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NOMINATION OF SCOTT J. BLOCH

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON THE

NOMINATION OF SCOTT J. BLOCH TO BE SPECIAL COUNSEL, OFFICE OF SPECIAL COUNSEL

NOVEMBER 12, 2003

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NOMINATION OF SCOTT J. BLOCH

WEDNESDAY, NOVEMBER 12, 2003

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:07 p.m., in room SD–342, Dirksen Senate Office Building, Hon. Peter G. Fitzgerald presiding.

Present: Senators Fitzgerald and Akaka.

OPENING STATEMENT OF SENATOR FITZGERALD

Senator FITZGERALD. I am going to call this meeting to order. Senator Akaka is on his way but he has asked for us to begin.

This afternoon the Governmental Affairs Committee will hold two hearings. The first hearing will be on the President's nominee to be Special Counsel. Upon conclusion of the nomination hearing, the Committee will immediately hold a legislative hearing on S. 1358, the Federal Employee Protection of Disclosures Act, the so-called whistleblower bill. I am chairing both hearings since the nomination and the bill are within the subject matter jurisdiction of the Subcommittee on Financial Management, the Budget, and International Security which I Chair. I am pleased to have this opportunity today, and I look forward to hearing from all of the witnesses.

I will also be pleased to recognize Senator Akaka, when he arrives. He is not only the Ranking Member of the Subcommittee on Financial Management, the Budget, and International Security but he also is the sponsor of S. 1358 which we will address shortly.

First, we will take up the nomination of Scott J. Bloch to be Special Counsel of the U.S. Office of Special Counsel. I would like to welcome Mr. Bloch today as well as Senator Brownback from Kansas, Mr. Bloch's home State. The President has selected you for a very important position in our government, and I congratulate you on your nomination, Mr. Bloch.

Mr. Bloch has filed responses to the Committee's biographical and financial questionnaire, answered prehearing questions submitted by the Committee, and has had his financial statement reviewed by the Office of Government Ethics. Without objection, this information will be made part of the hearing record, with the exception of the financial data which are on file and available for public inspection in the Committee offices. In addition, I personally have reviewed the FBI background investigation report on Mr. Bloch.

President Bush nominated Mr. Bloch to be Special Counsel on June 26, 2003. Mr. Bloch has a record of 15 years as a practicing attorney with extensive experience in employment and contract law. In November 2001, Mr. Bloch was appointed as Associate Director and Counsel to the Task Force for Faith-based and Community Initiatives in the U.S. Department of Justice. In January of this year, Mr. Bloch assumed the position of Deputy Director and Counsel for the task force.

The Office of Special Counsel is an independent Federal agency with investigative and prosecutorial responsibilities regarding three statutes: The Civil Service Reform Act, the Whistleblower Protection Act, and the Hatch Act. The primary mission of the Office of Special Counsel is to protect Federal employees from prohibited personnel practices, especially reprisals for whistleblowing. As part of its work to protect Federal Government whistleblowers, the Office of Special Counsel is authorized to receive, investigate, and prosecute allegations of prohibited personnel practices. The office also may file complaints with the Merit Systems Protection Board to seek disciplinary action against individuals who are found to have committed a prohibited personnel practice.

The Office of Special Counsel also is responsible for enforcing the Hatch Act that addresses political activities, protecting the re-employment rights of veterans and reservists, and operating a disclosure unit to which Federal employees may disclose information about government waste, fraud, and abuse.

The Office of Special Counsel is a vital agency in our Federal Government that impacts Federal employees. The nominee is being considered for an important position of leadership in this agency, and we appreciate his presence today before the Committee.

Before I swear in the witness I would like to call upon my colleague from Kansas, Senator Brownback, to introduce the nominee. I want to thank Senator Brownback for coming here today. I understand that Senator Roberts also wanted to be here today but he has a scheduling conflict with the Intelligence Committee. So Senator Brownback, welcome to the Governmental Affairs Committee, and you may proceed.

OPENING STATEMENT OF SENATOR BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator BROWNBACK. Thank you very much, Mr. Chairman. Thank you very much for holding this hearing today as well. Indeed my colleague Senator Roberts would like to be here, but for a scheduling conflict. We both strongly support Mr. Bloch's nomination.

As you noted in your introduction, he has 15 years of litigation experience ranging in a wide range, civil rights to employment law and private practice, in areas quite impressive. This experience, coupled with his recent work at the Department of Justice I think makes him really an ideal fit for this Office of Special Counsel, and as Special Counsel in the Office of Special Counsel.

I am pleased to say he is a fellow Kansan. He was a partner in a prominent Kansas law firm for 15 years. He taught at the University of Kansas School of Law, my alma mater. I believe we even have a coach from your State now at our alma mater, which I do

not want to bring up a sore point with the starting of basketball season, but he is doing a very nice job.

He was an honors graduate at the University of Kansas. He was on the board of editors of the law review, won awards for his writing in law school. He served on charitable and pro bono boards including the Douglas County Bar Grievance Committee, where he oversaw, as chair of the investigation and reporting on attorneys accused of unethical conduct. He was on the board of discipline that heard testimony and made findings to the Kansas Supreme Court for the discipline of attorneys. So he is used to this role in a whistleblower capacity within his own profession.

In the practice of law, Mr. Bloch has been a champion of employee rights, ethics, and protection of whistleblowers. He has demonstrated a resolve to pursue just results even in the face of difficult odds. He has served in the Justice Department for the last 2 years, bringing his wife Catherine and their seven children to live in Virginia. I have met and talked with his wife and two of their children are here with him today. I do not think you would probably mind, Mr. Chairman, if he introduced his wife and children at this point in time.

Senator FITZGERALD. That would be great, if you could do that.

Mr. BLOCH. Thank you, Senator. My wife Catherine is to my right. My daughter Mary, whose confirmation ceremony I attended last Monday at our church and now she is reciprocating.

Senator FITZGERALD. How old is Mary?

Mr. BLOCH. Mary is 13. Beatrice is 10 years old.

Senator FITZGERALD. Welcome.

Mr. BLOCH. My brother William, who came on the red-eye from California. He is a plaintiff's employment attorney in California.

Senator FITZGERALD. Welcome. Thank you for being here. You have five other kids?

Mr. BLOCH. That is correct. My youngest daughter celebrates her birthday today, her first birthday. I also want to recognize my son who could not be here, but wanted to be, who is in the Marines and just returned from a tour in Iraq, but he had to report back to California for duty.

Senator FITZGERALD. Thank him for his service for us. Thank you.

Senator BROWNBACK. He has obviously a strong tie with his family, and when he was telling me about his son and the work that he was doing in the Marines in Iraq, that shows a lot of strong character as well in a very difficult battle that we are involved in.

I would just conclude by saying that the Office of Special Counsel needs someone with rock solid ethics, leadership and a passion for justice. I think you find that in Mr. Bloch. That is why Senator Roberts and myself wholeheartedly support his nomination into this important position in the Federal Government. Mr. Chairman, thank you very much.

Senator FITZGERALD. Senator Brownback, thank you very much for introducing the witness for us, and thank you for being here today. We appreciate you taking time out of your schedule. Now, I would like to go ahead and swear in the witness, and thank Senator Brownback for being here today. All witnesses are sworn in under this Committee's rules and have to take an oath.

[Witness sworn.]

If you would like, Mr. Bloch, you could proceed now with your statement and then we will proceed to questions. So you may begin. Thank you for introducing your family earlier.

TESTIMONY OF SCOTT J. BLOCH,[1] TO BE SPECIAL COUNSEL IN THE OFFICE OF SPECIAL COUNSEL

Mr. BLOCH. Thank you, Mr. Chairman, and Ranking Member, Senator Akaka, when he gets here, and the Members of the Committee. I am grateful and deeply honored by the nomination of the President of the United States to the Office of Special Counsel. I am equally honored by the introduction from Senator Brownback from my great State of Kansas, and his and Senator Roberts' support of my nomination to this honorable position within our Federal Government.

The challenges to the Office of Special Counsel are daunting, but not insurmountable. If you honor me with confirmation to this position I will do my utmost to carry on the high standards of integrity and efficiency of the Office of Special Counsel.

As I reflect today on my background which has prepared me for this challenge, I am reminded that I grew up with an understanding of the importance of the underdog. My father was a lifelong member of a union, the Writers Guild of America, and he taught me the need for protections for those who are trying to earn a living for their families, who stand as a lone voice against a powerful industry. In my law practice I learned to champion the small worker and found this work to be the most rewarding of my legal career. That sense of justice and the rule of law inspired me to come to Washington for a career in public service. It continues to inspire me in this new position for which I have been nominated.

In Plato's Republic, Socrates asks whether justice is merely the will of the stronger. Socrates was a gadfly of Athens and may, in a certain sense be considered the first whistleblower for he exposed official corruption and called for real justice based on principle, based on each person's due.

OSC stands as a gadfly to those who would impose their will on the weaker, who would punish whistleblowers for exposing corruption, waste, and illegality that endanger the public. OSC stands as a guardian of justice and accountability in the Executive Branch. Responsible government is vital to the functioning of our country. The founders of our Nation set up a system of self-government with checks and balances. From the important protections of whistleblowers and civil and political rights of employees, to enforcing the Hatch Act, to protecting re-employment rights and veterans preferences for those who are literally putting their lives at risk for our liberty and the liberty of others throughout the world, I see this office as being a part of an ethical, self-governing nation.

I look forward to helping protect our country and the important work of nearly three million civilian employees in the Executive Branch. I look forward to working with you, Mr. Chairman, and

[1] The prepared statement of Mr. Bloch appears in the Appendix on page 13.
Biographical and professional information appears in the Appendix on page 14.
Pre-hearing questionnaire and responses appears in the Appendix on page 20.
Post-hearing questions and responses appears in the Appendix on page 50.

the Members of this Committee and the professional staff at OSC to improve the merit system of civil service. I thank you for this opportunity to appear before this Committee and to answer your questions.

Senator FITZGERALD. Thank you. That was a very good statement and I like your reference to Socrates, and your citing of him as perhaps the first whistleblower is very apropos. So thank you for that insight.

I am going to ask you a series of questions that our Committee asks of all nominees. These are standard questions, and then we will proceed into more specifically tailored questions regarding the Office of Special Counsel.

First, is there anything that you are aware of in your background which might present a conflict of interest with the duties of the office to which you have been nominated?

Mr. BLOCH. No.

Senator FITZGERALD. Do you know of anything, personal or otherwise, that would in any way prevent you from fully and honorably discharging the responsibilities of the office to which you have been nominated?

Mr. BLOCH. No.

Senator FITZGERALD. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of Congress if you are confirmed?

Mr. BLOCH. I do.

Senator FITZGERALD. Mr. Bloch, you have extensive private sector experience in litigation, and most recently you have been serving as Counsel and Deputy Director for the Task Force for Faith-based and Community Initiatives at the Department of Justice. How will you bring these experiences to bear on the work that you will undertake as a Special Counsel at the Office of Special Counsel?

Mr. BLOCH. Thank, you, Senator. I appreciate this opportunity to explore how my background can help with the position of Special Counsel. It is my understanding that the office requires someone who has a wide background in employment laws, who has a passion for protecting the rights of workers, who has an understanding of the interplay between various statutes and common-law doctrines concerning employment law. I believe I fit that bill. In my 15 years of practice in my law firm I was our resident expert in the area of employment law and quickly developed a specialty in plaintiffs employment work, which comprised better than a majority of my practice. I also represented——

Senator FITZGERALD. Did you also represent some defendants in labor lawsuits against companies? Did you represent some of the companies being sued?

Mr. BLOCH. Yes, I did, Senator. I believe that my background, which began when I was a law student and I clerked for a national labor law firm——

Senator FITZGERALD. Is that Seyfarth, Shaw?

Mr. BLOCH. Seyfarth, Shaw, from your fine State.

Senator FITZGERALD. But you worked in the Los Angeles office; is that right?

Mr. BLOCH. I did. We had the best of both worlds out there. In that capacity, that whetted my appetite for the area of labor law and employment law. When I got into private practice I began to represent individuals and found that that was both fascinating and rewarding because you got to develop the facts from the outset and really see the perspective from the worker.

Senator FITZGERALD. Can you give us some examples of the types of plaintiffs you represented, the types of aggrieved workers? What kind of cases would these have been?

Mr. BLOCH. They ranged anywhere from civil rights claims, sexual discrimination, racial discrimination, disability discrimination, fair labor standards practices cases, Family Medical Leave Act cases, retaliation cases. Retaliation is a rather broad topic and it includes a number of things under its umbrella, such as whistleblowing, retaliation for exercise of a protected right such as testifying, jury duty, workers compensation claims, and so on. There is also a subcategory of discrimination claims that result in a retaliation or a reprisal against an employee. I represented plaintiffs in all of those areas. In all of those areas actually I represented some corporations as well because we would often have—since I was the resident expert in the firm, all of the firm clients would come to me for help with any kind of appearance before an administrative agency or a local agency investigating claims at the early stages of any kind of discrimination or reprisal against an employee. So I have been experienced in all of those areas. And other areas as well, under ERISA, Section 1132 claims, 1983 claims involving constitutional rights, as well as protected employment rights and property interests.

Senator FITZGERALD. You really have a very broad labor law background. Did you only do labor law cases when you were in the private sector or did you do other things?

Mr. BLOCH. No, I was in a smaller firm. We had about 14 lawyers so you had to—I was the chair of the litigation department for the last 5 years of practice, so you had to be able to think on your feet and do a lot of different areas. I practiced in securities fraud, some medical malpractice, both on the plaintiffs and the defense side, as well as complex commercial litigation, ethics law which included claims against law firms both regional as well as national. So I had about 60 percent of my practice, 65 percent, in employment and the rest was a smattering of these other areas, including administrative law.

Senator FITZGERALD. Now the Special Counsel actually has several roles. On one hand, they are advocates for whistleblowers. On the other hand, in certain cases they may be required to actually prosecute government officials who have had the whistle blown on them. Where it merits prosecution, the Office of Special Counsel has to prosecute them; is that right? What is your understanding of the office based on your preparation for going into the office?

Mr. BLOCH. Thank you, Senator. The office, as I understand it, is to be a protector or guardian of the merit system of civil service and the merit system principles as found in Title 5 of the United States Codes, Section 2301, to make certain that we have an efficient workforce and that employees are not reprised against, or mistreated or discriminated against on non-merit related issues, as

well as bringing corrective actions to protect those employees, and when necessary and when merited, to bring disciplinary complaints against supervisors or even high level officials. So there is clearly a dual, maybe even a triple role that the office serves.

Senator FITZGERALD. Have there been any actions brought against high-level officials of which you are aware?

Mr. BLOCH. Yes, there have been a number. Some of them, as I understand it, have not public record but some are. But, yes, there have been.

Senator FITZGERALD. Is there not a public record of these proceedings?

Mr. BLOCH. I was limited in what I could get into with the Office of Special Counsel and the Acting Special Counsel, so there were certain things I was not allowed to see. Names, for instance. But I could see expurgated or redacted files, or redacted letters that had been written to the President or to high-level officials in agencies concerning other high-level officials. So, yes, I am aware of some.

Senator FITZGERALD. So there are prosecutions going on and the public does not know anything about them?

Mr. BLOCH. No, I am not saying that it is withheld from the public. There are some things as I understand it, of a national security nature that may be protected and I am not able to look at them at this time.

Senator FITZGERALD. Things that do not have an intelligence reason or a national security reason for protecting, do they make public those prosecutions when the Office of Special Counsel is actually going after a government official for waste, fraud or abuse that is actionable under the whistleblowers statute? Do they make that publicly available?

Mr. BLOCH. Senator, my understanding is it is a matter of public record when a disciplinary action is filed or a corrective action is filed with MSPB. The fact or existence of an investigation file I cannot honestly tell you as I sit here that I know that the investigations files are public. I do not think they are, but I really would have to ask a staff member.

Senator FITZGERALD. But when an action is filed—we have been joined by our Ranking Member, Senator Akaka. Thank you very much for being here. Senator, you may have an opening statement that you wish to give, and we would be happy to allow you to proceed at this time.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. Thank you very much, Mr. Chairman. I want to thank you for your leadership and I want to tell you that I am pleased you are having this nomination hearing for Scott Bloch to be Special Counsel. I want to join you in welcoming his lovely family, and also any friends who are joining him this afternoon. So, welcome.

The Office of Special Counsel was created under the Civil Service Reform Act way back in 1978. It is an independent Federal investigative and prosecutorial agency whose primary mission is to safeguard the merit system by protecting Federal employees and applicants from prohibited personnel practices. Unfortunately, for many

years, OSC was seen as more of an adversary than an ally to whistleblowers. During congressional hearings in the 1980's, this Committee was urged to abolish the OSC. Instead we chose to strengthen the agency and gave it a new charter. The charter is to protect employees, especially whistleblowers, from prohibited personnel practices and to act in the interest of employees who seek its assistance.

Our Committee affirmed that the OSC should not act contrary to those interests. This requires a Special Counsel to be a strong and independent advocate for whistleblowers. The Special Counsel must also be an educator, one who will ensure that Federal employees understand their rights and protections when disclosing waste, fraud, and abuse within the government. All too often workers find out too late that they are not covered by the Whistleblower Protection Act or are unaware of their rights and protections.

If confirmed, I urge you to make it a priority to inform Federal employees of their rights and protections or the lack thereof. Employees should not be losing their jobs or be subject to possible civil or criminal penalties because their agencies failed to educate its workforce of their rights and protections under the law. Federal civil servants should be encouraged to come forward with information vital to ensuring government accountability and a secure Nation.

Mr. Bloch, I want to thank you for being here today, and I am glad to have your family here as well. Thank you very much, Mr. Chairman.

Senator FITZGERALD. Mr. Bloch, I was wondering if you would want to describe what you think may be some of the challenges the Office of Special Counsel might face in the coming years. As Special Counsel, how will you address these challenges and which issues will be your top priorities?

Mr. BLOCH. Thank you, Senator. I have thought about this issue. I think it is very important to go in with an idea of what it is that you are facing in the way of challenges and what kind of vision you might have for the future. I look forward to working with this Committee and with you and with the staff at OSC to implement a broad vision for the future. That includes sending a message to the Federal workforce and to the public that efficiency, expeditious handling of claims is very important. That whistleblowers are going to be protected in not only name, and not only in words, but in action. That with the changing nature of the Federal personnel system as we see in several different agencies, that we have to fashion a better system for employee understanding of rights, because it can become very confusing, or there can be a crossfire of different avenues and different procedures that employees are put into and they are not sure what to do and become very confused. So we have to educate, and I thank the Ranking Member for bringing that to bear here today, that education is a very important part of the future of this office.

Senator FITZGERALD. The office has quite a backlog right now, does it not?

Mr. BLOCH. Yes, Senator. I am aware of the backlog. At the current time there are really three divisions of OSC where a backlog can become a serious issue or it has become something of a serious

issue. Leaving aside for the moment the Hatch Act unit, the three areas under the prohibited personnel practices that we think of when we talk about the backlog are in the CEU, or Complaints Examining Unit, the IPD, or the Investigation and Prosecution Division, and then the DU, or the Disclosure Unit. As you know, the primary mission of OSC is the protection of employees from prohibited personnel practices, especially reprisal for whistleblowing. Then secondarily, although not a far second, is a secure channel for the receipt of disclosures of wrongdoing in the government, of gross waste, of gross mismanagement, of illegality, of substantial danger to the public health or welfare.

Senator FITZGERALD. Do you know how large of a staff you will have under you?

Mr. BLOCH. Currently there are about 103 full-time equivalents. Special Counsel's office has a number of positions that have not been refilled; that have become vacant. So that the budget that exists for OSC has not been fully utilized for the full-time equivalents now. In the President's budget for 2004, in addition to filling approximately six or seven positions that have been vacant, there is an additional opportunity for filling an additional seven, I think, full-time equivalents to bring it to 113 under the 2004 budget, which I, of course, support.

Senator FITZGERALD. Do you know how many cases wind up with the OSC?

Mr. BLOCH. The number of matters that come in for prohibited personnel practices is a little over 2,000.

Senator FITZGERALD. A year?

Mr. BLOCH. A little under 2,000 I should say, per year average.

Senator FITZGERALD. Has that been going up over the years, do you know?

Mr. BLOCH. In reality, in the last 3 years there has been a little bit of a dip. There has been a year where it went down, and then went back up to pretty much a level that was experienced a few years ago.

Senator FITZGERALD. How many of those cases typically get prosecuted?

Mr. BLOCH. That are recommended for actual prosecution, that are not closed for one reason or another, or settled in an alternative dispute resolution?

Senator FITZGERALD. Right.

Mr. BLOCH. Around 400.

Senator FITZGERALD. Get prosecuted? That is a lot.

Mr. BLOCH. That are referred out. Then of those that get through the Investigation Prosecution Division, I think we are talking about 150 to 200 that actually go forward with continuing prosecution. Then if you are asking about the number of cases that actually go to the Merit Systems Protection Board, it is a smaller number. What that number is I cannot tell you, but it is significantly smaller, I believe.

Senator FITZGERALD. Senator Akaka.

Senator AKAKA. Thank you very much, Mr. Chairman. Mr. Bloch, as you know the OSC is responsible for working with agencies to ensure that employees know of their rights and protections when they believe they have been retaliated against. However, we are

finding that employees are still unaware of their rights. Do you see any deficiencies that exist in law that prevent employees from knowing their rights and protections?

Mr. BLOCH. Thank you, Senator. I believe this is a very important area that you have raised, and I thank you for your leadership in this area. I believe that the current law, the 2302(c) certification program is one area that is being under-utilized potentially. In addition to that, there is the education program, the ongoing education program and outreach program of OSC to the agencies. This is something that I feel strongly about. It is something that I have enjoyed tremendously in my current work in the Justice Department, is going not only to the public and educating and doing outreach, but actually going in among the agencies in the Federal Government. So there has been quite a bit of work, we have done interagency outreach and so on, that has been very helpful in educating employees and officials. I look forward to doing the same and on an expanded basis in the Office of Special Counsel.

Senator AKAKA. Thank you, Mr. Bloch. Under both the whistleblower statute and the labor management statute, the President may exclude agencies from coverage of those laws for national security reasons. However, in the labor management context the President is required to issue an Executive Order when removing agencies. Would you support adding a similar requirement to the WPA?

Mr. BLOCH. Senator, thank you. I do understand that there are a number of agencies that have been excluded in the past from certain personnel laws, and even currently we are facing a bill with the Department of Defense as well as Homeland Security which already has gone through and there have been discussions about, to what extent are the personnel laws going to be applied? Will the Secretary of an agency voluntarily agree to those provisions to be enforced?

I do know that in the Department of Defense as well as in certain portions of Homeland Security, for instance, the prohibited personnel practices, especially whistleblowing rights, will still apply. So I think it is important that any bill that comes out spells out and is very clear about the need for employees to be informed of their rights and to specifically have this delegated to the agency officials.

Senator AKAKA. Thank you. Federal employees are entrusted to serve the American public by helping the Nation prevent and recover from terrorist attacks, fighting crime and diseases, improving our economy, and protecting the environment. As such we must provide them with adequate protections for coming forward with information vital to an effective government. Based on your background and your experience in whistleblower issues, are there elements of any State or other whistleblower system that you believe should be included in the WPA?

Mr. BLOCH. Thank you, Senator. I have reflected on this and the thing that concerns me most is that when you look at State law whistleblower claims, the common law in the majority of States in the United States, and certainly in the Midwest region where I was most familiar with, you find a sense in which the courts and the law that has developed has required employees to jump through hoops, and to use magic words and magic procedures, and that if

they do not there is a sense of gotcha. I think the law should not be that way. I think the law has always been and always needs to be evenhanded, non-discriminatory, and not tilted in a particular person's direction or company's direction.

So I think it is important, it is vital that the law reflect that sense of evenhandedness, and fairness, especially in the whistleblower area where there seems to have developed a kind of accretion of requirements that are not in the spirit of what a whistleblower is, which is someone who believes in accountability and who is actually trying to help the public or the company, or the government in this case, and yet they are retaliated against and punished, and that is wrong.

Senator AKAKA. Thank you for that response, and thank you for your other responses, Mr. Bloch.

Thank you, Mr. Chairman.

Senator FITZGERALD. Thank you, Senator Akaka. I may just ask one more question before we are going to have to go into another hearing on actually a revision to the whistleblower laws. We are going to be considering a bill Senator Akaka is sponsoring.

I wanted to ask you about veterans. Your responsibilities will include protecting the rights of veterans. They do get a preference for government employment. There will be a lot of reservists and servicemen and women who will be returning from Iraq and Afghanistan. How do you plan to protect the re-employment rights of veterans and reservists under the law?

Mr. BLOCH. Thank you, Senator. I believe that protecting the rights of reservists, veterans, is very important to our country and to our integrity as a government. Just today or yesterday, I believe, there was an article in the *Washington Post* that reflected a problem with enforcement of the Uniformed Services Employment and Re-employment Rights Act, as well as veteran preferences. Since approximately a year ago there have been something in the order of 1,300 returning reservists and veterans from service to our country who have not been returned to their jobs or have not been given the employment benefits to which they are entitled. Very much like the whistleblower situation, we have people who are being, in a sense, punished for having served the public good and the country. We cannot do this.

So I feel committed to this area as well as the other areas of the office, and we have tools within the Special Counsel's law office, if I am lucky enough to be confirmed, that I can utilize such as the prohibited personnel practices concerning veterans preferences, 2302(b)(11) as well as the USERRA Act. We have, to my understanding—the staff has told me at OSC that we have a good relationship with the vets office at the Department of Labor where they are now currently mounting a campaign to bring awareness to the public. I think their slogan is, "They Did Their Job. Let's Give them Their Jobs Back," or something to that effect. I fully support that. I will enforce the USERRA laws as well as veterans preferences vigorously.

Senator FITZGERALD. Thank you very much, Mr. Bloch. Very good answers to our questions. I appreciate your appearance here today, and congratulate you and your family on your nomination. Please extend our good wishes to the rest of your children, all five of them

who couldn't be here, and good luck to you. We appreciate you having come today.

Without objection, the hearing record will remain open for any additional statements or questions from Senators through 5 p.m. on Tuesday, November 18, 2003.

If there is no further business to come before the Committee, this nomination hearing is adjourned and we will now take a 5-minute break while staff prepare for the legislative hearing on S. 1358.

Thank you very much.

[Whereupon, at 2:47 p.m., the Committee was adjourned.]

APPENDIX

OPENING STATEMENT OF SCOTT J. BLOCH FOR NOMINATION HEARING FOR SPECIAL COUNSEL IN OFFICE OF SPECIAL COUNSEL BEFORE THE SENATE GOVERNMENTAL AFFAIRS COMMITTEE:

Thank you, Mr. Chairman, members of the committee. I am grateful and deeply honored by the nomination of the President of the United States to the Office of Special Counsel. I am equally honored by the introduction from Senator Brownback from my great state of Kansas and his and Senator Roberts' support of my nomination to this honorable position within our federal government. I would like to take this opportunity to thank members of my family for being here, my wife, Catherine, and my daughter, Mary, whose confirmation ceremony I attended last Monday at our Church. Now she is reciprocating. My daughter Beatrice is also with me here. I have five other children who could not be here. My youngest, Anna, celebrates her first birthday today. I'm most disappointed that my oldest son, Michael, who is a Marine and just returned from Iraq, could not be here because he had to report back to duty in California. I honor him for his service to our country. Last but certainly never least, my brother, William Bloch, a plaintiff's employment attorney in Los Angeles, who took the red eye flight to be here with me.

The challenges to the Special Counsel are daunting, but not insurmountable. If you honor me with confirmation to this position, I will do my utmost to carry on the high standards of integrity and efficiency of the Office of Special Counsel if I am confirmed. As I reflect today on my background which has prepared me for this challenge, I am reminded that I grew up with an understanding of the importance of the underdog. My father was a lifelong member of a union, the Writers Guild of America, and he taught me the need for protections for those who are trying to earn a living for their families, who stand as a lone voice against a powerful industry. In my law practice, I learned to champion the small worker and found this work to be the most rewarding of my legal career. That sense of justice and the rule of law inspired me to come to Washington for a career in public service; it continues to inspire me in this new position for which I have been nominated.

In Plato's Republic, Socrates asks whether justice is merely the will of the stronger. Socrates was the gadfly of Athens and may have been the first whistleblower, for he exposed official corruption and called for real justice based on principle, based on each person's due. OSC stands as a gadfly to those who would impose their will on the weaker, who would punish whistleblowers for exposing corruption, waste, and illegality that endanger the public. OSC stands as a guardian of justice and accountability in the executive branch. Responsible government is vital to the functioning of our country. The Founders of our nation set up a system of self-government with checks and balances. From the important protections of whistleblowers and civil and political rights of employees, to enforcing the Hatch Act, to protecting reemployment rights and veterans preferences for those who are literally putting their lives at risk for our liberty and the liberty of others throughout the world -- I see this office as being part of the system of checks and balances and part of an ethical, self-governing nation.

I look forward to helping protect our country and the important work of nearly 3 million civilian employees in the executive branch. I look forward to working with you, Mr. Chairman, and the members of this committee, and the professional staff at OSC, to improve the merit system of civil service. I thank you Senators for this opportunity to appear before you and to answer your questions.

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES

A. BIOGRAPHICAL INFORMATION

1. **Name:** (Include any former names used.) Scott J. Bloch. Former name, Scott J. Black, from birth until 1975.

2. **Position to which nominated:** Special Counsel, The Office of Special Counsel.

3. **Date of nomination:** June 26, 2003.

4. **Address:** (List current place of residence and office addresses.) Home:
Office: US Department of Justice, Ste 4413, 950 Pennsylvania Ave, NW, Washington, DC 20530.

5. **Date and place of birth:** September 19, 1958, New York, NY.

6. **Marital status:** (Include maiden name of wife or husband's name.) Married to Catherine A. Bloch, nee Catherine A. Chalfant

7. **Names and ages of children:**

8. **Education:** List secondary and higher education institutions, dates attended, degree received and date degree granted.

William Howard Taft High School, Woodland Hills, CA, attended 1973-76, diploma awarded June 1976
University of Kansas, Lawrence, KS, attended 1976-80, BA awarded May, 1980
University of Kansas School of Law, Lawrence, KS, attended 1983-86. JD awarded May 1986.

9. **Employment record:** List all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment. (Please use separate attachment, if necessary.)

Painter, independent contractor, June, 1980-November, 1980
Clerk, Seven Eleven Stores, Toluca Lake, CA, February 1981-June 1981
Proofreader/copywriter, Arlcee Advertising, Kansas City, MO, July, 1981-June 1982
Asst Manager, Wal Mart Stores, Corpus Christi, TX, August, 1982-December, 1982
Assistant, Café Regal, Kansas City, MO, March, 1983-May, 1983
Painter, independent contractor, Kansas City, MO, February to March, 1983
Copywriter, scheduler, Cherokee Advertising, Lenexa, KS, June 1983-August, 1983
Clerk, Law library, University of Kansas, Lawrence, KS, October, 1983-April, 1984
Law Clerk, Foulston, Siefkin, Powers & Eberhardt, Wichita, KS May-August, 1984
Law Clerk, Seyfarth, Shaw, Fairweather & Geraldson, Los Angeles, CA, June-August, 1985
Law Clerk, Petefish, Curran & Immel, Lawrence, KS September, 1985-October, 1985
Law Clerk, Stevens, Brand, Lungstrum, Golden & Winter, Lawrence, KS October, 1985-May, 1986
Graduate Teaching Assistant, University of Kansas School of Law, Lawrence, KS January-May, 1986
Associate Lawyer, Stevens, Brand, Lungstrum, Golden & Winter, Lawrence, KS May, 1986-May, 1989
Partner, Stevens, Brand, Lungstrum, Golden & Winter, Lawrence, KS May, 1989-October, 2001 (in or around 1990, the firm changed names to Stevens, Brand, Golden, Winter & Skepnek, and in 1993 or so, changed its name to Stevens & Brand, LLP)
Associate Director & Counsel, Task Force for Faith-based and Community Initiatives, US Dept Justice, Washington, DC November 2001-January, 2003
Deputy Director & Counsel, Task Force for Faith-based and Community Initiatives, US Dept Justice, Washington, DC January, 2003 to present

10. **Government experience:** List any advisory, consultative, honorary or other part-time service or positions with federal, State, or local governments, other than those listed above.

As an attorney with Stevens & Brand, LLP, noted above, I represented state and local government in an advisory capacity, and also in a litigation capacity on a broad variety of employment and contract matters.

11. **Business relationships:** List all positions currently or formerly held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.

Current positions:

Member, Templeton Productions, LLC, a Kansas limited liability company dedicated to production of documentary on the life and art of my grandfather, Albert Bloch.
Member, AB Investments, LLC, a Kansas limited liability company that invests in apartments and Commercial real estate in Topeka, KS, and Lawrence, KS, and Kansas City, Missouri area
Trustee, Anna F. Bloch Revocable Trust, my grandmother's trust that pours over into the Albert Bloch Foundation, both of which are dedicated to preservation of the collection of the writings and art of Albert Bloch, an American expressionist painter.

Former positions:

Stevens & Brand, LLP, I was a partner in this law firm from 1989 until October 29, 2001
Adjunct Professor, University of Kansas School of Law, 1996-2001
Albert Bloch Foundation, a Kansas private foundation. I was Secretary/Treasurer and member of The Board of Directors from June, 2000 until December, 2001.
Wind River Partners, a verbal partnership with a friend for the purpose of purchasing jewelry stores in Santa Fe, NM, which was disbanded when the purchase fell through.
Phoenix Investments, LLC
Catholic Families, Inc, a charitable organization for which I was an incorporator in or around 1988 and have had no involvement in since
St. Joseph Academy, Inc., a charitable organization to organize and run a primary school. I was chairman of the Board of Trustees and the incorporator, from 1990-1994.
Our Lady of the Annunciation of Clear Creek Monastery, a charitable organization to found a Benedictine monastery near Tulsa, Oklahoma. I was on the Board of Directors from 1999 until 2001.
BBK Investors, LLC, member of a limited liability real estate investment company in Los Angeles, CA, dissolved. I was a member of that company for six months in approximately 1997.

12. **Memberships:** List all memberships and offices currently or formerly held in professional, business, fraternal, scholarly, civic, public, charitable and other organizations.

Current memberships:

Hilaire Belloc Society, an informal scholarly dinner society, Secretary.

Former Memberships:
Rotary Club International, 1989 to 2001, Lawrence, KS
American Bar Association, 1986-2002
Douglas County Bar Association, 1986-2001
American Trial Lawyers Association, 1986-2001
Kansas Trial Lawyers Association, 1986-1996
International Hilaire Belloc Society, 1996-2001, American Liaison, 1996-1999
Member, Advisory committee, Saint Gregory's Academy, Elmhurst, PA, advising Headmaster and Assistant Headmaster on school policy and legal issues, 2001-May, 2003

Catholic Law Students, member, 1983-1986
Catholic Law Students, faculty advisor, University of Kansas School of Law, 1999-2001
United Way of Douglas County, campaign captain, 1990

13. **Political affiliations and activities:**

(a) List all offices with a political party which you have held or any public office for which you have been a candidate.

Campaign Chairman, Hodges for Congress, Ottawa, KS 1990
Steering Committee, Tonkovich for District Attorney, 1996-2000

(b) List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.

Precinct Committeeman, Republican Central Committee, Lawrence, KS 1992-1995

(c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $50 or more for the past 5 years.

$50 to Phil Kline for Congress, 2000

14. **Honors and awards:** List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements.

Graduated from William Howard Taft High School with High Honors
Writing Awards for critical and creative writing at the University of Kansas
Honors program and Deans Honor List, University of Kansas
Graduated from University of Kansas School of Law Order of the Coif
Award for top Law Review note, 1986, University of Kansas School of Law
Am Jur Award for top grade in Torts I, II, and Criminal Law at University of Kansas School of Law
Lincoln Fellowship, Claremont Institute, 2002 fellow

15. **Published writings:** List the titles, publishers, and dates of books, articles, reports, or other published materials which you have written.

Belloc Redivivus, book review for *Crisis Magazine*, March 2003
The First Amendment and the Demise of Discourse, Proceedings and Notes, Washburn University School of Education, delivered at a 1999 seminar
Employee Issues Seminar, handbook section on Americans with Disabilities Act and Implied Contract, Retaliation and Whistleblower actions, for City of Lawrence, KS, 2000
Employment discrimination seminar handbook on Americans with Disabilities Act, Implied Contracts And Whistleblowing Actions, Overland Park, KS, for NBI legal Seminars, 1998
Son of Gilligan, column in 1991*Caelum et Terra* magazine
Apocalypse Soon, column in 1993*Caelum et Terra* magazine
Sinless Smoking, column in 1989 *Shakespeherian Rag* magazine
On Naming One's Son, column in 1990 *Shakespeherian Rag* magazine
The Public Safety Exception to Miranda, 33 Kansas Law Review Vol 3, 1986
Where Have All the Porches Gone, commentary for *The Toreador*, high school newspaper

16. **Speeches:** Provide the Committee with four copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated.

I have no copies of such speeches, which include continuing legal education power point presentations on employment law issues.

17. **Selection:**

(a) Do you know why you were chosen for this nomination by the President?

It is my belief that I was chosen because of my record of commitment as a practicing attorney for fifteen years representing individuals and organizations in the following areas: civil rights, 1983 actions, ADA, ADEA, Title VII, FMLA, state law whistleblowing and retaliatory discharge actions, constructive discharge, breach of implied contract, FLSA, and other employment law areas, as well as my record of commitment to lawyer ethics in litigation against lawyers accused of violating their ethical obligations, and my work as chair of the grievance committee for our county, and hearing cases on the Kansas Board of Discipline of Attorneys. I demonstrated this commitment to ethics and integrity in litigation against prominent law firms accused of unethical or illegal conduct. I am conversant with investigation and prosecution, as well as acting as a hearing officer, on cases involving violation of lawyer ethics, which is analogous to the functions of the Office of Special Counsel performs. For the last two years, my current position has provided me with a background in working with multiple components of an agency to identify barriers and mediate complaints or requests from religious and community organizations, give speeches to various groups around the United States, educate career and political officials in the initiative, and work closely with other agency on interagency initiatives and reduction of barriers.

(b) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

For the reasons in (a) above.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?

Yes, with the exception of AB Investments, LLC where I am a passive investor, Templeton Productions, LLC where I am a passive member on the production of a documentary, which is nearing completion, and my grandmother's trust, whereI am a passive trustee (one of six).

2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain.

No.

3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization?

No.

4. Has anybody made a commitment to employ your services in any capacity after you leave government service?

No.

5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is

applicable?

Yes.

C. POTENTIAL CONFLICTS OF INTEREST

1. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

   None.

2. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy other than while in a federal government capacity.

   I testified before a state legislative committee in Kansas for the Lawrence Apartment Association about 7 years ago.

3. Do you agree to have written opinions provided to the Committee by the designated agency ethics officer of the agency to which you are nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position?

   Yes.

D. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.

   Yes. An individual filed a broad-based complaint against all attorneys on the other side of a case in which he was acting as his own counsel. He alleged that all counsel had conspired to take his property, which was essentially true, since he had no right to his property because of a divorce decree, if I recall correctly. I believe I was representing a lienholder of a mechanic's lien on the property. The Kansas Disciplinary Administrator did not even docket the complaint or have it investigated, but dismissed it as having no probable cause.

2. To your knowledge, have you ever been investigated, arrested, charged or convicted (including pleas of guilty or nolo contendere) by any federal, State, or other law enforcement authority for violation of any federal, State, county or municipal law, other than a minor traffic offense? If so, provide details.

   No.

3. Have you or any business of which you are or were an officer, director or owner ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.

   Yes.

   (a) 10/1999 McCarthy and Bloch v. Cross Enterprises, Inc., Michael Cross, David Cross, George Margioukla and Spiro Petritsis, Albuquerque, NM Bernalillo County District Court: we alleged that defendants committed breach of fiduciary duty, aiding and abetting breach of fiduciary duty,

fraud, breach of contract; I was in partnership with McCarthy for the prospective purchase of jewelry stores in Santa Fe, New Mexico. Case settled in our favor at mediation.

(b) 05/1999 Scott and Catherine Bloch v. Doug and Brenda Ohlemeir, Douglas County, KS District Court: adjoining landowners created nuisance by causing massive runoff of water onto our rental property. We obtained summary judgment in our favor, which resolved the case.

(c) 01/1996 Katherine Milliken v. Stevens, Brand, Golden, Winter & Skepnek, et al., Harris County, TX District Court: Milliken sued my law firm and each partner individually claiming that she was owed reimbursement for services out of proceeds of a settlement in Houston, TX, and that she provided to our client psychological services, which were proved to be fraudulent, and she was already paid what she was entitled to. I was joined in the lawsuit not for any conduct of my own, but just by virtue of my being a partner in the firm. We won at trial and then we won on appeal.

(d) 06/1992 Umphrey, Burrow, Reaud & Williams v. Stevens, Brand, Golden, Winter & Skepnek, et al., Harris County, TX District Court: Umphrey Reaud firm sued my law firm and each partner individually claiming that they were defamed and that we interfered with their contract with their clients. This lawsuit followed a suit we had filed against them as a firm and individually claiming they had been guilty of breach of ethics and negligence in representing fifty clients in a mass disaster case. I was joined in the lawsuit not for any conduct of my own, but just by virtue of my being a partner in the firm. No discovery or trial was conducted, and the defendants dismissed the claims after we settled with them on our law suit against them.

(e) 01/2001 United States v. State of New Mexico Engineer, et al., Case No. Civ. 01-0072 filed 01/19/2001: My wife and I were named along with several hundred land owners in Zuni River Basin of New Mexico because we own 40 acres of vacation land in the Zuni National Forest, and not due to any conduct on our part. We were never served to the best of my knowledge, and the case was stayed and is not active at this time.

4. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

Nothing additional.

E. FINANCIAL DATA

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

AFFIDAVIT

Scott J. Bloch, being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.

Scott J. Bloch

Subscribed and sworn before me this 7th day of July, 2003.

Notary Public
D.C.

My Commission Expires 2/29/04

U.S. Senate Committee on Governmental Affairs
Pre-hearing Questions for the Nomination of
Scott Bloch to be Special Counsel,
Office of Special Counsel

I. Nomination Process, Conflicts of Interest, Qualifications

1. **Why do you believe the President nominated you to serve as Special Counsel, Office of Special Counsel (OSC)?**

It is my belief that I was chosen because of my record of commitment as a practicing attorney for fifteen years representing Individuals and organizations in the following areas: civil rights, 1983 actions, ADA, ADEA, Title VII, FMLA, state law whistleblowing and retaliatory discharge actions, constructive discharge, breach of implied contract, FLSA, and other employment law areas, as well as my record of commitment to lawyer ethics in litigation against lawyers who had violated their ethical obligations, and my work as chair of the grievance committee for our county, and hearing cases on the Kansas Board of Discipline of Attorneys.

I demonstrated this commitment to ethics and integrity in litigation against prominent law firms accused of unethical or illegal conduct. I am conversant with investigation and prosecution, as well as acting as a hearing officer, on cases involving violation of lawyer ethics, which is analogous to the functions of the Office of Special Counsel performs in that they involve breach of trust, abuse or unauthorized exercise of power. For the last two years, my current position has provided me with a background in working with multiple components of an agency to identify barriers and mediate complaints or requests from religious and community organizations, give speeches to various groups around the United States, as well as educate career and political officials in the initiative. My current position has afforded me an insight into and working knowledge of many federal agencies through interagency initiatives, which I believe would serve me well at OSC if confirmed.

2. **Were any conditions, expressed or implied, attached to your nomination? If so, please explain.**

No.

3. **What specific background and experience affirmatively qualifies you for this position?**

My background and experience as a trial lawyer and litigator in employment law issues for fifteen years on behalf of individuals and organizations affirmatively qualifies me. This background includes representation of individuals and government in

employment related issues, appearing before administrative agencies, juries, courts and appellate courts on a wide array of civil rights, employment, retaliation, and whistleblower claims. It also includes my leadership in issues of lawyer ethics in litigation as well as pro bono activities for the bar association and Supreme Court of Kansas, my teaching continuing legal education seminars on public policy law exception suits (including whistleblower), ADA, and other employment and writing experience in law.

I would also include my experience as an attorney for the past two years in the Justice Department in working among departmental components to achieve consensus on pilot programs and administrative changes, as well as performing outreach to the public, within the government, and working with other departments on inter-agency programs and fund sharing. I was responsible creating a pilot program for prisoner reentry, including designing the program, locating funding, and working with community groups as well as law enforcement to establish working partnerships.

I was a law clerk after my second year of law school at Seyfarth, Shaw, Fairweather & Geraldson, a national labor law firm, where I worked in employment and labor issues for the summer and received an offer of permanent employment. I worked on trial and appellate employment law issues as an intern after my first year of law school at Foulston & Siefkin, a large firm in Wichita, Kansas, and received an offer of permanent employment there as well. For the last five years of practice , I served as Chief of Litigation, forging policy, training litigation associates, collaborating with other lawyers in the office to oversee all litigation aspects of the firm's practice, including chairing litigation meetings and suggesting and implementing ways to improve the litigation practice. See also answer to Question 1, supra.

4. **Have you made any commitments with respect to the policies and principles you will attempt to implement as Special Counsel? If so, what are they and to whom have the commitments been made?**

No.

5. **If confirmed, are there any issues from which you may have to recuse or disqualify yourself because of a conflict of interest or the appearance of a conflict of interest? If so, please explain what procedures you will use to carry out such a recusal or disqualification.**

None of which I am presently aware.

II. Background and Experience

1. **What is the general nature of your litigation experience? In your litigation experience, have you appeared before an administrative body?**

The general nature of my litigation experience is presiding over jury trials, bench trials, hearings on motions, evidentiary hearings, depositions, inquests, preparing interrogatories, preparing hearing statements, appearing before state district courts, federal district courts, state appellate courts and federal circuit courts in Kansas, Missouri, Texas and California in employment, civil rights, personal injury, medical malpractice, complex contract, and products liability cases, as well as some criminal and probate matters.

Yes, I have appeared before many administrative bodies in writing and in person including EEOC, Federal Workers Compensation Appeals Board, the U.S. Social Security Administration Kansas Human Rights Commission, Missouri Civil Rights Commission, Kansas Department of Human Resources (and Board of Appeals), AAA arbitration panels, City of Lawrence Human Relations Commission, Missouri Employment Division, Kansas Department of Revenue, Division of Vehicles, Kansas Workers Compensation Division, Missouri Workers Compensation Division, Kansas Department of Transportation, and the Kansas Board of Healing Arts.

2. **In response to question 17(a) of the Committee's biographical questionnaire for nominees, which asks why you were chosen for this nomination, you cited your record as a practicing attorney representing individuals and organizations in many areas of employment law, including "state law whistleblower and retaliatory discharge actions." Please describe this part of your experience, including the most significant of those whistleblower and retaliatory discharge matters and your involvement in them.**

Under Kansas and Missouri law, I brought or defended numerous state law public policy exception cases under the rubric of retaliation for whistleblowing, testifying, bringing workers compensation claims, and union activity. Over a period of the last seven years of my practice, I represented nearly a dozen people against K Mart Corporation for retaliation for exercise of rights, including filing of workers compensation claims, and seeking medical treatment for injuries on the job. These were a significant portion of my practice in some of those seven years, resulting in verdicts or settlements against K Mart, as well as an appeal to the Tenth Circuit Court of Appeals.

I represented a national plastics manufacturer in defending several retaliation cases, including several for retaliation for filing of workers compensation, one for testifying in a court case, another for whistleblowing for illegal acts to the state of

Kansas. I also represented a Kansas corporation in OSHA whistleblowing matters, which were ultimately resolved with OSHA and the employees involved without resort to litigation. I represented Douglas County, Kansas, the State of Kansas Corporation Commission, and the Lawrence, Kansas School Board in numerous employment matters, including political firing, retaliation for reporting of violations of policy or state law, none of which went to trial but were successfully mediated or settled.

My most recent and significant representation concerning whistleblowing recently concerned several union employees of Farmland Industries who brought to the attention of the company and outside investigators from OSHA significant dangers to safety and health of 130 employees of the nitrogen plant in Lawrence, Kansas. I represented many of those people who were being harassed for their reporting, as well as their actitivity in the OCAW union local, and their opposition of the company in an NLRB proceeding. Before I could bring suit, the company declared bankruptcy and is currently in bankruptcy, selling off assets of the company.

The last whistleblower case I worked on prior to coming to Washington, D.C., went up to the Kansas Supreme Court. Specifically, the claim was that the client blew the whistle on safety violations by his employer involving firearms and the US Mail system and was retaliated against and fired for pretextual reasons. The case was trying to advance the law beyond its current status in Kansas by allowing whistleblower claims even when the alleged safety violations are determined ultimately not to be violations, and when the employee reports such potential violations to a third-party provider such as UPS. The Supreme Court refused to extend the law or read the facts as falling within a line of cases recognizing good faith whistleblower claims.

I advised numerous corporate and small business clients, as well as government, over the fifteen years as my firm's employment expert on the consequences of retaliating against employees who reported illegal activity, dangerous health or safety conditions, or mismanagement. Instead, I advised in many cases that the best course of action was to remedy any problems in the plant or office and to make sure they did not give rise to a claim of retaliation.

3. **In your work representing state and local governments, which you referenced in response to question 10 of the Committee's biographical questionnaire, did you participate in the development of any policies, forms, or agreements governing employee disclosures of information evidencing illegality, waste, fraud, abuse, or other topics covered by statutes or regulations similar to the federal Whistleblower Protection Act? If so, please describe your role in the process and please provide a copy of the policy, form, or agreement adopted by the state or local government.**

I do not recall that I participated in the development of any forms or agreements, but I did help clients to formulate better policies regarding workers compensation,

reporting of injuries, reporting of unsafe conditions, reporting of OSHA violations, and the like. None of these were of the kind called for in the Whistleblower Protection Act. I do not possess any copies of such handbooks or policies or procedures and cannot recall specifically for which employers I worked on such handbooks or policies, except for one. I recall helping redraft the large plastics manufacturer's human resources book and reviewed and possibly helped to rewrite policies for Douglas County and other employers whose names I cannot recall. I believe I worked on an audit of several other manufacturing plant's manuals and/or policies.

4. **In response to question 17(a) of the Committee's biographical questionnaire, you stated that you are "conversant with investigation and prosecution, as well as acting as a hearing officer, on cases involving violation of lawyer ethics, which is analogous to the functions of the Office of Special Counsel performs." Please describe the most significant of those cases and your involvement in them, and explain how this experience helps to demonstrate your qualification for the position of Special Counsel.**

Over a period of thirteen years, I was hearing officer on numerous cases that resulted in severe attorney discipline and/or suspension or disbarment. These cases involved dishonesty in taking advantage of clients, borrowing client money and not returning it, refusing client inquiries on status of cases and berating clients, allowing claims to lapse, threatening clients with adverse action, lying to tribunals and courts, and flouting the authority of the ethics board of which I was chair. Many of attorneys I had to investigate or whose investigations I had to write reports on or on which I had to make referrals to the state Disciplinary Administrator, were local attorneys with whom I practiced, and in some cases, with whom I had a friendly professional familiarity.

Likewise, I brought significant claims in civil court in Missouri and in Texas against highly prominent and publicly visible attorneys. In Texas, my partner and I spearheaded litigation against some of the wealthiest plaintiff's lawyers in the world for their unethical group settlement in violation of Texas Rules of Professional Conduct. In the course of representing sixty plaintiffs who were victims in one of the worst industrial accidents in history (the Phillips 66 explosion in Houston in October 1989), we made new law in the Texas Supreme Court that forced rich plaintiff's lawyers to represent their clients ethically in mass disaster tort cases. In another celebrated case in Kansas City, I sued on behalf of a former partner one of the larger and better known established law firms for widespread unethical behavior in the firm. In both cases, I was successful monetarily, but more importantly, successful in changing the practice of the lawyers. My involvement in these cases was controversial and not always popular.

The Office of Special Counsel requires an independence that will permit the Special Counsel to take actions that certain officials may not condone, or that could be looked upon with disdain by others. The Special Counsel must be an independent

defender of the merit system, employee rights, and efficient government. The Special Counsel must uphold integrity and ethics above all. In this sense, my work in lawyer ethics and bar investigations would inform the types of investigations and referrals I may be engaged in at the Office of Special Counsel.

5. **You were awarded a 2002 Lincoln Fellowship from the Clarement Institute. Please describe this fellowship. On what basis was it awarded? Did you apply, or do you know who sponsored you? What benefits or activities are associated with the fellowship?**

The Claremont Institute Lincoln Fellowships are offered to young professionals serving elected officials or appointed policy-makers in the federal government and places special emphasis on the statesmanship of Abraham Lincoln, and the principles of the founding of the United States of America, including the Declaration of Independence, the Constitution, and the Federalist Papers. The fellowship involves an intensive set of seminars over a week period, with talks from a faculty, and the fellows reading materials on the founding documents of the American Republic, discussion and meals. The fellowship was awarded based on a recommendation from others and my application. Written recommendations were given to Claremont Institute by Professor David M. Whalen and Andrew Emrich. The only benefits were the enjoyable stay at a hotel in California, stimulating seminars from highly qualified faculty, dinners, and an occasional lecture and banquet in Washington, D.C. for former fellows.

III. Role and Responsibilities of Special Counsel

1. **What do you consider to be role of the Special Counsel of the Office of Special Counsel?**

OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing, and providing a secure channel for whistleblower disclosures. The Special Counsel is the leader, manager, and responsible official in the Office of Special Counsel who must set the tone for vigorous enforcement of the statutes OSC is required to enforce, to act as ambassador to the public and the federal departments under its jurisdiction concerning its policies for encouraging disclosures, protecting whistleblowers, protecting federal employees and applicants from PPPs or reprisal for whistleblowing, and to uphold integrity and ethics in government by reducing waste, abuse, unsafe conditions, mismanagement, fraud, prohibited personnel practices, and illegal political activity. The Special Counsel must also run the office and make certain that fairness, quality, and efficiency combine to serve those who avail themselves of the protections of the office.

2. **How do you envision your relationship and your duties as they relate to the Merit Systems Protection Board?**

Both MSPB and OSC work to safeguard the merit system of the civil service. OSC works hand in glove with MSPB to ensure the principles of the merit system as set forth in 5 U.S.C. § 2301. OSC must appear before the MSPB when OSC determines a case merits corrective or disciplinary action. Due to its investigative and prosecutorial roles, OSC stands in much the same relationship to MSPB as a US Attorney does who prosecutes cases before a federal district court. For that reason, OSC should not be seen as taking its cues from MSPB, and MSPB cannot be seen as being one with OSC. Both work to uphold the integrity of the merit system. OSC can and should meet with MSPB on important issues, and appear together on panels at seminars and conferences. I know that this has occurred in the past, and I plan to continue that relationship.

3. **How do you envision your relationship and your duties as they relate to the Office of Personnel Management?**

I envision working collaboratively with OPM on technical issues, such as regulations applying to agencies in carrying out statutes. OPM has the sole agency authority, under current statutes, to appeal a decision of MSPB after it intervenes in a case and determines the case may have a "substantial impact" upon the administration of the civil service law. It is my understanding that some significant investigations have come from OPM that OSC has taken on and prosecuted and/or settled. For these reasons, I believe it will be critical to have a good working relationship with general counsel and with the Director of OPM. I have met the Director and her staff on a couple of occasions and believe that we can work together on the direction of the law and the proper interpretation of civil service regulations.

4. **How do you plan to communicate to the staff in OSC on efforts to address relevant issues?**

I plan to work with my staff, to encourage their strengths, improve efficiency and the quality and amount of work product, and to give opportunities where they are earned for advancement, creativity and problem solving, so that we can fulfill the mission of OSC as a team. I will communicate with the staff in open meetings, and in one on one sessions where appropriate. I will need to address some matters through directives or memoranda when appropriate to set the policy and direction of the agency.

5. **What objectives would you like to achieve in your tenure as Special Counsel? Why do you believe these objectives are important to OSC and to the government?**

I would like to leave the federal government a better place than I left it, including

OSC. I would like to eliminate the backlog, implement procedures that ensure the backlog will not become a problem again, and uphold the rule of law by enforcing the laws under our jurisdiction equitably, forcefully, and uniformly. Without prompt and efficient processing of complaints and disclosures, OSC risks not being taken seriously by affected employees, employees on the sidelines who are watching to see how complaints are handled, and by the very managers and agencies whose conduct has resulted in complaints or problem conditions at other agencies. The rule of law and justice become nothing more than words if we allow cases to go stale. Employees cannot trust the integrity of government if they feel hung out to dry and or left to the mercy of more powerful forces in the bureaucracy.

IV. Policy Questions

1. **Do you plan to make any changes to the existing organizational structure of the Office of Special Counsel to promote the accomplishment of its goals?**

I plan to examine the current structure and functioning of OSC to determine if the current system permits undue delay or duplicative functions. I want to study the office to see if the system in place encourages wasteful investigation. I want to study the workforce of OSC to determine if employees are efficiently and effectively working to produce prompt, efficient, and fair investigation, prosecution, and resolution of claims. I want to study the ADR system to see if there is room for increased use of mediation earlier in cases. It is impossible from this vantage point to grasp all of these issues and will require careful study and deliberation.

2. **Do you believe the Office of Special Counsel has the statutory authority needed to effectively carry out its mission?**

OSC has been through several statutory expansions and amendments to its authority and scope. It is my sense that these changes have been for the good of the government and the federal employees. If confirmed, I will make it a high priority to study the issue of what changes are needed to expand or improve on the work of Congress in the past. I look forward to working with Congress to achieve the best system possible.

3. **Are there regulatory changes you might suggest, if confirmed as Special Counsel, to reduce the time for processing employee appeals?**

This is certainly something that I would look carefully at doing if confirmed. I believe it is crucial to reduce the time for processing complaints, and this should probably include appeals, but I am not conversant with the appeals process from actually

participating in it as an attorney. Anything that can be done to remove unnecessary delay will likely help employees, the merit system, and the Executive branch to get on with the mission of serving the people of the United States.

4. **The Office of Special Counsel has initiated a program focused on Alternative Dispute Resolution in an effort to seek constructive resolution prior to the initiation or completion of OSC investigations.**

What is your assessment of the use of alternative dispute resolution in general and what are your plans for the use of ADR at the OSC? Have you examined the existing program at OSC? If so, what is your opinion of it, and do you expect to continue the program?

I am in favor of using ADR when possible. I was used to mandatory ADR for any cases that came before the Kansas Human Rights Commission. This helped many cases to settle within two or three months that otherwise would have dragged on for a year or more before any ADR was considered. I realize that some disclosures or PPP allegations are complex and may be inappropriate for early mediation. I still think it merits looking at an early mediation program for all cases except the most complicated. The ADR system at OSC appears to be working well. As I understand it, about one third of all complaints are recommended for mediation from the Complaints Examining Unit (CEU) at OSC. Of these, about seventy-five percent accept mediation. Of those that accept, about eighty-nine percent achieve a successful resolution.

5. **Are there any policies or procedures at OSC that you think should be modified?**

I do not know at this time, but I will study this early on if confirmed.

6. **As you know, the Department of Defense has requested significant civilian personnel flexibilities, including modifications to the appeals process. Neither the Defense civilian personnel legislation that passed the House as part of H.R. 1588 nor corresponding legislation ordered reported by the Governmental Affairs Committee, S. 1166, would modify an employees' right to seek the advice of the Special Counsel or the authority of the Special Counsel to investigate and enforce against prohibited personnel practices, but both of those bills would, establish an internal appeals process. One of the keys to the new system's success would be education.**

If such legislation is enacted, how will OSC work with the Department of Defense and MSPB to ensure that both employees and supervisors understand the process?

It is important that DOD employees, who comprise a very large share of the

federal workforce, understand they retain their rights to be free from prohibited personnel practices. Under the new DOD bill, as I am informed, OSC will retain jurisdiction over whistleblowers under the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. § 1214 both with respect to making whistleblower disclosures and to claims of whistleblower reprisal. It will not affect whistleblowers' ability to take their individual right of action (IRA) to MSPB. What the new legislation will affect is the jurisdiction of MSPB over all previously appealable actions, including actions based on poor performance. It is my understanding that OSC will continue to have jurisdiction over all prohibited personnel practices (PPPs) in DOD.

If confirmed, I will continue and endeavor to strengthen the education and outreach program pursuant to 5 U.S.C. § 2302(c). This program is be the best opportunity to inform DOD employees that they may still come to OSC for PPPs, but in one proposal they must appeal previously appealable actions, including actions based on poor performance, internally at DOD. I will study the new bill and meet with MSPB and DOD, as appropriate, to expand the outreach program to apprise all employees of their rights, to encourage them to utilize OSC so that the full panoply of rights under the merit system are understood.

7. **The Homeland Security Act (P.L. 107-296) allows the Department of Homeland Security to waive chapter 77 of title 5, United States Code, related to employee appeals. Although the Act specifies that the Merit Systems Protection Board (MSPB) is to consult with the Department in the creation of its appeals process, the Act does not specify a similar role for the OSC. What role, if any, do you believe the OSC should play in the development of this process?**

Because it is a new department, it is important that DHS employees understand they retain their rights to be free from prohibited personnel practices, and that they have whistleblower rights. Under the new bill, as I am informed, OSC will retain jurisdiction over whistleblowers under the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. § 1214, and all employees, other than screeners under the TSA, will have all of the appeal rights enjoyed by other departments. Prior to March 1, 2003, OSC handled PPPs from TSA under a memorandum of understanding. After March 1, 2003, OSC will handle the PPPs under the DHS bill. The bill will not affect whistleblowers' ability to take their individual right of action (IRA) to MSPB.

I would use the education and outreach program under 5 U.S.C. § 2302(c), as a perfect opportunity to embed merit system principles in the department, and inform employees of their right to bring allegations of PPPs to OSC. I will study the new bill and meet with MSPB and DHS, as appropriate, to expand the outreach program to apprise all employees of their rights, to encourage them to utilize OSC so that the full panoply of rights under the merit system are understood.

Regardless of whether OSC is, by law, required to be consulted, I believe it would be incumbent upon OSC and me, if confirmed, to seek a role in the process of constructing the system for enforcement of the personnel laws because we will be charged with enforcing some of them.

8. **The Special Counsel appears regulatory before the MSPB. What is your opinion of the existing federal employee appeals process administered by the MSPB, and what recommendations, if any, do you have for altering it.**

My understanding of the process is limited to having read about it. I would like to examine it on the ground, if confirmed, to see whether the current process is effective and affords the opportunity to fully vindicate the rights of employees, but also the interests of the OSC in protecting the merit system.

9. **The OSC may seek corrective action or disciplinary action under cases it files with the MSPB. In your view, under what circumstances should OSC place a greater focus on disciplinary actions, and under what circumstances on corrective actions?**

My view is this: in all cases, the focus should be on putting the aggrieved employee back in the position he would have occupied but for the PPP. Corrective action is consistent with the purposes of protection of employees in the amendments to the Civil Service Reform Act (CSRA) and the WPA. There is a higher standard of proof for disciplinary action. Each case presents unique facts, and my sense at this point is that disciplinary action will not always be appropriate, if, for instance, the actions of the manager were not willful or egregious. Sometimes corrective action is inappropriate, when for example the employee has left federal service. This is the way in which I handled this in private practice. While in some cases back pay and other remedies at law were satisfactory, there were times when I would demand some disciplinary action against a supervisor, or through my efforts, an offending supervisor would be terminated, transferred, or demoted. The first thing one looks to is corrective action for the employee, and then to disciplinary action.

10. **In 1994, Congress enacted legislation that charged agency heads with ensuring, in consultation with the Office of Special Counsel, that agency employees are informed of the rights and remedies available to them under the Whistleblower Protection Act and other laws establishing merit system principles and prohibited personnel practices. 5 U.S.C. section 2302(c). To assist agencies in meeting this statutory obligation, the Office of Special Counsel established the 2302(c) Certification Program. The Office of Personnel Management recently announced that 2302(c) certification is a suggested performance indicator of the Strategic Management of Human Capital element of the President's Management Agenda. http://apps.opm.gov/HumanCapital/standards/lkmq3a.html**

What is your assessment of this program? Do you see any need for modifications to the certification program? Would you continue to vigorously advocate that federal agencies register for and complete the program?

Through reading and consultation with OSC staff, I am aware of the program and know that some agencies have been certified, and others not. I would like the opportunity to examine the program more closely to know how well it has worked, but I am in favor of it and would continue it. I benefited from it personally at a Schedule C briefing for Administration appointees where I learned more about the Hatch Act.

11. **Some believe that OSC faces a public information problem, as many employees in the federal government are unaware of the role of the OSC and the laws it enforces. (This situation was shown by an OPM Merit System Principles Questionnaire for FY 2002.) To help address the problem of public information, OSC has hired an "outreach specialist" to establish outreach and training programs. What would you do to increase the awareness and understanding of the OSC and the laws it enforces among federal employees, and to help agencies meet their obligations, under 5 U.S.C. § 2302(c), to inform employees of their rights and remedies?**

I am informed by OSC staff that with the development of the website, and the public information program, public information about OSC and the rights employees enjoy in the federal government has increased. This increase has been reflected in a sharp increase in whistleblower disclosures. I have experienced the public information deficit myself when executive branch employees I have talked to are not even aware of the existence of OSC. I will study ways in which the website can continue to provide education and information, and outreach and publications can increase the understanding employees have about the functions of the office.

12. **One of the prohibited personnel practices, 5 U.S.C. § 2302(b)(10), which forbids discrimination based on conduct that does not adversely affect performance, has been interpreted by various agencies, including the OSC, as prohibiting discrimination against federal workers and applicants on the basis of sexual orientation. Moreover, while the OSC generally defers to EEOC procedures for the kinds of discrimination complaints that the EEOC handles, *see 5 C.F.R. § 1810.1,* the EEOC does not enforce against discrimination on the basis of sexual orientation, and the OSC has thus assumed a central role in investigating and enforcing in cases where discrimination on that basis is alleged.**

Do agree with these existing interpretations and policies? If so, what steps will you take, if you are confirmed, to safeguard federal employees and applicants against discrimination on the basis of sexual orientation?

Congress has given OSC the authority to investigate and prosecute, including

seeking corrective and disciplinary action, for twelve enumerated categories of prohibited personnel practices defined in 5 U.S.C. § 2302(b). Under subsection (b)(10), a supervisor may not "discriminate based on personal conduct which is not adverse to the on-the-job performance of the employee, applicant, or others...." If confirmed, I will continue to enforce this section and the other sections comprising prohibited personnel practices.

13. **On June 20, 2003, the Office of Special Counsel announced that, on the basis of the results of an OSC investigation, the IRS had agreed to offer a job applicant the job he had been denied and provide backpay to a job applicant who was denied a federal position because of his homosexuality. The IRS also agreed, at OSC's request, to suspend the discriminating supervisor for 45 days, without pay, and to detail the individual to a non-supervisory position for one year. OSC said that it obtained the corrective and disciplinary action through negotiation with the employing agency.**

Do you agree with these actions of the OSC obtaining the job offer and backpay for the complainant and discipline of the offending officer?

If the basis of a failure to promote an employee is due to conduct as described in 5 U.S.C. § 2302(b)(10), the supervisor is subject to that sort of disciplinary action and corrective action. I do not have access to the investigative file and do not know the details of the case; therefore, I cannot have any informed opinion of the appropriateness of the remedy in that specific case. That the agency agreed to the actions taken indicates they also found the corrective and disciplinary action warranted under the facts presented.

14. **What remedies might you suggest in a case where a federal employee claims that he or she was passed over for promotion because certain colleagues, citing deeply held convictions, express discomfort working with the employee because of the employee's sexual orientation?**

I do not want to address hypothetical situations. I would want to confer with my staff to understand the advice we have given in the past, and any action we have taken in the past, and act based on that advice and a complete assessment of the rights of all affected parties.

15. **In March 2001, the Office of Special Counsel established the Public Servant Award Program to recognize the contributions that federal employees make to the public interest when they make significant disclosures of violations of law, rule, or regulation; gross mismanagement; a gross waste of funds; a serious abuse of official authority; or, substantial danger to public health and safety.**

Do you plan to continue this initiative?

This strikes me as a good vehicle for encouraging good public servants to go above and beyond the call of duty by putting their jobs on the line to assure public safety, efficiency, and integrity. I will study the program and assess the agency's ability to continue this. I have no intention to eliminate the program.

16. **The 1994 Office of Special Counsel reauthorization act requires the Office of Special Counsel to conduct an annual survey of individuals who have contacted the agency for assistance. Survey results are to be published in the annual report. Based on the survey results provided in OSC's FY2002 Annual Report, please describe any suggestions you have for improving customer satisfaction.**

Filing a complaint against one's employer is stressful enough without having to endure the hardships of delay and confusion as your case wends its way through the tortuous bureaucracy. I can well imagine that the backlog of cases that are taking a year or more makes some employees think they are being victimized a second time. If confirmed, I will ensure that employees are being treated with dignity, respect, and promptness.

I have been informed by OSC staff that, over the last few years, the agency has worked hard to improve written and oral communications with complainants, improving tone and content toward complainants. I will encourage more efforts along these lines to assure better customer satisfaction. I will study new ways to improve customer satisfaction with efficiency in the handling of cases. I know from private practice that often employees are most interested in knowing someone is on their side. OSC is an independent agency, but once it pursues a case after the initial determination that a reasonable likelihood exists of a PPP, then OSC should not overlook or ignore the complainants. There will always be responders who are not pleased with the outcome of investigations. As well, one expects to see in these responses a contingent of people whose complaints lacked merit and were dismissed or found to be without basis. These people will most likely be unhappy with what OSC did regardless of the quality of service provided by OSC.

17. **Over time, an increasing number of agencies have been granted personnel authorities outside of the generally applicable civil service laws set forth in title 5 of the United States Code. Do you have any recommendations as the Congress considers current and future requests for similar flexibilities? Do you believe any of the statutory roles and responsibilities of the Office of Special Counsel should be subject to modification or waiver for particular departments and agencies, or should these roles and responsibilities be retained intact governmentwide?**

If confirmed, I look forward to educating myself more to be able to contribute to the discussion on this important issue. My general comment is that it is up to Congress to

determine whether agencies are exempted from OSC's jurisdiction or from particular provisions of Title 5. Sometimes such exemptions can create a patchwork effect that is hard to follow. I would encourage Congress to maintain OSC's role when changes are made to promote uniformity and avoid confusion.

18. **In your opinion, what has been the effect of the 1994 statutory changes to the Whistleblower Protection Act? Based on your current knowledge, do you believe any changes to the whistleblower statute are warranted?**

As I understand it, the chief features of the 1994 changes resulted in the implementation of the OSC annual survey of complainants, the 240-day requirement for concluding an investigation of a PPP, and an award of attorneys fees in favor of managers of agencies against OSC if disciplinary action is sought and OSC loses. I have learned from OSC staff that the attorney fee provision of the 1994 statutory changes has resulted in a potential chilling effect in bringing disciplinary action. I must study these issues, if confirmed, and make recommendations at that time concerning any changes that I believe are warranted.

19. **The Office of Special Counsel has worked with the Transportation Security Administration, under the Department of Homeland Security, to agree upon a process for providing whistleblower protection to airport screeners. How will you ensure the Office of Special Counsel continues to have an active role as the Department of Homeland Security develops its personnel system?**

I understand that previously, OSC had a memorandum of understanding under which TSA utilized the services of OSC. Now, under the new DHS statute, OSC will continue its role in investigating and prosecuting whistleblower reprisal cases. After March 1, 2003, screeners have PPP protections under 5 U.S.C. 2302(b)(1), (8), and (9). The law will leave to the Secretary of DHS to determine what will happen with the other nine PPPs. If confirmed, I will work closely with DHS, OPM and MSPB to ensure OSC has a vital and continuing role in the development of DHS' personnel system.

20. **The Disclosure Unit is responsible for reviewing the information submitted by a whistleblower, and advising the Special Counsel whether it reveals a substantial likelihood that the type of wrongdoing described in title 5 has taken place or continues to take place. How do you plan to make sure this process complies with the intent of the law?**

The intent of the law as I understand it is to provide a secure channel for whistleblowers to make disclosures, and to address the violations of law, rule, regulation, gross mismanagement, gross waste of funds, abuse of authority, and substantial and specific danger to public health or safety. The education and outreach will ensure channel for disclosures continues to be advertised. By addressing the disclosures in a

more timely way, the intent of the law will be better fulfilled. Quality of investigation is just as important, and therefore, increased training, recruiting of more highly qualified attorneys and investigators, and dedication of greater resources of the office will be a priority of mine if confirmed.

21. **Currently, OSC is required to determine within 240 days whether or not there are reasonable grounds for believing that a prohibited personnel practice has occurred, exists, or is to be taken. Do you feel this time limit should be modified to improve workplace due process for federal employees?**

Modifying the time limit may not necessarily improve workplace due process. What will improve due process for certain is complying with the 240-day limit. I will need to study this more carefully.

22. **When investigating a whistleblower disclosure, there is sometimes tension between protecting the confidentiality of the whistleblower and the need to conduct a thorough investigation. How will you work to ensure the confidence of individuals who file disclosures with OSC while allowing a thorough investigation to proceed?**

It is the agency from which the disclosure comes that investigates whistleblower disclosures. In most cases, employees give their identities and also their consent to have their identity made known to the agency. It may be more difficult for an agency to investigate a disclosure if it does not know the identity of the whistleblower, but OSC does provide sufficient facts so that the agency knows location of the problem and enough of the actors to intelligently address the disclosure. The privacy concerns of whistleblowers are important. If confirmed, I will follow the law concerning protection of the privacy and confidentiality of the whistleblower, but when the case requires it, I will encourage the whistleblower to "go public" in the public interest and the interests of achieving the best result for the government and themselves.

23. **Do you believe any changes to the Hatch Act are warranted at this time? Do you feel the Hatch Act strikes the appropriate balance between the interests of federal employees to participate in the political process and the public interest in maintaining a civil service system based on merit?**

My sense is the Hatch Act strikes an appropriate balance since the recent amendments in 1993. The rules are fairly simple for federal employees to follow. The understanding among state and local employees, and those in the District of Columbia may be harder to follow, which requires better education and outreach. I will need to study the operation of the Hatch Act to know if there are any changes needed.

24. **In 2002, OSC made progress against its long-standing case processing backlogs, reducing the number of pending prohibited personnel practice cases older than 240**

days by 28 percent. However, due to rising intake in both the Hatch Act and Disclosure Units, backlogs increased in these units during 2002.

Recent news reports suggest that a large and growing backlog of whistleblower complaints at the Office of Special Counsel may be compromising the ability of that agency to eliminate waste, fraud, and abuse and to protect federal whistleblowers. "Backlog of Whistleblower Cases Growing, Agency Report Says," WASHINGTON POST, July 21, 2003, page A4. "Backlog of whistleblower complaints piles up," GovExec.com, July 21, 2003. Both articles quote former Special Counsel Elaine Kaplan as saying that a substantial increase in OSC staff is necessary. The President's FY2004 Budget requests funding for seven additional full time staff in both the Hatch Act and Disclosure Units to address growing backlog concerns.

Do you support the President's request for funds to increase the OSC staff? Generally, what do you believe OSC should do to reduce the backlog of cases and to enable OSC to better fulfill its mission? What additional steps do you think need to be taken to address this significant backlog while ensuring the quality of investigations and legal analyses?

I support the President's request for funds to increase OSC staff. I think the general approach to the backlog of whistleblower disclosures should be to dedicate greater resources to reducing the backlog. This is a temporary solution. Longer term solutions will be hiring more permanent professionals to investigate the claims, and implementing policies that ensure a more prompt and efficient procedure for handling claims, such as creating a special unit to address cases older than 180 days, providing incentives, setting targets for reduction of backlog, and establishing standards of employee performance to quality work combined with quicker results. Based on my review of the statistics, OSC has a steady stream of cases of PPPs, and a backlog or carryover of such cases has existed for some years, but that the problem is in the Disclosure Unit where, owing to a great increase in complaints, and a loss of positions in the agency, a severe backlog of investigations has occurred. The chief role of OSC is protection of whistleblowers from reprisal, and, therefore, most of the agency's resources are devoted to that, and not to the sorting out of whether there is a substantial likelihood that the reported wrongdoing occurred.

I am informed by staff at OSC that measures are underway to assign new staff on detail to the Disclosure Unit, expanding the use of a short form procedure to more quickly inform Whistleblowers whose allegations have not met the substantial likelihood threshold required by the statute, and recruiting of new attorneys (contingent on passage of the FY 2004 budget). If OSC can increase staff and assign more existing staff to reduction of the backlog, the situation could improve greatly. If confirmed, I will consider it a high priority to immediately begin a study to grapple with the backlog and immediately reduce it.

26. **To inform federal workers and the public about OSC's work, and significant results in prohibited personnel practices, disclosure and Hatch Act matters, the previous Special Counsel issued press releases in key cases involving significant matters. Do you plan to continue this policy?**

Yes, I plan to continue to issue press releases and to publicize key cases. Based on my experience, OSC has among the better websites in the federal government. It is user friendly, has a frequent offering in terms of press releases, and has useful materials for the public to familiarize itself with the operations and accomplishments of the agency.

27. **The Deputy Special Counsel is currently assigned to serve as liaison with frustrated practitioners or complainants, as a type of informal appeal or ombudsman when there is an impasse between career staff and those seeking OSC assistance. What is your assessment of this initiative, and will you continue it?**

I was not aware of it, and I am not sure how it has worked. I will have to become better acquainted with this procedure and determine who would be best at performing this liaison function. I am in favor of keeping open lines of communication. If confirmed, I will make sure there is a mechanism for individuals and groups to air their concerns and recommendations.

28. **The Uniformed Services Employment and Reemployment Rights Act (USERRA) authorized OSC to represent before the MSPB and U.S. Court of Appeals for the Federal Circuit, a federal employee who is a veteran or reservist, if a federal agency has failed to reemploy that person in accordance with provisions of the law. How do you plan to protect the reemployment rights of veterans and reservists under USERRA?**

My own son is a Marine and served in Iraq. I am sensitive to the rights of those in the uniformed service because they have given of themselves in ways that are hard to imagine. Staff at OSC informs me that there were four corrective actions under USERRA in 2003. They tell me that OSC has a good relationship with the VETS office at the Department of Labor who refers USERRA cases.

Owing to the larger number of veterans and reservists who have been on active duty in Iraq and Afghanistan, USERRA enforcement is likely to see a resurgence. I plan to study the issue and will enforce USERRA cases in accordance with OSC's statutory mandate.

28. **Under 5 U.S.C. § 1216(a)(3), the Special Counsel must investigate any allegation of arbitrary or capricious withholding of information in violation of the Freedom of Information Act, and may seek corrective action or disciplinary action. However,**

the OSC has never actively exercised this authority. What is your opinion about the circumstances, if any, under which this authority should be exercised, and what do you believe would be the advantages and disadvantages of exercising this authority more actively?

I am aware that OSC has a FOIA unit, that the specialist position in that unit has been vacant for some time. If confirmed, I will quickly fill that position and will make certain that cases are brought under FOIA if warranted. FOIA is important. We live in an open society, and withholding of information without cause erodes the public confidence in our government. However, the disclosure unit and investigation and prosecution divisions take precedence at OSC.

OSC staff informs me that CEU has referred cases for investigation involving arbitrary and capricious withholding of information under FOIA requests. If confirmed, I will continue investigations and prosecutions under FOIA.

V. Relations with Congress

1. **Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed?**

   Yes.

2. **Do you agree without reservation to reply to any reasonable request for information from any duly constituted committee of the Congress if you are confirmed?**

   Yes.

VI. Assistance

1. **Are these answers your own? Have you consulted with OSC or any interested parties? If so, please indicate which entities.**

   Yes, they are my own. I consulted with OSC on technical issues and accuracy of answers, and no other interested parties.

AFFIDAVIT

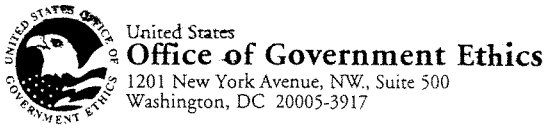
I, Scott J. Bloch, being duly sworn, hereby state that I have read and signed the foregoing Statement on Pre-hearing Questions and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Scott J. Bloch

Subscribed and sworn before me this 20th day of October 2003.

Valerie J. Jackson (D.C.)
Notary Public

My Commission expires: 2/29/04



July 22, 2003

The Honorable Susan M. Collins
Chair
Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Madam Chair:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Scott J. Bloch, who has been nominated by President Bush for the position of Special Counsel, Office of Special Counsel.

We have reviewed the report and have also obtained advice from the Office of Special Counsel concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is a letter dated June 13, 2003, from Mr. Bloch to the agency ethics official, outlining the steps which Mr. Bloch will take to avoid conflicts of interest.

Based thereon, we believe that Mr. Bloch is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

Amy L. Comstock
Director

Enclosures

Senator Daniel K. Akaka
Questions for Scott Bloch
Nominee for Special Counsel, Office of Special Counsel

1. **Senators Akaka, Grassley, Levin, Leahy, Durbin, and Dayton recently introduced S. 1358, the Federal Employee Protection of Disclosures Act. This bill would reverse certain judicial decisions restricting whistleblower protections, would grant the Office of Special Counsel (OSC) independent litigating authority and the right to apply for judicial review of certain Merit Systems Protection Board (MSPB) decisions, would strengthen OSC's power to discipline supervisors who retaliate against whistleblowers, and would make certain other changes intended to protect whistleblowers. Addressing these provisions in predecessor legislation, the former Special Counsel write, "I believe that these changes are necessary, not only to ensure OSC's effectiveness, but to address continuing concerns about the whittling away of the [Whistleblower Protection Act's] protections by narrow judicial interpretations of the law." For your convenience I have attached a copy of Ms. Kaplan's letter which was printed in the June 26, 2003 *Congressional Record.***

What is your opinion of the various provisions of S. 1358?

What is your opinion of the views expressed by the former Special Counsel?

Owing to my nomination, and the fact that this legislation is pending before the Senate, I believe it would be inappropriate for me to comment on what former Special Counsel Kaplan has said about the pending legislation or giving an opinion of my own on it. I have read it and, if I am confirmed, I will enforce it after its passage. If confirmed, I will also be in a position, due to being in the office and having requisite knowledge and experience to be able to comment and testify before this body concerning prospective legislation. I very much look forward to working with you in this important area.

2. **Some years ago, the OSC was perceived ineffectual in the area of whistleblower protection and has a poor reputation among whistleblowers.[1] In recent years, however, the agency's reputation as an advocate for whistleblowers has substantially improved. What steps will you take to ensure that OSC continues to serve as a vigorous advocate for whistleblowers and enforcer of the Whistleblower Protection Act?**

If confirmed, I will keep the current quality and amount of enforcement in place and focus on getting results in meritorious cases. Through communication with stakeholders, a vigorous outreach and certification program, and becoming an advocate for increased budget and increasing staff and reducing the backlog of disclosure and PPP cases, I can hope to raise the enforcement of the WPA to new levels. I will be active in looking at cases and making sure the backlog does not result in reduced quality of work on existing or new cases.

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[1] *See* Senate Rept. 103-358 which is attached to this document.

Questions for Scott J. Bloch, nominee for Special Counsel, Office of Special Counsel

Senator Carl Levin
October 8, 2003

1. **The Federal Circuit Court of Appeals has exclusive jurisdiction over whistleblower claims. Members of the Committee have been concerned that a number of Federal Circuit decisions have misinterpreted Congressional intent in the whistleblower law. Most notably in *LaChance v. White* the Federal Circuit stated that, in order to establish reasonable belief of gross mismanagement, the appellant had to overcome a presumption that management acted "correctly, fairly, in good faith, and in accordance with the law and governing regulations." The court said that this presumption stood unless the appellant provided "irrefragable proof to the contrary." The whistleblower law requires only that a whistleblower have reasonable belief that a violation of law, rule, regulation or gross mismanagement has occurred to be protected. Do you agree that the standard established by the Federal Circuit is inconsistent with the statute?**

   I have read *LaChance v. White*, 174 F.3d 1378 (Fed. Cir. 1999), as well as the MSPB decision on remand, *White v. Department of the Air Force & OPM*, DE-1221-92-0491-4 (Sept. 11, 2003). On remand, the Board interpreted the opinion of the Federal Circuit court in *LaChance* as relying on only one factor for determining under the objective standard whether an employees belief in wrongdoing was reasonable. The Board concluded that elevating a the presumption to the level of the sole test would undermine the reasonable belief test that has been enshrined in whistleblower law, and would set up an impossible standard. In other words, the Board determined that the "irrefragable proof" standard is not an irrebutable presumption but only one factor among many for determining whether a "disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee would reasonably conclude that the actions of the government evidence gross mismanagement."

   I do not consider it appropriate as a nominee to criticize court decisions. If confirmed, however, I will do my utmost to interpret court decisions according to appropriate legal standards to fulfill the intent of the statutes OSC enforces.

2. **Senators Akaka, Grassley, Levin, Leahy, Durbin and Dayton recently introduced S.1358 which, among other things, would overturn *LaChance* and several other Federal Circuit decisions and clarify Congressional intent in the whistleblower law. Former Special Counsel Elaine Kaplan said about an earlier version of the bill that she "firmly believed that these changes are necessary, not only to ensure OSC's effectiveness, but to address continuing concerns about the whittling away of the WPA's protections by narrow judicial interpretations of the law." Do you agree with Special Counsel Kaplan?**

Owing to my nomination, and the fact that this legislation is pending before the Senate, I believe it would be inappropriate for me to comment on what former Special Counsel Kaplan has said about the pending legislation or to give an opinion of my own on it. I have read it and, if I am confirmed, I will enforce it after its passage. If confirmed, I will also be in a position, due to being in the office and having requisite knowledge and experience to be able to comment and testify before this body concerning prospective legislation. I very much look forward to working with you in this important area.

3. **S. 1358 suspends for five years the Federal Circuit's exclusive jurisdiction over whistleblower appeals. During the five year period, the bill would allow a whistleblower to file a petition to review a final order or final decision of the Merit System Protection Board (MSPB) in the Federal Circuit or in any other federal circuit court of competent jurisdiction under existing federal venue rules (which would result primarily in filings at courts where the alleged misconduct took place). Special Counsel Kaplan supported this provision. Do you agree with Special Counsel Kaplan's support for this provision?**

Owing to my nomination, and the fact that this legislation is pending before the Senate, I believe it would be inappropriate for me to comment on what former Special Counsel Kaplan has said about the pending legislation or to give an opinion of my own on it. I have read it and, if I am confirmed, I will enforce it after its passage. If confirmed, I will also be in a position, due to being in the office and having requisite knowledge and experience to be able to comment and testify before this body concerning prospective legislation. I very much look forward to working with you in this important area.

4. **Current law permits a federal employee to file a case at the MSPB when the employee believes that a manager has taken a personnel action against the employee in retaliation for the employee blowing the whistle on possible wrongdoing. S.1358 would also make it illegal for a manager to suspend, revoke, or take other action relating to an employee's security clearance if taken because a whistleblower made a disclosure protected under the law. However, the bill limits the available relief by specifying that, while the MSPB or reviewing court may issue declaratory or other appropriate relief, it may not require a security clearance to be reinstated. Do you support providing the MSPB the authority to review a security clearance determination that a federal employee alleges has been made in retaliation for the employee's making a protected disclosure provided that the MSPB or reviewing court may not reinstate the clearance?**

Owing to my nomination, and the fact that this legislation is pending before the Senate, I believe it would be inappropriate for me to comment on what former Special

Counsel Kaplan has said about the pending legislation or to give an opinion of my own on it. I have read it and, if I am confirmed, I will enforce it after its passage. If confirmed, I will also be in a position, due to being in the office and having requisite knowledge and experience to be able to comment and testify before this body concerning prospective legislation. I very much look forward to working with you in this important area.

5. **Current law provides the OSC with no authority to request the MSPB to reconsider a decision in a whistleblower case or to seek review of an MSPB decision by the Federal Circuit. Even when another party with authority to petition for a review of a MSPB decision does so, OSC has historically been denied the right to participate in those proceedings. Further, when the MSPB misinterprets one of the laws within OSC's jurisdiction, the OSC has no right to appeal that decision. Under current law, while the OPM can request that the MSPB reconsider its rulings, OSC cannot. S. 1358 would provide explicit authority for the Office of Special Counsel to appear in any civil action brought in connection with the Whistleblower Act. In addition, it would provide OSC the authority to obtain court review of any MSPB order in a whistleblowing case if the OSC determines the Board erred and the case will have an impact on the enforcement of the whistleblower statute. In a letter to me regarding this amendment, then-Special Counsel Kaplan said she believed the change was necessary "not only to ensure OSC's effectiveness, but to address continuing concerns about the whittling away of the WPA's protections by narrow judicial interpretations of the law." Do you agree with Special Counsel Kaplan?**

Owing to my nomination, and the fact that this legislation is pending before the Senate, I believe it would be inappropriate for me to comment on what former Special Counsel Kaplan has said about the pending legislation or to give an opinion of my own on it. I have read it and, if I am confirmed, I will enforce it after its passage. If confirmed, I will also be in a position, due to being in the office and having requisite knowledge and experience to be able to comment and testify before this body concerning prospective legislation. I very much look forward to working with you in this important area.

6. **The OSC currently has the authority to pursue disciplinary action against managers who retaliate against whistleblowers. Special Counsel Kaplan said that "change is necessary in order to ensure that the burden of proof in these cases is not so onerous as to make it virtually impossible to secure disciplinary action against retaliators." S. 1358 would establish a reasonable burden of proof for OSC to meet in disciplinary proceedings. The bill would provide that, in any case in which the Board finds that a manager has committed a prohibited personnel practice under the whistleblower law, the MSPB shall impose disciplinary action if it finds that the whistleblower's protected activity was "a significant motivating factor, even if other factors also motivated" the manager's decision to engage in the prohibited personnel**

practice. The bill would also allow the manager to avoid disciplinary action if the manager "demonstrate[d], by preponderance of evidence, that the [manager] would have taken ... the same personnel action, in the absence of such protected activity." Would you agree with Special Counsel Kaplan that these bill provisions would establish appropriate burdens of proof for disciplinary proceedings?

Owing to my nomination, and the fact that this legislation is pending before the Senate, I believe it would be inappropriate for me to comment on what former Special Counsel Kaplan has said about the pending legislation or to give an opinion of my own on it. I have read it and, if I am confirmed, I will enforce it after its passage. If confirmed, I will also be in a position, due to being in the office and having requisite knowledge and experience to be able to comment and testify before this body concerning prospective legislation. I very much look forward to working with you in this important area.

7. **If the OSC loses a disciplinary case, it has to pay the legal fees of those against whom OSC initiated disciplinary action. Then-Special Counsel Kaplan has said that "the specter of having to pay large attorney fee awards...is a significant obstacle to our ability to use this important authority to hold managers accountable." S. 1358 would require the employing agency, not the OSC, to reimburse the prevailing party for attorney fees in a disciplinary proceeding. Do you support this change in the law?**

Owing to my nomination, and the fact that this legislation is pending before the Senate, I believe it would be inappropriate for me to comment on what former Special Counsel Kaplan has said about the pending legislation or to give an opinion of my own on it. I have read it and, if I am confirmed, I will enforce it after its passage. If confirmed, I will also be in a position, due to being in the office and having requisite knowledge and experience to be able to comment and testify before this body concerning prospective legislation. I very much look forward to working with you in this important area.

I have stated in a previous answer that it has been reported to me by OSC staff that there is an issue of a chilling effect on disciplinary actions when a court imposes attorneys fees against OSC due to losing in a disciplinary case, absent any showing of bad faith, lack of reasonable grounds, or vexatious litigation. I am not commenting on pending legislation when I say I am aware of prior decisions that have been made that could cause the agency not to bring disciplinary cases. If confirmed, I would certainly want to see first hand whether in practice the threat of attorney fee awards has any effect on how actual cases are handled. If it does, I would be in a position to comment from knowledge before this body.

Senator Daniel K. Akaka
Questions for the Record
Scott Bloch, Nominee for Special Counsel
Office of Special Counsel

November 12, 2003

Questions 1 and 2 of these Questions for the Record are asked to provide you an opportunity to clarify and complete your response to questions numbered 12, 13, and 14 of the Committee's prehearing questions.

1. Federal civil service statutes have long been interpreted as forbidding agencies from discriminating against employees on the basis of sexual orientation. In a memorandum to Heads of Departments and Independent Establishments, issued May 12, 1980, Alan Campbell, Director of the Office of Personnel Management (OPM), stated that federal law requires that "applicants and employees are to be protected against inquiries into, or actions based upon, non-job-related conduct, such are religious, community or social affiliations, or sexual orientation." This ruling was based on 5 U.S.C. § 2302(b), which includes, as a prohibited personnel practice, "discriminat[ion] based on personal conduct which is not adverse to the on-the-job performance of the employee, applicant or the performance of others . . . ." In March 1983, as the Department of Justice (DOJ) was apparently considering terminating an Assistant United States Attorney because of his sexual orientation, President Reagan's Assistant Attorney General Theodore Olsen offered the opinion of the Department's Office of Legal Counsel that such an action would be illegal under § 2302(b)(10). In January of 1994, OPM Director James King restated this position in a response to a letter from Congressman Barney Frank, as follows:

> "One of the list prohibited personnel practices, Sec. 2302(b)(10), provides that no employee with authority to take or direct a personnel action shall discriminate for or against any employee or application for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others. OPM has long taken the position that this prohibition applies directly to discrimination on the basis of sexual orientation."

Furthermore, OPM has published a brochure, which is maintained on its website, advising federal employees of their rights in cases of discrimination on the basis of sexual orientation: "OPM has interpreted this statute [5 U.S.C. § 2302(b)(10)] to prohibit discrimination based upon sexual orientation. Sexual orientation means homosexuality, bisexuality, or heterosexuality."[1]

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[1] http://www.opm.gov/er/address2/Guide04.asp

The Office of Special Counsel (OSC) has also adhered to this interpretation of the law. In a brochure advising federal employees about their rights, OSC states: "Under 5 U.S.C. §2302(b)(1)-(b)(12) a federal employee authorized to take, direct others to take, recommend or approve any personnel action may not: . . .

> "Discriminate against an employee on the basis of conduct, which does not adversely affect the performance of the employee (including discrimination based on sexual orientation). EXAMPLE: Supervisor Joe fires Employee Jack because he saw Employee Jack at a local Gay Pride Day event."[2]

Moreover, in a June 20, 2003, press release, the Office of Special Counsel stated that "discrimination based upon sexual orientation, or any other factor that has no bearing on an employee's ability to do the job, is irreconcilable with the fundamental principles that underlie the merit-based civil service, and should not be tolerated."

In prehearing questions while Kay Coles James' nomination was under consideration before this Committee, Ms. James was asked whether she, as OPM Director, would support this interpretation of the law, that discrimination against a federal employee based on that employee's sexual orientation is a violation of section 2302(b)(10). Her answer to this question was: "Yes."[3]

a. Do you agree with the interpretation, as expressed for more than 20 years by the Office of Personnel Management, the Department of Justice, and the Office of Special Counsel, that discrimination against a federal employee based on the employee's sexual orientation is a violation of 5 U.S.C. § 2302(b)(10)?

5 U.S.C. 2302(b)(10) prohibits discrimination "on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others...." Sexual conduct can clearly fall within the definition of conduct that is not adverse to the on-the-job performance of an employee, applicant or performance of others. I will not be selective in enforcement based on the orientation of an individual whose personal sexual conduct is at issue, and assure you that I will enforce the law as passed by Congress and interpeted by the Courts with complete impartiality.

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[2] This brochure is available on the OSC website at: http://www.osc.gov/documents/pubs/rights.htm

[3] Hearing before this Committee on the Nominations of Othoniel Armendariz to be a member of the Federal Labor Relations Authority and Kay Coles James to be Director of OPM, June 21, 2001, S. Hrg. 107-128, at page 89.

b. If confirmed as Special Counsel, would you support this interpretation of the law?

I believe the plain language of 5 U.S.C. § 2302(b)(10) is clear and understandable on its face, and I will enforce it as written and construed by the courts.

c. Do you agree with the advice provided by OSC that, if "Supervisor Joe fires Employee Jack because he saw Employee Jack at a local Gay Pride Day event," such firing constitutes an example of discrimination against the employee that is unlawful under 5 U.S.C. § 2302(b)?

Every case must be judged on its specific facts, and I will not prejudge any matter that could potentially come before me if I am confirmed. This is an important principle for someone with enforcement duties to adhere to, and I am sure you can understand why I want to be careful in my responses to hypothetical questions based on extremely limited facts. Having said that, I certainly agree with you that firing someone solely because the person is seen at an event such as the one you cited could fall within the prohibitions of 5 U.S.C. § 2302(b)(10).

2. OSC has a central role in enforcing sexual orientation discrimination protections for federal workers. Indeed, for most federal workers, it is the only independent third party remedy, as sexual orientation discrimination is not covered by the equal employment opportunity (EEO) procedures. For example, both OSC and OPM have published guidance advising federal employees and applicants who believe that a prohibited personnel practice has been committed against them that constitutes discrimination based upon sexual orientation, that they may seek assistance from OSC.[4]

   OSC has been active in the past several years in opposing discrimination on the basis of sexual orientation. OSC has reached out to groups representing gay, lesbian, bisexual, and transgendered employees to educate them of their rights and remedies against discrimination, and OSC worked closely with OPM in drafting its guide entitled "Addressing Sexual Orientation Discrimination in Federal Civilian Employment – A Guide to Employees' Rights." Moreover, OSC has brought important cases on behalf of federal workers and applicants discriminated against based on their sexual orientation.

   a. If you are confirmed as Special Counsel, would you continue these initiatives of outreach and education?

I am not familiar with the specific outreach and education efforts you have cited. I look forward to discussing them with my new staff if confirmed, and appreciate your perspective regarding them as well. If they are good and appropriate efforts to advise employees of their rights I assure you that I will support their continuance. Outreach has been a vital part of what I have done in government to date, and I understand its power and importance from having

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[4] 5 C.F.R. § 1810.1 (OSC regulations); http://www.opm.gov/er/address2/Guide04.asp (OPM brochure).

engaged in outreach within my Department as well as other Departments of the United States Government as well as to outside groups around the country. Outreach and education will be a vital part of the office if I am confirmed. It is important to ensure that all know their rights and remedies, and the procedures, especially whistleblowers for whom there are many traps for the unwary in the law. Employees need to know they have protections, that they can file complaints and disclosures of fraud, waste, abuse, and safety or health dangers, and not be reprised against, and if reprised against, they know they can come to OSC for protection. They need to know how to access the office.

b. If you are confirmed as Special Counsel, would you vigorously pursue cases alleging prohibited personnel practices based on sexual orientation discrimination?

I will vigorously uphold the law, including pursuing cases within my jurisdiction involving unlawful discrimination based on conduct -- regardless of who the individual is who has been discriminated against. I believe in fairness, evenhandedness, and nondiscrimination in employment, and in enforcement of the law. It is important that employees know that the OSC is a tough advocate for enforcement of employee rights.

3. In response to the Committee's prehearing questions (question # 9), you stated that "in all cases, the focus should be on putting the employee back in the position he would have occupied but for the PPP [prohibited personnel practice]."

Do you see any gaps in current law which prevent making the whistleblower whole? If so, do you have any recommendations for this Committee to consider to fill these gaps?

I do not have any specific recommendations at this time, although it is a topic of great interest to me. I look forward to talking to you about this topic further, if I am confirmed, after I have a chance to consult with the staff of the Office of Special Counsel. I am committed to the fair execution of these laws, and I believe whistleblowers should have all of the protections to which they are legally entitled based on reasonable belief of fraud, gross waste, gross mismanagement, abuse, illegality, or substantial and specific danger to public health and safety.

REVISED RESPONSES

Senator Daniel K. Akaka
Questions for the Record
Scott Bloch, Nominee for Special Counsel
Office of Special Counsel

November 12, 2003

Questions 1 and 2 of these Questions for the Record are asked to provide you an opportunity to clarify and complete your response to questions numbered 12, 13, and 14 of the Committee's prehearing questions.

1. Federal civil service statutes have long been interpreted as forbidding agencies from discriminating against employees on the basis of sexual orientation. In a memorandum to Heads of Departments and Independent Establishments, issued May 12, 1980, Alan Campbell, Director of the Office of Personnel Management (OPM), stated that federal law requires that "applicants and employees are to be protected against inquiries into, or actions based upon, non-job-related conduct, such are religious, community or social affiliations, or sexual orientation." This ruling was based on 5 U.S.C. § 2302(b), which includes, as a prohibited personnel practice, "discriminat[ion] based on personal conduct which is not adverse to the on-the-job performance of the employee, applicant or the performance of others . . . ." In March 1983, as the Department of Justice (DOJ) was apparently considering terminating an Assistant United States Attorney because of his sexual orientation, President Reagan's Assistant Attorney General Theodore Olsen offered the opinion of the Department's Office of Legal Counsel that such an action would be illegal under § 2302(b)(10). In January of 1994, OPM Director James King restated this position in a response to a letter from Congressman Barney Frank, as follows:

> "One of the list prohibited personnel practices, Sec. 2302(b)(10), provides that no employee with authority to take or direct a personnel action shall discriminate for or against any employee or application for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others. OPM has long taken the position that this prohibition applies directly to discrimination on the basis of sexual orientation."

Furthermore, OPM has published a brochure, which is maintained on its website, advising federal employees of their rights in cases of discrimination on the basis of sexual orientation: "OPM has interpreted this statute [5 U.S.C. § 2302(b)(10)] to prohibit discrimination based upon sexual orientation. Sexual orientation means homosexuality, bisexuality, or heterosexuality."[1]

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[1] http://www.opm.gov/er/address2/Guide04.asp

The Office of Special Counsel (OSC) has also adhered to this interpretation of the law. In a brochure advising federal employees about their rights, OSC states: "Under 5 U.S.C. §2302(b)(1)-(b)(12) a federal employee authorized to take, direct others to take, recommend or approve any personnel action may not: . . .

> "Discriminate against an employee on the basis of conduct, which does not adversely affect the performance of the employee (including discrimination based on sexual orientation). EXAMPLE: Supervisor Joe fires Employee Jack because he saw Employee Jack at a local Gay Pride Day event."[2]

Moreover, in a June 20, 2003, press release, the Office of Special Counsel stated that "discrimination based upon sexual orientation, or any other factor that has no bearing on an employee's ability to do the job, is irreconcilable with the fundamental principles that underlie the merit-based civil service, and should not be tolerated."

In prehearing questions while Kay Coles James' nomination was under consideration before this Committee, Ms. James was asked whether she, as OPM Director, would support this interpretation of the law, that discrimination against a federal employee based on that employee's sexual orientation is a violation of section 2302(b)(10). Her answer to this question was: "Yes."[3]

a. Do you agree with the interpretation, as expressed for more than 20 years by the Office of Personnel Management, the Department of Justice, and the Office of Special Counsel, that discrimination against a federal employee based on the employee's sexual orientation is a violation of 5 U.S.C. § 2302(b)(10)?

5 U.S.C. 2302(b)(10) prohibits discrimination "on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others...." Sexual conduct can clearly fall within the definition of conduct that is not adverse to the on-the-job performance of an employee, applicant or performance of others. I will not be selective in enforcement based on the orientation of an individual whose personal sexual conduct is at issue, and assure you that I will enforce the law as passed by Congress and interpreted by the Courts with complete impartiality.

The various interpretations and guidances go to show that OSC must enforce regardless of who the person is, and OSC will continue under my leadership, if I am confirmed, to look only to job performance and the merit system.

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[2] This brochure is available on the OSC website at: http://www.osc.gov/documents/pubs/rights.htm

[3] Hearing before this Committee on the Nominations of Othoniel Armendariz to be a member of the Federal Labor Relations Authority and Kay Coles James to be Director of OPM, June 21, 2001, S. Hrg. 107-128, at page 89.

b. If confirmed as Special Counsel, would you support this interpretation of the law?

I believe the plain language of 5 U.S.C. § 2302(b)(10) is clear and understandable on its face, and I will enforce it as written and construed by the courts. I will not fail to enforce if a claim of sexual orientation discrimination comes to my office that shows through the evidence the statute has been violated. I will fairly and equally apply the law to all employees.

c. Do you agree with the advice provided by OSC that, if "Supervisor Joe fires Employee Jack because he saw Employee Jack at a local Gay Pride Day event," such firing constitutes an example of discrimination against the employee that is unlawful under 5 U.S.C. § 2302(b)?

Every case must be judged on its specific facts, and I will not prejudge any matter that could potentially come before me if I am confirmed. This is an important principle for someone with enforcement duties to adhere to, and I am sure you can understand why I want to be careful in my responses to hypothetical questions based on extremely limited facts.

Having said that, I certainly agree with you that firing someone solely because the person is seen at an event such as the one you cited would fall within the prohibitions of 5 U.S.C. § 2302(b)(10). Furthermore, conduct such as being at a Gay Pride Day event, by itself, would not, in my view, affect job performance, and employers would not be able to say that being at such an event will discredit the agency or established a basis to discriminate because it makes other people uncomfortable. The federal workforce is not a place for selective discrimination.

2. OSC has a central role in enforcing sexual orientation discrimination protections for federal workers. Indeed, for most federal workers, it is the only independent third party remedy, as sexual orientation discrimination is not covered by the equal employment opportunity (EEO) procedures. For example, both OSC and OPM have published guidance advising federal employees and applicants who believe that a prohibited personnel practice has been committed against them that constitutes discrimination based upon sexual orientation, that they may seek assistance from OSC.[4]

   OSC has been active in the past several years in opposing discrimination on the basis of sexual orientation. OSC has reached out to groups representing gay, lesbian, bisexual, and transgendered employees to educate them of their rights and remedies against discrimination, and OSC worked closely with OPM in drafting its guide entitled "Addressing Sexual Orientation Discrimination in Federal Civilian Employment – A Guide to Employees' Rights." Moreover, OSC has brought important cases on behalf of federal workers and applicants discriminated against based on their sexual orientation.

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[4] 5 C.F.R. § 1810.1 (OSC regulations); http://www.opm.gov/er/address2/Guide04.asp (OPM brochure).

a. If you are confirmed as Special Counsel, would you continue these initiatives of outreach and education?

I am not familiar with the specific outreach and education efforts you have cited. I look forward to discussing them with my new staff if confirmed, and appreciate your perspective regarding them as well. If they are good and appropriate efforts to advise employees of their rights I assure you that I will support their continuance. Outreach has been a vital part of what I have done in government to date, and I understand its power and importance from having engaged in outreach within my Department as well as other Departments of the United States Government as well as to outside groups around the country. Outreach and education will be a vital part of the office if I am confirmed. It is important to ensure that all know their rights and remedies, and the procedures, especially whistleblowers for whom there are many traps for the unwary in the law. Employees need to know they have protections, that they can file complaints and disclosures of fraud, waste, abuse, and safety or health dangers, and not be reprised against, and if reprised against, they know they can come to OSC for protection. They need to know how to access the office.

b. If you are confirmed as Special Counsel, would you vigorously pursue cases alleging prohibited personnel practices based on sexual orientation discrimination?

I will vigorously uphold the law, including pursuing cases within my jurisdiction involving unlawful discrimination based on conduct -- regardless of who the individual is who has been discriminated against. I believe in fairness, evenhandedness, and nondiscrimination in employment, and in enforcement of the law. It is important that employees know that the OSC is a tough advocate for enforcement of employee rights.

3. In response to the Committee's prehearing questions (question # 9), you stated that "in all cases, the focus should be on putting the employee back in the position he would have occupied but for the PPP [prohibited personnel practice]."

Do you see any gaps in current law which prevent making the whistleblower whole? If so, do you have any recommendations for this Committee to consider to fill these gaps?

I do not have any specific recommendations at this time, although it is a topic of great interest to me. I look forward to talking to you about this topic further, if I am confirmed, after I have a chance to consult with the staff of the Office of Special Counsel. I am committed to the fair execution of these laws, and I believe whistleblowers should have all of the protections to which they are legally entitled based on reasonable belief of fraud, gross waste, gross mismanagement, abuse, illegality, or substantial and specific danger to public health and safety.

Post-hearing Questions for Scott Bloch
Nominee for Special Counsel, Office of Special Counsel

Senator Carl Levin
November 18, 2003

1. **In your pre-hearing questions, you mentioned that the Office of Personnel Management has the authority, under current law, to appeal an MSPB decision if the decision will have a substantial impact on the administration of the civil service law. However, the Office of Special Counsel does not have the authority to appeal MSPB decisions that will have a substantial impact on the whistleblower law. Doesn't the fact that OSC is precluded from appealing these decisions make it difficult for OSC to defend the whistleblower law against misinterpretation? Shouldn't OSC be provided the authority to appeal cases that will have substantial impact on the law?**

OSC has a number of avenues under existing law to promote appropriate interpretations of the whistleblower statute, including advovating before the MSPB, OPM, DOJ, and in appearances before Congress. I believe I have the demeanor, knowledge and relationships necessary to be a strong advocate for a robust interpretation of the whistleblower statute. I do not have a view yet about the need for additional statutory authority, but would be happy to discuss the issue with you further if I am confirmed, after I have had a chance to discuss the issue with the OSC staff.

2. **In LaChance v. White, the Federal Circuit said that in order to establish reasonable belief, the whistleblower had to overcome a "presumption that public officials perform their duties correctly, fairly, in good faith and in accordance with the law and governing regulations." The court went on to say this presumption could only be overcome if the whistleblower presented "irrefragable proof to the contrary." The Federal Circuit remanded LaChance to the MSPB and on September 11, 2003, the MSPB issued a decision stating:**

"We further observe that the dictionary definition of "irrefragable" is "impossible to gainsay, deny, or refute"; "impossible to break or alter"; "inviolable, indestructible." Webster's Third New International Dictionary (1993 ed.). Thus, to accept OPM's and the agency's interpretation of White IV's use of the term "irrefragable proof" would impose what amounts to a virtually impossible evidentiary burden on whistleblowers to prove that agencies in fact engaged in gross mismanagement. We located nothing in either the language of the WPA or its legislative history that even remotely suggests a congressional intent to impose such a standard under the WPA. Rather, the clear language of the statute requires only that an employee have a "reasonable belief" of gross mismanagement in order to

make a protected disclosure."

Do you agree with the MSPB?

I have reviewed the MSPB decision of September 11, 2003, and think I understand its rationale. I don't want to comment on a matter that may be subject to further review, but will tell you that my basic view is that the law should be interpreted in a common sense way to achieve its goals. Rather than forcing whistleblowers to jump through designated hoops or utter magic words, courts and those who assist them in interpreting and enforcing the whistleblower law should focus on the reasonableness of an employee's understanding of the circumstances then prevailing and what they genuinely believed in good faith. The system is protected by employees who report, even when they are wrong. This is common sense, to which the law should not be a stranger.

3. **The current interpretation of the law requires OSC to pay attorneys' fees when it loses disciplinary cases against managers who OSC charges have retaliated against employees. In your written answers to the Committee's pre-hearing questions, you say that OSC staff have told you about the chilling effect that this requirement has on OSC. Do you think the requirement that OSC pay attorneys' fees should be changed?**

I believe that OSC has experienced some difficulties in deciding whether to bring disciplinary actions in the past. It is my belief as a guardian of the merit system, and an advocate for employee rights, that I should have all of the powers at my disposal to pursue corrective action and disciplinary action if called for.

As a practicing attorney with fifteen years of civil and administrative employment and labor litigation experience, I wanted to make sure violators were let go or transferred when they engaged in wrongdoing that affected the workplace. I was successful in that. I know how important it is to be able to deal with serial wrongdoers in the workplace. Many of my clients were not satisfied, and indeed I was not satisfied with corrective action and backpay without redressing the wrongdoer through disciplinary action. I therefore do not want to be hindered in my ability to go after supervisors who are guilty of wilfully violating PPPs. I want the opportunity to consult with the professional staff at OSC further about this with the benefit of actual cases before us. I assure you, I will study this and be able to give a more considered opinion to you or your staff should I be confirmed, and I look forward to the opportunity of working with you and with my professional staff, if confirmed, in pursuit of any legislative changes.

4. **There are some gaps in the whistleblower law. Notably, under current law a whistleblower has no recourse if a security clearance is revoked or an**

investigation is initiated against them in retaliation for them blowing the whistle. Without commenting on legislation or those specific issues, when gaps in the whistleblower law are identified, do you feel that it is part of a Special Counsel's duty to advocate changes to the law to fill those gaps?

I consider available remedies to be very important. The Special Counsel is appropriately called upon to give the perspective of the Office of Special Counsel on laws that will affect the enforement of the CSRA, WPA, the Hatch Act, or USERRA. There may be cases in which OSC is called upon to initiate changes in the law. I do believe it is entirely appropriate to look at filling gaps in enforcement or gaps in the law through additional legislation in the right cases. I want to make sure that a law can be enforced fairly and with due regard for the hard-fought protections that advance greater government integrity and efficiency. I look forward, if confirmed, to consulting with you and your staff and my staff at OSC to comment on any legislation. I am committed to the fair execution of these laws, and I believe whistleblowers should have all of the protections to which they are legally entitled based on reasonable belief of fraud, gross waste, gross mismanagement, abuse, illegality, or substantial and specific danger to public health and safety.

Additional Question Submitted For the Record by Senator Levin for the Nomination of Scott J. Bloch to be Special Counsel, Office of Special Counsel

In your post-hearing questions, you were asked by Senator Akaka whether you agreed with the advice provided by OSC that, if "Supervisor Joe fires Employee Jack because he saw Employee Jack at a local Gay Pride Day event," such firing constitutes an example of discrimination against the employee that is unlawful under 5 U.S.C. § 2302(b)?

Part of your answer was that *"... conduct such as being at a Gay Pride Day event, by itself, would not, in my view, affect job performance, and employers would not be able to say that being at such an event will discredit the agency or established a basis to discriminate because it makes other people uncomfortable..."*

If one assumes that attending a Gay Pride Day event is as irrelevant to a person's job performance as is going to lunch or going jogging, the conclusion of that sentence is so self evident as to make the sentence ridiculous. The use of the phrase "by itself" implies that attendance at a Gay Pride Day event is different from lunch or jogging. Further, the use of that phrase suggests that attendance at such an event could potentially be a contributing factor for an employer to consider when taking a personnel action. Please clarify your answer on these points.

Answer: You will recall that I stated that every case must be judged on its specific facts, and that I will not prejudge any matter that could potentially come before me if I am confirmed. As a result, I said I wanted to be careful in my response to hypotheticals based on extremely limited facts.

The use of the phrases "by itself" or "in my view" in my response was a cautionary note because any situation could include additional context that casts the overall situation in a different light, and there may be things professional staff at OSC see that I do not see right now. For instance, going to lunch, "by itself", would not provide a basis for disciplining an employee, but going to lunch during working hours at a strip club and drinking heavily while there might present a very different case. Likewise, going for a jog, "by itself", would not be problematic, but lying to a supervisor about one's whereabouts when asked could, under some circumstances, raise questions about integrity and forthrightness that would be problematic in some jobs.

You can be confident that my caveat had nothing to do with the particular event mentioned in the hypothetical, and everything to do with my commitment to assessing every case carefully based on all the available facts. If confirmed, I will be fair in my dealings with all employees, and am committed to all the anti-discrimination principles that are embedded in our federal laws.

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