H.R. 2970, TO REAUTHORIZE THE OFFICE OF SPECIAL COUNSEL AND TO MAKE AMENDMENTS TO THE WHISTLEBLOWER PROTECTION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CIVIL SERVICE

OF THE

COMMITTEE ON POST OFFICE AND CIVIL SERVICE HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

SEPTEMBER 14, 1993

Serial No. 103-21

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SEPTEMBER 14, 1993

H.R. 2970, TO REAUTHORIZE THE OFFICE OF SPECIAL COUNSEL AND TO MAKE AMENDMENTS TO THE WHISTLEBLOWER PROTECTION ACT

TUESDAY, SEPTEMBER 14, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CIVIL SERVICE,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:35 a.m., in room 311, Cannon House Office Building, Hon. Frank McCloskey (chairman of the subcommittee) presiding.

Members present: Representatives McCloskey and Morella.

Mr. MCCLOSKEY. Let's proceed with the hearing. I have been told that Mrs. Morella should be here momentarily.

On August 6, 1993, I introduced H.R. 2970, a bill to reauthorize the Office of Special Counsel and to make amendments to the Whistleblower Protection Act of 1989 to further protect Federal employees who report misconduct from reprisal for that action.

Congress and the administration must give Federal employees an avenue to report waste, fraud, abuse, and other misconduct that they observe in their jobs. In recent weeks, the buzzword has been "reinvention," which in part depends on Federal workers to come forth with accounts of waste, fraud, and abuse. It is clear, however, from the work of the General Accounting Office and others, that many Federal employees are afraid to do so because they fear for their jobs and retaliation from their agencies.

H.R. 2970 contains needed reform of the process by which whistleblowers resolve disputes with their supervisors, and strengthens the protection of those employees against retaliation.

Among its provisions, the bill strengthens limitations on the type of information OSC can disclose to agencies, prohibiting leaks of the identity of the complainant and about the allegation the complainant is making.

The work of GAO has made clear that a massive number of Federal employees—up to 75 percent—who are covered by the WPA are unaware to whom they may report misconduct and do not know that they have rights against reprisal if and when they blow the whistle. The bill would make agency heads responsible for educating new and existing employees and require dissemination of written materials spelling out this information to all employees. This should also help the OSC by weeding out cases in which people believe they are whistleblowers when, in fact, they are not.

In addition, the bill would give Federal employees alternative venues to seek resolution of disputes that might arise in their case. This change will not only give employees who do not want to seek corrective action from OSC a choice of where to seek redress, but it should provide an incentive for OSC to improve its performance in the eyes of Congress and Federal employees. If the changes are enacted, and OSC continues to be perceived as hostile to complainants, Federal employees may stop seeking help there and OSC's role in the context of whistleblower protection will cease to exist.

Under the legislation, in cases brought under Title V, Section 2302(b)(8), employees could: (1) follow grievance and arbitration procedures if they are in a bargaining unit, of course; (2) seek corrective action from the OSC; (3) seek corrective action from the MSPB under the individual right of action (IRA) procedures; or (4) file a complaint in a U.S. District Court.

In non-whistleblower prohibited personnel practice cases, employees could also: (1) follow grievance and arbitration procedures if they are in a bargaining unit; (2) seek corrective action from the OSC; (3) seek corrective action from the MSPB from IRA procedures. In addition, these employees would be given the new right to have a de novo hearing in U.S. District Court, only after they have exhausted the administrative grievance mechanisms.

On benefit of allowing employees alternative venues is to compare employee success in each venue to the success they have had gaining correcting action at the OSC—as we know, this is about 5 percent according to the GAO. And although this 5 percent rate seems low, no one knows for sure what a reasonable success rate is for resolving whistleblower complaints.

There are at least 220,000 Federal employees who are not currently covered by the WPA that would be covered under this bill. Whistleblower protection would be expanded to include employees in government corporations, VA Administration employees hired under Title 38, as well as employees in law enforcement and intelligence agencies.

Since passage of the WPA, some supervisors have become extremely creative in circumventing the prohibition against personnel actions listed in Section 2302(a)(2) despite the clear intent of Congress. Retaliatory conduct is more reprehensible than some of the misconduct that is reported by whistleblowers. The bill addresses some of the specific practices that have come to our attention by adding to the definition of personnel actions the following: Ordering psychiatric exams, denying, revoking or suspending a security clearance, non-disciplinary removals, and a decision to order a formal investigation that could lead to criminal prosecution or an adverse personnel action.

The bill also would move the jurisdiction for appeals from MSPB decisions from the Federal Circuit to the D.C. Circuit which has more experience and expertise in labor and employment cases, discrimination cases, and general administrative law cases.

In response to a recent federal circuit case, *Clark* v. *Department of Army,* the bill clarifies Congress' intent that if a whistleblower shows that their protected disclosure was a contributing factor to a personnel action, the burden shifts to the agency to show by clear

and convincing evidence that it would have taken the personnel action regardless of the disclosure.

The Clark case had that, when an MSPB decision is appealed, an agency need only show by a preponderance of the evidence that it would have taken the personnel action, thereby circumventing the statutory burden of proof test. The bill clarifies that the standard the employee must meet is a separate test than that which the agencies must meet on appeal.

Perhaps the most frequent complaint I have heard since becoming Chairman is that cases languish at OSC for too long. This delay cannot be entirely attributed to OSC, since in many cases it is foot-dragging by agencies that lead to delay. Nevertheless, while cases drag on, employees feel they are left in limbo, and work goes undone. In an attempt to speed up the progress, the bill imposes a 120 day time limit by which the OSC must decide whether to go forward with a case.

One striking statistic from the work of GAO is that OSC has not often used its authority to bring disciplinary complaints against agency employees who commit a prohibited personnel practice. The bill authorizes the MSPB to refer matters to the OSC for disciplinary action if MSPB finds that an employee committed a prohibited personnel practice. This change is intended to make the threat of disciplinary complaints more real to employees who retaliate and act as a deterrent against such practices.

This bill does break new ground in its attempt to reform the WPA, and I understand that some of what is being proposed in this bill has raised some concerns in the administration. I am hopeful that we can address these concerns, and look forward to working towards common goals with the administration. I would say, however, that the subcommittee has made sincere and committed efforts to reach out to the administration to discuss these issues. We have not been entirely successful in establishing lines of communication.

I want to welcome our witnesses, look forward to a fruitful series of testimonies, and thank our witnesses in advance.

Our first witness is our key witness, of course, Kathleen Koch, who has appeared with us before, special counsel, Office of Special Counsel. Kathleen, welcome. Your formal statement, which I have read, don't know if I entirely understood it all, but I have made a good faith effort, you can elaborate on it today for my education, but at any rate, that statement is accepted for the record. You can proceed as you are comfortable with and let's have a good discussion.

Thank you.

STATEMENT OF KATHLEEN KOCH, SPECIAL COUNSEL, OFFICE OF SPECIAL COUNSEL, ACCOMPANIED BY WILLIAM E. REUKAUF, SENIOR LEGAL ADVISOR

Ms. KOCH. Thank you, Mr. Chairman. It is a pleasure to be here today. First let me introduce my colleague, William Reukauf, who is one of our senior legal advisors at the Office of Special Counsel. He will be assisting me today.

I appreciate this opportunity to appear before you today to discuss H.R. 2970, a bill to reauthorize the Office of Special Counsel

and to make amendments to the Whistleblower Protection Act of 1989.

Mr. Chairman, as you mentioned, it is indeed timely that we discuss changes to the Federal personnel system, just one week after the President released the recommendations of the National Performance Review, which is headed by Vice President Gore. As you know, NPR's recommendations for change have received very broad-based support.

While all of the recommendations of the NPR have not yet been fully explored, it is clear that the process of change has begun and that this process will have a profound effect on the Federal workplace. I am confident that you, Mr. Chairman, and this committee will play a vital role in crafting the legislation that is necessary to implement the NPR's recommendations.

I believe that your bill, H.R. 2970, also presents us with a significant challenge. That challenge is to maintain and augment the Office of Special Counsel's ability to assist Federal employees, while at the same time being mindful that additional requirements, unless carefully crafted, could inhibit OSC from adequately serving its Federal constituency.

Before I address your bill, Mr. Chairman, I would like to bring you up to date on OSC's activities since I last testified before this subcommittee in March. At that time I stated I was very proud of what OSC has accomplished, and that continues to be the case. In almost all of our recording categories, we are experiencing an increase over the same period of time last year.

We have received 60 percent more whistleblower disclosures and increased the number of whistleblower disclosure matters referred to agencies for action by 185 percent. We have also doubled the number of referrals of initial whistleblower reprisal matters for full investigation.

Clearly, these substantial increases indicate that more Federal employees are coming forward with disclosures and these disclosures are of a quality that enable us to move to a full investigation.

With respect to corrective actions, Mr. Chairman, this year we are close to the number that we obtained last year, and you may recall that fiscal year 1992 was a record year for OSC in that regard. While most of the cases in which we obtain corrective action do not make the front page of the various newspapers, a recent case did receive considerable attention.

You may recall, Mr. Chairman, the case of Greg Reynolds who was employed by the National Gallery of Art. He claimed he had been demoted to a lesser position because he blew the whistle on wasteful and improper handling of contracts with the National Gallery. Mr. Reynolds' attorney attributed the settlement received in his case to OSC's threat to litigate the matter if the National Gallery did not settle.

Finally, Mr. Chairman, my staff has established a solid working relationship with your staff and the staff of your Senate counterparts. Indeed, we have suggested changes to the law, provided technical assistance, and discussed specific matters which were of particular concern to you and the other members of this subcommittee. As we address our concerns with H.R. 2970, we will continue to maintain this open dialogue with your staff.

Mr. Chairman, members of the committee, as I am sure you are aware, the impact of H.R. 2970 as currently written would go well beyond affecting only OSC.

For example, virtually all Federal agencies would be affected by the substantially expanded rights of employees under the bill to adjudicate their complaints before the MSPB and the Federal courts, and government corporations would be covered by the Whistleblower Protection Act.

While I believe the breadth of the bill is a significant issue that must be addressed by the subcommittee, I believe that it is appropriate for me to limit my comments on the legislation to only those sections that directly impact the operations of OSC.

Clearly those provisions that are identical to provisions found in S. 622 we support. This includes coverage of Title 38, veterans affairs employees and the extended coverage to Federal corporations. However, I understand that other executive branch agencies will be separately expressing their views and concerns about the other provisions of the bill.

Section 1 of H.R. 2970 would change OSC's reauthorization from four years to two. While we would have preferred to remain at the current four-year reauthorization, we welcome the opportunity to highlight our accomplishments every two years. Thus, I have no objection to this provision.

We support Subsection 2(a) of this bill which would enable the Special Counsel to continue to serve after the expiration of the five-year term until a successor is confirmed, provided it is no longer than one year. This provision would not only ensure continued leadership within the agency, but would also enable OSC to perform its investigative and prosecutorial functions while a successor is nominated and confirmed by the Senate.

Without this provision, a backlog of cases would occur which would of course most directly hurt aggrieved Federal employees.

Mr. Chairman, Section 4(d) of the bill would impose on agency heads the requirement to inform their employees of the rights and remedies available under Chapters 12 and 23 of Title 5 of the United States Code. This is similar to a provision in the Senate OSC reauthorization bill.

As you know, Mr. Chairman, I welcome all such educational efforts that will inform Federal employees of their rights, and in particular the rights and protections available to whistleblowers. As is the case with the language in the bill, I believe that OSC must play an important role in assisting Federal agencies with these educational responsibilities.

We are concerned with paragraph two of Subsection 2(b) which requires the consent of the complainant before OSC discloses information about the allegation. This amendment to 5 U.S.C., Section 1212(g)(2) would have the practical effect of requiring OSC to go beyond the present protections of the Privacy Act by requiring OSC to obtain the consent of the complainant before commencing any investigative activity in every 2302 (b)(2), (b)(8) or (b)(9) case.

The Privacy Act already has adequate protections for complainants. Moreover, this would undoubtedly cause lengthy delays in processing the complaints, which in turn would be troublesome be-

cause other provisions of the bill impose stricter deadlines on all categories of cases.

Another problem posed by the requirement to obtain the complainant's consent before information can be used or disclosed relates to the fact that information is typically received from many sources.

We can foresee many disputes wherein the complainant would take issue with OSC's disclosure of information, when in fact that information was obtained from another source. Indeed, the goal of a thorough investigation is to arrive at the truth by contacting multiple sources and verifying information that is provided by the complainant and witnesses.

Section 7 of the bill would require OSC to provide an oral and perhaps a written briefing on OSC's findings in addition to the closure letter. OSC currently provides complainants with facts and reasons which explains OSC's determination to close the complaint. This provision would impose on OSC a significant additional burden that is not imposed when other avenues of redress are utilized, that is, arbitration or bringing cases to the Board or the courts.

This provision also raises significant Privacy Act and FOIA issues with respect to information provided by persons other than the complainant.

Next, Subsection (2)(e) of the bill amends 5 U.S.C., Section 1214(a)(1) which concerns OSC's investigations and corrective action business adding two new subsections. New Subsection C reduces from 90 days to 60 days the time period in which OSC must first report the status of an investigation.

While OSC would have no manpower constraints in providing such a notice, I am concerned that reducing the time allotted for that initial report would also reduce the likelihood that OSC will have obtained sufficient information to make a substantive report.

New Subsection D would require OSC to make a determination as to whether there are reasonable grounds to believe that a prohibited personnel practice has occurred within 120 days of the filing of the complaint, unless the complainant agrees to extend the due date for such a determination by written agreement.

This would apply to any prohibited personnel practice, not only allegations of whistleblower reprisal. Furthermore, under Subsection 2(g) of the bill, OSC would have to report on the number of instances in which it did not make a timely determination under new subparagraph D.

I am concerned that imposing a requirement to make a determination within 120 days will cause thorough investigations to play a secondary role to the legislative requirement to make determinations on matters within 120 days.

Also, it would be extremely difficult for OSC to accomplish this task within 120 days without the benefit of additional resources.

It must also be considered that many cases, especially those concerning whistleblower reprisals, are quite complex and require extensive investigation. I can assure you that we work as hard as we can with the resources that are available to us. I therefore believe it would be unwise for us to have to report as untimely those cases for which a determination cannot properly be made within 120 days.

It is inevitable that this statistic, which would reflect nothing more than the complexity of a certain percentage of cases, would undeservedly be used against OSC. Having said that, you should be aware that currently we complete over 67 percent of our most complex cases, that is, the whistleblower reprisal cases, within 120 days, and we complete 69 percent of all cases within 120 days.

This is a record of which I am proud and it speaks well for the agency.

Section 7 of the bill requires that a policy statement be made to every whistleblower, that is, those that come under 2302(b)(8) and have filed a complaint under that section of the statute. Such a statement would have to include detailed guidelines identifying specific categories of information that may be communicated to agency officials for investigative purposes or for obtaining corrective action, the circumstances under which the information is likely to be disclosed and whether or not the consent of any person is required in advance of such communication.

As I have already mentioned, I have significant concerns about detailing specific categories of information that could not be used in performing our duties, absent the complainant's consent. I do, however, wholeheartedly support the objective of a policy statement to apprise complainant's about OSC's operations.

In fact, I believe a policy statement should include information about the scope of Federal employees' whistleblower rights and protections and the procedures followed by OSC. In this regard, we have been working closely with the White House on the National Performance Review on steps that can be taken by the executive branch to increase Federal employees' knowledge of whistleblower rights and protections.

Such steps are imperative because it is clear that most Federal employees, as you mentioned in your opening statement, simply do not understand their rights in this area and do not understand the role and functions of OSC. I believe the best solution is to bring all Federal agencies into the education process, but any additional steps, such as a policy statement, that would increase Federal employees' awareness, should also be tried.

As I stated earlier, Mr. Chairman, I have not addressed those sections of the bill that do not directly impact OSC. However, I do have a concern with Section 5(d) of the bill which would appear to diminish the protections currently available to whistleblowers. The bill as drafted would force whistleblowers to choose between coming to OSC and going directly to the board.

The bill would not allow for whistleblowers to exercise the independent right of action they currently have which allows them to take their case before the board after coming to OSC. I believe that the current independent right of action provision which was added by the Whistleblower Protection Act is an effective measure for ensuring maximum consideration of whistleblower claims and should be maintained.

The OSC and Congress have worked together during OSC's short existence.

Mr. McCLOSKEY. Kathleen, could you repeat that last three or four sentences for me?

Ms. KOCH. Sure. The bill as drafted would force whistleblowers to choose between coming to OSC and going directly to the board. The bill as we read it would not allow for whistleblowers to exercise the independent right of action they currently have that would allow them to take a case to the board after going to the OSC.

The OSC and Congress have worked together during OSC's short existence to enhance OSC's mission. I again sit before you today and commit OSC to working with you and your staff to clarify any of the issues that I raised today.

Mr. Chairman, this concludes my prepared statement and I will be pleased, along with Mr. Reukauf, to answer any questions you may have.

[The prepared statement of Ms. Koch follows:]

PREPARED STATEMENT OF KATHLEEN DAY KOCH, SPECIAL COUNSEL, OFFICE OF SPECIAL COUNSEL

Mr. Chairman and Members of the Subcommittee:

I appreciate this opportunity to appear before you today to discuss H.R. 2970, a bill to reauthorize the Office of Special Counsel, and to make amendments to the Whistleblower Protection Act of 1989.

Mr. Chairman, it is indeed timely that we discuss changes to the federal personnel system, just one week after the President released the recommendations of the National Performance Review (NPR), which is headed by Vice President Gore. As you know, NPR's recommendations for change have received very broad-based support. While all of the recommendations for change have received very broad-based support. While all of the recommendations of the NPR have not yet been fully explored, it is clear that the process of change has begun and that this process will have to profound effect on the federal workplace. I am confident that you, Mr. Chairman, and this committee will play a vital role in crafting the legislation that is necessary to implement the NPR's recommendations.

Mr. Chairman, during this period of change, I believe it is essential that federal employees continue to have an effective means to redress prohibited personnel practices and a secure channel for disclosing illegal or improper conduct, gross waste, or dangers to health and safety. I am very gratified to see Mr. Chairman that your bill would not diminish these rights of federal employees.

I believe that your bill also presents us with a significant challenge. That challenge is to maintain and augment OSC's ability to assist federal employees, while at the same time, being mindful that additional requirements, even if well intended, could inhibit OSC from adequately serving its federal constituency.

I am well aware, Mr. Chairman, that addressing this challenge is a shared duty. The responsibility for establishing and maintaining a climate in which employee disclosures of fraud, waste, or abuse are encouraged and in which reprisals for such disclosures are not tolerated, must be borne by the government as a whole, including the President, the Congress, agency heads, managers and supervisors, appellate systems and the Inspectors General. We at OSC stand ready to do our part. To that end, Mr. Chairman, my entire staff and I are dedicated to continuing to work with you and your staff, as we have done throughout your tenure as Chairman, to improve these vital protections for federal workers.

UPDATE ON OSC ACTIVITIES

Before I address your bill, Mr. Chairman, I would like to bring you up-to-date on OSC's activities since I last testified before this Subcommittee in March. At that time, I stated that I was very proud of what OSC has accomplished, and that continues to be the case.

In almost all of our recording categories, we are experiencing an increase over the same period of time last year. We have received 60% more whistleblower disclosure and increased the number of whistleblower disclosure matters referred to the agencies for action by 185%. We have also doubled the number of referrals of initial whistleblower reprisal matters for full investigation. Clearly, these substantial increases indicate that more federal employees are coming forward with disclosures and these disclosures are of a quality that enable us to move to a full investigation.

We have also increased the number of case in which, as a result of OSC's efforts, federal agencies' personnel actions were held in abeyance pending our investigation. To date we are seeing a 72% increase from last year's number on informal stays

agreed to by agencies. The number of formal stays we have obtained from the Board has increased from one to five.

With respect to corrective actions, Mr. Chairman, this year we are close to the number that we obtained last year, and you may recall that FY 1993 was a record year for OSC in that regard. While most of the cases in which we obtain corrective actions do not make the front page of the newspaper, a recent case did receive considerable attention. You may recall, Mr. Chairman, the case of Gregg Reynolds who was employed by the National Gallery of Art. He claimed he had been demoted to a lesser position because he blew the whistle on wasteful and improper handling of contracts with the National Gallery. Mr. Reynold's attorney attributed the settlement to OSC's threat to litigate the matter if the National Gallery did not settle.

This case is an excellent example of how much OSC can accomplish without having to embark on protracted and costly litigation. It is our experience that when OSC determines that corrective action is warranted in a particular case, the agency almost always is receptive to an amicable settlement. Mr. Chairman, it is only a strong OSC that can achieve the results that we did in the National Gallery case.

During the past six months, OSC has also worked closely with personnel from the White House and the National Performance Review to explore steps that can be taken within the Executive Branch to increase the awareness of federal employees of their whistleblower rights and protections. I am hopeful that steps along these lines will be implemented in the near future.

Finally, Mr. Chairman, my staff has established a solid working relationship with your staff, and the staff of your Senate counterparts. Indeed, we have offered suggested changes to the law, provided technical assistance and discussed specific matters which were of particular concern to you and the members of the subcommittee. As we address our concerns with H.R. 2970, we will continue this open dialogue with your staff.

COMMENTS ON H.R. 2970

Mr. Chairman, as I am sure you are aware, the impact of H.R. 2970, as currently written, would go well beyond affecting only OSC. For example, virtually all federal agencies would be affected by the substantially expanded rights of employees under the bill to adjudicate their complaints before the MSPB and the federal courts, and government corporations would be covered by the Whistleblower Protection Act.

While I believe the breadth of the bill is a significant issue that must be addressed by the subcommittee, I believe that it is appropriate for me to limit my comments on the legislation to only those sections that directly impact the operations of OSC. However, I understand that other Executive Branch agencies will be separately expressing their views and concerns about other provisions of the bill.

Reauthorization

Section 1 of H.R. 2970 would change OSC's reauthorization from four years to two. While we would have preferred to remain at the current four year reauthorization, we welcome the opportunity to highlight OSC's accomplishments every two years. Thus, I have no objection to this provision.

Term of the Special Counsel

We support subsection 2(a) of this bill which would enable the Special Counsel to continue to serve after the expiration of the five-year term until a successor is confirmed, provided it is no longer than one year. This provision would not only ensure continued leadership within the agency, but would also enable OSC to perform its investigative and prosecutorial functions while a successor is nominated and confirmed by the Senate. Without this provision a backlog of cases would occur, which would, of course, most directly hurt aggrieved federal employees.

Disclosure of information

We are concerned with paragraph (2) of subsection 2(b) which requires the consent of the complainant before OSC "discloses" information about the allegation. This amendment to 5 U.S.C. § 1212(g)(2) would have the practical effect of requiring OSC to go beyond the present protections of the Privacy Act by requiring OSC to obtain the consent of the complainant before commencing any investigative activity in every § 2302(b)(2), (b)(8) or (b)(9) case. The Privacy Act already has adequate protections for complainants. Moreover, this would undoubtedly cause length delays in processing the complaints, which, in turn, would be troublesome because other provisions of the bill impose stricter deadlines on all categories of cases.

Another problem posed by the requirement to obtain the complainant's consent before information can be used or disclosed relates to the fact that information is typically received from many sources. We can foresee many disputes wherein the

complainant would take issue with OSC's disclosure of information, when in fact that information was obtained from another source. Indeed, the goal of a thorough investigation is to arrive at the truth by contacting multiple sources and verifying information that is provided by the complainant and witnesses.

Termination statement

Section 7 of the bill requires OSC to provide in the closure letter the name and telephone number of an OSC employee who will respond to "reasonable questions" from the complainant about the investigation, the relevant facts ascertained by OSC and the applicable law.

This would require OSC to provide an oral, and perhaps a written, briefing on OSC's findings in addition to the closure letter. OSC currently provides complainants with facts and reasons which explain OSC's determination to close the complaint. The provision would impose on OSC a significant additional burden that is not imposed when other avenues of redress are utilized, *i.e.,* arbitration or bringing cases to the Board and the courts. This provision also raises significant Privacy Act and FOIA issues. That is, OSC could under current law release information to the complainant which the complainant provided. Furthermore, the provision provides no amplification on what falls within the category of "reasonable questions." Indeed, what OSC might consider a reasonable amount of information, might well not be considered reasonable by a complainant or his/her legal representative.

Investigations

Subsection 2(e) of H.R. 2970 amends 5 U.S.C. § 1214(a)(1), which concerns OSC's investigations and corrective actions. Specifically, the bill would add to § 1214 new subsections (a)(1)(C) and (a)(1)(D) that would provide as follows:

"(C) Unless an investigation under this section is terminated, the Special Counsel shall, within 60 days after notice is provided under subparagraph B with respect to a particular allegation, and at least every 60 days thereafter, notify the person who made such allegation as to the status of the investigation and any action which has been taken by the Office of Special Counsel since notice was last given under this subsection.

"(D)(i) Except as provided in clause (ii), no later than 120 days after the date of receiving an allegation of a prohibited personnel practice, the Special Counsel shall determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken."

Subsection (C) reduces from 90 days to 60 days the time period in which OSC must first report the status of an investigation. While OSC would have no manpower constraints in providing such a notice, I am concerned that reducing the time allotted for the initial report, would also reduce the likelihood that OSC will have obtained sufficient information to make a substantive report.

New subsection (D) would require OSC to make a determination as to whether there are reasonable grounds to believe that a prohibited personnel practice has occurred within 120 days of the filing of the complaint, unless the complainant agrees to extend the due date for such a determination by written agreement. This would apply to any prohibited personnel practice, not only allegations of whistleblowing. Furthermore, under subsection 2(g) of the bill, OSC would have a report on the number of instances in which it did not make a "timely determination" under new subparagraph (D).

I am concerned that imposing a requirement to make a determination within '120 days will cause thorough investigations to play a secondary role to the legislative requirement to make determinations on matters within 120 days. Also, it would be very difficult for OSC to accomplish this task within 120 days without the benefit of additional resources.

It must also be considered that many cases, especially those concerning whistleblower reprisal are quite complex and require extensive investigation. in such cases, it is simply impossible to make a "reasonable grounds" determination within 120 days. it may, for example, be necessary to talk to witnesses in multiple and remote locations or conduct extensive research on many unique issues. In fact, this year alone we have had to investigate cases in Panama, Italy, and Saudi Arabia. Furthermore, during if it is possible to conclude a mutually satisfactory settlement of the case. I can assure you that we work as hard as we can with the resources that are available to us. I, therefore, believe it would be unwise for us to have to report as "untimely" those cases for which a determination cannot properly be made within 120 days. It is inevitable that this statistic, which would reflect nothing more than the complexity of a certain percentage of cases, would undersevedly be used against OSC. Having said that, you should be aware that currently we complete over 67% of our most complex cases, the whistleblower reprisal cases, within 120 days, and

we complete 69% of all of our cases within 120 days. This is a record of which I am proud, and it speaks well for the agency.

Policy statement

Section 7 of the bill requires that a policy statement be made available to every whistleblower (§2304(b)(8)) complainant. Such a statement would have to include detailed guidelines identifying specific categories of information that may be communicated to agency officials for investigative purposes or for obtaining corrective action, the circumstances under which the information is likely to be disclosed, and whether or not the consent of any person is required in advance of such communication.

As I have already mentioned, I have significant concerns about detailing specific categories of information that could not be used in performing our duties, absent the complainant's consent. I do, however, wholeheartedly support the objective of the policy statement to apprise complainants' about OSC's operations. In fact, I believe a policy statement should include information about the scope of federal employees' whistleblower rights and protections and the procedures followed by OSC. As I mentioned earlier, we have been working closely with the White House and the Nation Performance Review on steps that can be taken by the Executive Branch to increase federal employees' knowledge in this regard. Such steps are imperative because it is clear that many federal employees simply do not understand their rights in this area and do not understand the role and functions of OSC. I believe the best solution is to bring all federal agencies into the education process, but any additional steps, such as a policy statement, that would increase federal employees' awareness should also be tried.

As I stated earlier, Mr. Chairman, I have not addressed these sections of the bill that do not directly impact OSC. The OSC and Congress have worked together during OSC's short existence to enhance OSC's mission. I again commit OSC to working with you and your staff some of the issues I raised today.

Mr. Chairman, this concludes my prepared statement. I will be pleased to answer any questions you might have at this time.

Mr. McCLOSKEY. Thank you very much, Kathleen, for a good statement. Yes, I was going, before the end of your statement, to ask your comment on the venue restructuring. I think you partially have gone into this subject by saying you would like to see the present right to go to the MSPB, if the OSC process does not work to their satisfaction, maintained.

I intellectually or administratively have no problem with that. Do you have any other comments or concerns as to the venue options?

Ms. KOCH. There are a lot of them.

Mr. McCLOSKEY. Comments or concerns or venue options, or both?

Ms. KOCH. I am not really prepared to comment. We have not had an opportunity to analyze——

Mr. McCLOSKEY. But I think, unlike the inclusion of other agencies or whatever, I think that does in all respects it does go to the structure and function of your agency, but you don't care to comment?

Ms. KOCH. I think the venue options perhaps may be more appropriate for the other agencies in the administration to comment on.

Mr. McCLOSKEY. Okay. As you know, and I don't think this has ever been in any way personalized or reflecting on you, but there does seem to be a lot of smoke out there, documented and subjective, as to basic dissatisfaction by whistleblowers with the OSC process.

As you know, there is a pending GAO report that expresses widespread dissatisfaction. Many people feel confidentiality has been

breached. Many people feel that somehow the OSC—and these are feelings, I know, is a tool or an advocate of the agency.

There is just a lot of dissatisfaction, and as you know, many people have criticized the OSC about a real or perceived informational transaction problem as to when it is required to convey the identity of the whistleblower or the various circumstances.

You raise a concern that our suggestions on that transaction problem are unreasonable, unworkable or whatever. You may not have used those specific terms. Well, what would you like to see done or what could be done to handle that problem, to resolve or clean up this image problem, if not a substance problem?

Ms. KOCH. Let me ask Mr. Reukauf to respond to the procedural aspects of information. One of the things that we are very careful about is confidentiality. When a whistleblower comes to us and we send a whistleblower disclosure to an agency for action, I think it is important to remember there are two parts to our agency.

We have a very trusted disclosure arm where individuals come to us in a confidential manner and tell us agency X is doing something with their contracting and here is a piece of paper that proves it and please don't tell the agency my name, that I gave you this information.

We look at that information and if it evidences a likelihood that there is a violation of a law, rule, regulation, or gross mismanagement, fraud, waste, or abuse, I send a letter to the agency head and require the agency head to investigate and report back to me, and the individual's name is never used—unless the individual consents to the use of his name.

On the other side, we are the investigator and the prosecutor in an area of prohibited personnel practices where an individual says a personnel action has been imposed upon me because I blew the whistle. We then have an obligation to investigate that charge.

We are concerned that if we can't go to the agency and tell them what the allegation was, we can't investigate. That is—in very simple terms—my concern. If you have any other questions, maybe Mr. Reukauf could help us out.

Mr. MCCLOSKEY. Any further comment on that?

Mr. REUKAUF. No, except to reiterate that the provisions that deal with what information OSC can disclose—I don't know if the legislation intended to address the first aspect that Ms. Koch talked about, that is our whistleblower disclosure channel, and I think that aspect is currently working because we do have these confidentiality provisions. I don't know if there are any complaints from—I haven't analyzed the GAO draft report yet, but I don't think there are any complaints as to that aspect. When a complainant comes to OSC claiming that, for instance, he is a victim of whistleblower reprisal, implicit in that complaint and the statutory requirement that OSC conduct an investigation, is that OSC is going to go to the agency and say, this particular personnel action is under challenge and we are going to be questioning your officials about it and we are going to be demanding documentation about it to determine its validity or not. So I am a little bit concerned that there would be some interference in that type of investigative activity.

Mr. MCCLOSKEY. Mrs. Morella.

Mrs. MORELLA. Thank you.

Mr. MCCLOSKEY. Good to see you today.

Mrs. MORELLA. Thank you. It is good to be here for this important meeting too and look at your bill to reauthorize the Office of Special Counsel and to try to strengthen the Whistleblower Protection Act.

Thank you, Ms. Koch. I appreciated the specificity and clarity of your statement, and I want to say that in this bill, Mr. Chairman, that I am pleased to see that in Section 4 it has provisions that would add government corporations, national security agencies, and employees hired under Title 38, the Department of Veterans Affairs, to the definition of covered agencies for the purpose of whistleblower cases.

I think they have needed that for some time and I feel, of course, that all Federal employees should be covered under whistleblower protection. It is in the interest of public policy to do that. There may be cases where the acts of waste, fraud, and abuse in Federal corporations and the Veterans Administration will save Federal taxpayers money, and those employees who do report these actions deserve the protection of that Whistleblower Protection Act.

So I thank you, Mr. Chairman, for that inclusion.

I was interested in—I have been reading four of the other statements of the people who are going to be testifying and I think, Ms. Koch, you had a chance to look at their testimony too so you know what is going to be coming up or——

Ms. KOCH. I have not, but——

Mrs. MORELLA. Maybe you will want to have somebody here to be able then to respond to us afterwards in terms of——

Ms. KOCH. I would be happy to respond to any questions you have. If you would like to submit questions following today's hearing, that would be fine.

Mrs. MORELLA. You mention the National Performance Review. I am curious about how that was undertaken with regard to the Office of Special Counsel.

Was there somebody assigned to look into it and were you and/or your office involved in any of the recommendations?

Ms. KOCH. We were not part of the task force that looked at this aspect of Federal personnel issues. We were visited by members of the task force and were extensively questioned and actually did a rather lengthy briefing for those individuals who wanted to learn about protections for individuals in the Federal service.

The National Performance Review has indicated an interest, just as both H.R. 2970 and S. 622 address in improving the education efforts for employees. Some of the dissatisfaction that continues to be reflected in GAO reports—and have only got the draft report that the Chairman referred to and I am not real clear what is in it—but there is a continuing theme that comes out in these reports that Federal employees don't know what their rights are, and one of the reasons they don't know is that their employing agencies don't tell them. We support the administration's efforts and congressional efforts to address that problem, one way or another, so that employees get information, they know what their rights are, they know that to be a whistleblower there must be a disclosure,

so that when they come to us, they understand what we can do for them.

Many times they come to us as a last resort. They don't know where else to go, and they come to us and discover that we are the last resort and we even can't help them because perhaps they didn't disclose any information, and that is naturally going to cause dissatisfaction. If they come to the last place on earth that they think they are going to get help, and because they are not covered by the statute, they can't be helped, they are going to be dissatisfied and they will say so.

Mrs. MORELLA. I am sure that Vice President Gore heard that over and over again as he traveled the country, the concept of whistleblower protection, fear of recriminations and I guess that is why the Chairman put in his bill what he considers to be some of the protection that is——

Ms. KOCH. I think early on the Civil Service Reform Act, as well as the Whistleblower Protection Act of 1989, emphasized that it is not just the Office of Special Counsel's job to protect whistleblowers. It is an obligation on the head and subsequently the managers under the head of every agency to let their workers know that this is a valued right that employees have I think that needs to be communicated more and it needs to be an obligation that the heads of agencies accept and handle. I think H.R. 2970 addresses that issue, S. 622 addresses that issue and I know that the administration is looking at executive branch approaches to these matters.

Mrs. MORELLA. You are right. We have got to educate and make sure that people know that it does work.

I have a question about the difference. I just don't know what the difference is in the burden of proof requirements in the two sections. I don't know whether it is appropriate that I ask this of you or I will later ask it of someone testifying.

Sections 2302(b)(8) and 2302(b)(9) and then there is Section 7701, the burden of proof. It seems to be shifting and I am not sure exactly how——

Mr. REUKAUF. Well, let me see if I can help. The Whistleblower Protection Act provided for a new definition of causation and burden of proof for OSC or an employee to prove whistleblower reprisal. What the law provides under (b)(8) is that if the employee shows that his protected whistleblowing was a contributing factor to the subsequent personnel action, the burden then shifts to the agency. It is like a Mount Healthy type defense.

The burden shifts to the agency to prove by clear and convincing evidence that they would have taken that same personnel action anyway, even if that person had not been a whistleblower.

That greater burden of proof under 2302(b)(8) does not apply to 2302(b)(9) which is the protection against reprisal for appeal rights. There the causation standard is the old standard, that is the employee or OSC would have to show that the exercise of the appeal right or grievance right was a significant factor in the personnel action and, if that were shown, the agency would only have to show by a preponderance of the evidence that it would have taken the action even if that employee had not exercised that grievance or appeal right.

Now, under Chapter 77 appeals the same thing applies. If an employee is defending against an adverse action and claiming as an affirmative defense to the adverse action, that the real reason for the adverse action was the whistleblowing, the same burden of proof that I earlier described under (b)(8) applies.

That is, if in that Chapter 77 appeal the employee can show that whistleblowing was a contributing factor to the adverse action, then the burden shifts back to the agency to show by clear and convincing evidence that it would have taken that adverse action even without the whistleblowing.

Mrs. MORELLA. You agree that these additions and distinctions were necessary?

Mr. REUKAUF. Well, Congress decided that those burdens of proof were necessary.

Mrs. MORELLA. Yes, right.

Mr. REUKAUF. So I am not in the position to second guess that. I will say that it does make it easier for OSC in dealing with agencies and in litigation, because the burden of proof for us was diminished.

Mrs. MORELLA. Fine. Thank you, Mr. Chairman. I have no other questions.

Mr. MCCLOSKEY. Thank you, Connie. We really have no other questions. I might say, I think as Mrs. Morella partially alluded, all three subsequent witnesses are going to have concerns about the agency, particularly I believe all of them mentioned the confidentiality and informational transaction, confidentiality problems that were alluded to earlier.

If someone was around and listened to that, whether you participate or not, it might be good. We may have some written questions for you. Other than that, Kathleen and sir, thank you very much.

Ms. KOCH. Thank you, Mr. Chairman.

Mr. MCCLOSKEY. We have a two-person panel now, Mark Roth, general counsel for AFGE and Timothy Hannapel, if I am saying that right, assistant counsel, the National Treasury Employees Union.

Gentlemen, please be seated and your statements—formal statements—will be accepted for the record and you may proceed as you like.

STATEMENT OF MARK D. ROTH, GENERAL COUNSEL, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES AND TIMOTHY HANNAPEL, ASSISTANT COUNSEL, NATIONAL TREASURY EMPLOYEES UNION

Mr. ROTH. Mr. Chairman, my name is Mark Roth and I thank you for the opportunity to voice the American Federation of Government Employees support for H.R. 2970. I also commend you and the committee for recognizing the need for the changes promised by the bill and for taking the lead in initiating those changes. Technical changes to include government corporations, various excluded employees and better burdens of proof in (b)(9) cases are long overdue.

As counsel for the whistleblower deputy marshals in the very first special counsel case, the landmark Frazier case, and as an adviser to many reprised against whistleblowers since then, I have

lived through the failings and disappointments of the Office of Special Counsel.

Despite Congress' clear statement in the Whistleblower Protection Act of the purpose and responsibility of the Office of Special Counsel, as well as the many statutory improvements enacted in 1989, that office has remained a source of great frustration and little refuge for Federal workers complaining of prohibited personnel practices.

H.R. 2970 takes many positive steps towards remedying the weaknesses that have become apparent in the present system. The bill if enacted into law will also be totally in sync with the administration's current efforts to reinvent government in that merit systems principles will be upheld and gross mismanagement and waste of government funds will be more readily disclosed by those in the best position to know of their occurrence.

The bill offers alternative routes for correcting prohibited personnel practices and greater protections for employees alleging violations. The protections will create an atmosphere and a statutory operation which will allow whistleblowers and others complaining of prohibited personnel practices to come forward without fear of their identities and allegations becoming the knowledge of the individual against whom the allegations are made. With employees encouraged to make disclosures and assured of being protected against reprisal, the government can go about the business of seeing that the merit system principles are actually adhered to and thereby better service the public.

As the administration begins to implement one of the main features of its reinvention effort, the delegation of greater authority to line managers, these increased protections are absolutely necessary to preserve the checks and balances required to maintain accountability.

The bill also makes the OSC more accountable to both Congress and individuals making allegations to the OSC and we believe the heightened accountability features built into the bill are a crucial element in assuring that OSC lives up to its obligations to those it has been charged with assisting.

It will prevent that office from issuing yet another glossy, slick report that paints a portrait which is not entirely reflective of its actual practices.

AFGE views the alternative forum option offered by the bill as a direct acknowledgment that the OSC has failed to act in a timely and effective manner in too many of the situations brought before it, to the detriment of those the office is charged with helping. The beauty of this bill is that it simply allows individuals raising allegations of prohibitive personnel practices to obtain relief elsewhere.

This option is crucial where, as here, the avenue presently in place, namely the OSC, has proven itself unsympathetic or ineffectual. I would stress that the bill neither allows multiple bites of the same apple nor does it abolish outright the OSC.

Again, this parallels in many ways the administration's current reinvention effort which requires various centralized regulatory agencies, like the GSA, GPO, and OPM to, "compete." Although many OSC customers have called for the sunsetting of that office, we believe that by breaking up the Special Counsel's monopoly and

requiring that office to compete with others, this bill may provide that office with the necessary incentive to provide a quality product in order to survive or it will see its whistleblower market go elsewhere.

If at the end of this reauthorization period the OSC still has not met the challenge of change and proven itself to be a high value, high performance organization, Congress will quite rightfully be compelled to revisit the issue of the abolition of that office.

We support many features of the bill. We just want to briefly mention two features that we think are extremely significant and that is, one, the bill's express language guaranteeing that employees charging a prohibited personnel practice may utilize negotiated grievance procedures and two, the direct empowerment of arbitrators to order corrective action and stays from those practices and/or discipline in meritorious cases.

Grievance and arbitration is a proven mechanism. It allows for swifter and less costly resolution of prohibited personnel practices than either the courts or the OSC and MSPB can provide. Thus, the resulting law would allow for the swift correction of the practice and discipline of those who are found guilty of committing it.

This law expressly, affirmatively and unmistakenly sets up those rights and responsibilities for all those who decide prohibited personnel practices to abide by and apply.

We sincerely believe that this bill could not come at a more appropriate time. The bill continues the effort to protect whistleblowers, merit system principles and efficient, responsible government operations.

Mr. MCCLOSKEY. Is that your statement, Mr. Roth?

Mr. ROTH. Yes, it is, thank you.

[The prepared statement of Mr. Roth follows:]

PREPARED STATEMENT OF MARK D. ROTH, GENERAL COUNSEL, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Mr. Chairman and members of the Subcommittee: My name is Mark Roth. I am General Counsel of the American Federation of Government Employees, AFL–CIO ("AFGE"). On behalf of the approximately 700,000 federal employees represented by AFGE, I thank you for providing me with the opportunity to voice our union's support for the bill which is the basis of this hearing, H.R. 2970. I also commend Chairman McCloskey for recognizing the need for the changes promised by the bill and taking the lead in initiating those changes.

The Special Counsel came into existence in 1979, just prior to the effective date of the Civil Service Reform Act of 1978 ("CSRA"). The CSRA made it the duty of the Special Counsel to protect the merit principles of the federal civil service by preventing the occurrence of and seeking the remedy for prohibited personnel practices. The legislative history of the CSRA shows that included in the duty was "a particular mandate to investigate and take action to prevent reprisals against government 'whistle blowers'. . . ." Unfortunately for federal employees and the federal government as a whole, Congress' aims for the Special Counsel went unrealized.

The need for additional legislation to reiterate and confirm Congress' mandate to the Special Counsel was, therefore, necessary. That need was partially filled by the Whistleblower Protection Act of 1989 ("WPA"). In enacting the WPA, Congress made the Office of the Special Counsel ("OSC") an independent government agency, and in so doing, specifically set forth the purposes which that Office and the WPA were to serve. The legislation mandated "that employees should not suffer adverse consequences as a result of prohibited personnel practices" and established that two of the "primary role[s] of the [OSC are] to protect employees, especially whistleblowers, from prohibited personnel practices [and] . . . act in the interest of employees who seek assistance from the Office of Special Counsel."

Despite Congress' clear statement in the WPA of the purpose and responsibility of the OSC, that Office has proven to be a source of frustration and little refuge

for federal workers complaining of prohibited personnel practices. Neither the interests of the federal government nor the welfare of the individuals comprising its workforce are served by the Office's failure to live up to Congress' intentions. H.R. 2970 takes several positive steps toward remedying the weaknesses which have become apparent in the present system. The bill, if enacted into law, will also be in sync with the Administration's current efforts to "reinvent" government, in that merit system principles will be upheld and gross mismanagement and waste of government funds have the possibility of being more readily disclosed by those in the best position to know of their occurrence.

In its effort to actualize the purposes for which the OSC was created, H.R. 2970 offers alternative routes for correcting prohibited personnel practices and greater protections for employees alleging such violations. One significant way in which the bill achieves that aim is by not only protecting the identity of an individual making an allegation of a prohibited personnel practice, but by also prohibiting the Special Counsel from providing information about the allegation itself. The bill takes even greater precautions in protecting allegations of reprisals for "whistleblowing" and exercising of appeal rights, as well as the identities of the individuals making those allegations to persons outside of the OSC.

These protections, both described by me and provided by the bill at issue, will create an atmosphere and an operation which allow whistleblowers and others complaining of prohibited personnel practices to come forward without fear of their identities and allegations becoming the knowledge of the individual/agency against whom the allegations are made. With a more ready disclosure on the part of employees of prohibited personnel practices, the Government can go about the business of seeing that merit system principles are actually adhered to and thereby, better serve the public. Further protection of whistleblowers is provided by the bill's expansion of the definition of the term "agency" found in 5 U.S.C. §§ 2302(a)(2)(C) to include government corporations and various intelligence agencies for purposes of provisions of the WPA relating to whistleblowers. As the Administration begins to implement one of the main features of its reinvention effort—the delegation of greater authority to line managers—these increased protections are absolutely necessary to preserve the checks and balances required to maintain accountability.

In addition to giving increased protection to those coming forward with allegations that merit systems principles are being breached, the bill also makes the OSC more accountable to both Congress and individuals making allegations to the OSC. H.R. 2970 leaves intact the requirement that the Special Counsel annually submit a report to Congress detailing its activities, but goes one step farther. The OSC would additionally have to inform the legislative branch of the number of instances in which the Office failed to conduct a timely investigation of the allegations presented to it concerning prohibited personnel practices.

Thus, Congress will have not only the figures illustrating the final disposition of matters and investigations of allegations provided in reports such as in "A Report to Congress from the U.S. Office of Special Counsel Fiscal Year 1992," but actual figures illustrating the speed with which the OSC looks into matters brought before it. In regard to individuals making allegations of prohibited personnel practices, the OSC must inform the individual of the investigation's progress at specified intervals and reach a conclusion as to the allegations within 120 days. Presently, the OSC is under no real time constraint in which to issue a decision on the allegation to the individual making the charge. That lack has resulted in improper delays in resolving prohibited personnel practice charges. Those delays have, in turn, created the impression that such charges are not taken seriously by the OSC. The heightened accountability built into the bill is a crucial element in assuring that the OSC live up to its obligations to those it has been charged with assisting and not allowing the Office to paint a portrait which is not entirely reflective of its actual practices.

AFGE heartily supports the provisions of the bill which provide individuals complaining of prohibited personnel practices, particularly those falling under the label of whistleblowers, with alternative, non-duplicative fora for relief in addition to the OSC. AFGE views the choice of fora offered by the bill as a direct acknowledgement that the OSC has failed to act in a timely and effective manner in too many of the situations brought before it to the very detriment of those the Office is charged with helping. That failure has impeded the operation of the federal government, particularly its effort and ability to end harmful practices and abuses within its ranks. I would like to stress at this point that the bill does not allow as some might argue, nor does AFGE advocate that it should allow, an employee to split the effort to obtain corrective action among an unrestrained number of fora. Neither does the bill eliminate the OSC as an agent through which to seek corrective action. The bill simply allows individuals raising allegations of prohibited personnel practices to obtain

relief elsewhere. This is crucial where, as here, the avenue presently in place, namely the OSC, all too often has proven itself unsympathetic or ineffectual. Again this parallels, in many ways the Administration's current reinvention effort which requires various centralized regulatory agencies like GSA, GPO, and OPM to "compete." Although many OSC "customers" have called for the outright abolishment of that Office, we believe this bill, by breaking up the Special Counsel's "monopoly" and requiring the Special Counsel to compete with other fora, many provide that Office the necessary incentive to either provide a quality product in order to survive or see its "whistleblower market" disappear. If at the end of this reauthorization period the OSC has still not met the challenge of change and proven itself to be a high value, high performance organization, Congress will quite rightfully be compelled to revisit abolishing the Office.

The choices of fora which the bill offers employees insures that their claims of prohibited personnel practices on the basis of their disclosures of violations of law and/or gross mismanagement, their exercise of appeal rights, and other grounds are not only taken seriously in word, but treated seriously in deed. This piece of legislation gives employees who come forward a guarantee of being heard should their efforts with the OSC prove unfruitful. Federal employees who come forward with allegations of reprisal due to whistleblowing or other grounds are dedicated and committed civil servants with the goal of making the federal government not only a fair and equitable employer, but also a capable distributor of the services and programs which the government provides to its constituency.

Two features of the bill which AFGE regards as being extremely significant not only enable claims of prohibited personnel practices to be taken more seriously, but also hold the promise that such claims will be addressed expeditiously. Those features are the bill's express language guaranteeing that employees charging prohibited personnel practices may utilize negotiated grievance procedures and the direct empowerment of arbitrators to order corrective action from those practices and/or discipline. By their very nature, grievance and arbitration allow for swifter resolution of prohibited personnel practice allegations than either the courts or the OSC and/or MSPB can provide. Thus, the resulting law would allow for the swift correction of the practice and discipline of those who are found guilty of committing it. Although a recent D.C. Circuit court decision has clarified that arbitrators have such authority, the "word of mouth" vehicle of getting knowledge of court decisions out to federal managers and employees is insufficient to the task. This law expressly, affirmatively, and unmistakably sets out these rights and responsibilities for all federal officials, and all those deciding prohibited personnel practice cases, to abide by and apply.

AFGE sincerely believes that the features of the bill which I have highlighted in my testimony, along with the bill's many other merits, could not come at a more appropriate time. The bill continues the effort to protect whistleblowers, merit system principles and efficient, responsible government operations. The bill guarantees that reprisals of whistleblowing will be handled in an effective and timely manner and that charges of other, equally detrimental prohibited personnel practices will not remain ignored.

This concludes my testimony. At this time, I will be happy to answer any questions.

Mr. McCLOSKEY. Mr. Hannapel.

Mr. HANNAPEL. Hannapel, that is correct. Good morning, Mr. Chairman, my name is Tim Hannapel, I am an assistant counsel in the Office of General Counsel at the National Treasury Employees Union.

I have submitted the testimony to the committee, the testimony of the president of NTEU, Robert Tobias, and I would like to summarize briefly our views on the bill as proposed.

First, I would like to echo the thanks of Mr. Roth and AFGE to the Chairman for proposing this legislation and for holding this hearing. We believe the bill represents very significant improvements for whistleblowers and Federal employees generally and we are delighted to testify in support of it.

Let me just, if I could, summarize the very significant improvements that we think the bill makes and then I will offer two or

three suggestions that we might make for making a very good bill even better.

First, the bill would significantly improve the operations of the Office of Special Counsel by tightening disclosure prohibitions, shortening time limitations, increasing reporting requirements to Congress, and clarifying procedural and burden of proof issues.

But even more significantly, the bill expands the definition of the personnel actions to which it applies, including psychiatric evaluations, security clearance determinations, and non-performance related removals for the very first time and allows Federal employees to bring complaints of violation of any of these prohibited personnel practice provisions in several alternative fora, and NTEU was very much in favor of these significant improvements.

Also, as representative of approximately 8,000 employees of the Federal Deposit Insurance Corporation, we certainly applaud the expansion of whistleblower protection to government corporations. We are also very much in favor of the bill's attention, as Mr. Roth just testified, to the role of the negotiated grievance procedure for resolving disputes that arise in the workplace.

Together with the recognition of the plenary powers granted to the arbitrator, the salutary objectives of that grievance procedure would be much easier to realize. We believe that the combination of these significant improvements should lead to greatly expanded protections for whistleblowers, as well as Federal employees generally and will empower those employees who are on the front lines of government service to come forward to remedy gross mismanagement and waste of taxpayer funds.

Let me just summarize the items we suggest to make a very good bill even better. As to government corporations, we suggest that all of the prohibited personnel practice provisions be made applicable, not just the whistleblower provisions. Particularly at FDIC, many of these employees are in positions of great public trust.

There is currently significant potential for management abuse that is currently unchecked, particularly the employees that are liquidating assets of closed banks and savings and loans. These are people who are responsible for billions of dollars of assets.

Second, we suggest a provision to make sure that the new administrative remedies that are contained in this bill are not interpreted by courts to foreclose judicial remedies that might be contained in other statutes.

Third, we suggest that even more attention be paid to the negotiated grievance procedures, possibly by making it the exclusive administrative remedy for items that fall within its scope, and this would honor the significance of the labor/management relationship that is embodied in collective bargaining agreements and it also——

Mr. McCLOSKEY. Excuse me, Mr. Hannapel, could you repeat that last point?

Mr. HANNAPEL. Well, the point that we make is that it may be a concern that has not been raised here yet, but I thought I heard Ms. Koch alluding to it, but there could be a concern about overflow at the MSPB in terms of individual rights of action on other prohibited personnel practices than whistleblowing, and so one way that we might suggest of alleviating that concern, as well as con-

tinuing to pay significant attention to the labor/management relationship, is to allow the negotiated grievance procedure to be the exclusive remedy for those prohibited personnel practices that might be felt by people in bargaining units.

Again, as Mr. Roth said, the negotiated grievance procedure is a procedure that has proven to work quickly and can provide significant relief. Particularly as long as the powers of the arbitrator are expanded, this makes sense.

One final suggestion that I might make, if the grievance procedure is made exclusive, we believe the law should be clarified that it would only be the exclusive administrative remedy but would not foreclose judicial remedies contained in other statutes, and I particularly point to the Federal circuit's decision in Carter versus Gibbs that is noted in Mr. Tobias' testimony. Congress intended the grievance procedure to be a strong avenue but courts have misinterpreted that intent to take away the individual rights of individual employees under, for example, the overtime pay statutes and the Privacy Act to go to court.

Those are our suggestions, Mr. Chairman, but I would like to thank you once again on behalf of NTEU for recognizing the need for significant improvement in this area and we are happy to work with the committee and I am happy to answer any questions.

[The prepared statement of Mr. Tobias follows:]

PREPARED STATEMENT OF ROBERT M. TOBIAS, PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

Mr. Chairman and Members of the Subcommittee, I am Robert M. Tobias, President of the National Treasury Employees Union. As the exclusive representative of over 150,000 federal employees, I welcome the opportunity to comment on a bill to reauthorize the Office of Special Counsel and amend the Whistleblower Protection Act of 1989.

This hearing could not be more timely. This past week, Vice President Gore unveiled his plan to "Create a Government that Works Better and Costs Less." The Report of the National Performance Review (NPR) includes numerous recommendations to cut waste in the federal government. The NPR recommendations, if enacted, would produce savings of $108 billion over five years. Not surprising, to best determine where waste existed, the NPR turned to federal employees themselves. The Vice President stated:

"We turned to the people who know government best—who know what works, what doesn't, and how things ought to be changed . . . I spoke with federal employees at every major agency and at federal centers across the country-seeking their ideas, their input, and their inspiration."

One must ask why these federal employees rarely come forward on their own to report waste. Federal employees do not feel sufficiently protected to report waste at their agencies. In a report released in August of 1992, the General Accounting Office found that 36% of federal employees still believe that they will suffer retaliation if they report wrongdoing within their agencies.

The Whistleblower Protection Act was created because Congress was dissatisfied with the effectiveness of the Office of Special Counsel in protecting whistleblowers. The Act separated The Office of Special Counsel (OSC) from the Merit Systems Protection Board (MSPB) and specifically charged the Office of Special Counsel to protect whistleblowers. Although the Act passed in 1989, the OSC has failed to prosecute any cases to date to reinstate a whistleblower's job. The Merit Systems Protection Board's record is no more promising. In 1989, whistleblowers prevailed on the merits approximately 31% of the time. In 1990, that percentage dropped to 10.3% or 16.5% overall. This record is abysmal.

The Whistleblower Protection Act was sorely needed and met with great expectations. However, since its enactment, the Office of Special Counsel, the Merit Systems Protection Board, and the Federal Circuit have eroded any rights which the Act created. For example, employees who "whistleblow" in the context of an appeal, complaint, or grievance are not protected under the Statute. Ongoing harassment

and threats are not considered personnel action for the purpose of MSPB review. The deprivation of a benefit which is not an entitlement by statute or regulation does not qualify as a personnel action for purposes of coverage under the Statute. This short list scratches the surface of the many obstacles which whistleblowers face when bringing forth a claim today.

H.R. 2970, a bill to reauthorize the Office of Special Counsel and amend the Whistleblower Protection Act of 1989 contains many important and far reaching changes. We support this bill with some important changes and welcome the opportunity to work with this Subcommittee on these matters.

The bill cleans up many of the existing problems at the Office of Special Counsel. Whistleblowers have consistently complained that the Office of Special Counsel leaks the employees' evidence and arguments to the employing agency, undermining the employees' future case at the MSPB and exasperating a strained work place for employees. The proposed bill would broaden the limitation on the disclosure of information by the Office of Special Counsel. In addition, the proposed bill sets a deadline for the OSC to determine whether there is a reasonable belief that a prohibited personnel action has taken place. This should prevent the ongoing delaying tactics which whistleblowers often experience at the OSC.

The bill also provides some needed procedural changes to the MSPB. The bill requires the MSPB to issue supoenas in Individual Right of Action cases. This ensures that whistleblowers will have the necessary information to bring forth a claim. The proposed bill also gives the MSPB the authority to refer cases to the OSC for disciplinary action of there is a reason to believe that a prohibited personnel action was committed by an employee. It is our hope the OSC will take these referrals more seriously and prosecute managers who are committing prohibited personnel actions.

In addition to some of the housekeeping changes I have enumerated above, the proposed legislation makes some greatly needed changes to the definition of a personnel action for purposes of determining prohibited personnel actions. The bill expands the definition of a prohibited personnel action to include a decision to require a psychiatric exam, a denial, revocation, or other determination relating to a security clearance; a nonperformance related removal; and, a decision to commence a formal investigation of an employee that may result in criminal prosecution of an adverse personnel action. NTEU applauds these changes. This provision will help to close the loophole that allows agency reprisal through actions involving security clearances, psychiatric fitness for duty examinations and lay offs of employees.

In regard to a non-performance related removal, we would like to bring to your attention the unique position of many of our employees at the Federal Deposit Insurance Corporation. These employees are temporary employees under the excepted service, and are subject to one year employment contracts. Recently, we testified before this Subcommittee on the FDIC's abuse of their temporary hiring authority. In that testimony we highlighted that FDIC temporary employees are afraid to blow the whistle for fear that their employment contracts will not be renewed. We would ask his Subcommittee to ensure that the definition of a "non performance removal" would include a non-renewal of a temporary employee.

We applaud the Subcommittee's expansion of the definition of covered agencies to include govenment corporations for purposes of whistleblower cases. NTEU has been aware of this omission for sometime and sought whistleblower protection for FDIC employees in banking legislation. As part of the Federal Deposit Insurance Corporation Act, banking employees may bring a civil action when they provide information to a Federal banking agency or the Attorney General regarding any possible violation of law or regulation and they believe they are being discriminated against in their terms and conditions of employment. FDIC employees will therefore have two remedies for whistleblower allegations. Our experience with the courts demonstrate the necessity of explicitly stating when Congress intends to give employees a choice of remedies. Otherwise, the courts often favor one remedy over another. We would suggest that this Subcommittee insert the following statutory language in the proposed legislation to clarify this matter:

"This section shall not be construed to extinguish or lessen any right to bring a civil action granted pursuant to any other federal statute."

This Subcommittee recognizes that it makes no sense to exclude employees from government corporations from whistleblower protection when virtually all other groups of federal employees have protection. By the same token, it is equally unfair and illogical to exclude employees of government corporations from the same protection against prohibited personnel actions that most other federal employees are granted. There can be no question that employees of government corporations are equally at risk to prohibited personnel actions as other government employees from other Executive agencies. They deserve equal protection under the law. Yet, the pro-

posed bill falls short in this matter and fails to accord employees of government corporations any protection from prohibited personnel actions.

The proposed bill has many far reaching changes pertaining to Individual Rights of Action. Under current law, individuals can obtain relief through an individual right of action when there is a whistleblower allegation. The proposed legislation provides for an individual right of action for any alleged prohibited personnel practice. The employee may bring a claim to the MSPB or through the grievance procedure (provided they are covered under a collective bargaining agreement).

NTEU strongly supports expanding individual right of action claims for prohibited personnel actions. We are concerned however with the inclusion of the MSPB as an alternative forum to the grievance procedure. When Congress enacted the Civil Service Reform Act it intended for the grievance procedure to be the exclusive administrative procedure for matters that it covers. The reasons are obvious. The collective bargaining agreement is negotiated between management and labor. These parties have agreed upon procedures and guidelines for dealing with violations of rules, regulations and laws. Especially in view of the National Performance Review's emphasis on decreasing the adversarial nature of labor-management relations, and because the grievance procedure is an outgrowth of the parties' collective bargaining agreement, we believe these procedures and guidelines should be respected and not taken to a third party forum with separate rules and guidelines which were never a part of the labor management agreement.

We believe that employees will have sufficient protection under the proposed bill without the MSPB as an alternative forum. The proposed legislation permits employees or applicants for employment in cases involving alleged prohibited personnel practices to bring a civil action in the appropriate U.S. District Court. The MSPB would remain the appropriate administrative forum for employees who are not covered by a collective bargaining agreement.

In this connection too we would like to propose a change to existing law, as interpreted by the Federal Circuit in *Carter* v. *Gibbs*, to ensure that the negotiated grievance procedure is the exclusive administrative procedure, but does not supplant any remedies which allow Federal employees to be heard directly in Federal court.

We strongly support changing the jurisdiction of appeals of MSPB or arbitral decisions alleging prohibited personnel action from the Federal Circuit to the D.C. Circuit. The Federal Circuit has consistently been hostile to federal employee cases. It makes sense, however, for all MSPB cases or arbitration decision involving adverse personnel actions, not only those arising from an allegation of a prohibited personnel practice, to be appealed to the D.C. Circuit. This would provide an equitable appeal process in all MSPB and arbitral decisions involving adverse personnel actions and would be logically consistent.

Finally, I would like to note various provisions of the bill which we strongly endorse. First, we wholly endorse providing an arbitrator the power to order a stay of any personnel action and disciplinary action allowable under Section 1215. In addition, we strongly support the provision allowing attorney fees when an employee substantially prevails on the merits. We believe that this provision will encourage settlement for those litigants who could not afford to settle their cases because of legal fees.

Mr. Chairman and Members of the Subcommittee, I applaud you for taking a hard look at the Office of Special Counsel. Your proposed changes can only encourage employees to come forward on allegations of waste, fraud and abuse because of the additional protections they will be afforded. I welcome the opportunity to work with you on this issue and would be happy to answer any questions that you might have on this matter.

Mr. McCLOSKEY. Thank you very much. Could either of you comment on the problems of confidentiality and unnecessary information going to the agency. You saw the dialogue that we had with OSC. Now, they claim it is not a problem, that the protections as to confidentiality are in place, but I think your testimonies may indicate otherwise; is that right?

Tell us what happens, in other words, in the real world.

Mr. ROTH. Well, in the real world, our members don't use the special counsel so I can't say that I am the expert on, whether they go too far in disclosures, but it is definitely a perception problem.

I would probably have to refer to one of the whistleblower groups that is required to use them and will be freed up under this bill

to go elsewhere. Like I say, we really don't advise people to use that office based on many experiences, not on disclosure, but on results.

Mr. HANNAPEL. I would really echo what Mr. Roth has said. We are lucky enough in the grievance procedure, the scope of that is broad enough so that some personnel actions that might not be actionable otherwise are actionable in the grievance procedure, but we do not advise our members as well as AFGE to use that procedure, and—but clearly that is because there is a perception out there that they are not going to be helped by it.

So I might also suggest that perhaps GAP be consulted on that question.

Mr. MCCLOSKEY. I did not have the benefit of reading the Tobias testimony as I normally would have. Could we go over it just in the broadest outline? We don't need to go into all the details really, Mr. Hannapel, what you want to see there, but particularly are you calling for a renewed or reinvigorated emphasis on the collective bargaining grievance process?

Just summarize that again. Then I will get the statement later and we will work on it with you and staff.

Mr. HANNAPEL. I think perhaps the best way to describe this is perhaps by referring to the parallel of the EEO process. There the grievance procedure is allowed to really be a parallel to other avenues of relief.

Now, it is not the exclusive remedy there and that is perhaps a recognition by Congress that the Federal discrimination statutes are very, very important and it is not to denigrate the importance of what is going on here, but I think our concern is that these other fora may be overloaded and that this may be a way of providing a check on that, as long as there is, and I believe that we have read this properly in the bill, that there would still be the right of de novo review in Federal District Court.

So I believe that would preserve a whistleblowers's concern that——

Mr. MCCLOSKEY. So what do you want to do then or what are you suggesting as a change in this area?

Mr. HANNAPEL. For people who are in a bargaining unit, rather than going to the Office of Special Counsel or to the MSPB, they would be required at the administrative level to use the grievance procedure.

Mr. MCCLOSKEY. That is what I thought I heard you say the first time, yes.

Mr. HANNAPEL. Of course the arbitrator would have the plenary powers that the OSC and the MSPB would have, and that would be checked then by the de novo review procedure.

Mr. MCCLOSKEY. So for a member of a collective bargaining unit, you would basically have two options and the de novo or the collective bargaining process, leave out OSC and MSPB for the time being.

Mr. HANNAPEL. At least at the administrative level. If you did not get relief, you would be able to go into court, and we think that that makes a lot of sense because of the success that we have had with the grievance procedure.

Arbitrators are very well acquainted with what is going on in Federal agencies and provided that they have the same powers, it should work out.

Mr. McCloskey. What percent of employees are in bargaining units? What are we talking about here?

Mr. Hannapel. Is it about 70——

Mr. Roth. About 60 percent of the Federal work force is in a bargaining unit, that is about 1.3 million employees and well over a million of those are under contracts.

So about half of the Federal work force is covered by a collective bargaining agreement that ends up in binding arbitration.

Mr. McCloskey. Okay. Do either of you have any reactions to Ms. Koch's suggestions to a time deadline on the process as far as getting a determination of probable cause and so forth?

Mr. Roth. Well, I was a little bit bewildered by it since she says she basically meets it already, and I don't think that four months, just for that initial determination, is very much to ask. I think that is a standard they should be held accountable to and I think they can make it.

Mr. Hannapel. I think it is appropriate, especially in view of the track record.

Mr. McCloskey. It doesn't seem unreasonable to me.

Mr. Roth. No.

Mr. McCloskey. Can either of you comment on the provision that makes explicit the power of arbitrators to order stays and discipline employees who commit a prohibited personnel practice? We are told that doesn't occur very often no matter how egregious the whistleblower abuse.

Do you think we ought to urge employees to use these procedures to resolve this type of dispute?

Mr. Roth. I think it is a huge step forward. Unlike many of the things that are written into law, I think this one will make a huge difference out in the workplace. I mean, this is a remedy. Most agencies won't bother to engage in this type of blatant reprisal conduct when they know within a matter of a few days or a week the status quo is going to be restored anyway.

They will take more seriously the whistleblower disclosure, and arbitration is unlike a huge bureaucracy that you have to fight your way through to get any relief. I have not recently seen their figures on obtaining stays, but I don't think the OSC obtains all that many.

With an arbitrator, where they hear this in an initial way, we can incorporate the legal requirements into our bargaining agreements and there will be a simple procedure for this which will resolve it. Arbitrators are people that are qualified individuals, have spent their life in mediation, conciliation, and hearing these types of cases.

The power is there now. It is just that we have to go through years of negotiating to get it and most agencies don't like it because they are giving up some authority. Your bill will make these arbital authorities a fact, and I think looking back in a few years, people will wonder how we ever survived without it.

Mr. Hannapel. I would really echo what Mark says. In addition, I think it recognizes that the grievance procedure is really what—

you know, it is an extension of the collective bargaining agreement. It is what management and labor have agreed to.

It is the way that they resolve disputes at the very individual level, and by giving the arbitrator the necessary powers, I think that that is just in furtherance of that collective bargaining agreement. Plus employees know about the grievance procedure, they know that it works, they know it is out there already, and I think we would be in a good position to emphasize, if this bill goes forward with this provision, that arbitrators would have expanded powers.

Mr. MCCLOSKEY. Would either of you care to comment on your experience as to the Federal Circuit Court in the appeals process vis-a-vis the D.C. Circuit, why the D.C. Circuit may be a better, more functional forum?

Mr. ROTH. The Federal circuit is a great patent and trademark court, however, it is like going to a proctologist for a headache in our cases. You just don't want to be there because they have no conception. They study trademarks and patents and international law. This is their training and these Special Counsel cases are a small part of what they do, and for these cases, we don't have a high regard for that court.

In the other areas they do an excellent job. The D.C. Circuit has heard every arbitration labor case. They know all the cases, private sector, Federal sector. People may have gone elsewhere but they also end up with the same issue in the D.C. Circuit.

Obviously all the courts are conservative at this point after the appointments of the last 12 years, but I think this D.C. Circuit court does have a working knowledge of these types of cases and the equities involved and we would like to see the cases switched over there.

Mr. HANNAPEL. I agree with that 100 percent. I think that we have been concerned about a hostility that we have found by the Federal circuit to this group of Federal employee cases so we would really——

Mr. MCCLOSKEY. I think there is a manifest or definite hostility.

Mr. HANNAPEL. I hesitate to say that it is outright, but we have been concerned. I have heard a report that one of the judges says the way that I prepare for one of these cases is I look at the brief of the government and then if I have any questions, then I will read the employee's brief.

That is not, you know, a perception out there of great confidence in that court. We would really like to see these cases transferred to the D.C. Circuit because that is the court that has developed over the past 50 years the expertise in review of administrative agencies' action, and I think that that expertise is really a resource that could be drawn on.

Mr. MCCLOSKEY. Do either of you have anything else to add that hasn't been covered?

Mr. ROTH. No.

Mr. MCCLOSKEY. Well, thank you very much, gentlemen.

Mr. HANNAPEL. Thank you.

Mr. MCCLOSKEY. We appreciate it and look forward to working with you again.

STATEMENT OF TOM DEVINE, LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT, ACCOMPANIED BY JEFF RUCH, POLICY DIRECTOR

Mr. MCCLOSKEY. Our last witness is Tom Devine who has been here before, legal director of the Government Accountability Project.

Good morning, Mr. Devine, you want to introduce your associate and we will accept your statement and please proceed as you would like.

Mr. DEVINE. Thank you, Mr. Chairman. With me is Jeffrey Ruch, GAP's policy director, who has accompanied me to help in answering questions and worked on preparing the testimony. GAP's bottom line assessment of H.R. 2970 is simple. Congratulations on a job well done.

If this is passed, it will be a significant step towards turning the promise of the Whistleblower Protection Act into reality. It also has the necessary foundation to achieve the National Performance Review's goals.

Three key objectives in last week's report are, first, to put the customer first. That cannot occur unless Congress strengthens the protections currently available for whistleblowers, public servants who already put the customer first.

Second, build on prior successes to prevent fraud, waste, and abuse. Whistleblowers are history's most successful catalysts for changes to better serve the public before a tragedy or boondoggle occurs. Under this bill these successes are much more likely to be the rule than the exception.

Third is to achieve reform from the bottom up. The cornerstone for this goal is empowering employees with the freedom to tell the truth. Whistleblowers are indispensable to bridge the knowledge gap.

Mr. Chairman, my prepared statement is submitted for the record. I would like to reserve the majority of the time in this presentation to respond to some of the points made by the special counsel in her statement this morning.

If there is any time left over, there is one or two of your recommendations we think are particularly significant that we would like to support.

Overall, the paradox we heard this morning is that the office objected to every provision in this bill reducing its discretion to act in ways that could undermine employee rights. That is why we still believe that the office should be abolished, but we are glad to work with the subcommittee on trying to enhance their performance.

Second, the OSC did not make any objection to the provision allowing whistleblowers to bypass the office. I assume that that means——

Mr. MCCLOSKEY. We did try to provide that opportunity, which was not in their formal remarks.

Mr. DEVINE. Yes, sir.

Mr. MCCLOSKEY. I said I did try to provide them that opportunity to comment or object, but obviously for whatever reason, it was not explicitly stated.

Mr. DEVINE. We think that is a very important part of the bill also. It means that whistleblowers will be freed of having to take

the risk of funneling their cases through the Office of Special Counsel. It greatly reduces the risk inherent in keeping that agency operative.

Third, the office did not assert in its claims of improved performance that they have increased the 5 percent bottom line success rate. That is the figure that looks at the big picture, rather than raw numbers without a context. Obviously the current system still is not adequate.

The primary objection the OSC offered today concerned the anti-leaks provision of the reauthorization bill. And they stated in our view that this would require them to do more than they currently have to under the Privacy Act.

That is precisely right. It means that the office will now have to have a working relationship with complainants. About the risk from unauthorized leaks which would significantly undermine the rights of those seeking help, the office is exactly right and there is a serious need for it.

Second, we would point out that partnership does not inherently mean delay, which was the primary concern the OSC raised. The private bar always lives with this reality when we represent clients. Government attorneys have to work with their agency clients.

Those are the facts of life for being a lawyer and I think the OSC should be willing to accept this normal reality.

Third, the criticism is out of context on delay. It disregards that employees are now empowered to bypass the office so they may avoid some of the murkier cases or the ones with stickier choices to make in terms of these sensitive decisions.

Fourth, this is a hypothetical. We would challenge the OSC to tell us what has been the track record of unnecessary delays under 5 U.S.C. 2302(b)(2) where this identical provision already exists. The reauthorization bill simply extends it from (b)(2) to (b)(8) and (b)(9).

Finally, we think the employees have almost nothing to lose in terms of delays. We are concerned about a case, for example, involving the Forest Service where the investigation was done in March, but there is still no word in September on the results of it. We are concerned about a case we recently filed there where the stay was to go into effect on August 30th, to be completed—suspension that was being challenged as reprisal, going into effect on August 30th, being completed on September 16th and as yet there is no acknowledgment of the complaint from the Office of Special Counsel.

We don't have much to lose, but most significant, delay is much less prejudicial to the merit system than black listing, cynicism, and loss of confidence in the special counsel that the current practices have breeded.

Our survey of complainants showed that last year, 11 out of 38 were upset that there had been unauthorized leaks of information in their case. This year, 10 out of 21 reported that same finding and most felt that the leaks undercut their rights.

The bottom line is that this provision simply means that when employees file OSC complaints, they do not lose control of their careers and do not have to take the risks of OSC undercutting their rights in order to assert them.

It goes a significant step towards ending their second class status compared to other Americans who are trying to defend their rights. The OSC also objected to termination briefings. If they don't like the idea of briefing employees about their cases, the alternative is to revise the FOIA requirements so they will have to give out files the same as the NLRB does, after investigations at the regional level. That would save a tremendous amount of time because a large chunk of OSC resources go into litigation challenging FOIA requests right now. I think they would have the time to do it.

Overall, however, it is not adequate for employees to remain ignorant of what happened in their cases after a 120-day investigation, that we can't keep, whether it is through oral briefings or reading their files. Last year, 20 out of 21 employees said they still had no idea why the OSC ruled against them after reading those letters. This year it was 37 out of 38.

The OSC objected to status reports, that they wouldn't have enough time for substance if they have to report back to the complainant earlier in the process. Again, there is nothing to lose. There is no substance in those reports now. They are checklists, they are form checklists with a box that is x'd. They can't get any less in terms of substance. They said that 120 days is not enough.

Well, that is 90 days more than the Department of Labor's alternative agencies have for analogous investigations of corporate whistleblower complaints, and that is the same amount that the MSPB gives its administrative judges to make final decisions after adjudicating an entire hearing in discovery process. 120 days is enough.

Finally, the OSC said that we should maintain the option to let employees go to the board after an OSC investigation and seek relief through an individual right of action. We disagree that that is what the bill states. The bill doesn't cancel this option. It maintains the subchapter 2 and 3 provisions of the 1989 act, of which that option is built in, but if there is any doubt, we certainly would support this subcommittee adding in the clause, after exhausting procedures in subchapter 2 to their individual board right of action.

I will be honest, Mr. Chairman. We think this is an outstanding base to start from. There are still serious problems in the whistleblower protection laws that we think need to be addressed. Those are covered in our recommendations. For us, however, the ultimate conclusion is no matter how hard and how effectively this subcommittee succeeds in improving the rights on paper, the real moment of truth is going to come from oversight, oversight and more oversight to keep agencies honest in implementing the statutes that you pass. We pledge to continue working with you towards that goal as well.

[The prepared statement of Mr. Devine follows:]

PREPARED STATEMENT OF THOMAS DEVINE, LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT

Thank you for inviting the testimony of the Government Accountability Project (GAP) on H.R. 2970, a bill to reauthorize the Office of Special Counsel ("OSC" or "Office") and amend the Whistleblower Protection Act of 1989 (WPA or Act). My name is Thomas Devine and I serve as GAP's legal director. With me is GPA policy director Jeff Ruch. Nothing is higher in GAP's priorities than reform of the Whistelblower Protection Act as addressed by H.R. 2970. Since 1979 we have monitored how effectively civil service reform laws protect freedom of dissent, and from

1985–89 we led the constituency campaign for passage of the Whistleblower Protection Act.

Our bottom line assessment of this bill is simple: congratulations on a job well done. If passed, H.R. 2970 will be a significant step toward turning the promise of the Whistleblower Protection Act into reality.

The bill also is the necessary foundation to achieve the National Performance Review's (NPR) "Reinventing Government" goals. Three key objectives in last week's NPR Report are to—

(1) Put the customer first. That cannot occur until Congress provides genuine protection for whistleblowers—public servants who already put the customer first. As Representative Schroeder explained when the 1989 Act was passed, it should have been called the Taxpayer Protection Act. It is unrealistic to expect government employees with second class rights to be public servants instead of bureaucrats. Under H.R. 2970, civil service employees will be closer to first class legal rights.

(2) Build on prior successes to prevent fraud, waste and abuse. Whistleblowers are history's most successful individual catalysts for changes to better serve the public, before a tragedy or boondoggle occurs. They are the Achilles' Heel of bureaucratic corruption by calling the bluffs of institutional false advertising. As illustrated by the successes of Galileo and Copernicus, they have been successfully challenging conventional wisdom for centuries. GAP's March 31 testimony summarized twelve illustrative cases where civil service whistleblowers successfully prevented tragedies from occurring or challenged abuses of power. Under H.R. 2970, these successes are more likely to be the rule than the exception.

(3) Achieve reform from the bottom up. The NPR Report insightfully noted that a key to achieving reform is "shedding the power to make decisions from the sedimentary layers of management and giving it to the people on the ground who do the work." But the report also confirms that accurate information is a precondition for anyone to make sound management decisions.

"Yet everyone knows the truth: Management too often is happily unaware of what occurs at the front desk or in the field. In fact, it's the people who work closest to problems who know the most about solving them. As one federal employee asked Vice President Gore, If we can't tell what we're doing right and wrong, who better can?"

In short, the cornerstone for this goal is empowering employees with the freedom to tell the truth. Whistleblowers are indispensable to bridge the knowledge gap. Example after example of the report's success stories came after managers listened to employees, instead of silencing them.

SOLVING THE PROBLEMS

GAP's March 31 and August 3, 1993 testimony surveyed the WPA's disappointing tract record to date. The 1989 Act has achieved modest but significant results. The odds of an employee committing the truth without incurring professional martyrdom have improved from winning the lottery to losing at Russian Roulette. But that's still not a fair fight. Nor is it sufficient to realize the goals in the NPR Report.

Without repeating the horror stories illustrating the need for H.R. 2970, GAP's earlier testimony summarized six conceptual problems that must be solved for the Whistleblower Protection Act to reach its potential. Any serious structural reform must include—(1) closing the loopholes in free speech coverage; (2) restoring and more fully applying the WPA's improved legal burdens of proof; (3) enhancing due process, in terms of fair procedural rules, trial fora and judicial review; (4) ending abuses of power by the Office of Special Counsel; (5) establishing management accountability through more realistic disciplinary liability for merit system abuses; and (6) strengthening workers' rights to make a difference and accomplish change when they blow the whistle. To a varying degree, H.R. 2970 makes significant contributions toward solving each problem.

(1) Closing the loopholes. The bill adds merit system protection for employees of government corporations, law enforcement and national security agencies. These are areas where the last few years have exposed some of the most brazen, damaging abuses of power. By establishing prohibited personnel practice coverage, H.R. 2970 forces managers to consider merit system protections when they order psychiatric examinations; yank security clearances; remove employees through budget excuses such as "defunding" whistleblowers' positions and Reductions in Force; and open retaliatory investigations to create dossiers through witchhunts. The bill also prohibits ex post facto removal of merit system coverage through reclassifying a job as confidential or political after the employee was fired.

In GAP's experience, these reforms on security clearances, retaliatory and defunding are especially timely, particularly in national security and law enforce-

ment programs. One employee who blew the whistle on illegality during transportation of hazardous materials for nuclear weapons facilities was ordered to take four successive psychiatric examinations, because she kept passing them. The Forest Service has relied on defunding to gut a law enforcement staff that was vigilant to massive timber theft after courts halted environmental devastation through clearcutting.

In the last month, we have received dispositive evidence how the U.S. Army's Space and Strategic Defense Command (SDC) repeatedly has sought to eliminate Star Wars whistleblowers by yanking their clearances, specifically because they communicated with Congress or blew the whistle. Each time the agency chose security clearances, because firing the dissenter would trigger free speech and due process rights. And in the absence of due process rights, the Army's Space and Strategic Defense Command (SDC) has assumed that "all's fair" in its war with whistleblowers. This is how a U.S. government agency manages to treat Congress the same as it does the Soviet Union with "deception" programs.

A few illustrative examples may be helpful. Without new evidence, the agency repeatedly has opened new investigations of whistleblowers over alleged wrongdoing for which they had previously been investigated and cleared. In Mr. Saucier's case the agency—(1) conducted an internal investigation that flatly violated federal privacy statutes; (2) tore off the cover sheet concluding Mr. Saucier had been cleared of alleged 1968 wrongdoing, (3) forwarded the charges as new for a fresh security clearance investigation; (4) suspended his clearance in the meantime; and (5) contacted the press to attack him about these same charges. An SDC intelligence officer, Colonel Alan Brandolini, frankly explained to counsel Mr. Saucier's only new "misconduct": contrary to agency policy, he publicly blew the whistle with unclassified but "sensitive" information in a report that the Office of Special Counsel already had forwarded as protected speech for the Secretary of Defense's response. Colonel Brandolini did not dispute that if Mr. Saucier had been fired, this explanation would have been a direct admission of violating the Whistleblower Protection Act. But as he smilingly explained, the Act does not apply to security clearances. Unable to find new employment without a clearance, Mr. Saucier now is applying for food stamps.

The case of Thomas Golden, Deputy to SDC's Assistant Chief of Staff for Intelligence, is equally Kafkaesque. Some five months ago Mr. Golden was offered and accepted a job as Inspector General for the Air Force Intelligence Command. After selling his house in Huntsville, Alabama, shipping the family's possessions to his new post in San Antonio and going out to dinner with his wife their last night before moving, Mr. Golden returned home to find notice that his security clearance had been suspended, along with orders not to leave town. He and his family of three children, four Siamese cats and two Amazon parrots had to move to a two room hotel suite. The next morning Mr. Golden was interrogated about his ties to President Clinton, with whom he is personal friends, and his disclosures of information to Congress. General Donald Lionetti, SDC's chief, informed Mr. Golden in writing that he was being investigated for the disclosures. After congressional protests, the formal notice suspending Mr. Golden's clearance relied almost entirely on charges for which he already has been investigated and cleared, sometimes more than once. A Defense Criminal Investigative Service (DCIS) memorandum explained that the agency was acting against Mr. Golden through his security clearance, due to doubts that it could make normal discipline stick. Even the Office of Special Counsel has agreed this is a case of whistleblower reprisal, but internally concluded that nothing could be done to help against security clearance actions without congressional authorization. Mr. Golden and his family remain in limbo.

(2) Restoring and applying the WPA legal standards. H.R. 2970 takes two decisive steps here. Most significant, it overturns the Federal Circuit's recent decision in *Clark* v. *Department of Army*, which erased 5 USC 2302(b)(8). Amazingly, the court held that an agency automatically defeats the whistleblower defense by sustaining the normal burden it has anyway to justify a proposed personnel action under the Clark decision. The Whistleblower Protection Act vanishes. The bill solves the problem by specifying that the whistleblower defense exists independently from the routine burdens in 5 USC 7701 to support a personnel action.

Second, H.R. 2970 applies the more realistic WPA legal standards to 5 USC 2302(b)(9). This means that employees who refuse to violate the law, serve as government witnesses, or exercise due process rights will have a fighting chance to win when they get their day in court. Those protected activities can be as important for public service as conventional whistleblowing protected in section 2302(b)(8).

(3) Enhancing due process. H.R. 2970 provides due process for any prohibited personnel practice victim. By allowing an Individual Right of Action for any alleged

prohibited personnel practice, it breaks the OSC's current monopoly on the rights of all employees except those alleging whistleblower reprisal.

The bill strengthens Merit Systems Protection Board (Board or MSPB) proceedings by creating rules to enforce pre-trial discovery, the due process foundation for any litigation. Unfortunately, practicing attorneys consistently report that discovery has been a bad joke at the Board, which consistently has ignored the principles in the Federal Rules of Civil Procedure. Further, the bill closes loopholes in the scope and availability of attorney fee awards that financially have made MSPB success a Pyrrhic Victory for many whistleblowers, who can't afford to win.

The bill creates "managed competition" for the Board through general access to District Court, or arbitrators in most cases. This is a breakthrough sought by whistleblowers since the 1978 Civil Service Reform Act of 1978 segregated them from jury trials by the citizens whose interests they were trying to defend. Choices of forum will reduce the litigation load on the Board; allow more employees to survive through more sympathetic fora; and help keep the Board honest by ending its monopoly on precedents interpreting the Whistleblower Protection Act.

Finally, H.R. 2970 introduces meaningful judicial appellate review after 11 years of the Federal Circuit, a court which has only supported the whistleblower defense on the merits twice since 1982. The bill replaces the Federal Circuit with the respected U.S. Court of Appeals for the District of Columbia, the nation's premier forum for review of alleged Executive branch abuses of discretion.

(4) Defanging the Office of Special Counsel. H.R. 2970 does not abolish the OSC, as overwhelmingly recommended by whistleblowers. But the bill takes steps to protect them from OSC's continuing abuses of power. Most significant, it allows whistleblowers to bypass the Special Counsel and directly pursue their due process rights. The bill also flatly cancels the OSC's sophistic basis for refusing to honor the WPA's anti-leaks clause. Further, the bill establishes obligations for the Office to provide more timely decisions and status reports to complainants, expedited decisions, more meaningful data on its track record, and a contact official to explain the OSC's decision to close a case.

(5) Establishing management accountability. H.R. 2970 takes three initiatives to deter merit system violations through giving bureaucratic bullies something to lose by doing the dirty work for reprisals. Perhaps most fundamental, the bill builds respect for the merit system into the performance appraisal system for managers. It also permits MSPB Administrative Judges to refer cases back for OSC disciplinary prosecutions of merit system abuses. More significant, it also permits arbitrators to impose disciplinary sanctions when they provide reprisal relief.

(6) Making a difference. Two minor repairs here could achieve a modest, but noticeable impact. First, the bill strengthens the standard of review for agency self-investigative reports on whistleblower charges. Traditionally, these reports have been whitewashes in which agencies take the time to perfect their defenses before officially exonerating themselves. In other words, they have made whistleblowing through the Executive branch counterproductive. Unfortunately, with some exceptions the OSC routinely accepts nearly anything the agency submits. Under H.R. 2970 the OSC cannot accept the report as adequate unless the agency's findings are supported by clear and convincing evidence.

Second, the bill reestablishes citizens' right to blow the whistle through the Office of Special Counsel. This restores an option that citizen groups used effectively before a 1981 Justice Department ruling halted the practice.

MORE WORK TO BE DONE

Like any bill, H.R. 2970 is a compromise. While it is a major advance, serious problems will remain unsolved unless a few more bases are covered. We urge the Committee to consider the following provisions:

(1) Continue attempting to close the loopholes in protected whistleblowing—through statutory language explicitly providing there are no exceptions to coverage for "any" whistleblowing disclosure otherwise meeting statutory definitions. The Board and OSC continue to disqualify whistleblower protections when the disclosure is packaged as a grievance, the employee is merely "doing his job," defending scientific integrity or other professional codes of conduct; or other irrelevant exceptions exist that drastically shrink the statute's scope of protection.

Similarly, Congress should provide a statutory definition of "reasonable belief," the legal standard for dissent to earn whistleblower protection. The Board increasingly disqualifies whistleblowers by shifting from its former standard of a rational, good faith basis for whistleblowing, to requiring that the employee has proved the misconduct.

(2) Close remaining loopholes in available remedies—through preventing retaliation by providing interim relief upon request, once a whistleblower makes protected disclosures and demonstrates a prima face case of reprisal; and by permitting reimbursement of back pay withheld during suspension, if the employee has been cleared of wrongdoing. Whistleblowers report to GAP that preventing retaliation through earlier interim relief is their number one priority for further change.

(3) Institutionalize OSC accountability—through formalizing complainants' access to relevant evidence in OSC their case files; requiring the OSC to attempt no-fault settlements of complaints before opening investigations; and imposing personal liability on OSC personnel for Violating the Act's limits on their authority. Whistleblowers still consistently report to GAP their view that the OSC is a hopeless institution and should be abolished.

(4) Make the annual anti-gap statute permanent. Since fiscal year 1986, Congress has passed an annual appropriations rider forbidding spending to implement or enforce nondisclosure agreements or policies conflicting with the Whistleblower Protection Act or similar statutes. This shield for the WPA should be institutionalized within the Act.

(5) Structurally guarantee that all harassment violating merit system principles will be illegal—through replacing lists of personnel actions with a flat ban on all discrimination, the same boundary found in laws protecting corporate whistlebowers and the Equal Employment Opportunity (EEO) statute. The vehicles for effective retaliation are limited only by the imagination. Although H.R. 2970 provides new protection against four forms of harassment, inevitably there will be more.

(6) Establish employees' rights to deter prohibited personnel practices by filing disciplinary counterclaims. Although H.R. 2970 takes tentative first steps toward personal accountability, there is no substitute for the right Americans normally have when faced with false charges—fighting back with counterclaims for abusing the process. Until reprisal victims can counterattack by seeking disciplinary action, bureaucratic bullies will have nothing to do lose from false charges. The worst that can happen is they will not get away with it.

(7) Strengthen whistleblowers' ability to make a difference. Again H.R. 2970 will help, but structural reforms are necessary to break the conflicts-of-interest inherent when agencies investigate themselves. Three suggestions, some which may require joint efforts with other committees, include—provision for policy arbitration hearings on whistleblower charges, as an alternative to investigation by agency Office of Inspectors General (IG); creation of a central Office of Inspector general to replace agency IG's and expansion of private Attorney General suits for federal employee whistleblowers to challenge illegality, currently available under the False Claims Act (FCA) for dissent against fraud. The latter's potential is evident by the defense industry's sustained, somewhat hysterical attack on this FCA provision.

Even if all these additional amendments were adopted, however, the most important word to transform any Whistleblower Protection Act's promise to reality is "oversight," and more oversight. At GAP we have greatly admired and pledge to continue supporting this subcommittee's unique vigilance.

Mr. McCLOSKEY. Thank you, Mr. Devine, for a kind and cogent statement. I really didn't have too many questions and we are going to have to leave shortly for a vote and rather than to have people wait 20 minutes as we are approaching the lunch hour for us to return, I think I just wanted to ask you two quick questions and request that we all get together for maybe a future meeting. What about Mr. Hannapel's comment a short time ago that for covered employees, perhaps those four options should for the time being exclude the MSPB and OSC initial coverage and focus on obviously encouraging the collective bargaining grievance process while still allowing the de novo right in the Federal Court?

Mr. DEVINE. We think that his point is well taken, that the latter two options are the best routes for an employee to have a fighting chance of defending his or her career successfully. We favor the idea of managed competition, however, which doesn't force an employee to go one route or the other, but maintains the option of choosing an alternative.

Mr. MCCLOSKEY. As you know, my bill has the four options basically, but should we restructure the process for the covered employees, just have the two options to start with?

Mr. DEVINE. We think that the way the bill is drafted, by maximizing your choices, it also maximizes the chances that you will be able to defend yourself somehow. What we at GAP advise folks who are seeking assistance or advice is that——

Mr. MCCLOSKEY. Stay away from OSC.

Mr. DEVINE [continuing]. Go where you can pay for it. If you go to the Office of Special Counsel, it is free, but you may well end up in worse shape than when you started. There is no free lunch in the bureaucracy, as well as in life.

If you go to the MSPB, it is the lowest cost due process hearing but it oftentimes has the lowest chances of success and on up the scale.

Mr. MCCLOSKEY. And just very briefly, maybe 30 seconds or less, because I want to let Ms. Morella comment or ask a question or two, there are real and significant breaches in the confidentiality process, right?

I mean, you said that, but as you know, Ms. Koch says it doesn't happen, the protections are there.

Mr. DEVINE. We continue to receive reports from employees over and over again about breaches in the confidentiality process. Just this last week I heard testimony from an employee in the Star Wars program that disclosed how a scientist who is currently black listed due to his clearance being yanked after a retaliatory investigation, two loopholes corrected by your bill, began to—started suffering this nightmare after the Office of Special Counsel shared information with the agency that was the basis for renewed investigation.

We have seen discovery documents from the board where the agencies verify the chain of custody of their information by saying they got it from the Office of Special Counsel, and the information was used to attack the employee's rights in the MSPB hearing.

The employees were compromised by hostile evidence to the employee's case. Private attorneys don't need to have the right to leak to opposing counsel the evidence that they may or may not use on behalf of a client and neither does the OSC need the right to leak evidence that undermines whistleblowers' careers.

Mr. MCCLOSKEY. Thank you, Mr. Devine.

Mrs. Morella.

Mrs. MORELLA. Thank you.

You know they often say that government language is full of obfuscation but yours isn't. We very clearly know where you stand and I do commend you for the honesty and the clarity of it.

I just wanted to ask one question about the jurisdiction of appeals, and I know this was discussed while I was meeting with constituents, but I am wondering about going from the Federal circuit to the D.C. Circuit.

What happens if there is a Federal employee that wants to file an appeal who is in Alaska or Hawaii? Is there any opportunity for that person to have that case heard without coming to the District of Columbia?

Mr. DEVINE. Under current law or the bill, they have to put their briefs in the mail and decide whether it was worth the investment of sending counsel for an oral argument.

Mrs. MORELLA. If it were of course a Federal circuit, they would have one that would be part of their district. So in other words, this is going to make it a bit more difficult for those people who don't have a proximity to the District of Columbia, is that true, do you think?

Mr. DEVINE. Both courts are located in the same city. There was a proposal to allow general all-circuits review to reduce the amount of travel that is necessary in order to defend your rights in appeals court.

The consensus among employee advocates was that the benefits of achieving uniformity from being able to know if the laws by one respected court with a more balanced track record making those final decisions was more advantageous than cutting the travel costs.

Our group's feeling is that we have to be freed from the Federal Circuit as a top priority. We would be supportive of the D.C. Circuit for exclusive appellate review or all circuits review but we deferred to those who felt consistency was the top goal.

The Federal Circuit has only ruled in favor of the whistleblowers on the merits twice since its 1982 creation, which means that there virtually is no appellate review of a board decision that is keeping them honest, and in fact recently in the Clark decision canceled the legal standards that are the cornerstone in the Whistleblower Protection Act.

This bill has to go to the trouble of rewriting those legal standards to overturn the Clark decision and keep what we won in 1989.

Mrs. MORELLA. Just finally, could you conceive that there, in terms of the timing, you mentioned 120 days is too long, it should be reduced to the 60. Is there a possibility of a compromise to 90?

Mr. DEVINE. Oh, I think as long as whistleblowers are free to seek their due process remedies after 120 days, that those are the types of provisions in the bill that we would be very open to working on and flexible about.

As we have said, they don't really learn anything from their status reports now anyway, so getting a report after 60 days compared to 90 days is not that significant a change to us.

Mrs. MORELLA. Thank you very much.

Mr. MCCLOSKEY. Thank you very much, gentlemen, outstanding testimony.

I might say also that we have a statement from the Honorable Dan Burton accepted for the record. This hearing is adjourned.

[The prepared statements of Hon. Dan Burton and Mr. Gordon follow:]

PREPARED STATEMENT OF HON. DAN BURTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Today the Civil Service Subcommittee will conduct a hearing on H.R. 2970, which reauthorizes the Office of Special Counsel, and also amends the Whistleblower Protection Act of 1989. As my colleagues have heard me say many times on the floor, I strongly believe that authorizing committees in the House should do their job and pass authorization bills in a timely manner. They should not delegate this function to the Appropriations Committee by allowing that committee to continually appropriate money for agencies whose authorizations have expired. I am pleased that this

subcommittee plans to fulfill its responsibility by passing legislation to reauthorize the Office of Special Counsel, and I commend Chairman McCloskey for his initiative.

Having said that, I believe it is very important that the Chairman and members of the subcommittee pay very close attention to all of today's testimony as we prepare to amend the Whistleblower Protection Act. I am second to none in supporting efforts to root out waste, fraud, and abuse in the federal government. Federal employees who can document waste, fraud, and abuse should be able to do so without fear of reprisal. At the same time, we should be very careful about adding new regulations that affect the internal operations of federal agencies. The National Performance Review's report has, I think, very accurately pointed out the problems that excessive internal regulations within the federal government have caused.

I want to thank our witnesses for appearing before the subcommittee today, and I look forward to your testimony.

PREPARED STATEMENT OF H. STEPHAN GORDON, GENERAL COUNSEL, NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Mr. Chairman, and Members of this Subcommittee, my name is H. Stephan Gordon, General Counsel of the National Federation of Federal Employees (NFFE). On behalf of the NFFE which represents approximately 150,000 federal workers in 53 government agencies across the country, I am pleased to appear before you today to present our views on H.R. 2970, a bill to reauthorize the Office of Special Counsel.

The NFFE has long been concerned about the ability of the government to fairly and justly investigate complaints of government fraud, mismanagement and abuse lodged against it by its own employees. Our unfortunate experience has been that the government is often unable to do this and would prefer instead to harass and retaliate against employees who "blow the whistle" on such practices. Despite the intent of Congress that whistleblowers be protected from such prohibited personnel practices by government agencies, this abuse continues.

In 1989, Congress passed the Whistleblower Protection Act (WPA) in order to clarify the official duties of the Office of Special Counsel (OSC) and to strengthen the protections afforded federal employees against retaliation for whistleblowing. The OSC was given greater authority to defend whistleblowers while its discretionary authority to release information about whistleblowers to agencies was limited.

In the three years since the passage of the Act, the OSC's record in fairly and objectively investigating federal employee complaints of retaliation remains abysmal. We believe that the Special Counsel is operating in good faith and is diligently trying to implement the mandate of the office. However, our experience remains that the practices of the Office often directly conflict with the Act. And, from the employee's viewpoint it still appears that the OSC is often an agent of the government created to further harass and intimidate them due to the mere filing of a complaint.

We commend you, Mr. Chairman, for introducing a bill that we believe will truly protect federal employees from government reprisal, as well as ensure that shoddy management practices, which harm all U.S. taxpayers, are exposed and corrected. Indeed, this bill represents an important first step in the process of "reinventing government".

The NFFE has first hand experience of how the OSC abuses its powers to the benefit of the government and detriment of the individual bringing the claim. Lloyd Williams, an employee at the Army's Rock Island Arsenal in Illinois and a NFFE member learned this lesson just last year. Mr. Williams was working as a pilot in 1988 when he blew the whistle on his supervisors for ignoring and, in some cases, condoning dangerous aviation conditions at the Arsenal's flight detachment. Instead of rewarding Mr. Williams for his efforts to protect the lives of his fellow pilots and safeguard the public, his supervisors made his life so miserable that he was forced to remove himself from the flight line because of stress. He was promptly assigned to a job oiling machinery.

A few months later, Mr. Williams was given the green light to return to flight status by the Arsenals' chief medical officer, but his supervisors refused for over one year to reinstate him. Mr. Williams sought help from the OSC, but his complaint was dismissed.

Similar incidents of reprisal against Mr. Williams over the next few years finally prompted the House Armed Services Committee to call for a full investigation of the Arsenal's personnel practices. An investigation by the Department of Defense Inspector General (IG) concluded in March 1992 that the Arsenal's refusal to restore

Mr. Williams to flight duty was in retaliation for his whistleblowing, just as Mr. Williams had claimed all along.

Armed with this IG report, Mr. Williams asked the OSC to reopen his complaint, but they refused, citing the difficulties of establishing reprisal in a case almost five years old. OSC's failure to act is inexcusable. Problems of proof exist in every case, but the Defense Department had little trouble investigating Mr. Williams' charges, interviewing the handful of witnesses involved, most of whom still worked at the Arsenal, and finding that the law had been violated. The Special Counsel's unwillingness to reopen this case in the face of an explicit finding of retaliation by DOD is a symbol of its larger failure to protect whistleblowers nationwide.

In light of our experience, it is easy to see why we often advocate that the OSC be abolished and its duties turned over to an agency with a proven track record for objectivity and fairness. However, we believe H.R. 2970 further clarifies the obligations and powers of the OSC as well as provides it with another chance to prove itself before more drastic action is taken.

Under H.R. 2970, the obligations of the OSC would be further clarified, the powers of the MSPB would be increased, individuals would be provided with the right to seek redress from a neutral, detached third party and the definition of prohibited personnel practices would be expanded.

In order to ensure that the OSC represents the whistleblower, H.R. 2970 would further restrict OSC's discretionary powers by limiting the information the OSC can disclose to the agency about the complaint or the complainant. We believe this will prevent the OSC from releasing to agencies the claimant's identity and evidence and arguments crucial to the claimant's case, which, if such facts were released, would otherwise undermine the claimant's future case before the MSPB.

In order to ensure an adequate response, the bill would additionally require greater disclosure by agencies in their response to the claims made against it. Moreover, the bill would impose a 60-day time limit upon the OSC when notifying persons that a prohibited personnel practice is alleged as well as a 120-day time limit to issue a determination as to whether a prohibited personnel practice may have occurred.

H.R. 2970 expands the role of the MSPB with respect to Individual Right of Action cases. Moreover, this bill would give the MSPB the authority to refer cases to the OSC for disciplinary action if it is determined that a federal employee committed a prohibited personnel practice.

The bill, under section 4, expands the definition of the term "prohibited personnel practice" to include such offenses as requiring employees to undergo psychiatric exams, denying or revoking a security clearance, non-performance related removals and formal investigations for criminal wrongdoing. As our experience shows, such practices are routinely engaged in by management in order to harass and intimidate whistleblowers into dropping their claims. H.R. 2970 would make it clear to agencies that the use of these type of practices would be deemed retaliatory. The NFFE also supports the language in this section which would expand this bill to federal employees of national security agencies, government corporations and other agencies.

Under section 5, which NFFE strongly supports, whistleblowers would be allowed to directly bring their claims to court. The inclusion of this provision allows an employee the opportunity to be heard in a forum other than the OSC. As discussed above and based on our members' experience, OSC has, in the past, been a hostile forum for employees with legitimate whistleblowing complaints. It is our belief that OSC's actions have "chilled" legitimate public knowledge and debate as to fraud, waste and abuse committed by government agencies which either directly impact constituents who are subject to or affected by such agencies, or at a minimum, results in additional taxes for all U.S. citizens. By allowing for an alternative forum everyone benefits. In addition, non-whistleblowers would still be required to go through the administrative process first.

In a move that we believe embodies the spirit of the reinventing government process, H.R. 2970 would increase the accountability of the OSC to whistleblowers. Such accountability would be provided through section 7 which requires the OSC to develop a guideline for use by whistleblowers. This guide would provide detailed information about the investigative process, the disciplinary process and the circumstances in which an employee is to provide consent before the release of certain information. This section would also require the OSC provide terminated employees with a contact name and number at the agency who would be able to answer questions about the employee's case.

Finally, the bill would broaden the ability of the parties involved to obtain fees relating to their case. We believe this provision, for those employees that prevail, would remove the financial roadblock that employee's face when they decide to bring a case by allowing them to recoup the costs of their legal representation.

In conclusion, without an adequate forum for self-correction, the U.S. government will continue to be viewed as a bloated bureaucracy. By enforcing the whistleblower provisions, the government will hopefully be taking the necessary corrective steps when they first appear rather than waiting until the problem reaches national crisis proportions. This early opportunity for corrective action benefits the agency, its employees and most importantly the taxpayers.

Mr. Chairman, this concludes my testimony. Again, I appreciate the opportunity to appear before you today to present our views on H.R. 2970, a bill we strongly support. We commend you for your efforts to protect the rights of whistleblowers. I will be happy to answer any questions you may have.

[Whereupon, at 11:55 a.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

Arlington, VA, September 16, 1993.

Hon. FRANK MCCLOSKEY,
Chairman, Subcommittee on Civil Service, Post Office and Civil Service Committee, Washington, DC.

Re: Reauthorization of Office of Special Counsel

DEAR CHAIRMAN MCCLOSKEY: I offer my comments concerning the legislation reauthorizing the Office of Special Counsel. I am a writer of two books on civil service law, one concerning the Merit Systems Protection Board and the other relating to the Federal Labor Relations Authority. I am also in the private practice of law, exclusively concentrating on representation of federal employees and unions.

Conceived in 1978 as an experiment in improved government, the Office of Special Counsel has been widely condemned as a failure in the ensuing 14 years of its existence. Although it has served one purpose—rechanneling of federal employees' complaints from the federal judiciary to the civil service adjudicative bureaucracy—the Special Counsel has failed effectively to prosecute corrective actions or disciplinary actions before the Merit Systems Protection Board. The Special Counsel maintains that it is able to settle many of its cases, and thereby avoid litigation. Because, however, the Special Counsel will not release its files or details concerning the cases it settles or the nature of the settlements, Special Counsel's claimed rate of success with respect to settlements. The sad fact is that I and many other practitioners have brought many prohibited personnel practice cases of merit to the Special Counsel to receive in response only a cursory letter explaining that the Office finds no basis for continued pursuit of the case. My personal experience with the Office suggests that it is run as a small bureaucracy rather than a prosecutor's office. My direct experience with the staff suggests that their knowledge of civil service law is in need of improvement and that the Office lacks individuals with prosecutorial, as opposed to administrative, talents.

What has occurred over the years is that many individuals with bona fide claims of prohibited personnel practices take their cases to the Special Counsel and can go no further because they do not qualify as whistleblowers and because their cases do not rise to the level allowing direct appeal to the Merit Systems Protection Board. The two practices within the government designed to ensure avoidance of the Merit Systems Protection Board are reassignments (both organizational and geographical) and short suspensions (those under 15 days). If an agency reassigns or issues a short-term suspension to an employee, it is a safe bet that the Special Counsel will take no action for the employee despite strong evidence of a prohibited personnel practice. The employee can then take his or her case no further. As alternatives to the Special Counsel, there exist only grievance procedures within the agencies (and within control of the agencies) and the EEO process, which is often abused by people seeking a hearing without bona fide complaints of violations of the civil rights laws. I add that those individuals who are fortunate enough to be covered by collective bargaining agreements and represented by aggressive unions are able entirely to avoid the Special Counsel and to obtain neutral third party arbitration of their grievances.

Despite repeated calls for the abolition of the Special Counsel, it seems to be just one more organization that having been created will continue in existence for some time to come. Therefore, the best was to surmount the road block it presents is to permit certain categories of complaints to be elevated to the Merit Systems Protection Board in the same manner that Congress now allows whistleblowers to present their cases to the Board after initial access to the Special Counsel.

Geographical reassignments have a devastating effect upon employees and their families. They are beyond the appellate jurisdiction of the Merit Systems Protection Board unless they are coupled with some other penalty, e.g., demotion or long term suspension, which is within the jurisdiction of the Board. Reassignments within an

organization that do not require movement of the employee and his or her family are often just as disruptive to the employee, for the reassignment is frequently to a position with no real responsibilities. Enforced idleness or geographical reassignment often forces employees either to resign or retire. Short term suspensions, particularly those involving individuals not protected by labor union contracts, escape any meaningful review when the agency grieavance procedure relegates review to the agency managers who impose the suspensions, and when the EEO procedures are available only for those who claim that the suspensions are motivated by discrimination.

To meet the needs of employees who are given short term suspensions or reassignments, I suggest that the legislation reauthorizing the Special Counsel allow employees who assert that short term suspensions or reassignments (or long term details) are motivated by prohibited personnel practices be permitted to appeal their cases to the Merit Systems Protection Board after exhausting the Office of Special Counsel processes in the same way that whistleblowers are not permitted to present their cases to the Special Counsel and ultimately to present their cases to the MSPB. That step would provide meaningful redress, within the parameters of the existing system, for employees who are affected by significant personnel actions that are not otherwise now appealable.

As I have explained before to the Subcommittee, the laws governing the Special Counsel's office are adequate as long as the Special Counsel is a zealous prosecutor and protector of employee rights. The legislative changes in the Office of Special Counsel have been designed essentially to circumvent that organization because of its lack of investigative acumen and prosecutorial zeal. In the years to come I sincerely hope that Congress will reevaluate and reformulate the entire civil service adjudication system and, in the process, abolish or severely restructure the Office of Special Counsel. In the interim, however, federal employees need far more proctection than they are receiving from the Office of Special Counsel. My suggestions will afford some protections for some of those employees.

Yours very truly,

PETER B. BROIDA.

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