

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

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

February 1, 2017, 2:00 PM

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

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

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

I. The U.S. Office of Special Counsel

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

II. OSC and the WPEA

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

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

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

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

B. Allowing the prosecutor to help shape the law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Jurisdiction over TSA employees for whistleblower retaliation cases

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

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

III. Upcoming sunset provisions in the WPEA

A. Whistleblower Protection Ombudsman

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

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

B. All-circuit review of WPA cases

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

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

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

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

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

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

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

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

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

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

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

B. Whistleblower retaliation protection for former federal government employees

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

C. Retaliatory investigations and employee cooperation with government investigations

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

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

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

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

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

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

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

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

1. *Kaplan v. Conyers*

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

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

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

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

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

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

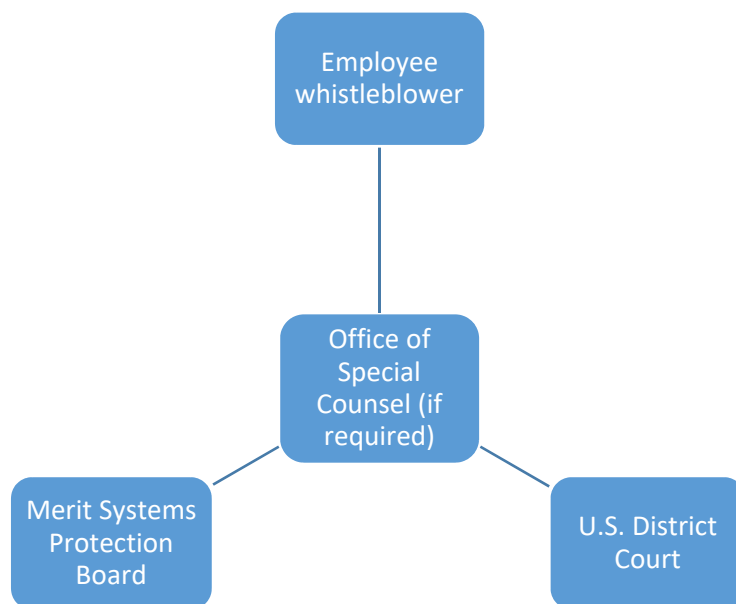
Instead of applying this burden narrowly and as intended to investigators and auditors—positions cited in the WPEA's legislative history—the Board, since *Benton-Flores*, has applied it broadly to, for example, teachers, purchasing agents, and motor vehicle supervisors. Similar far-reaching arguments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

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

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

E. Federal district court jurisdiction for certain whistleblower retaliation cases

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



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

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

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

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

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

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