

**EVALUATING THE U.S. DEPARTMENT OF  
VETERANS AFFAIRS OFFICE OF GENERAL COUNSEL**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON OVERSIGHT AND  
INVESTIGATIONS  
OF THE  
COMMITTEE ON VETERANS' AFFAIRS  
U.S. HOUSE OF REPRESENTATIVES  
ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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**EVALUATING THE U.S. DEPARTMENT OF  
VETERANS AFFAIRS OFFICE OF  
GENERAL COUNSEL**

**WEDNESDAY, JUNE 30, 2010**

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON VETERANS' AFFAIRS,  
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,  
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 10:05 a.m., in Room 334, Cannon House Office Building, Hon. Harry E. Mitchell [Chairman of the Subcommittee] presiding.

Present: Representatives Mitchell, Adler, Roe, and Bilbray.

**OPENING STATEMENT OF CHAIRMAN MITCHELL**

Mr. MITCHELL. Good morning, and welcome to the Veterans' Affairs Subcommittee on Oversight and Investigations' hearing on Evaluating the U.S. Department of Veterans Affairs Office of General Counsel.

And this meeting will come to order. This is June 30th, 2010.

I ask unanimous consent that all Members have 5 legislative days to revise and extend their remarks and that statements may be entered into the record. Hearing no objection, so ordered.

Each day, the U.S. Department of Veterans Affairs (VA) executes laws, regulations, and policies that have a profound effect on how the Department conducts its business and assists our Nation's veterans.

The General Counsel serves as the VA's Chief Legal Officer as the Office provides legal advice to the Secretary and all organizational components of the Department. It is no secret that the VA's General Counsel or OGC plays a critical role in the decision-making and oversight of the VA.

The OGC is a unique and complex office within the VA and its full range of responsibilities including legal, litigation, legislative, and regulatory activities is distributed among seven professional group staffs, each headed by an Assistant General Counsel.

Each of these groups has the expertise in specific subject areas and is responsible for providing legal advice to program officials, reviewing proposed regulations and directives, and handling litigation involving VA programs.

Additionally, the OGC operates 22 field offices which comprise almost two-thirds of OGC's workforce. With the General Counsel's widespread workforce, the OGC must promote consistency and uni-

formity of its recommendations that lead to executive decisions that directly impact millions of veterans.

We have heard many times that the OGC has repeatedly used time extensions from the court in order to keep pace with their workload. However, their workload is so great that it continues to remain an ongoing issue.

Additionally, we have too often heard from various Department entities that documents crucial to this Subcommittee's work are tied up with the General Counsel's Office or that they are restricted by the OGC for release.

Though OGC insists that the oversight responsibilities of Congress deserve respect, there is often at times a tension between the oversight responsibility and the Agency's needs to protect certain predecisional information from disclosure out of concern that it could have a chilling impact on the free and open internal discussion and debate leading to the provision of advice needed by Agency decision-makers.

As the VA OGC deals with these challenges, they must still continue to give timely and balanced legal recommendations that will benefit the needs of our veterans and the Department of Veterans Affairs.

Determining an objective standard to evaluate a subjective trait is a challenge. Nonetheless, the General Counsel needs to bring reform to the VA's Office of General Counsel.

I look forward to hearing from the General Counsel the challenges the office is facing as well as solutions that are being implemented to correct long-standing issues within the office.

[The prepared statement of Chairman Mitchell appears on p. 17.]

Mr. MITCHELL. And before I recognize the Ranking Republican Member for his remarks, I would like to swear in our witnesses. I ask that all witnesses stand and please raise their right hand from both panels.

[Witnesses sworn.]

Mr. MITCHELL. Thank you.

Now I would like to recognize Dr. Roe for opening remarks.

**OPENING STATEMENT OF HON. DAVID P. ROE, RANKING  
REPUBLICAN MEMBER**

Mr. ROE. Thank you, Mr. Chairman.

According to the VA Web site, the mission of the VA Office of General Counsel is to identify and meet the legal needs of the Department of Veterans Affairs. Its primary objective is to ensure the just and faithful execution of the laws, regulations, and policies that the Secretary has responsibility for administering and by doing so, enable a Department to accomplish its mission of service to our Nation's veterans.

In recent years, Congress has increased the budget allocation to the Office of General Counsel to assist them in meeting this mission. With the current 9.2 percent budget increase for fiscal year 2010 and the requested 9.6 percent increase for fiscal year 2011, it is appropriate to call this hearing to review the work of the Office of General Counsel and to make certain that the product produced by that office is providing the best benefit to our Nation's veterans and the American taxpayer.

Over the past several years, this Committee has reviewed a number of contracting issues where it was apparent that the guidance provided by the VA General Counsel was insufficient, inaccurate, or lacking.

Recent VA Office of Inspector General (OIG) reports on contracting have shown deficiencies within the Office of General Counsel with respect to supporting contract management.

I am interested in hearing from the General Counsel on how its resources have been allocated to improve contract management at the Department.

I also want to know if the General Counsel plans to improve the relations between the Contracting Officers and the Regional General Counsel so that they actively seek their advice on major contract awards prior to an award being granted.

Does the General Counsel perform pre- and post-award contract reviews on all contracts?

I am also interested and concerned about delays we frequently hear about during meetings on the concurrence process for directives issued by the Veterans Health Administration.

Often we are told that a directive is being held up by the General Counsel's Office. These delays in providing legal opinions can lead to delays in updated treatment information being sent to the VISNs (Veterans Integrated Service Networks) and medical facilities and may cause problems with patient care.

The bottom line here is that we make certain that the resources Congress provides to VA are being allocated properly in order to provide the most benefit for the veterans and the American public at the best possible value.

Given the current track record of the General Counsel in contracting matters, I am uncertain if this is the case.

Mr. Chairman, thank you for holding this and I yield back my time.

[The prepared statement of Congressman Roe appears on p. 17.]

Mr. MITCHELL. Thank you.

Mr. Bilbray.

Mr. BILBRAY. I have no opening statement, Mr. Chairman.

Mr. MITCHELL. Thank you.

At this time, I would like to welcome panel one to the witness table. Joining us on our first panel is Matthew Tully, Founding Partner of Tully Rinckey, PLLC.

I ask that all witnesses from both panels stay within 5 minutes for their opening remarks. Your complete statements will be made part of the hearing record.

And I also would like to let everybody know that votes may be called at any time, so we may have to go vote, and come back.

Thank you.

Mr. Tully.

**STATEMENT OF MATTHEW B. TULLY, ESQ., FOUNDING  
PARTNER, TULLY RINCKEY PLLC, ALBANY, NY**

Mr. TULLY. Thank you.

Chairman Mitchell, Ranking Member Roe, and Members of the Subcommittee, on behalf of the Tully Rinckey Law Firm and our Department of Veterans Affairs' employee clients, I would like to

thank you for the opportunity to present my evaluation of the VA Office of General Counsel.

As the Founding Partner of a law firm that deals extensively with the VA OGC and its Regional Offices on employment law issues, the matter of today's hearing is of particular importance to me.

Seventy-five years ago, the Supreme Court issued an opinion implying that government attorneys must practice to a higher standard of ethics than private attorneys. Unfortunately, my fellow employment law attorneys and I have witnessed violations of the ethical standards for government lawyers laid out by the Supreme Court and various Bar associations, including the tendency of VA lawyers to treat managers like private clients, zealously representing them without any concern for the person aggrieved in an employment action.

For example, a fellow attorney had witnesses privately badgered about their testimony by a VA lawyer prior to a hearing. A VA lawyer threatened disciplinary action against VA employee witnesses if their testimony did not conform to the Agency's desires.

In my firm's dealings with the VA Office of General Counsel, VA lawyers have utilized numerous litigation tactics that would have made the lawyers for BP<sup>®</sup>, AIG<sup>®</sup>, or Enron<sup>®</sup> proud.

In one case earlier this year, our client was demoted based on charges of misconduct and our firm appealed the VA decision to the Merit Systems Protection Board (MSPB).

The VA lawyer in this case failed to respond to our discovery requests and even our motion to compel discovery. This unprofessional conduct translated into greater financial cost for our client.

Due to the VA's tactics on employment law matters, VA employees are often denied quality legal representation because law firms like mine that handle Federal-sector employment law issues avoid accepting VA cases because of the legal and financial burdens of working with the VA lawyers or alternatively charge VA clients higher initial retainers.

My firm has represented many VA employees who enforce their legal rights pursuant to the Uniformed Services Employment or Reemployment Rights Act of 1994, also known as USERRA.

In 2003, the Court of Appeals for the Federal Circuit found that Federal agencies improperly charged members of the National Guard and Reserve military leave for non-workdays. In order to remedy these wrongs, hundreds of VA employees who had been improperly charged military leave were able to file claims with the Merit Systems Protection Board in order to recover lost benefits.

These claims often require the assistance of employment law attorneys like myself due to the difficulty in obtaining evidence needed to win the case. It has been my experience in these cases that VA lawyers often maliciously extend the legal process, causing VA employees to incur further financial loss and legal stress.

By exhausting the litigation process until the day before or even hours before the actual hearing on the merits, VA lawyers force legal bills to increase.

More striking, after some initial stonewalling, the VA ultimately provided the veteran with the relief originally requested minus at-

torneys' fees and litigation costs. This strategy known as mooting means the VA avoids paying attorneys' fees despite the clear use of stalling tactics. This is both costly and taxing to the VA employee, the law firms that represent these employees, as well as the VA whose resources are diverted from complying with the laws that protect veterans to irrelevant legal strategizing.

This tactic serves no legitimate purpose but to discourage attorneys like myself from taking these cases on behalf of VA employees.

For example, in one case, the VA restored to our client shortly before a hearing 34 days of annual leave. However, the VA lawyer specifically stated in writing that if our client elected to proceed with the claim through the MSPB as allowed by law and requested attorneys' fees, the VA would "resist any petition for the same for the reason that the appeal is unnecessary, needlessly confrontational, and a wasteful method of resolving this dispute."

This clear retaliation against our client for exercising his lawful right had a chilling impact on law firms who represented VA employees, as well as other VA employees who became afraid to file legal proceedings to recover damages from the VA's unlawful employment practices because of the costs involved in such actions.

In many of the claims that did get filed with the MSPB, legal costs substantially outweighed the payment returned to the employee for the wrongs they suffered due to the outrageous legal tactics of the VA's lawyers.

In order to alter the current course of the VA Office of General Counsel, I believe they should be held to the same or similar standard and scrutiny currently followed by the U.S. Department of Justice (DoJ). The Department of Justice Office of Professional Responsibility reports directly to the Attorney General and investigates allegations of misconduct concerning DoJ attorneys.

This would both deter VA lawyers from acting unethically and give the Department as a whole a newfound legitimacy. By doing so, the VA Office of General Counsel would become a model for ethical legal practices across all Federal agencies.

As a service-disabled veteran of the Iraq War who was active in providing pro bono legal services in the compensation and pension arena, I can also tell you that having an independent Office of Professional Responsibility would be helpful given the VA OGC's role of approving opposing counsel's lawful right to appear on behalf of veterans during the compensation and pension process.

This accreditation of opposing counsel is ripe for abuse or at the very least the appearance of abuse and an Office of Professional Responsibility would help increase the oversight in this important process.

I hope that I have provided valuable insight to this Committee and I hope it brings about positive change.

[The prepared statement of Mr. Tully appears on p. 18.]

Mr. MITCHELL. Thank you.

In your testimony, you discuss the OGC's lack of concern for the person aggrieved and employment action is in contravention of ethical duties required of attorneys.

Can you speak more about the ethical duties required of attorneys in the VA and how VA fails to meet the standard?

Mr. TULLY. Absolutely, Mr. Chairman.

The VA attorneys have an obligation not to the manager that is involved in the employment dispute but to the taxpayers and to the government as a whole.

I am a legal mercenary. I go to the highest bidder and I do my best to protect the people that retain me.

The VA attorneys do very similar things, but that is not their job. Their job is to protect the taxpayers. Their job is to make sure justice is done. And routinely in these Equal Employment Opportunity Commission (EEOC) cases in particular, they spend a great deal of time trying to protect the manager that allegedly and has been often proven to have engaged in unlawful conduct versus doing what is right for the person that was subjected to injustice.

Mr. MITCHELL. Again, in your statement, you discuss instances of OGC's engaging in unnecessary legal discovery requests with private counsel and refusing to submit discovery despite legal requests and failing to adhere to key legal deadlines.

Are there any penalties that the VA attorneys face for not complying with these legal requirements and, secondly, what penalties would attorneys in the private practice face if they did the same thing?

Mr. TULLY. Yes. There are motions to compel, but there are no financial penalties that could be imposed on the Agency. There could be sanctions in the case.

So, for example, if I was a VA attorney and I did not meet the discovery deadline, some of that information that would have been relevant in discovery could be excluded. But the EEOC and the MSPB do not have the authority to impose financial sanctions.

If this was in Federal District Court and I did that, I would be subjected to disciplinary action ranging from disbarment, suspension, as well as financial liability.

Mr. MITCHELL. But not if you were working with the government or OGC?

Mr. TULLY. Not before an administrative agency, no.

Mr. MITCHELL. Why do you think unprofessional conduct by the VA attorneys goes unchecked and what could the General Counsel for the VA do about this?

Mr. TULLY. Having spoken with my colleagues at the National Employment Lawyers Association at a recent convention about this, the problems seem to have occurred in the late 1990s, early 2000 before 9/11 when the VA Office of General Counsel had presidential appointees that were trying to instill a private law firm mentality into the Administration.

And many of the things that they did were very favorable, but this aspect of zealously representing a client to the point of exceeding the ethical bounds is unfortunately one of the things that they did bring in that I as a private attorney can do. As long as I stay within ethical bounds, I can zealously represent my client whether or not they are right or wrong. The VA has to protect the person who is aggrieved.

What I think the Office of General Counsel can do and specifically Colonel Gunn, and I believe he is trying to do that, is instill integrity amongst the career employees within the VA OGC. And

he has an upward battle because this is years, decades of this type of mentality going out there.

And it has worked to some degree. Many VA employees cannot find quality legal representation, which keeps the employment law complaints down or the ones that are filed are filed *pro se* and there is a much higher loss rate when there is a *pro se* person versus somebody represented by myself or one of my colleagues in my law firm.

Mr. MITCHELL. And one last question. Your testimony describes mooting.

Mr. TULLY. Mooting.

Mr. MITCHELL. And how the VA employs these filing techniques throughout the case. Can you explain what mooting is and how it adversely affects veterans and how the General Counsel is in the best position to remedy this?

Mr. TULLY. Absolutely. The General Counsel, previous General Counsel, I believe in 2007, issued a directive that in these USERRA claims involving *Butterbaugh* that the cases are to be immediately mooted upon presenting of evidence.

Under the way the current USERRA law is, you do not get attorneys' fees unless there is an adjudication on the merits. So until that MSPB Judge smacks the hammer down and says, VA employee A, you are awarded, you know, \$1,000 or \$2,000, the client could be stuck with attorneys' fees.

So we actively obtained the records needed to establish the case. Part of the discovery, because we are honest and forthcoming, we turn that discovery over to the VA and the VA takes that information and immediately begins processing the payment to the client, that a client receives the payment hours if not days before the hearing. The case gets mooted and there is no award of attorneys' fees.

So our firm put in several thousand dollars into the case and ultimately we do not recover. And because it is veterans, we try not to recover against those veterans, especially if they only receive \$2,000 or \$3,000 because of the damages that they suffered at the hands of the VA and they ran up \$3,000 or \$4,000 in legal bills. I, as a service-disabled veteran, am not going to charge that to that employee.

So ultimately I am holding the bag for hundreds of thousands of dollars in bad debt because the VA moots cases.

Mr. MITCHELL. Thank you.

Dr. Roe.

Mr. ROE. Thank you, Mr. Chairman.

I will start with the mooting. It reminds me of basketball. When Dean Smith played the four corners offense, you just keep throwing the ball around until the time runs out.

And what happens, I think, is that, and I have seen this, and if you want to make someone like me sweat is have an Obstetrician/Gynecologist doctor have a lawyer come in the office. That really sweats us and we do not like that. And most people do not. They are intimidated by the process.

And the longer they can make it harder for that person, the less likely they are to get you to represent them because you really are

pushing yourself away from the table if you know you are not going to recover your time. I understand that and I get that.

Is there an entity, and maybe you are the wrong person to ask this of, is there an entity that oversees the ethical conduct of VA attorneys? Is there some structure?

Mr. TULLY. There is confusion about that. I spoke with Colonel Gunn before this and specifically laid out an example in 2007 where my law firm was subjected to egregious ethical conduct, that an impartial Administrative Judge confirmed was unethical conduct.

We found out the jurisdiction in which that attorney was admitted. We notified the Bar of that State. That State said because it is a Federal practice and because it was before a Federal administrative agency, they do not have jurisdiction.

We then contacted the VA Supervisor who said they do not have any Office of Professional Responsibility and told us to contact the Office of Inspector General. Filed a complaint with the Office of Inspector General, never to be heard from again.

Mr. ROE. So really there is not any—

Mr. TULLY. Exactly. And that is why a Professional Standards Office would be perfect, especially in the Compensation and Pension practice arena where they accredit their opposing counsels.

Mr. ROE. I guess the other thing that is difficult in here, because it is shades of gray, where you would expect the VA attorney to vigorously, if they felt they were right, support their side of the case. I certainly understand that.

And I guess the question is, when does it step over the line? That is tough. And it is a gray area, I would assume.

Mr. TULLY. Some of it is not, Dr. Roe. The written testimony I submitted talks about fraudulently dating documents and I provided specific case references in that case. That is egregious. That person should be fired. That person should not be practicing as an attorney. Where do you go with that?

And that is just one example. The information I provided in the written testimony with names and docket numbers is the tip of the iceberg because I only limited it to a handful of employment law cases.

Mr. ROE. No question you are right. If somebody fraudulently changes a date, I agree they should be fired. You cannot believe anything they say.

Mr. TULLY. Exactly.

Mr. ROE. I totally agree with that.

Mr. TULLY. But right now there is nobody to go to.

Mr. ROE. Nobody to go to. As an attorney, how do you think the VA Office of General Counsel is doing? I mean, are they representing the government appropriately or overdoing it or underdoing it? How do you see it?

Mr. TULLY. My personal impression is that they are understaffed in their employment law section. They are overwhelmed. They are doing—as an overall system, they are not bad people. They are good, hard-working Americans. There are a handful of bad apples. But generally they are doing as good as they can do with the short staff that they have and the volume of cases that they have.

And their intimate involvement with the managers is something that I have not seen at any other Agency. They are actively involved in the day-to-day management of employment law with the deciding officials. And that kind of zaps a lot of time and energy so versus at other agencies, DoJ, Department of Labor, they, the managers, make the decisions and get the attorneys to rubber stamp it.

Mr. ROE. So generally you are thinking that in plain language you do not think that they are acting as an institution unethically? You think they are just overwhelmed and there may be a few bad apples, is that—

Mr. TULLY. Absolutely. And those few bad apple have been around for a while and they need to go. And, unfortunately, there is nobody around that is able to collect all of the information on those bad apples to build a case to get rid of them.

Mr. ROE. I would think, I know that if you want to lose a medical malpractice case, all you have to do is alter a document and you have lost it right then. You do not need to go any further.

And I would think if you altered a document, I mean, to me, that is as dishonest as you can get. When you are lying on a court of law, I would think it would be perjury or something. I do not know the legal part. But if you have done that to alter an outcome, I mean, that is just over the top, I think.

Mr. TULLY. I tend to agree. The downside, what quickly happens is when those attorneys are caught in that type of situation, the cases are almost automatically settled because the Department of Labor attorney knows that they are caught, goes back to the deciding official, and says give me \$50,000 and make this go away and I want a confidentiality clause.

And our clients are trying to keep their job and they want a little bit of money. They are going to sign that. So it is a self-fulfilling prophecy with the way the current system is set up because there is no independent person that we can call and say, hey, the only reason why they are doing a settlement right now is, you know, we got them.

Mr. ROE. Well, I want to thank you for your service to our country.

And I yield back.

Mr. MITCHELL. Thank you.

Mr. Adler.

Mr. ADLER. Thank you, Chairman.

Let me followup on Dr. Roe's comments. First, I also thank you for your service to our country and I thank you for this ongoing service you are providing, telling Congress about some anomalies, some outliers in the otherwise ethical conduct of the Office.

You spoke briefly in your written testimony about *Tang v. U.S. Department of Veterans Affairs*. Do you have actually documentary evidence that can back up the claim that there was a fraudulent postmarking?

Mr. TULLY. Absolutely. I would be more than happy to have my office send it to you this afternoon.

[Mr. Tully subsequently responded to Mr. Adler and VA General Counsel Gunn, in a letter dated July 7, 2010. The VA General Counsel, Mr. Gunn, responded to Chairman Mitchell in a letter,

dated August 19, 2010. The letters are being retained in the Committee files due to the inclusion of sensitive personal information.]

Mr. ADLER. I think it would be really helpful, I think, because I really liked your balanced testimony where you were saying that most folks, most of the attorneys representing the Veterans Affairs Department were behaving ethically.

But if there are outliers, if there are folks who are not following that higher standard to which government attorneys have to adhere, we should catch them. And I think it is Congress' job. If the Office of General Counsel cannot do that, we could help them do that.

So maybe if you could have your office send over to the Committee Chair and through the Chair to the rest of it, I think it would be very helpful to have us follow up more directly with the VA, not naming names publicly if that is not necessary, but maybe helping the VA identify those folks who are not performing up to that ethical level that you correctly note the Berger standard requires.

So I wonder if you could do that for us.

Mr. TULLY. Too easy, sir.

Mr. ADLER. Thank you.

I have no further questions. Thank you.

Mr. MITCHELL. Thank you.

Again, we appreciate your service and what you are doing to help veterans. Thank you, Mr. Tully.

Mr. TULLY. Thank you.

Mr. MITCHELL. I would like to welcome panel two to the witness table. And for our second panel, we will hear from the Honorable Will Gunn, General Counsel for the U.S. Department of Veterans Affairs.

Mr. Gunn is accompanied by Phillipa Anderson, Assistant General Counsel, and Michael Hogan, Assistant General Counsel.

Mr. Gunn, you will have 5 minutes to make your presentation and your complete record will be made part of the record. Thank you.

**STATEMENT OF HON. WILL A. GUNN, GENERAL COUNSEL, U.S. DEPARTMENT OF VETERANS AFFAIRS; ACCOMPANIED BY PHILLIPA ANDERSON, ASSISTANT GENERAL COUNSEL, OFFICE OF GENERAL COUNSEL, U.S. DEPARTMENT OF VETERANS AFFAIRS; AND MICHAEL HOGAN, ASSISTANT GENERAL COUNSEL, OFFICE OF GENERAL COUNSEL, U.S. DEPARTMENT OF VETERANS AFFAIRS**

Mr. GUNN. Thank you, Mr. Chairman, Mr. Roe, other Members of the Subcommittee. I appreciate this opportunity to come before you today to testify in my position as General Counsel for the Department of Veterans Affairs.

First of all, Members, I just want to emphasize that I am a veteran. I am a 25-year Air Force retiree. I spent most of my time as a judge advocate. I have spent time both defending military members and prosecuting military members and a wide variety of other roles.

Immediately before coming into this position, I served as the sole practitioner in my own law firm where I defended veterans and

represented military members. So the opportunity that I have in this role is one that I take very, very seriously and it is near and dear to my heart, to my passion.

First of all, I want to welcome with me Mr. Hogan, who essentially heads our management and operations group, and Ms. Phillipa Anderson, who heads our contract law and real property group.

Mr. Chairman, when I came into this office 13 months ago, I had talked to a variety of people about what was going on in the Office of General Counsel and I received advice from various individuals. Most of those people had a common theme and that was that the Office was one that was responsive and that provided good results.

After being in Washington for about a month, I went on the road, traveled around the country to our Regional Offices to test that initial hypothesis that this was a high-performing organization. And I am pleased to say that that initial hypothesis was validated.

Now that I have been here more than a year, I am still at that same position that this is a high-performing organization and it has been validated by evidence.

For instance, OGC, the Office of General Counsel, scores very high on our client satisfaction surveys. We have been sending out surveys since 2003. In 2010, our clients gave us an overall satisfaction score of 4.57 on a scale of 5.0.

The section led by Ms. Anderson received a recognition from our Major Construction and Real Property Programs Unit, received their Partner in Service Delivery Award. We also received recognition from the Department of Justice last year where we received their John Marshall Award for Outstanding Legal Achievement for Agency Cooperation in Support of Litigation. We are the only Federal agency to be recognized in this manner.

In addition, the Office of Government Ethics awarded us with outstanding achievement in managing an Agency Ethics Program and this past year, we received recognition from the Office of Government Ethics in terms of excellence in developing communications products that other Federal agencies have adopted.

I am also gratified that our employees within the Office of General Counsel also rate us extremely highly with respect to our internal employee scales, employee ratings.

Mr. Chairman, when I came aboard, I found a strategic planning process in place. And that strategic planning process identified a central goal for the organization. That was that the Office of General Counsel become a truly unified national law firm.

I embrace that theme because I believe that in order to meet the needs of the Department and in order to serve veterans, we are going to have to be more effective and we are going to have to be more unified.

As you mentioned in your earlier remarks, we have to focus on being more consistent and providing the very best service that we can.

With that in mind, I have established some strategic objectives and some strategic priorities. Those emphasize education and training for our staff, knowledge management so that we can retrieve information and share information across the country, and also cross-office and cross-regional collaboration. We are empha-

sizing these so that we can be even better and so that we can provide the very best service that we can.

I just want to close by stating this. I am committed to providing extraordinary customer service and I am also committed to providing service that is based in excellence and in integrity. That is my hallmark.

As an Air Force Officer, I lived by certain core values. Those core values were integrity first, service to others before self, and excellence in all that I do. I still live by those principles and I am committed to instilling those principles throughout the Office of General Counsel.

I stand ready to respond to your questions.

[The prepared statement of Mr. Gunn appears on p. 25.]

Mr. MITCHELL. Thank you very much, Mr. Gunn. And all of us appreciate very much the service you have given to this country and we appreciate that very much.

You mentioned at the very beginning all the great satisfaction reports you have received from your clients.

Who are your clients? They are not veterans, are they?

Mr. GUNN. Sir, we do not directly serve veterans. You are correct.

Mr. MITCHELL. Who are your clients?

Mr. GUNN. Ultimately my client is the Secretary of Veterans Affairs. And so as the Department's top lawyer, my job is to make sure that the Secretary is well-armed.

As I describe it and as we cascade down throughout the Department, we provide services to senior managers at local facilities and also within the Central Office of Veterans Affairs.

I look at it as we are providing legal guidance and support so that those that do provide direct services to veterans are able to do their jobs most effectively.

Mr. MITCHELL. There have been times in the past where the VA frequently declines to produce a witness requested to either testify at hearings or brief the Subcommittee. And the OGC's guidance often gets cited as the reason for not producing witnesses at either hearings or briefings.

Two questions. What role does OGC play in the VA deciding who either testifies or briefs the Subcommittee and does the OGC provide an opinion when the VA refuses to produce certain information as requested by Congress or through the public?

Mr. GUNN. Sir, with respect to the first issue in terms of whether or not OGC plays a role in who will testify, I will say, no, we do not see ourselves as having a role with respect to that.

In terms of the second issue, we do play a role in terms of responding to requests for documents. And our advice is focused on two things, what can we provide, what is permissible, and, secondly, what are we required to provide?

As you yourself, I believe, mentioned in your opening statement, there is a tension that exists from time to time, particularly when we are talking about predecisional documents in terms of whether or not we can release a given document. We do our best to provide advice and counsel in those situations.

Mr. MITCHELL. You heard the first panel discuss the OGC's lack of concern as being in contravention of the ethical duty required of Agency attorneys.

Can you speak more about the ethical duties required of attorneys in the VA and address allegations that the VA fails to meet the standard?

At the same time, there seems to be a difference in holding people to ethical standards in the private sector versus the OGC. There is a Bar Association, for example, that can hear complaints.

What is there on the part of the OGC to respond to unethical practices?

Mr. GUNN. Well, Mr. Chairman, first of all, I found out about the first panel less than an hour ago on my way over here and so that was the first, and when I got here, getting a chance to scan through his statement and also listening to him, and I did get an opportunity to speak to Mr. Tully briefly before this hearing began, and so I am very interested in his comments.

One of the things that we introduced is just a newsletter for the Office of General Counsel. We circulate it on a weekly basis. And in each one of these newsletters, I get an opportunity to prepare a column. I emphasize in those columns, I have taken most of the last 3 months to emphasize our values. Our values, at the top of those values are the value of integrity and the value of being ethical.

And so that is something that I take very, very seriously. I will say that before today, I had not heard comments along those lines. So I have invited Mr. Tully to follow up with me and to provide me with specific examples because I do want to follow up.

But I will also say, I just want to make sure that the Committee understands, that even though we are a Federal agency, all of our attorneys must be licensed by a State Bar Association. And they are subject to disciplinary action from those State Bars if they violate the Rules of Professional Responsibility for that given State.

So that is always an option that someone has if they are dissatisfied or if they believe that our attorney has acted in an unethical manner.

I have also instructed my team to develop an internal process for reviewing complaints of unprofessional conduct by our attorneys.

So that is something that I take very, very seriously and I look forward to finding out more information.

Mr. MITCHELL. Thank you.

I yield to Dr. Roe.

Mr. ROE. Thank you, Mr. Chairman.

Just to continue the Chairman's line of questioning briefly, and you just mentioned that you are working on an internal process and, of course, the State Bar, but what will you do if you found out that a document had been deliberately altered to alter the outcome of an event? What would you do with that?

Mr. GUNN. Dr. Roe, I agree with what you said in responding to the first panelist and that is that that is egregious conduct. That is unacceptable. And while I only rate personally two individuals, I would strongly suspect that that would be basis for dismissal.

Mr. ROE. That is a good answer. I think I know what I would do.

And I guess when you have a situation where let us say there are obviously two issues, Mr. Tully is defending someone and you are on the other side, when you discover that maybe your position is wrong, what do you do in that situation?

And what he was saying was that in the private practice of law, whether you are guilty or innocent, you can be vigorously defended. He is saying that is not the case.

Do you agree with that, what he said?

Mr. GUNN. I do. You know, last week, I had an opportunity to spend some time with new attorneys in the Office of General Counsel. We had a new attorney orientation course here. And I spent time with them on the first day of the course and I spent time with them on the last day of the course.

Included in my comments was just an overall theme and that theme was that as attorneys, as Federal Government attorneys, particularly attorneys in the Department of Veterans Affairs, we need to be focused on one thing and that is doing the right thing.

And so that has to be at the forefront of what we do. As you probably know, let us say our counterparts in the Department of Justice, the Federal prosecutors, they have a responsibility of representing the taxpayers, the American public in criminal litigation. And so they are trying to win those cases.

But ultimately they have a higher calling and that calling is to do justice. So I absolutely agree that that is also our responsibility.

Mr. ROE. So at the end of the day, you would negotiate an end to this if you found out that your side was—you would not vigorously defend the wrong position if you evaluated it as that?

Mr. GUNN. Absolutely. One of the tools that we have at our disposal is the settlement tool. And when we find that we are going up the wrong road in litigation, we are in a position where we can do our best to settle the case.

Mr. ROE. I think meeting with Mr. Tully, I think he had a different opinion sometimes about how that was happening. And I would like to see that worked out.

One other quick question. And this is an interpretation basically on the HITECH Act (Health Information Technology for Economic and Clinical Health Act) where an interpretation was that it had to be, when there is a breach, that there had to be 500 people in each State. And obviously a breach is embarrassing to VA and to the government. So you would like to not have breaches.

But in using that less than 500 interpretation, that means that you could have thousands of people whose data was breached, if you used the per State, instead of just saying that this is a 500 or 499, and you multiply that times 50, you get thousands of people. Now, that would be a hard, difficult scenario, I think.

But how did your office come, not necessarily you, but how did your office come to that conclusion?

Mr. GUNN. Dr. Roe, two points that I would like to make. Of course, I deal with situations when there has been an unauthorized disclosure of personal identifying information.

And with respect to that, first of all, in terms of our role of looking after the veteran, doing our best to take care of veterans, when we find that a veteran's information has been disclosed, we do our

utmost to notify the veterans. So regardless of the requirements of HITECH, we notify veterans. That is first and foremost.

In terms of the HITECH itself, I understand and I have had discussions with some of your staffers with respect to concerns about our interpretation of that, but our interpretation when it is necessary to make a media disclosure is based upon information that the U.S. Department of Health and Human Service (HHS) provided when they promulgated their interim regulations on this topic.

For instance, they specifically gave an example that if there was an unauthorized breach involving 600 individuals, 200 who lived in Virginia, 200 that lived in DC, and 200 in Maryland, then there would not be a breach that required notification of media under HITECH. So that was their interpretation.

So in providing advice to our clients, we went back and responded in that manner.

Mr. ROE. Okay. I think we have votes, Mr. Chairman. I yield back.

Mr. MITCHELL. We do have some votes.

Let me ask two quick questions. In my opening statement, I mentioned about the OGC repeatedly using time extensions in court in order to keep pace with their workload.

And I want to know, is the workload so great that it continues to be an ongoing issue?

And, secondly, we have often heard from various Department entities that the documents crucial to the Subcommittee's work had been tied up in the General Counsel's Office or restricted for release.

Now, one quick question with that. Are your attorneys overworked? How many hours a week do they work? Do they work 40 hours? Do they get overtime pay? How are they compensated compared to the private sector? What kind of incentives do they have to do work?

Mr. GUNN. Mr. Chairman, I believe first of all from an overall perspective we are blessed to have highly motivated employees. And the results from our employee surveys will bear that out. And we would be more than happy to share that information with the Committee so that you can see that.

[The VA subsequently provided VA Employee Survey Information for 2009 and 2010, which appears on p. 30.]

But in addition to that, beyond that, you are right. In terms of our representation of the Department before the Court of Appeals of Veterans Claims, we have fallen into a position that we were requesting delays at a higher rate than were the appellants who were bringing, the veterans who were bringing their cases before that court.

But thanks to you, thanks to other Members of this Committee and the Congress, we have had budget increases that have allowed us to bring more resources to bear in our Group 7, which provides that representation. As a result of that, we are doing much better on that front.

We are also working hard to do two things. We want to make sure that we are able to provide effective representation in a timely manner and we also have to be sensitive to the fact that we do not want our attorneys overworked.

We found in that particular section that if an attorney has more than 50 cases at a time, that leads to more delays. That also leads to burnout. So we have been able to increase the number of attorneys that we have and as a result of that, we have been able to respond in a much more timely manner and request fewer delays.

Mr. MITCHELL. Thank you.

We are going to have to conclude this hearing. We have votes.

I just want you to know that, first of all, how much we appreciate what you are doing and your service to the taxpayers and also to this country.

But as we have requested with all of our hearings, we will follow up and there are a number of questions we have to follow up to make sure that we are doing our job because it does no good to have a hearing and just let it go.

Mr. GUNN. Yes, sir.

Mr. MITCHELL. So we will do that.

Did you want to say anything?

Okay. All right. Thank you very much. And this hearing is adjourned.

Mr. GUNN. Thank you, sir.

[Whereupon, at 10:50 a.m., the Subcommittee was adjourned.]

## A P P E N D I X

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### **Prepared Statement of Hon. Harry E. Mitchell, Chairman, Subcommittee on Oversight and Investigations**

Thank you to everyone for attending today's Oversight and Investigations Subcommittee hearing entitled, *Evaluating the U.S. Department of Veterans Affairs Office of General Counsel*.

Each day the U.S. Department of Veterans Affairs (VA) executes laws, regulations and policies that have a profound effect on how the Department conducts its business and assists our Nation's veterans. The General Counsel serves as the VA's chief legal officer, as the office provides legal advice to the Secretary and all organizational components of the Department. It is no secret that the VA's General Counsel, or OGC, plays a critical role in the decision-making and oversight of the VA.

The OGC is a unique and complex office within the VA, and its full range of responsibilities, including legal, litigation, legislative and regulatory activities is distributed among seven Professional Staff Groups, each headed by an Assistant General Counsel. Each of these groups has the expertise in specific subject matter areas, and is responsible for providing legal advice to program officials, reviewing proposed regulations and directives, and handling litigation involving VA programs. Additionally, the OGC operates 22 field offices, which comprises almost two thirds of OGC's workforce. With general counsel's widespread workforce, the OGC must promote consistency and uniformity of its recommendations that lead to executive decisions that directly impact millions of veterans.

We have heard many times that the OGC has repeatedly used time extensions from the court in order to keep pace with their workload; however, the workload is so great that it continues to remain an ongoing issue. Additionally, we have too often heard from various Department entities, that documents crucial to this Subcommittee's work, are tied up with the General Counsel's office or that they are restricted by the OGC for release.

Though OGC insists that the oversight responsibility of Congress deserves respect, there is often, at times, a tension between this oversight responsibility and agencies' needs to protect certain pre-decisional information from disclosure out of concern that it could have a chilling impact on the free and open internal discussion and debate leading to the provision of advice needed by agency decision makers.

As the VA OGC deals with these challenges, they must still continue to give timely and balanced legal recommendations that will benefit the needs of our veterans and the Department of Veterans Affairs. Determining an objective standard to evaluate a subjective trade is a challenge; nonetheless, the general counsel needs to bring reform to the VA's Office of General Counsel.

I look forward to hearing from the general counsel the challenges the office is facing, as well as solutions that are being implemented to correct long standing issues within the Office.

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### **Prepared Statement of Hon. David P. Roe, Ranking Republican Member, Subcommittee on Oversight and Investigations**

Thank you Mr. Chairman.

According to the VA Web site, the mission of the VA Office of the General Counsel (OGC) is to identify and meet the legal needs of the Department of Veterans Affairs (VA). Its primary objective is to ensure the just and faithful execution of the laws, regulations and policies that the Secretary has responsibility for administering, and by so doing enable the Department to accomplish its mission of service to our Nation's veterans.

In recent years, Congress has increased the budget allocation to the Office of General Counsel to assist them in meeting this mission. With the current 9.2 percent

budget increase for FY 2010, and the requested 9.6 percent increase for FY 2011, it is appropriate to call this hearing to review the work of the Office of the General Counsel and make certain that the product produced by that office is providing the best benefit to our Nation's veterans and the American taxpayer.

Over the past several years, this Committee has reviewed a number of contracting issues, where it was apparent that the guidance provided by the VA General Counsel was insufficient, inaccurate, or lacking. Recent VA OIG reports on contracting have shown deficiencies within the Office of General Counsel with respect to supporting contract management. I am interested in hearing from the General Counsel on how his resources are being allocated to improve contract management at the department.

I also want to know if the General Counsel plans to improve the relationships between the Contracting Officers and the Regional General Counsels, so that they actively seek their advice on major contract awards prior to the award being granted. Does the General Counsel plan to more actively perform pre- and post-award contract reviews on all contracts?

I am also concerned about delays we frequently hear about during meetings on the concurrence process for Directives issued by the Veterans Health Administration. Often we are told that a directive is being held up by the General Counsel's office. These delays in providing legal opinions can lead to delays in updated treatment information being sent to the VISNs and medical facilities and may cause problems with patient care.

The bottom line here is that we make certain the resources Congress provides to VA are being allocated properly in order to provide the most benefit for the veterans and the American public, at the best value possible? Given the current track record of the General Counsel in contracting matters, I am uncertain that this is the case.

Mr. Chairman, I yield back my time.

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**Prepared Statement of Matthew B. Tully, Esq., Founding Partner,  
Tully Rinckey PLLC, Albany, NY**

Chairman Mitchell, Ranking Member Roe, and Members of the Subcommittee, on behalf of the Tully Rinckey law firm and our Department of Veterans Affairs' employee clients, thank you for the opportunity to present my evaluation of the U.S. Department of Veterans Affairs (VA) Office of General Counsel (OGC). As the founding partner of a law firm that deals extensively with the VA OGC and its Regional Offices, the matters of today's hearing are of particular importance to me.

In order for you to better understand my insight into the Department of Veterans Affairs, I would like to provide you with some brief information about myself. I am a Major in the New York Army National Guard and a service-connected disabled veteran, having served at Ground Zero after the attacks on the World Trade Center on September 11, 2001 and in Operation Iraqi Freedom. I established my law firm in Albany, NY in 2004, serving the legal needs of Federal Government employees in labor and employment law matters, including allegations of discrimination, whistleblower reprisal, disciplinary action, and USERRA claims. Today, my Washington, DC law office represents numerous Veterans' Affairs employees fighting for their Federal careers.

Through my professional legal dealings with the Office of General Counsel, as well as the dealings of my fellow attorneys, I come before you today with both general and specific examples of issues plaguing the VA legal department in the hopes that by shining a light on the ineffectual and often inhibitive actions taken by this Department's lawyers, concrete corrective actions may be taken.

***Ethics for Government Agency Counsel***

Seventy-five years ago, the Supreme Court in *Berger v. United States*, issued an opinion implying that government attorneys must practice a higher standard of ethics than private attorneys.<sup>1</sup> Following this decision, the judiciary and the American Bar Association embraced this implication by expressly requiring government attorneys to adhere to higher ethical standards.<sup>2</sup> The judiciary in confronting cases deal-

<sup>1</sup>*Berger v. United States*, 295 U.S. 78 (1935) (finding, "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done.")

<sup>2</sup>C. Mark Bain, *The Ethics of Government Attorneys: A Victory in the Pursuit for Justice*, 20 J. Legal Prof. 183 (1995).

ing with these issues, has been concerned with (1) the continuation of needless litigation, (2) harassment, and (3) the pursuit of a result contrary to justice and the public interest.<sup>3</sup> Most notably, in *Freeport-McMoRan Oil & Gas Co v. FERC*, the United States Court of Appeals for the District of Columbia Circuit, in citing *Berger*, found that a government lawyer “is the representative not of an ordinary party to a controversy,” “but of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done.”<sup>4</sup> The court also found that government agency attorneys may be held to higher standards than attorneys for private litigants.<sup>5</sup> As attorneys for the government, they have a “responsibility to seek justice,” and “should refrain from instituting or continuing litigation that is obviously unfair.”<sup>6</sup> Also significant was the United States Court of Appeals for the Tenth Circuit in *Bulloch v. United States*, in which concealment of information by the government during discovery was “made even more egregious” by the government lawyer’s heightened responsibility to seek justice and to develop a full and fair record.<sup>7</sup> This type of responsibility was properly exercised in connection with the post-trial litigation in *United States v. Theodore F. Stevens*, in which the Department of Justice asked a Federal judge to drop all charges against former Sen. Ted Stevens of Alaska. A review of the case indicated that certain information should have been disclosed to the defense for use at trial and that it was in the interests of justice to dismiss the indictment and not proceed with a new trial.

The American Bar Association, under Ethical Consideration 7–14 has also provided appropriate guidance with regard to this issue, which states:

A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.<sup>8</sup>

The Federal Ethical Considerations espoused by the Federal Bar Association contain similar commentary, which define the Federal lawyer’s professional obligation as “the promotion under law and applicable regulations of the public interest entrusted to the department, agency or other governmental agency of his employment.”<sup>9</sup> The prevailing attitude is perhaps best represented by one of the mottos on the walls of the Department of Justice, which reads, “The United States wins its point whenever justice is done its citizens in the courts.”<sup>10</sup>

<sup>3</sup>See, e.g., *Gray Panthers v. Schweiker*, 716 F.2d 23, 33 (D.C. Cir. 1983) (including a higher duty because the client is not only the agency but also the public at large); *Douglas v. Donovan*, 704 F.2d 1276, 1279–80 (D.C. Cir. 1983) (“[G]overnment attorneys . . . have special responsibilities to both this court and the public at large.”); *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1370 (9th Cir. 1980) (“The effectiveness of and need for harsh measures is particularly evident when the disobedient party is the government.”); *EEOC v. Waterfront Comm’n of New York Harbor*, 665 F. Supp. 197, 201 (S.D.N.Y. 1987) (“[T]his case should serve to put government attorneys on notice that they are not exempt from the Federal rules [of civil procedure] and that they will be held to the highest standards of the Bar.”); *Jones v. Heckler*, 583 F. Supp. 1250, 1257–58 n.7 (N.D. Ill. 1984) (“[C]ounsel for the United States has a special responsibility to the justice system.”); *Braun v. Harris*, Unempl. Ins. Rep. (CCH) P17,070, at 2499–2500 (E.D. Wis. Apr. 30, 1980) (“Government attorneys, however, by virtue of their unique position, owe a greater responsibility to the justice system. The courts have come to expect and have rightly [sic] demanded a higher degree of candor from government attorneys.”); *EEOC v. Datapoint Corp.*, 457 F. Supp. 62, 65 n.10 (W.D. Tex. 1978) (“Because of the peculiar power of the government litigator, he is subject to ethical consideration beyond the ordinary litigator.”).

<sup>4</sup>*Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992).

<sup>5</sup>*Id.* at 47.

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

<sup>7</sup>*Bulloch v. United States*, 763 F.2d 1115, 1125 (10th Cir. 1985), cert. denied, 474 U.S. 1086 (1986) (McKay, J., dissenting) (concealment of information by the government during discovery was “made even more egregious” by the government lawyer’s responsibility to seek justice and to develop a full and fair record).

<sup>8</sup>See Also, ABA Comm. On Ethics and Professional Responsibility, Formal Op. 342 (1975) (Canon 7 recognizes that “the duty of all government lawyers [is] to seek just results rather than the result desired by a client.”).

<sup>9</sup>FEC 7–2; See Also FEC 8–1 (“paramount consideration is due to the public interest.”).

<sup>10</sup>Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. Cal. L. Rev. 951 (1991).

### ***Failures to Uphold Ethical Considerations***

Based on the Supreme Court's holding in *Berger* as well as the case law espoused in a multitude of other jurisdictions and the appropriate ethical rules set forth by the American Bar Association and Federal Bar Association, attorneys representing government agencies have a heightened ethical duty to seek justice and develop a full and fair record in handling legal matters. The tendency of agency attorneys at the Department of Veterans Affairs to treat managers as private clients and to zealously represent them as clients without any concern for the person aggrieved in an employment action is completely in contravention of the ethical duties required of government attorneys. The practice of agency attorneys in protecting managers at all costs and contributing to the continuation of needless litigation reflects a complete disregard for the principles reflected in the appropriate ethical rules concerning the public interest and in seeking justice.

The current practice of the Department of Veterans Affairs, in using attorneys in management decisions as a form of legal strategy, is an additional example of agency attorneys acting in contravention of their ethical duties as attorneys for the government. Frequently, agency attorneys act as decision makers in adverse actions or discipline actions in an attempt to create an attorney-client privilege with managers if the employee pursues litigation.

Furthermore, it may isolate the government from liability or protect communications that may be discriminatory or retaliatory. These results do not show any concern for the public interest and are clearly not in accordance with Agency attorney's heightened ethical duty to seek justice and develop a full and fair record in those cases that they handle for the government.

In my firm's dealings, OGC representatives have utilized numerous stonewalling techniques, often mimicking the corporate litigation counsel at BP®, AIG® or Enron®. In fact, instances include OGC engaging in unnecessary legal discovery requests with private counsel, refusing to submit discovery despite private counsel legal requests and failing to adhere to key legal deadlines. This needless and borderline unethical action often lengthens the claim process, causing VA employees, many of whom are still employed by the VA during this time, to incur unnecessary legal costs and emotional stress. Additionally, the reputation of the VA OGC continues to deteriorate.

One such example includes the pending case of *Frank Gonzalez v. Shinseki, Sec'y, Dep't of Veterans Affairs*; EEOC No. 570-2010-00541X (2010), in which the VA attorney overly objected to interrogatories sent to the agency and failed to provide any substantive responses thereto. This legal maneuver will force our attorneys to produce and file a motion to compel to get even our most basic questions answered. Due to this, the client will be forced to incur greater legal costs in order to pursue his claims of workplace discrimination and will further tax the already overburdened Equal Employment Opportunity Commission.

In one particular case earlier this year, *Charlene Ng Tang v. U.S. Department of Veterans Affairs*, MSPB Docket No.: AT-0752-10-0514-I-1, a VA hospital employee was demoted based on charges of misconduct and our firm appealed to the Merit Systems Protection Board (MSPB). The VA representative wholly failed to respond to our discovery requests and our motion to compel. Further, VA Attorneys untimely served the VA's request for discovery, which was fraudulently dated about a week before the postmark, a date after the deadline.

Finally, our firm has had numerous issues with the VA OGC not complying with the terms of settlement agreements or not processing settlements altogether. In an EEO complaint in which the victim was sexually harassed by her direct supervisor, the VA settled the claim. However, the Agency failed to follow the terms of the settlement agreement. Further, the OGC refused to take any responsibility for the situation and specifically blamed its EEO office for the breach in agreement. Additionally, after admitting there was a breach, the OGC approved the EEO office moving this complainant back to the building where the harassment had occurred less than 1 year earlier, and the alleged harasser was still located, despite being told that the complainant did not feel comfortable being placed in close vicinity to this former supervisor.

In the case of *Patrice Robinson v. U.S. Department of Veterans Affairs*, EEOC Case No.: 570-2009-00634X, our firm hounded VA attorneys to complete terms of settlement including expunging required personnel files, timely processing the client's resignation, and completing her performance appraisal. Our firm had to file an appeal alleging breach of the settlement agreement before terms were finally complied with appropriately. This not only caused greater stress on the client, but greater legal costs and time.

In all of these instances, the unprofessional conduct displayed by the VA lawyers translated into greater financial costs for the client, a prolonged legal process, and

greater stress not only on the client, but to all VA staff members involved. Furthermore, due to OGC tactics, VA employees are often denied quality legal representation because plaintiff legal counsel actively avoid accepting VA cases to avoid the legal and financial burdens of working with the VA OGC.

#### ***Failing to Uphold USERRA Statutes***

The Uniformed Services Employment and Reemployment Rights Act of 1994<sup>11</sup> (USERRA) was enacted to protect the employment of this country's civilian soldiers while they are fulfilling their military responsibilities and requirements. In 2003, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") found that, prior to the change in the military leave law, which was effective on December 21, 2000, Federal agencies improperly charged members of the U.S. National Guard and Reserves military leave for non-workdays that occurred within a period of assigned military duty.<sup>12</sup>

Thus, thousands of Federal civilian employees, including Veterans Affairs employees, were charged military leave on days Federal agencies did not require them to work, *i.e.*, weekends and/or holidays. In order to remedy these wrongs, Federal employees who have improperly charged in this manner are able to file claims with the MSPB against the violating agency in order to recover lost leave or salary. *See* 38 U.S.C. § 4324. These claims often require the assistance of attorneys for the VA employees, due to the difficulty in obtaining old military and civilian pay records, including leave and earning statements, military orders, or time and attendance records to prove leave loss.

In these cases, our attorneys have found that the VA OGC often maliciously extends the legal process, causing VA employees to incur further financial loss and legal stress. By exhausting the litigation process until the day before, or even hours before the actual hearing, OGC continually forces private attorney legal bills to increase. More striking, after initial and prolonged stonewalling, the VA often ultimately provides the veteran with the relief originally requested minus the attorney costs and litigation expenses authorized by law. *See* 38 U.S.C. § 4324(c)(4).

This strategy, known as "mooting," means that the VA is under no obligation to pay attorney fees despite the clear stalling techniques that it had employed throughout the case. Thus, while the client receives back pay or leave, all legal costs associated with filing and proving the claim, including attorneys' fees generated by the VA's "mooting" strategy, are not reimbursed. This is both costly and taxing to the client, private law firms, as well as to the Department of Veterans Affairs, resources of which are diverted from settlement to irrelevant and unnecessary legal strategizing. The end result is that Federal employee law firms like mine refuse to accept VA employees as clients or alternatively charge a higher initial retainer because of the outrageous legal strategies of the VA OGC thus denying VA employees access to the legal system and equal justice under the law.

For example, in the case of *Richard Plezia v. Department of Veterans Affairs*, MSPB Docket Number: CH-3443-05-0404-1-2, the agency restored our client [Richard Plezia] thirty-four (34) days of annual leave. The Agency's unwillingness to provide any attorney fees was evidenced in its Response to the Acknowledgement Order. (*See* attached, Exhibit A). The Department of Veterans Affairs specifically stated that if our client elected to proceed with the claim through the MSPB and requested attorney fees, "the Agency provides notice that it will resist any petition for the same for the reason that the Appeal is an unnecessary, needlessly confrontational and wasteful method of resolving the dispute." This clear retaliation against our client for exercising his legal rights has a chilling impact on law firms who represent VA employees, as well as the VA employee's coworkers who become afraid to file legal proceedings because of the costs involved.

This same legal strategy, in which the VA declines to settle the leave claim at the outset and then later "moots" the case by giving the client their demands to avoid paying the client's attorney fees, is often repeated. In *Gonzalo Solis v. Department of Veterans Affairs*, MSPB Docket Number NY-4324-10-0063-1-1, the claim was dismissed as moot after the Agency restored the client [Gonzalo Solis] five (5) days of annual leave. Consequently, \$2,010.00 associated in legal costs was incurred. Further, in *Barry Phillips v. Department of Veterans Affairs*, MSPB Docket Number: PH-3443-05-0103-1-1, two (2) days of annual leave was restored and the claim was dismissed as moot after \$1,440.00 in legal costs were garnered.

In many of these instances, legal costs substantially outweighed the leave or leave payment returned to the Veterans Affairs employee because of the outrageous legal

<sup>11</sup> Pub. L. 103-353, codified as amended at 38 U.S.C. §§ 4301-4335 (2010).

<sup>12</sup> *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003).

tactics employed against these VA employees who continued to service in their National Guard and Reserve.

The cases cited in this testimony are just the tip of the iceberg of improper conduct by VA lawyers and are used to provide some specificity to the abstract allegations made herein. Similar situations can be cited in every other employment law related field of practice.

***Conclusion***

In order to alter the current course of the Department of Veterans Affairs Office of General Counsel, my firm believes that VA OGC and their regional offices should be held to the similar standards and scrutiny currently followed by the Department of Justice (DOJ). The DOJ's Office of Professional Responsibility (OPR) reports directly to the Attorney General and investigates allegations of misconduct concerning DOJ attorneys (this office is separate from the Inspector General's office further stressing the importance of high ethical standards for DOJ lawyers). OPR's objective is to ensure that DOJ attorneys act in accordance with the high professional standards not only expected of government attorneys, but of the Nation's principal law enforcement agency.

At this time, it would greatly benefit the Department of Veterans Affairs if both employees and private plaintiff counsel were able to file complaints of alleged misconduct to a separate and impartial office answerable directly to the Secretary. This would both deter VA OGC from acting unethically and give the Department as a whole a new found legitimacy. By doing so, the VA OGC could become a model of standard ethical practice across all Federal agencies.

Thank you once again for the opportunity to communicate my insight on the U.S. Department of Veterans Affairs Office of General Counsel, the Subcommittee's time and consideration is greatly appreciated. I look forward to working with the Committee in future endeavors to correct the issues facing VA employees in their attempts to settle their labor and employment disputes with the Office of General Counsel.

**Exhibit A: Richard Plezia v. Department of Veterans Affairs**

UNITED STATES OF AMERICA  
MERT SYSTEMS PROTECTION BOARD  
CENTRAL REGIONAL OFFICE

RICHARD A. PLEZIA,  
Appellant,  
v.

DOCKET NUMBER  
CH-3443-05-0404-1-2

DEPARTMENT OF VETERANS AFFAIRS,  
Agency.

DATE: February 22, 2008

AGENCY'S RESPONSE TO  
REFILED ACKNOWLEDGMENT ORDER

The Agency relies, in chief, on the documents already filed pursuant to this matter and those filed herewith. By way of refreshing recollections and development, the Appeal has proceeded as follows:

DATE	OCCURRENCE
01/27/05	Appeal received by MSPB seeking the following relief:  Description of agency action: I was charged military leave even on non work days which caused me to use annual, sick or leave without pay to perform military duty in violation of <u>Butterbaugh, et al., v. Department of Justice</u> , 336 F.3d 1332 (Fed. Cir. 2003) from 1985 to 2001.  Reason why agency action is wrong: Pursuant to <u>Butterbaugh, et al., v. Department of Justice</u> , 336 F.3d 1332 (Fed. Cir. 2003), the agency improperly charged military reservists leave pursuant to 5 USC 6323(a)(1) even on days when the employee was not scheduled to work.

Appellant wishes to re-file and amend his appeal to reflect he was improperly charged military leave from 1985 to 2001 thereby necessitating the uses of 20 days of annual leave, leave without pay, or sick leave to fulfill his remaining military obligations.

The Appellant provides no information beyond that which was set forth in the initial Appeal.

The Agency avers, both in response to the refiled Appeal and the directive concerning settlement, that it has provided notice to all employees at VAMC Detroit concerning its willingness to provide assistance with inquiries and/or claims for leave deducted during military service, that such notice has been provided to the Appellant, and that he has been advised concerning the methodology of communicating with Human Resources about his circumstance. Accordingly, there is no Agency opposition to investigating the Appellant's claim and restoring leave improperly taken from his annual or sick leave balances if the inquiry established that such is warranted.

Should the Appellant elect to follow the advice provided by the Chief of Human Resources at VAMC Detroit, resolution through administrative processes will be achieved. Should the Appellant elect to proceed with his Appeal with the anticipated requests for discovery devised to achieve the same end at financial cost in the form of attorney fees, the Agency provides notice that it will resist any petition for the same for the reason that the Appeal is an unnecessary, needlessly confrontational and wasteful method of resolving the dispute.

attest to the above  
Date: 11/1/11

The Agency further advises that VAMC Detroit, as a component of the Department of Veterans Affairs, is directly and fully engaged in activities supportive of veterans and no other party to this Appeal can claim superior status in such matters. Therefore, it

encourages the Appellant to pursue the method for resolution set forth herein.

FOR THE AGENCY:



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**Prepared Statement of Hon. Will A. Gunn, General Counsel,  
U.S. Department of Veterans Affairs**

Mr. Chairman, Dr. Roe, and Members of the Subcommittee, good morning. Thank you for the opportunity to testify today. As General Counsel and the chief legal officer of the Department of Veterans Affairs, I am pleased to discuss the operation of the Office of General Counsel (OGC) as it supports the Secretary, senior leaders, and VA's dedicated employees in their daily service to our Nation's Veterans.

### ***The Office of General Counsel and Its Mission***

The Office of General Counsel, as mandated by 38 U.S.C. §311 and 38 CFR §14.500, provides legal assistance to the Secretary concerning the programs and policies of the Department and is specifically responsible for litigation, interpretive legal advice, and other legal services required for program implementation.

OGC interprets all laws, regulations, and judicial precedents pertaining to the Department. We are responsible for the conduct of litigation—both independently and in coordination with the Justice Department—in State and Federal courts. OGC also plays a large role in preparing VA's testimony for legislative hearings, analyzing pending legislation in Congress, and drafting legislative proposals initiated by VA.

OGC supports the strategic goals of the Department by providing accurate, timely, and effective legal advice and representation. OGC also assists in formulating policy and in providing legal advice and services to the Secretary and all VA components. OGC also trains VA employees to ensure compliance with applicable laws. Finally, the General Counsel serves as VA's regulatory policy officer and manager of its centralized regulatory management office.

### ***Organizational Structure***

The OGC is the Department's national law firm, operating not only from VA Central Office and but also from 22 Offices of Regional Counsel located throughout the United States. My focus as General Counsel has been to foster a unified national-law office culture. By emphasizing knowledge management, education & training, and intra-office collaboration, we can leverage the collective expertise of nearly 500 attorneys and 230 paralegals and support staff to ensure timely, accurate, consistent legal service to the Secretary and all elements of the Department.

OGC headquarters is organized into seven Professional Staff Groups (PSGs) and the Office of Regulations Policy and Management. Approximately 40 percent of OGC's 730 personnel comprise these offices, which specialize in providing legal advice and services related to the subject areas identified below:

*Professional Staff Group I* has responsibility for administrative claims and litigation under the Federal Tort Claims Act, and legal services regarding education programs for Veterans and dependents, VA's debt-collection activities under a number of statutes, vocational rehabilitation programs, and VA's loan guaranty program. This group is also responsible for administrative claims under the Military Personnel and Civilian Employees' Claims Act and for requests for representation made by VA employees to the Department of Justice.

*Professional Staff Group II* has overall responsibility for providing advice concerning VA's multi-billion-dollar programs of disability and death compensation and pension for Veterans and their survivors, and Federal life-insurance programs for Servicemembers and Veterans. In addition, the group is responsible for all legal advice concerning the national cemetery system (except land acquisition, which is handled by PSG V) and various burial benefits administered by the Veterans Benefits Administration. The group is also responsible for reviewing proposed and final rules for all VA programs to ensure compliance with the Administrative Procedure Act, and other statutes and orders governing rule-making.

*Professional Staff Group III* provides legal advice in the areas of health-care eligibility and benefits, medical administration, medical research, labor-management relations, human resources, crimes and police matters, VA-affiliated non-profit corporations, technology transfer and ethics. The Assistant General Counsel for PSG III is VA's designated agency ethics official, responsible for operating the Department's ethics program.

*Professional Staff Group IV* is primarily responsible for four legal practice areas—equal employment opportunity (EEO) law, information law, appropriations/fiscal law, and intellectual property law.

*Professional Staff Group V* is responsible for three major legal practice areas—government contracts, including procurement, bid protests, and contract litigation; real- and personal-property law; and environmental law.

*Professional Staff Group VI* is responsible for providing management and administrative support and services to OGC at VA central office and the 22 Offices of Regional Counsel nationwide. The Assistant General Counsel for PSG VI also serves as the principal advisor to the Deputy General Counsel and the General Counsel on matters relating to the delivery of legal services to client VA facilities in the field. The Assistant General Counsel, PSG VI, supervises the 22 Regional Counsels.

*Professional Staff Group VII* is responsible for representing the Secretary of Veterans Affairs before the U.S. Court of Appeals for Veterans Claims (CAVC). The decisions issued by the CAVC are often precedential in nature and carry the weight of law, which, in turn, potentially affects the administration of VA benefit programs and claim procedures.

*Regulation Policy and Management:* OGC also has a separate directorate, the Office of Regulation Policy and Management (02REG), which is responsible for centrally managing development and amendment of all VA regulations. This office supervises major regulation rewrite projects for the Department, including an ongoing project to reorganize and rewrite all of the compensation and pension regulations in part 3 of Title 38, Code of Federal Regulations (CFR). It also is responsible for implementing the Federal Government's e-rulemaking initiative and operating the Federal Docket Management System (FDMS) for the Department.

*Offices of Regional Counsel* personnel comprise the remaining 60 percent of OGC's FTE and provide legal services to the Department's field facilities in a broad spectrum of legal practice areas. Regional Counsel attorneys, and the paralegals and legal assistants supporting them, adjudicate tort claims, including claims of medical malpractice, represent the Department in administrative proceedings involving discrimination complaints and appeals from employee discipline, provide the full array of contract law services, advise and assist regarding the Department's research corporations and related issues, provide ethics training and review of confidential financial disclosure reports, provide preventive law training, prepare opinions and generally advise Department managers regarding a multitude of legal issues.

#### ***Management Reforms and Innovations***

The Office of the General Counsel has undergone a number of significant organizational changes in the last 15 years. In 1995, OGC reduced the number of its field offices from 56 districts to 23 regions to combine areas of geographic responsibility to better serve our VA clients.

In 2003, OGC launched its own case and time management system, General Counsel Legal Automated Workload System (GCLAWS). Using GCLAWS, our practitioners create electronic case files, complete with file attachments for key documents and time entry information to document case management. GCLAWS also contains a robust report generation capability to assist OGC users, supervisors and OGC senior management in tracking cases, spotting trends, etc.

In 2008, OGC built the capability to provide contract legal support to VA's field activities to improve the quality of solicitations and contract awards. Each office of regional counsel now has at least two contract law attorneys. When used to their maximum advantage, the legal support begins before the solicitation and continues through the award, including any protest actions. OGC is also available to advise on contract-administration issues.

OGC implemented a robust client-survey program in 2003 and has used the feedback to deliver our clients the training, preventive-law guidance, and key information about what services we provide and who among us provides them.

We focused similar attention on our greatest resource, our employees. We conducted employee surveys in 2009 and again in 2010. We have provided training to our leaders to maximize use of the feedback to improve where needed and understand better why we are succeeding in other areas so we can sustain the success.

#### ***Strategic Outlook***

Also in 2008, OGC published its first strategic plan. We built the plan to align our operations with those of our clients. We understand strategic planning is not a static event. Instead, it requires continual review and updating to ensure the plan aligns with changes in Departmental priorities.

As stated in the plan, OGC's mission is to provide expert, timely and effective legal advice and representation to the Department of Veterans Affairs. While we move to implement our defined mission, the following vision lights our path: to be the premier Federal legal organization—unified, national and world class—composed of talented, dedicated professionals, working together to support the Department's mission of service to our Nation's Veterans.

The OGC strategic plan lists our core values, the principles that guide our organization.

- Honest—we will preserve our integrity and that of the Office of General Counsel in all of our dealings.

- **Ethical**—our practice reflects the highest ethical standards in the legal profession. We demand the highest level of awareness of and compliance with all ethical standards applicable to the Department.
- **Mission First**—Veterans have earned our gratitude and respect. We provide legal services that foster just and fair treatment of Veterans and their families through the faithful execution of the laws, regulations, and policies of the Department.
- **Professional**—we are a highly-skilled, diverse and responsive national law office dedicated to providing timely legal service to the Department. We are responsible and answerable for our professional decisions and actions. We treat everyone with respect and dignity.
- **Proactive**—we are committed to open communications with our associates, stakeholders and clients. To best serve our clients, we are committed to and encourage constructive and early engagement on a wide range of programmatic and legal issues. This can help resolve potential issues before they become legal problems, and result in a more comprehensive policy-formulation process within the Department.
- **Excellence**—we strive to perform at the highest level of competence and to exceed the expectations of our clients and stakeholders. We seek to continuously improve our services and skills.
- **Transparent**—we strive to improve service by making our organization, legal and business processes accessible to and understandable by our clients and stakeholders.
- **Stewardship**—we exercise responsible stewardship of human, financial, and other resources, as well as data and information entrusted to us. We embrace innovative technology to maximize our effectiveness and resource management.

Earlier this year, we began the process of reviewing our strategic plan to ensure it remains relevant and aligned with the Department's operations, particularly given the focus on transformation articulated by both the President and Secretary Shinseki, and the creation of a new VA Strategic Plan.

The OGC Strategic Plan and our commitment to its many elements promote the concept of a unified national law firm. One key aspect of the Strategic Plan involves greater collaboration and sharing of information within OGC to improve the consistency of our legal guidance and the speed with which we deliver it. This fundamental concept drives many of our current initiatives including Geographic Cooperatives, Specialty Panels and regional training events for OGC personnel.

A stable workforce and timely and effective information technology support are critical to achieving our goal of a truly unified national law firm. Staffing is a paramount concern because over 90 percent of our budget involves payroll and related expenses. Similarly, access to information, current and historical, logically organized and easily retrievable, is critical to our national law firm goal.

### ***Current Challenges***

#### **Meeting Court of Appeals for Veterans Claims (CAVC) Filing Deadlines**

OGC attorneys represent the Secretary in all appeals taken to the CAVC. As the Subcommittee is aware, the number of cases filed in that court has been steadily growing over the past several years. OGC's ability to increase staffing has not always kept pace. Fortunately, the FY 2010 budget increase for our office has permitted us to catch up to this workload. The FY 2011 VA budget request for OGC would allow us to stand up another litigation team to deal with the expected further growth in new CAVC cases.

The CAVC is coming off a record-setting year in which it received 4,725 new cases and we are now filing approximately 2,000 pleadings per month. With the additional attorney and support staff we have been able to add in FY 2009 and 2010, our average caseloads per attorney are now down to 47 active cases. Experience has shown that when our average caseloads exceed 50, we have difficulty staying current.

This is a high priority for us and while we realize there will always be some circumstances beyond our control requiring extensions to file, our goal is to reduce these requests to the minimum necessary.

#### **Supporting VA Acquisition Activities**

A second major challenge is to address the evolving need for legal support in the acquisition process. The Department's history shows it was slow to realize the value that attorneys could bring to the procurement arena. Fortunately, OGC's role, as well as the contracting function itself, is being buttressed, and this is a focus of the Secretary's initiatives to modernize VA.

In the early 1990's, as now, VA was one of the largest procurement agencies in the Federal Government. There were several hundred contracting locations and nearly 2000 contracting officials who annually awarded tens of thousands of contracts totaling several billion dollars in value. These contracts included construction, supply, service, information technology, resource sharing, and interagency agreements. Yet all of the legal support for contracting was provided by Professional Staff Group V, located in Washington D.C., along with three attorneys out-stationed at the National Acquisition Center, in Hines Ill. The VACO staff consisted then of fewer than 12 staff attorneys, and three supervisors.

The role of the attorneys in individual procurements was limited to reviewing certain high-dollar solicitations and other documents per the dictates of the Federal and VA Acquisition Regulations, litigating protests at the Government Accountability Office and claims at the Board of Contract Appeals, and providing advice when requested by the various contracting and program officials. There was no formal role for attorneys in the contract-formation process, including the selection of awardees, or in the contract-administration process. Moreover, existing VA attorney staff were unable to focus exclusively on contracting assistance as they also maintained responsibility for real-estate and environmental matters, regulation and policy reviews and various additional activities. In the mid-1990s and early 2000s, three more attorneys were assigned to support the Austin Automation Center and three attorneys were located at field locations to support construction and supply activities.

The Department reexamined its acquisition process in 2007 and decided to strengthen attorney support to VA procurement activity. In that year, OGC trained an attorney in each Office of Regional Counsel in contract law. In 2008, twenty five additional attorneys were assigned to each of those offices, allowing OGC to transfer responsibility for legal support for contracts awarded by field activities from PSG V to our 22 field offices. Four additional PSG V attorneys have been added to support the national contracting function performed in the Office of Acquisition, Logistics and Construction (OALC) headquarters office.

The Regional Counsel contract-law attorneys are each assigned expert PSG V mentor attorneys with whom to work. The expansion of the Regional Counsel attorney staff was particularly timely in view of VHA's subsequent consolidation of its local contracting actions first at the VISN level, and later at regional levels—consolidations OGC was well situated to support. In addition, in 2009, concurrent with the establishment of the Technology Acquisition Center in Eatontown, NJ, OGC's PSG V established a new section to provide dedicated legal support to VA's information technology acquisition function. This staff consists of 14 attorneys, ten in Eatontown, NJ and four in Austin, Texas, and an on-site supervisory attorney at Eatontown.

The growth of our procurement-attorney corps has permitted an expanded role for them in the acquisition process. OALC requires Contract Review Boards (CRB) in all high-dollar procurements and utilizes Integrated Product Teams (IPT) to prepare and conduct many of those acquisitions. Those innovations greatly increase the demand for legal support. For example, CRBs provide a legal review of the entire procurement process for an acquisition prior to the award decision being made, an excellent means for identifying potential flaws. Even at the earlier stages of an acquisition, there is an increased demand to use IPTs to develop VA's requirements, with legal counsel participating in the development of acquisition strategy and the creation of the solicitation, evaluation criteria, and statement of work. We are glad to have become full and active partners in VA acquisition activities.

OGC continually explores ways to improve its operations, and is implementing key measures every day. These include increasing focus on attorney development and coordination, and leveraging technology so attorneys can more effectively communicate through a number of means, as and when needed. We also have implemented a new SharePoint Web site, which enables each OGC attorney to stay "patched in" on the latest developments within each OGC Professional Staff Group and Regional Counsel Office. The SharePoint Site also contains a search vehicle that enables attorneys to seek and retrieve past legal opinions and memos. We also have enhanced OGC's regional and national training programs, and instituted a new OGC leadership development program to ensure OGC is poised to retain its best and brightest.

OGC is pointed in the right direction and working hard. As the Department moves forward to centralize aspects of its procurement activities, our office will position itself to provide the best possible legal services.

That concludes my opening statement and I ask that it be entered into the record. Mr. Chairman, I look forward to whatever questions you and other Members may have.

**MATERIAL SUBMITTED FOR THE RECORD****U.S. DEPARTMENT OF VETERANS AFFAIRS  
FOLLOWUP INFORMATION REGARDING VA EMPLOYEE SURVEYS**

The information below contains the questions from the VA's employee survey. The table at the end contains a summary report regarding the survey responses for the 2 years VA has conducted the survey, 2009 and 2010.

VA converted the answers to a 5-point scale, assigning the highest positive score the value of 5 and 1 for the lowest score, excluding "Do not know" as an answer when it is available.

For the 2009 survey results, the average scores are missing for three questions because VA did not ask those questions until the FY 2010 survey. The questions involve the Organizational Assessment topics of "Engagement" and "Psychological Safety" and the Culture question regarding "Enabling".

**VA ALL EMPLOYEE SURVEY****OVERVIEW:**

The purpose of this survey is to collect information on your perceptions of the workplace and your satisfaction with the Department of Veterans Affairs. **Please answer all of the following questions thinking about your experiences over the past six (6) months.**

Completing the survey is completely voluntary, but your help in responding to the survey is very important. By voicing your opinion you can influence your work destiny and assist all of us in making changes where needed. The survey is completely confidential and anonymity is protected throughout the process. Thank you for taking the time to answer this survey. Your opinion is very important to us. The usefulness of the survey depends on the frankness with which you answer each question.

**DEFINITIONS:**

Several questions refer to our law firm, senior managers, managers, supervisors, offices or clients. Use the following definitions when answering questions referring to these terms:

**Law Firm:** The component organizations of the Office of General Counsel, i.e., Professional Staff Groups, 02 Reg., 22 Offices of Regional Counsel and detailed OIT professionals.

**Senior Managers:** Those in executive positions who supervise managers, i.e., General Counsel, Deputy General Counsel.

**Managers:** Those in management or executive positions who supervise first-line supervisors and team leaders, i.e., Assistant General Counsel, Principal Deputy Assistant General Counsel, Regional Counsel.

**Supervisors:** First-line supervisors; those who are responsible for employees' performance appraisals and leave approval, i.e., Associate General Counsel, Deputy Assistant General Counsel, Assistant Regional Counsel.

**Office:** Professional Staff Group, 02 Reg., Office of Regional Counsel or detailed OIT professionals. Please think of this office when answering questions about offices in the survey.

**Clients:** Anyone who uses or receives the services that your office provides.

**Note: Please do not use your browser back or forward buttons as this will cause you to lose previously entered data.**

In what component of the Office of the General Counsel do you work?

- VACO
- Regional Counsel Office

Please select the appropriate office.

- Front Office
- PSG1
- PSG2
- PSG3
- PSG4
- PSG5
- PSG6
- PSG7
- 02REG
- VACO OIT Professionals

Please select the appropriate office.

- Region 1 (Bedford)
- Region 2 (Brooklyn)
- Region 3 (Baltimore)
- Region 4 (Philadelphia)
- Region 5 (Atlanta)
- Region 6 (Bay Pines)
- Region 7 (Cleveland)
- Region 8 (Nashville)
- Region 9 (Jackson)
- Region 10 (Hines/Chicago)
- Region 11 (Detroit)
- Region 12 (St. Louis)
- Region 13 (Temple/Waco)
- Region 14 (Houston)
- Region 15 (Minneapolis)
- Region 16 (Denver)
- Region 18 (San Francisco)
- Region 19 (Phoenix)
- Region 20 (Portland)
- Region 21 (Buffalo)
- Region 22 (Indianapolis)
- Region 23 (Winston)
- Regional OIT Professionals

#### **JOB SATISFACTION INDEX**

Please select the answer which corresponds to your **current** level of satisfaction.

Compared to what you think it should be, how satisfied are you with the type of work that you currently do?

- Not at all Satisfied
- Not Very Satisfied
- Neither Satisfied Nor Dissatisfied
- Somewhat Satisfied
- Very Satisfied

Compared to what you think it should be, how satisfied are you with the amount of work that you are able to accomplish?

- Not at all Satisfied
- Not Very Satisfied
- Neither Satisfied Nor Dissatisfied
- Somewhat Satisfied
- Very Satisfied

Compared to what you think it should be, how satisfied are you with the amount of pay that you receive?

- Not at all Satisfied
- Not Very Satisfied
- Neither Satisfied Nor Dissatisfied
- Somewhat Satisfied
- Very Satisfied

Compared to what you think it should be, how satisfied are you with relationships you have with your coworkers?

- Not at all Satisfied
- Not Very Satisfied
- Neither Satisfied Nor Dissatisfied
- Somewhat Satisfied
- Very Satisfied

Compared to what you think it should be, how satisfied are you with the quality of direct supervision you receive?

- Not at all Satisfied
- Not Very Satisfied
- Neither Satisfied Nor Dissatisfied
- Somewhat Satisfied
- Very Satisfied

Compared to what you think it should be, how satisfied are you with the quality of managers?

- Not at all Satisfied
- Not Very Satisfied
- Neither Satisfied Nor Dissatisfied
- Somewhat Satisfied
- Very Satisfied

Compared to what you think it should be, how satisfied are you with the number of opportunities for promotion?

- Not at all Satisfied
- Not Very Satisfied
- Neither Satisfied Nor Dissatisfied
- Somewhat Satisfied
- Very Satisfied

Compared to what you think it should be, how satisfied are you with working conditions in your job?

- Not at all Satisfied
- Not Very Satisfied
- Neither Satisfied Nor Dissatisfied
- Somewhat Satisfied
- Very Satisfied

Compared to what you think it should be, how satisfied do you think the clients of your organization are with the products and services it provides?

- Not at all Satisfied
- Not Very Satisfied
- Neither Satisfied Nor Dissatisfied
- Somewhat Satisfied
- Very Satisfied

Compared to what you think it should be, how satisfied are you with the amount of praise that you receive?

- Not at all Satisfied
- Not Very Satisfied
- Neither Satisfied Nor Dissatisfied
- Somewhat Satisfied
- Very Satisfied

Compared to what you think it should be, how satisfied are you with the quality of work you provide to the organization?

- Not at all Satisfied
- Not Very Satisfied
- Neither Satisfied Nor Dissatisfied
- Somewhat Satisfied
- Very Satisfied

Compared to what you think it should be, what is your current level of satisfaction with your job?

- Not at all Satisfied
- Not Very Satisfied
- Neither Satisfied Nor Dissatisfied
- Somewhat Satisfied
- Very Satisfied

If you have worked in the same office for the previous 24 consecutive months, please select the response which corresponds to your overall level of satisfaction compared to what it was 2 years ago. If you have **not** worked in the same office for the previous 24 consecutive months, please select “does not apply”.

Compared to what it was 2 years ago, how is your overall level of satisfaction with your job?

- Much Less
- Somewhat Less
- About The Same
- Somewhat More
- Much More
- Does Not Apply

**ORGANIZATIONAL ASSESSMENT INVENTORY**

Please answer all of the following questions thinking about your experiences over the past 6 months.

Your office consists of the individuals who report to your supervisor.

Indicate the extent to which you agree or disagree with each of the following statements by selecting the appropriate response. Please use the "do not know" answer only if you feel you do not have enough information to answer the question accurately.

My manager/supervisor is fair in recognizing individual accomplishments.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

My manager/supervisor is fair in recognizing team accomplishments.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

In my office employees are rewarded for providing high quality products and services to clients.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

I am given a real opportunity to develop my skills in my office.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

New practices and ways of doing business are encouraged in my office.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

Products, services and work processes are designed to meet client needs and expectations.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

Clients of my office are informed about the process for seeking assistance, commenting, and/or complaining about products and services.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

Managers/supervisors set challenging and yet attainable performance goals for my office.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

People treat each other with respect in my office.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

Disputes or conflicts are resolved fairly in my office.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

Employees in my office are involved in improving the quality of products, services, and work processes.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

Employees in my office have the job-relevant knowledge and skills necessary to accomplish organizational goals.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

Employees in my office have the appropriate supplies, materials, and equipment to perform their jobs well.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

Employees in my office are protected from health and safety hazards on the job.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

Managers/supervisors understand and support employee family/personal life responsibilities in my office.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

A spirit of cooperation and teamwork exists in my office.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

My manager/supervisor reviews and evaluates the progress toward meeting the goals and objectives of the organization.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

This organization does not tolerate discrimination.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

Differences among individuals are respected and valued in my office.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

Managers/supervisors work well with employees of different backgrounds in my office.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

My manager/supervisor provides fair and accurate ratings of employee performance.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

If I were able, I would leave my current job because I am dissatisfied.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

The safety of workers is a big priority with management where I work.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

My job requires that I work very fast.

- Strongly Disagree
- Disagree

- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

I have a lot of say about what happens on my job.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

The people I work with take a personal interest in me.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

The people I work with can be relied on when I need help.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

I feel a strong personal connection with the mission of VA.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

VA cares about my general satisfaction at work.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

Members in our law firm are able to bring up problems and tough issues.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

It is safe to take a risk in our law firm.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

#### CULTURE SURVEY

This set of questions relates to your office's culture. Please read each statement. Indicate the extent to which you **agree or disagree** by selecting the appropriate response.

My office is a very *dynamic and entrepreneurial* place. People are willing to stick their necks out and take risks.

- Strongly Disagree
- Disagree

- Neither Agree Nor Disagree
- Agree
- Strongly Agree

My office is a very **formalized and structured** place. Bureaucratic procedures generally govern what people do.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree

Managers/supervisors in my office are **warm and caring**. They seek to develop employees' full potential and act as their mentors or guide.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree

Managers/supervisors in my office are **risk-takers**. They encourage employees to take risks and be innovative.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree

Managers/supervisors in my office are **rule-enforcers**. They expect employees to follow established rules, policies, and procedures.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree

Managers/supervisors in my office are **coordinators and coaches**. They help employees meet the office's goals and objectives.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree

The glue that holds my office together is **loyalty and tradition**. Commitment to this office runs high.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree

The glue that holds my office together is **commitment to innovation and development**. There is an emphasis on being first.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree

The glue that holds my office together is **formal rules and policies**. People feel that following the rules is important.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree

The glue that holds my office together is the emphasis on **tasks and goal accomplishment**. A production orientation is commonly shared.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree

My office emphasizes **human resources**. High cohesion and morale in the organization are important.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree

My office emphasizes **growth and acquiring new resources**. Readiness to meet new challenges is important.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree

My office emphasizes **permanence and stability**. Keeping things the same is important.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree

My office emphasizes **competitive actions and achievement**. Measurable goals are important.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree

Policies and procedures in my office are helpful because they clarify roles and responsibilities.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree

Policies and procedures in my office help staff save time and effort.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree

Policies and procedures in my office represent the best way of doing things.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree

Rules, policies and procedures in my office are revised when they no longer work effectively.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree

**TRAINING**

Please read each statement. Indicate the extent to which you **agree or disagree** by selecting the appropriate response.

Employees in my office receive the training they need to do their jobs.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

Employees in my office receive the training they need to use new tools and technologies.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

Training opportunities are fairly allocated across my office.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

My managers/supervisors support employee efforts to learn.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

This organization gives a high priority to providing appropriate training.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

Additional training would assist me in my job.

- Strongly Disagree
- Disagree
- Neither Agree Nor Disagree
- Agree
- Strongly Agree
- Do Not Know

I would benefit from additional training in the following topic(s): (Choose all that apply).

- Benefits law.
- Business law (collections, enhanced use, sharing agreements/joint ventures, procurement, real property)
- Employment law (EEO, MSPB, FLRA, Title 38, government ethics).
- Health law (torts or intellectual property)
- Other specialized legal services (appropriations, ADR, information law, miscellaneous).
- Technology (GCLaws, Westlaw)

I find the following types of training to be the most effective: (Choose all that apply).

- Online training.
- Monthly OGC conference training (telephone).
- OGC Regional Training Conferences (Personnel law, Information law, torts).

- Commercial CLE courses.

Compared to what you think it should be, how satisfied are you with the training that you have received from the law firm?

- Not at all Satisfied
- Not Very Satisfied
- Neither Satisfied Nor Dissatisfied
- Somewhat Satisfied
- Very Satisfied

#### **Demographics**

What is your gender?

- Male
- Female

What is your age?

- Less than 20 years
- 20–29
- 30–39
- 40–49
- 50–59
- 60 years or older

Are you Spanish, Hispanic, or Latino?

- Yes
- No

What is your race? (mark one or more)

- White
- Black or African American
- American Indian or Alaskan Native
- Asian
- Native Hawaiian or other Pacific Islander

How long have you been with VA?

- Less than 6 months
- Between 6 months and 1 year
- Between 1 and 2 years
- Between 2 and 5 years
- Between 5 and 10 years
- Between 10 and 15 years
- Between 15 and 20 years
- More than 20 years

What is your level of supervisory responsibility?

- None
- Supervisor
- Manager
- Senior Manager

Prior to your full-time VA employment were you ever a trainee in the VA?

- Yes
- No

Thank you for participating in the VA All Employee Survey. Your input is very important to us.

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### **Employee Survey Results for 2009 and 2010**

#### ***All-Employee Survey (AES) Response Averages for OGC***

<b>Fiscal Year</b>	<b>2009</b>	<b>2010</b>
<b>Total Respondents</b>	457	615

*All-Employee Survey (AES) Response—Continued*  
Averages for OGC

<b>Fiscal Year</b>	<b>2009</b>	<b>2010</b>
<b>Factor</b>	<b>Avg.</b>	<b>Avg.</b>
<b>Job Satisfaction</b>		
Work Type	4.38	4.37
Work Amount	3.98	4.07
Pay Satisfaction	3.71	3.71
Coworker	4.37	4.36
Supervision	4.20	4.21
Senior Management	4.08	4.17
Promotion Opportunity	3.03	3.03
Work Condition	4.00	3.95
Customer Satisfaction	4.32	4.38
Praise	3.95	3.98
Work Quality	4.53	4.59
Satisfaction	4.13	4.07
Satisfaction-2yrs	3.40	3.29
<b>Organizational Assessment</b>		
Cooperation	4.07	4.04
Conflict Resolution	3.79	3.81
Diversity Acceptance	4.23	4.24
Coworker Support	4.01	4.00
Supervisory Support	3.96	4.07
Customer Service	4.00	4.04
Innovation	3.77	3.85
Resources	4.00	4.08
Safety Climate	3.79	3.92
Leadership	3.90	3.87
Rewards	3.93	3.99
Employee Development	3.92	3.92
Work/Family Balance	4.41	4.45
Planning/Evaluation	4.21	4.22
Job Control	3.47	3.46
Demands	3.63	3.68
Retention	3.91	3.85

*All-Employee Survey (AES) Response—Continued*  
Averages for OGC

<b>Fiscal Year</b>	<b>2009</b>	<b>2010</b>
Engagement		3.91
Psychological Safety		3.62
Civility	4.09	4.08
<b>Culture</b>		
Group	3.47	3.53
Entrepreneurial	3.07	3.15
Bureaucratic	3.25	3.31
Rational	3.63	3.70
Enabling		3.40
<b>Training</b>		
Training	3.78	3.78

Committee on Veterans' Affairs  
Subcommittee on Oversight and Investigations  
Washington, DC.  
*July 30, 2010*

Honorable Eric K. Shinseki  
Secretary  
U.S. Department of Veterans Affairs  
810 Vermont Avenue, NW  
Washington, DC 20420

Dear Secretary Shinseki:

Thank you for the testimony of the Honorable Will A. Gunn, General Counsel, U.S. Department of Veterans Affairs, accompanied by Phillipa Anderson, Assistant General Counsel; and Michael Hogan, Assistant General Counsel at the U.S. House of Representatives Committee on Veterans' Affairs Subcommittee on Oversight and Investigations hearing that took place on June 30, 2010, entitled "Evaluating the U.S. Department of Veterans Affairs Office of General Counsel."

Please provide answers to the following questions by Friday, September 10, 2010, to Todd Chambers, Legislative Assistant to the Subcommittee on Oversight and Investigations.

1. It seems that the OGC was going to be consulted about the action that the Office of Information and Technology (OI&T) needed to take with regards to the appropriate action recommendation from the VA Office of Inspector General (OIG) in the August 2 OI&T reports (#09-01123-195 and #09-01123-196). What advice did you give OI&T to implement the OIG recommendations from the two reports regarding:
  - a. Collecting money back;
  - b. Employees that received their positions through nepotism; and
  - c. Taking appropriate action regarding hiring relatives, direct hire authority expiration, and collecting on educational payments.
2. OI&T concurred with the OIG Recommendations but now they seem to be backsliding and disagreeing with the nepotism finding due to guidance from OGC. Has OGC given OI&T advice about the issues in the two OIG reports?
  - a. We hear that though VA concurred with the recommendation at the time of the report, not 10 months later they are not concurring due to advice they are receiving from OGC. Please explain what type of advice your office

is producing that is convincing officials to counter their OIG report concurrences.

3. Are there any VA regulations that are giving Regional Offices and regional counsels troubles either because VA is having issues interpreting them or because the regulations are obtuse?
  - a. Have you heard any complaints from VBA Regional Office or regional counsels about VA regulations?
  - b. If so, what is your office doing about fixing this problem?
4. Has VA consulted with, or plans to consult with the Department of Health and Human Services, which has jurisdiction over the HITECH Act regarding the notification requirements within the Act, and what advice has that Department provided VA with respect to instances of security breaches wherein over 500 individuals were affected, but not all within one jurisdiction or State?
5. Please respond in detail to the testimony provided by Mr. Tully during the hearing.
6. What incentives does VA provide to obtain the best individuals from the private sector to work for the Office of General Counsel?
7. It appears that VA is planning on hiring additional attorneys to limit the number of cases assigned to each attorney at 50 or fewer. Additionally, in the testimony provided, it appears that training for attorneys in contract law will be a top priority. Will this training include the Regional Counsels, as well as those at Headquarters, the National Acquisition Center (NAC), and the Technology Acquisition Center (TAC) in Eatontown, NJ?
8. Is there an entity that oversees the ethical conduct of VA attorneys? Who does a party go to if they believe there is unethical conduct on the part of a VA attorney? What recourse does the VA have when they find out that an attorney may have altered documents?

Thank you again for taking the time to answer these questions. The Committee looks forward to receiving your answers. If you have any questions concerning these questions, please contact Martin Herbert, Majority Staff Director for the Subcommittee on Oversight and Investigations at (202) 225-3569 or Arthur Wu, Minority Staff Director for the Subcommittee on Oversight and investigations at (202) 225-3527.

Sincerely,

Harry E. Mitchell  
*Chairman*  
 MH:tc

David P. Roe  
*Ranking Republican Member*

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**Questions for the Record**  
**The Honorable Harry E. Mitchell, Chairman**  
**Subcommittee on Oversight and Investigations**  
**The Honorable David P. Roe, Ranking Republican Member**  
**Subcommittee on Oversight and Investigations**  
**House Committee on Veterans' Affairs**  
**"Evaluating the U.S. Department of Veterans Affairs**  
**Office of General Counsel"**  
**June 30, 2010**

**Question 1:** It seems that the OGC was going to be consulted about the action that the Office of Information and Technology (OI&T) needed to take with regards to the appropriate action recommendation from the VA Office of Inspector General (OIG) in the August 2, OI&T reports (#09-01123-195 and #09-01123-196). What advice did you give OI&T to implement the OIG recommendations from the two reports regarding:

**Question 1(a):** Collecting money back

**Response:** The Office of Inspector General (OIG) recommended that VA issue bills of collection to six employees due to the failure of Office of Information and Technology (OIT) supervisors to follow VA policy regarding academic degree training. On August 13, 2010, we advised OIT we could find no legal support for the proposition that the employees are liable for money paid for their educational training.

**Question 1(b):** Employees that received their positions through nepotism; and

**Response:** Additionally, OIG recommended issuing bills of collection due to nepotism violations. Regarding these recommendations and question 1.b., as noted in response to question 2 there was insufficient evidence to demonstrate the nepotism statute was violated.

**Question 1(c):** Taking appropriate action regarding hiring relatives, direct hire authority expiration, and collecting on educational payments.

**Response:** One employee was demoted and another admonished based upon OIG's findings regarding the improper hiring of relatives. The Office of Human Resources and Administration is currently working with OIT to take appropriate action regarding employees appointed erroneously. The servicing Human Resources Offices are now in the process of taking the appropriate corrective actions for those individuals identified in the OIG report as well as other similarly situated OIT employees identified in a subsequent Agency-wide review.

**Question 2:** OI&T concurred with the OIG Recommendations but now they seem to be backsliding and disagreeing with the nepotism finding due to guidance from OGC. Has OGC given OI&T advice about the issues in the two OIG reports? Please explain what type of advice your office is producing that is convincing officials to counter their OIG report concurrences.

**Response:** At the time that OIT concurred with the OIG nepotism recommendations, OIT had not received any Office of General Counsel (OGC) legal advice regarding the recommendations. Further, OIT agreed, in its responses to the recommendations, to take "appropriate action" after consulting with OGC and the Office of Human Resources and Administration. In July 2010, we advised OIT that, based upon the elements of the nepotism statute (5 U.S.C. §3110) and case law involving alleged violations of that statute, there was insufficient evidence to establish that the OIT supervisor violated the statute.

**Question 3:** Are there any VA regulations that are giving Regional Offices and regional counsels trouble either because VA is having issues interpreting them or because the regulations are obtuse?

**Question 3(a):** Have you heard any complaints from VBA regional Offices or regional counsels about VA regulations?

**Question 3(b):** If so, what is your office doing about fixing this problem?

**Response:** We have not received complaints from Regional Offices or Regional Counsel about the VA-benefit regulations applied by the Regional Offices. However, OGC's Office of Regulations Management is overseeing VA's major project to reorganize and rewrite all of the VA's claims-adjudication regulations in Part 3 of the Code of Federal Regulations. This effort will make the compensation and pension regulations easier to read, understand, and apply.

**Question 4:** Has VA consulted with, or [does it have] plans to consult with the Department of Health and Human Services, which has jurisdiction over the HITECH Act regarding the notification requirements within the Act, and what advice has that Department provided VA with respect to instances of security breaches wherein over 500 individuals were affected, but not all within one jurisdiction or State?

**Response:** We have contacted the Privacy Division, Office of Civil Rights, which is the Health and Human Services (HHS) office responsible for promulgating the regulations governing notification of data breaches under the HITECH Act. That office declined to offer specific legal advice on notification in any particular situation, but instead referred us to what it considered to be clear guidance in the Supplementary Information in the Federal Register notice of the interim final rule, "Breach Notification for Unsecured Protected Health Information; Interim Final Rule," 74 Fed. Reg. 42740 (Aug. 24, 2009). That notice specifically addresses the instance of security breaches wherein over 500 individuals were affected but not all within one jurisdiction or State, and specifies that "if a covered entity discovers a breach of 600 individuals, 200 of which reside in Virginia, 200 of which reside in Maryland, and 200 of which reside in the District of Columbia, such a breach did not affect more than 500 residents of any one State or jurisdiction, and as such, notification is not required to be provided to the media pursuant to § 164.406." 74 Fed. Reg. at 42752.

An OGC attorney also contacted an individual identified after the June 30, 2010, Subcommittee hearing by a minority staff member as a Senior Advisor at HHS who

may have felt our interpretation was incorrect. That individual informed us that she did not work in the area of HITECH, and did not recall voicing such an opinion.

**Question 5:** Please respond in detail to the testimony provided by Mr. Tully during the hearing.

**Response:** Please see the enclosed August 19, 2010, letter from General Counsel Will Gunn to Chairman Mitchell, which responds to Mr. Tully's testimony.

[The letter is being retained in the Committee files.]

**Question 6:** What incentives does VA provide to obtain the best individuals from the private sector to work for the Office of General Counsel?

**Response:** If necessary, OGC could offer recruitment incentives including bonuses and repayment of student-loan debt to recruit well-qualified talent. However, in recent years there has been no shortage of very well-qualified applicants, including applicants from the private sector, for OGC vacancies anywhere in the United States.

**Question 7:** It appears that VA is planning on hiring additional attorneys to limit the number of cases assigned to each attorney at 50 or fewer. Additionally, in the testimony provided, it appears that training for attorneys in contract law will be a top priority. Will this training include the Regional Counsels, as well as those at headquarters, the National Acquisition Center (NAC), and the Technology Acquisition Center (TAC) in Eatontown, NJ?

**Response:** OGC is committed to the professional development of the people who provide legal services to the Department. A clear need, in light of the increasing workload in the area of contracts and procurement, is for significant training of OGC's contracting specialists, regardless of their geographic locations or particular areas of specialization.

As the question suggests, OGC has lawyers who specialize in contract law located throughout the United States. This includes the various Offices of Regional Counsel, the National Acquisition Center, the Technology Acquisition Center, and VA Central Office. OGC has provided considerable specialized training for these lawyers in the recent past. A Masters Level Contract Law Symposium will be held in early November 2010 for OGC contract-law specialists throughout OGC.

Creating our own training allows OGC to address and train to meet developing needs within our specialized department. There are also significant opportunities to be developed through other tried-and-true government professional-development programs, and mining these programs is another part of the overall OGC effort. We have developed a close relationship with both the United States Army Judge Advocate General's School in Charlottesville, Virginia, and the Department of Justice National Advocacy Center in Columbia, South Carolina. This allows our VA OGC contract attorneys to regularly attend the specialized training offered at those excellent institutions.

Finally, we have the flexibility to implement individualized legal-education opportunities in the field of government contracts for our contracts specialists—no matter their level of education or experience upon hiring. Our goal remains the development and retention of highly skilled contract-law specialists.

**Question 8:** Is there an entity that oversees the ethical conduct of VA attorneys? Who does a party go to if they believe there is unethical conduct on the part of a VA attorney? What recourse does the VA have when they find out that an attorney may have altered documents?

**Response:** There are three entities that oversee the ethical conduct of VA attorneys and complaints about unethical conduct can be made to any of these:

OGC Management—Internally within OGC, the General Counsel, the Deputy General Counsel, and subordinate managers and supervisors under their direction—Assistant General Counsels, Deputy Assistant General Counsels, Regional Counsels, and Assistant Regional Counsels—oversee VA attorneys' professional conduct on a daily basis. OGC supervisors are always available to receive feedback on the conduct of their employees and (as warranted) to take appropriate action which could involve remedies up to removal from employment.

OIG—Internally within VA, the OIG can be said to exercise oversight over all VA employees' conduct, including that of VA attorneys, by investigating matters that may suggest criminal activity, waste, fraud, abuse, or mismanagement of VA programs. Parties who believe they have knowledge of unethical conduct by a VA attorney that may rise to any of these levels may report it to the OIG for review and possible investigation.

Bar Associations—All attorneys who practice within OGC must be members in good standing of a State bar. The legal bars of every State and the District of Columbia oversee ethical conduct of all attorneys who are licensed within their jurisdictions. Bar officials enforce strict standards of professional conduct, breaches of which subject attorneys to sanctions that can include suspension and disbarment. The bars of the various States and the District of Columbia have publicly available information about how to report unprofessional conduct by attorneys they have licensed.

Alteration of official documents in order to deceive a court or administrative tribunal would be grounds for an attorney's dismissal from VA employment and for referral to his or her State bar for consideration of further disciplinary action.

