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**U.S. OFFICE OF SPECIAL COUNSEL**  
1730 M Street, N.W., Suite 218  
Washington, DC 20036-4505  
(202) 804-7000

June 28, 2018

Via Email:

Re: Freedom of Information Act Request (#FO-17-0075)

I am writing in response to your request dated April 2, 2017, in which you asked the U.S. Office of Special Counsel (OSC) to provide you with select records regarding communication between OSC and Congress, as narrowed. Your request has been processed under Freedom of Information Act (FOIA), 5 U.S.C. § 552.

In reviewing your request under the FOIA, OSC identified 350 pages of records, of which 35 pages are non-responsive constituent correspondence and not processed. Of the remaining 315 records, we are releasing 260 pages to you in full without redaction, and 55 pages withheld in part pursuant to FOIA Exemptions 5, 6, and 7(C).

FOIA Exemption 5 protects from disclosure inter-agency or intra-agency information that is normally protected from discovery in civil litigation based on one or more legal privileges (including, in this instance, the deliberative process and attorney work product privileges). *See* 5 U.S.C. § 552(b)(5). FOIA Exemption 6 protects information if disclosure would constitute a clearly unwarranted invasion of personal privacy. *See* 5 U.S.C. § 552(b)(6). FOIA Exemption 7(C) protects law enforcement information if disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy. *See* 5 U.S.C. § 552(b)(7)(C).

You have the right to appeal this determination under the FOIA. Any such appeal must be made in writing and sent to OSC's General Counsel at the address shown at the top of this letter or by email to [FOIAappeal@osc.gov](mailto:FOIAappeal@osc.gov). The appeal must be received by the Office of General Counsel within 90 days of the date of this letter.

If you have any questions, would otherwise like to discuss your request, or you require dispute resolution services, please feel free to contact Mahala Dar, OSC's Chief FOIA Officer and acting FOIA Public Liaison, at [mdar@osc.gov](mailto:mdar@osc.gov) or at (202) 804-7000. Please reference the above-noted tracking number if you call or write.

U.S. Office of Special Counsel  
June 28, 2018  
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Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer.<sup>1</sup>

With kind regards,

/s/

Tarik D. Ndonga  
FOIA Team  
Office of the Clerk

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<sup>1</sup> You can reach OGIS by mail at Office of Government Information Services (OGIS), National Archives and Records Administration, 8601 Adelphi Road, Room 2510, College Park, MD, 20740-6001; by email at [ogis@nara.gov](mailto:ogis@nara.gov); by fax at 202-741-5769; or by telephone at 202-741-5770 or toll-free at 1-877-684-6448.

**Testimony of Special Counsel Carolyn N. Lerner  
U.S. Office of Special Counsel**

**U.S. House of Representatives  
Committee on Oversight and Government Reform**

**“Transparency at TSA”**

**March 2, 2017, 10:00 AM**

Chairman Chaffetz, Ranking Member Cummings, and Members of the Committee:

Thank you for the opportunity to testify today about the U.S. Office of Special Counsel (OSC), and our efforts to investigate allegations of whistleblower retaliation at the Transportation Security Administration. I greatly appreciate the Committee’s commitment to oversight and to strengthening OSC’s ability to carry out our good government mission. Let me also take this opportunity to thank the Committee, and in particular Representatives Blum, Meadows, Cummings, and Connolly for your leadership in passing the Thoroughly Investigating Retaliation Against Whistleblowers Act (H.R. 69) during the opening week of this Congress. Making whistleblowers a first-week issue highlights their critical importance to effective oversight. We look forward to continuing to work with you and your Senate counterparts as the legislation moves forward. The clarified authority in that legislation will assist OSC in our efforts to conduct timely and complete investigations on behalf of whistleblowers at TSA and other federal agencies.

**I. OSC’s Critical Mission**

OSC is an independent investigative and prosecutorial federal agency that promotes accountability, integrity, and fairness in the federal workplace. We provide a safe and secure channel for government whistleblowers to report waste, fraud, abuse, and threats to public health and safety. And, we protect federal employees from prohibited personnel practices, most notably whistleblower retaliation. OSC also protects veterans and service members from job discrimination under the Uniformed Services Employment and Reemployment Rights Act (USERRA). And finally, we enforce the Hatch Act, which keeps partisan political activity out of the federal workplace. In all of these areas, OSC prioritizes outreach and education to federal employees and managers to prevent potential violations before they occur.

Although OSC has limited resources, we are fulfilling our critical mission more effectively now than ever before. Through our whistleblower disclosure process, we have worked with whistleblowers to improve care for veterans across the country, put a stop to millions of dollars of waste in government overtime programs, and identified and corrected significant threats to aviation security. These are significant victories for employees who risked their careers to promote more honest, accountable, safe and efficient government.



As noted, a critical part of OSC's mission is to protect those whistleblowers. In fiscal year 2016 alone, we secured 276 favorable actions for whistleblowers and other victims of prohibited personnel practices. These actions include reinstatement or relief for whistleblowers who have been fired, demoted, or reassigned, as well as back pay and other remedies. In appropriate cases, we also seek disciplinary action against the agency officials who engaged in the wrongdoing. The number of victories on behalf of whistleblowers and other employees reflects a 233 percent increase since my tenure began in FY 2011.

## **II. To Fulfill its Mandate, OSC Needs Broad Access to Agency Information**

Congress has given OSC a broad mandate to investigate potentially unlawful personnel practices, including whistleblower retaliation. OSC's authorizing statutes empower OSC to issue subpoenas, administer oaths, examine witnesses, take depositions, and receive evidence. 5 U.S.C. §§ 1212(b)(1), 1214(a)(1)(A), 1214(a)(5), 1216(a), 1303. Moreover, Office of Personnel Management (OPM) regulation 5 C.F.R § 5.4, specifically directs agencies to comply with OSC requests, stating: "agencies shall make available . . . employees to testify in regard to matters inquired of . . . [and] shall give . . . OSC . . . all information, testimony, documents, and material . . . the disclosure of which is not otherwise prohibited by law or regulation."

OSC uses its investigatory authority extensively. In particular, OSC investigations depend on the routine issuance of document requests and the ability to interview witnesses. Although agencies generally work with OSC to fulfill OSC's document requests, some agencies do not provide timely and complete responses. The failure to provide such responses can significantly delay and impede OSC's investigation. In addition, agencies sometimes withhold documents and other information responsive to OSC requests by asserting the attorney-client privilege. In these cases, OSC often must engage in prolonged disputes over access to information, or attempt to complete our investigation without the benefit of highly relevant communications. This undermines the effectiveness of whistleblower laws, wastes precious resources, and prolongs OSC investigations.

Neither OSC's governing statutes, nor applicable OPM regulations authorize an agency to withhold information from OSC based on an assertion of attorney-client privilege by a government attorney acting on behalf of a government agency. And no court has ever held that the attorney-client privilege can be asserted during intra-governmental administrative investigations. The purpose of the privilege is to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). But invoking the privilege in the context of an OSC investigation is inconsistent with this historical understanding of the privilege for several reasons.

First, Congress has made clear that there is a strong public interest in exposing government wrongdoing and upholding merit system principles. To uphold this public interest, OSC must review communications between management officials and agency counsel to determine whether an agency acted with a legitimate or unlawful basis in taking action against a whistleblower. Federal agencies have no legitimate basis to use privileges to conceal evidence of prohibited practices from the agency that Congress charged with investigating them. *See In re Lindsey*, 158

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F.3d 1263, 1266-67 (D.C. Cir. 1998) (citing the “obligation of a government lawyer to uphold the public trust” in rejecting the assertion of attorney-client privilege for White House lawyers in Whitewater litigation). It simply makes no sense to create an intra-executive branch investigative process to determine if prohibited conduct occurred, and then allow agencies to frustrate that process by withholding information.

Second, review by OSC does not deter frank and candid communications between government managers and lawyers. In fact, agencies routinely provide OSC with these communications to demonstrate that a personnel action against an employee was lawful and motivated by non-retaliatory, valid performance or misconduct-based reasons. When management engages in this type of communication with government lawyers, and provides evidence of these consultations to OSC, it facilitates prompt review by OSC and benefits the government as an employer.

Third, there is no precedent to support agency concerns that disclosure to OSC would constitute a waiver of the privilege in another forum or in third party litigation. OSC’s information requests are not akin to discovery requests made by a third party in litigation. OSC is an internal investigator for the U.S. Government, and our requests are made to other U.S. Government entities, not third parties. If Congress wished to allow agencies to shield information within this process, it would have crafted a limitation on OSC’s investigatory mandate and authority. For example, the exceptions included in the Freedom of Information Act pertaining to public release of privileged documents show that Congress does so when it chooses.

Although we believe Congress has already expressed its intent in this area, to provide additional clarity, OSC recommends that Congress establish explicit statutory authority for the Special Counsel to obtain information, similar to section 3 of the House-passed Thoroughly Investigating Retaliation Against Whistleblowers Act (H.R. 69). We urge Congress to amend this provision prior to final passage to expressly clarify OSC’s existing right to request and receive information that assertions of common-law privileges may protect in other contexts. This statutory provision would be similar to the authorities Congress has provided to Inspectors General, and clarified recently by the Inspector General Empowerment Act of 2016, and to the Government Accountability Office.

A statutory provision clarifying OSC’s access to information in whistleblower investigations should be broad enough to make clear that it applies to all OSC investigations, including whistleblower disclosure, Hatch Act, and USERRA cases. This will help OSC fulfill its statutory mandates and avoid unnecessary and duplicative investigations. Clear statutory authority to access agency information will help us resolve disputes over documents more quickly, resulting in faster case resolutions and better enabling OSC to respond to the increased demand and case levels.

### **III. OSC’s Challenges in Obtaining Information from TSA**

I will now turn to OSC’s investigations of whistleblower retaliation complaints at TSA. In December 2012, Congress extended statutory whistleblower protections to TSA employees through the Whistleblower Protection Enhancement Act. Since then, OSC has received more

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

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than 350 whistleblower retaliation cases from TSA employees (under 5 U.S.C. § 2302(b)(8) and (b)(9)).

To illustrate for the Committee the challenges OSC has faced in acquiring the information needed from TSA to complete our investigations, I will focus on two pairs of companion cases. The complainants in these cases are TSA officials who experienced involuntary geographical reassignments, a demotion, and a removal, all of which were allegedly in retaliation for protected whistleblower disclosures.

In these four cases, TSA withheld information from its document productions, asserting claims of attorney-client privilege. OSC asked TSA to withdraw the claims of privilege, and it elevated this request to TSA's parent agency, the Department of Homeland Security (DHS). Both TSA and DHS rejected OSC's requests, and refused to release the documents.

Several critical problems exist with TSA's assertions of privilege. As discussed above, shielding information from OSC through privilege is inconsistent with OSC's statutory mandate and regulatory authority to investigate the legality of certain personnel practices. TSA appears to be withholding information directly related to the decision-making process for the personnel actions it took against the complainants. Understanding the motivation behind these actions is essential to OSC's investigation. OSC requires access to all information relevant to potentially unlawful personnel practices, even if that information might be privileged in other contexts. When TSA refuses to disclose why it takes an action, it is impossible for OSC to investigate whether there was retaliation.

Additionally, in the two cases for which TSA has completed its document production, TSA stated it was unable to provide a privilege log describing the information withheld. The lack of a privilege log is particularly problematic because OSC has concerns that TSA may be withholding information more extensively than even a robust attorney-client privilege would allow. Without documentation of the information withheld—a basic requirement whenever the attorney-client privilege is asserted—it is difficult to evaluate the extent to which this is true.

The attached exhibit provides a particularly striking example (OSC Exhibit, March 2, 2017). TSA redacted every word of the document, including the date, author, and recipient. Based on our review of other information and testimony, OSC believes this exhibit may reflect a key witness's factual summary of a pivotal meeting about the personnel actions at issue in the relevant investigation. We understand that no attorneys were present at the meeting and it does not appear legal advice was discussed. It is not clear why the summary was determined to be privileged, and we cannot assess or challenge any improper privilege determinations, because TSA will not provide the information that would be necessary to do so.

TSA similarly redacted the names of email attachments, and other portions of documents with no apparent connection to an attorney or to any legal advice. Extensive redaction hinders OSC's ability to properly investigate, identify witnesses, and prepare for interviews.

Moreover, TSA's attorney-client privilege review causes significant delays in these investigations. OSC requested that TSA produce documents in the first two companion cases

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

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within 30 days, which is consistent with the discovery deadline under the Federal Rules of Civil Procedure. It took TSA nearly five months after the requested deadline to complete its production of documents. TSA has stated that its privilege review accounts for much of the delay. OSC attorneys and investigators have spent considerable time negotiating about the document production that could have been spent advancing the investigation.

Despite the challenges created by TSA's attorney-client privilege claims, OSC continues investigate these and other TSA cases as expeditiously as possible. OSC has reviewed hundreds of documents in connection to these matters and interviewed approximately 18 witnesses. OSC is committed to completing a thorough investigation of these cases and protecting TSA whistleblowers where appropriate.

We appreciate the Committee's interest in the challenges we are facing, and we hope that your engagement might facilitate some progress in addressing them. I thank you for the opportunity to testify today, and I look forward to answering your questions.

\* \* \* \* \*

**Special Counsel Carolyn N. Lerner**

The Honorable Carolyn N. Lerner heads the United States Office of Special Counsel. Her term began in June 2011. Prior to her appointment as Special Counsel, Ms. Lerner was a partner in the Washington, D.C., civil rights and employment law firm Heller, Huron, Chertkof, Lerner, Simon & Salzman, where she represented individuals in discrimination and employment matters, as well as non-profit organizations on a wide variety of issues. She previously served as the federal court appointed monitor of the consent decree in *Neal v. D.C. Department of Corrections*, a sexual harassment and retaliation class action.

Prior to becoming Special Counsel, Ms. Lerner taught mediation as an adjunct professor at George Washington University School of Law, and was mediator for the United States District Court for the District of Columbia and the D.C. Office of Human Rights.

Ms. Lerner earned her undergraduate degree from the Honors College at the University of Michigan, where she was selected to be a Truman Scholar, and her law degree from New York University (NYU) School of Law, where she was a Root-Tilden-Snow public interest scholar. After law school, she served two years as a law clerk to the Honorable Julian Abele Cook, Jr., Chief U.S. District Court Judge for the Eastern District of Michigan.



U.S. OFFICE OF SPECIAL COUNSEL  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

The Special Counsel

May 25, 2016

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security and Governmental Affairs  
United States Senate  
340 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: Office of Special Counsel Comments on Government Reform Legislation

Dear Chairman Johnson:

Thank you for requesting the U.S. Office of Special Counsel's (OSC) views on the "Bolster Accountability to Drive Government Efficiency and Reform Washington Act" (the Act). I highlight three titles within the Act that will promote stronger whistleblower protections and help to curb government waste, fraud, and abuse.

First, the Dr. Chris Kirkpatrick Whistleblower Protection Act clarifies and strengthens OSC's access to agency information. We thank the Committee for working to provide OSC, in this legislation and in pending OSC re-authorization legislation, with clear statutory authority to request and receive information from government agencies. The public interest in a transparent and accountable government is best served by allowing OSC access to all information. Agencies should not be able to shield managers from accountability or hide potentially retaliatory conduct by withholding information from OSC. In addition, the legislation prohibits retaliatory searches of employee medical records. In several of our cases, individuals accessed the medical records of Department of Veterans Affairs (VA) whistleblowers with the apparent motive of using the information contained in those records to discredit the whistleblowers. Preventing this type of retaliation is a necessary reform that will assist VA whistleblowers.

Second, the Inspector General Empowerment Act will help to curb government waste and prevent retaliation in the federal workplace. OSC works closely with Inspectors General to root out waste, fraud, and abuse after OSC receives whistleblower disclosures from government workers. Providing the Inspectors General with additional tools to obtain information, including testimony from former employees, contractors, or grantees, will enhance these efforts.

Third, the Administrative Leave Act of 2016 promotes accountability in government personnel decisions. Too often, government agencies have improperly used administrative leave, either to delay appropriate accountability actions or to

The Special Counsel

The Honorable Ron Johnson

May 25, 2016

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inappropriately idle and isolate whistleblowers. Both scenarios result in significant waste of taxpayer dollars. We support the responsible steps taken in S. 2450 to regulate the use of administrative leave in government agencies.

The Committee's government reform legislation, which includes these and other important measures, will have a positive impact on good government. We look forward to ongoing dialogue on these bills as well as OSC re-authorization legislation. Thank you for considering these views.

Respectfully,

A handwritten signature in cursive script, reading "Carolyn N. Lerner".

Carolyn N. Lerner

cc: The Honorable Thomas R. Carper, Ranking Member





U.S. OFFICE OF SPECIAL COUNSEL  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

The Special Counsel

May 26, 2016

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security and Governmental Affairs  
United States Senate  
340 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: Office of Special Counsel Comments on Government Reform Legislation

Dear Chairman Johnson:

Thank you for requesting the U.S. Office of Special Counsel's (OSC) views on the Bolster Accountability to Drive Government Efficiency and Reform Washington Act (the Act). We strongly support the Committee's decision to include the Office of Special Counsel Reauthorization Act in your government reform legislative package. In addition to the OSC Reauthorization Act, I highlight two additional titles within the Act that will promote stronger whistleblower protections and help to curb government waste, fraud, and abuse.

The OSC Reauthorization Act strengthens OSC's authorities, providing us with additional tools to protect whistleblowers and save taxpayer dollars. Importantly, the legislation clarifies OSC's authority to request and receive all agency information. The public interest in a transparent and accountable government is best served by ensuring OSC's authority to access all information, including certain privileged information. Agencies should not be able to shield managers from accountability or hide retaliatory conduct by withholding information from OSC.

Congress has tasked OSC with determining the legality of personnel actions taken against whistleblowers. Our investigations typically assess whether an agency acted for legitimate, non-retaliatory reasons, or whether agency justifications are really a pretext for retaliating against an employee. To make these assessments, it is often necessary to review communications between management officials and agency counsel. In fact, these communications can demonstrate that management officials acted responsibly, sought legal advice, and had a legitimate basis for disciplining a purported whistleblower. While agencies typically comply with OSC requests for this highly relevant material, some agencies assert that these types of communications are privileged and withhold this information from OSC. In such cases, OSC must engage in prolonged disputes over access to information or attempt to complete our investigation without the benefit of

The Honorable Ron Johnson  
May 26, 2016  
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these important communications. This undermines the effectiveness of the whistleblower law and prolongs OSC investigations.

In clarifying OSC's authority to request and receive this information, we note that the legislation also states that the production of privileged material to OSC will not constitute a waiver of the privilege by the agency in any other context or forum. This is an appropriate resolution that protects the interests of agencies, while also promoting merit system principles and protecting employees from retaliation.

In addition to clarifying OSC's authority to access agency information, the OSC Reauthorization Act:

- Prohibits retaliatory searches of employee medical records, a necessary reform that will better protect whistleblowers from the Department of Veterans Affairs;
- Strengthens OSC's authority to protect employees from other forms of retaliatory investigations;
- Restores OSC and Merit Systems Protection Board jurisdiction to review claims of whistleblower retaliation by employees in sensitive positions;
- Requires agencies to incorporate whistleblower protection principles into the performance plans for managers and supervisors;
- Requires agencies to complete OSC's whistleblower certification program;
- Promotes efficiency in OSC investigations and allows us to focus limited resources on meritorious cases;
- Protects OSC employees by codifying a requirement for OSC to enter into an agreement for services with an Inspector General, consistent with OSC's current agreement with the National Science Foundation OIG;
- Reauthorizes OSC's programs through 2021.

Each of these important reforms will strengthen OSC's ability to carry out our good government mission on behalf of federal workers and the taxpayers.

In addition to the OSC Reauthorization Act, the Committee's government reform legislation incorporates the Inspector General Empowerment Act, which will also help to curb government waste and prevent retaliation in the federal workplace. OSC works closely with Inspectors General to root out waste, fraud, and abuse after OSC receives whistleblower disclosures from government workers. Providing the Inspectors General with additional tools to obtain information, including testimony from former employees, contractors, or grantees, will enhance these efforts.

The Special Counsel

The Honorable Ron Johnson

May 26, 2016

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The government reform package also incorporates the Administrative Leave Act of 2016, which promotes accountability in government personnel decisions. Too often, government agencies have improperly used administrative leave, either to delay appropriate accountability actions or to inappropriately idle and isolate whistleblowers. Both scenarios result in significant waste of taxpayer dollars.

The Committee's government reform legislation, which includes these and other important measures, will have a positive impact on good government. Thank you for considering these views.

Respectfully,

A handwritten signature in cursive script, reading "Carolyn N. Lerner".

Carolyn N. Lerner

cc: The Honorable Thomas R. Carper, Ranking Member



U.S. OFFICE OF SPECIAL COUNSEL  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

The Special Counsel

May 18, 2016

The Honorable Mitch McConnell  
Majority Leader  
United States Senate  
Washington, D.C. 20510

The Honorable Harry Reid  
Minority Leader  
United States Senate  
Washington, D.C. 20510

Re: Office of Special Counsel Comments on S. 579

Dear Majority Leader McConnell and Minority Leader Reid:

The U.S. Office of Special Counsel (OSC) is an independent, Executive branch agency charged by Congress with the protection of government whistleblowers. The Senate sponsors of S. 579, the "Inspector General Empowerment Act of 2015," requested that OSC provide our views on the legislation, specifically with respect to the provision that equips Inspectors General with testimonial subpoena authority.

We believe S. 579 will help to curb government waste and prevent retaliation in the federal workplace. OSC works closely with Inspectors General to root out waste, fraud, and abuse after OSC receives whistleblower disclosures from government workers. Providing the Inspectors General with an additional tool to obtain testimony from former employees, contractors, or grantees, through the use of testimonial subpoenas when necessary, will enhance these efforts.

In addition, although OSC is rarely required to use our own testimonial subpoena authority, we have issued subpoenas to former employees or managers who would not voluntarily speak to OSC but who have critical knowledge about a retaliatory action taken against a whistleblower. In conducting their own reprisal investigations, Inspectors General are likely to have a similar need to obtain testimony from former employees to assist whistleblowers and prevent retaliation.

For these reasons, we believe S. 579 will have a positive impact on good government.

**The Special Counsel**

The Honorable Mitch McConnell  
The Honorable Harry Reid  
May 18, 2016  
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Thank you for considering these views.

Respectfully,

A handwritten signature in cursive script, reading "Carolyn N. Lerner".

Carolyn N. Lerner

cc:

Senator Charles E. Grassley  
Senator Claire McCaskill  
Senator Ron Johnson  
Senator Tammy Baldwin  
Senator Joni Ernst  
Senator John Cornyn  
Senator Barbara A. Mikulski  
Senator Susan R. Collins  
Senator Kelly Ayotte  
Senator Thomas R. Carper

Senator James Lankford  
Senator Mark S. Kirk  
Senator Deb Fischer  
Senator Ron Wyden  
Senator Michael B. Enzi  
Senator Joe Manchin, III  
Senator Gary C. Peters  
Senator Rob Portman  
Senator Johnny Isakson  
Senator Roy Blunt

**Written Testimony of the Honorable Carolyn N. Lerner, Special Counsel  
U.S. Office of Special Counsel**

**Committee on Indian Affairs  
United States Senate**

**Hearing on Pending Legislation**

**June 29, 2016**

Chairman Barrasso, Ranking Member Tester, and Members of the Committee:

Thank you for the opportunity to submit written testimony on behalf of the Office of Special Counsel (OSC). OSC protects the merit system for over 2 million civilian employees in the federal government, with a particular focus on investigating and prosecuting allegations of whistleblower retaliation. We appreciate the Committee's efforts to support whistleblowers and promote accountability within the Indian Health Service (IHS), and we offer the following views on S. 2953, the Indian Health Service Accountability Act ("the Act").

Section 6 of the Act establishes a new "mandatory reporting" procedure for IHS employees who witness retaliation or other misconduct. This new mandatory reporting procedure will restrict, rather than expand, existing channels for whistleblower disclosures. Under current law, IHS employees may choose to disclose information directly to their chain of command, to an Inspector General, to OSC, or through other avenues. Employees should have the flexibility, as they do under current law, to determine the best avenue for making a disclosure. However, Section 6 would require IHS employees to disclose the information to an official designated by the Secretary of Health and Human Services (HHS). Section 6's procedure does not include rules on confidentiality for the designated HHS official, and does not clearly define the terms that trigger the automatic reporting requirement to HHS. As stated, since IHS employees can already disclose information directly to the OIG, the benefit of establishing a new designated official to forward employee reports to the OIG is unclear. Reinforcing the existing channels for reporting concerns will result in better protections and outcomes for IHS whistleblowers. It would be appropriate to require HHS or IHS to provide additional information to IHS employees on available options for reporting wrongdoing.

Additionally, Section 3 of the Act establishes a new process for the removal of IHS employees based on performance or misconduct. We understand that the intent of this provision is to promote accountability within IHS by providing the Secretary of HHS with an additional, expedited process for disciplining IHS employees. We note, however, that the new process is modeled, without modification, on a similar provision adopted by Congress to discipline senior executives within the Department of Veterans Affairs (VA). The VA provision has been subject to constitutional attack in federal court. The constitutional challenge has significantly delayed final resolution of disciplinary actions taken against senior VA officials. If the goal of this legislation is to expedite disciplinary actions against IHS employees, the Committee may wish to consider modifying the provision to ensure the constitutionality of the process.





**U.S. OFFICE OF SPECIAL COUNSEL**  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

**The Special Counsel**

March 13, 2017

The Honorable Ron Johnson, Chairman  
The Honorable Claire McCaskill, Ranking Member  
Committee on Homeland Security and Governmental Affairs  
United States Senate  
340 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Chairman Johnson and Ranking Member McCaskill,

On behalf of the Office of Special Counsel (OSC), I thank you for your leadership in advancing S. 582, the Office of Special Counsel Reauthorization Act of 2017. This legislation will improve OSC's ability to protect whistleblowers and carry out our good government mission on behalf of U.S. taxpayers.

The Committee's longstanding support for whistleblowers and, in particular, your recent hearings on retaliation within the Department of Veterans Affairs (VA) helped to demonstrate the need for several of S. 582's critical reforms. Specifically, the legislation will ensure that employees are protected for cooperating with all government investigations, addressing the Merit Systems Protection Board's decision in *Graves v. Department of Veterans Affairs*. To promote accountability within the VA and other agencies, employees need to know that their cooperation and testimony will not result in unlawful retaliation against them. Second, the legislation prohibits the VA and other agencies from accessing an employee's medical record for improper purposes, including to retaliate against the employee. Relatedly, S. 582 strengthens OSC's ability to protect employees who are subjected to any form of retaliatory investigation, even if the investigation does not lead to a disciplinary action against the employee. Together, these reforms will help to ensure that agency investigative processes work properly to address misconduct and are not used for retaliatory purposes.

Importantly, S. 582 also clarifies OSC's existing authority to request and receive all agency information, including information that assertions of common-law privileges may protect in other contexts. Although federal agencies generally work with OSC to fulfill OSC's document requests, some agencies do not provide timely and complete responses to our document requests under 5 C.F.R. § 5.4. The failure to provide such responses can significantly delay and impede OSC's investigation. Specifically, agencies sometimes

**The Special Counsel**

The Honorable Ron Johnson and the Honorable Claire McCaskill

March 13, 2017

Page 2 of 2

withhold documents and other information responsive to OSC requests by improperly asserting the attorney-client privilege. In these cases, OSC often must engage in prolonged disputes over information to which OSC is clearly entitled. This undermines the effectiveness of whistleblower laws, wastes precious resources, and prolongs OSC investigations.

Although the attorney-client privilege protects certain communications between a lawyer and client, there is simply no basis for a federal agency to assert the privilege during an OSC investigation. Congress has directed OSC to conduct investigations as objective fact-finders, similar to Inspectors General and the Government Accountability Office. Indeed, Congress has made clear that there is a strong public interest in exposing government wrongdoing and upholding merit system principles. To uphold this public interest, OSC routinely reviews communications between management officials and agency counsel to determine whether an agency acted with a legitimate or unlawful basis in taking action against a whistleblower. Federal agencies have no legitimate basis to use privileges to conceal evidence of prohibited practices from the agency that Congress charged with investigating them. *See In re Lindsey*, 158 F.3d 1263, 1266-67 (D.C. Cir. 1998) (citing the “obligation of a government lawyer to uphold the public trust” in rejecting the assertion of attorney-client privilege for White House lawyers in Whitewater litigation). Congress created OSC as an intra-executive branch investigative agency to investigate whether prohibited conduct occurred. That purpose is frustrated when agencies withhold information.

Although we believe Congress has already expressed its intent in this area, we thank the Committee for its effort to provide additional clarity on this issue. This statutory provision is similar to the authorities Congress has provided to Inspectors General, clarified recently by the Inspector General Empowerment Act of 2016, and to the Government Accountability Office. Like the rest of S. 582, this provision will significantly improve OSC’s ability to protect the courageous government whistleblowers who seek our assistance. For these reasons, we strongly support S. 582, and look forward to its prompt passage.

Sincerely,

A handwritten signature in dark ink, appearing to read "Carolyn N. Lerner". The signature is fluid and cursive, with the first name "Carolyn" being more prominent than the last name "Lerner".

Carolyn N. Lerner

cc: The Honorable Chuck Grassley  
The Honorable Steve Daines



**U.S. OFFICE OF SPECIAL COUNSEL**  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

**The Special Counsel**

December 21, 2016

The Honorable Richard Blumenthal  
706 Hart Senate Office Building  
United States Senate  
Washington, D.C. 20510

Dear Senator Blumenthal:

I write in response to your December 15, 2016 letter, co-signed by eight of your colleagues, regarding a questionnaire sent to the U.S. Department of Energy from the President-elect's transition officials. The letter notes your concerns that the questionnaire may reflect an intent to retaliate or discriminate against career civil servants for implementing the policies of any previous administration.

Congress recently amended the Civil Service Reform Act of 1978 by unanimously passing the Whistleblower Protection Enhancement Act of 2012 (WPEA) (P.L. 112-199). The WPEA made two significant changes to the existing civil service protections for federal workers that are relevant to the concerns expressed in your letter. First, the law explicitly shields employees for blowing the whistle on any effort to "distort, misrepresent, suppress" or otherwise censor any government "research, analysis, or technical information." Second, the law makes clear that non-disclosure agreements in federal employment do not supersede whistleblower protections. Accordingly, Congress instructed agencies to respect the integrity of the scientific process and the employees who engage in that process on behalf of the taxpayers. Any effort to chill scientific research or discourse is inconsistent with the intent of the WPEA.

As to the questionnaire, according to press accounts, the President-elect's transition officials said the questionnaire "was not authorized" and the person responsible for sending it had been "counseled." The Energy Department also stated it did not provide employee names to the President-elect's transition officials, and no Department employee has reported a prohibited personnel action resulting from the questionnaire. In addition, transition officials are not considered federal employees for purposes of the WPEA (Presidential Transition Act of 1963). That being said, if any Department employee believes they have been subjected to an adverse action in violation of merit system principles, they may file a complaint with the Office of Special Counsel (OSC), and we will investigate their claim.

The Honorable Richard Blumenthal

December 21, 2016

Page 2 of 2

In addition to reviewing, investigating, and taking action to protect federal employees from whistleblower retaliation and other prohibited personnel practices, OSC works to prevent misconduct from happening in the first place through our education and outreach program. Section 2302(c) of title 5, United States Code, requires the head of every agency to certify compliance with the WPEA, to prevent prohibited personnel practices from occurring within their agency, and to ensure that employees are not chilled from exercising their rights and seeking the remedies available to them.

Through our 2302(c) Certification Program, OSC tracks compliance with this requirement and offers agencies a proactive way to ensure that employees and managers are informed of their rights and responsibilities under the whistleblower laws. Our program offers training on each of the prohibited personnel practices, and includes information on the WPEA's specific provisions on scientific integrity and non-disclosure agreements in federal employment. The Department of Energy has been certified under our program through June 2017. Early next year, we will contact the incoming heads of all agencies and offer training on the whistleblower law, the Hatch Act, and the other laws enforced by OSC.

I look forward to working with you, your colleagues, and the incoming administration to ensure that whistleblower retaliation, political discrimination and coercion, and all other prohibited practices are prevented.

Sincerely,

A handwritten signature in cursive script, reading "Carolyn N. Lerner".

Carolyn N. Lerner

cc: United States Senator Patrick Leahy  
United States Senator Dianne Feinstein  
United States Senator Tammy Baldwin  
United States Senator Cory Booker  
United States Senator Sheldon Whitehouse  
United States Senator Benjamin L. Cardin  
United States Senator Christopher A. Coons  
United States Senator Patty Murray



**U.S. OFFICE OF SPECIAL COUNSEL**  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

**The Special Counsel**

July 7, 2016

The Honorable Johnny Isakson  
Chairman  
Committee on Veterans' Affairs  
United States Senate

The Honorable Mark Kirk  
Chairman  
Subcommittee on Military Construction, Veterans Affairs, and Related Agencies  
Committee on Appropriations  
United States Senate

**Re: Pending Legislation to Protect VA Whistleblowers**

Dear Mr. Chairmen:

The Office of Special Counsel (OSC) has received, reviewed, and investigated thousands of whistleblower retaliation complaints and disclosures from Department of Veterans Affairs (VA) employees. Based on this experience, we write to express our strong support for the whistleblower protection provisions in the Veterans First Act (VFA). The VFA incorporates many concepts from the VA Patient Protection Act (PPA). As detailed below, the VFA refines and strengthens these provisions. Based on our review of the legislation, we believe the VFA will best advance the interests of VA whistleblowers. We thank you both for your sponsorship and support of this critical legislation.

Importantly, the VFA establishes the Office of Accountability and Whistleblower Protection (OAWP). OSC's ongoing work with VA whistleblowers will benefit from having a high-level point of contact with the statutory authority to identify, correct, and prevent threats to patient care and to discipline those responsible for creating them. The establishment of similar offices at other agencies, including the Federal Aviation Administration, has significantly improved the whistleblower experience at those agencies. And OAWP, with a Senate-confirmed leader, will have the authority and a mandate to make a significant difference. The VFA also requires the VA to include whistleblower protection criteria in the performance plans for all VA supervisors and managers. This step will create incentives for supervisors to respond constructively to employees' concerns, and help improve the culture at the VA.

The Special Counsel

Chairmen Isakson and Kirk

July 12, 2016

Page 2 of 2

In contrast, while we appreciate all efforts to promote and protect whistleblowers, we are concerned that the PPA may undermine whistleblower protections and accountability by creating a new and unnecessary process for reporting concerns. The PPA directs employees to report concerns, on a designated form, to their immediate supervisor, and creates conditions under which an employee may elevate a complaint up the chain of command. Existing whistleblower protections do not require chain of command reporting, and also do not require that disclosures be made on a prescribed form. The PPA also creates an unreasonable expectation that supervisors will be able to evaluate an employee concern within four business days. The PPA's process is overly-burdensome for employees and supervisors, and may be entirely unworkable in many instances. This approach is not the best method for improving accountability or evaluating supervisory efforts to support and protect whistleblowers. In addition, the PPA's framework for a Central Whistleblower Office lacks the OAWP's authority and independence, as well as its congressional mandate to monitor and prevent threats to patient care. The PPA also fails to establish any rules for confidentiality for disclosures made to the Central Whistleblower Office, which could undermine confidence in the VA whistleblower system.

For these and other reasons, we believe the VFA will best advance the interests of VA whistleblowers and the Veterans served by the Department. If you are in need of additional information, please contact Adam Miles, Deputy Special Counsel for Policy and Congressional Affairs, at 202-254-3607. We thank you for your efforts and support for VA whistleblowers.

Sincerely,



Carolyn N. Lerner

cc:

The Honorable Richard Blumenthal  
Ranking Member  
Committee on Veterans' Affairs  
United States Senate

The Honorable Jon Tester  
Ranking Member  
Subcommittee on Military Construction, Veterans Affairs, and Related Agencies  
Committee on Appropriations  
United States Senate





The Special Counsel

**U.S. OFFICE OF SPECIAL COUNSEL**

1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

May 3, 2017

The Honorable Johnny Isakson  
Chairman  
Committee on Veterans' Affairs  
United States Senate  
412 Russell Senate Office Building  
Washington, D.C. 20510

The Honorable Jon Tester  
Ranking Member  
Committee on Veterans' Affairs  
United States Senate  
412 Russell Senate Office Building  
Washington, D.C. 20510

Re: The Committee's Office of Accountability and Whistleblower Protection

Dear Chairman Isakson and Ranking Member Tester,

The Office of Special Counsel (OSC) has received thousands of whistleblower retaliation complaints and disclosures from Department of Veterans Affairs (VA) employees. Based on this experience, we support the Committee's decision, in the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, to establish the VA Office of Accountability and Whistleblower Protection (OAWP). We believe the OAWP will reinforce steps the VA has taken to elevate and address these critical issues. Indeed, the Trump administration recognized the importance of such an office with its April 27, 2017 Executive Order on Improving Accountability and Whistleblower Protection at the VA. The Committee's legislation takes additional, necessary steps to promote accountability, protect whistleblowers, and improve care at the VA.

OSC's work with VA whistleblowers will benefit from having a permanent, high-level point of contact with the statutory authority to identify, correct, and prevent threats to patient care and to discipline those responsible for creating them. The establishment of similar offices at other agencies, including the Federal Aviation Administration, has significantly improved the whistleblower experience at those agencies. And OAWP, with a Senate-confirmed leader, will have the authority and a mandate to make a significant difference. Additionally, we support the Committee's decision to include whistleblower protection criteria in the performance plans of all VA supervisors and managers. This step, which we implemented at OSC, will create additional incentives for supervisors to respond constructively to employees' concerns, helping to improve the culture at the VA. We thank the Committee for the opportunity to provide these views, and for recognizing OSC's work and the contributions of VA whistleblowers.

Sincerely,

A handwritten signature in cursive script that reads "Carolyn N. Lerner".

Carolyn N. Lerner



U.S. OFFICE OF SPECIAL COUNSEL  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

The Special Counsel

May 9, 2016

The Honorable Johnny Isakson  
Chairman  
Committee on Veterans' Affairs  
United States Senate  
412 Russell Senate Office Building  
Washington, D.C. 20510

The Honorable Richard Blumenthal  
Ranking Member  
Committee on Veterans' Affairs  
United States Senate  
412 Russell Senate Office Building  
Washington, D.C. 20510

**Re: Veterans First Act and the Office of Accountability and Whistleblower Protection**

Dear Chairman Isakson and Ranking Member Blumenthal,

The Office of Special Counsel (OSC) has received thousands of whistleblower retaliation complaints and disclosures from Department of Veterans Affairs (VA) employees. Based on this experience, we support the Committee's decision, in the Veterans First Act, to establish the VA Office of Accountability and Whistleblower Protection (OAWP). We believe the OAWP will reinforce steps the VA has taken to elevate and address these critical issues. We look forward to working closely with OAWP as we continue our efforts to protect veterans and whistleblowers.

OSC's work with VA whistleblowers will benefit from having a permanent, high-level point of contact with the statutory authority to identify, correct, and prevent threats to patient care and to discipline those responsible for creating them. The establishment of similar offices at other agencies, including the Federal Aviation Administration, has significantly improved the whistleblower experience at those agencies. And OAWP, with a Senate-confirmed leader, will have the authority and a mandate to make a significant difference. Additionally, we support the Committee's decision to include whistleblower protection criteria in the performance plans of all VA supervisors and managers. This step, which we are in the process of implementing at OSC, will create additional incentives for supervisors to respond constructively to employees' concerns, helping to improve the culture at the VA.

We thank the Committee for the opportunity to provide these views, and for recognizing OSC's work and the contributions of VA whistleblowers.

Sincerely,

A handwritten signature in cursive script, reading "Carolyn N. Lerner".

Carolyn N. Lerner

**Testimony of Special Counsel Carolyn N. Lerner  
U.S. Office of Special Counsel**

**U.S. Senate  
Committee on Homeland Security and Governmental Affairs**

**Nomination of Michael J. Missal to be Inspector General, U.S. Department of Veterans Affairs, and the Honorable Carolyn N. Lerner to be Special Counsel, Office of Special Counsel**

**January 12, 2016, 10:00 A.M.**

Chairman Johnson, Ranking Member Carper, and Members of the Committee:

Thank you for inviting me to testify today. I am honored that the President nominated me to serve a second term as head of the Office of Special Counsel (OSC). I would like to thank my family for their support and encouragement over the past 4 ½ years as I took on the new challenge of heading OSC.

I want to acknowledge the OSC leaders who are here with me today. I am very proud to serve with these exemplary public servants. I can say, without hesitation, that OSC is engaged in the most productive period in its history. This productivity is due to the hard work of the individuals in the room today and all of OSC's employees throughout the country, in D.C., Dallas, Detroit, and Oakland.

Our strong results in whistleblower retaliation, whistleblower disclosure, Hatch Act, and Uniformed Services Employment and Reemployment Rights Act (USERRA) cases demonstrate this office's ability to promote better and more efficient government. For example, our work with whistleblowers has prompted improvements in the quality of care provided to veterans at Department of Veterans Affairs (VA) medical centers across the country. And, by protecting and promoting the disclosures of over a dozen Customs and Border Protection whistleblowers, and working with this Committee, we curbed hundreds of millions of dollars of waste and improper overtime payments.

We helped the Air Force better fulfill its sacred mission on behalf of fallen service members and their families and protected the employees who blew the whistle on gross abuses at the Port Mortuary, Dover Air Base. We vigorously enforced the Hatch Act and worked with then-Chairman Akaka and Senator Mike Lee to modernize the Act by limiting the federal government's unnecessary interference with state and local elections. This has allowed OSC to better allocate our resources toward more effective enforcement of this important law. Finally, we have vigorously protected the employment rights of returning service members and helped them to restore successful post-deployment civilian careers in the government.

When I was first nominated as Special Counsel in 2011, I often remarked that OSC was the best kept secret in the federal government. I wanted this to change, so that more employees and taxpayers could benefit from the work of this small but effective agency.

## **U.S. Office of Special Counsel**

January 12, 2016

Page 2 of 4

Our commitment to protecting whistleblowers and other employees, and our efforts to reach out to the federal community, are moving us in the right direction. In 2015, for the first time in the agency's history, we received and resolved over 6,000 cases, a 50 percent increase from 2011, when I took office.

This dramatic increase in filings indicates that whistleblowers believe they can make a difference by bringing a claim to OSC. Studies have shown that the number one reason employees do not report waste, fraud, or abuse is not because they fear retaliation. It is because they do not believe any good will come from their risk. If the number of whistleblower cases is any indication of employees' willingness to raise concerns—and I think it is—then we are certainly moving in the right direction.

Over the past four years, demand for OSC's services has far exceeded our small agency's resources. Given our small size, we have needed to find new and more efficient ways to approach resource management and increasing caseloads. And we have.

OSC's cost to resolve a case is down by 45 percent, leading to record levels of productivity. My efforts to promote greater efficiencies have been large and small. I have focused on being a careful steward of taxpayer dollars by cutting unnecessary expenditures and found better ways to manage our cases.

I have implemented several policy initiatives to better manage our caseload. For example, I reinvigorated our alternative dispute resolution program. Mediation saves OSC, the employee, and the agency time and resources, while often resulting in better solutions for complainants and agencies alike. Advocates for whistleblowers and agency counsel have praised OSC's mediation program and its ability to bring about effective results. And, we are currently experimenting with a new and innovative approach to managing whistleblower cases. The new approach consolidates four OSC positions: intake examiner, disclosure attorney, investigative attorney, and mediator. We are receiving positive feedback from employees and agencies, because they no longer have to communicate with multiple OSC staff when seeking resolution on the same case.

By taking these smart approaches to our growing caseload, and focusing on positive outcomes for whistleblowers and employees, we have managed to generate efficiencies without compromising the quality of OSC's work. Indeed, when evaluating what is arguably the most important statistic for OSC—the number of favorable actions on behalf of whistleblowers and the merit system—we are consistently setting records. In fact, each year since my term began, OSC has reached new milestones.

In 2015, we secured 278 favorable actions for whistleblowers and other employees, up from 201 favorable actions in 2014. Prior to my tenure, the number of favorable actions had dropped to 29, and was consistently below 100 per year throughout the agency's 35-year history. These "victories" for whistleblowers include reinstatement, back pay, and other remedies, such as stays of improper removals or reassignments, and disciplinary actions against those who retaliate. These actions are a key measure of OSC's success.

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

January 12, 2016

Page 3 of 4

While I am proud of these accomplishments, our numbers do not tell the whole story. Statistics cannot capture the true impact and value of OSC's work. Our efforts to support whistleblowers often save lives and spark reforms that prevent wasteful, inefficient, or unsafe practices.

For example, early in my tenure, whistleblowers at the Air Force's Port Mortuary in Dover, Delaware, disclosed misconduct regarding the improper handling of human remains of fallen service members. After OSC reviewed the allegations and made recommendations to congressional oversight committees, the Air Force took important corrective action. OSC's work helped to ensure that problems were identified and corrected, and the Air Force is now better able to uphold its sacred mission on behalf of fallen service members and their families.

In addition, OSC's work with whistleblowers at the Department of Homeland Security (DHS) exposed the Department's longstanding failure to manage hundreds of millions of dollars in annual overtime payments. The lack of adequate safeguards in these overtime payments resulted in a significant waste of taxpayer dollars over many years. Investigations in response to OSC referrals confirmed that overtime payments were routinely provided to individuals who were not eligible to receive them. This work resulted in a series of reforms within DHS, multiple congressional hearings, including by this Committee, and bipartisan support for legislation to revise the pay system for Border Patrol agents that will result in \$100 million in annual cost savings at DHS—an amount roughly four times the size of OSC's annual appropriation.

OSC's work with VA whistleblowers has improved the quality of care for veterans throughout the country and promoted accountability. In numerous reports to the President and Congress, I documented severe shortcomings in VA internal investigations of threats to patient care at VA hospitals throughout the country. This led to an overhaul of the VA's internal medical oversight office, as well as other systemic changes at the VA.

In summary, I am grateful for the opportunity to have served as Special Counsel. But there is still much to be accomplished. If confirmed for a second term, I will look to expand the important work of this office by building on our current successes, continuing to protect VA and all other employees from retaliation, and finding additional ways to utilize our limited resources to build better and more accountable government. I will further increase our efforts to educate federal managers and employees, because the best way to safeguard the merit system and cut waste, fraud, and abuse is by preventing problems from occurring in the first place. By highlighting the important work of whistleblowers and this office, I hope to promote a culture in the government that encourages disclosures of waste and acts quickly to correct identified wrongs.

Mr. Chairman and Ranking Member Carper, thank you for the opportunity to testify today, and for 4 ½ years of a productive relationship that has made our government more accountable, efficient, and safer. I look forward to answering your questions.

\* \* \* \* \*

**Special Counsel Carolyn N. Lerner**

The Honorable Carolyn N. Lerner heads the United States Office of Special Counsel. Her five-year term began in June 2011. Prior to her appointment as Special Counsel, Ms. Lerner was a partner in the Washington, D.C., civil rights and employment law firm Heller, Huron, Chertkof, Lerner, Simon & Salzman, where she represented individuals in discrimination and employment matters, as well as non-profit organizations on a wide variety of issues. She previously served as the federal court appointed monitor of the consent decree in *Neal v. D.C. Department of Corrections*, a sexual harassment and retaliation class action.

Prior to becoming Special Counsel, Ms. Lerner taught mediation as an adjunct professor at George Washington University School of Law, and was mediator for the United States District Court for the District of Columbia and the D.C. Office of Human Rights.

Ms. Lerner earned her undergraduate degree from the Honors College at the University of Michigan, where she was selected to be a Truman Scholar, and her law degree from New York University (NYU) School of Law, where she was a Root-Tilden-Snow public interest scholar. After law school, she served two years as a law clerk to the Honorable Julian Abele Cook, Jr., Chief U.S. District Court Judge for the Eastern District of Michigan.



**Written Testimony of Special Counsel Carolyn N. Lerner  
United States Office of Special Counsel**

**Senate Committee on Veterans' Affairs**

**Hearing on Pending Legislation**

**May 17, 2017**

Chairman Isakson, Ranking Member Tester, and Members of the Committee:

Thank you for the opportunity to submit written testimony on behalf of the Office of Special Counsel (OSC). OSC protects the merit system for over two million civilian employees in the federal government, with a particular focus on investigating and prosecuting allegations of whistleblower retaliation. We offer the following views on the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (the Act), sponsored by Senators Rubio, Tester, Isakson, and Moran.

Since 2014, OSC has received thousands of whistleblower retaliation complaints and disclosures of wrongdoing from Department of Veterans Affairs (VA) employees, far more than from any other agency. Our VA whistleblower cases sparked an overhaul of the VA's internal medical oversight office, highlighted systemic disparate treatment in disciplinary actions taken against whistleblowers, and prompted improvements in the quality of care and access to care at VA hospitals around the country.

Based on this experience, we strongly support the Act's provisions to establish the VA Office of Accountability and Whistleblower Protection (OAWP). We believe the OAWP will reinforce steps the VA has taken already to elevate and address whistleblower protection within the Department. Indeed, the Trump administration recognized the importance of such an office with its April 27, 2017 Executive Order on Improving Accountability and Whistleblower Protection at the VA. The Act takes additional, necessary steps to promote accountability, protect whistleblowers, and improve care at the VA by strengthening and codifying the OAWP.

OSC's work with VA whistleblowers will benefit from having a high-level point of contact with the statutory authority to identify, correct, and prevent threats to patient care and to discipline those responsible for creating them. Our experience with VA whistleblowers demonstrates that an Assistant Secretary with these specific responsibilities will help to avert patient care crises at the early warning stage, before they become systemic threats to patient health and safety. The establishment of similar offices at other agencies, including the Federal Aviation Administration, has significantly improved the whistleblower experience at those agencies. OAWP, with a Senate-confirmed leader, will have the authority and a mandate to make a significant difference.

Additionally, we support the Committee's decision to include whistleblower protection criteria in the performance plans of all VA supervisors and managers. This step, which we implemented at OSC, will create additional incentives for supervisors to respond constructively to employees' concerns, helping to improve the culture at the VA. We thank the Committee for the opportunity to provide these views, and for recognizing OSC's work and the contributions of VA whistleblowers.

**From:** (b)(6)-(b)(7)(C) (HSGAC)  
**To:** Miles, Adam  
**Subject:** Questions for the record  
**Date:** Wednesday, January 13, 2016 1:40:51 PM  
**Attachments:** [Johnson QFR for Lerner.docx](#)  
[McCaskill QFRs for Lerner.docx](#)

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Adam – see the attached questions for the record from Senators Johnson and McCaskill.

(b)(6)-(b)(7)(C)  
*Deputy Chief Counsel – Governmental Affairs*  
U.S. Senate Homeland Security and  
Governmental Affairs Committee  
Chairman Ron Johnson  
202 (b)(7)(C)

**From:** Miles, Adam  
**To:** (b)(6);(b)(7) (Appropriations)  
**Cc:** (b)(6);(b)(7) (Appropriations); (b)(6);(b)(7)(C) (Appropriations); (b)(6);(b)(7) (Appropriations)  
**Bcc:** (b)(6);(b)(7)@appro.senate.gov; (b)(6);(b)(7)@appro.senate.gov  
**Subject:** RE: letter from OSC to Chairmen Kirk and Isakson  
**Date:** Thursday, July 7, 2016 12:01:00 PM  
**Attachments:** OSC to Chairmen Kirk and Isakson 7.7.16.pdf

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Letter attached.

-----Original Message-----

**From:** Miles, Adam  
**Sent:** Thursday, July 07, 2016 12:01 PM  
**To:** (b)(6);(b)(7) (Appropriations)  
**Cc:** (b)(6);(b)(7) (Appropriations); (b)(6);(b)(7)(C) (Appropriations); (b)(6);(b)(7)(C) (Appropriations)  
**Subject:** letter from OSC to Chairmen Kirk and Isakson

(b)(7) and all,

I've attached a letter from Special Counsel Lerner to Chairmen Kirk and Isakson, expressing OSC's support for the Veteran's First Act and outlining our concerns with the Patient Protection Act. We hope to have an opportunity to work with you and Chair Isakson's office to help bring forward legislation that best protects VA whistleblowers. Thanks for considering our views, and please let me know if you'd like to discuss.

Adam  
(202) 254-(b)(7)(C)

**From:** Lerner, Carolyn  
**To:** Skladany, Jon  
**Cc:** Miles, Adam  
**Subject:** RE: Letter to The President re Carolyn Lerner  
**Date:** Thursday, April 20, 2017 4:35:27 PM  
**Attachments:** image001.png

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Thanks very much, Jon. I really appreciate your help with this letter and through the entire process. I'll send a separate hand-written thank-you to Chairman Chaffetz, but in the meantime, I'd be grateful if you could please let him know I truly appreciate his support. I'll let you know what ends up happening.

(b)(6) Best,  
Carolyn

(b)(6)  
(b)(6) **From:** Skladany, Jon [redacted] mail.house.gov]  
**Sent:** Thursday, April 20, 2017 4:28 PM  
**To:** Lerner, Carolyn [redacted]@osc.gov>  
**Cc:** Miles, Adam [redacted]@osc.gov>  
**Subject:** FW: Letter to The President re Carolyn Lerner

Hi Carolyn,

This letter was just transmitted to the White House.

Please let me know if you hear anything!

Jon

---

**From:** Casey, Sharon  
**Sent:** Thursday, April 20, 2017 4:27 PM  
**To:** Skladany, Jonathan  
**Subject:** Letter to The President re Carolyn Lerner

This letter has been transmitted.

(b)(6)



Sharon Ryan Casey  
Deputy Chief Clerk  
Committee on Oversight and Government Reform  
2157 Rayburn Building, Washington, DC 20515  
202-593-[redacted]@mail.house.gov

**From:** Miles, Adam  
**To:** (b)(6):(b)(7)  
**Cc:** (b)(6):(b)(7) (Detailee); Leavitt, Tristan; (b)(6):(b)(7)  
**Subject:** RE: Questions for the Record - OGE OSC MSPB 12-16 Hearing  
**Date:** Wednesday, February 10, 2016 6:54:00 PM  
**Attachments:** QFR OGR 2.10.16 Chair Meadows.docx  
QFR OGR 2.10.16 RM Connolly.docx  
image001.png

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(b)(6):(b)(7)

I've attached Special Counsel Lerner's responses to Chairman Meadows' and RM Connolly's QFRs. Thank for the earlier extension, and apologies for the additional delay. Please let us know if you need any additional information,

Adam

---

**From:** (b)(6):(b)(7)(C) @mail.house.gov]  
**Sent:** Wednesday, January 27, 2016 4:29 PM  
**To:** Miles, Adam  
**Cc:** (b)(6):(b)(7)(C) (Detailee); Leavitt, Tristan; (b)(6):(b)(7) (b)(6):(b)(7)  
**Subject:** RE: Questions for the Record - OGE OSC MSPB 12-16 Hearing

Adam,

Thank you for the update. A one-week extension is fine. We appreciate the notification.

(b)(6):(b)(7)

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**From:** Miles, Adam (b)(7)(C) @osc.gov]  
**Sent:** Wednesday, January 27, 2016 4:25 PM  
**To:** (b)(6):(b)(7)(C) Miles, Adam  
**Cc:** (b)(6):(b)(7)(C) (Detailee); Leavitt, Tristan; (b)(6):(b)(7) (b)(6):(b)(7)  
**Subject:** RE: Questions for the Record - OGE OSC MSPB 12-16 Hearing

(b)(6):(b)

With snow and also staff travel, we're not going to be able to meet the Feb. 2 deadline for submitting responses to the QFRs.

Would it be ok if we provide a complete set of responses on Feb. 9?

Thank you,

Adam

---

**From:** (b)(6);(b)(7)(C)@mail.house.gov  
**Sent:** Tuesday, January 19, 2016 4:41 PM  
**To:** Miles, Adam  
**Cc:** (b)(6);(b)(7)(C) (Detailee); Leavitt, Tristan; (b)(6);(b)(7)  
**Subject:** Questions for the Record - OGE OSC MSPB 12-16 Hearing

Dear Ms. Lerner:

Thank you for appearing before the Subcommittee on Government Operations hearing on December 16, 2015, titled, "Merit System Protection Board, Office of Government Ethics, and Office of Special Counsel Reauthorization."

Pursuant to the direction of the Chairman, the hearing record remains open to permit Members to submit additional questions to the witnesses. Attached are questions from Members.

Thank you,  
(b)(6);(b)(7)(C)



(b)(6);(b)(7)(C)  
Deputy Chief Clerk  
Committee on Oversight and Government Reform  
2157 Rayburn Building, Washington, DC 20515  
202-(b)(6);(b)(7)(C)@mail.house.gov

**From:** Miles, Adam  
**To:** (b)(6);(b)(7)(C) (HSGAC)  
**Subject:** RE: Questions for the record  
**Date:** Friday, January 15, 2016 4:04:00 PM  
**Attachments:** McCaskill QFRs for Lerner.docx  
Johnson QFR for Lerner.docx

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(b)(6): I've attached the QFRs for Chairman Johnson and Sen. McCaskill.

Thank you and please let me know if you need any additional information,

Adam

---

**From:** (b)(6);(b)(7)(C) (HSGAC) (b)(6);(b)(7)(C) @hsgac.senate.gov]  
**Sent:** Wednesday, January 13, 2016 1:41 PM  
**To:** Miles, Adam  
**Subject:** Questions for the record

Adam – see the attached questions for the record from Senators Johnson and McCaskill.

(b)(6);(b)(7)(C)  
*Deputy Chief Counsel – Governmental Affairs*  
U.S. Senate Homeland Security and  
Governmental Affairs Committee  
Chairman Ron Johnson  
202. (b)(7)(C)

**From:** Miles, Adam  
**To:** (b)(6);(b)(7)(C) (Veterans Affairs); (b)(6);(b)(7)(C)@vetaff.senate.gov  
**Cc:** (b)(6);(b)(7)(C)@vetaff.senate.gov; (b)(6);(b)(7)(C) (Veterans Affairs) (b)(6);(b)(7)(C)@vetaff.senate.gov; (b)(6);(b)(7)(C)  
**Subject:** RE: Request written statement for SVAC hearing  
**Date:** Tuesday, May 16, 2017 6:21:00 PM  
**Attachments:** OSC Lerner Testimony VeteransAffairs 05.17.17.pdf

---

(b)(6);(b)(7)(C),

I've attached OSC's statement for the May 17 legislative hearing.

Thank you for the opportunity to provide views, and please let me know if you have any questions,

Adam

---

**From:** (b)(6);(b)(7)(C) (Veterans Affairs) (b)(6);(b)(7)(C)@vetaff.senate.gov]  
**Sent:** Thursday, May 11, 2017 10:02 AM  
**To:** Miles, Adam (b)(7)(C)@osc.gov>  
**Subject:** Request written statement for SVAC hearing

Adam,

Attached is a request for a written statement from OSC on the attached bill being considered at a legislative hearing on May 17, 2017. Please let me know if you have any questions and if this is something you can provide.

Thanks,

(b)(6);(b)(7)(C)

(b)(6);(b)(7)(C)  
Professional Staff Member  
Senate Committee on Veterans' Affairs  
412 Russell Senate Office Building  
Washington, DC 20510  
202-(b)(7)(C)  
[www.veterans.senate.gov](http://www.veterans.senate.gov)



**From:** Miles, Adam  
**To:** (b)(6);(b)(7)(C) (Veterans Affairs)\*  
**Subject:** RE: Senate letter to OSC  
**Date:** Wednesday, December 21, 2016 12:26:00 PM  
**Attachments:** OSC Response to Senator Blumenthal 12.21.16.pdf

---

(b)(6) – I've attached a response to Sen. Blumenthal's letter. Would you be able to distribute to your colleagues?

Also, are you ok with email transmission? I can get a hard copy to you too, but figured this is the most efficient.

Thanks,

Adam

---

**From:** (b)(6);(b)(7)(C) (Veterans Affairs (b)(6);(b)(7)(C)@vetaff.senate.gov]  
**Sent:** Thursday, December 15, 2016 11:16 AM  
**To:** Miles, Adam (b)(6);(C)@osc.gov>  
**Subject:** Senate letter to OSC

Adam, sending you a PDF of a letter led by Sen. Blumenthal to Special Counsel Lerner. Hard copy will leave the Senate today.

Thanks,

(b)(6);(b)(7)

**From:** (b)(6);(b)(7)(C) (Veterans Affairs)  
**To:** Miles, Adam  
**Subject:** Request written statement for SVAC hearing  
**Date:** Thursday, May 11, 2017 10:02:32 AM  
**Attachments:** [5.17.2017 Agenda.pdf](#)  
[DVAAWPA 2017.pdf](#)  
[OSC FTR Invitation.pdf](#)

---

Adam,

Attached is a request for a written statement from OSC on the attached bill being considered at a legislative hearing on May 17, 2017. Please let me know if you have any questions and if this is something you can provide.

Thanks,

(b)(6);(b)(7)(C)

(b)(6);(b)(7)(C)  
Professional Staff Member  
Senate Committee on Veterans' Affairs  
412 Russell Senate Office Building  
Washington, DC 20510  
202-(b)(7)(C)  
[www.veterans.senate.gov](http://www.veterans.senate.gov)

**From:** (b)(6);(b)(7) (Veterans Affairs)  
**To:** Miles, Adam  
**Subject:** Senate letter to OSC  
**Date:** Thursday, December 15, 2016 11:15:49 AM  
**Attachments:** LTR to OSC on DJT Transition.pdf

---

Adam, sending you a PDF of a letter led by Sen. Blumenthal to Special Counsel Lerner. Hard copy will leave the Senate today.

Thanks,

(b)(6);(b)(7)  
(S)

**From:** (b)(6);(b)(7)(Veterans Affairs)  
**To:** Miles, Adam  
**Cc:** (b)(6);(b)(7)(Veterans Affairs); (b)(6);(b)(7)(Veterans Affairs)  
**Subject:** SVAC Meeting request to discuss OSC's views on S.2291 (VA whistleblower bill)  
**Date:** Monday, February 1, 2016 3:30:29 PM  
**Attachments:** OSC Lerner Stmt FTR 11.18.15.pdf

---

Hi Adam,

Hope you're doing well. Writing to request a meeting with SVAC majority and minority staff to discuss OSC's views (attached) on whistleblower legislation, S. 2291, pending before our Committee. Let us know when would be a good time for you and your colleagues.

Thanks,

(b)(6);(b)(7)(

**From:** (b)(6):(b)(7)  
**To:** Miles, Adam  
**Cc:** (b)(6):(b)(7)(C)  
**Subject:** Witness Invitation Letter - Transparency at TSA 3-2  
**Date:** Tuesday, February 14, 2017 6:33:59 PM  
**Attachments:** image003.png  
Lerner-OSC Invitation Transparency at TSA.pdf

---

Dear Ms. Lerner:

Attached please find an invitation letter for the Committee on Oversight and Government Reform hearing on Thursday, March 2, 2017, at 10:00 a.m. in room 2154 Rayburn House Office building.

Please see the Witness Instruction Sheet for details on testimony. Please email an electronic copy of your testimony and bio no later than Tuesday, February 28, 2017, at 10:00 a.m. Please contact us with any questions.

Please confirm receipt of this invitation.

Thank you,

(b)(6):(b)(7)(C)



(b)(6):(b)(7)(C)

Deputy Chief Clerk

Committee on Oversight and Government Reform

2157 Rayburn Building, Washington, DC 20515

202-593-(b)(6):(b)(7)(C)@mail.house.gov

**From:** (b)(6):(b)(7)  
**To:** (b)(6):(b)(7)@mail.house.gov  
**Cc:** Miles, Adam:(b)(6):(b)(7)@mail.house.gov; (b)(6):(b)(7)@mail.house.gov; (b)(6):(b)(7)@mail.house.gov  
**Subject:** Written testimony for "Transparency at TSA"  
**Date:** Tuesday, February 28, 2017 1:23:23 PM  
**Attachments:** Lerner Testimony OGR TSA Hearing 03.02.17.pdf

---

Dear (b)(6):(b)(7)

Attached please find Special Counsel Lerner's written testimony for the Committee on Oversight and Government Reform hearing titled "Transparency at TSA" to take place on Thursday, March 2, 2017 at 10 AM.

Thank you.

Best,

(b)(6):(b)(7)(C)

Confidential Assistant to the Special Counsel

U.S. Office of Special Counsel

p: (202) 254-(b)(7) | f: (202) 254-3711 | e: (b)(6):(b)(7)@osc.gov

**From:** (b)(6) (Judiciary-Rep)  
**To:** (b)(6):(b)(7) (OLA)  
**Cc:** (b)(6):(b)(7) (Judiciary-Rep); (b) (Judiciary-Rep); (b)(6):(b)(7)(C) (Judiciary-Dem); (b)(6):(b)(7) (OLG); Miles, Adam  
**Subject:** 2016-01-08 CEG to DOJ (whistleblower protection)  
**Date:** Friday, January 8, 2016 5:10:47 PM  
**Attachments:** 2016-01-08 CEG to DOJ (whistleblower protection).pdf

---

Hey (b)(6);

Attached is a letter from Chairman Grassley. Please confirm receipt. Please send all formal correspondence electronically in PDF format to me, (b)(6):(b)(7)@judiciary-rep.senate.gov, (b)(6)@judiciary-rep.senate.gov, (b)(6):(b)(7)(C)@judiciary-dem.senate.gov, (b)(6):(b)(7)@usdoj.gov, and amiles@osc.gov, copied above.

Hope you enjoy your weekend.

Best,

(b)(6):(b)(7)(C)  
Investigative Counsel  
Chairman Charles E. Grassley  
U.S. Senate Committee on the Judiciary  
(202) 224-(b)(7)(C)

**From:** (b)(6);(b)(7)(C) Judiciary-Rep)  
**To:** (b)(6);(b)(7)(C) @mail.mil  
**Cc:** (b)(6);(b)(7)(C) @mail.mil; (b)(6);(b)(7)(C) OIG DoD; Miles, Adam; (b)(6);(b)(7)(C) (Judiciary-Dem); (b)(6);(b)(7)(C) Judiciary-Rep); (b)(6);(b)(7)(C) Judiciary-Rep)  
**Subject:** 2016-03-03 CEG to US Army (Whistleblower Retaliation)  
**Date:** Thursday, March 3, 2016 3:04:59 PM  
**Attachments:** 2016-03-03 CEG to US Army MEDCOM (Whistleblower Retaliation).pdf

---

Good afternoon,

Attached please find a letter from Chairman Grassley. Please confirm receipt and send any follow-up correspondence to me and to (b)(7)@judiciary-rep.senate.gov, copied above.

Best regards,

(b)(6);(b)(7)(C)

(b)(6);(b)(7)(C)

Investigative Counsel  
Chairman Charles E. Grassley  
U.S. Senate Committee on the Judiciary  
(202) 224-(b)(6)



**From:** (b)(6);(b)(7)(C) Judiciary-Rep)  
**To:** (b)(6);(b)(7)(C) OIG DoD; (b)(6);(b)(7)(C) OIG DoD  
**Cc:** (b)(6);(b)(7)(C) (HSGAC); (b)(6);(b)(7)(C) (HSGAC); (b)(6);(b)(7)(C) (Armed Services); (b)(6);(b)(7)(C) (Armed Services); (b)(6);(b)(7)(C) (HSGAC); (b)(6);(b)(7)(C) OIG; Miles, Adam; (b)(6);(b)(7)(C) Judiciary-Rep); (b)(6);(b)(7)(C) (Grassley); (b)(6);(b)(7)(C) (Judiciary-Rep); (b)(6);(b)(7)(C) (HSGAC); (b)(6);(b)(7)(C) (Gillibrand); Leavitt, Tristan; (b)(6);(b)(7)(C)  
**Subject:** 2016-06-10 CEG et al. to DOD OIG (Whistleblower Reprisal Investigations)  
**Date:** Friday, June 10, 2016 4:10:50 PM  
**Attachments:** 2016-06-10 CEG et al. to DOD OIG (Whistleblower Reprisal Investigations).pdf

---

(b)(6);(b)(7)(C)

As discussed, attached please find a letter from Senators Grassley, McCaskill, and Gillibrand and Representatives Chaffetz and Cummings to Acting Inspector General Fine. Please confirm receipt and send any follow-up correspondence to the contacts identified in the letter and to

(b)(7)(C) judiciary-rep.senate.gov, copied above.

Please let us know if you have any questions.

Kind regards,

(b)(6);(b)(7)(C)

(b)(6);(b)(7)(C)

Investigative Counsel  
Chairman Charles E. Grassley  
U.S. Senate Committee on the Judiciary  
(202) 224-(b)(6)

**From:** (b)(6);(b)(7)(C) (Judiciary-Rep)  
**To:** (b)(6);(b)(7)(C) (OLA); (b)(6);(b)(7)(C) (USMS)  
**Cc:** (b)(6);(b)(7)(C) (Judiciary-Rep); (b)(6);(b)(7)(C) (Judiciary-Rep); (b)(6);(b)(7)(C) (Judiciary-Dem); (b)(6);(b)(7)(C) (OIG); Mies, Adam  
**Subject:** 2017-03-27 CEG to DOJ USMS (Whistleblower Reprisal and Records Request)  
**Date:** Monday, March 27, 2017 6:01:29 PM  
**Attachments:** 2017-03-27 CEG to DOJ USMS (Whistleblower Reprisal and Records Request).pdf

---

Good afternoon:

Attached please find a letter from Chairman Grassley. Please confirm receipt and send any follow-up correspondence to me and to the individuals and addresses copied above.

Best regards,

(b)(6);(b)(7)(C)

(b)(6);(b)(7)(C)

Investigative Counsel  
Chairman Charles E. Grassley  
U.S. Senate Committee on the Judiciary  
(202) 224-(b)(6);

**From:** (b)(6);(b)(7)(C) (Judiciary-Rep)  
**To:** (b)(6);(b)(7)(C)@oig.dol.gov"; Miles, Adam  
**Cc:** (b)(6);(b)(7)(C) (Judiciary-Rep); (b)(6);(b)(7)(C) (Judiciary-Rep); (b)(6);(b)(7)(C) (HSGAC); (b)(6);(b)(7)(C) (HSGAC); (b)(6);(b)(7)(C) (Judiciary-Dem); (b)(6);(b)(7)(C) (HSGAC)  
**Subject:** 2017-04-04 CEG RHJ to CIGIE OSC (FHFA OIG Allegations)  
**Date:** Tuesday, April 4, 2017 1:04:55 PM  
**Attachments:** 2017-04-04 CEG RHJ to CIGIE OSC (FHFA OIG Allegations).pdf

---

Hello,

Please find attached a letter from Chairmen Chuck Grassley and Ron Johnson to CIGIE Integrity Committee Chair Scott Dahl and OSC Special Counsel Carolyn Lerner. Please send all formal correspondence in PDF to me (b)(6);(b)(7)(C)@judiciary-rep.senate.gov, (b)(6);(b)(7)(C)@judiciary-rep.senate.gov, (b)(6);(b)(7)(C)@hsgac.senate.gov, and (b)(6);(b)(7)(C)@hsgac.senate.gov. In addition, Ranking Member Feinstein's POC (b)(6);(b)(7)(C)@judiciary-dem.senate.gov) and Ranking Member McCaskill's POC (b)(6);(b)(7)(C)@hsgac.senate.gov) are cc'd for future correspondence.

Please acknowledge receipt of this email and attachment.

Thank you,

(b)(6);(b)(7)(C)

(b)(6);(b)(7)(C)

Investigative Counsel

Chairman Charles E. Grassley

Committee on the Judiciary

(202) 224-(b)(6);(b)(7)(C)

**From:** Leavitt, Tristan  
**To:** Lerner, Carolyn; Miles, Adam; (b)(6)-(b)(7)(C)  
**Subject:** 2017-05-02 JEC-EEC to Gowadia-TSA  
**Date:** Tuesday, May 2, 2017 1:58:04 PM  
**Attachments:** 2017-05-02 JEC EEC to Gowadia-TSA.PDF

---

Carolyn et. al,

You were cc'd on the attached letter from the Committee to TSA. A hard copy will be forthcoming, but I thought you might appreciate an electronic copy. Please let me know if you have any questions.

Kindly,  
Tristan

***Tristan Leavitt***  
Senior Counsel  
Chairman Jason Chaffetz  
House Committee on Oversight and Government Reform  
(202) 225-5074 front office  
(202) 225-(b)(6);direct

**From:** (b)(6)-(b)(7) HSGAC)  
**To:** (b)(6)-(b)(7)(C) @va.gov  
**Cc:** (b)(6)-(b)(7) HSGAC); (b)(6)-(b)(7)(C) HSGAC); (b)(6)-(b)(7)(C) (OIG);  
(b)(6)-(b)(7)(C) @va.gov); Miles, Adam; (b)(6)-(b)(7)(C) @mospb.gov); (b)(6)-(b)(7) (Blunt);  
(b)(6)-(b)(7) @mail.house.gov; (b)(6)-(b)(7) HSGAC); (b)(6)-(b)(7) HSGAC)  
**Subject:** Chairman Johnson and RM McCaskill letter to Sec. Shulkin  
**Date:** Wednesday, May 3, 2017 1:16:00 PM  
**Attachments:** 2017-05-03 RHJ CMC to Shulkin re (b)(6).pdf

---

(b)(6);(

Please find attached a letter from Chairman Johnson and Ranking Member McCaskill regarding (b)(6)-(b)(7) at the (b)(6)-(b)(7) VAMC. Please confirm receipt of this letter.

Thank you,

(b)(6)-(b)(7)(C)

Counsel

Committee on Homeland Security and Governmental Affairs

Chairman Ron Johnson (R-WI)

**From:** (b)(6);(b)(7)(C) (Judiciary-Rep)  
**To:** Miles, Adam  
**Subject:** FW: 2016-05-13 CEG to DOJ (Whistleblower Retaliation)  
**Date:** Friday, May 13, 2016 2:57:51 PM  
**Attachments:** 2016-05-13 CEG to DOJ (Whistleblower Retaliation).pdf

---

Hey Adam,

Please see the attached letter on which OSC was copied. This is in reference to the case we recently discussed.

Thanks,

(b)(6);(b)(7)(C)

---

**From:** (b)(6);(b)(7)(C) (Judiciary-Rep)  
**Sent:** Friday, May 13, 2016 2:29 PM  
**To:** (b)(6);(b)(7)(C) (OLA) (JMD); (b)(6);(b)(7)(C) @usdoj.gov>  
**Cc:** (b)(6);(b)(7)(C) (Judiciary-Rep); (b)(6);(b)(7)(C) @judiciary-rep.senate.gov>; (b)(6) Judiciary-Rep (b)(6)@judiciary-rep.senate.gov>; (b)(6);(b)(7)(C) (Judiciary-Dem) (b)(6);(b)(7)(C)@judiciary-dem.senate.gov>  
**Subject:** 2016-05-13 CEG to DOJ (Whistleblower Retaliation)

Hi (b)(6);(b)(7)(C)

Attached is a letter from Chairman Grassley. Please confirm receipt. Please send all formal correspondence electronically in PDF format to me, (b)(6);(b)(7)(C) @judiciary-rep.senate.gov, (b)(6)@judiciary-rep.senate.gov, and (b)(6);(b)(7)(C) @judiciary-dem.senate.gov, copied above.

Thank you,

(b)(6);(b)(7)(C)  
Investigative Counsel  
Chairman Charles E. Grassley  
U.S. Senate Committee on the Judiciary  
(202) 224-(b)(6);(b)(7)(C)

**From:** Lerner, Carolyn  
**To:** Miles, Adam  
**Subject:** FW: Carolyn Lerner Nomination Letter  
**Date:** Thursday, February 9, 2017 4:35:30 PM  
**Attachments:** Lerner OSC Nomination Letter.pdf

---

From: (b)(6);(b)(7)(C) Who is (b)(6);(b)(7)(C)? Someone on Johnson's staff?

---

**From:** (b)(6);(b)(7)(C)@mail.house.gov]  
**Sent:** Thursday, February 09, 2017 4:31 PM  
**To:** Lerner, Carolyn (b)(6);(b)(7)(C)@osc.gov>  
**Subject:** FW: Carolyn Lerner Nomination Letter

Carolyn – just wanted to pass along a copy of the letter the House Whistleblower Protection Caucus sent this week in support of your nomination. We will be sending out a press release on this as well, and sent copies to Sen. Johnson and Counsel McGahn also.

Best,

(b)(6);(b)(7)(C)

---

**From:** (b)(6);(b)(7)(C)  
**Sent:** Monday, February 06, 2017 4:37 PM  
**To:** (b)(6);(b)(7)(C)@hsgac.senate.gov  
**Cc:** (b)(6);(b)(7)(C)  
**Subject:** Carolyn Lerner Nomination Letter

(b)(6);(b)(7)(C)

I wanted to reach out and provide you with a copy of a letter members of the bipartisan House Whistleblower Protection Caucus will be sending to Majority Leader McConnell and Minority Leader Schumer in support of Carolyn Lerner's nomination to serve a second term as Special Counsel. If you have any questions, please don't hesitate to reach out.

Best,

(b)(6);(b)(7)(C)

Legislative Assistant  
Representative Rod Blum (IA-1)  
1108 Longworth House Office Building  
Washington, DC 20515  
(202) 225-(b)(6) (ph)  
(202) 225-(b)(6) (fax)

**From:** (b)(6):(b)(7)(C)  
**To:** Miles, Adam  
**Subject:** FW: Letter from House Ranking Members  
**Date:** Friday, March 3, 2017 6:44:07 PM  
**Attachments:** 03.03.17 - LTR from RMs to IGs re Threats Against Scientific Integrity.pdf

---

Per (b)(6):(b)(7)(C)'s automatic email reply, I'm forwarding this to you. If you would be so kind to make sure this finds its way to the appropriate hands, that would be appreciated.

Thanks,

(b)(6):(b)(7)(C)

---

**From:** (b)(6):(b)(7)(C)  
**Sent:** Friday, March 03, 2017 6:37 PM  
**To:** (b)(6):(b)(7)(C)@oig.doc.gov'; (b)(6):(b)(7)(C)@oig.doc.gov>; (b)(6):(b)(7)(C)@hq.doe.gov'; (b)(6):(b)(7)(C)@hq.doe.gov>; (b)(6):(b)(7)(C)@epa.gov'; (b)(6):(b)(7)(C)@epa.gov>; (b)(6):(b)(7)(C)@oig.hhs.gov'; (b)(6):(b)(7)(C)@oig.hhs.gov>; (b)(6):(b)(7)(C)@doioig.gov'; (b)(6):(b)(7)(C)@doioig.gov>; (b)(6):(b)(7)(C)@nasa.gov'; (b)(6):(b)(7)(C)@nasa.gov>; (b)(6):(b)(7)(C)@nsf.gov'; (b)(6):(b)(7)(C)@nsf.gov>; (b)(6):(b)(7)(C)@nrc.gov'; (b)(6):(b)(7)(C)@nrc.gov>; (b)(6):(b)(7)(C)@osc.gov'; (b)(6):(b)(7)(C)@osc.gov>  
**Cc:** (b)(6):(b)(7)(C)@mail.house.gov>; (b)(6):(b)(7)(C)@mail.house.gov>; (b)(6):(b)(7)(C)@mail.house.gov>; (b)(6):(b)(7)(C)@mail.house.gov>  
**Subject:** Letter from House Ranking Members

Attached you will find a copy of a letter which was sent today to each of your offices from the following committee ranking members of the House of Representatives:

Ms. Eddie Bernice Johnson, Committee on Science, Space, and Technology;  
Mr. Frank Pallone, Committee on Energy and Commerce;  
Mr. Elijah Cummings, Committee on Oversight and Government Reform; and,  
Mr. Raul Grijalva, Committee on Natural Resources.

If you have any questions or concerns, please feel free to contact me at this email address or (202)225-(b)(6):(b)(7)(C)

Thank you for giving this your attention,

(b)(6):(b)(7)(C)

Chief Counsel  
Democratic Staff  
Committee on Science, Space, and Technology



**From:** Leavitt, Tristan  
**To:** Miles, Adam  
**Cc:** (b)(6);(b)(7)(C)  
**Subject:** FW: Letter to Administrator Gabriel WAPA re Investigation Referral  
**Date:** Thursday, March 23, 2017 5:22:02 PM  
**Attachments:** 2017-03-23 JC EC BF SP PG to Gabriel-WAPA - Investigation Referral.pdf

---

Adam,

(b)(5);(b)(6);(b)(7)(C)

Kindly,  
Tristan

**From:** Skladany, Jon  
**To:** Lerner, Carolyn  
**Cc:** Miles, Adam  
**Subject:** FW: Letter to The President re Carolyn Lerner  
**Date:** Thursday, April 20, 2017 4:28:29 PM  
**Attachments:** image003.png  
2017-04-20 JEC EEC to The President - Lerner.pdf

---

Hi Carolyn,

This letter was just transmitted to the White House.

Please let me know if you hear anything!

Jon

---

**From:** Casey, Sharon  
**Sent:** Thursday, April 20, 2017 4:27 PM  
**To:** Skladany, Jonathan  
**Subject:** Letter to The President re Carolyn Lerner

This letter has been transmitted.

(b)(6)



Sharon Ryan Casey  
Deputy Chief Clerk  
Committee on Oversight and Government Reform  
2157 Rayburn Building, Washington, DC 20515  
202-593-  [@mail.house.gov](mailto:sharon.casey@mail.house.gov)

**From:** Miles, Adam  
**To:** (b)(6);(b)(7)  
**Subject:** Fwd: letter to Kirkpatrick  
**Date:** Tuesday, September 13, 2016 4:54:40 PM  
**Attachments:** 9.13.2016-letter-Rep-Kirkpatrick.pdf  
ATT00001.htm

---

(b)(6);(b)(7)(C)

Adam

<9.13.16 letter to Kirkpatrick.docx>

**From:** Miles, Adam  
**To:** (b)(6);(b)(7)(C)  
**Subject:** Fwd: letter to Kirkpatrick  
**Date:** Tuesday, September 13, 2016 4:51:58 PM  
**Attachments:** 9.13.2016-letter-Rep-Kirkpatrick.pdf  
ATT00001.htm

---

(b)(6);(b)(7)(C)

Adam

<9.13.16 letter to Kirkpatrick.docx>

**From:** Miles, Adam  
**To:** (b)(6);(b)(7)(C)  
**Subject:** Fwd: letter to Kirkpatrick  
**Date:** Tuesday, September 13, 2016 4:56:43 PM  
**Attachments:** 9.13.2016-letter-Rep-Kirkpatrick.pdf  
ATT00001.htm

---

(b)(6);(b)(7)(C)

Adam

Begin forwarded message:

**From:** "Miles, Adam" (b)(6);(b)(7)(C)<(b)(6);(b)(7)(C)@osc.gov>  
**Date:** September 13, 2016 at 4:54:39 PM EDT  
**To:** (b)(6);(b)(7)(C)<(b)(6);(b)(7)(C)@mail.house.gov>  
**Subject:** Fwd: letter to Kirkpatrick

**From:** Leavitt, Tristan  
**To:** [Miles, Adam](#)  
**Subject:** Fwd: Letter to The President re Carolyn Lerner  
**Date:** Thursday, April 20, 2017 5:12:25 PM  
**Attachments:** [2017-04-20 JEC EEC to The President - Lerner.pdf](#)  
[ATT00001.htm](#)

---

FYI. Any update on this?

**From:** Miles, Adam  
**To:** (b)(6)-(b)(7)@mail.house.gov; Leavitt, Tristan; (b)(6)-(b)(7)@mail.house.gov  
**Subject:** FYI  
**Date:** Wednesday, May 18, 2016 4:31:00 PM  
**Attachments:** 5.18.16 S.579 OSC Comments (McConnell Reid) LTR.pdf

---

**From:** (b)(6);(b)(7)(C)  
**To:** Miles, Adam  
**Cc:** (b)(6);(b)(7)(C)  
**Subject:** Invitation to Testify  
**Date:** Tuesday, September 6, 2016 4:47:34 PM  
**Attachments:** [image001.png](#)  
[image002.png](#)  
[image003.png](#)  
[image004.png](#)  
[OSC Invite for 09142016 FC Settlement Agreements Hearing.pdf](#)

---

Adam –

Hope all is well with you! Attached is an invitation for OSC to testify at a full committee HVAC hearing next Wednesday on VA settlement agreements with employees.

Please confirm receipt. Thank you!

Regards,

(b)(6);(b)(7)(C)

Professional Staff Member  
Committee on Veterans' Affairs  
Subcommittee on Economic Opportunity  
U.S. House of Representatives



**Please click here to subscribe to the Committee's eNewsletter to stay up-to-date on issues affecting America's veterans.**



**From:** (b)(6);(b)(7)(C) (HSGAC)  
**To:** Miles, Adam  
**Subject:** Lerner JAN 12 HSGAC Transcript  
**Date:** Thursday, January 21, 2016 2:49:29 PM  
**Attachments:** 2016-01-12 Lerner Transcript Cover Letter.pdf  
Lerner Pages 2016-01-12 Missal, Lerner Noms.pdf

---

Hello,

Attached is your transcript of the **January 12<sup>th</sup> Missal and Lerner Nomination** hearing.

These hearing transcript pages are furnished to you so that you may review your testimony and make necessary typographical and grammatical corrections. Other minor clarifying changes are acceptable provided that they do not change the context of your original testimony. Changes in substance are not permitted and excessive editing will be ignored.

Please print out, mark your corrections in red or blue ink, and return the cover letter and just the pages on which you have made corrections. If you have no edits, please note that on the cover letter.

To assure that your corrections appear in the final print, this transcript must be returned to the committee by: **Friday, February 19, 2016.**

Please return transcript (by mailing, faxing, or scanning and e-mailing) to:

(b)(6);(b)(7)(C)  
Hearing Clerk  
Committee on Homeland Security and Governmental Affairs  
SD-340  
Washington, DC 20510-6250

(b)(6);(b)(7)(C) @hsgac.senate.gov

(b)(6);(b)(7)(C)  
*Hearing Clerk*  
Homeland Security and Governmental Affairs Committee  
U.S. Senate  
Main: 202-224-(b)(7)(C)  
Direct: 202-224-(b)(7)(C)

**From:** (b)(6);(b)(7)(C) (Judiciary-Rep)  
**To:** Miles, Adam  
**Cc:** (b)(6);(b)(7)(C) HSGAC  
**Subject:** letter from Chairman Johnson and Chairman Grassley  
**Date:** Thursday, June 30, 2016 11:51:52 AM  
**Attachments:** 2016-06-30 CEG + RJ to CIGIE (FHFA-OIG peer review).pdf

---

Adam-

A letter from Senator Grassley and Senator Johnson to CIGIE Chair Horowitz on the FHFA OIG matter we have been reviewing.

Thanks,

(b)(6);(b)(7)(C)  
Investigative Counsel  
Chairman Charles E. Grassley  
U.S. Senate Committee on the Judiciary  
(202) 224-(b)(7)(C)

**From:** (b)(6);(b)(7)(C) (HSGAC)  
**To:** Miles, Adam  
**Cc:** (b)(6);(b)(7)(C) (HSGAC)  
**Subject:** Letter from Chairman Johnson to USSS Director Clancy  
**Date:** Monday, February 6, 2017 5:41:15 PM  
**Attachments:** 2017.02.06 RHJ to Clancy (USSS) re Denver SAIC.PDF

---

Hey Adam,

Please see the attached letter from Chairman Johnson to USSS Director Clancy. Ms. Lerner was cc'd.

(b)(6);(b)(7)(C)

(b)(6);(b)(7)(C)

Counsel

Committee on Homeland Security and Governmental Affairs

Senator Ron Johnson, Chairman

(202) 224-(b)(7)(C)

**From:** (b)(6):(b)(7) (HSGAC)  
**To:** (b)(6):(b)(7)@va.gov  
**Cc:** (b)(6):(b)(7)(C) (HSGAC); (b)(6):(b)(7)(C) (OIG); (b)(6):(b)(7)(C)@va.gov; Miles, Adam; (b)(6):(b)(7)(C)@mspb.gov; (b)(6):(b)(7)(C)@va.gov; (b)(6):(b)(7)(C) (HSGAC)  
**Subject:** Letter from Chairman Ron Johnson on (b)(6):(b)(7)  
**Date:** Wednesday, January 25, 2017 11:24:09 AM  
**Attachments:** 2017-01-25-RHJ-VA-Sec-Retaliatory-Actions-(b)(6):(b)(7).pdf

---

(b)(6):(b)(7)

Please find attached a letter from Chairman Ron Johnson concerning (b)(6):(b)(7)(C) of the (b)(6):(b)(7)(C) Veterans Affairs Medical Center.

Please confirm receipt of this letter.

Thank you,

(b)(6):(b)(7)(C)

Counsel

Committee on Homeland Security and Governmental Affairs  
Chairman Ron Johnson (R-WI)

**From:** (b)(6);(b)(7)(C) (HSGAC)  
**To:** Miles, Adam  
**Cc:** (b)(6);(b)(7)(C) (Judiciary-Rep)  
**Subject:** Letter from Chairmen Johnson and Grassley to VA  
**Date:** Tuesday, February 16, 2016 11:41:00 AM  
**Attachments:** 2016-02-16 RHJ + CEG to VA re (b)(6);(b)(7)(C).pdf

---

Hey Adam,

Please see the attached letter from Chairmen Johnson and Grassley to the VA. Ms. Lerner was cc'd.

Thanks,

(b)(6);(b)(7)(C)

Counsel

Committee on Homeland Security and Governmental Affairs

Senator Ron Johnson, Chairman

(202) 224-(b)(6);(b)(7)(C)

**From:** (b)(6);(b)(7) (HSGAC)  
**To:** Miles, Adam  
**Cc:** (b)(6);(b)(7) (HSGAC)  
**Subject:** Letter from Senator Carper Referring Possible Hatch Act Violation  
**Date:** Friday, April 7, 2017 4:16:37 PM  
**Attachments:** 2017-04-07 Carper Letter to OSC re Hatch Act.pdf

---

Adam,

I hope you are well. Attached, please find a letter from Senator Carper to Special Counsel Lerner. Kindly confirm receipt and let us know if you have any questions.

Regards,  
Portia

(b)(6);(b)(7)(C) | Democratic Chief Counsel  
Senator Tom Carper (D-DE), Ranking Member  
Permanent Subcommittee on Investigations  
Committee on Homeland Security & Governmental Affairs  
(202) 224-(b)(6);(C)

**From:** (b)(6);(b)(7) (Armed Services)  
**To:** Miles, Adam; (b)(6);(b)(7)(C) (OIG)  
**Cc:** (b)(6);(b)(7)(C) (McCain)  
**Subject:** Letter from Senator McCain to Secretary of VA McDonald  
**Date:** Monday, February 8, 2016 3:18:14 PM  
**Attachments:** 2.5.16 Letter to Secretary McDonald - Tucson VA Allegations.pdf

---

Please see attached letter to the Secretary of the VA which includes a carbon copy for your respective organizations.

(b)(6);(b)(7)(C)

Professional Staff Member  
Senate Armed Services Committee

**From:** (b)(6);(b)(7)(C) (Judiciary-Rep)  
**To:** Miles, Adam  
**Cc:** (b)(6);(b)(7)(C) (HSGAC); (b)(6);(b)(7)(C) (Judiciary-Rep)  
**Subject:** letter to FHFA-OIG  
**Date:** Tuesday, May 17, 2016 1:14:32 PM  
**Attachments:** 2016-05-17 CEG + RHJ to FHFA-OIG (private attorneys).pdf

---

Adam-

Another in our group of letters to FHFA OIG.

(b)(6);(b)(7)(C)

Investigative Counsel

Chairman Charles E. Grassley

U.S. Senate Committee on the Judiciary

(202) 224-(b)(6);(b)(7)(C)



**From:** (b)(6);(b)(7)(C) (Judiciary-Rep)  
**To:** Miles, Adam  
**Subject:** letter to FHFA-OIG  
**Date:** Wednesday, June 8, 2016 10:38:28 AM  
**Attachments:** 2016-06-08 CEG + RHJ to FHFA-OIG (FHFA-OIG VSIP).pdf

---

Adam-

Another letter from Senator Grassley and Senator Johnson to FHFA OIG.

Thanks,

(b)(6);(b)(7)(C)

Investigative Counsel

Chairman Charles E. Grassley

U.S. Senate Committee on the Judiciary

(202) 224-(b)(6);(b)(7)(C)

**From:** (b)(6) (Shaheen)  
**To:** Miles, Adam  
**Subject:** Letter to Ms. Lerner  
**Date:** Tuesday, September 13, 2016 5:29:24 PM  
**Attachments:** 2016-09-13. Shaheen Letter. OSC..pdf

---

Hi Adam,

Please see the attached letter from Sen. Shaheen to Ms. Lerner. Hoping you can help us get it in the right hands.

Thanks, Patrick

(b)(6)

Senator Jeanne Shaheen  
506 Hart Senate Office Building  
(202)224-(b)(6);(b)

**From:** (b)(6);(b)(7)(C) (HSGAC)  
**To:** Miles, Adam  
**Subject:** Letter to PMG regarding political activity  
**Date:** Wednesday, November 30, 2016 11:24:50 AM  
**Attachments:** 2016-11-30 RHJ to PMG Brennan re Hatch Act.pdf

---

Good Morning,

Attached is a letter that Chairman Johnson sent to the Postmaster General today about reports of improper political activity at the United States Postal Service, which has been cc'ed to the Special Counsel. We initially reported these concerns to the Hatch Act Office in October, so the OSC should already be aware of these concerns, but we wanted to make sure your office and the Special Council are aware of the communication between the Chairman and the PMG. Please let me know if you have any questions.

Sincerely,

(b)(6);(b)(7)(C)

Professional Staff Member

Committee on Homeland Security and Governmental Affairs

202-228-(b)(6);(b)

**From:** Miles, Adam  
**To:** (b)(6);(b)(7)(F)@vetaff.senate.gov"; (b)(6);(b)(7)(F) (Veterans Affairs) (b)(6);(b)(7)(F)@vetaff.senate.gov  
**Subject:** letter  
**Date:** Wednesday, May 3, 2017 3:35:00 PM  
**Attachments:** OSC to SVAC VA OAWP 05.03.17.pdf

---

(b)(6); and (b)(6);(b)(7)(F)

Please find attached an update support letter from Carolyn Lerner on the Office of Accountability and Whistleblower Protection.

Thanks and please let me know if you have any questions,

Adam

**From:** (b)(6):(b)(7)(HSGAC)  
**To:** Miles, Adam  
**Cc:** (b)(6):(b)(7)(HSGAC); (b)(6):(b)(7)(HSGAC); (b)(6):(b)(7)(Kirk)  
**Subject:** Letters from Chairman Johnson and Kirk to the VA and VA OIG  
**Date:** Friday, March 4, 2016 12:08:44 PM  
**Attachments:** 2016-03-04 RHJ Kirk to VA OIG whistleblower violations.pdf  
2016-03-04 RHJ Kirk to VA Secretary whistleblower violations.pdf

---

Hey Adam,

Please find attached to letters regarding OSC's recent letter to the president. OSC was cc'd.  
Thank you.

Sincerely,

(b)(6):(b)(7)(C)

Senior Investigator  
Chairman Ron H. Johnson (WI)  
U.S. Senate Homeland Security and Governmental Affairs Committee  
Washington, DC  
(P) 202-224-(b)(6):d

**From:** Miles, Adam  
**To:** (b)(6);(b)(7)(C)@mcconnell.senate.gov; (b)(6);(b)(7)(C)@reid.senate.gov  
**Subject:** Office of Special Counsel views on S. 579, the Inspector General Empowerment Act  
**Date:** Wednesday, May 18, 2016 1:12:00 PM  
**Attachments:** 5.18.16 S.579 OSC Comments (McConnell Reid) LTR.pdf

---

(b)(6);(b)(7)(C) and (b)(6);(b)(7)(C)

I've attached a letter from Special Counsel Carolyn Lerner, expressing the views of the Office of Special Counsel (OSC) on S. 579, the Inspector General Empowerment Act of 2015. Thank you, and please let me know if you have any questions.

Adam Miles  
U.S. Office of Special Counsel  
(202) 254-(b)(6);(b)(7)(C)

**From:** (b)(6),(b)(7)  
**To:** (b)(6),(b)(7)(Veterans Affairs)  
**Cc:** (b)(6),(b)(7) Miles, Adam: (b)(6),(b)(7)(C)  
**Subject:** OSC Lerner Testimony on Pending Legislation  
**Date:** Tuesday, June 28, 2016 10:32:06 AM  
**Attachments:** 6.29.16 SVAC OSC Lerner Testimony on Pending Legislation.pdf

---

(b)(6),(b)(7),

Please find attached Special Counsel Lerner's testimony on pending legislation for tomorrow's hearing.

Please let me know if you require any additional information.

Thanks,

(b)(6):(b)(7)(C)

*Senior Assistant to the Special Counsel*

U.S. Office of Special Counsel

p: (202) 254-(b)(6) | f: (202) 254-3711 | e: (b)(6)@osc.gov

*"Safeguarding Employee Rights, Holding Government Accountable."*

**From:** Miles, Adam  
**To:** (b)(6):(b)(7)(C) [HSGAC]; (b)(6):(b)(7)(C)@hsgac.senate.gov  
**Cc:** (b)(6):(b)(7)(HSGAC); (b)(6):(b)(7)@hsgac.senate.gov; (b)(6):(b)(7)(HSGAC); (b)(6):(b)(7)@hsgac.senate.gov  
**Subject:** OSC letter on HSGAC legislation  
**Date:** Thursday, May 26, 2016 4:00:00 PM  
**Attachments:** 05.26.16 OSC to Chairman Johnson on Government Reform.pdf

---

(b)(6):/

Please find attached a letter from Special Counsel Lerner on HSGAC government reform and OSC reauthorization legislation. Thank you, and please let me know if you have any questions,

Adam



**From:** Miles, Adam  
**To:** (b)(6):(b)(7)@vetaff.senate.gov;(b)(6):(b)(7) Veterans Affairs;(b)(6):(b)(7)@vetaff.senate.gov;(b)(6):(b)(7) Veterans Affairs;(b)(6):(b)(7)@vetaff.senate.gov  
**Subject:** OSC letter to Chairmen Isakson and Kirk  
**Date:** Thursday, July 7, 2016 11:42:00 AM  
**Attachments:** OSC to Chairmen Kirk and Isakson 7.7.16.pdf

---

(b)(6):(b)(7)(C)

Please find attached a letter from Special Counsel Lerner, expressing our support for the Veterans First Act and raising concerns about Patient Protection Act, which as you know, was recently included in VA spending legislation. Moving forward, we'd appreciate the opportunity to work with you and Chairman Kirk's office to bring forward legislation that will best advance the interests of VA whistleblowers. In our view, the Veterans First Act will do just that. Please let me know if you have any questions,

Adam

(202) 254-(b)(6):(b)(7)

p.s. (b)(6):(b)(7) could you please let me know who on Sen. Tester's VA approps staff should receive this letter? Thank you.

**From:** Miles, Adam  
**To:** (b)(6):(b)(7)(HSGAC) (b)(6):(b)(7)@hsgac.senate.gov; (b)(6):(b)(7)(HSGAC)\*  
**Cc:** (b)(6):(b)(7)(Judiciary-Rep) (b)(6):(b)(7)@judiciary-rep.senate.gov  
**Subject:** OSC letter to HSGAC on OSC re-auth  
**Date:** Monday, March 13, 2017 4:16:00 PM  
**Attachments:** OSC letter to HSGAC 03.13.17 OSC re-auth.pdf

---

Thank you all for your work on this. Please let me know if you have any questions,

Adam

**From:** Intern (b)(6) (VP)  
**To:** Miles, Adam  
**Subject:** OSC Report for Resubmission to Senate  
**Date:** Thursday, October 20, 2016 1:28:24 PM  
**Attachments:** [201610201312.pdf](#)

---

Hi Adam,

Following up on our conversation earlier today. Attached here is a copy of the cover letter to a report we received. Unfortunately, we cannot submit the report further without an original, wet signature. The one we received appeared to be a photocopy of the original. If you guys could send us the original, that would be great. Let me know if you need our address again – please mark the envelope to my attention, to ensure I get it.

Thanks!

(b)(6);(b)(7)(C)

*Office of the Vice President*

S-212, The Capitol

Phone: 202.224.2424 | Fax: 202.228.1475

**From:** (b)(6):(b)(7)  
**To:** Miles, Adam  
**Cc:** (b)(6):(b)(7) (Detailer); Leavitt, Tristan; (b)(6):(b)(7)  
**Subject:** Questions for the Record - OGE OSC MSPB 12-16 Hearing  
**Date:** Tuesday, January 19, 2016 4:41:07 PM  
**Attachments:** image003.png  
2016-01-19 Meadows to Lerner-OSC - QFRs 12-16 OGE OSC MSPB Hearing.pdf

---

Dear Ms. Lerner:

Thank you for appearing before the Subcommittee on Government Operations hearing on December 16, 2015, titled, "Merit System Protection Board, Office of Government Ethics, and Office of Special Counsel Reauthorization."

Pursuant to the direction of the Chairman, the hearing record remains open to permit Members to submit additional questions to the witnesses. Attached are questions from Members.

Thank you,

(b)(6):(b)(7)(C)



(b)(6):(b)(7)(C)  
Deputy Chief Clerk  
Committee on Oversight and Government Reform  
2157 Rayburn Building, Washington, DC 20515  
202-593-(b)(6):(b)(7)(C)@mail.house.gov

JOHN MCCAIN  
ARIZONA

CHAIRMAN, COMMITTEE ON  
ARMED SERVICES  
COMMITTEE ON HOMELAND SECURITY  
AND GOVERNMENTAL AFFAIRS  
COMMITTEE ON INDIAN AFFAIRS

## United States Senate

February 5, 2016

The Honorable Robert McDonald  
Secretary of Veterans Affairs  
U.S. Department of Veterans Affairs  
810 Vermont Avenue  
Washington, DC 20420

Dear Secretary McDonald,

I write to you regarding recent allegations by patients and former staff that the Tucson Veterans Affairs Medical Center (VAMC) is unable to retain its medical providers and that this is having a severe impact on patient wait times for medical appointments. I am concerned that, by the VA's own metrics, the number of recent patient appointments taking thirty days or more to schedule has risen significantly.<sup>1</sup>

Allegations have also been raised that, due to reduced staffing, medical equipment may have become contaminated and inappropriately reused. Moreover, staff who have spoken out about these problems claim they have been retaliated against by VA leadership.

As you know, I have repeatedly raised issues regarding the VA's failed responses to allegations of whistleblower retaliation in Arizona. Additionally, the United States Office of Special Counsel wrote to President Obama and later testified to the Senate Homeland Security and Governmental Affairs Committee last year highlighting numerous cases of whistleblower retaliation at the VA and urged the VA to examine the need for systemic changes in disciplinary procedures to correct the many problems in this area.<sup>2</sup> I ask you to ensure that allegations of whistleblower retaliation at the Tucson VAMC are thoroughly investigated.

These serious allegations also raise questions about whether the VA is using all of the tools and resources it has been granted through the *Veterans Access, Choice, and Accountability Act* and subsequent legislation to improve the quality and timeliness of medical care at the VA. The Veteran Choice Card Program was created specifically to prevent excessive wait times at VA hospitals and clinics by allowing veterans to receive care in the community if they cannot access care at a VA facility. Please identify what specific steps the VA has taken to ensure that it is using all available tools and resources to ensure that the Choice Card program is being effectively implemented in the veterans community in and around the Tucson VAMC.

---

<sup>1</sup> U.S. Department of Veterans Affairs, Veterans Health Administration, "Patient Access Data," <http://www.va.gov/health/access-audit.asp>.

<sup>2</sup> United States Office of Special Counsel, "Testimony of Carolyn Lerner, Special Counsel," United States Senate Committee on Homeland Security and Governmental Affairs, September 22, 2015, <https://osc.gov/Resources/Testimony-Lerner-2015-09-22.pdf>.

218 RUSSELL SENATE OFFICE BUILDING  
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(602) 952-2410

122 NORTH CORTEZ STREET  
SUITE 108  
PRESCOTT, AZ 86301  
(928) 445-0833

407 WEST CONGRESS STREET  
SUITE 103  
TUCSON, AZ 85701  
(520) 670-6334

TELEPHONE FOR HEARING IMPAIRED  
(602) 952-0170

Also, Congress has given the VA billions of dollars in emergency spending and direct-hire authority for hiring new doctors and nurses. The VA's Patient-Centered Community Care (PC3) provider network has progressed to the point where the inability of a veteran to see a primary care doctor within 30 days should be very rare. Perhaps the most troubling allegation is that VA has not yet changed its culture to eliminate retaliation against whistleblowers who identify problems and issues with veteran care.

I look forward to your timely response to these troubling allegations.

Sincerely,



John McCain  
United States Senator

cc: Department of Veterans Affairs, Office of Inspector General  
cc: United States Office of Special Counsel

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

March 3, 2017

The Honorable Arthur A. Elkins, Jr.  
Environmental Protection Agency  
Office of Inspector General  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

The Honorable Mary L. Kendall  
Office of Inspector General  
U.S. Department of the Interior  
1849 C Street NW  
Washington, DC 20240

The Honorable Peggy E. Gustafson  
U.S. Department of Commerce  
Office of Inspector General  
1401 Constitution Avenue NW  
Washington, DC 20230

The Honorable Paul K. Martin  
NASA Office of Inspector General  
300 E. Street, SW  
Suite 8V39  
Washington, DC 20546

The Honorable April Stephenson  
U.S. Department of Energy  
Office of Inspector General  
1000 Independence Avenue, SW  
Washington, DC 20585

The Honorable Allison Lerner  
National Science Foundation  
Office of Inspector General  
4201 Wilson Boulevard, Suite 1135  
Arlington, Virginia 22230

The Honorable Daniel R. Levinson  
U.S. Department of Health & Human Services  
Office of Inspector General  
330 Independence Avenue, SW  
Washington, DC 20201

The Honorable Hubert Bell  
U.S. Nuclear Regulatory Commission  
Office of the Inspector General  
11555 Rockville Pike  
Rockville, MD 20852

Dear Inspectors General,

We write to you out of our deep concern that the scientific integrity of our nation's research and development agencies be maintained by the Trump Administration. As an Inspector General for such an agency, we urge you to remain vigilant against threats to scientific integrity and independence at the agency you oversee.

The new administration has, on numerous occasions, articulated viewpoints that run counter to mainstream scientific thought - for instance on the issue of climate change. Those viewpoints are not a valid basis to harass, intimidate, or undermine the tens of thousands of dedicated public servant scientists who work for the federal government.

News reports during the Presidential transition period have highlighted specific areas of concern that we expect you will monitor in your capacity as Inspector General. First, on December 9, the

Washington Post reported<sup>1</sup> that the Trump transition team submitted a detailed questionnaire to Department of Energy (DOE) employees seeking various information, such as their professional society memberships and the names of employees who had worked on specific projects, including projects related to climate change.<sup>2</sup> The article went on to cite an Energy Department official who called the 74-question form:

“a hit list and said Trump’s team appears to be going after top scientists and employees who work on subjects ranging from the Iran nuclear deal to the internal operations of the national energy labs... The official said questions about professional society memberships and websites that staff at the Energy Department’s national laboratories maintain or contribute to could raise questions about Trump’s commitment to scientific independence – a fundamental tenet at the agency.”

While a transition spokesperson subsequently attempted to downplay the questionnaire, these types of questions are troubling in that they appear to target scientists and other individuals based on their areas of expertise and the findings of their scientific work.

The actions at DOE, unfortunately, do not appear to be an outlier. Members named to the transition team at the Environmental Protection Agency (EPA) have a long history of harassing climate scientists. Two reported members of the EPA transition team, David Schnare of E&E Legal and Chris Horner of the Competitive Enterprise Institute,<sup>3</sup> have used open records requests laws to harass mainstream climate scientists. The fact that individuals like Mr. Schnare and Mr. Horner were put into leadership roles for the EPA transition does not inspire confidence that the administration will respect the rights of the many scientists in the agency to work free from harassment by political appointees or that the agency will maintain an atmosphere fostering open exchange of ideas.

Another issue that has been reported on during the transition is data retention and continuity. The Washington Post reported in December that climate scientists are organizing to copy government climate data onto private servers to safeguard the data from being interfered with or deleted during the Trump Administration.<sup>4</sup> Another story from Politico noted that researchers are copying “Obamacare” data in case those data are hidden or deleted in the new administration.<sup>5</sup>

We share the concerns of the scientific community that public access to federal scientific data could be limited or curtailed by the new administration. Even the disruption of continuous data

---

<sup>1</sup> *Trump transition team seeks details on Energy Dept. Workers* Washington Post (Dec. 9, 2016). (online at [https://www.washingtonpost.com/business/trump-transition-team-seeks-details-on-energy-dept-workers/2016/12/09/3a4aeab2-be4b-11e6-ae79-bec72d34f8c9\\_story.html?utm\\_term=.40c75a2b13b2](https://www.washingtonpost.com/business/trump-transition-team-seeks-details-on-energy-dept-workers/2016/12/09/3a4aeab2-be4b-11e6-ae79-bec72d34f8c9_story.html?utm_term=.40c75a2b13b2)).

<sup>2</sup> *Questions for DOE*, Document (online at <https://www.washingtonpost.com/apps/g/page/politics/questions-posed-by-president-elect-trumps-transition-team-to-energy-department-officials/2143/>).

<sup>3</sup> *Agency’s FOIA adversary now on the inside*, Greenwire (December 12, 2016), *These are the climate myths guiding Trump’s EPA team*, Washington Post (December 13, 2016) (online at <https://www.washingtonpost.com/news/energy-environment/wp/2016/12/13/these-are-the-climate-myths-guiding-trumps-epa-team/>).

<sup>4</sup> *Scientists are frantically copying U.S. climate data, fearing it might vanish under Trump*, Washington Post (December 13, 2016) (online at <https://www.washingtonpost.com/news/energy-environment/wp/2016/12/13/scientists-are-frantically-copying-u-s-climate-data-fearing-it-might-vanish-under-trump/>).

<sup>5</sup> *Researchers race to copy Obamacare data for fear it will vanish*, Politico (December 21, 2016) (online at <http://www.politico.com/story/2016/12/obamacare-health-data-trump-232869>).



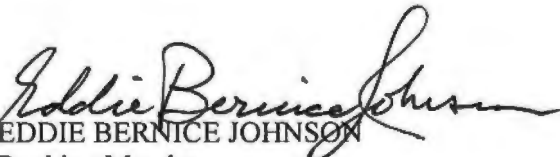
sets, such as climate data sets, could significantly affect their efficacy because they derive much of their value from their continuity.


Scientific data collected or produced by the federal government are a public good. In many cases, these data were produced at great expense to the U.S. taxpayers. Information and data should be protected no less vigorously than real property owned by the federal government. Inspectors General have a key oversight role to ensure these public resources are protected from potential political interference.

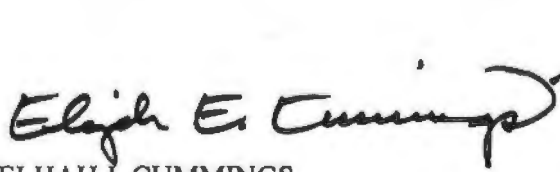
Inspectors General are provided with broad powers to act within their agencies to hold officials accountable for their compliance with the law. You play a critical role in the effort to safeguard taxpayers' interests in ensuring a sound and effective government. The U.S. has long been recognized as the world's leader in science and technology, largely due to sustained federal investments in research and development. As the new administration takes power, we expect that you will devote your attention and considerable resources to ensuring that all federal agencies maintain their high standards of scientific integrity and independence that are essential to our nation's continued global leadership in science and technology.

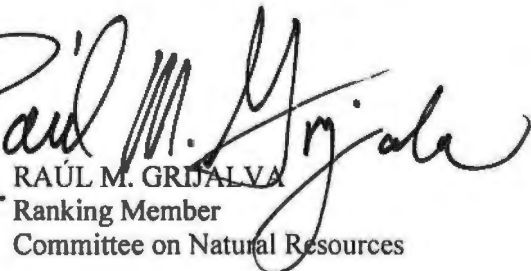
Thank you for your attention to this matter.

Sincerely,

  
EDDIE BERNICE JOHNSON  
Ranking Member  
Committee on Science, Space, and Technology

  
FRANK PALLONE, JR.  
Ranking Member  
Committee on Energy and Commerce

  
ELIJAH J. CUMMINGS  
Ranking Member  
Committee on Oversight and Government Reform

  
RAÚL M. GRIJALVA  
Ranking Member  
Committee on Natural Resources

Cc: The Honorable Carolyn Lerner  
Office of Special Counsel  
1730 M Street, NW Suite 218  
Washington, DC 20036-45050



U.S. OFFICE OF SPECIAL COUNSEL  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

The Special Counsel

May 26, 2016

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security and Governmental Affairs  
United States Senate  
340 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: Office of Special Counsel Comments on Government Reform Legislation

Dear Chairman Johnson:

Thank you for requesting the U.S. Office of Special Counsel's (OSC) views on the Bolster Accountability to Drive Government Efficiency and Reform Washington Act (the Act). We strongly support the Committee's decision to include the Office of Special Counsel Reauthorization Act in your government reform legislative package. In addition to the OSC Reauthorization Act, I highlight two additional titles within the Act that will promote stronger whistleblower protections and help to curb government waste, fraud, and abuse.

The OSC Reauthorization Act strengthens OSC's authorities, providing us with additional tools to protect whistleblowers and save taxpayer dollars. Importantly, the legislation clarifies OSC's authority to request and receive all agency information. The public interest in a transparent and accountable government is best served by ensuring OSC's authority to access all information, including certain privileged information. Agencies should not be able to shield managers from accountability or hide retaliatory conduct by withholding information from OSC.

Congress has tasked OSC with determining the legality of personnel actions taken against whistleblowers. Our investigations typically assess whether an agency acted for legitimate, non-retaliatory reasons, or whether agency justifications are really a pretext for retaliating against an employee. To make these assessments, it is often necessary to review communications between management officials and agency counsel. In fact, these communications can demonstrate that management officials acted responsibly, sought legal advice, and had a legitimate basis for disciplining a purported whistleblower. While agencies typically comply with OSC requests for this highly relevant material, some agencies assert that these types of communications are privileged and withhold this information from OSC. In such cases, OSC must engage in prolonged disputes over access to information or attempt to complete our investigation without the benefit of

The Honorable Ron Johnson  
May 26, 2016  
Page 2 of 3

these important communications. This undermines the effectiveness of the whistleblower law and prolongs OSC investigations.

In clarifying OSC's authority to request and receive this information, we note that the legislation also states that the production of privileged material to OSC will not constitute a waiver of the privilege by the agency in any other context or forum. This is an appropriate resolution that protects the interests of agencies, while also promoting merit system principles and protecting employees from retaliation.

In addition to clarifying OSC's authority to access agency information, the OSC Reauthorization Act:

- Prohibits retaliatory searches of employee medical records, a necessary reform that will better protect whistleblowers from the Department of Veterans Affairs;
- Strengthens OSC's authority to protect employees from other forms of retaliatory investigations;
- Restores OSC and Merit Systems Protection Board jurisdiction to review claims of whistleblower retaliation by employees in sensitive positions;
- Requires agencies to incorporate whistleblower protection principles into the performance plans for managers and supervisors;
- Requires agencies to complete OSC's whistleblower certification program;
- Promotes efficiency in OSC investigations and allows us to focus limited resources on meritorious cases;
- Protects OSC employees by codifying a requirement for OSC to enter into an agreement for services with an Inspector General, consistent with OSC's current agreement with the National Science Foundation OIG;
- Reauthorizes OSC's programs through 2021.

Each of these important reforms will strengthen OSC's ability to carry out our good government mission on behalf of federal workers and the taxpayers.

In addition to the OSC Reauthorization Act, the Committee's government reform legislation incorporates the Inspector General Empowerment Act, which will also help to curb government waste and prevent retaliation in the federal workplace. OSC works closely with Inspectors General to root out waste, fraud, and abuse after OSC receives whistleblower disclosures from government workers. Providing the Inspectors General with additional tools to obtain information, including testimony from former employees, contractors, or grantees, will enhance these efforts.

The Special Counsel

The Honorable Ron Johnson

May 26, 2016

Page 3 of 3

The government reform package also incorporates the Administrative Leave Act of 2016, which promotes accountability in government personnel decisions. Too often, government agencies have improperly used administrative leave, either to delay appropriate accountability actions or to inappropriately idle and isolate whistleblowers. Both scenarios result in significant waste of taxpayer dollars.

The Committee's government reform legislation, which includes these and other important measures, will have a positive impact on good government. Thank you for considering these views.

Respectfully,

A handwritten signature in cursive script, reading "Carolyn N. Lerner".

Carolyn N. Lerner

cc: The Honorable Thomas R. Carper, Ranking Member

**UNITED STATES SENATE  
COMMITTEE ON VETERANS' AFFAIRS**

**Hearing: Pending Legislation**

**May 17, 2017, 2:30 p.m.  
Russell Senate Office Building, Room 418**

**S. 23, Biological Implant Tracking and Veteran Safety Act of 2017 (Cassidy, Tester)**

**S. 112, Creating a Reliable Environment for Veterans' Dependents Act (Heller, Murray)**

**S. 324, State Veterans Home Adult Day Health Care Improvement Act of 2017 (Hatch, Hirono, Boozman, Heller, Manchin, Murray, Rounds, Sanders, Tillis)**

**S. 543, Performance Accountability and Contractor Transparency Act of 2017 (Tester, Murray, Manchin)**

**S. 591, Military and Veteran Caregiver Services Improvement Act of 2017 (Murray, Tester, Sanders, Brown, Blumenthal, Hirono, Manchin)**

**S. 609, Chiropractic Care Available to All Veterans Act of 2017 (Moran, Tester, Blumenthal, Brown)**

**S. 681, Deborah Sampson Act (Tester, Boozman, Murray, Blumenthal, Brown)**

**S. 764, Veterans Education Priority Enrollment Act of 2017 (Brown, Tillis)**

**S. 784, Veterans' Compensation Cost-of-Living Adjustment Act of 2017 (Isakson, Tester)**

**S. 804, Women Veterans Access to Quality Care Act (Heller, Murray)**

**S. 899, Department of Veterans Affairs Veteran Transition Improvement Act (Hirono, Moran, Tester)**

**S. 1024, Veterans Appeals Improvement and Modernization Act of 2017 (Isakson, Blumenthal, Tester)**

**S. \_\_\_, Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Rubio, Tester, Isakson, Moran)**

**S. \_\_\_, Serving our Rural Veterans Act (Sullivan, Tester)**

**S. \_\_\_, Veteran Partners' Efforts to Enhance Reintegration Act (Blumenthal)**



U.S. OFFICE OF SPECIAL COUNSEL  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

The Special Counsel

May 18, 2016

The Honorable Mitch McConnell  
Majority Leader  
United States Senate  
Washington, D.C. 20510

The Honorable Harry Reid  
Minority Leader  
United States Senate  
Washington, D.C. 20510

Re: Office of Special Counsel Comments on S. 579

Dear Majority Leader McConnell and Minority Leader Reid:

The U.S. Office of Special Counsel (OSC) is an independent, Executive branch agency charged by Congress with the protection of government whistleblowers. The Senate sponsors of S. 579, the "Inspector General Empowerment Act of 2015," requested that OSC provide our views on the legislation, specifically with respect to the provision that equips Inspectors General with testimonial subpoena authority.

We believe S. 579 will help to curb government waste and prevent retaliation in the federal workplace. OSC works closely with Inspectors General to root out waste, fraud, and abuse after OSC receives whistleblower disclosures from government workers. Providing the Inspectors General with an additional tool to obtain testimony from former employees, contractors, or grantees, through the use of testimonial subpoenas when necessary, will enhance these efforts.

In addition, although OSC is rarely required to use our own testimonial subpoena authority, we have issued subpoenas to former employees or managers who would not voluntarily speak to OSC but who have critical knowledge about a retaliatory action taken against a whistleblower. In conducting their own reprisal investigations, Inspectors General are likely to have a similar need to obtain testimony from former employees to assist whistleblowers and prevent retaliation.

For these reasons, we believe S. 579 will have a positive impact on good government.

**The Special Counsel**

The Honorable Mitch McConnell  
The Honorable Harry Reid  
May 18, 2016  
Page 2 of 2

Thank you for considering these views.

Respectfully,

A handwritten signature in cursive script, reading "Carolyn N. Lerner".

Carolyn N. Lerner

cc:

Senator Charles E. Grassley  
Senator Claire McCaskill  
Senator Ron Johnson  
Senator Tammy Baldwin  
Senator Joni Ernst  
Senator John Cornyn  
Senator Barbara A. Mikulski  
Senator Susan R. Collins  
Senator Kelly Ayotte  
Senator Thomas R. Carper

Senator James Lankford  
Senator Mark S. Kirk  
Senator Deb Fischer  
Senator Ron Wyden  
Senator Michael B. Enzi  
Senator Joe Manchin, III  
Senator Gary C. Peters  
Senator Rob Portman  
Senator Johnny Isakson  
Senator Roy Blunt

**Written Testimony of the Honorable Carolyn N. Lerner, Special Counsel  
U.S. Office of Special Counsel**

**Committee on Veterans' Affairs  
United States Senate**

**Hearing on Pending Legislation**

**June 29, 2016**

Chairman Isakson, Ranking Member Blumenthal, and Members of the Committee:

The U.S. Office of Special Counsel (OSC) welcomes this opportunity to provide written testimony for the Committee's June 29, 2016 hearing on pending legislation. OSC is the federal sector prosecutor of claims under the Uniformed Services Employment and Reemployment Rights Act (USERRA). We provide comments on Ranking Member Blumenthal's legislation, which clarifies the scope of procedural rights of members of the uniformed services with respect to their employment and reemployment rights.

USERRA was enacted in 1994 to provide more robust mechanisms for service members to enforce their employment and reemployment rights, including through actions in the U.S. district courts (private employers), state courts (state employers), and the U.S. Merit Systems Protection Board (federal employers). In section 4302(b) of USERRA (38 U.S.C. 4302(b)), Congress attempted to ensure that these enforcement rights could not be curtailed, limited, or otherwise restricted:

*This chapter supersedes any state law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.*

Congress specifically intended section 4302(b) to prevent employers from undermining USERRA's procedural protections through the use of arbitration and collective bargaining agreements. As the House Committee report notes:

*Section 4302(b) would reaffirm a general preemption as to state and local laws and ordinances, as well as to employer practices and agreements, which provide fewer rights or otherwise limit rights provided under chapter 43 or put additional conditions on those rights.... Moreover, this section would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required.... It is the Committee's intent that, even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law.*

H. Rept. No. 103-65 (April 28, 1993), USCCAN 2449, 2453.



Nevertheless, in *Garrett v. Circuit City Stores Inc.*, 449 F.3d 672 (5th Cir. 2006), the U.S. Court of Appeals for the Fifth Circuit ruled that section 4302(b) does not preclude the enforceability of binding arbitration agreements to resolve USERRA disputes. The court opined that section 4302(b) encompasses only “substantive,” not “procedural,” rights under USERRA, and that the right to have a USERRA claim independently adjudicated in court is not “substantive.” The only other circuit court to rule on the issue simply adopted the *Garrett* ruling. *See Landis v. Pinnacle Eye Care LLC*, 537 F.3d 559 (6th Cir. 2008).

Given Congress’s clear intent in enacting section 4302(b), OSC believes these rulings were erroneous and have impermissibly narrowed the scope of protections afforded to service members under USERRA. Section 1 of Ranking Member Blumenthal’s proposed bill would correct this misinterpretation by explicitly clarifying that USERRA’s procedural protections are part of the “rights and benefits” guaranteed by the statute. OSC supports this clarification and believes it advances the intent of this important law.

Thank you for the opportunity to comment on matters important to those who serve our nation in uniform.



**U.S. OFFICE OF SPECIAL COUNSEL**  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

**The Special Counsel**

September 13, 2016

The Honorable Ann Kirkpatrick  
201 Cannon House Office Building  
Washington, D.C. 20515

Re: Pending Legislation to Protect VA Whistleblowers

Dear Representative Kirkpatrick:

The Office of Special Counsel (OSC) has received thousands of whistleblower retaliation complaints and disclosures from Department of Veterans Affairs (VA) employees. Based on this experience, we write to express our strong support for your amendment to H.R. 5620, the VA Accountability First and Appeals Modernization Act. Based on our review of the amendment, we believe it will advance the interests of VA whistleblowers.

Importantly, the amendment establishes the Office of Accountability and Whistleblower Protection (OAWP). OSC's ongoing work with VA whistleblowers will benefit from having a high-level point of contact with the statutory authority to identify, correct, and prevent threats to patient care and to discipline those responsible for creating them. The establishment of similar offices at other agencies, including the Federal Aviation Administration, has significantly improved the whistleblower experience at those agencies. And OAWP, with a Senate-confirmed leader, will have the authority and a mandate to make a significant difference.

For these and other reasons, we believe your amendment will best advance the interests of VA whistleblowers and the Veterans served by the Department. If you are in need of additional information, please contact Adam Miles, Deputy Special Counsel for Policy and Congressional Affairs, at 202-254-3607. We appreciate the bipartisan support for stronger whistleblower protections for VA employees, as reflected in H.R. 5620, and believe this amendment will greatly enhance this effort.

Sincerely,

A handwritten signature in cursive script, reading "Carolyn N. Lerner".

Carolyn N. Lerner

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## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*  
KRISTINE J. LUCAS, *Democratic Chief Counsel and Staff Director*

January 8, 2016

### VIA ELECTRONIC TRANSMISSION

The Honorable Loretta Lynch  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Attorney General Lynch:

As you know, on October 5, 2015, and November 6, 2015, I wrote to you concerning Denise O'Donnell, Director of the Bureau of Justice Assistance (BJA) within the Justice Department. According to whistleblowers, Director O'Donnell allegedly gave preferential treatment to grant applicants from her native state of New York, in violation of rules and regulations that require fair and open competition. In March 2015, the independent Office of Special Counsel (OSC) found that there was a substantial likelihood that Director O'Donnell improperly participated in components of the grant selection process by BJA.

On October 28, 2015, the Justice Department informed this Committee that the Department's Office of Professional Responsibility (OPR) was investigating this matter and that Director O'Donnell would continue to perform her duties as the BJA Director as the investigation proceeds. In addition, on November 24, 2015, the Department stated as follows:

The Department appreciates all information provided to OPR to assist in this ongoing investigation and values the information provided by whistleblowers. As we have stated before, the Department shares your view that whistleblowers are a vital part of ensuring good government and stopping fraud, waste and abuse.

Unfortunately, it appears that some officials at BJA do not share this view of whistleblowers. For instance, (b)(7) (b)(6):7 is a BJA whistleblower who exercised his legally protected right to provide information to this Committee about Director O'Donnell's alleged misconduct. (b)(6):(b)(7) claims that, beginning in mid-November 2015, his supervisor—Associate Deputy Director Ruby Qazilbash—began retaliating against him for making those protected disclosures.

Whistleblowers are some of the most patriotic people I know—men and women who labor, often anonymously, to let Congress and the American people know when the Government isn't working so we can fix it. As such, I respectfully request that you remind Director

O'Donnell and Associate Deputy Director Qazilbash about the value of protected disclosures to Congress in accordance with the whistleblower protection laws. Absent such a clear communication from you, BJA management might be able to intimidate whistleblowers to prevent them from providing information to Congress and to the Department's ongoing OPR investigation.

Specifically, BJA management should be reminded that obstructing a Congressional investigation is a crime.<sup>1</sup> Also, "the right 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."<sup>2</sup> In addition, the "anti-gag" appropriations rider 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; or
- (2) removes, suspends from duty without pay, demotes, reduces in rank, seniority, status, pay, or performance or efficiency rating, denies promotion to, relocates, reassigns, transfers, disciplines, or discriminates in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any other officer or employee of the Federal Government, or attempts or threatens to commit any of the foregoing actions with respect to such other officer or employee, by reason of any communication or contact of such other officer or employee with any Member, committee, or subcommittee of the Congress as described in paragraph (1).<sup>3</sup>

Finally, pursuant to 5 U.S.C. § 2302 (b)(8):

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority [] take or fail to take, or threaten to take or fail to take, a

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<sup>1</sup> 18 U.S.C. §1505.

<sup>2</sup> 5 U.S.C. §7211.

<sup>3</sup> Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, (2015), at Div. E, Title VII, at Sec. 713.

personnel action with respect to any employee or applicant for employment because of [] any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences— [] any violation of any law, rule, or regulation, or [] gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs . . . .

Please provide a response to the following questions by January 22, 2016:

1. Will you remind Director O'Donnell and Associate Deputy Director Qazilbash about the value of protected disclosures to Congress in accordance with the whistleblower protection laws? If not, please explain why not.
2. If (b)(6);(b)(7)(C) allegations of retaliation are substantiated by OSC or the Department's Office of Inspector General, will you commit to not using any appropriated funds to pay the salary of Associate Deputy Director Qazilbash, as required by the Consolidated Appropriations Act of 2016? If not, please explain why not.

If you have any questions, please contact Jay Lim of my Committee staff at (202) 224-5225. Thank you for your immediate attention to this important matter.

Sincerely,



Charles E. Grassley  
Chairman  
Senate Committee on the Judiciary

cc:

The Honorable Patrick Leahy  
Ranking Member  
Senate Committee on the Judiciary

The Honorable Michael E. Horowitz  
Inspector General  
U.S. Department of Justice

The Honorable Carolyn N. Lerner  
Special Counsel  
U.S. Office of Special Counsel

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## United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

KEITH B. ASHDOWN, STAFF DIRECTOR  
GABRIELLE A. BATKIN, MINORITY STAFF DIRECTOR

To: **Honorable Carolyn N. Lerner**  
**Attn: Adam Miles**

From: (b)(6);(b)(7)(C)  
Homeland Security and Governmental Affairs Committee

Date: January 21, 2016

Re: Testimony from the hearing "**Nomination of Michael J. Missal to be Inspector General, U.S. Department of Veterans Affairs, and the Honorable Carolyn N. Lerner to be Special Counsel, Office of Special Counsel**" on **January 12, 2016**

These hearing transcript pages are furnished to you so that you may review your testimony and make necessary typographical and grammatical corrections. Other minor clarifying changes are acceptable provided that they do not change the context of your original testimony. Changes in substance are not permitted and excessive editing will be ignored.

Please **mark your corrections in red or blue ink** and return this cover letter and the pages on which you have made corrections. If you have no edits, please note that on the cover sheet.

To assure that your corrections appear in the final print, this transcript must be returned to the committee by: **Friday, February 19, 2016.**

Please return transcript (by mailing, faxing, or scanning and e-mailing) to:

(b)(6);(b)(7)(C)

Hearing Clerk

Committee on Homeland Security and Governmental Affairs  
SD-340

Washington, DC 20510-6250

(b)(6);(b)(7)(C) @hsgac.senate.gov

202-224-9603 (fax)  
202-(b)(6);(b)(7)(C) (desk)

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074  
MINORITY (202) 225-5061

<http://oversight.house.gov>

January 19, 2016

The Honorable Carolyn Lerner  
Special Counsel  
U.S. Office of Special Counsel  
1730 M Street, N.W., Suite 218  
Washington, D.C. 20036-4505

Dear Ms. Lerner:

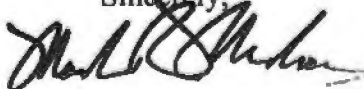
Thank you for appearing before the Subcommittee on Government Operations hearing on December 16, 2015, titled, "Merit System Protection Board, Office of Government Ethics, and Office of Special Counsel Reauthorization." We appreciate the time and effort you gave as a witness before the Committee.

Pursuant to the direction of the Chairman, the hearing record remains open to permit Members to submit additional questions to the witnesses. In preparing your answers to these questions, please include the text of the Member's question along with your response.

Please provide your response to these questions by February 2, 2016. Your response should be addressed to the Committee office at 2157 Rayburn House Office Building, Washington, DC 20515. Please also send an electronic version of your response by e-mail to Sharon Casey, Deputy Chief Clerk, at [Sharon.Casey@mail.house.gov](mailto:Sharon.Casey@mail.house.gov) in a single Word-formatted document.

Thank you for your prompt attention to this request. If you have any questions, please contact Janel Fitzhugh of the Committee staff at (202) 225-5074.

Sincerely,



Mark Meadows  
Chairman  
Subcommittee on Government Operations

cc: The Honorable Gerald E. Connolly, Ranking Member  
Subcommittee on Government Operations

Enclosure

**Questions for The Honorable Carolyn Lerner**  
Special Counsel  
U.S. Office of Special Counsel

**Questions from Chairman Mark Meadows**  
Subcommittee on Government Operations

Hearing: "Merit System Protection Board, Office of Government Ethics, and Office of Special  
Counsel Reauthorization"

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1. What criteria do you believe are best to measure OSC's success over time and to continue to identify areas of improvement?
2. What obstacles have you seen to OSC obtaining access to agency information with the current OPM regulatory authority which directs agencies to comply?
3. Common law privileges
  - a. What are the most frequent common law privileges that have been invoked to prevent OSC from getting the information it needs?
  - b. Which agencies invoked them?
  - c. Have you had success in educating agencies to the fact that such privileges are inapplicable?
4. Agency responses to disclosures
  - a. How closely do agencies stick to the 60-day timeframe required by 5 U.S.C. § 1213(c)(1)(B) for providing a written response to OSC?
  - b. Which agencies are the most delinquent in responding?
  - c. What is the average timeframe for such responses government-wide?
  - d. Do agencies ever completely fail to conduct investigation of the disclosures that OSC transmits? If so, how often?
5. Follow-up action on agency responses to disclosures
  - a. How often do agencies substantiate the allegations that OSC transmits, but then nevertheless fail to take any follow-up action, such as changing their practices, restoring employees who have been wronged, or disciplining employees who commit misconduct?
  - b. Does OSC have any ability to compel action in such a situation?
  - c. Currently, if an agency says it is going to take a certain action, what does OSC do to follow up and ensure the promised action gets taken?
6. Statute of limitations
  - a. How often does OSC receive prohibited personnel practices allegation where the facts and circumstances involved are more than three years old?
  - b. What limitations does OSC experience in investigating such allegations?
  - c. How did OSC arrive at the proposal of a 3-year limitation?
  - d. What if an individual doesn't learn about a prohibited personnel practice until after the time when the underlying conduct has occurred?



- e. Would you be open to OSC having discretion to investigate older cases if OSC determines there is good cause to review the allegation?
7. Previous action by MSPB
    - a. How does OSC typically learn whether a matter has already been previously filed with the MSPB or adjudicated by them?
    - b. How often does OSC receive such complaints that have already been filed with the MSPB?
    - c. How often does OSC receive such complaints that have already been adjudicated by the MSPB?
  8. Previous action by OSC
    - a. How often does OSC receive repeat complaints whereby OSC has already investigated a set of facts and circumstances but gets a second complaint on the matter?
    - b. What are OSC's current practices with regard to these circumstances?
  9. Per 5 U.S.C. § 1214(b)(2)(A), OSC is required to make a final determination on prohibited personnel practice complaints within 240 days, unless the complainant agrees to extend the period. Although being thorough in order to obtain proper outcome is critical, it is also important that individuals who have filed with OSC don't have wait an unreasonable period of time for an ultimate determination.
    - a. How closely does OSC track the progress on staying within these required timeframes?
    - b. What is the best way to quantify how closely is OSC to sticking to its statutorily mandated timeframes?
    - c. What is within OSC's control to trend in a positive direction there, versus what is outside OSC's control?
  10. Have there been significant problems from the experiment in "all-circuit" judicial review of whistleblower rulings? Do you oppose making that reform permanent?
  11. Please describe the impact to date of having whistleblower ombudspersons at every inspector general office, as mandated by the Whistleblower Protection Enhancement Act of 2012.
  12. OSC certification program
    - a. How many agencies out of what total universe have been certified as completing merit systems training in the OSC certification program?
    - b. Why impediments have you seen to all agencies becoming certified?
    - c. What is the realistic schedule for all government agencies and corporations to be trained in the WPA and merit system principles?
    - d. Do OSC staff, including administrative judges, complete certifiable training in the WPA and merit system principles? If not, should they?
  13. Please detail how OSC has used its WPEA authority to file *amicus* briefs, including the number of times this authority has been exercised, the issues and apparent impact.

14. What has been the effect of the U.S. Court of Appeals for the Federal Circuit decision *Kaplan v. Conyers* since 2013?
15. What is OSC's track record for each year of the Kaplan, Bloch, and Lerner administrations for litigating in a hearing to obtain corrective action for:
  - a. Whistleblowers.
  - b. Any federal employee who has suffered from any other prohibited personnel practice.Please provide any necessary explanation of the results.
16. What is OSC's track record for seeking stays of prohibited personnel practices? Please provide the record for both formal and informal stays for each year of the Kaplan, Bloch and Lerner administrations, with any explanation for the results.
17. What is OSC's track record for litigating in a hearing to seek disciplinary action for prohibited personnel practices? What is the OSC's track record of obtaining discipline informally through persuading agencies to act?
18. The 1994 WPA amendments required MSPB administrative judges to forward any case to the OSC to consider disciplinary action if the employee established a *prima facie* case of whistleblower retaliation.
  - c. How many referrals has the OSC received during the Kaplan, Bloch and Lerner administrations?
  - d. How many have led to disciplinary action?
19. Please describe changes the OSC has made to its § 1213 whistleblowing disclosure program to make it more accessible and effective for whistleblowers. As part of this response, please describe and summarize the track record to date for the OSC's new unit combining action on disclosures and alleged prohibited personnel practices.
20. Classified disclosures
  - e. Please describe OSC's progress with regard to accepting classified disclosures.
  - f. Does OSC have the facilities and staff it needs to continue to make the most use out of this authority?
  - g. How many times has OSC used this authority since receiving it?
21. In terms of volume and results, please describe the track record of the OSC's Alternative Disputes Resolution (ADR) program in obtaining resolutions, as well as the MSPB's mediation program.

**Questions for The Honorable Carolyn Lerner**  
Special Counsel  
U.S. Office of Special Counsel

**Questions from Ranking Member Gerald E. Connolly**  
Subcommittee on Government Operations

Hearing: "Merit System Protection Board, Office of Government Ethics, and Office of Special  
Counsel Reauthorization"

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1. Based on the Office of Special Counsel's (OSC) experience in investigating and prosecuting cases involving prohibited personnel practices, do you believe agencies need more tools and authorities to discipline employees for misconduct, or do you think the current authorities are sufficient?
2. The numerous VA retaliation cases for which you helped whistleblowers obtain settlements seem to suggest that when an agency wants to dismiss someone, it has the ability to do so fairly quickly.
  - a. Special Counsel Lerner, do you agree? If so, please explain.
  - b. Based on your examination of the VA and other federal agencies, would it be fair to say that a delay in or failure to take appropriate disciplinary action against an employee for misconduct can be characterized as more of a management problem rather than a lack of sufficient tools or authority?
  - c. Could lack of training for managers also be a factor in any delay or failure to take appropriate disciplinary action?
  - d. Are there ways that agencies can streamline their disciplinary processes under existing law?
2. The following questions relate to OSC's proposal to modify the procedural requirements for certain prohibited personnel practices cases:
  - a. How many cases and what percentage of OSC's caseload do you anticipate this proposal would affect?
  - b. Would this proposal apply to cases where the Merit Systems Protection Board or another adjudicating body has issued a decision?
  - c. Would this proposal apply to cases that are pending with MSPB or other another adjudicating body?
  - d. Under what circumstances would there be cases pending with both OSC and MSPB or other adjudicating body?
  - e. What other adjudicating bodies could be covered by this provision?
  - f. What effect would this proposal have on an employee's rights?
  - g. Would this proposal prevent an employee from pursuing a remedy in more than one forum?
3. As the head of an employing agency, do you believe OSC has sufficient tools and authorities to discipline employees for misconduct or performance issues when necessary?
4. Based on your agency's experience, do you think statutory change is needed to streamline the federal employee disciplinary process?

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

ORRIN G. HATCH, UTAH  
JEFF SESSIONS, ALABAMA  
LINDSEY O. GRAHAM, SOUTH CAROLINA  
JOHN CORNYN, TEXAS  
MICHAEL S. LEE, UTAH  
TED CRUZ, TEXAS  
JEFF FLAKE, ARIZONA  
DAVID VITTER, LOUISIANA  
DAVID A. PERDUE, GEORGIA  
THOM TILLIS, NORTH CAROLINA

PATRICK J. LEAHY, VERMONT  
DIANNE FEINSTEIN, CALIFORNIA  
CHARLES E. SCHUMER, NEW YORK  
RICHARD J. DURBIN, ILLINOIS  
SHELDON WHITEHOUSE, RHODE ISLAND  
AMY KLOBUCHAR, MINNESOTA  
AL FRANKEN, MINNESOTA  
CHRISTOPHER A. COONS, DELAWARE  
RICHARD BLUMENTHAL, CONNECTICUT

## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*  
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

March 3, 2016

### VIA ELECTRONIC TRANSMISSION

Lt. Gen. Nadja West  
The Surgeon General and Commander, US Army Medical Command  
7700 Arlington Blvd.  
Falls Church, VA 22042-5140

Dear Lieutenant General West:

I write with concern regarding reports received by my office of a potential threat to public safety as a result of alleged reprisal against a whistleblower within the U.S. Army Medical Command (MEDCOM).

According to information obtained by my office, in 2015, the Department of Defense Office of the Inspector General (DoD OIG) conducted an investigation of Department of Defense Chemical Nuclear and Biological facilities. During that investigation, the DoD OIG received reports that certain routine inspections—including Army MEDCOM inspections—of containment laboratories did not improve lab safety and in fact had failed to address key problems within certain Biosafety Level 3 laboratories. Following DoD OIG's investigation, individuals within the MEDCOM chain of command allegedly removed a civilian physician employee they suspected of cooperation with the DoD OIG to an offsite office with a non-working phone and prohibited the physician's contact with other staff. This physician is reportedly responsible for evaluating the health and safety of hundreds of biocontainment workers who conduct research within Biosafety Level 3 and 4 laboratories on pathogens such as anthrax, plague, and Ebola.

It is my understanding that this physician, among other things, must clinically assess any potential exposures that occur in the course of the researchers' work, as a result of any mishaps or problems with the workers' protective gear. It is also my understanding that, while this physician remains idled, there is no one available with

the necessary experience and training to oversee appropriate risk assessment or treat potentially exposed workers and thus minimize any possible spread of an inadvertently released pathogen.

This situation is precisely what the federal laws protecting whistleblowers are designed to prevent. Federal employees are required to disclose potential wrongdoing, so that agencies may address it. Ignoring those disclosures and punishing the whistleblower for making them only allows those problems to fester and flourish. In no case is this more troubling than when disclosures involve potential threats to public health and safety, like those at issue here. Thus federal law protects employees who report information that they reasonably believe demonstrates “any violation of any law, rule, or regulation,” or “gross management, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety.”<sup>1</sup> Moreover, federal agencies may not “take or fail to take, or threaten to take or fail to take, any personnel action against any employee” for “cooperating with or disclosing information to the Inspector General of an agency.”<sup>2</sup>

I bring this matter to your attention so that you may take appropriate action to address any public health concerns associated with this matter and cease any inappropriate reprisal actions taken by individuals within your command. Additionally, please provide written responses to the following questions by Thursday, March 17, 2016:

1. Please describe the steps you will take to assess and remedy the public health concerns presented in this letter.
2. Please provide any and all applicable policies related to cooperation by individuals under your command with DoD OIG investigations and audits, and to reporting public health and safety concerns and potential wrongdoing within MEDCOM.
3. Please describe in detail what steps you will take to review MEDCOM's reported acts of reprisal in this case.
4. Please describe in detail MEDCOM's response to the DoD OIG evaluation of biocontainment facilities and related safety and inspection processes.

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<sup>1</sup> 5 U.S.C. § 2302(b)(8).

<sup>2</sup> 5 U.S.C. § 2302(b)(9).

Sincerely,

A handwritten signature in black ink that reads "Chuck Grassley". The signature is written in a cursive, slightly slanted style.

Charles E. Grassley  
Chairman  
Committee on the Judiciary

cc: Patrick J. Murphy  
Acting Secretary of the Army  
United States Army

Glenn A. Fine  
Acting Inspector General  
U.S. Department of Defense

The Honorable Carolyn N. Lerner  
Special Counsel  
U.S. Office of Special Counsel

The Honorable Patrick J. Leahy  
Ranking Member  
Committee on the Judiciary

# United States Senate

WASHINGTON, DC 20510

May 17, 2016

## VIA ELECTRONIC TRANSMISSION

The Honorable Laura S. Wertheimer  
Inspector General  
Federal Housing Finance Agency  
400 Seventh Street, SW  
Washington, DC 20024

Dear Inspector General Wertheimer:

As you know, the Homeland Security and Governmental Affairs Committee and the Judiciary Committee have been inquiring into various issues regarding the Federal Housing Finance Agency Office of Inspector General (FHFA-OIG). In the course of that inquiry, it has come to the Committees' attention that your office is the subject of one or more complaints before the Integrity Committee of the Council of the Inspectors General on Integrity and Efficiency (CIGIE) and the Office of Special Counsel (OSC). It has also come to the Committees' attention that your office has retained one or more private attorneys in some capacity, perhaps in connection with these proceedings or the Committees' inquiry. Government agencies should generally obtain most of the legal services they need from government attorneys—whether from in-house attorneys or attorneys from another agency.<sup>1</sup> For example, Inspectors General may consult with and obtain advice from other counsel within the Inspector General community without incurring the added expense of private counsel.

In certain circumstances, where the proper authority exists, agencies may hire outside counsel. However, given the added expense and the substantial resources already devoted to paying for in-house legal advice, outside counsel should only be engaged when clearly authorized and necessary. In order to better understand the nature and circumstances of legal representation procured for or by FHFA-OIG, please provide responses to the following questions:

1. Has FHFA-OIG retained any private attorney(s)? If so, please provide a copy of all retainer agreements, including the hourly rate of pay.
2. For each attorney hired:
  - a. whom precisely does the attorney represent?
  - b. for what purpose was each attorney retained?
  - c. what is the scope of the representation?
  - d. how much has been paid to each attorney to date?

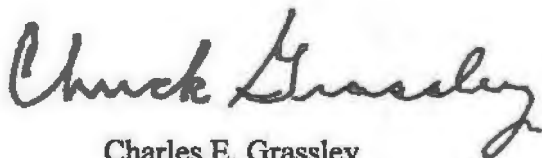
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<sup>1</sup> See, e.g., 5 U.S.C. § 3106 (providing that agencies should refer litigation matters to the Department of Justice unless otherwise authorized by law).

3. Please describe the legal authority for FHFA-OIG to hire a private attorney for the purposes described in your answer to question number 2.
4. According to FHFA-OIG's 2015 Congressional Budget Justification, the FHFA-OIG Office of Counsel serves as the chief legal advisor to the Inspector General and provides independent legal advice, counsel, and opinions to FHFA-OIG about, among other things, its programs and operations. Why was the FHFA-OIG Office of Counsel deemed insufficient to provide representation in this instance?
5. Prior to hiring outside counsel, did FHFA-OIG explore the possibility of using the expertise found at other agencies of the government on a temporary or short-term basis?
6. Please describe the efforts made to determine whether the proposed employment of outside counsel would be cost-effective, including the analysis performed and the outcome of that analysis.
7. What procedures were used to ensure that the hiring of any private attorney was competitive and designed in a manner to reduce the prospect or appearance of favoritism and result in a higher quality legal service and savings in cost?
8. What efforts were made to identify conflicts or potential conflicts and how are those conflicts being managed?
9. The Administrative Conference of the United States has recommended that any agency that anticipates a need to hire private attorneys should prepare written public guidelines concerning when and how it will seek outside counsel and that agencies should prepare an annual report listing basic information relating to legal service contracts awarded.<sup>2</sup> Has FHFA-OIG completed these actions? If so, please provide a copy and indicate where they have been made public. If not, please explain why not.

Please provide your responses to these questions no later than May 31, 2016. Should you have any questions, please contact Paul Junge of Chairman Grassley's staff at (202) 224-5225 or Michael Lueptow of Chairman Johnson's staff at (202) 224-4751. Thank you for your cooperation in this important matter.

Sincerely,



Charles E. Grassley  
Chairman  
Committee on the Judiciary



Ron Johnson  
Chairman  
Committee on Homeland Security  
and Governmental Affairs

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<sup>2</sup> Agency Hiring of Private Attorneys, 52 Fed. Reg. 23,632 (June 24, 1987).



cc:

The Honorable Patrick J. Leahy  
Ranking Member  
Committee on the Judiciary

The Honorable Thomas R. Carper  
Ranking Member  
Committee on Homeland Security  
and Governmental Affairs

Carolyn N. Lerner  
Special Counsel  
United States Office of Special Counsel  
1730 M Street, NW  
Washington, DC 20036

The Honorable Michael E. Horowitz  
Chair of Council of the Inspectors General on Integrity and Efficiency (CIGIE)  
1717 H Street, NW, Suite 825  
Washington, D.C. 20006

# United States Senate

WASHINGTON, DC 20510

June 8, 2016

## VIA ELECTRONIC TRANSMISSION

The Honorable Laura S. Wertheimer  
Inspector General  
Federal Housing Finance Agency  
400 Seventh Street, SW  
Washington, DC 20024

Dear Inspector General Wertheimer:

On October 8, 2015, Chairman Grassley sent you a letter asking about the significant organizational changes made to the Federal Housing Finance Agency (FHFA) Office of Inspector General (OIG), based on information that you had submitted in FHFA-OIG's Semiannual Report to Congress.<sup>1</sup> Your response of October 29, 2015, revealed that the FHFA-OIG Office of Audit had gone from 36 FTE, as of September 20, 2014, to 9 FTE, as of October 29, 2015.<sup>2</sup> A large part of the reduction was attributable to a so-called "Voluntary Separation Program (VSP)" conducted by FHFA-OIG because, as detailed in your letter, you determined that the Office of Audit "struggled to complete audits within the timeframes that it had established" and that "restructuring [the Office of Audit] into an office consisting of smaller, leaner teams capable of turning out targeted, timely audits was necessary to increase FHFA-OIG oversight."<sup>3</sup> Thus, you stated in your letter of October 29, 2015: "I also authorized the VSP buy-out, which was offered to every [Office of Audit] employee, but only to [Office of Audit] employees. The VSP buy-out offer was limited to six months' salary, exclusive of any benefits."<sup>4</sup> Your letter revealed that 16 employees elected to participate at a total cost of \$1,155,105.68.<sup>5</sup>

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<sup>1</sup> Letter from Charles E. Grassley, Chairman, U.S. Senate Committee on the Judiciary, to Laura S. Wertheimer, Inspector General, Federal Housing Finance Agency, Office of Inspector General (Oct. 8, 2015).

<sup>2</sup> Letter from Laura S. Wertheimer, Inspector General, Federal Housing Finance Agency, Office of Inspector General, to Charles E. Grassley, Chairman, U.S. Senate Committee on the Judiciary (Oct. 29, 2015).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

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

Based on information obtained by the Committees, it appears that you did not have legal authority to conduct this buy-out.

Pursuant to sections 3521-3525 of title 5 of the United States Code, the Office of Personnel Management (OPM) has the authority to oversee the use of voluntary separation incentive payments (VSIP).<sup>6</sup> As described by OPM, VSIP allows agencies that are downsizing or restructuring to offer employees an incentive to voluntarily separate.<sup>7</sup> When approved by OPM, the agency may offer VSIP to employees who are in surplus positions or who have skills that are no longer needed in the workforce.<sup>8</sup> VSIP should be planned for when it appears likely that the organizational changes the agency needs to make cannot be accomplished by lesser measures; for example, a hiring freeze, normal attrition, or reassignments.<sup>9</sup>

In order to implement VSIP, agencies must submit to OPM a plan outlining the intended use of incentive payments and a proposed organizational chart for the agency once the incentive payments have been completed, among other requirements.<sup>10</sup> The plan must contain detailed information including, among other things, the specific positions and functions to be reduced or eliminated and a description of which categories of employees will be offered incentives.<sup>11</sup> There is a statutory maximum payment per employee of \$25,000.<sup>12</sup> According to OPM's regulations and guidance, agencies may have other statutory authority to implement VSIP; however, the only authority identified is as provided in Chief Human Capital Officers Act of 2002, which allows for agencies that had VSIP authority in effect on January 24, 2003 to use

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<sup>6</sup> To implement this authority, OPM has promulgated regulations—found at 5 C.F.R. part 576—and issued guidance to agencies. U.S. Off. of Personnel Mgmt. (OPM), *Guide to Voluntary Separation Incentive Payments* (Aug. 2006), available at <https://www.opm.gov/policy-data-oversight/workforce-restructuring/voluntary-separation-incentive-payments/guide.pdf> [hereinafter OPM VSIP Guide].

<sup>7</sup> OPM, *Workforce Restructuring Voluntary Separation Incentive Payments*, <https://www.opm.gov/policy-data-oversight/workforce-restructuring/voluntary-separation-incentive-payments/>.

<sup>8</sup> *Id.*

<sup>9</sup> OPM VSIP Guide, at 3. Your letter also revealed that the expected staffing level for the Office of Audit is 18-20 FTE once the OIG reorganization is completed, which is inconsistent with the workforce-reduction goal of a buy-out. Letter from Laura S. Wertheimer, Inspector General, Federal Housing Finance Agency, Office of Inspector General, to Charles E. Grassley, Chairman, U.S. Senate Committee on the Judiciary (Oct. 29, 2015).

<sup>10</sup> 5 U.S.C. § 3522. Pursuant to section 6 of the Inspector General Act, as amended, for purposes of subchapter II of chapter 35, which consists of the authority to implement a VSIP, each Office of Inspector General is considered a separate agency and the Inspector General has the functions, powers, and duties of an agency head. Inspector General Act of 1978, as amended, § 6(d)(1) (5 U.S.C. app. § 6); see also Memorandum from Edward Kelley, FHFA OIG, to Edward DeMarco, Deputy Director, FHFA (July 7, 2009) (“Pursuant to the legislative history of the Inspector General Reform Act of 2008, the amendments to the Inspector General Act that relate to Inspectors General offices as independent agencies provide that Inspectors General, rather than their associated agency heads, will be considered the ‘agency head’ with regard to... Voluntary Separation Authority...”).

<sup>11</sup> 5 U.S.C. § 3522.

<sup>12</sup> 5 U.S.C. § 3523(b)(3).

such authority until it expires.<sup>13</sup> This obviously does not apply to FHFA-OIG, which was statutorily established in 2008.<sup>14</sup>

In order to obtain a better understanding of the VSIP offered by FHFA-OIG, Chairman Grassley wrote to OPM on March 15, 2016, requesting information about the OPM approval of any FHFA-OIG buy-out or authority that FHFA-OIG had to conduct a buy-out.<sup>15</sup> OPM responded on May 19, 2016, stating "OPM has not issued any VSIP authorities to the FHFA-OIG, nor did it request such authority from OPM."<sup>16</sup>


Thus, please explain how you legally "authorized" a buy-out at FHFA-OIG. Please provide this justification no later than June 22, 2016. If you have any questions, please contact Paul Junge of Chairman Grassley's staff at (202) 224-5225 or Michael Lueptow of Chairman Johnson's staff at (202) 224-4751.

Thank you for your cooperation in this important matter.

Sincerely,



Charles E. Grassley  
Chairman  
Committee on the Judiciary



Ron Johnson  
Chairman  
Committee on Homeland Security  
and Governmental Affairs

cc:

The Honorable Patrick J. Leahy  
Ranking Member  
Committee on the Judiciary

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<sup>13</sup> 5 C.F.R. § 576.105 (citing Pub. L. No. 107-296, § 1313(a)(3)).

<sup>14</sup> Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654.

<sup>15</sup> Letter from Charles E. Grassley, Chairman, U.S. Senate Committee on the Judiciary, to Beth F. Colbert, Acting Director, OPM (March 15, 2016) (Attachment A).

<sup>16</sup> Letter from Jason Levine, Director, Congressional, Legislative, and Intergovernmental Affairs, OPM, to Charles E. Grassley, Chairman, U.S. Senate Committee on the Judiciary (May 19, 2016) (Attachment B).

The Honorable Thomas R. Carper  
Ranking Member  
Committee on Homeland Security  
and Governmental Affairs

Beth F. Cobert  
Acting Director  
U.S. Office of Personnel Management  
Theodore Roosevelt Federal Building  
1900 E Street, NW  
Washington, DC 20415-0001

Carolyn N. Lerner  
Special Counsel  
United States Office of Special Counsel  
1730 M Street, NW  
Washington, DC 20036

The Honorable Michael E. Horowitz  
Chair of Council of the Inspectors General on Integrity and Efficiency (CIGIE)  
1717 H Street, NW, Suite 825  
Washington, D.C. 20006

# Attachment A

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

ORRIN G. HATCH, UTAH  
JEFF SESSIONS, ALABAMA  
LINDSEY O. GRAHAM, SOUTH CAROLINA  
JOHN CORNYN, TEXAS  
MICHAEL S. LEE, UTAH  
TED CRUZ, TEXAS  
JEFF FLAKE, ARIZONA  
DAVID VITTER, LOUISIANA  
DAVID A. PERDUE, GEORGIA  
THOM TILLIS, NORTH CAROLINA

PATRICK J. LEAHY, VERMONT  
DIANNE FEINSTEIN, CALIFORNIA  
CHARLES E. SCHUMER, NEW YORK  
RICHARD J. DURBIN, ILLINOIS  
SHELDON WHITEHOUSE, RHODE ISLAND  
AMY KLOBUCHAR, MINNESOTA  
AL FRANKEN, MINNESOTA  
CHRISTOPHER A. COONS, DELAWARE  
RICHARD BLUMENTHAL, CONNECTICUT

## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*  
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

March 15, 2016

### VIA ELECTRONIC TRANSMISSION

Beth F. Cobert  
Acting Director  
U.S. Office of Personnel Management  
Theodore Roosevelt Federal Building  
1900 E Street, NW  
Washington, DC 20415-0001

Acting Director Cobert:

Pursuant to sections 3521-3525 of the title 5 of the United States Code, the Office of Personnel Management (OPM) has the authority to oversee the use of voluntary separation incentive payments (VSIP) at Executive Branch agencies.<sup>1</sup> As described by OPM, VSIP allows agencies that are downsizing or restructuring to offer employees an incentive to voluntarily separate.<sup>2</sup> When approved by OPM, the agency may offer VSIP to employees who are in surplus positions or who have skills that are no longer needed in the workforce.<sup>3</sup> VSIP should be planned for when it appears likely that the organizational changes the agency needs to make cannot be accomplished by lesser measures; for example, a hiring freeze, normal attrition, or reassignments.<sup>4</sup>

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<sup>1</sup> To implement this authority, OPM has promulgated regulations—found at 5 C.F.R. part 576—and issued guidance to agencies, U.S. Off. of Personnel Mgmt. (OPM), *Guide to Voluntary Separation Incentive Payments* (Aug. 2006), available at <https://www.opm.gov/policy-data-oversight/workforce-restructuring/voluntary-separation-incentive-payments/guide.pdf> [hereinafter OPM VSIP Guide].

<sup>2</sup> OPM, *Workforce Restructuring Voluntary Separation Incentive Payments*, <https://www.opm.gov/policy-data-oversight/workforce-restructuring/voluntary-separation-incentive-payments/>.

<sup>3</sup> *Id.*

<sup>4</sup> OPM VSIP Guide, at 3.

In order to implement VSIP, agencies must submit to OPM a plan outlining the intended use of incentive payments and a proposed organizational chart for the agency once the incentive payments have been completed, among other requirements.<sup>5</sup> The plan must contain detailed information including, among other things, the specific positions and functions to be reduced or eliminated and a description of which categories of employees will be offered incentives.<sup>6</sup> There is a statutory maximum payment per employee of \$25,000.<sup>7</sup> According to OPM's regulations and guidance, agencies may have other statutory authority to implement VSIP.<sup>8</sup>

VSIP may only be paid as provided by the plan and must be offered to employees on the basis of criteria, such as organizational unit or geographic location.<sup>9</sup> Any changes to the VSIP plan must be approved by OPM.<sup>10</sup> Agencies are responsible for ensuring that employees are not coerced into accepting VSIP, and for ensuring that the employee's decision is not based on erroneous or misleading information.<sup>11</sup>

In August 2015, a voluntary separation program was offered to employees in the Federal Housing Finance Agency (FHFA) Office of Inspector General (OIG), Office of Audit.<sup>12</sup> According to the FHFA-OIG, sixteen employees<sup>13</sup> elected to participate at the total cost of \$1,155,105.68.<sup>14</sup> According to information obtained by the Committee, the FHFA-OIG program may have been offered pursuant VSIP authority obtained by FHFA.

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<sup>5</sup> 5 U.S.C. § 3522.

<sup>6</sup> *Id.*

<sup>7</sup> 5 U.S.C. § 3523(b)(3).

<sup>8</sup> OPM notes VSIP authority provided in the Chief Human Capital Officers Act of 2002 that allows for agencies that had VSIP authority in effect on January 24, 2003 to use such authority until it expires. 5 C.F.R. § 576.105 (citing Pub. L. No. 107-296, § 1313(a)(3)).

<sup>9</sup> 5 U.S.C. § 3523.

<sup>10</sup> See 5 C.F.R. § 576.104; see also OPM VSIP Guide, at 10 ("An agency cannot expand voluntary separation incentive offers beyond the scope of the authority provided by OPM."); at 13 ("An agency may offer VSIP only as authorized in the agency-specific authority approved by OPM.").

<sup>11</sup> 5 C.F.R. § 576.013(f); OPM VSIP Guide, at 15.

<sup>12</sup> Letter from Laura S. Wertheimer, Inspector General, Federal Housing Finance Agency, Office of Inspector General, to Charles E. Grassley, Chairman, U.S. Senate Committee on the Judiciary (Oct. 29, 2015).

<sup>13</sup> In the fiscal year prior to the VSIP, the Office of Audit had 36 FTE (as of September 30, 2014). *Id.* Shortly after the VSIP, the Office of Audit was reduced to nine FTE (as of October 29, 2015). *Id.* The expected staffing level for the Office of Audit is 18-20 FTE once the OIG reorganization is completed. *Id.*

<sup>14</sup> *Id.* According to FHFA-OIG, the total cost includes \$ 1,065,738.23 in salaries and employer-owned taxes and \$89,367.45 owed for accrued annual leave and employer-owned taxes for that leave.



In order to obtain a better understanding of the VSIP offered by FHFA-OIG, please provide the following information:

- (1) A copy of the OPM-approved plan pursuant to which FHFA-OIG conducted a VSIP, whether submitted by FHFA or FHFA-OIG. Please include all OPM-approved amendments or modifications submitted by the agency.
- (2) Did FHFA and/or FHFA-OIG have VSIP authority under any provision other than 5 U.S.C. §§ 3521-25? Please provide citations to any additional statutory authority and explain OPM's role in agency implementation of any such additional authority.
- (3) Please explain on the basis of what authority FHFA-OIG provided incentive payments in excess of \$25,000 per employee.
- (4) How does OPM ensure agency compliance with approved plans?
- (5) What constitutes coercion for purposes of 5 C.F.R. § 576.103(f)?
- (6) How does OPM ensure that employees are not coerced into accepting VSIP?

Please provide your responses to these questions no later than March 29, 2016. Should you have any questions, please contact Paul Junge of my Committee staff at (202) 224-5225. Thank you for your cooperation in this important matter.

Sincerely,



Charles E. Grassley  
Chairman  
Senate Committee on the Judiciary

cc:

The Honorable Patrick Leahy  
Ranking Member  
Senate Committee on the Judiciary

# Attachment B



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

Congressional,  
Legislative and  
Intergovernmental  
Affairs

MAY 19 2016

The Honorable Charles E. Grassley  
Chairman  
Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Grassley:

Thank you for your letter, dated March 15, 2016, concerning payments under a Voluntary Separation Incentive Payment (VSIP) authority offered to employees at the Federal Housing Finance Agency (FHFA) Office of Inspector General (OIG), Office of Audit. OPM has not issued any VSIP authorities to the FHFA-OIG, nor did it request such authority from OPM.

Generally speaking, consistent with Merit Systems Principles and Prohibited Personnel Practices, agency VSIP decisions under Title 5 are to be based on non-personal, objective factors. They must not be used either to target or favor an individual, but can be used only in accordance with statute and regulation, and their intended use. Until recently, agencies were required to provide quarterly reports to OPM on their use of VSIP authority granted by OPM. OPM considered the information provided and advised the agency accordingly. Now, OPM will review agency VSIP usage by reviewing Enterprise Human Resources Integration initiative data on a quarterly basis. As outlined in OPM's "Guide to Voluntary Separation Incentive Payments" (<https://www.opm.gov/policy-data-oversight/workforce-restructuring/voluntary-separation-incentive-payments/guide.pdf>), agencies are responsible for ensuring that employees are not coerced into separation under VSIP and for ensuring that the employee's decision is not based on erroneous or misleading information. If OPM finds evidence of misuse and determines that an agency is not operating its VSIP program in a manner consistent with applicable laws or regulatory requirements, it may revoke or suspend the agency's authority, or refer the matter to the Office of the Special Counsel. Finally, under OPM's VSIP regulations, an employee who separates with a VSIP, but who believes that the separation was involuntary, may appeal the basis for the separation to the Merit Systems Protection Board.

I appreciate the opportunity to respond to your interest in this matter. If you need any further assistance in this matter, please do not hesitate to contact me at (202) 606-1300.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason Levine", is written over a horizontal line.

Jason Levine  
Director  
Congressional, Legislative,  
and Intergovernmental Affairs

**Congress of the United States**  
**Washington, DC 20510**

June 10, 2016

**VIA ELECTRONIC TRANSMISSION**

Glenn A. Fine  
Acting Inspector General  
U.S. Department of Defense  
4800 Mark Center Drive  
Alexandria, VA 22350

Dear Acting Inspector General Fine:

We have a longstanding interest in whistleblower protections for Department of Defense (DoD) military and civilian personnel, as well as contractors. Among other things, we have requested that the Government Accountability Office (GAO) review the Department of Defense Office of Inspector General's (DoD OIG) whistleblower reprisal programs,<sup>1</sup> supported statutory improvements to those programs, and conducted crucial oversight of the handling of reprisal cases and the treatment of whistleblowers.<sup>2</sup> These efforts have produced some improvements.<sup>3</sup>

We also appreciate your willingness to engage with our offices regarding these issues since you assumed your acting role in January of this year. Before you came to the DoD IG, we had expressed concerns regarding the DoD OIG's interpretation of statutory protections for contractors. In 2014, Members of Congress wrote that the DoD OIG's overly narrow reading of 10 U.S.C. § 2409 regarding personnel who could receive protected disclosures was inconsistent with the statute and congressional intent.

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<sup>1</sup> U.S. Gov't Accountability Office (GAO), GAO-12-362, *Actions Needed to improve DOD's Military Whistleblower Reprisal Program* (2012) (requested by Senator Grassley) [Hereinafter GAO-12-362]; GAO, GAO-15-477, *DOD Needs to Enhance Oversight of Military Whistleblower Reprisal Investigations* (2015) (requested by Senators Grassley, Gillibrand, and McCaskill) [Hereinafter GAO-15-477]; Letter from Claire McCaskill, Ranking Member, Permanent Subcommittee on Investigations, Senate Homeland Security and Governmental Affairs Committee et al. to Gene Dodaro, Comptroller General, GAO (Mar. 16, 2015) (requesting GAO review of civilian and contractor reprisal cases) [Hereinafter Phase II GAO Request].

<sup>2</sup> See, e.g., Letter from Senators to Jon T. Rymer, Inspector General, Office of the Inspector General (Sept. 18, 2014) (overly restrictive interpretation of 10 U.S.C. § 2409); Letter from Charles E. Grassley, Ranking Member, U.S. Senate Committee on the Judiciary to John T. Rymer, Inspector General, U.S. Department of Defense Office of the Inspector General (Nov. 17, 2014) (Staff Report regarding *Zero Dark Thirty* Investigation) [Hereinafter Staff Report: *Zero Dark Thirty*].

<sup>3</sup> GAO-15-477 at 51.

Recently we received information that caused us to inquire, again, about DoD OIG's application of contractor whistleblower protections to its reprisal cases. In February, Senators Grassley and McCaskill asked you whether the DoD OIG is reviewing contractor reprisal claims involving disclosures of "violations of law, rule, or regulation," but not also, as the statute provides, of "gross mismanagement of a Department of Defense contract or grant, a gross waste of Department funds, [or] an abuse of authority relating to a Department contract or grant."<sup>4</sup> On April 11, 2016, based on these concerns, you responded that the DoD OIG would reopen two contractor reprisal cases and take "a more expansive approach" in examining complaints arising under Section 2409.<sup>5</sup> We are encouraged by this initial response and commitment to reviewing contractor reprisal complaints according to the correct legal standard, and we look forward to receiving the remaining requested information.

We believe, however, that there are ongoing challenges, including significant delays in investigations, the lack of a fully implemented, reliable, and comprehensive case management system, ineffective oversight of service branch inspector general (Service IG) reprisal investigations, and allegations of reprisal and misconduct within the DoD OIG itself.<sup>6</sup> We write to express our concerns regarding what appear to be persistent, systemic issues within the DoD OIG, and our hope that you will work diligently to help resolve them.

First, the most recent GAO report, released in May 2015, found chronic noncompliance with statutory notification requirements and continued delays in reprisal case processing. According to GAO, DoD OIG "did not meet statutory notification requirements to inform service members about delays in investigations for about half of military whistleblower reprisal investigations in fiscal year 2013."<sup>7</sup> Specifically, DoD OIG's notification letters were late in 53 percent of cases reviewed.<sup>8</sup>

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<sup>4</sup> Letter from Senators Charles E. Grassley and Claire McCaskill to Glenn Fine, Acting Inspector General, U.S. Department of Defense Office of the Inspector General (Feb. 25, 2016) (citing 10 U.S.C. § 2409).

<sup>5</sup> Letter from Glenn A. Fine, Acting Inspector General, U.S. Department of Defense Office of the Inspector General to Senators Charles E. Grassley and Claire McCaskill (Apr. 11, 2016) (citing 10 U.S.C. § 2409).

<sup>6</sup> Marisa Taylor, *Is whistleblower advocate for nation's spies under attack?*, McClatchy (Apr. 2, 2014); available at: <http://www.mcclatchydc.com/news/nation-world/national/national-security/article24766012.html>; Letter from Rep. Jackie Speier to Jon T. Rymer, Inspector General, U.S. Department of Defense Office of the Inspector General (Dec. 29, 2014) [Hereinafter Speier Letter], available at: <https://s3.amazonaws.com/s3.documentcloud.org/documents/1386488/ig-letter-re-mike-helms.pdf>; Charles S. Clark, *Former Pentagon IG Official Probed for Destroying Documents*, Government Executive (June 3, 2015), available at: <http://www.govexec.com/defense/2015/06/former-pentagon-ig-officials-probed-destroying-documents/114367/>; Marisa Taylor, *Possible Pentagon destruction of evidence in NSA leak case probed*, McClatchy (June 15, 2015), available at: <http://www.mcclatchydc.com/news/nation-world/national/national-security/article25186123.html>; Letter from Danielle Brian and Mandy Smithberger, Project on Government Oversight to Glenn Fine, Acting Inspector General, U.S. Department of Defense Office of the Inspector General (Mar. 8, 2016) [Hereinafter POGO Letter]; available at: <http://www.pogo.org/our-work/letters/2016/letter-to-pentagon-watchdog.html?referrer=http://www.pogo.org/our-work/letters/2016/letter-to-pentagon-watchdog.html>.

<sup>7</sup> GAO-15-477 at 11 (emphasis added).

<sup>8</sup> *Id.* at 51.

Overall, “[t]he average length of an investigation during fiscal years 2013 and 2014 was almost three times the DOD requirement.”<sup>9</sup>

Second, the 2015 report repeatedly notes the shortcomings of DoD OIG’s new case management system. As of 2015, the office did not have “procedures to ensure accurate and complete recording of total case-processing time.”<sup>10</sup> Moreover, the system was still under development and had “limited reporting capabilities.”<sup>11</sup> For example, the system cannot aggregate data for each investigative and oversight stage—data that can help identify deficiencies and opportunities for improvement.<sup>12</sup> Additionally, GAO found that investigators were not using the case management system to monitor case information and progress in real time, despite the system’s capability to do so. Rather, investigators were uploading key data and documents after cases were already closed.<sup>13</sup> Specifically:

For 83 percent of cases closed in fiscal year 2013, DODIG staff made changes to the case variables in the case management system in 2014, at least 3 months after case closure. For cases where DODIG made changes to the data, we estimate that about 68 percent had significant changes, such as changes to the date the servicemember filed the complaint and the organization that conducted the investigation, as well as the result code, which indicates whether the case was fully investigated.<sup>14</sup>

DoD OIG explained that the investigators “had not been consistently recording information” and the office had to correct the data.<sup>15</sup> GAO warned that DoD OIG should update internal guidance on the use of the system and its real-time tracking capabilities, or its reporting challenges would continue.<sup>16</sup> Further, many of these “significant changes” were made after DoD OIG was notified of GAO’s audit.<sup>17</sup> Recent allegations disclosed to your office by the Project on Government Oversight (POGO) indicate that DoD OIG managers “advis[ed] staff to add information to files that were specifically within the scope of GAO’s review,” which POGO suggests is evidence of “efforts to improperly influence the GAO’s findings.”<sup>18</sup> We trust that DoD OIG will fully cooperate with GAO in its Phase II review of civilian and contractor reprisal cases, and commit to transparency regarding any continuing practice of modifying data after-the-fact and in advance of that review.<sup>19</sup>

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<sup>9</sup> *Id.* at 11 (emphasis added).

<sup>10</sup> *Id.* at 20.

<sup>11</sup> *Id.* at 21.

<sup>12</sup> *Id.* at 22-23. DoD OIG also does not have the ability to track data on each investigative and oversight stage for Service IG cases. DoD OIG reported that it had planned to complete the last phase of development by the end of fiscal year 2015.

<sup>13</sup> *Id.* at 24.

<sup>14</sup> *Id.* at 25.

<sup>15</sup> *Id.* at 25.

<sup>16</sup> *Id.* at 26.

<sup>17</sup> *Id.* at 84.

<sup>18</sup> POGO Letter.

<sup>19</sup> See Phase II GAO Request.

Third, the GAO report revealed significant challenges in tracking and monitoring Service IG reprisal investigations. The Service IGs use separate systems,<sup>20</sup> and the DoD OIG has expressed that it will not incorporate all of the Service IGs' key concerns as it expands its system to include the Service IGs.<sup>21</sup> GAO also noted important differences in the way the DoD OIG and the Service IGs address case intakes. Apparently, as a result, "DODIG investigators had incorrectly coded some cases in the case management system as fully investigated when the service IG had dismissed the case prior to a full investigation."<sup>22</sup> Notably, in many of these preliminary investigations, the Service IG had not even interviewed the complainant,<sup>23</sup> although DoD OIG guidance requires such interviews at the DoD OIG intake stage.<sup>24</sup>

Fourth, the GAO has notified us that, although DoD OIG concurred with key GAO recommendations related to congressional oversight, it has declined to implement them. According to GAO, DoD OIG disagrees with GAO's recommendation to "[r]egularly report to Congress on the timeliness of military whistleblower reprisal investigations, including the number of cases exceeding the 180 days provided by law."<sup>25</sup> As GAO notes in its 2012 report, "the absence of timeliness information in these reports limits congressional decision makers' ability to thoroughly evaluate and identify whether delays continue to exist within DOD's whistleblower reprisal investigative process."<sup>26</sup> According to GAO, DoD OIG's purported reasoning for declining to provide regular data to Congress regarding the timeliness of its investigations is the fact that the agency responds to ad hoc congressional requests. In our experience, however, regular reporting is far more efficient and effective. Further, the need for such data does not necessarily arise in a predictable or scheduled manner, and staff and members frequently must make informed decisions quickly. Their ability to do so is significantly impaired when they must wait for agencies to compile, analyze, review, and approve responses to ad hoc requests.

Further, GAO has informed us that DoD OIG also disagrees with GAO regarding its recommendation to "[r]egularly report to Congress on the frequency and type of corrective action taken in response to substantiated reprisal claims."<sup>27</sup> According to GAO, DoD OIG reports corrective actions in its semi-annual reports to Congress, but those reports do not disclose instances where the services declined to take DoD OIG's recommended actions. Without this information, Congress cannot effectively evaluate whether the whistleblower protection laws are working as intended. Congress must be

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<sup>20</sup> GAO-15-477 at 20.

<sup>21</sup> *Id.* at 30.

<sup>22</sup> *Id.* at 24.

<sup>23</sup> *Id.* at 40-41. Overall, GAO estimated that "59 percent of service preliminary inquiry case files compared to 10 percent of service full investigation case files were missing evidence of a servicemember interview."

<sup>24</sup> *Id.* at 9, 41; *see also id.* at 16-17 (GAO also could not include data on cases dismissed at intake in its "overall timeliness calculations" because Service IGs do not track that information or report it to DoD OIG.).

<sup>25</sup> GAO-12-362 at 76-78.

<sup>26</sup> *Id.* at 23.

<sup>27</sup> *Id.* at 76-78.



able to determine the extent to which whistleblowers are actually made whole and retaliators are held accountable.

Fifth, as POGO notes in its recent letter, the DoD OIG substantiates very few reprisal cases, and “has dismissed 84.6 percent of the cases it has received since pledging to make reforms in 2012.”<sup>28</sup> The low substantiation rate is likely due to multiple factors. The POGO letter alleges that DoD OIG may be hastily closing cases to improve its timeliness and, at times, “based on the unsubstantiated belief that the official would have taken the same action regardless of a protected disclosure.”<sup>29</sup> We also understand that DoD OIG investigators may be dismissing reprisal cases at the intake stage without interviewing the complainant. Finally, multiple whistleblowers have alleged that DoD OIG officials frequently, and improperly, issue instructions to alter investigative findings from substantiated to unsubstantiated.<sup>30</sup>

Sixth, POGO’s letter alleges an environment within DoD OIG that is “toxic” to whistleblowers and that condones misconduct.<sup>31</sup> As GAO noted in its 2015 report, “within the [DoD OIG], a quarter of employees surveyed in 2014 did not feel they could disclose a suspected violation of any law, rule, or regulation without fear of reprisal.”<sup>32</sup> The press has reported that “[o]fficials who’ve raised the concerns about reprisal investigations have alleged that they’ve been retaliated against themselves.”<sup>33</sup> As legislators who have worked with our colleagues from both sides of the aisle for many years to protect whistleblowers, we are baffled by the painful irony that an office responsible for investigating reprisal is charged with committing it.

Lastly, and perhaps even more troubling, are allegations of misconduct involving senior DoD OIG officials. On March 18, 2016, the Office of Special Counsel (OSC) referred to the Department of Justice Office of the Inspector General (DOJ OIG) allegations that current and former DoD OIG officials improperly destroyed documents at issue in the criminal prosecution of a National Security Agency (NSA)

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<sup>28</sup> POGO Letter.

<sup>29</sup> *Id.* (citing GAO-15-477 at 40).

<sup>30</sup> Marisa Taylor, *Intelligence, defense whistleblowers remain mired in broken system*, McClatchy (Dec. 30, 2014) (“At the Pentagon inspector general’s office, its own investigators accused the office of improperly dismissing, watering down or stalling conclusions in retaliation inquiries, according to five federal officials who are familiar with the allegations and spoke only on the condition of anonymity because of the matter’s sensitivity. Cases that are controversial, complicated or involve high-level officials are especially prone to being altered in a way that’s unfavorable to whistleblowers, the federal officials said.”), available at: <http://www.mcclatchydc.com/news/nation-world/national/national-security/article24777871.html>; Speier Letter; Marisa Taylor, *For whistleblower vet, winning is a long-elusive quest*, McClatchy (Dec. 30, 2014), available at: <http://www.mcclatchydc.com/news/nation-world/national/national-security/article24777874.html>.

<sup>31</sup> POGO Letter.

<sup>32</sup> GAO-15-477 at 1 (citing Office of Personnel Management, *Department of Defense Office of Inspector General 2014 Employee Viewpoint Survey* (Aug. 4, 2014)).

<sup>33</sup> Marisa Taylor, *Intelligence, defense whistleblowers remain mired in broken system*.



whistleblower.<sup>34</sup> The whistleblower's advocates had sought the documents to demonstrate that the whistleblower cooperated with a DoD OIG probe.<sup>35</sup> We are pleased that the DoD OIG has agreed to the referral and supports an independent inquiry.<sup>36</sup> Unfortunately, as you know, this referral follows multiple inquiries into DoD OIG conduct in audits, investigations of wrongdoing, and the treatment of whistleblowers.<sup>37</sup>

Against the backdrop of these troubling allegations and findings, it has been suggested that the culture within DoD OIG is harmful to its mission to investigate whistleblower reprisal, and that the Inspector General should carefully consider whether key responsibilities have been placed in the right hands.<sup>38</sup>

We believe that in your new role as Acting Inspector General, you have an important opportunity to further advance the progress already made, and to set a new tone and direction within the DoD OIG. To those ends, we request that you respond to the following questions:

1. Please provide an update on DoD OIG's progress in implementing GAO recommendations, including specific steps DoD OIG has taken to:
  - a. Improve the overall timeliness of its investigations;
  - b. Update its investigations manual and the current procedures for conducting intakes, investigations, and oversight;
  - c. Ensure investigators record information in the case management system in a timely fashion, prior to case closure;
  - d. Standardize investigations across the service branches;
  - e. Correct investigators' practice of marking cases as fully investigated by Service IGs, when they were not; and
  - f. Incorporate Service IGs into the case management system.
2. Please provide a full, written explanation regarding DoD OIG's position on GAO recommendations 10 and 18 from its 2012 report.

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<sup>34</sup> Marisa Taylor, *Probe launched into Pentagon handling of NSA whistleblower evidence*, McClatchy (Mar. 21, 2016), available at: <http://www.mcclatchydc.com/news/nation-world/national/national-security/article67392097.html>.

<sup>35</sup> *Id.*; Clark, *Former Pentagon IG Official Probed for Destroying Documents* (A federal judge also has requested the "cooperation" of the Department of Justice in investigating the matter.).

<sup>36</sup> Marisa Taylor, *Probe launched into Pentagon handling of NSA whistleblower evidence*.

<sup>37</sup> Letter from Charles E. Grassley, Chairman, U.S. Senate Committee on the Judiciary to Jon T. Rymer, Inspector General, U.S. Department of Defense Office of the Inspector General (Jan. 7, 2016) (concerns regarding independence of DoD OIG in DoD response to SIGAR); GAO, GAO-15-198, *DOD Financial Management: Actions are Needed on Audit Issues Related to the marine Corps' 2012 Schedule of Budgetary Activity* (2015); Floor Speech of Senator Charles E. Grassley, 161 Cong. Rec. S6254-56 (daily ed. Aug. 4, 2015) (statement of Sen. Grassley); Staff Report: *Zero Dark Thirty*.

<sup>38</sup> POGO Letter; Letter from Claire McCaskill, Ranking Member, Permanent Subcommittee on Investigations, Senate Homeland Security and Governmental Affairs Committee et al. to Jon T. Rymer, Inspector General, U.S. Department of Defense Office of the Inspector General (Apr. 21, 2015).

3. In the last 5 years, how many reprisal cases have investigators' findings of "substantiated" reprisal been altered to "unsubstantiated" prior to publication? In each case, what individual changed those findings and what individual instructed that they be changed? Why were they changed? Please include any and all cases originally deemed substantiated, regardless of the level of review.
4. In the last 5 years, how many reprisal cases has DoD OIG dismissed at intake without contacting and interviewing the complainant?
5. What efforts have been and are being made to correct or alter data in the case management system prior to the start of the next GAO review? What types of data have been corrected or modified? How many reprisal cases have been modified or corrected to date since the GAO 2015 report was issued? Please list the cases updated and explain the purpose for such updates.
6. What specific steps have you taken and do you plan to take to foster a culture that is responsive and hospitable to internal whistleblowers?
7. Please provide a briefing on the case management system as it functions today.

Please contact us to schedule a briefing on the case management system as soon as possible. Please also provide a response to each of the remaining above questions by June 30, 2016, and number your responses according to their corresponding questions. Finally, please contact Charlie Murphy or DeLisa Lay of Senator Grassley's staff at 202-224-5225, Margaret Daum of Senator McCaskill's staff at 202-224-3721, Brooke Jamison of Senator Gillibrand's staff at 202-224-4451, Tristan Leavitt of Representative Chaffetz's staff at 202-225-5074, or Krista Boyd of Representative Cummings' staff at 202-225-9493, if you have any questions.

Sincerely,



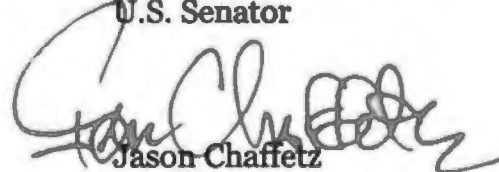
Charles E. Grassley  
U.S. Senator



Claire McCaskill  
U.S. Senator



Kirsten Gillibrand  
U.S. Senator



Jason Chaffetz  
Member of Congress



Elijah E. Cummings  
Member of Congress

cc: The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security  
and Governmental Affairs

The Honorable Tom Carper  
Ranking Member  
Committee on Homeland Security  
and Governmental Affairs

The Honorable John McCain  
Chairman  
Committee on Armed Services

The Honorable Jack Reed  
Ranking Member  
Committee on Armed Services

The Honorable Gene L. Dodaro  
Comptroller General  
U.S. Government Accountability Office

The Honorable Michael E. Horowitz  
Chairman  
Council of the Inspectors General  
on Integrity and Efficiency

The Honorable Carolyn Lerner  
Special Counsel  
Office of Special Counsel

# United States Senate

WASHINGTON, DC 20510

June 30, 2016

## VIA ELECTRONIC TRANSMISSION

The Honorable Michael E. Horowitz  
Chair of Council of the Inspectors General on Integrity and Efficiency  
1717 H Street, NW, Suite 825  
Washington, D.C. 20006

Dear Chair Horowitz:

The Committee on Homeland Security and Governmental Affairs and the Committee on the Judiciary have been conducting an inquiry into the Federal Housing Finance Agency (FHFA), Office of Inspector General (OIG). The Committees understand that the FHFA-OIG passed its last external peer review in 2014. Peer reviews of federal audit organizations are required by generally accepted government auditing standards (GAGAS) or the Council of the Inspectors General on Integrity and Efficiency (CIGIE) to help OIGs fulfill their oversight roles and comply with statutory requirements, professional standards, and established policies and procedures.<sup>1</sup> Peer reviews must be conducted at least every three years.<sup>2</sup> Thus, the next peer review of FHFA-OIG is scheduled for 2017. However, the Committees have obtained information suggesting that an earlier peer review of FHFA-OIG is warranted to ensure that its audits meet GAGAS standards and that the office is properly fulfilling its role of providing accountability and transparency over government programs.

The FHFA-OIG Office of Audit has experienced significant organizational changes, including a substantial reduction in its audit workforce. Specifically, as of September 30, 2014, the Office of Audit had 36 FTE.<sup>3</sup> A little more than one year later—as of October 29, 2015—the Office of Audit was reduced to only nine FTE.<sup>4</sup> The justification provided by the Inspector General for the restructuring of the Office of Audit was that the IG “observed that [the Office of Audit] struggled to complete its audits within the timeframes established, even when its resources were supplemented” and that over a one year period (October 28, 2014 through

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<sup>1</sup> Council of the Inspectors General on Integrity and Efficiency, *Guide for Conducting Peer Reviews of Audit Organizations of Federal Offices of Inspector General* (Sept. 2014), available at <https://www.ignet.gov/content/ig-peer-reviews>.

<sup>2</sup> U.S. Gov’t Accountability Office, GAO-12-331G, Government Auditing Standards, § 3.82(b) (2011).

<sup>3</sup> Letter from Laura S. Wertheimer, Inspector General, Federal Housing Finance Agency, to Charles E. Grassley, Chairman, U.S. Senate Committee on the Judiciary (Oct. 29, 2015).

<sup>4</sup> *Id.*

October 28, 2015) the Office of Audit “published no white papers or audit reports . . . save for three statutory audits, two of which were conducted and completed by an external audit firm.”<sup>5</sup> However, a summary of the work published on the FHFA-OIG website reveals that the decline in production occurred *after* the confirmation of a new Inspector General, in the fall of 2014:

- CY 2011: 4 audit reports
- CY 2012: 13 audit reports
- CY 2013: 13 audit reports
- CY 2014: 18 audit reports (all in the first 10 months)

On September 24, 2014, the new Inspector General was confirmed and on October 28, 2014, she was sworn in.

- CY 2015: 3 audit reports and 3 reports from the newly created “Office of Compliance”

Moreover, current and former employees with whom the Committees have spoken have said the IG canceled a number of on-going or nearly completed audits or other projects. Information obtained from these interviews suggests that at least one audit with findings was sent to the agency for comment but was never subsequently published, following a meeting between the Inspector General and the head of the agency, at which the head of the agency expressed his displeasure with the findings. These claims call into question not only the independence of the Office of the Inspector General, but also whether the office was in compliance with GAGAS requirements that auditors must issue reports communicating the results of each completed performance audit.<sup>6</sup> While there may be additional audits implicated by these allegations, the Committees are aware of three in particular that merit scrutiny:

- 1) *Nonbank Sellers*: The Committees have obtained information that an audit was commenced on this topic in November 2014. This is consistent with information provided in both FHFA-OIG’s FY 2016 Congressional Budget Justification<sup>7</sup> and its FY 2015 Audit and Evaluation Plan,<sup>8</sup> which state that FHFA-OIG had identified nonbank sellers as one of four areas of risk that would be a focus in FY 2015. FHFA-OIG planned to assess various aspects of this issue, to include “audits [that] will cover significant risks related to FHFA’s supervision and regulation of the Enterprises’ business with nonbank sellers and their information technology

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

<sup>6</sup> U.S. Gov’t Accountability Office, GAO-12-331G, Government Auditing Standards, § 7.03 (2011).

<sup>7</sup> Federal Housing Finance Agency, Office of Inspector General, Fiscal Year 2016, Congressional Budget Justification, *available at*

<https://origin.www.fhfaoig.gov/Content/Files/FY%202016%20Congressional%20Budget.pdf>; *see also*

Federal Housing Finance Agency, Office of Inspector General, Fiscal Year 2017 Congressional Budget Justification 2017, *available at* <https://origin.www.fhfaoig.gov/Content/Files/FY2017CongressionalBudget.pdf>.

<sup>8</sup> Office of Inspector General Federal Housing Finance Agency, Audit and Evaluation Plan (Feb. 2015), *available at* February 2015 [https://origin.www.fhfaoig.gov/Content/Files/AuditAndEvaluationPlan\\_1.pdf](https://origin.www.fhfaoig.gov/Content/Files/AuditAndEvaluationPlan_1.pdf).

security.”<sup>9</sup> As such, several audit assignments were anticipated, and, according to information obtained by the Committees, at least one draft report was completed in the spring of 2015. However, to date, no audit involving nonbank sellers has been issued; thus, it is unclear whether findings were communicated to management as required.

- 2) National Mortgage Database: This audit was commenced on August 20, 2014 and closed on December 18, 2014. The audit was initiated after the prior Acting Inspector General sent a letter to FHFA detailing serious concerns with the National Mortgage Database that was required under the Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, § 1324(c), 122 Stat. 2654, 2694 (codified at 12 U.S.C. § 4544). According to information obtained by the Committees, this audit was terminated at the direction of the Inspector General, despite serious concerns that the audit team wanted to continue to pursue and, as documented by the close-out letter sent to the agency, a potential violation of the requirements of HERA with respect to the database efforts.<sup>10</sup>
- 3) 3% White Paper: According to information obtained by the Committees, Office of Audit staff expended significant resources on a white paper reviewing Fannie Mae and Freddie Mac’s 97% Loan-to-Value Program (3% White Paper). The paper was allegedly drafted by the Office of Audit and sent to FHFA for official agency comment in early March 2015. The response from FHFA was received by FHFA-OIG office in late March 2015, but FHFA-OIG failed to publish the report. According to FHFA-OIG, the transmittal of the 3% White Paper to agency for comment may have been premature and did not meet GAGAS requirements for referencing.<sup>11</sup> According to FHFA-OIG, factual inaccuracies were not addressed and “publication of such a draft might adversely (and unfairly) affect the credibility of other FHFA-OIG publications.”<sup>12</sup>

Another cause for the Committees’ concern with respect to the audit function of FHFA-OIG is the hiring of a head of the Office of Audit lacking in audit experience generally and GAGAS experience specifically, who served in that position in an acting capacity for more than a year. Section 3 of the Inspector General Act requires, in accordance with applicable laws and regulations governing the civil service, for each Inspector General to appoint an Assistant Inspector General for Auditing.<sup>13</sup> The statutory responsibility of the Assistant IG for Auditing is “supervising the performance of auditing activities relating to programs and operations of the

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<sup>9</sup> Federal Housing Finance Agency, Office of Inspector General, Fiscal Year 2016, Congressional Budget Justification, *supra* note 7.

<sup>10</sup> Letter from Laura S. Wertheimer, Inspector General, Federal Housing Finance Agency, to Ron Johnson, Chairman, Committee on Homeland Security and Governmental Affairs (May 6, 2016), at 23.

<sup>11</sup> It is not clear to what extent a white paper is subject to GAGAS requirements.

<sup>12</sup> Letter from Leonard J. DePasquale, Chief Counsel, Federal Housing Finance Agency, Office of Inspector General, to Investigative Counsel, Senate Committee on Homeland Security and Governmental Affairs (May 20, 2016).

<sup>13</sup> Inspector General Act of 1978, 5 U.S.C. § APP. 3 § 3.



establishment.”<sup>14</sup> However, rather than filling the advertised position for a Deputy Inspector General for Audit with an individual who met the minimum qualifications for the “Auditing Series” and GAGAS continuing professional education (CPE) requirements, FHFA-OIG filled the position with an attorney in an acting capacity. It is not clear that this individual had the requisite experience and expertise to “supervise the performance of auditing activities,” as required by the IG Act.<sup>15</sup>

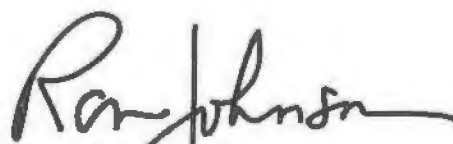
The use of staff without required audit experience or CPEs may also be implicated by the use of counsel to perform “all referencing.”<sup>16</sup> According to FHFA-OIG, the IG moved all referencing activity to the Office of Counsel and directed that office to hire two additional staff lawyers to perform all referencing.<sup>17</sup> It is unclear to what extent these staff attorneys are familiar with GAGAS and to what extent they meet GAGAS standards for continuing professional education. Based on interviews with current and former employees with extensive audit experience, the referencing process is generally handled by experienced auditors within the Office of Audit.

Given concerns raised to the Committees regarding the audit function at FHFA-OIG, including concerns raised by the agency itself, commencement of a peer review of FHFA-OIG audit activities may be warranted. An earlier peer review would ensure that FHFA-OIG audits are compliant with GAGAS and better position the agency to provide accountability and transparency over government programs. Should you have any questions, please contact Paul Junge of Chairman Grassley’s staff at (202) 224-5225 or Michael Lueptow of Chairman Johnson’s staff at (202) 224-4751. Thank you for your attention to this important matter.

Sincerely,



Charles E. Grassley  
Chairman  
Committee on the Judiciary



Ron Johnson  
Chairman  
Committee on Homeland Security  
and Governmental Affairs

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<sup>14</sup> *Id.* at § 3(d)(1).

<sup>15</sup> GAGAS moreover requires that an audit organization should establish policies and procedures designed to provide it with reasonable assurance that those assigned operational responsibility for the audit organization’s system of quality control have sufficient and appropriate experience and ability, and the necessary authority, to assume that responsibility. U.S. Gov’t Accountability Office, GAO-12-331G, Government Auditing Standards § 3.87 (2011).

<sup>16</sup> Letter from Leonard J. DePasquale, Chief Counsel, Federal Housing Finance Agency, Office of Inspector General, to Investigative Counsel, Senate Committee on Homeland Security and Governmental Affairs (May 20, 2016).

<sup>17</sup> According to FHFA-OIG, these “enhancements to the referencing process” were set out in an internal email to all FHFA-OIG employees on March 10, 2015. The Committees have not reviewed this document.

cc:

The Honorable Patrick J. Leahy  
Ranking Member  
Committee on the Judiciary

The Honorable Thomas R. Carper  
Ranking Member  
Committee on Homeland Security  
and Governmental Affairs

The Honorable Richard Shelby  
Chairman  
Senate Committee on Banking, Housing, Urban Affairs

The Honorable Sherrod Brown  
Ranking Member  
Senate Committee on Banking, Housing, Urban Affairs

The Honorable Laura S. Wertheimer  
Inspector General  
Federal Housing Finance Agency  
400 Seventh Street, SW  
Washington, DC 20024

Carolyn N. Lerner  
Special Counsel  
United States Office of Special Counsel  
1730 M Street, NW  
Washington, DC 20036



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GABRIELLE A. BATKIN, MINORITY STAFF DIRECTOR

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

November 30, 2016

The Honorable Megan J. Brennan  
Postmaster General and Chief Executive Officer  
United States Postal Service  
475 L'Enfant Plaza SW  
Washington, DC 20260-0010

Dear Postmaster General Brennan:

I write to you regarding concerns I have received about overtime hours during the election season as well as the potential involvement of United States Postal Service (USPS) management in partisan activity. I strongly believe that all USPS employees have a right to engage in the political process in accordance with all applicable laws. However, due to the potential seriousness of these allegations, I feel that it is important to raise these issues with you directly.

I recently received information from a USPS employee who was concerned with the use of overtime hours to cover for employees who had taken leave without pay (LWOP) to volunteer for campaign activities through the Letter Carriers Political Fund (LCPF). This employee was concerned that because overtime hours were being used to cover for individuals who were absent campaigning for certain political candidates, the expense of the overtime hours needed to cover the empty delivery route could be considered as an in-kind donation by the Postal Service to those candidates. The employee was also concerned about the burden that the extended absences placed on his local post office and whether the correct leave procedures were followed in approving the time off.

I fully support the right of all federal employees, including USPS employees, to engage in the political process, provided they follow the appropriate laws,<sup>1</sup> and I encourage federal employees to exercise their rights to individual and collective political speech. While the right of employees to take LWOP to engage in campaign activities does not appear to be in question in this case, there may be some issue with the processes by which the leave was approved.<sup>2</sup> My

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<sup>1</sup> See, e.g., 5 U.S.C. § 7321.

<sup>2</sup> According to the Employee and Labor Relations (ELM 40 §514.22) decisions for LWOP should be based on "the needs of the employee, the needs of the Postal Service, and the cost to the Postal Service. The granting of LWOP is a matter of administrative discretion and is not granted on the employee's demand except as provided in collective bargaining agreements." According to the current collective bargaining agreement, NALC employees may be granted LWOP for union activities, provided that "a request for leave has been submitted by the employee to the installation head as soon as practicable and provided that approval of such leave does not seriously

staff has referred this allegation to the USPS Office of Inspector General (OIG), and I will be interested in reviewing the OIG's findings about this matter.

In addition to contacting my office, the employee also raised concerns with his union leadership that the use of overtime could affect the nonpartisan posture of the Postal Service. In response, the union president wrote an email suggesting that senior USPS leadership guided union leadership in selecting the candidates for which USPS employees could campaign. According to this email, the chosen candidates were apparently "approved at the highest levels of USPS management" because of their "agreement with the objectives . . . to strengthen and protect the USPS." The email reads in full:

**The names were approved at the highest level of USPS management.**

The endorsed candidates have proven themselves to be in agreement with the objectives that the NALC [National Association of Letter Carriers] hold to strengthen and protect the USPS. That really is the nature of what we're doing and since the USPS can't advocate for themselves they are allowing us to do it.

The Hatch Act prohibits a federal employee from "us[ing] his official authority or influence for the purpose of interfering with or affecting the result of an election."<sup>3</sup> If it is accurate that someone "at the highest level of USPS management" selected candidates for endorsement by the NALC—because "USPS can't advocate for themselves"—this action could potentially contravene the Hatch Act. I am concerned by this allegation, and my staff has forwarded the information to the Office of Special Counsel (OSC) so that they may investigate this matter.

Although I support the right of USPS employees to engage in the political process, I am concerned by the allegations I have received. Federal agency leadership should never exert influence over the decision about which candidates a federal employee should support or for whom they should campaign. I expect the USPS OIG and OSC to promptly and thoroughly investigate these allegations, and I ask that you ensure that USPS is fully cooperative with these inquiries. In addition, I ask that you please arrange for a staff-level briefing with my staff about these allegations as soon as possible but no later than December 16, 2016.

If you have any questions about this request, please have your staff contact Jennifer Scheaffer with my staff at 202-224-4751. Thank you very much for your attention to this matter.

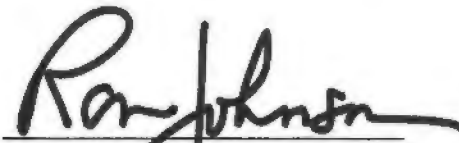
Sincerely,

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adversely affect the service needs of the installation." See also 2011-2016 National Agreement Between the National Association of Letter Carriers & the United States Postal Service, Article 24.2.A.

<sup>3</sup> 5 U.S.C. § 7323.

The Honorable Megan J. Brennan  
November 30, 2016  
Page 3

A handwritten signature in black ink, appearing to read "Ron Johnson", written over a horizontal line.

Ron Johnson  
Chairman  
Homeland Security and  
Governmental Affairs Committee

Cc: The Honorable Thomas R. Carper  
Ranking Member  
Committee on Homeland Security and Governmental Affairs

The Honorable James H. Bilbray  
Chairman, U.S. Postal Service Board of Governors

The Honorable Carolyn N. Lerner  
Special Counsel  
U.S. Office of Special Counsel

The Honorable Tammy Whitcomb  
Acting Inspector General  
U.S. Postal Service

RON JOHNSON, WISCONSIN, CHAIRMAN

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JOHN HOEVEN, NORTH DAKOTA  
STEVE DAINES, MONTANA

CLAIRE McCASKILL, MISSOURI  
THOMAS R. CARPER, DELAWARE  
JON TESTER, MONTANA  
HERD HEITKAMP, NORTH DAKOTA  
GARY C. PETERS, MICHIGAN  
MARGARET WOOD HASSAN, NEW HAMPSHIRE  
KAMALA D. HARRIS, CALIFORNIA

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

February 6, 2017

The Honorable Joseph P. Clancy  
Director  
United States Secret Service  
950 H Street, NW  
Washington, DC 20223

Dear Director Clancy:

The Committee on Homeland Security and Governmental Affairs is examining social media statements allegedly made by the Special Agent-in-Charge (SAIC) of the United States Secret Service (USSS) field office in Denver, Colorado. I appreciate your assistance with this matter.

According to media reports, the SAIC reportedly wrote on Facebook in October 2016 about the presidential election. "As a public servant for nearly 23 years, I struggle to not violate the Hatch Act," she wrote. "To do otherwise can be a criminal offense for those in my position. Despite the fact that I am expected to take a bullet for both sides. But this world has changed and I have changed. And I would take jail time over a bullet or an endorsement for what I believe to be disaster to this country and the strong and amazing women and minorities who reside here. Hatch Act be damned. I am with Her."<sup>1</sup>

According to the Department of Homeland Security Office of Inspector General (DHS OIG), the OIG received a complaint about the SAIC's social media use in "mid-October" 2016 and referred the matter to USSS.<sup>2</sup> After recent media reports, the OIG reportedly received a second complaint, which it also referred to USSS.<sup>3</sup> In January 2017, USSS reportedly placed the SAIC on paid administrative leave.<sup>4</sup>

I fully support the right of all federal employees to engage in the political process, provided they follow the appropriate laws. Under the Hatch Act, USSS employees are subject to enhanced prohibitions on political activity that do not ordinarily apply to other federal

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<sup>1</sup> E.g., Susan Crabtree, *Senior Secret Service agent suggests she wouldn't take 'a bullet' for Trump*, WASH. EXAMINER (Jan. 24, 2017), available at <http://www.washingtonexaminer.com/senior-secret-service-agent-suggests-she-wouldnt-take-a-bullet-for-trump/article/2612814>.

<sup>2</sup> Email from DHS OIG Staff to Comm. Staff, Jan. 27, 2017.

<sup>3</sup> *Id.*

<sup>4</sup> Susan Crabtree, *Secret Service puts agent who decried taking 'a bullet' for Trump on paid leave*, WASH. EXAMINER (Jan. 27, 2017), available at <http://www.washingtonexaminer.com/secret-service-puts-agent-who-decried-taking-a-bullet-for-trump-on-paid-leave/article/2613210>.

government employees.<sup>5</sup> To better understand the circumstances of these social media posts and USSS's response to them, I request the following information and materials:

1. Did the SAIC make any of the reported social media posts while on duty or using federal resources? Please explain.
2. What is the status of USSS's investigation into this matter? Please explain.
3. Please provide a timeline of when USSS management learned of the SAIC's alleged social media posts. What actions did USSS management take when made aware? Please explain.
4. When did USSS receive allegations from the DHS OIG regarding the SAIC's alleged social media posts? What action did it take when it received these allegations? Please explain.
5. Since USSS became aware of the SAIC's social media posts, have her job duties been subject to review pending investigation? Please explain.
6. Has this matter been referred to the Office of Special Counsel? If so, when? If not, why not?
7. Please explain USSS's reasons for placing the SAIC on paid administrative leave.

Please provide this information as soon as possible, but no later than 5:00 p.m. on February 20, 2017. In addition to a written response, I ask that your staff coordinate a staff-level briefing with Committee staff with respect to this matter. Please schedule this briefing by February 13, 2017.

The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate to investigate "the efficiency and economy of operations of all branches of the Government."<sup>6</sup> Additionally, S. Res. 73 (114<sup>th</sup> Congress) authorize the Committee to examine "the efficiency and economy of all branches and functions of Government with particular references to the operations and management of Federal regulatory policies and programs."<sup>7</sup>

If you have any questions regarding this letter, please ask your staff to contact Chris Boness or Kyle Brosnan of the Committee staff at (202) 224-4751. Thank you for your prompt attention to this matter.

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<sup>5</sup> 5 U.S.C. § 7323. Office of Special Counsel, *The Hatch Act: Permitted and Prohibited Activities for Federal Employees Subject to Further Restrictions*, Feb. 2016, available at <https://osc.gov/Resources/HA%20Poster%20Further%20Restricted%202016.pdf>.

<sup>6</sup> S. Rule XXV(k); see also S. Res. 445, 108<sup>th</sup> Cong. (2004).

<sup>7</sup> S. Res. 73 § 12, 114<sup>th</sup> Cong. (2015).

The Honorable Joseph P. Clancy  
February 6, 2017  
Page 3

Sincerely,



Ron Johnson  
Chairman

cc: The Honorable Claire McCaskill  
Ranking Member

The Honorable John Roth  
Inspector General  
U.S. Department of Homeland Security

The Honorable Carolyn Lerner  
Special Counsel  
U.S. Office of Special Counsel

Enclosure

**Instructions for Responding to a Committee Request**  
Committee on Homeland Security and Governmental Affairs  
United States Senate  
115th Congress

**A. Responding to a Request for Documents**

1. In complying with the Committee's request, produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data, or information should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization, or person denoted in the request has been or is also known by any other name or alias than herein denoted, the request should be read also to include the alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e. CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic form should be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
  - a. The production should consist of single page Tagged Image Files (".tif"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
  - b. Document numbers in the load file should match document Bates numbers and .tif file names.
  - c. If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
  - d. All electronic documents produced should include the following fields of metadata specific to each document:

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

## **Instructions for Responding to a Committee Request**

- e. Alternatively, if the production cannot be made in .tif format, all documents derived from word processing programs, email applications, instant message logs, spreadsheets, and wherever else practicable should be produced in text searchable Portable Document Format (".pdf") format. Spreadsheets should also be provided in their native form. Audio and video files should be produced in their native format, although picture files associated with email or word processing programs should be produced in .pdf format along with the document it is contained in or to which it is attached. In such circumstances, consult with Committee staff prior to production of the requested documents.
  - f. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), consult with the Committee staff to determine the appropriate format in which to produce the information.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to the request should be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When producing documents, identify the paragraph in the Committee's schedule to which the documents respond.
9. Do not refuse to produce documents on the basis that any other person or entity also possesses non-identical or identical copies of the same documents.
10. This request is continuing in nature and applies to any newly discovered information. Any record, document, compilation of data or information not produced because it has not been located or discovered by the return date, should be produced immediately upon subsequent location or discovery.
11. All documents should be Bates-stamped sequentially and produced sequentially. Each page should bear a unique Bates number.
12. Two sets of documents should be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets should be delivered to the Majority Staff in Room 340 of the Dirksen Senate Office Building and the Minority Staff in Room 346 of the Dirksen Senate Office Building.
13. If compliance with the request cannot be made in full by the date specified in the request, compliance should be made to the extent possible by that date. Notify Committee staff as



## **Instructions for Responding to a Committee Request**

soon as possible if full compliance cannot be made by the date specified in the request, and provide an explanation for why full compliance is not possible by that date.

14. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author, and addressee; and (e) the relationship of the author and addressee to each other.
15. In the event that a portion of a document is redacted on the basis of privilege, provide a privilege log containing the following information concerning any such redaction: (a) the privilege asserted; (b) the location of the redaction in the document; (c) the general subject matter of the redacted material; (d) the date, author, and addressee of the document, if not readily apparent; and (e) the relationship of the author and addressee to each other.
16. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
17. If a date, name, title, or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date, name, title, or other descriptive detail is known to you or is otherwise apparent from the context of the request, produce all documents which would be responsive as if the date, name, title, or other descriptive detail was correct.
18. In the event a complete response requires the production of classified information, provide as much information in unclassified form as possible in your response and send all classified information under separate cover via the Office of Senate Security.
19. Unless otherwise specified, the period covered by this request is from January 1, 2009 to the present.
20. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

## **B. Responding to Interrogatories or a Request for Information**

1. In complying with the Committee's request, answer truthfully and completely. Persons that knowingly provide false testimony could be subject to criminal prosecution for perjury (when under oath) or for making false statements. Persons that knowingly withhold subpoenaed information could be subject to proceedings for contempt of Congress. If you are unable to answer an interrogatory or information request fully, provide as much information as possible and explain why your answer is incomplete.

## **Instructions for Responding to a Committee Request**

2. In the event that any entity, organization, or person denoted in the request has been or is also known by any other name or alias than herein denoted, the request should also be read to include the alternative identification.
3. Your response to the Committee's interrogatories or information requests should be made in writing and should be signed by you, your counsel, or a duly authorized designee.
4. When responding to interrogatories or information requests, respond to each paragraph in the Committee's schedule separately. Clearly identify the paragraph in the Committee's schedule to which the information responds.
5. Where knowledge, information, or facts are requested, the request encompasses knowledge, information or facts in your possession, custody, or control, or in the possession, custody, or control of your staff, agents, employees, representatives, and any other person who has possession, custody, or control of your proprietary knowledge, information, or facts.
6. Do not refuse to provide knowledge, information, or facts on the basis that any other person or entity also possesses the same knowledge, information, or facts.
7. The request is continuing in nature and applies to any newly discovered knowledge, information, or facts. Any knowledge, information, or facts not provided because it was not known by the return date, should be provided immediately upon subsequent discovery.
8. Two sets of responses should be delivered, one set to the Majority Staff and one set to the Minority Staff. When responses are provided to the Committee, copies should be delivered to the Majority Staff in Room 340 of the Dirksen Senate Office Building and the Minority Staff in Room 346 of the Dirksen Senate Office Building.
9. If compliance with the request cannot be made in full by the date specified in the request, compliance should be made to the extent possible by that date. Notify Committee staff as soon as possible if full compliance cannot be made by the date specified in the request, and provide an explanation for why full compliance is not possible by that date.
10. In the event that knowledge, information, or facts are withheld on the basis of privilege, provide a privilege log containing the following information: (a) the privilege asserted; (b) the general subject matter of the knowledge, information, or facts withheld; (c) the source of the knowledge, information, or facts withheld; (d) the paragraph in the Committee's request to which the knowledge, information, or facts are responsive; and (e) each individual to whom the knowledge, information, or facts have been disclosed.
11. If a date, name, title, or other descriptive detail set forth in this request is inaccurate, but the actual date, name, title, or other descriptive detail is known to you or is otherwise apparent from the context of the request, provide the information that would be responsive as if the date, name, title, or other descriptive detail was correct.

## **Instructions for Responding to a Committee Request**

12. In the event a complete response requires the transmission of classified information, provide as much information in unclassified form as possible in your response directly to the Committee offices and send only the classified information under separate cover via the Office of Senate Security.
13. Unless otherwise specified, the period covered by this request is from January 1, 2009 to the present.

### **C. Definitions**

1. The term “document” in the request or the instructions means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” in the request or the instructions means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face to face, in meetings, by telephone, mail, telex, facsimile, email (desktop or mobile device), computer, text message, instant message, MMS or SMS message, regular mail, discussions, releases, delivery, or otherwise.
3. The terms “and” and “or” in the request or the instructions should be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

## **Instructions for Responding to a Committee Request**

4. The terms “person” or “persons” in the request or the instructions mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, businesses or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify” in the request or the instructions, when used in a question about individuals, means to provide the following information: (a) the individual’s complete name and title; and (b) the individual’s business address, email address, and phone number.
6. The terms “referring” or “relating” in the request or the instructions, when used separately or collectively, with respect to any given subject, mean anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” in the request or the instructions means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint venturer, loaned employee, part-time employee, permanent employee, provisional employee, or subcontractor.
8. The terms “you” and “your” in the request or the instructions refer to yourself; your firm, corporation, partnership, association, department, or other legal or government entity, including all subsidiaries, divisions, branches, or other units thereof; and all members, officers, employees, agents, contractors, and all other individuals acting or purporting to act on your behalf, including all present and former members, officers, employees, agents, contractors, and all other individuals exercising or purporting to exercise discretion, make policy, and/or decisions.

# # #

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074  
MINORITY (202) 225-5051  
<http://oversight.house.gov>

March 23, 2017

Mr. Mark A. Gabriel  
Administrator and CEO  
Western Area Power Administration  
P.O. Box 281213  
Lakewood, CO 80228

Dear Mr. Gabriel:

We appreciate you making personnel available to brief the Committee staff regarding recent employment decisions made within the Western Area Power Administration (WAPA) related to Director of Security Keith Cloud. As your staff explained, WAPA is currently in the process of initiating an investigation into allegations of employee misconduct. While we appreciate WAPA's responsiveness to such allegations, we have questions about the manner in which WAPA plans to conduct this investigation.

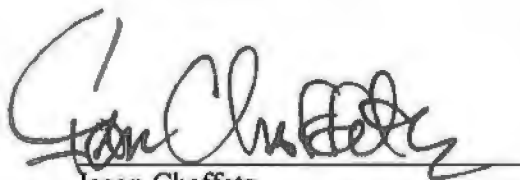
During the briefing, your staff explained WAPA intends to contract with a private individual to conduct an investigation into allegations of employee misconduct. Based on the information provided to the Committee, however, we feel this is either a matter best investigated by the Department of Energy's Office of Inspector General (DOE OIG) or the Office of Special Counsel (OSC). Both offices are uniquely qualified to conduct fair and efficient investigations into the type of allegations raised by your staff during the briefing.

In the interest of managing taxpayer funds efficiently and utilizing resources already at WAPA's disposal, the Committee encourages WAPA to refer these allegations to either or both DOE OIG or OSC without further delay. Please contact Chris Esparza of the Majority staff at (202) 225-5074, or Kapil Longani with the Minority Committee staff at (202) 225-5051, if you have any questions.

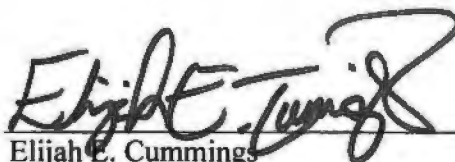
Mr. Mark A. Gabriel  
March 23, 2017  
Page 2

Thank you for your prompt attention to this matter, and we look forward to an update as soon as possible, but no later than March 30, 2017.

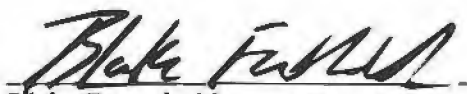
Sincerely,



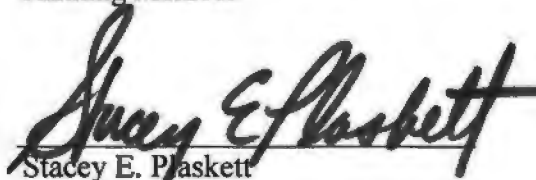
Jason Chaffetz  
Chairman



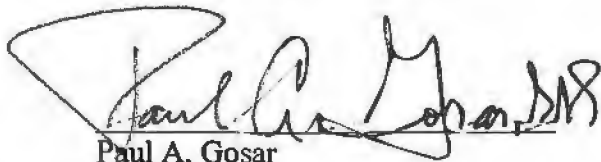
Elijah E. Cummings  
Ranking Member



Blake Farenthold  
Chairman  
Subcommittee on the Interior,  
Energy, and Environment



Stacey E. Plaskett  
Ranking Member  
Subcommittee on the Interior,  
Energy, and Environment



Paul A. Gosar  
Vice Chair  
Subcommittee on the Interior,  
Energy, and Environment

cc: The Honorable April Stephenson, Acting Inspector General  
U.S. Department of Energy

The Honorable Carolyn Lerner, Special Counsel  
U.S. Office of Special Counsel

# United States Senate

WASHINGTON, DC 20510

April 4, 2017

## VIA ELECTRONIC TRANSMISSION

The Honorable Scott Dahl  
Integrity Committee Chair  
Council of the Inspectors General on Integrity and Efficiency  
Inspector General of the U.S. Department of Labor  
935 Pennsylvania Avenue, N.W.  
Room 7452  
Washington, D.C. 20535

The Honorable Carolyn Lerner  
Special Counsel  
Office of Special Counsel  
1730 M Street, N.W.  
Suite 300  
Washington, D.C. 20036

Dear Chair Dahl and Special Counsel Lerner:

We write to ask the Integrity Committee of the Council of the Inspectors General on Integrity and Efficiency (CIGIE) to coordinate with the Office of Special Counsel (OSC) to investigate allegations of wrongdoing and gross mismanagement by the Federal Housing Finance Agency (FHFA) Inspector General Laura Wertheimer. Our committees conducted five formal witness interviews in 2016 and we have received reports from numerous whistleblowers who allege that Inspector General Wertheimer:

- (1) hindered the audit mission of the Office of Inspector General (OIG);
- (2) failed to publish audit findings disfavored by agency leadership;
- (2) implemented a coercive "Voluntary Separation Program (VSP)";
- (3) abused the performance appraisal process;
- (4) used prohibited hiring practices;
- (5) expressed a desire to discriminate on the basis of age and gender; and
- (6) intimidated, harassed, and publicly embarrassed employees.

We understand that OSC is currently investigating some of these allegations. However, other related matters reported to the committees may not be within OSC's jurisdiction. Based on our witness interviews and document review, the whistleblowers' allegations appear credible and are quite concerning. Also, it seems that the productivity of the office's audit function has suffered as a result of Ms. Wertheimer's tenure.<sup>1</sup> The morale of a significant portion of its workforce has

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<sup>1</sup> Federal Housing Finance Agency Office of Inspector General, <https://fhfaig.gov/Reports/AuditsAndEvaluations>. Prior to Ms. Wertheimer's confirmation, the Office of Audit published 13 to 18 audit reports per year in 2012, 2013,



suffered as a result of the perception that there is a lack of accountability for the Inspector General.

Accordingly, to ensure that each allegation of wrongdoing is thoroughly and independently addressed, we ask the Integrity Committee to coordinate closely with OSC to initiate concurrent, parallel investigations of the matters within each of your jurisdictions. Failure to fully coordinate can lead to an unnecessarily lengthy investigative period, preventing a timely resolution of the allegations, as occurred with the Inspector General of the National Archives and Records Administration.<sup>2</sup>

**Whistleblowers allege Inspector General Wertheimer gutted the FHFA-OIG audit function.**

Whistleblowers reported to our committees that Ms. Wertheimer has hindered the FHFA-OIG's audit mission by reducing the Office of Audit from 36 to 9 full-time employees,<sup>3</sup> and hiring employees in their places with limited auditing experience and without the necessary education and credentials to conduct or supervise government audits.

To downsize the Office of Audit, Ms. Wertheimer implemented an allegedly coercive VSP without seeking authorization from the Office of Personnel Management (OPM).<sup>4</sup> Reportedly, Ms. Wertheimer and her senior staff used the VSP to force out audit employees by threatening them with negative performance appraisals if they refused to accept the buy-out offer. According to whistleblowers, Ms. Wertheimer modified the performance appraisal metrics in the middle of a review period so that it became impossible for auditors to receive positive evaluations. This caused numerous audit employees to take the buyout rather than risk a negative evaluation that would be detrimental to their careers. The VSP cost a total of \$1,155,105.68—6 months' salary for 16 employees, regardless of whether and when the employees obtained new employment.<sup>5</sup>

Moreover, by Ms. Wertheimer's own admission, she used the VSP for purposes that conflict with OPM's guidance that VSPs are intended to reduce employees who are in surplus

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and 2014. Following Ms. Wertheimer's confirmation, in 2015 the office published 3 audit reports and 3 reports from the newly created "Office of Compliance."

<sup>2</sup> Lisa Rein, *Embattled National Archives IG To Retire After Probe Finds Misconduct*, THE WASHINGTON POST (Aug. 4, 2014).

<sup>3</sup> Letter from Hon. Laura S. Wertheimer, Inspector General, FHFA-OIG, to Hon. Charles E. Grassley, Chairman, Senate Judiciary Committee, at 2 (Oct. 29, 2015).

<sup>4</sup> FHFA-OIG claims its authority to conduct buyouts is not governed by OPM and rests under the "[e]nabling statutes for a number of independent financial regulators." Letter from Hon. Laura S. Wertheimer, Inspector General, FHFA-OIG, to Hon. Charles E. Grassley, Chairman, Senate Judiciary Committee, and Hon. Ron Johnson, Chairman, Senate Homeland Security and Governmental Affairs Committee (July 1, 2016).

<sup>5</sup> Letter from Hon. Laura S. Wertheimer, Inspector General, FHFA-OIG, to Hon. Charles E. Grassley, Chairman, Senate Judiciary Committee, at 5 & n.7 (Oct. 29, 2015) (specifying that employees who did not obtain new employment were also paid their annual leave balances, necessarily implying that even employees who obtained new employment within six months of separation received the full buy-out).



positions, or who have skills that are no longer needed in the workforce. Ms. Wertheimer intended to refill at least some of the “eliminated” positions within the Office of Audit.<sup>6</sup> She wrote to our committees that once she completes her planned reorganization, the Office of Audit will be expanded to have 18 to 20 full-time employees.<sup>7</sup> According to a whistleblower, Ms. Wertheimer has hired 9 auditors since August 2016.

In addition to reducing the size of the Office of Audit, Ms. Wertheimer decreased the office’s output. According to whistleblowers, Ms. Wertheimer cancelled ongoing or nearly-completed audits, including one completed audit with findings that was sent to the agency for comment but ultimately never published because the agency head did not like the report’s findings. Apparently, the report found that FHFA failed to diligently review implementation proposals for the 97% loan-to-value program and, therefore, failed to accurately assess the amount of risk Fannie Mae and Freddie Mac assumed by implementing the program.<sup>8</sup> If true, Ms. Wertheimer’s actions suggest, at minimum, a lack of independence required for an effective Inspector General.

**Whistleblowers allege Inspector General Wertheimer committed prohibited personnel practices.**

According to whistleblowers, Ms. Wertheimer deliberately circumvented veterans’ preference hiring requirements. Ms. Wertheimer allegedly held a meeting in November 2014 to discuss strategies for avoiding veterans’ preference. She allegedly filled multiple positions with her own desired candidates by using noncompetitive hiring processes, including not posting vacancy announcements.

Whistleblowers also reported to our committees that Ms. Wertheimer has stated her discriminatory intent against employees on the basis of race, gender, age, and disability. She allegedly harassed and demeaned older, male employees. One whistleblower explained that Ms. Wertheimer created a “fear-oriented environment,” in which she identified “favorites” in the office and spoke about her contempt for specific individuals in the office and her desire for them to leave. She reportedly demoted and taunted an employee because of the employee’s mental illness, despite the employee’s proven track record of competence and reliability. She reportedly used unprofessional, abusive language on multiple occasions. She allegedly commented on an employee’s weight and medical condition in front of other employees. On another occasion, she allegedly berated an employee until the employee cried in her office, then subsequently boasted and laughed about making the employee cry.

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<sup>6</sup> See Letter from Hon. Laura S. Wertheimer, Inspector General, FHFA-OIG, to Hon. Charles E. Grassley, Chairman, Senate Judiciary Committee, at 3 (Oct. 29, 2015).

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

<sup>8</sup> Whistleblowers dispute the FHFA-OIG’s claims that the report contained factual inaccuracies and did not contain sufficient citations to supporting sources. See Letter from Leonard J. DePasquale, Chief Counsel, FHFA-OIG, to Investigative Counsel, Senate Homeland Security and Governmental Affairs Committee (May 20, 2016).

The FHFA-OIG has wasted significant resources as a consequence of Ms. Wertheimer's mismanagement of the office. The FHFA-OIG spent more than \$300,000 to settle one employee's administrative personnel action, including paying \$200,000 to relocate the employee to another state.<sup>9</sup> The FHFA-OIG also paid that employee more than \$250,000 while on administrative leave for 14 months, pending an internal "misconduct" investigation that failed to identify any misconduct.<sup>10</sup> The FHFA-OIG also allegedly budgeted \$500,000 for private counsel to assist with matters related to the above-referenced administrative personnel action, our committees' inquiries, and other proceedings already initiated by the Integrity Committee of CIGIE and OSC.

The FHFA-OIG retained two private counsels, billing at \$400 and between \$775 and \$850 per hour, respectively<sup>11</sup>—and refused to explain the legal authority that justified hiring private counsels rather than using the lawyers in its own office of General Counsel. Nor did it explain the process by which FHFA-OIG arrived at the decision to do so.<sup>12</sup> Federal agencies are authorized to hire outside counsel in certain circumstances, but because of the resources already dedicated to in-house legal advice, government agencies should generally obtain most of the legal services they need from government attorneys, and should only engage outside counsel when clearly authorized and necessary.<sup>13</sup> Moreover, it is not uncommon for an Inspector General to supplement in-house legal advice through a cooperative agreement with another, larger Inspector General's office in order to avoid expensive outside counsel. However, the FHFA-OIG failed to pursue that option.

Additionally, we have learned that OSC has initiated investigations into whistleblower retaliation, other prohibited personnel practices, and the VSP.<sup>14</sup> In order to obtain a better understanding of CIGIE and OSC's respective investigations, we request the following:

1. Confirmation that the Integrity Committee of CIGIE will promptly and fully coordinate with OSC to initiate concurrent investigations into matters within the Integrity Committee's jurisdiction to ensure a timely resolution of all the related allegations.

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<sup>9</sup> W. Heath Wolfe v. Federal Housing Finance Agency, Docket # DC-0752-16-0674-I-1, Agency Motion to Accept Settlement into Record & Dismiss Appeal as Settled (July 21, 2016); Relocation Authorization, William H. Wolfe.

<sup>10</sup> W. Heath Wolfe v. Federal Housing Finance Agency, Docket # DC-0752-16-0674-I-1, Agency Motion to Accept Settlement into Record & Dismiss Appeal as Settled (July 21, 2016).

<sup>11</sup> Letter from Leonard J. DePasquale, Chief Counsel, FHFA-OIG, to Senate Homeland Security and Governmental Affairs Committee, Senate Judiciary Committee, at 1 n.2 (May 31, 2016).

<sup>12</sup> *Id.*

<sup>13</sup> *See, e.g.*, 5 U.S.C. § 3106 (providing that agencies should refer litigation matters to the Department of Justice unless otherwise authorized by law); *see also* Agency Hiring of Private Attorneys, 52 Fed. Reg. 23,632 (June 24, 1987).

<sup>14</sup> The committees have reviewed the Pension Benefit Guaranty Corporation OIG's (PBGC-OIG) peer review of the FHFA-OIG and the accompanying letter of comment which includes additional findings. The peer review and letter of comment, while helpful, do not cover all of the issues that whistleblowers have reported to the committees. *See* Letter from Hon. Robert A. Westbrook, Inspector General, PBGC-OIG, to Hon. Laura S. Wertheimer, Inspector General, FHFA-OIG, External Peer Review Report (Feb. 28, 2017); Letter from Hon. Robert A. Westbrook, Inspector General, PBGC-OIG, to Hon. Laura S. Wertheimer, Inspector General, FHFA-OIG, External Peer Review Letter of Comment (Feb. 28, 2017).

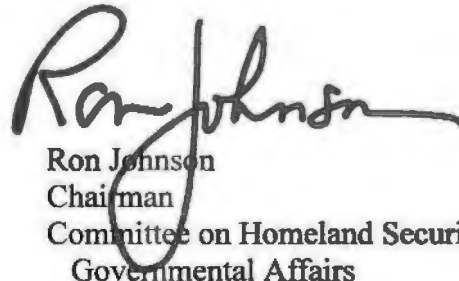
2. A briefing from the Integrity Committee and OSC to inform the committees of the investigations initiated related to the FHFA-OIG, including a plan and estimated timeline to complete each investigation.

Please provide your response and schedule a briefing by April 18, 2017. If you have any questions, please contact Samantha Brennan of Chairman Grassley's staff at (202) 224-5225, or Michael Lueptow of Chairman Johnson's staff at (202) 224-4751. Thank you for your cooperation.

Sincerely,



Charles E. Grassley  
Chairman  
Committee on the Judiciary



Ron Johnson  
Chairman  
Committee on Homeland Security and  
Governmental Affairs

cc: The Honorable Dianne Feinstein  
Ranking Member  
Committee on the Judiciary Committee

The Honorable Claire McCaskill  
Ranking Member  
Committee on Homeland Security and Governmental Affairs

The Honorable Don McGahn  
White House Counsel

The Honorable Michael E. Horowitz  
Chair  
Council of the Inspectors General on Integrity and Efficiency  
Inspector General of the U.S. Department of Justice

# United States Senate

WASHINGTON, DC 20510-0803

April 7, 2017

The Honorable Carolyn N. Lerner  
Special Counsel  
U.S. Office of Special Counsel  
1730 M Street, NW  
Washington, DC 20036

Dear Special Counsel Lerner:

As you know, the Hatch Act generally prohibits certain categories of political activities for all covered employees.<sup>1</sup> While the Hatch Act prohibits covered employees from engaging in political activity in an official capacity at any time, or while on duty or in the workplace, there are additional restrictions for covered employees in their personal capacity.<sup>2</sup> Specifically, as you know, guidance issued by your office on the use of social media and Hatch Act compliance notes that the Hatch Act prohibits federal employees from referring to their official titles or positions while engaged in political activity at any time.<sup>3</sup> I write today to request your assistance with a review of a tweet by (b)(6);(b)(7)(C)

On April 1, 2017, (b)(6);(b)(7)(C) sent the following tweet that raised serious concerns:

@realDonaldTrump is bringing auto plants & jobs back to Michigan. (b)(6);(b)(7)(C) is a big liability. #TrumpTrain, defeat him in primary.

Although (b)(6);(b)(7)(C) used (b)(6);(b)(7)(C)'s personal Twitter account, and not (b)(6);(b)(7)(C)'s official White House Twitter account, these two accounts are nearly indistinguishable. Both (b)(6);(b)(7)(C)'s official and personal Twitter accounts use the same profile and background images, which, as of the date of (b)(6);(b)(7)(C)'s tweet, are, respectively, an image of (b)(6);(b)(7)(C) in the Oval Office and of President Donald Trump giving a speech in front of the America flag. (b)(6);(b)(7)(C)'s nearly identical Twitter pages could easily create the impression that (b)(6);(b)(7)(C) is acting in an official capacity when engaging in political activity on his personal account.

(b)(6);(b)(7)(C)'s tweet may have also violated other Hatch Act regulations that prohibit certain categories of political activities. Specifically, the Office of Personnel Management's regulations state:

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<sup>1</sup> 5 U.S.C. § 7321 *et seq.* (2015).

<sup>2</sup> 5 U.S.C. § 7323(a)(1) (2015).

<sup>3</sup> *The Hatch Act: Frequently Asked Questions on Federal Employees and the Use of Social Media and Email*, U.S. OFFICE OF SPECIAL COUNSEL (revised December 18, 2015), available at [https://osc.gov/Resources/FAQ%20Hatch%20Act%20Employees%20and%20Social%20Media%20\(revised%2012-18-2015\).pdf](https://osc.gov/Resources/FAQ%20Hatch%20Act%20Employees%20and%20Social%20Media%20(revised%2012-18-2015).pdf).

An employee covered under this subpart may not participate in political activities: while he or she is on duty...while he or she is in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof....<sup>4</sup>

In this case, it is unclear whether (b)(6);(b)(7)(C) was on official duty or on federal property when (b)(6);(b)(7)(C) sent this tweet from (b)(6);(b)(7)(C)'s personal Twitter account. It is also unclear whether (b)(6);(b)(7)(C)'s tweet encouraged individuals to make political contributions. As you know, social media guidance for federal employees issued by the Office of Special Counsel specifically prohibits the encouragement of political contributions.<sup>5</sup>

As the Special Counsel, you have authority to review potential Hatch Act violations. I request that you use the authority Congress granted you under the Hatch Act of 1939, as amended, to "receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken."<sup>6</sup>

I request that you review (b)(6);(b)(7)(C)'s tweet and act promptly on the basis of your findings. I also ask you to report back to my staff with any recommendation for disciplinary action, if warranted. If you or members of your staff have any questions about this request, please do not hesitate to ask your staff to contact Roberto Berrios with at 202-224-2627.

With best personal regards, I am

Sincerely yours,



Tom Carper  
U.S. Senator

cc: Kathleen M. McGettigan  
Acting Director  
U.S. Office of Personnel Management

Don McGahn  
White House Counsel  
Office of the White House Counsel

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<sup>4</sup> 5 C.F.R. § 734.406(a) (2016).

<sup>5</sup> *The Hatch Act: Frequently Asked Questions on Federal Employees and the Use of Social Media and Email*, U.S. OFFICE OF SPECIAL COUNSEL (revised December 18, 2015), available at [https://osc.gov/Resources/FAQ%20Hatch%20Act%20Employees%20and%20Social%20Media%20\(revised%2012-18-2015\).pdf](https://osc.gov/Resources/FAQ%20Hatch%20Act%20Employees%20and%20Social%20Media%20(revised%2012-18-2015).pdf); 5 U.S.C. § 7323(a)(2) (2015).

<sup>6</sup> 5 U.S.C. § 1214 (2015).

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074  
MINORITY (202) 225-5051  
<http://oversight.house.gov>

April 20, 2017

The President  
The White House  
Washington, DC 20500

Dear Mr. President:

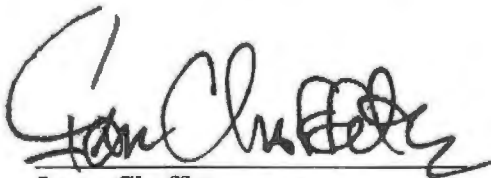
We write to recommend that you re-nominate Carolyn Lerner as Special Counsel of the United States.

The Office of Special Counsel (OSC) is a non-partisan, independent agency charged with protecting whistleblowers and other federal employees from prohibited personnel practices and shielding the government from undue political influence by enforcing the Hatch Act. Whistleblowers are key to exposing waste, fraud, and abuse in government, so encouraging an atmosphere in which they are protected is critical.

Lerner has provided objective and effective leadership at OSC. She began her tenure in an environment with significant management problems and low morale. She has presided over significant improvements at OSC, an organization that has increased its case volume and productivity. Under Lerner's leadership, OSC has increased the number of successful outcomes for whistleblowers by 233%.<sup>1</sup> Both Republican and Democratic Members have voiced their support for Lerner's work and her re-nomination.

We believe the American people would benefit from Lerner's continued service as Special Counsel, and urge her re-nomination to a second term.

Sincerely,



Jason Chaffetz  
Chairman



Elijah E. Cummings  
Ranking Member

<sup>1</sup> House Committee on Oversight and Government Reform, Testimony of Carolyn N. Lerner, Special Counsel, Office of Special Counsel, *Hearing on Transparency at TSA*, 115th Cong. (Mar. 2, 2017).

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074  
MINORITY (202) 225-5051

<http://oversight.house.gov>

May 2, 2017

The Honorable Huban A. Gowadia, Ph.D.  
Acting Administrator  
Transportation Security Administration  
601 S. 12<sup>th</sup> St.  
Arlington, VA 22202

Dear Ms. Gowadia:

On March 17, 2017, pursuant to its authority under House Rule X, the Committee on Government Reform and Oversight ("Committee") issued to you a subpoena *duces tecum* requiring you appear and produce documents by 12:00 noon on March 31, 2017.<sup>1</sup> You have failed to comply with the subpoena. The Committee has received and reviewed a letter dated March 31, 2017, from the Department of Homeland Security's ("Department") Acting General Counsel arguing that it was entitled to withhold responsive documents on the ground that they are protected by the attorney-client privilege. Although the Committee acknowledges the interests underpinning the attorney-client privilege in judicial proceedings, we reject the claim that an assertion of the attorney-client privilege is a legitimate basis for withholding documents in response to a congressional subpoena, noting the letter provides no alternative basis for your failure to comply with the subpoena.

The House of Representatives derives its authority from the United States Constitution and is bound only by the privileges derived therefrom. As the schedule instructions accompanying the subpoena provided, neither the Committee nor the United States House of Representatives recognizes purported non-disclosure privileges associated with the common law.<sup>2</sup> Further, the mere possibility that a common law privilege may apply in a judicial proceeding is not, in and of itself, a legal justification to withhold documents from this Committee or the Congress.

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<sup>1</sup> Subpoena to Huban A. Gowadia (Mar. 17, 2017) [hereinafter Gowadia Subpoena].

<sup>2</sup> Gowadia Subpoena, Schedule Instructions No. 14.



Your failure to comply with a congressional subpoena may result in serious consequences for you, including penalties pursuant to 2 U.S.C. § 192. We strongly encourage you to consider carefully the implications of continuing to ignore this subpoena. As your interests in this matter may now diverge from the Department's, you may also wish to retain private counsel. Should you choose to retain counsel in this matter, Committee Rule 16(b) requires counsel representing an individual or entity before the Committee or any of its subcommittees, whether in connection with a request, subpoena or testimony, promptly submit the attached notice of appearance to the Committee.

The Committee's need for the information responsive to the subpoena significantly outweighs any other interest. The interests of the investigation into what appears to be the inappropriate conduct at TSA counsels in favor of a full and complete accounting of what has occurred. Separately, it is well established that production of materials to Congress is not deemed a disclosure to the public,<sup>3</sup> nor is a compelled production considered a voluntary production for the purpose of waiver.<sup>4</sup> Accordingly, production to the Committee does not constitute a waiver of applicable privileges in other contexts.<sup>5</sup>

Additionally, your objections are not timely. The schedule instructions required that the Committee be provided no later than March 30, 2017, at 12:00 noon with an explanation of why full compliance is not possible and that a privilege log be provided to the Committee prior to the subpoena compliance date.<sup>6</sup> Any objections were waived by the failure to follow these requirements.<sup>7</sup>

While ostensibly responding to the subpoena for you, the letter from the Department's Acting General Counsel apparently conflates the Committee's subpoena with pending requests from the Office of Special Counsel (OSC). The legal obligations created by a subpoena from Congress, as outlined above, derive from a different source than TSA's obligations to OSC, namely the Constitution.

The Committee's investigation also serves an entirely different purpose than OSC's inquiry. As Committee staff explained to Office of General Counsel officials on March 17, 2017, the Committee is separately and independently investigating whether TSA is abusing the attorney-client privilege as a means to avoid oversight. This inquiry is part of a larger

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<sup>3</sup> See, e.g., *Fed. Trade Comm'n v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980); *Exxon Corp. v. FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978); *Ashland Oil v. Fed. Trade Comm'n*, 548 F.2d 977, 979 (D.C. Cir. 1976); *Moon v. Cent. Intelligence Agency*, 514 F. Supp. 836, 840-41 (S.D.N.Y. 1981).

<sup>4</sup> See, e.g., *Fla. H. of Rep. v. U.S. Dep't of Commerce*, 961 F.2d 941, 946 (11th Cir. 1992); *U.S. v. Zolin*, 809 F.2d 1411, 1415 (9th Cir. 1987), *aff'd in part, vacated in part*, 491 U.S. 554 (1989).

<sup>5</sup> *Rockwell Int'l Corp. v. U.S. Dep't of Justice*, 235 F.3d 598, 604 (D.C. Cir. 2001); *Fla. H. of Rep.*, 961 F.2d at 946; *Owens-Corning Fiberglass Corp.*, 626 F.2d at 970; *Murphy v. Dep't of the Army*, 613 F.2d 1151, 1155-59 (D.C. Cir. 1979); *Exxon Corp.*, 589 F.2d at 589; *Ashland Oil*, 548 F.2d at 979.

<sup>6</sup> Gowadia Subpoena, Schedule Instructions Nos. 11-12.

<sup>7</sup> Gowadia Subpoena, Schedule Instructions No. 13.



investigation dating back to the fall of 2015 into TSA's personnel practices.<sup>8</sup> The Committee's inquiry on this matter—which has included conducting transcribed interviews, holding hearings, and reviewing internal TSA disciplinary and personnel documents from specific cases—continues, as does a line of inquiry into potential misconduct within TSA's Office of Chief Counsel.

The March 17, 2017, meeting between Committee staff and Department Office of General Counsel staff failed to alleviate concerns about those allegations. Rather, the meeting raised further questions regarding the lack of oversight of TSA's Office of Chief Counsel as it revealed there is little or no process by which the Department ensures the integrity of TSA's legal decisions, such as prohibiting an attorney from reviewing his or her own emails for privileged information. In such cases, there is a substantial risk that an attorney will improperly apply a privilege to shield from disclosure unprivileged emails that are embarrassing or otherwise reveal improper or illegal conduct by the attorney.

It should be clear that the Committee's subpoena is not an attempt at "discovery by OSC or other non-congressional bodies," as it was termed in the March 31 letter. Rather, the Committee issued the subpoena to further its own investigation and to obtain answers to specific, longstanding questions. You must comply with your legal obligations immediately. The Committee expressly reserves its right to commence enforcement proceedings if you do not.

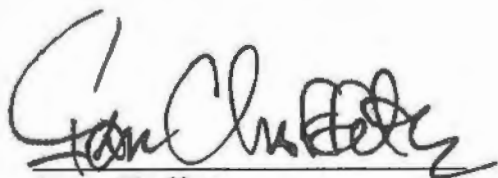
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<sup>8</sup> See letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Peter V. Neffenger, Adm'r, Transp. Sec. Admin. (Nov. 10, 2015); letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Peter V. Neffenger, Adm'r, Transp. Sec. Admin. (Dec. 3, 2015); letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Peter V. Neffenger, Adm'r, Transp. Sec. Admin. (Jan. 7, 2016); letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Peter V. Neffenger, Adm'r, Transp. Sec. Admin. (Feb. 2, 2016); letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Peter V. Neffenger, Adm'r, Transp. Sec. Admin. (Feb. 19, 2016); letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, Hon. Elijah E. Cummings, Ranking Mem., H. Comm. on Oversight & Gov't Reform, Hon. John L. Mica, Chairman, H. Subcomm. on Transportation & Public Assets, and Hon. Tammy Duckworth, Ranking Mem., H. Subcomm. on Transp. & Public Assets, to Hon. Peter V. Neffenger, Adm'r, Transp. Sec. Admin. (Mar. 15, 2016); letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, and Hon. Elijah E. Cummings, Ranking Mem., H. Comm. on Oversight & Gov't Reform, to Hon. Peter V. Neffenger, Adm'r, Transp. Sec. Admin. (Apr. 26, 2016); *Examining Management Practices and Misconduct at TSA: Part I: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (Apr. 27, 2016); letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, and Hon. Elijah E. Cummings, Ranking Mem., H. Comm. on Oversight & Gov't Reform, to Hon. Peter V. Neffenger, Adm'r, Transp. Sec. Admin. (May 12, 2016); *Examining Management Practices and Misconduct at TSA: Part II: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (May 12, 2016); letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, Hon. Elijah E. Cummings, Ranking Mem., H. Comm. on Oversight & Gov't Reform, Hon. John L. Mica, Chairman, H. Subcomm. on Transportation & Public Assets, Hon. Tammy Duckworth, Ranking Mem., H. Subcomm. on Transp. & Public Assets, Hon. Mark Meadows, Chairman, H. Subcomm. on Gov't Operations, Hon. Gerald E. Connolly, Ranking Mem., H. Subcomm. on Gov't Operations, and Hon. Charles E. Grassley, Chairman, S. Comm. on the Judiciary, to Hon. Peter V. Neffenger, Adm'r, Transp. Sec. Admin. (Aug. 12, 2016).

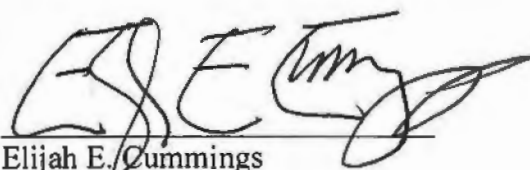
Additionally, in furtherance of the Committee's investigation, please make yourself and the following Department employees available for transcribed interviews as soon as possible, but no later than May 16, 2017:

- 1) Steven Colon, Acting Assistant Administrator, Office of Professional Responsibility, TSA; and
- 2) Francine Kerner, Chief Counsel, TSA.

Sincerely,



Jason Chaffetz  
Chairman



Elijah E. Cummings  
Ranking Member

Enclosure

cc: The Honorable Rodney Frelinghuysen, Chairman  
Committee on Appropriations, U.S. House

The Honorable Nita Lowey, Ranking Member  
Committee on Appropriations, U.S. House

The Honorable Michael McCaul, Chairman  
Committee on Homeland Security, U.S. House

The Honorable Bennie Thompson, Ranking Member  
Committee on Homeland Security, U.S. House

The Honorable Carolyn N. Lerner, Special Counsel  
Office of Special Counsel

**COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
U.S. HOUSE OF REPRESENTATIVES  
115<sup>TH</sup> CONGRESS**

**NOTICE OF APPEARANCE OF COUNSEL**

**Counsel submitting:** \_\_\_\_\_

**Bar number:** \_\_\_\_\_ **State/District of admission:** \_\_\_\_\_

**Attorney for:** \_\_\_\_\_

**Address:** \_\_\_\_\_

**Telephone:** ( \_\_\_\_\_ ) \_\_\_\_\_ - \_\_\_\_\_

**Pursuant to Rule 16 of the Committee Rules, notice is hereby given of the entry of the undersigned as counsel for \_\_\_\_\_ in (select one):**

- ☒ **All matters before the Committee**
- ☐ **The following matters (describe the scope of representation):**

\_\_\_\_\_  
\_\_\_\_\_

**All further notice and copies of papers and other material relevant to this action should be directed to and served upon:**

**Attorney's name:** \_\_\_\_\_

**Attorney's email address:** \_\_\_\_\_

**Firm name (where applicable):** \_\_\_\_\_

**Complete Mailing Address:** \_\_\_\_\_

\_\_\_\_\_

**I agree to notify the Committee within 1 business day of any change in representation.**

\_\_\_\_\_  
**Signature of Attorney**

\_\_\_\_\_  
**Date**



**U.S. OFFICE OF SPECIAL COUNSEL**

1730 M Street, N.W., Suite 218  
Washington, D.C. 20036-4505  
202-254-3600

July 11, 2016

The Honorable Joseph R. Biden, Jr.  
President of the Senate  
The White House  
1600 Pennsylvania Avenue NW  
Washington, D.C. 20500

Dear Vice President Biden:

Enclosed is the FY 2015 Annual Report from the U.S. Office of Special Counsel. OSC is proud to present the results of another fiscal year. Identical letters are being sent to the Speaker of the House of Representatives, the President of the Senate, and the President pro tempore of the Senate. A copy of this report will be placed on the OSC web site: <https://osc.gov/Pages/Resources-ReportsAndInfo.aspx>.

If you have any questions, please contact me at 202-254-3600.

Sincerely,

A handwritten signature in cursive script that reads "Carolyn Lerner".

Carolyn Lerner

Enclosure

115TH CONGRESS  
1ST SESSION

**S.** \_\_\_\_\_

To amend title 38, United States Code, to improve the accountability of employees of the Department of Veterans Affairs, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

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Mr. RUBIO (for himself, Mr. TESTER, Mr. ISAKSON, Mr. NELSON, Mr. MCCAIN, Mrs. SHAHEEN, Mr. MORAN, and Ms. BALDWIN) introduced the following bill; which was read twice and referred to the Committee on

---

**A BILL**

To amend title 38, United States Code, to improve the accountability of employees of the Department of Veterans Affairs, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4       (a) **SHORT TITLE.**—This Act may be cited as the  
5       “Department of Veterans Affairs Accountability and  
6       Whistleblower Protection Act of 2017”.

7       (b) **TABLE OF CONTENTS.**—The table of contents for  
8       this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—OFFICE OF ACCOUNTABILITY AND WHISTLEBLOWER  
PROTECTION

- Sec. 101. Establishment of Office of Accountability and Whistleblower Protection.
- Sec. 102. Protection of whistleblowers in Department of Veterans Affairs.
- Sec. 103. Report on methods used to investigate employees of Department of Veterans Affairs.

TITLE II—ACCOUNTABILITY OF SENIOR EXECUTIVES,  
SUPERVISORS, AND OTHER EMPLOYEES

- Sec. 201. Improved authorities of Secretary of Veterans Affairs to improve accountability of senior executives.
- Sec. 202. Improved authorities of Secretary of Veterans Affairs to improve accountability of employees.
- Sec. 203. Reduction of benefits for Department of Veterans Affairs employees convicted of certain crimes.
- Sec. 204. Authority to recoup bonuses or awards paid to employees of Department of Veterans Affairs.
- Sec. 205. Authority to recoup relocation expenses paid to or on behalf of employees of Department of Veterans Affairs.
- Sec. 206. Time period for response to notice of adverse actions against supervisory employees who commit prohibited personnel actions.
- Sec. 207. Direct hiring authority for medical center directors and VISN directors.
- Sec. 208. Time periods for review of adverse actions with respect to certain employees.
- Sec. 209. Improvement of training for supervisors.
- Sec. 210. Assessment and report on effect on senior executives at Department of Veterans Affairs.
- Sec. 211. Measurement of Department of Veterans Affairs disciplinary process outcomes and effectiveness.

1 **TITLE I—OFFICE OF ACCOUNT-**  
2 **ABILITY AND WHISTLE-**  
3 **BLOWER PROTECTION**

4 **SEC. 101. ESTABLISHMENT OF OFFICE OF ACCOUNT-**  
5 **ABILITY AND WHISTLEBLOWER PROTECTION.**

6 (a) IN GENERAL.—Chapter 3 of title 38, United  
7 States Code, is amended by adding at the end the fol-  
8 lowing new section:

1 **“§ 323. Office of Accountability and Whistleblower**  
2 **Protection**

3 “(a) ESTABLISHMENT.—There is established in the  
4 Department an office to be known as the ‘Office of Ac-  
5 countability and Whistleblower Protection’ (in this section  
6 referred to as the ‘Office’).

7 “(b) HEAD OF OFFICE.—(1) The head of the Office  
8 shall be responsible for the functions of the Office and  
9 shall be appointed by the President pursuant to section  
10 308(a) of this title.

11 “(2) The head of the Office shall be known as the  
12 ‘Assistant Secretary for Accountability and Whistleblower  
13 Protection’.

14 “(3) The Assistant Secretary shall report directly to  
15 the Secretary on all matters relating to the Office.

16 “(4) Notwithstanding section 308(b) of this title, the  
17 Secretary may only assign to the Assistant Secretary re-  
18 sponsibilities relating to the functions of the Office set  
19 forth in subsection (c).

20 “(c) FUNCTIONS.—(1) The functions of the Office  
21 are as follows:

22 “(A) Advising the Secretary on all matters of  
23 the Department relating to accountability, including  
24 accountability of employees of the Department, re-  
25 taliation against whistleblowers, and such matters as

1 the Secretary considers similar and affect public  
2 trust in the Department.

3 “(B) Issuing reports and providing rec-  
4 ommendations related to the duties described in sub-  
5 paragraph (A).

6 “(C) Receiving whistleblower disclosures.

7 “(D) Referring whistleblower disclosures re-  
8 ceived under subparagraph (C) for investigation to  
9 the Office of the Medical Inspector, the Office of In-  
10 spector General, or other investigative entity, as ap-  
11 propriate, if the Assistant Secretary has reason to  
12 believe the whistleblower disclosure is evidence of a  
13 violation of a provision of law, mismanagement,  
14 gross waste of funds, abuse of authority, or a sub-  
15 stantial and specific danger to public health and  
16 safety.

17 “(E) Receiving and referring disclosures from  
18 the Special Counsel for investigation to the Medical  
19 Inspector of the Department, the Inspector General  
20 of the Department, or such other person with inves-  
21 tigatory authority, as the Assistant Secretary con-  
22 siders appropriate.

23 “(F) Recording, tracking, reviewing, and con-  
24 firming implementation of recommendations from  
25 audits and investigations carried out by the Inspec-



1       tor General of the Department, the Medical Inspec-  
2       tor of the Department, the Special Counsel, and the  
3       Comptroller General of the United States, including  
4       the imposition of disciplinary actions and other cor-  
5       rective actions contained in such recommendations.

6           “(G) Analyzing data from the Office and the  
7       Office of Inspector General telephone hotlines, other  
8       whistleblower disclosures, disaggregated by facility  
9       and area of health care if appropriate, and relevant  
10      audits and investigations to identify trends and issue  
11      reports to the Secretary based on analysis conducted  
12      under this subparagraph.

13          “(H) Receiving, reviewing, and investigating al-  
14      legations of misconduct, retaliation, or poor perform-  
15      ance involving—

16           “(i) an individual in a senior executive po-  
17      sition (as defined in section 713(d) of this title)  
18      in the Department;

19           “(ii) an individual employed in a confiden-  
20      tial, policy-making, policy-determining, or pol-  
21      icy-advocating position in the Department; or

22           “(iii) a supervisory employee, if the allega-  
23      tion involves retaliation against an employee for  
24      making a whistleblower disclosure.

1           “(I) Making such recommendations to the Sec-  
2       retary for disciplinary action as the Assistant Sec-  
3       retary considers appropriate after substantiating any  
4       allegation of misconduct or poor performance pursu-  
5       ant to an investigation carried out as described in  
6       subparagraph (F) or (H).

7           “(2) In carrying out the functions of the Office, the  
8       Assistant Secretary shall ensure that the Office maintains  
9       a toll-free telephone number and Internet website to re-  
10      ceive anonymous whistleblower disclosures.

11          “(3) In any case in which the Assistant Secretary re-  
12      ceives a whistleblower disclosure from an employee of the  
13      Department under paragraph (1)(C), the Assistant Sec-  
14      retary may not disclose the identity of the employee with-  
15      out the consent of the employee, except in accordance with  
16      the provisions of section 552a of title 5, or as required  
17      by any other applicable provision of Federal law.

18          “(d) STAFF AND RESOURCES.—The Secretary shall  
19      ensure that the Assistant Secretary has such staff, re-  
20      sources, and access to information as may be necessary  
21      to carry out the functions of the Office.

22          “(e) RELATION TO OFFICE OF GENERAL COUN-  
23      SEL.—The Office shall not be established as an element  
24      of the Office of the General Counsel and the Assistant  
25      Secretary may not report to the General Counsel.

1       “(f) REPORTS.—(1)(A) Not later than June 30 of  
2 each calendar year, beginning with June 30, 2017, the As-  
3 sistant Secretary shall submit to the Committee on Vet-  
4 erans’ Affairs of the Senate and the Committee on Vet-  
5 erans’ Affairs of the House of Representatives a report  
6 on the activities of the Office during the calendar year  
7 in which the report is submitted.

8       “(B) Each report submitted under subparagraph (A)  
9 shall include, for the period covered by the report, the fol-  
10 lowing:

11           “(i) A full and substantive analysis of the ac-  
12 tivities of the Office, including such statistical infor-  
13 mation as the Assistant Secretary considers appro-  
14 priate.

15           “(ii) Identification of any issues reported to the  
16 Secretary under subsection (c)(1)(G), including such  
17 data as the Assistant Secretary considers relevant to  
18 such issues and any trends the Assistant Secretary  
19 may have identified with respect to such issues.

20           “(iii) Identification of such concerns as the As-  
21 sistant Secretary may have regarding the size, staff-  
22 ing, and resources of the Office and such rec-  
23 ommendations as the Assistant Secretary may have  
24 for legislative or administrative action to address  
25 such concerns.

1           “(iv) Such recommendations as the Assistant  
2       Secretary may have for legislative or administrative  
3       action to improve—

4           “(I) the process by which concerns are re-  
5       ported to the Office; and

6           “(II) the protection of whistleblowers with-  
7       in the Department.

8           “(v) Such other matters as the Assistant Sec-  
9       retary considers appropriate regarding the functions  
10      of the Office or other matters relating to the Office.

11      “(2) If the Secretary receives a recommendation for  
12      disciplinary action under subsection (c)(1)(I) and does not  
13      take or initiate the recommended disciplinary action before  
14      the date that is 60 days after the date on which the Sec-  
15      retary received the recommendation, the Secretary shall  
16      submit to the Committee on Veterans’ Affairs of the Sen-  
17      ate and the Committee on Veterans’ Affairs of the House  
18      of Representatives a detailed justification for not taking  
19      or initiating such disciplinary action.

20      “(g) DEFINITIONS.—In this section:

21           “(1) The term ‘supervisory employee’ means an  
22      employee of the Department who is a supervisor as  
23      defined in section 7103(a) of title 5.

24           “(2) The term ‘whistleblower’ means one who  
25      makes a whistleblower disclosure.

1           “(3) The term ‘whistleblower disclosure’ means  
2           any disclosure of information by an employee of the  
3           Department or individual applying to become an em-  
4           ployee of the Department which the employee or in-  
5           dividual reasonably believes evidences—

6                   “(A) a violation of a provision of law; or

7                   “(B) gross mismanagement, a gross waste  
8                   of funds, an abuse of authority, or a substantial  
9                   and specific danger to public health or safety.”.

10          (b) CONFORMING AMENDMENT.—Section 308(b) of  
11 such title is amended by adding at the end the following  
12 new paragraph:

13           “(12) The functions set forth in section 323(c)  
14           of this title.”.

15          (c) CLERICAL AMENDMENT.—The table of sections  
16 at the beginning of chapter 3 of such title is amended by  
17 adding at the end the following new item:

          “323. Office of Accountability and Whistleblower Protection.”.

18 **SEC. 102. PROTECTION OF WHISTLEBLOWERS IN DEPART-**  
19 **MENT OF VETERANS AFFAIRS.**

20          (a) IN GENERAL.—Subchapter II of chapter 7 of title  
21 38, United States Code, is amended by—

22                   (1) striking sections 731, 732, 734, 735, and  
23                   736;

24                   (2) by redesignating section 733 as section 731;  
25                   and

1           (3) by adding at the end the following new sec-  
2       tions:

3       **“§ 732. Protection of whistleblowers as criteria in**  
4               **evaluation of supervisors**

5       “(a) DEVELOPMENT AND USE OF CRITERIA RE-  
6       QUIRED.—The Secretary, in consultation with the Assist-  
7       ant Secretary of Accountability and Whistleblower Protec-  
8       tion, shall develop criteria that—

9           “(1) the Secretary shall use as a critical ele-  
10       ment in any evaluation of the performance of a su-  
11       pervisory employee; and

12           “(2) promotes the protection of whistleblowers.

13       “(b) PRINCIPLES FOR PROTECTION OF WHISTLE-  
14       BLOWERS.—The criteria required by subsection (a) shall  
15       include principles for the protection of whistleblowers,  
16       such as the degree to which supervisory employees respond  
17       constructively when employees of the Department report  
18       concerns, take responsible action to resolve such concerns,  
19       and foster an environment in which employees of the De-  
20       partment feel comfortable reporting concerns to super-  
21       visory employees or to the appropriate authorities.

22       “(c) SUPERVISORY EMPLOYEE AND WHISTLE-  
23       BLOWER DEFINED.—In this section, the terms ‘super-  
24       visory employee’ and ‘whistleblower’ have the meanings  
25       given such terms in section 323 of this title.

1 **“§ 733. Training regarding whistleblower disclosures**

2       “(a) TRAINING.—Not less frequently than once every  
3 two years, the Secretary, in coordination with the Whistle-  
4 blower Protection Ombudsman designated under section  
5 3(d)(1)(C) of the Inspector General Act of 1978 (5 U.S.C.  
6 App.), shall provide to each employee of the Department  
7 training regarding whistleblower disclosures, including—

8               “(1) an explanation of each method established  
9 by law in which an employee may file a whistle-  
10 blower disclosure;

11               “(2) the right of the employee to petition Con-  
12 gress regarding a whistleblower disclosure in accord-  
13 ance with section 7211 of title 5;

14               “(3) an explanation that the employee may not  
15 be prosecuted or reprimed against for disclosing in-  
16 formation to Congress, the Inspector General, or an-  
17 other investigatory agency in instances where such  
18 disclosure is permitted by law, including under sec-  
19 tions 5701, 5705, and 7732 of this title, under sec-  
20 tion 552a of title 5 (commonly referred to as the  
21 Privacy Act), under chapter 93 of title 18, and pur-  
22 suant to regulations promulgated under section  
23 264(c) of the Health Insurance Portability and Ac-  
24 countability Act of 1996 (Public Law 104–191);

25               “(4) an explanation of the language that is re-  
26 quired to be included in all nondisclosure policies,

1 forms, and agreements pursuant to section  
2 115(a)(1) of the Whistleblower Protection Enhance-  
3 ment Act of 2012 (5 U.S.C. 2302 note); and

4 “(5) the right of contractors to be protected  
5 from reprisal for the disclosure of certain informa-  
6 tion under section 4705 or 4712 of title 41.

7 “(b) MANNER TRAINING IS PROVIDED.—The Sec-  
8 retary shall ensure, to the maximum extent practicable,  
9 that training provided under subsection (a) is provided in  
10 person.

11 “(c) CERTIFICATION.—Not less frequently than once  
12 every two years, the Secretary shall provide training on  
13 merit system protection in a manner that the Special  
14 Counsel certifies as being satisfactory.

15 “(d) PUBLICATION.—The Secretary shall publish on  
16 the Internet website of the Department, and display  
17 prominently at each facility of the Department, the rights  
18 of an employee to make a whistleblower disclosure, includ-  
19 ing the information described in paragraphs (1) through  
20 (5) of subsection (a).

21 “(e) WHISTLEBLOWER DISCLOSURE DEFINED.—In  
22 this section, the term ‘whistleblower disclosure’ has the  
23 meaning given such term in section 323 of this title.”.

24 (b) CLERICAL AMENDMENTS.—The table of sections  
25 at the beginning of such chapter is amended—



1           (1) by striking the items relating to sections  
2       731 through 736; and

3           (2) by adding at the end the following new  
4       items:

“731. Adverse actions against supervisory employees who commit prohibited personnel actions relating to whistleblower complaints.

“732. Protection of whistleblowers as criteria in evaluation of supervisors.

“733. Training regarding whistleblower disclosures.”.

5       (c) CONFORMING AMENDMENTS.—Section 731 of  
6       such title, as redesignated by subsection (a)(2), is amended—  
7       ed—

8           (1) in subsection (c)—

9               (A) in paragraph (1)—

10                   (i) by striking subparagraphs (A) and  
11                   (B) and inserting the following:

12                       “(A) making a whistleblower disclosure to  
13                   the Assistant Secretary for Accountability and  
14                   Whistleblower Protection, the Inspector General  
15                   of the Department, the Special Counsel, or  
16                   Congress;”; and

17                       (ii) by redesignating subparagraphs  
18                   (C) through (F) as subparagraphs (B)  
19                   through (E), respectively; and

20                       (iii) in subparagraph (B), as redesignated by clause (ii), by striking “complaint in accordance with section 732 or with”  
21                   and inserting “disclosure made to the As-  
22                   and inserting “disclosure made to the As-  
23                   and inserting “disclosure made to the As-

1                   sistant Secretary for Accountability and  
2                   Whistleblower Protection,”; and  
3                   (B) in paragraph (2), by striking “through  
4                   (F)” and inserting “through (E)”; and  
5                   (2) by adding at the end the following new sub-  
6                   section:

7                   “(d) WHISTLEBLOWER DISCLOSURE DEFINED.—In  
8                   this section, the term ‘whistleblower disclosure’ has the  
9                   meaning given such term in section 323(g) of this title.”.

10                   **SEC. 103. REPORT ON METHODS USED TO INVESTIGATE EM-**  
11                                   **PLOYEES OF DEPARTMENT OF VETERANS AF-**  
12                                   **FAIRS.**

13                   (a) REPORT REQUIRED.—Not later than 540 days  
14                   after the date of the enactment of this Act, the Assistant  
15                   Secretary for Accountability and Whistleblower Protection  
16                   shall submit to the Secretary of Veterans Affairs, the  
17                   Committee on Veterans’ Affairs of the Senate, and the  
18                   Committee on Veterans’ Affairs of the House of Rep-  
19                   resentatives a report on methods used to investigate em-  
20                   ployees of the Department of Veterans Affairs and wheth-  
21                   er such methods are used to retaliate against whistle-  
22                   blowers.

23                   (b) CONTENTS.—The report required by subsection  
24                   (a) shall include the following:

1           (1) An assessment of the use of administrative  
2       investigation boards, peer review, searches of med-  
3       ical records, and other methods for investigating em-  
4       ployees of the Department.

5           (2) A determination of whether and to what de-  
6       gree the methods described in paragraph (1) are  
7       being used to retaliate against whistleblowers.

8           (3) Recommendations for legislative or adminis-  
9       trative action to implement safeguards to prevent  
10      the retaliation described in paragraph (2).

11      (c) WHISTLEBLOWER DEFINED.—In this section, the  
12      term “whistleblower” has the meaning given such term in  
13      section 323 of title 38, United States Code, as added by  
14      section 101.

15      **TITLE II—ACCOUNTABILITY OF**  
16      **SENIOR EXECUTIVES, SUPER-**  
17      **VISORS, AND OTHER EMPLOY-**  
18      **EES**

19      **SEC. 201. IMPROVED AUTHORITIES OF SECRETARY OF VET-**  
20                      **ERANS AFFAIRS TO IMPROVE ACCOUNT-**  
21                      **ABILITY OF SENIOR EXECUTIVES.**

22      (a) IN GENERAL.—Section 713 of title 38, United  
23      States Code, is amended to read as follows:

1 **“§ 713. Senior executives: removal, demotion, or sus-**  
2 **pension based on performance or mis-**  
3 **conduct**

4 “(a) **AUTHORITY.**—(1) The Secretary may, as pro-  
5 vided in this section, reprimand or suspend, involuntarily  
6 reassign, demote, or remove a covered individual from a  
7 senior executive position at the Department if the Sec-  
8 retary determines that the misconduct or performance of  
9 the covered individual warrants such action.

10 “(2) If the Secretary so removes such an individual,  
11 the Secretary may remove the individual from the civil  
12 service (as defined in section 2101 of title 5).

13 “(b) **RIGHTS AND PROCEDURES.**—(1) A covered indi-  
14 vidual who is the subject of an action under subsection  
15 (a) is entitled to—

16 “(A) advance notice of the action;

17 “(B) be represented by an attorney or other  
18 representative of the covered individual’s choice; and

19 “(C) grieve the action in accordance with an in-  
20 ternal grievance process that the Secretary, in con-  
21 sultation with the Assistant Secretary for Account-  
22 ability and Whistleblower Protection, shall establish  
23 for purposes of this subsection.

24 “(2)(A) The aggregate period for notice, response,  
25 and decision on an action under subsection (a) may not  
26 exceed 15 business days.

1       “(B) The period for the response of a covered indi-  
2       vidual to a notice under paragraph (1)(A) of an action  
3       under subsection (a) shall be 7 business days.

4       “(C) A decision under this paragraph on an action  
5       under subsection (a) shall be issued not later than 15 busi-  
6       ness days after notice of the action is provided to the cov-  
7       ered individual under paragraph (1)(A). The decision shall  
8       be in writing, and shall include the specific reasons there-  
9       for and a file containing all evidence in support of the pro-  
10      posed action.

11      “(3)(A) The Secretary shall ensure that the grievance  
12      process established under paragraph (1)(C) takes fewer  
13      than 21 days.

14      “(B) The Secretary shall ensure that grievances  
15      under this subsection are reviewed only by employees of  
16      the Department.

17      “(4) A decision under paragraph (2) that is not  
18      grieved, and a grievance decision under paragraph (3),  
19      shall be final and conclusive.

20      “(5) A covered individual adversely affected by a deci-  
21      sion under paragraph (2) that is not grieved, or by a griev-  
22      ance decision under paragraph (3), may obtain judicial re-  
23      view of such decision.

1       “(6) In any case in which judicial review is sought  
2 under paragraph (5), the court shall review the record and  
3 may set aside any Department action found to be—

4               “(A) arbitrary, capricious, an abuse of discre-  
5 tion, or otherwise not in accordance with a provision  
6 of law;

7               “(B) obtained without procedures required by a  
8 provision of law having been followed; or

9               “(C) unsupported by substantial evidence.

10       “(c) RELATION TO OTHER PROVISIONS OF LAW.—  
11 Section 3592(b)(1) of title 5 and the procedures under  
12 section 7543(b) of such title do not apply to an action  
13 under subsection (a).

14       “(d) DEFINITIONS.—In this section:

15               “(1) The term ‘covered individual’ means—

16                       “(A) a career appointee (as that term is  
17 defined in section 3132(a)(4) of title 5); or

18                       “(B) any individual who occupies an ad-  
19 ministrative or executive position and who was  
20 appointed under section 7306(a) or section  
21 7401(1) of this title.

22               “(2) The term ‘misconduct’ includes neglect of  
23 duty, malfeasance, or failure to accept a directed re-  
24 assignment or to accompany a position in a transfer  
25 of function.

1           “(3) The term ‘senior executive position’  
2       means—

3           “(A) with respect to a career appointee (as  
4       that term is defined in section 3132(a) of title  
5       5), a Senior Executive Service position (as such  
6       term is defined in such section); and

7           “(B) with respect to a covered individual  
8       appointed under section 7306(a) or section  
9       7401(1) of this title, an administrative or execu-  
10      tive position.”.

11       (b) CONFORMING AMENDMENT.—Section 7461(c)(1)  
12 of such title is amended by inserting “employees in senior  
13 executive positions (as defined in section 713(d) of this  
14 title) and” before “interns”.

15       (c) CLERICAL AMENDMENT.—The table of sections  
16 at the beginning of chapter 7 of such title is amended by  
17 striking the item relating to section 713 and inserting the  
18 following new item:

“713. Senior executives: removal, demotion, or suspension based on performance  
or misconduct.”.

19 **SEC. 202. IMPROVED AUTHORITIES OF SECRETARY OF VET-**  
20 **ERANS AFFAIRS TO IMPROVE ACCOUNT-**  
21 **ABILITY OF EMPLOYEES.**

22       (a) IN GENERAL.—Subchapter I of chapter 7 of title  
23 38, United States Code, is amended by inserting after sec-  
24 tion 713 the following new section:

1   **“§ 714. Employees: removal, demotion, or suspension**  
2                   **based on performance or misconduct**

3           “(a) IN GENERAL.—(1) The Secretary may remove,  
4 demote, or suspend a covered individual who is an em-  
5 ployee of the Department if the Secretary determines the  
6 performance or misconduct of the covered individual war-  
7 rants such removal, demotion, or suspension.

8           “(2) If the Secretary so removes, demotes, or sus-  
9 pends such a covered individual, the Secretary may—

10           “(A) remove the covered individual from the  
11 civil service (as defined in section 2101 of title 5);

12           “(B) demote the covered individual by means of  
13 a reduction in grade for which the covered individual  
14 is qualified, that the Secretary determines is appro-  
15 priate, and that reduces the annual rate of pay of  
16 the covered individual; or

17           “(C) suspend the covered individual.

18           “(b) PAY OF CERTAIN DEMOTED INDIVIDUALS.—(1)  
19 Notwithstanding any other provision of law, any covered  
20 individual subject to a demotion under subsection (a)(2)  
21 shall, beginning on the date of such demotion, receive the  
22 annual rate of pay applicable to such grade.

23           “(2)(A) A covered individual so demoted may not be  
24 placed on administrative leave during the period during  
25 which an appeal (if any) under this section is ongoing,  
26 and may only receive pay if the covered individual reports



1 for duty or is approved to use accrued unused annual,  
2 sick, family medical, military, or court leave.

3 “(B) If a covered individual so demoted does not re-  
4 port for duty or receive approval to use accrued unused  
5 leave, such covered individual shall not receive pay or  
6 other benefits pursuant to subsection (d)(5).

7 “(c) PROCEDURE.—(1)(A) The aggregate period for  
8 notice, response, and final decision in a removal, demotion,  
9 or suspension under this section may not exceed 15 busi-  
10 ness days.

11 “(B) The period for the response of a covered indi-  
12 vidual to a notice of a proposed removal, demotion, or sus-  
13 pension under this section shall be 7 business days.

14 “(C) Paragraph (3) of subsection (b) of section 7513  
15 of title 5 shall apply with respect to a removal, demotion,  
16 or suspension under this section.

17 “(D) The procedures in this subsection shall super-  
18 sede any collective bargaining agreement to the extent that  
19 such agreement is inconsistent with such procedures.

20 “(2) The Secretary shall issue a final decision with  
21 respect to a removal, demotion, or suspension under this  
22 section not later than 15 business days after the Secretary  
23 provides notice, including a file containing all the evidence  
24 in support of the proposed action, to the covered individual  
25 of the removal, demotion, or suspension. The decision shall

1 be in writing and shall include the specific reasons there-  
2 for.

3 “(3) The procedures under chapter 43 of title 5 shall  
4 not apply to a removal, demotion, or suspension under this  
5 section.

6 “(4)(A) Subject to subparagraph (B) and subsection  
7 (d), any removal or demotion under this section, and any  
8 suspension of more than 14 days under this section, may  
9 be appealed to the Merit Systems Protection Board, which  
10 shall refer such appeal to an administrative judge pursu-  
11 ant to section 7701(b)(1) of title 5.

12 “(B) An appeal under subparagraph (A) of a re-  
13 moval, demotion, or suspension may only be made if such  
14 appeal is made not later than 10 business days after the  
15 date of such removal, demotion, or suspension.

16 “(d) EXPEDITED REVIEW.—(1) Upon receipt of an  
17 appeal under subsection (c)(4)(A), the administrative  
18 judge shall expedite any such appeal under section  
19 7701(b)(1) of title 5 and, in any such case, shall issue  
20 a final and complete decision not later than 180 days after  
21 the date of the appeal.

22 “(2)(A) Notwithstanding section 7701(c)(1)(B) of  
23 title 5, the administrative judge shall uphold the decision  
24 of the Secretary to remove, demote, or suspend an em-

1 ployee under subsection (a) if the decision is supported  
2 by substantial evidence.

3 “(B) If the decision of the Secretary is supported by  
4 substantial evidence, the administrative judge shall not  
5 mitigate the penalty prescribed by the Secretary.

6 “(3) The decision of the administrative judge under  
7 paragraph (1) may be appealed to the Merit Systems Pro-  
8 tection Board.

9 “(4) In any case in which the administrative judge  
10 cannot issue a decision in accordance with the 180-day  
11 requirement under paragraph (1), the Merit Systems Pro-  
12 tection Board shall, not later than 14 business days after  
13 the expiration of the 180-day period, submit to the Com-  
14 mittee on Veterans’ Affairs of the Senate and the Com-  
15 mittee on Veterans’ Affairs of the House of Representa-  
16 tives a report that explains the reasons why a decision was  
17 not issued in accordance with such requirement.

18 “(5)(A) A decision of the Merit Systems Protection  
19 Board under paragraph (3) may be appealed to the United  
20 States Court of Appeals for the Federal Circuit pursuant  
21 to section 7703 of title 5.

22 “(B) Any decision by such Court shall be in compli-  
23 ance with section 7462(f)(2) of this title.

1       “(6) The Merit Systems Protection Board may not  
2 stay any removal or demotion under this section, except  
3 as provided in section 1214(b) of title 5.

4       “(7) During the period beginning on the date on  
5 which a covered individual appeals a removal from the civil  
6 service under subsection (c) and ending on the date that  
7 the United States Court of Appeals for the Federal Circuit  
8 issues a final decision on such appeal, such covered indi-  
9 vidual may not receive any pay, awards, bonuses, incen-  
10 tives, allowances, differentials, student loan repayments,  
11 special payments, or benefits related to the employment  
12 of the individual by the Department.

13       “(8) To the maximum extent practicable, the Sec-  
14 retary shall provide to the Merit Systems Protection  
15 Board such information and assistance as may be nec-  
16 essary to ensure an appeal under this subsection is expe-  
17 dited.

18       “(9) If an employee prevails on appeal under this sec-  
19 tion, the employee shall be entitled to backpay (as pro-  
20 vided in section 5596 of title 5).

21       “(10) If an employee who is subject to a collective  
22 bargaining agreement chooses to grieve an action taken  
23 under this section through a grievance procedure provided  
24 under the collective bargaining agreement, the timelines

1 and procedures set forth in subsection (c) and this sub-  
2 section shall apply.

3 “(e) WHISTLEBLOWER PROTECTION.—(1) In the  
4 case of a covered individual seeking corrective action (or  
5 on behalf of whom corrective action is sought) from the  
6 Office of Special Counsel based on an alleged prohibited  
7 personnel practice described in section 2302(b) of title 5,  
8 the Secretary may not remove, demote, or suspend such  
9 covered individual under subsection (a) without the ap-  
10 proval of the Special Counsel under section 1214(f) of title  
11 5.

12 “(2) In the case of a covered individual who has made  
13 a whistleblower disclosure to the Assistant Secretary for  
14 Accountability and Whistleblower Protection, the Sec-  
15 retary may not remove, demote, or suspend such covered  
16 individual under subsection (a) until—

17 “(A) in the case in which the Assistant Sec-  
18 retary determines to refer the whistleblower disclo-  
19 sure under section 323(c)(1)(D) of this title to an  
20 office or other investigative entity, a final decision  
21 with respect to the whistleblower disclosure has been  
22 made by such office or other investigative entity; or

23 “(B) in the case in which the Assistant Sec-  
24 retary determines not to refer the whistleblower

1 disclosure under such section, the Assistant Sec-  
2 retary makes such determination.

3 “(f) TERMINATION OF INVESTIGATIONS BY OFFICE  
4 OF SPECIAL COUNSEL.—(1) Notwithstanding any other  
5 provision of law, the Special Counsel (established by sec-  
6 tion 1211 of title 5) may terminate an investigation of  
7 a prohibited personnel practice alleged by an employee or  
8 former employee of the Department after the Special  
9 Counsel provides to the employee or former employee a  
10 written statement of the reasons for the termination of  
11 the investigation.

12 “(2) Such statement may not be admissible as evi-  
13 dence in any judicial or administrative proceeding without  
14 the consent of such employee or former employee.

15 “(g) VACANCIES.—In the case of a covered individual  
16 who is removed or demoted under subsection (a), to the  
17 maximum extent feasible, the Secretary shall fill the va-  
18 cancy arising as a result of such removal or demotion.

19 “(h) DEFINITIONS.—In this section:

20 “(1) The term ‘covered individual’ means an in-  
21 dividual occupying a position at the Department, but  
22 does not include—

23 “(A) an individual occupying a senior exec-  
24 utive position (as defined in section 713(d) of  
25 this title);

1           “(B) an individual appointed pursuant to  
2           sections 7306, 7401(1), or 7405 of this title;

3           “(C) an individual who has not completed  
4           a probationary or trial period; or

5           “(D) a political appointee.

6           “(2) The term ‘suspend’ means the placing of  
7           an employee, for disciplinary reasons, in a temporary  
8           status without duties and pay for a period in excess  
9           of 14 days.

10          “(3) The term ‘grade’ has the meaning given  
11          such term in section 7511(a) of title 5.

12          “(4) The term ‘misconduct’ includes neglect of  
13          duty, malfeasance, or failure to accept a directed re-  
14          assignment or to accompany a position in a transfer  
15          of function.

16          “(5) The term ‘political appointee’ means an in-  
17          dividual who is—

18               “(A) employed in a position described  
19               under sections 5312 through 5316 of title 5  
20               (relating to the Executive Schedule);

21               “(B) a limited term appointee, limited  
22               emergency appointee, or noncareer appointee in  
23               the Senior Executive Service, as defined under  
24               paragraphs (5), (6), and (7), respectively, of  
25               section 3132(a) of title 5; or

1           “(C) employed in a position of a confiden-  
2           tial or policy-determining character under  
3           schedule C of subpart C of part 213 of title 5,  
4           Code of Federal Regulations, or successor regu-  
5           lation.

6           “(6) The term ‘whistleblower disclosure’ has the  
7           meaning given such term in section 323(g) of this  
8           title.”.

9           (b) CLERICAL AND CONFORMING AMENDMENTS.—

10           (1) CLERICAL.—The table of sections at the be-  
11           ginning of chapter 7 of such title is amended by in-  
12           serting after the item relating to section 713 the fol-  
13           lowing new item:

“714. Employees: removal, demotion, or suspension based on performance or  
misconduct.”.

14           (2) CONFORMING.—Section 4303(f) of title 5,  
15           United States Code, is amended—

16           (A) in paragraph (2), by striking “or” at  
17           the end;

18           (B) in paragraph (3), by striking the pe-  
19           riod at the end and inserting “, or”; and

20           (C) by adding at the end the following:

21           “(4) any removal or demotion under section  
22           714 of title 38.”.



1 **SEC. 203. REDUCTION OF BENEFITS FOR DEPARTMENT OF**  
2 **VETERANS AFFAIRS EMPLOYEES CONVICTED**  
3 **OF CERTAIN CRIMES.**

4 (a) REDUCTION OF BENEFITS.—

5 (1) IN GENERAL.—Subchapter I of chapter 7 of  
6 title 38, United States Code, is amended by adding  
7 at the end the following new section:

8 **“§ 719. Reduction of benefits of employees convicted**  
9 **of certain crimes**

10 “(a) REDUCTION OF ANNUITY FOR REMOVED EM-  
11 PLOYEE.—(1) The Secretary shall order that the covered  
12 service of an employee of the Department removed from  
13 a position for performance or misconduct under section  
14 719 or 7461 of this title or any other provision of law  
15 shall not be taken into account for purposes of calculating  
16 an annuity with respect to such individual under chapter  
17 83 or chapter 84 of title 5, if—

18 “(A) the Secretary determines that the indi-  
19 vidual is convicted of a felony (and the conviction is  
20 final) that influenced the individual’s performance  
21 while employed in the position; and

22 “(B) before such order is made, the individual  
23 is afforded—

24 “(i) notice of the proposed order; and

1           “(ii) an opportunity to respond to the pro-  
2           posed order by not later than ten business days  
3           following receipt of such notice; and

4           “(C) the Secretary issues the order—

5           “(i) in the case of a proposed order to  
6           which an individual responds under subpara-  
7           graph (B)(ii), not later than five business days  
8           after receiving the response of the individual; or

9           “(ii) in the case of a proposed order to  
10          which an individual does not respond, not later  
11          than 15 business days after the Secretary pro-  
12          vides notice to the individual under subpara-  
13          graph (B)(i).

14          “(2) Any individual with respect to whom an annuity  
15          is reduced under this subsection may appeal the reduction  
16          to the Director of the Office of Personnel Management  
17          pursuant to such regulations as the Director may pre-  
18          scribe for purposes of this subsection.

19          “(b) REDUCTION OF ANNUITY FOR RETIRED EM-  
20          PLOYEE.—(1) The Secretary may order that the covered  
21          service of an individual who is removed for performance  
22          or misconduct under section 719 or 7461 of this title or  
23          any other provision of law but who leaves employment at  
24          the Department prior to the issuance of a final decision  
25          with respect to such action shall not be taken into account

1 for purposes of calculating an annuity with respect to such  
2 individual under chapter 83 or chapter 84 of title 5, if—

3 “(A) the Secretary determines that individual is  
4 convicted of a felony (and the conviction is final)  
5 that influenced the individual’s performance while  
6 employed in the position; and

7 “(B) before such order is made, the individual  
8 is afforded—

9 “(i) notice of the proposed order;

10 “(ii) opportunity to respond to the pro-  
11 posed order by not later than ten business days  
12 following receipt of such notice; and

13 “(C) the Secretary issues the order—

14 “(i) in the case of a proposed order to  
15 which an individual responds under subpara-  
16 graph (B)(ii), not later than five business days  
17 after receiving the response of the individual; or

18 “(ii) in the case of a proposed order to  
19 which an individual does not respond, not later  
20 than 15 business days after the Secretary pro-  
21 vides notice to the individual under subpara-  
22 graph (B)(i).

23 “(2) Upon the issuance of an order by the Secretary  
24 under paragraph (1), the individual shall have an oppor-  
25 tunity to appeal the order to the Director of the Office

1 of Personnel Management before the date that is seven  
2 business days after the date of such issuance.

3 “(3) The Director of the Office of Personnel Manage-  
4 ment shall make a final decision with respect to an appeal  
5 under paragraph (2) within 30 business days of receiving  
6 the appeal.

7 “(c) ADMINISTRATIVE REQUIREMENTS.—Not later  
8 than 37 business days after the Secretary issues a final  
9 order under subsection (a) or (b) with respect to an indi-  
10 vidual, the Director of the Office of Personnel Manage-  
11 ment shall recalculate the annuity of the individual.

12 “(d) LUMP-SUM ANNUITY CREDIT.—Any individual  
13 with respect to whom an annuity is reduced under sub-  
14 section (a) or (b) shall be entitled to be paid so much of  
15 such individual’s lump-sum credit as is attributable to the  
16 period of covered service.

17 “(e) SPOUSE OR CHILDREN EXCEPTION.—(1) The  
18 Secretary, in consultation with the Director of the Office  
19 of Personnel Management, shall prescribe regulations that  
20 may provide for the payment to the spouse or children  
21 of any individual referred to in subsection (a) or (b) of  
22 any amounts which (but for this subsection) would other-  
23 wise have been nonpayable by reason of such subsections.

1       “(2) Regulations prescribed under paragraph (1)  
2 shall be consistent with the requirements of section  
3 8332(o)(5) and 8411(l)(5) of title 5, as the case may be.

4       “(f) DEFINITIONS.—In this section:

5           “(1) The term ‘covered service’ means, with re-  
6 spect to an individual subject to a removal for per-  
7 formance or misconduct under section 719 or 7461  
8 of this title or any other provision of law, the period  
9 of service beginning on the date that the Secretary  
10 determines under such applicable provision that the  
11 individual engaged in activity that gave rise to such  
12 action and ending on the date that the individual is  
13 removed from or leaves a position of employment at  
14 the Department prior to the issuance of a final deci-  
15 sion with respect to such action.

16           “(2) The term ‘lump-sum credit’ has the mean-  
17 ing given such term in section 8331(8) or section  
18 8401(19) of title 5, as the case may be.

19           “(3) The term ‘service’ has the meaning given  
20 such term in section 8331(12) or section 8401(26)  
21 of title 5, as the case may be.”.

22           “(2) CLERICAL AMENDMENT.—The table of sec-  
23 tions at the beginning of chapter 7 of such title is  
24 amended by inserting after the item relating to sec-  
25 tion 717 the following new item:

“719. Reduction of benefits of employees convicted of certain crimes.”.

1       (b) APPLICATION.—Section 719 of title 38, United  
2 States Code, as added by subsection (a)(1), shall apply  
3 to any action of removal of an employee of the Department  
4 of Veterans Affairs under section 719 or 7461 of such title  
5 or any other provision of law, commencing on or after the  
6 date of the enactment of this Act.

7       **SEC. 204. AUTHORITY TO RECOUP BONUSES OR AWARDS**  
8                               **PAID TO EMPLOYEES OF DEPARTMENT OF**  
9                               **VETERANS AFFAIRS.**

10       (a) IN GENERAL.—Subchapter I of chapter 7 of title  
11 38, United States Code, as amended by section 203, is  
12 further amended by adding at the end the following new  
13 section:

14       **“§ 721. Recoupment of bonuses or awards paid to em-**  
15                               **ployees of Department**

16       “(a) IN GENERAL.—Notwithstanding any other pro-  
17 vision of law, the Secretary may issue an order directing  
18 an employee of the Department to repay the amount, or  
19 a portion of the amount, of any award or bonus paid to  
20 the employee under title 5, including under chapters 45  
21 or 53 of such title, or this title if—

22               “(1) the Secretary determines that the indi-  
23 vidual engaged in misconduct or poor performance  
24 prior to payment of the award or bonus, and that  
25 such award or bonus would not have been paid, in

1 whole or in part, had the misconduct or poor per-  
2 formance been known prior to payment; and

3 “(2) before such repayment, the employee is af-  
4 forced—

5 “(A) notice of the proposed order; and

6 “(B) an opportunity to respond to the pro-  
7 posed order by not later than 10 business days  
8 after the receipt of such notice; and

9 “(3) the Secretary issues the order—

10 “(A) in the case of a proposed order to  
11 which an individual responds under paragraph  
12 (2)(B), not later than five business days after  
13 receiving the response of the individual; or

14 “(B) in the case of a proposed order to  
15 which an individual does not respond, not later  
16 than 15 business days after the Secretary pro-  
17 vides notice to the individual under paragraph  
18 (2)(A).

19 “(b) APPEAL OF ORDER OF SECRETARY.—(1) Upon  
20 the issuance of an order by the Secretary under subsection  
21 (a) with respect to an individual, the individual shall have  
22 an opportunity to appeal the order to the Director of the  
23 Office of Personnel Management before the date that is  
24 seven business days after the date of such issuance.

1       “(2) The Director shall make a final decision with  
2   respect to an appeal under paragraph (1) within 30 busi-  
3   ness days after receiving such appeal.

4       “(c) APPEAL OF FINAL DECISION ON APPEAL OF  
5   ORDER.—An individual may appeal a final decision on an  
6   appeal under subsection (b) to the Merit Systems Protec-  
7   tion Board under section 7701 of title 5.”.

8       (b) CLERICAL AMENDMENT.—The table of sections  
9   at the beginning of such chapter, as amended by section  
10  203(a)(2), is further amended by inserting after the item  
11  relating to section 719 the following new item:

      “721. Recoupment of bonuses or awards paid to employees of Department.”.

12       (c) EFFECTIVE DATE.—Section 721 of title 38,  
13  United States Code, as added by subsection (a), shall  
14  apply with respect to an award or bonus paid by the Sec-  
15  retary of Veterans Affairs to an employee of the Depart-  
16  ment of Veterans Affairs on or after the date of the enact-  
17  ment of this Act.

18       (d) CONSTRUCTION.—Nothing in this Act or the  
19  amendments made by this Act may be construed to modify  
20  the certification issued by the Office of Personnel Manage-  
21  ment and the Office of Management and Budget regarding  
22  the performance appraisal system of the Senior Executive  
23  Service of the Department of Veterans Affairs.



1 **SEC. 205. AUTHORITY TO RECOUP RELOCATION EXPENSES**  
2 **PAID TO OR ON BEHALF OF EMPLOYEES OF**  
3 **DEPARTMENT OF VETERANS AFFAIRS.**

4 (a) IN GENERAL.—Subchapter I of chapter 7 of title  
5 38, United States Code, as amended by section 204, is  
6 further amended by adding at the end the following new  
7 section:

8 **“§ 723. Recoupment of relocation expenses paid on**  
9 **behalf of employees of Department**

10 “(a) IN GENERAL.—Notwithstanding any other pro-  
11 vision of law, the Secretary may issue an order directing  
12 an employee of the Department to repay the amount, or  
13 a portion of the amount, paid to or on behalf of the em-  
14 ployee under title 5 for relocation expenses, including any  
15 expenses under section 5724 or 5724a of such title, or  
16 this title if—

17 “(1) the Secretary determines that relocation  
18 expenses were paid following an act of fraud or mal-  
19 feasance that influenced the authorization of the re-  
20 location expenses;

21 “(2) before such repayment, the employee is af-  
22 forded—

23 “(A) notice of the proposed order; and

24 “(B) an opportunity to respond to the pro-  
25 posed order not later than ten business days  
26 following the receipt of such notice; and

1 “(3) the Secretary issues the order—

2 “(A) in the case of a proposed order to  
3 which an individual responds under paragraph  
4 (2)(B), not later than five business days after  
5 receiving the response of the individual; or

6 “(B) in the case of a proposed order to  
7 which an individual does not respond, not later  
8 than 15 business days after the Secretary pro-  
9 vides notice to the individual under paragraph  
10 (2)(A).

11 “(b) APPEAL OF ORDER OF SECRETARY.—(1) Upon  
12 the issuance of an order by the Secretary under subsection  
13 (a) with respect to an individual, the individual shall have  
14 an opportunity to appeal the order to the Director of the  
15 Office of Personnel Management before the date that is  
16 seven business days after the date of such issuance.

17 “(2) The Director shall make a final decision with  
18 respect to an appeal under paragraph (1) within 30 days  
19 after receiving such appeal.

20 “(c) APPEAL OF FINAL DECISION ON APPEAL OF  
21 ORDER.—An individual may appeal a final decision on an  
22 appeal under subsection (b) to the Merit Systems Protec-  
23 tion Board under section 7701 of title 5.”.

24 (b) CLERICAL AMENDMENT.—The table of sections  
25 at the beginning of such chapter is further amended by

1 inserting after the item relating to section 721, as added  
2 by section 204(b), the following new item:

“723. Recoupment of relocation expenses paid on behalf of employees of Department.”.

3 (c) **EFFECTIVE DATE.**—Section 723 of title 38,  
4 United States Code, as added by subsection (a), shall  
5 apply with respect to an amount paid by the Secretary  
6 of Veterans Affairs to or on behalf of an employee of the  
7 Department of Veterans Affairs for relocation expenses on  
8 or after the date of the enactment of this Act.

9 **SEC. 206. TIME PERIOD FOR RESPONSE TO NOTICE OF AD-**  
10 **VERSE ACTIONS AGAINST SUPERVISORY EM-**  
11 **PLOYEES WHO COMMIT PROHIBITED PER-**  
12 **SONNEL ACTIONS.**

13 Section 731(a)(2)(B) of title 38, United States Code,  
14 as redesignated by section 102(a)(2), is amended—

15 (1) in clause (i), by striking “14 days” and in-  
16 serting “10 days”; and

17 (2) in clause (ii), by striking “14-day period”  
18 and inserting “10-day period”.

19 **SEC. 207. DIRECT HIRING AUTHORITY FOR MEDICAL CEN-**  
20 **TER DIRECTORS AND VISN DIRECTORS.**

21 (a) **IN GENERAL.**—Section 7401 of title 38, United  
22 States Code, is amended by adding at the end the fol-  
23 lowing new paragraph:

1           “(4) Directors of medical centers and directors  
2           of Veterans Integrated Service Networks with dem-  
3           onstrated ability in the medical profession, in health  
4           care administration, or in health care fiscal manage-  
5           ment.”.

6           (b) CONFORMING AMENDMENT.—Section 7404(a)(1)  
7           of such title is amended by inserting “and 7401(4)” after  
8           “7306”.

9   **SEC. 208. TIME PERIODS FOR REVIEW OF ADVERSE AC-**  
10                   **TIONS WITH RESPECT TO CERTAIN EMPLOY-**  
11                   **EES.**

12           (a) PHYSICIANS, DENTISTS, PODIATRISTS, CHIRO-  
13           PRACTORS, OPTOMETRISTS, REGISTERED NURSES, PHY-  
14           SICIAN ASSISTANTS, AND EXPANDED-FUNCTION DENTAL  
15           AUXILIARIES.—Paragraph (2) of section 7461(b) of title  
16           38, United States Code, is amended to read as follows:

17           “(2) In any case other than a case described in para-  
18           graph (1) that involves or includes a question of profes-  
19           sional conduct or competence in which a major adverse  
20           action was not taken, such an appeal shall be made  
21           through Department grievance procedures under section  
22           7463 of this title.”.

23           (b) MAJOR ADVERSE ACTIONS INVOLVING PROFES-  
24           SIONAL CONDUCT OR COMPETENCE.—Section 7462(b) of  
25           such title is amended—

1 (1) in paragraph (1)—

2 (A) in the matter preceding subparagraph  
3 (A), by inserting “, within the aggregate time  
4 period specified in paragraph (5)(A),” after “is  
5 entitled”;

6 (B) in subparagraph (A)—

7 (i) by striking “At least 30 days ad-  
8 vance written notice” and inserting “Ad-  
9 vance written notice”;

10 (ii) by striking “and a statement” and  
11 inserting “a statement”; and

12 (iii) by inserting “and a file con-  
13 taining all the evidence in support of each  
14 charge,” after “with respect to each  
15 charge,”; and

16 (C) in subparagraph (B), by striking “A  
17 reasonable time, but not less than seven days”  
18 and inserting “The opportunity, within the time  
19 period provided for in paragraph (4)(A)”;

20 (2) by striking paragraph (3) and inserting the  
21 following new paragraph (3):

22 “(3) After considering the employee’s answer, if any,  
23 and within the time period provided for in paragraph  
24 (5)(B), the deciding official shall render a decision on the

1 charges. The decision shall be in writing and shall include  
2 the specific reasons therefor.”;

3 (3) in paragraph (4)—

4 (A) by striking subparagraph (A) and in-  
5 serting the following new subparagraph (A):

6 “(A) The period for the response of an employee  
7 under paragraph (1)(B) to advance written under para-  
8 graph (1)(A) shall be seven business days.”; and

9 (B) in subparagraph (B), by striking “30  
10 days” and inserting “seven business days”; and

11 (4) by adding at the end the following new  
12 paragraphs:

13 “(5)(A) The aggregate period for the resolution of  
14 charges against an employee under this subsection may  
15 not exceed 15 business days.

16 “(B) The deciding official shall render a decision  
17 under paragraph (3) on charges under this subsection not  
18 later than 15 business days after the Under Secretary pro-  
19 vides notice on the charges for purposes of paragraph  
20 (1)(A).

21 “(6) The procedures in this subsection shall super-  
22 sede any collective bargaining agreement to the extent that  
23 such agreement is inconsistent with such procedures.”.

24 (c) OTHER ADVERSE ACTIONS.—Section 7463(c) of  
25 such title is amended—

1           (1) in paragraph (1), by striking “the same no-  
2       tice and opportunity to answer with respect to those  
3       charges as provided in subparagraphs (A) and (B)  
4       of section 7462(b)(1) of this title” and inserting  
5       “notice and an opportunity to answer with respect to  
6       those charges in accordance with subparagraphs (A)  
7       and (B) of section 7462(b)(1) of this title, but with-  
8       in the time periods specified in paragraph (3)”;

9           (2) in paragraph (2)—

10           (A) in the matter preceding subparagraph  
11       (A), by inserting “, within the aggregate time  
12       period specified in paragraph (3)(A),” after “is  
13       entitled”;

14           (B) in subparagraph (A), by striking “an  
15       advance written notice” and inserting “written  
16       notice”; and

17           (C) in subparagraph (B), by striking “a  
18       reasonable time” and inserting “time to an-  
19       swer”; and

20           (3) by adding at the end the following new  
21       paragraph (3):

22       “(3)(A) The aggregate period for the resolution of  
23       charges against an employee under paragraph (1) or (2)  
24       may not exceed 15 business days.

1       “(B) The period for the response of an employee  
2 under paragraph (1) or (2)(B) to written notice of charges  
3 under paragraph (1) or (2)(A), as applicable, shall be  
4 seven business days.

5       “(C) The deciding official shall render a decision on  
6 charges under paragraph (1) or (2) not later than 15 busi-  
7 ness days after notice is provided on the charges for pur-  
8 poses of paragraph (1) or (2)(A), as applicable.”.

9       **SEC. 209. IMPROVEMENT OF TRAINING FOR SUPERVISORS.**

10       (a) IN GENERAL.—The Secretary of Veterans Affairs  
11 shall provide to each employee of the Department of Vet-  
12 erans Affairs who is employed as a supervisor periodic  
13 training on the following:

14               (1) The rights of whistleblowers and how to ad-  
15 dress a report by an employee of a hostile work envi-  
16 ronment, reprisal, or harassment.

17               (2) How to effectively motivate, manage, and  
18 reward the employees who report to the supervisor.

19               (3) How to effectively manage employees who  
20 are performing at an unacceptable level and access  
21 assistance from the human resources office of the  
22 Department and the Office of the General Counsel  
23 of the Department with respect to those employees.

24       (b) DEFINITIONS.—In this section:



1           (1) SUPERVISOR.—The term “supervisor” has  
2           the meaning given such term in section 7103(a) of  
3           title 5, United States Code.

4           (2) WHISTLEBLOWER.—The term “whistle-  
5           blower” has the meaning given such term in section  
6           323(g) of title 38, United States Code, as added by  
7           section 101.

8   **SEC. 210. ASSESSMENT AND REPORT ON EFFECT ON SEN-**  
9                           **IOR EXECUTIVES AT DEPARTMENT OF VET-**  
10                          **ERANS AFFAIRS.**

11          (a) IN GENERAL.—Not later than two years after the  
12          date of the enactment of this Act, the Secretary of Vet-  
13          erans Affairs shall—

14               (1) measure and assess the effect of the enact-  
15               ment of this title on the morale, engagement, hiring,  
16               promotion, retention, discipline, and productivity of  
17               individuals in senior executive positions at the De-  
18               partment of Veterans Affairs; and

19               (2) submit to the Committee on Veterans’ Af-  
20               fairs of the Senate and the Committee on Veterans’  
21               Affairs of the House of Representatives a report on  
22               the findings of the Secretary with respect to the  
23               measurement and assessment carried out under  
24               paragraph (1).

1       (b) ELEMENTS.—The assessment required by sub-  
2 section (a)(1) shall include the following:

3           (1) With respect to engagement, trends in mo-  
4       rale of individuals in senior executive positions and  
5       individuals aspiring to senior executive positions.

6           (2) With respect to promotions—

7               (A) whether the Department is experi-  
8       encing an increase or decrease in the number of  
9       employees participating in leadership develop-  
10      ment and candidate development programs with  
11      the intention of becoming candidates for senior  
12      executive positions; and

13               (B) trends in applications to senior execu-  
14      tive positions within the Department.

15          (3) With respect to retention—

16               (A) trends in retirement rates of individ-  
17      uals in senior executive positions at the Depart-  
18      ment;

19               (B) trends in quit rates of individuals in  
20      senior executive positions at the Department;

21               (C) rates of transfer of—

22                   (i) individuals from other Federal  
23      agencies into senior executive positions at  
24      the Department; and

1                   (ii) individuals from senior executive  
2                   positions at the Department to other Fed-  
3                   eral agencies; and

4                   (D) trends in total loss rates by job func-  
5                   tion.

6                   (4) With respect to disciplinary processes—

7                   (A) regarding individuals in senior execu-  
8                   tive positions at the Department who are the  
9                   subject of disciplinary action—

10                   (i) the length of the disciplinary proc-  
11                   ess in days for such individuals both before  
12                   the date of the enactment of this Act and  
13                   under the provisions of this Act described  
14                   in subsection (a)(1); and

15                   (ii) the extent to which appeals by  
16                   such individuals are upheld under such  
17                   provisions as compared to before the date  
18                   of the enactment of this Act;

19                   (B) the components or offices of the De-  
20                   partment which experience the greatest number  
21                   of proposed adverse actions against individuals  
22                   in senior executive positions and components  
23                   and offices which experience the least relative to  
24                   the size of the components or offices' total  
25                   number of senior executive positions;

1 (C) the tenure of individuals in senior ex-  
2 ecutive positions who are the subject of discipli-  
3 nary action;

4 (D) whether the individuals in senior exec-  
5 utive positions who are the subject of discipli-  
6 nary action have previously been disciplined;  
7 and

8 (E) the number of instances of disciplinary  
9 action taken by the Secretary against individ-  
10 uals in senior executive positions at the Depart-  
11 ment as compared to governmentwide discipline  
12 against individuals in Senior Executive Service  
13 positions (as defined in section 3132(a) of title  
14 5, United States Code) as a percentage of the  
15 total number of individuals in senior executive  
16 positions at the Department and Senior Execu-  
17 tive Service positions (as so defined).

18 (5) With respect to hiring—

19 (A) the degree to which the skills of newly  
20 hired individuals in senior executive positions at  
21 the Department are appropriate with respect to  
22 the needs of the Department;

23 (B) the types of senior executive positions  
24 at the Department most commonly filled under

1 the authorities in the provisions described in  
2 subsection (a)(1);

3 (C) the number of senior executive posi-  
4 tions at the Department filled by hires outside  
5 of the Department compared to hires from  
6 within the Department;

7 (D) the length of time to fill a senior exec-  
8 utive position at the Department and for a new  
9 hire to begin working in a new senior executive  
10 position;

11 (E) the mission-critical deficiencies filled  
12 by newly hired individuals in senior executive  
13 positions and the connection between mission-  
14 critical deficiencies filled under the provisions  
15 described in subsection (a) and annual perform-  
16 ance of the Department;

17 (F) the satisfaction of applicants for senior  
18 executive positions at the Department with the  
19 hiring process, including the clarity of job an-  
20 nouncements, reasons for withdrawal of applica-  
21 tions, communication regarding status of appli-  
22 cations, and timeliness of hiring decision; and

23 (G) the satisfaction of newly hired individ-  
24 uals in senior executive positions at the Depart-  
25 ment with the hiring process and the process of

1           joining and becoming oriented with the Depart-  
2           ment.

3           (c) SENIOR EXECUTIVE POSITION DEFINED.—In  
4 this section, the term “senior executive position” has the  
5 meaning given such term in section 713 of title 38, United  
6 States Code.

7 **SEC. 211. MEASUREMENT OF DEPARTMENT OF VETERANS**  
8 **AFFAIRS DISCIPLINARY PROCESS OUTCOMES**  
9 **AND EFFECTIVENESS.**

10          (a) MEASURING AND COLLECTING.—

11           (1) IN GENERAL.—The Secretary of Veterans  
12 Affairs shall measure and collect information on the  
13 outcomes of disciplinary actions carried out by the  
14 Department of Veterans Affairs during the three-  
15 year period ending on the date of the enactment of  
16 this Act and the effectiveness of such actions.

17           (2) ELEMENTS.—In measuring and collecting  
18 pursuant to paragraph (1), the Secretary shall meas-  
19 ure and collect information regarding the following:

20           (A) The average time from the initiation of  
21 an adverse action against an employee at the  
22 Department to the final resolution of that ac-  
23 tion.

24           (B) The number of distinct steps and lev-  
25 els of review within the Department involved in

1 the disciplinary process and the average length  
2 of time required to complete these steps.

3 (C) The rate of use of alternate discipli-  
4 nary procedures compared to traditional dis-  
5 ciplinary procedures and the frequency with  
6 which employees who are subject to alternative  
7 disciplinary procedures commit additional of-  
8 fenses.

9 (D) The number of appeals from adverse  
10 actions filed against employees of the Depart-  
11 ment, the number of appeals upheld, and the  
12 reasons for which the appeals were upheld.

13 (E) The use of paid administrative leave  
14 during the disciplinary process and the length  
15 of such leave.

16 (b) REPORT.—

17 (1) IN GENERAL.—Not later than December 31,  
18 2017, the Secretary shall submit to the appropriate  
19 committees of Congress a report on the disciplinary  
20 procedures and actions of the Department.

21 (2) CONTENTS.—The report submitted under  
22 paragraph (1) shall include the following:

23 (A) The information collected under sub-  
24 section (a).

1           (B) The findings of the Secretary with re-  
2           spect to the measurement and collection carried  
3           out under subsection (a).

4           (C) An analysis of the disciplinary proce-  
5           dures and actions of the Department.

6           (D) Suggestions for improving the discipli-  
7           nary procedures and actions of the Department.

8           (E) Such other matters as the Secretary  
9           considers appropriate.

10          (3) APPROPRIATE COMMITTEES OF CON-  
11          GRESS.—In this subsection, the term “appropriate  
12          committees of Congress” means—

13               (A) the Committee on Appropriations and  
14               the Committee on Veterans’ Affairs of the Sen-  
15               ate; and

16               (B) the Committee on Appropriations and  
17               the Committee on Veterans’ Affairs of the  
18               House of Representatives.



**Post-Hearing Questions for the Record  
Submitted to Carolyn Lerner  
From Senator Ron Johnson**

**Nomination Hearing to Consider  
Michael J. Missal to be Inspector General, Department of Veterans Affairs  
and  
Carolyn N. Lerner to be Special Counsel, U.S. Office of Special Counsel  
January 12, 2015**

1. The Committee's analysis of Federal Employee Viewpoint Surveys from 2012 to 2015 has shown a consistently downward trend in OSC employees' faith in leadership, morale, and belief that they can report wrongdoing. How do you plan to address this issue?

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

February 6, 2017

The Honorable Mitch McConnell  
Majority Leader  
United States Senate  
S-230, The Capitol  
Washington, D.C. 20515

The Honorable Charles Schumer  
Minority Leader  
United States Senate  
S-221, The Capitol  
Washington, D.C. 20515

Dear Majority Leader McConnell and Minority Leader Schumer:

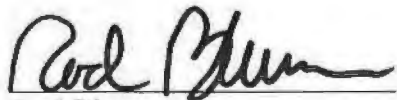
We write to you in support of Ms. Carolyn Lerner's nomination to serve a second term as Special Counsel of the Office of Special Counsel (OSC). OSC plays a vital role in our government by protecting federal employees from prohibited personnel practices, which often comes in the form of illegal retaliation against whistleblowers.

As Co-Chairs of the House Whistleblower Protection Caucus, we believe strongly that whistleblowers are crucial to the exposure of waste, fraud, and abuse in the Federal Government, and that their courage in coming forward is invaluable to Congress as it performs oversight of federal agencies. All federal employees should feel safe to report violations without fear of retaliation – which is exactly why the mission of OSC is so important.

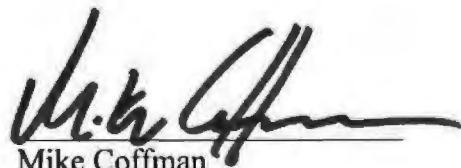
Under Ms. Lerner's leadership, OSC has increased both the number of claims it investigates and the number of cases resolved. OSC has won bipartisan praise for its work, including resolving multiple cases of retaliation against whistleblowers at the Veterans Administration, resulting in meaningful reforms meant to improve the care of our nation's veterans. We believe Ms. Lerner has earned a second term, and expect OSC to continue to excel under her guidance.

Though the Senate calendar is understandably busy as you consider many of President Trump's nominees, we respectfully request that you consider Ms. Lerner's nomination as soon as possible to guarantee continued protection for whistleblowers.

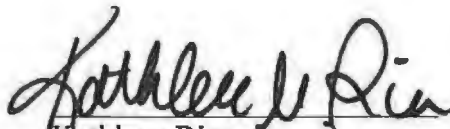
Respectfully,



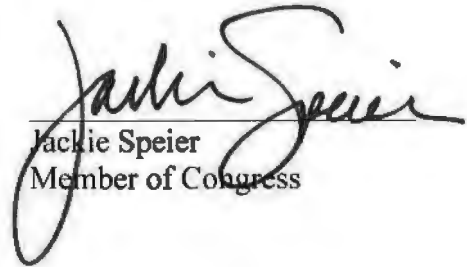
Rod Blum  
Member of Congress



Mike Coffman  
Member of Congress



Kathleen Rice  
Member of Congress



Jackie Speier  
Member of Congress

CC: The Honorable Ron Johnson, Chairman, Senate Committee on Homeland Security  
and Government Affairs  
Mr. Donald F. McGahn, Counsel, The White House

1 Chairman Johnson. Welcome.

2 Senator Carper. Is Jordan the one wearing the green  
3 tie?

4 Mr. Missal. Green tie.

5 Senator Carper. Thank you.

6 Ms. Lerner. My husband, Dwight Bostwick, is here with  
7 me. Our two children, Ben and Anna, would be here if they  
8 could be, but they are back at college. But they sat  
9 through the first hearing, so I cannot really hold it  
10 against them.

11 Chairman Johnson. Okay. Well, again, we certainly  
12 welcome you and your family members, and we truly appreciate  
13 the fact you are willing to serve your Nation in these  
14 capacities. These are not easy jobs.

15 OPENING STATEMENT OF SENATOR CHAIRMAN JOHNSON

16 Chairman Johnson. I do have an opening statement which  
17 I would ask consent to have entered in the record,

18 [The prepared statement of Chairman Johnson follows:]

19 / COMMITTEE INSERT

1           Chairman Johnson. It is the tradition of this  
2           Committee to swear in witnesses, so if you will both rise  
3           and raise your right hand. Do you swear the testimony you  
4           will give before this Committee will be the truth, the whole  
5           truth, and nothing but the truth, so help you God?

6           Mr. Missal. I do.

7           Ms. Lerner. I do.

8           Chairman Johnson. Our first nominee is Mr. Michael  
9           Missal. Mr. Missal is the nominee to be Inspector General  
10          at the Department of Veterans Affairs. He is currently a  
11          partner at the law firm K&L Gates, where he leads the firm's  
12          policy and regulatory practice groups. Mr. Missal hold a  
13          B.A. from Washington and Lee University and a J.D. from the  
14          Catholic University of America.

15          Mr. Missal?

1           TESTIMONY OF THE HONORABLE CAROLYN N. LERNER,  
2           NOMINEE TO BE SPECIAL COUNSEL, U.S. OFFICE OF  
3           SPECIAL COUNSEL

4           Ms. Lerner. Thank you. Chairman Johnson, Ranking  
5 Member Carper, members of the Committee, thank you for the  
6 opportunity to testify today. I also want to thank Senator  
7 Cardin for his kind words.

8           I want to thank my family for their support and  
9 encouragement over the last 4-1/2 years since I have taken  
10 on the new challenge of heading up the Office of Special  
11 Counsel. I am honored that the President renominated me to  
12 serve a second term.

13          I want to acknowledge the OSC leaders that are here  
14 today. I am very proud to serve with these exemplary public  
15 servants.

16          Senator Carper. Could we ask them to raise their  
17 hands?

18          [Hands raised.]

19          Senator Carper. All right. Thank you all.

20          Ms. Lerner. I can say, without hesitation, that the  
21 Office of Special Counsel is engaged in the most productive  
22 period in its history, and this productivity is due to the  
23 hard work of all of OSC's employees--the folks who are here  
24 today, the people in the field offices, in Washington, D.C.,  
25 Oakland, Dallas, and Detroit. I am very proud to serve with

1 all of them.

2 Our strong results in whistleblower retaliation,  
3 whistleblower disclosure, Hatch Act, and USERRA cases  
4 demonstrate this office's ability to promote better and more  
5 efficient Government. For example, our work with  
6 whistleblowers has prompted improvements in the quality of  
7 care for veterans at VA centers across the country. We have  
8 protected Customs and Border Protection whistleblowers who  
9 reported widespread waste and improper overtime payments at  
10 the Department of Homeland Security. And by working with  
11 this Committee in oversight hearings, Congress passed  
12 bipartisan legislation that will save \$100 million a year.  
13 That is about four times OSC's annual budget.

14 And we vigorously enforced the Hatch Act and worked  
15 with this Committee, particularly then-Chairman Akaka and  
16 Senator Mike Lee, to modernize the act by limiting the  
17 Federal Government's unnecessary interference with State and  
18 local elections.

19 When I was first nominated as Special Counsel, I often  
20 remarked that OSC was the best kept secret in the Federal  
21 Government. I wanted this to change so that more employees  
22 and taxpayers could benefit from the work of this small but  
23 effective agency. And change it has.

24 In 2015, for the first time in the agency's history, we  
25 received and resolved over 6,000 new matters, a 50-percent

1 increase from 2011, when I first took office. This dramatic  
2 increase in filings indicates that whistleblowers believe  
3 they can make a difference by coming to OSC. Studies have  
4 shown that the number one reason that employees do not  
5 report waste, fraud, or abuse is not because they fear  
6 retaliation. It is because they do not believe any good  
7 will come from their taking the risk. If the number of  
8 cases filed is any indication of employees' willingness to  
9 raise concerns--and I think it is--then we are moving in the  
10 right direction.

11       Given that the demand for OSC's services has far  
12 exceeded our small agency's resources, we have needed to  
13 find new and more efficient ways to approach increasing  
14 caseloads, and we have. OSC's cost to resolve a case is  
15 down by 45 percent, leading to record levels of  
16 productivity, and I have focused on being a careful steward  
17 of the taxpayer dollars.

18       I have also found better ways to manage cases. For  
19 example, I reinvigorated our alternative dispute resolution  
20 program because we know that mediation saves time and money  
21 for both agencies and employees alike, and it often results  
22 in better outcomes. And we are currently experimenting with  
23 an innovative approach to managing whistleblower cases. The  
24 new approach consolidates four OSC positions into one. This  
25 is proving to be both efficient and effective. By taking



1 these smart approaches to our growing caseload, we are  
2 generating efficiencies without compromising the quality of  
3 OSC's work. Indeed, when evaluating the most important  
4 statistic--the number of favorable outcomes for  
5 whistleblowers and the merit system--we are consistently  
6 setting records. For example, in 2015, we secured 278  
7 favorable actions for whistleblowers and other employees.  
8 Prior to my tenure, the number of favorable actions had  
9 dropped to 29 and was consistently below 100 per year.

10 But statistics cannot capture OSC's true impact. Our  
11 work with whistleblowers often saves lives and sparks  
12 reforms that prevent wasteful, inefficient, or unsafe  
13 practices.

14 In summary, I am very grateful for the opportunity to  
15 have served as Special Counsel. But there is still much to  
16 be accomplished. If confirmed for a second term, I hope to  
17 build on current successes. I will continue to protect VA  
18 and all other Federal employees from retaliation, and we  
19 will strive to find new ways to use our limited resources to  
20 improve Government.

21 I thank this Committee for 4-1/2 years of a productive  
22 relationship. I look forward to answering your questions.

23 [The prepared statement of Ms. Lerner follows:]

1 Chairman Johnson. Thank you, Ms. Lerner. I want to  
2 thank all my colleagues that have come here. It just  
3 underscores really how important we all feel these positions  
4 are and what these positions have to do and what they offer  
5 to Government. Because we have so many members, we are  
6 going to limit questions to 5 minutes.

7 Let me start out. I have some questions I am going to  
8 ask both of you, and I would like both of you to answer in  
9 series.

10 The first one: Is there anything you are aware of in  
11 your background that might present a conflict of interest  
12 with the duties of the office to which you have been  
13 nominated? Mr. Missal?

14 Mr. Missal. I do not

15 Chairman Johnson. Ms. Lerner?

16 Ms. Lerner. I do not.

17 Chairman Johnson. Do you know of anything personal or  
18 otherwise that would in any way prevent you from fully and  
19 honorably discharging the responsibilities of the office to  
20 which you have been nominated? Mr. Missal

21 Mr. Missal. I do not.

22 Chairman Johnson. Ms. Lerner?

23 Ms. Lerner. No, I do not.

24 Chairman Johnson. Do you agree without reservation to  
25 comply with any request or summons to appear and testify

1 before any duly constituted Committee of Congress if you are  
2 confirmed? Mr. Missal?

3 Mr. Missal. I do, Mr. Chairman.

4 Ms. Lerner. Yes, I do.

5 Chairman Johnson. Okay. Thank you.

6 Let me go back to the White Paper. Again, not to beat  
7 a dead horse, but I think it is just such a powerful example  
8 of why these positions are important and really to get your  
9 commitment, both of your commitment, to make sure that we  
10 rectify the problems within particularly the Office of  
11 Inspector General.

12 There was a whistleblower, Dr. Chris Kirkpatrick. He  
13 came forward. He was trying to get the attention of the  
14 management within the VA about the overprescription of  
15 opiate drugs. Because he came forward, he was terminated.  
16 The day of his termination he committed suicide.

17 If that is not tragic enough, on June 4th of 2015,  
18 after spending 3 years investigating and then not publishing  
19 a report on the problems of the VA health care system, the  
20 Office of Inspector General issued and made public a White  
21 Paper that included this statement: "I strongly recommend a  
22 thorough review of the in-depth sheriff's report, a publicly  
23 available document that is included in the documents  
24 produced, records produced, pages 5795 to 5851, with  
25 specific attention to the pages detailing the voluminous

1 amounts and types of marijuana and what appears to be other  
2 illegal substances found in Dr. Kirkpatrick's residence as  
3 well as other items including a scale and used devices  
4 containing marijuana residue. The evidence indicates that  
5 Dr. Kirkpatrick was likely not only to have been using but  
6 also distributing the marijuana or other illegal  
7 substances."

8 I have no idea what any of this had to do with the  
9 issue at hand in terms of the overprescription of opiates  
10 that resulted in veterans' deaths and the lack of care that  
11 resulted in the death by lack of care to Thomas Baer. This  
12 is the Office of Inspector General writing a report that is  
13 retaliating against a dead whistleblower.

14 Now, I asked Ms. Linda Halliday, when she testified  
15 before us, I wanted to know who was involved in this within  
16 the office. There is a problem within the office. I have  
17 not gotten that answer, and that is my first question to  
18 you, Mr. Missal. Are you disturbed by this?

19 Mr. Missal. I am disturbed by the language in the  
20 White Paper, yes.

21 Chairman Johnson. Are you disturbed that the White  
22 Paper was ever issued?

23 Mr. Missal. I just do not know enough about the facts  
24 and circumstances as to why it would, but that is certainly  
25 one of my first priorities would be to look at that.

1 Chairman Johnson. Will you cooperate with this  
2 Committee and me to find out who was involved in the writing  
3 of this White Paper in the office?

4 Mr. Missal. Mr. Chairman, I will provide you the  
5 information you need to get the answers to your questions.

6 Chairman Johnson. Also, this Committee was forced,  
7 because of the lack of cooperation by the Acting Inspector  
8 General, to issue a subpoena on April 29th. That subpoena  
9 has yet to be complied with.

10 Now, we are getting many excuses for not complying with  
11 it, you know, privacy issues. We do not want to reveal any  
12 private information. Obviously, the Office of Inspector  
13 General had no problem revealing private information  
14 publicly. We certainly have no interest in that. Will you  
15 commit yourself to making sure that our subpoena is complied  
16 with so we can get to the bottom of not only the problems  
17 within the Tomah VA system but within other health care  
18 systems within the VA, but also to get to the bottom of the  
19 problems within the Office of Inspector General? Will you  
20 comply with that subpoena?

21 Mr. Missal. Mr. Chairman, I have not seen the  
22 subpoena, but I certainly will look at it. My goal is to  
23 have a cooperative and collaborative relationship with this  
24 Committee. I hope in the future we do not need any more  
25 subpoenas. But I commit that I will look at the subpoena

1 and will address all the issues in it.

2 Chairman Johnson. Okay. I will be rather tenacious in  
3 looking for cooperation on that.

4 Ms. Lerner, I just want to get your assessment. We  
5 talked yesterday a little bit about this White Paper. I  
6 realize this is probably not going to be within your  
7 office's jurisdiction, but can you just talk about how  
8 corrosive something like that is coming from the Office of  
9 Inspector General?

10 Ms. Lerner. You know, one of the primary roles of an  
11 IG office is to inspire confidence in employees because you  
12 need them to do your work as an IG. I think it is similar  
13 to the Office of Special Counsel. Employees need to feel  
14 comfortable coming to you and reporting waste, fraud, abuse,  
15 other misconduct. It is the lifeblood of what we do. And  
16 my concern with that White Paper is that it sends a message  
17 to the wider VA community that if you do come forward, your  
18 reputation may become an issue. And that I think has a very  
19 chilling effect potentially on the workforce, and so it  
20 concerns me from that perspective.

21 Chairman Johnson. Okay. Thank you. I want to be  
22 respectful of time. I will go to Senator Carper.

23 Senator Carper. Thanks again very much.

24 Mr. Missal, the IG launched over a year ago  
25 investigations, I think maybe close to 100 investigations,

1 at facilities across the country. I am told there are about  
2 25 that are still outstanding and incomplete. I am told  
3 that the workload that the IG's office carries is enormous,  
4 and the other challenges and problems are far greater than  
5 the workforce allows them to address. What should be done  
6 about that? And I might say the VA facility in Wilmington,  
7 Delaware, including South Jersey and all of Delaware, we are  
8 very proud of, but we have been waiting for a long time for  
9 that report.

10 Mr. Missal. Well, Senator, one of the first  
11 priorities, if confirmed, will be to immerse myself into the  
12 work, the priorities, the plans of the office to make sure  
13 that things are properly staffed. If I come to the  
14 conclusion that additional resources are needed, I certainly  
15 would bring it to the attention of this Committee.

16 Senator Carper. All right. Thank you. Let me just  
17 talk about cross-agency collaboration between the VA IG's  
18 office and the Office of Special Counsel. We have heard  
19 that it is not the best, and I always like to say if it is  
20 not perfect, make it better. That is one of my guiding  
21 principles in life. What do you think you all might do,  
22 each of you just very briefly, what might you do to improve  
23 the relationship between your agencies and to better protect  
24 whistleblowers? Do you want to go first, Ms. Lerner?

25 Ms. Lerner. I guess it is better to be forward-looking

1    than backward, but--and I am very optimistic that we will be  
2    able to work with the new VA IG leadership. The primary  
3    problem that we have had in the past has been basically the  
4    lack of a collaborative and cooperative relationship, and  
5    particular as it regards information sharing, which is  
6    really important so that we are not duplicating efforts,  
7    that we are using our resources wisely, and we should be  
8    sharing information with each other. I am very hopeful that  
9    with new leadership that will happen. Mr. Missal and I have  
10   spoken a couple of times. I am sure that we will have  
11   further conversations about the ways that our offices can  
12   work together in a productive way.

13       Senator Carper. Good. Thank you.

14       Mr. Missal, just very briefly.

15       Mr. Missal. Sure. I believe that the Office of  
16   Special Counsel plays a really important role, that the  
17   mission of the Office of Inspector General is very similar  
18   in some respects to what the Office of Special Counsel does.  
19   And they should work very closely together, share resources,  
20   share information, work collaboratively.

21       Senator Carper. Okay. Let us talk about whistleblower  
22   protection. As I think others have mentioned, maybe the  
23   Chairman, our Committee held a hearing where VA employees  
24   recounted their experiences blowing the whistle on  
25   misconduct. Some of these whistleblowers expressed the view



1   that we also heard from others that the IG's office does not  
2   maintain whistleblower confidentiality when investigating  
3   complaints. I do not know if you are aware of these  
4   concerns. I would like to ask you if you are. What would  
5   you do to find out if they are valid? And if they are, what  
6   would you do about it?

7       Mr. Missal. Well, I am generally aware of it from what  
8   I have read in publicly available information. This is  
9   something that I have zero tolerance for in terms of any  
10   mistreatment of whistleblowers. I share Ms. Lerner's belief  
11   that whistleblowers are very critical to the workings of  
12   better Government, and one of my goals would be to increase  
13   the environment for whistleblowers so that they feel  
14   comfortable coming forward and to treat them with respect  
15   and dignity.

16       Senator Carper. All right. Ms. Lerner, Senator Cardin  
17   in his introduction of you went through some metrics,  
18   interesting metrics--you mentioned them as well--in terms of  
19   measuring the performance, good performance, by you and the  
20   team that you lead. What could other agency heads, what  
21   could other managers in the Federal Government learn from  
22   you and from your team that might be transferable to them?

23       Ms. Lerner. Thank you for the question. It is an  
24   interesting one. I think necessity is the mother of  
25   invention--I think that is the--

1           Senator Carper. I have heard that before.

2           Ms. Lerner. And we really needed to come up with more  
3 efficient, creative ways of doing business because of the  
4 influx of cases. Our staff has seen their caseload double  
5 and triple. We are inundated with cases. And we are a  
6 small agency. We have about 140 employees. We have  
7 jurisdiction for the entire civil workforce. With the new  
8 VA cases that make up about 30 or 40 percent of our cases,  
9 our caseload increased by 1,000 in just over 1 year. So we  
10 have had to look really carefully at the way we do business  
11 and see if there are more efficient ways of doing it.

12           One thing that I have really emphasized is mediation.  
13 It gets cases resolved more quickly, often with better  
14 results, and without a full investigation. We do not have  
15 to spend a year investigating a case that we think has  
16 merit. If we think that we can get it solved early, that is  
17 what we do, and that has been my instruction to the case  
18 examiners as well. We do not even have to get to the point  
19 where it goes to mediation or to a full investigation. If  
20 the case examiners can resolve a case early on, let us do  
21 it.

22           We have come up with a pilot project that consolidates  
23 four different positions into one to try and see if that can  
24 lead to more efficiencies and be more effective, and I am  
25 very optimistic that that project is going to work out.

1           So I guess the short answer is look for new ways of  
2   doing business. Old models may work, but sometimes you have  
3   to be flexible and come up with more efficient ways.

4           Senator Carper. My time has expired. I just want to  
5   add one last thing. If there are things that we need to be  
6   doing, we, this Committee, or the Senate, the House, the  
7   administration, to enable you and your folks to do an even  
8   better job going forward and continue these kind of results,  
9   please let us know. Thank you.

10          Ms. Lerner. Thank you.

11          Senator Carper. And I thank you both for a great job.

12          Chairman Johnson. Thank you, Senator Carper.

13          Before I move on to Senator Portman, I just want to ask  
14   consent to enter into the record the White Paper issued by  
15   the Office of Inspector General, my July 8th response to the  
16   White Paper, my September 29th letter to Ms. Linda Halliday  
17   asking her to find out who wrote the White Paper, and then  
18   her October 6th response saying she would not give me those  
19   names. So we will just enter that in the record.

20          [The information follows:]

21          / COMMITTEE INSERT

1 Chairman Johnson. Senator Portman.

2 Senator Portman. Thank you, Mr. Chairman. And for  
3 both of you, thank you for your continued interest in  
4 serving your country.

5 I am going to focus my comments, Mr. Missal, on your  
6 important role. The men and women in uniform who have put  
7 their lives at risk for all of us deserve the best, and as  
8 you know, they have not always received that in terms of  
9 their health care. This is an issue that has had a lot of  
10 focus in general. I do think that Secretary McDonald  
11 appreciates the need for us to reform the way veterans are  
12 getting their health care. Back home, I have held a bunch  
13 of town meetings on this and gotten some good input. We  
14 have a long list of concerns. The long waiting lists you  
15 know about, the adjudication of claims, some of the  
16 eligibility requirements. Things like Agent Orange  
17 eligibility is a big concern back in Ohio.

18 But let me focus on one that is a little different, and  
19 it builds on something the Chairman just talked about, and  
20 that is the issue of mental health treatment and the  
21 overprescription of painkillers, particularly opiates, that  
22 have led too often to the use of heroin and to some tragic  
23 circumstances.

24 I have been focusing on this issue for a number of  
25 years, and I think, although there has been some progress

1 made, there is a lot more that needs to be done. So I would  
2 just ask you in your role as Inspector General, where, as  
3 you know, you have a responsibility to look at health care  
4 issues, review medical center operations, evaluate the  
5 health care programs, provide oversight really on the  
6 critical role that the VA plays in health care, what you  
7 plan to do about that.

8       One common theme that I have found as I talk to  
9 veterans is that too often it is just too easy for doctors  
10 in the VA system to prescribe painkillers that are  
11 narcotics, that are opiates, that, again, lead to a similar  
12 high to heroin but a more expensive one. This, of course,  
13 has devastated families, torn communities apart, robbed  
14 individuals of their dreams.

15       I recently met with a veteran in Columbus, Ohio, who  
16 lost a family member who started on prescription drugs that  
17 were given to him by the VA to deal with pain, and then  
18 moved to heroin and eventually overdosed on heroin. The  
19 Chairman talked about the whistleblower who helped to reveal  
20 some of these cases and eventually committed suicide.

21       This VA Inspector General report from 2012 and 2013  
22 found that VA providers often inadequately assessed patients  
23 who were prescribed opiates, inadequately monitored patients  
24 on opiates, were asked by facility managers to write opiate  
25 prescriptions for patients they had not even assessed.

1 There is a more recent concern I have, which is the use of  
2 opiates for PTSD and traumatic brain injury. This report  
3 was just issued last week. This is a report by the  
4 Government Accountability Office with regard to DOD and VA  
5 health care actions needed to help ensure appropriate  
6 medication and continuation in prescribing practices. I  
7 brought two copies today because, Ms. Lerner, I think you  
8 also will be indirectly involved in this issue. I would  
9 like to hand these to you today and also enter this, Mr.  
10 Chairman, into the record. It is fresh off the presses, and  
11 it has some very disturbing information in it, including the  
12 following:

13 VA's new policy to ensure continuation of mental health  
14 medications lacks clarity on the types of medications  
15 considered mental health medications. As a result, the  
16 provides may be inappropriately changing or discontinuing  
17 mental health medications due to formulary differences,  
18 potentially increasing the risk of adverse health effects  
19 for transitioning servicemembers. And, again, if you look  
20 on pages 14, 15, 16, and page 23, you will see the reference  
21 to opiate use even for traumatic brain injury.

22 So my question to you is: If nominated, I would like  
23 your assurance you are going to look into these matters in  
24 order to help us hold the VA accountable for the proper care  
25 of our veterans who deserve the best.

1           Mr. Missal.   Senator, I will do so, including look at  
2   any recommendations that have been previously made on these  
3   issues and see whether or not they have been implemented.

4           Senator Portman.   Thank you, Mr. Missal.

5           Thank you, Mr. Chairman.

6           Chairman Johnson.   And without objection, your and my  
7   records will be entered into the record.

8           [The report follows:]

9           / COMMITTEE INSERT

1 Chairman Johnson. Senator Baldwin.

2 Senator Baldwin. Thank you, Mr. Chairman, and I want  
3 to thank you for holding this nomination hearing today.

4 Welcome to the nominees. I thank you both for being  
5 here and your willingness to serve the public, and  
6 especially to serve our Nation's veterans. The Special  
7 Counsel at the Office of Special Counsel and the Inspector  
8 General at the Department of Veterans Affairs both play  
9 essential roles in the oversight of our Government and the  
10 care of our veterans. And as I have seen in Tomah,  
11 Wisconsin, and indeed in the rest of the Nation, effective  
12 oversight is crucial to confronting the many challenges that  
13 plague the Veterans Administration. And, unfortunately, in  
14 the past few years, this oversight has been lacking, and  
15 troubling issues like whistleblower retaliation have  
16 persisted.

17 So I am glad, Mr. Chairman, that we are moving forward  
18 with these nominees today, and I hope that this hearing  
19 offers us a chance to make progress in fixing what is  
20 broken.

21 Mr. Missal, you are aware of some of the challenges  
22 facing the Tomah VA Medical Center in Wisconsin and the IG's  
23 early role in addressing those challenges in the form of a  
24 review that was done on inappropriate prescribing of  
25 controlled substances and abuse of authority. That review



1 was closed--in my view, prematurely--and subsequent  
2 investigations have further exposed serious issues at the  
3 Tomah VA, issues that were allowed to go on for far, far too  
4 long with absolutely tragic consequences.

5 As we move forward, it is essential that the VA Office  
6 of Inspector General is more transparent and works more  
7 cooperatively with the Congress to confront the serious  
8 problems that exist at the VA.

9 In order to help make the IG's office more transparent,  
10 I was successful in including language in the recently  
11 passed omnibus appropriations bill to ensure that when the  
12 VA OIG completes a report, it is promptly shared with the VA  
13 Secretary, Congress, and the public. That language would  
14 help address failures of transparency and agency oversight  
15 by requiring any recommendations made by the VA OIG during  
16 investigations, audits, or other reports to be sent directly  
17 to the VA Secretary--something that was not done in the case  
18 that I described. In addition, these recommendations would  
19 be made available to the public and submitted directly to  
20 relevant congressional oversight committees.

21 If confirmed, will you commit to significantly  
22 improving the transparency at the VA Office of Inspector  
23 General? And if so, what specific steps will you take to  
24 make sure this happens?

25 Mr. Missal. Senator, I will do so. I agree with you.

1 I believe transparency, increased transparency, is very  
2 important. I think it is one of the things that could  
3 increase the trust and confidence that our veterans and the  
4 American public would have in not only the VA OIG but VA as  
5 well. I intend to take a number of steps, including looking  
6 at what they are doing now. If there are reports that are  
7 not being made public that should be made public,  
8 particularly on the health care side, I cannot imagine a  
9 situation--although I do need to learn more--why a health  
10 care report would not be released publicly if it is  
11 completed. So that is one of the things I am going to look  
12 at and then have further discussions with the staff about  
13 other opportunities to increase transparency.

14 Senator Baldwin. Ms. Lerner, you have mentioned that  
15 30 to 40 percent of your caseload comes from VA employees  
16 and that these employees were projected to make up around  
17 37.5 percent of the whistleblower retaliation cases in the  
18 past year. As I have seen firsthand in Wisconsin with  
19 retaliation against whistleblowers at the Tomah VA and other  
20 facilities in the State of Wisconsin, there are significant  
21 and troubling issues with the whistleblower culture at the  
22 Department of Veterans Affairs. The Office of Special  
23 Counsel plays a key role and you are a key ally in this  
24 area, both in advocating for individual whistleblowers, such  
25 as Ryan Honl, who blew the whistle on opioid

1 overprescription at the Tomah VA, and in pressing for policy  
2 changes at the VA.

3 I have run out of time, but I hope you will follow up  
4 and provide an answer in follow-up also to your testimony in  
5 front of the Appropriations Subcommittee hearing on  
6 whistleblower culture at the VA in terms of your opinions as  
7 to whether enough is being done at the VA at this point to  
8 create an environment where whistleblowers can feel safe in  
9 coming forward with information that helps improve the  
10 agency.

11 Chairman Johnson. Would you like to quickly respond?

12 Ms. Lerner. Sure. Just very briefly, I think that  
13 there is a really good message that is coming from the top.  
14 What I hear Secretary McDonald saying and Deputy Secretary  
15 Gibson saying, it is new than what we heard a year and a  
16 half, 2 years ago, and that sets a tone that is really  
17 important.

18 The problem is the VA is such a large institution. It  
19 has so many facilities. It has the regions and then the  
20 individual facilities. And that message has to trickle down  
21 throughout the country, and it may take a little bit of  
22 time, but there are things that can be done. More training.  
23 The VA is doing a lot now. They can do more. We have  
24 helped them with training. We have trained the trainers.  
25 We have trained their investigators. We have trained their

1 regional counsel. We have made training materials available  
2 to them. They need to do more of it.

3 They need to hold managers accountable. You know, one  
4 of the missing links here--we have seen a lot of progress in  
5 many ways, but the one area that still concerns me very much  
6 is discipline for managers who are found responsible. And  
7 we need to work on that. That will help change the culture.

8 So just in brief, I think the VA is heading in the  
9 right direction. I think a new IG is going to really help a  
10 lot, so there is reason to be optimistic, but there is still  
11 a lot of work to be done.

12 Chairman Johnson. Senator Ayotte.

13 Senator Ayotte. I want to thank the Chairman, and I  
14 want to thank both of you for your service and your  
15 willingness to serve in such important positions for our  
16 country.

17 There has been a lot of discussion today about the  
18 Tomah VA situation, and I was very interested to hear you  
19 say, Ms. Lerner, that we need to hold managers in the VA  
20 more accountable for their actions. Yet what happened not  
21 just at Tomah but also with what happened at Phoenix is  
22 appalling because there were thousands of dollars of  
23 bonuses, actually millions overall, but thousands to  
24 individuals each at those VA facilities who were managers,  
25 who got bonuses even though they were participating in the

1 misconduct that occurred, and this body here in HSGAC,  
2 Senator McCaskill and I introduced a bill to claw back those  
3 bonuses and to deal with this going forward. It was changed  
4 to be only prospective. Our Committee voted it out, and the  
5 VA Committee did its work and voted it out. And guess what?  
6 I tried to get it passed right before we left at the end of  
7 the year, and people are anonymously objecting to  
8 essentially just saying if you commit misconduct, because  
9 the managers at the Tomah facility got bonuses between  
10 \$1,000 to \$4,000 even though they oversaw the  
11 overprescription of opiates to veterans and, of course, we  
12 know that veterans died.

13       So we have got to be part of the solution, too, and if  
14 people are going to object to legislation like that, it is  
15 just appalling to me. So I just wanted to bring that up  
16 because, as we see more accountability, if we are going to  
17 continue giving bonuses to people who participate in  
18 misconduct, and with no mechanism in current law to actually  
19 take back those bonuses or revisit issues like that or to  
20 actually discipline managers, then we are going to continue  
21 to see this cycle going forward.

22       So I hope--I know the members, we did the right thing  
23 in this Committee, but I am going to continue to push this  
24 on the Senate floor because I find it appalling that anyone  
25 would object to that legislation. And so come forward,

1 identify yourself. I look forward to having the debate on  
2 the floor with you about why you think that this is not  
3 appropriate.

4 I am so glad to see both of you here. Ms. Lerner,  
5 thank you for your incredible work. We are so glad to have  
6 your renomination here today. And, Mr. Missal, you are  
7 being asked to perform a very important job. On a  
8 bipartisan basis in this Committee, this position was vacant  
9 for 630 days, and all of us really pushed. This was not a  
10 partisan issue. We needed this position filled because of  
11 the many issues not just at Tomah and Phoenix and across the  
12 country that we were hearing from our veterans that needed a  
13 watchdog. So I am so glad to see you here today, and you  
14 have such an important job, working with Ms. Lerner and  
15 really having accountability in the VA. Our veterans  
16 deserve that, and we need to do it, and you have such an  
17 important job.

18 I wanted to ask you about health care in the VA, and  
19 that is the Veterans Choice Program, which offers  
20 eligibility to veterans, the option of receiving care in  
21 their community at a private provider. This is very  
22 important in New Hampshire because we do not have a full-  
23 service veterans hospital. And, in fact, there is a  
24 provision that was passed in the VA reform law that allows  
25 our veterans in New Hampshire, almost like a pilot, allows

1   them to go seek private care because we do not have a full-  
2   service hospital. But there have been a lot of bumps in  
3   actually getting this program right for our veterans, and  
4   the VA's Inspector General Office has issued semiannual  
5   reports. The most recent report has only a passing  
6   reference to the Choice Program.

7           So I would ask you, I hope that as you do your work in  
8   the Inspector General's Office, all the work that we have  
9   tried to do on the wait lists, on the issue of making sure  
10   that veterans have access to care in their community, we  
11   have got to get this program right. We have got to allow  
12   veterans to choose so they are not waiting and so they are  
13   not driving long distance for their care, especially in my  
14   home State of New Hampshire. But also this is an issue  
15   across the country.

16           So I would ask you how familiar you are with the  
17   Veterans Choice Program, what oversight you will bring to  
18   the program, and do I have your commitment to personal  
19   oversight over this program and some review of this program  
20   to make sure we get this right for our veterans?

21           Mr. Missal. Senator, I am generally aware of the  
22   program. I know it is a relatively new program that was  
23   implemented to fill a real need out there. I do not know  
24   what oversight the OIG's office is doing right now, but you  
25   do have my commitment to look into it because I do recognize

1   how important it is. And it is a new program. There is a  
2   possibility there could be issues, and you want to address  
3   those issues before they become larger issues.

4           Senator Ayotte. Well, let me just say that I do not  
5   think there has been enough oversight at this point, and  
6   also, as a new program, this is interjecting change to the  
7   VA, and we all know that often people do not want to change  
8   when there is a new program to give veterans access to care.  
9   So I would ask you to make sure that we also deal with the  
10   issue of this type of change coming with the agency and  
11   focus on the oversight of getting it right for our veterans,  
12   because Congress, we support this program. It is important  
13   for our veterans to have the choice for their care and to  
14   have the access so that they never have to wait and they do  
15   not have to drive long distances to get the care that they  
16   have earned defending this Nation.

17           Mr. Missal. I will do so, Senator.

18           Senator Ayotte. All right. Thank you both. I  
19   appreciate it.

20           Chairman Johnson. Thank you, Senator Ayotte.

21           Just to underscore the point, "bumps" is being kind.  
22   There is a veteran in Wisconsin who had pancreatic cancer,  
23   and they were forcing him to drive more than 100 miles to  
24   get treatment in Milwaukee, where, again, he could have gone  
25   to Marshfield



1           Senator Ayotte. Yes, it is crazy.

2           Chairman Johnson. It is.

3           Senator Ayotte. It is crazy, and this is--our veterans  
4 should not have to drive. They should be able to decide,  
5 and we owe it to them to get this right.

6           Chairman Johnson. So, again, you view that as a pilot  
7 program. There are a lot of bumps, and that is something  
8 that the Office of Inspector General really nominees to look  
9 into.

10          Senator Ernst?

11          Senator Ernst. Thank you very much. It is so nice to  
12 have you both in front of us today. Thank you, Mr.  
13 Chairman, for calling for this nomination process.

14          I want to thank your families as well for joining you  
15 today. It takes a lot to put that on their shoulders as  
16 well. And for those that came from the OSC, we want to  
17 thank you for your very important work.

18          You can tell--this is not the Veterans Committee, but  
19 you can tell that the members of this Committee are very,  
20 very passionate about the care that not only our veterans  
21 are provided through the VA health care system but also  
22 those that see issues within that VA health care system and  
23 protecting those whistleblowers and making sure that they  
24 are afforded the opportunity to speak out without reprisal.  
25 So thank you again for the work that you are doing.

1           Mr. Missal, it is good to see you again. I appreciate  
2   you taking the time before the holidays to sit down with me  
3   and my staff and talk through a number of these issues.  
4   Again, very passionate about the care that we provide to our  
5   veterans.

6           It was actually last March when all of the members of  
7   this Committee joined together in a letter to the President  
8   asking for a nominee to this position of Inspector General  
9   for the VA. So we do need to act swiftly on this. I am  
10   very excited about this opportunity, and I, like a number of  
11   our other members--Chairman Johnson, you have had  
12   frustrations with the VA, and Senator Baldwin, all of us  
13   have had specific frustrations with our own VA health care  
14   centers.

15          Last February, I requested a review of the mental  
16   health care provided to an Iraq war veteran from the Des  
17   Moines area, a young man that committed suicide. And the VA  
18   IG's office did not report back to me for many, many months.  
19   And, again, this was a very serious situation. Again, a  
20   young man had taken his own life out of the frustration that  
21   he felt, and now the frustration that we all bear.

22          So, again, it was months before they got back to my  
23   office, and my State staff has also reported to me that the  
24   VA OIG has failed to respond to their repeated requests for  
25   an update on three cases, now three additional cases in Iowa

1 that were opened last spring. So this is not a one-time  
2 occurrence for any of us. Repeated requests for information  
3 on cases that are going unanswered.

4 Can you please just repeat to me your commitment to all  
5 of us on this Committee that you will assist us in our  
6 oversight responsibilities in a timely manner and keep us  
7 effectively informed on all OIG matters?

8 Mr. Missal. Senator, I recognize the important role an  
9 IG can play in assisting the Committee and Congress in its  
10 oversight responsibility. I think you will find me highly  
11 communicative, that I would respond very quickly to  
12 requests. I may not always have the answer right away. It  
13 sometimes takes time to develop it. But I just believe it  
14 is important to keep people informed of the progress so you  
15 know exactly what is going on.

16 Senator Ernst. That is wonderful. I appreciate that  
17 very much because, unfortunately, as we have seen all too  
18 many times in the past there has not been the follow-up  
19 necessary, and those months' delay could mean another  
20 veteran that has been left untreated or another veteran that  
21 takes their own life because of the lack of care provided by  
22 the VA. So we do have to be vigilant in this oversight, and  
23 it quite literally is a matter of life and death. So I just  
24 want to make sure that we all understand how important it is  
25 for timely response.

1           I was a little appalled to learn during this  
2 Committee's hearing last September that the VA OIG  
3 investigates only a fraction of the approximately 40,000  
4 complaints--40,000--that it gets annually. And I understand  
5 that both the VA OIG and the OSC are resource constrained,  
6 but a top priority of both organizations should be ensuring  
7 that not one of these VA whistleblower complaints goes  
8 unresolved.

9           So I would like to hear just very briefly your general  
10 thoughts on that.

11          Mr. Missal. Sure. I understand there are 40,000  
12 contacts to the hotline a year, give or take there. I do  
13 not know what they are doing to triage those, how they  
14 decide which ones are addressed, which ones are not. But  
15 that is, again, one thing that I find very important. If  
16 there is an issue out there that needs to be addressed, it  
17 needs to be addressed quickly and figure out a way to find  
18 resources to at least initially address them and see what  
19 can be done.

20          Senator Ernst. Thank you.

21          Ms. Lerner, just very briefly.

22          Ms. Lerner. Sure. Let me tell you just briefly some  
23 of the steps that OSC has taken to prioritize VA cases. We  
24 have set up a triage system that prioritizes VA health and  
25 safety cases, so any case involving health and safety,

1 whether it is a disclosure or someone who claims retaliation  
2 for having reported a health and safety violation, those get  
3 a very quick look. We have a senior counsel who is assigned  
4 full-time to coordinate our VA cases. I have assigned one  
5 of my deputies to coordinate VA cases. They meet weekly  
6 with the VA team of employees at OSC that we created after  
7 we got this total influx of new cases. That team meets  
8 weekly.

9 We have worked with the VA Office of Inspector General  
10 and Office of Accountability and Review to expedite the  
11 resolution of VA retaliation cases so that we can get  
12 quicker, better results without having to do a full  
13 investigation.

14 So those are just some of the things that we are doing  
15 to prioritize VA cases at the OSC.

16 Senator Ernst. I appreciate it very much.

17 Thank you, Mr. Chair.

18 Chairman Johnson. Senator Lankford.

19 Senator Lankford. Thank you both for being here and  
20 for your service to get to this point.

21 Ms. Lerner, let me ask you about budget items. When  
22 you first came in--well, let us go back to 2011. We have  
23 got a good picture there. Your budget was \$18 million. It  
24 is now \$24 million. Tell us about, as you have mentioned  
25 before, how we are getting a bang for a buck in that

1 increased spending. What has changed, both the efficiency  
2 of that kind of increase in budget, and what is the taxpayer  
3 getting better now than they were in 2011?

4 Ms. Lerner. Thank you for your question. I am really  
5 proud of the way we have been able to manage our budget.  
6 When I came in, we had about 108 employees. Again, we have  
7 jurisdiction for the entire Federal civilian workforce,  
8 basically more or less, a few exceptions. And we now have  
9 about 140 employees, so that increase in personnel has gone  
10 a long way to letting us handle this influx of VA cases.

11 Let me give you an example of one case that I think is  
12 typical of the way we can get a return on our budget, return  
13 on the taxpayer's money.

14 Department of Homeland Security whistleblowers came to  
15 us reporting the abuse of overtime, widespread abuse by  
16 Customs and Border Patrol agents and other employees at the  
17 Department. We were able to do a full investigation. We  
18 did a full report, and working with this Committee, we were  
19 able to get legislation, bipartisan legislation, through  
20 Congress that changes the overtime pay system at the  
21 Department of Homeland Security. The Congressional Budget  
22 Office estimates that those changes are going to result in  
23 \$100 million a year of savings. Our budget is, as you said,  
24 about \$24 million right now.

25 So those types of cases are out there. We are making

1    them.  I mean, they are not all \$100 million a year of  
2    savings, but that is the type of case that we think we are  
3    now capable of taking.  We are working with Congress.  We  
4    view ourselves as partners with this Committee and other  
5    committees to get legislation through when it is needed.  So  
6    that is the kind of bang that we are getting for the buck.

7           Senator Lankford.  Okay.  That is helpful.  We will get  
8    a chance to follow up in the days ahead on that as well,  
9    just to be able to see the effectiveness of that.  This is a  
10   "feed the lions" type strategy to say where we are actually  
11   effective and people are efficient with dollars.  That is  
12   entirely reasonable to continue to be able to help their  
13   budget because they are efficient and have to actually carry  
14   them out.

15          Tell me about internal controls for personally  
16    identifiable information and limiting the access of  
17    individuals to information that they really do not need to  
18    access.  This has been an issue in several of the agencies  
19    where they have access to information for other people, both  
20    inside and outside the organization, and no internal  
21    controls to make sure they are not accessing it  
22    inappropriately.

23          Ms. Lerner.  Well, that has definitely been a problem  
24    at the VA and something that we have talked to them a lot  
25    about.  We think that there are technical fixes that can

1 solve that problem fairly easily at the VA, and I look  
2 forward to talking to Mr. Missal about that.

3 What we have seen at the VA is, you know, many of the  
4 folks who work there are also patients.

5 Senator Lankford. Right.

6 Ms. Lerner. And so what is happening is someone who  
7 might be sort of mischief-minded is going into the medical  
8 records of their coworkers or oftentimes it is people who  
9 have blown the whistle and getting access to their medical  
10 information.

11 Senator Lankford. Mr. Missal, how do we stop that?

12 Mr. Missal. I think you need to look at it very  
13 closely. If there is a technology fix to do, I think we  
14 need to--

15 Senator Lankford. Which I think there is.

16 Mr. Missal. --use the resources to do it, and then to  
17 make a recommendation it does, and then follow up to make  
18 sure that recommendation--

19 Senator Lankford. I would highly recommend that we do  
20 look through that process to see what technology. Some  
21 agencies do a great job at that. Most agencies do not.  
22 They are not limiting the access of people that work there  
23 to getting information that they do not have any business  
24 professionally actually accessing. And VA is one of those  
25 areas of many there. Many people around this dais know--and



1 I have talked to many others around this place. I am one of  
2 many that I look towards the horizon with VA and see the  
3 days ahead that VA will be small-scale clinics for ongoing  
4 care, but that veterans can choose to go any place they want  
5 to go for health care in the days ahead, and that the  
6 veterans have this absolute choice to say you do not have to  
7 drive past seven good hospitals to be able to get to the VA  
8 hospital, then wait 3 months for a knee replacement that you  
9 could get across the street 3 miles from your house, that  
10 there is the moment that we actually treat our veterans with  
11 the ability to be able to choose. And I know you have  
12 already had some conversation about the Choice Program. I  
13 think that does need a tremendous amount of oversight. My  
14 perception is from meeting with some of the individuals at  
15 VA that they seem reluctant to actually implement the  
16 congressional mandate for choice, and they are trying to  
17 find ways not to give choice, or to say, yes, we can take  
18 care of that internally. But I think that is a big issue.

19 I would also say to you that I would recommend that the  
20 IG looks at things like staff turnover. Every time I talk  
21 to veterans, they say, "When I return back to the VA, I am  
22 with a new doctor and I saw a different nurse than I saw  
23 last year," because the turnover rate is so high. There is  
24 a basic question there of why. Why would the turnover rate  
25 be high? Because that affects actual care for those

1 individuals.

2 I would like to ask you as well just on priority of  
3 your own investigations and your own personality with this,  
4 there is a tendency with some of the IGs to look at  
5 efficiency of how the agency operates rather than the  
6 quality of care the patient receives. So as an IG, what I  
7 am interested to hear from you is when you do  
8 investigations, are you looking at how well paper is moving  
9 and how fast paper is moving through the VA or how good the  
10 care will be for the veteran when they come into the VA  
11 centers?

12 Mr. Missal. I do not think they are necessarily  
13 mutually exclusive. I think you can look at both. The  
14 quality of care to me for veterans is a critically important  
15 issue, but also the economy and efficiencies of how the  
16 Department operates, which could impact the quality of care,  
17 I think is also very important.

18 Senator Lankford. Okay. So at the end of the day,  
19 veteran care will be essential. I will tell you one of the  
20 veteran families that I spoke to just last weekend, trying  
21 to gather all the records for their Dad, and they cannot go  
22 any one place and get his health records. The dentist has  
23 it over here, and the general person has it here, and the  
24 surgeon has it over here, and they all have to request each  
25 other. And so there is a lot of conversation about

1 centralized records. That is not actually occurring in the  
2 VA system. And literally the different specialists do not  
3 know what each other is doing, and when they even try to get  
4 all the files together, they literally were going section to  
5 section to be able to get it.

6       There is some basic operational movement of paper that  
7 does affect the quality of care for our veterans, but at the  
8 end of the day, I would encourage you to focus in on what is  
9 the care that is being received and what are the impediments  
10 to good quality care more than anything else.

11       Mr. Missal. I will, Senator.

12       Senator Lankford. Thank you.

13       Chairman Johnson. Senator Heitkamp.

14       Senator Heitkamp. Thank you, Mr. Chairman.

15       You know, it is interesting, because we have been  
16 talking a lot about efficiency, a lot about quality of care,  
17 but the issues that the VA confronts are issues of life and  
18 death. That is how serious this is. That is how serious we  
19 are about making sure that we have an oversight system and  
20 that we have partnerships with both of your agencies in  
21 terms of providing oversight, because it can mean the  
22 difference between life and death. That is how critical  
23 this is.

24       And as we kind of look going forward, I think it is  
25 important, although you have heard a lot about choice here,

1 that you understand this from the perspective of a rural  
2 State, where I think the Chairman talked about a 100-mile  
3 drive. I have Native American veterans who live in the  
4 northwest part of my State who literally have to drive 5  
5 hours to get chemotherapy.

6 Now, as somebody who is a breast cancer survivor, the  
7 last thing I wanted to do before and after my chemotherapy  
8 was get in a car and drive 5 hours.

9 This is a sacred duty that we have to make sure that  
10 our veterans are treated appropriately, and this body, the  
11 United States Congress, signed by the President, have  
12 adopted a new policy, which is called "Choice," that there  
13 ought to be an opportunity for that veteran, that 90-year-  
14 old veteran who may be getting chemotherapy to get it at  
15 home or get it as close as what he can or she can to home.

16 And so I would tell you, since the rollout of the  
17 Choice Program in November of 2014, an overwhelming number  
18 of veterans, family members, doctors, and health care  
19 providers have contacted my office out of frustration. And  
20 you hear that frustration among all the members here. We  
21 have to have a watchdog, because this is a very big  
22 bureaucracy that thinks they are just going to wait this  
23 out, that if people's attention just deviates from the  
24 problems of the past, that we will, in fact, be pulled off  
25 target.

1           I am not going to be pulled off target on the Choice  
2 Program. I am not going to be pulled off target on making  
3 sure that our veterans get the benefits that they have  
4 earned by serving this country. And so, Mr. Missal--and I  
5 thank you so much for coming into my office. I know that  
6 you heard the same kind of passion there. But I want to  
7 really impress upon you how truly important it is to look at  
8 this program and look at what this means, because it can  
9 mean life and death, and to think about even if there is not  
10 outright fraud or abuse--and no one is claiming that--that  
11 the efficiency and fulfilling the promise of this program is  
12 within your mission.

13           Mr. Missal. I understand that, Senator.

14           Senator Heitkamp. Okay. Thank you. And I want to  
15 maybe just take a moment and talk about following up with  
16 Senator Ayotte, talk about the bonuses, because, you know,  
17 is it appalling that these bonuses were paid and not paid  
18 back? Absolutely. And we will work through that. But what  
19 is appalling to me is that we created a system by providing  
20 bonuses that provided a huge incentive for fraud. And I  
21 know this is far-reaching, but as you look at kind of  
22 administration, how do you see being proactive on the front  
23 end of those kinds of decisions that are made to prevent  
24 fraud or prevent incentivizing fraud by staff?

25           Mr. Missal. Sure. I think, you know, several things.

1 One, that could be part of the audit function when you are  
2 going to test things to identify issues before they become  
3 larger problems.

4 Secondly, the IG also can weigh in on proposed  
5 legislation to determine the efficiency, effectiveness,  
6 things like that, so the ways the IG can use his or her  
7 voice to come in on issues such as the ones you raise.

8 Senator Heitkamp. So the great tragedy is that an  
9 incentive program that was built to improve the quality of  
10 care actually led, in my opinion, to fraud because all of a  
11 sudden there was a monetary reward which you could get if  
12 you lied. Right?

13 Mr. Missal. Correct.

14 Senator Heitkamp. So that is the kind of thing that we  
15 need to be very proactive on, not just taking care of what  
16 are the decisions today but how decisions in administering  
17 the programs at the VA can, in fact, create even more  
18 bureaucracy for our veterans.

19 So I want to thank both of you for stepping up and for  
20 being part of this important life-and-death mission, which  
21 is providing those services that some of the great heroes of  
22 this country have earned. And so thank you, and if there is  
23 anything that we can do on this Committee or anything I can  
24 personally do to assist you in carrying out that mission, I  
25 hope that you pick up the phone and call me personally.

1           Thank you, Mr. Chairman.

2           Chairman Johnson. Thank you, Senator Heitkamp.

3           I think because of the strong attendance and, I think,  
4 thoughtful questions and answers, I really do not have any  
5 further questions. I know Senator Carper does. Before we  
6 give you both an opportunity to kind of make a closing  
7 comment, we will turn to Senator Carper.

8           Senator Carper. Thanks. Thanks so much. I was not  
9 going to ask another question, but I want to ask one  
10 lighthearted question and one serious question.

11          I said to the Chairman and I would say it to Senator  
12 Heitkamp--I have spoken to our staffs--I feel very  
13 fortunate. I felt fortunate walking into this hearing that  
14 one of you is already serving in an important role in our  
15 Government and that the other is willing to serve. You are  
16 two very impressive people. I would just ask your wife--was  
17 it Deborah?

18          Mr. Missal. Yes.

19          Senator Carper. And your husband--is it Dwight?

20          Ms. Lerner. Yes.

21          Senator Carper. Were these two people this smart when  
22 you first met them?

23          [Laughter.]

24          Senator Carper. Have they, like, learned from you?  
25 Has it, like, rubbed off? I mean, what--I do not know.

1           Mr. Missal. I do not want her to answer that question.

2           [Laughter.]

3           Ms. Lerner. My kids would tell you it is all them.

4           Senator Carper. I have heard many people say of their  
5 teen-aged children that their kids think that they are just  
6 the dumbest parents in the world, and then when the kids  
7 turn 18 or 19, it all changes. How old is your son?

8           Mr. Missal. 22.

9           Senator Carper. And how old are your kids?

10          Ms. Lerner. My daughter is 18, and my son is 21.

11          Senator Carper. All right. Well, you are past--you  
12 are over the hill.

13          Ms. Lerner. We are still waiting for that.

14          [Laughter.]

15          Senator Carper. You are almost over the hump.

16          Here is my serious question: James Lankford asked  
17 really good questions, a very perceptive fellow, and talked  
18 about the idea of having a VA in the future where we have  
19 our outpatient clinics, which I think do provide great  
20 service. But for the most part, the mother ship--the  
21 hospitals and so forth--would use existing hospitals within  
22 the communities across our country, and that is an idea that  
23 has some appeal. But I also know as a veteran myself,  
24 somebody who has spent a lot of time--23 years, 5 years in a  
25 hot war in Southeast Asia, another 18 right up to the end of



1 the Cold War--as a naval flight officer. But I know that  
2 sometimes the conditions that veterans are treated for--PTSD  
3 is certainly one, Agent Orange is another, but there are  
4 others--are ones that veterans feel like they get better  
5 care and maybe better focused care in a VA facility.

6 Our community college back in Delaware, Delaware  
7 Technical Community College, has created a unit that is run  
8 by veterans for veterans, coming in many cases back from  
9 Afghanistan and back from Iraq. They are on the campus and  
10 are trying to acclimate to being a student, and some of the  
11 most go-to people there is a unit that is run by veterans.  
12 So that is in the back of my mind.

13 One of the things that he said that caused me special  
14 concern was that it sounded like he was suggesting a  
15 breakdown in communications between specialties within VA  
16 hospitals and facilities. And if that is widespread, that  
17 is a matter of huge concern to me.

18 It was, I do not know, maybe 15, 20 years ago that the  
19 VA began experimenting with electronic health records, and  
20 many people give the VA credit for being a pioneer, first on  
21 the beach in terms of deploying that kind of technology to  
22 provide for better health care for less money. And I would  
23 just ask of you, Mr. Missal--I will try to make you a guided  
24 missile here, as opposed to an unguided missile. But I  
25 would urge you to take a look at that. We know that there

1 is a problem with interoperability between the electronic  
2 health records within the VA and within the Department of  
3 Defense. People come off active duty and have one kind of  
4 electronic health record. They go into the VA, and it is  
5 different, and the two do not communicate. There has been a  
6 huge effort to try to address that.

7 But I would ask you to monitor that interoperability  
8 between the Departments, but also James' comments with  
9 respect to the breakdown of communications within a hospital  
10 across specialty units.

11 Again, you all have done a great job. We are hopeful  
12 that we will get you reported out of here and get you  
13 confirmed by the Senate, and you can continue to do the good  
14 work you are doing, Ms. Lerner. And, Mr. Missal, you will  
15 be able to be a guided missile and go to work and do a great  
16 job there, as you have in other chapters of your life.

17 Again, our thanks to your families.

18 Mr. Missal. Thank you, Senator.

19 Chairman Johnson. Thank you, Senator Carper.

20 I will just give both of you the opportunity, if you  
21 have some closing comments, and we will let Ms. Lerner go  
22 first.

23 Ms. Lerner. I do not have anything prepared, but I  
24 just wanted to thank you both, Senator Johnson and Senator  
25 Carper, both for the hearing today and also for the work

1 that you have done with my agency over the last 4-1/2 years.  
2 I really do view us as partners in trying to make Government  
3 work better, more efficiently, keep it safe. And we can be  
4 more effective when we are working with you, and so I have  
5 really appreciated that partnership and your support over  
6 these last 4-1/2 years. So thank you.

7 Chairman Johnson. Thank you, Ms. Lerner.

8 Mr. Missal?

9 Mr. Missal. I would also like to thank you, Mr.  
10 Chairman, and the Committee, Mr. Ranking Member, for the  
11 courtesies extended today, the opportunity to discuss our  
12 views with you. I am committed to working tirelessly and  
13 independently on behalf of veterans and the American public.  
14 I am also committed to working cooperatively and  
15 collaboratively with this Committee as well, and I am  
16 available to answer any other questions you may have.

17 Thank you.

18 Chairman Johnson. Okay.

19 Senator Carper. Mr. Chairman?

20 Chairman Johnson. Sure.

21 Senator Carper. Could I ask, Ms. Lerner, if you were  
22 just to give Mr. Missal one word of advice, just terrific  
23 advice that really helped you in the success at your agency,  
24 give him just one really great piece of advice as he  
25 prepares, once confirmed, to assume his new

1 responsibilities, what would that be?

2 Ms. Lerner. Hire really great people. You are one  
3 person. I am one person. The reason that we have been able  
4 to be effective as an agency is because I have been able to  
5 recruit and retain really talented staff who do the day-to-  
6 day work of protecting whistleblowers, and I could not be  
7 prouder to serve with them, but they are the reason that we  
8 have been able to be successful. So my one piece of advice  
9 is to surround yourself with people who are smarter than you  
10 are and, you know, who will really make a difference.

11 Senator Carper. It is funny you should say that,  
12 because down in Guatemala--the Chairman and I have been down  
13 to Central America, down on the border quite a bit with  
14 Mexico. But they are going to be swearing in a new  
15 President in Guatemala on Thursday of this week, a former  
16 comedian, Jimmy Morales, who actually had his own TV show,  
17 and I met with him when I was down there a couple of months  
18 ago, and he is not that funny.

19 [Laughter.]

20 Chairman Johnson. I am sure he is, but he is also a  
21 very serious individual.

22 Senator Carper. But he has a serious side. You know  
23 what? He said, "Give me some advice." And the advice I  
24 gave him, I said, "You will have one chance to put together  
25 a world-class team around you, and the people who elected

1 you"--two-thirds of them voted for him. "Look and see who  
2 are you going to surround yourself with, the quality of  
3 those people, the integrity of those people, their  
4 commitment to doing a good job." That is great advice, and  
5 I take that one to heart, and my guess is you already have.

6 Thank you.

7 Chairman Johnson. That was a good question. That is a  
8 right answer. Let us face it. Any organization, a bunch of  
9 people. And so good answer.

10 I want to thank again the nominees. I want to thank  
11 their families. Families, look very carefully at these two  
12 individuals because you will see them probably less. I  
13 think Ms. Lerner's family already realizes that. Mr.  
14 Missal's family will soon find that out, because this is an  
15 enormous task.

16 I appreciate a lot of the answers to our questions  
17 talking about working with this Committee, cooperating,  
18 being a partner. When you need legislation out of this  
19 Committee, let us know. You are the ones that understand  
20 that. And I hope if you walk away from this hearing with  
21 basically one thought or one piece of understanding, that it  
22 is how even in divided Government, even when, you know, a  
23 lot of times things are pretty partisan, I hope that you  
24 understand as well as the American people watching this  
25 understand, this is one area of completely unanimous

1 agreement that we must honor the promises to the finest  
2 among us, to provide them with quality care. You are the  
3 tip of the spear to provide the transparency and the  
4 accountability to actually accomplish that shared goal, that  
5 shared purpose.

6       So, again, I just want to thank you, your families, all  
7 my colleagues for understanding how important these  
8 positions are and your willingness to serve.

9       With that, for the record, I just want to state that  
10 both nominees have filed responses to biographical and  
11 financial questionnaires, answered prehearing questions  
12 submitted by the Committee, and had their financial  
13 statements reviewed by the Office of Government Ethics.  
14 Without objection, this information will be made part of the  
15 hearing record, with the exception of the financial data,  
16 which is on file and available for public inspection in the  
17 Committee offices.

18       [The information of Mr. Missal follows:]

1           [The information for Ms. Lerner follows:]

1           Chairman Johnson. The hearing record will remain open  
2 until noon tomorrow, January 13, 2016, for the submission of  
3 statements and questions for the record. And I will give  
4 you my commitment we will move very expeditiously on these  
5 two nominations so you can continue your important work or  
6 start your important work.

7           With that, this hearing is adjourned.

8           [Whereupon, at 11:33 a.m., the Committee was  
9 adjourned.]



**Testimony of Special Counsel Carolyn N. Lerner  
U.S. Office of Special Counsel**

**U.S. House of Representatives  
Committee on Oversight and Government Reform**

**“Transparency at TSA”**

**March 2, 2017, 10:00 AM**

Chairman Chaffetz, Ranking Member Cummings, and Members of the Committee:

Thank you for the opportunity to testify today about the U.S. Office of Special Counsel (OSC), and our efforts to investigate allegations of whistleblower retaliation at the Transportation Security Administration. I greatly appreciate the Committee’s commitment to oversight and to strengthening OSC’s ability to carry out our good government mission. Let me also take this opportunity to thank the Committee, and in particular Representatives Blum, Meadows, Cummings, and Connolly for your leadership in passing the Thoroughly Investigating Retaliation Against Whistleblowers Act (H.R. 69) during the opening week of this Congress. Making whistleblowers a first-week issue highlights their critical importance to effective oversight. We look forward to continuing to work with you and your Senate counterparts as the legislation moves forward. The clarified authority in that legislation will assist OSC in our efforts to conduct timely and complete investigations on behalf of whistleblowers at TSA and other federal agencies.

**I. OSC’s Critical Mission**

OSC is an independent investigative and prosecutorial federal agency that promotes accountability, integrity, and fairness in the federal workplace. We provide a safe and secure channel for government whistleblowers to report waste, fraud, abuse, and threats to public health and safety. And we protect federal employees from prohibited personnel practices, most notably whistleblower retaliation. OSC also protects veterans and service members from job discrimination under the Uniformed Services Employment and Reemployment Rights Act (USERRA). And finally, we enforce the Hatch Act, which keeps partisan political activity out of the federal workplace. In all of these areas, OSC prioritizes outreach and education to federal employees and managers to prevent potential violations before they occur.

Although OSC has limited resources, we are fulfilling our critical mission more effectively now than ever before. Through our whistleblower disclosure process, we have worked with whistleblowers to improve care for veterans across the country, put a stop to millions of dollars of waste in government overtime programs, and identified and corrected significant threats to aviation security. These are significant victories for employees who risked their careers to promote more honest, accountable, safe and efficient government.

As noted, a critical part of OSC's mission is to protect those whistleblowers. In fiscal year 2016 alone, we secured 276 favorable actions for whistleblowers and other victims of prohibited personnel practices. These actions include reinstatement or relief for whistleblowers who have been fired, demoted, or reassigned, as well as back pay and other remedies. In appropriate cases, we also seek disciplinary action against the agency officials who engaged in the wrongdoing. The number of victories on behalf of whistleblowers and other employees reflects a 233 percent increase since my tenure began in FY 2011.

## **II. To Fulfill its Mandate, OSC Needs Broad Access to Agency Information**

Congress has given OSC a broad mandate to investigate potentially unlawful personnel practices, including whistleblower retaliation. OSC's authorizing statutes empower OSC to issue subpoenas, administer oaths, examine witnesses, take depositions, and receive evidence. 5 U.S.C. §§ 1212(b)(1), 1214(a)(1)(A), 1214(a)(5), 1216(a), 1303. Moreover, Office of Personnel Management (OPM) regulation 5 C.F.R. § 5.4, specifically directs agencies to comply with OSC requests, stating: "agencies shall make available . . . employees to testify in regard to matters inquired of . . . [and] shall give . . . OSC . . . all information, testimony, documents, and material . . . the disclosure of which is not otherwise prohibited by law or regulation."

OSC uses its investigatory authority extensively. In particular, OSC investigations depend on the routine issuance of document requests and the ability to interview witnesses. Although agencies generally work with OSC to fulfill OSC's document requests, some agencies do not provide timely and complete responses. The failure to provide such responses can significantly delay and impede OSC's investigation. In addition, agencies sometimes withhold documents and other information responsive to OSC requests by asserting the attorney-client privilege. In these cases, OSC often must engage in prolonged disputes over access to information, or attempt to complete our investigation without the benefit of highly relevant communications. This undermines the effectiveness of whistleblower laws, wastes precious resources, and prolongs OSC investigations.

Neither OSC's governing statutes, nor applicable OPM regulations authorize an agency to withhold information from OSC based on an assertion of attorney-client privilege by a government attorney acting on behalf of a government agency. And no court has ever held that the attorney-client privilege can be asserted during intra-governmental administrative investigations. The purpose of the privilege is to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). But invoking the privilege in the context of an OSC investigation is inconsistent with this historical understanding of the privilege for several reasons.

First, Congress has made clear that there is a strong public interest in exposing government wrongdoing and upholding merit system principles. To uphold this public interest, OSC must review communications between management officials and agency counsel to determine whether an agency acted with a legitimate or unlawful basis in taking action against a whistleblower. Federal agencies have no legitimate basis to use privileges to conceal evidence of prohibited practices from the agency that Congress charged with investigating them. *See In re Lindsey*,

## **U.S. Office of Special Counsel**

March 2, 2017

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158 F.3d 1263, 1266-67 (D.C. Cir. 1998) (citing the “obligation of a government lawyer to uphold the public trust” in rejecting the assertion of attorney-client privilege for White House lawyers in Whitewater litigation). It simply makes no sense to create an intra-executive branch investigative process to determine if prohibited conduct occurred, and then allow agencies to frustrate that process by withholding information.

Second, review by OSC does not deter frank and candid communications between government managers and lawyers. In fact, agencies routinely provide OSC with these communications to demonstrate that a personnel action against an employee was lawful and motivated by non-retaliatory, valid performance or misconduct-based reasons. When management engages in this type of communication with government lawyers, and provides evidence of these consultations to OSC, it facilitates prompt review by OSC and benefits the government as an employer.

Third, there is no precedent to support agency concerns that disclosure to OSC would constitute a waiver of the privilege in another forum or in third party litigation. OSC’s information requests are not akin to discovery requests made by a third party in litigation. OSC is an internal investigator for the U.S. Government, and our requests are made to other U.S. Government entities, not third parties. If Congress wished to allow agencies to shield information within this process, it would have crafted a limitation on OSC’s investigatory mandate and authority. For example, the exceptions included in the Freedom of Information Act pertaining to public release of privileged documents show that Congress does so when it chooses.

Although we believe Congress has already expressed its intent in this area, to provide additional clarity, OSC recommends that Congress establish explicit statutory authority for the Special Counsel to obtain information, similar to section 3 of the House-passed Thoroughly Investigating Retaliation Against Whistleblowers Act (H.R. 69). We urge Congress to amend this provision prior to final passage to expressly clarify OSC’s existing right to request and receive information that assertions of common-law privileges may protect in other contexts. This statutory provision would be similar to the authorities Congress has provided to Inspectors General, and clarified recently by the Inspector General Empowerment Act of 2016, and to the Government Accountability Office.

A statutory provision clarifying OSC’s access to information in whistleblower investigations should be broad enough to make clear that it applies to all OSC investigations, including whistleblower disclosure, Hatch Act, and USERRA cases. This will help OSC fulfill its statutory mandates and avoid unnecessary and duplicative investigations. Clear statutory authority to access agency information will help us resolve disputes over documents more quickly, resulting in faster case resolutions and better enabling OSC to respond to the increased demand and case levels.

### **III. OSC’s Challenges in Obtaining Information from TSA**

I will now turn to OSC’s investigations of whistleblower retaliation complaints at TSA. In December 2012, Congress extended statutory whistleblower protections to TSA employees through the Whistleblower Protection Enhancement Act. Since then, OSC has received more

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

March 2, 2017

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than 350 whistleblower retaliation cases from TSA employees (under 5 U.S.C. § 2302(b)(8) and (b)(9)).

To illustrate for the Committee the challenges OSC has faced in acquiring the information needed from TSA to complete our investigations, I will focus on two pairs of companion cases. The complainants in these cases are TSA officials who experienced involuntary geographical reassignments, a demotion, and a removal, all of which were allegedly in retaliation for protected whistleblower disclosures.

In these four cases, TSA withheld information from its document productions, asserting claims of attorney-client privilege. OSC asked TSA to withdraw the claims of privilege, and it elevated this request to TSA's parent agency, the Department of Homeland Security (DHS). Both TSA and DHS rejected OSC's requests, and refused to release the documents.

Several critical problems exist with TSA's assertions of privilege. As discussed above, shielding information from OSC through privilege is inconsistent with OSC's statutory mandate and regulatory authority to investigate the legality of certain personnel practices. TSA appears to be withholding information directly related to the decision-making process for the personnel actions it took against the complainants. Understanding the motivation behind these actions is essential to OSC's investigation. OSC requires access to all information relevant to potentially unlawful personnel practices, even if that information might be privileged in other contexts. When TSA refuses to disclose why it takes an action, it is impossible for OSC to investigate whether there was retaliation.

Additionally, in the two cases for which TSA has completed its document production, TSA stated it was unable to provide a privilege log describing the information withheld. The lack of a privilege log is particularly problematic because OSC has concerns that TSA may be withholding information more extensively than even a robust attorney-client privilege would allow. Without documentation of the information withheld—a basic requirement whenever the attorney-client privilege is asserted—it is difficult to evaluate the extent to which this is true.

The attached exhibit provides a particularly striking example (OSC Exhibit, March 2, 2017). TSA redacted every word of the document, including the date, author, and recipient. Based on our review of other information and testimony, OSC believes this exhibit may reflect a key witness's factual summary of a pivotal meeting about the personnel actions at issue in the relevant investigation. We understand that no attorneys were present at the meeting and it does not appear legal advice was discussed. It is not clear why the summary was determined to be privileged, and we cannot assess or challenge any improper privilege determinations, because TSA will not provide the information that would be necessary to do so.

TSA similarly redacted the names of email attachments, and other portions of documents with no apparent connection to an attorney or to any legal advice. Extensive redaction hinders OSC's ability to properly investigate, identify witnesses, and prepare for interviews.

Moreover, TSA's attorney-client privilege review causes significant delays in these investigations. OSC requested that TSA produce documents in the first two companion cases

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

March 2, 2017

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within 30 days, which is consistent with the discovery deadline under the Federal Rules of Civil Procedure. It took TSA nearly five months after the requested deadline to complete its production of documents. TSA has stated that its privilege review accounts for much of the delay. OSC attorneys and investigators have spent considerable time negotiating about the document production that could have been spent advancing the investigation.

Despite the challenges created by TSA's attorney-client privilege claims, OSC continues investigate these and other TSA cases as expeditiously as possible. OSC has reviewed hundreds of documents in connection to these matters and interviewed approximately 18 witnesses. OSC is committed to completing a thorough investigation of these cases and protecting TSA whistleblowers where appropriate.

We appreciate the Committee's interest in the challenges we are facing, and we hope that your engagement might facilitate some progress in addressing them. I thank you for the opportunity to testify today, and I look forward to answering your questions.

\* \* \* \* \*

**Special Counsel Carolyn N. Lerner**

The Honorable Carolyn N. Lerner heads the United States Office of Special Counsel. Her term began in June 2011. Prior to her appointment as Special Counsel, Ms. Lerner was a partner in the Washington, D.C., civil rights and employment law firm Heller, Huron, Chertkof, Lerner, Simon & Salzman, where she represented individuals in discrimination and employment matters, as well as non-profit organizations on a wide variety of issues. She previously served as the federal court appointed monitor of the consent decree in *Neal v. D.C. Department of Corrections*, a sexual harassment and retaliation class action.

Prior to becoming Special Counsel, Ms. Lerner taught mediation as an adjunct professor at George Washington University School of Law, and was mediator for the United States District Court for the District of Columbia and the D.C. Office of Human Rights.

Ms. Lerner earned her undergraduate degree from the Honors College at the University of Michigan, where she was selected to be a Truman Scholar, and her law degree from New York University (NYU) School of Law, where she was a Root-Tilden-Snow public interest scholar. After law school, she served two years as a law clerk to the Honorable Julian Abele Cook, Jr., Chief U.S. District Court Judge for the Eastern District of Michigan.

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED]

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[REDACTED]

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074  
MINORITY (202) 225-5051

<http://oversight.house.gov>

February 14, 2017

The Honorable Carolyn Lerner  
Special Counsel  
U.S. Office of Special Counsel  
1730 M Street, N.W., Suite 218  
Washington, D.C. 20036-4505

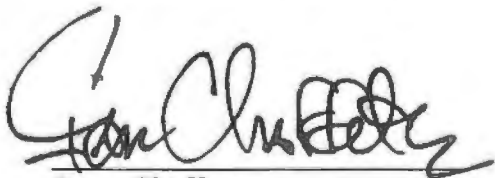
Dear Ms. Lerner:

The Committee on Oversight and Government Reform requests your testimony at a hearing titled "Transparency at TSA" on **Thursday, March 2, 2017, at 10:00 a.m.** in room 2154 Rayburn House Office Building.

This hearing will examine the Transportation Security Administration's (TSA) handling of the Sensitive Security Information program, TSA's level of cooperation with Office of Special Counsel investigations, and other related matters. You should be prepared to provide a five-minute opening statement and to answer questions posed by Members.

The enclosed Witness Instruction Sheet provides information for witnesses appearing before the Committee. In particular, please note the procedures for submitting written testimony at least two business days prior to the hearing. We ask that you please contact the Committee by February 23, 2017, to confirm your attendance. If you have questions, please contact Ari Wisch of the Committee staff at (202) 225-5074.

Sincerely,



Jason Chaffetz  
Chairman



Elijah E. Cummings  
Ranking Minority Member

Enclosure

**Witness Instruction Sheet**  
**Governmental Witnesses**

1. Witnesses should provide their testimony via e-mail to Sharon Casey, Deputy Chief Clerk, [Sharon.Casey@mail.house.gov](mailto:Sharon.Casey@mail.house.gov), no later than 10:00 a.m. two business days prior to the hearing.
2. Witnesses should also provide a short biographical summary and include it with the electronic copy of testimony provided to the Clerk.
3. At the hearing, each witness will be asked to summarize his or her written testimony in five minutes or less in order to maximize the time available for discussion and questions. Written testimony will be entered into the hearing record and may extend to any reasonable length.
4. Written testimony will be made publicly available and will be posted on the Committee's website.
5. The Committee does not provide financial reimbursement for witness travel or accommodations. Witnesses with extenuating circumstances, however, may submit a written request for such reimbursements to Robin Butler, Financial Administrator, 2157 Rayburn House Office Building, at least one week prior to the hearing. Reimbursements will not be made without prior approval.
6. Witnesses with disabilities should contact Committee staff to arrange any necessary accommodations.
7. Committee Rules governing this hearing are online at [www.oversight.house.gov](http://www.oversight.house.gov).

For inquiries regarding these rules and procedures, please contact the Committee on Oversight and Government Reform at (202) 225-5074.



# United States Senate

WASHINGTON, DC 20510

December 15, 2016

The Honorable Carolyn N. Lerner  
Special Counsel  
U.S. Office of Special Counsel  
1730 M Street, N.W., Suite 218  
Washington, D.C. 20036

Dear Special Counsel Lerner:

It has come to our attention that President-elect Donald J. Trump's transition officials have asked the Department of Energy through a questionnaire for a list of the individual personnel who have worked on certain climate change policies, as well as for lists of the publications and associations of scientists at the National Laboratories. These requests appear to have violated long-standing federal laws designed to protect civil servants against coercion for partisan purposes. We ask that you take immediate action to review these deeply troubling requests.

The questionnaire, which may be just one of many such documents, required the Department to "...provide a list of all Department of Energy employees or contractors who have attended any Interagency Working Group on the Social Cost of Carbon meetings" as well as a list of "Department employees or contractors who attended any of the Conference of the Parties (under the UNFCCC) in the last five years." Another question demands "a list of the top twenty salaried employees" at National Laboratories. Taken together, these questions seem to demonstrate a clear intent to retaliate or discriminate against federal employees.

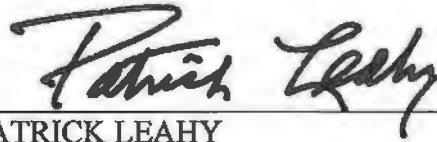
Through the Civil Service Reform Act of 1978 (CSRA), Congress established that federal personnel management should be conducted consistent with merit system principles, which are codified in section 2301 of Title V. This section establishes that employees should be protected against coercion for partisan political purposes. Officials who violate this law are subject to disciplinary action. The CSRA also created the independent U.S. Office of the Special Counsel to safeguard the merit system by protecting federal employees from prohibited personnel practices. The primary basis for a personnel practice to be considered prohibited is the motivations behind it. As stated in the Senate's CSRA report, a "prohibited personnel practice is a personnel action which is taken for a prohibited purpose." We are alarmed by the requests in the Energy Department questionnaire because they strongly appear to be motivated by partisan political purposes, which are forbidden by the Act and are therefore impermissible actions by transition officials.

We urge you to investigate whether this questionnaire, or any similar questionnaire being circulated by transition officials, violates federal law and to hold accountable those responsible. In your investigation, we ask you to take a close look at the motives of the transition officials in singling-out federal employees for implementing our nation's climate change policies. We also ask that you publicly communicate to Congress clear guidance on the circumstances under which the Office of Special Counsel will investigate instances of retaliation or discrimination against career civil servants for implementing the policies of any previous administration.

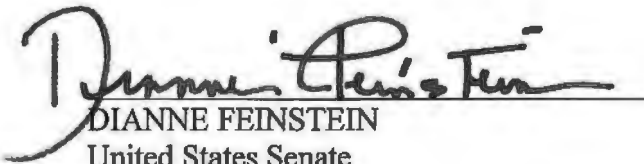
Given the seriousness and urgency of this matter, we ask that you provide a response to this letter no later than December 23, 2016. We thank you for your dedication to public service and to the career civil servants who, on a daily basis, apply their skills and energy on behalf of our country.



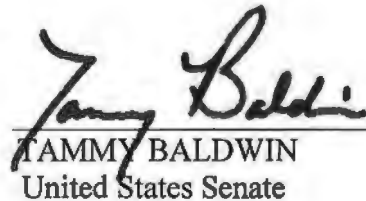
RICHARD BLUMENTHAL  
United States Senate



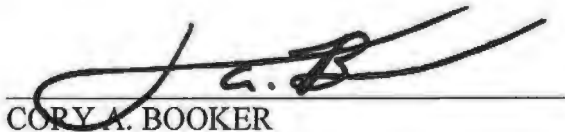
PATRICK LEAHY  
United States Senate



DIANNE FEINSTEIN  
United States Senate



TAMMY BALDWIN  
United States Senate



CORY A. BOOKER  
United States Senate



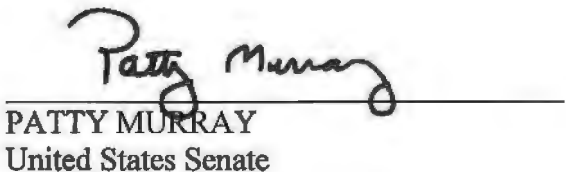
SHELDON WHITEHOUSE  
United States Senate



BENJAMIN L. CARDIN  
United States Senate



CHRISTOPHER A. COONS  
United States Senate



PATTY MURRAY  
United States Senate

**Post-Hearing Questions for the Record  
Submitted to Carolyn Lerner  
From Senator Claire McCaskill**

**Nomination Hearing to Consider  
Michael J. Missal to be Inspector General, Department of Veterans Affairs  
and  
Carolyn N. Lerner to be Special Counsel, U.S. Office of Special Counsel  
January 12, 2015**

In your prepared statement, you talk about the efficiencies that you have achieved by improving and streamlining some of OSC's internal policies and procedures. However, I'm concerned that the gains and benefits for whistleblowers by having a faster process may be offset by moving too quickly to dismiss potentially meritorious cases. The number of favorable actions for whistleblowers has gone up dramatically during your tenure, and you should be proud of that. But the number of cases has also gone up dramatically.

1. Please provide the following information for the past 5 years, broken down by year:
  - a. The total number of cases that have been received;
  - b. The percentage of cases that have resulted in favorable outcomes for the employee;
  - c. The percentage of cases that have resulted in successful mediation over the past 5 years;
  - d. The percentage of cases that result in a negative preliminary determination.

You state that you have achieved a 45 percent reduction in OSC's cost to resolve a case.

2. In addition to the increase in the pursuit of mediation, what are the other primary drivers of that reduction?

I am concerned that the changes you have made at OSC, while commendable, are covering up a considerable lack of adequate resources. You said in your written statement that OSC's caseload has gone up 50 percent since you first took office in 2011.

3. How much has OSC's budget increased since that time?

The OSC website indicates that 80 percent of complainants hear from an examiner within 60 to 90 days.

4. Does that mean that after someone submits information to OSC, the first time that person is contacted is 2-3 months later?
5. What is the average length of time it takes for OSC to reach a preliminary determination in a case that is not resolved through mediation?

6. What would it take to get this time frame down to 1 month?
7. What do you think is an ideal size for OSC to be able to adequately handle the caseload you're seeing?

In your prepared statement, you indicate that OSC received and resolved over 6,000 cases in 2015, a 50% increase from 2011.

8. What do you think is driving this increase?

I want to get a better understanding of where the core of the problem lies because I think our civil service system is badly in need of reform on several fronts. The increase in OSC complaints is clearly a symptom of larger issues.

9. Do you have a breakdown of the types of employees that are the subjects of the complaints – what percentage are political appointees versus career managers or SES?

Over the past 10 years, OSC and Congressional stakeholders have supported federal Inspectors General in their efforts to conduct whistleblower reprisal investigations. However, recently, there has been a string of complaints about IG offices themselves. Sources tell my staff that the Defense Department Office of Inspector General alone has ten reprisal complaints about senior leadership, investigative staff, and security officials in the IG's office.

10. What is your view on how the IG community is handling reprisal complaints within their own offices?
11. Do you have a sense of when these DOD IG reprisal investigations might be resolved?

JOHNNY ISAKSON, GEORGIA,  
CHAIRMAN  
JERRY MORAN, KANSAS  
JOHN BOOZMAN, ARKANSAS  
DEAN HELLER, NEVADA  
BILL CASSIDY, LOUISIANA  
MIKE ROUNDS, SOUTH DAKOTA  
THOM TILLIS, NORTH CAROLINA  
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SHERROD BROWN, OHIO  
RICHARD BLUMENTHAL, CONNECTICUT  
MAZIE HIRONO, HAWAII  
JOE MANCHIN III, WEST VIRGINIA

# United States Senate

COMMITTEE ON VETERANS' AFFAIRS

WASHINGTON, DC 20510

May 11, 2017

Ms. Carolyn Lerner  
Special Counsel  
Office of Special Counsel  
1730 M Street, NW, Suite 218  
Washington, DC 20036

Dear Ms. Lerner:

I am writing to invite you to submit written testimony for the record in connection with a Senate Committee on Veterans' Affairs hearing on pending legislation. The hearing will be held on May 17, 2017.

The draft hearing agenda is attached to this letter. As you can see, the Committee is seeking input on a number of bills and legislative proposals at this hearing. Please provide your written testimony on each agenda item for which your organization has a position or an interest. Of particular interest to the committee are your views on the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017.

Your full written statement will be made part of the official record of the hearing. Please send an electronic copy of the written statement to our Chief Clerk, Heather Vachon, via email at [Heather\\_Vachon@vetaff.senate.gov](mailto:Heather_Vachon@vetaff.senate.gov) no later than 10:00 a.m. on May 17, 2017.

If you have any questions or would like additional information, you may contact Amanda Meredith of the Committee's staff at (202) 224-9126.

Sincerely,



Johnny Isakson  
Chairman

Enclosures  
cc: The Honorable Jon Tester

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

September 6, 2016

The Honorable Carolyn N. Lerner  
Special Counsel  
U.S. Office of Special Counsel  
1730 M St NW #218  
Washington, DC 20036

Dear Special Counsel Lerner:

On Wednesday, September 14, 2016, the House Committee on Veterans' Affairs will conduct an oversight hearing entitled, "An Examination of VA's Misuse of Employee Settlement Agreements." The hearing will begin at 10:30AM in room 334 of the Cannon House Office Building.

The purpose of this hearing is to examine the Department of Veterans Affairs' practice of entering into settlement agreements with departing employees or with employees who have filed certain grievances with their supervisors or the Department. Earlier this year, in response to a request from me, Secretary McDonald provided a copy of all settlement agreements between VA and its employees since July of 2014. A review of these agreements by Committee staff has raised many significant questions and concerns regarding VA's seemingly common practice of entering into these settlements and whether this practice is in the best interest of employees, veterans and taxpayers.

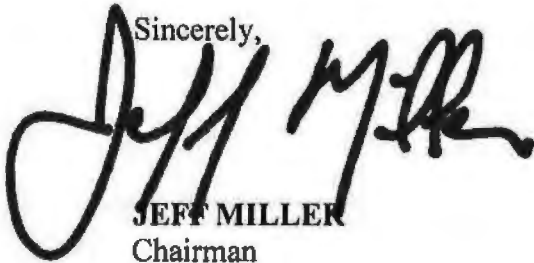
I invite you, or your representative, to testify before the Committee and answer questions regarding employee settlement agreements as well the Office of Special Counsel's involvement in employee settlement agreements. I also ask that you discuss how settlement agreements are used across the Federal government in settling with whistleblowers as well as when used in lieu of disciplinary action.

Please confirm you, or your representative's, participation by contacting Kelsey Baron, Professional Staff Member for the Subcommittee on Economic Opportunity, via email at [Kelsey.Baron@mail.house.gov](mailto:Kelsey.Baron@mail.house.gov). During the hearing, you will be recognized for five minutes to make an oral statement. Your complete written statement will be made a part of the hearing record. Please send an electronic copy of you written statement and a brief biography in Microsoft Word format to Kelsey Baron at the above email address and Jessica Eggimann at [Jessica.Eggimann@mail.house.gov](mailto:Jessica.Eggimann@mail.house.gov) by no later than 12:00PM on Monday, September 12, 2016. Please also hand deliver 75 copies of your written testimony in accordance with the enclosed formatting requirements to the Committee in room 335 of the Cannon House Office Building no later than 12:00PM on Tuesday, September 13, 2016.

Please be reminded that testimony requested pursuant to this invitation is governed by the applicable provisions of sections 1001, 1505, and 1621 of Title 18, United States Code, which dictate penalties pertaining to submitting intentionally false statements to the Committee, or knowingly falsifying or concealing pertinent facts related to inquiries made by the Committee.

We look forward to hearing your views. If you have any questions, please contact Jon Clark, Staff Director for the Subcommittee on Economic Opportunity, via email at [Jon.Clark@mail.house.gov](mailto:Jon.Clark@mail.house.gov) or by calling (202) 225-3527.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Miller", is written over the word "Sincerely,". The signature is stylized with a large initial "J" and a long, sweeping underline.

**JEFF MILLER**  
Chairman

JM/kb

cc: Acting Ranking Member Mark Takano

## **Submission Requirements for Hearing Statements and Exhibits 114<sup>th</sup> Congress**

As you prepare to testify before the Committee, please keep in mind the following submission requirements for the printing and electronic dissemination of hearing statements, written comments, and exhibits.

**Electronic Version of Statement:** The Committee requires witnesses to submit testimony electronically so that it may be made available to the public via the Committee website (<http://veterans.house.gov>) in a timely manner. **Please make your statement available to the Committee in Microsoft Word and send it as an attachment electronically to [Kelsey.Baron@mail.house.gov](mailto:Kelsey.Baron@mail.house.gov) and [Jessica.Eggimann@mail.house.gov](mailto:Jessica.Eggimann@mail.house.gov).**

**Please be advised your written statement will be available online through the Committee's web page and Committee Repository (<http://docs.house.gov>) immediately following the conclusion of the hearing.** You may notify us of any changes to your written statement up to the morning of the day of the hearing. This is not an official record of your testimony. The official hearing transcript will be made available electronically once submitted to GPO for printing.

**Written Statement:** Each statement presented to the Committee by a witness or any written statement or exhibit submitted for the record of a hearing must be in a form that is capable of being photocopied for printing ("camera ready") and should, therefore conform to the following guidelines. The Committee reserves the right not to include any statement or exhibit that is not submitted in the following form:

- For the printed hearing record, one copy of the statement and any accompanying exhibits for the printed hearing record should be prepared on **letter size paper**.
- The Committee may elect to retain exhibit materials or documents submitted for the record in Committee files instead of reproducing them in the hearing record. Therefore, any relevant material should be referenced and quoted in the written statement or paraphrased. Illegible exhibits cannot be printed.

**Nongovernmental Witnesses:** Witnesses who appear before a committee in a non-governmental capacity are to include with each copy of their written testimony **a curriculum vitae and statement disclosing the amount and source (by agency and program) of any Federal grant or contract (relevant to the subject matter of their testimony) received during the current or previous two fiscal years by the witness or by the organization the witness represents.**

**Disclosure of Foreign Payments to Witnesses.** The House Rules require to the greatest extent practicable, nongovernmental witnesses to disclose payments or contracts to the witness or an organization they represent originating from foreign governments received in the current and preceding two calendar years, to the extent that such information is relevant to the subject matter of, and the witness' representational capacity at, that hearing. While failure to comply fully with this requirement would not give rise to a point of order against the witness testifying, it could result in an objection to including the witness's written testimony in the hearing record in the absence of such disclosure.



**Written Testimony of Special Counsel Carolyn N. Lerner  
United States Office of Special Counsel**

**Senate Committee on Veterans' Affairs**

**Hearing on Pending Legislation**

**November 18, 2015**

Chairman Isakson, Ranking Member Blumenthal, and Members of the Committee:

Thank you for the opportunity to submit written testimony on behalf of the Office of Special Counsel (OSC). OSC protects the merit system for over 2 million civilian employees in the federal government, with a particular focus on investigating and prosecuting allegations of whistleblower retaliation. We appreciate Senator Kirk's and the Committee's efforts to support whistleblowers at the Department of Veterans Affairs (VA), and offer the following views on the "Veterans Affairs Retaliation Prevention Act" of 2015 ("the Act").

The Act establishes a new process for VA employees to report concerns about misconduct. This new process directs employees to report concerns, on a designated form, to their immediate supervisor, and creates conditions under which an employee may elevate a complaint up the chain of command. It is often appropriate and practical for an employee to disclose information to their immediate supervisor. However, existing whistleblower protections do not require chain of command reporting, and also do not require that disclosures be made on a prescribed form. Accordingly, the process is more cumbersome, but also duplicative of existing protections. However, if Congress believes a new statutory process for reporting concerns is needed, to avoid confusion with existing law, employees should be clearly notified that the outlined procedure is not the exclusive process by which they may report a concern.<sup>1</sup>

The legislation also requires the VA to evaluate supervisors on "whether the supervisor treats whistleblower complaints in accordance" with the new reporting process described above. We believe the Act's process is overly-prescriptive for employees and supervisors, and may not be practical in many instances, especially for low level supervisors who are not best-positioned to respond to their subordinates' concerns. This specific approach, therefore, is not the best method for evaluating management efforts to support and protect whistleblowers.

Nevertheless, OSC strongly supports the concept of including whistleblower protection and promotion criteria in management performance appraisals. The Labor Department's Whistleblower Protection Advisory Committee (WPAC), on which OSC is a non-voting member, recently recommended this as a best practice for all employers in the public, private, and non-profit sectors. Specifically, WPAC recommends that businesses "incorporate anti-retaliation measures (e.g. constructively addressing concerns, attending training, and championing compliance initiatives) in management performance standards and reviews." The

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<sup>1</sup> In addition, because the process is primarily intended as an avenue for reporting concerns about waste, fraud, and abuse (and not to address complaints about retaliation), it may be helpful to use the term "whistleblower disclosure" rather than "whistleblower complaint" throughout this section.

goal of using these criteria is to provide management incentives for responding constructively to employee concerns, fostering an environment that promotes disclosure and prevents retaliation.

Rather than limiting the performance criteria to those specified in the Act, we recommend that the Committee seek the VA's views on what criteria would be a better fit for VA supervisors, and modify the legislation accordingly. Performance criteria to hold managers accountable for constructively resolving employee concerns can play a critical role in fostering an anti-retaliation culture in the VA.

The Act also establishes a VA "Central Whistleblower Office," which is responsible for investigating all whistleblower disclosures made by employees in the Department. To the extent that this office will act as a de facto depository of all VA whistleblower information and identities, it is critical that there are clear rules and expectations on confidentiality and the release and use of names and information. VA employees should also receive clear guidance that this office is in addition to other available channels for reporting concerns, such as OSC and the Inspector General.

OSC supports additional mandatory training on whistleblower protections for all employees, and would be pleased to work with the VA to carry out specific training requirements.

Finally, OSC supports the Act's expansion of the definition of a personnel action in section 2302 of title 5 to include performance evaluations under title 38. This covers a gap in OSC's enforcement authority for title 38 VA employees. Under current law, a title 38 employee may file a whistleblower retaliation complaint with OSC, and we may review and correct other personnel actions such as a termination, demotion, or suspension, but we are technically barred from seeking to correct a retaliatory performance review for these workers. The Act would address this concern, without adding considerably to OSC's caseload.

We thank you for the opportunity to submit these views.



**U.S. OFFICE OF SPECIAL COUNSEL**  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

**The Special Counsel**

March 13, 2017

The Honorable Ron Johnson, Chairman  
The Honorable Claire McCaskill, Ranking Member  
Committee on Homeland Security and Governmental Affairs  
United States Senate  
340 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Chairman Johnson and Ranking Member McCaskill,

On behalf of the Office of Special Counsel (OSC), I thank you for your leadership in advancing S. 582, the Office of Special Counsel Reauthorization Act of 2017. This legislation will improve OSC's ability to protect whistleblowers and carry out our good government mission on behalf of U.S. taxpayers.

The Committee's longstanding support for whistleblowers and, in particular, your recent hearings on retaliation within the Department of Veterans Affairs (VA) helped to demonstrate the need for several of S. 582's critical reforms. Specifically, the legislation will ensure that employees are protected for cooperating with all government investigations, addressing the Merit Systems Protection Board's decision in *Graves v. Department of Veterans Affairs*. To promote accountability within the VA and other agencies, employees need to know that their cooperation and testimony will not result in unlawful retaliation against them. Second, the legislation prohibits the VA and other agencies from accessing an employee's medical record for improper purposes, including to retaliate against the employee. Relatedly, S. 582 strengthens OSC's ability to protect employees who are subjected to any form of retaliatory investigation, even if the investigation does not lead to a disciplinary action against the employee. Together, these reforms will help to ensure that agency investigative processes work properly to address misconduct and are not used for retaliatory purposes.

Importantly, S. 582 also clarifies OSC's existing authority to request and receive all agency information, including information that assertions of common-law privileges may protect in other contexts. Although federal agencies generally work with OSC to fulfill OSC's document requests, some agencies do not provide timely and complete responses to our document requests under 5 C.F.R. § 5.4. The failure to provide such responses can significantly delay and impede OSC's investigation. Specifically, agencies sometimes

**The Special Counsel**

The Honorable Ron Johnson and the Honorable Claire McCaskill

March 13, 2017

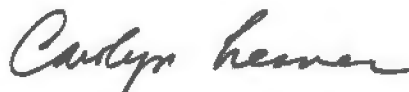
Page 2 of 2

withhold documents and other information responsive to OSC requests by improperly asserting the attorney-client privilege. In these cases, OSC often must engage in prolonged disputes over information to which OSC is clearly entitled. This undermines the effectiveness of whistleblower laws, wastes precious resources, and prolongs OSC investigations.

Although the attorney-client privilege protects certain communications between a lawyer and client, there is simply no basis for a federal agency to assert the privilege during an OSC investigation. Congress has directed OSC to conduct investigations as objective fact-finders, similar to Inspectors General and the Government Accountability Office. Indeed, Congress has made clear that there is a strong public interest in exposing government wrongdoing and upholding merit system principles. To uphold this public interest, OSC routinely reviews communications between management officials and agency counsel to determine whether an agency acted with a legitimate or unlawful basis in taking action against a whistleblower. Federal agencies have no legitimate basis to use privileges to conceal evidence of prohibited practices from the agency that Congress charged with investigating them. *See In re Lindsey*, 158 F.3d 1263, 1266-67 (D.C. Cir. 1998) (citing the “obligation of a government lawyer to uphold the public trust” in rejecting the assertion of attorney-client privilege for White House lawyers in Whitewater litigation). Congress created OSC as an intra-executive branch investigative agency to investigate whether prohibited conduct occurred. That purpose is frustrated when agencies withhold information.

Although we believe Congress has already expressed its intent in this area, we thank the Committee for its effort to provide additional clarity on this issue. This statutory provision is similar to the authorities Congress has provided to Inspectors General, clarified recently by the Inspector General Empowerment Act of 2016, and to the Government Accountability Office. Like the rest of S. 582, this provision will significantly improve OSC’s ability to protect the courageous government whistleblowers who seek our assistance. For these reasons, we strongly support S. 582, and look forward to its prompt passage.

Sincerely,

A handwritten signature in dark ink, appearing to read "Carolyn N. Lerner". The signature is fluid and cursive, with the first name "Carolyn" being more prominent than the last name "Lerner".

Carolyn N. Lerner

cc: The Honorable Chuck Grassley  
The Honorable Steve Daines



**U.S. OFFICE OF SPECIAL COUNSEL**  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

**The Special Counsel**

December 21, 2016

The Honorable Richard Blumenthal  
706 Hart Senate Office Building  
United States Senate  
Washington, D.C. 20510

Dear Senator Blumenthal:

I write in response to your December 15, 2016 letter, co-signed by eight of your colleagues, regarding a questionnaire sent to the U.S. Department of Energy from the President-elect's transition officials. The letter notes your concerns that the questionnaire may reflect an intent to retaliate or discriminate against career civil servants for implementing the policies of any previous administration.

Congress recently amended the Civil Service Reform Act of 1978 by unanimously passing the Whistleblower Protection Enhancement Act of 2012 (WPEA) (P.L. 112-199). The WPEA made two significant changes to the existing civil service protections for federal workers that are relevant to the concerns expressed in your letter. First, the law explicitly shields employees for blowing the whistle on any effort to "distort, misrepresent, suppress" or otherwise censor any government "research, analysis, or technical information." Second, the law makes clear that non-disclosure agreements in federal employment do not supersede whistleblower protections. Accordingly, Congress instructed agencies to respect the integrity of the scientific process and the employees who engage in that process on behalf of the taxpayers. Any effort to chill scientific research or discourse is inconsistent with the intent of the WPEA.

As to the questionnaire, according to press accounts, the President-elect's transition officials said the questionnaire "was not authorized" and the person responsible for sending it had been "counseled." The Energy Department also stated it did not provide employee names to the President-elect's transition officials, and no Department employee has reported a prohibited personnel action resulting from the questionnaire. In addition, transition officials are not considered federal employees for purposes of the WPEA (Presidential Transition Act of 1963). That being said, if any Department employee believes they have been subjected to an adverse action in violation of merit system principles, they may file a complaint with the Office of Special Counsel (OSC), and we will investigate their claim.

The Honorable Richard Blumenthal

December 21, 2016

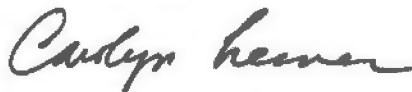
Page 2 of 2

In addition to reviewing, investigating, and taking action to protect federal employees from whistleblower retaliation and other prohibited personnel practices, OSC works to prevent misconduct from happening in the first place through our education and outreach program. Section 2302(c) of title 5, United States Code, requires the head of every agency to certify compliance with the WPEA, to prevent prohibited personnel practices from occurring within their agency, and to ensure that employees are not chilled from exercising their rights and seeking the remedies available to them.

Through our 2302(c) Certification Program, OSC tracks compliance with this requirement and offers agencies a proactive way to ensure that employees and managers are informed of their rights and responsibilities under the whistleblower laws. Our program offers training on each of the prohibited personnel practices, and includes information on the WPEA's specific provisions on scientific integrity and non-disclosure agreements in federal employment. The Department of Energy has been certified under our program through June 2017. Early next year, we will contact the incoming heads of all agencies and offer training on the whistleblower law, the Hatch Act, and the other laws enforced by OSC.

I look forward to working with you, your colleagues, and the incoming administration to ensure that whistleblower retaliation, political discrimination and coercion, and all other prohibited practices are prevented.

Sincerely,

A handwritten signature in black ink, appearing to read "Carolyn N. Lerner". The signature is fluid and cursive, with the first name "Carolyn" being more prominent than the last name "Lerner".

Carolyn N. Lerner

cc: United States Senator Patrick Leahy  
United States Senator Dianne Feinstein  
United States Senator Tammy Baldwin  
United States Senator Cory Booker  
United States Senator Sheldon Whitehouse  
United States Senator Benjamin L. Cardin  
United States Senator Christopher A. Coons  
United States Senator Patty Murray



**U.S. OFFICE OF SPECIAL COUNSEL**  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

**The Special Counsel**

July 7, 2016

The Honorable Johnny Isakson  
Chairman  
Committee on Veterans' Affairs  
United States Senate

The Honorable Mark Kirk  
Chairman  
Subcommittee on Military Construction, Veterans Affairs, and Related Agencies  
Committee on Appropriations  
United States Senate

**Re: Pending Legislation to Protect VA Whistleblowers**

Dear Mr. Chairmen:

The Office of Special Counsel (OSC) has received, reviewed, and investigated thousands of whistleblower retaliation complaints and disclosures from Department of Veterans Affairs (VA) employees. Based on this experience, we write to express our strong support for the whistleblower protection provisions in the Veterans First Act (VFA). The VFA incorporates many concepts from the VA Patient Protection Act (PPA). As detailed below, the VFA refines and strengthens these provisions. Based on our review of the legislation, we believe the VFA will best advance the interests of VA whistleblowers. We thank you both for your sponsorship and support of this critical legislation.

Importantly, the VFA establishes the Office of Accountability and Whistleblower Protection (OAWP). OSC's ongoing work with VA whistleblowers will benefit from having a high-level point of contact with the statutory authority to identify, correct, and prevent threats to patient care and to discipline those responsible for creating them. The establishment of similar offices at other agencies, including the Federal Aviation Administration, has significantly improved the whistleblower experience at those agencies. And OAWP, with a Senate-confirmed leader, will have the authority and a mandate to make a significant difference. The VFA also requires the VA to include whistleblower protection criteria in the performance plans for all VA supervisors and managers. This step will create incentives for supervisors to respond constructively to employees' concerns, and help improve the culture at the VA.

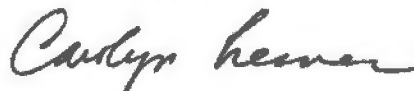
The Special Counsel

The Honorable Ron Johnson  
May 26, 2016  
Page 2 of 2

In contrast, while we appreciate all efforts to promote and protect whistleblowers, we are concerned that the PPA may undermine whistleblower protections and accountability by creating a new and unnecessary process for reporting concerns. The PPA directs employees to report concerns, on a designated form, to their immediate supervisor, and creates conditions under which an employee may elevate a complaint up the chain of command. Existing whistleblower protections do not require chain of command reporting, and also do not require that disclosures be made on a prescribed form. The PPA also creates an unreasonable expectation that supervisors will be able to evaluate an employee concern within four business days. The PPA's process is overly-burdensome for employees and supervisors, and may be entirely unworkable in many instances. This approach is not the best method for improving accountability or evaluating supervisory efforts to support and protect whistleblowers. In addition, the PPA's framework for a Central Whistleblower Office lacks the OAWP's authority and independence, as well as its congressional mandate to monitor and prevent threats to patient care. The PPA also fails to establish any rules for confidentiality for disclosures made to the Central Whistleblower Office, which could undermine confidence in the VA whistleblower system.

For these and other reasons, we believe the VFA will best advance the interests of VA whistleblowers and the Veterans served by the Department. If you are in need of additional information, please contact Adam Miles, Deputy Special Counsel for Policy and Congressional Affairs, at 202-254-3607. We thank you for your efforts and support for VA whistleblowers.

Sincerely,



Carolyn N. Lerner

cc:

The Honorable Richard Blumenthal  
Ranking Member  
Committee on Veterans' Affairs  
United States Senate

The Honorable Jon Tester  
Ranking Member  
Subcommittee on Military Construction, Veterans Affairs, and Related Agencies  
Committee on Appropriations  
United States Senate





The Special Counsel

**U.S. OFFICE OF SPECIAL COUNSEL**

1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

May 3, 2017

The Honorable Johnny Isakson  
Chairman  
Committee on Veterans' Affairs  
United States Senate  
412 Russell Senate Office Building  
Washington, D.C. 20510

The Honorable Jon Tester  
Ranking Member  
Committee on Veterans' Affairs  
United States Senate  
412 Russell Senate Office Building  
Washington, D.C. 20510

Re: The Committee's Office of Accountability and Whistleblower Protection

Dear Chairman Isakson and Ranking Member Tester,

The Office of Special Counsel (OSC) has received thousands of whistleblower retaliation complaints and disclosures from Department of Veterans Affairs (VA) employees. Based on this experience, we support the Committee's decision, in the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, to establish the VA Office of Accountability and Whistleblower Protection (OAWP). We believe the OAWP will reinforce steps the VA has taken to elevate and address these critical issues. Indeed, the Trump administration recognized the importance of such an office with its April 27, 2017 Executive Order on Improving Accountability and Whistleblower Protection at the VA. The Committee's legislation takes additional, necessary steps to promote accountability, protect whistleblowers, and improve care at the VA.

OSC's work with VA whistleblowers will benefit from having a permanent, high-level point of contact with the statutory authority to identify, correct, and prevent threats to patient care and to discipline those responsible for creating them. The establishment of similar offices at other agencies, including the Federal Aviation Administration, has significantly improved the whistleblower experience at those agencies. And OAWP, with a Senate-confirmed leader, will have the authority and a mandate to make a significant difference. Additionally, we support the Committee's decision to include whistleblower protection criteria in the performance plans of all VA supervisors and managers. This step, which we implemented at OSC, will create additional incentives for supervisors to respond constructively to employees' concerns, helping to improve the culture at the VA. We thank the Committee for the opportunity to provide these views, and for recognizing OSC's work and the contributions of VA whistleblowers.

Sincerely,

A handwritten signature in cursive script, reading "Carolyn N. Lerner".

Carolyn N. Lerner

**Written Testimony of Special Counsel Carolyn N. Lerner  
United States Office of Special Counsel**

**Senate Committee on Veterans' Affairs**

**Hearing on Pending Legislation**

**May 17, 2017**

Chairman Isakson, Ranking Member Tester, and Members of the Committee:

Thank you for the opportunity to submit written testimony on behalf of the Office of Special Counsel (OSC). OSC protects the merit system for over two million civilian employees in the federal government, with a particular focus on investigating and prosecuting allegations of whistleblower retaliation. We offer the following views on the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (the Act), sponsored by Senators Rubio, Tester, Isakson, and Moran.

Since 2014, OSC has received thousands of whistleblower retaliation complaints and disclosures of wrongdoing from Department of Veterans Affairs (VA) employees, far more than from any other agency. Our VA whistleblower cases sparked an overhaul of the VA's internal medical oversight office, highlighted systemic disparate treatment in disciplinary actions taken against whistleblowers, and prompted improvements in the quality of care and access to care at VA hospitals around the country.

Based on this experience, we strongly support the Act's provisions to establish the VA Office of Accountability and Whistleblower Protection (OAWP). We believe the OAWP will reinforce steps the VA has taken already to elevate and address whistleblower protection within the Department. Indeed, the Trump administration recognized the importance of such an office with its April 27, 2017 Executive Order on Improving Accountability and Whistleblower Protection at the VA. The Act takes additional, necessary steps to promote accountability, protect whistleblowers, and improve care at the VA by strengthening and codifying the OAWP.

OSC's work with VA whistleblowers will benefit from having a high-level point of contact with the statutory authority to identify, correct, and prevent threats to patient care and to discipline those responsible for creating them. Our experience with VA whistleblowers demonstrates that an Assistant Secretary with these specific responsibilities will help to avert patient care crises at the early warning stage, before they become systemic threats to patient health and safety. The establishment of similar offices at other agencies, including the Federal Aviation Administration, has significantly improved the whistleblower experience at those agencies. OAWP, with a Senate-confirmed leader, will have the authority and a mandate to make a significant difference.

Additionally, we support the Committee's decision to include whistleblower protection criteria in the performance plans of all VA supervisors and managers. This step, which we implemented at OSC, will create additional incentives for supervisors to respond constructively to employees' concerns, helping to improve the culture at the VA. We thank the Committee for the opportunity to provide these views, and for recognizing OSC's work and the contributions of VA whistleblowers.

**Questions for The Honorable Carolyn Lerner**  
Special Counsel  
U.S. Office of Special Counsel

**Questions from Chairman Mark Meadows**  
Subcommittee on Government Operations

Hearing: “Merit Systems Protection Board, Office of Government Ethics, and Office of Special Counsel Reauthorization”

**1. What criteria do you believe are best to measure OSC’s success over time and to continue to identify areas of improvement?**

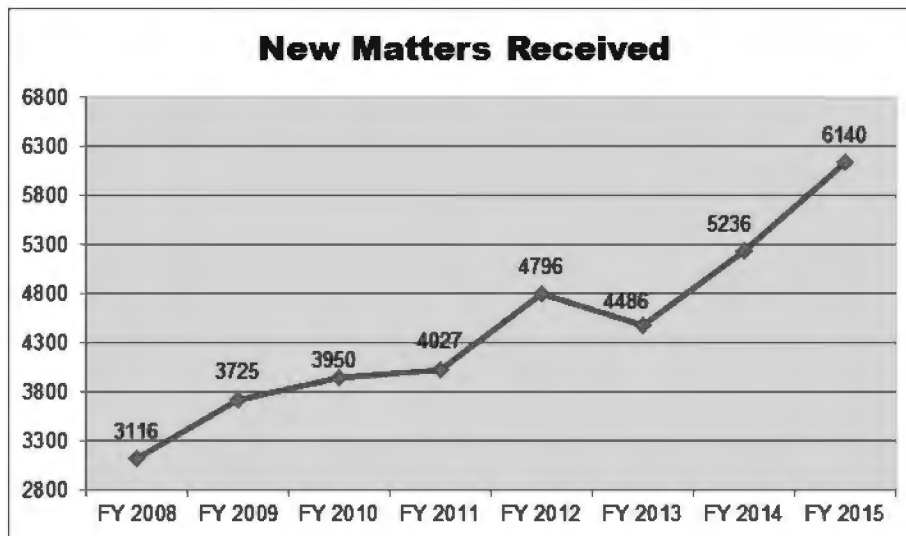
We have identified six criteria that best measure OSC’s success over time. The trends in these data sets also help us to identify areas for improvement. For each area, we explain why the category is significant in evaluating OSC’s work and accomplishments. For context, we provide information for the last eight fiscal years—a period that covers the last year of the prior Special Counsel (FY2008), an interim period with no Senate-confirmed Special Counsel (FY2009–FY2011), and my current term (FY2012–FY2015).

**1) Total Cases Received**

The total number of cases OSC receives in a year allows us to measure the federal workforce’s confidence in OSC and whether our efforts to increase visibility are effective. If employees are confident in our ability to produce results and are aware that OSC is an option for seeking relief or reporting a concern, then this number should steadily increase over time.<sup>1</sup>

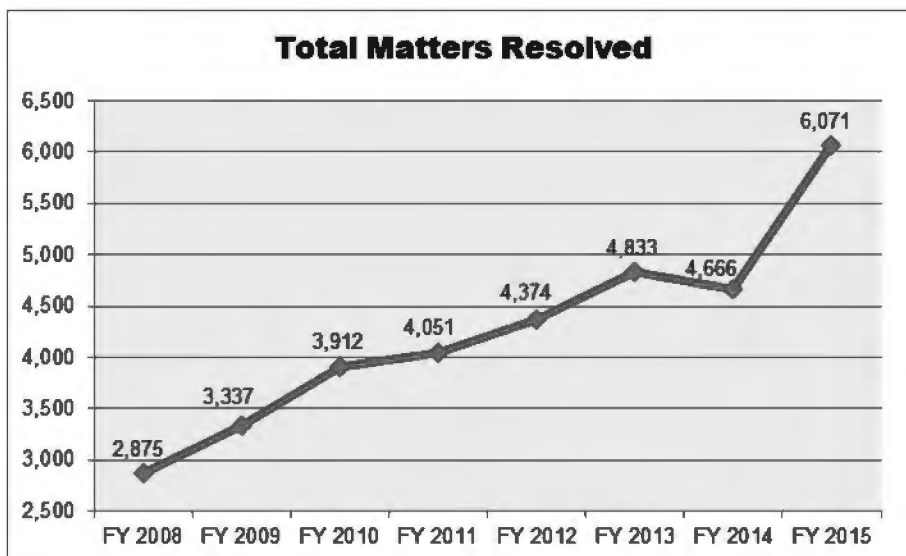
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<sup>1</sup>Each year, OSC receives a number of cases that are inadvertently filed by federal employees as disclosures of wrongdoing, and properly should have been filed as prohibited personnel practice complaints. In order to process these cases, OSC must open a disclosure file, read the information provided, and determine that the individual is only seeking relief to address a possible prohibited personnel practice, and not separately making a disclosure of wrongdoing. After making a determination that the case was improperly filed as a disclosure, OSC’s Disclosure Unit forwards the case to OSC’s Complaints Examining Unit, which reviews the claim as a prohibited personnel practice complaint. In 2014, the number of these misfiled disclosure cases increased by an estimated 9 percent over the historical average because of changes in OSC’s online complaint filing system. OSC is in the process of modernizing its online complaint filing system to make it more user-friendly and intuitive. OSC anticipates that the changes to the online system will be completed by the middle of FY 2016. The changes will address not only the current, elevated number of misfiled disclosure cases, but, with the smarter, more user-friendly interface for federal employees, should greatly diminish the historical problem of wrongly-filed disclosure forms. By diminishing the number of wrongly filed disclosure cases, the new system should also provide a more accurate, but likely lower number of actual disclosure cases received in FY 2016 and beyond.



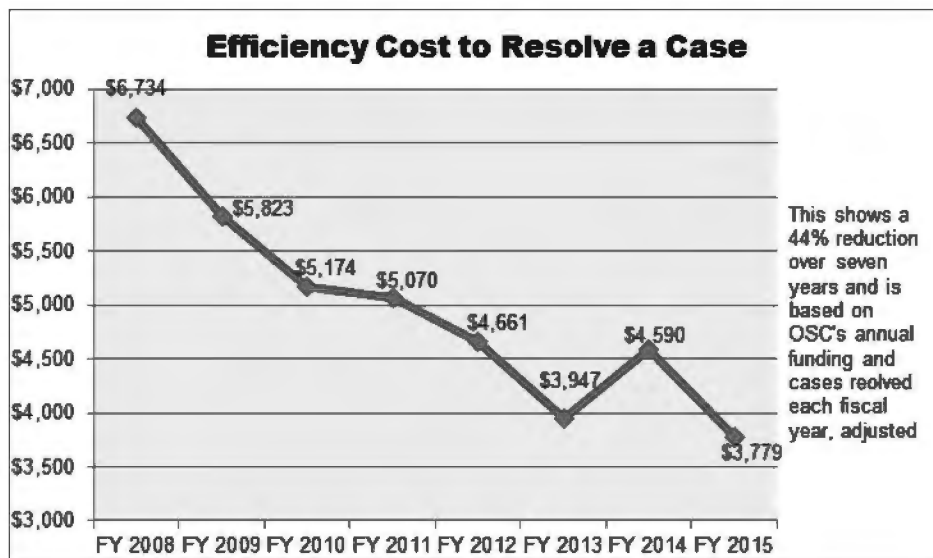
## 2) Cases Resolved

The number of cases resolved in a year allows us to measure our productivity. If the number of cases received is increasing, our organization must increase productivity by increasing the number of cases resolved over time to keep up with demand.



## 3) Cost Per Case

OSC's cost to resolve a case allows us to measure our efficiency. To resolve more cases with limited resources, we must find innovative and more efficient ways to deploy our staff and resolve cases quickly without compromising results. In reducing the cost per case, we are finding new ways to limit overhead expenses and putting more of our fixed appropriation toward core mission work and the resolution of cases.



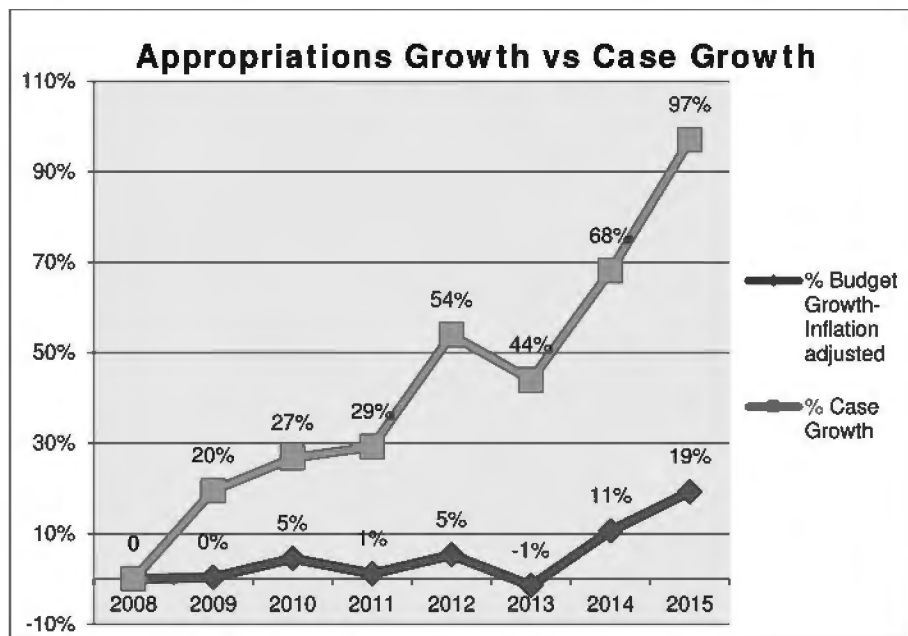
#### 4) Backlog of cases

OSC's case backlog allows us to measure whether our resources are keeping pace with demand for our services. If OSC's efficiency and productivity indicators are positive, but the case backlog continues to increase, then OSC's resources are not sufficient to keep pace with the demand in terms of case volume. OSC needs adequate resources to control spiraling backlogs. A growing backlog is likely to undermine confidence gains in OSC, as employees will inevitably have to wait longer for OSC to process their case, even if OSC is operating more efficiently and effectively.

#### Total Number of Cases Pending at End of Fiscal Year

FY2008	FY2009	FY2010	FY2011	FY2012	FY2013	FY2014	FY2015
937	1324	1361	1331	1729	1397	1969	2129

Another method for evaluating whether resources are consistent with demand is to compare OSC's growth in cases with our budget. As the chart below demonstrates, cases have increased by 97 percent since 2008 while resources (in real values) have increased by 19 percent.



### 5) Number and Rate of Favorable Actions

The total number of favorable actions for whistleblowers and other employees is a key indicator of OSC's effectiveness. While it is important to be efficient, opening and closing an increased number of cases, even at a reduced cost, does little to promote merit system values and advance OSC's mission if we do not secure relief for whistleblowers and other employees in the process.

This metric measures the quality of OSC investigations and our ability to have an impact. Favorable actions for whistleblowers and other employees include reinstatement, back pay, stays of improper removals or reassignments, disciplinary actions against those who retaliate, and systemic corrective actions, such as changes in agency policies that allow for prohibited practices to occur. If OSC is operating effectively, then both the number and rate of favorable actions we achieve for complainants should steadily increase over time.

**Percentage of OSC prohibited personnel practice (PPP) cases that resulted in favorable actions for the employee, and the total number of favorable actions OSC secured<sup>2</sup>:**

**FY2008—33 favorable case outcomes, 58 favorable actions overall, 1.6% of cases**

**FY2009—53 favorable case outcomes, 62 favorable actions overall, 2.2% of cases**

**FY2010—76 favorable case outcomes, 96 favorable actions overall, 3.1% of cases**

<sup>2</sup> Some cases may include multiple favorable actions, such as 1) a stay of a personnel action followed by 2) a settlement that permanently resolves the retaliatory personnel action, and 3) a disciplinary action against the manager who engaged in retaliation.

**cases**

**FY2011—65 favorable case outcomes, 84 favorable actions overall, 2.5% of cases**

**FY2012—128 favorable case outcomes, 159 favorable actions overall, 4.3% of cases**

**FY2013—124 favorable case outcomes, 173 favorable actions overall, 4.2% of cases**

**FY2014—165 favorable case outcomes, 201 favorable actions overall, 4.9% of cases**

**FY2015—212 favorable case outcomes, 278 favorable actions overall, 5.2% of cases<sup>3</sup>**

## **6) Outreach and Training Sessions**

The number of outreach and training sessions OSC conducts measures our efforts to promote awareness of the agency and to prevent future violations of merit systems laws by educating managers about their responsibilities. OSC's whistleblower and PPP certification program provides an important avenue for raising awareness about these rights and preventing violations. In 2015, I reassigned a senior OSC attorney to the newly created position of Director of Training and Outreach. This is the first time OSC has had a full-time employee dedicated to these duties. The Director of Training and Outreach is responsible for increasing outreach as part of our efforts to prevent retaliation and increase awareness of whistleblower protections.

### **Total number of outreach and training sessions:**

<b>FY2008</b>	<b>FY2009</b>	<b>FY2010</b>	<b>FY2011</b>	<b>FY2012</b>	<b>FY2013</b>	<b>FY2014</b>	<b>FY2015</b>
60	60	57	33	121	64	104	118

## **2. What obstacles have you seen to OSC obtaining access to agency information with the current OPM regulatory authority which directs agencies to comply?**

OSC historically has faced a range of obstacles in accessing agency information under OPM's civil service rule 5.4. Rule 5.4 is not specific to OSC and has no enforcement mechanism. The obstacles include nonresponses, untimely responses, incomplete responses, and, in limited instances, unambiguous refusals to comply.

## **3. Common law privileges**

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<sup>3</sup> Approximately 15 percent of PPP claims each year involve allegations of discrimination under 5 U.S.C. § 2302(b)(1), matters that OSC generally closes after initial review, to not duplicate the well-established processes for addressing claims of discrimination through the EEOC. In addition, the same employee may file multiple cases that are resolved through one favorable action. When these and other factors are considered, the percentage of favorable actions may increase.

**1) What are the most frequent common law privileges that have been invoked to prevent OSC from getting the information it needs?**

The most frequent common law privilege OSC encounters is the attorney-client privilege, by a large margin. OSC sometimes will encounter the deliberative process privilege and the criminal law enforcement privilege. The latter can be particularly troublesome because it means OSC cannot access information that another entity has obtained until that investigation has been completed. In one case, we waited four years for the investigation to be completed without indication that the agency had made any progress.

**2) Which agencies invoked them?**

We do not maintain statistics on this, but our staff reports that the following agencies have recently invoked privileges in response to OSC requests for information: Department of Justice, Department of Defense, Department of Homeland Security, Environmental Protection Agency, and the Federal Mediation and Conciliation Service. In addition, I testified last year before this Committee and expressed concerns about blanket assertions of attorney-client privilege by the Chemical Safety Board.

**3) Have you had success in educating agencies to the fact that such privileges are inapplicable?**

Our success has been mixed. First, agencies generally believe they can invoke the attorney-client privilege to protect communications between management officials and counsel in personnel disputes. Agencies do not uniformly agree that rule 5.4 requires them to provide privileged material. Indeed, agencies commonly argue that production is not required because of rule 5.4's exception, which permits agencies to withhold information prohibited by law or regulation from disclosure, claiming that a common law privilege falls within the term "law."

Likewise, agencies fear that production to OSC will waive the privilege for the future, when they are litigating against the individual challenging the personnel action. OSC's proposal would clarify that the production of potentially privileged material to OSC would not constitute a waiver of the privilege by the agency in any other context or forum. This would obviate the need in most circumstances for OSC to spend significant time and resources negotiating with agencies prior to document productions.

Second, OSC lacks independent authority to enforce rule 5.4. The only mechanism to compel disclosure derives from our statutory authority to subpoena. 5 U.S.C. § 1212. That authority, however, requires OSC to apply to the Merit Systems Protection Board (MSPB) each time it seeks to enforce a subpoena. The MSPB, not OSC, ultimately decides whether to enforce an OSC subpoena in district court under 5 U.S.C. § 1212(b)(3). This process is indirect and cumbersome, while a statutory right to access the information is direct and clear.



By law, agencies share an interest in protecting the merit system and preventing prohibited personnel practices. 5 U.S.C. § 2302(c). This interest includes protecting the merit system through fair and impartial investigations that weigh all the facts in a timely manner. On this important principle, OSC's interests should align with the interests of any agency it investigates. OSC has and will continue to educate the agencies on their statutory responsibilities, but given a lack of clarity surrounding the attorney-client privilege, room to disagree will persist. Congressional action would clarify the law, promote merit system principles, and better protect employees from retaliation.

#### **4. Agency responses to disclosures**

##### **1) How closely do agencies stick to the 60-day timeframe required by 5 U.S.C. § 1213(c)(1)(B) for providing a written response to OSC?**

When the Special Counsel refers a disclosure of information to an agency head for investigation under 5 U.S.C. § 1213(c), the agency is required investigate the allegations and submit a written report within 60 days of the referral. However, this 60-day time frame is typically insufficient for agencies to conduct a thorough investigation and prepare a report that meets the statutory requirements. Agencies adhere to the statutory 60-day time frame in less than 1 percent of cases.

##### **2) Which agencies are the more delinquent in responding?**

The agency most delinquent in responding is the Department of Veterans Affairs (VA) followed by the Department of Homeland Security. It is worth noting that the majority of OSC's referrals have been to these two Departments.

**3) What is the average timeframe for such responses government-wide?**

The average time frame for agency responses to § 1213(c) referrals government-wide is 387 days.

**4) Do agencies ever completely fail to conduct investigation of the disclosures that OSC transmits? If so, how often?**

It is extremely rare that an agency fails altogether to conduct an investigation or to submit a report to OSC. Since OSC was established, OSC has transmitted only two cases to the President pursuant to § 1213(e)(4), reporting that the agency head failed to submit the required report. OSC strives to work with agencies to ensure that allegations are fully investigated and resolved, as we believe this better serves the government and public interests.

**5. Follow-up action on agency response to disclosures**

**1) How often do agencies substantiate the allegations that OSC transmits, but then nevertheless fail to take any follow-up action, such as changing their practices, restoring employees who have been wronged, or disciplining employees who commit misconduct?**

In most cases where an agency investigation has substantiated some or all of the allegations, the investigative component recommends that the agency take some form of corrective action. Pursuant to § 1213(d)(5), the agency report must include a description of any action taken or planned as a result of the investigation. However, there have been numerous instances in which an agency report fails to clearly explain the basis for failing to take sufficient follow up action after substantiating the whistleblower's concerns. For instance, in a recent case at the Carl T. Hayden VA Medical Center in Phoenix, Arizona, the VA confirmed gross mismanagement of the Medical Center's emergency room. For a period of several years, the ER had no nurses on staff who were properly trained to conduct triage of incoming patients. This created a threat to patient safety, yet no VA officials were held responsible for the misconduct, as required by § 1213.

**2) Does OSC have any ability to compel action in such a situation?**

OSC does not have authority to compel agencies to take corrective action. OSC's current authority is limited to reporting a deficient finding if the agency fails to take adequate action to address problems or issues substantiated by the investigation. In these cases, OSC conducts follow-up with the agency, through a request for supplemental information, to determine whether the recommended and any other corrective action has been taken. OSC seeks to ensure that the necessary action is taken, or is in the process of being taken, before transmitting the agency reports and whistleblower comments to the President and Congress and closing the matter.

**3) Currently, if an agency says it is going to take a certain action, what does OSC do to follow up and ensure the promised action gets taken?**

In a limited number of cases, typically where the corrective action may require a significant period of time for completion, OSC will close the matter under the condition that the agency report back to OSC upon completion of the corrective action. In those cases, OSC will conduct additional follow-up with the agency to ensure that the action is completed and forward a final closure letter and any supplemental reports submitted by the agency to the President and Congress.

## **6. Statute of Limitations**

### **1) How often does OSC receive prohibited personnel practice allegations where the facts and circumstances involved are more than three years old?**

Approximately three percent of PPP allegations involve allegations where the disclosure and all of the personnel actions are more than three years old.

### **2) What limitations does OSC experience in investigating such allegations?**

It is often difficult to obtain evidence in these cases. We are faced with the following obstacles: 1) witnesses are more difficult to locate; 2) memories fade; and 3) agency records and physical evidence are often lost or destroyed.

### **3) How did OSC arrive at the proposal of a 3-year limitation?**

The proposal for a 3-year limitation is consistent with the statute of limitation that was recently passed for employees of government contractors. See 10 U.S.C. §2409 and 41 U.S.C. § 4712.

### **4) What if an individual doesn't learn about a prohibited personnel practice until after the time when the underlying conduct has occurred?**

Under OSC's proposal, we would have the discretion to review a PPP allegation after the statute of limitations has passed. If an employee makes a strong case that OSC should review the claim, we will initiate an investigation, notwithstanding the proposed statute of limitations.

### **5) Would you be open to OSC having discretion to investigate older cases if OSC determines there is good cause to review the allegation?**

Yes, we believe it is important to have the authority to review any strong claim presented to OSC even if the allegations are older.

## **7. Previous action by MSPB**

- 1) How does OSC typically learn whether a matter has already been previously filed with the MSPB or adjudicated by them?**

This information is obtained in one of three ways: 1) filers are asked on OSC complaint forms whether they have filed an appeal with the MSPB; 2) the assigned examiner obtains this information during an initial interview with the filer; or 3) the assigned examiner may obtain this information directly from the MSPB.

- 2) How often does OSC receive such complaints that have already been filed with the MSPB?**

Approximately five percent of the PPPs complaints we receive have already been filed with the MSPB.

- 3) How often does OSC receive such complaints that have already been adjudicated by the MSPB?**

Approximately one percent of the PPP complaints we receive have already been adjudicated by the MSPB.

## **8. Previous action by OSC**

- 1) How often does OSC receive repeat complaints whereby OSC has already investigated a set of facts and circumstances but gets a second complaint on the matter?**

Approximately six percent of the PPP complaints we receive are considered “repeat complaints.”

- 2) What are OSC’s current practices with regard to these circumstances?**

OSC’s current practice is to issue a letter explaining that we are closing the complaint because the facts and circumstances have previously been addressed. If the filer submits additional information in support of the same facts and circumstances, we may review it as a request for reconsideration.

- 9. Per 5 U.S.C. § 1214(b)(2)(A), OSC is required to make a final determination on prohibited personnel practice complaints within 240 days, unless the complainant agrees to extend the period. Although being thorough in order to obtain proper outcome is critical, it is also important that individuals who have filed with OSC don’t have to wait an unreasonable period of time for an ultimate determination.**

- 1) How closely does OSC track the progress on staying within these required timeframes?**

OSC tracks individual case age and average case age for both existing and closed matters. This allows us to monitor the agency’s overall success rate regarding the statutory

timeframes. We track individual case progress within ten days of receipt, after 90 days, and every 60 days thereafter, and notify the complainant of case progress. If a matter is not resolved within 240 days, OSC's case tracking system sends the assigned examiner a notice to contact the complainant consistent with section 1214(b)(2)(A) to request permission to continue the investigation.

**2) What is the best way to quantify how closely OSC is to sticking to its statutorily mandated timeframes?**

Monitoring the average age of open cases and average age of cases at time of closure shows how closely OSC is sticking to its statutorily mandated timeframe for resolution of PPP complaints.

**3) What is within OSC's control to trend in a positive direction there, versus what is outside OSC's control?**

We are continually working to improve efficiencies in case processing to reduce the time for case completion. For example, we have initiated cross-training across program units. This has allowed OSC's Investigation and Prosecution Division (IPD) to assist our Complainants Examining Unit in screening PPP complaints. OSC also looks for cases that are appropriate for early settlement without a full investigation. Early settlement uses fewer agency resources and takes less time than full investigation. When appropriate, IPD refers cases to OSC's Alternative Dispute Resolution Unit, where they may be settled more quickly.

Case examiners also receive reminders from our case tracking system when a case has been open for 90 days and every 60 days thereafter, as well as when the 240-day timeframe has been reached. This encourages case examiners to focus on resolving those cases that are reaching the 240-day deadline. Examiners also receive reminders to speak to their supervisors about cases that are reaching the statutory timeframes.

Other factors, however, are outside our control.

- Our growing caseload, and the corresponding increase in each examiner's docket, makes it increasingly difficult to meet the 240-day timeframe.
- Under section 1214(a)(1)(D), before OSC closes a PPP case, it must send the complainant a report with its factual findings and legal conclusions, and give the complainant an opportunity to provide written comments. The time it takes to prepare the report, receive comments, and address those comments, adds significant time to the process, making it more difficult to complete all cases within the statutory timeframes.
- Complex retaliation or discrimination investigations often will go well beyond the 240-day statutory requirement because, for example, complex allegations require extensive investigations; after investigation, OSC is engaged in protracted settlement negotiations, or OSC is preparing to file a formal complaint for disciplinary or corrective action. Successful advocacy and enforcement efforts sometime require

investigations significantly longer than 240 days.

- Agency delays in responding to OSC's requests for information under rule 5.4 frequently contribute to matters extending beyond the 240-day timeframe. Delays can extend for months and can severely hamper investigation and prosecution efforts. These delays are often due to claims of insufficient resources. For example, agencies assert that they lack sufficient IT resources to timely perform requested email searches. Agencies send encrypted e-discovery, sometimes asserting they are unable to decrypt their own documents. Claims of privilege over agency information lead to additional disputes and delays. Because OSC lacks a meaningful enforcement mechanism for failures to comply with our rule 5.4 requests, we have little recourse when agencies fail to fully and timely respond. These barriers to obtaining information are among the greatest challenges OSC faces in meeting statutory timeframes for investigations.

While OSC constantly searches for ways to increase efficiency, factors outside our control prevent us from consistently resolving cases within 240 days.

**10. Have there been significant problems from the experiment in "all circuit" judicial review of whistleblower rulings? Do you oppose making that reform permanent?**

No, there have been no problems from the experiment in "all circuit" judicial review from OSC's perspective. OSC supports making that reform permanent.

**11. Please describe the impact to date of having whistleblower ombudspersons at every inspector general office, as mandated by the Whistleblower Protection Enhancement Act of 2012.**

From OSC's perspective, the whistleblower ombudsperson program has been extremely positive. In many agencies, the OIG whistleblower ombudsperson has taken the lead in educating employees about their rights and responsibilities under the whistleblower law. In addition, the ombudsperson program has led to more collaboration and information sharing among the various OIGs 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.

**12. OSC certification program**

**1) How many agencies out of what total universe have been certified as completing merit systems training in the OSC certification program?**

There are approximately 172 agencies or entities that employ federal workers. This number includes OIGs. To date, 50 agencies or components have completed OSC's 2302(c) Certification Program (program), including 40 separate agencies and 10 agency components. An additional 17 agencies and components have registered to complete the OSC program. OSC keeps an updated list of certified agencies and pending certifications

on its web site. On February 4, 2016, I sent a reminder to all non-certified federal agencies and entities reminding them of their obligation to participate in OSC's program.

**2) What impediments have you seen to all agencies becoming certified?**

The very large agencies appear to have more difficulty coordinating the supervisory training requirement. One of the impediments is the coordination of the program among a large number of components or sub-agencies. Another impediment includes training large numbers of supervisors, sometimes located across the country and overseas. OSC has attempted to address these obstacles by providing expert trainers to train agency supervisors, including providing web-based training. Very recently, OSC developed a training quiz that will alleviate some of the issues that the larger agencies face in training all supervisors. (Nevertheless, OSC still recommends in person training for supervisors whenever possible.)

As to smaller agencies, there are still some that appear to lack awareness of the requirement to participate in OSC's program. As noted above, to address this challenge, I recently sent correspondence to remind all non-certified federal agencies and/or entities of their obligation to participate in OSC's program.

**3) What is the realistic schedule for all government agencies and corporations to be trained in the WPA and merit system principles?**

On OSC's website, we note, "It is our expectation that agencies will be able to complete the certification process within six months of registering with OSC and we are committed to assisting all federal agencies with meeting the requirements of 5 U.S.C. § 2302(c)." Accordingly, after an agency registers to complete the process, six months is a realistic schedule for completion. We expect to see an increase in registrations in response to our February 4, 2016 letter.

**4) Do OSC staff, including administrative judges, complete certifiable training in the WPA and merit system principles? If not, should they?**

OSC follows the relevant steps under the certification program, including providing information on civil service and whistleblower protection laws to all incoming staff in their written orientation materials. Additionally, OSC follows the supervisory training requirements of the program by ensuring that all supervisors are trained every three years on the civil service and whistleblower protection laws over which OSC has jurisdiction. OSC's program staff is comprised primarily of investigators, attorneys, and human resource professionals. We do not employ administrative judges.

**13. Please detail how OSC has used its WPEA authority to file *amicus* briefs, including the number of times this authority has been exercised, the issue and apparent impact.**

Since the WPEA was enacted in 2012, OSC has filed the following *amicus curiae* briefs in the following cases in federal court:

- *Department of Homeland Security v. MacLean* (Supreme Court), filed September 30, 2014. The case involved a former federal air marshal who blew the whistle on the Transportation Security Administration's decision to stop its air marshal coverage of long distance flights, even though there were heightened intelligence warnings that terrorists were targeting those flights. OSC argued that Robert MacLean's disclosures should be covered by the Whistleblower Protection Act.
- *Clarke v. Department of Veterans Affairs* (Federal Circuit), filed August 14, 2014. OSC argued that the MSPB's decision was erroneous because the MSPB's analysis of the exhaustion of administrative remedies requirement disregarded the plain language of the statute, conflicted with precedent barring the MSPB from relying on OSC's determinations in analyzing the exhaustion requirement, and encroached upon OSC's independence, thereby threatening future whistleblower claims.
- *Kerr v. Salazar* (Ninth Circuit), filed May 13, 2013. OSC argued that the WPEA should be applied to cases pending before the law's enactment. Specifically, OSC urged the Ninth Circuit to apply the WPEA to the case because: 1) it clarified existing law by overturning prior decisions that unduly limited whistleblower protections; 2) Congress expressly intended the WPEA to apply to pending cases; and 3) applying the WPEA to pending cases promotes government efficiency and accountability.
- *Berry v. Conyers & Northover* (Federal Circuit), filed March 14, 2013. OSC urged the court to respect the due process rights of federal employees by allowing the MSPB and OSC to review adverse personnel actions based on sensitivity determinations, especially in whistleblower cases.
- *Day v. Department of Homeland Security* (Federal Circuit), filed February 21, 2013. The case concerned whether restrictive decisions by the Federal Circuit that barred certain recurring whistleblower claims from review should be applied to pending cases or only to cases filed after the WPEA's enactment. OSC urged that the statute should be applied retroactively to pending cases.

**14. What has been the effect of the U.S. Court of Appeals for the Federal Circuit decision in *Kaplan v. Conyers* since 2013?**

In *Kaplan v. Conyers*, the Federal Circuit Court of Appeals held that the MSPB could no longer review the merits of an agency decision to remove or significantly suspend federal employees when the asserted basis for the personnel action is the employee's alleged ineligibility to occupy "sensitive" positions. In so holding, the Court of Appeals unnecessarily expanded a decades-old Supreme Court holding in *Department of Navy v.*



*Egan*, 484 U.S. 518. *Egan* held that the MSPB could not review agency security clearance determinations. The expansion of the *Egan* decision was unnecessary because 1) the government unequivocally conceded that positions at issue in *Kaplan* did not require security clearances or involve access to classified information; and, 2) in enacting the Civil Service Reform Act, Congress already established a mechanism for removing or suspending employees when doing so is in the interest of national security. Thus, the *Kaplan* decision essentially sanctioned an agency's overreach into an area that Congress had explicitly addressed. The federal government has designated tens of thousands of positions as noncritical sensitive. The effect of *Kaplan* has been to deprive these individuals of guaranteed due process or judicial review when facing removal, even in cases involving discrimination and whistleblowing.

**15. What is OSC's track record for each year of the Kaplan, Bloch, and Lerner administrations for litigating in a hearing to obtain corrective action for:**

- 1) Whistleblowers.**
- 2) Any federal employee who has suffered from any other prohibited personnel practice. Please provide any necessary explanation of the results.**

From 1998–2003, under Special Counsel Elaine D. Kaplan's tenure, OSC filed one petition for corrective action, in 2003. OSC argued for MSPB jurisdiction under the whistleblower law for employees of the International Boundary and Water Commission.

From 2004–2008, under the tenure of Special Counsel Scott J. Bloch, OSC filed one corrective action petition in each year except for 2008. Two of the four petitions involved whistleblower retaliation. In the two whistleblower cases, the agency settled the case after OSC filed the petition.

From 2011–2015, under my tenure, OSC has filed two corrective action petitions, one in 2011 and one in 2015. The 2011 filing involved whistleblower retaliation, and the 2015 petition involved a Bureau of Alcohol, Tobacco, and Firearms (ATF) whistleblower who OSC argued was protected by the First Amendment for testimony he gave in Federal Court. After OSC prevailed on the decision on the scope of First Amendment protections for federal employees under the Civil Service Reform Act, the agency settled the claim.

OSC has not historically brought many cases to the MSPB. The main reason is that agencies typically settle when strong cases are presented, precluding the need for formal litigation. Because so many cases settle prior to litigation, OSC is publicizing more PPP reports, even after the agency has accepted OSC's corrective action request. We believe these reports deter future misconduct and educate agencies on the scope of the whistleblower law.

- 16. What is OSC's track record for seeking stays of prohibited personnel practices? Please provide the record for both formal and informal stays for each year of the Kaplan, Bloch and Lerner administrations, with any explanation for the results.**

**Elaine D. Kaplan**

*Served: April 1998–June 2003*

	<b>Informal Stays</b>	<b>Formal Stays</b>
FY 1998	10	2
FY 1999	12	3
FY 2000	7	2
FY 2001	13	1
FY 2002	7	1
FY 2003	6	1

**Scott J. Bloch**

*Served: December 2003–November 2008*

	<b>Informal Stays</b>	<b>Formal Stays</b>
FY 2004	11	1
FY 2005	3	1
FY 2006	8	1
FY 2007	7	3
FY 2008	4	0

**Carolyn N. Lerner**

*Served: April 2011–present*

	<b>Informal Stays</b>	<b>Formal Stays</b>
FY 2011	12	4
FY 2012	27	8
FY 2013	28	5
FY 2014	23	2
FY 2015	62	3

Under my tenure, OSC has more aggressively sought stays, especially informal stays. In fiscal year 2015, OSC obtained a large spike in the number of informal stays because of the influx of cases from the VA. In addition, I have instructed employees in our Complaints Examining Unit (CEU), which conducts the initial review of cases, to seek early resolution of complaints, including stays where appropriate. We are identifying cases that are appropriate for stays more quickly and preventing employees from suffering harm as OSC continues its review of their cases.

- 17. What is OSC's track record for litigating in a hearing to seek disciplinary action for prohibited personnel practices? What is the OSC's track record of obtaining discipline informally through persuading agencies to act?**

**Elaine D. Kaplan***Served: April 1998–June 2003*

	<b>Disciplinary Actions Negotiated</b>	<b>Disciplinary Action Petitions Filed</b>
FY 1998	0	0
FY 1999	4	0
FY 2000	1	0
FY 2001	4	0
FY 2002	13	1
FY 2003	12	2

**Scott J. Bloch***Served: December 2003–November 2008*

	<b>Disciplinary Actions Negotiated</b>	<b>Disciplinary Action Petitions Filed</b>
FY 2004	11	0
FY 2005	3	1
FY 2006	4	0
FY 2007	5	0
FY 2008	3	3

**Carolyn N. Lerner***Served: April 2011–present*

	<b>Disciplinary Actions Negotiated</b>	<b>Disciplinary Action Petitions Filed</b>
FY 2011	6	0
FY 2012	19	0
FY 2013	27	0
FY 2014	23	3
FY 2015	9	0

During my tenure, OSC has significantly increased the number of disciplinary actions obtained for whistleblower retaliation and other PPPs, and particularly violations of merit rules in the hiring process. We have active investigations in multiple VA facilities that may lead to further formal disciplinary action petitions with the MSPB.

**18. The 1994 WPA amendments required MSPB administrative judges to forward any case to the OSC to consider disciplinary action if the employee established a *prima facie* case of whistleblower retaliation.**

**1) How many referrals has the OSC received during the Kaplan, Bloch and Lerner administrations?**

**Elaine D. Kaplan**

*Served: April 1998–June 2003*

	<b>Referrals from MSPB</b>
FY 1998	4
FY 1999	4
FY 2000	4
FY 2001	3
FY 2002	1
FY 2003	3

**Scott J. Bloch**

*Served: December 2003–November 2008*

	<b>Referrals from MSPB</b>
FY 2004	0
FY 2005	1
FY 2006	0
FY 2007	1
FY 2008	4

**Carolyn N. Lerner**

*Served: April 2011–present*

	<b>Referrals from MSPB</b>
FY 2011	6
FY 2012	8
FY 2013	4
FY 2014	2
FY 2015	11

**2) How many have led to disciplinary action?**

Based on a review of data in OSC's case tracking system, it appears that no referrals from MSPB led to disciplinary action from FY 1998 through FY 2009. In FY 2010, one referral led to discipline; in FY 2012, three referrals led to discipline; in FY 2013, one referral led to systemic corrective action (agency training); and, in FY 2014, one referral led to discipline. Many of the cases referred in FY 2015 are still active.

**19. Please describe changes the OSC has made to its § 1213 whistleblowing disclosure program to make it more accessible and effective for whistleblowers. As part of this response, please describe and summarize the track record to date for the OSC's new unit combining action on disclosures and alleged prohibited personnel practices.**

In the last two years, OSC has implemented the following measures to improve access and help whistleblowers who file disclosures with OSC.

- OSC has clarified that disclosures must be made based on credible information, such as first-hand observation or documents, and may be supported by sworn affidavits from witnesses. Previously, OSC required that referrals be based exclusively on first-hand knowledge.
- When OSC has jurisdiction over a whistleblower disclosure, OSC now calls each person who files a disclosure to ensure we understand their allegations and to explain our process for making a substantial likelihood determination.
- OSC now affords the whistleblower the opportunity to review the information OSC plans to refer to an agency for investigation to ensure accuracy in the referral and issues presented for investigation.
- OSC referral letters to agencies strongly recommend that the agency begin its investigation by interviewing the whistleblower, unless the whistleblower has requested that OSC keep their name confidential.
- In the absence of a substantial likelihood finding, OSC now makes discretionary referrals to agencies under § 1213(g), where a disclosure is of such danger or gravity that it warrants notification of the agency head, or where the information available to OSC is inadequate to make or decline to make a substantial likelihood determination.
- OSC's referral letters now detail the criteria that an agency's investigative report must address to be deemed complete under § 1213(e)(2)(B).
- In appropriate cases, OSC now exercises its discretion to post to its online public file agency findings, whistleblower comments, and the Special Counsel's determination in § 1213(g) matters.
- OSC is preparing to issue a new "smart" complaint form to help whistleblowers file disclosures that satisfy statutory requirements and standards.

In 2015, I established a pilot project called the Retaliation Disclosure Team (RDT). The purpose of the RDT is to evaluate the efficacy of having one attorney handle both the disclosure claim and a whistleblower retaliation complaint filed by one person. Currently, up to four staff members may work on the disclosure and PPP claim filed by one individual. The RDT model generates efficiencies because it allows one attorney to serve as 1) the intake examiner, 2) the formal investigation and prosecution attorney, 3) the disclosure attorney and 4) the mediator.

Another benefit of this model is that the RDT attorney has easier access to the full range of information available. For example, the attorney gains information from the disclosure review that informs the whistleblower retaliation complaint, and evidence from the retaliation complaint helps give a fuller picture of the disclosure. The RDT model also develops a team of cross-trained attorneys whose flexible skill-set allows OSC to meet its needs as they evolve. Finally, whistleblowers have praised the benefit of having one OSC point of contact, which helps improve OSC's customer service.

## **20. Classified disclosures**

- 1) Please describe OSC's process with regard to accepting classified disclosures.**
- 2) Does OSC have the facilities and staff it needs to continue to make the most use out of this authority?**
- 3) How many times has OSC used this authority since receiving it?**

OSC is authorized to receive classified disclosures of information and currently has the staff and facility resources to safeguard classified material. OSC has followed GSA guidelines for procuring appropriate storage units for this information. However, OSC does not have a Sensitive Compartmented Information Facility (SCIF). OSC has received very few cases, approximately two, that include documents classified at the Secret level. In the most recent case, OSC used a facility at another agency to conduct an interview. The low number of disclosures involving classified information does not support the purchase of a SCIF for the agency. Instead, OSC will arrange for the use of another agency's SCIF on an as-needed basis to accommodate the review of classified documents.

## **21. In terms of volume and results, please describe the track record of the OSC's Alternative Dispute Resolution (ADR) Program in obtaining resolutions, as well as the MSPB's mediation program.**

The table below shows that the number of cases OSC has mediated increased from an average of nine per year in FY 2008–2011 to about 35 per year from FY2012–2014. OSC does not have data on the MSPB's ADR program

	<b>FY 2008</b>	<b>FY 2009</b>	<b>FY 2010</b>	<b>FY 2011</b>	<b>FY 2012</b>	<b>FY 2013</b>	<b>FY 2014</b>	<b>FY 2015</b>
Number of completed mediations	7	11	6	13	30	47	38	26
Number of completed mediations that yielded settlement	4	4	3	10	18	29	30	21
Percentage of completed mediations that resulted in settlement	57%	36%	50%	77%	60%	62%	79%	81%

**Questions for The Honorable Carolyn Lerner**  
Special Counsel  
U.S. Office of Special Counsel

**Questions from Ranking Member Gerald E. Connolly**  
Subcommittee on Government Operations

Hearing: “Merit Systems Protection Board, Office of Government Ethics, and Office of Special Counsel Reauthorization”

- 1. Based on the Office of Special Counsel’s (OSC) experience in investigating and prosecuting cases involving prohibited personnel practices, do you believe agencies need more tools and authorities to discipline employees for misconduct, or do you think the current authorities are sufficient.**

Based on our review of dozens of whistleblower retaliation and disclosure cases, my concern is not that agencies are unable to take disciplinary actions. Rather, too often agencies may be motivated to take action for the wrong reason – to punish a whistleblower instead of holding poor performing employees or bad actors accountable.

On September 17, 2015, I wrote to the President and cited my concerns about disciplinary actions taken against whistleblowers at the Department of Veterans Affairs (VA). In that letter, I specifically noted:

The VA has attempted to fire or suspend whistleblowers for minor indiscretions, and, often, for activity directly related to the employee’s whistleblowing. While OSC has worked with VA headquarters to rescind the disciplinary actions in these cases, the severity of the initial punishments chills other employees from stepping forward to report concerns.

As an example, I referenced a VA food services manager who blew the whistle on VA sanitation and safety practices. He was reassigned to clean a morgue and issued a proposed termination after being accused of eating four expired sandwiches worth a total of \$5.00 instead of throwing them away.

In my letter, I contrasted the disciplinary action in this and other whistleblower cases with the lack of accountability for VA officials who have engaged in confirmed wrongdoing that threatened the health and safety of veterans.

- 2. The numerous VA retaliation cases for which you helped whistleblowers obtain settlements seem to suggest that when an agency wants to dismiss someone, it has the ability to do so fairly quickly.**
  - a. Special Counsel Lerner, do you agree? If so, please explain.**

See response to Question 1 above.

- b. **Based on your examination of the VA and other federal agencies, would it be fair to say that a delay in or failure to take appropriate disciplinary action against an employee for misconduct can be characterized as more of a management problem rather than a lack of sufficient tools or authority?**

Based on our review of VA and other whistleblower cases, we have seen instances in which the delay or failure to take appropriate disciplinary action can be characterized as a management problem. For instance, a whistleblower disclosed to OSC that an agency had placed a high level manager on paid administrative leave for over two years to delay acting on a proposed removal. This misuse of taxpayer dollars is evidence of a management failure, and was eventually corrected because of the whistleblower.

- c. **Could lack of training for managers also be a factor in any delay or failure to take appropriate disciplinary action?**

Yes, additional training for managers, particularly on documenting instances of poor performance, and how to promptly address performance issues with employees, could assist in agency efforts to take appropriate disciplinary action.

- d. **Are there ways that agencies can streamline their disciplinary process under existing law?**

The VA established an Office of Accountability Review (OAR) to centralize and streamline the disciplinary action process for high level officials. We believe this approach can be an effective model for streamlining the disciplinary action process, if staffed and resourced appropriately.

3. **The following questions relate to OSC's proposal to modify the procedural requirements for certain prohibited personnel practice cases:**

- a. **How many cases and what percentage of OSC's caseload do you anticipate this proposal would affect?**

OSC's proposal would remove unique procedural requirements imposed on OSC that prolong the process for closing a non-meritorious case. Our proposal would only apply to certain types of cases. These include: 1) cases that are older than 3 years, which account for approximately 3% of OSC cases; 2) cases which had previously been filed with OSC, which comprise approximately 6% of OSC cases; 3) cases that had previously been filed with the MSPB or another adjudicative body, which account for approximately 5% of OSC cases; and 4) cases in which OSC does not have jurisdiction, which account for approximately 12% of OSC cases.

In considering OSC's proposal, it is important to note that the proposal does not impact the ultimate decision by OSC in any of these cases. With or without the



burdensome procedural steps, OSC would rarely take action to assist the complainant in these categories of cases, and OSC would still have the discretion to do so. The proposal simply streamlines the process without changing the end result.

**b. Would this proposal apply to cases where the Merit Systems Protection Board or another adjudicating body has issued a decision?**

Yes. OSC is bound by MSPB decisions, so allowing OSC to process cases in which an MSPB decision has been reached will allow us to dedicate more of our limited resources to meritorious claims.

**c. Would this proposal apply to cases that are pending with the MSPB or another adjudicating body?**

Yes. Employees are already required by statute and MSPB rules to elect a remedy. If an employee chooses to bring their case to the MSPB, our current practice in most scenarios is to close the case based on the employee's election.

**d. Under what circumstances would there be cases pending with both OSC and MSPB or other adjudicating body?**

In almost all cases, under the election of remedy rules cited above, the same case should not be pending before OSC and the MSPB. In select cases, however, OSC may opt to keep a case open that is also pending at the Board if OSC determines systemic corrective action and/or discipline is necessary in addition to the individual corrective action the complainant may seek at the Board.

**e. What other adjudicating bodies could be covered by this provision?**

The provision applies primarily to the MSPB, but could also apply to the federal courts in "mixed" cases under Title VII and the whistleblower law, or other entities that hear federal employee appeals such as the Foreign Service Grievance Board.

**f. What effect would this proposal have on an employee's rights?**

The proposal will not impact the adjudication of any employee's rights. It will simply streamline the process for issuing decisions, allowing OSC to dedicate more of our limited resources to meritorious claims.

**g. Would this proposal prevent an employee from pursuing a remedy in more than one forum?**

The proposal does not impact existing law, which already prevents employees from pursuing a remedy in more than one forum under most circumstances.

4. **As the head of an employing agency, do you believe OSC has sufficient tools and authorities to discipline employees for misconduct or performance issues when necessary?**

Yes. With our drastically increasing case levels, OSC's staff is working at full capacity, often going above and beyond to ensure timely and fair review of whistleblower and other claims. There is simply no room for underperforming individuals. To the extent individual employees have needed to improve their performance, I have instructed managers to give prompt feedback on areas that need improvement and provide the employee an opportunity to appropriately respond. Fortunately, OSC is staffed with dedicated public servants who care deeply about the agency's mission.

5. **Based on your agency's experience, do you think statutory change is needed to streamline the federal employee disciplinary process?**

OSC's experience is generally reflected in the examples and responses above. I do not have a position on whether statutory change in this area is needed, but hope the examples are instructive as Congress considers these important issues.