AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

ENSURING A MERIT–BASED EMPLOYMENT SYSTEM: AN EXAMINATION OF THE MERIT SYSTEMS PROTECTION BOARD AND THE OFFICE OF SPECIAL COUNSEL

HEARING

BEFORE THE

SUBCOMMITTEE ON FEDERAL WORKFORCE, POSTAL SERVICE, AND THE DISTRICT OF COLUMBIA

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

JULY 12, 2007

Serial No. 110–197

Printed for the use of the Committee on Oversight and Government Reform

Available via the World Wide Web: http://www.gpoaccess.gov/congress/index.html
http://www.house.gov/reform

U.S. GOVERNMENT PRINTING OFFICE

52–629 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HENRY A. WAXMAN, California, *Chairman*

TOM LANTOS, California
EDOLPHUS TOWNS, New York
PAUL E. KANJORSKI, Pennsylvania
CAROLYN B. MALONEY, New York
ELIJAH E. CUMMINGS, Maryland
DENNIS J. KUCINICH, Ohio
DANNY K. DAVIS, Illinois
JOHN F. TIERNEY, Massachusetts
WM. LACY CLAY, Missouri
DIANE E. WATSON, California
STEPHEN F. LYNCH, Massachusetts
BRIAN HIGGINS, New York
JOHN A. YARMUTH, Kentucky
BRUCE L. BRALEY, Iowa
ELEANOR HOLMES NORTON, District of Columbia
BETTY McCOLLUM, Minnesota
JIM COOPER, Tennessee
CHRIS VAN HOLLEN, Maryland
PAUL W. HODES, New Hampshire
CHRISTOPHER S. MURPHY, Connecticut
JOHN P. SARBANES, Maryland
PETER WELCH, Vermont

TOM DAVIS, Virginia
DAN BURTON, Indiana
CHRISTOPHER SHAYS, Connecticut
JOHN M. McHUGH, New York
JOHN L. MICA, Florida
MARK E. SOUDER, Indiana
TODD RUSSELL PLATTS, Pennsylvania
CHRIS CANNON, Utah
JOHN J. DUNCAN, Jr., Tennessee
MICHAEL R. TURNER, Ohio
DARRELL E. ISSA, California
KENNY MARCHANT, Texas
LYNN A. WESTMORELAND, Georgia
PATRICK T. McHENRY, North Carolina
VIRGINIA FOXX, North Carolina
BRIAN P. BILBRAY, California
BILL SALI, Idaho
JIM JORDAN, Ohio

PHIL SCHILIRO, *Chief of Staff*
PHIL BARNETT, *Staff Director*
EARLEY GREEN, *Chief Clerk*
DAVID MARIN, *Minority Staff Director*

SUBCOMMITTEE ON FEDERAL WORKFORCE, POSTAL SERVICE, AND THE DISTRICT OF COLUMBIA

DANNY K. DAVIS, Illinois

ELEANOR HOLMES NORTON, District of Columbia
JOHN P. SARBANES, Maryland
ELIJAH E. CUMMINGS, Maryland
DENNIS J. KUCINICH, Ohio, *Chairman*
WM. LACY CLAY, Missouri
STEPHEN F. LYNCH, Massachusetts

KENNY MARCHANT, Texas
JOHN M. McHUGH, New York
JOHN L. MICA, Florida
DARRELL E. ISSA, California
JIM JORDAN, Ohio

TANIA SHAND, *Staff Director*

CONTENTS

	Page
Hearing held on July 12, 2007	1
Statement of:	
Bloch, Scott J., special counsel, U.S. Office of Special Counsel; and Neil McPhie, chairman, Merit Systems Protection Board	4
Bloch, Scott J.	4
McPhie, Neil	13
Miles, Adam, legal representative, Government Accountability Project; Natresha Dawson, former Office of Special Counsel employee and whistleblower; Lara Schwartz, chief legislative counsel, Human Rights Campaign; and Beth Daley, director of investigations, the Project on Government Oversight	111
Daley, Beth	159
Dawson, Natresha	136
Miles, Adam	111
Schwartz, Lara	149
Rosenberg, Morton, Senior Analyst, Congressional Research Service, accompanied by Thomas J. Nicola, Legislative Attorney, American Law Division, Congressional Research Service; and Henry B. Hogue, Analyst, American National Government, Government and Finance Division, Congressional Research Service	58
Letters, statements, etc., submitted for the record by:	
Bloch, Scott J., special counsel, U.S. Office of Special Counsel, prepared statement of	6
Daley, Beth, director of investigations, the Project on Government Oversight, prepared statement of	161
Davis, Hon. Danny K., a Representative in Congress from the State of Illinois, prepared statement of	175
Dawson, Natresha, former Office of Special Counsel employee and whistleblower, prepared statement of	137
McPhie, Neil, chairman, Merit Systems Protection Board, prepared statement of	15
Miles, Adam, legal representative, Government Accountability Project, prepared statement of	113
Rosenberg, Morton, Senior Analyst, Congressional Research Service, prepared statement of	62
Schwartz, Lara, chief legislative counsel, Human Rights Campaign, prepared statement of	151

ENSURING A MERIT-BASED EMPLOYMENT SYSTEM: AN EXAMINATION OF THE MERIT SYSTEMS PROTECTION BOARD AND THE OFFICE OF SPECIAL COUNSEL

THURSDAY, JULY 12, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON FEDERAL WORKFORCE, POSTAL SERVICE, AND THE DISTRICT OF COLUMBIA,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 2 p.m. in room 2154, Rayburn House Office Building, Hon. Danny K. Davis (chairman of the subcommittee) presiding.

Present: Representatives Davis of Illinois, Cummings, Clay, Norton, Davis of Virginia, Mica, Issa, Marchant, and Jordan.

Staff present: Tania Shand, staff director; Caleb Gilchrist, professional staff member; Lori Hayman, counsel; Cecelia Morton, clerk; Ashley Buxton, intern; David Marin, minority staff director; Keith Ausbrook, minority general counsel; Ellen Brown, minority legislative director and senior policy counsel; Jim Moore, Steve Castor and Charles Phillips, minority counsels; Howie Denis, minority senior professional staff member; Alex Cooper, minority professional staff member; Patrick Lyden, minority parliamentarian and Member services coordinator; and Brian McNicoll, minority communications director.

Mr. DAVIS OF ILLINOIS. The subcommittee will come to order.

Let me first of all welcome Ranking Member Marchant, who is on his way. Members of the subcommittee, hearing witnesses, and all of those in attendance, welcome to the Federal Workforce, Postal Service, and the District of Columbia Subcommittee hearing entitled, "Ensuring a Merit-Based Employment System: an Examination of the Merit Systems Protection Board and the Office of Special Counsel."

The purpose of the hearing is to examine how the Office of Special Counsel and the Merit Systems Protection Board are meeting their statutory mission and safeguarding the Federal Government's merit-based system of employment. The hearing will examine each agency's reauthorization request.

Hearing no objection, the Chair, ranking member, and subcommittee members will each have 5 minutes to make opening statements, and all Members will have 3 days to submit statements for the record.

I will note that the ranking member is not here, but the ranking member of the full committee, Representative Tom Davis, is, in fact, here. We are delighted that he is present.

As I indicated, Members will have 5 minutes to make opening statements, and all Members will have 3 days to submit statements for the record.

I will begin with an opening statement and then proceed.

Welcome to today's hearing on the Office of Special Counsel [OSC], and the Merit Systems Protection Board [MSPB]. The OSC and MSPB, which were established in 1978 by the Civil Service Reform Act, are responsible for safeguarding the Federal Government's merit-based system of employment. On October 13, 1978, when President Jimmy Carter signed the Civil Service Act into law, he said, "This legislation will bring fundamental improvements to the Federal personnel system. It puts merit principles into statute and defines prohibited personnel practices. It provides better protection for employees against arbitrary actions and abuses and contains safeguards against political intrusion. The act assures that whistleblowers will be heard and that they will be protected from reprisal."

President Carter said, "Now this bill is law, but this is just the start of a continuing effort to improve the Federal Government's services to the people. By itself, the law will not ensure improvement in the system. It provides the tools; the will and determination must come from those who manage the Government."

Those who manage the Government must have the will and determination to ensure, in the case of OSC and MSPB, that Federal employees who disclose information of Government waste, fraud, and abuse are not retaliated against; that Government employees comply with legal restrictions on political activity; and that employee appeal cases are adjudicated in a fair and timely fashion.

Unfortunately, there is some indication that the will and determination is not there. Stakeholders such as the Government Accountability Project, the Project on Government Oversight, and the Public Employees for Environmental Responsibility claim that OSC is not giving badly needed attention to Federal whistleblower cases.

For this reason I am pleased to have joined Chairman Waxman and Ranking Member Davis in co-sponsoring H.R. 986, The Whistleblower Protection Act of 2007. This legislation, which has passed the House and is waiting consideration in the Senate, would grant whistleblowers the right to challenge reprisals in Federal District Court and clarifies that any protected disclosure applies to all lawful communication of misconduct.

OSC and MSPB were last reauthorized in 2002 for 5 years. Both agencies are seeking reauthorization through fiscal year 2012 and additional legislative changes. These additional legislative changes have to be reviewed carefully.

I am sure that Ms. Norton will share her thoughts on OSC's reauthorization request to be allowed to relocate out of the District of Columbia.

The Congressional Research Service has indicated that provisions in MSPB's reauthorization request, which the MSPB has characterized as technical corrections, would substantively enhance

the power and authority of the Office of the chairman, which is counter to current congressional intent.

I ask unanimous consent to submit for the record the statements of the National Treasury Employees Union and the American Federation of Government Employees. Both groups are opposed to MSPB's reauthorization request to approve motions for summary judgment. They argue that this would lead to the loss of crucial employee rights, including employees' ability to defend themselves from unjust adverse actions.

I look forward to hearing the witnesses address these and other issues pertaining to the statutory mission of OSC and the MSPB.

Now I would yield to the ranking member of the full committee for any opening remarks that he would have.

Mr. DAVIS OF VIRGINIA. Mr. Chairman, I think to move things along I ask that my statement be put in the record. We have a fairly lengthy statement.

Mr. DAVIS OF ILLINOIS. Thank you very much, without objection.

I will introduce the first panel. The Honorable Scott J. Bloch brings over 17 years of experience to the Office of Special Counsel, including litigation of employment, lawyer ethics, and complex cases before State courts, Federal courts, and administrative tribunals.

On June 26, 2003, President George W. Bush appointed Mr. Bloch for the position of special counsel. The U.S. Senate unanimously confirmed him.

We welcome you, sir.

The Honorable Neil McPhie was confirmed as chairman of the U.S. Merit Systems Protection Board on November 21, 2004. He had served as acting chairman since December 10, 2003, when President Bush designated him to be vice chairman.

Prior to joining the Board, he was senior assistant attorney general in the Office of the Attorney General of Virginia. Among other responsibilities, he defended employment discrimination claims brought under the Federal law and wrongful discharge claims brought under State law.

I want to thank both of you gentlemen for being here.

As is customary, if you gentlemen would stand and raise your right hands, we will swear in the witnesses.

[Witnesses sworn.]

Mr. DAVIS OF ILLINOIS. The record will show that each witness answered in the affirmative.

Thank you, gentlemen, very much. You may be seated.

The green light, of course, indicates that you have 5 minutes to summarize your statement. The yellow light means that your time is running down, that you have 1 minute left. Of course, the red light means that your time has expired.

We will begin with Mr. Bloch. After we have heard from both witnesses, we will begin the questioning.

Thank you very much, sir. You may proceed.

STATEMENTS OF SCOTT J. BLOCH, SPECIAL COUNSEL, U.S. OFFICE OF SPECIAL COUNSEL; AND NEIL MCPHIE, CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD

STATEMENT OF SCOTT J. BLOCH

Mr. BLOCH. Chairman Davis, Ranking Member Davis, Member Mica, distinguished members of the committee, John Adams said, "Good government is an empire of laws." As the special counsel of the U.S. Office of Special Counsel, I am requesting reauthorization because upholding USC's laws keeps Government accountable and lawful.

I am pleased to tell you OSC is functioning better than ever, while continuing to improve. Morale is high, and I am proud of the very qualified employees who uphold the laws every day to provide a needed, independent watchdog over the executive branch. Our independance is our bulwark. Your support of this independence fosters greater public trust in Government and combats the negative image of Government as catering to special interests.

I have submitted written testimony that goes into greater detail, but let me give an overview of how we are functioning in four important areas: whistleblower disclosures; prohibited personnel practices—especially whistleblower reprisal; Hatch Act limiting political activity of Government employees; and Uniformed Services Employment and Reemployment Rights Account [USERRA], protecting job rights of military service members.

These charts I have brought show our progress. The first is our whistleblower disclosure unit. It shows a steep dropoff in numbers of pending cases from year to year during my tenure.

The next chart shows the number of cases rising and increased referrals of substantiated whistleblower claims that go to agencies for full investigation. We doubled the number of those over prior years.

This translates into a safer and more efficient America, in cases ranging from better border patrol enforcement to combating procurement waste.

One significant case you may remember is Anne Whiteman, whom we awarded our Public Servant of the Year Award in 2005 for her disclosures of FAA's 7-year cover-up of near misses and operational errors at Dallas-Fort Worth International Airport. Based on new disclosures of Ms. Whiteman and an additional whistleblower, we wrote this week to the Secretary of Transportation demanding a full investigation of cover-ups and a possible nationwide policy to improperly reduce reporting of operational errors and to hold to account those involved in the cover-up and those who are retaliating against Ms. Whiteman.

The next chart is prohibited personnel practices, showing a decrease in processing times by half from 2004 to 2006.

The next chart shows a decrease in average age of cases in our IPD, or prosecution unit. Prominent cases in this area include a finding of retaliation by the Inspector General of the Department of Commerce against a subordinate who reported possible travel fraud. After reporting out to the President, the IG is no longer with the Department of Commerce.

Monday we got a permanent stay for a DEA whistleblower, Mr. Waddell, who reported unconstitutional witness interrogation and was retaliated against. After opening statements, the DEA settled and gave full corrective action.

Our next chart shows our Hatch Act unit and how it is bringing down processing times in the cases in the years that I have been here, and then the chart after that shows an increase of disciplinary and corrective actions in the same period.

We have had several higher-profile rulings from the Board in the last year that emphasized the reach of the Hatch Act in areas such as Government e-mail use, and we are looking into the appropriateness of presentations throughout the executive branch on political races.

Regarding USERRA, the final chart, it shows that we are achieving results in protecting the rights of military service members. This is a distinct priority for me, not only as head of OSC but as the father of a veteran Marine who has served three tours of duty in Iraq. I filed the first three USERRA prosecutions in our agency's history in my first year. We created a USERRA unit, and the demonstration project begun at OSC in 2004 expires at the end of this fiscal year, but we ask that it be made permanent.

We have achieved a 25 percent corrective action rate. Such is the case of a service member injured in Iraq who was denied his postal job on his return. We got his job back, and back pay for him.

We were criticized by outside groups after fixing the chronic backlogs at OSC, so at our request in May 2005 bipartisan staff from this committee did an onsite review of OSC's work. They pored over our files and interviewed numerous career attorneys over 3 weeks. Committee staff on both sides expressed satisfaction that OSC did nothing wrong, and OSC received a kind letter from then committee Chairman Tom Davis praising OSC's hard work and protection of whistleblowers. Here is a blow-up of that letter.

My written statement includes details of our legislative reauthorization request.

I look forward to answering any questions you may have, and thank you.

[The prepared statement of Mr. Bloch follows:]

FOR OFFICIAL USE ONLY
UNTIL RELEASED BY THE HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM SUBCOMMITTEE ON THE FEDERAL WORKFORCE, POSTAL SERVICE, AND THE DISTRICT OF COLUMBIA

STATEMENT OF SCOTT J. BLOCH
SPECIAL COUNSEL
U.S. OFFICE OF SPECIAL COUNSEL

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
SUBCOMMITTEE ON
THE FEDERAL WORKFORCE, POSTAL SERVICE, AND
THE DISTRICT OF COLUMBIA

HEARING ON

A REVIEW OF THE MERIT SYSTEMS PROTECTION BOARD
AND
THE OFFICE OF SPECIAL COUNSEL

Thursday, July 12, 2007
Washington, DC

In 1776, John Adams wrote that "Good government is an empire of laws." I have quoted this often in my tenure, and I believe in its emphasis on enforcing laws and the rule of law, holding our officials and managers in the federal government to a higher standard of fidelity to the law, and holding ourselves accountable to the law and our public charge to make a difference.

Chairman Davis, Ranking Member Marchant, and distinguished Members of the Subcommittee – thank you for the opportunity to address you on the reauthorization of the U.S. Office of Special Counsel. It's also an honor to be here beside Chairman Neil McPhie, who's done so much for the Merit System and the rule of law.

My name is Scott Bloch and I am the Special Counsel of the U.S. Office of Special Counsel, or OSC. I am here to seek reauthorization of the U.S. Office of Special Counsel because it is upholding our small empire of laws that keep our federal government accountable, honest, efficient, and just for more people in a timely way than at any time in its history.

We have sought to bring to the attention of the public, and in particular the federal employees, the fine work that our career staff is doing in government accountability and protections for the ordinary heroes who blow the whistle.

I have written and spoken often about these matters, as have my staff, because it is important that people know there is someone there who will stand up for them, who has powers to bring redress, who will not countenance reprisal when citizens show their concern by blowing the whistle on waste, fraud and abuse.

The Office of Special Counsel upholds laws intended to maintain accountability, honesty and integrity in our federal government, and provides protection for its employees. This is a vital function: when those who work for our fellow citizens show their concern by blowing the whistle on waste, fraud, and abuse, someone who has powers to bring redress, and not countenance reprisal, must stand up for them.

Accordingly, I come before you today to request congressional reauthorization of the U.S. Office of Special Counsel.

As you know, OSC is an independent watchdog agency established as part of the post-Watergate reforms of the late 1970s. We essentially operate within the executive branch to protect worker rights and the merit system under four statutory functions. These are to:

1. Review and validate whistleblower disclosures;

2. Investigate and prosecute complaints of Prohibited Personnel Practices (PPP), with a special focus on discrimination against whistleblowers;

3. Enforce the Hatch Act, the law that limits the political activity of government employees, and;

4. Enforce the Uniformed Services Employment and Reemployment Rights Act, or USERRA, the law that protects the job rights of military service members when they return from active duty.

These functions are less meaningful if federal employees are unaware of how they are protected.

OSC's contribution to upholding the empire of laws and bringing accountability, transparency and good government is secured by our independence. When others in government try to interfere in our investigations or to intimidate or pressure us, then the independence we use to provide justice and accountability is itself threatened.

We need support from this committee, support that shows the committee encourages our independence. This combats a negative image that government is all about partisan bickering and special interests. We need authority and moral support to continue on in the matters that we are engaged in to instill greater public trust in government, and to secure the rights of government employees to report whistleblower wrongdoing, and to hold accountable the leaders of agencies, at the highest levels, if need be to have them removed if they have offended their oaths and transgressed the laws of the United States.

When I accepted this appointment I understood that, as an independent "watchdog" agency, I would often be the bearer of bad news to the White House, federal agencies, and the public. As the Great Greek Sophocles noted in *Antigone*, "No one likes the bearer of bad news." We do not always please everyone, and sometimes, we please no one.

But we are required by law and the oath I took to uphold the laws of the United States in my charge, and to uphold the Constitution. There are many who wonder what the government's commitment is to real accountability, real principles of good government, and real integrity in the agencies that run this mighty nation.

What does independence mean? It means I make decisions based on facts and law, on evidence. I do so based on the decisions of experienced office staff members who understand the concept of independence and are not influenced by partisanship or political cycles.

Those who know me know that I bring a stringent commitment to law, the rule of law, and an independent spirit to this office and have from day one. If we show we are not committed to those principles, or only committed when it does not result in something we disagree with, we show disrespect for the justice system of which I am a part. Justice is what we are talking about.

We've had some signature successes in recent years. Many of you should remember the Anne Whiteman case involving aircraft near-misses at Dallas-Fort Worth International Airport, one of the world's busiest. We are looking at the continuing issues of whistleblower retaliation there, as well as problems in the follow through with the IG investigation of DFW.

It turns out that the concerns of the whistleblower have intensified and turned out to be correct. Based on her new disclosures as well as those of an additional FAA confidential whistleblower with personal knowledge of these matters – the problems of cover-up of near misses and operational errors have not been remedied, proper discipline of officials has not occurred, and the culture of underreporting is worse. We have reported to the Secretary of the Department of Transportation this week of extensive retaliation against Ms. Whiteman in the last two years as well as a continuing problem with cover up of operational errors, near misses and other deviations from FAA regulations that potentially compromise air safety, not only in Dallas Fort Worth, but across the country.

We are asking the DOT to do a more extensive investigation than was done before to unearth whether this is a national policy to underreport and assign what are classic operational errors to pilots or just not to write them up at all. There is evidence that the union has been ceded control over these safety and other management issues, and that the pay for performance system may be the reason why people are being told not to report errors: the fewer errors a facility has, the better they do in their ratings, and the more people are paid by way of salary increases and bonuses. The only losers in the whole system are the passengers and air safety.

We also substantiated Leroy Smith's disclosure involving environmental hazards within federal prison facilities. That case resulted in pushing and pulling between us and the Bureau of Prisons, and really required some work on our part to get attention to a frankly deficient report delivered by the target agency. As a result of our efforts, and that of the Whistleblower, the investigation by the DOJ IG has expanded to other prison facilities, and it has changed the system for how such facilities function.

Safety and health have benefited because of his brave disclosures. We awarded him our Public Servant Award at the end of last fiscal year. There is continuing investigation going on in a number of prison facilities of the same problems our case revealed. The IG is continuing to investigate environmental safety issues as a result of what OSC instigated, and as of a couple of months ago, the whistleblower was in contact with OSC to give us the names of additional whistleblowers who have had problems with these toxic releases.

As you know, we have also had several prominent Hatch Act cases arise in the recent past, such as the matter involving The Administrator of the General Services Administration, Lurita Doan. It is important for the American taxpayer to know whether federal positions are being abused for political gain and that the agencies of our government are there for the benefit of all taxpayers, and not just for those who are in power.

In the area of whistleblower retaliation, there have been some important victories for whistleblowers, including our substantiation on retaliation against a whistleblower and one who was perceived to be one, and we reported to the President that the Inspector General in that case at the Department of Commerce should be disciplined. As of June 29, the Inspector General was no longer with the Department of Commerce.

Last year, we uncovered whistleblower retaliation and Hatch Act coercion when a lower grade secretary to the top political appointee in the USDA in Alaska was trying to make her do his outside political work and also wanted her to falsify a travel voucher. When she refused, she was transferred and demoted. We got her job back and the political appointee fired. There are many others we have listed on our website, but these are some of the newsworthy whistleblower cases of recent vintage.

It is the responsibility of each of us appointed to investigatory positions in government to investigate every legitimate complaint. If we do not, we fail the American people, and the rule of law begins to erode. I choose to fight this erosion, and it is my hope that this Committee will support OSC as it continues its watchdog role.

It is of great importance for people to know there is an agency that will stand up for them, has powers to bring redress, and will defend citizens who blow the whistle on government waste, fraud, and abuse.

Not only is this important for the federal employee, but to all Americans, as well, to know that there is an agency who will protect federal workers who report the waste of taxpayer money.

Moreover, greater awareness of the work we do in government accountability and whistleblower protection has deterrence value, to keep employers and employees from violating these laws in the first place.

I am here to request reauthorization for our office, and to request several enhancements to allow us to improve on our record for the benefit of the government and the taxpayers.

It is my pleasure to report that our agency is functioning better than at any other time in its history, and I believe we have a chance to improve on even that record. To support this claim, I refer you to our annual report for Fiscal Year 2006.

Among the topics I will address today, I'll begin with something that is a distinct priority for me, not only as an American citizen, but as the father of a veteran who has served three tours of duty in Iraq.

The authority granted to OSC over claims of some federal employees under the Uniformed Services Employment and Re-employment Rights Act, USERRA, was conferred on OSC in the Veterans Benefits Improvement Act of 2004.

The Act established a demonstration project for referral of USERRA claims against federal agencies to the Office of Special Counsel. For the period of this demonstration project, roughly half of the claims against federal agencies under USERRA are to be referred to the OSC for assistance, investigation, and resolution, as well as for enforcement. The remaining federal claims are to be referred to the Veterans' Employment and Training Service (VETS) of the Department of Labor.

The Demonstration Project is to conclude with the end of this fiscal year. This matter is under the jurisdiction of the Committee on Veterans' Affairs, which we expect to take up this matter once the General Accountability Office provides a mandated assessment of this Demonstration Project.

Nonetheless, I want to take advantage of this opportunity to express our concern and create awareness of the need for ensuring that our returning National Guard and Reserve have the clearest possible pathway to resolution of claims they make under USERRA.

We are concerned that, should decisions be made that increase the number of troops returning from combat, we could see a corresponding "spike" in the number of military members requiring relief under USERRA. Before this happens, Congress should ensure that procedures and resources are in place to ensure that a surge in USERRA claims does not result in delay in the resolution of these claims. In other words, the sooner the Demonstration Project is terminated, and legislation is passed to streamline the USERRA claims process, the better we will meet the needs of our returning service members.

On matters of general agency functioning, three years ago the Office of Special Counsel was heavily criticized – and rightly so – by the Government Accountability Office. The GAO issued a report pointing out OSC's dysfunctions: the agency was saddled with a huge backlog, and bureaucratic disorganization made it a challenge to fulfill the statutory mission OSC has of protecting the rights of federal workers and the merit system.

In response to the GAO report and congressional requests, my staff and I undertook efforts to dramatically reduce the case backlog I had inherited, and to improve the operations of the agency to preclude future backlogs.

The central achievement of the months that followed was the backlog resolution and increased enforcement under all areas of OSC jurisdiction. Over the initial eighteen months of my tenure, OSC employees worked incredibly hard to reduce the backlog. They were able to double the percentage of positive findings in whistleblower disclosure and prohibited personnel practice cases. Our career staff should be proud of the many achievements made during that time.

The case process was also made more transparent and, in spring 2005, staff from this Committee did a review of OSC's backlog resolution work. These staffers pored over OSC's case files and interviewed numerous career attorneys over a three-week period to examine each aspect of the operation. At the conclusion of their review, committee staff on both sides expressed satisfaction, and OSC received a very kind letter from then-committee Chairman Tom Davis and then-subcommittee Chairman Jon Porter, praising OSC's hard work and protection of whistleblowers.

As you know, OSC also underwent reorganization during this time. In addition to implementing standard operating procedures for the investigation units and coordinating policy implementation, OSC also opened a third field office in Detroit, which joined our other field offices in Dallas and Oakland, California and brings more geographic balance to our field offices.

Our field offices work in conjunction with our DC headquarters to provide relief for federal employees who have found themselves in the midst of a whistleblower or Prohibited Personnel Practice complaint. Our Detroit office has only been operational for two years, but it is functioning very well, by any measure.

The results speak for themselves. We have no backlogs. The cases in the pipeline are appropriate by age and status, and each field office is keeping up and providing strong production and strong results. We're doing aggressive outreach to educate federal workers, and geographic balance has helped there as well as it has in the arena of investigations.

As I mentioned earlier, OSC has recently been involved in some high profile cases regarding enforcement of the Hatch Act, as well as whistleblower protections. I am proud that the excellent work of our career staff has been highlighted in these cases, and we will continue to pursue justice in these matters.

Now, for the legislative matters I want to bring before the committee:

1. An overzealous provision in the Prohibited Personnel Practice law allows our agency to be tagged with attorneys fees in any case in which OSC's request for disciplinary action has been denied. You can see how this might have a chilling effect on OSC's vigorous pursuit of disciplinary cases. We would ask that the Committee modify this provision, which threatens to inhibit our prosecutorial discretion.

2. I ask for our agency to have the power to file Amicus Briefs in cases of ours that go beyond the Merit Systems Protection Board. This would allow our expertise in both our statutes and the specific cases to complement the work of the Justice Department.

3. Our agency is unable to provide one-stop shopping of the Veterans Preference provision in the Prohibited Personnel Practice law. It is the case that OSC is able to seek corrective action under other PPP provisions, like the blanket (b)6 and (b)12 provisions against any unauthorized preference, or even under USERRA, as the cases frequently overlap. However, we think it would be much less confusing for service members to understand that we can seek corrective or disciplinary action under any of the PPPs, as well as USERRA.

4. That leads to another issue, the current lack of a provision in USERRA for disciplinary action.

I hope during the upcoming question and answer period I can highlight the excellent work our career staff has done, and would be glad to attempt to answer any questions you may have about our day-to-day operations that have produced excellent results for so many people. Combined with our slashing of processing times and increased enforcement, these results show that our agency has improved and is promoting good government.

Together with this committee, and other agencies like MSPB and OGE, we can look forward to continuing service to federal employees and the American taxpayer. I look forward to your questions.

Thank you.

Mr. DAVIS OF ILLINOIS. Thank you, Mr. Bloch.
Mr. McPhie.

STATEMENT OF NEIL MCPHIE

Mr. MCPHIE. Thank you, Chairman Davis and other Members, for giving me the opportunity to come before you and tell you what we have done to safeguard the merit system principles.

I serve as the chairman of the MSPB. I will ask that my official statement be submitted for the record.

I am pleased to support that the Board has been voted one of the best places to work in the Federal Government for 2007. Today I will highlight some of the Board's accomplishments since the last reauthorization and summarize the legislative proposals we have submitted. Finally, I will discuss some of the challenges that I foresee in the Board's future.

From fiscal year 2002 to 2007, the Board adjudicated 42,145 cases, for an average of 8,429 cases per year. The average processing time for initial decisions at the beginning of the last reauthorization period was 99 days. We have reduced processing time significantly, with an average of 89 days for fiscal year 2006. We have also made significant progress in reducing the average case processing time at headquarters from 265 days in fiscal year 2005 to 154 days in fiscal year 2006; yet, there has been no sacrifice in the quality of our decisions. During this period, a Court of Appeals for the Federal Circuit affirmed 93 percent of the Board cases that were appealed to that court.

The Board has embraced technology to expedite case processing. For example, since 2002 we have increased the use of video conferencing. In fiscal year 2003, MSPB implemented an electronic appeals process that allows appellants and other parties to file initial appeal using the Internet. Currently, approximately 25 percent of all initial appeals are filed electronically.

In addition to the Board's successful adjudication settlement program, the Board has implemented its mediation appeal program nationwide in 2004. Although only a few years old, MAP has resulted in the successful settlement of more than 100 appeals.

The Board also conducts independence, nonpartisan, objective research and produces reports that promote the merit system values embodied in title 5. Between 2002 and 2006, the Board issued over 20 reports. Board employees also conducted more than 400 outreach presentations to generate awareness of Board activities and responsibilities.

With respect to general management issues, I am pleased to report that the Board has earned a clean audit for each of the 4-years that Federal agencies have been required to submit a financial audit.

During this reauthorization period, we are requesting the enactment of six legislative proposals in an effort to improve the efficiency and effectiveness of the Board. One proposal seeks to provide for an order of succession for the Board when, one, the Board membership is comprised of two or more Board members but no member has been designated chairman or vice chairman; or, two, all three board positions are vacant.

This proposed legislation recognizes the President's prerogative to control key executive branch appointments while preserving the continuity of agency operations.

In another proposal, the Board requests summary judgment authority, as other agencies such as the EEOC already have. We believe that such authority would greatly enhance the efficiency of the Board's adjudicatory process, without adversely affecting the rights of appellants.

The Board also requests three technical corrections. Pursuant to statute, the chairman of the Board serves as the chief executive and administrative officer of the agency. As such, the chairman has historically exercised chief executive responsibilities for the agency. Two other proposed technical amendments merely reconcile inconsistent provisions. The third amendment emphasizes the chairman's authority to delegate certain responsibilities to the employees he or she appoints.

Finally, the Board requests unlimited exemption from requirements in the Sunshine Act. In accordance with the responsibility of a quasi-judicial agency, the three-member board functions similar to a court when it deliberates and decides cases. The proposed exemption from requirements of the Sunshine Act will enable the Board members to freely discuss and deliberate cases.

As a Federal agency, the Board faces several potential challenges in the near future. Factors that could result in increase in the Board's caseload include the anticipated increase in retirement and the resultant increase in hiring, changes in traditional, present, and new legislation may also result in an increase in the Board's caseload.

Additionally, we have been working to prepare for the implementation of the new employee appeal system for DHS. We recognize that the MSPB, itself, will be directly affected by the increase in Federal Government retirements. Within 5 years, 40 percent of the MSPB's work force will be eligible to retire. Only 20 percent are eligible at this moment. To prepare for these retirements, my administration has looked for creative ways to attract, develop, and retain employees. For example, I have directed each office to develop a succession plan. I have also instituted and developed a new training program throughout the agency.

My time is up. I have one final point. May I finish, Mr. Chairman?

In short, Board members, officials, and staff have successfully fulfilled the agency's statutory missions. In addition, we will continue to be careful stewards of the public's funds. We believe that the proposed amendments described during this hearing will help the agency meet its goals. In these times of great change in Federal human resource management, a strong, vibrant, and independent MSPB is critical.

We look forward to the opportunity to continue our important work in the next 5 years, and I would be happy to answer any question any Member may have.

Thank you very much, sir.

[The prepared statement of Mr. McPhie follows:]

Hearing Statement Submitted by

The Honorable Neil A. G. McPhie, Chairman

U. S. Merit Systems Protection Board

United States House of Representatives
Committee on Oversight and Government Reform
Subcommittee on Federal Workforce, Postal Service,
and the District of Columbia

Hearing:

Ensuring a Merit-Based Employment System:
An Examination of the Merit Systems Protection Board
and the Office of Special Counsel

July 12, 2007

The Honorable Danny K. Davis
Chairman

The Honorable Kenny Marchant
Ranking Member

Chairman Davis, Ranking Member Marchant, and Members of the Subcommittee, thank you for the opportunity to share the Board's accomplishments in safeguarding the merit system principles. These principles reflect acknowledgment on the part of the legislative and executive branches of government that the fair and equitable treatment of Federal employees and applicants is critical to the efficient and effective operation of the Federal government. I am proud and honored to serve as the 7th Chairman of the Merit Systems Protection Board, the lead agency responsible for upholding the merit system principles. I am particularly pleased that in FY 2007, the Board was voted second among small agencies in the rankings of the Best Places to Work in the Federal Government.

The Board's current authorization was enacted in 2002 and expires on September 30, 2007. The authorization of appropriations for MSPB was permanent under its enabling statute, the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. This authorization was changed under the Whistleblower Protection Act of 1989 (WPA) to a 6-year period that expired at the end of FY 1994. (Pub. L. 101-12, 103 Stat. 34, 5 U.S.C. 5509 note). In 1994, the Board's authorization was extended through FY 1997 (Pub. L. 103-424, 108 Stat. 4361), placing it on the same reauthorization cycle as that of the Office of Special Counsel. The Board was subsequently reauthorized for five years, through FY 2002, (Pub. L. 104-208, 110 Stat. 3009) and again through 2007 (Pub. L. 107-304, 116 Stat. 2364). My request for reauthorization would amend Section 8(a)(1) of the Whistleblower Protection Act to authorize the MSPB for an additional 5 years, through FY 2012.

In addition to reauthorization of appropriations, we are requesting the enactment of six legislative proposals designed to increase the efficiency and effectiveness of the Board. These proposals seek: an order of succession for the executive leadership of the agency; the authority to grant summary judgment; a limited exemption from the Sunshine Act; and three technical corrections to the Board's authorizing statute that clarify the Chairman's authority to make administrative decisions regarding the management of the agency.

Since the MSPB's reauthorization in 2002, the Board Members, managers and staff have worked diligently to continue to earn the public's trust in our ability to carry out our statutory missions. I will first briefly provide an overview of the Board and highlight some of the Board's accomplishments since the last reauthorization. I will then discuss the justifications for the legislative proposals submitted for your consideration. Finally, I will discuss some of the challenges that I foresee in the Board's future.

I. THE MERIT SYSTEMS PROTECTION BOARD: MISSION AND OVERVIEW

The mission of the Merit Systems Protection Board is to protect Federal merit systems and the rights of individuals within those systems. The Board carries out its statutory functions by adjudicating certain employee appeals and conducting studies of the Federal civil service and other merit systems in the Executive Branch.

I am pleased to report that the Board is currently operating with its full complement of 3 Members. I have served as a Member of the Board since April 23, 2003 and was confirmed as Chairman on November 21, 2004. My term will expire on March 1, 2009. Mary M. Rose was confirmed as a Board Member on December 17, 2005, and designated as Vice Chair on January

27, 2006. Her term will expire on March 1, 2011. Barbara J. Sapin was confirmed as a Board Member on November 21, 2004. Her appointment expired on March 1, 2007. She continues to serve as a Member pursuant to 5 U.S.C. § 1202(c) of the Board's enabling statute which permits a member whose term has expired to continue to serve until a successor has been appointed but not longer than one year after the term has expired.

The Merit Systems Protection Board is headquartered in Washington, D.C., with 6 regional offices (Atlanta, Chicago, Dallas, Philadelphia, San Francisco, and Alexandria, Virginia) and 2 field offices (Denver, New York). The staff consists of 228 employees; approximately 60 of whom are administrative judges.

II. MSPB ACCOMPLISHMENTS: FY2002-FY2006

A. ADJUDICATION

From FY 2002 through FY 2006, the Board adjudicated 42,145 cases, for an average of 8,429 per year. More specifically, the Regional and Field Offices issued 35,214 decisions over this period (for an annual average of 7,043) and the Board issued a total of 6,931 decisions (for an annual average of 1,386). During this time period, we reduced the average processing time for initial decisions to 92 days, an improvement from the annual average of 99 days from the previous reauthorization period. In FY 2006, the regions decided 7,110 cases in an average of 89 days. We have made significant progress in reducing the case processing time for cases in headquarters. In FY 2002, the average case processing time for cases in headquarters was 205 days. In FY 2006, the average time was 154 days. These reductions are being accomplished without a loss in the quality of those decisions. During the period covered by FY2002-FY2006, the Court of Appeals for the Federal Circuit affirmed 93% of the Board decisions that were appealed to the Court.

We have employed a number of technological innovations that are designed to expedite case processing at the Board. In FY 2002, we made the option of conducting hearings through the use of video conferencing a permanent part of our adjudication process. During FY 2003, MSPB implemented an electronic appeals process (e-Appeal) that allows appellants to file an initial appeal using the Internet. Approximately 1000 appeals were filed electronically in its first year. Currently, approximately 25% of initial appeals are filed electronically.

Phase II of e-Appeal was implemented in September of 2004. Phase II permits the parties to upload filings as attachments and provides for same-day electronic distribution of filings, orders and decisions. The system also notifies the appropriate MSPB office of each filing and automatically files submissions into the Board's Document Management System (DMS). The e-Appeal program has improved the Board's efficiency in handling appeals and made it easier for appellants to file appeals and to communicate with the Board.

In addition to our successful adjudication settlement program, the Board makes its Mediation Appeals Program (MAP) available to the parties to appeals in the regional and field offices. When both parties to an appeal agree, a Board-certified mediator is appointed to mediate their dispute to a mutually beneficial conclusion. We had just begun to develop our mediation program when our reauthorization was under consideration in 2002. Although only a few years

old, MAP has enjoyed great success. Announced in 2004 as a nationwide initiative after a successful pilot project, MAP is now staffed by 20 trained, collateral duty Board employee Mediators. Settlements have been achieved in more than 100 appeals under this program. In FY 2006, 109 appeals were mediated; 45% of the cases settled. For the past two years, Board staff and management have promoted the benefits of MAP to a segment of current and potential Board customers by conducting two sessions on alternative dispute resolution at the widely-attended Federal Dispute Resolution Conference.

B. STUDIES AND OUTREACH

The Board educates appellants, federal agencies, and the general public in two important ways - - by publishing reports of its studies and conducting outreach throughout the nation. In our studies function, the Board's goal is to conduct independent, nonpartisan, objective research, based on established scientific methods, and produce reports that promote the merit system values in Title V and help ensure the public interest in a viable merit-based civil service. Based upon our recent work, we have identified and reported on some trends that we believe will affect Federal human resources management over the next several years and four areas of need based on such trends: 1) the need for succession planning; 2) the need to focus more attention on retention; 3) the need to improve recruitment and selection procedures; and 4) the need for agencies to change their methods for motivating and rewarding employees. For example, we have issued studies that advise agencies on how to navigate the complex issues that arise when determining whether an employee undergoing a probationary or trial period has appeal rights before the Board; that suggest ways to make hiring practices more effective and cost efficient; and that provide guidance on how to design an effective pay for performance compensation system.

The Board aims to publish eight study reports annually. In addition, we publish four quarterly versions of the "Issues of Merit" newsletter per year. A significant indicator of the value of our studies, reports and recommendations is the degree to which the recommendations discussed therein are reflected in government-wide policies. Recent examples of our recommendations that are reflected in current Federal civil service policies and programs include recommendations pertaining to: 1) Adoption of Category Rating to replace Rule of Three; 2) redesign of USA Jobs site and redesign of vacancy announcements; 3) emphasis on assessment tools including structured interviews; 4) development of the Federal Career Intern Program; 5) replacement of the Presidential Management Intern with the Presidential Fellows Program; 6) emphasis on Human Capital practices as a key business function; and 7) expansion of Family Friendly policies.

The Board undertakes major efforts to educate the parties to the appeals that come before it about Board practice, procedure, and law. In 2002, the Board produced a training video on MSPB appeals which is available free upon request to appellants and practitioners before the Board. During the period FY 2002 through FY 2006 more than 400 outreach presentations were conducted by Board employees and officials. Outreach activities related to the studies function included consultation with Federal Executive Boards and other stakeholders including international visitors; consultation with the Thai Civil Service Commission to create a Thai MSPB; a symposium on the Practice of Merit in agencies operating outside of Title 5; co-sponsorship of a symposium on pay for performance with the Government Accountability Office

and the Office of Personnel Management; increased coordination with OPM, GAO, the National Academy of Public Administration and the Partnership for Public Service with periodic meetings on research efforts; and our work on the electronic human resource information system initiative with OPM.

C. MANAGEMENT SUPPORT

With respect to general management issues, I am pleased to report that the Board has earned a clean audit each of the four years that Federal agencies have been required to submit a financial audit pursuant to the Accountability of Tax Dollars Act of 2002. In July 2003, we strengthened our credit card program to provide for additional safeguards in light of concerns of government-wide abuse. We decreased the number of cards issued and added a second level of review of monthly statements.

III. LEGISLATIVE PROPOSALS

In addition to reauthorization of appropriations, we are also requesting the enactment of six legislative proposals. These proposals seek: 1) an order of succession for management of the agency; 2) authority to grant summary judgment; 3) an exemption from certain requirements of the Sunshine Act; and 4) three technical corrections to the Board's authorizing statute that clarify the Chairman's authority to make administrative decisions regarding the management of the agency.

A. ORDER OF SUCCESSION

One proposal seeks to amend section 1203 of Title 5 to provide for an order of succession for the leadership of the Board. In two instances since the Board was last authorized, the agency was faced with the possibility of a vacuum in its chief executive leadership. In one instance, the agency was on the brink of having no Board members at all. The uncertainty of leadership for the agency in such circumstances calls for an effective statutory solution. We are recommending that: 1) in the event that no member has been designated to serve as Chairman or Vice Chairman, the member who is an adherent of the same political party as the President shall perform the duties and functions of the Chairman; 2) if the only members currently in office are adherents of the same political party as the President and neither has been designated to serve as Chairman or Vice Chairman, the member who was first appointed to the Board shall perform the duties and functions of the Chairman; and 3) in the event that all three Board positions are vacant, the General Counsel of the Board shall perform the chief executive and administrative officer duties and functions of the Chairman. We believe that the proposed legislation recognizes the Presidential prerogative to control key appointments in the Executive branch while preserving the continuity of agency operations in the absence of the affirmative exercise of such prerogatives.

B. SUMMARY JUDGMENT

In another proposal, the Board is requesting summary judgment authority. Its governing statute, at 5 U.S.C. § 7701 (a)(1), provides that: "An appellant shall have the right to a hearing for which a transcript will be kept." In *Crispin v. Department of Commerce*, 732 F. 2d 919 (Fed. Cir. 1984), the Court of Appeals interpreted this provision to mean that the Board does not have

authority to grant summary judgment. We believe that such authority would greatly enhance the efficiency of the Board's adjudicatory process without adversely affecting the rights of appellants.

We also believe that the Board has developed, over a period of almost 30 years, a reputation for adjudicating appeals in a fair and impartial manner. As set forth in the Board's regulations, 5 C.F.R. § 1201.44, MSPB administrative judges have the responsibility and the broad authorities necessary to assure the fair adjudication of all appeals. Under our legislative proposal, a motion for summary judgment may be granted only "when it has been determined that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In all cases, the parties must be afforded the opportunity to develop the record sufficiently so that the administrative judge can determine whether those prerequisites are met in each case. The Board has instituted numerous mechanisms, formal and informal, which serve to ensure that all potential appellants have an opportunity to present an appeal for adjudication.

The Board's role as a neutral adjudicator of employment disputes compels it to take all reasonable measures to ensure that all parties are afforded a fair opportunity to fully participate in the hearing process. We therefore believe that such authority would greatly enhance the efficiency of the Board's adjudicatory process without adversely impacting the rights of appellants.

Two additional points are worth noting. First, other Federal adjudicatory agencies, such as the Equal Employment Opportunity Commission, have the authority to issue summary judgments. Second, the MSPB will have summary judgment authority under the Department of Homeland Security's (DHS's) employee appeals process and the proposed Department of Defense (DoD) National Security Personnel System, and we recognize the complications that may develop from any adjudicatory inconsistencies that arise solely based on the respective agencies from which individual appeals arise.

C. TECHNICAL CORRECTIONS - AUTHORITIES OF THE CHAIRMAN OF THE BOARD

Pursuant to 5 U.S.C. § 1203, the Chairman of the Merit Systems Protection Board serves as the chief executive and administrative officer of the agency. As such, the incumbent of this position is vested with the authority to make all decisions relating to the administration and management of the agency's operations. Notwithstanding this clear authority, one provision, § 1204(g), authorizes the Board, rather than the Chairman, to delegate the performance of administrative functions. A second provision, § 1204(k), creates an ostensible ambiguity by appearing to bestow one particular administrative function, preparation and submission of the annual budget, on the Board. Two of the technical corrections are intended to eliminate these apparent ambiguities created by these provisions read together with section 1203 by substituting the words "Chairman of the Board" for "the Board." The third technical correction adds a sentence to § 1204(j) to emphasize the Chairman's authority to delegate certain responsibilities to the employees he or she appoints.

D. ENHANCEMENT OF PETITION FOR REVIEW PROCESS

Finally, the Board requests a limited exemption from the requirements of the Government in the Sunshine Act, 5 U.S.C. § 552b, (Sunshine Act) when it exercises its adjudicatory function. The Sunshine Act requires federal agencies headed by a collegial body, a majority of whose members are appointed by the President and confirmed by the Senate, to hold open meetings. While Sunshine Act requirements do not apply to informal discussions between Board members or to a meeting scheduled to dispose of a particular case, the difficulty of ensuring that an informal discussion or a discussion of a particular case does not evolve into a "meeting" covered by the Sunshine Act has generally led the Board members to be wary of engaging in such discussions, thus hampering the efficiency of the MSPB's adjudicatory process.

IV. FUTURE CHALLENGES

At present, we are operating with the expectation that DHS's expedited employee appeals system will launch in the immediate future. In anticipation of the launch, we will continue our work to amend the Board's regulations to accommodate the new system. As with any other statutory or regulatory change that relates to the rights of employees within the Federal merit systems, we look forward to working with DHS on the implementation of this new system. We have already provided relevant training to the Board's AJs, staff attorneys and paralegals.

We also anticipate that several factors could result in an increase in the Board's caseload. Both the anticipated increase in Federal employee retirements and the resultant increase in hiring government-wide may account for a large portion of the increase. Additionally, changes in statutes, case law and regulations as well as the increasing need to control the Federal budget may also have a significant impact on the Board's caseload. In FY 2005, issues related to retirements accounted for approximately a quarter of MSPB's caseload. In addition to an increase in retirement claims, the MSPB's caseload may be affected by the changes in the composition of the workforce that replaces retirees. MSPB studies suggest that new employees are more likely to experience an adverse action in the first decade of their service. Younger employees also are more likely to experience an adverse action than older employees with a similar length of service. Thus, as agencies hire new employees of all ages, and particularly younger employees, the Board's adverse action appeal rates can be expected to climb.

Historically, the Board has experienced an increase in its appeals workload when long-held government policies are modified by the courts. For example, in *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003), the Court changed the way by which agencies accounted for military leave. The decision was responsible for a significant number of Board appeals in the past 3 years. Moreover, in *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed. Cir. 2007) (*en banc*), the Court held that Veterans who allege a violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) that is not an adverse action as defined at 5 U.S.C. § 7512 are entitled to a hearing. Thus, this case could result in an increased workload for the Board's administrative judges. Prior to *Kirkendall*, the Board interpreted the law to provide that an administrative judge could exercise discretion in determining whether to grant a hearing in a USERRA case as long as there was no adverse action

involved, the appellant had not demonstrated the existence of evidence pertaining to the credibility of the parties involved and there were no material facts in dispute.

The Board also anticipates an increase in its caseload if new legislation is enacted, such as the separate bills concerning whistleblower protections that have been introduced this year in each chamber of Congress. For example, the House of Representatives passed H.R. 985, the "Whistleblower Protection Enhancement Act of 2007," which would expand the scope of whistleblower protections and increase the number of covered employees. Additionally, the Senate whistleblower bill, S. 274, was recently reported out of the Senate Committee on Homeland Security and Governmental Affairs. The Board welcomes the opportunity to adjudicate all appeals, including those of whistleblowers, to the extent and in the manner that policymakers deem appropriate. Beyond the foreseeable increase in the Board's workload, the House bill amends the framework for judicial review of whistleblower appeals and incorporates a 180-day standard for the Board to adjudicate whistleblower appeals, both of which may create procedural uncertainties that are not clearly resolved by the bill.

Another factor that could impact the MSPB workload is the increasing need to reduce the size of the Federal budget. As this pressure continues, it may lead to the need for some agencies to reduce the size of their workforces. This, in turn, could lead to an increase in the number of employees who are involuntarily separated through reduction-in-force (RIF) procedures. If historical trends are an accurate predictor, this could lead to a potentially large increase in the number of RIF appeals to MSPB. Further, the complexity of appeals has increased with expanded appeal rights under Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA) and Veterans Employment Opportunities Act of 1998 (VEOA), and the numbers of these appeals working their way to MSPB has increased. The sheer numbers of returning veterans from Iraq and Afghanistan may be predictive of an increased USERRA and VEOA caseload.

In the context of the Board's studies function, we anticipate that the DHS and DoD personnel systems will require greater study as they are implemented. The Board is developing baseline data of organizations in both DHS and DoD. This baseline data will be helpful in comparing and analyzing the personnel system changes that occur in both Departments. We will study and survey more specific impacts of the varied human resources initiatives as they are deployed.

As the Board prepares for the impact of increased retirement on its customers, we recognize that the MSPB itself will be directly affected. Within 5 years, 40 percent of the MSPB's workforce will be eligible to retire. Almost 20 percent are eligible at this moment. To prepare for these retirements, my administration has looked for creative ways to attract, develop and retain employees. For example, I have directed each office to develop a succession plan. I have also instituted developmental training programs throughout the agency. Under my leadership, MSPB managers also work to enhance employee training opportunities in a number of ways, beginning with the use of individual development plans. I am particularly proud of the MSPB Senior Management Fellows program, in which high-potential employees are identified and provided with training and developmental assignments to prepare them to become the future leaders at MSPB. We have also created a mentoring program for Board paralegals, helping them

to contribute even more to our agency's success while providing them with career enhancing training and opportunities.

V. CONCLUSION

In short, the Board Members, officials and staff have successfully fulfilled the agency's statutory missions. In addition, we have been careful stewards of the public funds that have been entrusted to us for the purpose of fulfilling those missions. The Merit Systems Protection Board has made great strides in improving all aspects of the agency's operations. However, we continue to explore ways to achieve new levels of efficiency and to better serve the American public. We believe that the proposed amendments described during this hearing will help the agency meet this goal. In these times of great change in Federal human resource management, a strong, vibrant and independent MSPB is critical. We look forward to the opportunity to continue our important work over the next 5 years.

Mr. DAVIS OF ILLINOIS. I thank the gentleman very much.

We will move right into the question period.

Mr. Bloch, let me ask if you could comment on the Office of Personnel Management Inspector General's investigation of allegations by current and former OSC employees that you retaliated against underlings who disagreed with your policies by transferring them out of State and tossing out legitimate whistleblower cases to reduce backlog?

Mr. BLOCH. Thank you, Mr. Chairman.

We have, of course, not done any of the things that have been alleged by the outside pressure groups. They have their own interest in why they are saying those things. They are reckless and false and slanderous.

We have had five investigations that have exonerated me over the same allegations. The final one that has been hanging over my head for 2 years at the Office of Personnel Management Inspector General is doing what I just said, hanging fire. I haven't seen anything. I haven't heard from anybody. So as soon as that is over, it is over, but it has been there for 2 years. Enough is enough.

The allegations, the absolutely hilarious and scandalously slanderous allegations that my staff would throw out whistleblower claims was proved to be utterly false by bipartisan staff members, 12 of them who came to our agency at our request to dispel these utterly absurd notions that my career staff would ever do such illegal things and violate not only the law of our statutes but also put their bar licenses at risk.

So the bipartisan staff looked at evidence. They aren't outside pressure groups. They are qualified staff investigators. They looked at all the evidence and they went through the files, and they also looked at specific cases where allegations have been made that they were improperly dismissed or told the whistleblower they didn't have a close or the Hatch Act complainant or the PPP complainant or whoever it was. They went through all four enforcement areas, and it was very detailed, and they interrogated our staff, not me, our staff, the people who actually work these cases. It is really insulting and absolutely unhelpful to the merit system to accuse the people who do this fine work every day and have achieved incredible results for the American people and for the Federal Government of absolutely heinous acts they never committed.

Mr. DAVIS OF ILLINOIS. Are you cooperating fully with the OPM's Inspector General's investigation into those allegations?

Mr. BLOCH. Well, if you consider waiting around for 2 years for them to finish cooperating, yes. I don't have anything to cooperate in. Nobody has talked to me. But I am doing nothing with regard to that investigation. I am fully willing to cooperate and ready and anxious to get it over with, because it is unfair to the staff, it is unfair to me, and it is unfair to the Government to have this sort of thing, these political attacks hanging over the head of an agency.

Mr. DAVIS OF ILLINOIS. Has the Office of Personnel Management asked you to provide any information or documents that you have not provided?

Mr. BLOCH. No. I was given a document request back in the fall of 2005. I gave up a stack of about 400 pages, I think, plus a whole

notebook of documents, another 250 or 300 pages, was a part of a Senate record from May 2005.

I never heard any request for documents again until last month, and I gave up another stack about yay high, which is about a foot deep. I don't know how many pages it was.

But yes, everything that I have been asked for I have provided and held nothing back. There were, I think, four or five documents that were withheld originally attachment were attorney/client protected, but they really were just notes from an attorney to me about unrelated matters, and so that was the only thing that I withheld.

Mr. DAVIS OF ILLINOIS. On panel three we have a witness who will testify that, based on less than 1 year active service working under your jurisdiction, that she has filed two EEO complaints, three Whistleblower Protection Act claims, two Office of Workmen's Compensation claims, and a Federal Tort Claims Act lawsuit. Are you familiar with any of that? How would you reconcile this kind of activity in terms of what may be happening in this person's case?

Mr. BLOCH. Well, Mr. Chairman, I don't want to talk about something I don't know anything about, but I can tell you that I have been informed there was an employee that I had no contact with except for saying hello to in the hallways who was with our agency a short time. More than that I don't know. I understand it was a routine personnel matter. It is being handled by the head of our EEO. I had no involvement in the underlying facts of whatever it is that is being claimed. And I really don't know a lot about what those cases or claims, you know, contain, and I don't want to denigrate anybody, you know. People have a right to file before different tribunals and to exercise their rights, and we believe that is appropriate and we honor that, so I am not going to sit here and say anything about that person. I don't know what that person's situation really is.

Mr. DAVIS OF ILLINOIS. Thank you very much.

Mr. McPhie, in your testimony you mentioned that the mission of the Merit Systems Protection Board is to protection Federal merit systems and the rights of individuals within those systems. Could you provide clarification on the specific types of claims that would not fall under your jurisdiction? And what are the rights of an individual who has a mixed case complaint?

Mr. MCPHIE. The rights of an individual who has a mixed case complaint is to have that, like any other case, to have that case adjudicated promptly. It comes through the same process. It starts off with a board AJ somewhere in the regions. He or she writes an opinion. The personnel then tries to appeal it forward. If the person takes that choice on to the Board, the Board then either affirms what the AJ has done or issues a new decision. And if the person is dissatisfied, the person has a choice. It is an appellant-driven kind of system. If they don't like what the Board has done, it has choices. It can take it on to the EEOC and get another further administrative review, and beyond EEOC can keep on going. It can go to Federal District Court. I mean, those cases are treated just about the same way except they have more legs than other cases which would traverse a path that would take it only from the

Board to the Federal Circuit Court and end there unless some opportunity for review to the Supreme Court of the United States is sought by the appellant.

Mr. DAVIS OF ILLINOIS. An employee who files a mixed case complaint who does not like the MSPB decision may appeal to the EEOC, and if the EEOC disagrees with the MSPB the MSPB is given an opportunity to adopt the EEOC's decision?

Mr. MCPHIE. That is correct.

Mr. DAVIS OF ILLINOIS. What percentage of the time does the MSPB adopt the EEOC's decision?

Mr. MCPHIE. Let me say this. EEOC has accepted the vast majority of Board decisions in the area of discrimination law. I mean, that is a given. Those few cases that would be sent back to the Board—in fact, I am being reminded it is almost 100 percent of our decisions bearing on discrimination is affirmed by the EEOC, for starters, so very few cases would ever come back. But if they do, then we are required to follow what the EEOC says the law is, and if we disagree we can seek a special panel. This is very rarely done. The special panel then makes the call along some established lines.

Mr. DAVIS OF ILLINOIS. During the interval while resolution is being sought between the MSPB and the EEOC, is the employee's adverse action stayed during the interval?

Mr. MCPHIE. A mixed case is a case that is primarily an adverse action case that has elements of a discrimination case, where somebody is being fired, let's say, and the adverse action is I am appealing my removal. And that person then says, you know, the reason why I was removed was really retaliation, so you have a mixed case, retaliation based on race, sex, and what not, so you have a mixed case.

When the MSPB's AJ decides that case, that MSPB AJ is going to decide the entire case, so the adverse action part could be finished by that point. It is done at that point in time. The person may not like the adverse action decision as well as the discrimination piece.

In terms of the discrimination aspect of the case, they may appeal that forward to EEOC, but the adverse action case is finished.

Mr. DAVIS OF ILLINOIS. Finally, how long does it take for cases to be decided by the Board? And what is the Board doing to speed up the processing?

Mr. MCPHIE. Well, I tell you, as I said in my statement, in the regions where we have approximately 60 agents, we decide 7,164 cases in fiscal year 2006, an average time of 89 days per case—that is 8–9—in the field. In headquarters we did 1,367 cases in fiscal year 2006 for an average time of 153 days. So the field is more efficient than it is in headquarters.

In terms of making sure that we maintain some level of efficiency—which, by the way, we have to. We know it. Every new system that comes down requires us to do it more quickly. DOD and DHS, as well as the new whistleblower legislation, require us to start and finish cases in a very short timeframe.

So what we have been doing is we have really fully implemented our alternative dispute resolution techniques. I mean, we are doing mediations, we are looking at settlement potential. We are really trying to figure out those cases that ought not to hang around for

a long time and really cost people a lot of money and time and that kind of thing.

We are continuing to train our personnel. We have been looking to new technology. As a small agency, we have been very proactive in using technology. And we are looking at such things as altering the way we manage our work force. For example, we have reorganized attorneys who draft recommended decisions into smaller teams. Smaller teams mean that folks can get closer supervision and more vigorous mentoring for the younger folks.

Those are the kinds of proactive things we are doing.

Mr. DAVIS OF ILLINOIS. Thank you very much, Mr. McPhie. I thank both of you gentlemen.

I now yield 10 minutes to the ranking member, Mr. Marchant.

Mr. MARCHANT. Thank you, Mr. Chairman. I am going to concede my time to the ranking member of the full committee, Mr. Davis.

Mr. DAVIS OF VIRGINIA. Thank you very much.

Let me say to both of you I appreciate your commitment to public service. Mr. Bloch, I appreciate your putting my letter up there. I think we did investigate that, as you noted, in a bipartisan way and found, at least for this purpose, that there was no problem with it. And I appreciate your clearing the backlog, and I think we praised you for that. When I think you are right, we will say so. You have done some good things.

But you also are under investigation on a number of issues. I think that you should be accorded a presumption of innocence on these issues, but I have some specific questions.

I would like to ask if you would be willing to respond in writing to any questions that we don't get a chance to ask today from me or the other Members.

Mr. BLOCH. Absolutely.

Mr. DAVIS OF VIRGINIA. OK. We have a number of questions.

On April 27th you were on C–SPAN. Ironically, you said, "We will not compromise the justice system by speaking about the facts of the case before our investigation is complete." I think you know where I am going. We have talked about this. The day before, however, your staff briefed our staffs, both Mr. Waxman's and mine, and during that briefing your staff openly disparaged the GSA Administrator. This was in the middle of your investigation. Your agency hadn't even wrapped up its interviews yet.

During the April 26th staff briefing, your staff disclosed confidential aspects of the investigation, namely that there was an issue with the version of the transcript used by your investigators. As the deposition transcript shows, the first interview with Mrs. Doan was called off for these reasons and rescheduled. This confidential fact of the investigators was shared with our staffs.

Your staff made comments about her having amnesia. Similar comments were overheard by our staff at a social gathering, a Kentucky Derby party, 2 weeks before the report was issued.

Your staff has also alluded to the need for Chairman Waxman's help with its reauthorization, presumably the more administration officials who broil in Hatch Act problems, the happier the Democrats will be.

Our staff was told the Hatch Act inquiry provides an opportunity for OSC to show they are willing to be aggressive.

Now, my first question is: did you know that officials from your Agency were on the Hill disparaging the Administrator on April 26th?

Mr. BLOCH. Thank you, Mr. Davis. No, I did not know that until we discussed this yesterday.

Mr. DAVIS OF VIRGINIA. OK.

Mr. BLOCH. I expressed to you then and I will express to you now that I disapprove of any such disparagement. I believe at that time we had not completed our report and the Administrator was entitled to the presumption of innocence, as you said, and I agree with that entirely. I meant what I said on C–SPAN. I do not agree with trying people in the press or doing things to people to try to suggest they are guilty in the press. I have had it happen enough to me that I realize it is not fair and it is not right, and it is too often the case, I think, that we denigrate the justice system and we give people a kind of cynicism about whether there is such a thing as justice when we do thing like that.

So I heartily agree with you that is wrong and I disapprove of it, and I have already had words, but will continue——

Mr. DAVIS OF VIRGINIA. With the individuals involved. I just want you to take care of it and just make sure it doesn't happen again.

Mr. BLOCH. Absolutely. I take it very seriously. Also, I want to make it clear for the record that I am unaware of any of the staff members who actually did any of the investigating in any cases, including the Administrator, who had any involvement in the things that you are discussing. I think we need to make a distinction there. But I still don't excuse it. Don't get me wrong.

Mr. DAVIS OF VIRGINIA. I will be happy to give you the names.

A draft report on Doan was released to the news media before it was shown to her and before she had a chance to respond. Now, the GSA Administrator had told us she received media inquiries quoting at length from your report before she received her copy, and the Washington Post published a correction stating that it wrongly quoted from a draft report that would not have been available to her.

The only OSC, to my knowledge, had drafts dated to May 18th, and the Washington Post posted a PDF of a May 17th draft. The Post correction reads, "On May 24th, a section article about U.S. General Services Administration Administrator Chief Lurita Alexis Doan incorrectly reported that the U.S. Office of Special Counsel report sent to Doan had stated that we recommend that the President take disciplinary action against Administrator Doan because her disregard for such protections and safeguards is serious and warrants punishment."

Those passages appeared in an earlier version of the report, but not in the final version sent to Doan. The final version included a cover letter from you containing "his recommendation that the President take appropriate disciplinary action against you for your serious violation of the Hatch Act."

Leaking the damaging but inaccurate information report before she had a chance to respond you would agree would be prejudicial?

Mr. BLOCH. Congressman, let me correct the record here. First of all, I do not agree with releasing the report before the Adminis-

trator had the chance to respond and to submit it to the President. I believe I made that clear to any reporters who asked, and I have certainly made it clear to my staff.

Mr. DAVIS OF VIRGINIA. And you made it clear to me yesterday.

Mr. BLOCH. Yes. And we gave the report to Ms. Doan by hand delivery to her attorney on May 18th.

Mr. DAVIS OF VIRGINIA. But the May 17th draft she would not have had.

Mr. BLOCH. I don't think so. I doubt that very seriously.

Mr. DAVIS OF VIRGINIA. That was what was leaked to the paper.

Mr. BLOCH. But let me just try to explain the dates here. So May 18th we had that sent over to Ms. Doan through her attorney, and also I believe electronically transmitted that to Mr. Nardotti.

Then the following Monday was the first I or anyone on my staff that relayed anything to me indicated that the media was starting to make noise about a report that had been sent to Ms. Doan.

I asked my staff what happened here, what do we know. We didn't give out the report, did we? No. So we started to make inquiries at the places where they were making some noise. When I say making noise, I am referring to Government Executive and Federal Times putting out reports that——

Mr. DAVIS OF VIRGINIA. The media.

Mr. BLOCH. Yes. Putting out reports, not specific reports, but just indicating that there had been a report, or that sources had indicated a report had been sent and then intimated but never said that there was specific content.

So I was concerned that somehow, either through Mr. Nardotti or Ms. Doan or someone else accidentally somebody had let the report out, so I asked my staff to inquire of the reporters what is going on or do you actually have the report.

They hemmed and hawed and they could produce no evidence they had the report, and they could not quote anything from it. So then we met again and realized, OK, they don't really have it, they are just hearing rumors.

Then on, I think, Tuesday or Wednesday, the 23rd is what I am coming up with in my memory, of May, we got word from Government Executive and, I believe, the Federal Times, but for sure Government Executive that they had the report. We didn't believe them because we didn't give it to them, and so we queried them as to what was in there, and they started to tell us quotes. So we said send us some actual quotes from the report, and they sent us an e-mail. In that e-mail there are quotes from the report that I sent over to Mr. Nardotti on behalf of Ms. Doan.

So we asked the reporter where did you get that, because we knew we hadn't given it out. I don't know if it is a he or a she, but the reporter said that it had come from GSA and that it had a fax cover at the top of the page from the GSA number, but did not indicate who it was. They weren't going to give up any source.

Mr. DAVIS OF VIRGINIA. But my question is a simple one. The correction in the Post said those passages appeared in an earlier version of the report but not in the final version sent to Doan, so they had a version that was not sent to GSA that they had to correct later, so she couldn't have had it, if that is correct.

Mr. BLOCH. Well, if you tell me that is so, I mean, I have heard that. I have never seen it.

Mr. DAVIS OF VIRGINIA. I gave you a copy. We have given you a copy of the report that is blown up right there from the Washington post.

Mr. BLOCH. I understand. I——

Mr. DAVIS OF VIRGINIA. What I would ask you, I mean, you would agree that leaking damaging and inaccurate information before somebody has a chance would be prejudicial, obviously.

Mr. BLOCH. Well, I want to address that question this way, Congressman. We have the power legally, and it is published in the Federal Register, to release anything we deem to be in the public interest, and there are several categories of——

Mr. DAVIS OF VIRGINIA. Let me ask you this.

Mr. BLOCH. And so that is not necessarily prejudicial.

Mr. DAVIS OF VIRGINIA. Well, if it printed the report before the final and before she had a chance to see it—but let me just ask you this. Did you authorize your staff to leak a draft to the newspaper?

Mr. BLOCH. No, I did not authorize them to leak a draft. This was put out by someone at GSA. That is all I know.

Mr. DAVIS OF VIRGINIA. Well, if GSA didn't have it——

Mr. BLOCH. I don't know who had it. All I am telling you is that I know——

Mr. DAVIS OF VIRGINIA. You didn't authorize it.

Mr. BLOCH [continuing]. We got information from a reporter that GSA had sent them the report.

Mr. DAVIS OF VIRGINIA. So your staff never explained to you that the leak could only have come from OSC?

Mr. BLOCH. Who?

Mr. DAVIS OF VIRGINIA. Your staff never explained that the leak could only have come from the Office of Special Counsel?

Mr. BLOCH. Well, I——

Mr. DAVIS OF VIRGINIA. Let me just say this. In a telephone conversation with my staff shortly after the leak, they acknowledged that the draft report, which was not sent to the Administrator, posted on the Web by the Washington Post could only have come from inside the agency, because only people inside the agency had it. It was a draft report.

Your staff also told us that this fact had been communicated to you and that there was no plan to investigate the leak. And you are saying that is incorrect?

Mr. BLOCH. There is a lot that you put in that question. Let me——

Mr. DAVIS OF VIRGINIA. That was pretty simple. It is pretty simple.

Mr. BLOCH. Well, there are different things you are putting in there. First of all, you are asking me to assume a fact I don't know, which is that it came from my office. And I have been advised, by the way, for many years now not to use the word leak because that is disparaging. But we say——

Mr. DAVIS OF VIRGINIA. Released.

Mr. BLOCH [continuing]. Released, because it is lawful.

Mr. DAVIS OF VIRGINIA. It was early released.

Mr. BLOCH. I don't know about prematurely. All I know is that——

Mr. DAVIS OF VIRGINIA. It was a draft report.

Mr. BLOCH. Congressman, I am not arguing with you, I am just telling you I don't know what someone had or didn't have or why they had it.

Mr. DAVIS OF VIRGINIA. This last question. You are telling me then, to the best of your knowledge under oath, that not only didn't you authorize it in any way, shape, or form, but you don't have any idea that this came from OSC; that the best of your information, nothing came out of your office prematurely?

Mr. BLOCH. I am telling you that I did not authorize it, and I understand the logic of what you are saying about it had to come from OSC, but I don't know that, that it had to. It could have——

Mr. DAVIS OF VIRGINIA. And you did ask——

Mr. BLOCH [continuing]. Been out there before that.

Mr. DAVIS OF VIRGINIA. You did ask your staff and they said that it did not come from OSC?

Mr. BLOCH. I have not done an investigation because I have been warned away from impinging and infringing employee rights and attacking—it has been alleged that I have attacked people for so-called——

Mr. DAVIS OF VIRGINIA. I am not saying attack. I am just asking to do an inquiry. OK. I will get——

Mr. BLOCH. I have not instituted an investigation. I don't intend to. I have gotten severely criticized for impliedly doing that which I have never done, but I really don't want to attack people. If someone saw fit to give out an earlier draft I don't approve of it but I am not going to get into—I think it is a red herring. I think it has nothing to do with the facts. I think my understanding is the only difference in the reports had to do with the last couple of pages in terms of the recommendation.

Mr. DAVIS OF VIRGINIA. It has to do with the leak. It has to do with where the leak came from, because a draft report could only have been released. I am just going back to what you said on April 27th on C–SPAN that you don't leak information on ongoing investigations. That is all. I think the point is pretty clear. I just ask that you take a look at that and go back and talk to your staff. I will have more questions on it later.

Mr. BLOCH. Congressman, I will not refuse your request. I will go back and talk to my staff. But I want to be careful not to institute investigations of staff for doing things that they feel are appropriate expressions of their first amendment rights.

Mr. DAVIS OF ILLINOIS. Ms. Norton.

Ms. NORTON. Thank you, Mr. Chairman.

Mr. Bloch, it is a red herring. It is a red herring. There may have been mistakes made, and if you discover who leaked your report you ought to have a medal, because the fact is that the leaks that come out of the Government for time immemorial, almost no one has been able to decipher. It is a red herring, and I want to commend you on having the courage to issue a report that involved your own White House with all the repercussions. It is these side issues that have been used by the other side to detract from the serious violation of the Hatch Act and from the fact that somebody

within the administration was willing to go at the Hatch Act. If anything, we want more of that, particularly from this Government, than we have seen in the past.

May I ask you, sir, where do you live?

Mr. BLOCH. Ma'am, I live in Alexandria, Fairfax County.

Ms. NORTON. Why do you want to take an office that serves 250,000 Federal employees that come to the District of Columbia every day and move it outside of the District of Columbia?

Mr. BLOCH. Thank you, Congresswoman Norton. I appreciate your commitment to the District and to the merit system that we are talking about here today. I don't propose to move it outside the District. We had submitted a series of legislative requests with our reauthorization to get the flexibility, if we have to, based upon need and cost, because we have a very, very small budget.

Ms. NORTON. Mr. Bloch, if cost, particularly, not to mention need were the case, there wouldn't be a single Federal agency located in the District of Columbia. This is the capital of the United States, and you will need more than to reduce your rent or lease to move out of this city. Have you spoken with the General Services Administration about available leases in the District of Columbia at this time?

Mr. BLOCH. Well, Congresswoman, I am not sure of the answer to that question. We will supply you with it after I talk to my staff.

Ms. NORTON. I want you not only to supply me with that, but, since I am chair of the subcommittee that has jurisdiction over GSA, I wish to help you find low rent accommodations in the District of Columbia. I feel I can do that, sir, so I would say to you that it will be over my dead body at several times that you take an agency of this importance to Federal employees out of the District of Columbia against—because you will require a statutory change, and I will do all in my power to see that no such statutory change unnecessarily occurs, and I am willing not only to tell you that to your face, but to say to you that I will help you find in the District of Columbia space. I might even be able to help you find space less than what you are paying in the middle of town now, space close to the Capitol of the United States, sir.

Mr. BLOCH. Well, Congresswoman, I thank you for that and I really appreciate that help. We like our quarters very much.

Ms. NORTON. Well, I know you are located where everybody wants to be located. See, everybody wants to be located in a strip near K Street where the restaurants are, where the theaters are. Now, you take them even close to the Capitol and they say oh, my god. Well, I am saying oh, my god, for moving out of the District of Columbia.

Let me ask you something about a very serious allegation involving you, sir. Are you aware that the Congress of the United States has just passed hate crimes legislation?

Mr. BLOCH. I am aware that there is a bill pending and——

Ms. NORTON. No, sir. Are you aware that the House of Representatives, shall I put it that way, has passed hate crimes legislation?

Mr. BLOCH. Yes, ma'am.

Ms. NORTON. Are you aware that uses the term sexual orientation to describe what is barred and barred as to whom?

Mr. BLOCH. I believe I have seen that, yes.

Ms. NORTON. Why would you make a distinction nowhere found in law in changing what had been existing protected class guidance? Would you explain the distinction you have made up—I have to say you have made up, because I can't Google it and find such a distinction anywhere—between sexual orientation and sexual conduct? Should we have put in the statute sexual conduct? I am asking your advice now. Did we do something wrong in putting sexual orientation as the basis for the hate crimes act in the statute? Would you have preferred us to put sexual conduct? If so, why?

Mr. BLOCH. Well, thank you, Congresswoman. Let me clear up——

Ms. NORTON. And what in the world do you know about anybody's sexual conduct, anyway?

Mr. BLOCH. I don't know anybody's sexual conduct other than my own, and——

Ms. NORTON. So how could the Congress of the United States base it on what somebody does in his bedroom, his conduct? How many people do their conduct in the workplace when it comes to sex?

Mr. BLOCH. Well, not very many, I hope, but we do have a case we just investigated where that was alleged. But let me answer your question.

Ms. NORTON. Well that, of course, is punishable on other grounds, sir.

Mr. BLOCH. And I would like to stay away from those sorts of things.

Well, Congresswoman, this really is an area of the question of what is in our law and what was passed by Congress.

Ms. NORTON. I just told you what the law says. There is no law existing. The hate crimes law has passed the Senate more than once. Now we passed it in the House. The distinction you have made is not made in law.

Let me tell you why, because if you make a distinction based on conduct it implies that the employer has to find out something about the conduct, and I don't want to find out anything about your conduct and I don't want you finding out anything about somebody else's conduct. So if we were to put the burden in the statute on conduct, that would require an investigation of somebody's sexual conduct. Do you really mean for that to be what the guidance for OPM should be?

Mr. BLOCH. Well, let me just read our law, and then maybe we can clear this up. Our prohibited personnel practices appear at 2302.B of title 5 of the U.S. Code, and the protections for people who allege discrimination on the basis of who they are, such as race, color, creed, etc., are found in B.1, and that includes all of the normal what we consider the title 7 categories that have been in the law.

Ms. NORTON. They are not the normal categories. They are the categories you have gotten to so far.

Mr. BLOCH. That is right.

Ms. NORTON. This is not a category in the statute.

Mr. BLOCH. No, and it is not in that statute, and so sexual orientation doesn't appear there. And then the only other section that

potentially pertains to anything to do with a person's sexuality or their conduct is in——

Ms. NORTON. But it did appear in guidance, OPM guidance.

Mr. BLOCH. Well, the OPM guidance is incorrect.

Ms. NORTON. Sorry?

Mr. BLOCH. The OPM guidance is incorrect legally. They have mis-stated our laws.

Ms. NORTON. In other words, the fact that sexual orientation had been a part of OPM guidelines before was illegal?

Mr. BLOCH. Well, it was put in there in 1998 with the help of my predecessor and it never had appeared there before.

Ms. NORTON. And does that make it illegal? Do you recognize, sir, that guidelines have the force and effect of law?

Mr. BLOCH. Well, Congresswoman, that is not necessarily correct. It depends on the issue that is being guided. They don't have jurisdiction over these. The enforcement——

Ms. NORTON. Who is they?

Mr. BLOCH. OPM does not have jurisdiction to enforce——

Ms. NORTON. Has any court of law said that?

Mr. BLOCH. Yes.

Ms. NORTON. Would you please cite to me that case?

Mr. BLOCH. Sure.

Ms. NORTON. In other words, you changed the law because the court said that change had to be made?

Mr. BLOCH. Yes, and I didn't change the law; I put it back to where the agency had enforced it for 20 years before my predecessor. Let me read you the cases. There are two cases from the MSPB, one in 1998 and one this year, *Morales* v. *Department of Justice,* 77 MSPR 482, and also *Mahaffey* v. *Department of Agriculture,* 2007 MSPB 93, a March 30, 2007, ruling.

Ms. NORTON. Holding, of course, those are not exactly——

Mr. BLOCH. I am sorry?

Ms. NORTON. That is not the District Court or the Court of Appeals. What did those MSPB judges hold?

Mr. BLOCH. Well, those holdings bind our office and they do bind Federal employees, unless overturned by the Federal Circuit, and they haven't been. So there are both cases, 1998 and 2007 both hold that section B.1, which contains our status protections that title 7 contains, as well as political affiliation and marital status, do not protect the status of sexual orientation.

Ms. NORTON. Mr. McPhie, he is now speaking about the MSPB. Do you concur with what he now says, as you have overturned—it is because of you, the MSPB, that Mr. Bloch was forced to change the OPM guidelines.

Mr. MCPHIE. With all due respect for my friend, Mr. Bloch, I respectfully disagree. Morales is a title 7 case, and title 7 cases are governed clearly by the precedent established by the U.S. Supreme Court some time ago that sexual orientation is not prohibited. Mahaffey is a more recent case. In Mahaffey the Board left open the question as to whether or not discrimination based on sexual orientation is a prohibited personnel practice.

The case went off on whether or not it was conduct on the job or conduct—the person was terminated, I believe, fired because of off-the-job conduct. I mean, that was the distinction. The Board ex-

pressly left open any decision on whether or not sexual orientation is a prohibited personnel practice.

At some point we are going to have that case and we will have to decide that case square on, but until that case is decided I want to stay away from the discussion on cases that may come to us.

Ms. NORTON. But you certainly don't want those cases cited for a change in the law or in the guidelines for separating orientation and conduct——

Mr. MCPHIE. No, ma'am.

Ms. NORTON [continuing]. As based on your cases.

Mr. MCPHIE. No, ma'am. That is not the way I think a reasonable reading of MSPB law at this point.

Ms. NORTON. Did you change the guidelines before or after those cases, Mr. Bloch?

Mr. BLOCH. Well, I didn't change any guidelines; I applied the law——

Ms. NORTON. You just said your it was your predecessor who had the wrong interpretation and you had to change it, sir.

Mr. BLOCH. I had to correct, yes, I had to correct something that was put into our Web site materials as well as our educational materials.

Ms. NORTON. Otherwise known as guidelines with the force and effect of law.

Mr. BLOCH. Ma'am, I respectfully disagree. They are not the force and effect of law.

Ms. NORTON. If I may say so finally, Mr. Bloch, you have just heard repudiated and refuted entirely your basis, your legal basis. In light of that, would you return to the OPM guidelines as they were? And if not, why not? You no longer have the legal authority you relied upon. I am asking you to return to the guidelines as they were, and especially in light of the fact that we have now passed in the House, at least—I expect to have in the Senate—a hate crimes law that has sexual orientation in it. I now ask you to return the guidelines to what they were, ask you if you are willing to do that, and if you are not to indicate why not.

Mr. BLOCH. I am not willing to do anything illegal that is contrary to our statute and also to the case law. I respectfully disagree with my esteemed colleague, the chairman of the Board, because the Mahaffey case does affirm Morales, which says the B.1 protections—that is title 7 protections——

Ms. NORTON. The title 7 cases——

Mr. BLOCH [continuing]. Does not include protection——

Ms. NORTON. We are talking about cases brought under the guidelines, the former OPM guidelines.

Mr. BLOCH. And I am getting there. So it affirmed Morales, saying there is no sexual orientation status protection, and the only other section that was argued in Mahaffey was B.10, which is conduct protection, and the claimant in that case, the petitioner, argued that B.10 covers status, sexual orientation, not conduct of a sexual nature, but just orientation.

Ms. NORTON. Mr. McPhie just said that matter was left open.

Mr. Chairman, I think that, in light of the fact that this witness has determined the law into and unto himself, quoting decisions that have been specifically refuted under oath, that we have an ob-

ligation by law to change, to bring the guidelines back to where they were, sir, if I may say so.

Mr. DAVIS OF ILLINOIS. Thank you very much, Ms. Norton.

Mr. Davis.

Mr. DAVIS OF VIRGINIA. Mr. Bloch, is the Doan matter closed and off your desk at this point?

Mr. BLOCH. The Doan matter, as defined by the allegations that Ms. Doan's comments following a political presentation violated the Hatch Act, has been closed and was closed when we sent the matter to the President. I forget the date of that, but it was some time at the end of May.

Mr. DAVIS OF VIRGINIA. Is it possible that the White House could ask you some followup questions or ask you to help them understand the relevant case law, evidentiary standard, or other pertinent legal questions not addressed in your papers?

Mr. BLOCH. It would be my pleasure.

Mr. DAVIS OF VIRGINIA. OK. Is there ever a point where you can then disparage Mrs. Doan?

Mr. BLOCH. I am sorry? What?

Mr. DAVIS OF VIRGINIA. Is there ever a point where it becomes acceptable for you to disparage Mrs. Doan?

Mr. BLOCH. Well, it would depend on your definition of disparage. I don't agree with the idea of personal attacks, but if you mean that, I don't agree with disparaging Ms. Doan personally.

Mr. DAVIS OF VIRGINIA. Is it appropriate for officials at your agency to comment about agency business to family, friends, on personal e-mail accounts?

Mr. BLOCH. Again, we are back to the first amendment issues. I am not going to attack employees for their free exercise of expression if they want to talk about their reactions to——

Mr. DAVIS OF VIRGINIA. Let me get more specific. What if an agency official was offering personal commentary, sending news clips via mass e-mail about agency business on their person accounts during business hours? Would that be a concern or not?

Mr. BLOCH. News clips?

Mr. DAVIS OF VIRGINIA. And personal commentary.

Mr. BLOCH. You know, again, it is a free country. First amendment——

Mr. DAVIS OF VIRGINIA. All right. Let me move ahead. Have you ever used your personal e-mail account to send e-mails about official agency business?

Mr. BLOCH. I don't know what you mean by official agency business. Have I ever sent news clips of what is going on in my office to my family and friends? Of course.

Mr. DAVIS OF VIRGINIA. Well, let me put it this way. We have been conducting oversight in this committee, as you are aware, into the use of personal e-mail accounts to discuss official business with the White House. We have an e-mail that you sent out at 11:52 a.m. on Tuesday, June 19th. It is from your private AOL account. It was sent to a large number of people, some of whom, by the way, were kind enough to forward it to us. In an e-mail which I will read you begin by making disparaging remarks about Mrs. Doan. You compare some of Mrs. Doan's testimony to the testimony of former President Clinton, then you move into some disparaging re-

marks about me and my colleague, the ranking member of the Committee on Transportation and Infrastructure, Mr. Mica.

Let me read it. First, "Is hilarious piece riffing on Doan's hortatory, subjective, and I didn't think anyone could improve on Clinton's 'depends on what the meaning of is is.'"

Second is "Doan, apparently encouraging her people to move on, suggesting President Bush is not going to do anything about her."

Third is from the hearing where Doan said, "hortatory, subjective. It is Congressman Tom Davis who has been acting like Doan's defense counsel, saying reckless things about OSC's report and calling for my resignation. Mere Kabuki Theater, all of this. I am going up for my reauthorization hearing on July 12th and Davis will either show up as ranking member or have Congressman Mica do his dirty work of raking me over the coals. We may have something to say about that."

Mr. Bloch, I would like to ask you if you could produce all the e-mails sent on your AOL e-mail account between January 26, 2007, and today where you discuss official business, including anything related to Hatch Act violations and Hatch investigations and that discuss Mrs. Doan, me, the chairman, Mr. Mica, other members of this committee, and any other Government official. Do you have any problem with that request?

Mr. BLOCH. Congressman, I think this is inappropriate. It is an invasion of my privacy. It is an invasion of my first amendment rights. This is my personal life you are talking about. It is not official business. I have every right, just like you do, to talk to my friends and family——

Mr. DAVIS OF VIRGINIA. During business hours?

Mr. BLOCH [continuing]. And tell them of the sort of things that are going on, and it is not going to happen. Let's move on to something real.

Mr. DAVIS OF VIRGINIA. You know, this is exactly what we have been talking about in terms of the White House utilizing—these are Government computers, I assume, and you are not bringing your personal computer in the office during Government time?

Mr. BLOCH. Congressman, I don't know if it as at home. I don't know what——

Mr. DAVIS OF VIRGINIA. Well, it is 11:52 a.m. Were you home that day on Tuesday at 11:52?

Mr. BLOCH. I could have been. I could have been. Let me just say that it has nothing to do with the issue that——

Mr. DAVIS OF VIRGINIA. You state that I have called for your resignation. When?

Mr. BLOCH. Congressman, I don't want to get into a personal argument with you.

Mr. DAVIS OF VIRGINIA. Well, you said I had. Can you recall when?

Mr. BLOCH. Yes.

Mr. DAVIS OF VIRGINIA. When?

Mr. BLOCH. It was in a hearing after we closed the file and I believe you said this man has produced a worthless report, no——

Mr. DAVIS OF VIRGINIA. Well, I did say that.

Mr. BLOCH [continuing]. Evidence, and he should have to resign, and the President should fire him.

Mr. DAVIS OF VIRGINIA. No, I didn't.

Mr. BLOCH. Yes, you did. You said that. And it was inappropriate for you to say that, and it is inappropriate for us to argue about that.

Mr. DAVIS OF VIRGINIA. I think Mr. Mica said it, but that is OK.

Mr. BLOCH. Doesn't sound like you to me.

Mr. DAVIS OF VIRGINIA. Why are you sending news clips on your AOL account in the form of a mass mailing?

Mr. BLOCH. I don't agree with your characterization of mass mailing. I have friends who take an interest in the business of our office as reported in the public press, which is all I did. I didn't give anything out that is from our office. I am simply——

Mr. DAVIS OF VIRGINIA. Well, we don't know that. What I have asked is if we could look at the documents and understand if you did or didn't——

Mr. BLOCH. Well, anyway, that is——

Mr. DAVIS OF VIRGINIA [continuing]. And basically you are saying that, without subpoena, you are unwilling to give that information up.

Mr. BLOCH. Congressman, I don't agree in personal attacks. If you want to engage in personal attacks——

Mr. DAVIS OF VIRGINIA. I just asked for the information.

Mr. BLOCH [continuing]. If you want to exchange personal attacks, maybe we should go outside, but I think it is inappropriate. Government business. Let's talk about the merit system. That is not a threat. We can discuss it outside if you like, but I think in here we ought to talk about the business of our office, what we are doing for the country, and what we are doing for whistleblower.

Mr. DAVIS OF VIRGINIA. I would yield to my friend.

Mr. ISSA. This is getting awfully personal, and I would like to raise it above that, but I have to followup on the questioning because I think it is extremely important.

Where you e-mail, whose resources you use, and what you say about Members of Congress related to an oversight, when you meet with the majority about your upcoming oversight and an ongoing investigation, these are all on-the-clock events that we do have an obligation to look at. This is the Committee on Government Oversight and Reform, and we have an obligation to decide, to a great extent, whether or not your very office continues to exist.

So whether or not the controls are in place for you and people like you to do the job you think is so important is part of what we are dealing with here today, so please, I would ask that you first of all rethink your question of your first amendment rights when you distribute something. This wasn't stolen off your computer. This was sent out the same as if you threw it in the garbage can in the front of your house and somebody picked it up and posted it on the side of a bus. This was made publicly available and passed on by somebody who exercised their first amendment rights to leak something that they thought you did that was inappropriate.

Now, I am not your attacker. I wasn't in any of your e-mails. But I would like you to reconsider your statement on the first amendment, and then I would like you to re-answer the question that the ranking member asked, and asked very civilly, because it is a fair

question as to this e-mail and other things and your conduct, both publicly and now publicly again.

So I would ask you to rethink it and re-answer the question without talking about the first amendment right. You gave up your first amendment rights when you put this out on a Government computer and put it out and made it available. This leak from some friend of a friend of a friend of yours is something that you have to look at. So would you please reconsider it?

I would return the time to the gentleman.

Mr. BLOCH. Do you want me to answer that? Thank you, Congressman Issa. I believe that these questions are inappropriate and are directed at an attempt to suppress our investigation of the White House and of the e-mails that we are looking at that were, in fact, discussing actual Government business, and I am not going to be intimidated by this committee and I am not going to be swayed away from doing actual investigations that we have to do, and I believe the commentary that was made about me and my office and the threats that were made about my office that are in the public news stories that I forwarded to friends on my private e-mail account——

Mr. DAVIS OF VIRGINIA. During business hours on Government computers.

Mr. BLOCH. Do I have a right to answer fully or do I get interrupted all the time?

Mr. DAVIS OF VIRGINIA. It is our time.

Mr. BLOCH. Will you let me answer it?

Mr. DAVIS OF VIRGINIA. Fine with me. Go ahead.

Mr. BLOCH. Thank you.

I believe that these threats that were made in these hearings and these accusations about our office were an attempt to intimidate us about official investigations and of our ongoing work with regard to the GSA and the White House, and I will not be intimidated, and we will do our job, and I will not answer any further questions concerning e-mail accounts.

Mr. DAVIS OF VIRGINIA. Let me just note for the record, Mr. Chairman, that I asked him before I went into the inquiry if his investigation was complete. For the record, he said that it was. So there is no intimidation. I think we are showing appropriate bias, and I think the facts speak for themselves.

Thank you.

Mr. DAVIS OF ILLINOIS. Thank you very much.

Mr. Clayton.

Mr. CLAYTON. I will yield to Ms. Norton.

Ms. NORTON. I thank the gentleman for yielding.

Actually, I have a question for Mr. McPhie, but I do want to say for the record myself, Mr. Chairman, that I think it is inappropriate to disparage special counsel; that if special counsel can be hauled up here for the underlying basis for his decision, I think you will have special counsels not willing to do their job.

I think you were perfectly correct not to answer questions concerning your decisions. You are an independent officer. Many expected you not to act independently, given where you sit. I think you are within your rights and I think you would do a disservice

to the Office of Special Counsel if you believed you could be subject to this kind of cross-examination on your findings.

Now, as to disparaging or leaking concerning someone under investigation, that is criticism that you and any other officer of the Government must take, but beyond that it seems to me there is no other criticism, and the reason you are getting so much criticism on that score, Mr. Bloch, is the following: when people continue to attack somebody on something like leaks, it is often because they have no attack to make on the underlying issue. The issue here was whether Lurita Doan was in violation of the Hatch Act, and I have yet to hear a valid defense to what she did at the instance of the White House. It was one of the most naked violations of the Hatch Act I have ever seen.

Mr. McPhie, I am not referring with regard to existing law. I am just trying to ask everybody to kind of step back. Mr. Bloch, I would be anxious to hear your answer to this, as well. Do you believe that employees of the Federal Government should have the right to file complaints before an objective body that does not include your own employer?

Mr. MCPHIE. You mean whether or not they should have an outside——

Ms. NORTON. Someone other than——

Mr. MCPHIE. Some third party?

Ms. NORTON. Yes, a third party other than the agency of the Federal employee involved in the decisionmaking on the complaint filed against the agency. In our system of law, would that not be the usual course?

Mr. MCPHIE. I have seen it work both ways.

Ms. NORTON. Well, I see it work both ways now, Mr. McPhie. I am asking, given our system of law, isn't it normal for some third party, not including the party accused, to decide issues against the party accused?

Mr. MCPHIE. Are you asking me as a business practice or are you asking me if we——

Ms. NORTON. I am asking if the system of American law, as a system of American law, in our system of law is not the notion of an objective third party routine? Isn't that what distinguishes us, the distinction between us and other societies, that some objective person, not the accused? That the accused is in no way involved who hears complaints that are brought? Is that not central to our system of justice?

Mr. MCPHIE. With respect to Federal employment, that is the customary layout. You tend to have a third party appeal system. I haven't——

Ms. NORTON. You have a third party appeal system.

Mr. MCPHIE. Right.

Ms. NORTON. But what do you have in the first instance, Mr. McPhie?

Mr. MCPHIE. In the Federal system that is customary. Anything different from that is——

Ms. NORTON. Well, in the Federal system the complaint is filed where first?

Mr. MCPHIE. In the Federal system the complaint is filed in the agency, but——

Ms. NORTON. That is what I am speaking of. You then look at what the agency says.

Mr. MCPHIE. Right. In the Federal EEO system it starts with the agency.

Ms. NORTON. All right.

Mr. MCPHIE. And then the agency, itself, looks at it, itself.

Ms. NORTON. Look, I was a chair of the Equal Employment Opportunity. I am aware of how it goes. I am trying to get to it before my time runs out. You start with the agency. You then look, in part, at what the agency found, do you not?

Mr. MCPHIE. The Board?

Ms. NORTON. Yes. You don't discard what the agency found, do you?

Mr. MCPHIE. Not really. The Board proceeds de novo.

Ms. NORTON. Then why do you need the agency to find anything in the first instance?

Mr. MCPHIE. I don't need the agency to do anything. All I am saying is, let me tell you, I think if you look at the way the different complaint processes are structured, the one agency whose structure approximates more closely a judicial structure is the MSPB.

Ms. NORTON. No question about it. But you don't file with the MSPB initially; is that not true?

Mr. MCPHIE. I am sorry?

Ms. NORTON. You file with the agency that you are accusing; is that not true?

Mr. MCPHIE. What kind of case? I mean——

Ms. NORTON. You are an appeal board; therefore, somebody below must have made a decision, Mr. McPhie.

Mr. MCPHIE. You have to have a final agency decision.

Ms. NORTON. I am asking you whether or not you find that outside of the normal course of American law.

Mr. MCPHIE. Not really. No. No.

Ms. NORTON. I don't know anybody at AT&T who files there before they go to the EEOC, for example.

Mr. MCPHIE. I have had a lot of experience with non-Federal public employee situations, and, as far as I can tell, in every instance the agency takes an action and the employee disagrees with the action. The employee has the right——

Ms. NORTON. In the Federal Government, of course?

Mr. MCPHIE. I beg your pardon?

Ms. NORTON. In the Federal Government, of course? All I am trying to establish, Mr. McPhie, is that we have a unique system here, and it is part of the controversial nature of that system. It is not easy to figure out because you have peer agencies, but the one principle it seems to me we ought to establish is one that you uphold, which is the MSPB, is certainly not the agency, and yet so you make the decision, albeit it sometimes with the EEOC in mixed cases. You make the decision apart from the agency, except there has already been an agency finding, sir.

Mr. MCPHIE. And I do believe that is part of the reason. If you look at the structure of these complaint processes, I think that is part of the reason why the MSPB process——

Ms. NORTON. No, it isn't, because——

Mr. MCPHIE [continuing]. Is efficient.

Ms. NORTON. That is not the reason because if, in fact, I work for Microsoft, I get the same right to appeal to an objective body, but I get to file before an objective body in the first place, and that happens to be the EEOC in the case of private employment. So there is a great distinction. You must have been ensconced in the MSPB for so long that it has all melted away.

Mr. Bloch, do you see the distinction at least that I am making? I don't hold you accountable for it. It is set up by the Congress of the United States, but do you see the distinction I am making?

Mr. BLOCH. I do, Congresswoman, and it is analogous to me, having come from the private sector where every right and remedy that I was aware of came outside of one's own employer or company or even public employment. However, in the area of Government employment, I was familiar with a grievance system, I think, that existed in the States, and I knew there was something in the Federal Government of a similar nature.

What is the best system is really something that Congress debates best, but I do understand your distinction.

Ms. NORTON. I am not trying to involve you in the decisions that you didn't make; I just want to establish for the record how unique it is and, frankly, how unjustifiable it is. I am not suggesting that there is an easy way out, but it bespeaks some other country to say you have to go before the accused first and then you can come to Mr. McPhie and find out what the real deal is, particularly since Mr. McPhie doesn't disregard what the agency has found but obviously builds on it.

Finally, you said, Mr. McPhie, that you believe that there has been satisfaction with the way you handled EEOC complaints. I hope that is the case. I am not saying I heard anything different, but on what basis do you say that?

Mr. MCPHIE. Based on EEOC's own records, their statistics, their surveys.

Ms. NORTON. Because, in fact, they have agreed with what you have found?

Mr. MCPHIE. Yes.

Ms. NORTON. And since they normally find for themselves, I am sure they love you. Remember, the agency makes the decision in the first place, and when you bless the agency I am sure they are not going to have many differences.

Mr. MCPHIE. I am not so sure. The presumption here is something I can't buy into, that I bless the agency.

Ms. NORTON. Strike that. I am sure you do your own. Look, moreover I can tell you, as the former chair of the agency, most complaints filed before such an agency are not probable cause complaints that should be sustained, so I am not here criticizing your work. I am trying to get at the nature of the system and to ask whether or not such a system can be justified in the year of our Lord 2007 as we bounce around the world telling people to set up objective third-party systems or be condemned by the United States of America when right here every Federal employee who has a complaint of discrimination against her agency must file with her agency first, get the guts to file against your agency and then hope

that somehow or the other some objective review will be found after you look at what the agency has found in the first place, sir.

Mr. MCPHIE. Again, you sort of conflict in what I do with what the agency has done. I don't have a dog in the agency's fight. Look, we have a system——

Ms. NORTON. You have quite a dog there because you don't take the agency's decision and say that is null and void, I don't even want to know about it.

Mr. MCPHIE. But ours isn't——

Ms. NORTON. You say, Let me look at what the agency has found and then let me see what the appeal from the agency should be. This agency's decision is as much the first-line decision as the decision of a district court is a first-line decision. The court of appeals looks at what the district court did, finds whether it was in error, changes it or not. You look at what the agency did, look at the agency decision, find whether it was in error, and change it or not. There has been no third-party adjudication before it gets to you.

Mr. DAVIS OF ILLINOIS. The gentlelady's time has expired.

Mr. Mica.

Mr. MICA. Thank you.

Well, Mr. Bloch, I don't know quite where to start. I have a copy of the e-mail which came from your office. Maybe I could ask you if you would supply for the record of the committee if you were at work at 11:52 Tuesday, June 19th, in your office. That would be the first question. Do you know?

Mr. BLOCH. Congressman——

Mr. MICA. You don't know?

Mr. BLOCH. I am an independent agency with a charge that we are discharging effectively for whistleblowers.

Mr. MICA. Were you in your office——

Mr. BLOCH. That is what I am here to discuss. I am not going to get into personal attacks here.

Mr. MICA. This is not a personal attack.

Mr. BLOCH. Well, we are done talking about this.

Mr. MICA. You were in——

Mr. BLOCH. I am not going to answer that.

Mr. MICA. Well, I want you to supply or I will ask our staff investigators to find out if you were in the office on that date. I have an e-mail that I just received a copy of which has disparaging remarks about me in it, and I just want to know if you used Government resources to distribute this particular personal e-mail.

Again, I do want to know that. I will find that out. OK?

And the second part of the question is whether you used Government resources to distribute this e-mail.

Now, some comments have been made about calling for your resignation, and you accused Mr. Davis of saying that. I don't recall ever—and then you said you thought it might be some attempt to intimidate your investigation. Was that what you intimated?

Mr. BLOCH. I didn't intimate it; I said it.

Mr. MICA. OK. You said it.

First of all, let's review what we did here. The committee undertook an investigation of the GSA Administrator, and it started with the matter of a contract. That was all, I guess, the end of last year. All of those events took place last year.

In the course of that investigation it looked like that folks were going after Ms. Doan, and maybe they should have. When I first heard about it, I thought if she was giving some sweetheart contract to somebody who she received money from, let's go after her and take her out. As it turned out, she had actually employed somebody to produce those diversity reports, paid them money, and I think the contract was some $20,000 to avoid her agency being disparaged with another poor performance on diversity, herself being an African American executive, a woman, successful background.

So there was nothing there. And then it turns out that someone found out about the presentation. The presentation, the political briefing, was that initiated by Ms. Doan? Do you know?

Mr. BLOCH. What do you mean by initiated?

Mr. MICA. Initiated. Did she initiate the political briefing, from your investigation?

Mr. BLOCH. My understanding of the facts is that she, as the head of the agency, hosted it, but that the actual mechanics of the presentation on January 26th of this year——

Mr. MICA. Right, was by the White House political office.

Mr. BLOCH. Well, working with the White House liaison, as I understand it.

Mr. MICA. OK. Now, at the end of that she did ask a question, and I have heard several comments about the question, and I believe she asked a legitimate question, How can we help our candidates or how can we help our guys. I have heard several people who you, your investigators talked to. I did not view that as a serious violation of the Hatch Act. If she said how could we use GSA resources, blah, blah, blah, but we won't get into that.

But I thought it ought to be investigated, and I thought we should send it to the Office of Special Counsel, your office. I hadn't really known much about you. I heard your name, may have seen you, but had every confidence that you would investigate that.

I never called for your resignation until I picked up this newspaper—I saved the newspaper—and read about a leaked report, and then the next day or thereafter read that the Washington Post had to do a correction on the leaked report.

Now, Mr. Davis indicated and the draft report you said was developed on the 17th or available on May 17th. Then it went to her attorney on the 18th. But it had to be your office that leaked that draft report. It had to be your office. And you said you had the power to leak?

Mr. BLOCH. Well, Congressman——

Mr. MICA. You have the power to leak or to——

Mr. BLOCH. I don't use that term.

Mr. MICA. To disseminate information.

Mr. BLOCH. I have the power to release documents or reports or any information I deem in the public interest——

Mr. MICA. Let me tell you I have the power to ask for your resignation, because when I see us asking you to investigate something and I pick up in the paper, as a member of the Government Reform and Oversight Committee—I have been on this 15 years—and read in the damned newspaper information, and then a retraction and a correction of what your agency had leaked, I am not a

happy camper. It doesn't give me a lot of confidence in what you have done.

Then I thought well, maybe Mica has just got his shorts bound up, or something, but then I started reading about what people have said about you. Did you know what Representative Eliot Engel said on March 31, 2004? "Mr. Bloch ought to find a new job. He ought to get fired. President Bush should not tolerate this from someone he appointed."

I have Mr. Waxman's quote. I didn't know you were in trouble until I read it in the paper, and your office, itself, was under investigation. "The Doan investigation, one of the most highly profile undertaken by the Office of Special Counsel, Scott J. Bloch, who, himself, is under investigation by the Office of Personnel Management for allegedly retaliating against his employees who disagreed with his policies."

I have more. I won't read them all into the record.

Have you read what the executive director of employees for Environmental Responsibility has said about you?

Mr. BLOCH. I don't read slander.

Mr. MICA. OK. Well, let me just say what he said about you. "It is only when a probe serves his political agenda that Bloch latches onto it as if it were the last helicopter leaving Saigon."

This isn't what I have said. I have more quotes, and I will ask unanimous consent that they be put in. I have a page of them, of what they have said about how you operate.

I didn't know how you operated, but I felt that you were coming after Doan, or at least you appeared you were coming after her to take the heat off of you, and that is what it appears like.

Mr. BLOCH. Congressman, do you believe those statements are truth that the pressure groups put out because they disagree with one interpretation of the law?

Mr. MICA. This isn't where I get questioned. This is where you get questioned.

Mr. BLOCH. Well, you have thrown them at me——

Mr. MICA. I am concerned about the leak that——

Mr. BLOCH. You have thrown them at me like arrows.

Mr. MICA [continuing]. That appeared, the leak that had to appear from your office in an important investigation that was given to you and a responsibility given to you, and then I read—the ultimate insult is to read your personal e-mail, whether it was sent on your personal computer or whatever, that Davis will either show up as ranking member of the larger committee or have Congressman Mica do his dirty work of raking me over the coals.

Mr. BLOCH. You have done a good job.

Mr. MICA. I never intended to rake you over the coals. I intended to conduct an investigation of Ms. Doan and then have a proper investigation by your office of her conduct relating to the Hatch Act. I don't think I got that. I think I got, unfortunately, your latching on to her situation and misusing, again, the resources of your office to cover up what appears to be an office in disarray.

So I did ask for your resignation when I heard that if, in fact, it was true. And if it is not true that your office did not leak that information, then I am not interested in your resignation.

Mr. BLOCH. Fair enough. Do you want to hear the evidence we have against Ms. Doan to rebut what you are saying?

Mr. MICA. No.

Mr. BLOCH. Not interested?

Mr. MICA. I have read the report.

Mr. BLOCH. You don't know all the evidence, Congressman. Do you want to hear it?

Mr. MICA. First of all, I don't need you to tell me what I know.

Mr. BLOCH. You don't have all the evidence. We have all the evidence.

Mr. MICA. I believe that——

Mr. BLOCH. You don't want to hear it. That is fine.

Mr. DAVIS OF ILLINOIS. The gentleman's time has expired.

Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman. I will followup on that.

What evidence do you have that you didn't put in your report?

Mr. BLOCH. We put all of our conclusions——

[Inaudible comment from audience member.]

Mr. ISSA. No, no, no. Please. You were not sworn in. Unless you want to stand and be recognized and be sworn in, let's limit what happens.

Mr. Chairman, were the people behind Mr. Bloch sworn in? Mr. Chairman, I apologize, but were the people behind Mr. Bloch sworn in? The policy of the committee is either the person or anyone who will convey information with him is to be sworn in. I would just like to get that done before I begin my process.

Mr. DAVIS OF ILLINOIS. Those were not.

Mr. ISSA. OK, then, sir, would you please just answer the question.

Mr. BLOCH. All right. I will answer it.

Mr. ISSA. Do you have evidence not in your report?

Mr. BLOCH. We have all of the evidence, which is transcripts of witness testimony. It is hundreds, if not thousands, of pages.

Mr. ISSA. OK. Let's——

Mr. BLOCH. Which you have not read.

Mr. ISSA. Thank you.

Mr. BLOCH. You don't have.

Mr. ISSA. OK. I appreciate that, and I would ask the chairman to please have those made available to us so we could read the actual transcripts.

Mr. BLOCH. We have not made them available because they are——

Mr. ISSA. You haven't chosen to leak those yet?

Mr. BLOCH. More personal attacks, Congressman. Thank you.

Mr. ISSA. No, no, no. See, you don't use leak, but I have to ask a question very straightforward. Congress is reviewing itself with a critical eye about earmarks. Do you know what an earmark is around here? It is either something you do in front of everyone and go back home on the 4th of July and brag about trying to bring something to your District that is needed, or it is something you slip into a bill in the late of night and then try not to have your fingerprints on.

Now, you came before this committee and you say you don't do leaks, but then when we ask you who released the information,

which is your term, you tell me you are not going to go check on it. Well, quite frankly, if you are in charge of it and it was released, which we know to be true, who released it and why is it you don't know who released it?

Mr. BLOCH. Congressman, this is a red herring. It has nothing to do with the——

Mr. ISSA. No, no, no. Excuse me. This is my time and you do not characterize red herring. This is not a red herring. The question, very straightforward, is your office released it, we have had confirmation your office released it. Let me ask it straightforward. Do you know who leaked it or do you have a strong suspicion who leaked it?

Mr. BLOCH. I have stated very clearly—I will state it again—that I believe the person that put the report out to the public was from GSA. Whether it was with the Administrator's knowledge or not, I don't know that.

Mr. ISSA. OK. So who in the GSA——

Mr. BLOCH. But I didn't authorize it.

Mr. ISSA. Who in the GSA——

Mr. BLOCH. I did not authorize it.

Mr. ISSA. Right. Who in the GSA ever received the draft that was released to the Post? Who ever received the draft? The Administrator did not receive the draft. Who received the draft?

Mr. BLOCH. I don't know anything about the draft because I haven't seen that on the Washington Post Web site. I am taking it on faith that you are right, that this was on there, but I didn't put it there.

Mr. ISSA. So let me understand something.

Mr. BLOCH. I don't know that.

Mr. ISSA. They had to print a redaction. The final report contained names of individuals which, if it had been leaked, would have been a separate crime to release covered individuals because that disclosure is not allowed. So a draft was released that did not have those names, thus getting around any question of that release, but you don't know anything about it and you are the head of special counsel? You are the investigator that is supposed to keep Government clean and you don't know and you are not willing to check?

Mr. BLOCH. Congressman, I think your recitation of facts is incorrect concerning what was——

Mr. ISSA. No. I am asking the question.

Mr. BLOCH [continuing]. In the report.

Mr. ISSA. Do you know?

Mr. BLOCH. I have stated what I am going to state on this, and——

Mr. ISSA. OK. You are refusing to answer.

Mr. BLOCH [continuing]. I stand by it. And I stand by it.

Mr. ISSA. Now that you are refusing to answer that, we will go on to a——

Mr. BLOCH. I have answered it several times.

Mr. ISSA [continuing]. Couple of other things.

Mr. BLOCH. I stand by it. Do you want me to continue——

Mr. ISSA. You may be the special counsel——

Mr. BLOCH [continuing]. To repeat the same answer?

Mr. ISSA [continuing]. Who ends the Office of Special Counsel. I just want you to understand that here today. When your agency conducts interviews, is it in a deposition-like fashion? Yes or no?

Mr. BLOCH. Is what?

Mr. ISSA. Is a transcript-like document or a transcript prepared? You mentioned transcript.

Mr. BLOCH. Not always. Sometimes.

Mr. ISSA. OK. Under what circumstances is a transcript not prepared?

Mr. BLOCH. When the investigators and attorneys deem it unnecessary or too costly a use of resources or impracticable.

Mr. ISSA. If a court reporter is present at the time of a deposition and is taking annotations, as we are doing here today, does that mean a transcript is being prepared?

Mr. BLOCH. Not necessarily, but I don't think we use court reporters.

Mr. ISSA. OK. Well, court-like reporters. Somebody like the lady next to you.

Mr. BLOCH. That would be correct, yes, but with a tape recorder. Yes.

Mr. ISSA. OK. In the case of Administrator Doan, you did, in fact, take records, there was a transcript created. Could you please explain to me the rationale for denying under those investigations, when a transcript is prepared, the transcript to the individual who, in fact, you are taking their deposition?

Mr. BLOCH. You are talking about the subject of the investigation?

Mr. ISSA. Yes. Why would you not give them the transcript of their own interrogation?

Mr. BLOCH. We do. We give them a CD with them doing exactly what they did, which is testifying to every word that they testified to, and then they can have a court reporter transcribe it for them if they like.

Mr. ISSA. So what you are saying is you will not supply a transcript, even if you have it transcribed? You just give them a raw CD?

Mr. BLOCH. Well, we——

Mr. ISSA. Is that professional to do? Is that what would be done in a Federal court? If a U.S. attorney replaced you, is that what would be done?

Mr. BLOCH. If the U.S. attorney did not change our written policies, yes.

Mr. ISSA. OK. So I will take that as an answer that no, a U.S. attorney does not operate that way, the Federal courts do not operate that way, but you operate that way.

Mr. BLOCH. That is what our policies provide, Congressman.

Mr. ISSA. OK. Well, that is one of the things we are, as oversight for policies that are inconsistent with the normal fair play in investigations, something that is bipartisan in this committee. So you don't see that procedure of withholding until actually after you have not only had a transcript but you have already begun leaking—sorry, releasing—to other people the output of that transcript, and then and only then do you provide a CD to somebody and say go get it transcribed? You don't see anything unfair about that?

Mr. BLOCH. Well, everything you said is incorrect, so I don't know what I am considering fair or unfair.

Mr. ISSA. Well, you know, it is amazing how many things you think are incorrect that——

Mr. BLOCH. Well, I am happy to visit with you about what I consider incorrect.

Mr. ISSA. You have already said you are going to take the ranking member outside, so I think that is quite enough for today.

Mr. BLOCH. I said I was happy to take a discussion outside of personal attacks, taking it off the record, where it belongs.

Mr. ISSA. OK. Now, as special counsel you are probably aware that huge amounts of documents in the past and present by the Office of Special Counsel and, in fact, by this very committee, have been subpoenaed over the years and presently for private accounts, including accounts that are presently in the possession of the RNC. It is quite a topic du jour here on the dias that we are, in fact, getting AOL accounts that are in the possession of the RNC and accounts like that. In light of the fact that, in fact, the Office of the President and Vice President have been subpoenaed and the Republican National Committee, a partisan group only represented by less than half the people on the dias here, has been subpoenaed and is being required and is in the process, at their own expense, of delivering personal e-mail accounts, do you still stand by the fact that you think that an e-mail produced on an AOL account in the middle of a work day is, in fact, off limits?

Mr. BLOCH. Well, Congressman, I wouldn't categorize it that way.

Mr. ISSA. No, no. I categorized it. We are not talking about your e-mail. I am just talking about e-mail in general.

Mr. BLOCH. That is what I mean. I would agree that I wouldn't say that wholesale and, in fact, we are, ourselves, engaged in an investigation of the matters you are talking about, and I would draw this distinction for you——

Mr. ISSA. You mean the RNC versus you?

Mr. BLOCH. I hope there is a distinction between the RNC and me.

Mr. ISSA. I suspect there is a large one.

Mr. BLOCH. The distinction is very simple. When one is using one's accounts for conducting Government business, then it is the business of the Government. When one is engaged in private discussions using private accounts having nothing to do with Government business and the conduct of Government business——

Mr. ISSA. What part of Government is the RNC?

Mr. BLOCH. No, it is the people communicating through their RNC accounts who may—I am not pre-judging, because we are investigating that. It is kind of inappropriate to really get into a big discussion.

Mr. ISSA. Yes, I remember it is inappropriate to release information until it is concluded. I have seen you on C–SPAN on that.

Mr. BLOCH. You are good at sarcasm, Congressman. I will give you that.

Mr. ISSA. And you are good at evading the answer to the question. You are perfectly willing to demand that the RNC turn over a document that was produced on an AOL account, perhaps in the

middle of the day from a Government computer. It is fair game to demand that and go through it, but it is not fair game to even ask you about what appeared to me to be a disparaging remark about the ranking member of the full committee here done by you in the middle of a work day on an AOL account. You feel you have no responsibility to answer, and yet you are perfectly willing to grill other agencies about it.

Now, I have to ask you, don't you think there is a little hypocrisy there that you are exempt but the Republican National Committee isn't exempt and others aren't exempt?

Mr. BLOCH. I wasn't conducting Government business. I was talking about my private opinion about some news stories.

Mr. ISSA. OK. And what is Government business, if you are talking to the RNC about your friend Louie or about a fundraiser you are going to do on your own time that night, what is Government business there?

Mr. BLOCH. Well, you are trying to push me into pre-judging a case that we are looking into, but let me just——

Mr. ISSA. No, no.

Mr. BLOCH. We are not doing that.

Mr. ISSA. Sir, I am trying to get you to take a cold, hard look at your own indiscretions and your refusal to answer questions here today, and I simply want you to at least begin to come to grips with the fact that the Office of Special Counsel does not act like a normal U.S. attorney or anybody else in the Justice Department or in the Judiciary, and we are concerned because we have to consider whether or not there should continue to be an Office of Special Counsel on an ongoing basis.

Mr. MICA. Would you yield a second?

Mr. BLOCH. May I answer?

Mr. MICA. For a second yielded to me.

Mr. BLOCH. All right.

Mr. MICA. This is a part about what he was asking about Mr.——

Mr. ISSA. There has been extra time on the other side. Just go ahead.

Mr. MICA. What he was asking about was actually a specific reauthorization hearing for his agency. He was commenting that he was going to——

Mr. CLAY. Mr. Chairman, could we have regular order, please?

Mr. MICA. I would like that in the record.

Mr. DAVIS OF ILLINOIS. The gentleman's time has expired.

Mr. CLAY. Thank you, Mr. Chairman.

Mr. DAVIS OF ILLINOIS. The Chair is going to yield 10 additional minutes to himself, myself, and to the ranking member, and I am going to yield 6 of those minutes to Mr. Clay.

Mr. CLAY. Thank you, Mr. Chairman, for yielding.

Mr. Bloch, let me try to clarify some of the confusion that my friends on the other side of the aisle of this committee have brought to us today. I am sure that the viewing public and the people in this room are somewhat confused, and some of us are artists in confusion.

The OSC has found that Administrator Doan committed a Hatch Act violation and that you sent a recommendation to the President

to punish her on June 8th. The President has not acted or given a timeframe for his actions. Do you believe this was a serious violation?

Mr. BLOCH. Thank you, Congressman Clay. The report that we sent to the President outlines how we do believe it is very serious and the reason why is that you have an agency that has $50 billion in contracts and $500 billion approximately in real estate holdings, with an ability certainly, if there is a will to do so, to target congressional districts with resources and help for candidates and for parties if there is a will to do that, and so any suggestion or hint or implication that someone at the head of that kind of agency would offer it up as something that we can brainstorm about how to use those resources of getting people to various openings and highlighting people on a particular party is a very, very serious matter.

Not only that, but you have 30 political appointees present who are not allowed to engage in such a brainstorming session in a Federal building, and yet they are being, in a sense, forced to.

I know that others disagree with our report, but we had all the evidence. And I didn't do the investigating. I did ratify the report. I do believe it was correct. But we have Hatch Act experts who have been doing this for many years. If you look at all the people that worked on this file, very experienced litigators, very experienced attorneys who really, really know the Hatch Act, and we are the only agency in the Federal Government that is authorized to investigate and prosecute Hatch Act violations, as well as to give advisory opinions about what is and what isn't acceptable behavior.

Then, finally, I would note that the level of authority that an employee has weighs into what should happen to them if they violate the Hatch Act. The higher up you go the higher the standards are, and that is in the case law. We have tried to be clear about that and tried to be fair.

If you read the transcript of the interview of Ms. Doan, as I have, you see investigators who are really trying to give her a fair shake to let her tell whatever evidence she has, whatever information she needs to put forth that would help us to make our decision.

Unfortunately, Congressman, she was not very forthcoming. I believe that there was a great deal of misleading evidence provided, and that also weighs into an aggravating factor under the case law as to whether the individual cooperated and took responsibility for their action, and so on. This is a serious aggravating factor in this case.

Mr. CLAY. And I couldn't agree more with you. We also on this committee experienced that kind of behavior from Ms. Doan, where she was very recalcitrant about answering the questions and being forthcoming.

Do you know when the President will make a decision on your recommendation?

Mr. BLOCH. No, I do not, Congressman. I think, you know, that is certainly within the President's domain and appropriate moment. I don't know exactly when that would be, and I will ask my Hatch unit to advise me on this, but maybe we will make an inquiry at the appropriate time if, you know, there is no decision

made within a reasonable period. But there is no statutory timeframe.

Mr. CLAY. Sure.

Mr. BLOCH. And so I don't know exactly how to answer that.

Mr. CLAY. What do you think he should decide?

Mr. BLOCH. Well, far be it from me to tell the President what to do. We have made our recommendations. If I were in that position, I would want to make a decision in a timely and reasonable fashion so that people would have a sense of there being a process that is reasonable and fair, and that some decisionmaking takes place, and I think everybody does believe that is the right thing to do. So I would certainly encourage the White House to do what they believe is appropriate and reasonable in terms of time to make the decision.

Mr. CLAY. This case has been pretty high profile, and I just hope it is not symptomatic of a recurring theme throughout this administration that you use an agency, that you use Federal largesse to help in political campaigns. We all know that is wrong. We know it is a violation of the Hatch Act when you involved Federal employees in that kind of activity. I couldn't agree more with you, and thank you for your service.

Mr. BLOCH. Thank you, Congressman.

Mr. CLAY. I appreciate that very much.

Let me go to Mr. McPhie.

Mr. McPhie, welcome. Historically, Congress has not received many requests to exempt agencies from the Sunshine Act. Tell me what makes the Board so special?

Mr. MCPHIE. It is the nature of the Board's work. It is not the Board being special. The Board has the obligation to decide cases, an adjudicative responsibility. There are three members, three Board members. The Board has been identified by the court as a quasi-judicial agency.

The Board has not had a meeting under the Sunshine Act since I think the last one was in November 2001. There are multiple reasons for that. One of the reasons is the unwillingness to talk freely because you can't really talk freely between Board members about cases. What we do, what is common practice is we send our surrogates, you know, chief counsels, and they expound your position, and so on and so forth. And in a case that is complex or ticklish, tough to decide, those discussions back and forth happen frequently.

Mr. CLAY. You mean you can't even hold a meeting, a regular business meeting?

Mr. MCPHIE. Well, you can hold a regular business meeting and you can hold a Sunshine Act meeting, but there are predicates. You have to give the notice, and the notice has to state the time and place, and so on and so forth, and the subject matter of the discussion. But you may give a notice, for example, about a case, and you get into a discussion about that case, you have to be real careful that discussion doesn't morph into a discussion about other cases in the pipeline.

Mr. CLAY. That goes to my next question. Will this exemption occur at the adjudicatory function or apply to any meeting of the Board——

Mr. MCPHIE. No.

Mr. CLAY [continuing]. At the discretion of the chairman?

Mr. MCPHIE. No, no. Adjudicatory. Adjudicatory. The issue comes up when we are discussing cases. The issue does not come up in other areas. We are not trying to evade or run from the Sunshine Act. Government and Sunshine is good, is sound policy. That is not the issue.

I want to point out also that the Board is required, when it renders a decision, to give the reasons for its decision, the law upon which it applied, and so forth. So it is not a situation where what the Board does in darkness doesn't see the light of day.

The only purpose of it really is to make the Board more efficient as adjudicators. I don't believe it would happen very often, because not all Board cases are that complex. Some are fairly routine cases. But it is an effort by us, especially in today's climate, where the demands upon us are to be efficient. DOD requires us to do cases in the field in 90 days, headquarters in 90 days. DHS requires the same sort of time line. The proposed whistleblower legislation requires us to do it in 180 days. The time when an agency like the Board to take a case and take its good time to decide those cases, those days are gone.

Mr. DAVIS OF ILLINOIS. The gentleman's time has expired.

Mr. CLAY. I thank you. I thank the chairman. Thank you, Mr. McPhie.

Mr. DAVIS OF ILLINOIS. Mr. Marchant.

Mr. MARCHANT. Thank you, Mr. Chairman. I am going to give my time to Mr. Mica and Mr. Issa, 5 minutes each.

Mr. MICA. Thank you.

Again, Mr. Bloch, I have never had any reason to rake you over the coals, as you intimated in this June 19, 2007, 11:52 a.m. e-mail. I told you the context in which all of my interest occurred, and that was when we started investigating Ms. Doan. Turned out to be sort of a reckless attack on her, on the issue of the contract which was never let, which she was not giving the contract to anyone which she had received financial gain. In fact, she had given between $400,000 and $500,000 worth of business to that individual.

They went on a fishing expedition afterwards and found this Jennings political briefing, and I really thought that it would be appropriate for the Office of Special Counsel to objectively investigate that report.

Mr. BLOCH. And that is what we did, Congressman.

Mr. MICA. Well, I don't know that to be the case, based again on your particular situation and what I have seen. I quoted for the record here, and you have heard, normally, too, in these situations Mr. Issa and I, Mr. Davis, we do the best. You are an administration appointee, I believe, and we do our best to try to defend or to assist presenting as much information as we can to offer into the record to support those in our administration. I gave quotes of others who had concern about your tactics. I did not note that you and your office were under investigation in matters. I have quotes from Mr. Waxman. Mr. Waxman said, "Mr. Bloch's actions are part of a larger attack on the Federal Service system by the Bush administration. Over the past 3½ years Federal employees lost collective bargaining and appeals rights and they have seen their jobs

outsourced, and now they face discrimination based on their sexual orientation."

I am now being critical of you, and I know that quote by Mr. Waxman is taken out of context, but people have had differences of agreement with both your approach and some of your findings. I find that to be the case in the Doan case.

I go back again to having sat on this panel for 15 years, investigated Republican appointees, Democrat employees, and I have never had an instance—I saved that newspaper. Where is it? I threw it down here a while ago. I don't want to lose it because the morning I read it I became unglued to know that an important matter that we had put in your trust and confidence to investigate, I found a leak.

Again, you told Mr. Davis yesterday morning that the leak was from inside GSA, and you have repeated that several times here today.

Mr. BLOCH. That is what I believe to be the truth.

Mr. MICA. That is impossible. The Washington Post had access to a version of the draft of the report that was never provided to GSA.

When did you find out about the Washington Post clarification? I had a copy of that I held up earlier. When did you find out about the Washington Post clarification?

Mr. BLOCH. Well, I can only answer that I wrote to Mr. Nardotti on May 25th indicating what the information I had from my office as to how the report got out, and I would like to submit it for the record, if I could.

Mr. MICA. I would like that as part of the record, Mr. Chairman, without objection.

Mr. DAVIS OF ILLINOIS. Without objection.

Mr. MICA. Again, the point is that we are involved in investigations and oversight, and I find the draft report with conclusions that they have to do a correction on. Did anyone on your staff call this to your attention, your communications director or——

Mr. BLOCH. Yes. I was told about it. I didn't read the Washington Post.

Mr. MICA. OK. Do you recall——

Mr. BLOCH. I didn't see it on the Post's Web site.

Mr. MICA. Someone said it may have been a communications director. Do you recall who the individual——

Mr. BLOCH. I honestly don't remember if it was one of the communications staff or my chief of staff or a combination. I don't remember exactly, but yes, it was communicated to me that there was something. This was after we had confirmed that somebody at GSA had sent it by fax to the Government Executive and maybe also the Federal Times. Then there was, some time later, maybe the next day, I don't know, I was informed another version was on the Washington Post Web site and then was taken down. I don't know if that is true, but I accept your representation that it was. I never saw it, myself.

Mr. MICA. Again, I will just conclude. You ran an investigative agency, an important one, and it is important that we have confidence in that. I think it is important that you investigate this leak, because this goes to the very heart of this whole investigative

process. Do you intend to go back and pursue how this leak occurred?

Mr. BLOCH. Congressman, I believe that it was inconsequential. It had nothing to do with the facts of the case. What GSA had sent to Government Executive was already out there, which was the sum and substance of the report. The only thing that was in this other edition of it, I guess—again, I didn't see it on the Web site—was something added in at the end about recommendations of punishment, but that was something that was put in the letter that I signed to go to the President, and so that is all I can say.

But if there were some prejudice to Ms. Doan I would think it was important, but there was no prejudice because the report was already out there in the public domain and we had already completed the report, so the President was not going to be swayed by something that was put on a Government Executive or Washington Post Web site.

The President was the decisionmaker always. Always has been and is now. I don't think that is a matter, and I talked about this with Mr. Fielding, White House counsel, and explained to him that I didn't do that and that we found out that somebody at GSA had faxed over this report to Government Executive, and I told him I didn't believe in putting out these reports before the President had a chance to make a decision and I didn't believe in putting our reports before Ms. Doan had a chance to respond.

I have said that all along, but I don't think that it is appropriate for me now to engage in an investigation of my staff to get into these matters. I don't think that is appropriate.

Mr. DAVIS OF ILLINOIS. Mr. Issa, you have only got about 4 minutes.

Mr. ISSA. OK. I will hurry.

Mr. Bloch, the gentleman, Jimmy Mitchell, behind you, would he know whether that leak came from your organization?

Mr. BLOCH. Jimmy Mitchell sitting behind you?

Mr. ISSA. No, the gentleman in the white shirt and tie.

Mr. BLOCH. Mr. Mitchell, the communications director?

Mr. ISSA. Yes. Mr. Mitchell, would you know whether that could have come from your organization or not and would you have a suspicion?

Mr. BLOCH. Congressman, I am the one here speaking on behalf of the Office of Special Counsel. I am under oath. I would appreciate the questions being addressed——

Mr. ISSA. I appreciate the fact that you don't want to ask, you have a don't ask/don't tell policy. It is clear that your organization knows that it came from within. It may be inconsequential, as you say, and, in fact, it may be that we often don't find out where the leaks come from. I can accept some of that. What I can't accept is the fact that you are gagging the very ability to correct a statement you are making repeatedly that it came from GSA when your own organization knows it came from your organization.

Mr. BLOCH. Well, the gagging that you are referring to I could be accused of if I instituted any kind of investigation internally. Whether someone——

Mr. ISSA. No, you just gagged Mr. Mitchell right now.

Let's move on.

Who did you send this e-mail to?

Mr. BLOCH. Which e-mail?

Mr. ISSA. The one that we have been talking about from June 19th.

Mr. BLOCH. I am not talking about that any more. It is a private e-mail. It is not——

Mr. ISSA. OK. It is a private e-mail that, in fact, isn't it true that something you released characterizing this investigation, characterizing Mr. Davis as trying to defend Doan, characterizing what Ms. Doan has said before this committee, and characterizing and actually speaking of your own reauthorization in your e-mails, isn't it true that could have a chilling effect on the ability for Ms. Doan to survive your report? Isn't that true? Isn't it true you could—wait a second. I am going to ask the question and ask it completely one time. Isn't it true and pretty obvious that this e-mail sent by you to others and then sent by others and others could, in fact, very well affect the outcome, the public opinion outcome that could lead to and affect by the President just at a time in which your investigation has been completed but the President has not made a ruling? Isn't it true that you could have done that by sending this out?

Mr. BLOCH. I think that is probably very speculative and not anything——

Mr. ISSA. But you sent it out in reckless disregard for what the effect it might have if it were widely viewed?

Mr. BLOCH. It was a private e-mail on a private account to friends and family and some news reports——

Mr. ISSA. What is amazing is everything is private to you. You won't tell us where you sent it to.

Mr. BLOCH. I don't know. I mean, I honestly don't know.

Mr. ISSA. Your wife.

Mr. BLOCH. I told my wife about it. I remember that.

Mr. ISSA. Right. In the e-mail you talk about showing up of the ranking member of the larger committee, Congressman Mica, but you are also talking about I am going up for my reauthorization on July 12th. The fact is you are talking official business and not official business. You are mixing and matching things in e-mails on AOL, and then you want to say that they are not.

On top of that, you are trying to submit information here when your own flawed report that is at the President's desk doesn't cite transcript references, talks about interviewing 20 people but doesn't cite that, and you didn't cite case law. You sent something up with a conclusion, a recommendation for the President, and today you say you have evidence and transcripts which you haven't released, and you are telling us that, in fact, you could give it to us today, but you did not give the President citings of the very things you are talking about here today. I am ashamed you sent us——

Mr. BLOCH. May I——

Mr. ISSA [continuing]. That piece of work product.

Mr. BLOCH. May I answer?

Mr. ISSA. You can certainly answer on the——

Mr. BLOCH. I am going to answer now, if I may. May I, Mr. Chairman? All right.

The answer to your question is we did cite case law. We cited Supreme Court case law, we cited regulations, and we cited the statute. The statute under which we operate, 5 U.S.C. 1214, requires only that we set forth the facts upon which we base our decision and the statute that was violated. That is all that is required to be sent to the President. We did a lot more than that, and we cited the record, we cited a great deal of evidence, but there were things that we didn't believe were appropriate to put in because of individuals who did not want their identities revealed, and that is why this committee does not have their transcripts.

Mr. ISSA. Thank you.

Mr. Chairman, for the record, for the reauthorization which is upcoming, I would hope that we look at that statute and the fact that it does not have to cite with specificity enough, in fact, for somebody to defend themselves when they are being accused of something by unnamed people and egregious acts that are unsubstantiated.

I yield back.

Mr. DAVIS OF ILLINOIS. Thank you.

Let me thank both of you gentlemen for your testimony and let me just state, Mr. McPhie, I think I am going to probably have some difficulty with the Sunshine notions. I am a firm believer in what I call the Open Meetings Act, so I am going to probably have to have some more discussion relative to that request.

Mr. MCPHIE. I would be more than happy to answer questions or try to explain a little bit more fully at your pleasure.

Mr. DAVIS OF ILLINOIS. I thank the gentlemen very much. We appreciate you. You are excused.

Mr. BLOCH. Thank you, Mr. Chairman.

Mr. MCPHIE. Thank you, sir.

Mr. DAVIS OF ILLINOIS. We will now move to our second panel, Mr. Rosenberg, Mr. Nicola, and Mr. Hogue.

Since you are standing, we will go ahead, and then I will introduce the witness.

Mr. ROSENBERG. I explained to the chief of staff that with me today are two of my colleagues who collaborated in my testimony, and I will be the prime spokesman, but there are questions that you may have that they are expert in.

Mr. DAVIS OF ILLINOIS. And they can certainly join you at the table. There is room.

Our witness is Mr. Morton Rosenberg. He is a specialist in the American Law Division of the Congressional Research Service, Library of Congress. He has been with the Library since 1972. Mr. Rosenberg specializes in the areas of Constitutional law, administrative law and process, congressional practice and procedure, and labor law. He is the author of a number of journal articles on separation of powers and administrative law issues.

He is joined and accompanied by Mr. Thomas J. Nicola, the Legislative Attorney in the American Law Division of CRS, and Henry B. Hogue, Analyst in American National Government in the Government and Finance Division of CRS.

Mr. Rosenberg, as is our custom, if you would stand and raise your right hand.

[Witness sworn.]

Mr. DAVIS OF ILLINOIS. The record will show that the witness answered in the affirmative.

Your entire statement is in the record. Of course, the green light indicates that you have 5 minutes. The yellow light indicates that 1 minute is left, and the red light means that you have ended and we will then proceed with the questions.

Thank you so much for your patience. Thank you for being here. You may proceed.

STATEMENT OF MORTON ROSENBERG, SENIOR ANALYST, CONGRESSIONAL RESEARCH SERVICE, ACCOMPANIED BY THOMAS J. NICOLA, LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE; AND HENRY B. HOGUE, ANALYST, AMERICAN NATIONAL GOVERNMENT, GOVERNMENT AND FINANCE DIVISION, CONGRESSIONAL RESEARCH SERVICE

Mr. ROSENBERG. Thank you for inviting me, Mr. Chairman and Congresswoman Norton. I appreciate your calling me here.

What I would like to highlight in my remarks today is a notable theme that appears to underlie MSPB's proposed legislation. Although described as technical corrections, the language in those proposals dealing with the authority to prepare and submit annual budget requests and the authority to delegate various Board functions would have the effect of concentrating substantive policymaking in the Office of the Chairman. This would be a significant change from current specific statutory directions that such decisionmaking authority is reserved for members of the Board acting as a body.

On the record, statements by Chairman McPhie appear to corroborate this intent and indicate that his management of the agency has been unilateral rather than collegial in nature, an apparent variance from the MSPB statute and the expectations of Congress.

We understand that Congress may elect to endorse this arrangement. Our purpose today, however, is solely to identify these apparent departures from the original, congressionally established scheme and the potential consequences.

MSPB, as you are aware, is an independent Executive agency whose essential mission is to discourage subversions of merit principles from partisan, political, and other statutorily prohibited personnel practices, principally by hearing and deciding appeals for Federal employees of removals and other major adverse personnel actions, as well as other types of Civil Service cases.

In nature and function, it is primarily an adjudicatory body. In establishing the Board, Congress structured it in a manner to assure both a high degree of independence and insulation from Presidential intervention, and to provide avenues for congressional oversight and public access to its decisional and operational processes. It also intended that substantive decisionmaking was to be collegial in nature.

The independence and collegiality goals are reflected in the enabling legislation. Members serve for 7-year terms. Those terms are staggered so that a President can't appoint all of them at one time. Members cannot be removed except for stated cause. Members must be qualified, experienced, and be able to carry out the func-

tions of the Board. The Board, as a body, has independent litigation authority to enforce subpoenas and to appear in civil actions in connection with Board functions apart from the Justice Department.

Its annual budget request prepared by the Board is to be simultaneously presented to the President and to the appropriate congressional committees, thereby bypassing OMB review, and the Board as a body is directed to submit its legislative recommendations simultaneously to the appropriate legislative committees, once again bypassing OMB clearance requirements.

The Board as a body may delegate the performance of its administrative functions under the act to any employee of the Board.

These and other combinations of such political insulation and collegiality features are to be found in numerous single-headed and multi-member independent agencies. The choice of which agencies and functions are to be so specially treated is that of Congress alone to make.

The scheme and structure and organization established by Congress for MSPB was intended to allow it to carry out its adjudicatory function freer from the influence of short-term political considerations and influences that might otherwise be.

The importance of each structural element of the independence of a Governmental agency intended by Congress was recognized in the 2002 decision by the Court of Appeals for the District of Columbia Circuit. The court held that the requirement of staggered terms was so integral to the congressional scheme of independence designed for the U.S. Commission on Civil Rights in 1983 that its omission in the subsequent 1994 reauthorization measure could not be deemed an implied repeal of that provision.

That court's opinion suggests that a successful scheme of independence at times may be undermined by either the elimination, diminution, or avoidance of one or more parts of that scheme. This implies that the proposed changes at MSPB's organizational arrangements should be assessed both individually and collectively for the impact that they could have on the continued level of independence of the Board.

Let me turn to the proposals that are in question. Under current law, the full Board may delegate performance of any of its administration functions under the act to any employee of the Board. That subsection would be amended to allow such delegations in the sole discretion of the chairman.

Under current law, the chairman is authorized to appoint such personnel as may be necessary to perform the functions of the Board. A proposed amendment would allow the chairman to delegate officers and employees under this subsection authority to perform such duties and make such expenditures as may be necessary.

Under current law, finally, the full Board is to prepare and submit simultaneously the Board's annual budget to the President and to appropriate congressional committees. A proposed amendment would vest the preparation of the annual budget submission solely in the chairman.

We believe that, rather than being technical corrections, as characterized by the MSPB, these amendments may be viewed as substantive enhancements of the power and authority of the Office of

the chairman. Indeed, the MSPB chairman, in his written responses to member queries following the Senate's March 2007, reauthorization hearing, candidly expressed his view that, as chairman, he occupies "a position of responsibility that is superior and not co-equal to that of the other two Board members," and that he is, "the head of the agency."

He asserted that, since the statute makes the chairman the chief executive administrative officer of the Board, the vesting of budget preparation and submission to the President and Congress by the MSPB's statute to the full Board is inconsistent with the chairman's statutory authority to be CEO and creates an ambiguity in the relative roles and responsibilities of the three-member Board and chairman of the Board.

The proposal to vest budget preparation and submission authority in the chairman is asserted not to be a ratification or approval, sanctioning, or endorsement of the chairman's views, but merely to clarify an apparent ambiguity and to reflect past agency practice, as well.

Although the statute provides that the Board is required to simultaneously submit to the President and each House of Congress any legislative recommendations related to title 5 functions, Chairman McPhie stated that, pursuant to his authority as chief executive administrative officer, he "develops and submits legislative recommendations with input from the individual Board members and program managers." Just input.

With respect to the promulgation of regulations, the chairman stated that he "consults with Board members and other program managers as appropriate in developing and prescribing regulations that govern the general operation and management of the agencies."

Again, current law provides that the full Board should have the authority to prescribe such regulations as may be necessary for the performance of its functions.

The rationale that is proffered as the basis of these proposals, that congressional designation of the chairman of MSPB as the chief executive officer and administrative officer of the Board, encompasses sole authority over such matters as budget formulation and delegation of substantive Board functions, is contrary to the history of the development of the position of Chairperson of multimember agencies and the law that has evolved in relationship to that development.

It is well established that chairpersons are not the heads of Federal collegial bodies such as MSPB in a legal sense. It is important and interesting to note that a consistent and unbroken series of Department of Justice Office of Legal Counsel decisions has held that, even when legislation provides that a collegial body's chairperson "shall be the chief executive officer of the board and shall exercise executive and administrative functions of the board," that such language does not encompass the substantive and policymaking functions of the body as prescribed by enabling statutes.

The OOC says the chairperson, in other words, superintends and carries on the day-to-day activities necessary to effectuate the board's substantive decisions. He does not, absent some board approval such as an expression of expressed delegation by the board

or the board's acquiescence of the chairperson's actions, make those decisions by himself.

We have found no basis in law or practice for deeming the chair of a collegial regulatory body as either a superior officer or the head of the body in a legal sense. A commission like the MSPB substantively acts only as a collegial body, with each member exercising one vote. A chairman's exercise of the executive and administrative functions of such a body may be defined and limited by a majority of such body.

Let me conclude then. It is arguable that the alterations suggested by these technical corrections would affect substantively the overall scheme of the independence of the MSPB. By vesting budget preparation and submission authority solely in the chairman, together with the assertions by the chairman of the exclusive control of MSPB powers vested in the Board by law, the collegial nature of the Board and its political balance would be jeopardized.

With less need to negotiate with fellow Board members, the Chair might be more aligned with the viewpoint of the President who selected him or her. The ability to delegate substantive agency functions to persons appointed by the chairman, including expenditure authority, may be seen as diminishing the heretofore presumed equality of the other members. Such authorities would appear to affect a significant change in the independent nature of the Board.

Thank you.

[The prepared statement of Mr. Rosenberg follows:]

STATEMENT

OF

MORTON ROSENBERG
SPECIALIST IN AMERICAN PUBLIC LAW
CONGRESSIONAL RESEARCH SERVICE

BEFORE THE

HOUSE SUBCOMMITTEE ON THE FEDERAL WORKFORCE, POSTAL SERVICE AND THE DISTRICT OF COLUMBIA
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

CONCERNING

"ENSURING A MERIT-BASED EMPLOYMENT SYSTEM: AN EXAMINATION OF THE MERIT SYSTEMS PROTECTION BOARD AND THE OFFICE OF SPECIAL COUNSEL"

PRESENTED ON

JULY 12, 2007

Mr. Chairman and Members of the Subcommittee

I am Morton Rosenberg , a Specialist in American Public Law in the American Law Division of CRS. I thank you for inviting me to comment on changes proposed by the Merit Systems Protection Board (MSPB or board) and the Office of Special Counsel (OSC) in their respective enabling acts on the occasion of your Subcommittee's reauthorization review of their current statutory authorities. With me today are Henry B. Hogue and Barbara L. Schwemle, Analysts in American National Government in CRS' Government and Finance Division, and Thomas J. Nicola, a Legislative Attorney in the American Law Division of CRS, with whom I closely collaborated in the preparation of my written testimony.

As you requested, this testimony provides background on the MSPB and OSC, and a critical analysis of the draft legislation submitted by them, to reauthorize them. The board's legislation would: (1) authorize appropriations to MSPB for FY2008-FY2012; (2) provide for a line of succession to the board's chairmanship; (3) establish new delegation and budget authority for the chairman; (4) alter the board's appellate procedures to give the Board the authority to grant summary judgment; and (5) exempt MSPB from compliance with the Government in the Sunshine Act, at the discretion of the chairman.

Concerns have been voiced about the potential impact of these proposals on the operations and continued independence of the board. This testimony begins with background information about MSPB's history, purpose, organization, independence, and current operations. Following this background, each of the substantive changes proposed in the draft legislation is discussed and analyzed. For the Subcommittee's convenience, correspondence from MSPB to CRS are appended to this testimony.

The OSC's draft legislation would (1) modify or delete a current statutory provision that makes OSC liable for attorneys fees after an unsuccessful disciplinary action under 5.U.S.C. 1215; (2) give statutory permission to relocate the agency outside the District of Columbia; (3) allow MSPB to combine the disciplinary penalties currently provided in 5 U.S.C. 1215 (a)(3); (4) allow OSC to file amicus briefs in cases that go beyond MSPB to the federal court system; (5) authorize OSC to investigate and bring disciplinary actions with respect to all federal sector claims under the Unformed Services Employment and Employment Rights Act (USERRA); (6) vest OSC with full veterans preference prosecutorial power and allow it to receive, investigate, analyze and prosecute veterans' preferences claims for corrective action purposes; and (7) establish more flexible time frames for processing whistleblower reprisal claims. The OSC proposals were presented to the Subcommittee shortly before the request for our testimony. A number of the proposals involves complex areas of law and policy, some beyond our group's area of expertise. Following a brief description of OSC's history, purpose, organization, independence, and current operations, we will address Subcommittee concerns raised by several of the proposals.

MSPB Background

History and Purpose of MSPB

The Merit Systems Protection Board (MSPB) is an independent, quasi-judicial agency in the executive branch, headquartered in Washington, DC. It has six regional offices and two

field offices.[1] Reorganization Plan No. 2 of 1978, effective January 1, 1979, created MSPB, as one of three agencies, to replace the United States Civil Service Commission.[2] P.L. 95-454, the Civil Service Reform Act (CSRA) of 1978, as amended, codified the Reorganization Plan in statute.[3] P.L. 107-304 reauthorized MSPB through FY 2007.[4]

President Jimmy Carter transmitted his message on civil service reform, which included a draft of the CSRA, to Congress on March 2, 1978. One of the objectives of the legislative proposal was "To strengthen the protection of legitimate employee rights."[5] MSPB was created to assume responsibility for the appellate authority that previously had been vested in the Civil Service Commission. According to the House Committee on Post Office and Civil Service report that accompanied the legislation, "One of the inherent conflicts" that prompted the reform was "that the Commission [had] both the enforcement authority as the chief personnel office of the executive branch and also the administrative review authority in adverse action cases."[6]

The Senate Committee on Governmental Affairs report that accompanied the legislation quoted the Federal Personnel Management Project's[7] finding that:

> Expected to be all things to all parties — Presidential counsellor (sic), merit 'watchdog,' employee protector, and agency advisor — the Commission has become progressively less credible in all of its roles.[8]

The report stated that, "a vigorous protector of the merit system is needed" and noted that "a strong and independent Board" would "discourage subversions of merit principles."[9]

---

[1] The six regional offices are Atlanta; Dallas; Central, based in Chicago; Northeastern, based in Philadelphia; Washington, based in Alexandria, VA; and Western, based in San Francisco. Field offices are located in Denver and New York. (U.S. National Archives and Records Administration, Office of the Federal Register, *The United States Government Manual 2006/2007* (Washington: GPO, June 1, 2006), p. 436.)

[2] Reorganization Plan No. 2 of 1978 created the Office of Personnel Management, the Merit Systems Protection Board, and the Federal Labor Relations Authority to replace the United States Civil Service Commission. When created, MSPB included a Special Counsel. P.L. 101-12, enacted on April 10, 1989, created the Office of Special Counsel as an independent investigative and prosecutorial agency.

[3] P.L. 95-454, Title II, § 202(a), Oct. 13, 1978, 92 Stat. 1111, at 1121-1122, 1131; 5 U.S.C. §§ 1201-1206.

[4] P.L. 107-304, § 2, Nov. 27, 2002, 116 Stat. 2364; 5 U.S.C. § 5509 note.

[5] U.S. Congress, House Committee on Post Office and Civil Service, *Civil Service Reform Act of 1978*, report to accompany H.R. 11280, 95th Cong., 2nd sess., H. Rept. 95-1403 (Washington: GPO, 1978), p. 3.

[6] Ibid., p. 6.

[7] The Federal Personnel Management Project, an entity separate from the United States Civil Service Commission, developed a comprehensive plan for reform of the Civil Service.

[8] U.S. Congress, Senate Committee on Governmental Affairs, *Civil Service Reform Act of 1978*, report to accompany S. 2640, S. Rept. 95-969, 95th Cong., 2nd sess. (Washington: GPO, 1978), p. 5. (Hereafter referred to as S. Rept. 95-969.)

[9] Ibid., pp. 6-7.

MSPB describes itself as an agency "established to protect Federal merit systems against partisan political and other prohibited personnel practices."[10] The President's FY 2007 budget request for MSPB stated that the board:

> serves as guardian of the Federal Government's merit-based system of employment, principally by hearing and deciding appeals from Federal employees of removals and other major personnel actions. The Board also hears and decides other types of civil service cases, reviews regulations of the Office of Personnel Management (OPM), and conducts studies of the merit systems. The intended results (outcomes) of MSPB's efforts are to assure that (1) personnel actions taken involving employees are processed within the law, and (2) actions taken by OPM and other agencies support and enhance Federal merit principles.[11]

Agency Management

MSPB is composed of three members appointed by the President, by and with the advice and consent of the Senate. Not more than two of the members may be "adherents of the same political party." The members are to be individuals who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the board. No member may hold another office or position in the U. S. Government, except as otherwise provided by law or at the direction of the President.[12] The members — chairman, vice chairman, and member — adjudicate the cases brought to MSPB.

Each position on the board is a seven-year term, and a member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. A member appointed to fill an unexpired term serves for the remainder of the predecessor's term. The new member serving only a portion of a term continues to serve until a successor has been appointed and qualified. Such member may not continue to serve for more than one year beyond the expiration date of the original term, unless he or she is reappointed. A member serving a full term may not be reappointed, but may continue to serve for one year beyond the original expiration date of the term until a successor has been appointed and qualified.[13] A term continues to run even when a position is unfilled or filled by a replacement, thereby creating a continuous scheme of staggered terms for the members. For example, if the term of a position on the board runs from January 1, 2000 until January 1, 2007, and a member is appointed in June 2003, the member can serve until January 1, 2007.

The chairman is the chief executive and administrative officer of the board. During the absence or disability of the chairman, or when that office is vacant, the vice chairman performs the chairman's functions. The remaining board member performs the functions of the chairman when both the chairman and the vice chairman are absent or disabled, or when both

---

[10] U.S. Merit Systems Protection Board, *Performance Budget Justification for FY 2007* (Washington: Feb. 6, 2006), p. 1.

[11] U.S. Executive Office of the President, Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2007; Appendix* (Washington: GPO, 2006), p. 1174.

[12] 5 U.S.C. § 1201.

[13] 5 U.S.C. § 1202.

of these offices are vacant.[14] The current board members are Neil Anthony Gordon McPhie, who was confirmed as chairman on November 21, 2004, and whose term expires March 1, 2009;[15] Mary M. Rose, vice chairman, who was confirmed on December 17, 2005, and whose term expires March 1, 2011; and Barbara J. Sapin, who was confirmed on November 21, 2004, and whose term expired on March 1, 2007.[16] The law provides that a board member may remain in office for up to one year after the end of his or her seven-year term. As of this date a nomination has not been made for this position. Each board member has his or her separate staff, generally consisting of a chief counsel, at least two additional staff attorneys and one confidential assistant.[17]

Powers and Functions of the Board

By law, MSPB is required to perform four functions:

- hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the board under Title 5; Title 38, Chapter 43; or any other law, rule, or regulation. MSPB, subject to otherwise applicable provisions of law, shall take final action on any such matter;
- order any federal agency or employee to comply with any order or decision issued by the board under the authority granted above and enforce compliance with any such order;
- conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected; and
- review OPM rules and regulations.[18]

Powers. Any member of the board, any administrative law judge appointed by the board, and any employee of the board designated by the board may administer oaths, examine witnesses, take depositions, and receive evidence. These individuals may, with respect to any individual:

- issue subpoenas requiring the individual to attend and present testimony and to produce documentary or other evidence from any place in the United States,

---

[14] 5 U.S.C. § 1203.

[15] Mr. McPhie was sworn in as a member of the board on April 23, 2003, following his recess appointment. He was designated as vice chairman on December 10, 2003, and served as acting chairman (because the chairman's position was vacant) from then until his confirmation as chairman.

[16] Ms. Sapin served as vice chairman of the board from December 2000 to December 2001 under a recess appointment.

[17] U.S. Merit Systems Protection Board, Office of the General Counsel, Legislative Counsel, *Meetings of the Merit Systems Protection Board*, July 20, 2006. Provided to CRS by electronic mail. (Hereafter referred to as MSPB July 2006 Response to CRS.)

[18] 5 U.S.C. § 1204(a).

any territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia; and

- order depositions to be taken from the individual, and responses to written interrogatories by the individual.

Witnesses may be compelled to testify or produce evidence before the board either voluntarily or by subpoena.[19] In any hearing or adjudication, any board member may request an advisory opinion from the OPM director concerning the interpretation of any rule, regulation, or other policy directive promulgated by the personnel agency. The board may issue any order which may be necessary to protect a witness or other individual from harassment during an Office of Special Counsel (OSC) investigation or while any proceeding is pending before the board. In carrying out special studies relating to the civil service and to other merit systems in the executive branch, the board can make inquiries as necessary and, unless otherwise prohibited by law, have access to personnel records or information collected by OPM. The board can require additional reports from other agencies as needed.[20]

The board can review any rule or regulation issued by the OPM director in carrying out functions under 5 U.S.C. § 1103 at any time after its effective date. This review can occur (1) on its own motion; (2) on MSPB granting, in its sole discretion and after consideration, any petition for review filed with the board by any interested person; or (3) on the filing of a written complaint by the Special Counsel requesting review. In reviewing any provision of any rule or regulation, the board can declare such provision (1) invalid on its face, if the board determines that it would require any employee to violate the prohibitions against discrimination at 5 U.S.C. § 2302(b) if implemented by any agency; or (2) invalidly implemented by any agency if the board determines that, as implemented by the agency through any personnel action or policy, the provision has required any employee to violate those prohibitions. The OPM director and the head of any agency implementing any provision of any rule or regulation being reviewed by the board have the right to participate in the review. The board can require any agency (1) to cease compliance with any provisions of any rule or regulation which the board declares to be invalid on its face, and (2) to correct any invalid implementation by the agency of any provision of any rule or regulation which the board declares to have been invalidly implemented by the agency.[21]

The board may delegate to any employee of the board the performance of any of its administrative functions.[22] It may prescribe regulations, but cannot issue advisory opinions.[23] The board chairman appoints necessary personnel. Any appointment must comply with Title 5, except that OPM or Executive Office of the President approval or supervision is not required

---

[19] 5 U.S.C. § 1204(b)-(d).

[20] 5 U.S.C. § 1204(e).

[21] 5 U.S.C. § 1204(f).

[22] 5 U.S.C. § 1204(g).

[23] The regulations are published at 5 C.F.R. §§ 1201-1210. 5 U.S.C. § 1204(h).

(other than the approval required under 5 U.S.C. §3324 or Chapter 33, subchapter VIII, relating to the qualifications of employees).[24]

The board is required to prepare and simultaneously submit to the President, and the appropriate committees of Congress, an annual budget of expenses and other items which, as revised, will be included as a separate item in the President's budget transmittal to Congress.[25] The board is required to submit simultaneously, to the President and each house of Congress, any legislative recommendations relating to any of its Title 5 functions.[26]

Any member of the board, or any employee of the board who is designated by the board, may transmit to Congress information and views on functions, responsibilities, or other matters relating to the board. This transmittal, which would occur at the request of any committee or subcommittee, could be by report, testimony, or otherwise, and would be without review, clearance, or approval by any other administrative authority.[27] MSPB is required to submit an annual report to the President and Congress on its activities, including a description of significant actions taken by the board to carry out its functions. The report is also required to review the significant actions of OPM, including an analysis of whether these actions are in accord with merit system principles and free from prohibited personnel practices.[28] Records of open meetings under the Government in the Sunshine Act[29] are kept by the clerk of the board. Disclosure of such records is made in accordance with the procedures specified in the Sunshine Act and the Freedom of Information Act.[30]

MSPB Organization and Board Operations

As stated earlier, MSPB has regional offices in Atlanta, Dallas, Chicago, Philadelphia, Alexandria, VA, and San Francisco, and field offices in Denver and New York. The board currently has 226 employees. To carry out its functions, MSPB has organized itself around nine offices (the number of employees assigned to each office is indicated in parentheses):

- The board offices — chairman, vice chairman, and member. (12 employees)
- The Office of the Administrative Law Judge adjudicates and issues initial or recommended decisions on petitions for corrective action and disciplinary action complaints (including Hatch Act complaints) brought by the Special Counsel, proposed agency actions against administrative law judges, MSPB employee appeals, and other cases assigned by the board. (position is currently vacant)

---

[24] 5 U.S.C. § 1204(j).

[25] 5 U.S.C. § 1204(k).

[26] 5 U.S.C. § 1204(l).

[27] 5 U.S.C. § 1205.

[28] 5 U.S.C. § 1206.

[29] 5 U.S.C. §552b.

[30] MSPB July 2006 Response to CRS.

- The Office of Appeals Counsel prepares proposed decisions that recommend appropriate action in petition for review cases and all other cases decided by the three-member board, with the exception of requests for review of OPM regulations. The office conducts legal research and submits proposed opinions to the board for final adjudication. It also conducts the board's petition for review settlement program, processes interlocutory appeals of rulings made by administrative judges on the board's own motion, and provides research and policy memoranda to the board on legal issues. (38 employees)

- The Office of the Clerk of the Board receives and processes cases filed at board headquarters, rules on certain procedural matters, and issues the board's decisions and orders. (14 employees)

- The Office of Financial and Administrative Management administers the budget, accounting, travel, time and attendance, procurement, property management, physical security, and general services functions of the board, and manages the board's financial audit function. It develops and coordinates internal management programs and projects, including review of internal controls agency-wide. Included in this office is the Equal Employment Opportunity [31] function that plans, implements, and evaluates the board's equal employment opportunity programs, processes complaints of alleged discrimination, and furnishes advice and assistance on affirmative action initiatives to the board's managers and supervisors. (12 employees)

- The Office of the General Counsel, as legal counsel to the board, provides advice to the board and MSPB offices on matters of law arising in day-to-day operations; represents the board in litigation; and prepares proposed decisions for the board on assigned cases. (14 employees)

- The Office of Information Resources Management develops, implements, and maintains the board's automated information systems to help the board manage its caseload efficiently and carry out its administrative and research responsibilities. (17 employees)

- The Office of Policy and Evaluation carries out the board's statutory responsibility to conduct special studies of the civil service and other merit systems and conducts special projects for the board. (13 employees)
- The Office of Regional Operations oversees the regional and field offices in carrying out their adjudicatory and administrative functions. (106 employees)[32]

---

[31] MSPB's regulations (5 C.F.R. § 1200.10(b)(7)) and the board's FY2006 Performance and Accountability Report (cited below) list the Office of Equal Employment Opportunity (EEO) as a separate office. During a telephone conversation on February 8, 2007, MSPB staff told CRS that the EEO Office is now part of the Office of Financial and Administrative Management.

[32] The descriptions are summarized from 5 C.F.R. § 1200.10(b)(7) and U.S. Merit Systems Protection Board, *Performance and Accountability Report for Fiscal Year 2006* (Washington: Nov. 15, 2006), pp. 3-5. MSPB staff provided the employment data to CRS, by telephone, on February 8, 2007.

In July and August 2006, MSPB, at the request of CRS, provided information on the board's operations.[33] The following summarizes the agency's responses.[34]

The board does not hold regular meetings. The adjudication of cases is not generally done in a meeting. Rather, each member of the board adjudicates cases independently. The chairman is, by statute, the chief executive and administrative officer of the board, and is responsible for making all policy decisions regarding the governance and operations of the agency. Most board meetings may be closed pursuant to exemption 10 of the Sunshine Act (discussed in detail below), which provides an exception for deliberations concerning formal agency adjudication.[35]

Since calendar year 2000, the board has held six open meetings that were subject to the requirements of the Sunshine Act. These meetings were as follow:

- March 23, 2001 — to consider the disposition of certain motions and petitions filed in the cases of *Azdell* and *Fishman*.
- May 31, 2001 — to consider the adjudication of OPM's Request for Reconsideration in *Azdell* and *Fishman*.
- September 7, 2001 — to consider MSPB's FY 2002-2003 Performance Plan, the status of *Azdell* and *Fishman*, the target group of cases expected to be over 300 days old by September 30, the appreciation of effects in accomplishing 2001 goals, and the expedited petition for review pilot.
- October 18, 2001 — to brief board members on the Senior Management retreat and case processing issues.
- November 14, 2001 — to brief a board member on the issues in the matter of *Mohammed Yunus* v. *VA*, and *Phillip A. Geyer* v. *Department of Justice*.
- November 29, 2001 — to consider strategies for acting on long-standing cases.

The board has not conducted any meetings since November 29, 2001, because no chairman since then has determined that meetings were necessary. Generally, the chief of staff and the chief counsels to each board member would attend the board meetings. The general counsel and the clerk of the board also would attend the meetings. Additionally, other board employees would attend if they were presenting matters to be considered by the board members at the meeting.

Matters such as management issues, strategic plans, and workload, which were included as agenda items in the 2001 meetings, are now generally discussed in meetings of the senior staff,

---

[33] MSPB July 2006 Response to CRS and U.S. Merit Systems Protection Board, Office of the General Counsel, Legislative Counsel, *Responses to Follow-up Questions Regarding Meetings of the MSPB Board Members*, Aug. 11, 2006. (Hereafter referred to as MSPB Aug. 2006 Response to CRS.) Provided to CRS by electronic mail.

[34] The MSPB letters to CRS are attached to this testimony.

[35] 5 U.S.C. § 552b(d)(2).

which are attended by the board's office heads and the chief counsels to the board members. While board members generally do not attend meetings of the senior staff, any one of the board members may, on occasion, sit in on the meetings. The chief of staff presides at these meetings and reports on the meetings to the chairman. The usual practice is for the chief counsels to brief their respective board members.

Generally, the chairman signs off on documents regarding the administration of the agency. The other board members generally sign off on documents that relate to the adjudicatory function of the agency (e.g., regulations that govern the adjudication of cases). In other matters, such as the reports of studies conducted by the Office of Policy and Evaluation and budgets or other documents prepared by the Financial and Administrative Management Office, the other board members have the same opportunity to provide input as do all office heads. However, the members do not have decision-making authority regarding these matters.

While the chairman may consult with the other two board members on matters not covered by the Sunshine Act, he is not required to do so, and such consultation does not take place as a matter of course. This consultation is not generally conducted as part of any meeting. There are no formal regular interactions held between the top officials of MSPB (such as the Director of the Office of Policy and Evaluation or the Director of Finance and Administrative Management) and the board members as a group. The chief of staff conducts a bi-weekly meeting of senior staff which is attended by the agency's senior managers and the chief counsels of all board members, including the chairman.[36]

As stated earlier, by law, MSPB hears, adjudicates, or provides for the hearing or adjudication, of all matters within the jurisdiction of the board under Title 5; Title 38, Chapter 43; or any other law, rule, or regulation, and subject to otherwise applicable provisions of law, shall take final action on any such matter.[37] Regulations governing the MSPB further provide that:

> The three Board members make decisions in all cases by majority vote except in circumstances described [below] or as otherwise provided by law.
>
> When due to a vacancy, recusal or other reasons, the Board members are unable to decide any case by majority vote, the decision, recommendation or order under review shall be deemed the final decision or order of the Board. The Chairman of the Board may direct the issuance of an order consistent with this paragraph.
>
> When due to a vacancy, recusal, or other reasons, the Board members are unable to decide a matter in a case which does not involve a decision, recommendation or order, the Chairman may direct referral of the matter to an administrative judge or other official for final disposition.[38]

It is unclear how these decisions are currently being made by the board. (This issue is discussed in detail below.)

---

[36] MSPB July 2006 Response to CRS and MSPB Aug. 2006 Response to CRS.

[37] 5 U.S.C. § 1204(a)(1).

[38] 5 C.F.R. § 1200.3

Analysis of Draft Legislation

In anticipation of the expiration of the authorization of MSPB at the end of September, 2007, the board offered draft legislation that would reauthorize the agency and amend its enabling act to make several changes to its organization and functioning. The draft legislation was accompanied by a justification and section-by-section analysis. The proposed provisions (1) would prescribe the order of succession to the chairmanship in the event of a vacancy in that office under circumstances that are not currently expressly provided for in law; (2) would vest in the chairman the authority to delegate any of the board's administrative functions under the act to any employee of the board, allow the chairman to delegate to officers and employees the authority to perform such duties and make such expenditures as the chairman deems necessary, and to authorize the chair alone to prepare and submit the board's annual budget; (3) would allow the board to dispose of a controversy by summary judgement solely on the pleadings without an evidentiary hearing, a power presently not available to the board under the law; and (4) would permit the chairman, at his or her discretion, to call a meeting of the board without regard to the Government in the Sunshine Act. This section of our testimony addresses issues related to whether these proposals could have a significant impact on the operations and independence of the board.

The Nature of MSPB and Consideration of Issues Raised by the Draft Legislation

As has been indicated previously, MSPB is an independent executive branch agency whose essential mission is to "discourage subversions of merit principles"[39] from partisan political and other statutory prohibited personnel practices, principally by hearing and deciding appeals from Federal employees of removals and other major adverse personnel actions, as well as other types of civil service cases.[40] In nature and function it is primarily an adjudicatory body. In establishing the board, Congress structured it in a manner to assure both a high degree of independence and insulation from presidential intervention, and to provide avenues for congressional oversight and public access to its decisional and operational processes. To accomplish these dual goals, the board's enabling legislation contains the following requirements:

- members serve for a fixed seven-year term[41]
- the terms are staggered so that most Presidents do not have the opportunity to replace the entire board at one time;[42]
- members are ineligible for reappointment, arguably reducing any incentive to curry favor with the current President;[43]

---

[39] S. Rept. 95-969, pp. 6-7.

[40] See preceding discussion of history and purposes.

[41] 5 U.S.C. §102 (a).

[42] U.S.C. § 1202(b).

[43] 5 U.S.C. § 1202(c).

- members may not be removed by the President at will — only for inefficiency, neglect of duty, or malfeasance in office;[44]
- members must be qualified — they must be "individuals who by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board";[45]
- not more than two members can be from the same political party;[46]
- the chairman is appointed by the President with Senate advice and consent;[47]
- each member of the board may issue subpoenas or order depositions to be taken from an individual or order written responses to interrogatives;[48]
- the board, as a body, has independent (of the Department of Justice) authority to enforce subpoenas and to appear in any civil action in connection with any board function;[49]
- the board's annual budget request is to be simultaneously presented to the President and to the appropriate congressional committees, thereby bypassing OMB review;[50]
- the board is directed to submit its legislative recommendations simultaneously to the appropriate legislative committees, thereby bypassing OMB clearance;[51]
- any member of the board, or employee designated by the board, can respond to a committee or subcommittee request for reports, testimony or other information or views on functions and responsibilities relating to the board, without review, clearance, or approval by OMB or any other administrative authority;[52]
- the board, as a body, may delegate the performance of its administrative functions under the act to any employee of the board;[53] and
- the appointment by the chairman of personnel necessary to carry out the function of the board is not subject to White House or OPM approval.[54]

These and other combinations of such political insulation features are to be found in numerous single-headed and multi-member independent executive agencies. Arguably, the single most important independent feature, common to all such bodies, is the denial to the

---

[44] 5 U.S.C. § 1202(d).

[45] 5 U.S.C. § 1201.

[46] Ibid.

[47] 5 U.S.C. § 1203(a).

[48] 5 U.S.C. § 1204(b)(2).

[49] 5 U.S.C. § 1204(c), (I).

[50] 5 U.S.C. § 1204(k).

[51] 5 U.S.C. § 1202(*l*).

[52] 5 U.S.C. § 1205.

[53] 5 U.S.C. § 1204(g).

[54] 5 U.S.C. § 1204(j). The conference report that accompanied the Civil Service reform legislation stated that this "is to prevent 'political clearance' of appointments" because "[t]he conferees believe that it would be inappropriate for any unit of the White House or the Office of Personnel Management to screen such candidates." U.S. Congress, Conference Committees, 1978, *Civil Service Reform Act of 1978*, conference report to accompany S. 2640, H. Rept. 95-1717, 95th Cong., 2nd sess. (Washington: GPO, 1978), p. 133.

President of at-will removal power of members of such bodies. While the efficacy and utility of such bodies remain a matter of debate, particularly by those who advocate the necessity of presidential supervision and control over every aspect of the administrative bureaucracy,[55] the Supreme Court has consistently upheld Congress's constitutional power to establish, structure, locate, and empower all offices and officers of the bureaucracy,[56] and in particular has upheld statutory provisions limiting the President's power to remove officers he has appointed except for cause.[57] The choice of which agencies and functions are to be so specially treated is Congress's alone to make. One prominent administrative law commentator has stated that

> insulation from political pressure seems most desirable in the context of adjudicatory decisionmaking by agencies. No one wants the President, or anyone else, to control the outcome of adjudicatory disputes based on political beliefs or affiliations of the individual whose rights are at stake.[58]

While the divesting of the President's at-will removal power by Congress normally must be clear and express,[59] in one case involving an independent commission exercising purely adjudicative functions whose enabling legislation was silent with respect to presidential removal of its members, the Supreme Court held that the adjudicative functions being performed were sufficiently sensitive that presidential removal only for cause was properly implied.[60]

The scheme of structure and organization established by Congress for MSPB was intended to allow it to carry out its adjudicatory function freer from the influence of short-term political considerations and influences than it might otherwise be. The importance of each structural element to the independence of a governmental agency intended by Congress was recognized in a 2002 decision by the Court of Appeals for the District of Columbia Circuit. In *United States* v. *Wilson*,[61] the court held that the requirement of staggered terms was so integral to the congressional scheme of independence designed for the United States Commission on Civil Rights (Commission) in 1983 that its omission in a subsequent 1994 reauthorization measure

---

[55] See, e.g., Christopher S. Yoo, Steven G. Calabresi, and Anthony Colangelo, "The Unitary Executive in the Modern Era," 90 Iowa L. Rev. 601, 603-608 (2005).

[56] *Crenshaw* v. *United States*, 134 U.S. 99, 105-106 (1890); *Lewis* v. *United States*, 244 U.S. 134 (1917); *Myers* v. *United States*, 272 U.S. 52, 129 (1926); *Buckley* v. *Valeo*, 424 U.S. 1, 134-135 (1976); *Mistretta* v. *United States*, 488 U.S. 361 (1989).

[57] *Morrison* v. *Olson*, 487 U.S. 654 (1988).

[58] Richard J. Pierce, Jr., Administrative Law Treatise, Vol. I, section 2.5 at 65 (4th ed., 2002).

[59] *Swan* v. *Clinton*, 100 F. 3d 973, 981-87 (D.C. Cir. 1996).

[60] *Weiner* v. *United States*, 357 U.S. 349, 354-56 (1958) ("If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing."). Expressing a similar concern, the Senate Committee on Governmental Affairs report that accompanied the 1978 Civil Service reform legislation stated that, "As a result of this structure, the Board should be insulated from the kind of political pressures that have led to violations of merit principles in the past . . . the Board . . . will exercise statutory responsibilities independent of any Presidential directives." S. Rept. 95-969, p. 7.

[61] 290 F. 3d 347. (D.C. Cir. 2002) *cert. denied*, 537 U.S. 1023 (2002).

could not be deemed to be an implied repeal of the provision. The *Wilson* case arose under the following circumstances. Victoria Holt was appointed by President Clinton on January 13, 2000, to fill the unexpired term of her predecessor who had died. When that term expired on November 29, 2001, President Bush appointed Peter Kirsanow as her successor. However, the commission refused to seat Kirsanow on the ground that Holt was entitled to a full six-year term. This was based on the commission's interpretation of its 1994 reauthorization in which the requirement of staggered terms was absent. The commission interpreted this absence to mean that staggered terms had been eliminated. The government and Kirsanow brought suit to have Holt's term declared expired. The district court ruled in Holt's favor, holding that the amended statute on its face was plain and unambiguous and no longer required staggered terms. The appeals court reversed. Contrary to the district court, it found an ambiguity in the amended statutory provision relied on by the lower court wherein after establishing six-year terms, it also contained subsequent language that tied the expiration of terms of then sitting members to that which would have been applicable to members in place on September 30, 1994, before the amended statute took effect.[62] As a consequence, the appeals court proceeded to examine the legislative history of the 1983 reauthorization of the commission, which established a scheme to protect the independence of the commission, at the heart of which was the requirement of fixed, staggered terms. In the absence of any clear indication that Congress's 1994 revision meant to alter that scheme, the appeals court concluded that it was meant to be continued:

> Congress went to great lengths to put various structural features in place to preserve the independence, autonomy, and non-partisan nature of the Commission. Clearly staggering was one of those features. *See* Pub.L. No. 98-183 § 2(b)(2), (3), 97 Stat. 1301 (1983). The 1983 Act was enacted at a time when Congress was responding to President Reagan's decision to remove and replace first two, then a total of five, members of the Commission. *See* Congressional Research Service, Tenure of Members of the Civil Rights Commission, Memorandum to House Subcommittee on the Constitution, at 2-3, 5 (Dec. 14, 2001). Thus it is evident that in staggering the membership (among other features), Congress was insulating the Commission from carte blanche replacement at any given time. To suggest that Congress abolished this practical structural feature without any indication that it intended to — evidenced by the fact that the Clinton and Bush Administrations continued to treat the Commission as a body with staggered membership — presents a highly improbable scenario. There is no evidence in or external to the 1994 Act that Congress meant to disrupt the system it had meticulously put into motion.[63]

As the *Wilson* opinion suggests, a successful scheme of independence at times may be undermined by the elimination, diminution, or avoidance of one or more parts of the scheme. In *Wilson*, the requirement of the element of staggered terms was deemed integral to maintenance of the independence of the commission, because in its absence one President would ultimately be able to pack a majority of the commission with members of his own political persuasion, thus rendering the for cause removal protection a less potent independence factor. This implies that the proposed changes in MSPB's organizational arrangements should be assessed, both individually and collectively, for the impact they could have on the continued level of independence of the board.

---

[62] See 42 U.S.C. § 1975(c) (2000).

[63] 290 F. 3d at 359.

Temporary Chairmanship Succession

Background and Proposal. Section 1204 of Title 5 provides the following:

(a) The President shall from time to time appoint, by and with the advice and consent of the Senate, one of the members of the Merit Systems Protection Board as the Chairman of the Board. The Chairman is the chief executive and administrative officer of the Board.

(b) The President shall from time to time designate one of the members of the Board as Vice Chairman of the Board. During the absence or disability of the Chairman, or when the office of Chairman is vacant, the Vice Chairman shall perform the functions vested in the Chairman.

(c) During the absence or disability of both the Chairman and the Vice Chairman, or when the offices of Chairman and Vice Chairman are vacant, the remaining Board member shall perform the functions vested in the Chairman.[64]

Section 3 of the draft legislation would amend Section 1203 by adding four so-called "order of succession" subsections:

(d) In the event that no member has been appointed or designated to serve as Chairman or Vice Chairman or is eligible to serve in either position by operation of subsections (b) or (c) of this section, the member who is an adherent of the same political party as the President shall perform the duties and functions of the Chairman;

(e) If the only members currently in office are adherents of the same political party as the President and neither has been designated to serve as Chairman or Vice Chairman or is eligible to serve in either position by operation of subsection (b) or (c) of this section, the member who was first appointed to the Board shall perform the duties and functions of the Chairman;

(f) In the event that all three Board positions are vacant, the General Counsel of the Board shall perform the chief executive and administrative officer duties of the Chairman;

(g) The person who performs the duties and functions of the Chairman, as provided in subsections (d) through (f) of this section, shall do so only until such time as the President makes an appointment or designation as described in subsection (a) or (b); the President makes an appointment in accordance with Article II, Section 2 of the U.S. Constitution; or the member's term (including the holdover period) expires, whichever occurs first.

Agency Justification. The board's justification for this proposed amendment explains that these provisions are intended to address the perceived risk of a leadership vacuum on the board under conditions that are not addressed under current law. These conditions arise when either (1) the board has more than one member, but no member has been appointed as chairman or designated as vice chairman; or (2) when no board members remain. Both of these scenarios are illustrated, in the justification, with reference to recent MSPB history. In the first instance, the board had two sitting members, neither of whom was chairman or vice chairman. The members, in this case, "agreed to a shared-leadership arrangement" until the President

---

[64] 5 U.S.C. § 1203.

designated one as vice chairman. In this case, under the proposed resolution, the member of the President's party, or, if two were from the same party, the member who was first appointed would temporarily take over the chairman's functions. In the second instance, a confluence of events was leading toward the possibility that the board would be left with no members. In this case, the situation was resolved when the Senate confirmed, and the President appointed, two members, one of whom was also confirmed as chairman. The proposal to resolve the second scenario would vest the functions of the chairman in the general counsel, who is appointed by the chairman.

Analysis. Constitutionally, the Senate and the President share the power to fill the top leadership positions in the federal government, and the arrangements by which this appointment power is shared are often carefully delineated. As noted above, Congress established MSPB membership positions with several features that increase the independence of the incumbents, and the board, from the President.

This appointment scheme is similar to those Congress has established for many other independent agencies, particularly independent regulatory commissions. Change to the board's organizational structure, including the appointment arrangements, raises the issue of the impact it could have on the independence of the board. In this case, the potential impact of the proposed chairmanship succession provisions on board independence might be weighed against the improved agency functioning that might result from the changes. Several questions follow that might be raised in connection with this assessment:

(1) What powers would a temporary chairman exercise?

(2) How long would he or she be able to serve under the proposed provisions?

(3) What impact would this have on the existing process for appointing a permanent chairman, or on the process for making appointments to the board?

(4) What might happen if the chairmanship succession provisions are not changed? Are the present arrangements insufficient to maintain efficient agency operations?

Temporary Powers. It is unclear, from MSPB's organic act and the rules published in the *Code of Federal Regulations* regarding its organization,[65] which specific duties and functions would be transferred by the provisions above; the terms "duties" and "functions" are undefined. The distinction among the existing and proposed succession provisions with regard to the specific powers and authorities that each of them would confer, is also unclear. The existing and proposed provisions use each of the following phrases as noted:

- "the functions vested in the Chairman" (§1204(b) and (c));
- "the duties and functions of the Chairman" (proposed §1204(d), (e) and (g)); or
- "the chief executive and administrative officer duties and functions of the Chairman" (proposed §1204(f)).

---

[65] 5 C.F.R. Part 1200.

It could be argued that these provisions each direct essentially all of the chairman's powers to be temporarily conferred on the specified member or general counsel. This interpretation is supported by the response of the board's chairman to written questions following a Senate hearing on reauthorization. When asked to identify the functions that would be performed by the general counsel under the proposed provisions, the chairman stated that they would include

> those executive and administrative matters typically performed by the head of an Executive Branch agency, to the extent that the assumption of such duties is not prohibited by statute, regulation or executive order. It is not possible to enumerate all such functions, since the specific functions to be performed by the GC would be determined by the functions that need to be performed on behalf of the agency at the time that the total absence of any Board members exists. The General Counsel would not assume any of the adjudicatory functions of the Board beyond those currently delegated by the Board.[66]

According to the chairman, certain of these powers are beyond those the board itself could delegate to the general counsel or another MSPB staff member. He stated that these include

> those authorities and functions that are normally within the sole purview of the chief executive or administrative officer of the Board. Examples of such authorities and functions include approving personnel actions or approving contracts and other Board expenditures.[67]

MSPB's power resides predominantly in its three members collectively. As noted in other sections of this testimony, most of the statutory authorities of the agency are vested in the board. The board's rules recognize this when they specify, for example, that the "three Board members make decisions in all cases by majority vote except in [specified] circumstances."[68]

Authority of the Chairman. The MSPB chairman has certain specified statutory authorities, and it appears that certain other authorities have been inferred or have been delegated to the position by the board. The authorities to be taken over by another member or the MSPB general counsel under the existing and proposed chairmanship provisions might include those specified in the board's organic act and published organizational rules. In addition, these authorities might include those internally vested in the chairman.[69]

Congress delegated certain general functions to the chairman when establishing the board. It provided that the "Chairman is the chief executive and administrative officer of the Board"; that, with certain exceptions, the chairman would designate an attorney to "appear for the Board, and represent the Board, in any civil action brought in connection with any function

---

[66] U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, "Additional Questions for the Record for Mr. Neil McPhie, Chairman, Merit Systems Protection Board," submitted March 22, 2007 (McPhie Response).

[67] Ibid.

[68] 5 C.F.R. § 1200.3(a).

[69] It could be argued, for example, that because the chairman is statutorily denominated the "chief executive and administrative officer of the Board" (5 U.S.C. § 1203(a)), he or she has certain inherent powers. But see discussion of legal authorities, infra at 23-25 , casting doubt on such a notion.

carried out by the Board ..."; and that the "Chairman of the Board may appoint such personnel as may be necessary to perform the functions of the Board."

The board's rules characterize the chairman as the "chief executive officer of the Board."[70] The rules specify certain tasks, in addition to those established in statute, that are to be completed by the chairman. These tasks, which appear to be administrative in nature, involve moving board business forward when there are at least two members in office, but members are unable to come to a decision "due to a vacancy, recusal or other reasons ...."[71] The applicable rules are as follow:

> When due to a vacancy, recusal or other reasons, the Board members are unable to decide any case by majority vote, the decision, recommendation or order under review shall be deemed the final decision or order of the Board. The Chairman of the Board may direct the issuance of an order consistent with this paragraph.[72]

> When due to a vacancy, recusal or other reasons, the Board members are unable to decide a matter in a case which does not involve a decision, recommendation or order, the Chairman may direct referral of the matter to an administrative judge or other official for final disposition.[73]

Inasmuch as another member or general counsel is more likely to take on the chairman's functions in the case of at least one board vacancy, he or she might carry out the actions specified by these rules. The general counsel might not take on these functions, however, if they are regarded as part of the "adjudicatory functions of the board."[74]

Additional information on the board's operations, provided to CRS by MSPB, might provide further insight concerning the duties and functions of the MSPB chairman, as they would be transferred under existing and proposed chairmanship succession provisions. The board's response included the statement that the "Chairman of the Board is, by statute, the chief executive and administrative officer of the Board. As such, the Chairman is responsible for making all policy decisions regarding the governance and operations of the agency."[75]

Taken together, the provisions from MSPB's organic act, responses by the board's chair to congressional inquiries, the board's published organizational rules, and statements of the board in response to CRS inquiries suggest that the chairman believes he has, and a temporary successor might have, considerable discretion in running the board and determining board

---

[70] 5 C.F.R. § 1200.2(b).

[71] 5 C.F.R. § 1200.3.

[72] 5 C.F.R. § 1200.3(b).

[73] 5 C.F.R. § 1200.3(c).

[74] As previously noted, the board's chairman has stated that, under the proposed provisions, the "General Counsel would not assume any of the adjudicatory functions of the Board beyond those currently delegated by the Board." U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, "Additional Questions for the Record for Mr. Neil McPhie, Chairman, Merit Systems Protection Board."

[75] MSPB July 2006 Response to CRS, p. 1.

policies. The power of the chairman, and the power temporarily conferred under existing and proposed succession provisions, seemingly would be greater if Section 5 of the draft legislation were enacted. The additional powers that would be vested in the chairman by some of the provisions in this section would presumably accompany the position's existing powers. These powers, and the powers of the chairman generally, are discussed later in this testimony, in the section entitled "The Power of the MSPB Chairman."

Potential Duration of Temporary Service. As noted previously, MSPB's powers reside predominantly in the board. The potential maximum period of time for which the functions of the chairman could be conferred upon another member or the general counsel depends, in part, on the maximum period of time that a chairman, temporary or permanent, could keep the board running under different scenarios. This depends, in turn, on the extent to which the board has delegated power to the chairman. If the chairman is vested with broad administrative authority, all or most of this power seemingly would be conferred under the temporary succession provisions. In this case, the board could be run for a considerable period of time under temporary leadership, even with board membership vacancies. If, however, delegations by the board to the chairman are limited in nature, the functioning of the agency might be impaired by a succession period of more than a few months, particularly if there were membership vacancies on the board. This would be the case if, for example, the chairman were not empowered to unilaterally prepare and submit to Congress the board's annual budget.[76]

Even under the broadest interpretation of the authorities that could be performed by a temporary caretaker of the chairmanship (see above), the functioning of the board seemingly would be impaired by a long-term absence of full membership. However, it could be argued that the greater the number of authorities and functions vested in the chairman, the more easily the board could function without other members. It would follow that such greater authorities and functions could then be transferred to others under both existing and proposed succession provisions, possibly lessening the pressure for timely appointments of board members.

Impact on the Advice and Consent Process. Although enactment of the proposed succession provisions might have an impact on the process of appointing a permanent chairman, the precise impact is difficult to predict. The process of appointing a permanent chairman requires the cooperation of the President and the Senate. The success of this appointment process is generally a function of the political and institutional environment at the time of a vacancy. More specifically, the appointment of an MSPB chairman through the advice and consent process requires that the President and the Senate each have greater incentives to reach accord than not to reach accord. It could be argued that the more easily MSPB functions without the appointment of a permanent chairman, the less likely it is that the President and the Senate will reach accord to fill the position. Furthermore, if the chairman's role can be filled for a long period of time by a particular individual, potential nominees for the position might be evaluated against this individual, rather than the consequences of a long-term vacancy. Depending on how acceptable the temporary officeholder is to the Senate, this dynamic might limit or expand the range of candidates the President could nominate.

---

[76] The budget submission authority is, under current law, vested in the board. As discussed later in this testimony, however, the board justification for the draft legislation contends that "[t]he term 'Board' can be read to mean the Merit Systems Protection Board as a Federal agency or the three members of the Merit Systems Protection Board." Under the former interpretation, the authority would presumably be vested in the chairman. The board seeks to have the budget authority clearly conferred upon the chairman.

Consequently, to the degree, if any, that these succession provisions make it easier for MSPB to operate for long periods of time without a permanent chairman, the permanent appointment process might take longer, and the President might select different nominees.

Similar dynamics might attend the appointment of MSPB members if the proposed changes were adopted. Under current law, if the President could appoint one or two members and designate one of them as vice chairman, he could avoid the necessity of appointing a chairman through the advice and consent process. The Senate could, of course, withhold its consent for the nominations of these one or two members until the President submitted an acceptable nomination for chairman. The prospect of an empty board with a leadership vacuum might provide a strong incentive for the President and Senate to reach accord in the appointment of a chairman and other members. If the proposed chairmanship succession provisions were enacted, the appointment dynamics might change. Because the second proposed succession provision would empower the general counsel to carry out the powers of the chairman, the board seemingly could continue to function for some time with no members, and the incentive for the President and the Senate to reach accord in the appointment process would be reduced.

In any of these scenarios, the President has an additional advantage over the Senate: under the Constitution, he may unilaterally appoint a chairman or other members of the board during a Senate recess.[77] Such appointments generally last for between one and two years. President Ronald W. Reagan used this authority for three appointments to the board,[78] and President William J. Clinton made two such appointments.[79] As of June 20, 2007, President George W. Bush had also made two recess appointments to the board.[80]

Consequences of Maintaining the Status Quo. The final questions raised in this analysis are as follow: What might happen if the chairmanship succession provisions are not changed? Are the present arrangements insufficient to maintain agency operations?

As noted above, the board justified the proposed chairmanship succession provisions on the basis of a perceived risk of a leadership vacuum on the board when either no member has qualified to be chairman, under the existing provisions, or no board members remain. Yet, the board has not presented any case in which the present authorities were not sufficient to maintain the operations of the board. Presumably, this means that there has been no insurmountable difficulty in the 28 years of the board's operation.

Some might argue that the current provisions are sufficient to maintain the agency. The agency has acknowledged that, in both of the cases it has cited as evidence of a need for further succession provisions, the situations were resolved. In the first case, the two members led the agency together, and this arrangement was apparently sufficient to maintain MSPB operations

---

[77] For more information on recess appointments, see CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue.

[78] President Reagan recess appointed Herbert E. Ellingwood to be a member and to be chairman, on December 17, 1981, and Samuel W. Bogley to be a member, on November 22, 1988.

[79] President Clinton recess appointed Beth S. Slavet to be a member, on December 22, 2000, and Barbara J. Sapin to be a member, on December 28, 2000. He also designated Sapin as vice chairman.

[80] President Bush recess appointed Susanne T. Marshall to be chairman, on August 6, 2002, and Neil McPhie to be a member, on April 22, 2003. He also designated McPhie as vice chairman.

for several months. This experience seemingly provides a precedent for similar situations that might arise in the future. In the second case, the potential problem (of no members) was resolved through the actions of the President and the Senate. Some may view the prospect of three vacancies at MSPB as a catalyst to moving appointments through the advice and consent process.

In addition, the chairmanship succession provisions that would be amended by the draft legislation constitute only one of several tools that might be used to maintain leadership at the board. The law also provides that a board member, including the chairman, can remain in office for up to a year after the end of a seven-year term.[81] As discussed above, the President may unilaterally fill any advice and consent post, including an MSPB member position or chairmanship, during a Senate recess.

The sufficiency of existing provisions to date notwithstanding, MSPB, in its justification, has notified Congress of perceived weaknesses in the statutory chairmanship succession arrangements. These perceived weaknesses have reportedly led to two cases in which "the agency was faced with the possibility of a vacuum in its chief executive leadership." The fact that this possibility was avoided in these cases does not completely negate the possibility of a future recurrence in which such a leadership vacuum could not be avoided.

The significance of a possible "vacuum in [MSPB's] chief executive leadership" is, to a considerable degree, a function of the power of the chairmanship. If the chairman has broad powers to run the board essentially on his or her own, his or her absence, and the absence of any temporary placeholder, would seemingly interrupt the functioning of the agency. If, however, most of the board's powers are vested in the board collectively, the board's functioning would be impaired during sustained vacancies of two or more member positions.[82] In fact, although the chairman is statutorily established as the "chief executive and administrative officer of the Board,"[83] few functions are statutorily assigned to this position. Most powers and functions are vested in the board collectively.[84] If most power is seen to reside in the board collectively, the board could seemingly delegate to career employees sufficient power to continue basic agency operations (e.g., hold hearings, review and make recommendations on rules, etc.) for relatively short periods, if it has not already done so.[85] Such a delegation would arguably obviate the need for additional succession provisions.

---

[81] A member "may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire" (5 U.S.C. § 1202(c)).

[82] The statute anticipates that the board can function with two members, since a quorum of the three is required to make board decisions. The board's rules establish that when only two members remain, and these two members cannot agree on an adjudicative result, "the decision, recommendation, or order under review shall be deemed the final decision or order of the Board." If the ruling is not adjudicative, it can be referred to an administrative law judge or other officer (5 CFR § 1200.3).

[83] 5 U.S.C. § 1203(a).

[84] 5 U.S.C. § 1204. This analysis presumes that the current vesting of powers and functions is unchanged. Should Congress elect to concentrate more powers and functions in the office of the chairman, the analysis might be different.

[85] Subsection 1204(g) of Title 5 provides that "[t]he Board may delegate the performance of any of its administrative functions under this title to any employee of the Board."

Possible Options for Consideration. With respect to the draft chairmanship succession provisions, the following is an analysis of some available options:

Maintain the Status Quo. Arguably, the present provisions have been sufficient to maintain MSPB for 28 years. The recent examples cited in the justification can be interpreted as evidence that current law is sufficient. Changes to these provisions could, under certain circumstances, allow the board to continue to function for long periods of time without a chairman who is duly appointed by the President with the advice and consent of the Senate. To the degree that the board anticipates operational difficulties from temporary member or chairman vacancies, it could proactively delegate a caretaker role to career employees.

Adopt one or both proposed provisions. It could be argued that, the sufficiency of the present law to date notwithstanding, the cited examples provide evidence of weaknesses in current board leadership succession provisions, and only Congress can address these weaknesses. The proposed provisions address most reasonably foreseeable situations, and they would allow continuity of leadership regardless of the President's or Senate's actions or inaction. The enactment of provisions such as these might be particularly important if Congress envisions a centralized MSPB with powers concentrated in the chairman.

Specify temporary powers. The existing and proposed succession provisions indicate only generally the functions of the chairman that are to be performed on a temporary basis. Regardless of whether Congress accepts or rejects the proposed succession provisions, it could add greater specificity to the statute concerning the power of an official acting in lieu of a chairman. Temporary powers could be narrowly tailored to include only those functions necessary to "keep the lights on" and MSPB operating, or they could include certain policymaking authorities. Congress could thereby indicate whether or not such a temporary actor would have the full authority of a permanent chairman. Arguably, the enactment of such provisions would be particularly important if the statutory designation of the chairman as "chief executive and administrative officer of the Board" is seen as giving the chairman broad, unilateral discretion over board operations.

Limit the duration of successions with greater specificity. Present and proposed succession provisions are activated by the absence of a chairman and remain in force until the chairmanship or members are appointed through the advice and consent process or by recess appointment. As suggested above, the presence of indefinite succession arrangements could reduce the pressure on the President and Senate to reach accord on permanent appointments to board positions. Congress could place time limits on succession that are tied to the nomination and confirmation process. It has included such a provision, for example, regarding the general counsel for the National Labor Relations Board. It reads as follows: "In case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted."[86] A provision of this kind seemingly would temporarily respond to the need for leadership at the board without removing the pressure on the President and Senate to reach accord on the appointment of permanent leadership.

---

[86] 29 U.S.C. § 153(d).

The Power of the MSPB Chairman

Background and Proposals. Under current law, the full board may delegate the performance of any of its administrative functions under the act to any employee of the board.[87] That subsection would be amended to allow such delegations in the sole discretion of the chairman.

Under current law the chairman is authorized to appoint "such personnel as may be necessary to perform the functions of the Board.[88] A proposed amendment would allow the chairman to delegate officers and employees under this subsection "authority to perform such duties and make such expenditures as may be necessary."

Under current law the full board is to prepare and submit simultaneously the board's annual budget to the President and to the appropriate congressional committees. A proposed amendment would vest the preparation of the annual budget submission solely in the chairman.

Under current law, the Sunshine Act[89] and its open meeting requirements and its special procedures for covered agencies to close limited categories of business meetings is applicable to MSPB. A proposed new subsection of Section 1204 would allow the Chairman, at his or her sole discretion, to call a business meeting of the board "without regard to section 552b."[90]

Agency Justification. MSPB suggests that since the current legislation makes the chairman "the chief executive and administrative officer of the Board," all "management authority" should be vested in that office. In this view, the failure to vest sole authority in the chairman, rather than the board, in subsection 1204(g) with respect to delegation of the performance of the board's "administrative function," to board employees, and the failure to vest the preparation and submission of the board's annual budget in the chairman, rather than in the board, is an "ambiguity" in the language of the statute. To remedy those flaws, it suggests that the language of those subsections "should be clarified" to reflect that the functions of delegation of statutory authority and budget preparation authority are "administrative responsibilities" under the "sole purview" of the chairman. For similar reasons, the proposed amendment to subsection 1204(j), which permits the chairman to hire personnel, "merely emphasizes the Chairman's authority to delegate certain responsibilities [to perform unspecified "duties" and "make such expenditures as may be necessary"] to the employees he or she appoints." These three proposals are designated "technical corrections."

A final proposed enhancement of the chairman's authority is an amendment that would allow the chairman, "in his or her sole discretion, [to] call a meeting without regard to section 552b (the Sunshine Act) at which members may jointly conduct or dispose of agency business." MSPB's justification is that this new authority would be applicable only "when it exercises its adjudicatory authority." If that is its purpose, the proposed amendatory language is not so limited and appears to allow the chairman to decide whether or not to hold a business meeting at his or her sole discretion. A subsequent section will discuss the question of whether, if the

---

[87] 5 U.S.C. § 1204(g).

[88] 5 U.S.C. § 1204(j).

[89] 5 U.S.C. § 552b.

[90] Section 552b is the Sunshine Act (5 U.S.C. § 552b).

proposed amendment is actually limited to the discussion of adjudicatory issues, it is really necessary under current law.

Analysis. Rather than being "technical corrections," as characterized by MSPB, these amendments may be viewed as substantive enhancements of the power and authority of the office of the chairman. Indeed, the MSPB chairman, in his written responses to Member queries following the Senate's March 2007 reauthorization hearing, candidly expressed his view that as chairman he occupies "a position of responsibility that is superior, and not co-equal, to that of the other 2 Board members,"[91] and that he is the "head of the agency.[92] He asserts that since the statute makes the chairman "the chief executive and administrative officer of the Board" under Section 1203(a), the vesting of budget preparation and submission to the President and Congress in Section 1204(k) to the full board is " inconsistent" with the chairman's 1203(a) authority, and creates " an ambiguity in the relative roles and responsibilities of the 3-Member Board and Chairman of the Board."[93] The proposal to vest budget preparation and submission authority in the Chairman is asserted not to be a "ratification" or "approval, sanctioning, or an endorsement" of the chairman's views but merely to "clarify the apparent ambiguity" and to reflect past agency practice.[94] Although the statute provides that the board is required to simultaneously submit to the President and each House of Congress any legislative recommendations relating to the Title 5 functions, Chairman McPhie stated that pursuant to his authority as chief executive and administrative officer he "develops and submits legislative recommendations with input from individual Board members and program managers."[95] With respect to the promulgation of regulations, the chairman stated that he "consults with Board members and other program managers as appropriate in developing and prescribing regulations that govern the general operation and management of the agency."[96] Section 1204(b) provides that the Board should have the authority to prescribe such regulations as may be necessary for the performance of its function.

The rationale proffered as the basis of the proposals — that congressional designation of the chairman of MSPB as "chief executive officer and administrative officer of the Board" encompasses sole authority over such matters as budget formulation and delegation of substantive board functions — is contrary to the history of the development of the position of chairperson of multi-member agencies and the law that has evolved in relationship to that development. It is well established that chairpersons are not the "heads" of federal collegial bodies, such as MSPB, in a legal sense.[97] The MSPB chairman "exercises the executive and

---

[91] McPhie responses, supra note 66, at 11.

[92] Id. at 13.

[93] Id. at 10, 13.

[94] Id. at 10

[95] Id. at 12.

[96] *Id.*

[97] See *Freytag* v. *Commission of Internal Revenue*, 501 U.S. 868,887 note 4, 916-920(1991)(See also Scalia, concurring, arguing that the term "Head of Department," for the constitutional purposes of the appointment of inferior officers, encompasses collegial bodies such as the Securities and Exchange Commission, the Federal Communications Commission, and the Commodities Futures Trading Commission acting as a body); *Silver* v. *U.S. Postal Service*, 951 F. 2.d. 1033(9th Cir. 1991) (concluding that the nine governors of the (continued...)

administrative functions of the Board," which may be defined or limited by a majority vote of the board. Congress could have defined the terms "executive and administrative" functions to encompass the budget, delegation, or other substantive functions, but it did not, and we are unaware of it doing so with the chairs of similar independent agencies in the past.

More particularly, a close examination of the historical evolution of the position of chair of independent regulatory agencies indicates that the chairman of no other multi-member independent agency is in any constitutional or legal sense the "head" of such a collegial body. The concept of providing for appointment of the MSPB chairman by the President from among its members, and making the chairman subject to at-will removal from the chairmanship by the President (but not as a member), traces back to the recommendations of the first Hoover Commission that such multi-member commissions would function more efficiently with respect to housekeeping and day-to-day operations by placing primary responsibility for such affairs with a chairperson, but was understood not to have meant to effect a large-scale transfer of significant substantive powers and authorities to the chairperson from the body as a whole. President Truman, in submitting the Reorganization Plans creating chairpersons for the SEC and other independent regulatory agencies for congressional approval in 1950, emphasized that "the plans only eliminate multi-headed supervision of internal administrative functioning. The Commission[s] retain policy control over administrative activities since these are subject to the general policies and regulatory decisions, findings and determinations of the commissions."[98]

Moreover, a consistent and unbroken series of Department of Justice Office of Legal Counsel decisions have held that even when legislation provides that a collegial body chairperson "shall be the Chief Executive Officer of the Board and shall exercise the executive and administrative functions of the Board," such language does not encompass the substantive and policymaking functions of the body as prescribed by the enabling statute. "The chairperson, in other words, superintends and carries on the day-to-day activities necessary to effectuate the Board's substantive decisions. He does not, absent some Board approval (such as an express delegation by the Board or the Board's acquiescence in the chairperson's actions) make those decisions by himself."[99] There is no basis, in law or practice, for deeming the chair of a collegial regulatory body as either a superior officer or the "head" of that body in a constitutional sense. A commission like MSPB substantively acts only as a collegial body, with

---

[97] (...continued)
Postal Service constitute the "head of department" and may constitutionally appoint the Postmaster General and the deputy Postmaster General, who are inferior officers subject to the authority of the Board. Finally, strong support is given this view of the law in this area by the Department of Justice. See 20 Op. OLC 124, 151-153, 164-165(1996) ("The Appointments Clause does not forbid the exercise of authority by a decisionmaking body that consists of principal officers and an inferior officer removable by them."). (Dellinger Opinion)

[98] "Special Message to the Congress Transmitting Reorganization Plans 1 Through 13 of 1950," Public Papers of Harry S. Truman, 199, 202 (1950). See also, David M. Welborn, "Governance of Federal Regulatory Agencies," 9 (1997) (discussion of reorganizations).

[99] "Division of Power and Responsibilities Between the Chairperson of the Chemical Safety Board and the Board as a Whole," Memorandum Opinion for the General Counsel of the Chemical Safety and Hazard Investigation Board from Randolph B. Moss, Acting Assistant Attorney General, Office of Legal Counsel, DOJ (June 26, 2000) at 3, 5-8.

each member exercising one vote. A chairman's exercise of "the executive and administrative functions" of such a body may be defined and limited by a majority of such body.[100]

A 1996 opinion by then Assistant Attorney General Walter Dellinger[101] asserted the Office of Legal Counsel's agreement with the Ninth Circuit's ruling in *Silver v. U.S. Postal Service*[102] that the Postmaster General was an inferior officer who could be appointed by the Board of Governors of the Postal Services.[103] With respect to the scope of the term "Head of Department," Dellinger noted that "[e]arlier Attorneys General had accorded the term a broad construction, citing "Authority of the Civil Service Commission to Appoint a Chief Examiner."[104] In that 1933 opinion the Attorney General noted that the Commission "ha[d] certain independent duties to perform," was "responsible only to the Chief Executive," and was "not a subordinate Commission attached to one of the so-called executive departments." As "an independent division of the Executive Branch," he concluded, the Commission was a "Department" for Appointments Clause purposes and its three commissioners, collectively, "the 'head of a Department' in the constitutional sense."[105] Dellinger stated that "We find this opinion persuasive and note that the Court's opinion in *Freytag* ultimately reserved the question of whether the heads of entities other than cabinet-level departments can be vested with the power to appoint inferior officers."[106]

Arguably then, the alterations suggested by these "technical corrections" would affect substantively the overall scheme of independence of MSPB. By vesting budget preparation and submission authority solely in the chairman, together with the assertions by the chairman of the exclusive control of MSPB powers vested in the board by law, the collegial nature of the board, and its political balance, could be jeopardized. With less need to negotiate with fellow board members, the chair might be more aligned with the viewpoint of the President who selected him or her. The ability to delegate substantive agency functions to persons appointed by the chairman, including "expenditure authority," concomitantly diminishes the heretofore presumed equality of the other members. Such authorities would appear to effect a significant change in the independent nature of the board.

Appellate Procedures and Summary Judgment

Section 4 of the draft legislation relates to appellate procedures and section 5 relates to powers and functions of MSPB. Section 7701(a)(1) of Title 5, United States Code, "Appellate Procedures," currently provides that:

---

[100] Ibid.

[101] Dellinger Opinion, *supra* note 97.

[102] 951 F.2d 1033 (9th Cir. 1991), discussed above at n. 97.

[103] Dellinger Opinion at 29-30, 31 note 97.

[104] 37 Op. Att'y Gen. 227 (1933).

[105] Id. at 229-231.

[106] Dellinger Opinion at, supra n. 97 at 151-153.

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right —

(1) to a hearing for which a transcript shall be kept; . . . .

Section 4 of the draft bill would amend this language to state that:

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board under any law, rule, or regulation. An appellant shall have the right —

(1) to a hearing for which a transcript will be kept, subject to the provisions of section 1204(b) of this title as amended by this Act; and . . . .

Section 5 would redesignate section 1204(b)(3) of Title 5 of the U.S. Code as subsection (b)(4) and insert after subsection (b)(2)(B) a new subsection (b)(3) to read as follows:

(B)(3) Any member of the Board, any administrative law judge appointed by the Board under section 3105, and any employee designated by the Board may, with respect to any party, grant a motion for summary judgment when it has been determined that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

Summary Judgment Background. Summary judgment authority permits an agency to dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that there is no genuine dispute as to any material fact, and that the party seeking the motion is entitled to a judgment, in whole or in part, as a matter of law.[107] "In an adjudicative context, an agency has discretion to forgo a hearing through summary judgment. It is proper to do so where there is no genuine issue of material fact."[108]

"Summary judgment in administrative adjudications is well accepted."[109] Administrative agencies, like courts, hold hearings for the purpose of weighing evidence to determine whether to give credence to facts asserted by one party or the other before deciding which law should apply to them. If pleadings and other documents presented before a hearing, however, reveal that the parties agree, i.e., there is "no genuine issue" on some or all of the "material" facts, an adjudicating official can dispense with an evidentiary hearing completely or limit one only to disputed facts. A summary judgment in whole or in part for one party can be entered by applying the appropriate law to the undisputed facts. If the parties agree on eight of 10 facts, for example, an adjudicating official can issue a summary judgment on the undisputed ones, but

---

[107] See Charles H. Koch, Jr., *Administrative Law and Practice* § 5.42 (2d ed. 1997) (hereinafter Koch) and Federal Rule of Civil Procedure 56(c) in 28 *U.S. Code Appendix*.

[108] Koch at § 5.42.

[109] Ibid., citing *Puerto Rico Aqueduct Sewer Authority v. Environmental Protection Agency*, 35 F.3d 600 (1st Cir. 1994), *cert. denied* 513 U.S. 1148 (1995). The Puerto Rico case indicated that many agencies have promulgated regulations to allow them to issue summary judgments. These agencies include the Nuclear Regulatory Commission, the Federal Trade Commission, the Food and Drug Administration, the Federal Communications Commission, the Environmental Protection Agency, the National Labor Relations Board, and the Occupational Safety and Health Administration, but not the Securities and Exchange Commission. See 35 F.3d at 606 for the citations to summary judgment authorities for these agencies in the *Code of Federal Regulations*.

holds an evidentiary hearing to determine which party's version of the two disputed facts should be accepted before applying the appropriate law and entering a judgment.

Agency Justification. As noted above, Section 7701(a)(1) of Title 5 of the United States Code, in relevant part, currently provides that, ". . . An appellant shall have the right — (1) to a hearing for which a transcript shall be kept; . . . ." The board's justification accompanying the draft bill states that the Court of Appeals for the Federal Circuit has held that this unqualified grant of "a right to a hearing" denies the board authority to issue summary judgments.[110] The court reached this conclusion because the joint explanatory statement to the conference report to the Civil Service Reform Act of 1978 (P.L. 95-454) reveals that the House position granting an appellant a right to a hearing was included in the final bill; the Senate position, which would have granted the board summary judgment authority, was rejected.[111]

The justification asserts the board's belief that it has developed, over a period of almost 30 years, a reputation for adjudicating appeals in a fair and impartial manner and that the board intends to use its summary judgment authority, if granted, sparingly. With this authority, the board, according to the justification, will be able (1) to terminate lengthy appeals without going to a hearing, thereby avoiding the cost and delay of further proceedings; (2) to require parties to show proof of their claims or defenses instead of resting on their pleadings; (3) to narrow the issues to be addressed during the hearing by disposing of particular claims or defenses through a partial summary judgment; and (4) to encourage parties to consider settlement by targeting areas in which parties are most vulnerable.

Analysis. MSPB's justification states that the Crispin case held that the board does not have summary judgment authority because the conference managers to the bill enacted as the Civil Service Reform Act of 1978 rejected the Senate's proposal that would have granted it, but it does not elaborate on the text of that proposal. That text merits attention because it reveals some safeguards that the 2006 MSPB draft legislation does not expressly provide.

Section 5 of the draft bill would amend Section 1204 of Title 5 by adding a new subsection (b)(3) to state that a board adjudicating official ". . . may, with respect to any party, grant a motion for summary judgment when it has been determined that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This text is silent on issues such as what standard and what evidence an adjudicating official at the board would use to determine whether or not "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Moreover, it does not address the stage of an appeal when this determination would be made. For example, would an adjudicating official rule on a motion for summary judgment immediately after an appellant has filed an appeal and an agency has filed its answer? Would the determination that there is no genuine issue as to any material fact be based solely on the pleadings, or would a party who has not filed a motion for summary judgment be given an opportunity to obtain information needed adequately to respond to it?

---

[110] "Merit Systems Protection Act Board Reauthorization Act of 2006: Justifications for Legislative Proposals" at 3, citing *Crispin v. Department of Commerce*, 732 F.2d 919 (Fed. Cir. 1984).

[111] See H. Rept. 95-1717 at 137 (1978), quoted in *U.S. Code Congressional and Administrative News* 2723, 2871 (1978).

The draft bill differs with the text of the summary judgment subsection of the bill, S. 2640, 95th Congress, 2nd session, the Civil Service Reform Bill of 1978, that was reported to the Senate. Section 205 of the Senate bill, amending 5 U.S.C. Sections 7701(b) and (c), provided that:

Section 7701. Appellate procedures.

> (b) The Board may refer any case appealable to it to an administrative law judge appointed under section 3105 of this title, or to an appeals officer, who shall, except as provided in subsection (c) of this section, render a decision after conducting an evidentiary hearing with an opportunity for cross-examination.
> . . . .
>
> (c) At any time after the filing of the appeal, any party may move for summary judgment. The adverse party shall have a reasonable time, fixed by regulations of the Board, to respond. If the response of the adverse party shows that he cannot for reasons stated present facts essential to justify his opposition, the motion may be denied or a continuance may be ordered to permit affidavits to be obtained or depositions to be taken or discovery to be had. If the administrative law judge or appeals officer finds, based on the written submission of the parties and other materials in the record that there are no genuine and material issues of fact in dispute, the administrative law judge or appeals officer shall grant a summary decision to the party entitled to such a decision as a matter of law. The administrative law judge or appeals officer may, at the request of either party, provide for oral presentation of views in coming to a decision under this subsection.[112]

The description of this language in the Senate report states that:

Sections 7701(b) and (c) govern the type of hearing an employee must receive before the Board. The committee amended this provision of the bill to make it absolutely clear that an employee would receive a full evidentiary hearing in any case where there is a dispute as to any genuine and material issue of fact — that is, a dispute as to facts which must be resolved before a decision can be reached, and which may be most appropriately considered and resolved through the traditional adjudicatory methods used in evidentiary hearings. This would include, for example, where oral testimony and cross-examination is the best way to test the credibility of witnesses. The bill was amended by the committee to specifically provide that in such cases an evidentiary hearing should include the traditional right of cross-examination . . . .

Where there is no dispute about the facts, the presiding officer may avoid holding an evidentiary hearing since in these cases a full hearing is unnecessary. The committee amendment specifies the procedure either party must follow if it requests summary judgment on the grounds there are no factual disputes in the case. The wording adopted by the committee assures the employee a full opportunity to present his case before a decision is made. The presiding officer may authorize the conduct of discovery procedures so that the employee has a chance to assemble his case before a decision on the summary judgment is rendered. This is especially important because often the agency alone will possess the records the employee needs to successfully

---

[112] S. Rept. 95-969, pp. 223-224.

> argue his case. The administrative law judge or appeals officer may afford the parties the right to an oral argument before a decision is reached on the summary judgment motion.[113]

This report passage highlights some safeguards for possible consideration concerning whether to grant summary judgment authority to the board. It suggests that an employee or applicant who appeals an adverse action with the board may be at an informational disadvantage if an agency, in response to an appeal, should move for a summary judgment based solely on the pleadings. The passage adds that an appellant should be afforded an opportunity to obtain affidavits or take depositions or conduct discovery because "often the agency alone will possess the records an employee needs to successfully argue his case."[114] These processes would enable an appellant to respond in an informed way to a summary judgment motion before a board adjudicating official rules on it.

A commentator on administrative law has observed that:

> Summary judgment in the administrative context is linked inextricably to Federal Rule 56 [of the Federal Rules of Civil Procedure]. As incorporated in Rule 56 of the Federal Rules, a summary judgment makes possible the prompt disposition of a case on its merits without a formal trial if there is no 'genuine issue as to material fact.' The motion may be made as to some or all of the claim in order to claim that 'as a matter of law' the moving party should prevail.[115]

Rule 56 permits a party seeking to recover on a claim or a defending party to "move with or without supporting affidavits, for a summary judgment in the party's favor as to all or any part thereof," i.e., a claim. Like the language in the Civil Service Reform Bill that was reported to the Senate in 1978, Rule 56 prescribes a procedure that may be followed when a party who has not moved for a summary judgment, i.e., an adverse party, lacks information on which to base a response. Rule 56(f) states that:

> Should it appear from the affidavits of a party opposing the [summary judgment] motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment and may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

---

[113] Ibid., at 53-54 (Emphasis supplied.). The corresponding explanation of language that was reported to the House in section 205 of H.R. 11280 in the committee report states that, "An employee or applicant is entitled to a hearing on the record and may be represented by an attorney or other person[,]" but does not elaborate on the reason. See H. Rept. 95-1403 at 22 (1978).

[114] See 5 U.S.C. § 7513, which indicates that an employee who has been the subject of a major adverse action such as a removal is entitled to a written decision from the agency and the reasons that it imposed an adverse action; the agency is required to maintain copies of a notice of a proposed adverse action, the employee's answer when written or a summary if made orally, and any order effecting an adverse action, together with supporting materials and to furnish these materials to MSPB and to the affected employee upon request. Under Section 7513, an employee does not have an absolute right to a hearing in an adverse action; the section provides that, "An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer under subsection (b)(2) of this section." See also 5 C.F.R. § 1201.24, a provision of MSPB regulations, which identifies the information that an appellant must include in an appeal document.

[115] Koch at § 5-42.

The text of a portion of the text in the Senate bill relating to this matter is identical to the text of Rule 56(f).

In its draft legislation, MSPB has proposed to Congress amendments to some statutory provisions to enable the board to issue summary judgments. As noted above, this proposal does not address issues such as the standard that an adjudicating official would use to grant or deny a summary judgment or the stage of an appeal when a decision would be made. If Congress should adopt the language that the board has proposed, it is possible that the board in the future may address these issues by promulgating regulations.

Two agencies that have been granted authority by Congress to develop new personnel systems and to waive provisions of Chapter 77 ("Appeals") of Title 5 of the United States Code — the Department of Homeland Security (DHS) and the Department of Defense (DOD) — have issued final regulations that prescribe conditions under which an evidentiary hearing will be required in the new DHS and DOD personnel systems. Both departments were required by law to consult with MSPB before issuing regulations relating to appellate procedures.[116]

The Secretary of DHS and the Director of OPM jointly promulgated regulations, codified at 5 C.F.R. 9701.706(a), relating to MSPB appellate procedures. It provides, in relevant part, that, "A covered Department employee may appeal an adverse action identified under § 9701.704(a) to MSPB. Such an employee has a right to be represented by an attorney or other representative, and to a hearing if material facts are in dispute . . . ." (emphasis supplied). Section 9701.706(k)(5) states that, "When there are no material facts in dispute, the adjudicating official must render summary judgment on the law without a hearing. However, when material facts are in dispute and a hearing is held, a transcript must be kept."

The Secretary of DOD and the Director of OPM jointly issued regulations, codified at 5 C.F.R. 9901.807(e)(2), relating to decisions without a hearing under appellate procedures. The regulations state that:

> Decisions without a hearing. If the AJ [administrative judge] determines upon his or her own initiative or upon request of either party that some or all material facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing, including filing evidence and/or arguments, within 15 calendar days, issue an order limiting the scope of the hearing or issue a decision without holding a hearing.

The DHS regulation (5 C.F.R. § 9701.706(k)(5)), which mandates that an MSPB adjudicating official must render a summary judgment without a hearing when no material facts are in dispute, was challenged by the National Treasury Employees Union and other plaintiffs on the ground that it exceeded authority that Congress had granted the department in a provision of the Homeland Security Act of 2002. Codified at 5 U.S.C. § 9701(f)(2), this provision states that appellate regulations must be consistent with due process requirements and advance fair, efficient, and expeditious handling of departmental matters. The District Court for the District of Columbia rejected this assertion in National Treasury Employees Union v. Chertoff.[117] The court held that granting DHS summary judgment authority by regulation was reasonable,

---

[116] 5 U.S.C. § 9701(f)(1)(B)(ii) and (2)(A) for DHS and 5 U.S.C. § 9902(h)(1)(B)(ii) for DOD.

[117] 385 F.Supp.2d 1 (D.D.C. 2005).

consistent with the statutory purpose, and entitled to deference.[118] The Court of Appeals for the District of Columbia Circuit affirmed this holding in *National Treasury Employees Union* v. *Chertoff*.[119]

The Court of Appeals for the District of Columbia Circuit in *American Federation of Government Employees* v. *Gates*[120] held that some of the appeals procedures met the "fair treatment" standard, reversing the decision of the district court, and that others were not ripe for judicial review until the Department of Defense exercised them. Like the district court, the court of appeals did not address the summary judgment procedure.

These provisions of the DHS and DOD regulations illustrate the approaches that agencies have taken with respect to summary judgment authority and the right of parties to a hearing. The DHS regulation provides that if a board adjudicating official finds that there is no genuine issue or dispute on material facts, the official "must render a summary judgment." It does not expressly provide an opportunity for a party to respond before an adjudicating official makes this decision. The DOD regulation also states that an adjudicating official may limit the scope of a hearing or decide an appeal without a hearing if the official determines that some or all material facts are not in genuine dispute, but conditions this authority on giving the parties an opportunity to respond in writing and to file evidence and/or arguments before the official reaches a decision.

In deliberating on the board's proposed language to grant summary judgment authority, Congress may wish to consider whether to adopt or reject the language that the board has proposed or to grant this authority with some modifications to enable parties to obtain information that would permit them to respond to a summary judgment motion before a board adjudicating official rules on it. The board has indicated that it would be willing to consider including in regulations or in the proposed bill safeguards similar to those that appeared in the 1978 Senate bill and in Rule 56 of the Federal Rules of Civil Procedure. These safeguards would enable a party to obtain information needed to respond in an informed way to a motion for summary judgement.

Exemption from the Government in the Sunshine Act

Proposal and Background. Section 5(j) of the draft legislation would authorize the chairman, "in his or her sole discretion, [to] call a meeting of the members of the Board without regard to section 552b [of Title 5 of the *United States Code*] at which the members may jointly conduct or dispose of agency business." In effect, this proposed provision would exempt MSPB from the Sunshine Act.

The Sunshine Act, initially enacted in 1976, covers federal executive agencies headed by collegial bodies with two or more members, a majority of whom are appointed by the President

---

[118] 385 F.Supp.2d at 37.

[119] 452 F.3d 839 (D.C.Cir. 2006). See CRS Report RL33052, *Homeland Security and Labor Management Relations: NTEU v. Chertoff*, by Thomas J. Nicola and Jon O. Shimabukuro, for a discussion of the decisions by the District Court and the Court of Appeals.

[120] No. 06-5113a (May 18, 2007), available at www.cadc.uscourts.gov by decision date.

with the advice and consent of the Senate.[121] It has been estimated that more than 60 federal collegial bodies, such the Securities and Exchange Commission, the National Museum Services Board, and the National Labor Relations Board, either are covered by the act or have voluntarily adopted some of its provisions.[122] The act provides that covered agencies must hold certain meetings in public. In general, these include meetings during which "deliberations determine or result in the joint conduct or disposition of official agency business."[123] Although such meetings must be open to public observation, agencies are not required by the act to allow public participation.[124]

Under the Sunshine Act, agency meetings are presumed to be open. An agency must publish a public notice prior to an agency meeting, indicating the time, location, and subject of the meeting; whether the meeting is open or closed; and the name and telephone number of the official designated to respond to requests for information about the meeting.

An agency may close a portion or all of a meeting and withhold information if the meeting involves any of 10 exemptions:

(1) national defense or foreign policy matters that are specifically authorized by an executive order to be protected and are properly classified;
(2) internal personnel rules and practices;
(3) matters specifically exempted from disclosure by statute;
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
(5) formal censure or accusation of a crime;
(6) clearly unwarranted invasion of personal privacy;
(7) law enforcement investigatory records or information;
(8) information contained in, or related to, reports used by agencies responsible for the regulation or supervision of financial institutions;
(9) information whose premature disclosure would:
    (a) lead to financial speculation or significantly endanger a financial institution; or
    (b) significantly frustrate a proposed agency action; or
(10) issuance of a subpoena or other related judicial matter.

An agency must follow a prescribed set of procedures when closing a meeting, including a majority vote of the members and certification by the general counsel that the meeting may properly be closed. The act also provides that "[w]henever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public" under exemption (5), (6), or (7) "the agency, upon request of any one of its members,

---

[121] 5 U.S.C. § 552b(a)(1).

[122] Richard K. Berg, Stephan H. Klitzman, and Gary J. Edles, *An Interpretive Guide to the Government in the Sunshine Act*, 2nd ed. (Chicago: ABA Publishing, 2005), p. xv.

[123] 5 U.S.C. § 552b(a)(2).

[124] See *We the People, Inc. of the United States* v. *Nuclear Regulatory Commission*, 746 F. Supp. 213, 217 (D.D.C. 1990).

shall vote ... whether to close the meeting."[125] An agency's action to close a meeting is subject to judicial review.

Agency Justification. The justification for the draft legislation notes that, "[w]hen adjudicating cases, the responsibilities of the Board's three members are analogous to those of an appellate court panel." It asserts that MSPB's functioning in this capacity is impaired by the constraints imposed by the Sunshine Act. It states that, "[t]he procedures mandated by the Sunshine Act make it practically impossible for the Board to meet to consider the merits of even a small portion of its appellate caseload." The justification acknowledges that discussions of appellate cases are exempt, but reports that the Sunshine Act problem arises from the intermingling of such discussions and the larger issues:

> Portions of a meeting pertaining to the agency's disposition of a particular case are exempt from the requirement of public observation. However, a meeting scheduled to dispose of a particular case could lead to discussions of subject matters that are subject to the public observation requirement. Moreover, the open nature of such meetings necessarily impedes free discussion of complex and sensitive issues. Given the Board Members' concerns that the line between informal discussions and "meetings" covered by the Sunshine Act is often difficult to discern, the Board members typically avoid meeting to discuss any specific petitions for review. Instead, the Board members circulate various draft opinions until a final resolution is reached among all sitting members of the Board. This inefficient process slows the work of the Board and unnecessarily stifles free and thoughtful discussion and interaction by the Board members.

Analysis. MSPB sums up its justification for this proposed change by stating, "the Board requests an exemption from the requirements of the Sunshine Act when it exercises its adjudicatory function." Yet the legislative language seemingly would apply to any meeting of the board, and not merely those at which adjudication is conducted. If it is solely the adjudicatory function that MSPB would like to shield from the Sunshine Act, the legislative language could be more narrowly tailored for that purpose. Otherwise, the provision would seemingly apply to meetings of the board that have no relation to the adjudication of individual cases.

It appears, however, that the problem that this proposed provision purports to solve relates to MSPB's operational patterns. As the chairman acknowledged in recent Senate testimony, subsection (b)(10) already allows adjudicatory meetings to be closed.[126] But MSPB has argued that deliberations of the board at adjudicatory meetings could lead to deliberations about broader issues that require such meetings to be re-opened. MSPB has not been alone in facing this issue. Close observers of the implementation of the Sunshine Act summarize the issue and the current legal thinking in this area:

---

[125] 5 U.S.C. § 552b(d)(2).

[126] U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Oversight and Government Management, the Federal Workforce and the District of Columbia, *Safeguarding the Merit System Principles: A Review of the Merit Systems Protection Board and the Office of Special Counsel*, hearing, 110th Cong., 1st sess., Mar. 22, 2007. According to a transcript of the hearing prepared CQ.com, with regard to closed adjudicatory meetings, Chairman McPhie stated, "Well, you can do it under (b)(10), but you still have to do everything the Sunshine Act requires of you. You've got to give the notice. You've got to have an agenda, say what the agenda is. And you can close that portion of the meeting and engage in a discussion" (p. 23).

> A recurring issue in Exemption 10 cases is whether, and to what degree, an agency may blend its discussion of a particular case with a discussion of broader issues. A threshold inquiry is whether agency deliberations will deal with the specifically enumerated topics that trigger the exemption — for example, whether the agency deliberations will deal with "the agency's participation in a civil action." But the mere fact that an agency meeting may be devoted in part to exempt matters does not automatically permit the agency to close the meeting in its entirety. Agencies are required to "make every reasonable effort to segregate the exempt from the nonexempt." However, the D.C. Circuit has recognized that "[f]or purposes of Exemption 10 . . . there can be no hard-and-fast distinction between litigation strategy and policy questions; what matters is simply that the agency deliberations in question deal with 'the agency's participation in a civil action.'" In other words, agencies are not required to segregate a discussion of a civil action into the litigation and policy aspects necessarily implicated in that action and open up the discussion of the policy aspect. This is not to say, however, that an agency may avoid public discussion of policy questions merely because the policy developed might be implemented through civil actions. Indeed, the General Counsel of the Federal Trade Commission has suggested that "[t]he conventional wisdom . . . is that the agency may not meet in closed session to develop a consistent approach for application in future cases.'"[127]

It could be argued, then, that the Sunshine Act, as interpreted, might be sufficiently flexible to allow MSPB to meet on adjudicatory matters and occasionally venture into policy discussions, as long as such discussions do not lead to the establishment of new policies.

MSPB also states that members might feel inhibited from engaging in candid discussions in public. They are also not alone in expressing this concern. Some research has suggested that open meeting requirements may have reduced collegiality by creating meeting conditions that discourage frank discourse. The results of one study of multi-member agency officials suggested that reluctance to discuss substantive issues at open meetings is common.[128] Citing former officials' recollections of pre-Sunshine Act processes, some hold that better, more informed decision making would result from a more collegial process. They have advocated amending the act to provide for a pilot project in which agencies would have greater leeway to close a meeting. Under the proposal, a "detailed summary" would be made available to the public within five days of the meeting. In the event that such a project were successful, Congress could incorporate such changes government-wide.[129]

Some researchers question the view that collegial decision making was more deliberative and meaningful prior to the implementation of the Sunshine Act. Decisions from that era, they assert, "frequently reflected more the influence of staff or of chairpersons in association with staff than a true amalgamation of member views informed by staff expertise."[130] They also

---

[127] Richard K. Berg, Stephan H. Klitzman, and Gary J. Edles, *An Interpretive Guide to the Government in the Sunshine Act*, 2nd ed. (Chicago: ABA Publishing, 2005), pp. 94-95, footnotes omitted. The omitted footnotes to the text cite several district and appellate court opinions supporting the authors' points.

[128] David M. Welborn, William Lyons, and Larry W. Thomas, "Implementation and Effects of the Federal Government in the Sunshine Act," *Administrative Conference of the United States: Recommendations and Reports 1984* (Washington: GPO, 1985), pp. 199-261.

[129] Administrative Conference of the United States, "Report & Recommendation by the Special Committee to Review the Government in the Sunshine Act," *Administrative Law Review*, vol. 49, spring 1997, pp. 421-428.

[130] David M. Welborn, William Lyons, and Larry W. Thomas, "The Federal Government in the Sunshine Act (continued...)

argue that evidence suggests that "members are inclined to prepare more thoroughly for open meetings than for closed ones,"[131] and are, therefore, better informed in their decision making than they were prior to the act. Opponents of altering the Sunshine Act to give agencies more leeway in closing meetings have also suggested that it is incumbent upon members of multi-member agencies to shed their reluctance to deliberate more meaningfully in public meetings.[132]

Should the MSPB chairman be empowered to close any board meeting, at his or her discretion, to avoid the need to potentially re-open the meeting or the inhibition of frank discussion? It could be argued that the inherent inconvenience to, and inhibition of, members and staff, resulting from this method of complying with Sunshine Act requirements should be weighed against the government policy embodied in the act, that "the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government."[133] One question, in this case, is whether or not the public interest in knowing the philosophy and reasoning of the board is outweighed by the operational difficulties the Sunshine Act requirements might introduce.

As a practical matter, it is worth noting that MSPB has, in effect, appeared to have avoided Sunshine Act requirements since the end of 2001, when the last Sunshine Act meeting of the board was held. The board reports that the "adjudication of cases is not generally done in a meeting. Rather each member of the Board adjudicates cases independently."[134] Other matters, such as management issues, strategic plans, and workload are generally discussed in meetings of the senior staff which are attended by the board's office heads and the chief counsels to the board members. While board members generally do not attend meetings of the senior staff, any one of the board members may, on occasion, sit in on the meetings.[135] The chief of staff then briefs the chairman, and chief counsels brief the other members. Perhaps, if the chairman were able to "in his or her sole discretion, call a meeting of the members of the Board" without regard to the Sunshine Act, the board would conduct some of its business through direct meetings of the principals.

The draft legislation presented by the board does not seek to dismantle the Sunshine Act for all agencies. As noted above, however, MSPB is not alone in noting the potential operational difficulties associated with compliance with its provisions. Nor is it the only agency to seek exemptions from its requirements. Some agency leaders have asked Congress to amend the statute to allow boards and commissions greater flexibility to close their deliberations.[136] To the

---

[130] (...continued)
and Agency Decision Making," *Administration and Society*, vol. 20, Feb. 1989, p. 470.

[131] Ibid., p. 472.

[132] This position is ascribed to representatives of the press by Randolph May in "Reforming the Sunshine Act," *Administrative Law Review*, vol. 49, spring 1997, p. 418.

[133] P.L. 94-409, § 2.

[134] MSPB July 2006 Response to CRS.

[135] MSPB Aug. 2006 Response to CRS.

[136] See, e.g., "Letter from Michael K. Powell, Chairman, and Michael J. Copps, Commissioner, Federal Communications, to the Honorable Ted Stevens, Chairman, Senate Committee on Commerce, Science, and Transportation, February 2, 2005," in Berg, Klitzman, and Edles, pp. 344-346.

degree that the Sunshine Act exemption arguments raised by MSPB are persuasive, Congress might elect to revisit the act and its provisions, generally.

If Congress were to address this issue, it might respond in a number of ways. It could, for example, commission a group of public administration experts, such as the National Academy of Public Administration (NAPA), to study the issues raised above. Alternatively, a committee of Congress could conduct oversight hearings to assess the act's functioning and weigh its benefits and drawbacks as presented by representatives of affected government agencies, administrative procedure experts, and advocates of government openness.[137] In addition to, or instead of, these options, legislation amending the Sunshine Act might be developed and considered.

OSC Background

History and Purpose of OSC

The United States Office of Special Counsel (OSC) is an independent investigative and prosecutorial agency within the executive branch which litigates before the Merit Systems Protection Board (MSPB). It is headquartered in Washington, DC, and has field offices in Dallas, Texas; Oakland, California; Detroit, Michigan; and Washington, DC. Prior to obtaining this independent status through the enactment of the Whistleblower Protection Act of 1989, P.L. 101-12, as amended, on April 10, 1989,[138] the OSC was part of MSPB. Reorganization Plan No. 2 of 1978, effective January 1, 1979, created MSPB, as one of three agencies, to replace the United States Civil Service Commission. P.L. 95-454, the Civil Service Reform Act (CSRA) of 1978, as amended, codified the Reorganization Plan in statute.[139] P.L. 107-304 reauthorized OSC through FY2007.[140]

As stated earlier, the Senate Committee on Governmental Affairs report that accompanied the CSRA noted the need for a "vigorous protector of the merit system." The report also stated that "The Special Counsel will have power to initiate disciplinary action against those who knowingly and willfully violate the merit principles by engaging in prohibited personnel practices" and listed such actions as simple reprimand, removal, suspension, demotion, exclusion from Federal employment for up to 5 years, and fines up to $1,000." According to the report, "For the first time, and by statute, the Federal Government is given the mandate — through the Special Counsel of the Merit Systems Protection Board — to protect whisteblowers from improper reprisals." These protections included "petition[ing] the Merit Board to suspend

---

[137] The most recent congressional hearing concerning, in part, the implementation of the Sunshine Act was in 1996. (See U.S. Congress, House Committee on Government Reform and Oversight, Subcommittee on Government Management, Information, and Technology, *Federal Information Policy Oversight*, hearings, 104th Cong., 2nd sess., June 13, 1996 (Washington: GPO, 1996).

[138] 103 Stat. 16; 5 U.S.C. §1201 et seq.

[139] P.L. 95-454, Title II, §202(a), Oct. 13, 1978, 92 Stat. 1111, at 1121-1122, 1131; 5 U.S.C. §§1201-1206.

[140] P.L. 107-304, §2, Nov. 27, 2002, 116 Stat. 2364; 5 U.S.C. §5509 note.

retaliatory actions against whistle blowers" and initiating "[d]isciplinary action against violators of whistle blowers' rights."[141]

An analysis of the Whistleblower Protection Act of 1989, which established OSC as an independent agency, stated that the "primary responsiblities" of the OSC "have remained essentially the same as set forth in the CSRA" and quoted a portion of the debate in the House of Representatives on the legislative intent of the Act:

> Individuals should be able to go to the Special Counsel to make a disclosure ... to complain about a prohibited personnel practice ... or to allege a violation of another law within the jurisdiction of the Special Counsel, ... without any fear that the information they provide or the investigation they set off will be used against them. Simply put, the Special Counsel must never act to the detriment of employees who seek the help of the Special Counsel.[142]

Agency Management

OSC is headed by the Special Counsel, who is appointed by the President, by and with the advice and consent of the Senate, for a five-year term. The Special Counsel may continue to serve beyond the expiration of the term until a successor is appointed. He or she may not continue to serve for more than one year after the term would have expired. The Special Counsel must be an attorney who, by demonstrated ability, background, training, or experience, is especially qualified to carry out the functions of the position. A Special Counsel appointed to fill a vacancy occurring before the end of a predecessor's term of office serves for the remainder of the term. The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. He or she may not hold another government office or position, except as otherwise provided by law or at the direction of the President.[143]

The current Special Counsel is Scott J. Bloch, who was confirmed on December 9, 2003, and whose term expires January 5, 2009.[144]

Powers and Functions of OSC

OSC's statutory authority is codified at 5 U.S.C. §§1212 through 1219. The agency states that its "primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing." Other aspects of the mission are to "facilitate disclosures of wrongdoing in the federal government," "enforce restrictions on political activity by government employees," and "participate in enforcement of the Uniformed Services Employment and Reemployment Rights Act." According to the OSC, it carries out this mission by:

---

[141] U.S. Congress, Senate Committee on Governmental Affairs, *Civil Service Reform Act of 1978*, report to accompany S. 2640, S. Rept. 95-969, 95th Cong., 2nd sess. (Washington: GPO, 1978), pp. 7-8.

[142] CRS Report 97-787A, *Whistleblower Protections for Federal Employees*, by L. Paige Whitaker and Michael Schmerling, pp. 15-16. (Available from author.)

[143] 5 U.S.C. §1211.

[144] Mr. Bloch was sworn in on January 5, 2004.

Investigating allegations of prohibited personnel practices and other improper employment practices within its jurisdiction, and seeking any appropriate corrective or disciplinary action;

Providing an independent, secure channel for disclosure and resolution of wrongdoing in federal agencies;

Interpreting and enforcing Hatch Act provisions on permissible and impermissible political activity;

Promoting greater understanding of the rights and responsibilities of government employees; and

Enforcing the law that protects service members reemployment rights[145]

A CRS Report, entitled *The Whistleblower Protection Act: An Overview*, analyzes the 5 U.S.C. §§1212-1215 provisions.[146] The remaining statutory provisions are discussed below.

Other matters within the jurisdiction of the Office of Special Counsel. In addition to the authority otherwise provided in chapter 12 of Title 5, United States Code, the Special Counsel must conduct an investigation of any allegation concerning:

1. political activity prohibited under 5 U.S.C. chapter 73, subchapter III, relating to political activities by federal employees;

2. political activity prohibited under 5 U.S.C. chapter 15, relating to political activities by certain state and local officers and employees;

3. arbitrary or capricious withholding of information prohibited under 5 U.S.C. §552. The Special Counsel cannot investigate any withholding of foreign intelligence or counterintelligence information the disclosure of which is specifically prohibited by law or by executive order;

4. activities prohibited by any civil service law, or regulation, including any activity relating to political intrusion in personnel decisionmaking; and

5. involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action. The Special Counsel cannot investigate if he or she determines that the allegation may be resolved more appropriately under an administrative appeals procedure.

If the Special Counsel receives an allegation concerning a matter under items 1, 3, 4, or 5, immediately above, he or she may investigate and seek corrective action under section 1214 of

---

[145] U.S. Office of Special Counsel, *The Role of the U.S. Office of Special Counsel*, Jan. 2006. Available on the Internet at: [http://www.osc.gov/documents/pubs/oscrole.pdf].

[146] CRS Report RL33918, *The Whistleblower Protection Act: An Overview*, by L. Paige Whitaker.

Title 5, United States Code and disciplinary action under section 1215 of Title 5, United States Code in the same way as if a prohibited personnel practice were involved.[147]

Transmittal of information to Congress. The Special Counsel or any employee designated by him or her must transmit to Congress, on the request of any committee or subcommittee, information and the Special Counsel's views on functions, responsibilities, or other matters relating to the OSC. The information can be transmitted by report, testimony, or otherwise, and must be transmitted concurrently to the President and any other appropriate executive branch agency.[148]

Annual report. The Special Counsel must submit an annual report to Congress on its activities, including the number, types, and disposition of allegations of prohibited personnel practices filed with it; investigations conducted by it; cases in which it did not make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, currently exists, or will occur within the 240-day period specified in 5 U.S.C. §1214(b)(2)(A)(I); and actions initiated by it before the Merit Systems Protection Board. The report must also include a description of the recommendations and reports made by the OSC to other agencies pursuant to 5 U.S.C. chapter 12, subchapter II, and the actions taken by the agencies as a result of the reports or recommendations. Recommendations for legislation or other congressional action the Special Counsel considers appropriate are included in the report as well.[149]

Public information. The Special Counsel must maintain and make available to the public:

- A list of noncriminal matters referred to agency heads under 5 U.S.C. §1213(c), together with reports from agency heads under 5 U.S.C. §1213(c)(1)(B) relating to such matters. Section 1213 covers provisions relating to disclosures of violations of law, gross mismanagement, and certain other matters.
- A list of matters referred to agency heads under 5 U.S.C. §1215(c)(2). Section 1215 covers disciplinary action.
- A list of matters referred to agency heads under 5 U.S.C. §1214(e), together with certifications from agency heads. Section 1214 covers investigation of prohibited personnel practices and corrective action.
- Reports from agency heads under 5 U.S.C. §1213(g)(1).

The Special Counsel must take steps to ensure that any lists or reports referred to above that are made available to the public do not contain any information that must be kept secret in the interest of national defense or the conduct of foreign affairs.[150]

---

[147] 5 U.S.C. §1216.

[148] 5 U.S.C. §1217.

[149] 5 U.S.C. §1218.

[150] 5 U.S.C. §1219.

Representing veterans or reservists. OSC has an enforcement role under P.L. 103-353, the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994.[151] USERRA "protects the reemployment rights of persons who are absent from their respective civilian employment due to the performance of military duties ... and makes it illegal for an employer to deny any benefit of employment on the basis of past, current, or future performance of military service." Under the law, "OSC is authorized to act as the attorney for an aggrieved person ("claimant") and initiate legal action against the involved federal employer." The OSC serves as special prosecutor of USERRA cases having merit, and as such, "seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or litigation before MSPB." The "OSC objectively reviews the facts and laws applicable to each complaint" and where "satisfied that claimant is entitled to relief, then it may exercise its prosecutorial authority and represent the claimant before the MSPB and, if required, the U.S. Court of Appeals for the Federal Circuit."[152]

Under a demonstration project authorized by P.L. 108-454, the Veterans Benefits Improvement Act of 2004,[153] OSC "has the exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit" and "also receives and investigates all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction regardless of the person's social security number." The demonstration project ends on September 30, 2007.[154]

OSC Organization and Functions

As stated earlier, OSC is headquartered in Washington, DC, and has field offices in Dallas, Oakland, Detroit, and Washington, DC. As of December 2006, OSC had 107 employees on-board.[155] In terms of organization and functions, the Immediate Office of the Special Counsel is "responsible for policymaking and overall management of OSC," including congressional liaison and public affairs activities. The agency has five operating units/divisions and five supporting offices, and are described in OSC's annual report to Congress as follows:

- The Complaints Examining Unit receives "all complaints alleging prohibited personnel practices and other violations of civil service law, rule, or regulation within OSC's jurisdiction." Claims that are potentially valid are referred to the Investigation and Prosecution Division to be investigated further.

- The Disclosure Unit receives and reviews disclosures from whistleblowers and "advises the Special Counsel on the appropriate disposition of the information disclosed." The unit determines whether agency reports of investigation "appear to be reasonable and in compliance with statutory requirements."

---

[151] P.L. 103-353, 108 Stat. §3166; 38 U.S.C. §4301.

[152] U.S. Office of Special Counsel, *Fiscal Year 2008 Congressional Budget Justification and Performance Budget Goals*, [Feb. 2007], p. 41. (Hereafter referred to as OSC Budget Justification.)

[153] P.L. 108-454, §204, Dec. 10, 2004, 118 Stat. 3606-3608; 38 U.S.C. §4301 note.

[154] OSC Budget Justification, p. 41.

[155] U.S. Office of Personnel Management, FedScope database, Dec. 2006.

- The Investigation and Prosecution Division "conducts field investigations of matters referred after preliminary inquiry by the Complaints Examining Unit." The attorneys in the division "conduct a legal analysis after investigations are completed to determine whether the evidence is sufficient to establish that a prohibited personnel practice (or other violation within OSC's jurisdiction) has occurred" and work with investigators "in evaluating whether a matter warrants corrective action, disciplinary action, or both." Cases that are not resolved through negotiation with the agency involved are presented before MSPB. Investigators and attorneys also "investigate alleged violations of the Hatch Act" and USERRA.

- The Hatch Act Unit enforces the Hatch Act and "issues advisory opinions to individuals seeking information about Hatch Act restrictions on political activity by federal, and certain state and local, government employees." The unit "reviews complaints alleging a Hatch Act violation and, when warranted, investigates and prosecutes the matter (or refers the matter to the Investigation and Prosecution Division for further action)."

- The USERRA Unit is located at the OSC's headquarters and is "designated to receive, investigate, analyze, and resolve ... all USERRA and related veteran-employment claims. Claims are resolved by voluntary agreement or prosecution before MSPB. The unit "educates federal agencies on their USERRA obligations."

- The Alternative Dispute Resolution Program receives the referral of selected cases from the Complaints Examining Unit for further investigation. OSC "contacts the complainant and the agency involved and invites them to participate in [its] voluntary Mediation Program." If a complaint is resolved, "the parties execute a written and binding settlement agreement," otherwise, it is referred "for further investigation."

- The Legal Counsel and Policy Division "provides general counsel and policy services to OSC, including legal advice and support on management and administrative matters; legal defense of OSC in litigation filed against the agency; policy planning and development; and management of the agency ethics program."

- The Management and Budget Division "provides administrative and management support services to OSC" to inform decisions related to program, human capital, and budget.

- The Training Office "train[s] all new employees, cross train[s] existing employees, and develop[s] specialized training in areas such as litigation skills."

- The Special Projects Unit "uses senior trial lawyers to work cases of high priority, ... conduct[s] internal research on the processes and procedures of the operational units at OSC, ... and is responsible for the project "that requires

OSC to investigate the re-employment rights of military service members under USERRA."[156]

Analysis of Draft Legislation

OSC has submitted for this reauthorization hearing seven "suggested legislative adjustments" for Subcommittee consideration, accompanied by justifications and, in some instances, draft statutory language. The suggested adjustments would (1) modify (or eliminate) OSC's potential liability for attorneys fees after an unsuccessful disciplinary action against an employee in a prohibited personnel action case instituted at the MSPB; (2) grant permission to relocate OSC outside the District of Columbia; (3) combine disciplinary penalties; (4)permit OSC to appear as amicus curiae in cases that reach the federal court system; (5) amend USERRA to grant OSC the authority to investigate all federal sector claims; (6) allow OSC to receive, investigate, analyze and prosecute veterans' preference claims for corrective action purposes; and (7) amend the statute to allow OSC's Disclosure Unit 45 days, instead of the current 15 days, to make the determination whether a whistleblower has presented information indicating that a "substantial likelihood of wrongdoing has taken place." This section of the testimony briefly addresses the justifications presented by each proposal.

Attorneys Fees

OSC advises that under current court interpretation of Section 1204(m)(1) of the MSPB statute, it may be held liable for attorneys fees after it brings an unsuccessful disciplinary action against an agency employee in a prohibited personnel practice (PPP) case at the MSPB. OSC believes this to be an improper reading of the provision which has had "a detrimental effect on legitimate OSC enforcement efforts." OSC argues that the disciplinary actions, which are initiated against agency employees only after independent investigation and determination of a law violation, are taken to enforce the law. "As such they are more akin to the prosecution by the Justice Department, after which defendants are not permitted to seek attorneys fees after an unsuccessful prosecution."

OSC's reliance on a purported analogy to criminal prosecution appears unfounded. Public Law 105-119, section 617, codified at 18 U.S.C. § 3006A note, provides in pertinent part:

> The [federal] court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) . . . may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of the title 28, United States Code. . ..

---

[156] The descriptions are summarized from U.S. Office of Special Counsel, *Report to Congress, Fiscal Year 2006*, (Washington: OSC, [2007], pp. 20-21.

The referenced section 2412 of title 28 is the Equal Access to Justice Act, and the procedures and limitation referred to have been held to be those mentioned in section 2412(d).[157] Awards of attorneys fees by federal courts and agencies generally, and to prevailing criminal defendants in particular, are discussed in CRS Report No. 94-970A, "Awards of Attorneys Fees by Federal Courts and Federal Agencies," by Henry Cohen.

The OSC justification also does not detail or particularize the "detrimental effect" on its law enforcement efforts or how it differs from the impact such ubiquitous attorneys fees provisions have had on other agencies.

Agency Relocation

Under 2 U.S.C. 72 "All offices attached to the seat of government shall be exercised in the District of Columbia, and not elsewhere, except as otherwise expressly provided by law." Because its current lease will expire before its next reauthorization OSC would like the option of relocating elsewhere in the D. C. Metropolitan area. The Committee may require more immediate, specific compelling reasons before granting that option.

Disciplinary Action

Under current law MSPB is authorized to impose a variety of disciplinary penalties against an employee: removal, reduction in grade, debarment from federal employment for up to five years, suspension, reprimand *or* a civil penalty not in excess of $1000.[158] But there can be no imposition of a combination of these penalties. OSC requests that MSPB be given the discretion to combine penalties, giving as an example the circumvention of a Board order to an agency to remove an employee who was then rehired then next day because he had not been debarred. OSC provides legislative language that would effect this purpose. Thus, under the first subsection of revised Section 1215 (a) (3) the MSPB could impose any combination of the above-described disciplinary actions, thereby allowing for increased penalties against employees who retaliate against whistleblowers.

However, it appears that the second part of the proposed legislation would *lower* the standard that the government must meet in its affirmative defense by demonstrating that it would have taken the personnel action in question even if the employee had not engaged in whistleblowing. Under current law, once the complainant has made a prima facie case, the government is required to demonstrate by "clear and convincing" evidence that it would have taken the same personnel action even in the absence of the whistleblowing disclosure. The proposed language appears to lower the standard of the government's affirmative defense to simply a "preponderance of the evidence." Prior to the enactment of the Whistleblower Protection Act of 1989 (WPA), the standard was "preponderance of the evidence." In an effort to make the statute more whistleblower protective, the standard was raised to "clear and convincing."

---

[157] See , U.S. v. Knott, 256 F. 3d. 20 (1st Cir. 2001); U.S. v. Ranger Elections Communications, Inc., 210 F. 3d., 632-33 (6th Cir. 2000)

[158] 5 U.S.C. 1215 (a) (3) (emphasis supplied).

Also of significance, the proposed language appears to make it *more difficult* for the complainant to prove retaliation for whistleblowing. Under current law, the Special Counsel need only show that the whistleblowing disclosure was a "contributing factor" in the government taking the personnel action in question. The proposed language appears to increase that burden to a "significant motivating factor." It may be noted that the WPA made it easier for a complainant to prove retaliation for whistleblowing by changing the earlier standard that the Special Counsel had to meet from "significant factor" to "contributing factor;" the proposed language appears to revert the standard back to what it was prior enactment of the WPA.

Finally, the proposed language would amend section 1215 of title 5, "Disciplinary action," whereas the current statute provides for the government's affirmative defense standard and the complainant's burden of proof in section 1214, "Investigation of prohibited personnel practices; corrective action." The significance or rationale behind amending section 1215 instead of section 1214 is not clear. The OSC's justification does not address these issues.

Special Counsel Amicus Appearances

OSC requests that it be given authority to make amicus curiae appearances in cases that go beyond MSPB to the federal court system. Such appearances need to be authorized by law. [159] As a matter of policy, the Justice Department consistently objects to according independent litigating authority of any sort outside of its control on the grounds that the executive should speak with one voice before the courts. Congress, however, has frequently authorized independent litigating authority in civil matters where it has determined that particular agencies have the knowledge, expertise and interest in particular matters or programs that make agency presentations to courts more appropriate and effective. In what might be viewed as an analogous situations, the Chief Counsel for Advocacy of the Small Business Administration " is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule [that impacts on small business interests]. In any such action the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities."[160]

Disciplinary Action Under USERRA

OSC advises the Committee that USERRA contains no disciplinary action provisions for federal sector cases. Since a violation of USERRA is not a prohibited personnel practice, OSC does not have jurisdiction to seek such disciplinary action for USERRA. To close this "loophole," OSC has submitted a bill that would give it jurisdiction to seek disciplinary actions and also grant it authority to investigate all federal sector USERRA claims. The proposal is submitted to the Committee only to inform it since the Committee on Veterans' Affairs has primary jurisdiction under USERRA. The proposal may be briefly described.

The bill would amend 38 U.S.C. § 4324 to authorize the OSC to request from MSPB disciplinary action against any federal employee who "knowingly takes, recommends, or approves (or fails to take, recommend, or approve) any action that violates USERRA provisions.

---

[159] See 28 U.S.C. 516, 518, 519 vesting control of all federal litigation in the Attorney General unless otherwise authorized by law.

[160] 5 U.S.C 312 (2000).

The remedies for a USERRA violation under current law in 38 U.S.C.§ 4324 are an MSPB order requiring an agency to comply with the statute and to compensate the complainant for any loss of wages or benefits suffered by reason of lack of compliance. Unlike PPP, there is currently no authority to discipline the perpetrator for a USERRA violation.

The authority that OSC seeks with respect to USERRA violations is analogous to the authority it has under 5 U.S.C. § 1215 to request that the Board discipline an employee who has "committed a prohibited personnel practice; violated the provisions of any law, rule or regulations; or has engaged in any other conduct within the jurisdiction of the Special Counsel as described in 5 U.S.C. § 1216 (including Hatch Act violations), or knowingly and willfully refused or failed to comply with an order of the MSPB."

This recommendation also expressly would deny to the MSPB authority to award attorneys fees in cases to discipline federal employees for violating USERRA provisions, "so that the Special Counsel will not be impeded in its effort to seek disciplinary action. . . ."

Time Frame for Processing Whistleblower Disclosures

OSC proposes that the statutory deadline of 15 days be extended to 45 days to make a determination whether there is a "substantial likelihood that information presented by a whistleblower discloses a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety." Such claims are evaluated by OSC's Disclosure Unit which does not have authority to investigate the allegations. The agency states that it must present a case that under the current statutory time frame, and in light of its vastly increased case load and limited resources, does not allow sufficient time to review and manage the cases and respond to whistleblower in the manner Congress intended. The proposal and justification appear to merit further Committee review and verification.

Mr. DAVIS OF ILLINOIS. Thank you very much. We appreciate your testimony.

Let me ask you, Mr. Rosenberg, are you saying a dual role for the chairman may not be in the best interest of the Board or the independence of the Board?

Mr. ROSENBERG. I wouldn't characterize it as a dual role. I would characterize it as a supervening role. If, in fact, what is happening is that he consults with the members and then makes the decisions—and they are policy decisions—with respect to the budget preparation and the budget submissions, that is a huge amount of control that he has. As I read the legislative history and the reason for creating it in 1978, this was supposed to be a collegial body that was supposed to work together, and not setting up a single-person agency.

Mr. DAVIS OF ILLINOIS. And so the Board should have their three members then, and then they have somebody else processing their work rather than the decisionmaking?

Mr. ROSENBERG. Well, it would be interesting to know if there is acquiescence by the other two members. The statements of the chairman appear to be that he has their acquiescence. One of the difficulties is this problem, if it is a problem, has been addressed by the Senate. It is before you. If nothing is done about it, there is a possibility of an argument that Congress has acquiesced in this subtle change in the nature of the Board.

Mr. DAVIS OF ILLINOIS. What should Congress be concerned about when considering exempting the MSPB from compliance with the Sunshine Act?

Mr. ROSENBERG. We have addressed that in the paper, and I will defer to Mr. Hogue, who has studied this program question.

Mr. HOGUE. The act requires that collegial bodies, when they are holding substantive meetings, comply with certain processes and procedures, and MSPB, in their justification, indicated that they would like exemption from this at the discretion of the Chair for the purposes of their adjudicatory functions. But in a legislative language that we were given to review, the section would allow the chairman, in his or her sole discretion, to call a meeting of the members of the Board without regard to Section 522.B, at which members may jointly conducted or dispose of agency business. It does not specify in that context the adjudicatory functions only.

In line with that, the act allows an exemption for adjudicatory type meetings, and the agency has acknowledged that they would be exempt under this.

I think that the difficulty that the agency has identified has to do with moving between discussion of specific cases, which arguably would be covered under the exemption, and moving into broader policy discussions that may be related to those cases. That is one of the difficulties that they cite. And other agencies have identified this as a difficulty when they are moving backward and forward.

Some of the literature that I reviewed in the process of looking at their proposal indicates that, based on case law, it could be argued that there is enough flexibility in the law, in the way it has been interpreted, to allow an agency or a board like MSPB to occasionally venture into discussion of broader areas, as long as they

are not establishing new policy. So perhaps that would be a solution as an alternative to giving them an exemption.

They also argue that the Sunshine Act, having open meetings inhibits candid discussion, and this is also a common complaint that comes from other agencies that are subject to the Sunshine Act. There is some evidence that has been cited in the literature that I have reviewed that indicates that candor perhaps has decreased under the Sunshine Act; however, there also have been counter-arguments made that having open meetings might encourage members to be better prepared for meetings and also that it should be incumbent on members, when they are serving in the public interest, to shed reluctance to speak candidly in open sessions.

That is what the literature that I have reviewed has said about that.

As the chairman indicated earlier, as a practical matter the Board is not holding the Sunshine meetings. Their decisionmaking is through members' staffs meeting to discuss and decide on these issues.

I guess what I would say in conclusion in my analysis is that there are difficulties with the Sunshine Act, but they are broader than just the MSPB, and other agencies have found ways to adapt. They may not be perfect, but that is how people have responded to it.

Perhaps Congress will want to come back to it at some point to resolve some of these issues.

Mr. DAVIS OF ILLINOIS. Although the flexibility may be present, is it unwieldy in any kind of way for the Board to transition into what might be called executive session when there is a need to make decisions or when there is need to discuss sensitive issues?

Mr. HOGUE. Well, it may be. I don't have examples to cite on how other agencies have done that and whether it would be unwieldy. The flexibility argument that I referred to before suggests that they might be able to remain in closed session and discuss wider issues as long as they are not making fresh policy, in which case they would want to reopen the meeting.

I am merely saying this is an avenue that may merit further exploration by the agency.

Mr. ROSENBERG. In my youth I worked at the National Labor Relations Board on a member's staff. That is an adjudicatory body, you know, just like the MSPB. In discussions of cases, it was often true and seemed natural at the time that the decision in a particular case might have an effect or might be moving toward one direction or another, and the members' discussions of those possibilities seemed a normal part of the discussion of an individual case, particularly an important one.

The five members of the board took part in it, seemed very comfortable. These were closed meetings, of course, under the exemption.

So my own personal experience is that what happens in those meetings, you know, allows for a formative discussion, an informative discussion, too.

The real problem here is the proposed legislative language is so broad that, unless it is clearly to enhance the adjudicatory excep-

tion there, it might be used in the future much more broadly. It is part of the problem of the centralization of control in the Chair.

Mr. DAVIS OF ILLINOIS. Bottom line, you really don't see any particular reason why they should be exempt?

Mr. ROSENBERG. That is for the committee's judgment, sir.

Mr. DAVIS OF ILLINOIS. Thank you, gentlemen. I don't have any further questions. I think Mr. Cummings was out, but thank you very much. We certainly appreciate your testimony, appreciate your being here, and the patience that you have displayed with us.

Mr. ROSENBERG. Thank you. It is a pleasure to be here.

Mr. HOGUE. Thank you very much.

Mr. DAVIS OF ILLINOIS. We will now hear from our third panel. I want to thank all of them for their patience and willingness to remain.

Our third panel is going to consist of Adam Miles, who is the Legislative Representative for the Government Accountability Project [GAP], a nonprofit, nonpartisan organization that supports Government and corporate whistleblowers. Mr. Miles coordinates GAP's legislative campaign to restore genuine free speech protections for Government whistleblowers and is GAP's primarily client liaison with the U.S. Office of Special Counsel.

Ms. Natresha Dawson began her public service career at the age of 17 as a stay-in-schooler. From June 25, 2005, until October 13, 2006, Ms. Dawson was employed by the Office of Special Counsel as one of two paralegal specialists initially hired for the OSC's newly created customer service unit [CSU].

Welcome, and thank you.

Ms. Lara Schwartz, is the chief legislative counsel at the Human Rights Campaign. She advocates against discriminatory practices and policy initiatives that affect the everyday lives of gay, lesbian, bisexual, and trans-gender people and their families. Prior to joining the Human Rights Campaign, Ms. Schwartz was associated with the law firm of Gilbert Heintz and Randolph, LLP, where she focused on legislative redistricting, voting rights, insurance litigation, and fair housing.

Thank you.

Ms. Beth Daley is the director of investigations at the Project on Government Oversight [POGO]. She has worked for public policy organizations in Washington, DC, for 15 years. She has conducted POGO's investigation into protections for homeland and national security whistleblowers.

Thank you all so very much.

[Witnesses sworn.]

Mr. DAVIS OF ILLINOIS. The record will show that each witness answered in the affirmative. Thank you very much.

Your statements are in the record and, of course, the green light indicates that you have 5 minutes in which to summarize your statement. The yellow light, 1 minute left. Red light, stop. We will begin with Mr. Miles.

STATEMENTS OF ADAM MILES, LEGAL REPRESENTATIVE, GOVERNMENT ACCOUNTABILITY PROJECT; NATRESHA DAWSON, FORMER OFFICE OF SPECIAL COUNSEL EMPLOYEE AND WHISTLEBLOWER; LARA SCHWARTZ, CHIEF LEGISLATIVE COUNSEL, HUMAN RIGHTS CAMPAIGN; AND BETH DALEY, DIRECTOR OF INVESTIGATIONS, THE PROJECT ON GOVERNMENT OVERSIGHT

STATEMENT OF ADAM MILES

Mr. MILES. Chairman Davis, thank you for inviting testimony from GAP today.

GAP is a nonprofit, nonpartisan organization that supports whistleblowers, and a significant component of that work is oversight of the U.S. Office of Special Counsel. From our perspective, this hearing is long overdue. The Office of Special Counsel is in a crisis of credibility and legitimacy from nearly every perspective, and much more than what we heard in the first panel, I think. We will get into some of that, and there is a lot more detail in the written testimony.

Over the years, GAP has been one of OSC's biggest cheerleaders, as well as one of its harshest critics. Our testimony today provides numerous specific examples of both positive and negative contributions that OSC has made to the merit system during Special Counsel Bloch's tenure.

Despite a few notable exceptions, our underlying assessment has to be that OSC is currently undermining, not promoting, its vital merit system role.

Special Counsel Bloch's track record of merit system violations provides the most telling example for OSC's decline under his tenure. Rather than promote free speech and other whistleblower protections within his agency, he has consistently demonstrated intolerance for the same rights that he is charged with enforcing in the rest of the Government. Morale there is down, and many of the seasoned professionals with proven track records of helping employees have left or been forced out. Mr. Bloch has politicized the office to such an extent that even the good work being done there is vulnerable to charges that OSC's mission only comes into play when that means serving the special counsel's needs.

Having said all this, we have no doubt that the agency, and especially the remaining dedicated career staff, are fully capable of advancing the agency's mission when they are given the opportunity. The problem is not the professional career staff; it is a question of priorities and leadership.

I want to be perfectly clear about that. The charges that have been made against OSC relate specifically to Mr. Bloch and his leadership, his mismanagement, and his retaliatory tendencies, not to the career staff.

There remain a few important illustrations of the role OSC can and should always play on behalf of concerned Government employees. Just recently, GAP client Richard Conrad, a Vietnam veteran and civilian mechanic with 25 years experience at the North Island Depot, brought to OSC allegations about maintenance breakdowns on fighter aircraft at North Island. The allegations were serious, and OSC took them seriously. They demanded that

the Navy Department investigate, and they did. They substantiated Mr. Conrad's allegations, and now they are following through on a reprisal complaint from Mr. Conrad, who is eligible for retirement, to make sure that he gets some relief for 16 months that he was harassed, isolated from the work force, and denied overtime pay because of his whistleblowing.

Unfortunately, Mr. Conrad is the exception, or one of the few exceptions, and his experience should be the experience for all good faith employees who have turned to OSC. Unfortunately, this level of service has been practically unheard of under Mr. Bloch's tenure.

The number of favorable actions that OSC has produced for whistleblowers—in other words, how many people is the agency actually helping—those numbers dropped 60 percent since Mr. Bloch took over the agency. And, despite claims that this number would increase in fiscal year 2006, the percentage of employees helped by OSC that year for all whistleblower and other complaints dropped to what is probably an all-time low of 2½ percent.

The explanations put forth by OSC for this lack of productivity continue to shift. Just recently, in response to questions at the Senate reauthorization hearing, Special Counsel Bloch stated that the quality of whistleblower and other complaints was not as good, and we struggled and scratch our heads to figure out, well, what can we do given the low quality of complaints.

But this effort to scapegoat the reprisal victims after he has abandoned them cannot withstand scrutiny. The truth is that for every success story like Mr. Conrad's, there are many more employees that were systematically turned away with inadequate explanation of their rights, who were not allowed to communicate with the attorney assigned to their case, or were shifted internally and then dismissed in order to cushion misleading claims about backlog clearing measures.

Our written testimony adds much more detail on the process OSC complainants are experiencing. To put it simply, the process needs to change.

We have a number of recommendations that constitute a bill of rights for the level of service, transparency, and accountability every whistleblower should receive from OSC when they file a complaint there. GAP would be pleased to work with the subcommittee staff to provide further bases and follow through on these recommendations.

I am happy to answer any questions along these lines. Thank you very much.

[The prepared statement of Mr. Miles follows:]

Testimony of ADAM MILES and THOMAS DEVINE

Government Accountability Project

"Ensuring a Merit-Based Employment System: An Examination of the Merit Systems Protection Board and the Office of Special Counsel"

House Government Oversight and Reform Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia

July 12, 2007

Chairman Davis, Ranking Member Marchant, and Members of the Subcommittee: Thank you for inviting testimony from the Government Accountability Project (GAP) at today's hearing on oversight and reauthorization of the U.S. Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB).

This hearing is long overdue. The Office of Special Counsel, a cornerstone of the merit system when it functions as Congress intended, is currently in a crisis of credibility and legitimacy from nearly every perspective. This underlying assessment is balanced during the course of this testimony with specific examples of positive and negative contributions OSC has made to the merit system since the current Special Counsel, Scott Bloch, took over the agency on January 5, 2004.

On the positive side, outside of its own staff, the OSC is not actively attacking the merit system throughout the executive branch, as during the 1980's. Moreover, when the Special Counsel allows them to, the career staff at OSC has done a professional job helping federal government employees enforce their merit system rights. OSC has done an outstanding job in a limited number of individual cases.

Unfortunately, these anecdotes have been the rare exception under Special Counsel Bloch, who also has engaged in an ingrained pattern of violating the same merit system laws he is charged with enforcing. For all practical purposes, until recently the Special Counsel has been AWOL and the OSC has been a non-factor in protecting the merit system. Mr. Bloch has politicized the office to such an extent that even OSC's good work is suspect. This politicization of OSC is not consistently partisan, but rather in the classic bureaucratic sense: OSC's mission only comes into play when that means serving the Special Counsel's political needs. It should go without saying that this is not the way it should be. The Special Counsel's job is to protect the merit system, period, and not only when it suits the institutional and personal self-interest of the Special Counsel.

GAP is a non-profit, non-partisan public interest organization whose mission is to support whistleblowers, those employees who exercise free speech rights to challenge abuses of power that betray the public trust. GAP has led the public campaigns for passage of the Whistleblower Protection Act in 1989, subsequent amendments to the Act in 1994, and recently, with a coalition of nearly 50 other public interest organizations, the campaign to again restore the discredited WPA through this Committee's legislation, HR 985, the Whistleblower Protection Enhancement Act of 2007, which the House passed in March by an overwhelming bipartisan majority, 331-94.

Oversight of the Office of Special Counsel is a cornerstone of GAP's work with whistleblowers. Over the year's GAP has been among OSC's biggest cheerleaders as well as one of its harshest critics. For example, when OSC's budget was rescinded in

1980 we volunteered our law school clinic students to answer the OSC phones so the agency could remain functional. By contrast, in the campaign to pass the 1989 Whistleblower Protection Act we advocated its abolition. Our judgment has always been based strictly on the agency's performance. In addition to our experience and assessment, this testimony also is intended to provide a voice for dozens of whistleblowers who have responded over the last three years to inquiries about OSC's performance. Further, it reflects and is consistent with the exhaustive OSC oversight research available on the website of Public Employees for Environmental Responsibility (PEER).

In many cases there is no practical alternative to the OSC when good faith whistleblowers are harassed. The OSC's dismal track record in this regard has helped determine the need for stronger due process channels to enforce employee free speech rights, such as those spearheaded by this Committee in H.R. 985. Yet, even if H.R. 985 becomes law, OSC will remain the primary place federal employees turn to for help when they suffer retaliation for "committing the truth." Unfortunately, the vast majority of federal employees who have sought OSC for assistance during Mr. Bloch's tenure believe that his leadership is undermining, not promoting, its vital merit system role. Despite striking exceptions, our research and experience with OSC supports this assessment in the overwhelming majority of cases.

Special Counsel Scott Bloch's own track record of merit system violations provides the most telling explanation for OSC's decline under his tenure. Rather than promoting free speech and whistleblower protections within his agency, he has demonstrated intolerance for the same rights he is responsible to enforce in the rest of the government. Morale is down. Many of the seasoned veteran professionals with a proven track record of helping employees have left or been forced out. At the same time, the number of political staff has increased along with the number of totally inexperienced professional staff drawn from the recent graduate pools of an institution ideologically aligned with Mr. Bloch.

Many of these allegations were formally raised in a Whistleblower Protection Act complaint brought by GAP, PEER, the Project on Government Oversight, Human Rights Campaign, and a group of anonymous OSC employees. In October 2005, Clay Johnson III, Chair of the PCIE, assigned the investigation of Special Counsel Bloch to Office of Personnel Management Inspector General Patrick McFarland. Frankly, we are skeptical of the nonpartisan objectivity of this probe, which appears to run hot and cold depending on the current political winds. But the investigation continues, despite Mr. Bloch's efforts earlier this year to intimidate potential witnesses within OSC. A list of the violations alleged in the complaint, originally filed on March 3, 2005, include allegations that Mr. Bloch:

- Created a hostile work environment by repeatedly retaliating against career OSC staff members, culminating in the involuntary reassignment of twelve career employees for whistleblowing;

- Gagged career staff in violation of the anti-gag statute and the Lloyd Lafollette Act, which guarantees all federal employees the right to communicate with Congress

- Abandoned merit-based competitive hiring for career positions and misused special hiring authorities;

- Refused to enforce existing statutory prohibitions against sexual orientation discrimination in the federal workforce, and provided misleading statements to Congress about this; and

- Abused his authority with disparate and politically-motivated treatment for two high-profile Hatch Act complaints.

An amendment to the complaint added the following allegations:

- That Mr. Bloch hastened the termination date of the employees who refused geographic reassignments in retaliation for whistleblowing, First Amendment activity, and/or the assertion of their legal rights to hire counsel and challenge the illegal reassignments; and

- Declined to permit employees to remain on at OSC headquarters in positions they were qualified to hold, in retaliation for whistleblowing, First Amendment activity, and/or the assertion of their legal rights to hire counsel and challenge the illegal reassignments.

OSC at its Best

While it has been a difficult period for the Office of Special Counsel, we have no doubt that the agency, and especially the remaining dedicated career staff, are fully capable of upholding and advancing the agency's mission when given the opportunity. The problem is not, and never has been, the professional career staff at OSC. It is a question of priorities and leadership. Before Mr. Bloch's arrival, whistleblower support organizations regularly viewed the OSC as the first choice to help retaliation victims. While no panacea, OSC staff could be counted on to – 1) make an honest effort reviewing employees' evidence and discussing it with them, 2) conduct intensive, no stones unturned investigations, 3) pressure steadily and aggressively for

informal corrective action throughout the investigation to make a difference without litigation, 4) sustain the civil service's most effective Alternative Dispute Resolution mediation program, and 5) when dissatisfied, appeal directly to Special Counsel Kaplan or Deputy Special Counsel and informal Ombudsman Tim Hannapel, both of whom were accessible and available when needed. This was an organization that attempted to make a difference.

None of those premises are true today. This is not an editorial comment, but simply the facts of life, supported by statistical and anecdotal evidence, as well as ongoing disclosures relayed by whistleblowers from within the agency. Currently, whistleblower support groups regularly advise reprisal victims to steer clear of the Special Counsel unless unavoidable to preserve their rights. For all but a few, the Office of Special Counsel is a waste of time, energy and money.

Despite this current status quo for the overwhelming majority of OSC complainants, there remain a few illustrations of the role OSC can and should always play on behalf of concerned government employees. Just recently, GAP client Richard Conrad, a Vietnam Veteran and civilian mechanic with 25 years experience at the North Island Naval Depot (NADEP) in San Diego, brought to OSC allegations about improper maintenance practices at the Navy's flagship repair facility. For years, NADEP management did not provide his team with the tools needed to repair and overhaul certain flight critical components on F/A-18 aircraft, according to military specifications. A rash of serious F/A-18 mishaps in 2005, resulting in the loss of several air crew and aircraft, prompted Mr. Conrad to raise his concerns about the improper maintenance procedures. He knew the shoddy maintenance procedures posed reliability and readiness threats to the F/A-18 Fleet during wartime, placed an additional unnecessary burden on the taxpayers because of an increased, unnecessary number of repairs, and could be a contributing factor in the recent surge in F/A-18 flight mishaps.

He took these concerns to his supervisors, to North Island Command investigators, and then to the Naval Air Systems Command's Office of Inspector General. Instead of addressing the safety and quality control issues raised by Mr. Conrad, his supervisors focused their attention on him. Mr. Conrad was given a Letter of Reprimand the day after he contacted his Command's Waste, Fraud, and Abuse hotline. He then was reassigned to work nights in a unit that doesn't perform any repairs on second shift, where his primary activity for the last sixteen months has been reading the paperback novels he picks up on his way into work. He has been isolated from the rest of the

workforce, stripped of all his overtime pay, and no longer has any job duties,[1] but continues to be paid with tax dollars for repairs he does not perform.

After being told by the NAVAIR IG that there was nothing they could do to help him, Mr. Conrad turned to OSC. OSC Disclosure Unit Chief Catherine McMullen and staff attorney Malia Myers recognized the importance of Mr. Conrad's disclosures. On their recommendation, Special Counsel Bloch determined there was a "substantial likelihood" that the lack of torque tools for repair and overhaul of F/A-18 components constituted a "substantial and specific danger to public safety." He ordered the Department of the Navy to investigate.[2]

The completed Navy investigation substantiated Mr. Conrad's allegations about the improper maintenance procedures, and outlined a series of corrective actions to ensure that all repairs in the NADEP Generator Control Unit program would be done according to military specifications and safety guidelines. The Navy's engineering analysis determined that the changes were necessary, but that the problem did not represent an immediate "safety of flight" concern and therefore rejected Mr. Conrad's recommendation to recall all affected parts.

In his formal comments to OSC on the Navy investigation,[3] Mr. Conrad accepted the Navy's resolution of the safety issues, but expressed ongoing concern about the reliability of the remaining improperly repaired units in the Fleet. OSC Disclosure Unit staff respected his comments and took the initiative to demand evidence from the Navy that in fact no aircraft or crew had been lost because of the maintenance problems identified by Mr. Conrad. In the OSC analysis on the disclosure and investigation,[4] Special Counsel Bloch recommended disciplinary action for a NADEP supervisor who had provided Navy investigators with misleading and false statements about the availability of proper tools for repairs, and who also made false statements to investigators about the job duties Mr. Conrad currently performs. Through its mediation program, OSC is currently following through on a separate reprisal complaint that has reached Agreement in principle, helping to make sure that Mr. Conrad, who is eligible for retirement, is able to leave government service with a clean record and relief for the sixteen months that he was isolated, harassed, and denied overtime pay because of his whistleblowing.

---

[1] Mr. Conrad says he has averaged approximately 10 minutes of work per 8 hour shift for the last sixteen months.

[2] Pursuant to 5 U.S.C. § 1213(c).

[3] Pursuant to 5 U.S.C. § 1213(e)(1).

[4] See attachment 1.

Unraveling OSC's Statistics and Claims of Success

Unfortunately, this level of service from OSC has been practically unheard of since Special Counsel Bloch's arrival in 2004. The most telling statistic supporting this claim is the number of favorable actions[5] that OSC has produced for whistleblowers – in other words, how many employees OSC actually has helped. This number has dropped 60 percent since Mr. Bloch took over the agency, from 98 in 2002 to only 40 favorable actions in 2006, despite a significant increase in the number of cases OSC processed last year.

The explanations put forth by Mr. Bloch for this lack of productivity continue to shift. Initially, Special Counsel Bloch told the Congress that immediate measures were necessary to reduce a significant backlog in OSC's intake, or Complaints Examining Unit (CEU). During this process, Mr. Bloch repeatedly took credit for what he claimed was a significant increase in the number of internal referrals to OSC's Investigations and Prosecution Division (IPD). For example, in an April 28, 2005 letter to the American Spectator Magazine, Mr. Bloch wrote: "During the period of backlog reduction, we more than doubled the rate of referral to our investigation and prosecution unit [IPD] of those screened cases, so that we had more new claims that we accepted as validated in whole or in part than had been validated previously."[6]

However, after three years of case statistics, it is clear that having a case referred to IPD now in most cases means nothing more than an internal shifting of paperwork that does nothing to benefit the complainant, while giving the agency an opportunity to trash the whistleblower. Despite the alleged increase in the number of referrals to IPD, the number and percentage of complainants that received any help has continued to plummet.

A new explanation for the reduced number of favorable actions arrived in the FY2005 OSC annual report to Congress, which stated: "FY2006 will be the first year that the IPD will be able to focus primarily on cases received during the current fiscal [because of previous backlog clearing measures]. Therefore, we expect a higher

---

[5] OSC defines "favorable action" as "actions taken to directly benefit the complaining employee; actions taken to punish, by disciplinary or other corrective actions, the supervisor(s) involved in the personnel action; and systemic actions, such as training or educational programs, to prevent future questionable personnel actions." More than one favorable action can be obtained for an individual complainant.

[6] See also Special Counsel Bloch's May 17, 2005, letter to Comptroller General David Walker: "I am happy to report that OSC has reduced the overall case backlog by 82 percent, from 1121 to 201 cases, by the end of Calendar Year (CY) 2004. . .Furthermore, during the backlog reduction project period, OSC increased by 22% the internal referral rate of meritorious cases for further action in the investigation and prosecution unit [IPD]."

number of favorable actions on PPPs [Prohibited Personnel Practices] in FY2006." Yet, in FY2006 the number of corrective actions generated by OSC increased only from 45 to 52 for all whistleblower and other PPP complaints. By contrast, in FY2002, the last full fiscal year for the previous Special Counsel, the number of favorable actions for all PPPs was 126, despite having 226 less complaints processed and closed than in fiscal '06. In fact, the percentage of employees helped by OSC in FY2006 for all whistleblower and other PPP cases dropped to what may be an all-time low of 2.49%.[7]

At this March's Senate OSC/MSPB reauthorization hearing, Sen. Akaka questioned Special Counsel Bloch on the free-falling number of favorable actions. In his reply Mr. Bloch shifted explanations again, and now had the audacity to blame the whistleblowers for OSC's lack of productivity. He told the Senators in attendance that "the quality [of whistleblower and other PPP complaints] was not as good....And we have struggled and scratched our head[s] to figure out, well, what can we do [given the low quality of complaints]?"

He continued, "We have tried to encourage the CEU examiners to speak with the complainants and try to find the good that is within their case. It might not be 100 percent good, but maybe there's a PPP in there...I've even sat in on the sort of round robin sessions of the CEU where they brainstorm and try to figure out where is the PPP. I've kidded with them that it's kind of like Where's Waldo? Where's the hidden PPP, because sometimes when a federal executive employee comes to you, they have a problem, and it's a bundle of things..."

Basically, Mr. Bloch's explanation is that "they don't make whistleblowers like they used to." This effort to scapegoat the reprisal victims for abandoning them cannot withstand scrutiny. This is underscored further by the experience of Natresha Dawson, who also is testifying today. Ms. Dawson was harassed and removed from federal service for actually trying to follow through on Mr. Bloch's 2005 commitments to the Senate. Ms. Dawson staffed OSC's Customer Service Unit, which Mr. Bloch created in response to criticisms about poor management of complaints at May 2005 Senate oversight hearings. Her experience illustrates that OSC's commitments from that hearing to start working closely with the whistleblowers was nothing more than a façade. Moreover, the federal employees that turn to OSC continue each year to

---

[7] The number of meaningful favorable actions by OSC has been so sparse in recent years that OSC opted to recycle summaries of previous year's work in order to fill up space in the relevant section of its annual report to Congress. In early FY2003, Special Counsel Elaine Kaplan brokered a favorable settlement with the Department of Energy on behalf of a nuclear security specialist after he was suspended and had his security clearance removed in retaliation for protected whistleblowing. Despite having played no role in this action, Special Counsel Bloch took credit for brokering the settlement and misleadingly included a summary of it in his report to Congress for work completed in FY2004 and then again included the same summary in the FY2005 report.

surpass previous record lows in terms of their level of satisfaction with the agency. The percentage of employees "satisfied" with the courtesy, oral communications, written communications, and results from OSC has dropped by 40-50% in each of these categories in just the few short years Mr. Bloch has been in charge, according to OSC's own statistics.

The truth is that for every success story like Mr. Conrad's there are many more employees that were systematically turned away with inadequate explanation of their rights, who were not allowed to communicate with the attorney assigned to their case, and/or were shifted to the IPD and then dismissed in order to cushion Mr. Bloch's misleading claims about CEU backlog clearing measures that did nothing other than extend the amount of time complainants had to wait before being told they would not be helped. Consider the following examples:

- In one active case, OSC unilaterally decided it would no longer enforce protections against retaliatory investigations, despite long-standing case law that says retaliatory witch hunts constitute a personnel action under the WPA even when no adverse information is generated.

- In another case, OSC referred an investigation to IPD for an overseas government employee who was placed on Leave without Pay. After ten months, without any additional questions or requests for evidence from IPD, OSC sent him an initial determination letter which stated that OSC planned to close the complaint. He never received this preliminary letter, but two weeks later received notification that his file had been closed. When he called the OSC attorney to inform her that he never received the initial notification and that he had seven boxes of documentation that OSC investigators had not seen, the OSC attorney told him it wasn't their fault the letter had not been received and that she was "probably sure" that the investigator had enough information to make the decision.

- Another Department of Navy employee recently filed a complaint with OSC after being threatened with involuntary transfer for blowing the whistle on security breakdowns. OSC referred his case to the IPD shortly after he filed the complaint. His experience with the IPD unit is telling:

  I made my complaint [to OSC] in...2006. The CEU forwarded my complaint to IPD [two months later]. That was pretty quick. Then my complaint sat in IPD for months without my knowing who was assigned to it. In desperation, I finally sent them a fax in January 2007 saying that I was going to be relocated if they didn't do something...Finally IPD came along and offered minimal help arranging an informal stay. Other than [a few] status letters, I [had

not] heard anything at all from IPD until out of the blue they surprised me with their Preliminary Determination Letter [which stated OSC had found "clear and convincing evidence" that the pending transfer was not retaliatory and OSC was planning to close the complaint].

[During this process] I...communicated [with OSC] entirely by email...I expected the IPD attorney or investigator to talk to me personally by phone at some point. Surprisingly a year [went] by and they've never tried to talk to me once. Not having ever talked to me is the main reason their Preliminary Determination Letter was so completely off the mark.

I...received a number of status reports and they're a complete joke. The bulk of the reports are just generic copy and paste paragraphs about OSC's authority. The personalized part of the reports amount to just one or two sentences telling me that my complaint is still under investigation. And those paltry sentences have often had typographical errors and spelling mistakes.

The IPD never asked once about which witnesses to talk to or about their credibility or motivations. They also never went over the evidence with me. I provided them with over 100 pages of written analysis and testimony. There was probably another 50 pages of supporting documentation. Yet, all the combined communications that I've received from the IPD would fit on a single page (perhaps even a half a page). It's been an extremely one sided dialogue.

IPD [sent] me a Preliminary Determination Letter...Like the status letters, it was bulked out with generic copy and paste paragraphs and a short section about my case in which they got everything completely wrong. There was not a word in the letter about my having reported [security breakdowns]...[I]t was like they hadn't read a single word I had written. They also just accepted everything the agency said without any critical analysis whatsoever. Their mistakes were so grossly outrageous that I felt it might be intentional, i.e., a test of my will and staying power...I wrote a [detailed] response to their letter that basically did all the analysis that they should have done. With facts and numbers I poked giant holes in all the agency's arguments. How OSC could call the agency argument "clear and convincing" is beyond imagination...I've not heard a peep out of OSC [since]...

The only thing [OSC did] is arrange an informal stay during the investigation. However, it now appears that they actually might have harmed me in doing so. The wording of the stay is such that

> *the agency might be able to kick me out of government after 20 years of service. In fact, I've already been threatened with that loophole in the stay if OSC drops my complaint.*
>
> *In retrospect I would have been better off just accepting forced relocation six months ago. This process has crushed my spirit, hurt my family, and cost me around $10k...My experience with OSC has convinced me that merit system rights and whistleblower protections are just nice talk. We feds have no protection and so next time I will turn a blind eye no matter how wrong something seems.*

This type of experience has been the rule, not the exception for OSC complainants who had their cases referred from the intake unit (CEU) to IPD. The internal referral more often than not means the agency gets an opportunity to defend itself, often by trashing the whistleblower, and then OSC accepts the agency justification (as clear and convincing evidence of an independent justification for the personnel action) without the whistleblower's response.

The Navy Department employee summarized this process neatly: "CEU had my complaint for 3 months, asked me 32 questions, requested multiple pieces of evidence, and sent me 7 emails. In contrast, IPD had my complaint for 10 months, asked 0 (zero) questions, requested 1 piece of evidence, sent me 7 emails (5 of which were status updates or unrelated to the investigation), and never once talked to me personally. It's shameful." Indeed, and this from an employee who received far better service than most from OSC. Ironically, OSC will include the flawed stay it negotiated on behalf of this employee amid its paltry list of favorable actions in the fiscal 2007 report.

OSC's Disclosure Unit—Mixed Results

Surveys of federal employees repeatedly have confirmed that the primary reason would-be whistleblowers remain silent when they witness misconduct is not fear of retaliation. It is that they will not be able to make a difference in correcting the problems they identify. If functioning as Congress intended, the OSC Disclosure Unit (DU) should give whistleblowers an opportunity to do just that. Despite the best efforts of the unit's career staff, as demonstrated in the summary of Mr. Conrad's case above, by most accounts the DU under Mr. Bloch's tenure as Special Counsel has retreated from this vital good government function.

The Disclosure Unit has been responsible for some important whistleblower disclosures that were referred to agencies for investigation. The WPA, 5 U.S.C. § 1213, gives the Special Counsel the authority to order and then review agency investigations, but OSC does not conduct them. While the federal department or agency is responsible for investigating itself, this process can and has worked well in cases in which the Special Counsel is willing to hold the agency's "feet to the fire" by flunking incomplete or bad faith investigations, and by demanding corrective measures that

responsibly address the whistleblower's concerns. However, in many of the cases handled by Special Counsel Bloch, he has failed to make the politically challenging and necessary decision to refuse to accept agency reports that do not adequately resolve the whistleblower's complaint.

It appears we are on the verge of a new example that could seriously compromise homeland security. In August 2006, Disclosure Unit Chief Catherine McMullen and top DU attorney Karen Gorman recommended to Special Counsel Bloch that he order the Department of Homeland Security to investigate the Federal Air Marshal Service (FAMS) pursuant to his authority under 5 U.S.C § 1213(c). Their recommendation was based on disclosures made by air marshal Frank Terreri, which included evidence that FAMS is undermining its own mission by implementing operational procedures that compromise the anonymity of individual air marshals. He further alleged that aviation security was harmed by FAMS' repeated endorsement of promotional television pieces that contained information which could be used by terrorists, providing them in essence with a "road-map" for a successful operation to defeat air marshals in flight.

After ordering the investigation, Special Counsel Bloch made repeated public statements about the role his office played in advancing these disclosures. For example, in a letter to the Washington Post in defense of his agency's record, Mr. Bloch wrote: "While The Post was occupied with trivial dress tips, the OSC was occupied with life-or-death implications of Federal Air Marshal Service dress guidelines that might have compromised anonymity and thus national security..."[8]

Mr. Terreri's disclosures, which go well beyond concerns about the dress code, are serious, and OSC deserves credit for ordering the investigation. However, that is only an initial step. Making a difference requires following through under the statutory process Congress created, by requiring accountability and corrective action from FAMS.

Yet, Special Counsel Bloch subsequently gave an interview for Federal News Radio on Monday, May 14th. In reference to the OSC ordered investigation of FAMS, Mr. Bloch stated, "as a result of the investigation that ensued...we've become satisfied that [FAMS has] done a good job" dealing with the anonymity and other issues in the disclosure. Mr. Bloch, who is not an aviation security specialist and has no law enforcement experience, made this comment <u>before</u> Federal Air Marshal Terreri had seen the completed investigation or had a chance to comment, which is required by statute before the Special Counsel makes <u>any</u> determination on the adequacy or completeness of the investigation. This is vital, because in nearly every disclosure case the Special Counsel has no subject matter expertise or first hand experience either on the content of the disclosure or what happens in the agency after an investigation is ordered. Quite frankly, no Special Counsel is qualified to comment on the adequacy of the agency report or resolutions without first reviewing the whistleblower's comments.

---

[8] Washington Post, Saturday, September 23, 2006; Page A17

Mr. Terreri was forwarded a copy of the completed investigation on May 23, more than a week after Mr. Bloch's public congratulation of FAMS (and by inference himself). Due to numerous overseas assignments, Mr. Terreri has had to request an extension of the comment period. Mr. Terreri has been working actively with the new FAMS management attempting to reform operational procedures. However, his first reaction to the investigative report is that it is incomplete and fails to address many specific allegations in the disclosure. OSC staff attempted to explain that Mr. Bloch's public approval reflected their conversations with new FAMS Director Dana Brown and not the submitted investigation. But, unless Mr. Bloch fulfills his statutory responsibilities and demands verifiable changes, his rush to declare victory could endanger the flying public by letting FAMS off the hook for confirmed gross mismanagement of the Air Marshal program.

Mr. Bloch's previous record leaves plenty of room for doubt. Two additional case studies from OSC's Disclosure Unit further help to demonstrate the failure of leadership at OSC's highest levels on significant public safety and security disclosures after career staff dedicated significant time and energy to doing the job right.

Former FAA manager Gabe Bruno is one of the "success" stories cited by Special Counsel Bloch following 2005 Senate hearings when he came under intense scrutiny for mismanagement of agency personnel. In a June 14, 2005, OSC press release declaring victory on Mr. Bruno's disclosure of air safety threats, Mr. Bloch boasted, "Nothing could be more central to the nation's overall security and the well-being of our citizenry than aviation safety...Thanks to the efforts of the whistleblowers, a problem was identified and is being corrected." However, a reality-based examination of Mr. Bruno's experience with OSC reveals Mr. Bloch decreed a "good-government" stamp of approval on the fourth successive FAA whitewash of serious air safety concerns that continue to endanger the flying public.

Mr. Bruno blew the whistle after FAA Southern Region managers abruptly canceled a mechanic reexamination program he had designed and implemented to assure that properly qualified mechanics were working on commercial and cargo aircraft. The reexamination program was necessary because of the activity of Anthony St. George, an FAA contractor that was convicted and sent to jail for fraudulently certifying over 2,000 airline mechanics. Individuals from around the world had sought out St. George to pay a negotiated rate and receive an Airframe and Power Plant Certificate without proper testing. After the conviction, Mr. Bruno instituted a follow-up re-exam program, which required a hands-on demonstration of competence. This program resulted in 75% of the St. George-certified mechanics failing when subjected to honest tests. Rather than deal with the consequences, the FAA arbitrarily canceled the retesting program, leaving well over 1,000 mechanics with fraudulently-obtained credentials, many working throughout the aviation system, including at major commercial airlines.

In June 2002, Mr. Bruno filed a whistleblower disclosure with OSC. In May 2003 Special Counsel Elaine Kaplan backed Mr. Bruno's disclosures, finding a "substantial likelihood" that the disclosure constituted a danger to public safety. OSC's "substantial

likelihood" finding resulted in a Department of Transportation (DOT) Office of Inspector General (OIG) investigation of Mr. Bruno's disclosures. At first, there was reason for faith in the OSC system. The DOT OIG submitted three bad faith reports endorsing the status quo. OSC flunked each report after receiving Mr. Bruno's comments and ordered DOT to try again. Mr. Bruno worked regularly with an OSC attorney who monitored the investigation and reports closely.

However, in June 2005, OSC accepted a fourth DOT OIG report that confirmed some mistakes, but absolved the FAA of any intentional wrongdoing. Moreover, Special Counsel Bloch endorsed the re-implementation of a disingenuous retesting program that skips the hands-on, practical test necessary to determine competence. The FAA's nearly completed reexamination program consists now of an oral and written test only, which Mr. Bruno has said is the equivalent of handing someone a driver's license without making them drive the car. In effect, this resolution decriminalized the same scenario – incomplete testing – that previously led to prison time for Anthony St. George. After years of work by his agency, the Special Counsel took the easy way out by endorsing the status quo that had proven itself vulnerable to criminal fraud.

In his transmittal letter to the President after accepting the fourth DOT report, Mr. Bloch provided rhetorical understanding of the safety issues Mr. Bruno had raised:. "It is crucial to the safety of the flying public that A&P mechanics receive proper training and master the skills necessary to perform their jobs, as evidenced by their ability to pass certification exams." Yet Mr. Bloch refused to meet personally[9] with Mr. Bruno to gain a better understanding of the inadequacies in the FAA's resolution. Also, despite acknowledging "concern" that the retesting program had again been halted, Special Counsel Bloch has done nothing to follow-up on his recommendation to immediately restart the retesting program, or to monitor the program's progress or results.[10]

Mr. Bruno made several appeals to Mr. Bloch to reconsider, all of which were ignored until a final effort last week finally penetrated.[11] Mr. Bloch forwarded the attached letter to DU Chief McMullen, and the OSC has committed to reopening a disclosure case based on Mr. Bruno's letters. Again, while we applaud the Special Counsel for now reconsidering the compromised resolution of this air safety threat, the timing is highly suspect given its proximity to this hearing.

Another example of the recent OSC leadership vacuum is demonstrated in the case of Department of Energy Nuclear Security Specialist Richard Levernier, who blew the whistle on the Department's systemic failure to adequately protect the nuclear

---

[9] The previous Special Counsel met personally with a few whistleblowers whose cases weighed heavily on U.S. national security or public safety prior to making a decision on the outcome of their disclosures.

[10] The FAA has finished retesting most, but not all of the St. George certified mechanics. It has not disclosed the number of mechanics that failed their test, and states it does not know how many of these individuals were working or are currently working for commercial airlines.

[11] See attachment 2.

weapons facilities under its control. Special Counsel Kaplan found a "substantial likelihood" that Mr. Levernier's allegations constituted a substantial and specific threat to public safety and ordered DOE to investigate. In 2003, DOE issued a report denying all of Mr. Levernier's allegations. Mr. Levernier submitted numerous, detailed comments, including authoritative internal studies confirming his identical concerns of ongoing terrorist vulnerability at nuclear weapons facilities, and flatly contradicting the official public word from DOE.

Nevertheless, after two years of delays, with no additional information requested from OSC, Special Counsel Bloch closed out the case and forwarded the Department of Energy's report to the President and Congress with the following explanation: "I have concluded that I am unable to determine whether or not the agency report contains all the information required by statute or whether its findings appear to be reasonable." This defied the Special Counsel's clear, statutory duty to make findings whether the report satisfies the minimum legal requirements of the Whistleblower Protection Act.[12]

For over 25 years, as required by law, the OSC has sent reports back to agencies with instructions to keep working on them until they either pass statutory muster, or until it is clear that the agency is refusing to comply with section 1213's requirements for responsible resolution of whistleblower charges. When that has occurred, every Special Counsel has imposed accountability by flunking the agency's resolution as failing to meet legal standards. There does not seem to have been any legal or public policy basis for Mr. Bloch to wash his hands of a serious, ongoing threat to terrorist attack of nuclear weapons facilities. The stakes are unusually high, because Mr. Levernier was the Department of Energy's (DOE) top expert on quality assurance for safeguards and security at nuclear weapons facilities. He documented numerous vulnerabilities to terrorism throughout the U.S. nuclear weapons complex. Yet again, the Special Counsel's response was to let an agency off the hook, despite openly doubting DOE conclusions about "its ability to protect the nuclear assets entrusted to its care." In a January 18, 2006 letter to Mr. Levernier, Mr. Bloch noted, "[T]here is much more work to be done to safeguard the nuclear facilities of this great country. Your tireless efforts to this end have been laudatory." Yet, he refused to meet personally with Mr. Levernier to gain a better understanding of the issues, and then dropped the ball on vulnerability to terrorism that continues today.

Recommendations

The overwhelming opinion among federal government whistleblowers, with a few vocal exceptions, is that this agency should be abolished. If Congress is determined to give the Office still another chance, certain basic reforms are necessary.

---

[12] As provided by 5 USC 1213(e)(2) -- (2) Upon receipt of any report of the head of an agency required under subsection (c) of this section, **the Special Counsel shall review the report and determine whether**— (A) the findings of the head of the agency appear reasonable; and (B) the report of the agency under subsection (c)(1) of this section contains the information required under subsection (d) of this section.

I. Service to retaliation and other PPP victims

1. The OSC's mandatory duty to investigate in 5 USC § 1212 should be further defined by statute, to include mandatory communications asking and answering questions about the initial submission, and providing guidance about any additional evidence or support needed to justify an OSC field investigation, or referral to IPD. Whether or not a field investigation is opened, the duty to investigate should not be complete unless and until an OSC attorney has: 1) made a positive determination as to whether there are reasonable grounds to believe a prohibited personnel action has occurred and met mandatory reporting requirements for any determination under section 1214; 2) reviewed any preliminary disposition; 3) prepared a menu of alternative sources for relief if there is no prohibited personnel practice jurisdiction; and 4) concluded with a second call to explain any decision to close the case as well as the other available options, and to answer any questions. Congress should mandate in 5 USC § 1212(e) that OSC "shall" prescribe regulations for the conduct of prohibited personnel practice investigations.

   Along these lines, according to the suggestions of a Department of Agriculture whistleblower, "Congress should require OSC/MSPB to make available to whistleblowers two things: a) a manual on how the two conduct themselves, comparable to the Operations Manual EEOC once posted on the internet describing how it handles EEO complaints, and b) a plain language guidance on how to write up and document a whistleblower claim so that it meets the standards for accepting a complaint (whatever those standards may be.) In conjunction with that, OSC complaint adjudicators should have a prepared checklist against which they check off whether a complaint was adequate or deficient, and make that list available to the whistleblower before closing out the complaint. Currently, whistleblowers are forced to 'toss darts at a murky target.' The OSC website currently includes only forms, a short description of whistleblower rights and a vague description of the process." If Special Counsel Bloch is committed to "finding the good in every complaint," OSC should make it easier for the complainants to help themselves.

2. The law should be reinforced to highlight the OSC's duty to report positive prohibited personnel practice findings, when it declines to act on the illegality. OSC has systematically violated the clear reporting requirements in 5 U.S.C. § 1214 (a), (b) and (e), depriving the complainants, their agencies, Congress, and the taxpayers of any public record of merit system violations within the federal workplace. The statute requires OSC, after receiving a complaint of a prohibited personnel practice, to investigate it to the extent necessary to make a

determination as to whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken. It is not clear if this determination is currently being made. If it is, the complainant, the involved agency and the public has no way of knowing.

If a positive determination is made under section 1214(b), the Special Counsel is required to report that "determination together with any findings or recommendations to the [Merit Systems Protection Board], the agency involved and to the Office of Personnel Management..." Alternatively, under section 1214(e), a positive determination must be reported to the agency head, who must respond within 30 days. Both the determination and response are public records under 5 USC 1219. These determinations should be made and reported even if the Special Counsel pursues alternative means of securing corrective action on behalf of the complainant and even if the Special Counsel is able to negotiate corrective action that addresses the prohibited personnel action. The MSPB admits that it has virtually no record of ever receiving 1214(b) reports from OSC. And, a review of OSC's public records shows it has not made a single 1214(e) report between 1989 and the Spring 2006. Even though current law appears to mandate these reports clearly, OSC has not complied. It is necessary to force compliance with these reporting requirements for the following reasons: 1) There currently is no publicly available record into the frequency and type of prohibited personnel practices occurring annually in the federal workplace, 2) Heads of agencies have a statutory duty, per 5 USC 2302(c), to prevent prohibited personnel practices and are unable to do so if they're not informed about the violations occurring inside their agencies, and 3) This would provide routine violators of merit system laws within the workplace with notice of their actions, thus serving as a reasonable and welcome deterrent to prohibited personnel practices, in addition to providing agency HR departments, IGs, and general counsels with information that could help assist their efforts in preventing prohibited personnel practices within their agencies.

In addition, section 1214(a)(1)(c) should be amended to require the Special Counsel to report any action, "including a determination whether there are reasonable grounds to believe a prohibited personnel practice has occurred" to the complainant. This would provide the complainant with important documentation about the merit of their alleged complaint even if the Special Counsel decides not to pursue it.

3. Provide complainants with copies of their case files, as are available from the EEOC on discrimination cases. In 1994 Congress accepted an OSC suggestion that this step would be unnecessary, if the OSC were required by statute to

include an informal Findings of Fact and Conclusions of Law section in its closeout letters. Those summaries, however, have been virtually useless as explanatory devices or substitutes for direct human communication, and have served to mask the routine lack of effort by the Special Counsel to consider evidence submitted by reprisal victims even after opening up a field investigation. In addition, the addendum to 5 U.S.C. 1214 concerning "termination statements" needs to be enforced to provide complainants with a name and contact info of an employee of the Special Counsel who is available to respond to reasonable questions from the person regarding the investigation or review conducted by the Special Counsel, the relevant facts ascertained by the Special Counsel, and the law applicable to the process.

4. Restore an Alternative Dispute Resolution unit to the Washington, D.C. headquarters, where most of the cases occur.

5. Provide independent, external, mutual strike consensus selection, shared cost arbitration for OSC staff who allege prohibited personnel practices. The history of a currently-languishing, two year investigation into Mr. Bloch's alleged Whistleblower Protection Act violations against staff members illustrate the structural vacuum for accountability. The case could not be investigated by the OSC due to conflict of interest, but a President's Council on Integrity and Efficiency (PCIE) investigation conducted by the Office of Personnel Management (OPM) Office of Inspector General (OIG) has been stalled for two years, due to lack of OSC cooperation. Since the OSC sets an example for the rest of the merit system, retaliation disputes should be resolved without delay, and without any credibility questions on accountability.

6. Specifically amend 5 USC § 1212 so that the Special Counsel shall be removed if there is a pattern of prohibited personnel practices within the Office.

7. Amend 5 USC § 1211(b) to require that the individual appointed to be Special Counsel have experience demonstrating an understanding of issues involving the protection of whistleblowers and a commitment to protecting the merit based civil service.

8. Amend 5 USC 1211 to make clear that attorneys hired by OSC to implement 5 USC 1214, including the Special Counsel, do not have an "attorney-client" relationship with their employer, OSC, and are required to "blow whistles" if they believe OSC is not fully complying with its statutory duty to protect those who seek OSC's (and their) protection from PPP's.

9. Congress should provide employees with the opportunity to seek review in U.S. District Court of OSC action or inaction when the agency is failing to comply with

its mandatory duties. Congress should provide a more liberal standard of review than is typically afforded citizens when they challenge the actions of an administrative agency. In addition, Congress should provide that employees who are successful in whole or in part in challenging the OSC should recover costs and attorneys fees.

II. Whistleblowing disclosures

1. Provide that whistleblowers are entitled to see how the OSC frames issues in their disclosures and consult with the Office, before any referrals under 5 USC § 1213. Currently the OSC does not permit whistleblowers to know how their issues have been framed for investigation. This has maximized mistakes such as investigations into charges the employee did not make or, more frequently, avoiding the point of the whistleblowing disclosure through strategic edits. At a minimum, the OSC should demonstrate to the whistleblower that it understands the full scope of their allegations by providing documentation that specifies which allegations have and have not been referred. OSC should provide the language used in referring the allegation to the agency for the whistleblower to review. OSC communications with the agency should be available to the whistleblower for greater transparency and accountability during the process.

2. As an alternative to agency investigations, permit the employee to elect nonbinding, mutual strike consensus selection, shared cost arbitration for fact-finding and recommendations on disclosures referred under 5 USC 1213(c). All too often, the inherent conflict of interest in agency self-investigations has meant that OSC backing under this section facilitates institutional drawn out cover-ups for serious problems that require expedited corrective action.

3. After making a "substantial likelihood" finding under section 1213, OSC should provide the whistleblower with written, bimonthly status updates after, as is most often the case, the agency fails to meet the 60-day deadline for submitting the report of investigation to the Special Counsel. Likewise, after the agency submits its report and the whistleblower offer's comments, OSC should provide the whistleblower with written bimonthly status reports as the OSC reviews the information.

4. Existing legislative history that Mr. Bloch is ignoring should be codified to require including the whistleblower's comments in the final file for the public record under section 1213, as well as in all associated communications to the President or Congress.

5. Enhance transparency by requiring the Special Counsel in its public records and annual reports to break down which disclosures are referred to agencies under 5

USC 1213(c) for full investigations, and which under section 1213(g) for limited review. Similarly, require the OSC to include the Disclosure Unit's work in its Customer Satisfaction Surveys. Also, all whistleblower disclosures referred to agency heads for investigation, with the exception of classified information, should be on the OSC's web site, along with the corresponding agency report of investigation, the whistleblower's subsequent comments, and the OSC analysis. In FY05, OSC sent 16 completed whistleblower disclosures to the President and Congress, according to its annual report, but information on only 2 are posted with a press release on the OSC web site. The public has a right to know about the 14 other significant cases of wrongdoing.

6. Explicitly eliminate the Special Counsel's discretion to close out a whistleblowing case under section 1213 without first taking a stand whether the agency's proposed resolution meets statutory requirements for completeness and reasonableness.

7. Require OSC to put all the public records described in 5 USC 1219 on its website.

III. MSPB

Our testimony focuses primarily on OSC, because H.R. 985 covers many of problems whistleblowers have been facing at the Merit Systems Protection Board. This is not meant to suggest that things have been any better at the formal, due process stage of enforcement for employee rights under the Whistleblower Protection Act and Civil Service Reform Act. Indeed, no whistleblower has won on the merits in a Whistleblower Protection Act case at the Board since the current Chairman McPhie, took office in 2003. The Board, like the Federal Circuit Court of Appeals, has not respected the congressional mandate in the WPA, and the record for decisions on the merits at the MSPB since May 2003 is 0-32. In addition, 0-18 is the track record against whistleblowers for decisions on the merits by the MSPB Administrative Judge who is responsible for Whistleblower Protection Act cases the Board deems politically significant. Our recommendations appropriate for the reauthorization bill are as follows:

1. The Board's annual report should be required to itemize its record in whistleblower cases, including those in which the Board provided relief and when it did not, when cases settled, what was the range of relief provided in decisions on the merits in addition to that provided for in settlements, the number of stays requested, approved, and denied broken down by OSC and employee requests, and a won-loss record for whistleblower cases decided on the merits.

2. The Board should stop requiring whistleblowers to disclose their entire case to OSC in order to exhaust their administrative remedy there. This requirement, in

effect, has meant free discovery for the agency in WPA cases. It also flatly violates the House Committee report on the 1994 WPA amendments.

3. Board rules of practice and procedure should adhere to procedures set forth in the Federal Rules of Civil Procedure and afford the parties sufficient time to engage in discovery and present all relevant evidence at the hearing. The rules of practice and procedure governing whistleblower cases before the DOL OALJ are an appropriate model.

4. Board procedures shall provide for additional time to complete discovery and present evidence at the hearing when agency motive or retaliation are issues to be litigated.

5. Board procedures shall permit the parties to present their own witnesses and evidence.

6. Congress should require the Board to conduct mandatory training for all Administrative Judges in the congressional mandate of the Whistleblower Protection Act.

7. According to a Department of Energy whistleblower who has conducted extensive research on OSC and MSPB: "MSPB has, via its regulations for whistleblower stays, negated the intent of the law that federal whistleblowers were to be protected from all possible harm, sooner rather than later. The law specifies that OSC can seek a stay at MSPB on the basis of "reasonable grounds to believe," but MSPB has abused the discretion the law allows in to write regulations requiring "substantial likelihood" when a whistleblower seeks a stay directly from it. By MSPB records from the 1990's, it only granted about 3% of stay requests made - far from the legislative history of the WPA, which called for MSPB to make "liberal" use of whistleblower stays. MSPB refused to provide Congress information about its record in granting and denying stays since 2000, but it is possible it has not granted a single whistleblower stay, not in about 400 stay requests, in past 5 years. MSPB has abused the discretion Congress gave it in 1989 in establishing an evidentiary standard for granting stays, Congress should mandate "reasonable grounds to believe," - the same standard Congress created for MSPB when OSC seeks a stay, for MSPB stay requests."

8. This same employee astutely notes, "Even though the current law appears clear that MSPB is required to conduct indirect oversight of OSC, EEOC, and other agencies such as is necessary for MSPB to determine and report, "whether the public interest in a civil service free of PPP's is being adequately protected," MSPB does not believe it has this oversight responsibility. MSPB further claims that reports which do not directly respond to this question help form public opinion on

this subject. The law needs to be clarified to ensure MSPB conducts the necessary oversight of OSC, EEOC, and other agencies to make this report on a regular basis."

We would be pleased to work with subcommittee staff to provide further bases and/or follow through on these recommendations.

Attachment 2

Adam Miles

From: gabriel_bruno@bellsouth.net
Sent: Friday, June 29, 2007 1:45 PM
To: SBloch@osc.gov
Cc: whistle47@aol.com; Adam Miles; bmyers@dcexaminer.com; rich_rutecky@irco.com
Subject: OSC case No. DI-02-1869

Dear Mr. Bloch:

On June 14, 2005, in closing my whistleblower case, you issued a press release headlining, "U.S. OFFICE OF SPECIAL COUNSEL TRANSMITS REPORT THAT FAA IMPROPERLY HALTED RE-EXAMINATIONS OF AVIATION MECHANICS WITH SUSPECT CERTIFICATES". You went on to state, "Nothing could be more central to the nation's overall security and the well-being of our citizenry than aviation safety of which the aviation mechanics and inspectors form a critical link. Thanks to the efforts of the whistleblowers, a problem was identified and is being corrected. OSC takes these and all disclosures very seriously."

To this date, you have not responded to any of my letters to you outlining the serious deficiencies in your investigation. Throughout your agency's investigation and in response to each of the FAA's excuse-making responses I responded to you with concrete evidence.

On December 19, 2005, just six months after your closure of my case, and your press release, a Chalk's Ocean Airways regularly scheduled passenger flight to Bimini, Bahamas experienced an in-flight separation of its right wing from the fuselage and crashed into the shipping channel adjacent to the Port of Miami shortly after takeoff. All twenty people on board, eighteen passengers and two pilots were killed.

On May 30, 2007, a year and a half after this fatal accident, the National Transportation Safety Board (NTSB) issued their press release headlining, "FAULTY MAINTENANCE, INADEQUATE FAA OVERSIGHT CITED IN MIAMI SEAPLANE CRASH".

Although the NTSB once again cites the frequently heard accident causal factor of "faulty maintenance and inadequate FAA oversight", their investigation stops well short of examining the relevant information that I provided to you. My disclosures to you of the St. George Aviation criminal activity and resultant multitude of fraudulently issued mechanic certificates, that the FAA allowed to remain active in the aviation industry, is directly relevant to an investigation into faulty aircraft maintenance and inadequate FAA oversight.

The NTSB, in its rush to close this fatal accident investigation, in which a wing actually fell off the airplane, surprisingly did not report any interviews with mechanics employed by Chalk's Ocean Airways. Also, the NTSB did not report if any of those mechanics held certificates fraudulently obtained from the St. George criminal enterprise. This shortcoming raises the question as to whether Chalk's was relying on unqualified mechanics to recognize and repair maintenance deficiencies of its aging aircraft. The NTSB release cited "the failure and separation of the right wing, which resulted from (1) the failure of Chalk's Ocean Airways' maintenance program to identify and properly repair fatigue cracks in the wing, and (2) the failure of the Federal Aviation Administration (FAA) to detect and correct deficiencies in the company's maintenance program." Additionally, this would lead an investigator to question the safety impact of the FAA's willful obstruction of the St. George Retesting Program.

Just how "seriously" do you take these disclosures and loss of the lives of these twenty victims? Please advise me whether or not you intend to open an inquiry into this subject that will be a true measure of your job performance and commitment to public safety.

Sincerely,

Gabriel D. Bruno
Gabriel_bruno@bellsouth.net

Mr. DAVIS OF ILLINOIS. Thank you very much for that testimony. Ms. Dawson.

STATEMENT OF NATRESHA DAWSON

Ms. DAWSON. Good afternoon. Thank you.

I am not sure if Mr. Bloch purposely presented under oath an untruth that he was unaware of my complaints. Mr. Bloch was fully aware of my complaints. In fact, we submitted several documents to Mr. Bloch regarding the several complaints that I have filed against the agency as an employee there.

One of the complaints detailed violations of the merit systems, as well as violations of whistleblowers, and subsequent to that I was given a gag order that specifically stated that I could not contact Mr. Bloch at all or file any complaints, and if I did I would be removed from public services. That was in a detailed letter submitted to me, which was also submitted.

I was hired into the Office of Special Counsel to staff the new customer service unit that Mr. Bloch created to answer congressional critics over 2 years ago. As a staff there, I witnessed, although the agency was supposed to protect Federal employees, I witnessed the outright hostility and contempt against people who alleged prohibited personnel practices, and especially retaliation for whistleblowing. These employees were not calling to make trouble, they were not troublemaking, seeking attention; these were honest employees seeking help from an agency who was supposed to help them, but did not receive the help they deserved.

On top of the complainants being violated, their rights being violated, them being referred to as crazies, there were extensive violations to the merit systems, and that included downgrading positions without any type of adverse action or any type of performance application, hiring employees without vacancy announcements, including a FOIA specialist with no prior Government experience of FOIA experience.

In conclusion, with all of that we talked to Mr. Bloch about these internal repressions within the OSC. Mr. Bloch became extremely upset, and his all-out attack against me through his management was to have me removed not only from the Office of Special Counsel but as well as from public services, period.

Thank you.

[The prepared statement of Ms. Dawson follows:]

TESTIMONY OF NATRESHA DAWSON

BEFORE THE SUBCOMMITTEE ON FEDERAL WORKFORCE, POSTAL SERVICE, AND GOVERNMENT MANAGEMENT OF THE HOUSE OVERSIGHT AND GOVERNMENT REFORM COMMITTEE

on

THE U.S. OFFICE OF SPECIAL COUNSEL

July 12, 2007

MR. CHAIRMAN,

Thank you for inviting my testimony for today's hearing. I can speak from experience on the U.S. Office of Special Counsel, because it was the most disillusioning experience of my professional life. Its stated mission and public relations identity is defending the merit system and whistleblowers. But in practice it has ignored whistleblowers, and internally violated the same merit system principles it is charged with enforcing in the rest of the civil service system. I know, because my duties were to staff the Customer Service Unit (CSU) that Special Counsel Scott Bloch created in response to congressional criticisms two years ago.

From June 25, 2005 until October 13, 2006 I was employed by the OSC. Prior to that time I had worked in the federal government for 17 years, most recently as legal secretary for the Chief Administrative Law Judge (ALJ) at the U.S. Department of Agriculture. Until taking extended medical leave in April 2006, I was one of two Paralegal Specialists initially hired for the new Customer Service Unit. My stated duties were to receive initial calls and work with intakes to understand their cases, review associated documents and prepare introductory analyses of whether and how the OSC could be of assistance.

I accepted the offer to work under Mr. Bloch for two reasons: 1) I had reached a career ceiling as a GS-9 Legal Secretary for the Chief Administrative Law Judges at the U.S. Department of Agriculture, and the OSC offered me a GS 9-11 Paralegal Specialist position. 2) It was an opportunity to make a difference helping to enforce employee rights. During the course of my employment, I spoke with hundreds of employees seeking help against prohibited personnel practices or attempting to blow the whistle.

Based on my experience at the CSU, I drew two conclusions. 1) As an overwhelming rule the OSC did not respect or help victims of illegal retaliation. I knew of no one who contacted the CSU and received assistance. Eventually I stopped making any statements offering hope to those who sought help from the Special Counsel, because I believed it would be dishonest. 2) In terms of practices for its own staff, the OSC was the lowest common denominator in the Executive branch in terms of respect for and compliance with the merit system. While he is always superficially pleasant, through his managers Mr. Bloch has ruled by an atmosphere of fear. I know, because I blew the whistle internally on the Office's neglect of whistleblowers. The response was swift, ugly retaliation.

Before coming to the OSC, I had a spotless record of federal service, with consistently positive performance appraisals and no disciplinary or other personnel actions against me. For example, I had just received an Outstanding rating in my mid term review from USDA's Chief ALJ. By contrast, despite approval of all relevant medical leave in October 2006 the Special Counsel fired me for being AWOL during the leave period.

Similarly, I had never asserted legal rights against an employer. However, based on less than a year of active service working under Special Counsel Bloch, I filed 2 EEO complaints, 3 Whistleblower Protection Act claims, 2 Office of Workman's Compensation claims, and a Federal Tort Claims Act lawsuit. Currently I am pursuing a mixed WPA-EEO case. I came today to defend the merit system, however, not my personal rights except as the retaliation I suffered is necessary for context. The

Government Accountability Project (GAP) represents me in the Whistleblower Protection Act claim.

My specific concerns are summarized below.

I. Customer Service Unit

* Initially the other new CSU staffer and I worked with the Complaints Examining Unit (CEU). Although other staffers helped on evaluating intakes and filling out CEU disposition forms, there was no formal training beyond general reading material.

* In September the CSU inexplicably was moved to become part of the Human Resources branch run by Mr. Robert Wise, Director of Human Resources. He instructed me to limit myself to receiving phone calls and summarizing what was on the OSC website.

* OSC personnel never questioned or discussed with me any specific calls from alleged victims of prohibited personnel practices seeking assistance. Their calls were nothing more than an opportunity to make noise. There was a 100 percent disconnect with the rest of the agency, and I could not point to any indications that my discussions intakes had any relevance for handling of their cases, other than that other OSC staff would not have to talk with them.

* Intakes were dismissed arbitrarily, even though their alleged facts appeared to correspond directly to the elements of prohibited personnel practices summarized on the OSC website. OSC supervisors and other staff regularly referred to whistleblowers as "crazy." I empathized deeply with many of the callers and wanted to help change that attitude. I protested that intakes seemed that way, because they were under attack,

bewildered and in danger of losing their professional lives. There was no empathy or commitment to help, as evidenced by a CEU Team Leader throwing an emergency stay request on a stack of other papers and refusing to discuss it with me. It felt like I was talking to walls. Other than CEU chief Audrey Williams, no OSC manager ever discussed with me the agency's mission to help whistleblowers.

* By February 2006 the other CSU Paralegal had left the unit, taking a lateral reassignment and the other component of the unit took a position outside OSC. After my last day of active duty on March 28, there was no CSU at least through October 13, 2006 when I was terminated. Shutting down the Customer Service Unit enabled a "Don't Want to Know (or Be Bothered) Syndrome" at the OSC, since we were supposed to screen for the best cases and refine raw complaints into a record that attorneys could follow through on.

II. Whistleblowing disclosures and response.

* I was not passive about the disillusioning practices. I made both verbal and written internal whistleblowing disclosures ranging from supervisors to Mr. Bloch on the following issues:

- structurally and functionally isolating CSU staff from the Complaints Examining Unit, when they should have been working in partnership to assess whether and how the Special Counsel most effectively could help prohibited personnel practice victims.

- Refusing to permit call intake sheets, so that Mr. Wise would know what issues the complainants had raised, and assess whether and how the OSC could help.
- failing to make an honest effort to respect or help whistleblowers and other reprisal victims who sought relief.
- hiring three CEU staffers without vacancy announcements.
- hiring a Freedom of Information Act (FOIA) specialist who had no prior expertise or federal experience, and without a vacancy announcement despite my request to be kept informed because I was interested in applying for the position and had FOIA training.
- monopolizing agency power at the top, illustrated by the practice of supervisors so disenfranchised that they did not meet their staff until after hiring decisions in which they played no role.
- reducing efficiency and exacerbating backlogs, due to Mr. Wise's orders that he would have to be the intermediary for all communications with other OSC staff, supervisors and employees assigning work to the Customer Service Unit.
- absence of performance standards for my position.
- downgrading my position without a desk audit or performance evaluation.
- Creating unauthorized preferences for favored employees.

* I did not have any employment history of being a critic, and did not initially raise my concerns in that context. I was responding to Mr. Wise's request at the introductory meeting that he wanted the new CSU staff's help to get the unit off the

ground. I consistently tried to present my concerns as constructive suggestions to solve problems. But Mr. Wise appeared threatened, refused to discuss my ideas and summarily rejected them.

* In September 2005 I appealed to Mr. Bloch to provide leadership against threats to the merit system from within the OSC. It was in an email also copied to Deputy Special Counsel McVay. Mr. Bloch never responded, but a few days later Mr. McVay told me in response to the emails, "We're sticking with management." Other employees described that phrase as a mantra at the agency. The day after Mr. McVay's response, Mr. Wise said I had placed him and his supervisor in a bad light by going to the Special Counsel, so he gave me a gag order in the form of a "letter of counseling." It ended with an open ended threat of termination if I communicated again with Mr. Bloch. Mr. Wise said that Mr. Bloch personally directed that I stop communicating with him, that it was Mr. Bloch's decision to issue the gag order/so-called letter of counseling, and that it could not be removed until he gave instruction to remove it. It never was. The action and threat directly contradicted the Special Counsel's anti-harassment policy. Mr. Wise later explained that he issued the letter of counseling, "because technically Mr. Bloch is not in Ms. Dawson's chain of command."

* On July 22, 2006 I alerted Mr. Anderson of my intention to disclose the CSU breakdown to Congress, as well as the atmosphere of internal repression. The next month he proposed my termination.

III. Racism.

* There was a system of de facto segregation in office placement for OSC staff. Seasoned employees referred from one side of Mr. Bloch's office to the end as "Mahogany Row," because no black staff could occupy an office and work there. After getting ordered to move from that side, I asked why other minority employees or I couldn't be located in vacant offices there and was told that they were reserved for storage of old furnishings, files and potential new hires. Later I was told the rooms were reserved for future SES hires who did not arrive before my departure.

* Initially I had been assigned to another office on Mahogany Row, but Mr. Wise removed me with the explanation that Associate Special Counsel Lenny Dribinsky complained that he couldn't walk by my door "without his stomach turning." Mr. Wise confirmed that there was nothing else which could have caused Mr. Dribinsky's distress besides me, the only employee in the office. He also said it was reserved for SES employees, but ultimately it was used by white interns, contractors, and for office files.

IV. Hostility to the merit system.

* The OSC leadership was rigidly intolerant of agency employees asserting their rights, which created an atmosphere of fear. Numerous employees warned me that anyone who filed a complaint about working conditions would be ruined and go down. One veteran employee was so upset about internal harassment that s/he cried in telling me about it, but the employee was afraid to file a legal challenge due to certainty that it would lead to certain termination.

* The reaction to correcting an administrative mistake illustrates the hostility to employees asserting themselves. Shortly after being hired, I learned that due to an error I

would not receive a paycheck for my first pay period. When I could not obtain cooperation within OSC, I directly contacted the National Finance Center and easily straightened the matter out. I notified Mr. Wise. To my surprise, he and his Assistant Human Resource Specialist angrily accused me of a "security breach." A few days later Mr. Wise passed along the comment the sight of me made Mr. Dribinsky sick. He also ordered me not to call OPM or the NFC. A few weeks later he moved my workstation next to the men's room, where I was distracted by regular flushing and felt sick from the smell of disinfectant-masked urine.

* On August 8, 2005 I complained to my second line supervisor about the seating arrangement. Mr. Wise moved me to new seating locations five times over two months and six times total prior to my termination. The last was a storage room with excess furniture unstably stacked six feet high. In late August I decided to disclose the matter in compliance with the agency anti-harassment policy, when a chair fell and came close to striking my head. Mr. Wise responded by canceling my flexible schedule. Mr. Anderson smiled while advising that if he had complained about his seating arrangement he would have been fired.

* I returned to work from sick leave the day after the Office of Personnel Management (OPM) Office of Inspector General (OIG) opened an investigation of Mr. Bloch. Without warning on my second day back, Federal Protective Service officers and an OSC security guard escorted me from my desk to the library, where they questioned me. This all took place in front of other employees, and appeared intended to make an example of me. The FPS staff explained the OSC had called them in, because allegedly I had made threatening statements. Supposedly I was dangerous and had been threatening

to bring a machine gun in to work and shoot the place up. To illustrate the crude dishonesty, these statements allegedly occurred in the office, while I had been out on medical leave. I was never charged, and FPS closed the case for lack of substantiation because no one would testify about any such threats. After being released, I called Mr. Bloch's name and attempted to get his attention and find out what had happened, since he was observing by an elevator. But he quickly turned away. The FPS agreed with my request to investigate the basis, but the OSC then refused to cooperate – dismissing the incident as an EEO personnel matter. Mr. Wise and Mr. Anderson continued to repeat the allegation in statements to the EEOC and OWCP answering my harassment charges.

* On October 2, 2005 I filed an EEO complaint challenging hostile working conditions, and my gag order/threatened termination for communicating with Mr. Bloch. A little less than three weeks later, Mr. Wise downgraded me from a GS-9/11 to a GS-9 with no possibility for future advancement to the GS-11 track I had been hired in – all without a desk audit, performance appraisal or any adverse action to justify the demotion.

* On October 10, 2006 I communicated to Mr. Bloch a protest that the OSC was violating an EEO judge's settlement order. On October 13 he finalized my termination, which I received via email on October 17, 2006, explaining that I had been terminated effective October 13, 2006. As mentioned initially, the termination was for AWOL, but the agency was aware of my medical reports and had approved my medical leave based on them. While the agency terminated me, it insists that it was not disciplinary so I do not have civil service rights to appeal my firing.

* The physical effects of the harassment were severe. Although I did not have a history of medical problems, I developed insomnia and migraine headaches, to the point

where on one occasion I had to be taken to the emergency room. My doctor ordered me not to work, I submitted all required medical documentation, and sick leave was approved. While out, however, it was arbitrarily removed without notifying me. The OSC changed my status to AWOL and then terminated me for the "offense" they had not communicated. I do not understand how the OSC can carry out a mission to protect the same rights of other federal employees, that it regularly violates for its own staff.

Some hope for accountability based on an investigation by the Office of Personnel Management (OPM) Inspector General (IG) into a Whistleblower Protection Act complaint by six other OSC employees and several public interest groups. I'm not holding my breath. The OPM investigator was on the premises when Mr. Bloch tried to scare off other witnesses by making an example of me. She did not follow through. Several months ago my attorney Tom Devine sent my affidavit with the same information as in this testimony. There has been no response, not even an acknowledgement. If there is going to be any accountability, it will have to come from Congress. The OIG's effort has all the symptoms of the same type window dressing that Mr. Bloch has mastered.

Unlike many other critics, I am not an advocate of abolishing the Office of Special Counsel. I listened to too many desperate whistleblowers whose careers were ruined for doing the right thing, and who had no where else to turn. What's needed is a Special Counsel who makes an honest effort, instead of playing cynical games that have stripped his office of credibility and respect from those it is charged with serving. I am glad to work further with committee staff on any items in this testimony.

It is a great relief that Congress is investigating to learn the truth about the Office of Special Counsel. There is no realistic hope elsewhere. I have presented evidence of all these abuses to the Office of Personnel Management (OPM) Office of Inspector General (OIG), which officially is investigating Mr. Bloch. They have not seen fit to follow through, or even to return my GAP attorney calls and emails when we presented a detailed affidavit and exhibits on the points summarized today. It is long overdue that Congress faces what has happened in this agency, and what that means for whistleblowers whose only hope is the Office of Special Counsel.

Mr. DAVIS OF ILLINOIS. Thank you very much.
Ms. Schwartz.

STATEMENT OF LARA SCHWARTZ

Ms. SCHWARTZ. Chairman Davis, thank you for giving me the opportunity to speak on behalf of the Human Rights Campaign and our grassroots force of more than 700,000 members and supporters.

Merit-based employment is a core American value, yet discrimination based upon sexual orientation continues to be pervasive in this country, where gay and lesbian workers can be fired in 31 States because of who they are and not their job performance.

The Federal Government is our Nation's largest employer and ought to set an example of fairness and take a stand against discrimination. In fact, Federal workers are protected from sexual orientation discrimination by 5 U.S.C. section 2302.B.10. For decades this law has protected gay and lesbian civilian employees. In fact, until recently the Office of Special Counsel has consistently enforced this law, even providing Web site and written materials to inform Federal employees of their rights.

Every prior OSC had, OPM has, and even Reagan administration Assistant Attorney General Theodore Olson have concluded in interpreting this law that sexual orientation is covered. However, the current special counsel, Scott Bloch, has not only ceased to enforce this statute, but he has actually contradicted its previously undisputed interpretation and claimed without basis that the law does not apply. As a result, Federal civilian employees are being denied employment protections. Mr. Bloch's actions are legally groundless and contrary to well-settled law. In fact, as recently as today Chairman McPhie stated that Mr. Bloch's justifications and legal analysis surrounding this law is completely groundless, and Mr. Bloch's analysis of the MSPB's decisions was inaccurate.

The Government has explicitly recognized that the statute covers sexual orientation since 1980, when then Director of the OPM, Alan Campbell, wrote a memorandum advising that applicants and employees are to be protected against inquiries into or actions based upon non-job-related conduct, such as religious, community, or social affiliations or sexual orientation.

As I have stated, this position has since been reaffirmed by subsequent OPM Directors under both parties.

Prior to Mr. Bloch's tenure as special counsel, OSC also interpreted this provision similarly. In fact, in a well-publicized case settled by OSC in 2003, OSC's investigation revealed that a manager had declined his selected best qualified applicant for a position because the manager was overheard to have said he was a—derogatory comment. In that case, OSC obtained monetary damages for the job applicant and the manager was removed from her supervisory position.

Within weeks of his taking office in January 2004, Mr. Bloch abruptly ordered the removal of references to OSC's jurisdiction to enforce sexual orientation discrimination protection from OSC's Web site, including information about the recently settled case. He did so without conducing a legal analysis, consulting OPM or any other executive agency, or providing an explanation. He stated that his office would conduct a legal review of jurisdiction to enforce

these claims, even though this legal issue had been clearly settled for over 20 years.

When Members of Congress objected, even the White House issued a statement that Federal policy prohibits discrimination, but still Mr. Bloch remained determined to roll back civil rights. He has attempted to justify his actions citing cases that are inapposite. I refer to the testimony of Chairman McPhie and also to my written testimony submitted into the record explaining why his legal analysis is inaccurate.

Mr. Bloch's refusal to enforce the law has had real-world consequences. For instance, he refused to investigate the complaint of Michael Levine, a 32-year veteran of the Forest Service who alleged that he was subjected to a 14-day suspension in retaliation for engaging in whistleblowing and based on sexual orientation discrimination. In spite of compelling evidence, the OSC wrote a letter dismissing his claim, stating that there was no evidence of discrimination for conduct, and therefore no basis for an investigation.

The Human Rights Campaign is gravely concerned that Mr. Bloch has single-handedly stripped thousands of Federal workers of protections that Congress conferred upon them decades ago. Although it is clear that his actions lack any legal justification, the real-world consequences are huge. They also point to the need for every American to have a law addressing workplace discrimination.

Fortunately, many employers have come to recognize that basing employment decisions on merit rather than sexual orientation is a wise business policy, enabling them to attract the best talent and to demonstrate a commitment to fairness. That is why nearly 90 percent of the Fortune 500 corporations have non-discrimination policies covering sexual orientation. The Federal Government should not lag behind the top employers in its policies and practices, and it should certainly not fail to enforce laws that have been in force for decades.

I thank you for the opportunity to present our concerns with Mr. Bloch's performance. It is imperative that Federal nondiscrimination protections be restored.

On behalf of the Human Rights Campaign, I strongly urge this subcommittee either to compel Mr. Bloch and the OSC to follow the law, or to ensure that Mr. Bloch is replaced with a special counsel who will do so.

[The prepared statement of Ms. Schwartz follows:]

United States House of Representatives
Committee on Oversight and Government Reform
Subcommittee on Federal Workforce, Postal Service and the District of Columbia

"Ensuring a Merit-Based Employment System: An Examination of the Merit Systems Protection Board and the Office of Special Counsel."
July 12, 2007
Testimony of Lara Schwartz, Human Rights Campaign

My name is Lara Schwartz, and I am legal director at the Human Rights Campaign, the nation's largest advocacy organization working for the civil rights of gay, lesbian, bisexual, and transgender Americans. On behalf of the Human Rights Campaign and our grassroots force of more than 700,000 members and supporters, I thank you for the opportunity to testify before this Subcommittee.

Merit-based employment is a core American value, yet discrimination based upon sexual orientation continues to be pervasive in this country, where gay and lesbian workers can be fired in 31 states because of who they are, and not their job performance. The federal government—our nation's largest employer— ought to set an example of fairness, and take a stand against discrimination. In fact, federal workers are protected from sexual orientation discrimination by a 1978 law, 5 U.S.C. § 2302(b)(10). For decades, this law has protected gay and lesbian civilian employees from workplace discrimination. Until recently, the Office of Special Counsel, or OSC, has consistently enforced this law, even providing website and written materials to inform federal employees of their rights.

However, the current Special Counsel, Scott Bloch, has not only ceased to enforce the statute, he has actually contradicted its previously undisputed legal interpretation and

claimed, without basis, that the law does not apply to sexual orientation at all. As a result, federal civilian employees are being denied the employment protections to which they are legally entitled. As set forth more fully in my testimony below, Mr. Bloch's actions with regard to sexual orientation discrimination in federal employment are legally groundless, and contrary to well-settled law. Mr. Bloch's refusal to enforce the law has had real consequences: claims of discrimination are being ignored in spite of compelling evidence.

The statutory provision at issue, 5 U.S.C. § 2302(b)(10), makes it unlawful to discriminate against a federal employee or applicant "on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others." Enacted more than 25 years ago as part of the Civil Service Reform Act of 1978, this provision has since been uniformly interpreted by the Executive Branch (including both Republican and Democratic Administrations) to prohibit discrimination against federal workers on the basis of their sexual orientation, whether that discrimination is based solely on the employee's sexual 'orientation' or 'status,' or on sexual 'conduct'.

The government explicitly recognized that the statute covers sexual orientation in 1980, when then-Director of the U.S. Office of Personnel Management Alan Campbell wrote a memorandum to the heads of all executive agencies advising that, under 5 U.S.C. § 2302(b)(10), "applicants and employees are to be protected against inquiries into, or actions based upon, non job-related conduct, such as religious, community, or social affiliations, or sexual orientation." (Emphasis added). This position was reaffirmed in 1994 by then-OPM Director James King, in a letter to Congressman Barney Frank. It has since been reaffirmed by all of Mr. King's successors as OPM Director: Janice LaChance

(President Clinton's appointee), Kay Coles James (President Bush's first OPM director) and Linda Springer (the current OPM director). Indeed, OPM issued government-wide guidance in 1999 in a publication that remains available today on OPM's web-site, "Addressing Sexual Orientation Discrimination in Federal Civilian Employment: A Guide to Employee's Rights." In that guidance, OPM stated that it "has interpreted this statute [2302(b)(10)] to prohibit discrimination based upon sexual orientation. Sexual orientation means homosexuality, bisexuality or heterosexuality." *See* http://www.opm.gov/er/address2/Guide04.asp .

The Justice Department issued similar guidance, in a written opinion issued more than 20 years ago by Theodore Olson, who was then an Assistant Attorney General in the Reagan Administration, heading DOJ's Office of Legal Counsel. In that opinion, Mr. Olson reviewed the statutory language of 2302(b)(10), as well as an extensive body of judicial decisions issued by the Courts of Appeals in the 1960's and 1970's that had led OPM's predecessor, the U.S. Civil Service Commission, to conclude that applicants and employees may not be found unsuitable for federal government employment solely because they were homosexual. On the basis of those legal precedents, he concluded that "it is improper to deny employment or to terminate anyone on the basis either of sexual preference or of conduct that does not adversely affect job performance."[1]

Prior to Mr. Bloch's tenure as Special Counsel, OSC also interpreted this provision to prohibit discrimination based on sexual orientation. In one well-publicized case, settled by OSC in June 2003, OSC's investigation revealed that a manager had declined to select the best-qualified applicant for a position because, the manager was overheard to have said, he was a "flaming queer." In that case, OSC obtained monetary

[1] *See* 7 Op.O.L.C. 58 (1983).

damages for the job applicant and the manager was removed from her supervisory position for a year and suspended without pay for 45 days.

Within weeks of his taking office in January 2004, Mr. Bloch abruptly ordered the removal of all references to OSC's jurisdiction to enforce sexual orientation discrimination protections from OSC's web-site and printed materials, including information about the recently-settled case. He did so without conducting a legal analysis, consulting OPM or any other executive branch agency, or providing an explanation. He claimed that his office would conduct a "legal review" of OSC's jurisdiction to enforce sexual orientation discrimination claims—even though the issue had been clearly settled for over twenty years. When several members of Congress objected, the White House issued a statement that federal policy prohibits discrimination based upon sexual orientation. As set forth more fully below Mr. Bloch remained determined to roll back civil rights for federal employees.

Mr. Bloch has attempted to justify his actions, finally providing the reasoning behind his decision at a hearing conducted on May 24 2005.[2] He stated that the civil rights laws, including Title VII, do not make sexual orientation a "protected class" like race, gender, or age. This reasoning was inapposite because Title VII is not the statute applicable to sexual orientation discrimination in federal employment. Mr. Bloch also stated that § 2302(b)(10) prohibits discrimination based on "conduct" and does not mention discrimination based on sexual "orientation." Determining without reference to a single statute, regulation, or case that there was a distinction between "conduct" and "sexual orientation" in non-discrimination law, Mr. Bloch stated that OSC would exceed

---

[2] Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia--
"Safeguarding the Merit System: A Review of the U.S. Office of Special Counsel" May 24, 2005.

the bounds of its statutory jurisdiction if it were to investigate and prosecute cases alleging discrimination based on sexual orientation.

The distinction that Mr. Bloch appears to be drawing between discrimination based on sexual "conduct" and discrimination based on sexual "orientation" is unsupported by any precedent or logic. When a federal agency denies an applicant a job or otherwise discriminates against an employee because he or she is gay, the discrimination is inevitably rooted in disapproval of their conduct. It is inconceivable that such discrimination would be rooted in some abstract disapproval of a person's orientation. There is no meaningful real world distinction to be drawn between discrimination based on sexual "conduct," and discrimination based on sexual "orientation." In this context, "orientation" is inextricably intertwined with "conduct." *See Steffan v. Perry*, 41 F.3d 677, 689 (D.C. Cir. 1994)(*en banc*) (Silberman, J.)(upholding the rationality of the military's 'don't ask, don't tell' policy on the grounds that "homosexuality, like all forms of sexual orientation, is tied closely to sexual conduct," and observing that "[a]lthough there may well be individuals who could, in some sense, be described as homosexuals based solely on inchoate orientation, certainly in the great majority of cases those terms are coterminous.").

Second, Mr. Bloch's analysis relies upon a Merit Systems Protection Board opinion that does not support his conclusion, and is in fact completely irrelevant to the question.[3] That decision interprets 5 U.S.C. § 2302(b)(1), not 5 U.S.C. § 2302(b)(10).[4] Indeed, after conducting extensive legal research, we are unaware of any decision by any

---

[3] *Morales v. Department of Justice*, 77 M.S.P.R. 482 (1998)
[4] *See id.*

court, or by the MSPB, holding directly or indirectly that OSC has no jurisdiction under 5 U.S.C. § 2302(b)(10) to enforce claims of sexual orientation discrimination.

Mr. Bloch has repeatedly attempted to confuse the issue by claiming that prior OSC enforcement actions were based not on 5 U.S.C. § 2302(b)(10), but on an Executive Order issued by President Clinton in 2000, and re-affirmed by President Bush in public statements made in 2004.[5] Mr. Bloch's claim that OSC previously based its jurisdiction on the Executive Order is blatantly false, and despite repeated requests that he refrain from making such misstatements and correct the erroneous press release that remains on OSC's web-site, he has refused to do so. Indeed, the material he ordered removed from the web-site earlier in 2004, including the press release attached hereto as Ex. 4, explicitly cited 5 U.S.C. § 2302(b)(10) as the basis for OSC's jurisdiction.

Mr. Bloch's refusal to enforce the law has had real-world consequences. For instance, he refused to investigate the complaint of Michael Levine, a 32-year veteran of the Forest Service, who alleged that he was subjected to a 14-day suspension in retaliation for engaging in whistle-blowing, and based on sexual orientation discrimination. Mr. Levine provided a witness's statement that the person who suspended him used an anti-gay slur—substantial evidence of workplace bias. However, in a letter dismissing his claim, the OSC wrote that because there was no evidence of discrimination for *conduct,* there was no basis for an investigation.

---

[5] *See* OSC Press Release, Feb. 27, 2004 ("It appears that, beginning five years ago, this Office based jurisdiction in this area on the amendment to Executive Order 11487 made by Executive Order 13087. But Executive Order 11487, as further amended by Executive Order 13152, expressly states that it 'does not confer any right or benefit enforceable in law or equity against the United States or its representatives.' Further, Executive Order 11487, as amended, expressly places responsibility for its enforcement and implementation in the EEOC, not in OSC. This raises questions as to my power to enforce this Executive Order and reinforces my decision to conduct a full legal review of this policy.")

As an organization advocating for workplace protections for all Americans, we are gravely concerned that Mr. Bloch has apparently single-handedly stripped thousands of federal workers of protections that Congress conferred upon them decades ago, and that the President claims to support. During Mr. Bloch's tenure, the OSC has ceased to enforce a much-needed law. Although it is clear that Mr. Bloch's actions lack any legal justification, this situation provides additional evidence that a federal law is needed to ensure that *every* American has redress for workplace discrimination. When one executive officer can play fast and loose with employee rights, the system is not working.

Fortunately, many employers have come to recognize that basing employment decisions on merit rather than sexual orientation is a wise business policy, enabling them to attract the best talent and to demonstrate a commitment to fairness. That is why nearly ninety percent of Fortune 500 corporations have non-discrimination policies covering sexual orientation. The federal government should not lag behind the top employers in its policies and practices. With the nation's important work to do, and taxpayer dollars being spent on the workforce, it is imperative that the government be a model of employment practices. By attempting to strip workplace protections from federal employees, Mr. Bloch has not only flouted the law and harmed the federal workforce, but denied the American people a work force that is equal to any corporate staff.

I thank this Subcommittee for the opportunity to present our concerns with Mr. Bloch's performance. It is imperative that federal non-discrimination protections be restored. For three years, Mr. Bloch has refused to do so in spite of rebukes from the President and Congress. On behalf of the Human Rights Campaign, I strongly encourage

this Subcommittee either to compel Mr. Bloch and the OSC to follow the law, or to ensure that Mr. Bloch is replaced with a Special Counsel who will do so.

Mr. DAVIS OF ILLINOIS. Thank you very much.

We will go to Ms. Daley.

STATEMENT OF BETH DALEY

Ms. DALEY. Chairman Davis, thank you for inviting me here to testify.

My name is Beth Daley, and I am director of investigations at the Project on Government Oversight [POGO]. POGO is an independent nonprofit that has for more than 25 years investigated, exposed, and helped to remedy corruption and other misconduct in the Federal Government. Because of POGO's role as a watchdog, I hear from many whistleblowers who are seeking justice from the Office of Special Counsel and the Merit Systems Protection Board. I am sad to report that very few of these whistleblowers that I hear from find the help that they are seeking.

Although the House of Representatives recently passed the Whistleblower Protection Act of 2007 as an effort to remedy the situation, I fear that OSC and MSPB will continue to fail because they are small, weak agencies inside of an executive branch which has been perpetually hostile to whistleblowers.

As we approach the 30th anniversary of these institutions, it is time for Congress to consider if it is time to end this experiment and if it has failed.

Since 1980, numerous reports have documented the failures of the OSC and MSPB. For instance, the GAO reported in 1985 that in its first 5 years the OSC and MSPB had gained corrective or disciplinary action in only 16 of the estimated 1,500 whistleblower cases which had been closed. In other words, just 1 percent.

A Senate report later noted that in its first 10 years OSC had not brought a single correction action case on behalf of the a whistleblower to the MSPB. That is in 10 years.

In 1989 and 1994 the Congress attempted to remedy the situation by strengthening whistleblower protections, but those reforms ultimately failed again.

In the past 10 years, favorable actions obtained by the OSC for whistleblowers and others has declined. In 2005 and 2006, only about 2½ percent of OSC cases resulted in a favorable action for the employee.

The total number of favorable actions obtained for whistleblowers declines considerably from 120 in 1995 to just 40 in 2006.

Finally, the OSC continues to issue a minuscule number of enforcement actions against managers who engage in retaliation, on average between just zero to five total annually.

So with odds like these, it is easy to see why whistleblower retaliation continues to be a deeply entrenched practice throughout the Federal Government. Current leaders at the OSC have brought the agency to a point where it has, itself, become mired in a series of scandals that have undermined its credibility as the Federal Government's protector of whistleblowers.

In early 2004, OSC insiders blew the whistle on Mr. Bloch's refusal to enforce anti-discrimination statutes. Shortly thereafter, Mr. Bloch was quoted in a Federal Times article saying, "It is unfortunate we have a leaker or leakers in our office who went to the press rather than coming to me."

On the heels of this interview, Mr. Bloch sent an e-mail to his staff directing that any official comment on or discussion of confidential or sensitive internal agency matters with anyone outside of OSC must be approved in advance by an official in his immediate Office of Special Counsel.

The e-mail wasn't a legal gag order and exemplified the kind of communication which Congress has annually determined cannot be issued by executive branch officials using Federal funds.

A complaint filed against OSC by anonymous employees and public interest groups, including mine, resulted in an investigation assigned to the OPM Inspector General, which has not yet been completed, yet OSC managers have inappropriately attempted to interfere with this investigation and have conducted themselves in a manner that is intimidating to employees. Mr. Bloch has even contemplated requiring employees interviewed in the investigation to submit affidavits reporting on their discussions with investigators.

It is time for Congress to conduct a series of vigorous oversight activities aimed at evaluating the OSC's and the MSPB's performance, determining why these agencies have failed, and analyzing whether their activities could be better performed by other Government bodies.

As a start, it would be appropriate for this committee to commission a series of GAO and Congressional Research Service studies, something that has not been done on a large basis since the mid-1990's. In conducting this analysis, I would encourage the committee to consider what role the legislative branch could play in assisting whistleblowers. Congress should consider whether taking the OSC's budget and moving it into a congressional agency tasked with conducting investigations into whistleblower allegations might be a more effective expenditure of funds. Half of the whistleblowers' battle against retaliation is gaining a fair review of his or her concerns, and a congressional agency would be better suited to this task, given its independence from the political constraints inherent in the executive branch.

My other recommendations are in my written testimony.

Again, thank you for inviting me to testify here today.

[The prepared statement of Ms. Daley follows:]

Testimony of Beth Daley

Director of Investigations, Project On Government Oversight

"Ensuring a Merit-Based Employment System: An Examination of the Merit Systems Protection Board and the Office of Special Counsel"
Subcommittee of Federal Workforce, Postal Service and the District of Columbia
July 12, 2007

Chairman Davis and Ranking Member Marchant, thank you for inviting me to testify today. My name is Beth Daley and I am the Director of Investigations for the Project On Government Oversight (POGO). POGO is an independent nonprofit that has, for more than 25 years, investigated and exposed corruption and misconduct in order to achieve a more accountable federal government.

Whistleblowers are the Congress' most important allies in the war against Executive Branch corruption, waste, fraud, and abuse. In POGO's long history, our organization has seen that almost all of the information coming from government agencies only tells the good news. The bad news is locked away where it festers. In this age of increasing government secrecy, it has become even more difficult to find out what is really going on inside the Executive Branch. Whistleblowers and concerned insiders who disclose information about wrongdoing are, in most cases, the only way for Congress, watchdogs, and the news media to get an uncensored reality check.

Yet these whistleblowers face enormous risks. Their managers often retaliate against them if they are discovered. Over and over again, I hear the same stories of retaliation by managers who want to make an example of whistleblowers inside the agency: A whistleblower's desk is moved to the basement or into the hallway; computers are taken away; job responsibilities and authorities are stripped away. But blowing the whistle can have far more serious repercussions. Whistleblowers are frequently fired from their jobs, or are blackballed and therefore lose their entire careers. And these examples don't even touch on the personal costs to the whistleblowers and their families.

Because of POGO's role as a watchdog, I hear from many whistleblowers who are seeking assistance and justice from the U.S. Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB). I am sad to report that very few of the whistleblowers I hear from find the help they need from these agencies. Instead, the whistleblowers are frequently frustrated by the OSC's and MSPB's unwillingness to act on their concerns, to provide a fair hearing of their evidence, or to act as a means of reigning in agency abuses. The OSC and MSPB are failing in their missions.

666 11th Street, NW, Suite 900, Washington, DC 20001
(202) 347-1122 www.pogo.org

Although the House of Representatives recently passed H.R. 985, the Whistleblower Protection Enhancement Act of 2007, as an effort to remedy the situation, I fear that the OSC and MSPB will continue to fail as they have for most of their history. Both OSC and MSPB are small, weak institutions located in the Executive Branch, which is persistently hostile to whistleblowers. As we approach the 30-year anniversary of these institutions, I believe the time has come for Congress to seriously consider ending this failed experiment, and to explore whether justice would be better served by relocating the OSC's and MSPB's functions to other agencies. Efforts to repair the agency's failures have resembled an extended game of whack-a-mole.

The OSC and the MSPB were created by the 1978 passage of the Civil Service Reform Act to protect merit-based civil service rules. These rules are meant to ensure that federal civil servants are qualified and can serve the public free of management abuse and partisan political interference. From the very beginning, however, OSC and MSPB demonstrated an inability to fulfill their mission. This pattern of failure has persisted over the decades.

Since 1980, the Government Accountability Office (GAO) has issued numerous reports documenting the failures of the OSC and MSPB. There are several reasons for these failures. Some failures were the result of poorly-crafted policies.

For instance, the GAO reported in 1985 that in the first five years, the OSC and MSPB had gained corrective or disciplinary action in only 16 of the estimated 1,500 whistleblower cases that had been closed—in other words, just *one percent* of the whistleblowers who filed a claim to challenge retaliation received some sort of relief. According to the GAO's review of a sample of cases, the criteria for determining whether whistleblower reprisal took place were simply too stringent. OSC had also failed to successfully prosecute even a single whistleblower case in front of the MSPB in its first five years. Even at this early juncture, Members of Congress contemplated abolishing the OSC given its abysmal failure.[1] According to a Senate report:

> The Whistleblower Protection Act was passed in 1989, in large part because the Office of Special Counsel was perceived as being ineffectual. At that time, OSC had not brought a single corrective action case since 1979 to the Merit Systems Protection Board on behalf of a whistleblower. A former Special Counsel had been quoted in the press advising whistleblowers "Don't put your head up, because it will get blown off." Whistleblowers told the Governmental Affairs Committee that they thought of the OSC as an adversary, rather than an ally, and urged the Committee to abolish the office altogether.
>
> The Committee chose to strengthen the office instead, giving it another chance to act aggressively on behalf of whistleblowers.[2]

To remedy these and other problems, Congress passed the Whistleblower Protection Act in 1989, which enacted a series of structural reforms to the OSC and MSPB. Central to these reforms was an attempt to ease the burden of proof for the whistleblower that retaliation had occurred.

---

[1] General Accounting Office, "Whistleblower Complainants Rarely Qualify for Office of the Special Counsel Protection," May 1985. http://archive.gao.gov/d9t2/126924.pdf

[2] Senate Report 103-358, "Authorization Appropriations for the United States Office of Special Counsel, the Merit Systems Protection Board, and for other Purposes," Senate Committee on Governmental Affairs, August 23, 1994.

However, studies conducted by the GAO subsequently found that, despite the reforms, not much had improved:

> In October 1992, we reported that even though the 1989 act was intended to strengthen and improve protection for whistleblowers, employees claiming reprisal for whistleblowing at OSC were finding that proving their cases was as difficult then as it was before the act was passed. The principal reason remained the lack of sufficient evidence to establish the link between the employee's whistleblowing and the reprisal.
>
> OSC disagreed with our conclusion that proving reprisal remained difficult, indicating that employees claiming reprisal under the 1989 act were having greater success than our analysis of OSC's data indicated. However, we found that although the number of whistleblower reprisal complaints, corrective and disciplinary actions, and stays (postponed action) had increased under the 1989 act, the increases were generally proportionate to the increases in the volume of complaints that had been filed. We also found that before and after the 1989 act's passage, about the same percentage (5.8 percent versus 6.3 percent) of reprisal complaints filed with OSC resulted in some form of corrective action.[3]

In 1994, the Congress was forced to act once again to repair the failed system by making amendments through the reauthorization process. In its report on the legislation, the House Committee on Post Office and Civil Service noted:

> Contrary to its rhetoric, the OSCs [sic] empirical track record is one of hostility to its stated mission as the rule, rather than the exception. Despite 400-500 cases yearly and the most sympathetic legal standards in history, the Office still has not litigated a single case to restore a whistleblowers job since the Acts 1989 passage, or indeed since 1979.
>
> During the last two fiscal years, the OSC has sought from the MSPB only three stays of prohibited personnel practices, out of some 4,000 complaints. Last year GAO concluded the OSC has not improved on its traditional claim of obtaining relief for 5% of complaints. Significantly, 35% of those whom the OSC turned away got help elsewhere, often through settlements a no-fault, constructive approach the OSC routinely refuses to attempt during MSPB appeals. The Office ordered full agency investigations under 5 U.S.C. 1213(c) into whistleblowers charges of waste, fraud or abuse for only five out of 149 whistleblowing disclosures in FY 1992, and 14 out of 209 new disclosures in FY 1993.[4]

Unfortunately, things have generally not improved, and, in some regards, are much worse since the 1994 amendments.

---

[3] General Accounting Office, "Whistleblower Protection: Employees' Awareness and Impact of the Whistleblower Protection Act of 1989," March 31, 1993. http://archive.gao.gov/d43t14/148871.pdf

[4] House Report 103-769, "Reauthorization of the Office of Special Counsel," House Committee on Post Office and Civil Service, September 30, 1994.

The OSC's 2006 annual report proudly declares: "The next seven pages graphically tell the story of the successes of the last three years at OSC, especially the decreased case processing times and the elimination of the backlogs, including those backlogs mentioned by GAO in 2004."[5] But what is really in the first few pages of this report is a razzle-dazzle of data charts showing all kinds of statistics regarding the closures of case files, but none showing who—if anyone—was helped. There is a reason why. Fewer and fewer whistleblowers and employees who are subjected to illegal personnel practices and retaliation are actually helped by OSC.

In the past ten years, favorable actions obtained by the OSC for whistleblowers and others have declined. In 2005 and 2006, only about 2.5 percent of the cases coming before the OSC resulted in a favorable action for the employee who filed the complaint. The total number of favorable actions obtained for whistleblowers declined from 120 in 1995 to just 40 in 2006. Finally, the OSC continues to issue a miniscule number of enforcement actions against managers who engage in retaliation: on average, between zero to five total annually. With odds like these, it is easy to see why whistleblower retaliation continues to be a deeply-entrenched practice throughout the federal government.

Another reason for the failures of the OSC and MSPB has been a lack of adequate leadership. Although former Special Counsel Elaine Kaplan did a notable job, other leaders of the OSC and MSPB have simply not been committed enough to fulfilling the mission of their agencies. As a result, Congress' policy reforms have been doomed to failure.

For instance, current leaders at the OSC have brought the agency to a point where it has itself become mired in a series of scandals that have undermined its credibility and authority as the federal government's protector of whistleblowers. Special Counsel Scott Bloch has a history of taking prohibited personnel actions and retaliating against whistleblowers at his own agency. In early 2004, OSC insiders blew the whistle on Mr. Bloch's refusal to enforce anti-discrimination statutes. Shortly after, Mr. Bloch was quoted in a *Federal Times* article stating, "It's unfortunate that we have a leaker or leakers in our office who went to the press rather than coming to me...."[6]

On the heels of this interview, Mr. Bloch sent an email to his staff directing "that any official comment on or discussion of confidential or sensitive internal agency matters with anyone outside OSC must be approved in advance by an [Immediate Office of the Special Counsel] official."[7] The email was an illegal gag order, and exemplified the kind of communication which Congress has annually determined cannot be issued by Executive Branch officials using federal funds.[8] In April 2004, the Government Accountability Project, and Public Employees for Environmental Responsibility, and POGO issued a letter denouncing this email.

---

[5] U.S. Office of Special Counsel, "Report to Congress," FY 2006. http://www.osc.gov/documents/reports/ar-2006.pdf

[6] Debra Katz, Katz, Marshall and Banks, "Complaint of Prohibited Personnel Practices Against Special Counsel Scott Bloch, March 3, 2005. http://pogo.org/m/gp/gp-OSCcomplaint-03032005.pdf

[7] Letter to Scott Bloch, U.S. Office of Special Counsel, April 24, 2004. http://www.peer.org/docs/osc/OSCletter.pdf

[8] Project On Government Oversight, *Homeland and National Security Whistleblower Protections: The Unfinished Agenda*, April 28, 2005. http://www.pogo.org/p/government/go-050402-whistleblowerB.html#uacommunication

These opening salvos in Mr. Bloch's tenure have set the stage for a tumultuous reign. In January 2005, we learned that Bloch ordered 12 headquarters employees to accept involuntary transfers to field offices in Dallas, Oakland, and Detroit, on penalty of removal. The employees were given only ten days to decide whether they would uproot their families, or lose their jobs.[9] Most simply resigned and moved on to other jobs.

Furthermore, whistleblowers have alleged that Mr. Bloch violated personnel rules, engaged in cronyism, and violated whistleblower free speech statutes. In March 2005, employees, who remained anonymous, and public interest groups including POGO, GAP, Public Employees for Environmental Responsibility and the Human Rights Campaign filed a complaint, which was filed with the OSC as required by law.[10] After six months of confusion regarding who should conduct the investigation, the President's Council on Integrity and Efficiency (PCIE) assigned the investigation to the Office of Personnel Management Inspector General (OPM IG) in October 2005. That investigation has not yet been completed.

Ironically, the complaint seems to have spurred more retaliation and prohibited personnel actions within the OSC. High level OSC staff inappropriately attempted to interfere with the investigation on several occasions, and have conducted themselves in a manner that is intimidating to employees. On January 30, 2007, a high-level OSC official sent an email to all of OSC's employees outlining a series of procedures for the investigation which, in effect, would allow managers to monitor who was interviewed by the OPM IG. This seemed to be an attempt to find out who the agency's internal critics were. The contents of the email revealed a startling lack of acumen concerning proper procedures for handling sensitive investigations.[11] [12]

In September 2006, Debra Katz, an attorney representing the complainants wrote to the Office of Management and Budget's Clay Johnson to express concern about Mr. Bloch's interference with the investigation:

> One witness already informed OPM IG investigators that shortly after the investigation began and the first staff witnesses were interviewed, Mr. Bloch seriously considered and debated whether he could and should compel employees who had been interviewed by the IG's staff to complete affidavits describing what they had been asked and what they had told investigators. We have been advised that Mr. Bloch discussed this plan with members of the senior staff, who apparently talked him out of this bizarre and patently

---

[9] "Staff Purge at Office of Special Counsel: Whistleblower Staff Claim Retaliation, Forced Moves to New Midwest Field Office," Press release from POGO, GAP & PEER, January 10, 2005. http://www.pogo.org/p/government/ga-050101-whistleblower.html

[10] "Documents Concerning the Special Counsel," http://pogo.org/p/government/OSCcompendium.html

[11] Debra Katz, Katz, Marshall and Banks, Letter to Clay Johnson III, Chairman, President's Council on Integrity and Efficiency, February 1, 2007. http://www.peer.org/docs/osc/07_12_2_protest_ltr.pdf

[12] Williamson, Elizabeth, "Special Counsel Accused Of Intimidation in Probe: Contact with Investigators Controlled, Employees Say," *Washington Post*, February 16, 2007. http://www.washingtonpost.com/wp-dyn/content/article/2007/02/15/AR2007021501725.html

> illegal plan. Nonetheless, his consideration of a plan to compel employees to reveal what they had told investigators, and his continuing involvement, have become widely known at OSC, causing current employees—including several of the complainants—to be reluctant, and thus far to refuse to meet with OPM IG investigators.[13]

These keystone-cops antics would be disturbing to hear about under any circumstances. However, they are even more disturbing given that the Office of Special Counsel is the agency to which whistleblowers must turn to for help, for confidentiality, and for support. It is simply not possible for the whistleblower community to have any confidence in Mr. Bloch's ability to perform his duties when he has repeatedly demonstrated a fundamental lack of understanding about whistleblowers, proper investigation procedures, employee free speech laws, and his responsibilities as a government manager.

Even the 2006 recipient of OSC's own Public Servant Award expressed frustration with the agency's failures. In a speech he prepared regarding his acceptance of the award, Bureau of Prisons whistleblower Leroy Smith described how the OSC failed to follow up on his disclosures and dismissed his retaliation claims, which he then pursued on his own. He noted: "as I stand here with my award for being the 'Public Servant of the Year,' I cannot help but feel that my experience is a beacon of false hope for public servants who are trying to correct wrongdoing."[14]

Recommendations

It is time for Congress to conduct a series of vigorous oversight activities aimed at evaluating the OSC's and the MSPB's performance, determining why these agencies have largely failed, and analyzing whether their activities could be better performed by other government bodies. As a start, it would be appropriate for this Committee to commission a series of GAO and Congressional Research Service studies on the overall performance of the OSC and MSPB, something that has not been done since the mid-1990s.

In conducting this analysis, I would encourage the Committee to consider what role the legislative branch could play in assisting whistleblowers. Congress should consider whether taking the OSC's budget and moving it into a Congressional agency tasked with conducting investigations into whistleblower allegations might be a more effective expenditure of funds. Half of a whistleblower's battle against retaliation is gaining a fair review of his or her concerns. A Congressional agency would be better suited to this task, given its independence from the political constraints inherent in the Executive Branch.

At the same time, Congress must consider how to improve those procedures which allow whistleblowers to legally challenge actions against them, whether that is loss of a job, decrease of in salary, or other retaliation. Yet, no analysis has been done by the GAO to compare the various frameworks and establish which are functioning most effectively. For example, one basis

---

[13] Debra Katz, Katz, Marshall and Banks, Letter to Clay Johnson III, Chairman, President's Council on Integrity and Efficiency, September 7, 2006. http://www.peer.org/docs/osc/07_12_2_protest_ltr.pdf

[14] Leroy Smith, "Beacon of False Hope," September 7, 2006. Mr. Smith was never able to give his speech at OSC's "Public Servant Award" presentation: OSC had cancelled the event after it learned Mr. Smith planned to be critical of its performance. http://www.peer.org/docs/osc/06_7_9_lsmith_stmt.pdf.

of comparison might be the process in the Department of Labor. Some statutes allow whistleblowers to file complaints with the Department of Labor and have a hearing with an Administrative Law Judge. A 2006 law review article by a City University of New York law Professor presented statistics on the disposition of whistleblower cases filed under the Sarbanes-Oxley Act, finding that out of 393 cases completed, the Department of Labor found merit in 64 cases (or 16%). Out of those 64 cases, 49 subsequently settled. This is a fairly high settlement rate, even given how few of the Sarbanes-Oxley cases are reported to have prevailed before the Department of Labor's Administrative Judges or in federal court.[15]

Furthermore, Congress should only extend reauthorization of the OSC and MSPB for two more years, rather than five as is usually done. The failures of OSC and MSPB are simply too grave to allow to continue unchecked. These two years will give Congress more time to study the situation and, if whistleblower protection legislation passes in the Senate in the near term, as is hoped, it will perhaps provide an opportunity to see if the reforms of H.R. 985 work.

Finally, there has been unnecessary delay and confusion surrounding who should investigate allegations involving the OSC's Special Counsel and Deputy Special Counsel in the 2005 complaint by public interest groups and anonymous OSC employees. As part of the reauthorization, Congress should clarify that allegations made by OSC employees can be investigated by the Integrity Committee of the President's Council on Integrity and Efficiency (PCIE). The GAO reported on this problem in November 2005, noting:

> OSC employees could be afforded an external investigation of their prohibited personnel practice allegations against the Special Counsel or Deputy Special Counsel through an independent entity. Most of the current and former OSC officials we spoke with acknowledged that the option of such an external investigation is warranted.[16]

There is precedent for such action. In 1988, President Ronald Reagan issued Executive Order 12625, adding the Special Counsel to the PCIE's membership.[17] In 1996, President Bill Clinton authorized the Integrity Committee of the PCIE to be the independent investigative body which would "ensure that administrative allegations against IGs and certain staff members of the OIGs are appropriately and expeditiously investigated and resolved."[18] The Integrity Committee has continued to serve as the body to which whistleblowers can turn to in cases involving Inspectors General, including the recent high-profile investigations of the NASA IG and the Commerce Department IG, and others as noted by this Committee. However, the Integrity Committee has not been authorized to investigate and resolve allegations involving the Special Counsel or the Deputy Special Counsel.

---

[15] Valerie J. Watnick, "Whistleblower Protections under the Sarbanes-Oxley Act: A Primer and a Critique," *bepress Legal Series,* Working Paper 1822, October 3, 2006.

[16] Government Accountability Office, "U.S. Office of Special Counsel: Selected Contracting and Human Capital Issues," November, 2005. http://www.gao.gov/new.items/d0616.pdf

[17] Executive Order 12625, "Integrity and Efficiency in Federal Programs," January 27, 1988. http://www.presidency.ucsb.edu/ws/index.php?pid=36201

[18] Executive Order 12993, "Administrative Allegations Against Inspectors General," March 21, 1996. http://www.ignet.gov/pande/gporetri.html

Again, thank you for inviting me to testify today. I look forward to working with you and the Committee to further explore how our nation's patriots, the whistleblowers, can be protected from retaliation and supported in their efforts to make the government more honest, open, and accountable.

Mr. DAVIS OF ILLINOIS. Thank you very much.

Neither one of you has expressed much confidence in OSC. Of course, Ms. Daley, you had a number of recommendations relative to what you think would be helpful to change the effectiveness of the agency, but let me ask the other three of you what would you recommend that we do or attempt to do to change the effectiveness of OSC? We will just begin with you, Mr. Miles.

Mr. MILES. We have spent a lot of time thinking about this, you know. It is sort of what we do. You know, we scratch our heads, too. The thing is that the statutes are pretty good. I mean, if there was somebody there who was able to implement them as they are written, it would work pretty well. So it really is a question of leadership and priorities.

Having said that, there are, you know, certain basic levels of service that we feel everyone deserves that goes to OSC, and sort of a level of transparency and a level of sort of investigative procedure that everyone should get, and that is in more detail in our testimony. I could go through it a little bit more if you would like, or I can stop.

Mr. DAVIS OF ILLINOIS. Well, we will get it.

Mr. MILES. OK.

Mr. DAVIS OF ILLINOIS. Ms. Dawson.

Ms. DAWSON. From my experience within the agency, I believe that there should be a special counsel who would respect not only the laws of our country but the employees of this country, as well. I believe that, just from observing the activities inside the OSC, that Mr. Bloch just doesn't have a respect for the Federal work force, period. I don't know where that lack of respect comes from, but, as I witnessed today, it is not only against the Federal work force employees, but it is also against his own management. So I just believe that we need a special counsel who is going to respect the laws of this country, respect the employees of this country, as well as respect its own management.

Mr. DAVIS OF ILLINOIS. Ms. Schwartz.

Ms. SCHWARTZ. Yes. Thank you. In a sense I would say that the laws on the books are good. At least we saw in the preceding couple of decades that section B.10 was adequate. However, when one individual can single-handedly play fast and loose with the civil rights of the entire Federal work force, as Mr. Bloch has done, it shows the fragility of that law.

So I would say, first and foremost, our concerns are with Mr. Bloch's intentional rolling back of civil rights without legal basis or justification, and that he be either forced to apply the law, which has been attempted in the past and failed, or be replaced.

Second, I do believe that the fragility of these workplace protections points yet again to the importance of Federal workplace nondiscrimination protections for all Americans.

Mr. DAVIS OF ILLINOIS. Ms. Daley, let me ask you, what is it that OSC does well?

Ms. DALEY. Well, I have to say it appears that they are doing a great job on the USERRA cases. You know, Mr. Bloch was claiming that 25 percent or so of those cases are gaining a favorable action. In my mind it makes me wonder why he can't have such a high rate of favorable actions for whistleblowers.

Mr. DAVIS OF ILLINOIS. If the leadership is as bad as you all suggest, how do you think he has managed to remain? I don't think I have ever heard as much indictment of an agency that focused so directly on the leadership as what I am hearing, and I am just wondering why do you think he is still there.

Ms. DALEY. Well, I think the White House is waiting for this OPM IG investigation to be completed to determine, you know, to get some verification of some of the concerns that have been raised. Unfortunately, Mr. Bloch in the interim has inserted himself into a variety of other investigations which, in many ways, have compromised the White House's ability to act aggressively to root him out, if that is what they choose to do.

Mr. DAVIS OF ILLINOIS. Anyone else?

Ms. SCHWARTZ. He is an executive appointee who serves at the pleasure of the President, so, you know, he keeps his job at the will of the person who appointed him.

Mr. MILES. And he actually can't be removed at will, he has to be removed for cause, for neglect of duty or malfeasance, which we believe there is plenty of evidence of. But Beth is probably right that they are waiting for the results of the PCIE investigation, and even then, you know, there has been some, again, like our testimony suggests, that even the good work that is being done is so politically suspect at this point, because opening up an investigation of the White House as you are being investigated by the White House smells.

Mr. DAVIS OF ILLINOIS. Let me just ask you, Ms. Dawson, in your particular instance, what were your cases about?

Ms. DAWSON. They were discriminatory on the basis of sex, as far as gender, as well as illness. When I was sick they spoke with my doctor and they understood that I was out under doctor's care. They retroactively AWOLed me. In other words, I was in a paid status. They went back in time and took me out of the paid status and AWOLed me. They never gave me a minimum due process of law to the AWOL and they never changed the AWOL after speaking with my doctor and my doctor giving them a medical report stating that she had me out.

This came as a result of the internal disclosures of mistreating and abusing employees' rights, as well as the whistleblowers who called in to talk with me to have complaints filed and to be helped, and they were not receiving help.

Mr. DAVIS OF ILLINOIS. In the reauthorization process, as we go through the request to reauthorize, are there changes that any of you perhaps can think of relative to how the agencies, either one, are structured that might have some positive impact on the way in which they function?

Ms. DALEY. I think there are two things that we would love to see. The first one is to clarify that investigations into the special counsel and the deputy special counsel, that the President's Council on Integrity and Efficiency be authorized to undertake those investigations. The reason why is that OSC is a member of the PCIE and the Integrity Committee of the PCIE has a process already established for conducting similar investigations of IG offices. So there is already a well-developed channel, and there was a lot of confusion about where the complaint that was filed by employees

and Human Rights Campaign and GAP and POGO, there was a lot of confusion about who should undertake that investigation. It took 6 months of the ball being thrown around before PCIE finally commissioned the OPM IG. That seems like a very simple thing that should be done.

Adam in his testimony made an excellent suggestion, which is that perhaps there should be some qualifications that are required for the special counsel to try and get a higher quality type of leader running the agency. I think that is an excellent suggestion and I commend Adam Miles for making it.

Mr. MILES. Thanks. There are a couple of others that may make a difference, and one of them was in OSC's regulations they are allowed to put some regulations down and not others. It is discretion on their part. Maybe it would be a little bit to authoritarian on Congress' part, but to mandate them to put down in their regulations how they conduct investigations would be a good idea. Then the whistleblower could look at what the regulations say and decide whether or not that was actually followed through on. That could really help.

And the other may be a little bit more of a stretch, but one that could really make a difference would be to relax the standards a little bit, but allow people who sought relief in some capacity with the Office of Special Counsel to be able to challenge in district courts whether or not the office met its mandatory duties during that process, and relaxed standards, because there has been some case law on this, but mandamus actions have been too difficult, and so reducing the standards would allow people to make sure that the OSC is following through on its duties could help.

Mr. DAVIS OF ILLINOIS. Thank you very much. I don't have any further questions.

Ms. Norton, do you have any questions?

Ms. NORTON. Yes, I just have a couple of questions, Mr. Chairman.

I would be interested in your views about Mr. Bloch, the wholesalely negative view of this office, if one looks objectively at the record. Then we look at the Lurita Doan case. How do you account for the fact that investigation seems to—leave aside the issues which nobody can condone for which he deserves to be sharply criticized should there have been a leak at his hand or with his knowledge, or, for that matter, disparaging remarks that were inappropriate. Leaving aside those notions, if you look at the strong way in which he went at a case which many people consider to be politically risk and particularly so, how do you account for the difference between the handling of that matter and the apparent record going the opposite way rather consistently otherwise?

Mr. MILES. Unfortunately, the answer to that, I mean, it sounds bad, but it is the 2006 elections. I mean, his whole track record prior to that, he has been charged with politicized enforcement of the Hatch Act the other way, but then Congress changed hands, and he has been under a lot of scrutiny since he has been in office, and so to appease, ingratiate himself to a Democratically controlled Congress, there was an excellent investigation that was done by the Hatch Act unit. He gave them the authority to do that.

The problem is—and this has been consistent behavior by Mr. Bloch—that he undermines the good work that his career people are doing by leaving himself vulnerable to charges of political activity. Nobody can defend the actions that Lurita Doan did. I don't have any expertise to challenge the investigation that the Hatch Act unit did. I mean, I am sure it was a quality investigation. But he undermined that investigation by leaking it to the press and everything else that has happened today.

Ms. NORTON. If he did leak it to the press.

Mr. MILES. If he did. Correct. Yes. I mean, that is a tough one, too, because if it was somebody in his office who felt like that results of that investigation were going to be suppressed or something, then that would be a whistleblower, right? And then that person——

Ms. NORTON. The results of that investigation could hardly have been suppressed.

Mr. MILES. No, that is what I am saying. But if it had to be somebody in the office that would have leaked it——

Ms. NORTON. If they did make those kind of findings, then he would have to leak them that he had made those kind of findings and keep them in house?

Mr. MILES. I don't know. You know, maybe so. That is what I am saying. It is very speculative, but——

Ms. NORTON. That is the first explanation made. In other words, you have seen the what you are saying the regime change may have brought a change in conduct on the part of Mr. Bloch?

Mr. MILES. Unfortunately.

Ms. NORTON. The rest of you think that there have been changes subsequent to the change in control of Congress?

Ms. SCHWARTZ. Well, there has been no change with regard to the sexual orientation discrimination.

Ms. NORTON. Say that again.

Ms. SCHWARTZ. There has been no change with regard to enforcing sexual——

Ms. NORTON. Not only that; he under oath, under oath, stood there and allowed as how-to decision said exactly what they did not say, and was refuted on the spot by the MSPB witness.

Ms. SCHWARTZ. And I don't think that undermines what Mr. Miles said at all. I think that he is so entrenched in his position, has remained entrenched in this position for 3 years, and, you know, he feels that he has a safety zone or not to take this position. I can't speculate on that, but he has remained entrenched further and further, as you saw, even contradicting the chairman whose decisions he was citing for his own position.

Ms. NORTON. It really goes to what we fear most by fact finders; that is, ideological fact finding here was not even fact finding, it was changing the law single-handedly in ways that counsel could not possibly have suggested, and now continuing to justify that and saying, as he did here today, that he did not intend to change law.

In light of that, I note that the former ranking member, now chairman of the committee, did, in fact, file a bill—and all of us were on it—in 2005, not long after this change was made. We could not have expected that to be brought to the House. Would you suggest that the appropriate thing to do now would be to come forward

with that bill in order to return to the interpretation that stood for years?

Ms. SCHWARTZ. This committee, if this subcommittee determines that is what is necessary to have the law enforced correctly, then that is what it takes.

Ms. NORTON. What are you suggesting might be our alternatives?

Ms. SCHWARTZ. A possible alternative, you know, I know that pending the OPM investigation that is going very slowly of Mr. Bloch, if he is removed for cause and a more worthy successor replaces him, but yes, a clarification of the law would certainly leave no shadow of doubt.

Ms. NORTON. I appreciate what you are saying, but it is a bit more radical. You think that perhaps a more radical remedy may be forthcoming, but may I advise you that we would then have nothing to say about who would be appointed unless there was a new President.

Ms. SCHWARTZ. Yes. We would suggest a Federal nondiscrimination law applying to all employees, but yes, clarifying the civil service laws to make sure that there is no way any special counsel, regardless of his ideology or her ideology, can flout the laws is certainly preferable to allowing one person to play fast and loose.

Ms. NORTON. Well, having him removed wouldn't do a thing about the law for the moment. I mean, I can understand your need for retaliation here, given the kind of retaliation that has taken place with Federal employees and others, but may I remind you this is the Congress of the United States, and there are three branches of Government, and we don't have to get somebody kicked out of office in order to get the law returned to what it has been for a long time. Maybe that is your concern, but we are going to kick this administration out of office, as far as I am concerned, in 2008, and one wonders whether the gay/lesbian/trans-sexual community should have to wait to see whether he is penalized, No. 1, and, No. 2, whether we should just sit here and say that is the only remedy.

Ms. SCHWARTZ. No, that wasn't my intention to state that.

Ms. NORTON. I am sure it wasn't.

Ms. SCHWARTZ. But that the law, you know, that a remedy come, you know, soon so that——

Ms. NORTON. Look, you have every reason to say what you said.

Ms. SCHWARTZ [continuing]. Everyone is protected.

Ms. NORTON. In your position, if I had had an administrative official to single-handedly deprive me of my rights, I would want more than a law changed; I would want him changed. So it is perfectly understandable what you said, but we have an obligation to move forward to protect every Federal employee, including employees who need protection based on their sexual orientation.

I thank you for your testimony and I thank all of you for really important testimony as we look at the record of the Office of Special Counsel.

If I may, on behalf of myself and the chairman and other members of the committee, I want to thank you for waiting so long to testify to this important testimony to get on the record, and because the chairman may want to sign off on his own, I now defer to the distinguished Chair of the subcommittee, Mr. Davis.

Mr. DAVIS OF ILLINOIS. Well, thank you very much.

Let me thank each one of you for your testimony and for the insight that you have displayed, the recommendations and suggestions that you have given to us. I think that your testimony is going to be very helpful as we try and evaluate and re-evaluate the situation, so I thank you very much.

It has been a long afternoon, but a very productive one, and we will adjourn the meeting.

Mr. MILES. Thank you.

Ms. DAWSON. Thank you.

Ms. SCHWARTZ. Thank you.

Ms. DALEY. Thanks.

[Whereupon, at 5:20 p.m., the subcommittee was adjourned.]

[The prepared statement of Hon. Danny K. Davis follows:]

HENRY A. WAXMAN, CALIFORNIA,
CHAIRMAN

TOM LANTOS, CALIFORNIA
EDOLPHUS TOWNS, NEW YORK
PAUL E. KANJORSKI, PENNSYLVANIA
CAROLYN B. MALONEY, NEW YORK
ELIJAH E. CUMMINGS, MARYLAND
DENNIS J. KUCINICH, OHIO
DANNY K. DAVIS, ILLINOIS
JOHN F. TIERNEY, MASSACHUSETTS
WM. LACY CLAY, MISSOURI
DIANE E. WATSON, CALIFORNIA
STEPHEN F. LYNCH, MASSACHUSETTS
BRIAN HIGGINS, NEW YORK
JOHN A. YARMUTH, KENTUCKY
BRUCE L. BRALEY, IOWA
ELEANOR HOLMES NORTON,
DISTRICT OF COLUMBIA
BETTY McCOLLUM, MINNESOTA
JIM COOPER, TENNESSEE
CHRIS VAN HOLLEN, MARYLAND
PAUL W. HODES, NEW HAMPSHIRE
CHRISTOPHER S. MURPHY, CONNECTICUT
JOHN P. SARBANES, MARYLAND
PETER WELCH, VERMONT

ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

MAJORITY (202) 225–5051
FACSIMILE (202) 225–4784
MINORITY (202) 225–5074
TTY (202) 225–6852

http://oversight.house.gov

TOM DAVIS, VIRGINIA,
RANKING MINORITY MEMBER

DAN BURTON, INDIANA
CHRISTOPHER SHAYS, CONNECTICUT
JOHN M. McHUGH, NEW YORK
JOHN L. MICA, FLORIDA
MARK E. SOUDER, INDIANA
TODD RUSSELL PLATTS, PENNSYLVANIA
CHRIS CANNON, UTAH
JOHN J. DUNCAN, JR., TENNESSEE
MICHAEL R. TURNER, OHIO
DARRELL E. ISSA, CALIFORNIA
KENNY MARCHANT, TEXAS
LYNN A. WESTMORELAND, GEORGIA
PATRICK T. McHENRY, NORTH CAROLINA
VIRGINIA FOXX, NORTH CAROLINA
BRIAN P. BILBRAY, CALIFORNIA
BILL SALI, IDAHO

STATEMENT OF CHAIRMAN DANNY K. DAVIS AT THE SUBCOMMITTEE ON FEDERAL WORKFORCE, POSTAL SERVICE, AND THE DISTRICT OF COLUMBIA HEARING ON SAFEGUARDING THE MERIT SYSTEM PRINCIPLES: A REVIEW OF THE MERIT SYSTEM PROTECTION BOARD AND THE OFFICE OF SPECIAL COUNSEL

July 12, 2007

Good afternoon. Welcome to today's hearing on the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB). OSC and MSPB, which were established in 1978 by the Civil Service Reform Act, are responsible for safeguarding the federal government's merit-based system of employment.

On October 13, 1978, when President Jimmy Carter signed the Civil Service Act into law, he said that, "This legislation will bring fundamental improvements to the Federal personnel system. It puts merit principles into statue and defines prohibited personnel practices…It provides better protection for employees against arbitrary actions and abuses and contains safeguards against political intrusion. The act assures that whistleblowers will be heard, and that they will be protected from reprisal."

President Carter said, "Now this bill is law, but this is just the start of a continuing effort to improve the Federal Government's services to the people. **By itself, the law will not ensure improvement in the system. It provides the tools; the will and determination must come from those who manage the Government.**"

Those who manage the government must have the will and determination to ensure, in the case of OSC and MSPB, that federal employees who disclose information of government waste, fraud, and abuse are not retaliated against; that government employees comply with legal

restrictions on political activity; and that employee appeal cases are adjudicated in a fair and timely fashion.

Unfortunately, there is some indication that the will and determination is not there. Stakeholders, such as the Government Accountability Project, the Project on Government Oversight, and the Public Employees for Environmental Responsibility, claim that OSC is not giving badly needed attention to federal whistleblower cases.

For this reason, I am pleased to have joined Chairman Waxman and Ranking Member Davis in cosponsoring H.R. 986, the Whistleblower Protection Act of 2007. This legislation, which has passed the House and is waiting consideration in the Senate, would grant whistleblowers the right to challenge reprisals in federal district court and clarifies that "any" protected disclosure applies to all lawful communication of misconduct.

OSC and MSPB were last reauthorized in 2002 for five years. Both agencies are seeking reauthorization through FY 2012 and additional legislative changes. These additional legislative changes have to be reviewed carefully.

I am sure Ms. Norton will share her thoughts on OSC's reauthorization request to be allowed to relocate out of the District of Columbia. The Congressional Research Service has indicated that provisions in MSPBS' reauthorization request, which MSPB has characterized as "technical corrections," would substantively enhance the power and authority of the office of the chairman which is counter to current congressional intent.

I ask unanimous consent to submit, for the record, the statements of the National Treasury Employees Union and The American Federation of Government Employees. Both employee groups are opposed to MSPB's reauthorization request to approve motions for summary judgment. They argue that this would lead to the loss of crucial employee rights, including employees' ability to defend themselves from unjust adverse actions.

I am looking forward to hearing the witnesses address these and other issues pertaining to the statutory mission of OSC and MSPB.

○