Government Accountability Project
National Office
1612 K Street, N.W. • Suite 1100
Washington, D.C. 20006
(202)408-0034 • Fax: (202)408-9855
Email: info@whistleblower.org • Website: www.whistleblower.org

S. 274 and H.R. 985

	S. 274	H.R. 985		(Senate)	(House)
1. Overturns existing hostile case law from Federal Circuit Court of Appeals and restores definition of "any" disclosure.	**YES**	**YES**	**Language Identical.**	**Sec. 1 (b)**	**Sec. 2 (a)**
2. Grants federal employees access to jury trials to enforce their rights.	**NO**	**YES**	**House Language Unique.**	**N/A**	**Sec. 9 (a)**
3. Bans additional judicially-imposed burdens to qualify for protection, such as "irrefragable proof."	**YES**	**YES**	**Language Identical.**	**Sec. 1 (d)**	**Sec. 4**
4. Establishes normal access to appeals courts, eliminating Federal Circuit's monopoly.	**YES**	**YES**	**Some Differences. See note A. below.**	**Sec. 1 (j)**	**Sec. 9 (b)**
5. Eliminates FBI and other intelligence agencies loophole for whistleblower protections.	**NO**	**YES**	**House Language Unique. See note B. below.**	**N/A**	**Sec. 10**
6. Closes the security clearance loophole in the WPA.	**YES**	**YES**	**Some Differences. See note C. below.**	**Sec. 1 (e)(1) and (e)(3)(A)**	**Sec. 10 (a)**
7. Includes federal contractors in whistleblower protection framework.	**NO**	**YES**	**House Language Unique. See note D. below.**	**N/A**	**Sec. 11**
8. Legalizes process for classified disclosures to Congress.	**YES**	**YES**	**Some Differences. See note E. below.**	**Sec. 1 (b)(3)**	**Sec. 10 (a)**
9. Requires agencies to inform employees how to make a classified disclosure.	**YES**	**NO**	**Senate language unique.**	**Sec. 1 (m)**	**N/A**
10. Neutralizes the government's use of the "states secret privilege."	**NO**	**YES**	**House Language Unique.**	**N/A**	**Sec. 10 (a)**
11. Institutionalizes statutory rights against executive gag orders.	**YES**	**YES**	**Language Identical.**	**Sec. 1 (e)(2)**	**Sec. 5 (b)**

12. Institutionalizes statutory rights against retaliatory investigations.	**YES**	**YES**	**Language Identical.**	**Sec. 1 (e)(2)**	**Sec. 5 (b)**
13. Bars ex post facto determination that an agency is not covered by WPA.	**YES**	**YES**	**Language Identical.**	**Sec. 1 (f)**	**Sec. 6**
14. Bars MSPB from deciding for an agency before whistleblower has opportunity to present evidence of retaliation.	**YES**	**NO**	**Senate language unique.**	**Sec. 1 (n)**	**N/A**
15. Extends WPA supremacy over CII restrictions/gags.	**YES**	**NO**	**Senate language unique.**	**Sec. 1 (l)**	**N/A**
16. Lowers burdens of proof necessary for MSPB disciplinary action against alleged retaliator.	**YES**	**YES**	**Some Differences. See note F. below.**	**Sec. 1 (h)**	**Sec. 7**
17. Authorizes the Special Counsel to appear as amicus curiae in whistleblower cases.	**YES**	**NO**	**Senate Language unique.**	**Sec. 1 (i)**	**N/A**
18. Frees OSC from responsibility to pay personal attorney fees for managers in unsuccessful disciplinary actions.	**YES**	**NO**	**Senate Language unique.**	**Sec. 1 (g)**	**N/A**
19. Extends whistleblower and other rights to TSA baggage screeners.	**NO**	**YES**	**House Language Unique.**	**N/A**	**Sec. 12**
20. Grants full due process rights to witnesses in government investigations and those who refuse to violate the law.	**NO**	**YES**	**House Language Unique.**	**N/A**	**Sec. 2 (b)**
21. Provides a definition of Clear and Convincing Evidence.	**NO**	**YES**	**House Language Unique.**	**N/A**	**Sec. 3 (b)**
22. Clarifies rights for federally-funded scientists under abuse of authority.	**NO**	**YES**	**House Language Unique.**	**N/A**	**Sec. 13**
23. Provides for compensatory damages and expert witness fees in whistleblower cases.	**NO**	**YES**	**House Language Unique. See note G. below.**	**N/A**	**Sec. 9 (c)**
24. Allows for disclosures on the “consequences” of agency polices	**YES**	**YES**	**Language Identical.**	**Sec. 1 (c)**	**Sec. 3 (a)**

A. Both H.R. 985 and S. 274 establish normal access to appeals courts, eliminating Federal Circuit's monopoly.

1. H.R. 985 (Section 9(b)) amends 5 USC 7703(b) to allow for appeals of MSPB decisions to all circuits. In contrast, S. 274's amendments to 5 USC 7703(b) set up a 5-year period in which an employee may appeal a Board decision to any circuit.

2. S. 274's amendments (subsection (j)) would allow for OPM to take an appeal to the Federal Circuit or any circuit during the 5-year period, whereas the House language only permits OPM petitions for extraordinary review to the Federal Circuit. See S. 274's amendments to 7703(d), creating a new paragraph (2).

3. We note that this leaves an outstanding issue – to a varying degree, both bills permit OPM and the Department of Justice to guarantee that the Federal Circuit will control all significant precedents for test cases after an employee has won at the Board or District Court. A possible solution is to give the employee choice for forum rights for OPM petitions, through a *forum non conveniens* or related provision.

4. We note that neither version amends 7703(c) to account for these changes and apply the standard for judicial review to the other circuits. We do not know if that technical reference to the other circuits is necessary, since section 7703(c) merely applies the generic Administrative Procedures Act standard of appellate review anyway.

B. Eliminates FBI and other intelligence agencies loophole for whistleblower protections.

1. H.R. 985, section 10, extends due process rights to FBI and other intelligence agency employees, creating a new 5 USC 2303a. There is no corresponding Senate language.

2. We note that in section 10, subsection (f)(4), the definition of "authorized official of an Executive agency" does not specifically protect employees for disclosures made to the his or her supervisor or others in the chain of command. This creates an apparent contradiction with the *Garcetti* (protection for "job duties" disclosures) language for national security employees in section 10(2)(a), and would leave the law unhelpful in the overwhelming majority of communications made through the chain of command (See Mike German's case, FBI). We understand a concern was raised by House Intelligence that in some rare circumstances a supervisor would not be cleared to hear the information if it involves a secret project on which the subordinate employee is working. A solution is to add supervisors to the list of protected audiences with a qualification that a disclosure must adhere to existing

guidance for communicating classified information. We have discussed and received a favorable preliminary response from Senate Intelligence committee staff for this modification.

C. Closes the security clearance loophole in the WPA.

1. There are significant difference between the Senate and House approach to this reform.

2. S. 274 amends 2302(a)(2)(A), adding a new clause (xii), making "a suspension, revocation, or other determination relating to a security clearance or any other access determination by a covered agency" a new personnel action covered by the WPA.

3. Under the Senate model, the Board can determine whether the clearance decision was retaliatory and may order declaratory or other relief, but may not restore the clearance. If retaliation is found, the agency must do a review of the action and report back to Congress on its review. Security clearance actions are to receive expedited review by OSC and MSPB. The agency may prove independent justification by a preponderance, rather than clear and convincing standard.

4. In H.R. 985, security clearance reprisals are routed through the new rights created by 5 USC 2303a (Note "B" above). An agency head acting on an IG recommendation or a district court may order a clearance restored.

5. We note that under subsection (d) of this section, "applicability to non-covered agencies," an employee that is not an intel employee may be entitled to this process if their disclosure consists in whole or in part of *classified or sensitive information*. It would not apply against revocation of clearance for *completely unclassified* and otherwise protected disclosures. (See Rich Levernier, DOE) That problem can be solved in the House model in subsection (d) by adding the phrase "any information protected under section 2302(b)(8) of Title 5, including" after "for purposes of any disclosure …" on line 8 of page 20.

D. Includes federal contractors in whistleblower protection framework.

1. H.R. 985 provides for a right of action in federal district court if an employee of a contractor is retaliated against for blowing the whistle and does not receive timely relief from the agency head after filing a complaint with the Inspector General.

2. The provisions in section 11 of H.R. 985 amend 41 USC 265 for civilian agency contractors and 10 USC 2409 for Defense Department contractors.

3. We note that the FY08 NDAA amends 10 USC 2409 for defense contractor employees, also providing for a right of action in district court if timely relief is not received through the IG/agency head route (employing a slightly different process than what is in H.R. 985). The amendments in the NDAA also expand the scope of employees covered to include grantees, expand the scope of protected audiences for making a disclosure, expand the categories of protected speech, and place stricter time limits on the IG. That law did not exist when HR 985 was passed, and its enactment creates the potential for an inconsistency between defense contractors and the rest of contractor employees. The problem can be solved by reconciling HR 985 so it is consistent with the later legislation.

E. Legalizes process for classified disclosures to Congress

1. S. 274 protects non-intelligence agency employees for classified disclosures to Congress if the employee reasonably believes she has "direct and specific" evidence of wrongdoing and the disclosure is made to: "(I) a member of a committee of Congress having a primary responsibility for oversight of a department, agency, or element of the Federal Government to which the disclosed information relates and who is authorized to receive information of the type disclosed; (II) any other Member of Congress who is authorized to receive information of the type disclosed; or (III) an employee of Congress who has the appropriate security clearance and is authorized to receive information of the type disclosed.

2. H.R. 985 protects intelligence agency employees – and allows non-intel employees to utilize the channel – to make classified disclosures to Congress based on the following procedure: "(A) with respect to covered information about sources and methods of the Central Intelligence Agency, the Director of National Intelligence, and the National Intelligence Program (as defined in section 3(6) of the National Security Act of 1947), a member of the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, or any other committees of the House of Representatives or Senate to which this type of information is customarily provided; (B) with respect to special access programs specified in section 119 of title 10, an appropriate member of the Congressional defense committees (as defined in such section); and (C) with respect to other covered information, a member of the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, or any other committees of the House of Representatives or the Senate that have oversight over the program which the covered information concerns."

3. We note that in the subparagraph (C) quoted directly above, which begins "with respect to other covered information," that this would limit the protected channel for UNCLASSIFIED, as well as classified information, to the Committees cited. This is

because the definition of covered information in section 10 includes both classified and unclassified information. The problem can be solved by clarifying that unclassified disclosures are protected if they are made to any Member of Congress.

F. Lowers burdens of proof necessary for MSPB disciplinary action against alleged retaliator.

1. Both H.R. 985 and S. 274 change the standards for Board disciplinary actions against those who retaliate.

2. H.R. 985, section 7, states: (B) "In any case in which the Board finds that an employee has committed a prohibited personnel practice under paragraph (8) or (9) of section 2302(b), the Board shall impose disciplinary action if the Board finds that the activity protected under such paragraph (8) or (9) (as the case may be) was the primary motivating factor, *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*.

3. Compare with (italicized) text in S. 274, subsection (h): "(B) In any case in which the Board finds that an employee has committed a prohibited personnel practice under paragraph (8) or (9) of section 2302(b), the Board shall impose disciplinary action if the Board finds that the activity protected under paragraph (8) or (9) of section 2302(b) *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 preponderance of 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. We note that the Senate language reflects the traditional *Mt.* Healthy legal burdens of proof more accurately than the House language, which adopts the most difficult to achieve for a successful disciplinary prosecution.

G. Provides for compensatory damages and expert witness fees in whistleblower cases.

1. H.R. 985 amends 5 USC 1221(g) to provide for compensatory damages, in addition to consequential damages, should a whistleblower prevail.

2. We note that it is necessary to also amend 5 USC 1214(g) with identical language so that the Board's authority to order damages in cases brought by OSC petition under 1214 is consistent with the remedy available in an Individual Right of Action under section 1221.