenas under section 1204.

(e)(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under 【section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D),】 *section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g),* the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated

that a disclosure or protected activity described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—

(A) the official taking the personnel action knew of the disclosure or protected activity; and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.

(2) Corrective action under paragraph (1) may not be ordered if, after a finding that a protected disclosure was a contributing factor, the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(f)(1) A final order or decision shall be rendered by the Board as soon as practicable after the commencement of any proceeding under this section.

(2) A decision to terminate an investigation under subchapter II may not be considered in any action or other proceeding under this section.

(3) If, based on evidence presented to it under this section, the Merit Systems Protection Board determines that there is reason to believe that a current employee may have committed a prohibited personnel practice, the Board shall refer the matter to the Special Counsel to investigate and take appropriate action under section 1215.

(g)(1)(A) If the Board orders corrective action under this section, such corrective action may include—

(i) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(ii) back pay and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs).

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

(2) If an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred.

(3) If an employee, former employee, or applicant for employment is the prevailing party in an appeal from the Merit Systems Protection Board, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred, regardless of the basis of the decision.

(4) Any corrective action ordered under this section to correct a prohibited personnel practice may include fees, costs, or damages

reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

(h)(1) An employee, former employee, or applicant for employment adversely affected or aggrieved by a final order or decision of the Board under this section may obtain judicial review of the order or decision.

(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

[(i) Subsections] (i) (1) Subsections (a) through (h) shall apply in any proceeding brought under section 7513(d) if, or to the extent that, a prohibited personnel practice as defined in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) is alleged.

(2)(A) *If, in the case of an employee, former employee, or applicant for employment who seeks corrective action from the Merit Systems Protection Board based on an alleged prohibited personnel practice described in section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g), no final order or decision is issued by the Board within 180 days after the date on which a request for such corrective action has been duly submitted to the Board, such employee, former employee, or applicant may, after providing written notice to the Special Counsel and the Board and only within 20 days after providing such notice, bring an action for review de novo before the appropriate United States district court, and such action shall, at the request of either party to such action, be tried before a jury. Upon filing of an action with the appropriate United States district court, any proceedings before the Board shall cease and the employee, former employee, or applicant for employment waives any right to refile with the Board.*

(B) *If the Board certifies (in writing) to the parties of a case that the complexity of such case requires a longer period of review, subparagraph (A) shall be applied by substituting "240 days" for "180 days".*

(C) *In any such action brought before a United States district court under subparagraph (A), the court—*

- (i) shall apply the standards set forth in subsection (e); and*
- (ii) may award any relief which the court considers appropriate, including any relief described in subsection (g).*

(j) In determining the appealability of any case involving an allegation made by an individual under the provisions of this chapter, neither the status of an individual under any retirement system established under a Federal statute nor any election made by such individual under any such system may be taken into account.

(k) If the Board grants a stay under subsection (c) and the employee who is the subject of the action is in probationary status, the head of the agency employing the employee shall give priority to a request for a transfer submitted by the employee.

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PART III—EMPLOYEES

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SUBPART A—GENERAL PROVISIONS

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CHAPTER 23—MERIT SYSTEM PRINCIPLES

* * * * *

§ 2302. Prohibited personnel practices

(a)(1) For the purpose of this title, “prohibited personnel practice” means any action described in subsection (b) *or* (g).

(2) For the purpose of this section—

(A) “personnel action” means—

- (i) an appointment;
- (ii) a promotion;
- (iii) an action under chapter 75 of this title or other disciplinary or corrective action;
- (iv) a detail, transfer, or reassignment;
- (v) a reinstatement;
- (vi) a restoration;
- (vii) a reemployment;
- (viii) a performance evaluation under chapter 43 of this title or under title 38;
- (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;
- (x) a decision to order psychiatric testing or examination;
- (xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; **[and]**
- (xii) *for purposes of subsection (b)(8)—*

(I) the commencement, expansion, or extension of an investigation, but not including any investigation that is ministerial or nondiscretionary (including a ministerial or nondiscretionary investigation described in section 1213) or any investigation that is conducted by an Inspector General of an entity of the Government of an employee not employed by the office of that Inspector General; and

(II) a referral to an Inspector General of an entity of the Government, except for a referral that is ministerial or nondiscretionary; and

[(xii)] *(xiii) any other significant change in duties, responsibilities, or working conditions;*

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), *subsection (b)(9)(A)(i), (B), (C), (D), or (E), subsection (b)(13), or subsection (g)*, an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31, *a commissioned officer or applicant for employment in the Public Health Service, an officer or applicant for employment in the commissioned officer corps of the National Oceanic and Atmospheric Administration, and a noncareer appointee in the Senior Executive Service;*

(B) “covered position” means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action—

- (i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or
- (ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration;

(C) “agency” means an Executive agency and the Government Publishing Office, but does not include—

- (i) a Government corporation, except in the case of an alleged prohibited personnel practice described under [subsection (b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D)] *section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g)*;

(ii)(I) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; and

(II) as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, provided that the determination be made prior to a personnel action; or

(iii) the Government Accountability Office; and

(D) “disclosure” means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences—

- (i) any violation of any law, rule, or regulation; or
- (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

- (E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;
- (2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—
- (A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or
- (B) an evaluation of the character, loyalty, or suitability of such individual;
- (3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;
- (4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;
- (5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;
- (6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;
- (7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;
- (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—
- (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
- (i) any violation of any law, rule, or regulation, or
- (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
- if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;
- (B) any disclosure to the Special Counsel, [or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures] *the Inspector General of an agency, a supervisor in the employee's direct chain of command up to and including the head of the employing agency, or to an employee*

designated by any of the aforementioned individuals for the purpose of receiving such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) any violation (other than a violation of this section) of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or

(C) any disclosure to Congress (including any committee of Congress) by any employee of an agency or applicant for employment at an agency of information described in subparagraph (B) that is—

(i) not classified; or

(ii) if classified—

(I) has been classified by the head of an agency that is not an element of the intelligence community (as defined by section 3 of the National Security Act of 1947 (50 U.S.C. 3003)); and

(II) does not reveal intelligence sources and methods.

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—

(i) with regard to remedying a violation of paragraph (8); or

(ii) other than with regard to remedying a violation of paragraph (8);

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);

(C) cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law; **[or]**

(D) refusing to obey an order that would require the individual to violate a law, rule, or regulation; *or*

(E) *the exercise of any right protected under section 7211;*

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

(11)(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement;

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title;

(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement—

(A) does not contain the following statement: “These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General or the Office of Special Counsel of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.”; or (B) prohibits or restricts an employee or applicant for employment from disclosing to Congress, the Special Counsel, the Inspector General of an agency, or any other agency component responsible for internal investigation or review any information that relates to any violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or any other whistleblower protection; or

(14) access the medical record of another employee or an applicant for employment as a part of, or otherwise in furtherance of, any conduct described in paragraphs (1) through (13).

This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress. For purposes of paragraph (8), (i) any presumption relating to the performance of a duty by an employee whose conduct is the subject of a disclosure as defined under subsection (a)(2)(D) may be rebutted by substantial evidence, and (ii) a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.

(c)(1) In this subsection—

(A) the term “new employee” means an individual—

(i) appointed to a position as an employee on or after the date of enactment of this subsection; and

(ii) who has not previously served as an employee; and

(B) the term “whistleblower protections” means the protections against and remedies for a prohibited personnel practice

described in [paragraph (8) or subparagraph (A)(i), (B), (C), or (D) of paragraph (9) of subsection (b)] *paragraph (8), subparagraph (A)(i), (B), (C), or (D) of paragraph (9), or paragraph (13) of subsection (b) or subsection (g).*

- (2) The head of each agency shall be responsible for—
- (A) preventing prohibited personnel practices;
 - (B) complying with and enforcing applicable civil service laws, rules, and regulations and other aspects of personnel management; and
 - (C) ensuring, in consultation with the Special Counsel and the Inspector General of the agency, that employees of the agency are informed of the rights and remedies available to the employees under this chapter and chapter 12, including—
 - (i) information with respect to whistleblower protections available to new employees during a probationary period;
 - (ii) the role of the Office of Special Counsel and the Merit Systems Protection Board with respect to whistleblower protections; and
 - (iii) the means by which, with respect to information that is otherwise required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs, an employee may make a lawful disclosure of the information to—
 - (I) the Special Counsel;
 - (II) the Inspector General of an agency;
 - (III) Congress (including any committee of Congress with respect to information that is not classified or, if classified, has been classified by the head of an agency that is not an element of the intelligence community and does not reveal intelligence sources and methods);
 - or
 - (IV) another employee of the agency who is designated to receive such a disclosure.
- (3) The head of each agency shall ensure that the information described in paragraph (2) is provided to each new employee of the agency not later than 180 days after the date on which the new employee is appointed.
- (4) The head of each agency shall make available information regarding whistleblower protections applicable to employees of the agency on the public website of the agency and on any online portal that is made available only to employees of the agency, if such portal exists.
- (5) Any employee to whom the head of an agency delegates authority for any aspect of personnel management shall, within the limits of the scope of the delegation, be responsible for the activities described in paragraph (2).
- (d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under—
- (1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;

(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

(e)(1) For the purpose of this section, the term “veterans’ preference requirement” means any of the following provisions of law:

(A) Sections 2108, 3305(b), 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317(b), 3318, 3320, 3351, 3352, 3363, 3501, 3502(b), 3504, and 4303(e) and (with respect to a preference eligible referred to in section 7511(a)(1)(B)) subchapter II of chapter 75 and section 7701.

(B) Sections 943(c)(2) and 1784(c) of title 10.

(C) Section 1308(b) of the Alaska National Interest Lands Conservation Act.

(D) Section 301(c) of the Foreign Service Act of 1980.

(E) Sections 106(f), 7281(e), and 7802(5) of title 38.

(F) Section 1005(a) of title 39.

(G) Any other provision of law that the Director of the Office of Personnel Management designates in regulations as being a veterans’ preference requirement for the purposes of this subsection.

(H) Any regulation prescribed under subsection (b) or (c) of section 1302 and any other regulation that implements a provision of law referred to in any of the preceding subparagraphs.

(2) Notwithstanding any other provision of this title, no authority to order corrective action shall be available in connection with a prohibited personnel practice described in subsection (b)(11). Nothing in this paragraph shall be considered to affect any authority under section 1215 (relating to disciplinary action).

(f)(1) A disclosure shall not be excluded from subsection (b)(8) because—

(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);

(B) the disclosure revealed information that had been previously disclosed;

(C) of the employee’s or applicant’s motive for making the disclosure;

(D) the disclosure was not made in writing;

(E) the disclosure was made while the employee was off duty;

(F) the disclosure was made before the date on which the individual was appointed or applied for appointment to a position; or

(G) of the amount of time which has passed since the occurrence of the events described in the disclosure.

(2) If a disclosure is made during the normal course of duties of an employee, the principal job function of whom is to regularly investigate and disclose wrongdoing (referred to in this paragraph as the “disclosing employee”), the disclosure shall not be excluded from subsection (b)(8) if the disclosing employee demonstrates that an employee who has the authority to take, direct other individuals to take, recommend, or approve any personnel action with respect to the disclosing employee took, failed to take, or threatened to take or fail to take a personnel action with respect to the disclosing employee in reprisal for the disclosure made by the disclosing employee.

(g)(1) No employee of an agency may willfully communicate or transmit to any individual who is not an officer or employee of the Government the identity of, or personally identifiable information about, any other employee because that other employee has made, or is suspected to have made, a disclosure protected by subsection (b)(8), unless—

(A) the other employee provides express written consent prior to the communication or transmission of their identity or personally identifiable information;

(B) the communication or transmission is made in accordance with the provisions of section 552a;

(C) the communication or transmission is made to a lawyer for the sole purpose of providing legal advice to an employee accused of whistleblower retaliation; or

(D) the communication or transmission is required or permitted by any other provision of law.

(2) In this subsection, the term “officer or employee of the Government” means—

(A) the President;

(B) a Member of Congress;

(C) a member of the uniformed services;

(D) an employee as that term is defined in section 2105, including an employee of the United States Postal Service, the Postal Regulatory Commission, or the Department of Veterans Affairs (including any employee appointed pursuant to chapter 73 or 74 of title 38); and

(E) any other officer or employee in any branch of the Government of the United States.

(h)(1) In this subsection—

(A) the term “applicant” means an applicant for a covered position;

(B) the term “censorship related to research, analysis, or technical information” means any effort to distort, misrepresent, or suppress research, analysis, or technical information; and

(C) the term “employee” means an employee in a covered position in an agency.

(2)(A) Any disclosure of information by an employee or applicant for employment that the employee or applicant reasonably believes is evidence of censorship related to research, analysis, or technical information—

(i) shall come within the protections of subsection (b)(8)(A) if—

- (I) the employee or applicant reasonably believes that the censorship related to research, analysis, or technical information is or will cause—
 - (aa) any violation of law, rule, or regulation; or
 - (bb) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; and
 - (II) such disclosure is not specifically prohibited by law or such information is not specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs; and
- (ii) shall come within the protections of subsection (b)(8)(B) if—
- (I) the employee or applicant reasonably believes that the censorship related to research, analysis, or technical information is or will cause—
 - (aa) any violation of law, rule, or regulation; or
 - (bb) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; and
 - (II) the disclosure is made to the Special Counsel, or to the Inspector General of an agency or another person designated by the head of the agency to receive such disclosures, consistent with the protection of sources and methods.
- (3) A disclosure shall not be excluded from paragraph (2) for any reason described under subsection (f)(1) or (2).
- (4) Nothing in this subsection shall be construed to imply any limitation on the protections of employees and applicants afforded by any other provision of law, including protections with respect to any disclosure of information believed to be evidence of censorship related to research, analysis, or technical information.

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SUBPART F—LABOR-MANAGEMENT AND EMPLOYEE RELATIONS

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CHAPTER 72—ANTIDISCRIMINATION; RIGHT TO PETITION CONGRESS

SUBCHAPTER I—ANTIDISCRIMINATION IN EMPLOYMENT

Sec.

7201. Antidiscrimination policy; minority recruitment program.

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SUBCHAPTER II—EMPLOYEES' RIGHT TO PETITION CONGRESS

[7211. Employees' right to petition Congress]

7211. Employees' right to petition or furnish information or respond to Congress.

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SUBCHAPTER II—EMPLOYEES' RIGHT TO PETITION
CONGRESS

【§ 7211. Employees' right to petition Congress

【The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.】

§ 7211. Employees' right to petition or furnish information or respond to Congress

(a) *IN GENERAL.*—Each officer or employee of the Federal Government, individually or collectively, has a right to—

- (1) petition Congress or a Member of Congress;
- (2) furnish information, documents, or testimony to either House of Congress, any Member of Congress, or any committee or subcommittee of the Congress; or
- (3) respond to any request for information, documents, or testimony from either House of Congress or any Committee or subcommittee of Congress.

(b) *PROHIBITED ACTIONS.*—No officer or employee of the Federal Government may interfere with or deny the right set forth in subsection (a), including by—

- (1) prohibiting or preventing, or attempting or threatening to prohibit or prevent, any other officer or employee of the Federal Government from engaging in activity protected in subsection (a); or
- (2) removing, suspending from duty without pay, demoting, reducing in rank, seniority, status, pay, or performance or efficiency rating, denying promotion to, relocating, reassigning, transferring, disciplining, or discriminating in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any other officer or employee of the Federal Government or attempting or threatening to commit any of the foregoing actions protected in subsection (a).

(c) *APPLICATION.*—This section shall not be construed to authorize disclosure of any information that is—

- (1) specifically prohibited from disclosure by any other provision of Federal law; or
- (2) specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs, unless disclosure is otherwise authorized by law.

(d) *DEFINITION OF OFFICER OR EMPLOYEE OF THE FEDERAL GOVERNMENT.*—For purposes of this section, the term “officer or employee of the Federal Government” includes—

- (1) the President;
- (2) a Member of Congress;
- (3) a member of the uniformed services;
- (4) an employee (as that term is defined in section 2105);
- (5) an employee of the United States Postal Service or the Postal Regulatory Commission; and
- (6) an employee appointed under chapter 73 or 74 of title 38.

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CHAPTER 75—ADVERSE ACTIONS

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SUBCHAPTER II—REMOVAL, SUSPENSION FOR MORE THAN 14 DAYS, REDUCTION IN GRADE OR PAY, OR FURLOUGH FOR 30 DAYS OR LESS

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§ 7512. Actions covered

This subchapter applies to—

- (1) a removal;
- (2) a suspension for more than 14 days;
- (3) a reduction in grade;
- (4) a reduction in pay; **[and]**
- [(5) a furlough of 30 days or less;]**
- (5) a furlough of more than 14 days but less than 30 days;*
- and*
- (6) a furlough of 13 days or less that is not due to a lapse in appropriations;*

but does not apply to—

- (A) a suspension or removal under section 7532 of this title,
- (B) a reduction-in-force action under section 3502 of this title,
- (C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,
- (D) a reduction in grade or removal under section 4303 of this title,
- (E) an action initiated under section 1215 or 7521 of this title, or
- (F) a suitability action taken by the Office under regulations prescribed by the Office, subject to the rules prescribed by the President under this title for the administration of the competitive service.

* * * * *

§ 7515. Discipline of supervisors based on retaliation against whistleblowers

(a) DEFINITIONS.—In this section—

- (1) the term “agency”—
 - (A) has the meaning given the term in section 2302(a)(2)(C), without regard to whether any other provision of this chapter is applicable to the entity; and
 - (B) does not include any entity that is an element of the intelligence community, as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 3003);

(2) the term “prohibited personnel action” means taking or failing to take an action in violation of [paragraph (8), (9), or (14) of section 2302(b)] *paragraph (8), (9), (13), or (14) of section 2302(b) or section 2302(g)* against an employee of an agency; and

(3) the term “supervisor” means an employee who would be a supervisor, as defined in section 7103(a), if the entity employing the employee was an agency.

(b) PROPOSED DISCIPLINARY ACTIONS.—

(1) IN GENERAL.—Subject to section 1214(f), if the head of the agency in which a supervisor is employed, an administrative law judge, the Merit Systems Protection Board, the Special Counsel, a judge of the United States, or the Inspector General of the agency in which a supervisor is employed has determined that the supervisor committed a prohibited personnel action, the head of the agency in which the supervisor is employed, consistent with the procedures required under paragraph (2)—

(A) for the first prohibited personnel action committed by the supervisor—

(i) shall propose suspending the supervisor for a period that is not less than 3 days; and

(ii) may propose an additional action determined appropriate by the head of the agency, including a reduction in grade or pay; and

(B) for the second prohibited personnel action committed by the supervisor, shall propose removing the supervisor.

(2) PROCEDURES.—

(A) NOTICE.—A supervisor against whom an action is proposed to be taken under paragraph (1) is entitled to written notice that—

(i) states the specific reasons for the proposed action; and

(ii) informs the supervisor about the right of the supervisor to review the material that is relied on to support the reasons given in the notice for the proposed action.

(B) ANSWER AND EVIDENCE.—

(i) IN GENERAL.—A supervisor who receives notice under subparagraph (A) may, not later than 14 days after the date on which the supervisor receives the notice, submit an answer and furnish evidence in support of that answer.

(ii) NO EVIDENCE FURNISHED; INSUFFICIENT EVIDENCE FURNISHED.—If, after the end of the 14-day period described in clause (i), a supervisor does not furnish any evidence as described in that clause, or if the head of the agency in which the supervisor is employed determines that the evidence furnished by the supervisor is insufficient, the head of the agency shall carry out the action proposed under subparagraph (A) or (B) of paragraph (1), as applicable.

(C) SCOPE OF PROCEDURES.—An action carried out under this section—

(i) except as provided in clause (ii), shall be subject to the same requirements and procedures, including those with respect to an appeal, as an action under section 7503, 7513, or 7543; and

(ii) shall not be subject to—

(I) paragraphs (1) and (2) of section 7503(b);

(II) paragraphs (1) and (2) of subsection (b) and subsection (c) of section 7513; and

(III) paragraphs (1) and (2) of subsection (b) and subsection (c) of section 7543.

(3) NON-DELEGATION.—If the head of an agency is responsible for determining whether a supervisor has committed a prohibited personnel action for purposes of paragraph (1), the head of the agency may not delegate that responsibility.

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CHAPTER 77—APPEALS

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§ 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective [upon the making of the decision] *upon making of the decision, necessary to make the employee whole as if there had been no prohibited personnel practice, including training, seniority and promotions consistent with the employee's prior record*, and remaining in effect pending the outcome of any petition for review under subsection (e), unless—

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place

of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) or section 2302(g) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which—

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

(k) The Board may prescribe regulations to carry out the purpose of this section.

* * * * *

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

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

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

(3) If an employee, former employee, or applicant for employment is the prevailing party under a proceeding brought under this section, the employee, former employee, or applicant for employment shall be entitled to attorney fees for all representation carried out pursuant to this section. In such an action for attorney fees, the agency responsible for taking the personnel action shall be the respondent and shall be responsible for paying the fees.

(b)(1)(A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Ap-

peals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(B) A petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in **section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)** *section 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D), or (E), section 2302(b)(13), or section 2302(g)* shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

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

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

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) obtained without procedures required by law, rule, or regulation having been followed; or
- (3) unsupported by substantial evidence;

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

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

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

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

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NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION COMMISSIONED OFFICER CORPS ACT OF 2002

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TITLE II—NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION COMMISSIONED OFFICER CORPS

* * * * *

Subtitle E—Rights and Benefits

SEC. 261. APPLICABILITY OF CERTAIN PROVISIONS OF TITLE 10, UNITED STATES CODE.

(a) PROVISIONS MADE APPLICABLE TO THE CORPS.—The rules of law that apply to the Armed Forces under the following provisions of title 10, United States Code, as those provisions are in effect from time to time, apply also to the commissioned officer corps of the Administration:

- (1) Chapter 40, relating to leave.
- (2) Section 533(b), relating to constructive service.
- (3) Section 716, relating to transfers between the armed forces and to and from National Oceanic and Atmospheric Administration.
- (4) Section 771, relating to unauthorized wearing of uniforms.
- (5) Section 774, relating to wearing religious apparel while in uniform.
- (6) Section 982, relating to service on State and local juries.

(7) Section 1031, relating to administration of oaths.

[(8)] (8) Section 1034, relating to protected communications and prohibition of retaliatory personnel actions.】

[(9)] (8) Section 1035, relating to deposits of savings.

[(10)] (9) Section 1036, relating to transportation and travel allowances for escorts for dependents of members.

[(11)] (10) Section 1052, relating to reimbursement for adoption expenses.

[(12)] (11) Section 1074n, relating to annual mental health assessments.

[(13)] (12) Section 1090a, relating to referrals for mental health evaluations.

[(14)] (13) Chapter 58, relating to the Benefits and Services for members being separated or recently separated.

[(15)] (14) Section 1174a, relating to special separation benefits (except that benefits under subsection (b)(2)(B) of such section are subject to the availability of appropriations for such purpose and are provided at the discretion of the Secretary of Commerce).

[(16)] (15) Chapter 61, relating to retirement or separation for physical disability.

[(17)] (16) Chapter 69, relating to retired grade, except sections 1370, 1375, and 1376.

[(18)] (17) Chapter 71, relating to computation of retired pay.

[(19)] (18) Chapter 73, relating to annuities based on retired or retainer pay.

[(20)] (19) Subchapter II of chapter 75, relating to death benefits.

[(21)] (20) Subchapter I of chapter 88, relating to Military Family Programs, applicable on an as-available and fully reimbursable basis.

[(22)] (21) Section 2005, relating to advanced education assistance, active duty agreements, and reimbursement requirements.

[(23)] (22) Section 2634, relating to transportation of motor vehicles for members on permanent change of station.

[(24)] (23) Sections 2731 and 2735, relating to property loss incident to service.

[(25)] (24) Section 2771, relating to final settlement of accounts of deceased members.

[(26)] (25) Such other provisions of subtitle A of that title as may be adopted for applicability to the commissioned officer corps of the National Oceanic and Atmospheric Administration by any other provision of law.

(b) REFERENCES.—The authority vested by title 10, United States Code, in the “military departments”, “the Secretary concerned”, or “the Secretary of Defense” with respect to the provisions of law referred to in subsection (a) shall be exercised, with respect to the commissioned officer corps of the Administration, by the Secretary of Commerce or the Secretary’s designee. 【For purposes of paragraph (8) of subsection (a), the term “Inspector General” in section 1034 of such title 10 shall mean the Inspector General of the Department of Commerce.】

(c) REGULATIONS REGARDING PROTECTED COMMUNICATIONS AND PROHIBITION OF RETALIATORY PERSONNEL ACTIONS.—The Secretary may prescribe regulations to carry out the application of section 1034 of title 10, United States Code, to the commissioned officer corps of the Administration, including by prescribing such administrative procedures for investigation and appeal within the commissioned officer corps as the Secretary considers appropriate.

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WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2012

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TITLE I—PROTECTION OF CERTAIN DISCLOSURES OF INFORMATION BY FEDERAL EMPLOYEES

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[SEC. 110. DISCLOSURE OF CENSORSHIP RELATED TO RESEARCH, ANALYSIS, OR TECHNICAL INFORMATION.

[(a) DEFINITIONS.—In this subsection—

[(1) the term “agency” has the meaning given under section 2302(a)(2)(C) of title 5, United States Code;

[(2) the term “applicant” means an applicant for a covered position;

[(3) the term “censorship related to research, analysis, or technical information” means any effort to distort, misrepresent, or suppress research, analysis, or technical information;

[(4) the term “covered position” has the meaning given under section 2302(a)(2)(B) of title 5, United States Code;

[(5) the term “employee” means an employee in a covered position in an agency; and

[(6) the term “disclosure” has the meaning given under section 2302(a)(2)(D) of title 5, United States Code.

[(b) PROTECTED DISCLOSURE.—

[(1) IN GENERAL.—Any disclosure of information by an employee or applicant for employment that the employee or applicant reasonably believes is evidence of censorship related to research, analysis, or technical information—

[(A) shall come within the protections of section 2302(b)(8)(A) of title 5, United States Code, if—

[(i) the employee or applicant reasonably believes that the censorship related to research, analysis, or technical information is or will cause—

[(I) any violation of law, rule, or regulation; or

[(II) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; and

[(ii) such disclosure is not specifically prohibited by law or such information is not specifically required by

Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs; and [(B) shall come within the protections of section 2302(b)(8)(B) of title 5, United States Code, if—

[(i) the employee or applicant reasonably believes that the censorship related to research, analysis, or technical information is or will cause—

[(I) any violation of law, rule, or regulation; or

[(II) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; and

[(ii) the disclosure is made to the Special Counsel, or to the Inspector General of an agency or another person designated by the head of the agency to receive such disclosures, consistent with the protection of sources and methods.

[(2) DISCLOSURES NOT EXCLUDED.—A disclosure shall not be excluded from paragraph (1) for any reason described under section 2302(f)(1) or (2) of title 5, United States Code.

[(3) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to imply any limitation on the protections of employees and applicants afforded by any other provision of law, including protections with respect to any disclosure of information believed to be evidence of censorship related to research, analysis, or technical information.]

* * * * *

MINORITY VIEWS

Republicans oppose H.R. 2988, the Whistleblower Protection Improvement Act (WPIA), because the bill severely restrains the executive branch from managing bad-acting employees who claim whistleblower status to protect their positions. The WPIA's stated intent is to bolster recourses and remedies for whistleblowers beyond the protections they already have. Whistleblowers serve an important role in the federal government by reporting instances of waste, fraud, or abuse. They have no shortage of protections for their actions, as evidenced by the already existing Whistleblower Protection Act (Pub. L. 101-12), Intelligence Community Whistleblower Protection Act of 1998 (Pub. L. 105-272), Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (Pub. L. 107-174), Whistleblower Protection Enhancement Act (Pub. L. 112-199), Executive Order 13526 (75 FR 705), Presidential Policy Directive 19, and many others. The need to protect whistleblowers is one of the most bipartisan points of agreement in Congress (and Congress has rarely failed to pass legislation to highlight that).

There are creditable portions of the WPIA that Republicans do not oppose, such as the expansion of whistleblower protections to Senior Executive Service employees, Public Health Service officials, and the Commissioned Officer Corps of the National Oceanic and Atmospheric Administration. However, there is much in the bill that goes too far.

For example, Section 2(a) would chill reporting to inspectors general and would create an almost impervious legal veil around whistleblowers—regardless of the merit of their claims—that presumes all whistleblowers act in good faith. Some do not. And bad actors who should face disciplinary actions because of their actions should not be able to so easily cast themselves as whistleblowers, avail themselves of whistleblower protections, and entrench themselves in the federal government that they undermine or inhibit.

There exists a difference that becomes lost in the WPIA between “retaliation” against legitimate whistleblowers and consequences, including disciplinary action or termination, in response to unacceptable actions taken by a government employee. The proponents of the WPIA reference the Government Accountability Office’s report that indicates a higher rate of termination for whistleblowers than other employees.¹ But the same report indicates the data “do not represent proof of a causal relationship between filing [of a whistleblower complaint] and terminations.”² Further, the estimates on termination rates “do not consider the timing or merit of terminations, or other factors potentially associated with terminations.” It is possible the increased rate of termination for whis-

¹ Government Accountability Office, *Whistleblowers: Office of Special Counsel Should Require Information on the Probationary Status of Whistleblowers*, GAO-20-436 (May 28, 2020).

²*Id.* at 3.

tleblowers is being distorted by employees who determined their termination to be imminent and then sought protection from establishing themselves as whistleblowers (and were nonetheless terminated).

Section 2(c)'s protection of employees' identities in all situations is not good policy: there are legitimate times in which a whistleblower is not entitled to total anonymity. Those who would impugn the actions of a president or an executive branch employee should be required to be identified in a court or other setting when appropriate to gather information. The alternative is to rely on hearsay evidence that undermines judicial processes and infringes upon privileges encapsulated by the Sixth Amendment's right to confront a witness.

The Majority's mention of a hole created by a 2020 Federal Circuit Court decision is an allusion to *Sistek v. Department of Veterans Affairs*,³ which involved the Administrative Investigation Board (AIB) finding an Obama-era VA employee (Mr. Sistek) had "fail[ed] to act and/or investigate allegations of a hostile work environment."⁴ A subsequent AIB report found "Mr. Sistek had failed to properly report information and allegations regarding an inappropriate sexual relationship between a director and director's subordinate staff member."⁵ Mr. Sistek was issued a letter of reprimand pursuant to the AIB recommendation.⁶ Mr. Sistek argued to the Merit Systems Protection Board (MSPB) that the AIB investigation was in retaliation for his whistleblowing activity relating to the use of certain VA funds.⁷ MSPB denied Mr. Sistek corrective action on the matter.

The Federal Circuit's decision affirmed MSPB's decision that the investigation into Mr. Sistek was merited and, also, not a prohibited personnel action protected by whistleblower laws.⁸ The Majority appears to disagree with the holding and would have found Mr. Sistek was above reproach or investigation because he became a whistleblower. The case underscores the negative outcome that would come from allowing problematic employees easy protections just by becoming whistleblowers. Becoming a whistleblower should not shield an employee from him/herself facing scrutiny for their inappropriate actions; the WPIA would enshrine just that.

At best, the WPIA is another whistleblower protection bill in search of a problem. At worst, it is a means for Democrats to talk about President Trump to distract from the failings of President Biden. Though proponents of this bill may believe it is politically difficult to vote against any bill with the words "whistleblower" and "protection" in the name, it is not the name of a bill that carries the force of law, but the words within it. The federal courts have identified rightly that not all actions taken against whistleblowers are retaliation. Common sense would affirm that. While legitimate, good-faith whistleblowers should be protected against reprisal from their superiors, in so doing they do not become immune from oversight themselves.

³ 955 F.3d 948 (Fed. Cir. 2020).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

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JAMES COMER,
*Ranking Member, Committee
on Oversight and Reform.*

