June 7, 2016

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security and Government Affairs  
United States Senate  
Washington, DC 20150

The Honorable Chuck Grassley  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Chairman Johnson and Chairman Grassley,

This letter is to express our appreciation for your leadership in preparing the Office of Special Counsel (OSC) Reauthorization Act of 2016. The legislation is a balanced, responsible measure that if enacted will strengthen the OSC’s ability to protect the merit system generally, and to implement the Whistleblower Protection Enhancement Act of 2012’s mandate in particular. We appreciate that you consulted with stakeholders committed to strengthened merit system principles, and we hope that the working relationship will continue to grow.

In particular, we applaud the Committee’s initiative to strengthen OSC investigations by formalizing the agency’s authority for subpoenas. Whistleblower cases inherently involve fact-finding into alleged illegality on multiple fronts – both personnel law and misconduct that betrays the public trust. Under those circumstances, it is unrealistic to expect voluntary agency cooperation in supplying the evidence of its own guilt. The OSC currently asserts the authority to obtain agency records. We believe authority for this practice should be formalized cleanly, without vulnerability to exceptions or qualifiers that actually would weaken the OSC’s current ability in practice to protect the merit system. Importantly, Section 2 of the Act achieves that goal and expressly states that an agency’s claim of common law privilege cannot be used to withhold documentation from the Special Counsel. That is a critical safeguard within the provision, in order to prevent a dangerous and unprecedented loophole for agencies to claim privilege where it did not previously exist.

We also applaud the legislation’s provision permitting due process appeals of actions to remove an employee’s eligibility for sensitive jobs. For over five years, this potentially all-encompassing national security loophole has been the most severe threat both to the merit system and the Whistleblower Protection Act (WPA). The Committee’s action will provide both the OSC and individual employees the right to challenge arbitrary decisions or retaliatory abuse by agencies of their authority for sensitive positions.
We believe that same principle should be extended to retaliatory investigations, the first step and most common form of harassment against whistleblowers. While the bill permits the OSC to challenge abusive investigations, most whistleblowers who are victimized will remain defenseless. The OSC only can help a token number or victims for any form of reprisal. Retaliatory investigations should not be the only remaining form of harassment where whistleblowers defending the public still will not have the right to defend themselves. They not only have a severe chilling effect, but are the first step toward criminal referrals beyond the authority of employees or merit system agencies to challenge. We hope that prior to conference the Committee will work with the whistleblower community on a responsible approach to end this unacceptable WPA loophole.

Our section by section analysis of the bill is attached. Thank you again for the Committee setting an example of leadership in public service with this legislation.

Respectfully,

ACORN8

Bill of Rights Defense Committee/Defending Dissent Foundation

Blacks In Government – Heritage Chapter

Demand Progress

Federally Employed Women – Legal & Education Fund, Inc.

Government Accountability Project

International Association of Whistleblowers

Liberty Coalition

National Taxpayers Union

Project On Government Oversight

Public Citizen

Taxpayers Protection Alliance
SECTION BY SECTION ANALYSIS: OSC REAUTHORIZATION ACT OF 2016

Section 2 would ensure that the OSC has timely and adequate access to information necessary to investigate allegations of wrongdoing and retaliation. Importantly, it expressly states that an agency’s claim of common law privilege cannot be used to withhold documentation from the Special Counsel. That is a critical safeguard within the provision, in order to prevent a dangerous and unprecedented loophole for agencies to claim privilege where it did not previously exist.

Section 3 would expand prohibited personnel practices and training for whistleblower protections. Among other measures, it would prohibit the improper access of an employee or applicant’s medical record; entrust agency heads or their delegates with greater responsibilities to prevent prohibited personnel practices; and ensure adequate agency-wide whistleblower training.

Section 4 would: strengthen the Special Counsel’s oversight authority of agency whistleblower reports, including implementation of corrective action commitments; increase whistleblower confidentiality measures; allow the Special Counsel to investigate and order corrective action in response to a retaliatory investigation; restore normal rights for employees with sensitive positions, where the position does not require a security clearance or access to classified information; require agency heads to develop whistleblower protection as a criteria in performance appraisals for supervisory employees, and establish an annual report to Congress on unacceptable performance in compliance with the Whistleblower Protection Act.

Section 5 would allow for OSC to terminate certain investigations in cases where: the individual has submitted a duplicative allegation that contains no additional evidence; the individual has filed the allegation with the Merit Systems Protection Board; it is outside the jurisdiction of the Special Counsel; and more than three years have passed since the alleged retaliation occurred and was made known. Importantly, the Special Counsel still must provide the individual who submitted the allegation with a written notice that explains the basis for terminating the investigation.

Section 6 would strengthen the ability of Inspectors General to receive, review and investigate allegations of wrongdoing within the OSC, including enhanced methods for OSC employees to communicate directly with IGs.

Section 7 would require the Special Counsel to submit annual reports to Congress that detail the whistleblower complaints filed with the OSC, the number of investigations conducted and stays or disciplinary actions required by the Special Counsel, among other data for Congress to perform adequate oversight of the OSC. Further, it would expand the public record for results of reports ordered on whistleblowing disclosures.

Section 8 would require OSC to design and establish a survey pilot program for individuals who have filed a complaint or disclosure. The survey results are intended to inform and improve OSC services.

Section 9 would authorize OSC appropriations from 2016 through 2021.