Office of the Attorney General
Washington, D. C. 20530

December 17, 2007

The Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington, D.C. 20515

Dear Madam Speaker:

This letter presents the views of the Department of Justice on S. 274, the "Federal Employee Protection of Disclosures Act," as passed by the Senate. While we understand the important public interest in protecting whistleblowers, we strongly oppose this legislation. Generally, the bill is unconstitutional and would create the exact negative consequences that Congress pledged to avoid in the language of the Whistleblower Protection Act. It would undermine the constitutional authority of the President to control the disclosure of classified information (subsection 1(d)) and require specific content in nondisclosure policies, forms, and agreements (subsection 1(k)). Our opposition is consistent with the Department's longstanding objections to previous versions of similar legislation. Indeed, if S. 274 were presented to the President, his senior advisors would recommend that he veto the bill.

S. 274 would make a number of significant and extremely undesirable changes to the Whistleblower Protection Act ("WPA") and the Civil Service Reform Act ("CSRA"). Among other things, the bill would permit, for the first time, the Merit Systems Protection Board ("MSPB") and the courts to review the Executive branch's decisions regarding security clearances. It would provide unwarranted new protections for the unauthorized disclosure of classified information. It would make sweeping changes to the WPA, including a vast expansion of the definition of a "protected disclosure." It would alter the carefully crafted scheme for judicial review of decisions of the MSPB, which is set forth in the CSRA.

S. 274 is burdensome, unnecessary, and unconstitutional. Rather than promote and protect genuine disclosures of matters of real public concern, S. 274 would provide a legal shield for unsatisfactory performance and behavior by Federal employees. This is inconsistent with the purposes of the WPA, as the Congress has explained them. *See, e.g.,* S. Rep. No. 100-413, at 15 (1988) ("The Committee does not intend that employees who are poor performers escape sanction by manufacturing a claim of whistleblowing"); S. Rep. No. 95-969, at 8, *reprinted in* 1978 U.S.S.C.A.N. 2723, 2730-31 ("Nor would the bill protect employees who claim to be whistle blowers in order to avoid adverse action based on inadequate performance").

I. Constitutional Objections

The bill includes three unconstitutional provisions. First, paragraph 1(b)(3) of the bill would amend paragraph 2302(b)(8) of title 5 of the United States Code to prohibit a personnel action against an employee or applicant for disclosing to (1) "a member of a committee of Congress having a primary responsibility for oversight of" the Department; (2) "any other Member of Congress who is authorized to receive information of the type disclosed"; or (3) "an employee of Congress who has the appropriate security clearance and is authorized to receive information of the type disclosed" any "information required by law or Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." This provision purports to authorize the disclosure of information that is subject to the President's constitutional authority and control. *See Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) (discussing the President's authority to control national security information). In 1998, the Department objected to S. 1668, a bill similar to S. 274, that would have required the President to inform employees of covered Federal agencies that their disclosure to Congress of classified information that the employee reasonably believed provided direct and specific evidence of misconduct (including violations of law) was not prohibited. *See Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 100 (1998). The Department testified that S. 1668

> would deprive the President of his authority to decide, based on the national interest, how, when and under what circumstances particular classified information should be disclosed to Congress. This is an impermissible encroachment on the President's ability to carry out core executive functions. In the congressional oversight context, as in all others, the decision whether and under what circumstances to disclose classified information must be made by someone who is acting on the official authority of the President and who is ultimately responsible to the President. The constitution does not permit Congress to authorize subordinate executive branch employees to bypass these orderly procedures for review and clearance by vesting them with a unilateral right to disclose classified information — even to Members of Congress.

Id. Indeed, if the bill had been presented to the President in the form described above, his senior advisors would have recommended that he veto it. *See* Statement of Administration Policy, *S. 1668 - Disclosure to Congress Act of 1998* (Mar. 9, 1998). Our position finds further support in the Supreme Court's explicit recognition of the President's constitutional authority to protect national security and other privileged information. *See generally Whistleblower Protections*, 22 Op. O.L.C. 92 (citing cases); *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 154-57 (1989) (discussing cases, and practice since the Founding). Therefore, paragraph 1(b)(3) should be deleted from the bill.

Second, subparagraph 1(e)(3)(A) should be deleted from the bill. This subparagraph would add a new section 7702a to title 5 of the United States Code to require the Merit Systems Protection Board ("MSPB") or any reviewing court, in any appeal relating to a security clearance determination, to review and decide whether a security clearance determination was made

because the employee disclosed information that the bill would permit the employee to disclose. This provision would intrude unconstitutionally on "the President's constitutional responsibility to protect certain information." *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 254 (1989). A security-clearance decision requires "a sensitive and inherently discretionary judgment call" that the Constitution vests in the President "quite apart from any explicit congressional grant." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (concluding that the MSPB lacked statutory authority to review the substance of an underlying decision to deny or revoke a security clearance); *see also id.* (The President's "authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from the [Commander-in-Chief Clause's] investment of power in the President."); *id.* ("The authority to protect [national security] information falls on the President as head of the Executive Branch and as Commander in Chief."). As the Supreme Court has concluded, "For 'reasons . . . too obvious to call for enlarged discussion,' *CIA v. Sims*, 471 U.S. 159, 170 (1985), the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment . . . ." *Egan*, 484 U.S. at 528; *cf. also McCabe v. Department of the Air Force*, No. 94-3463, 1995 App. Lexis 21440, at *5 (Fed. Cir. 1995) ("Given the high degree of discretion involved in matters of national security, we are convinced that Congress did not intend that agency decisions regarding security clearance status be encompassed within the definition of 'personnel action' under the [Whistleblower Protection Act]."). Although the current version of the legislation provides that the MSPB "may not order the President or the designee of the President to restore a security clearance or otherwise reverse a determination of clearance status or reverse an access determination," the legislation also states that the MSPB may ("subject to" the foregoing limitation) "issue declaratory relief and any other appropriate relief." Any such relief — and, more fundamentally, the process of reviewing the "substance of the judgment" that led to the clearance decision precipitating the request for such relief — would burden the President's constitutional and discretionary authority to control who receives security clearances. Accordingly, this provision should be deleted.

Third, paragraph 1(e)(2) and subsection 1(k) should be deleted from the bill. These provisions purport to require that nondisclosure agreements applicable to Executive branch employees (and contractors) permit classified disclosures in derogation of the President's authority "to decide, based on the national interest, how, when and under what circumstances particular classified information should be disclosed." *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. at 100. (We also note that paragraph 1(e)(2) of the bill (in what would be new 5 U.S.C. § 2302(b)(13)) fails to include the Privacy Act (5 U.S.C. § 552a) in the list of statutes that the bill would not supersede.)

II. Policy Concerns

Paragraph 1(b)(1)

Paragraph 1(b)(1) of the bill would broaden the definition of "protected disclosure" by amending 5 U.S.C. § 2302(b)(8)(A). This amendment appears intended to override or supersede a series of decisions by the United States Court of Appeals for the Federal Circuit that defined the scope of disclosures covered by paragraph 2302(b)(8). *See, e.g., Horton v. Dep't of Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995) (*Horton*) (complaints to wrongdoers are not protected whistleblowing); *Willis v. Dep't of Agriculture*, 141 F.3d 1139, 1143-44 (Fed. Cir. 1998) (ordinary work disagreements are not protected disclosures, nor are disclosures made during the course of performing ordinary job duties); *Meuwissen v. Dep't of the Interior*, 234 F.3d 9, 12-14 (Fed. Cir. 2000) (discussion of matters already known does not constitute a covered disclosure); *LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (*White*) (in determining whether a disclosure is covered, the Board should consider the motives of the employee making the disclosure). The Federal Circuit precedent appropriately insulates Federal agencies from having to defend against potentially burdensome whistleblower litigation involving no more than workplace disagreements, complaints by disgruntled employees, or matters that never were, in any real sense, "disclosed" to any individuals or organizations having any authority to address the disclosures.

The expanded definition in subsection 1(b) would upset the delicate balance between whistleblower protection and the ability of Federal managers to manage the workforce. The Whistleblower Protection Act ("WPA") already provides adequate protection for legitimate whistleblowers. The proposed expansive definition has the potential to convert any disagreement or contrary interpretation of a law, no matter how trivial, into a whistleblower disclosure. It would not provide further protection to those with legitimate claims, who already are covered by the existing law. It simply would increase the number of trivial and meritless claims of whistleblower reprisal. Such an increase in the number of frivolous claims would impose an unwarranted burden upon Federal managers and, ultimately, the MSPB and the Federal Judiciary. While subsection 1(c) appears intended to address this concern by excluding disclosures about lawful, discretionary management decisions on policy issues, the potential still exists for vastly expanded litigation attempting to distinguish covered and excluded disclosures.

Subsection 1(e)

Subsection 1(e) would provide expanded review opportunities for those employees dissatisfied with decisions regarding their access to classified information. While the section bars direct action regarding the security clearances, even if prohibited whistleblower reprisal has occurred, declaratory judgment and other "appropriate" relief (which is left undefined) are available and therefore open the floodgates to litigation in this area over matters that are either classified or extremely sensitive. Taken together with subsection 1(j), which provides for review in either the Federal Circuit or other competent Federal circuit court of appeals, subsection 1(e)

constitutes a comprehensive intrusion by Congress into areas left for decades to the jurisdiction and competence of the Executive branch.

We strongly oppose it because it would authorize court review of any determination relating to a security clearance — a prerogative left firmly within the Executive branch's discretion. In *Egan*, 484 U.S. 518 (1988), the Supreme Court explicitly rejected the proposition that the MSPB and the Federal Circuit could review the decision to revoke a security clearance. In doing so, the Court relied upon a number of premises, including (1) decisions regarding security clearances are an inherently discretionary decision best left to the particular agency involved, not to be reviewed by non-expert bodies such as the MSPB and the courts; (2) review under the CSRA, which provides for a preponderance-of-the-evidence standard, conflicts with the requirement that a security clearance should be given only when clearly consistent with the interests of the national security; and (3) that the President's power to make security clearance determinations is based in his constitutional role as Commander-in-Chief.

An example demonstrates one of the many fundamental problems with this bill's security clearance provisions. As we noted above, the burden of proof in CSRA cases is fundamentally incompatible with the standard for granting security clearances. This conflict is even more apparent in whistleblower cases. Under the WPA, a putative whistleblower establishes a *prima facie* case of whistleblower retaliation by establishing a protected disclosure and, under the knowledge/timing test, a personnel action taken within a certain period of time following the disclosure. Once the employee meets that minimal burden, the burden shifts to the agency to establish *by clear and convincing evidence* that it would have taken the action absent the protected disclosure.

Therefore, the bill would require in the security clearance context, that where individuals make protected disclosures (which, as we explain above, would include virtually every Federal employee under other amendments in this bill), the agency justify its security clearance decision by the stringent standard of clear and convincing evidence. This standard would be shockingly inconsistent with national security, especially in these times of heightened security concerns.

Subsection 1(g)

Subsection 1(g) of the bill would amend 5 U.S.C. § 1204(m)(1) to provide that, in disciplinary action cases, a prevailing employee could obtain attorney fees from the agency at which the prevailing party was employed rather than, as currently exists, from the agency proposing the disciplinary action against the employee. Essentially, this provision would shift the burden for attorney fees from the Office of Special Counsel, the agency responsible for pursuing disciplinary actions, to the prevailing party's employing agency. We object to this change for at least two reasons. First, one of the general policies underlying fee-shifting provisions against the Government is ensuring that the Government acts responsibly. By shifting the burden from the agency responsible for taking disciplinary actions — the Special Counsel — to the employing agency, this amendment would eliminate this important check on the Special

Counsel in considering which actions to pursue because even if the Special Counsel took an unjustified action, it will not have to bear the attorney fees. Second, this amendment is patently unfair to the employing agencies, which might disagree with the action the Special Counsel was pursuing but nevertheless would be responsible for any fees. Indeed, it is not uncommon that an agency will refuse to take a disciplinary action that is proposed by the Special Counsel, agreeing with a particular employee that no wrongdoing had been committed. If the employee hired an attorney and successfully defended himself against the Special Counsel before the MSPB or the Federal Circuit, the employing agency — who disagreed with the Special Counsel's actions — would be required to pay the fees.

Subsection 1(h)

Subsection 1(h) provides for greatly expanded authority to the MSPB to discipline an employee in any case in which the employee is found to have violated 5 U.S.C. § 2302(b)(8),(9). Taken together with the broadened definition of covered disclosures, this provision would increase the chilling effect imposed on Federal managers making potentially debatable decisions on policy, personnel, and missions. In a real sense, subsection 1(b) would increase markedly the risk that an employee will be found to have made protected disclosures and the likelihood that the employee could prevail on a claim that a covered personnel action was taken in reprisal for the disclosure. Subsection 1(h), in turn, would increase the personal risk to the Federal manager involved in such a case that the manager would be removed expeditiously, debarred from Federal employment, *and* fined for making a good-faith management decision. We are concerned that the legislation tells Federal managers, in effect, that they risk their livelihoods and economic viability every time they make a controversial management decision and we strongly oppose that message's dampening effect on flexible, creative management efforts that are essential for a more effective government.

Subsection 1(j)

As noted above, we object to subsection 1(j) of the bill, which would give dissatisfied appellants the ability to seek review in other circuit courts of appeal instead of the Federal Circuit. As we have stated previously when Congress has proposed expanding court jurisdiction in this area, such an expansion is inconsistent with Congress's sensible centralization of those appeals. Since the enactment of the Federal Courts Improvement Act of 1982, the Federal Circuit has exercised exclusive jurisdiction to consider appeals from the MSPB in cases not involving discrimination. In those years, the court has developed substantial expertise and a well-defined body of law regarding Federal personnel matters that inures to the benefit of both the Federal Government and its employees. Moreover, the court's rules, which provide for more expedited and informal briefing in *pro se* cases provide an added benefit for Federal employees, many of whom choose to appeal the MSPB's decisions without the aid of an attorney.

Supplementing the Federal Circuit's exclusive jurisdiction with review by various United States circuit courts creates the potential for a fractured personnel system, subject to attack from

a greatly multiplied number of directions. Inevitably, conflicts would arise as to the proper interpretation of the Federal personnel laws, so that an employee's rights and responsibilities would be determined by the geographic location of his or her place of employment and the location of the district court at issue. These, in turn, would be influenced by the relevant law existing in the district court's circuit. Not only is a non-uniform system undesirable, it could contribute to a loss of morale, as Federal employees would be treated differently depending upon where they lived. Inevitably, it would require the Supreme Court to intervene more often in Federal personnel matters to resolve inconsistencies among the circuits.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Michael B. Mukasey
Attorney General

cc: The Honorable John A. Boehner
Minority Leader
United States House of Representatives

The Honorable Richard B. Cheney
President
United States Senate

The Honorable Harry Reid
Majority Leader
United States Senate

The Honorable Mitch McConnell
Minority Leader
United States Senate

The Honorable Joseph I. Lieberman
Chairman
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United States Senate

The Honorable Susan M. Collins
Ranking Minority Member
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