

5. AN AMENDMENT TO BE OFFERED BY REPRESENTATIVE
Tierney OF Massachusetts, OR HIS
DESIGNEE, DEBATEABLE FOR 10 MINUTES:

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**AMENDMENT TO H.R. 985, AS REPORTED
OFFERED BY MR. TIERNEY OF MASSACHUSETTS**

Page 13, strike line 19, and all that follows through
page 24, line 7, and insert the following:

1 SEC. 10. NATIONAL SECURITY WHISTLEBLOWER RIGHTS.

2 (a) IN GENERAL.—Chapter 23 of title 5, United
3 States Code, is amended by inserting after section 2303
4 the following:

5 “§ 2303a. National security whistleblower rights

6 “(a) PROHIBITION OF REPRISALS.—

7 “(1) IN GENERAL.—In addition to any rights
8 provided in section 2303 of this title, title VII of
9 Public Law 105–272, or any other provision of law,
10 an employee or former employee in a covered agency
11 may not be discharged, demoted, or otherwise dis-
12 criminated against (including by denying, sus-
13 pending, or revoking a security clearance, or by oth-
14 erwise restricting access to classified or sensitive in-
15 formation) as a reprisal for making a disclosure de-
16 scribed in paragraph (2).

17 “(2) DISCLOSURES DESCRIBED.—A disclosure
18 described in this paragraph is any disclosure of cov-
19 ered information which is made—

1 “(A) by an employee or former employee in
2 a covered agency (without restriction as to time,
3 place, form, motive, context, or prior disclosure
4 made to any person by an employee or former
5 employee, including a disclosure made in the
6 course of an employee’s duties); and

7 “(B) to an authorized Member of Con-
8 gress, an authorized official of an Executive
9 agency, or the Inspector General of the covered
10 agency in which such employee or former em-
11 ployee is or was employed.

12 “(b) INVESTIGATION OF COMPLAINTS.—An employee
13 or former employee in a covered agency who believes that
14 such employee or former employee has been subjected to
15 a reprisal prohibited by subsection (a) may submit a com-
16 plaint to the Inspector General and the head of the cov-
17 ered agency. The Inspector General shall investigate the
18 complaint and, unless the Inspector General determines
19 that the complaint is frivolous, submit a report of the find-
20 ings of the investigation within 120 days to the employee
21 or former employee (as the case may be) and to the head
22 of the covered agency.

23 “(c) REMEDY.—

24 “(1) Within 180 days of the filing of the com-
25 plaint, the head of the covered agency shall, taking

1 into consideration the report of the Inspector Gen-
2 eral under subsection (b) (if any), determine whether
3 the employee or former employee has been subjected
4 to a reprisal prohibited by subsection (a), and shall
5 either issue an order denying relief or shall imple-
6 ment corrective action to return the employee or
7 former employee, as nearly as possible, to the posi-
8 tion he would have held had the reprisal not oc-
9 curred, including voiding any directive or order de-
10 nying, suspending, or revoking a security clearance
11 or otherwise restricting access to classified or sen-
12 sitive information that constituted a reprisal, as well
13 as providing back pay and related benefits, medical
14 costs incurred, travel expenses, any other reasonable
15 and foreseeable consequential damages, and compen-
16 satory damages (including attorney's fees, interest,
17 reasonable expert witness fees, and costs). If the
18 head of the covered agency issues an order denying
19 relief, he shall issue a report to the employee or
20 former employee detailing the reasons for the denial.

21 “(2)(A) If the head of the covered agency, in
22 the process of implementing corrective action under
23 paragraph (1), voids a directive or order denying,
24 suspending, or revoking a security clearance or oth-
25 erwise restricting access to classified or sensitive in-

1 formation that constituted a reprisal, the head of the
2 covered agency may re-initiate procedures to issue a
3 directive or order denying, suspending, or revoking
4 a security clearance or otherwise restricting access
5 to classified or sensitive information only if those re-
6 initiated procedures are based exclusively on national
7 security concerns and are unrelated to the actions
8 constituting the original reprisal.

9 “(B) In any case in which the head of a covered
10 agency re-initiates procedures under subparagraph
11 (A), the head of the covered agency shall issue an
12 unclassified report to its Inspector General and to
13 authorized Members of Congress (with a classified
14 annex, if necessary), detailing the circumstances of
15 the agency’s re-initiated procedures and describing
16 the manner in which those procedures are based ex-
17 clusively on national security concerns and are unre-
18 lated to the actions constituting the original reprisal.
19 The head of the covered agency shall also provide
20 periodic updates to the Inspector General and au-
21 thorized Members of Congress detailing any signifi-
22 cant actions taken as a result of those procedures,
23 and shall respond promptly to inquiries from author-
24 ized Members of Congress regarding the status of
25 those procedures.

1 “(3) If the head of the covered agency has not
2 made a determination under paragraph (1) within
3 180 days of the filing of the complaint (or he has
4 issued an order denying relief, in whole or in part,
5 whether within that 180-day period or thereafter,
6 then, within 90 days after such order is issued), the
7 employee or former employee may bring an action at
8 law or equity for de novo review to seek any correc-
9 tive action described in paragraph (1) in the appro-
10 priate United States district court (as defined by
11 section 1221(k)(2)), which shall have jurisdiction
12 over such action without regard to the amount in
13 controversy. An appeal from a final decision of a dis-
14 trict court in an action under this paragraph may,
15 at the election of the appellant, be taken to the
16 Court of Appeals for the Federal Circuit (which
17 shall have jurisdiction of such appeal), in lieu of the
18 United States court of appeals for the circuit em-
19 bracing the district in which the action was brought.

20 “(4) An employee or former employee adversely
21 affected or aggrieved by an order issued under para-
22 graph (1), or who seeks review of any corrective ac-
23 tion determined under paragraph (1), may obtain ju-
24 dicial review of such order or determination in the
25 United States Court of Appeals for the Federal Cir-

1 cuit or any United States court of appeals having ju-
2 risdiction over appeals from any United States dis-
3 trict court which, under section 1221(k)(2), would
4 be an appropriate United States district court. No
5 petition seeking such review may be filed more than
6 60 days after issuance of the order or the deter-
7 mination to implement corrective action by the head
8 of the agency. Review shall conform to chapter 7.

9 “(5)(A) If, in any action for damages or relief
10 under paragraph (3) or (4), an Executive agency
11 moves to withhold information from discovery based
12 on a claim that disclosure would be inimical to na-
13 tional security by asserting the privilege commonly
14 referred to as the ‘state secrets privilege’, and if the
15 assertion of such privilege prevents the employee or
16 former employee from establishing an element in
17 support of the employee’s or former employee’s
18 claim, the court shall resolve the disputed issue of
19 fact or law in favor of the employee or former em-
20 ployee, provided that an Inspector General investiga-
21 tion under subsection (b) has resulted in substantial
22 confirmation of that element, or those elements, of
23 the employee’s or former employee’s claim.

24 “(B) In any case in which an Executive agency
25 asserts the privilege commonly referred to as the

1 'state secrets privilege', whether or not an Inspector
2 General has conducted an investigation under sub-
3 section (b), the head of that agency shall, at the
4 same time it asserts the privilege, issue a report to
5 authorized Members of Congress, accompanied by a
6 classified annex if necessary, describing the reasons
7 for the assertion, explaining why the court hearing
8 the matter does not have the ability to maintain the
9 protection of classified information related to the as-
10 ssertion, detailing the steps the agency has taken to
11 arrive at a mutually agreeable settlement with the
12 employee or former employee, setting forth the date
13 on which the classified information at issue will be
14 declassified, and providing all relevant information
15 about the underlying substantive matter.

16 "(d) APPLICABILITY TO NON-COVERED AGENCIES.—
17 An employee or former employee in an Executive agency
18 (or element or unit thereof) that is not a covered agency
19 shall, for purposes of any disclosure of covered information
20 (as described in subsection (a)(2)) which consists in whole
21 or in part of classified or sensitive information, be entitled
22 to the same protections, rights, and remedies under this
23 section as if that Executive agency (or element or unit
24 thereof) were a covered agency.

1 “(e) CONSTRUCTION.—Nothing in this section may
2 be construed—

3 “(1) to authorize the discharge of, demotion of,
4 or discrimination against an employee or former em-
5 ployee for a disclosure other than a disclosure pro-
6 tected by subsection (a) or (d) of this section or to
7 modify or derogate from a right or remedy otherwise
8 available to an employee or former employee; or

9 “(2) to preempt, modify, limit, or derogate any
10 rights or remedies available to an employee or
11 former employee under any other provision of law,
12 rule, or regulation (including the Lloyd-La Follette
13 Act).

14 No court or administrative agency may require the ex-
15 haustion of any right or remedy under this section as a
16 condition for pursuing any other right or remedy otherwise
17 available to an employee or former employee under any
18 other provision of law, rule, or regulation (as referred to
19 in paragraph (2)).

20 “(f) DEFINITIONS.—For purposes of this section—

21 “(1) the term ‘covered information’, as used
22 with respect to an employee or former employee,
23 means any information (including classified or sen-
24 sitive information) which the employee or former
25 employee reasonably believes evidences—

1 “(A) any violation of any law, rule, or reg-
2 ulation; or

3 “(B) gross mismanagement, a gross waste
4 of funds, an abuse of authority, or a substantial
5 and specific danger to public health or safety;
6 “(2) the term ‘covered agency’ means—

7 “(A) the Federal Bureau of Investigation,
8 the Office of the Director of National Intel-
9 ligence, the Central Intelligence Agency, the
10 Defense Intelligence Agency, the National
11 Geospatial-Intelligence Agency, the National Se-
12 curity Agency, and the National Reconnaissance
13 Office; and

14 “(B) any other Executive agency, or ele-
15 ment or unit thereof, determined by the Presi-
16 dent under section 2302(a)(2)(C)(ii)(II) to have
17 as its principal function the conduct of foreign
18 intelligence or counterintelligence activities;

19 “(3) the term ‘authorized Member of Congress’
20 means—

21 “(A) with respect to covered information
22 about sources and methods of the Central Intel-
23 ligence Agency, the Director of National Intel-
24 ligence, and the National Intelligence Program
25 (as defined in section 3(6) of the National Se-

1 security Act of 1947), a member of the House
2 Permanent Select Committee on Intelligence,
3 the Senate Select Committee on Intelligence, or
4 any other committees of the House of Rep-
5 resentatives or Senate to which this type of in-
6 formation is customarily provided;

7 “(B) with respect to special access pro-
8 grams specified in section 119 of title 10, an
9 appropriate member of the Congressional de-
10 fense committees (as defined in such section);
11 and

12 “(C) with respect to other covered informa-
13 tion, a member of the House Permanent Select
14 Committee on Intelligence, the Senate Select
15 Committee on Intelligence, the House Com-
16 mittee on Oversight and Government Reform,
17 the Senate Committee on Homeland Security
18 and Governmental Affairs, or any other com-
19 mittees of the House of Representatives or the
20 Senate that have oversight over the program
21 which the covered information concerns; and

22 “(4) the term ‘authorized official of an Execu-
23 tive agency’ shall have such meaning as the Office
24 of Personnel Management shall by regulation pre-
25 scribe, except that such term shall, with respect to

1 any employee or former employee in an agency, in-
2 clude the head, the general counsel, and the ombuds-
3 man of such agency.”.