

AMENDMENT NO. _____ Calendar No. _____

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—114th Cong., 2d Sess.

S. 2390

To provide adequate protections for whistleblowers at the
Federal Bureau of Investigation.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended
to be proposed by Mr. GRASSLEY (for himself and Mr.
LEAHY)

Viz:

1 Strike all after the enacting clause and insert the fol-
2 lowing:

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Federal Bureau of In-
5 vestigation Whistleblower Protection Enhancement Act of
6 2016”.

7 **SEC. 2. FBI WHISTLEBLOWER PROTECTIONS.**

8 (a) IN GENERAL.—Section 2303 of title 5, United
9 States Code, is amended to read as follows:

1 **“§ 2303. Prohibited personnel practices in the Fed-**
2 **eral Bureau of Investigation**

3 “(a) DEFINITIONS.—In this section—

4 “(1) the term ‘administrative law judge’ means
5 an administrative law judge appointed by the Attor-
6 ney General under section 3105 or used by the At-
7 torney General under section 3344;

8 “(2) the term ‘Inspector General’ means the In-
9 spector General of the Department of Justice;

10 “(3) the term ‘personnel action’ means any ac-
11 tion described in section 2302(a)(2)(A) with respect
12 to an employee in, or applicant for, a position in the
13 Federal Bureau of Investigation (other than a posi-
14 tion of a confidential, policy-determining, policy-
15 making, or policy-advocating character);

16 “(4) the term ‘prohibited personnel practice’
17 means a prohibited personnel practice described in
18 subsection (b); and

19 “(5) the term ‘protected disclosure’ means any
20 disclosure of information by an employee in, or ap-
21 plicant for, a position in the Federal Bureau of In-
22 vestigation—

23 “(A) made—

24 “(i) in the case of an employee, to a
25 supervisor in the direct chain of command

1 of the employee, up to and including the
2 head of the employing agency;

3 “(ii) to the Inspector General;

4 “(iii) to the Office of Professional Re-
5 sponsibility of the Department of Justice;

6 “(iv) to the Office of Professional Re-
7 sponsibility of the Federal Bureau of In-
8 vestigation;

9 “(v) to the Inspection Division of the
10 Federal Bureau of Investigation;

11 “(vi) as described in section 7211;

12 “(vii) to the Office of Special Counsel;

13 or

14 “(viii) to an employee designated by
15 any officer, employee, office, or division de-
16 scribed in clauses (i) through (vii) for the
17 purpose of receiving such disclosures; and

18 “(B) which the employee or applicant rea-
19 sonably believes evidences—

20 “(i) any violation of any law, rule, or
21 regulation; or

22 “(ii) gross mismanagement, a gross
23 waste of funds, an abuse of authority, or
24 a substantial and specific danger to public
25 health or safety.

1 “(b) PROHIBITED PRACTICES.—Any employee of the
2 Federal Bureau of Investigation or another component of
3 the Department of Justice who has authority to take, di-
4 rect others to take, recommend, or approve any personnel
5 action, shall not, with respect to such authority—

6 “(1) take or fail to take, or threaten to take or
7 fail to take, a personnel action with respect to an
8 employee in, or applicant for, a position in the Fed-
9 eral Bureau of Investigation because of a protected
10 disclosure;

11 “(2) take or fail to take, or threaten to take or
12 fail to take, any personnel action against an em-
13 ployee in, or applicant for, a position in the Federal
14 Bureau of Investigation because of—

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

18 “(i) with regard to remedying a viola-
19 tion of paragraph (1); or

20 “(ii) other than with regard to rem-
21 edying a violation of paragraph (1);

22 “(B) testifying for or otherwise lawfully as-
23 sisting any individual in the exercise of any
24 right referred to in clause (i) or (ii) of subpara-
25 graph (A);

1 “(C) cooperating with or disclosing infor-
2 mation to the Inspector General of an agency,
3 or the Special Counsel, in accordance with ap-
4 plicable provisions of law; or

5 “(D) refusing to obey an order that would
6 require the individual to violate a law; or

7 “(3) implement or enforce any nondisclosure
8 policy, form, or agreement, if such policy, form, or
9 agreement does not contain the statement described
10 in section 2302(b)(13).

11 “(c) PROCEDURES.—

12 “(1) FILING OF A COMPLAINT.—An employee
13 in, or applicant for, a position in the Federal Bureau
14 of Investigation may seek review of a personnel ac-
15 tion alleged to be in violation of subsection (b) by fil-
16 ing a complaint with the Office of the Inspector
17 General.

18 “(2) INVESTIGATION.—

19 “(A) IN GENERAL.—The Inspector General
20 shall investigate any complaint alleging a per-
21 sonnel action in violation of subsection (b), con-
22 sistent with the procedures and requirements
23 described in section 1214.

24 “(B) DETERMINATION.—The Inspector
25 General shall issue a decision containing the

1 findings of the Inspector General supporting
2 the determination of the Inspector General.

3 “(C) PRELIMINARY RELIEF.—

4 “(i) IN GENERAL.—If the Inspector
5 General determines under subparagraph
6 (B) that reasonable grounds exist to be-
7 lieve that a personnel action occurred, ex-
8 ists, or is to be taken, in violation of sub-
9 section (b)—

10 “(I) the Inspector General shall
11 request from an administrative law
12 judge a preliminary order providing
13 relief from the personnel action; and

14 “(II) except as provided in clause
15 (ii), the administrative law judge,
16 without further proceedings, shall
17 issue such an order.

18 “(ii) GOOD CAUSE.—Upon motion by
19 the Government, after notice and an op-
20 portunity to be heard, and if the adminis-
21 trative law judge determines that there is
22 a particularized showing of good cause that
23 an order should not be issued returning an
24 employee to the position the employee
25 would have held had the personnel action

1 not been taken, the administrative law
2 judge shall issue an order directing that
3 the employee be returned, as nearly as
4 practicable and reasonable, to such posi-
5 tion.

6 “(3) FILING OF OBJECTIONS.—

7 “(A) IN GENERAL.—Not later than 60
8 days after the Inspector General issues a deci-
9 sion under paragraph (2)(B), either party may
10 file objections to the decision and request a
11 hearing on the record.

12 “(B) NO EFFECT ON PRELIMINARY RE-
13 LIEF.—The filing of objections under subpara-
14 graph (A) shall not affect an order issued under
15 clause (i) or (ii) of paragraph (2)(C).

16 “(C) NO OBJECTIONS FILED.—If no party
17 has filed objections as of the date that is 61
18 days after the date the Inspector General issues
19 a decision—

20 “(i) the decision is final and not sub-
21 ject to further review; and

22 “(ii) if the Inspector General had de-
23 termined that reasonable grounds exist to
24 believe that a personnel action occurred,

1 exists, or is to be taken, in violation of
2 subsection (b)—

3 “(I) an administrative law judge,
4 without further proceedings, shall
5 issue an order providing permanent
6 relief from the personnel action; and

7 “(II) upon motion by the em-
8 ployee or applicant, and after an op-
9 portunity for a hearing, an adminis-
10 trative law judge may issue an order
11 that provides for corrective action as
12 described under section 1221(g),
13 which shall be accompanied by a writ-
14 ten decision explaining the grounds
15 for the order.

16 “(4) REVIEW BY ADMINISTRATIVE LAW
17 JUDGE.—

18 “(A) IN GENERAL.—If objections are filed
19 under paragraph (3)(A), an administrative law
20 judge shall review the decision by the Inspector
21 General on the record after opportunity for
22 agency hearing.

23 “(B) CORRECTIVE ACTION.—An adminis-
24 trative law judge may issue an order providing

1 for corrective action as described under section
2 1221(g).

3 “(C) DETERMINATION.—An administrative
4 law judge shall issue a written decision explain-
5 ing the grounds for the determination by the
6 administrative law judge under this paragraph.

7 “(D) EFFECT OF DETERMINATION.—The
8 determination by an administrative law judge
9 under this paragraph shall become the decision
10 of the Department of Justice without further
11 proceedings, unless there is an appeal to, or re-
12 view on motion of, the Attorney General within
13 such time as the Attorney General shall by rule
14 establish.

15 “(5) REVIEW BY ATTORNEY GENERAL.—

16 “(A) TIMEFRAME.—

17 “(i) IN GENERAL.—Upon an appeal
18 to, or review on motion of, the Attorney
19 General under paragraph (4)(D), the At-
20 torney General, through reference to such
21 categories of cases, or other means, as the
22 Attorney General determines appropriate,
23 shall establish and announce publicly the
24 date by which the Attorney General in-
25 tends to complete action on the matter,

1 which shall ensure expeditious consider-
2 ation of the appeal or review, consistent
3 with the interests of fairness and other pri-
4 orities of the Attorney General.

5 “(ii) FAILURE TO MEET DEADLINE.—
6 If the Attorney General fails to complete
7 action on an appeal or review by the an-
8 nounced date, and the expected delay will
9 exceed 30 days, the Attorney General shall
10 publicly announce the new date by which
11 the Attorney General intends to complete
12 action on the appeal or review.

13 “(B) DETERMINATION.—The Attorney
14 General shall issue a written decision explaining
15 the grounds for the determination by the Attor-
16 ney General in an appeal or review under para-
17 graph (4)(D).

18 “(6) PUBLICATION OF DETERMINATIONS.—

19 “(A) PUBLIC AVAILABILITY.—Except as
20 provided in subparagraph (B), the Attorney
21 General shall make written decisions issued by
22 administrative law judges under paragraph
23 (3)(C) or (4)(C) and written decisions issued by
24 the Attorney General under paragraph (5)(B)
25 publicly available in a manner that is—

1 “(i) to the maximum extent prac-
2 ticable, consistent with the manner in
3 which the Merit Systems Protection Board
4 makes decisions of the Board available to
5 the public; and

6 “(ii) in accordance with section 552.

7 “(B) RULE OF CONSTRUCTION.—Nothing
8 in subparagraph (A) shall be construed to limit
9 the authority of an administrative law judge or
10 the Attorney General to limit the public disclo-
11 sure of information under law or regulations.

12 “(7) JUDICIAL REVIEW.—Any determination by
13 an administrative law judge or the Attorney General
14 under this subsection shall be subject to judicial re-
15 view under chapter 7. A petition for judicial review
16 of such a determination shall be filed in the United
17 States Court of Appeals for the Federal Circuit or
18 any court of appeals of competent jurisdiction.

19 “(d) REGULATIONS.—Not later than 18 months after
20 the date of enactment of the Federal Bureau of Investiga-
21 tion Whistleblower Protection Enhancement Act of 2016,
22 the Attorney General shall prescribe regulations to carry
23 out subsection (c) that—

24 “(1) ensure that prohibited personnel practices
25 shall not be taken against an employee in, or appli-

1 cant for, a position in the Federal Bureau of Inves-
2 tigation;

3 “(2) provide for the administration and enforce-
4 ment of subsection (c) in a manner consistent with
5 applicable provisions of sections 1214 and 1221 and
6 in accordance with the procedures under subchapter
7 II of chapter 5 and chapter 7;

8 “(3) ensure that employees of the Federal Bu-
9 reau of Investigation are informed of the rights and
10 remedies available to the employees under this sec-
11 tion, including how to make a lawful disclosure of
12 information that is specifically required by law or
13 Executive Order to be kept classified in the interest
14 of national defense or the conduct of foreign affairs;
15 and

16 “(4) provide for the protection of classified in-
17 formation and intelligence sources and methods.

18 “(e) REPORTING.—Not later than March 1 of each
19 year, the Attorney General shall make publicly available
20 a report containing—

21 “(1) the number and nature of allegations of a
22 prohibited personnel practice received during the
23 previous year;

1 “(2) the disposition of each allegation of a pro-
2 hibited personnel practice resolved during the pre-
3 vious year;

4 “(3) the number of unresolved allegations of a
5 prohibited personnel practice pending as of the end
6 of the previous year and, for each such unresolved
7 allegation, how long the allegation had been pending
8 as of the end of the previous year;

9 “(4) the number of disciplinary investigations
10 and actions taken with respect to each allegation of
11 a prohibited personnel practice during the previous
12 year;

13 “(5) the number of instances during the pre-
14 vious year in which the Inspector General found rea-
15 sonable grounds existed to believe that a prohibited
16 personnel practice had occurred that were appealed
17 by the Federal Bureau of Investigation; and

18 “(6) the number of allegations of a prohibited
19 personnel practice resolved through settlement, in-
20 cluding the number that were resolved as a result of
21 mediation.

22 “(f) RULES OF CONSTRUCTION.—Nothing in this
23 section shall be construed to—

24 “(1) limit the jurisdiction of any office under
25 any other provision of law to conduct an investiga-

1 (iv) that were appealed to a court of
2 appeals of the United States;

3 (B) the number of decisions made publicly
4 available under 2303(c)(6) of title 5, United
5 States Code, as amended by this Act, and the
6 nature of any limitations on public disclosure of
7 the decisions;

8 (C) the nature of corrective action provided
9 in instances of a prohibited personnel practice;

10 (D) the number and type of disciplinary
11 actions taken in instances of a prohibited per-
12 sonnel practice;

13 (E) an evaluation of the timeliness of reso-
14 lution of allegations of a prohibited personnel
15 practice;

16 (F) an assessment of the mediation process
17 of the Department of Justice;

18 (G) a discussion of how the use of adminis-
19 trative law judges and review under chapters 5
20 and 7 of title 5, United States Code, affected
21 the process of investigating and resolving alle-
22 gations of a prohibited personnel practice; and

23 (H) a discussion of the perspectives of key
24 stakeholders on the effects of the amendments

1 of title 5, United States Code, as
2 amended by this Act; and

3 (ii) for which an investigation or re-
4 view is pending on or after the date of en-
5 actment of this Act.

6 (B) APPLICATION OF EXISTING PROCE-
7 DURES UNTIL RULES ISSUED.—Subject to sub-
8 paragraph (C), for any covered complaint—

9 (i) the procedures under section
10 2303(c) of title 5, United States Code, as
11 amended by this Act, shall not apply; and

12 (ii) the covered complaint shall be in-
13 vestigated and reviewed in accordance with
14 the regulations and procedures prescribed
15 under section 2303 of title 5, United
16 States Code, as in effect on the day before
17 the date of enactment of this Act.

18 (C) APPLICATION OF NEW REVIEW PROCE-
19 DURES TO PENDING INVESTIGATIONS.—For any
20 covered complaint for which the investigation is
21 pending on the effective date of the regulations
22 prescribed by the Attorney General under sec-
23 tion 2303(d) of title 5, United States Code, as
24 amended by this Act—

1 (i) the procedures under paragraphs
2 (1), (2), and (3) of section 2303(c) of title
3 5, United States Code, as amended by this
4 Act, shall not apply; and
5 (ii) if either party files objections and
6 requests a hearing on the record not later
7 than 60 days after the date on which the
8 investigation is completed, the covered
9 complaint shall be subject to review in ac-
10 cordance with paragraphs (4), (5), (6), and
11 (7) of section 2303(c) of title 5, United
12 States Code, as amended by this Act.