



Legislative Bulletin.....March 14, 2007

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Summary of the Bills Under Consideration Today:

Total Number of New Government Programs: At least one

Total Cost of Discretionary Authorizations: At least \$93 million over 10 years

Effect on Revenue: Reduced revenue of \$10 million over 10 years

Total Change in Mandatory Spending: \$0

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: 1

Number of Bills Without Committee Reports: 0

Number of Reported Bills that Don't Cite Specific Clauses of Constitutional Authority: 4

**H.R. 1309 — The Freedom of Information Act Amendments of 2007
(Clay, D-MO)**

Order of Business: The bill is scheduled for consideration on Wednesday, March 14, 2007, under a motion to suspend the rules and pass the bill.

Summary: H.R. 1309 would amend and expand the Freedom of Information Act (FOIA) to prohibit federal agencies from denying a requester status as a news media representative (for purposes of determining FOIA request processing fees) solely on the absence of institutional association, to require agencies to develop a system to track FOIA requests, and to modify various other requirements and regulations. The specific provisions of the bill are as follows:

- Contains a number of findings, including the following:
 - “the Freedom of Information Act establishes a ‘strong presumption in favor of disclosure’ as noted by the United States Supreme Court in United States

- Department of State v. Ray (502 U.S. 164 (1991)), a presumption that applies to all agencies governed by that Act;
- “disclosure, not secrecy, is the dominant objective of the Act,’ as noted by the United States Supreme Court in Department of Air Force v. Rose (425 U.S. 352 (1976)); and
 - “in practice, the Freedom of Information Act has not always lived up to the ideals of that Act.”
- Prohibits an agency, when making a determination whether to deny fee waivers (for a FOIA request) for a news media representative, from denying the representative’s status solely on the basis of the absence of institutional associations of the requester (i.e. – the requestor is not associated with a specific organization). This provision requires the agency to consider prior publication history of the requestor (including books, articles, media broadcasts, etc.). If no prior publication history exists, it requires the agency to consider the requester’s stated intent to distribute information to a “reasonably broad audience,” though this term is not defined in the bill or U.S. Code.
 - Declares that, regarding the recovery of attorney fees and other litigation costs, the requesters have “substantially prevailed” (in FOIA litigation) when they have obtained relief either through 1) a judicial order or administrative action, or 2) a voluntary or unilateral change in position by the opposing party (the agency). The committee report states that the purpose of this provision is to ensure that requesters are eligible for attorney fees and other litigation costs “if they obtain relief from the agency during the litigation.”
 - Requires the Attorney General (AG) to notify the Special Counsel regarding each civil action taken against government officials who “arbitrarily and capriciously” deny records to FOIA requesters, and requires to AG to submit an annual report to Congress on the number of these actions taken, as well as the action taken by the Special Counsel on these civil actions.
 - Requires that the 20-day statutory clock (in current law) to begin once the agency has receipt of the FOIA request *and* has obtained the consent of the requesting party. The provision also prohibits an agency from charging a requester fees if the above time limit for the request is not met.
 - Requires each agency to create a system to assign individual tracking numbers for each FOIA request. This provision also requires the agency to provide the tracking number to the requester within 10 days of receiving the request, and establish a telephone line or internet service that provides status information to the requester. It states these provisions must be implemented within one year of enactment, and will apply to all requests made after the effective date.
 - Stipulates that Congress can not create new statutory exemptions under FOIA, unless it explicitly does so by citing section 552(b) of the code and establishing the “particular criteria for withholding (the requested information) or referring to particular types of matters to be withheld” from a FOIA request.
 - Imposes additional annual reporting requirements on FOIA activities to the AG, including:
 - the average, median, and range in number of days the agency took to respond to requests (from the date the request was initially received);
 - the number of occasions on which each statute was relied upon to deny a request;

- the number of requests the agency responded to with a determination within certain timeframes;
 - specific data on agency responsiveness to administrative appeals;
 - the number of expedited review requests received by the agency, the number that were granted, and the number that were denied, the average and median number of days for adjudicating expedited review requests, and the number of requests that were adjudicated within the required 10 days.
- Stipulates that agency records, regardless of the format (e.g., hardcopy or electronic), or who the records are maintained by (whether the agency or a private contractors), remain subject to FOIA.
 - Establishes a **new Office of Government Information Services** at the National Archives and Records Administration (NARA), and a **new director for the office to be known as the National Information Advocate**” (NIA) to “provide informal guidance to requesters and may provide fact-finding reviews and opinions to requesters.” This provision tasks the NIA to review the policies and procedures of administrative agencies and recommend policy changes to Congress and the President to improve FOIA handling procedures.
 - Requires the Comptroller General to submit a report to Congress (each year for the following three years after enactment) on the implementation of the Critical Infrastructure Information (CII) Act of 2002, to include the number of private sector, state, and local agency submissions of CII data to the Homeland Security Department and the number of requests for access to records.
 - Requires the Office of Personnel Management (OPM) to submit a report to Congress that examines whether changes to executive branch personnel policies could be made that would a) provide “greater encouragement to all federal employees to fulfill their duties regarding FOIA requests, and b) enhance the stature of executive branch officials administering the FOIA program, among other items.
 - Declares that “the policy of the federal government is to release information to the public in response to a request under this section” if the release is required by law or if the release is allowed by law and the agency concerned does not “reasonably foresee” that disclosure would be harmful, and mandates that all guidance provided to federal employees be consistent with this codified presumption.
 - Requires agencies to note the specific exemption used to withhold information on the partial records that are released in response to a FOIA request, unless revealing the information would harm an interest protected by the exemption.

Additional Background: The FOIA was originally signed into law in 1966 by President Lyndon B. Johnson. FOIA is a federal law (5 U.S.C. § 552) that establishes the public’s right to obtain information from federal government agencies. Any entity can file a FOIA request, including U.S. citizens, foreign nationals, organizations, associations, and universities. The Act was amended to force greater agency compliance in 1974 following Watergate, and was also amended in 1996 to broaden access to electronic information. As noted in the summary, there are certain limitations and exemptions related to national security issues.

Possible Conservative Concerns: Some conservatives may be concerned with the increased regulations and reporting requirements placed on the executive branch regarding FOIA requests, and some may consider the amount and nature of these requirements to be onerous and unduly

burdensome. Conservatives may also be concerned with the fact that this bill creates a new office at the National Archives and at least one new position, and has an overall cost \$63 million over five years.

Rep. Lamar Smith, RSC Member and Ranking Member on the Judiciary Committee, has also stated serious concerns with the presumption of the disclosure provision in this bill. According to his office, “This provision would reverse the Freedom of Information Act (FOIA) guidelines set out by former Attorney General John Ashcroft that stated FOIA should be used to ensure an open and accountable system of government while protecting national security and personal privacy. Overturning the Ashcroft presumption, as this provision would do, would allow documents to be released that could have a serious impact on national security. Therefore, Congressman Smith urges all members to oppose H.R. 1309.”

Committee Action: H.R. 1309 was introduced on March 5, 2007, and referred to the Committee on Oversight and Government Reform’s Subcommittee on Information Policy, Census, and National Archives. It was marked-up and forwarded to the full committee the next day, and then marked-up and reported (amended) to the House on March 8 by a voice vote (House Report [110-45](#)).

Administration Policy: No Statement of Administration Policy was available as of press time.

Cost to Taxpayers: CBO estimates that enacting **H.R. 1309 would increase direct spending by \$6 million in 2008 and \$63 million over the 2008-2017 period**, “to reimburse citizens making FOIA requests for attorneys’ fees and litigation cost payments.” **CBO also estimates that enacting H.R. 1309 would result in a loss of fees of \$10 million over the 2008-2017 period** (since fees are recorded in the budget as revenues). In addition, the Majority is circumventing its own pay-as-you-go (PAYGO) rules by scheduling FOIA on the suspension calendar. As noted above, the bill costs 63 million over ten years, and includes a revenue loss of \$10 million over the same period. As a result, if the bill were considered under regular order (without suspending the rules of the House), both a PAYGO point of order and a Budget Act point of order (for consideration of a spending bill before the adoption of a budget resolution) would lie against the legislation. However, by moving the bill on the suspension calendar, the Majority avoids these two points of order.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Constitutional Authority: The Oversight and Government Reform Committee, in House Report [110-45](#), cites constitutional authority in Article I, Section 8, Clause 18 (to make all laws necessary and proper to carry out the *foregoing* powers), **but fails to cite a foregoing power or another specific enumerated clause.**

House Rule XIII, Section 3(d)(1), requires that all committee reports contain “a statement citing the *specific* powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution.” *[emphasis added]*

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H.R. 1255 — Presidential Records Act Amendments of 2007 **(Waxman, D-CA)**

Order of Business: The bill is scheduled for consideration on Wednesday, March 14, 2007, under a motion to suspend the rules and pass the bill.

Summary: H.R. 1255 would modify and expand current procedures for requesting and releasing presidential records. The bill would stipulate certain deadlines by which records must be made publicly available, requires notice to be given to presidents and former presidents just prior to release of presidential records, and requires that presidents and former presidents notify the Archivist and Congress simultaneously when asserting constitutional privilege against disclosure of certain records. The specific provisions of the bill are as follows:

- Establishes how records will be reviewed by a former or current president prior to the public release under the Presidential Records Act. It requires the Archivist, when determining to make presidential records available to the public (that were not previously available) to promptly provide notice of this determination to the former president (during whose term the records were created), the current president, and the public 20 days prior to release of the information.
- Allows a current or former president to extend the initial notice period once, for an additional 20 days.
- Directs the Archivist, upon expiration of the 20-day notice, to make the applicable records public, except those records which the Archivist receives a claim of constitutionally based privilege against disclosure from a current or former president.
- Stipulates that the deadline for making the records public will not expire before July 20th of the year the incumbent president first takes office.
- Requires that any claim of constitutionally based privilege against disclosure must be asserted “personally” by an incumbent or former president.
- Requires an incumbent or former president to notify the Archivist, the House Oversight and Government Reform Committee, the Senate Homeland Security and Governmental Affairs Committee of a privilege claim on the *same day* that the claim is asserted to the Archivist.
- Requires the Archivist to make presidential records publicly available that are subject to a privilege claim asserted by a former president after the expiration of the 20-day period (not withstanding or despite the existing privilege claim), unless the Archivist is directed by court order initiated by the former president to not release the records.
- Requires the Archivist to *not* make presidential records publicly available that are subject to a privilege claim asserted by the incumbent president, unless the president withdraws

the privilege claim, or the Archivist is directed by a final court order that is not subject to appeal.

- Requires the Archivist to “adjust any otherwise applicable time period under this section as necessary to comply with the return date of any congressional subpoena, judicial subpoena, or judicial process.”
- Prohibits the Archivist from making any original presidential records available to an individual claiming access to the records as a designated representative, if that individual has been convicted of a crime relating to the review, retention, removal, or destruction of records of the Archives. This was an amendment by Rep. Tom Davis that was accepted in committee.
- Repeals Executive Order number [13233](#), dated November 1, 2001, the Presidential Records Act Executive Order. This executive order stipulates the right of the president to make privilege claims against the release of records to current and former vice presidents. It also requires the concurrence of the incumbent and former president prior to release of the requested records.

Additional Background: The Presidential Records Act (PRA) of 1978 (44 U.S.C. § 2201-2207) governs the official records of presidents and vice presidents. The PRA transferred legal ownership of the official records of the president from private to public: “The United States shall reserve and retain complete ownership, possession, and control of Presidential records; and such records shall be administered in accordance with the provisions of this chapter.” (44 U.S.C. § 2202).

Possible Conservative Concerns: Some conservatives may be concerned by the significant burden certain provisions place on current and former presidents, under which they must assert a claim of privilege within a fixed time period of no more than 40 days if they do not wish the records to become publicly available immediately after the deadline expires. Presidential records requests can number in the thousands of pages and, as the President’s SAP notes, this creates an incentive for incumbent and former presidents to assert sweeping, blanket claims of privilege over large quantities of material (for lack of time to adequately review the material in question and assert claims on only the relevant sections).

Also, some conservatives may be concerned by the implication of separation of powers issues presented with certain provisions that impose burdens or requirements on presidents regarding the presidential records of their administration.

Committee Action: H.R. 1255 was introduced on March 1, 2007, and referred to the Committee on Oversight and Government Reform’s Subcommittee on Information Policy, Census, and National Archives. It was marked-up and forwarded to the full committee the next day, and then marked-up and reported (amended) to the House on March 8 by a voice vote (House Report [110-44](#)).

Administration Policy: The Administration strongly opposes passage of H.R. 1255 and released a Statement of Administration Policy (SAP) on March 13, 2007, which included the following statement:

The Administration strongly opposes House passage of H.R. 1255 because it would be counterproductive and invite unnecessary litigation, is misguided, and would improperly impinge on the President’s constitutional authority, in violation of settled separation of powers principles. Although the Administration is otherwise willing to work with interested parties to strike a meaningful balance of competing interests, **if H.R. 1255 were to be presented to the President, his senior advisors would recommend that he veto the bill.** (bold emphasis added).

Cost to Taxpayers: CBO estimates that implementing H.R. 1255 “would have no significant impact on federal spending. In addition, the legislation would not affect direct spending or revenues.”

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: According to CBO, H.R. 1255 “would impose private-sector mandates, as defined by UMRA [Unfunded Mandates Reform Act], on former Presidents, their designees and families, and former vice presidents by changing the procedure or eliminating the ability to claim constitutionally based privileges related to the disclosure of Presidential or Vice-Presidential records,” but these costs would be minimal and well below the annual threshold established by UMRA.

Constitutional Authority: The Oversight and Government Reform Committee, in House Report [110-44](#), cites constitutional authority in Article I, Section 8, Clause 18 (to make all laws necessary and proper to carry out the *foregoing* powers), **but fails to cite a foregoing power or another specific enumerated clause.**

House Rule XIII, Section 3(d)(1), requires that all committee reports contain “a statement citing the *specific* powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution.” *[emphasis added]*

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H.R. 1254 — Presidential Library Donation Reform Act of 2007 **(Waxman, D-CA)**

Order of Business: The bill is scheduled for consideration on Wednesday, March 14, 2007, under a motion to suspend the rules and pass the bill.

Summary: H.R. 1254 would amend the Presidential Libraries act and impose additional reporting requirements on donations to presidential library funding organizations, require public disclosure of donation records, and imposes civil penalties for violations. The specific provisions of the bill are as follows:

- Require presidential library funding organizations to submit to Congress (on a quarterly basis) information on every contributor who donated \$200 or more to the organization in a quarterly period. The information required is the amount and source of each contribution, the address of the contributor, and the occupation of the contributor if an individual.
- Requires this information to be submitted until either the Archivist has accepted, taken title to, or entered into an agreement to use any land or facility for the archival depository, or the president whose archives are contained in the depository no longer is the incumbent president *and* a four-year period has elapsed.
- Requires that the Archivist make the contributor/contribution information submitted available over the internet “as soon as is practicable” (without charge) after each quarterly filing.
- Prohibits any person making a contribution from knowingly and willfully submitting false information or omitting information regarding their contribution, and prohibits any presidential library fundraising organization from knowingly or willingly submitting false information or omitting information. This provision subjects violators to either a fine of up to \$10,000, imprisonment up to five years, or both.
- Prohibits any person from making a contribution to the presidential library in the name of another person, or to allow his or her name to be used for a contribution that is not their own.
- Requires the Archivist to promulgate regulations to carry out the above provisions.

Additional Background: In 1955, Congress passed the Presidential Libraries Act (PLA), establishing a system of privately erected and federally maintained libraries. According to the National Archives, this Act encouraged other Presidents to donate their historical materials to the government and ensured the preservation of Presidential papers and their availability to the American people. For additional information on the Presidential Libraries Act, please visit the [National Archives website](#).

Possible Conservative Concerns: Some conservatives may find the restrictions and public disclosure on private contributions to a presidential library (and, as such, an entity that is not an elected official and subject to the same strict scrutiny as those in political office) intrusive and potentially unconstitutional. These regulations may also have the effect of reducing the number and amount of contributions to future presidential libraries.

Committee Action: H.R. 1255 was introduced on March 1, 2007, and referred to the Committee on Oversight and Government Reform. It was marked-up and reported to the House on March 8 by a voice vote (House Report [110-43](#)).

Administration Policy: No Statement of Administration Policy was available as of press time.

Cost to Taxpayers: CBO estimates that implementing **H.R. 1254 would cost \$1 million in 2008 and about \$5 million over the 2008-2012 period.** CBO estimates that NARA would need **\$800,000 annually** to update and maintain the database after it is established.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Constitutional Authority: The Oversight and Government Reform Committee, in House Report [110-43](#), cites constitutional authority in Article I, Section 8, Clause 18 (to make all laws necessary and proper to carry out the *foregoing* powers), **but fails to cite a foregoing power or another specific enumerated clause.**

House Rule XIII, Section 3(d)(1), requires that all committee reports contain “a statement citing the *specific* powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution.” *[emphasis added]*

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H.R. 985 — Whistleblower Protection Enhancement Act (*Waxman, D-CA*)

Order of Business: The bill is scheduled for consideration on Wednesday, March 14, 2007, subject to a structured rule ([H.Res. 239](#)). Amendment summaries are below.

Summary: H.R. 985 would modify and expand the current federal definition of “whistleblowing.” Whistleblower protections allow for employees to disclose information that the employee reasonably believes is “in 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 and safety,” hereafter referred to as gross mismanagement.

This bill would extend employee protections to Transportation Security Administration (TSA) employees, federal contractors, and certain federal employees involved in national security issues. The specific provisions of the bill are as follows:

- Expands current regulations regarding communications by current or former federal employees to include any disclosure “without restriction as to time, place, form, motive, context, or prior disclosure.” In other words, employee disclosures are covered regardless of when, where or in what context they took place (i.e. – not just formal communications are covered). Thus, an employer is forbidden to take punitive action against an employee because that employee disclosed gross mismanagement, regardless of the mode of that communication.
Note: The committee report states this provision is in response to recent federal circuit decisions that have limited the scope of disclosures to formal communications.
- Broadens current protections and the new provisions described below to also include former employees and prospective employees where applicable (in addition to current employees), hereafter referred to as employees.
- Defines the term “employee disclosure” to mean a formal or informal communication, but does *not* include a communication concerning “policy decisions that lawfully exercise discretionary authority unless employee providing the disclosure reasonably believes the

disclosure” is an example of gross mismanagement. In other words, a legitimate “disclosure” (under which the employee is protected from reprisal) does *not* include a policy disagreement.

- Codifies what is called a “reasonable belief test” for all whistleblower employee disclosures. To determine if an employee “reasonably believes” he or she disclosed information that represents gross mismanagement (et al.), it will be determined whether a disinterested observer with knowledge of the essential facts could reasonably conclude that the actions of the government show evidence of such mismanagement.
- Allows for any presumption relating to the performance of a public official whose misconduct has been disclosed by the whistleblower to rebut the presumption by “substantial evidence.” The committee report noted that a federal circuit court has required a standard of “irrefragable proof” in a previous decision, so this provision lowers that standard.
- Adds to the list of prohibited personnel practices “the implementation or enforcement of any nondisclosure policy, form, or agreement” that does not include specific language notifying the employee of their rights.
- Prohibits the investigation of any employee due to any activity protected by the whistleblower provisions (5 U.S.C. § 2302).
- Requires that any agency that is removed from whistleblower protection by the President (which conducts foreign intelligence activities) must be removed *prior* to any personnel action being taken against a whistleblower of that agency. It designates five federal agencies that are automatically not part of or subject to whistleblower protection regulations: FBI, CIA, DIA, National Geospatial-Intelligence Agency, and the National Security Agency.
- Allows the Merit System Protection Board (MSPB) to take disciplinary action against an employee if it finds that the protected activity was a “primary motivating factor” in the employee’s action. In other words, if an employee commits a prohibited personnel practice *primarily motivated* by the fact that they will be protected against discipline due to the whistleblower protections (and not because they were reporting a violation of law or example of gross mismanagement), they can be disciplined accordingly. This provision is intended to prohibit employees from conducting prohibited activities and hiding behind the whistleblower protection provisions to escape punishment.
- Requires the GAO to conduct a study of security clearance revocations since 1996, and report the findings to the relevant House and Senate Committees, in order to find whether a link exists between revocations and whistleblower claims.
- Allows employees seeking corrective action, based on an alleged prohibited personnel practice, to bring an action in U.S. District Court for a trial by jury, if no final order or decision has been made within 180 days following the employee’s request for corrective action. In other words, the provision allows the employee to seek redress in court (to get back pay, for example) if the MSPB does not act swiftly enough to resolve the matter.
- Prohibits relevant employees (those within an agency covered by the whistleblower protections) from being fired or otherwise discriminated against in retaliation for making a covered disclosure (discussed above) to an authorized Member of Congress, executive agency official, Department of Justice official, or the Inspector General of the respective covered agency.

- Prohibits employers from firing or otherwise discriminating against employees for making a covered disclosure (discussed above) to an authorized Member of Congress, executive agency official, Department of Justice official, or the relevant Inspector General (IG) of the covered agency. The provision also allows employees who believe they have been retaliated against to submit a complaint to the IG and the relevant agency's head, and stipulates procedures for resolution of the complaint, including the ability of the employee to appeal a decision to a U.S. district court of appeals.
- Requires that an agency head make a determination, within 180 days after a complaint is submitted, whether a contractor has subjected a contractor employee to retaliation for a covered disclosure. If the agency head does not resolve the issue within 180 days, the provision allows the contractor employee to bring an action in district court to seek compensatory and other relief.
- Grants employees at the Transportation Security Administration (TSA) the same whistleblower protections as other federal employees. According to the committee report, this provision is in response to the court case of Schott v. Department of Homeland Security where the MSPB ruled TSA screeners did not have whistleblower rights.
- Expands the definition of "abuse of authority" (used in 5 U.S.C. § 2302(b)(8)) to include "any action that compromises the validity or accuracy of federal funded research or analysis" and "the dissemination of false or misleading scientific, medical, or technical information."
- Stipulates that all of the provisions above will take effect 30 days after the date of enactment.

Additional Background: Federal whistleblower protections were originally passed as part of the Civil Service Reform Act of 1978, signed into law by President Jimmy Carter and addressed a campaign promise of Carter's to reform the federal civil service and protect federal employees who "blew the whistle" on government misconduct and fraud. In 1989, Congress passed the Whistleblower Protection Act in to broaden statutory protections for federal employees who identify fraud, waste, abuse, illegality, and corruption. The Office of Special Counsel (OSC) currently serves as the repository for whistleblower disclosures (from current and former federal employees and applicants for federal employment) covered under the Whistleblower Protection Act (5 U.S.C. § 1213).

Possible Conservative Concerns: As noted above, and highlighted in the Administration's SAP (below), this bill would expand whistleblower protections to employees at national security agencies. Some conservatives suggest that this expansion and subsequent disclosures of this kind could have grave national security concerns, since these independent disclosures could occur without regard larger national security issues. Some conservatives may also be concerned about the expansive nature of several of the provisions, hindering executive branch managers to effectively manage staff and significantly increasing regulations and compliance issues with regard to whistleblower protected allegations, regardless of the mode or manner of the communication. Also, some conservatives may be concerned with included provisions that would allow whistleblowers to have their claims heard.

H.R. 985 also would permit employees to engage in judicial forum shopping for having their claims resolved. Whistleblowers already have the right to seek corrective action for an unlawful personnel action from the Merit Systems Protection Board, and are afforded judicial review before the Federal Circuit. H.R. 985 would allow employees to have their claims heard initially in any federal district court. As the Administration asserts, this may result in two trials instead of one, and thus increase litigation.

Amendments: Below are the summaries of the five amendments made in order under the rule.
Note: Summaries are based on RSC staff’s review of actual amendment text.

1. Stupak (D-MI). Adds new language to section of the bill by expanding the definition of “abuse of authority” (one of the covered whistleblower protections), stating that any action restricting or preventing an employee or person performing federally funded research or analysis from publishing in peer-reviewed journals or making oral presentations would be considered an abuse of authority.

2. Platts (R-PA). Expands the definition of “clear and convincing evidence (with regard to an agency’s case for personnel action and burden of proof) to mean “evidence indicating that the matter to be proved is highly probably or reasonably certain. In other words, the agency must meet this slightly higher burden of proof (under the new definition) when arguing that it would have taken the same personnel action independent of an employee’s protected whistleblower conduct.

3. Platts (R-PA). Stipulates that an otherwise protected disclosure cannot be disqualified because of the forum or location in which it is communicated. It also extends equal burdens of proof and individual rights of action to those serving as witnesses in Inspector General or Special Counsel investigations, as well as to those who allege retaliation for refusing to violate the law.

4. Sali (R-ID). Strikes section 13 of the bill, removing the provision that would make influencing federally funded scientific research a prohibited personnel practice. The bill’s provision states any action that compromises the validity or accuracy of federally funded research or analysis is an “abuse of authority,” but does not define, or give an example for, an action that would be deemed to “compromise” the validity of such research.”

5. Tierney (D-MA). Provides for national security whistleblower rights and extends protections to prohibit current or former employees of a covered agency from being discriminated against (including denying or revoking a security clearance); allows employees to submit complaints to the IG if the employee feels they have been retaliated against, and requires the IG to submit a report (for every such employee or former employee complaint, unless the IG determines the complaint is frivolous) of the findings within 120 days to the employee and the head of the agency; modifies the underlying section regarding national security whistleblowers to limit which members of Congress can receive information about especially sensitive subjects, such as sources and methods (to members of the respective House and Senate intelligence committees) and special access programs (to defense committees), and for other programs (to committees with oversight over the program in question).

Committee Action: H.R. 985 was introduced on February 12, 2007, and referred to the Committee on Oversight and Government Reform. The bill was marked-up on February 14 and reported to the House by unanimous consent the same day (House Report [110-42](#), Part I).

Administration Policy: The Administration strongly opposes passage of H.R. 985 and released a Statement of Administration Policy (SAP) on March 13, 2007, which included the following statement:

The Administration supports accountability and transparency in the implementation of Federal programs. **However, the Administration strongly opposes House passage of H.R. 985 because it could compromise national security, is unconstitutional, and is overly burdensome and unnecessary.** Rather than promote and protect genuine disclosures of matters of real public concern, it would likely increase the number of frivolous complaints and waste resources. **If H.R. 985 were presented to the President, his senior advisors would recommend that he veto the bill.** (bold emphasis added).

Cost to Taxpayers: CBO estimates that implementing H.R. 985 would cost \$5 million a year and about **\$25 million over the 2008-2012 period.**

Does the Bill Expand the Size and Scope of the Federal Government?: As noted above, the bill expands protections for whistleblower employees, and increases regulations on federal agencies in regard to employee communications and complaints protected by whistleblower provisions.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Constitutional Authority: The Oversight and Government Reform Committee, in House Report [110-42](#), cites constitutional authority in Article I, Section 8, Clause 18 (to make all laws necessary and proper to carry out the *foregoing* powers), but fails to cite a foregoing power or another specific enumerated clause.

House Rule XIII, Section 3(d)(1), requires that all committee reports contain “a statement citing the *specific* powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution.” [*emphasis added*]

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