

**AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 2988
OFFERED BY MRS. CAROLYN B. MALONEY OF
NEW YORK**

Strike all after the enacting clause and insert the following:

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Whistleblower Protec-
3 tion Improvement Act of 2021”.

4 **SEC. 2. ADDITIONAL WHISTLEBLOWER PROTECTIONS.**

5 (a) INVESTIGATIONS AS PERSONNEL ACTIONS.—

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

8 (A) in clause (xi), by striking “and” at the
9 end;

10 (B) by redesignating clause (xii) as clause
11 (xiii); and

12 (C) by inserting after the clause (xi) the
13 following:

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

16 “(I) the commencement, expan-
17 sion, or extension of an investigation,

1 but not including any investigation
2 that is ministerial or nondiscretionary
3 (including a ministerial or nondis-
4 cretionary investigation described in
5 section 1213) or any investigation
6 that is conducted by an Inspector
7 General of an entity of the Govern-
8 ment of an employee not employed by
9 the office of that Inspector General;
10 and

11 “(II) a referral to an Inspector
12 General of an entity of the Govern-
13 ment, except for a referral that is
14 ministerial or nondiscretionary;”.

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

21 (b) RIGHT TO PETITION CONGRESS.—

22 (1) IN GENERAL.—Section 2302(b)(9) of title
23 5, United States Code, is amended—

24 (A) in subparagraph (C), by striking “or”
25 at the end;

1 (B) in subparagraph (D), by adding “or”
2 at the end after the semicolon; and

3 (C) by adding at the end the following:

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

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

12 (c) PROHIBITION ON DISCLOSURE OF WHISTLE-
13 BLOWER IDENTITY.—

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

17 “(g)(1) No employee of an agency may willfully com-
18 municate or transmit to any individual who is not an offi-
19 cer or employee of the Government the identity of, or per-
20 sonally identifiable information about, any other employee
21 because that other employee has made, or is suspected to
22 have made, a disclosure protected by subsection (b)(8),
23 unless—

24 “(A) the other employee provides express
25 written consent prior to the communication or

1 transmission of their identity or personally
2 identifiable information;

3 “(B) the communication or transmission is
4 made in accordance with the provisions of sec-
5 tion 552a;

6 “(C) the communication or transmission is
7 made to a lawyer for the sole purpose of pro-
8 viding legal advice to an employee accused of
9 whistleblower retaliation; or

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

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

15 “(A) the President;

16 “(B) a Member of Congress;

17 “(C) a member of the uniformed services;

18 “(D) an employee as that term is defined in
19 section 2105, including an employee of the United
20 States Postal Service, the Postal Regulatory Com-
21 mission, or the Department of Veterans Affairs (in-
22 cluding any employee appointed pursuant to chapter
23 73 or 74 of title 38); and

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

1 (2) APPLICATION.—The amendment made by
2 paragraph (1) shall apply to any transmission or
3 communication described in subsection (g) of section
4 2302 of title 5, United States Code, as added by
5 paragraph (1), made on or after the date of enact-
6 ment of this Act.

7 (d) RIGHT TO PETITION CONGRESS.—

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

10 **“§ 7211. Employees’ right to petition or furnish infor-**
11 **mation or respond to Congress**

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

15 “(1) petition Congress or a Member of Con-
16 gress;

17 “(2) furnish information, documents, or testi-
18 mony to either House of Congress, any Member of
19 Congress, or any committee or subcommittee of the
20 Congress; or

21 “(3) respond to any request for information,
22 documents, or testimony from either House of Con-
23 gress or any Committee or subcommittee of Con-
24 gress.

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

4 “(1) prohibiting or preventing, or attempting or
5 threatening to prohibit or prevent, any other officer
6 or employee of the Federal Government from engag-
7 ing in activity protected in subsection (a); or

8 “(2) removing, suspending from duty without
9 pay, demoting, reducing in rank, seniority, status,
10 pay, or performance or efficiency rating, denying
11 promotion to, relocating, reassigning, transferring,
12 disciplining, or discriminating in regard to any em-
13 ployment right, entitlement, or benefit, or any term
14 or condition of employment of, any other officer or
15 employee of the Federal Government or attempting
16 or threatening to commit any of the foregoing ac-
17 tions protected in subsection (a).

18 “(c) APPLICATION.—This section shall not be con-
19 strued to authorize disclosure of any information that is—

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

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

1 “(d) DEFINITION OF OFFICER OR EMPLOYEE OF
2 THE FEDERAL GOVERNMENT.—For purposes of this sec-
3 tion, the term ‘officer or employee of the Federal Govern-
4 ment’ includes—

5 “(1) the President;

6 “(2) a Member of Congress;

7 “(3) a member of the uniformed services;

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

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

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

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

“7211. Employees’ right to petition or furnish information or respond to Con-
gress.”.

18 **SEC. 3. ENHANCEMENT OF WHISTLEBLOWER PROTEC-**
19 **TIONS.**

20 (a) DISCLOSURES RELATING TO OFFICERS OR EM-
21 PLOYEES OF AN OFFICE OF INSPECTOR GENERAL.—Sec-
22 tion 1213(c) of title 5, United States Code, is amended
23 by adding at the end the following:

1 “(3) If the information transmitted under this
2 subsection disclosed a violation of law, rule, or regu-
3 lation, or gross waste, gross mismanagement, abuse
4 of authority, or a substantial and specific danger to
5 public health or safety, by any officer or employee
6 of an Office of Inspector General, the Special Coun-
7 sel may refer the matter to the Committee of Inspec-
8 tors General for Integrity and Efficiency, which shall
9 comply with the standards and procedures applicable
10 to investigations and reports under subsection (c).”.

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

14 “(3) In any case in which the Special Counsel
15 determines that a referral to an Inspector General of
16 an entity of the Federal Government was in retali-
17 ation for a disclosure or protected activity described
18 in section 2302(b)(8) or in retaliation for exercising
19 a right described in section 2302(b)(9)(A)(i), the
20 Special Counsel shall transmit that finding in writ-
21 ing to the Inspector General within seven days of
22 making the finding. The Inspector General shall con-
23 sider that finding and make a determination on
24 whether to initiate an investigation or continue an

1 investigation based on the referral that the Special
2 Counsel found to be retaliatory.”.

3 (c) ENSURING TIMELY RELIEF.—

4 (1) INDIVIDUAL RIGHT OF ACTION.—Section
5 1221 of title 5, United States Code, is amended by
6 striking “section 2302(b)(8) or section
7 2302(b)(9)(A)(i), (B), (C), or (D),” in each instance
8 and inserting “section 2302(b)(8), section
9 2302(b)(9)(A)(i), (B), (C), (D), or (E), section
10 2302(b)(13), or section 2302(g),”.

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

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

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

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

22 (3) APPEAL OF STAY.—Section 1221(c) of title
23 5, United States Code, is amended by adding at the
24 end the following:

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

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

13 (A) IN GENERAL.—Section 1221(i) of title
14 5, United States Code, is amended—

15 (i) by striking “(i) Subsections” and
16 inserting “(i)(1) Subsections”; and

17 (ii) by adding at the end the fol-
18 lowing:

19 “(2)(A) If, in the case of an employee, former em-
20 ployee, or applicant for employment who seeks corrective
21 action from the Merit Systems Protection Board based on
22 an alleged prohibited personnel practice described in sec-
23 tion 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D),
24 or (E), section 2302(b)(13), or section 2302(g), no final
25 order or decision is issued by the Board within 180 days

1 after the date on which a request for such corrective action
2 has been duly submitted to the Board, such employee,
3 former employee, or applicant may, after providing written
4 notice to the Special Counsel and the Board and only with-
5 in 20 days after providing such notice, bring an action
6 for review de novo before the appropriate United States
7 district court, and such action shall, at the request of ei-
8 ther party to such action, be tried before a jury. Upon
9 filing of an action with the appropriate United States dis-
10 trict court, any proceedings before the Board shall cease
11 and the employee, former employee, or applicant for em-
12 ployment waives any right to refile with the Board.

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

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

19 “(i) shall apply the standards set forth in sub-
20 section (e); and

21 “(ii) may award any relief which the court con-
22 siders appropriate, including any relief described in
23 subsection (g).”.

24 (B) APPLICATION.—

1 (i) The amendments made by sub-
2 paragraph (A) shall apply to any corrective
3 action duly submitted to the Merit Systems
4 Protection Board, during the five-year pe-
5 riod preceding the date of enactment of
6 this Act, by an employee, former employee,
7 or applicant for employment based on an
8 alleged prohibited personnel practice de-
9 scribed in section 2302(b)(8),
10 2302(b)(9)(A)(i), (B), (C), or (D), or
11 2302(b)(13) of title 5, United States Code,
12 with respect to which no final order or de-
13 cision has been issued by the Board.

14 (ii) In the case of an individual de-
15 scribed in clause (i) whose duly submitted
16 claim to the Board was made not later
17 than 180 days before the date of enact-
18 ment of this Act, such individual may only
19 bring an action before a United States dis-
20 trict court as described in section
21 1221(i)(2) of title 5, United States Code,
22 (as added by subparagraph (A) if that in-
23 dividual—

24 (I) provides written notice to the
25 Office of Special Counsel and the

1 Merit Systems Protection Board not
2 later than 90 days after the date of
3 enactment of this Act; and

4 (II) brings such action not later
5 than 20 days after providing such no-
6 tice.

7 (d) RECIPIENTS OF WHISTLEBLOWER DISCLO-
8 SURES.—Section 2302(b)(8)(B) of title 5, United States
9 Code, is amended by striking “or to the Inspector General
10 of an agency or another employee designated by the head
11 of the agency to receive such disclosures” and inserting
12 “the Inspector General of an agency, a supervisor in the
13 employee’s direct chain of command up to and including
14 the head of the employing agency, or to an employee des-
15 ignated by any of the aforementioned individuals for the
16 purpose of receiving such disclosures”.

17 (e) ATTORNEY FEES.—

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

21 “(3) If an employee, former employee, or appli-
22 cant for employment is the prevailing party under a
23 proceeding brought under this section, the employee,
24 former employee, or applicant for employment shall
25 be entitled to attorney fees for all representation

1 carried out pursuant to this section. In such an ac-
2 tion for attorney fees, the agency responsible for
3 taking the personnel action shall be the respondent
4 and shall be responsible for paying the fees.”.

5 (2) APPLICATION.—In addition to any pro-
6 ceeding brought by an employee, former employee,
7 or applicant for employment on or after the date of
8 enactment of this Act to a Federal court under sec-
9 tion 7703 of title 5, United States Code, the amend-
10 ment made by paragraph (1) shall apply to any pro-
11 ceeding brought by an employee, former employee,
12 or applicant for employment under such section be-
13 fore the date of enactment of this Act with respect
14 to which the applicable Federal court has not issued
15 a final decision.

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

18 (1) IN GENERAL.—Section 2302(a)(2)(A) of
19 title 5, United States Code, is amended in the mat-
20 ter following clause (xiii)—

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

24 (B) by inserting after “title 31” the fol-
25 lowing: “, a commissioned officer or applicant

1 for employment in the Public Health Service,
2 an officer or applicant for employment in the
3 commissioned officer corps of the National Oce-
4 anic and Atmospheric Administration, and a
5 noncareer appointee in the Senior Executive
6 Service”.

7 (2) CONFORMING AMENDMENTS.—Section 261
8 of the National Oceanic and Atmospheric Adminis-
9 tration Commissioned Officer Corps Act of 2002 (33
10 U.S.C. 3071) is amended—

11 (A) in subsection (a)—

12 (i) by striking paragraph (8); and

13 (ii) by redesignating paragraphs (9)
14 through (25) as paragraphs (8) through
15 (24), respectively; and

16 (B) in subsection (b), by striking the sec-
17 ond sentence.

18 (3) APPLICATION.—

19 (A) IN GENERAL.—With respect to an offi-
20 cer or applicant for employment in the commis-
21 sioned officer corps of the National Oceanic and
22 Atmospheric Administration, the amendments
23 made by paragraphs (1) and (2) shall apply to
24 any personnel action taken against such officer
25 or applicant on or after the date of enactment

1 of the National Oceanic and Atmospheric Ad-
2 ministration Commissioned Officer Corps
3 Amendments Act of 2020 (Public Law 116–
4 259) for making any disclosure protected under
5 section 2302(8) of title 5, United States Code.

6 (B) EXCEPTION.—Subparagraph (A) shall
7 not apply to any personnel action with respect
8 to which a complaint has been filed pursuant to
9 section 1034 of title 10, United States Code,
10 and a final decision has been rendered regard-
11 ing such complaint.

12 (g) RELIEF.—

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

21 (2) APPLICATION.—In addition to any appeal
22 made on or after the date of enactment of this Act
23 to the Merit Systems Protection Board under section
24 7701 of title 5, United States Code, the amendment
25 made by paragraph (1) shall apply to any appeal

1 made under such section before the date of enact-
2 ment of this Act with respect to which the Board
3 has not issued a final decision.

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

6 (a) IN GENERAL.—Section 7512 of title 5, United
7 States Code, is amended—

8 (1) in paragraph (4), by striking “and” at the
9 end; and

10 (2) by striking paragraph (5) and inserting the
11 following:

12 “(5) a furlough of more than 14 days but less
13 than 30 days; and

14 “(6) a furlough of 13 days or less that is not
15 due to a lapse in appropriations;”.

16 (b) APPLICATION.—The amendment made by sub-
17 section (a) shall apply to any furlough covered by such
18 section 7512(5) or (6) (as amended by such subsection)
19 occurring on or after the date of enactment of this Act.

1 **SEC. 5. CODIFICATION OF PROTECTIONS FOR DISCLO-**
2 **SURES OF CENSORSHIP RELATED TO RE-**
3 **SEARCH, ANALYSIS, OR TECHNICAL INFOR-**
4 **MATION.**

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

8 “(h)(1) In this subsection—

9 “(A) the term ‘applicant’ means an applicant
10 for a covered position;

11 “(B) the term ‘censorship related to research,
12 analysis, or technical information’ means any effort
13 to distort, misrepresent, or suppress research, anal-
14 ysis, or technical information; and

15 “(C) the term ‘employee’ means an employee in
16 a covered position in an agency.

17 “(2)(A) Any disclosure of information by an employee
18 or applicant for employment that the employee or appli-
19 cant reasonably believes is evidence of censorship related
20 to research, analysis, or technical information—

21 “(i) shall come within the protections of sub-
22 section (b)(8)(A) if—

23 “(I) the employee or applicant reasonably
24 believes that the censorship related to research,
25 analysis, or technical information is or will
26 cause—

1 “(aa) any violation of law, rule, or
2 regulation; or

3 “(bb) gross mismanagement, a gross
4 waste of funds, an abuse of authority, or
5 a substantial and specific danger to public
6 health or safety; and

7 “(II) such disclosure is not specifically pro-
8 hibited by law or such information is not spe-
9 cifically required by Executive order to be kept
10 classified in the interest of national defense or
11 the conduct of foreign affairs; and

12 “(ii) shall come within the protections of sub-
13 section (b)(8)(B) if—

14 “(I) the employee or applicant reasonably
15 believes that the censorship related to research,
16 analysis, or technical information is or will
17 cause—

18 “(aa) any violation of law, rule, or
19 regulation; or

20 “(bb) gross mismanagement, a gross
21 waste of funds, an abuse of authority, or
22 a substantial and specific danger to public
23 health or safety; and

24 “(II) the disclosure is made to the Special
25 Counsel, or to the Inspector General of an

1 agency or another person designated by the
2 head of the agency to receive such disclosures,
3 consistent with the protection of sources and
4 methods.

5 “(3) A disclosure shall not be excluded from para-
6 graph (2) for any reason described under subsection (f)(1)
7 or (2).

8 “(4) Nothing in this subsection shall be construed to
9 imply any limitation on the protections of employees and
10 applicants afforded by any other provision of law, includ-
11 ing protections with respect to any disclosure of informa-
12 tion believed to be evidence of censorship related to re-
13 search, analysis, or technical information.”.

14 (b) REPEAL.—

15 (1) IN GENERAL.—Section 110 of the Whistle-
16 blower Protection Enhancement Act of 2012 (Public
17 Law 112–199) is hereby repealed.

18 (2) RULE OF CONSTRUCTION.—Nothing in this
19 section shall be construed to limit or otherwise affect
20 any action under such section 110 commenced be-
21 fore the date of enactment of this Act or any protec-
22 tions afforded by such section with respect to such
23 action.

1 **SEC. 6. TITLE 5 TECHNICAL AND CONFORMING AMEND-**
2 **MENTS.**

3 Title 5, United States Code, is amended—

4 (1) in section 1212(h), by striking “or (9)” in
5 each instance and inserting “, (b)(9), (b)(13), or
6 (g)”;

7 (2) in section 1214(a)—

8 (A) by striking “section 2302(b)(8) or sec-
9 tion 2302(b)(9)(A)(i), (B), (C), or (D)” in each
10 instance and inserting “section 2302(b)(8), sec-
11 tion 2302(b)(9)(A)(i), (B), (C), (D), or (E),
12 section 2302(b)(13), or section 2302(g)”;

13 (B) in subsection (i), by striking “section
14 2302(b)(8) or subparagraph (A)(i), (B), (C), or
15 (D) of section 2302(b)(9)” and inserting “sec-
16 tion 2302(b)(8), subparagraph (A)(i), (B), (C),
17 (D), or (E) of section 2302(b)(9), section
18 2302(b)(13), or section 2302(g)”;

19 (3) in section 1215, by striking “section
20 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)” in
21 each instance and inserting “section 2302(b)(8), sec-
22 tion 2302(b)(9)(A)(i), (B), (C), (D), or (E), section
23 2302(b)(13), or section 2302(g)”;

24 (4) in section 2302—

25 (A) in subsection (a)—

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

3 (ii) in paragraph (2)(C)(i), by striking
4 “subsection (b)(8) or section
5 2302(b)(9)(A)(i), (B), (C), or (D)” and in-
6 serting “section 2302(b)(8), section
7 2302(b)(9)(A)(i), (B), (C), (D), or (E),
8 section 2302(b)(13), or section 2302(g)”;
9 and

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

17 (5) in section 7515(a)(2), by striking “para-
18 graph (8), (9), or (14) of section 2302(b)” and in-
19 serting “paragraph (8), (9), (13), or (14) of section
20 2302(b) or section 2302(g)”;

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

23 (7) in section 7703(b)(1)(B), by striking “sec-
24 tion 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or
25 (D)” in each instance and inserting “section

1 2302(b)(8), section 2302(b)(9)(A)(i), (B), (C), (D),
2 or (E), section 2302(b)(13), or section 2302(g)”.

