

# FIVE YEARS LATER: A REVIEW OF THE WHISTLE- BLOWER PROTECTION ENHANCEMENT ACT

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## HEARING BEFORE THE SUBCOMMITTEE ON GOVERNMENT OPERATIONS OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM HOUSE OF REPRESENTATIVES ONE HUNDRED FIFTEENTH CONGRESS FIRST SESSION

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## **FIVE YEARS LATER: A REVIEW OF THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT**

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**Wednesday, February 1, 2017**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON GOVERNMENT OPERATIONS,  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,  
*Washington, D.C.*

The subcommittee met, pursuant to call, at 2:14 p.m., in Room 2154, Rayburn House Office Building, Hon. Mark Meadows [chairman of the subcommittee] presiding.

Present: Representatives Meadows, Hice, Jordan, DeSantis, Ross, Blum, Connolly, Cummings, Maloney, Clay, Lawrence, and Watson Coleman.

Mr. ROSS. [Presiding.] The Subcommittee on Government Operations will come to order. Without objection, the chair is authorized to declare a recess at any time.

I will defer at this time to the ranking member of the subcommittee for an opening statement.

Mr. CONNOLLY. Thank you, Mr. Chairman. And I know Mr. Meadows will be here shortly.

Federal employees who blow the whistle on waste, fraud, and abuse are on the front lines in the effort to ensure that our government functions efficiently and effectively. This committee has a long history of strong bipartisan support for those whistleblowers, and I want to thank the chairman, Mr. Meadows, for holding today's hearing to examine how we can continue to improve protections for those employees.

Whistleblower protection is rooted in civil service protections. Due process and merit-based hiring and promotion free of discrimination, retaliation, and political influence form the bedrock of the very whistleblower protections we are concerned about and have been for a long time on this committee and subcommittee.

Five years ago, the bipartisan Whistleblower Protection Enhancement Act of 2012 significantly strengthened the rights of Federal employees who disclose waste, fraud, and abuse. This legislation marks substantial progress, but as we discovered, gaps remain, and we must continue to work to protect all Federal employees who disclose wrongdoing.

I look forward to hearing from our witnesses today about challenges to protecting those whistleblowers under current law, such as vacancies at the MSPB, loopholes for sensitive positions, retaliatory investigations, as well as proposals to address those chal-

lenges. In fact, tomorrow this committee, the Oversight and Government Reform Committee, will be marking up a bill that I cosponsored, H.R. 657, the Follow the Rules Act.

Last year, a Federal court ruled that an employee who refused to obey an order is protected from retaliation only if that order violates a statute, which was never the intent of the law. This bill clarifies that the Whistleblower Protection Act, as originally intended, protects employees who refuse to violate a rule or a regulation. It need not be a statute.

But legislative changes will not be enough. Congress must provide inspectors general and the Office of Special Counsel with the resources they need to investigate and enforce whistleblower protections under the law.

For example, we've heard reports of egregious whistleblower retaliation at TSA. OSC has already taken action in some of those cases, but there is a backlog. Without additional resources, these whistleblowers won't be protected; in fact, one hears descriptions at TSA that sound like the Wild West. And a lot of cleanup has to occur there, not only whistleblowers but performance, measurements, and the like.

Finally, we can't ignore the committee's oversight responsibility. I was alarmed to hear news reports last week, only days after the inauguration, that certain Federal agencies had issued gag orders on Federal employee communications. One memo issued by the acting secretary of the Department of Health and Human Services on the very first day in office of the new President states, and I quote, "No correspondence to public officials, that is Members of Congress, governors and the like, unless specifically authorized by me or my designee shall be sent between now and December 3rd."

That language, which ostensibly prevents an employee from speaking with Members of Congress on his own, appears to violate, however, a number of Federal laws, including the Whistleblower Protection Enhancement Act itself. And it certainly sends a chilling message to our Federal employees. So I plan to send a letter to agency heads asking them what steps they're taking to ensure that their communications to employees comply with the law.

I ask my colleagues across the aisle to join in these oversight measures. It's my hope that moving forward we can work in a bipartisan manner, as we always have on this subject. We must ensure that civil service and due process protections, the bedrock of the Whistleblower Protection Enhancement Act, remain in place and are vigorously enforced, and we must provide diligent oversight to verify that agencies in this administration are implementing the protections required under the law.

And with that, I yield back.

Welcome, Mr. Chairman.

Mr. MEADOWS. [Presiding.] I thank the gentleman from Virginia. And I also thank the gentleman from Florida for gaveling us in, and certainly, thank each of you. My apologies for being tardy.

The chair notes the presence of our colleagues from the full Committee of Oversight and Government Reform. We appreciate your interest in this topic and welcome your participation today. And so with that, I ask unanimous consent that all members of the Com-

mittee on Oversight and Government Reform be allowed to fully participate. Hearing no objection, so ordered.

I'm going to go ahead in the interest of time and skip my opening statement and actually go with recognizing each of you, and let's hear from you on that.

Mr. CONNOLLY. Don't worry, Mr. Chairman, I pretty much—I spoke for both of us.

Mr. MEADOWS. Oh, well, there's no doubt about that, knowing that we are attached to the hip. But so I would—we'll hold the record open for 5 legislative days for any member who would like to submit a written statement.

Mr. CONNOLLY. Mr. Chairman, could I ask just a quick unanimous consent request. I have a statement from National Treasury Employees Union for the record. I ask unanimous consent it be entered into the record.

Mr. MEADOWS. Without objection, so ordered.

Mr. CONNOLLY. I thank my friend.

Mr. MEADOWS. I'm pleased to welcome Mr. Robert Storch, deputy inspector general at the U.S. Department of Justice. Welcome; Mr. Eric Bachman, deputy special counsel for litigation and legal affairs at the U.S. Office of Special Counsel, welcome; Mr. Thomas Devine, legal director at the government accountability project; and Ms. Elizabeth Hempowicz, policy counsel at the project on government and oversight. Welcome to you, all.

And pursuant to committee rules, we ask that all witnesses be sworn in before they testify.

If you will please rise and raise your right hand. Do you solemnly swear or affirm that the testimony you're about to give will be the truth, the whole truth, and nothing but the truth? I do.

Please let the record reflect that all witnesses answered in the affirmative.

In order to allow time for discussion, we would appreciate if you would please limit your testimony to 5 minutes.

But, Mr. Storch, before I come to you, the chair recognizes the ranking member from the full committee, the gentleman from Maryland, Mr. Cummings, for an opening statement.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. I really appreciate your indulgence.

I want that thank Chairman Meadows and Ranking Member Connolly for this hearing today. Whistleblower protections are built on the foundation of our civil service system and its due process protections. I look forward to the testimony today on how we can continue to strengthen whistleblower laws to ensure that all Federal employees who blow the whistle are protected.

The topic of today's hearing is the Whistleblower Protection Enhancement Act of 2012, and it could not be a more timely subject. I was an original cosponsor of this bill, which significantly expanded the protections available to government workers who risk their jobs to disclose wrongdoing. And we have had a number of them to come before us over my 21 years in this committee.

Unfortunately, it appears that the Trump administration in its first week has already violated the Whistleblower Protection Enhancement Act. Just last week, only days after President Trump's inauguration, we learned that Federal agencies issued gag orders

on Federal employee communications, including their communications with Congress.

For example, we have obtained one of these memos, which was issued by the new acting secretary of the Department of Health and Human Services. This memo tries to prohibit Federal employees from speaking to Members of Congress. Let me repeat that: The Trump administration is trying to prohibit Federal employees from speaking to Members of Congress. Something is absolutely wrong with that picture.

On its face, this memo violates the Whistleblower Protection Enhancement Act because it does not include mandatory language, that we in Congress required, to protect whistleblowers who want to report waste, fraud, or abuse. We required, and I quote, “any disclosure policy, form, or agreement,” end of quote, to include a mandatory statement that it does not supersede the rights of employees, including specifically, quote, “communications with Congress,” end of quote. And we passed this unanimously.

Now, my understanding is that the Trump administration first tried to deny that memo was sent to its employees. Then they reportedly sent out some kind of clarifying statement. But my understanding is that even the clarifying statement still failed to include the mandatory statement we required in the Whistleblower Protection Enhancement Act.

Mr. Chairman, I ask that this committee—I ask this committee to seek and obtain all emails and other communications in the possessions of anyone at HHS relating to this directive, its drafting, circulation, and subsequent clarification, as well as any communications about prohibiting Federal employees from speaking to Congress.

Will you join me in a letter to HHS and other agencies requesting those documents, Mr. Chairman?

I’m just making a simple request, Mr. Chairman.

Mr. MEADOWS. Would the gentleman from Maryland repeat his request? I’m sorry, I was otherwise engaged. That deer-in-the-headlight look was because I had no idea what you asked.

Mr. CUMMINGS. I apologize. I didn’t mean to catch you off guard, Mr. Chairman. And you have been absolutely wonderful and a good bipartisan member, and I really appreciate it. But I didn’t mean to—what I said, I asked this subcommittee to seek and obtain all the emails, and other communications in the possessions of anyone at HHS, relating to a directive in the drafting, and circulation, and subsequent clarification, as well as, any communications about prohibiting Federal employees from speaking to Members of Congress. I think that should be a no-brainer for most of us.

Mr. MEADOWS. The gentleman knows very well that regardless of who is in the White House, that the chairman believes that having open communication between members of the Federal Government and Members of Congress is something that should not be inhibited. And so certainly, I’m open to following up and making sure that we get clarification, and hopefully on this, making sure that the message is loud and clear, that an open and transparent government is not only something that this committee supports but the administration supports as well.



Mr. CUMMINGS. Thank you very much. I really appreciate it. And I'm almost finished, Mr. Chairman.

This is not the only action that the Trump administration has taken that could chill whistleblowers. In December, President Trump's transition team asked for the names of employees at the Department of Energy who had worked on climate change initiatives. Another transition team request was made to the State Department for information regarding staffing and positions related to gender equity, and violence against women.

Just 2 days ago, White House spokesman Sean Spicer announced that State Department employees who voiced dissent regarding President Trump's immigration order should, quote, "either get with the program or they can go," end of quote. To quote Walter Shaub, the director of the Office of Government Ethics, quote, "Tone from the top matters," end of quote.

I fear the President's tone will discourage whistleblowers from reporting waste, fraud, and abuse, exactly the opposite of what we hope to accomplish through the Whistleblower Protection Enhancement Act. There's still time for this administration to change.

In a letter I wrote with my colleague, Ranking Member Pallone, to White House counsel Donald McGahn, we requested that the President take immediate action to rescind all policies on employee communications that do not comply with the Whistleblower Protection Enhancement Act.

We also urged the President to issue an official statement making clear that all Federal employees have the right to communicate with Congress and will not be silenced or be retaliated against for their disclosures. I urged the President to adopt these recommendations immediately and send a clear signal to Federal employees that whistleblowers will be protected, as this committee has made it clear, on both sides of the aisle, we will protect whistleblowers to the nth degree.

And with that, Mr. Chairman, I appreciate your indulgence, and I yield back.

Mr. MEADOWS. I thank the gentleman. The chair is certainly committed to making sure that we have an open and transparent accountability. And I think that that serves the American taxpayer well regardless of party, regardless of any partisan outlook. And so I look forward to working with not only the ranking member of the full committee but the ranking member of the subcommittee on that.

And with that, Mr. Storch, I recognize you for 5 minutes. I apologize to some of your staff who was actually here earlier today, and so you're recognized for 5 minutes.

## WITNESS STATEMENTS

### STATEMENT OF ROBERT P. STORCH

Mr. STORCH. Thank you, Mr. Chairman, Ranking Member Connolly, and members of the subcommittee.

Whistleblowers perform an invaluable service when they come forward with what they reasonably believe to be evidence of wrongdoing, and they should never suffer reprisal for doing so. Thank you for inviting me to speak today about the important role that

the Offices of the Inspectors General play under the WPEA with regard to informing whistleblowers about their rights and protections.

I have served as a whistleblower ombudsperson at the DOJ OIG since our program was established in the summer of 2012. In November of that year, the WPEA was enacted requiring the creation of such positions in the offices of all presidentially-appointed, Senate-confirmed IGs, and many designated Federal entity IGs have such programs as well.

We are responsible under the act for educating agency employees about the prohibitions on retaliation for making protected disclosures and informing employees who have made, or are contemplating making, disclosures about their rights and remedies against retaliation. The DOJ OIG strongly supports reauthorization of this important provision.

The OIG's work in this area is entirely consistent with the importance of whistleblowers as reflected in the Inspector General Act itself, which specifically provides for OIGs to receive and investigate complaints provided by agency employees and to protect their confidentiality and prohibits the taking of personnel actions against them for coming to us.

Just as OIGs are well placed within agencies to detect and deter waste, fraud, abuse, and misconduct, whistleblowers are very much at the front lines, direct witnesses to potential wrongdoing, and they play a critical role in bringing forward such information. Ensuring that whistleblowers are comfortable, informed, and protected is therefore of central importance to the OIG's core mission.

We, and many of our fellow OIGs, carry out our role under the WPEA by creating and disseminating educational materials and conducting training programs. At DOJ OIG, we filmed an instructional video that is now required viewing for all DOJ managers and supervisors and available online for all employees.

We also prepared informational fliers that have been posted in offices throughout the Department with contact information for the OIG and the Office of Special Counsel, which plays a central role in addressing many cases of suspected reprisal.

We have worked with the FBI and other components to develop particularized training programs for their workforces, and in the case of the FBI, to address the specific requirements applicable to its employees, including, under the recently enacted FBI WPEA.

We, and other OIGs, also prepared informational brochures for employees of department contractors, subcontractors, and grantees. And like many of our counterparts, we created a robust page on our website with a range of information regarding whistleblower rights and protections.

Shortly after the passage of the WPEA, we worked through the Council of the Inspectors General to create a working group which meets quarterly to share information, discuss best practices on current issues, and host speakers from within an outside government.

Our colleagues from OSC have been active participants, providing their expertise, and facilitating coordination and cooperation between OSC and the OIGs. And representatives of many other leading groups, including both GAP and POGO have met with us as well.

The working group also has facilitated meetings with congressional members and staff to discuss these issues, and we partnered with OSC, OSHA, and congressional staff in organizing last summer's successful celebration here at the Capitol of National Whistleblower Appreciation Day.

As Congress considers reauthorization of the ombuds provision, I'd close by mentioning a couple of areas that have surfaced in the working group: First, the work we do generally does not include much of what is often done by traditional ombudsmen. And some of their activities might even be seen as inconsistent with our independent position as OIGs. This may result in some confusion about our roles, and I would be pleased to work with the committee to discuss possible ways to address this.

Second, many of the working group discussions have reflected what we found at DOJ; namely, that both our educational activities and the underlying whistleblower reprisal investigations are resource intensive. And our ability to do this, along with our other responsibilities, is impacted by the limitations on our available staffing and resources. Our work in this area is only expected to increase as whistleblower rights and protections are expanded and made permanent and more educational activities take place.

I'd be pleased to work with you and your staffs on these issues. Thank you for the opportunity to speak with you today. And I'd be happy to answer any questions you might have. Thank you.

[Prepared statement of Mr. Storch follows:]



Office of the Inspector General  
United States Department of Justice

Statement of Robert P. Storch  
Deputy Inspector General, U.S. Department of Justice

*before the*

U.S. House of Representatives Committee on Oversight and Government  
Reform, Subcommittee on Government Operations

*concerning*

"Five Years Later: A Review of the Whistleblower Protection Enhancement  
Act"

February 1, 2017

Mr. Chairman, Ranking Member Connolly, and Members of the Subcommittee:

Whistleblowers perform an invaluable service to the public when they come forward with what they reasonably believe to be evidence of wrongdoing, and they never should suffer reprisal for doing so. Thank you for inviting me to speak with you today about the important role that the Offices of the Inspectors General play with regard to informing whistleblowers about their rights and protections.

I have served as the Whistleblower Ombudsperson at the Department of Justice Office of the Inspector General (DOJ OIG) since our program was established in the summer of 2012. In November of that year, the Whistleblower Protection Enhancement Act of 2012 (WPEA) was enacted, amending the Inspector General Act of 1978 to require the creation of such positions in the offices of all Presidentially-appointed, Senate confirmed Inspectors General. A number of other designated federal entity IGs, who are appointed by agency leadership, have created such programs as well. Under the WPEA, the Whistleblower Protection Ombudsmen have the responsibility of educating agency employees and managers about the prohibitions on retaliation for making protected disclosures of suspected wrongdoing, and informing employees who have made or are contemplating making such disclosures about their rights and remedies against retaliation for doing so. Pursuant to the statute, this provision will sunset five years from enactment, or in November of this year, absent Congressional action to the contrary. The DOJ OIG strongly supports reauthorization of this important provision of the WPEA.

OIGs have performed and continue to perform an important function under the WPEA by ensuring that information regarding whistleblower rights and protections is effectively disseminated to agency personnel and others. This is consistent with the importance of whistleblowers as key sources of information for OIGs regarding the activities of personnel within the agencies that we oversee. Section 7 of the Inspector General Act reflects this important principle by specifically providing for OIGs to receive and investigate complaints or information provided by agency employees, by providing for the protection of the confidentiality of such person's identity, and by prohibiting the taking of personnel actions as reprisal for employees coming forward with what appears to be evidence of wrongdoing. In this sense, whistleblowers are very much at the front lines, direct witnesses to potential wrongdoing, and they play a critical role in bringing forward information to the OIGs or other appropriate recipients so that it can be looked into and any appropriate action taken. Ensuring that whistleblowers are comfortable, informed, and protected in coming forward is, therefore, entirely consistent with the OIGs' core mission of detecting and deterring waste, fraud, abuse, and corruption, and the OIG Whistleblower Ombudspersons have played an important role in ensuring that they have the information necessary to enable this to occur.

At DOJ OIG, as at many of our sister OIGs, we have carried out the important responsibilities entrusted to us under the WPEA by creating and disseminating training materials – at DOJ OIG, we filmed an instructional video in which I discuss various aspects of whistleblower rights and protections with two Department employees interspersed with relevant portions of an interview with one

of the whistleblowers from the Fast and Furious investigation who describes his experiences with the process. The Department has made this video required viewing for all DOJ managers and supervisors, and made it available online for all employees. We also prepared informational posters on whistleblowing and whistleblower retaliation that the Department has required to be posted in offices throughout all DOJ components, with contact information for the OIG and also the Office of Special Counsel (OSC), which of course plays a central role in addressing many cases of suspected reprisal. We also have worked with the Federal Bureau of Investigation (FBI) and the other Department components to develop particularized training programs that are tailored to their workforces and, in the case of the FBI, address the somewhat different requirements applicable to its employees under the law. At DOJ OIG, as at many of our counterpart agencies, we also created a robust page on our website with a range of information regarding whistleblower rights and protections, including a link to our video, answers to frequently asked questions, specific information for FBI whistleblowers and also for whistleblowers employed by Department contractors, subcontractors and grantees, who also have the ability to come to the OIG if they believe that they have suffered reprisal for protected whistleblowing, and we have included links on the website to a variety of additional relevant resources and websites.

Early on following the passage of the WPEA, it became clear that the development of the whistleblower protection ombudsmen programs would benefit from collaboration and sharing of information across the Inspector General community. Therefore, we worked through the Council of the Inspectors General on Integrity and Efficiency (CIGIE) to create a working group, which has met quarterly since 2013 to share information, discuss best practices and current issues and developments, and host speakers from within and outside government who have provided information to the OIG ombudsmen on a wide range of issues related to whistleblowers and their protections. OSC also has been an active participant in the working group, both providing its expertise and facilitating coordination and cooperation between it and the OIGs. The working group has also served as an important vehicle for liaison with Congress, which has resulted in several meetings with Members and staff of the bipartisan Senate Whistleblower Caucus and, more recently, the bipartisan House Whistleblower Caucus at which we have shared information regarding the implementation of the WPEA and whistleblower programs across the OIG community. We also worked with OSC and the Department of Labor Occupational Safety and Health Administration to partner with Congressional staff on a celebration of National Whistleblower Appreciation Day at the Capitol this past summer, at which the DOJ Inspector General served as Master of Ceremonies and the FBI Director delivered keynote remarks addressing the important role of whistleblowers in government.

As the Congress considers reauthorization of this provision of the WPEA, I would like to mention a couple of areas for additional consideration that have repeatedly surfaced within the working group related to the title of the position and the resources necessary to do this important work. With regard to the title in the current statute, the work we do under the WPEA generally does not include much of what is often done by traditional ombudsmen and, indeed, some such things might

be seen as inconsistent with our independent role and consideration of complaints as OIGs. Given the current title, there have been concerns expressed that some employees may be confused and expect us to perform such functions, even though the WPEA specifically provides that the ombudsman shall not act as a legal representative, agent, or advocate. I would be pleased to work with the Committee to discuss possible alternative ways to identify this important work.

Second, many of the working group discussions have reflected in one way or the other what we ourselves have found at DOJ OIG, namely that both educational activities regarding whistleblower rights and protections and, where OIGs have jurisdiction to conduct them, the investigations of alleged reprisal against whistleblowers are resource intensive, and our ability to fulfill these responsibilities and do so in a timely fashion is significantly impacted by the limitations on our available staffing and resources. OIGs have developed various structures to accomplish this important work based on what best fits their own organizational structures and agencies but, however it is organized, all of this requires time and resources. While OSC, of course, has primary jurisdiction to address the underlying reprisal claims raised by many employees under Title 5, OIGs also have seen increasing numbers of reprisal cases, for instance the employees of contractors, subcontractors, and grantees that I mentioned above, allegations of actions affecting access to classified information under Presidential Policy Directive PPD-19 and, for DOJ OIG, FBI whistleblowers. This work is only expected to increase as protections are expanded and made permanent, and as there is additional information disseminated by OIGs and others about whistleblower rights and protections.

I would be pleased to work with you and your staffs on these issues going forward. This concludes my prepared statement, and I would be happy to answer any questions that you may have.

Mr. MEADOWS. Thank you so much.  
Mr. Bachman, you're recognized for 5 minutes.

**STATEMENT OF ERIC BACHMAN**

Mr. BACHMAN. Thank you.

Good afternoon Chairman Meadows, Ranking Member Connolly, and members of the subcommittee.

Thank you for the opportunity to testify today about the U.S. Office of Special Counsel and our enforcement of the Whistleblower Protection Enhancement Act, the WPEA.

My testimony today will discuss the key parts of the WPEA, how its new safeguards have helped OSC protect more whistleblowers than ever, and suggestions on how to make the law more effective.

OSC is an independent agency, and one of our primary missions is to protect employees from whistleblower retaliation. Since the WPEA was enacted nearly 5 years ago, the number of whistleblower retaliation complaints filed with our office has increased by 15 percent, and we've helped a record number of whistleblowers.

For example, OSC has increased the number of favorable outcomes from whistleblowers by 150 percent; we've increased the disciplinary actions against retaliators by 117 percent; and we've taken further steps to strengthen the whistleblower law through our amicus briefs and our outreach programs. These protections are important because whistleblowers are a vital tool in rooting out waste, fraud, and abuse in the government and have helped saved hundreds of millions of taxpayer dollars.

And we want to thank Congress and this committee for its forceful, bipartisan support of Federal whistleblowers in OSC. In particular, we thank Representative Blum for his sponsorship of H.R. 69 to reauthorize OSC, which passed the House earlier this year. This committee's enthusiastic backing has made our office far more effective in helping whistleblowers, and we look forward to continuing this productive relationship in the new Congress and beyond.

The WPEA is landmark legislation, and it has unmistakably helped Federal whistleblowers. The WPEA provided many new protections, including, among other things, authorizing OSC to help shape the whistleblower law by filing friend-of-the-court briefs, bolstering the remedies that are available to whistleblowers who win their retaliation claims and granting full whistleblower protections to all TSA employees.

And for every new safeguard in the WPEA, OSC has succeeded in securing victories for whistleblowers. For example, we used our new amicus authority to file a brief with the Supreme Court in the Department of Homeland Security vs. MacLean case. And in a seven-two decision, the Supreme Court agreed with our arguments on behalf of the whistleblower. And since 2012, OSC has received and investigated about 243 whistleblower retaliation cases from TSA employees, which we would not have been able to investigate prior to the WPEA.

Another new element of the WPEA is this anti-gag order provision, which ensures that whistleblower protections supersede any agency nondisclosure agreements or policies. It requires that any



nondisclosure agreement or policy include language that clearly states that the employee may still blow the whistle even if they have signed the agreement or are subject to the policy. OSC has vigorously enforced this anti-gag provision, and since 2013, we've obtained nearly three dozen corrective actions and also issued specific guidance to agencies on this important topic.

The WPEA also contains two valuable provisions that are set to expire at the end of this year: The whistleblower protection ombudsman program that Mr. Storch discussed, and the all circuit appellate review program. OSC strongly recommends that both of these programs be made permanent.

Finally, although the WPEA has undeniably strengthened protections for Federal whistleblowers, further enhancements should be considered. For example, the WPEA sets a higher evidentiary burden for disclosures that are made in the normal course of duties. Congress intended this heightened burden to apply to jobs like investigators and auditors, where investigating reporting wrongdoing is an everyday job function.

But recent court decisions have applied this heightened burden to a much broader universe of jobs, jobs like teachers and purchasing agents. And this risks making it harder for many Federal employees to be able to prove their whistleblower retaliation claims. So we recommend that Congress clarify that this additional burden applies only to that small subset of Federal workers who investigate and report wrongdoing as a core job function.

We greatly appreciate the committee's robust support for office and for Federal whistleblowers. I thank you for the opportunity to testify, and I'm happy to answer your questions.

[Prepared statement of Mr. Bachman follows:]

**Testimony of Deputy Special Counsel Eric Bachman  
U.S. Office of Special Counsel**

**U.S. House of Representatives Committee on Oversight and Government Reform  
Subcommittee on Government Operations  
“Five Years Later: A Review of the Whistleblower Protection Enhancement Act”**

**February 1, 2017, 2:00 PM**

Chairman Meadows, Ranking Member Connolly, and Members of the Subcommittee:

Thank you for the opportunity to testify on behalf of the U.S. Office of Special Counsel (OSC). In the nearly five years since Congress passed the Whistleblower Protection Enhancement Act of 2012 (WPEA), this law has lived up to its name. It has significantly enhanced OSC’s ability to protect federal employees from retaliation. Compared to the four years before the WPEA passed in 2012, OSC has increased the number of favorable outcomes for whistleblowers by 150%, increased disciplinary actions against retaliators by 117%, and taken further steps to strengthen the whistleblower law through our amicus briefs and outreach program.

My testimony today will discuss these victories for whistleblowers. In addition, I will detail OSC’s experience in enforcing the WPEA, and provide specific examples of how the law has worked in practice. Like any law, the WPEA can benefit from further enhancements, so I will also outline several proposals for Congress to consider.

**I. The U.S. Office of Special Counsel**

OSC is an independent investigative and prosecutorial federal agency that protects the merit system for approximately 2.1 million federal civilian employees. We fulfill this good government role with a staff of approximately 140 employees—and one of the smallest budgets of any federal law enforcement agency. OSC has vigorously enforced its mandate to protect and promote whistleblowers in the federal government, and to hold the government accountable by providing a safe and secure channel for whistleblower disclosures. In addition, our specific mission areas include enforcement of the Hatch Act, which keeps the federal workplace free from improper partisan politics. OSC also protects the civilian employment rights for returning service members under the Uniformed Services Employment and Reemployment Rights Act (USERRA). In 2016, OSC received over 6,000 complaints covering all program areas—an increase of approximately 26% since the WPEA was passed in 2012.

**II. OSC and the WPEA**

In 2012, Congress unanimously passed the WPEA, which strengthened the substantive protections for federal employees who disclose evidence of waste, fraud, and abuse, and reinforced OSC’s ability to enforce the law. Below is a summary of key WPEA provisions, with examples of how OSC has used the changes to improve safeguards for federal workers.

A. Protecting all lawful disclosures of waste, fraud, health and safety dangers, and abuse

The WPEA legislatively overturned court decisions narrowing the broad scope of whistleblower protections that Congress had intended. These decisions restricted OSC's efforts to protect government whistleblowers. Prior to the WPEA, OSC was required to close otherwise valid claims because the courts narrowly defined who is protected for blowing the whistle. For example, employees were not protected for whistleblowing in the normal course of their job duties. This eliminated protections for some of the most important positions in government. Federal auditors, safety inspectors, and other employees with health and safety roles should be encouraged to perform their jobs diligently and with the public interest in mind. An efficient whistleblower law encourages employees to work within the chain of command to resolve problems early and efficiently. The WPEA recognized this important principle and restored protections for any lawful, reasonable disclosure of misconduct. Likewise, the WPEA clarified that disclosures are protected even if they, for example, are not made in writing or reveal information that had been previously disclosed.

In practice, these changes significantly improved OSC's ability to protect government whistleblowers. For example, a whistleblower in the Department of Treasury filed a complaint with OSC because of alleged retaliation he suffered after he reported to his supervisor that the supervisor had allowed improper expenses to be incurred by the agency. Prior to the WPEA, his disclosure would not have been deemed protected because it was made to a supervisor involved in the alleged wrongdoing. After the WPEA, however, OSC is able to pursue this case and has an active, ongoing investigation into the claim.

B. Allowing the prosecutor to help shape the law

The WPEA provided OSC greater authority to shape the whistleblower law by allowing our office to file friend of the court (*amicus curiae*) briefs in important whistleblower cases. Prior to the WPEA, OSC was generally blocked from participating in the most important, precedent-setting cases at the federal appellate court level. The WPEA provided OSC with the authority to file *amicus* briefs and state our position on behalf of whistleblowers.

Since 2013 OSC has filed nine *amicus curiae* briefs with the Merit Systems Protection Board (MSPB or Board), federal courts of appeal, and the Supreme Court. OSC's briefs addressed issues ranging from whether an agency may nullify statutory whistleblower protections by issuing rules that restrict disclosures (*Dep't of Homeland Security v. MacLean*) to the proper contours of the "normal course of duties" provision (*Benton-Flores v. Dep't of Defense*, and two other *amicus* briefs). OSC also objected to a Federal Circuit decision that restricts the right of employees in certain "sensitive" positions to seek MSPB review, and potentially, allege that they have been removed in retaliation for whistleblowing (*Kaplan v. Conyers*). Our *amicus* briefs are meant to help courts interpret the contours of whistleblower laws, and we are optimistic that over time this will lead to improved jurisprudence.

C. Ensuring that whistleblower protections supersede agency non-disclosure agreements

The WPEA created the thirteenth prohibited personnel practice (PPP) under which agencies may not use non-disclosure (gag order) agreements unless the agreement states clearly that the employee may still blow the whistle consistent with existing whistleblower laws, rules, and regulations. 5 U.S.C. § 2302(b)(13). This new PPP is important because without it federal employees may erroneously believe that a nondisclosure agreement nullifies whistleblower rights when the WPEA's required language is absent. Congress recognized that it is vital for the federal government to foster an environment where employee disclosures are welcomed. Doing so makes government more effective and protects taxpayer dollars through disclosure of waste, fraud, health and safety dangers, or abuse. Nondisclosure policies and agreements may chill would-be whistleblowers from coming forward, and the WPEA makes clear that these orders must explicitly state that federal employees still have a right to blow the whistle.

The WPEA authorizes OSC to enforce this anti-gag provision and we have done so vigorously. Indeed, since 2013, OSC has obtained nearly three dozen corrective actions related to nondisclosure agreements, and also issued specific guidance to agencies about this PPP in March 2013 as well as in a recent press release.

Typically, these corrective actions involve agency management revising their communication to employees to include language explicitly stating that employees have the right to blow the whistle. For example, two police officers with the Federal Emergency Management Agency (FEMA) disclosed alleged misconduct by a supervisor to a Justice Department investigator. FEMA disciplined both officers based on a FEMA directive, which forbade employees from disclosing information related to certain types of misconduct to anyone other than the Department of Homeland Security (DHS) Inspector General. OSC found that this directive violated the WPEA's nondisclosure provision and FEMA agreed to revise it. OSC was also able to reverse FEMA's discipline against the officers, thus settling their retaliation claims.

In our training provided to federal agencies as part of the required 5 U.S.C. § 2302(c) certification program, OSC educates agency managers and employees about the non-disclosure PPP to help prevent future violations from happening in the first place.

D. Providing full and fair relief for victims of unlawful retaliation

The WPEA bolsters remedies for whistleblowers who prevail in their retaliation claims. The legislation provides for compensatory damages, which has allowed OSC to seek full and fair relief for employees who, in addition to an adverse personnel action, may suffer emotional distress as a result of the agency's harassment. Since the WPEA's passage, OSC has successfully obtained compensatory damages for complainants in dozens of whistleblower retaliation cases.

For example, OSC obtained a settlement on behalf of a whistleblower who is a food services manager in the VA's Philadelphia medical center. The whistleblower disclosed, among other things, several violations of VA sanitation and safety policies, including a fly and pest infestation in facility kitchens. On the same day he made these disclosures to his supervisor, he was detailed

to the VA's Pathology and Lab Service and became the subject of an investigation himself, for having eaten four expired sandwiches worth \$5.00. His new job mostly consisted of janitorial work, including sanitizing the morgue and handling human body parts. After the VA investigation concluded he had stolen government property (the sandwiches), the VA issued a proposed removal and fined him \$75. The whistleblower spent over two years on the detail and was under the threat of the pending removal for most of that time. The VA ultimately took positive steps to address his case by reassigning him to his previous position and rescinding the proposed removal. OSC determined, however, that the VA also owed him compensatory damages, which the VA agreed to provide as part of a settlement.

E. The modified legal standard for seeking disciplinary action in whistleblower retaliation cases

Disciplinary action is important to deter retaliation and can have a significant ripple effect within an agency that shows officials can be held accountable for whistleblower retaliation. Prior to the WPEA, OSC had to prove a more rigorous "but for" causation to prevail in a disciplinary action case before the MSPB. The WPEA revamped OSC's ability to seek discipline against employees who unlawfully retaliate. In particular, the WPEA clarified that disciplinary action may be warranted if the whistleblower's protected disclosure was a "significant motivating factor" in an agency's decision to take the adverse action, even if other factors motivated the decision. The WPEA also provides that, if OSC does not prevail, then the employing agency (rather than OSC) will be responsible for the subject official's attorneys' fees in disciplinary action cases. Since 2012, OSC has obtained 50 disciplinary actions against federal employees who engaged in whistleblower retaliation, which is a 117% increase in these disciplinary cases since 2007-2011.

For example, a whistleblower who was a Contract Specialist for the Navy in Norfolk, Virginia made several allegations of nepotism and improper hiring practices to the Navy Inspector General, which substantiated over 40 instances of nepotism and/or improper hiring practices. Following the Inspector General investigation, the whistleblower alleged that she faced retaliation, including denial of training opportunities and significant changes to her duties and responsibilities. OSC ultimately negotiated for disciplinary action against three subject officials for suspensions ranging from five to fourteen days.

F. Jurisdiction over TSA employees for whistleblower retaliation cases

The WPEA also closed a loophole that had existed, which exempted certain employees of the Transportation Security Administration (TSA) from the whistleblower protections afforded to other employees. The WPEA provides TSA employees with the full protection of the Whistleblower Protection Act (WPA), including the right to appeal their whistleblower retaliation cases to the MSPB and a federal court of appeal. This is important because the tens of thousands of employees tasked with, among other things, securing the nation's airports should feel confident that they will be protected from retaliation for speaking out against threats to aviation security. Since December 2012, OSC has received approximately 243 cases from TSA employees who believe they suffered whistleblower retaliation.

For example, a whistleblower who is an assistant federal security director disclosed violations of aviation security policy. Specifically, he objected to a supervisor's proposal to have TSA screeners improperly handle confiscated weapons. Additionally, he reported that stickers were not consistently placed on checked bags that had been cleared by TSA. Both issues were remedied by TSA. A series of local news stories subsequently ran on security lapses at the Minneapolis-St. Paul International Airport. And one of the whistleblower's supervisors sought to learn if his employees were providing information to the media. This same supervisor then issued the whistleblower a forced reassignment to an airport in Florida. After the whistleblower filed with OSC, TSA granted OSC's initial request to halt the reassignment and ultimately rescinded it formally. OSC is continuing to investigate this whistleblower's retaliation complaint, as well as other TSA employees' complaints, helping to build confidence within TSA that employees will be protected if they disclose threats to aviation security.

### **III. Upcoming sunset provisions in the WPEA**

#### **A. Whistleblower Protection Ombudsman**

The WPEA requires each agency Inspector General to designate a Whistleblower Protection Ombudsman. The Ombudsmen work with employees to explain the processes for working with OSC to file a whistleblower disclosure, to make a confidential communication of wrongdoing responsibly, or to submit a retaliation claim. Also, the Ombudsmen may serve as intermediaries between employees and managers and provide recommendations for resolving problems between an employee and management before retaliation occurs.<sup>1</sup> The Ombudsman provision is subject to a five-year sunset provision, which is set to expire later this year.

From OSC's perspective, the Whistleblower Protection Ombudsman program has been extremely positive. For example, the ombudsman program has led to more collaboration and information sharing among the various Inspectors General and with OSC. Increased cooperation allows our related offices to share best practices for investigation techniques and training, and to identify and resolve issues quickly and effectively. The Ombudsman provision has also resulted in an increased focus on whistleblower protection within many Inspector General offices. Stated simply, the Ombudsman program has helped to better inform federal employees about whistleblower protections and fostered whistleblower awareness within Inspector General offices and federal agencies as a whole. OSC strongly recommends that Congress make this program permanent.

#### **B. All-circuit review of WPA cases**

The WPEA expanded the appellate review of WPA cases beyond the Federal Circuit. In particular, the WPEA provided first for a two-year pilot project, subsequently extended to five years, in which whistleblower retaliation cases may be appealed to any U.S. Court of Appeal of competent jurisdiction.

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<sup>1</sup> The Ombudsman, however, may not act as a legal representative, advocate, or agent for the employee.

Through the all-circuit review, Congress intended to create potential circuit splits, which encourage peer review of cases by sister circuits, as well as accountability for judges through possible Supreme Court review of circuit splits. Likewise, allowing all-circuit review of whistleblower retaliation cases is consistent with how other whistleblower laws (for example, Sarbanes Oxley, False Claims Act) operate.<sup>2</sup> OSC recommends that this all circuit review be made permanent.

#### **IV. Additional clarifications and enhancements to the WPEA and OSC's enforcement authority**

The WPEA has been a major success. But, like any law, it can continue to be improved, to best serve the interests of whistleblowers and more accountable government. Our experience over the last five years informs the following recommendations for areas in which Congress may want to further strengthen and clarify the whistleblower law.

##### **A. Statutory clarification of OSC's right to access agency information**

Congress has given OSC a broad mandate to investigate potentially unlawful personnel practices, including whistleblower retaliation, as well as the authority to receive evidence, examine witnesses, and conduct related activities. An Office of Personnel Management (OPM) regulation directs agencies to comply with OSC information requests. 5 C.F.R. § 5.4. And OSC actively pursues evidence to determine whether whistleblower retaliation has occurred. A full and complete investigation requires OSC, as a law enforcement agency, to have access to all available information within the agencies, regardless of whether an attorney-client or other privilege may otherwise apply to a third-party.

Most agencies comply in good faith with document requests under OSC's statutory authority and their regulatory responsibility under OPM Rule 5.4. Some agencies, however, assert the attorney-client privilege incorrectly and do not provide timely and complete responses. In these cases, OSC must engage in lengthy disputes over access to information, or attempt to complete our investigation without the benefit of highly relevant communications. This undermines the effectiveness of the whistleblower law, wastes precious resources, and prolongs OSC investigations.

Accordingly, OSC recommends that Congress clarify OSC's authority to receive all relevant documents and information from an agency by including a specific statutory authorization, similar to the access recently granted to Inspectors General in the Inspector General Empowerment Act of 2016.

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<sup>2</sup> One concern raised about the all-circuit review was that confusion may result among agencies who no longer have the unified voice of Federal Circuit decisions on whistleblower retaliation issues. Instead, circuit splits would result in uncertain guidance for federal managers, which would impede management decisions. OSC, however, is unaware of this type of negative effect from the all circuit review.

We thank this Committee and Representative Blum (R-IA) for advancing legislation to re-authorize OSC, H.R. 69, which would accomplish this goal. H.R. 69 was among the first bills to pass the House of Representatives during the new Congress, sending a clear message about the House's support for the OSC access to information provision and the other important reforms in that legislation. We look forward to working with your Senate colleagues on this legislation.

B. Whistleblower retaliation protection for former federal government employees

Current law protects employees and applicants for employment from retaliation, but a gap exists for actions taken against former government employees. Congress may want to evaluate whether post-employment retaliation should be actionable under the whistleblower law. Former employees are vulnerable to blacklisting and negative references that may harm their careers outside of government or destroy possibilities for future employment after blowing the whistle on government misconduct. Depending on the circumstances, OSC currently may not be able to assist these individuals. Congress could consider providing OSC with explicit jurisdiction to pursue disciplinary actions against managers who retaliate against a former employee, and/or provide a damages remedy for former workers who are fired or not hired by a private employer because of their government whistleblowing.

C. Retaliatory investigations and employee cooperation with government investigations

Under the WPEA, OSC lacks jurisdiction to determine whether an investigation of a whistleblower, which does *not* result in a personnel action (such as a suspension), was retaliatory. Accordingly, a whistleblower who is subjected to a year-long investigation—as well as the surrounding cloud of uncertainty and disruption—but is not disciplined as a result, currently has no legal recourse.

An agency investigation is not defined as a “personnel action” under the WPA. If, however, an agency conducts a retaliatory investigation that results in a personnel action, such as termination, then OSC may stop or fix the resulting personnel action. And the WPEA provides certain forms of relief to employees who are subjected to a retaliatory investigation, which culminate in a personnel action. 5 U.S.C. § 1214(h).<sup>3</sup> An enforcement gap remains, however, for employees who are subjected to a retaliatory investigation—but suffer no discipline as a result. Legitimate competing interests exist here. An agency needs to be able to investigate its employees, and managers should not feel chilled from investigating misconduct because it could lead to a

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<sup>3</sup> Under Board precedent, certain retaliatory investigations may also be subject to whistleblower retaliation protections. In *Russell v Dep't of Justice*, the Board held that the WPA protects whistleblowers from retaliatory investigations if two conditions are met. First, if the investigation is so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate. And second if the agency does not show by clear and convincing evidence that the evidence would have been gathered absent the disclosure, then the employee will prevail on their affirmative defense of whistleblower retaliation. Again, however, this is limited to the context in which the employee suffers a personnel action as a result of the retaliatory investigation.



whistleblower complaint. At the same time, current law does not protect whistleblowers who are subjected to certain retaliatory investigations.

It is important to address these subtler forms of retaliation, which have a significant adverse effect on the whistleblower and may chill others from coming forward. Under the current state of the law, however, it can be very difficult to challenge these less obvious retaliatory tactics. We will continue to investigate these retaliatory actions as appropriate, but closing the statutory void in our enforcement power may ultimately require a legislative fix.

Relatedly, employees may be asked to cooperate in a government investigation, but can be vulnerable to retaliation for providing testimony. Current law protects employees for cooperating with an OSC or Inspector General investigation. Agencies, however, commonly initiate formal and informal investigations that do not involve OSC or an Inspector General. Employees should be encouraged to provide truthful, accurate testimony and information in these proceedings, and not fear potential retaliation for doing so. A recent MSPB decision (*Graves v. Dep't Veterans Affairs*) stated that the whistleblower law does not protect employees for cooperating in an internal government investigation. This is a gap in coverage that should be addressed.

For example, OSC has reviewed thousands of whistleblower cases from the Department of Veterans Affairs (VA) in recent years. In response to whistleblower claims, the VA has (properly) initiated numerous administrative investigations to assess the scope of potential harm to patients. These inquiries rely on the testimony of doctors, nurses, and other VA employees, who should be empowered to provide candid testimony, even if that testimony conflicts with the views of management. Addressing this loophole in whistleblower protection would benefit care for veterans and promote better and more complete investigations across government.

#### D. Ongoing implications of the *Kaplan v. Conyers* decision and other case law

##### 1. *Kaplan v. Conyers*

The Federal Circuit's 2013 decision in *Kaplan v. Conyers* poses a potential threat to whistleblower protections for hundreds of thousands of federal employees whose positions are, or may be, designated as "sensitive," even when these positions do not require a security clearance or access to classified information. This gap in protection may chill civil servants from blowing the whistle because, as a pretext for retaliation, an agency may classify their job as a "sensitive" position and then deem them ineligible to hold it. Under *Conyers*, this eligibility decision is essentially unreviewable by the Board or other federal court.

The *Conyers* Court did not specifically address whether its ruling applies to whistleblower and other prohibited personnel practice cases, and OSC makes two recommendations on this point. First, particularly in light of recent Federal Circuit precedent (*Ryan v. Dep't of Homeland Security*), it may be helpful for Congress to clarify that OSC and the MSPB maintain jurisdiction to review standard personnel actions—such as pay status—to determine whether a whistleblower received disparate treatment in terms of pay during a suitability or security clearance review. Second, it may also be helpful for Congress to track the number of adverse actions taken because

an employee is deemed ineligible to hold a sensitive position, rather than the traditional bases for punishment: employee conduct or performance. If the number of actions based on eligibility begins to trend upward, it would indicate that agencies are more actively using the authority provided by *Conyers*. And our concerns about the impact on the merit system and due process rights for federal workers would therefore increase.

## 2. *Benton-Flores v. Dep't of Defense*

Likewise, the MSPB's decision in *Benton-Flores v. Dep't of Defense*, as well as several subsequent decisions that rely on it, threaten to impose an additional, unnecessary burden on virtually all federal employees who blow the whistle through their chain of command or about matters that may relate to their job duties.

Before the WPEA, the touchstone for whether a disclosure was made in the "normal course of duties" was whether the employee was specifically tasked with regularly investigating and reporting wrongdoing as an integral function of their job. In a series of pre-WPEA cases, the Federal Circuit held that disclosures made by these employees did not constitute protected whistleblowing under the WPA. In passing the WPEA, Congress overturned this precedent and included an additional burden to ensure that, for those employees who must regularly investigate and report wrongdoing as a part of their jobs, whistleblower claims are only actionable when the disclosures provoke a retaliatory response.

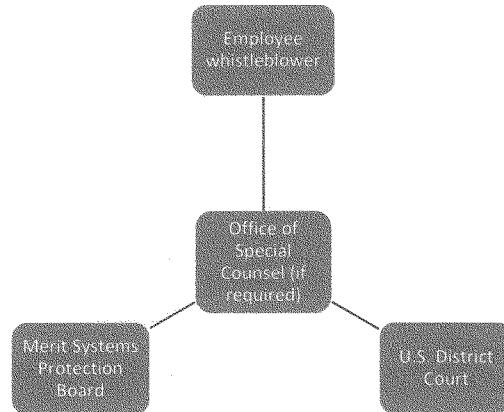
Instead of applying this burden narrowly and as intended to investigators and auditors—positions cited in the WPEA's legislative history—the Board, since *Benton-Flores*, has applied it broadly to, for example, teachers, purchasing agents, and motor vehicle supervisors. Similar far-reaching arguments also have been made in the federal courts of appeals.

This line of cases risks imposing the additional, more onerous "normal course of duties" burden any time a federal employee makes a disclosure to a supervisor that is related to their day-to-day responsibilities: a doctor reporting patient care abuses, a facilities operator disclosing dangerous maintenance practices, etc. This result clearly conflicts with what Congress intended in passing the WPEA.

We recommend that Congress clarify that this additional burden in the WPEA applies only to the small subset of federal workers who investigate and report wrongdoing as their principal job functions.

## E. Federal district court jurisdiction for certain whistleblower retaliation cases

Congress has previously considered providing whistleblowers with the option to litigate their cases in federal district court. And in its November 2016 report ("Whistleblower Protection – Additional Actions Would Improve Recording and Reporting of Appeals Data"), the Government Accountability Office (GAO) found that focus group participants generally favored this appellate option. The GAO report determined that the preferred method for federal district court jurisdiction would be as follows:



Under this scenario, a whistleblower would have “one bite of the apple” in which they must choose to have either the MSPB or the district court hear their appeal. Likewise, the GAO report discussed whether all whistleblower retaliation claims—or only a subset of them involving more severe personnel actions like termination or demotion—should be permitted to appeal to federal district court.

A number of benefits may flow from granting federal district court jurisdiction over certain whistleblower retaliation claims. For example, whistleblowers would have access to jury trials and additional procedural options, which may help strengthen and expand the whistleblower protection laws. Likewise, affording federal employee whistleblowers access to federal jury trials is consistent with how private sector whistleblowers are treated under various statutes such as Sarbanes Oxley and the False Claims Act.<sup>4</sup> Accordingly, OSC recommends that Congress consider a five-year pilot project under which:

- Whistleblower retaliation cases that have administratively exhausted through OSC, if required, have the option to appeal their case to a U.S. District Court or to the MSPB (but not both); and
- This appellate option is available only to whistleblower retaliation cases involving more severe personnel actions (for example, a significant suspension; demotion; geographic reassignment; or termination).

<sup>4</sup> The GAO report stated that some survey participants noted the already high caseloads in most U.S. District Courts, as well as the loss of agency control in defending the case (the Department of Justice, rather than agency counsel, would represent agencies in federal court actions) as factors against providing federal district court jurisdiction.

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Thank you for the opportunity to testify today. On behalf of OSC, I also want to thank this Committee for its bipartisan, forceful support for whistleblowers and your efforts to curb waste, fraud, and abuse in government. Without active and ongoing support from Congress on these critical issues, OSC would be far less effective in its efforts to protect whistleblowers and promote better, safer, and more accountable government. We look forward to a productive relationship with this Committee in the 115<sup>th</sup> Congress, and your continued support for OSC and our critical good government mission.

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**Deputy Special Counsel for Litigation and Legal Affairs Eric Bachman**

Eric Bachman joined the U.S. Office of Special Counsel in 2014. He served as a special litigation counsel in the Justice Department's Civil Rights Division from 2012 to 2014, and was a senior trial attorney from 2009 to 2012. Before joining the Justice Department, he was in private practice, as an associate and then as a partner, in a Washington, DC civil rights law firm. Mr. Bachman began his legal career as a public defender in Louisville, Kentucky. He received a J.D. from Georgetown University Law Center.

Mr. MEADOWS. Thank you, Mr. Bachman.  
Mr. Devine.

#### STATEMENT OF THOMAS M. DEVINE

Mr. DEVINE. Thank you. This hearing is significant because action is essential to address newly emerging threats in loopholes that obstruct or circumvent the WPEA's mandate, and because 2017 will be the year of truth for unfinished business on the due process structure to enforce the law's rights. If Congress acts effectively, after 39 years whistleblowers will have legal rights on which they can rely, a genuine metal shield against retaliation.

2016 continued a pattern since the WPEA's passage. The last 5 years have been the best and worst of times for whistleblowers. My written testimony summarizes encouraging news about closing the loopholes, Supreme Court support for the law, the Office of Special Counsel's effective track record, and unprecedented impact from whistleblowers in making a difference.

To illustrate the latter, in Supreme Court oral arguments for Air Marshal Robert MacLean, whose disclosures stopped TSA from going AWOL during a more ambitious rerun of 9/11, we argued that Mr. MacLean acted to better protect the Nation. Justice Scalia interjected, "And he was successful." It's no wonder that whistleblowers are receiving more respect than ever before.

Unfortunately, it is the sad truth that the Office of Special Counsel's track record of 5.2 percent corrective action against retaliation reflects the best option that exists. As a rule, employee rights under the Whistleblower Protection Act continue to be a mirage when agencies violate them, and whistleblowing is more dangerous than ever before.

Consider four primary causes: The first is administrative agency enforcement. Despite best efforts, the special counsel is hampered by resource-based tradeoffs that result in almost no litigation and excessive delays that unemployed whistleblowers cannot afford and that undermine the relevance of its decisions on current events.

Special counsel can never be more than anecdotal source of justice that makes impressive points. To consistently achieve the X purpose, no remedial agency can substitute for due process. And unfortunately, whistleblowers are not getting it at the Merit Systems Protection Board.

Board members have been good-faith, responsible stewards of the act, but the hearings are conducted by administrative judges who are openly hostile to the act, ruling against whistleblowers from 95 to 98 percent of the decisions on the merits. When you combine that with OSC's 5 percent corrective action rate, whistleblowers do not have more than a token chance of justice under this law.

Consider the ordeal of Kim Farrington, who is an FAA inspector, fired after she challenged the Agency's failure to assure proper training of flight attendants. Her case has been pending for 7 years. In 2012, the board overturned a hostile administrative judge decision but remanded rather than reversing. The AJ then held a hearing but never issued a decision. When the AJ retired, a new judge was appointed, who held another hearing in December 2013, but again did not rule.

In May 2016, Ms. Farrington protested the delays to the full board and the administrative judge promptly responded with a June decision that rejected all of her claims without even referencing the hearing audiotape. There was no transcript because the court reporter had died during the delays. Her case is again on appeal, but due to vacancies, the board cannot issue decisions and there is no end in sight.

The lack of credible due process at the MSPB is the Whistleblower Protection Act's Achilles heel. Shifting tactics have made the law less effective. Because it is more difficult to fire employees, agencies are opening more retaliatory investigations with criminal prosecution referrals. And currently, there is no defense against this even uglier form of harassment.

Then there's the sensitive jobs loophole, an all-encompassing national security loophole that will subsume the entire merits system if Congress does not act.

And finally, there is lack of acceptance. Mr. MacLean's experience is a microcosm. Immediately after his victory, TSA lagged 4 months and then assigned him to air marshal missions on flights to the Mideast despite intelligence that ISIL was combing the internet to find the identities of undercover air marshals, and he was the most visible air marshal in history.

After the OSC intervened, the Agency reassigned him to an empty room with no duties for 4 months. It refused to consider him even routine promotions, forcing him into bankruptcy. Although he continues to make impressive disclosures on security breaches, they will not assign him any duties due to lack of seniority caused by his own illegal termination. It held up processing his security clearance for 10 months, although required to forward it within 14 days. He has still lost by winning due to the poor attitudes.

Mr. Chairman, my written testimony has a full menu of suggestions for how we can deal with these challenges. Thank you.

[Prepared statement of Mr. Devine follows:]

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CORRECTED TESTIMONY OF THOMAS DEVINE,  
GOVERNMENT ACCOUNTABILITY PROJECT

before the

HOUSE OVERSIGHT AND GOVERNMENT REFORM COMMITTEE,  
SUBCOMMITTEE ON FEDERAL WORKFORCE, U.S. POSTAL SERVICE AND THE  
CENSUS

on

WHISTLEBLOWER PROTECTION SINCE PASSAGE OF THE WHISTLEBLOWER  
PROTECTION ENHANCEMENT ACT

January 30, 2017

MR. CHAIRMAN:

Thank you for inviting the Government Accountability Project's (GAP) testimony on the first five years of the Whistleblower Protection Enhancement Act. (WPEA) My name is Thomas Devine, and I serve as GAP's legal director. This hearing is significant for two reasons – 1) oversight of how the WPEA has worked in reality; and 2) building a record for legislative action. Action is essential to address newly emerging threats and loopholes that obstruct or circumvent the Act's good government mandate. Most fundamental, 2017 will be the year of truth for unfinished business on the due process structure to enforce the Whistleblower Protection Act's (WPA) free speech rights. If Congress acts in a responsible, timely manner to meet those challenges, after 39 years federal whistleblowers will have legal rights on which they can rely – a genuine metal shield against retaliation.

GAP is a nonprofit, nonpartisan, public interest organization that assists whistleblowers, those employees who exercise free speech rights to challenge abuses of power that betray the public trust. GAP has led or been on the front lines of campaigns to enact or defend nearly all modern whistleblower laws passed by Congress, including the Whistleblower Protection Act of 1989, 1994 amendments and the Whistleblower Protection Enhancement Act.

Our work for corporate whistleblower protection rights includes those in the Sarbanes-Oxley law for some 40 million workers in publicly-traded corporations, the 9/11 law for ground transportation employees, the defense authorization act for defense contractors, and the Consumer Product Safety Improvement Act for some 20 million workers connected with retail sales, the Energy Policy Act for the nuclear power and weapons industries and AIR 21 for airlines employees, among others. Last year GAP was counsel for an *amicus curiae* brief filed by Representative Speier, as well as Senators Grassley and Johnson, which successfully defended the WPA burdens of proof for analogous corporate whistleblower statutes.



We teamed up with professors from American University Law School to author a model whistleblower law approved by the Organization of American States (OAS) to implement at its Inter American Convention against Corruption. In 2004 we led the successful campaign for the United Nations to issue a whistleblower policy that protects public freedom of expression for the first time at Intergovernmental Organizations, and in 2007 analogous campaigns at the World Bank and African Development Bank. GAP has published numerous books, such as *The Whistleblower's Survival Guide: Courage Without Martyrdom*, and law review articles analyzing and monitoring the track records of whistleblower rights legislation. See "Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 *Administrative Law Review*, 531 (1999); Vaughn, Devine and Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 Geo. Wash. Intl. L. Rev. 857 (2003); *The Art of Anonymous Activism* (with Public Employees for Environmental Responsibility and the Project on government Oversight)(2002); and *The Corporate Whistleblower's Survival Guide: A Handbook for Committing the Truth* (2010). The latter won the International Business Book of the Year Award at the Frankfurt Book Fair.

Over nearly 40 years we have formally or informally helped over 8,000 whistleblowers to "commit the truth" and survive professionally while making a difference, and been leaders in campaigns to pass 34 whistleblowers laws ranging from Washington, DC to the United Nations. This testimony shares and is illustrated by painful lessons we have learned from this experience. We could not avoid gaining practical insight into which whistleblower systems are genuine reforms that work in practice, and which are illusory.

Along with the Project on Government Oversight, GAP also is a founding member of the Make it Safe Coalition, a non-partisan, trans-ideological network of 75 organizations whose members pursue a wide variety of missions that span defense, homeland security, medical care, natural disasters, scientific freedom, consumer hazards, and corruption in government contracting and procurement. We are united in the cause of protecting those in government who honor their duties to serve and warn the public. Our coalition led the citizen campaign for passage of the Whistleblower Protection Enhancement Act. (WPEA) MISC has some 75 members, including good government organizations ranging from Center for American Progress, National Taxpayers Union and Common Cause, environmental groups from Council for a Livable World, Friends of the Earth and the Union of Concerned Scientists, conservative coalitions and organizations such as the Liberty Coalition, Competitive Enterprise Institute, American Conservative Defense Alliance and the American Policy Center, to unions and other national member based groups from American Federation of Government Employees and the National Treasury Employees Union, to the National Organization for Women. But the coalition itself is only the tip of the iceberg for public support of whistleblowers. Some 400 organizations with over 80 million members joined the petition for passage of the WPEA.

#### WPEA TRACK RECORD TO DATE

##### *Positives*

2016 continued a consistent pattern since the WPEA's passage. The last five years have been the best of times and the worst of times for federal whistleblowers. On the positive side, its blanket closure of prior loopholes means that employees no longer have to guess whether they are covered by the law. Similarly, increased training and multiple legislative mandates have created unprecedented management respect for whistleblowers, if not acceptance. Perhaps most

exciting, in *Department of Homeland Security v. MacLean*, the Supreme Court heard its first test case of the Whistleblower Protection Act and decisively backed the law's cornerstone. Its 7-2 ruling held that agency secrecy regulations cannot override WPA free speech rights. In the decision's aftermath only Congress can restrict the WPA's right to public freedom of expression, through specific statutory language that provide fair notice of restraints on public disclosures.

In terms of impact, whistleblowers are making a difference more than at any time in history. Consider the impact of just a few who have testified before this committee. An avalanche of whistleblowers at the Department of Veterans Affairs (DVA), spearheaded by the VA Truth Tellers, has sparked an unprecedented spotlight on corruption and deadly neglect, as well as initial reforms that may save the lives of countless veterans. Marine scientist Franz Gayl's disclosures sparked delivery of effective mine resistant armored vehicles that cut Iraqi land mine casualties from 60% of the total (and 90% of fatalities) to 5% of the total. They exposed and stopped the sale of Fast and Furious weapons to Mexican drug cartels. Government is taking whistleblowers more seriously than ever before, and it is producing results.

Although Mr. MacLean blew the whistle before the WPEA, Justice Scalia's comment at his Supreme Court oral argument highlights how whistleblowers can change the course of history, if we listen. In 2003 Mr. MacLean publicly exercised the freedom to warn, and prevented the Transportation Security Administration from ordering cancelation of all relevant Federal Air Marshal missions during a more ambitious rerun of 9/11 planned by Al Qaeda. Thanks to Mr. McLean, DHS conceded error, Air Marshals stayed on the job and the high-jacking was prevented. But rather than honor Mr. MacLean, TSA pseudo-classified its order after-the-fact and fired him supposedly for endangering national security by exposing the agency's secret order to go AWOL during an enemy attack. When counsel at the Supreme Court

argued that Mr. Maclean acted to better protect the nation, Justice Scalia interjected, “And he was successful!”

Another net positive has to be the Office of Special Counsel’s (OSC) track record. Since the House already has acted on reauthorizing the OSC, this testimony will not be a detailed analysis. By any measure, however, under Special Counsel Carolyn Lerner and her management team its performance has peaked, and whistleblowers have been the beneficiaries. At GAP we often get frustrated with the OSC on individual cases and procedures. But it would be dishonest to ignore the obvious. The Office’s leadership has displayed unqualified commitment to the WPEA’s goals, and on balance has the most impressive record in agency history of helping whistleblowers.

There is a good reason why the OSC’s record of new complaints has nearly doubled since 2008: results. Since 2014 the OSC has obtained 164 informal or formal stays of retaliation, including over 100 during the last two years. Its corrective actions in 2016 alone thwarted prohibited personnel practices in 216 cases, including 174 whistleblower complaints. Additionally, the OSC’s reborn Alternative Disputes Resolution (ADR) has become one of the WPA’s most effective resources. GAP’s experience is that both sides end up getting defeated to a painful degree in win-loss litigation. By contrast, mediation offers win-win resolutions that allow both sides to move on, and can produce creative relief not available through litigation. The OSC’s roughly 80% success rate for mediations is far better than the 25-30% norm for private sector lawsuits.

Overall, 5.2% of those who challenge prohibited personnel practices through the Office obtain some corrective action. This is almost double the rate of other remedial agencies for whistleblowers covering the private sector and military services. Conservatively, the OSC under

Ms. Lerner's leadership has saved careers or stopped retaliation against more than 500 whistleblowers. That is why the Special Counsel has switched from being the last to the first option for GAP when defending whistleblowers. Currently it is the best protection available.

The Office deserves credit for making its whistleblowing disclosure channels far more whistleblower friendly. For example, the OSC now reviews with the employee how issues are worded before forwarding them for investigation. Along with referrals ordering investigations of whistleblowing disclosures, the Office now puts agencies on notice of tough criteria to evaluate subsequent reports. Supported by this Committee, the Office properly has pressed for authority to monitor implementation of corrective action commitments.

The OSC has been a leader in policy advocacy to strengthen whistleblower protection. It actively has used WPEA's authority to file *amicus* friend of the court briefs that champion interpretations of the law true to congressional intent. It already has exercised this authority in 12 cases from the Merit Systems Protection Board (MSPB) to the Supreme Court. The OSC's advocacy has ranged from WPEA retroactivity, to the WPA's supremacy over agency secrecy rules, to credible due process in security clearance cases, to the scope and evidentiary burdens for modified "job duty" protection, to protection against blacklisting.

The Office has exercised an effective leadership role in agency training on WPA rights and responsibilities, the most significant factor to prevent retaliation. Before Ms. Lerner's term, no cabinet agencies were certified as completing the WPA's training requirement. Now the 100 certified agencies represent a majority of cabinet departments and some two thirds of Executive branch agencies.

*Negatives*

The stark rise in OSC complaints illustrates another stark truth: retaliation has not decreased. It is a sad truth that the OSC's track record of 5.2% corrective action reflects the best option. As a rule, employee rights under the Whistleblower Protection Act continue to be a mirage when agencies violate them. Whistleblowing is more dangerous than ever. Four primary causes are reviewed below.

Administrative agency enforcement. Part of the reason is the enforcement agencies. Despite its intensified informal efforts, the OSC only has filed two formal corrective action complaints in whistleblower cases since 2011. Its failure to litigate almost at all weakens the terms of settlements it negotiates, and prevents victories from becoming case law with precedents. There has been a similar litigation vacuum for disciplinary actions, which are essential to deter reprisals. While the current OSC administration has obtained 84 disciplinary actions informally, it only has filed three formal disciplinary complaints. Discrete discipline simply does not have the same chilling effect on retaliation as visible punishment.

Delays also have been a particular source of frustration. To illustrate, 5 USC 1213 calls for 15 day OSC reviews of whistleblowing disclosures to determine if there is a substantial likelihood of misconduct and order an agency investigation, followed by a 60 day turnaround for agencies to report back. Admittedly, those time frames are unrealistic. But it took us over three years advocacy before the Office referred a disclosure of significant misconduct that was sustaining abuse of foster children. Another disclosure has been pending for nearly two years. Whistleblowers speak out to make a difference, and often the consequences don't wait. The delays do not stop when the OSC makes up its mind. On the average, agencies take 387 days to

turn in their 60 day investigative reports. The WPA's disclosure channel is designed to spark timely reports that can make a difference about current events, not history lessons.

The frustrations summarized above do not reflect bad faith by the OSC. They reflect the facts of life, and unavoidable trade-offs. Without an exponential increase in resources, the OSC cannot hope to provide timely action except in emergency scenarios, when it has acted impressively. More thorough review of cases and enfranchisement of whistleblowers inherently causes delays. Further, formal actions exhaust far more resources than resolution without conflict, and the OSC has chosen the tradeoff that helps the most whistleblowers for the buck. That is hard to disagree with.

Positive or negative judgments about this Office do not change the facts of life, however. At best, the OSC never can or will be more than an anecdotal source of justice that can make impressive points. To consistently achieve the WPA's promise, no remedial agency can substitute for credible due process.

Unfortunately, whistleblowers are not getting it at the Merit Systems Protection Board. (MSPB) As a rule, decisions by Board Members have interpreted the WPA consistent with legislative intent and backed by well-reasoned legal analysis. They have been good faith, responsible stewards of the WPA.

But the hearings are conducted by Administrative Judge's (AJ) who have been openly hostile to the Act. In fact, they have been far more hostile even than the Federal Circuit Court of Appeals, whose rulings sparked passage of the WPA and WPEA to restore unanimously enacted rights gutted by judicial activism. Depending on the year, AJ's rule against whistleblowers on the merits from 95-98% of decisions on the merits. Combined with the OSC's 5% corrective action rate, this means whistleblowers do not have more than a token chance for justice.

Further, delays at the Board are as bad or worse than at the Office of Special Counsel. For example, the Board still has not completed proceedings to implement Mr. MacLean's January 2015 Supreme Court victory.

Frequently the reason for delays is the common practice of remanding cases instead of reversing initial AJ rulings. The ordeal of Kim Farrington is sadly illustrative. Ms. Farrington was an Aviation Safety Inspector for the Federal Aviation Administration (FAA) who was harassed and then fired after she challenged the agency's failure to assure proper oversight of the training of flight attendants at an assigned airline. Her case has been pending for seven years. In 2012 the Board issued an excellent decision overturning a hostile AJ decision on numerous errors of law, but remanded rather than reversing. The AJ then held a hearing on remand, but never issued a decision. When the AJ retired, a new judge was appointed who held another hearing in December 2013. After almost a year and half of no action, the parties jointly filed August 3, 2015 motion for status conference. The AJ never even acknowledged it. In May 2016 Ms. Farrington protested the delays to the full Board. The AJ promptly responded by issuing a June 2016 decision that rejected all of her claims. He acted without even referencing the hearing audio tape, half of which was inaudible. There was no transcript, because the court reporter had died during the delay. H<https://www.linkedin.com/pulse/fly-by-night-faa-aviation-safety-given-second-wind-andersener> case again is on appeal to the full Board through a Petition for Review. However, due to vacancies the Board cannot issue decisions, and there is no end in sight. For a detailed description of her nightmare, see <https://www.linkedin.com/pulse/fly-by-night-faa-aviation-safety-given-second-wind-andersen>. The lack of credible due process at the MSPB is the Whistleblower Protection Act's Achilles heel.



Shifting tactics. Since the WPEA made it more difficult to fire employees, many agencies have shifted to a new tactic: put them under retaliatory investigation, often followed by a prosecution referral. To illustrate, at 2015 Senate hearings last year VA Truth Tellers leader Shea Wilkes testified that all of the 50 plus members in that whistleblower coalition had been placed under retaliatory investigation. NRC engineer Larry Criscione was subjected to a prolonged third degree interrogation and referred for prosecution, specifically because he blew the whistle by disclosing unclassified information to Congress. This newly-popular tactic is not surprising. First, criminal investigations are much easier and less burdensome than multi-year litigation with teams of lawyers, depositions, hearings and appeals. All it takes is an investigator who is proficient at bullying. Second, there is no risk of losing. In a worst case scenario, an agency merely closes the investigation (and can open up a new probe on a new pretext at any time). Third, the chilling effect of facing jail is much more severe than facing an adverse action.

Criminal witch hunts are the most effective means available to scare employees into silence, but under current law WPA anti-retaliation rights are not available until an investigation leads to a personnel action. Unfortunately, prosecution referrals are not personnel actions, and merely leaving a criminal probe open indefinitely can create more fear than a completed adverse action. It would be ironic if the WPEA's stronger employment rights led to an uglier substitute for traditional retaliation.

"Sensitive jobs" loophole. A decision by the Federal Circuit Court of Appeals which the Supreme Court declined to review has created the most significant threat to the civil service merit system in our lifetime. In *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), cert. denied, 134 S. Ct. 1759 (U.S. Mar. 1, 2014), the courts declined to interfere with policies by the last two presidents to create a 'sensitive jobs' loophole that could eliminate independent due process

rights for virtually the entire federal workforce. The roots of this doctrine are a McCarthy era regulation creating a prerequisite security check for those whose jobs that do not currently but some day may need a security clearance for access to classified information. Although the practice had been long dormant, it has been revived by the last two presidents for implementation throughout the Executive branch.

In the aftermath, the government has uncontrolled power to designate any position as “sensitive.” The Federal Circuit applied the principle to those who stock sunglasses at commissaries, and proposed OPM regulations will permit the designation for all jobs that require access either to classified or unclassified information—in other words, all jobs that require literacy. “Sensitive” employees no longer can defend themselves through an independent due process proceeding at the MSPB, and there are no consistent procedures to achieve justice within agencies. Already workers are being removed for old debts or other financial problems, despite having good credit without significant current debt—even if financial hardship were a valid basis to purge the civil service. In effect, we are on the verge of replacing the merit system with a national security spoils system. This would provide absolute authority over nearly two million workers for the most secretive, wasteful bureaucracy in government, whose surveillance abuses already have created a national crisis for freedom. Since 1883 the merit system has kept the federal labor force comparatively non-partisan and professional. The “sensitive jobs” loophole would open the door to replace accountability with a national security spoils system. GAP’s associated friend of the court brief to the Federal Circuit, and public comments on the Office of Personnel Management’s proposed new rules are attached as Exhibits 1 and 2.

Lack of acceptance. At GAP we frequently celebrate that the legal revolution in whistleblower rights has been matched by the public’s cultural revolution of acceptance. That

revolution has not reached the federal bureaucracy. While agencies treat whistleblowers with greater respect, that is not because of acceptance. It is because whistleblowers rightly are viewed as greater threats to abuses of power than ever before, and therefore must be silenced in a manner that stops others from speaking out.

Mr. MacLean's experience at the TSA is a microcosm of ongoing hostility to the WPA. Despite explicit statutory authority, MSPB proceedings for over 11 years, two Federal Circuit opinions and the Supreme Court victory, in legal briefs the agency still does not concede that Title 5 applies to TSA. Immediately after his victory, the agency lagged four months and then assigned Mr. MacLean to Air Marshal missions on flights to the Mideast. It acted, despite intelligence that ISIL was combing the internet to find the identities of undercover Air Marshals. Mr. MacLean is the most publicly visible Air Marshal in history, having testified in Congress and appeared in the Internet over 50 times. TSA might as well have painted a red X on planes with him. It appeared the agency was intensifying retaliation to the point of threatening not only Mr. Maclean's life, but all the passengers he was responsible to protect. After the OSC intervened, the agency reassigned Mr. MacLean to an empty room with no duties for four months. It refused to consider providing him with even routine promotions that he would have received during the nearly nine years he was unemployed, which has forced him to file bankruptcy. Although Mr. MacLean continues to make impressive disclosures that expose air security breaches, TSA still will not assign him to any duties beyond junior level due to lack of seniority – caused entirely by its own illegal termination. It held up administratively processing his security clearance for 10 months although regulations required his file to be forwarded in 14 days. The consequence is that it took 18 months to renew his clearance, with greater delays for TSA to forward the file than for OPM to investigate. He also had to successfully defend himself

from investigation groundless charges. In short, due to agency disrespect for the law, Mr. MacLean still has lost by winning.

His experience is hardly unique at TSA. Supervisors who tried to shield him since reinstatement have faced retaliatory investigations and counseling. Nor is it just the MacLean case. His treatment is consistent with so many other whistleblowers that TSA employees believe the agency strategy is to flood the legal system. The OSC has over 200 retaliation complaints. To illustrate its intransigence, after the OSC blocked termination TSA placed two aviation security whistleblowers on administrative leave, paid to gather dust for some 500 days now and counting.

TSA is not an exception. As Congress has confirmed, retaliation at the Department of Veterans Affairs is even worse. Most discouraging, GAP's docket currently is dominated by personnel at non-OSC agencies charged with protecting whistleblowers, who faced retaliation for trying to fulfill that mission. Without cultural acceptance, whistleblower rights always will be resources for an uphill battle. I regularly counsel whistleblowers that if all they have on their side is the law, they are in big trouble.

It is encouraging that agencies respect whistleblowers more than ever before. But until they respect the law, whistleblowing will continue to be as dangerous as ever. Or more so. The backlash is likely to get worse as managers feel threatened by an Administration committed to "draining the swamp."

Last week's wave of blanket nondisclosure policies is not grounds for optimism and makes the WPEA's numerous "anti-gag" provisions particularly significant. Five agencies issued a series of gag orders that are incompatible with four provisions of the WPA, two longstanding appropriations spending bans, a century old shield on congressional communications, and the First Amendment. They were issued at the Departments of Agriculture,

Energy, Health and Human Services and Interior, as well as the Environmental Protection Agency. So far, they appear primarily to target scientists and other professionals. They range from restrictions on social media, to blanket prior restraint on all communications, including Congress.

A January 18 memo is illustrative. The Energy Department's public relations chief directed that "NOTHING is released after 12:01 on Friday that I have not cleared .... New team, new rules."

The new rules cancel the rule of law. Four federal laws reaffirm a requirement that restrictions on federal employee speech have "anti-gag" language. That means any nondisclosure policy, form or agreement must also include a congressionally-required qualifier stating the free speech rights in whistleblower and related laws trump any contradictory restrictions. To date, there is no indication that any of the new gag orders have that qualifier.

Without anti-gag language, prior approval and uncontrolled restraints on speech violate the constitution and seven federal laws, including six statutes passed unanimously. For starters, prior restraint is the foundation for an Official Secrets Act that is incompatible with the First Amendment.

The gags also violate the Lloyd LaFollette Act of 1912, which shields all communications by government employees with Congress. The Whistleblower Protection Enhancement Act of 2012 has three anti-gag provisions, as well as a ban on censorship that threatens scientific freedom. Two appropriations riders that have been passed for decades without opposition ban any spending to implement or enforce uncontrolled nondisclosure rules. One bans spending for any restraints without anti-gag language. The other adds teeth for the Lloyd LaFollette Act by banning salary payments for those who obstruct congressional communications.

There is a reason for this broken record of legal mandates, and it is consistent with the election mandate for government accountable to the citizens. As Justice Brandeis explained, “If corruption is a social disease, sunlight is the best disinfectant.” Whistleblowers live that principle, by exercising free speech rights to challenge government abuses of power that betray the public trust.

Hopefully these gag orders are just spontaneous efforts by scattered bureaucrats afraid to offend the new boss. If so, the boss needs to set them straight. If he wants whistleblowers to believe in him, President Trump needs to intervene and show he has the back of those who risk their professional lives for his campaign promises. Washington’s swamp won’t get drained if he feeds them to the alligators. This Committee and the OSC have been doing their share. Since 2012 the OSC actively has enforced the WPEA’s anti-gag provisions. And all whistleblowers should say thank you to Ranking Member Cummings for last week’s in-depth, well-reasoned challenge to the policies’ legality.

#### RECOMMENDATIONS

While the WPEA was landmark legislation, the above concerns demonstrate that we have a lot of work left to achieve its purposes. The recommendations below are a menu of unfinished business that badly needs completion. Suggestions are organized to reflect issues remaining from the WPEA; structural reforms for emerging threats from new loopholes and tactics; and fine tuning of rights already established.

#### *Holdover issues*

\* *Jury trials*: This is the most significant, necessary reform, because currently there is no legitimate due process forum for whistleblowers to defend their rights. As seen above, credible

due process has not been available at the MSPB. In the WPEA Congress postponed whether to provide jury trials for civil service whistleblowers until after a Government Accountability Office (GAO) study last fall. GAO did not find any disadvantages. Without further delay federal whistleblowers should have the right to seek justice from the citizens they risk their careers to defend. They are the only significant portion of the labor force without the option for jury trials. Since 2002 Congress has included it for corporate whistleblowers in 13 laws for nearly the entire private sector. Further, even if were functional, the MSPB lacks the expertise and independence from political pressure for politically-sensitive or high-stakes cases of national significance. But those cases are the most important reasons we need whistleblowers.

Currently federal whistleblowers are the only major sector of the labor force without access to juries to enforce their rights. They are available for all state and local government employees, as well as nearly the entire private sector. This loophole must be closed. First class public service requires first class due process.

*\* MSPB Summary Judgment authority:* Unfortunately, many unemployed whistleblowers cannot afford to seek justice in court. For them an MSPB administrative hearing is their only chance for due process. Agency desires to avoid public hearings also lead to a significant number of settlements. The Board previously sought authority to deny hearings though summary judgment authority, so Congress sought GAO review. The MSPB has stopped seeking summary judgment powers, and last fall's GAO report did not recommend providing them.

This proposal should be shelved. The right to some hearing is important for whistleblowers to achieve closure, and to obtain at least some relief. Most significant, summary judgment authority means denying a hearing on legal grounds. But Board AJ's legal

interpretations have butchered the law and forced lengthy remands. The Administrative Judge corps badly needs WPA training. It would be irresponsible to consider giving them any power to further curtail whistleblower due process rights until training has been completed.

\* *All Circuits Review*: This issue should be as noncontroversial as it is significant. In 2012 Congress experimented with giving whistleblowers normal access to appeals courts for challenges to MSPB decisions. If the experiment is not made permanent this year, the Federal Circuit Court of Appeals again will have a judicial monopoly on how the WPA is interpreted. There should not be any opposition to institutionalizing this right consistent with the Administrative Procedures Act. The Federal Circuit's prior hostility is why Congress has had to reenact three times the rights it passed in 1978. The pilot solution of all circuits review has not had any adverse side effects; and has provided healthy competition that has improved the quality of Federal Circuit statutory interpretations, such as in *MacLean v. DHS*. While not a final decision, the court twice unanimously rejected an MSPB decision that would have permitted agency regulations to cancel the WPA.

Unfortunately, while its respect for the law has improved, the court remains close minded to whistleblowers. Based on its track record the Federal Circuit remains a forum hostile to the Act's bottom line goal – canceling retaliation. Since 2012 the court's record is 0-15 against whistleblowers for final decisions on the merits. At other circuits, the track record is 1-2. Digests are enclosed as Exhibits 3 and 4. Significantly, a favorable decision in *Kerr v. Jewell* not only supported the whistleblower but held that the pre-WPEA Federal Circuit loopholes were erroneous. If we had all circuits review previously, Congress may not have needed to spend 13 years enacting the WPEA. If we institutionalize it now, it may not be necessary for statutory whistleblower rights to be born again a fourth time.



*\* Ombudsmen:* The WPEA also included an experiment for every Office of Inspector General (OIG) to have a Whistleblower Ombudsman. Again, it must be made permanent this year, or lapse. This resource should be made permanent. This experiment has been an unqualified success, with effective leadership government-wide by the Department of Justice OIG to help train and share lessons learned.

*Structural reforms to address newly emerging threats*

Four other issues must be addressed to counter emerging threats to whistleblower rights that may be more severe than conventional termination.

*\* Retaliatory criminal actions:* Since the WPEA made it more difficult to fire whistleblowers, as discussed above agencies increasingly have shifted to harassment through criminal investigations and prosecution referrals. The bottom line is that whistleblowers are defenseless against criminal witch hunts. This loophole must be closed by giving them the right to challenge retaliatory investigations as soon as they are opened. Last year Congress outlawed retaliatory investigations at the Department of Veterans Affairs, and by Offices of Inspector General. Those sound precedents should be adopted generally in the WPA.

*\* Temporary relief:* More than any other factor, temporary relief makes a difference to end unnecessary, prolonged conflict. When granted, agencies try to resolve retaliation disputes quickly and constructively, because they are losing until the case is over. Without it, agencies drag out conflict as long as possible. Until the dispute is over, they are winning with maximum chilling effect, because the whistleblower has vanished from the workplace. This is fatal for the Act's goals, since OSC and MSPB final decisions often take three to six years, or more. By that point, whistleblower victories may be too late. They could not survive for years without a salary,

and already have gone bankrupt. That creates an incentive for agencies to stall, appeal indefinitely, or do whatever is necessary to starve out the whistleblower.

Currently only the OSC has a realistic chance to obtain stays. The OSC and Offices of Inspector General should have the authority to grant stays automatically, without resorting to litigation. But those agencies only can act anecdotally and never will be reliable as a consistent source for temporary relief. As this Committee previously has approved in subcommittee markup, the legal standards should be changed to provide temporary relief whenever employees prove a *prima facie* case of illegal retaliation.

\* *Accountability through discipline*: Currently there is no deterrent effect to prevent retaliation, because accountability only occurs on a token basis. Only the OSC can seek discipline under tougher legal standards than to prove retaliation, and formal disciplinary prosecutions almost never occur.

To prevent harassment, accountability through discipline must become a credible threat for agencies to consider whistleblower retaliation. At GAP we are concerned about a schedule for automatic discipline based solely on OSC, OIG or Board AJ rulings as passed last year for the DVA, because it bypasses due process. Agencies frequently use the Machiavellian tactic of accusing whistleblowers of whistleblower retaliation, and under the constitution no one should be deprived of a fair day in court. In our view, a better option is enfranchising employees to file disciplinary counterclaims when defending themselves. Judges could order discipline as part of relief. Most significant, there should be personal liability and punitive damages for retaliation. That would institutionalize both deterrence and make it easier for whistleblowers to find attorneys.

\* *Sensitive jobs*: As discussed above, this national security loophole to the merit system can be imposed at will to cancel all civil service rights for any employee working in the federal government. Normal civil service appeal rights for a non-partisan, professional work force must be restored for any commitment to prevent government abuses of power. Last session's Senate bill for OSC reauthorization wisely closed the due process loophole. We recommend enacting the Senate provision, and reinforcing it by making sensitive job designations a personnel action to lock in protection against merit system violations like whistleblower retaliation.

*Fine tuning*

Similar to hostile, specific pre-WPEA precedents, the post-WPEA requires clarification to make boundaries more precise. OSC *amicus* briefs effectively have isolated the most significant new loopholes. We recommend WPA clarifying amendments for the following issues.

\* *OSC access to information*: Another reason for delays and low corrective action rates is that agencies do not cooperate with, or even obstruct OSC investigations. Passive resistance through long delays or refusal to provide relevant documents frustrate the WPEA's goals. The OSC should have the same subpoena authority to enforce the law as Offices of Inspector General. Further, the WPA should specify that if agencies do not provide relevant documents or answer relevant inquiries, the OSC can presume the silence is a legal admission. GAP applauds prior Committee and House action on this issue.

\* *Scope of job duties exception*: In terms of public policy, it does not make any difference whether a federal whistleblower discloses fraud, waste and abuse as part of a job duty or as personal compliance with the Government Employee Code of Ethics. The heightened requirement for retaliation only was added to the WPEA to prevent another Senate hold. It should be interpreted narrowly only to cover specific assignments that are part of an employee's

primary responsibility, such as the contents of audits, inspections, reports of investigation or professional research publications. It would rewrite the WPA if the heightened job duties were applied whenever a disclosure is *related to* a job duty.

\* *Burden of proof for job duties exception:* If the category applies, the statute should specify that retaliation can be established through circumstantial evidence, consistent with the standards for all other prohibited personnel practices. Circumstantial evidence of retaliation includes factors such as threats, inconsistent treatment, motive, hostile reactions or personal attacks, failure to take corrective action, and failure to follow agency procedures. Those standards have been consistent for a quarter century since the Board's precedent in *Valerino v. Department of Health and Human Services*, and have served the merit system well.

\* *Pre-employment disclosures:* Under current case law, the law is unclear whether disclosures covered by the WPA are protected if made before an application for federal employment. There is no basis for this temporal loophole, either in law or public policy. Congress repeatedly has specified that the WPA protects "any" disclosure. The point of the merit system is to protect the entry of qualified public servants, not just to prevent their removal.

\* *Blacklisting:* The law also is unclear about protection for ongoing retaliation after a whistleblower leaves federal service. For many agencies termination is not enough. In order to make an example that scares others into silence, they use negative references or even pressure tactics with contractors and private employers to blacklist the whistleblower from the profession or any employment, not just the civil service. The National Defense Authorization Act holds federal contractors liable for whistleblower retaliation even when directed by a federal agency to retaliate. The WPA should balance accountability for the civil service by making clear that the

same rights and responsibilities apply. Recommendations or other actions to support or oppose employment should be institutionalized as a personnel action.

\* *Right to refuse illegal rules and regulations.* Since 1989 it has been equally illegal to act against an employee for refusing to violate the law, the same as for blowing the whistle. In the *Rainey* decision, however, the Board and Federal Circuit ruled that protection does not extend to those who refuse to violate illegal regulations. This is essential a sophist loophole, since statutes are the authority for rules and regulations. Even if there were a valid distinction, as a matter of public policy the loophole is invalid. Whistleblowers are protected for disclosing any illegality, not just statutory violations. The same shield should protect them for walking the talk. Last Congress the House passed the Follow the Rules Act to close this loophole, but the Senate failed to act. WPEA revisions should include this well-taken reform.

#### CONCLUSION

The Whistleblower Protection Act is a law with deep ironies. Congress first enacted these rights in the Civil Service Reform Act of 1978, and unanimously has restored, reaffirmed or strengthened them three times since. On paper the WPA has the world's strongest free speech rights. In practice, however, it has failed to provide more than anecdotal success. Due to weak due process, no whistleblower can count on the WPA for justice. The Enhancement Act was a landmark breakthrough for rights on paper, and an excellent start. But I feel like whistleblowers are in a similar spot to Moses looking at the Promised Land of credible free speech rights. We can see it, but we're not there yet. This year Congress can finish the journey. However it will be helpful, GAP pledges to do our share to get there.

Mr. MEADOWS. Mr. Devine, thank you so much for your passionate and articulate testimony. And I can assure you that we will be following up in earnest. Some of these things are things that we were aware of; some, obviously not, but working with OSC in making sure that their success rate is greater and not laborious is something that this committee is committed to. But thank you so much.

Ms. Hempowicz.

#### **STATEMENT OF ELIZABETH HEMPOWICZ**

Ms. HEMPOWICZ. Ranking Member Cummings, Subcommittee Chairman Meadows, and Ranking Member Connolly, and members of the Subcommittee on Government Operations, thank you for inviting me to testify today and for your dedication to ensuring proper implementation of whistleblower protections.

Five years ago, Congress passed the Whistleblower Protection Enhancement Act, closing many loopholes and upgrading protections for Federal workers who blow the whistle on waste, fraud, abuse, and illegality. The WPEA codified an anti-gag statute championed by Senate Judiciary Committee Chairman Senator Chuck Grassley that requires agencies to issue a statement notifying employees that statutory rights to communicate with Congress and whistleblower protections supersede agency restrictions on disclosures or communications.

In addition, the WPEA clarified that any whistleblower disclosure may be protected, including when a whistleblower makes a reasonable disclosure to his or her supervisor even if that supervisor is involved in the wrongdoing. Similarly, it clarified that a whistleblower's intent in making a disclosure should not be factored in when determining whether he or she made a protected disclosure. These changes provided essential channels to report through and prioritized disclosing wrongdoing as being the primary public interest.

Finally, the law created a pilot program for Federal employees who appeal a judgment of the Merit Systems Protection Board to file their appeal in any U.S. Court of Appeals with jurisdiction. This committee led the charge in extending that pilot program 2 years ago and should now work to make that right permanent.

While the positive impact of this law is significant, its enforcement has not been without issue. A report released by Senator Grassley, 2 years after the passage of the WPEA, revealed that only one agency out of the 15 studied was fully compliant with the anti-gag provision of the law. This important provision has been called into question as recently as last week when several agencies ordered staff to cease or limit external communications.

As members of this committee have recognized, these directives may violate the law. Efforts to prevent government employees from communicating with Congress and the public could represent a serious threat to public health and safety, and continued congressional oversight is necessary to make sure that this important provision continues to be implemented properly.

Despite broad protection laws like the WPA and the WPEA, the totality of whistleblower protection laws include a patchwork of

protections dependent on where a whistleblower works in the government and in what capacity. The WPEA afforded new and necessary protections to many Federal employees when it was enacted, but it excluded intelligence community contractors despite having a proven track record of success with previous protections.

Although IC contractor whistleblowers have some protection under presidential policy directive 19, it is too narrow to be considered comprehensive and can be revoked at the President's discretion. Whistleblowers must have safe channels to report abuses of power that betray the public trust, and Congress has a responsibility to fill these accountability loopholes. The next round of whistleblower protection legislation must include protections for intelligence community contractors.

Congress should also consider requiring mandatory punishment against supervisors who retaliate against whistleblowers. Without mandatory punishment for those who retaliate, there is no substantial deterrence to violating these laws.

Any legislation should carefully balance due process rights of employees accused of retaliatory actions with the proper chance to present a defense and appeal a final decision. Recently passed legislation creates a minimum 12-day unpaid suspension when a complaint that a supervisor has retaliated against a whistleblower is substantiated. This should serve as a model.

As you mentioned, Ranking Member Connolly, it is also important to update the law to undue a recent curtailing of whistleblower protections in cases where Federal employees refuse to obey an order that would break a rule or regulation created by the agency.

Another area of concern is the implementation of former President Obama's insider threat program. This program was created in order to ensure responsible sharing and safeguarding of classified information. It includes a provision prohibiting the use of the program to identify or prevent lawful whistleblower disclosures. Despite this, we've repeatedly seen government training materials conflate whistleblowers like Thomas Drake with terrorists like the Fort Hood and Navy Yard killers.

The Office of the Director of National Intelligence has assured POGO that these errors have been corrected and its general counsel's office has fastidiously implemented whistleblower protection training for the intelligence community. However, increased congressional oversight may be helpful to make sure this program isn't used improperly.

Additionally, the House should create a whistleblower ombudsman office to train congressional staff on working with whistleblowers and to provide assistance and advice to staff on working with whistleblowers.

Many of these issues that I have raised in my testimony hinge on congressional oversight. Passing stronger laws is a necessary first step, but continued congressional oversight ensures that whistleblowers are championed and not punished. I look forward to your questions, and thank you again for holding this important hearing.

[Prepared statement of Ms. Hempowicz follows:]



**Testimony of Elizabeth Hempowicz, Policy Counsel  
Project On Government Oversight  
before the  
House Oversight and Government Reform  
Subcommittee on Government Operations  
on  
“Five Years Later: A Review of the Whistleblower Protection Enhancement Act”**

**February 1, 2017**

Chairman Chaffetz, Ranking Member Cummings, Subcommittee Chairman Meadows, Ranking Member Connolly, and members of the Subcommittee on Government Operations, thank you for inviting me to testify today and for your oversight efforts to ensure proper implementation of whistleblower protections. I am Liz Hempowicz, the Policy Counsel at the Project On Government Oversight. Thirty-five years ago, POGO was founded by Pentagon whistleblowers who were concerned about the Department’s procurement of ineffective and overpriced weapons. A few years later, POGO expanded its mission to cover the entire federal government, and POGO’s resulting investigations into corruption, misconduct, and conflicts of interest have helped achieve a more effective, accountable, open, and ethical federal government. Whistleblowers have played an essential role in that work.

**Important Reforms in the Whistleblower Protection Enhancement Act**

Five years ago, Congress passed the Whistleblower Protection Enhancement Act (WPEA), closing many loopholes and upgrading protections for federal workers who blow the whistle on waste, fraud, abuse, and illegality. In short, the WPEA made it easier to blow the whistle. I want to take a few minutes to discuss four major improvements included in the WPEA and how they changed the landscape for federal whistleblowers.

First, it codified an “anti-gag” statute championed by Senator Chuck Grassley (R-IA). The anti-gag provision requires agencies to issue a statement notifying employees that statutory rights to communicate with Congress, whistleblower rights, and other statutory rights and obligations supersede agency restrictions on disclosures or communications.<sup>1</sup> Before this codification, Senator Grassley included an appropriations rider to accomplish the same goal every year for 24 years in order to protect whistleblowers from official actions to stifle their speech.<sup>2</sup>

In addition, the WPEA clarified that “any” disclosure of gross waste or mismanagement, fraud, abuse, or illegal activity may be protected, including when a whistleblower makes a reasonable disclosure to his or

<sup>1</sup> U.S. Congress, Whistleblower Protection Enhancement Act (S. 743), Introduced April 6, 2011, by Senator Daniel Akaka. <https://www.congress.gov/bill/112th-congress/senate-bill/743/text> (Downloaded January 23, 2017) (Hereinafter WPEA)

<sup>2</sup> See generally Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 932 (2011); Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 685 (2009).



her supervisor, even if the supervisor ends up being involved in the wrongdoing. Similarly, the WPEA clarified that a whistleblower's intent in making a disclosure should not be factored in when determining whether he or she made a protected disclosure.<sup>3</sup> These changes made it easier for whistleblowers to have clear and protected channels to report through, and in turn made it easier to present a case proving whistleblower retaliation.

The WPEA also allows whistleblowers who prevail under Whistleblower Protection Act administrative hearings to receive compensatory damages.<sup>4</sup> The financial toll that blowing the whistle takes on many whistleblowers cannot be overstated. Allowing for compensatory damages not only attempts to make the whistleblower financially whole, but also sends a message that the government values their service and that retaliation is not supported at the highest levels.

Finally, the WPEA created a right for federal employees who appeal a judgment of the Merit Systems Protection Board (MSPB) to file their appeal in any U.S. Court of Appeals with jurisdiction, instead of limiting them to the U.S. Court of Appeals for the Federal Circuit.<sup>5</sup> This Committee led the charge in extending that pilot program two years ago, and should now work to make that right permanent.

There are a host of other changes that improved whistleblower protections under this law, and I'm sure other members of the panel will mention some of them. But while the positive impact of this law is significant, its enforcement has not been without issue.

#### **Problems with Implementation of the Whistleblower Protection Enhancement Act**

As mentioned previously, the codification of the anti-gag provision was a major victory for federal whistleblowers. However, a report released by Senator Grassley two years after the passage of the WPEA revealed that many agencies were still utilizing nondisclosure agreements that undermined that provision.<sup>6</sup> Senator Grassley found that only one agency out of 15 studied, the Department of the Treasury, was fully compliant with the anti-gag provision of the law.

The application of this provision has been called into question as recently as last week, with major news outlets reporting that various agencies have been issuing nondisclosure memos to their staffs. The Environmental Protection Agency (EPA) has been directed to cease all external communications, including press releases and social media posts.<sup>7</sup> The U.S. Department of Agriculture has reportedly ordered staff to route all media inquiries and press releases through the office of the Secretary.<sup>8</sup> A memo to the Department of Health and Human Services (HHS)—which includes the Centers for Disease

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<sup>3</sup> WPEA

<sup>4</sup> WPEA

<sup>5</sup> WPEA

<sup>6</sup> Press Release, Senator Chuck Grassley, "Grassley: Federal Agencies Failing to Implement Anti-gag Provision of Whistleblower Law," April 2, 2014. <http://www.grassley.senate.gov/news/news-releases/grassley-federal-agencies-failing-implement-anti-gag-provision-whistleblower-law> (Downloaded January 25, 2017)

<sup>7</sup> Kate Sheppard, "EPA Freezes Grants, Tells Employees Not To Talk About It, Sources Say," *The Huffington Post*, January 23, 2017. [http://www.huffingtonpost.com/entry/environmental-protection-grants-staff\\_us\\_5886825be4b0e3a7356b575f](http://www.huffingtonpost.com/entry/environmental-protection-grants-staff_us_5886825be4b0e3a7356b575f) (Downloaded January 24, 2017)

<sup>8</sup> Jose A. DelReal, "USDA scrambles to ease concerns after researchers were ordered to stop publishing news releases," *The Washington Post*, January 25, 2017. [https://www.washingtonpost.com/news/post-politics/wp/2017/01/24/usda-science-researchers-ordered-to-stop-publishing-news-releases-other-documents/?utm\\_term=.107e02e4eb78](https://www.washingtonpost.com/news/post-politics/wp/2017/01/24/usda-science-researchers-ordered-to-stop-publishing-news-releases-other-documents/?utm_term=.107e02e4eb78) (Downloaded January 25, 2017)

Control (CDC) and the Food and Drug Administration (FDA)—forbids them from sending “any correspondence to public officials.”<sup>9</sup>

Unfortunately, we can’t know for sure if any of those gag orders are in force because there have been no public statements from the White House, and the agencies haven’t released the memos. We only have leaked information to go on. However, as members of this Committee have recognized, any directive such as these violates the WPEA if it is not accompanied by a disclaimer that nothing in the order supersedes whistleblower rights and protections.

Across-the-board efforts to prevent government employees from communicating with Congress and the public could represent a serious threat to public health and safety. Close Congressional oversight is necessary to make sure that this important provision continues to be implemented properly.

The WPEA also included administrative improvements to the handling of whistleblower cases. It provided the Office of Special Counsel (OSC) with authority to file *amicus* briefs to support employees appealing MSPB rulings and made it easier for the Special Counsel to discipline those responsible for illegal retaliation.<sup>10</sup> However, these improvements are only as strong as the Office of Special Counsel itself. This can be illustrated by a comparison between two OSC’s: one led by Scott Bloch and one led by Carolyn Lerner.

Though his tenure as U.S. Special Counsel ended before the WPEA was enacted, it bears mentioning that we have seen what the OSC looks like when under the wrong leadership. Special Counsel Scott Bloch repeatedly demonstrated a fundamental lack of understanding about whistleblowers, proper investigation procedures, employee free-speech laws, and his responsibilities as a government manager. For example, the number of favorable actions that the OSC took to actually help whistleblowers dropped by 60 percent during Bloch’s time at the agency.<sup>11</sup>

As POGO’s late Director of Investigations Beth Daley wrote about Bloch in 2006, “Since being appointed head of the agency, he ‘cleaned house’ of career employees whose ‘loyalty’ he doubted, inappropriately steered contracts to friends and cronies, interfered with politically-sensitive investigations, closed hundreds of whistleblower files summarily without investigation, and unilaterally re-interpreted his responsibilities so that they better fit his personal views. Along the way, he publicly made disparaging remarks about ‘leakers,’ even though it is his job to protect the federal government’s whistleblowers. As a result, Bloch has been a lightning rod for the news media, Republicans and Democrats in the Congress, whistleblower attorneys, and good government groups.”<sup>12</sup>

Contrast this to the last five years at OSC, under current U.S. Special Counsel Carolyn Lerner. In Fiscal Year 2015 alone, OSC obtained 233 favorable actions for 175 federal employees who filed whistleblower

<sup>9</sup> House Committee on Oversight and Government Reform, Memo from Acting Secretary of the Department of Health and Human Services on Immediate Action on Regulatory Review. <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/HHS%20Memo.pdf> (Downloaded January 30, 2017)

<sup>10</sup> WPEA

<sup>11</sup> POGO Press Release, “Special Counsel Scott Bloch Submits Resignation Letter,” October 22, 2008. <http://www.pogo.org/about/press-room/releases/2008/wi-osc-20081022-1.html>

<sup>12</sup> Beth Daley, “Who Wrote this Document?” POGOBlog, May 10, 2006. <http://www.pogo.org/blog/2006/05/who-wrote-this-document.html>

reprisal complaints, a 264 percent increase from 2011.<sup>13</sup> OSC has also filed numerous *amicus* briefs in whistleblower cases, serving as an important voice in the fight to maintain the protections codified in the WPA and WPEA.<sup>14</sup> Office of Special Counsel representatives have testified before Congress, including at this hearing, and have worked with Congressional staff and civil society to further improve whistleblower protections.

It is imperative that OSC continue the upward trend. Special Counsel Lerner has been re-nominated to serve another term, but there has been no movement on the nomination. We urge the Senate to confirm Lerner, and hope that you share our concerns about the future of the OSC and voice them to your Senate colleagues.

Additionally, the MSPB is now being rendered almost useless due to Senate inaction. There are currently two vacant seats on the three-person Board. Until one vacancy is filled, there will not be a quorum for the Board to interpret key issues from the Whistleblower Protection Enhancement Act. Without a quorum MSPB can't issue final rulings. The resulting vacuum could cripple enforcement of the merit system principles generally, and the Whistleblower Protection Act in particular. While not under this Committee's jurisdiction, I urge you to pass these concerns on to your Senate counterparts, who haven't yet acted on the nomination of OSC's principal deputy Special Counsel Mark Cohen to the MSPB.

#### **Areas Ripe for Further Strengthening of Whistleblower Protections**

Discussing areas where further whistleblower protections are necessary isn't a simple task, because despite broad protection laws like the WPA and the WPEA, the totality of whistleblower protection laws include a patchwork of protections dependent on where a whistleblower works in the government and in what capacity. Today I would like to address further necessary protections as they relate to Intelligence Community (IC) whistleblowers, employees in positions designated as "national security sensitive" positions, and then more general suggestions.

The WPEA afforded new and necessary protections to many federal employees when it was enacted. Unfortunately, contractors in the intelligence community were not included, despite there being a track record of success with previous protections.

From 2008 through 2012, all Pentagon and stimulus-funded IC contractors enjoyed best-practice whistleblower protections through the American Recovery and Reinvestment Act of 2009.<sup>15</sup> This included Intelligence Community agencies like NSA. Implementation of the law was without controversy and there were never any allegations that it harmed national security. The whistleblower shield was so effective in deterring taxpayer waste that the Council of the Inspectors General on Integrity and Efficiency proposed its permanent expansion, and the Senate approved it with bipartisan support.

<sup>13</sup> Nick Schwellenbach, "Office of Special Counsel Obtains Record Breaking Results for Whistleblowers in FY 2015," July 12, 2016. <https://osc.gov/News/pr16-17.pdf> (Downloaded January 25, 2016)

<sup>14</sup> See generally Nick Schwellenbach, "OSC Files Third Amicus Brief Opposing Higher Burdens in Whistleblower Retaliation Cases," August 4, 2016. <https://osc.gov/News/pr16-22.pdf>; Nick Schwellenbach, "OSC Amicus Briefs Argue Against Additional Burden in Whistleblower Cases," April 13, 2016. <https://osc.gov/News/pr16-08.pdf>; Nick Schwellenbach, "OSC Files First Supreme Court Amicus Brief to Help Protect Whistleblower Rights," September 30, 2014. <https://osc.gov/news/pr14-18.pdf> (All downloaded January 24, 2017)

<sup>15</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 297 (2009)

Notwithstanding its widespread support, the closing conference committee stripped all whistleblower rights for IC contractors from the National Defense Authorization Act for Fiscal Year 2012.

Six months later, NSA contractor Edward Snowden disclosed the U.S. government's mass surveillance programs. He later explained the circumstances that led to his course of action: "There are no proper channels for making this information available when the system fails comprehensively." Currently, IC contractors have two alternatives to almost certain retaliation: either remain silent observers of wrongdoing or make anonymous revelations to the media.

Although IC contractor whistleblowers have some protection under Presidential Policy Directive 19 (PPD 19)—access to review if they face adverse security clearance actions as retaliation for their whistleblowing—this is too narrow to be comprehensive protection. While it is working (POGO reported on the removal of the NSA IG following a PPD 19 complaint that he retaliated against whistleblowers<sup>16</sup>) Presidential Policy Directives are subject to revocation at the President's will. Whistleblowers must have safe channels to report abuses of power that betray the public trust, and Congress has a responsibility to fill these accountability loopholes. The next round of whistleblower protection legislation must include protections for Intelligence Community contractors.

Other employees vulnerable to whistleblower retaliation are those who hold "national security sensitive" positions with the federal government. In a 2014 court decision, *Kaplan v. Conyers, Northover and MSPB*<sup>17</sup> (Conyers), the United States Court of Appeals for the Federal Circuit held that federal agencies have unlimited discretion to remove an individual's eligibility to occupy a national security position. The agency's removal decision is not subject to any review. The court's decision wiped out civil service due process rights and whistleblower protections for anyone in a national security "sensitive" position.

Now, if an agency uses the determination of ineligibility for a national security sensitive position as a pretext to fire an employee after the employee made a legally protected whistleblower disclosure or because of that employee's race or religion, that employee cannot seek justice from the MSPB and has no other recourse.

In 1978, Congress created the MSPB to hear federal employee appeals of alleged prohibited personnel practices. But this new system of "sensitive jobs" circumvents the MSPB, allowing the agencies an unchecked ability to remove federal employees from their positions without access to an appeal. Without the stability, balanced treatment, and consistent review Congress intended the MSPB process to provide, federal workers have lost and will continue to unfairly lose their jobs.

Congress should enact legislation to restore due process rights for employees who were removed from their positions due to a change in "sensitive" status. This right existed for all federal employees from 1883-2012 and guaranteed them a day in court before an independent administrative board after termination of employment.

Congress should also consider legislation that would require mandatory punishment against supervisors who retaliate against whistleblowers. Any such legislation should carefully balance due process rights of

<sup>16</sup> Adam Zagorin, "NSA Watchdog Removed for Whistleblower Retaliation," POGO Blog, December 15, 2016. <http://www.pogo.org/blog/2016/12/intelligence-community-landmark.html>

<sup>17</sup> *Kaplan v. Conyers*, No. 2011-3207, (Fed. Cir. August 20, 2013).

employees accused of retaliatory actions with a proper chance to present a defense and appeal a final decision. Without mandatory punishment for those who retaliate against whistleblowers, there is no substantial deterrence to violating these laws. While a whistleblower may eventually prevail in a claim of retaliation, he or she may also see the person who retaliated against them receive a bonus, a promotion, or both.

Recently passed legislation creates a minimum 12-day, unpaid suspension when a complaint that a supervisor has retaliated against a whistleblower is substantiated in the Department of Veterans Affairs (VA).<sup>18</sup> This combination of due process and mandatory punishment for retaliators is the right way to send and enforce the message that retaliating against whistleblowers will not be tolerated.

Another area of concern is the implementation of former President Obama's Insider Threat program. The program was created in 2011 through Executive Order 13587 in order to ensure "responsible sharing and safeguarding of classified information."<sup>19</sup> It included a specific provision prohibiting the use of this program to identify or prevent lawful whistleblower disclosures. Despite this prohibition, last year Kenneth Lipp at the *Daily Beast* uncovered a joint webinar from the Department of Justice and the Office of the Director of National Intelligence (ODNI) that conflated whistleblowers like Thomas Drake with terrorists like Nidal Hasan (the Fort Hood killer) and Aaron Alexis (the Navy Yard killer).<sup>20</sup> Erroneously conflating true insider threats to classified information with lawful whistleblowing is a dangerous precedent. While ODNI has assured POGO that these slides have been corrected and that the General Counsel's office has fastidiously implemented whistleblower protection training for the IC, increased Congressional oversight may be helpful to make sure incidents like the one uncovered last year don't happen again.

In addition to further protections for whistleblowers, it is important to continue to monitor enforcement of the current protections. Agency Inspectors General should be required to track whistleblower complaints and case outcomes and include these numbers and accompanying summaries in semiannual reports to Congress. This type of reporting could shed light on challenges faced by agencies in implementing whistleblower protections.

Similarly, trainings for managers about whistleblower protections and prohibited personnel practices are vital to continued improvement of WPEA implementation. Federal laws already require agency heads to ensure, in consultation with OSC, that employees are informed of their rights and any remedies available to them under the WPA and the WPEA.<sup>21</sup> And OSC has already worked with over 100 offices to ensure they have completed OSC's 2302(c) Certification Program, which includes training for supervisors on prohibited personnel practices and whistleblower disclosures.<sup>22</sup> But we urge you to make compliance with this training program mandatory for all agencies and include reasonable deadlines for when agencies must become certified.

<sup>18</sup> Consolidated Appropriations Act, 2017, Pub. L. No. 114-223, 129 Stat. 2242 (2016)

<sup>19</sup> Exec. Order No. 13587, § 7(e).

<sup>20</sup> Kenneth Lipp, "Government Compares NSA Whistleblower to Ft. Hood Shooter, Soviet Spies," *The Daily Beast*, November 18, 2015. <http://www.thedailybeast.com/articles/2015/11/18/government-compares-nsa-whistleblower-to-ft-hood-shooter-soviet-spies.html> (Downloaded January 25, 2017)

<sup>21</sup> 5 U.S.C. § 2302(c)

<sup>22</sup> Office of Special Counsel, 2302(c) - Agency Certification Status. <https://osc.gov/Pages/2302status.aspx> (Downloaded January 28, 2017)

Until then, we encourage you to seek more information about what offices and agencies have completed the 2302(c) Certification Program, including when their certifications will expire and how many individuals from the offices attended the certification program. Additionally, the House should create a whistleblower ombudsman office to train Congressional staff on working with whistleblowers and to provide assistance and advice to staff working with whistleblowers.

**Conclusion**

Many of the issues I have raised in my testimony hinge on Congressional oversight. Passing stronger laws is a necessary first step, but continued Congressional oversight is essential to ensure that whistleblowers are lauded, not retaliated against, shunned, or harmed.

Mr. MEADOWS. Thank you so much for your testimony.

I'll now recognize the gentleman from Florida, Mr. Ross, for 5 minutes.

Mr. ROSS. Thank you, Chairman.

And I thank the panel for being here very much.

You know, as we talk about the WPEA, it leads one to believe that it should have a dual purpose: First being a shield, a shield to protect those who have seen the wrongdoings or the corruption and allow them the opportunities and, quite frankly, the incentives to report them; and then it should be a sword as well. It should be a sword to be able to go in and cut off the wrongdoing and enforce what needs to be done.

But it seems, through some of this testimony, that the sword has been turned back and it has been turned back on the whistleblower. And so my first question is to Mr. Storch in regards to retaliatory investigations. It said that for every one whistleblower complaint that in most cases there's a counter complaint against them by the person whom the complaint is lodged.

So now, is this something that is routine for you or any other inspectors general to investigate as to the source or the circumstances surrounding the complaint to see if it may be a counter complaint?

Mr. STORCH. Thank you very much for the question. I mean, it raises important issues. Obviously, as inspectors general, we receive information in our offices from employees throughout our departments that we oversee, right. And one of the things we always take into account is the source of the information, and we evaluate that as we evaluate the information.

People may have lots of reasons they come forward. That doesn't in any way invalidate the information that they provide and, in fact, it can be very important information for us to have in order to conduct our oversight functions.

So, the primary thing we want to do is encourage people to be able to come forward and to be comfortable coming forward knowing that they'll be protected under the WPEA in doing so.

Mr. ROSS. But will they be protected? I mean, will they really be protected? In other words, they make themselves subject of a counter complaint if they're not careful. And I think that's the protection I'm trying to make sure that we can nip in the bud, either through cross-referencing in the complaints or maybe there's a logarithm that can be worked out to find out that.

Mr. STORCH. Right. No, it's a difficult question, and I think our colleagues from OSC referred to it in their prepared statements; that there certainly are competing interests here because we want to encourage legitimate investigations, but we don't want to have investigations be used to in any way deter people from coming forward with information.

Mr. ROSS. I agree.

Mr. STORCH. And so the question is how do you strike that balance—

Mr. ROSS. And protect due process.

Mr. STORCH. —in a way that protects whistleblowers and encourages them to come forward. And we certainly would be very happy to continue to work with OSC, with you, and the committee on this.

Mr. ROSS. And that leads me to my next question, Mr. Bachman, with regard to the OSC. How important is subpoena power?

Mr. BACHMAN. Thank you for the question. The subpoena power for us, we currently have under an OPM rule——

Mr. ROSS. For documents or for testimony?

Mr. BACHMAN. For both.

Mr. ROSS. Okay.

Mr. BACHMAN. But the issue that we have, it's really a related issue, is our access to information where we think it would be extremely helpful for Congress to clarify, give us statutory direct access to all relevant information and documents and witnesses and not be subject to perhaps an incorrect assertion of attorney/client privilege by the Agency, similar to what the IGs currently have. So having that ability to know what the Agency knows so that we can investigate whether wrongdoing occurred is essential.

Mr. ROSS. So if somebody files an objection to a subpoena, what's the court of competent jurisdiction there? Is it an ALJ? Is it—who decides whether there should be enforcement? Do they have to come—where do they go?

Mr. BACHMAN. It's unfortunately a cumbersome process.

Mr. ROSS. Yeah.

Mr. BACHMAN. We need to go to the MSPB and ask——

Mr. ROSS. That doesn't have a quorum now——

Mr. BACHMAN. Exactly, yes.

Mr. ROSS. —which Mr. Devine pointed out is problematic.

Mr. BACHMAN. So they would not be able to move forward with that. If there was a quorum, the MSPB, not OSC, would make the decision of whether or not to attempt to enforce that subpoena.

Mr. ROSS. And then that subpoena, if still objected to, would have to be enforced eventually——

Mr. BACHMAN. In district courts, yes.

Mr. ROSS. —in district courts. Okay.

Lastly, Mr. Bachman, there has been some positives with the WPEA, but one of the things has been its lack of enforcement where I really think the sword should be. Can you articulate in any way what additional measures of enforcement may be necessary in order to make it really effective.

Because as one who is a student of the law, you know, deterrents have an impact on future behavior and future performance, especially if somebody decides that they don't want to have that repercussions against them if they know what the law will be and how it is enforced. Any suggestions as to further enforcement or additional enforcements of the WPEA?

Mr. BACHMAN. Yes. We couldn't agree more that disciplinary actions play an important deterrence role in the Federal Government. They have ripple effect. They show that managers can be held accountable.

At OSC though we have made a decision though that we need to prioritize getting the whistleblower back on their feet and back on their job and protect them first——

Mr. ROSS. Yes.

Mr. BACHMAN. —to the extent we can though. I think we are proud of the fact that we've been able to increase the number of disciplinary actions by 117 percent since the WPEA was passed. Of



course with additional resources, I think we can do even better than that.

Mr. ROSS. Look forward to working with you on that.

And I yield back. Thank you.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes the gentleman from Virginia, the ranking member, Mr. Connolly.

Mr. CONNOLLY. I thank my friend, and welcome, again, to our panelists.

Mr. Storch, do you recall that back in 1988, a long time ago, then-Senator Chuck Grassley—who is still with us in the Senate, been there a long time—he had something called the anti-gag rule. Can you describe that to us if you're familiar with it.

Mr. STORCH. I'm not familiar with the rule.

Mr. CONNOLLY. Anyone familiar with it? Yes, Mr. Devine.

Mr. MEADOWS. If you'll hit your mic, please.

Mr. DEVINE. Thank you. It was instituted in December 1988 to thwart a nondisclosure policy being ordered throughout the Federal Government that prevented employees from disclosing classifiable information without prior approval.

And since classifiable is designed as any information that could or should have been classified, it created basically a backdoor official secret set. The restrictions on funding to implement or enforce that were passed unanimously without exception through the time of the WPEA when Congress codified both rights, sir.

Mr. CONNOLLY. And it was in some ways designed, was it not—well, that anti-gag rule, even writ larger, it was ultimately incorporated into the Whistleblower Protection Act. Is that correct?

Mr. DEVINE. Yes, sir.

Mr. CONNOLLY. And so let me ask you this: We have the acting secretary of the Department of Health and Human Services on the very first day of the new administration writing, quote, "No correspondence to public officials, for example, Members of Congress and governors"—his example, not mine—"unless specifically authorized by me or my designee shall be sent between now and February 3rd." How does that comport with the anti-gag provision of the Whistleblower Protection Act?

Mr. DEVINE. Well, the official who issued the order said, new team, new rules. But those new rules cancel the rule of law, Congressman. It violates three provisions in the Whistleblower Protection Enhancement Act. It violates two appropriations writers. It violates the Lloyd LaFollette Act of 1912, and by the way, the First Amendment.

Mr. CONNOLLY. Oh. Other than that, it's just helpful guidance? Yeah, okay.

Anyone else on the panel want to comment on that? Mr. Storch. Mr. Devine has just said, what I read from a member of the new administration, violates the law, a number of laws, and the Constitution itself in a number of respects.

Mr. STORCH. Yes, sir.

Mr. CONNOLLY. You're from the Department of Justice. Would you concur?

Mr. STORCH. I was a prosecutor at the time of Senator Grassley's rule that you referred to, but I have been with the Office of the In-

spector General and acting as the ombuds for our OIG for the last 4 and-a-half years. And I'm very familiar with the provision in the WPEA that requires that appropriate language be put in place in any policy or agreement that would attempt to deter communications by whistleblowers, communications with Congress. And the law seems quite clear in requiring that. And anything that doesn't do that, that falls within those parameters, would be in violation of that provision of the WPEA.

Mr. CONNOLLY. You would concur, Ms. Hempowicz?

Ms. HEMPOWICZ. I would, and I would even go a little bit further. Even if these statements or these guidance documents are reissued with the disclaimer that they're required to have, they've already had a chilling effect. So that, you know, I would encourage this committee to continue its rigorous oversight and keep watching.

Mr. CONNOLLY. I mean, what could go wrong with the chilling effect?

Ms. HEMPOWICZ. Well, if you don't have whistleblowers feeling like they can come forward through protected channels, you'll see more and more increased leaks to the media, to the press. And I think you always want the strongest whistleblower protections in place because you want to incentivize people within an agency to go through those proper channels.

And they're not going to if they're not going to be safe from reprisal, but they're also not going to go through those channels if they don't find that they're meaningful channels, if they don't see that the complaints that they're making to—through those proper channels are being taken seriously and addressed within the agency.

Mr. CONNOLLY. And one might note that this committee historically has been the recipient of whistleblower information that has often led to useful legislation and sunshine hearings that, you know, spotlight an issue that otherwise wouldn't get covered.

So the chilling effect in deterring people or discouraging people from providing that information to elected Members of Congress actually can really preclude the ability to reform and fix problems we identify because we're not identifying them.

I yield back.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes the gentleman from Iowa, Mr. Blum, for 5 minutes.

Mr. BLUM. Thank you, Mr. Chairman.

Thank you to the panel for being here today.

My questions are primarily for Mr. Storch or Mr. Bachman. How many whistleblowers have there been over the last 2 years, the last session of Congress?

Mr. BACHMAN. Thank you for the question. I can tell you, for OSC, this past year we received a total of 6,000 complaints across all of our program areas. Of those 6,000, 2,000 alleged that they had been retaliated against for blowing the whistle, and that's consistent over the last 2 years.

Mr. BLUM. So a third of them.

Mr. BACHMAN. So let's say, 4,000, about 4,000 from our office.

Mr. BLUM. Is that trend up or down, number of whistleblowers that we are aware of?

Mr. BACHMAN. That trend is up.

Mr. BLUM. And why do you think so?

Mr. BACHMAN. I think there's several different factors. I think, number one is the enhanced outreach and education that OSC, the IGs, the ombudsmen have been doing throughout the government. People are——

Mr. BLUM. Ombudsperson.

Mr. BACHMAN. Excuse me, yes. Thank you for that.

Mr. BLUM. I do the same thing.

Mr. BACHMAN. Although that is what is in the law. But I think more and more agencies and employees are better informed about their rights and where to go to make these complaints. I think there has been increased attention through Congress and the media on these rights, and I think it's encouraged more people to come forward with complaints.

Mr. BLUM. Of these cases, how many were threatened by management, either explicitly or implicitly?

Mr. BACHMAN. Of the whistleblower retaliation cases we get, most—I mean, I would say almost all of them are——

Mr. BLUM. So the 2,000 of the 6,000?

Mr. BACHMAN. Yes, are saying that they have been subjected to some sort of personnel action.

Mr. BLUM. And then how many positive outcomes? And would you define a positive outcome.

Mr. BACHMAN. Positive outcome covers a range of issues. It could be us settling the case, or helping to settle the case between the whistleblower and the employee where they get their job back, they get some sort of damages for backpay if they were out of their job, maybe they get a suspension rescinded, or were able to temporarily halt their termination while we investigate it. So those are the types of things that we'd say are a favorable outcome.

For whistleblowers, over the last couple of years coming to our office, it's ranged about 200 favorable outcomes a year for whistleblowers coming to our office.

Mr. BLUM. Do you need more staff?

Mr. BACHMAN. Absolutely, we could use more resources. We are stretched to capacity. Our folks are doing a fantastic job. They're achieving record levels of successes, but they're also carrying case-loads that are two or three times as high as they normally would be.

Mr. BLUM. I'm from the private sector, from Iowa, and there's a perception there, as across the Nation, I think, that the Federal Government is bloated, that the Federal employees are overpaid, and most importantly, it's next to impossible to terminate a Federal employee. And I know it's not particularly your area of expertise, but what we're talking about here's accountability.

So I'd like to ask, in the context of whistleblowers and retaliation, what happens to the manager, the supervisor who threatened the retaliation? What happens? Because, you know, often people sit here and they've done things that are, you know, it's waste, fraud, and abuse, and I ask, did you get a bonus? The answer is yes. Did you get promotion? Half the time it's yes. Worst case is they get reassigned.

Where is the accountability in Federal Government? What happens to supervisors who threaten retaliation against a whistleblower? What happens?

Mr. BACHMAN. That's an excellent question, and we couldn't agree more about the importance of the deterrence factor when it comes to disciplinary actions. As I mentioned, we have increased our rate of achieving those by over 100 percent, but—

Mr. BLUM. What kind of number are we talking about?

Mr. BACHMAN. We're talking going from 23, in the years prior to the WPEA, to 50 over the last 4 years. But in addition to that—

Mr. BLUM. So 50 out of 2,000?

Mr. BACHMAN. Fifty out of the 2,000, although I do want to clarify one issue on that denominator of 2,000. When we're talking about that, that 2,000 number includes a number of cases, for example, 15 percent, that are actually discrimination claims which we defer to the agency process on that. So we don't handle those.

Another 12 percent or so we don't have jurisdiction over, and then another portion of that just don't meet the statutory limits.

Mr. BLUM. How can we increase that? It's such a serious thing for a supervisor to retaliate against an employee who is trying to do well, trying to do something good for the taxpayers. We need to increase that number.

Mr. BACHMAN. Excuse me, I'm sorry. Resources absolutely would help. But I do want to add that there are other ways that we help to get discipline imposed, for example, through our disclosure process. With the VA, over the last couple of years, the VA alone has disciplined about 40 or actually more than 40 employees who were implicated in wrongdoing that was brought to light by whistleblowers coming to OSC and us referring that case to the VA. They subsequently disciplined those employees.

So it doesn't always have to be a formal investigation into whistleblower retaliation that leads to this accountability. It can happen through our other program areas as well, and it does.

Mr. BLUM. Once again, thank you to the panel.

And Mr. Chairman, I yield back the time I do not have.

Mr. MEADOWS. I thank the gentleman from Iowa.

The chair recognizes the gentlewoman from New Jersey, Mrs. Watson Coleman.

Mrs. WATSON COLEMAN. Thank you, Mr. Chairman.

And thank you all for coming and for your testimony.

We heard reports last week that multiple Federal agencies issued gag orders on Federal employee communications. And one of the memos obtained by the committee appears to specifically prohibit employees from speaking to Congress, in violation of the Whistleblower Protection Enhancement Act.

And now White House press secretary Sean Spicer has declared that State Department employees who utilize the Department's dissent channel to object to the President's executive order on immigration should, quote, "Get with the program or they can go," closed quote.

Mr. Devine, do you believe that the State Department's dissent channel is a means by which the State Department employees can blow the whistle?

Mr. DEVINE. Yes, ma'am, and indeed, it's the type of channel that the posters on the wall of every office in the government direct employees to bring their concerns if they want to blow the whistle. This is the proper channels that you're supposed to use if you're a public servant who's following in respecting the Code of Ethics.

It is incompatible with the Whistleblower Protection Act to threaten people with termination or ask them to leave because they're doing what the Code of Ethics says they're supposed to.

Mrs. WATSON COLEMAN. Thank you. I think you answered my second question.

So is it your understanding that communication in this manner through this dissent channel should be protected?

Mr. DEVINE. There could be no credible disagreement that under the laws as it's written, that's legally protected speech, and there should be discipline against those who try to cancel the flow of information to Congress.

To respond to the earlier question, one way to achieve some deterrence would be empowering judges, whether they're administrative or article III court judges, to order discipline as part of the relief when they find a violation of the Whistleblower Protection Act. They could do it on the same record instead of expecting the OSC to do it for them.

Mrs. WATSON COLEMAN. Would you say that if indeed the White House press secretary threatened those employees by saying that, quote, "Get with the program or they can go," that that sounds like a potential violation of the Whistleblower Protection Act's prohibition on taking or threatening to take retribution against whistleblowers?

Mr. DEVINE. Well, Mr. Spicer didn't have the—he's not eligible to violate the Whistleblower Protection Act because he can't recommend or take a personnel action. But he wasn't speaking for himself.

Mrs. WATSON COLEMAN. Absolutely.

Mr. DEVINE. So the people behind that policy were violating the law.

Mrs. WATSON COLEMAN. So I'm glad to hear that and sorry to have to deal with that issue, because I certainly am alarmed by the tone that the President Trump has said in his first few days in office. But he certainly does have the time to make changes that would create a better tone.

I'd like to enter into the record a letter dated January 26, 2017, from Ranking Member Cummings and Ranking Member Pallone to the White House counsel, Donald McGahn. And I have it right here.

Mr. MEADOWS. Without objection.

Mrs. WATSON COLEMAN. Thank you.

This letter recommends that the President immediately rescind all policies on employees' communications that do not comply with the Whistleblower Protection Enhancement Act. Mr. Bachman, do you agree with this communication?

Mr. BACHMAN. Thank you for the question. And I can't speak directly on this issue because I don't want to prejudge a case or an investigation that may come before my office, but what I can do is

speaking more broadly about the idea that everybody shares the goal of cutting waste, fraud, and abuse in our government.

But in order to do that, you have got to encourage whistleblowers to come forward. They're the ones who know about that waste, fraud, and abuse. And tone at the top really matters in these situations. And that's what's going to encourage and give employees that comfort that if they come forward they're not going to be retaliated against.

So on a broader level, we have two recommendations here: The first is that to cure any potential chilling effect on whistleblowing that nondisclosure agreements or policies may have had, agency leadership, once they're installed, or if they're already installed, should make it very clear in writing to all their employees that any nondisclosure agreements or policies that went out do not wipe out whistleblower protection.

Mrs. WATSON COLEMAN. Thank you.

Just really quite briefly, do you believe that it is important that the President of the United States set the tone by stating affirmatively that there is whistleblower protection; that individuals do have the right to speak to Congressmembers; and that, there is nothing that this administration will do that will place any daunting upon whistleblower protection? That's a yes or no, and if you would each just give me a yes or no on that, I'd appreciate it.

And thank you, Mr. Chairman.

Mr. MEADOWS. Yes. The gentlewoman's time has expired, but please, you can give a brief answer, each one of you.

Mr. BACHMAN. Yes, tone at the top is critical, and support of whistleblowers is paramount.

Mr. STORCH. I agree.

Mr. DEVINE. Yes, if the President wants whistleblowers to help him drain the swamp, he can't feed them to the alligators, ma'am.

Ms. HEMPOWICZ. I agree, and I think it's important for any incoming administration to make that clear from the beginning.

Mrs. WATSON COLEMAN. Thank you.

And thank you, Mr. Chairman, for your indulgence.

Mr. MEADOWS. I thank the gentlewoman.

You'll be pleased to hear that today Chairman Chaffetz and I are joining Senate Judiciary Committee Chairman Chuck Grassley to send a letter to the White House encouraging it to use whistleblowers as an ally to identify waste, fraud, and abuse, and mismanagement of the Federal Government.

We're suggesting that the White House clarify any confusion that may exist regarding various transition memos as they relate to the WPEA or the anti-gag provision which Senator Grassley authored. These are issues that are extremely important to those of us that are committed to making government work more effectively through the oversight process, and we will ensure that whistleblower rights to communicate directly with Congress are not impeded.

And with that, I will recognize the vice chairman of the subcommittee, the gentleman from Georgia, Mr. Hice.

Mr. HICE. Thank you very much, Mr. Chairman. And I thank each of you for being here.

Mr. Bachman, I think I heard you said, and I'm not sure that you really meant this, but you said everyone in government wants to deal with waste, fraud, and abuse. I'm not so sure that that's an accurate statement. I actually have come to more or less believe that the three real branches of our government are waste, fraud, and abuse. They feel like that sometimes. And this is a serious problem, but the whistleblowers, as you did go on to say, are an essential ingredient to dealing with this problem.

Can you give me a couple of examples of what the retaliation of these whistleblowers looks like.

Mr. BACHMAN. Certainly. We have had a number of cases recently with the VA. Before I go into this, I do want to say the VA has been an excellent example of good tone at the top. I think they really have made strides to improve their protections of whistleblowers.

That being said, we've had a number of whistleblower retaliation complaints with them. One of them involves an employee in the Puerto Rico facility who had blown the whistle about activities that the director of that facility was engaged in that he believed evidenced a violation of law, rule, or regulation.

Very soon after that, this employee found himself detailed to a position in which he had basically no job functions, no office, and no real career path after that. After he filed a complaint with OSC, we were able to get involved, get him temporarily put back into his job while we investigated. Ultimately, was able to get his job back full-time, get him damages for what he suffered. And the VA has recently announced the removal of the director of that facility.

Mr. HICE. Okay. That's a good outcome when all is said and done, but that's somewhat of a typical retaliation, an outward change in their job or responsibilities or something along—are there more subtle retaliations? What would a subtle—and I'll just open this up, but if you could answer relatively quickly because I want to drive somewhere with this. What is a more subtle, less obvious retaliation?

Mr. BACHMAN. I mean, for example, just getting less glamorous assignments within the agency, the ones that aren't going to get you the awards or get you the recognition for the promotion that's coming up in another year or so, that—you know, it's hard to really put your finger on exactly what it is, but you know it's affecting your career. And those can be extremely damaging and, frankly, extremely difficult to investigate as well.

Mr. HICE. Okay. Ms. Hempowicz, I would like—you were ready to go.

Ms. HEMPOWICZ. I would refer again to the retaliatory investigations that have been mentioned earlier. We called them the weapons of choice for retaliation against whistleblowers because it's a lose—it's a win-win situation for the agency. Either they find something and then they can take whatever action they want to against the whistleblower and have a reason for it, or they don't find something and it just looks like they were doing their due diligence.

Mr. HICE. Okay. So in your testimony, I believe you suggested some legislative solutions. What would—how do you draw the balance in providing an agency the ability to investigate and at the

same time protect the whistleblower? What does the legislation look like to you?

Ms. HEMPOWICZ. I believe that was in Tom's.

Mr. HICE. Okay.

Mr. DEVINE. Yes, sir. It's really not a different balance than any other personnel action. We need to terminate employees who don't perform properly. We don't want to abuse that responsibility. And it's the same with investigations. We'd recommend just exempting routine, ministerial, administrative, nondiscretionary investigations from the X coverage. But the discretionary ones are very, very commonly used. They're more chilling than the actual personnel action when they lead to criminal prosecutions. And even when the investigation is closed, we have seen a very common phenomenon of serial witch hunts. There's another one opened 1 or 2 months later, and it just goes on indefinitely. This has a far greater chilling effect than conventional personnel action.

Mr. HICE. So the congressional action would be?

Mr. DEVINE. The congressional action would be similar to what we have in all the corporate whistleblower laws and in many State whistleblower laws and the First Amendment, that you can challenge a retaliatory investigation as a violation of the Whistleblower Protection Act. We agree that there should be limitations on it so that it can function the routine necessary—you can't interfere with the routine necessary functions of government, but when it's misused—this is a start of almost every case of retaliation, to shift the spotlight from the message to the messenger and try to destroy their credibility, ruin them and make an example. And you can do that without ever touching the Whistleblower Protection Act, because they're defenseless until the other shoe drops, a formal personnel action. And if the other shoe is a prosecution referral, the act never becomes relevant, the whistleblower is defenseless.

Mr. HICE. Thank you, Mr. Chairman.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes the gentlewoman from Michigan, Mrs. Lawrence, for 5 minutes.

Mrs. LAWRENCE. Thank you, Mr. Chairman, and to my ranking member.

Last month, the Republicans included the Holman act as part of the rules package for the 115th Congress. This rule allows lawmakers to slash the salary of an individual Federal employee to \$1. Imagine a Federal employee who is considering blowing the whistle on wrongdoing. Even if that disclosure is protected, meaning the agency cannot take retaliatory action, nothing prevents Congress from slashing that employee's salary.

Mr. Devine, and I ask the other ones too, what do you think the Holman Rule—do you think it would have a chilling effect on the whistleblower disclosure?

Mr. DEVINE. It should have a chilling effect because it creates a deep vulnerability. It allows Members of Congress to engage in the same actions that would be illegal if taken by an executive branch employee who actually is familiar with the whistleblower's performance or work. So it's a serious new loophole that should be addressed.

Mrs. LAWRENCE. Mr. Bachman.



Mr. BACHMAN. I agree. I think that anything like the Holman Rule or nondisclosure agreements that might have a chilling effect on employees, that might give somebody pause or more than pause about coming forward to expose waste, fraud, and abuse in the government, that's something that, from a whistleblower's point of view, is not helpful. And I'll leave it at that. Thank you.

Mrs. LAWRENCE. Mr. Storch.

Mr. STORCH. Yes. I certainly agree. I mean, as we've said from the outset, and I think everyone in the room has said, we want to encourage people to come forward with information. That's the only way we can find out what's really going on and be able to address it, if appropriate. And if people in our government agencies don't feel comfortable coming forward, whether it's because they feel they're going to suffer reprisal in their jobs or they feel they're going to suffer some other economic consequences, that's a thing that could deter them from coming forward and something we want to stop.

I didn't get a chance to mention it before, but I will now. We get over 12,000 complaints a year on our hotline at DOJ, which is just one agency. Something like 500 of those in the last year were within the ambit of what are considered whistleblowers. Now, not all of those, fortunately, are reprisal cases, because a lot of those go to the OSC. But having said that, we do see a lot of reprisal and we see it increasing.

We oversee the FBI, we have jurisdiction to investigate there. And with the FBI WPEA, that's only going to increase, which is a great thing. We support it expanding the ambit of people that FBI employees can report to. But with that comes a cost, a cost in terms of resources. But that's something we think is important to do because we want to encourage people to come forward. And anything that stops that from happening or deters that in our view is a bad thing.

Mrs. LAWRENCE. You know, I served as an EEO investigator for a Federal agency. And the one thing I will say, and I'm glad that you all are saying it, the act of discrimination or a case that's filed, the culture of organization is based on that reprisal point. And if we do not manage that and make sure that we're clear that reprisal of a person whistleblowing or a victim of discrimination will not be tolerated in an agency, it is extremely chilling and damaging for any organization.

The last thing I want to say—I wanted to hear from you, Ms. Hempowicz.

Ms. HEMPOWICZ. I agree with my copanelists that we are deeply concerned that the Holman Rule can be used to retaliate against whistleblowers. As Tom said, it would be perfectly legal for it to. It's not against the WPEA. And so, unfortunately, it creates more work for the members of this Committee on Oversight over that rule in making sure that it's not used as retaliation against whistleblowers.

I think employees of Federal agencies are going to look to you and to the House Whistleblower Protection Caucus to make sure that you are conducting that oversight and making sure that it's not being used as a new tool to retaliate against whistleblowers.

Mrs. LAWRENCE. I just want to say to the chairman, it's refreshing to hear that the party, my colleagues are actually taking on the banner of saying how important our whistleblowers are to the health and the trust of the American people and that we are doing our job. And we must continue to protect the whistleblower.

Thank you, and I yield back.

Mr. MEADOWS. I thank the gentlewoman for her kind comments.

The chair recognizes himself for a series of questions. So let me start off by saying for those that are whistleblowers that are watching here today, this is something that the ranking member and I, the retaliation, we will not tolerate. And by saying that, it means that we won't forget. There are people here in the audience, there's also people here that are watching that are hoping against hope that, Mr. Bachman, that you can help them or that they can get their reputation back. And sometimes it's not even the financial aspect. It is really the humiliation of being treated the way that they've been treated by a government that should and can do better.

And so I say that because it's real easy to have hearings and assume that nothing's going to happen. That's not the way that I conduct my hearings. In fact, if anything, this is normally a culmination of fine, fine work by the staff. I'd like to take all the credit for their great work, and yet it is their work that brings forth a hearing, but also has a follow-up hearing. The gentleman from Virginia and I are committed to making sure that protections are there.

With that being said, Mr. Bachman, I am concerned that a third of the whistleblowers are retaliated against. Did I hear you correctly, out of 6,000, some 2,000 are retaliated against?

Mr. BACHMAN. No, I'm sorry. Let me clarify that. The overall number of cases that OSC receives across all program areas is 6,000. In terms of whistleblower retaliation complaints we receive, it's 2,000.

Mr. MEADOWS. Okay. Okay. So even if we look at whistleblower retaliation, one of the things that we've talked about, we talk about chilling effects, is there any consequences to those that actually do the retaliation? Because I'm not seeing a whole bunch, other than, at times, maybe a slap on the wrist or even that may be more than they get, they get a letter in their file. Mr. Bachman, are we seeing any of that?

Mr. BACHMAN. Well, I think—we couldn't agree more that we would like to see more disciplinary actions. I think, you know, as I said, we've made an over 100 percent increase in those numbers. We obviously want to do more. Our main focus has been to help the whistleblower. You know, when they come to us, they've been fired, we need to get them back on their job and back on their feet. I do think getting them back on their job does send a message. It's not the same thing as getting that manager fired, but it does send a message to the other employees that this person was protected, they were brought—

Mr. MEADOWS. And I do get that and I understand that, but I guess here is my concern with that. Having been in the private sector for a long time, I'm rewarded for those things I get rewarded by and I do them more. And those things that I don't get rewarded for or that I get punished for, I don't do them. And if there is nei-

ther the reward for good behavior, I mean—and so maybe we look at this as if you have zero whistleblower retaliation events, that you get some kind of recognition.

I'm not sure how we go about this, but I can tell you the ranking member and I were having a private conversation, the time is now. And what I would ask of each of you is to give this committee some of your recommendations on how we can do that. Because if we've got senior level managers who will continue to do this, and, Mr. Bachman, with all due respect, you're doing a great job, but they can thwart you as we do know with TSA and some of the other events that I'm familiar with, they thwart you and they try to run out the clock. And when they are running out the clock, bringing one person back sends an unbelievable message to all those other whistleblowers.

And the reason I know that is I get calls from agencies all across the country. And they're calling and they make sure their numbers are unidentified, and they call with aliases just because they know that I will actually do something about it. But the other problem that we have there is, is if they're that fearful to talk to a Member of Congress, then we've got a systemic problem that we've got address.

So I would ask, are you all all willing to give recommendations to this committee in terms of how we can maybe incentivize or discourage the behavior, and give me two recommendations on what you think? Mr. Storch, are you willing to do that?

Mr. STORCH. Yes, sir, absolutely. I am happy to participate in that very important discussion. One thing I would add that we've been doing for a while, and I was very happy to see in the IG Empowerment Act, was posting of instances where there's been reprisal. And that's something—we always look at these reprisal cases, and we don't have the volume that OSC does, but say in the FBI area or other areas. We look at them both in terms of whistleblower, obviously, and the harmed that they have suffered for coming forward and performing the service of doing that. But also we look at the person who engaged in the reprisal and whether or not that we can show that that constitutes misconduct, and if so, then to our standard procedures we would refer that.

We had a posting not long ago where we posted a fairly high level person within the FBI who we found, based on our investigation, had engaged in reprisal against someone who had blown the whistle. And we publicly reported on that. And we're not the adjudicative body, as you know, that goes to another part of the Department, but still, hopefully, there's a deterrent effect from that, right? And very happy to see that in the IG Empowerment Act. And I think others in the IG community do that, and as more of that happens, hopefully, people will see that there are consequences for supervisors and managers who engage in that concept.

Mr. MEADOWS. So since you do it there at DOJ, would you say that that's something we need to implement through OPM or some directive from OPM?

Mr. STORCH. Well, my understanding of the IG Empowerment Act is that now all of the IGs will be reporting when they find instances of reprisal against—

Mr. MEADOWS. Yeah, but it kind of bypasses OSC when you—I mean, indeed, if it's an IG investigation that applies and it's—I'm very familiar with that Act, but at the same time, it's critical that we send a message. So if you all would do that.

Mr. Bachman, are you willing to do that?

Mr. BACHMAN. Yes, absolutely. And very quickly, I think one thing to point out that has had a concrete effect is including within performance evaluations. So every employee gets an annual performance appraisal. We at OSC have now made that part of our supervisors and managers performance appraisals that they will be judged upon having an open atmosphere that would encourage whistleblowing. That has also been made a part of the VA's performance appraisals. So we think that could have a big impact as well.

The second part is tone at the top, as I mentioned previously, and I just want to commend you and this committee and Senator Grassley for "walking the walk." And planning to send this letter, I think, sends exactly the right message to whistleblowers across the—

Mr. MEADOWS. It either is gone or about to go out. So by the time we will gavel out, it'll be there.

Mr. Devine.

Mr. DEVINE. Sir, I agree with Mr. Bachman's priorities that the OSC has to focus on saving the careers of people who are being purged as a top priority. And that's why I think that structural reform in franchising the ability to seek discipline as part of the due process dimension of the list of our protection act is the most effective and direct solution, that a whistleblower should be able to seek discipline as part of the relief when prohibited personal practice is proven.

The other alternative is to restore personal liability for constitutional violations, which historically existed but the Supreme Court canceled in 1983 due to passage of the statutory provisions. And Congress could restore that liability and that also would create deterrence.

Mr. MEADOWS. Those are good recommendations. The latter one will be much more difficult to have happen.

So, Ms. Hempowicz.

Ms. HEMPOWICZ. Yeah. I would be happy to give you some more recommendations after the hearing. But I will just repeat what I said in my testimony, that I think it's incredibly important that we make punishment for those found to have retaliated against whistleblowers mandatory. It was in the VA bill last year and went through.

And when you have this mandatory punishment for somebody who retaliates, you've got to make sure that you have due process in place to make sure that you're not going to be punishing somebody who doesn't deserve it. But a mandatory suspension for the first offense sounds fair to me and sends that picture that retaliation is not acceptable and won't be rewarded. Because like you said, a lot of times, these people who are retaliating against whistleblowers receive bonuses, are promoted, or are moved up and out of the agency.

Mr. MEADOWS. All right. So one final question and then I'll recognize the ranking member.

Mr. Bachman, in terms of former Federal employees and the protections there, I mean, what kind of circumstances would you be able to help with former Federal employees?

Mr. BACHMAN. That's an excellent question and identifies one of the big gaps in our enforcement areas. Right now, if you're an employee or an applicant for a Federal position, you are protected from retaliation. However, if you've left the Federal Government and then somebody retaliates against you because of what you had disclosed while you're with the government, the WPEA does not cover that. So right now, we are not able to—

Mr. MEADOWS. What about things they disclose after they've left? So they're a retiree. I've had some come to my office just afraid to share anything because they're afraid of potential retaliation with either clearances or retirements or anything else.

Mr. BACHMAN. And if that—for example, if they retired and then blew the whistle and then were considering being a, you know, re-employed annuitant or something like that, yes, I think that should be covered. And we—OSC has actually taken that position recently in an amicus brief that any disclosure means any disclosure, regardless of whether you're an employee at the time. If you then seek employment with the Federal Government and they hold that against you, that's whistleblower retaliation.

Mr. MEADOWS. All right. Well, with that, I would look forward to maybe some clarifying language that we could work in a legislative manner. And I'll recognize the ranking member.

Mr. CONNOLLY. Just underscoring your point, Mr. Meadows. I think we would be interested in trying to look at some kind of set of standards for disciplinary action when somebody is conclusively found to have retaliated against a whistleblower.

The adjudication is going to be important because I am aware of cases of the opposite, where somebody claimed to have been discriminated against, and when you look at the evidence, it's simply not true. And they either have it in their head or they have a grievance against somebody and want to tarnish their good name. And so we have to be careful about that too in protecting reputations.

The interesting thing to get at, for me, what I hear the most about is retaliation is more subtle than that. Putting someone in a broom closet without a phone and without a window, everyone can kind of catch on to that. But it's the subtle performance erosion in the evaluation and the lack of promotion that follows from that because you've got a bad evaluation or suddenly issues are cropping up. You know, and it's done cleverly and in an almost sinister way to damage your career and your good name over time.

I think that is one that I worry a lot about because it's much harder to get at. It's harder to prove, but in some ways it's even more insidious. I don't know if anyone wants to comment on that before we close the hearing.

Mr. STORCH. I would agree entirely. You're absolutely right. And I would just say, based on our experience, when we've done these investigations in the FBI contacts, with the contractors, sub-contractors, grantees, and the like, the more subtle the discrimination or the action, the more difficult it is to ferret out. And that—

not that this is a play for resources, but I will say that it feeds into that problem, because they are very resource intensive investigations. I know I don't have to tell OSC that.

I know from our working group OIGs across the community, we believe in the importance of whistleblowers. They're really key partners in the work we do. And we don't want to see them suffer reprisal. So there is not a lack of commitment. There are issues with resources—

Mr. CONNOLLY. Yeah, but don't get too carried away. I know of one example, at least in an OIG office—

Mr. STORCH. Yes, sir.

Mr. CONNOLLY. —where this occurred and it was the IG doing it.

Mr. STORCH. Right. No, I don't claim anything is absolute, but I think people—certainly, I can speak for our office, we get and others in our working group have talked about the importance of these principles, but also have talked about the difficulty of ferreting out just that sort of subtle discrimination. So the reason I bring it up is I really do think it feeds into this issue that these are really important issues that we want to be able to tackle and work with you on tackling and work with you on getting the resources to make sure we can do it effectively.

Mr. BACHMAN. And for OSC, we couldn't agree more on the importance of the subtle forms of retaliation. And we've really made it a point, in our office, for our complaints examining unit who are the initial front line to review these complaints, if they see something like this and they believe there's an evidence of a violation, that we want to address this as quickly as possible because, A, it stops the bad action from happening, it helps the whistleblower. But B, it lets the agency, it lets the folks know we're looking at the little stuff too. We're not just going—you know, we're not just looking at the termination, we're looking at these subtler forms of retaliation. And also in terms of our outreach programs where we go to agencies, we train them, we make sure to include that these smaller personnel actions, that's retaliation too and you can't do it.

Mr. DEVINE. So your insight about subtle retaliation is very well taken. The Whistleblower Protection Act shields against harassment, such as refusing to give people training that would allow them to advance in their careers. One of the common tactics that I come across is in a performance appraisal, having a comment in the appraisal that, I'm disturbed that Mr. Smith is not a team player. And that sends a message to all future employers in all job applications that are reviewed.

And your question is a cue for the importance of the amicus briefs by the Office of Special Counsel and the job duties, so a short portion of the Whistleblower Protection Act. That's the only portion that requires actual retaliation. And the board has been drifting into expanding the scope of the job duties loophole and having high burdens of proof for it. And this should be interpreted very, very narrowly.

There is no public policy relevance to whether a whistleblower commits the truth as part of an assignment or a personal initiative. And the same causal link that can cancel adverse actions for taking

a personal initiative should be there when you're just doing your job properly.

Ms. HEMPOWICZ. I don't know if I have anything to add. However, it is definite that's something that we're very concerned about, and I'm happy to hear that you share that concern and plan to do more on that going forward.

Mr. CONNOLLY. Thank you. And, Mr. Chairman, thank you so much.

Mr. MEADOWS. Well, thank you all for your enlightening testimony. I can assure you that it will be followed up on. Our staff here is one that are not only diligent, but they're tenacious and so—in doing that.

If there's no more business before the committee, the committee stands adjourned.

[Whereupon, at 3:41 p.m., the committee was adjourned.]





## **APPENDIX**

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MATERIAL SUBMITTED FOR THE HEARING RECORD

**Congress of the United States**  
**Washington, DC 20515**

January 26, 2017

Donald F. McGahn, II  
 White House Counsel  
 The White House  
 1600 Pennsylvania Avenue N.W.  
 Washington, D.C. 20500

Dear Mr. McGahn:

We are writing to request that you take immediate action to remedy the Trump Administration's apparent violations of multiple federal laws by imposing gag orders on federal employees that prevent them from communicating with Congress.

It has been widely reported that the Trump Administration has issued restrictions at multiple agencies on employee communications including, in some instances, communications with Congress.<sup>1</sup> These directives appear to violate a host of federal laws.

First, these gag orders appear to violate the Whistleblower Protection Enhancement Act because they do not include a mandatory statement that employee communications with Congress and Inspectors General are protected. Congress passed the Act unanimously in 2012 to prohibit agencies from implementing or enforcing "any nondisclosure policy, form, or agreement" that does not include the following statement:

These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.<sup>2</sup>

The Office of Special Counsel, which is charged with protecting the rights of federal whistleblowers, has made clear that "this statement should be incorporated into every non-disclosure policy, form, or agreement used by an agency."<sup>3</sup>

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<sup>1</sup> See, e.g., *Information Lockdown Hits Trump's Agencies*, Politico (Jan. 24, 2017) (online at [www.politico.com/story/2017/01/federal-agencies-trump-information-lockdown-234122](http://www.politico.com/story/2017/01/federal-agencies-trump-information-lockdown-234122)).

<sup>2</sup> 5 U.S.C. § 2302(b)(13).

<sup>3</sup> Memorandum from Special Counsel Carolyn Lerner to the Heads of Executive Departments and Agencies, *The Whistleblower Protection Enhancement Act of 2012 and Non-Disclosure Policies, Forms, and Agreements* (Mar. 2013) (online at

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Second, the implementation or enforcement of any nondisclosure policy that does not include the required whistleblower protection statement also violates section 744 of the Consolidated Appropriations Act of 2016.<sup>4</sup>

Third, these gag orders also apparently violate Section 713 of the Consolidated Appropriations Act of 2016, which provides:

No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who—

- (1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee.<sup>5</sup>

Fourth, these gag orders also may violate 5 U.S.C. § 7211, which was enacted in 1912 to protect the rights of federal employees to communicate with Congress. This law states:

The rights of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

One example of the restrictions the Trump Administration has placed on employee communications is a memo issued by the Acting Secretary of the Department of Health and Human Services on President Trump's first day in office. That memo states:

No correspondence to public officials (e.g. Members of Congress, Governors) or containing interpretations or statements of Department regulations or policy, unless specifically authorized by me or my designee, shall be sent between now and February 3, during which time you will have the opportunity to brief President Trump's appointees and designees on any such correspondence which might be issued.<sup>6</sup>

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<https://osc.gov/Resources/OSC%20Memorandum%20on%20Whistleblower%20Law%20and%20Non%20Disclosure%20Agreements%2003%2014%2013.pdf>.

<sup>4</sup> Pub. L. No. 114-113 as continued by Pub. L. No. 114-254.

<sup>5</sup> *Id.*

<sup>6</sup> Memorandum from Acting Secretary, Health and Human Services, to OPDIV Heads and Staff Div Heads, *Immediate Action on Regulatory Review—ACTION* (Jan. 20, 2017).

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The memo also provides: "If you identify any actions taken inconsistent with these requests, please know they shall not be considered impliedly ratified and please immediately withdraw or rescind them as void and without effect."<sup>7</sup>

This memo appears to violate all of these laws, and it creates the impression that the Trump Administration intends to muzzle whistleblowers. Other agencies have reportedly issued similar restrictions, including the Departments of Interior, Transportation, and Agriculture, among others.<sup>8</sup>


For more than a century, Congress has protected the rights of federal employees to communicate with Congress about waste, fraud, and abuse in the Executive Branch.

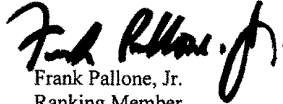
For the reasons set forth above, we urge you to immediately rescind all policies on employee communications that do not comply with the Whistleblower Protection Enhancement Act and other federal statutes.

In addition, because of the magnitude of these problematic directives, we request that the President issue an official statement making clear to all federal employees that they have the right to communicate with Congress and that he and his Administration will not silence or retaliate against whistleblowers.

Thank you for your consideration of this request.

Sincerely,

  
Elijah Cummings  
Ranking Member  
House Committee on Oversight and  
Government Reform

  
Frank Pallone, Jr.  
Ranking Member  
House Committee on  
Energy and Commerce

cc. The Honorable Jason Chaffetz, Chairman  
House Committee on Oversight and Government Reform

The Honorable Greg Walden, Chairman  
House Committee on Energy and Commerce

<sup>7</sup>*Id.*

<sup>8</sup> *Information Lockdown Hits Trump Agencies*, Politico (Jan. 24, 2017) ([www.politico.com/story/2017/01/federal-agencies-trump-information-lockdown-234122](http://www.politico.com/story/2017/01/federal-agencies-trump-information-lockdown-234122)).