OVERSIGHT HEARING ON WHISTLE-BLOWER PROTECTION AND THE OFFICE OF SPECIAL COUNSEL

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

MARCH 31, 1993

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OVERSIGHT HEARING ON WHISTLEBLOWER PROTECTION AND THE OFFICE OF SPECIAL COUNSEL

WEDNESDAY, MARCH 31, 1993

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

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

Members present: Representatives McCloskey and Morella.

Members also present: Representatives Bishop and Gilman.

Mr. MCCLOSKEY. Good morning. I have been informed several subcommittee members are on their way. Also, we have with us today Mr. Bishop, who very generously is participating, a member of the full committee, with a strong awareness in the area; and hopefully we will have about 2 hours of good testimony coming to a close about 12 m.

I guess before too long Congresswoman Morella should be here. I am looking forward to her input today.

I might say we are happy and gratified to be involved in this area as the chairman of the Civil Service Subcommittee. I think it is a fascinating and important subject area. I would sincerely commend and request anyone with an interest in any pertinent civil service issues to get in touch with our subcommittee here in Cannon, particularly Debbie Kendall, the staff director.

I am relatively new to some of the technicalities in the area of whistleblowers. I sincerely appreciate the GAO, the various whistleblower and other witnesses that will be testifying today. I do think before too long, a matter of weeks, no more than a month or so, we are very likely to have remedial legislation and at least one more hearing at that time.

The protection of whistleblowers has long been a serious problem for the Federal Government. The Civil Service Reform Act of 1978 was expected to provide relief against reprisal for blowing the whistle on mismanagement, waste, fraud, and abuse in the Federal Government. Unfortunately, the 1978 act was insufficient in protecting employees, and in 1989, Congress passed the Whistleblower Protection Act of 1989 to further strengthen and improve the protections for whistleblowers in the Federal Government. In 1993, as part of ongoing efforts to improve whistleblower protections, Congress again must examine the process.

The language and the intent of the Whistleblower Protection Act of 1989 is clear. It separated the Office of Special Counsel from the Merit Systems Protection Board and established it as an independent and distinct agency. In doing so, Congress clearly established the limits of OSC's duties and responsibilities. The Office of Special Counsel's powers are confined within boundaries that mandate it: "Protect employees, especially whistleblowers, from prohibited personnel practices," and "act in the interest of employees who seek assistance from the Office." However, it is highly questionable whether Federal whistleblowers are receiving adequate relief from the Office of Special Counsel according to the provisions of the 1989 legislation.

Since 1991, the GAO has been conducting an ongoing study for this subcommittee chaired by my predecessor, Mr. Sikorski. They have been evaluating the success that whistleblowers have had in seeking relief from reprisals for blowing the whistle on mismanagement, waste, fraud, and abuse within the Federal Government. The results have been mediocre at best.

In October 1992, the GAO issued its second report on whistleblower protection, entitled "Determining Whether Reprisal Occurred Remains Difficult." The charts in the report paint a dismal picture: The OSC's success in securing relief for whistleblowers has not improved, despite the fact that the Whistleblower Protection Act of 1989 lowered the burden of proof for reprisals. The OSC has shown basically no improvement in achieving relief for whistleblowers since the implementation of the act.

The OSC also has the power to seek disciplinary action against employees who retalitate. However, the GAO found that only once under the 1989 act did OSC seek disciplinary action between July 1989 and September 1990. Furthermore, the GAO determined that about one-third of employees appealing to the MSPB after being turned down at OSC obtained relief from their agency, either through settlements or reversals of adverse personnel actions. In addition, one-third of whistleblowers who went direct to MSPB obtained relief.

The GAO is not alone in its findings regarding OSC's effectiveness. The Government Accountability Project, a nonpartisan whistleblower support organization, has been monitoring the OSC since 1979. GAP has found that the OSC has at times released information on whistleblowers without their consent and that the OSC often fails to provide protection for whistleblowers who take their cases to the OSC. In a survey taken by GAP, 31 of 42 whistleblowers reported increased harassment after OSC disclosures with no protection from the OSC against the reprisals.

The whistleblowers we will hear from today tell a compelling story. Each one of them has served the Federal Government well—saving millions of dollars and revealing systemic management problems—but each whistleblower has been to hell and back trying to maintain their integrity.

One of the most important findings of the GAO is that only 2 of the 19 Federal agencies notified all of its employees about all their rights under the Whistleblower Protection Act and the existence of OSC. This means that only 11 percent of all Federal employees have knowledge of the resources available to them as whistle-

blowers. While Congress can easily remedy this through legislation, I find it shocking as to how ill-informed the Federal workforce appears to be. As the National Performance Review, led by Vice President Gore, asks Federal employees to come forward and help reinvent government, they must feel safe to report waste, fraud, and abuse. President Clinton, as you are aware, is also very concerned.

Federal workers are the key to an effective and efficient Federal Government. The agencies must change their culture and focus, and view whistleblowers as a viable way to improve their operations, not as a threat.

The purpose of this hearing is to examine whistleblower protection and the OSC, and to determine what needs to be accomplished in terms of authorizing legislation so that the OSC can serve its intended purpose. The OSC's current authorization expired at the end of fiscal year 1992. My predecessor, Representative Gerry Sikorski, was so concerned about the GAO's findings and the numerous complaints from whistleblowers to his office that he decided not to report legislation to reauthorize the OSC last Congress.

I welcome all of today's witnesses and look forward to their testimony.

I am very pleased to have my good friend, Connie Morella here. Congresswoman, do you care to make a statement?

Mrs. MORELLA. I would like to thank you, Mr. Chairman. I really appreciate the fact you scheduled this meeting on this important issue of the Whistleblower Protection Act. I do want to add, I look forward, since this is the first meeting of the subcommittee, to working with you on the challenges, and there are many challenges we will face in this session. It should be very productive.

You have a number of witnesses I am looking forward to hearing. So my observations really are going to be just that, as we begin our hearing today.

I am pleased at the placement of the witnesses. Too often, Government witnesses they are placed first; and then afterwards, we never really get the opportunity to hear from them when we need to. So by placing the special counsel last, I think that she can respond to some of the concerns that our witnesses will be projecting.

Reading the testimony, I do believe there is a real need for education. We need to educate our Federal employees about what this whistleblower protection is. I think there is a need for employees to be encouraged to report instances of waste, fraud, and abuse, and for employees to be assured they will be protected.

I think employees also need to be educated that all disclosures are not protected disclosures, as they very often claim.

Mr. Chairman, you know every plaintiff who takes a case to court is convinced that that case is going to win on its merits and that justice will prevail. Sometimes, these people are disappointed because the evidence just is not there. There is a legal precedent which disallows winning or there is no cause of action or no jurisdiction. In other words, this gets back to the need for specific education on what this act does and does not do.

I think that many people truly believe that they have whistleblower's protection and may not be correct. Of course, this is dis-

appointing to the employee. As I indicated earlier, I am looking forward to hearing these witnesses.

I have a bit of concern, though, Mr. Chairman, that there isn't a single witness that is going to say anything good about the Office of Special Counsel. My point is, I really want to know. I wonder if there are any Federal employees that have, in fact, been helped. What are the pluses of this legislation?

For the sake of fairness, I hope that there will be something in the record that will talk about the number of cases that perhaps have been resolved in favor of the employees by the Office of Special Counsel.

Finally, Mr. Chairman, I would like to state I look forward to working with you to amend the Whistleblower Protection Act as necessary. I think we will get a lot of information in this hearing about what might be necessary. As witnesses have indicated in their testimony that I perused, there needs to be a better definition of whistleblower, a better definition of protected disclosure and extension of protection to employees who do not fall under the Whistleblower Protection Act. We may need to put into the code where agency responsibilities regarding the WPA lie and that the Office of Special Counsel is charged with educating the agencies; then to be sure they know that and have the appropriate support to do that.

I hope this special counsel and her staff will continue to make strides in making the Office of Special Counsel more effective; and should they have any concerns, they should be free to share the concerns with this subcommittee.

Federal employees should know the OSC is supposed to be an advocate for them; and OSC should be fully aware that they, indeed, are an advocate for the employees.

I thank you, Mr. Chairman. I look forward to the committee hearing.

Thank you.

Mr. MCCLOSKEY. Thank you, Congresswoman Morella. I think your point about balance is well taken. I would regret any implication that the OSC is not staffed by fine and diligent people. Indeed, in all reports, from our own conversations, I know they have and will continue to help a lot of people; and hopefully we are going to improve the process.

I also think—one thing I have done in previous subcommittees that sometimes gets the dialog going is to have not only the non-government—the nonagency witnesses first, so to speak, but to mix it up, to put them on one panel. I don't know if we will do that today.

There are all sorts of interesting ways to encourage frank dialog. I will say, as I said to the staff this morning, just looking at the witness list today—and I mention there will be subsequent, at least one major subsequent hearing in this area within 4 to 6 weeks as we prepare the legislation—I am concerned that we get more of a balance from various agency employees into the testimony process very soon.

I understand your concerns there. I have the same concern.

I am pleased to have, again, Mr. Bishop with us today. I welcome any statement he may care to make.

Mr. BISHOP. Thank you very much, Mr. Chairman.

I don't have a lot to say. I am just interested in the workings of this subcommittee. Particularly of interest is the whistleblower legislation. I would like to sit and monitor the proceedings and educate myself into the workings of our civil service system, the office of OSC, and just offer whatever help I might in my small way.

Thank you very kindly for allowing me to sit in.

Mr. MCCLOSKEY. Thank you, Mr. Bishop.

We are pleased to have with us today Nancy Kingsbury, Director of the Federal Government Division of the GAO. She tells me has worked in this field for 12 years.

Ms. KINGSBURY. I was at OPM for 12 years before going to GAO.

Mr. MCCLOSKEY. You may want to introduce your associates.

Your formal statement is accepted for the record.

STATEMENT OF NANCY KINGSBURY, DIRECTOR, FEDERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY RONALD J. CORMIER AND NORMAN A. STUBENHOFER

Ms. KINGSBURY. I should clarify. It was 12 years 8 months ago, so I know just enough to be dangerous. I have with me Norm Stubenhofer and Ron Cormier, who have been planning the ongoing work you referred to so generously in your opening statement.

At the risk of being a little redundant with your opening statement, I would like to briefly summarize where our work takes us. Then we can get on to questions.

As you pointed out, Mr. Chairman, the statutory protection for whistleblowers was first introduced by the Civil Service Reform Act of 1978. However, Congress subsequently found the 1978 act was having little impact on encouraging Federal employees to report fraud, waste, abuse or misconduct, and protecting those who did.

In an attempt to deal with those reported problems, Congress enacted the Whistleblower Protection Act of 1989 to strengthen and improve protection for whistleblowers. Among other changes—as you noted—the act was intended to ease the employee's burden of proof that the reprisal that they thought they had experienced was associated with their whistleblowing and allow employees to file appeals with the Merit System Protection Board if they did not obtain relief with the Office of Special Counsel.

In October 1992, we reported, despite the intended improvements of the act, employees were finding that proving their cases was as difficult then as it was before the act was passed. The principal reason remained the difficulty of demonstrating sufficient evidence to establish a link between the employee's whistleblowing and the personnel action that they alleged was a reprisal.

On the positive side, we found allowing employees to file appeals with MSPB had a measurable impact. As you noted, about a third of those employees whose cases we reviewed, who appealed to MSPB after going to OSC for assistance, were getting relief, sometimes through settlements and sometimes through reversals of actions.

To refer to your statement, Ms. Morella, we are doing work to look at those statements and to get information from those employ-

ees about how they felt about the process. Hopefully, within a few months, we will have further data to get at the issue you raised.

In July 1992, we reported on the results of a Governmentwide survey of Federal employees. The survey indicated that most Federal employees would be willing to report misconduct in the abstract. However, the majority of employees said they had little knowledge about where to report misconduct or about their right to protection from reprisal; and response to questions about whether they would be likely to report misconduct indicated that we have a long way to go in driving fear out of the Federal workplace.

On a related issue, in March 1993, we reported there were wide disparities in how the 19 agencies we reviewed had implemented the whistleblower statutes. Some agencies informed employees about their whistleblower protection rights, but most agencies had neither informed employees nor developed policies and procedures for implementing the 1989 act. In addition, the 19 agencies identified over 220,000 employees, most of them in the Departments of Defense and Veterans Affairs, in departments not covered by whistleblower statutes. To address these problems, we continue to recommend Congress consider amending the whistleblower statutes with OSC's guidance for carrying out the whistleblower statutes and to inform employees periodically of their right to protection from reprisal and where and how to report misconduct.

We also recommend the special counsel, with the agency's assistance, assess whether whistleblower protection coverage needs to be extended to those positions currently not covered by the statutes and recommend any coverage changes to Congress.

In concluding, Mr. Chairman, I offer the observation that the problems we are observing in whistleblower protection, problems this subcommittee is clearly concerned about, need to be addressed beyond legislation. If the program is to be successful, agency leadership and support for identifying and correcting abuse and mismanagement is essential and must go beyond rhetoric.

Employees should be encouraged to call improprieties to the attention of management and must be assured such actions will not result in reprisal. Employees must be reminded of their obligations to bring such matters to the attention of management in a proper and responsible manner and participate with management in resolving the identified problems.

Employees may need to recognize the right to be heard is not the right to prevail; but they should be rewarded, not punished, for doing their duty as they see it.

With that, I will be happy to take your questions.

Mr. MCCLOSKEY. Thank you, Ms. Kingsbury.

[The prepared statement of Ms. Kingsbury follows:]

United States General Accounting Office

GAO

Testimony
Before the Subcommittee on the Civil Service
Committee on Post Office and Civil Service
House of Representatives

For Release on Delivery
Expected at
10:00 a.m. EST
Wednesday
March 31, 1993

WHISTLEBLOWER PROTECTION

Employees' Awareness and Impact of the Whistleblower Protection Act of 1989

Statement of
Nancy R. Kingsbury, Director
Federal Human Resource Management Issues
General Government Division

GAO/T-GGD-93-19

Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to take part in the Subcommittee's hearing on whistleblower protection and the Office of Special Counsel (OSC). You asked us to summarize our recent work on whistleblower protection and OSC. Since July 1992, we have issued reports dealing with federal employees' awareness of whistleblower protection, the effectiveness of the Whistleblower Protection Act of 1989, and agencies' implementation of the whistleblower statutes.

Overall, our work has shown that despite the intent of the 1989 act to strengthen and improve whistleblower protection, employees are still having difficulty proving their cases. Employees are not aware of their right to protection, and agencies are not informing them of this right.

THE PURPOSE OF THE WHISTLEBLOWER PROTECTION ACT OF 1989 WAS TO STRENGTHEN PROTECTION OF EMPLOYEES

Statutory protection for whistleblowers was first introduced by the Civil Service Reform Act of 1978 (P.L. 95-454). However, on the basis of reports by the Merit Systems Protection Board (MSPB) and GAO, as well as OSC's data, Congress subsequently found that the 1978 act was having little impact on encouraging federal employees to blow the whistle and protecting whistleblowers. In

1984, for example, MSPB reported that between 1980 and 1983 there was no measurable progress in overcoming employee reluctance to reporting fraud, waste, and abuse.[1] And we reported that, in fiscal year 1984, OSC closed 99 percent of the whistleblower reprisal complaints without seeking corrective or disciplinary action.[2]

In an attempt to deal with such reported problems, Congress enacted the Whistleblower Protection Act of 1989 (P.L. 101-12) to strengthen and improve protection for whistleblowers. The act, among other changes, separated OSC from MSPB and established OSC as an independent agency. The act expanded OSC's role in protecting federal employees, especially whistleblowers, from prohibited personnel practices.

Other changes in the act to help whistleblowers included

-- easing the employee's burden of proof that reprisal for whistleblowing had occurred, and

-- allowing employees to file appeals with MSPB if they did not obtain relief through OSC.

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[1]Blowing the Whistle in the Federal Government: A Comparative Analysis of 1980 and 1983 Survey Findings, U.S. Merit Systems Protection Board (Washington, D.C.: Oct. 1984).

[2]Whistleblower Complainants Rarely Qualify for Office of the Special Counsel Protection (GAO/GGD-85-53, May 10, 1985).

EMPLOYEES CONTINUE TO HAVE DIFFICULTY PROVING REPRISAL

In October 1992, we reported that even though the 1989 act was intended to strengthen and improve protection for whistleblowers, employees claiming reprisal for whistleblowing at OSC were finding that proving their cases was as difficult then as it was before the act was passed.[3] The principal reason remained the lack of sufficient evidence to establish the link between the employee's whistleblowing and the reprisal.

OSC disagreed with our conclusion that proving reprisal remained difficult, indicating that employees claiming reprisal under the 1989 act were having greater success than our analysis of OSC's data indicated. However, we found that although the number of whistleblower reprisal complaints, corrective and disciplinary actions, and stays (postponed action) had increased under the 1989 act, the increases were generally proportionate to the increases in the volume of complaints that had been filed. We also found that before and after the 1989 act's passage, about the same percentage (5.8 percent versus 6.3 percent) of reprisal complaints filed with OSC resulted in some form of corrective action.

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[3]Whistleblower Protection: Determining Whether Reprisal Occurred Remains Difficult (GAO/GGD-93-3, Oct. 27, 1992).

On the positive side, we found that allowing employees to file appeals with MSPB was having a measurable impact on whistleblower reprisal cases. About one-third of those employees appealing to MSPB after going through OSC for assistance were getting relief, usually through settlements and sometimes through reversals of adverse personnel actions.

MOST EMPLOYEES DO NOT KNOW HOW THE WHISTLEBLOWER STATUTES PROTECT THEM, AND AGENCIES ARE NOT INFORMING THEM

In July 1992, we reported on the results of a governmentwide survey of federal employees.[4] The survey indicated that most federal employees would be willing to report misconduct. However, the majority of employees said that they had little knowledge about where to report misconduct or about their right to protection under the law from whistleblower reprisal. Also, many employees said fear of reprisal for reporting misconduct was a concern.

On a related issue, in March 1993 we reported that there were wide disparities in how the 19 agencies we reviewed had implemented the whistleblower statutes.[5] Some agencies had

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[4]Whistleblower Protection: Survey of Federal Employees on Misconduct and Protection From Reprisal (GAO/GGD-92-120FS, July 14, 1992).

[5]Whistleblower Protection: Agencies' Implementation of the Whistleblower Statutes Has Been Mixed (GAO/GGD-93-66, Mar. 5, 1993).

informed employees about their whistleblower protection rights, but most agencies had neither informed their employees nor developed policies and procedures for implementing the 1989 act.

Under 5 U.S.C. 2302(c), the head of each department and agency is responsible for preventing prohibited personnel practices, including whistleblower reprisal. However, no explicit requirement exists in the whistleblower statutes (5 U.S.C. 1201 et seq.) for OSC or the agencies to inform employees about their right to protection from reprisal or where to report misconduct. OSC, to its credit, has attempted to spread the word about employees' right to be protected from reprisal. However, as OSC officials acknowledge, they have had limited success in eliciting the support of the agencies to inform employees of what their rights are under the law and how to go about exercising them.

The lack of agency commitment appears to us to be a major problem in the whistleblower program. If the program is to be successful, agencies' support for the program is critical. Employees should be encouraged to call improprieties to the attention of management and be assured that such actions will not result in reprisal. All too often in the past, such assurances have been absent and employees did not know how much agency support they would receive.

ALL EMPLOYEES ARE NOT COVERED
UNDER THE WHISTLEBLOWER STATUTES

Our March 1993 report also observed that not all federal employees were protected against reprisal by the whistleblower statutes. Congress specifically excluded certain agencies and employees from certain civil service provisions of Title 5 of the U.S. Code with the passage of the Civil Service Reform Act of 1978. One of the specific exclusions under Title 5 was protection against prohibited personnel practices, including whistleblower reprisal. Additionally, some agencies' enabling legislation has been interpreted to exclude all or some of their employees from the civil service provisions of Title 5; as a result, the employees are not covered under the whistleblower statutes.

The 19 agencies in our review identified over 220,000 employees, most of them in the Departments of Defense and Veterans Affairs, in positions not covered by the whistleblower statutes. While some exempt agencies, such as the Federal Deposit Insurance Corporation and the Resolution Trust Corporation, offer limited whistleblower protection, further analysis may be necessary to clearly identify employees not covered by the whistleblower statutes and to assess whether further coverage is warranted.

RECOMMENDATIONS TO CONGRESS AND THE SPECIAL COUNSEL

To address these problems, we recommended in our recently issued reports that Congress consider amending the whistleblower statutes (5 U.S.C. 1201 et seq.) to require agencies, with OSC's guidance, to develop policies and procedures for carrying out the provisions of the whistleblower statutes and to inform employees periodically on their right to protection from reprisal and where to report misconduct.

We also recommended that the Special Counsel, with agencies' assistance, assess whether whistleblower protection coverage needs to be extended to those positions currently not covered by the whistleblower statutes and recommend any coverage changes to Congress. OSC officials were in general agreement with our recommendations to Congress and the Special Counsel.

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Mr. Chairman, this concludes my statement on the work we have done to date. In the future, we will be reporting to the Subcommittee on the results of an ongoing survey of federal employees who have sought whistleblower protection from OSC.

I will be pleased to answer any questions you or the members of the Subcommittee may have.

CHAIRMAN FRANK MCCLOSKEY
QUESTIONS TO BE SUBMITTED IN WRITING BY GAO

Question:

Ms. Kingsbury, in your testimony, you say that the 1989 act to strengthen and improve whistleblower protection has not been successful. Whistleblowers are finding relief at the Merit Systems Protection Board rather than the OSC, and employees are still having difficulty proving their case at OSC. The OSC contends, however, that there is a marked increase in claims that receive corrective actions and that it's committed to enforcing the 1989 act. How can you explain this discrepancy?

Answer:

OSC is correct in that there has been an increase in the number of corrective actions under the 1989 act. However, as we stated in our October 1992 report, although the number of whistleblower complaints, corrective and disciplinary actions, and stays increased under the 1989 act, the increases were generally proportion to the increases in the volume of complaints filed. About the same percentage of reprisal complaints filed with OSC for periods we studied before and after the 1989 act's passage resulted in corrective action.

Question:

Would you please comment on the proposals to eliminate the Office of Special Counsel?

Answer:

Work we have performed to date has not led us to believe that the elimination of OSC is the answer. Rather, we believe the focus should be on what can be done to improve OSC and protection for whistleblowers. As we stated in our testimony, we have made several recommendations directed to federal agencies and OSC to improve whistleblower protection. These recommended changes and a continued effort to provide protection for those federal employees who have suffered reprisals against for whistleblowing will not only improve the rights of employees but also improve government.

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Mr. MCCLOSKEY. Mrs. Morella?

Mrs. MORELLA. I think it is a nice succinct statement you made with regard to the wonderful work GAO has done in the number of studies they have done. I am wondering about where should employees report whistleblowing acts of waste, fraud and abuse?

Ms. KINGSBURY. I was startled by the results of the survey that suggested employees didn't know the answer to that question. The entire Inspector General network was established for purposes of investigating these kinds of problems. That is an obvious answer to that question.

We asked in our survey whether they knew to report it to a whole variety of places. Their own agency's management; the General Accounting Office has a hot line some people could use; certainly the Inspector General community.

My sense is that agencies ought to have an established procedure, and it is up to them to set up what they want to do.

Mrs. MORELLA. So in other words, because they don't have an established procedure, employees don't know where to report it. But as you suggest, they could report it any number of places?

Ms. KINGSBURY. That is right.

Mrs. MORELLA. They are doing it all over the lot, the union, the agency head?

Ms. KINGSBURY. That is right.

Mrs. MORELLA. It is something that is begging for clarification?

Ms. KINGSBURY. Yes. As you said earlier, education. More education.

Mrs. MORELLA. Right.

What about if each agency, after we come to grips with where the reporting should take place? How it should take place? Perhaps if there were a pamphlet or something that we could devise—an information pamphlet. In other words, "Your Rights As an Employee," explaining the whistleblower act?

It seems to me that is a minimal expenditure of money, which would be worth a great deal in terms of what it would do for the morale of the employees, too, to know that there is this clarification; would you agree?

Ms. KINGSBURY. I would agree. When we talked to agencies about this, it was interesting. Their response was the law didn't require them to do it, so they didn't do it.

When we talked to OSC, OSC said the law doesn't require us to make them do it, so we really are not—they do some education stuff themselves but don't have the resources to do it at the agency level.

So I would agree, although I don't—my sense is it is a continuing thing that needs to be done, doing and publishing one brochure, having it available for new employees is a good first step. Moving to periodically reinforcing an ongoing agency training program, that this is part of people's obligation, would be another thing agencies could do. I think it is going to take time.

Mrs. MORELLA. It seems in personnel training, that should be one element of it?

Ms. KINGSBURY. Yes, ma'am.

Mrs. MORELLA. Maybe we can do something with legislation that would be appropriate.

Let us see. All employees are not covered. Again, clarification about who is covered, who is not; and the whole question that you point out about whether more should be covered who are not covered is a tremendous discrepancy.

I guess basically what you are saying is it is not working because no one knows the definitions; nobody knows who is covered; nobody knows where to report; and the agencies don't seem to truly have a commitment to it. They have so many other things they are doing.

OK. I guess that is about all. You have certainly confirmed what we have felt was the problem and we look forward to getting some of those statistics about what kinds of cases have been handled.

We did have one hearing of the Federal Advisory Council on Public Service. And in public comment, a woman said one of the problems was that there was no followup to make sure there were no recriminations against the employee who had filed for whistleblower protection. Is that something that you also sense is needed—the followup afterwards? Do you have any idea how it would be done if you would agree?

Ms. KINGSBURY. I haven't thought about how it would be done. I think part of the difficulty is that both the investigation of an issue that is brought to management's attention as well as sort of what happens to the employee can drag out over a number of years. If you look at some of the cases, I think you may hear some of those cases this morning. At what point do you follow up; what form that followup takes is a very difficult thing to actually carry out.

I think that is part of the problem that the Office of Special Counsel has. They are operating off file records. They do investigations. It is not always clear that there is a causal relationship between something that happens to an employee and something that they claimed to have blown the whistle about.

As you point out, employees are not well-informed about what kinds of things are protected and what are not, and what are just the ordinary—to use an odd sort of phrase—ravages of the workplace.

Mrs. MORELLA. Maybe this is something we can keep in mind, and when we hear from the Office of Special Counsel maybe there will be a suggestion about what can be done. Maybe the employees who are testifying may.

Thank you very much. Thank you, Mr. Chairman.

Mr. MCCLOSKEY. Thank you, Ms. Morella.

Mr. Bishop, welcome again. Care to proceed?

Mr. BISHOP. Mr. Chairman, I will pass at this time. I will come back later. I want to thank you. I read your testimony.

Ms. KINGSBURY. Thank you.

Mr. MCCLOSKEY. Ms. Kingsbury, obviously the function of the GAO is to analyze structure and make mathematical judgments as it affects policy. I think at one or two points, you did use more subjective terms such as attitude or rhetoric.

I am not looking to dump on the OSC—which I think would be unfair. Is there an attitude problem, as you see it, as far as a desire to defend whistleblowers or zeal for the mission in the OSC?

Ms. KINGSBURY. I don't think I would characterize it that way. My staff has been interacting with OSC folks now for a number of years.

We see there a view of a technical, legal view of a job to do. One of the things I asked them in preparation for this hearing was whether or not when the 1989 act was passed, they had sensed a change to mirror the intention of the act in how they interpreted the legalities of what they were doing.

The answer was "no"; that by and large, there was no guidance, for example. I would have looked for additional guidance to have been issued within OSC saying this is how we interpret how our mission has changed because the Congress has passed this act. There wasn't any.

As far as we can tell, there was no real discussion of what the meaning of this new interpretation of the law was supposed to be.

But I don't attribute that to a lack of zeal. I think it is they have a relatively narrow view of what constitutes a reprisal about which they have an obligation to protect someone; and what you see in the cases is that interpretation.

Mr. MCCLOSKEY. I was reading some of this material last night, and was truly amazed at the idea that if you are not in a covered position or if it is interpreted that your complaint is not on all fours with the statute, in essence, the system has a right to run you out of town. You are open game and dead meat, so to speak.

It is amazing that the process allowed that to happen. Can you comment on that?

Ms. KINGSBURY. I have not read that particular statement, because I only got it this morning. I was a little surprised at the interpretation of there being somehow not coverage if you are in a position where you are doing policy work or something.

Mr. MCCLOSKEY. There is a statutory legislative statement, is there not, anyone who makes a complaint in good faith, regardless of the technicalities, should be subjected from reprisal. Somehow that is not happening?

Ms. KINGSBURY. I think that is right. Although some positions inherently do not have positions in them. If you are on a temporary appointment or something like that, it is harder to prove reprisal; the statute intended to cover it.

Do you want to add anything?

Mr. CORMIER. No. I think the point about the—talking about the gross fraud, waste, and abuse, where it is a little less than that?

Mr. MCCLOSKEY. A policy, a managerial problem, whatever.

Ms. KINGSBURY. I think that was—in writing it into the statute, my impression is that was a balancing mechanism.

Mr. MCCLOSKEY. The point is that there is a right? Yes or no?

Ms. KINGSBURY. Yes.

Mr. MCCLOSKEY. The way it is handled in the field, whether there is a right or not, there is a practice of reprisal against people whose complaints do not technically fit the statute and, in essence, there is no redress for them?

Ms. KINGSBURY. OSC does take a fairly technical view of defining who is covered and who is not; that is correct.

Mr. MCCLOSKEY. What agencies have the poorest information for employees regarding the whistleblower process?

Ms. KINGSBURY. We looked at 19 agencies. Only two of them had an actual program to inform their employees. We didn't distinguish among the other agencies about how much worse some of them were.

They simply did not do it. So their employees not surprisingly were not well-informed.

Mr. MCCLOSKEY. Serving on Armed Services, it seems to me, DOD was mentioned as being low in participation.

Ms. KINGSBURY. That is certainly one that has not done anything.

Mr. MCCLOSKEY. Anything?

Maybe a subjective question, Ms. Kingsbury. It is amazing to me there is this variation in compliance and interest in whistleblowers—in different agencies, just with information being what it is in this society, the Federal press, the national press, the daily press, the media, et cetera, with the union activities.

In essence, don't nearly all Federal employees really know even if indirectly or by osmosis that they do have a right to whistleblower protection? Or may have a right?

Ms. KINGSBURY. It is clear from our survey they do get information from these other sources; but the more important aspects of the information, the kind of things that Representative Morella was referring to, to clearly inform employees about what specific acts on their part are covered versus what are not, that sort of thing, there is no systematic way of providing that information out there.

And a little bit of knowledge can be dangerous. People can infer from a general right to protection that anything they do is protected. Consequently, more information about what this law specifically intends to do would certainly be helpful.

Mr. MCCLOSKEY. Have you noticed any problem on the other side as far as a pattern of abuse, oppression, slander as to people unjustly and arbitrarily trying to accuse——

Ms. KINGSBURY. Certainly in our survey, there were a number of responses to our survey where at the end we said: Do you have any other comments that were clearly from management officials who, as they put it, had been the victim of a whistleblower and unfairly so?

So I think there is some evidence out there that some people feel that this statute has been abused in the other direction. Whether the numbers are as great as the people who feel they should be protected, my sense is that—we don't have a very good sense of that. There are clearly people out there who feel the other way.

Mr. MCCLOSKEY. Thank you.

I have no further questions.

Mrs. Morella.

Mrs. MORELLA. I appreciate your generosity, Mr. Chairman.

In reviewing the GAO report, of October 1992, on page 2, it says: "We did not review the OSC, Office of Special Counsel, and the Merit System Protection Board files to determine the adequacy of investigations or the appropriateness of dispositions made by OSC and MSPB of whistleblower reprisal claims."

I am curious about why didn't GAO review these?

Ms. KINGSBURY. Well, we had been asked specifically just to get a picture of how many of the complaints went, were disposed of in a certain way. We were answering that question.

We are looking at some of the—as I mentioned earlier—some of the cases that went to the MSPB and were settled to see what the substance of those settlements were and to talk to the employees involved and find out how they feel about it.

Going beyond that, to be honest with you, I think it is not altogether—excuse me.

Oh, that is right.

I am reminded we did issue a report in 1985, in which we did look at the substance of the cases and by and large we found at that time with the cases, that they were handled properly.

To go through that again, at this point, would be an exercise in substituting our judgment for the agency's about the individual facts of the case and we didn't think that that was appropriate to answer the question.

Mrs. MORELLA. You seem to think that was an attitude of adequacy?

Ms. KINGSBURY. In 1985, our lawyers did look at the cases. We could not find any cases at that point that we could raise a question had not been handled properly.

These are people who technically are trying to do a good job.

Mrs. MORELLA. I think maybe that should be part of the record in some way.

I am also curious to know, even though the burden of proof has been lowered by the enactment of the Whistleblower Protection Act, the success rate by OSC for the benefit of the employees seems to be in question; and I am wondering are these Federal managers, supervisors, agency heads, et cetera, a department not making a causal connection between the protected disclosure and the personnel action?

It seems like we have already said that is true, and how do you prevent it, if you do believe that is true?

Ms. KINGSBURY. In these cases, OSC asks the agency for their explanation of what happened. The agencies produce explanations, and the explanations on their face are apparently reasonably plausible.

The difficulty is the direct link. Even with the lesser burden of proof, it is still a subjective judgment and it is still—if the agency, for example, argues that, well, we would have taken this action anyway, for performance reasons, conduct reasons, some other reason, absent some evidence that that is not the case, that there were a whole series of performance appraisals that countervailed that, or something else, OSC under its procedures would accept that argument and fail to find that nexus.

Mrs. MORELLA. The agency heads also have to be educated?

Ms. KINGSBURY. Yes. Yes.

Mrs. MORELLA. Thank you very much, Mr. Chairman.

Ms. KINGSBURY. I think they have to change the culture so that the problems that are brought to their attention are seen as opportunities to improve.

Mrs. MORELLA. Absolutely.

Thank you.

Mr. MCCLOSKEY. Mr. Bishop.

Mr. BISHOP. Let me just ask Ms. Kingsbury, do you perceive the problem with the management to be one of more esprit de corps between OSC and the agency people? Is it just sort of a camaraderie, an esprit de corps because they work for——

Ms. KINGSBURY. I don't think so. I think it is their rather technical view of the constraints in the statute and how those are to be applied that is, quote-unquote, "the problem" in that sense, rather than their associating themselves with management officials.

Mr. BISHOP. I was going to ask whether or not the association that they were all management might have some resulting consequences in terms of their more likely being able to find in favor of management's arguments than necessarily listening to the complaints of the employee?

Ms. KINGSBURY. I don't think we see any particular evidence of that. I think the nature of the statute is such that it is fairly narrowly drawn. That is the way they approach it.

Mr. BISHOP. One other problem. Do you think it would enhance if, perhaps, employee representatives were—served on some kind of panels with the OSC? In other words, some lay representation?

Some people that participated with the OSC that had the employees' perspective?

Ms. KINGSBURY. Employees can bring representation to this process. I am not sure that——

Mr. BISHOP. I don't mean outside representation. I mean have as part of the OSC——

Ms. KINGSBURY. As sort of an advisory function in these cases?

Mr. BISHOP. Yes.

Ms. KINGSBURY. I really haven't thought about how that would work.

Mr. BISHOP. It is sort of like the oversight that many States, many agencies has in terms of their oversight boards. They include lay members on those boards.

Ms. KINGSBURY. I think an advisory committee to the Office of Special Counsel, which they used to explore interpretations of the law might be an interesting exercise for them.

Mr. BISHOP. I guess what I mean——

Ms. KINGSBURY. In the individual cases, it strikes me as being unwieldy.

Mr. BISHOP. Investigative teams. It seems to me, employees are going to get the idea that this is going to be rubber stamped, so why go through the process.

Ms. KINGSBURY. I am not sure that adding additional members to that team will solve that problem either.

Mr. BISHOP. By adding someone to the investigative part of the team, who has a perspective, in whom the employee might reposit trust as opposed to having someone from OSC in whom they may not have trust? I am just throwing that out. If you do not think that is feasible, I appreciate your comments.

Ms. KINGSBURY. It is hard for me to figure out how that would help the process.

Mr. BISHOP. OK.

Mr. MCCLOSKEY. Thank you, Mr. Bishop.

Ms. Kingsbury, I don't think any of us have any further questions.

Thank you for your work on this.

Thank you for the participation of all three of you. We will be talking again.

Ms. KINGSBURY. We will look forward to bringing our future work back to your committee.

Mr. MCCLOSKEY. Did you have anything you wish to add, please feel welcome.

Thank you so much.

I see my good friend and colleague Congressman James Bilbray in the audience. I believe he is here in connection with one of the witnesses on our next panel.

Jim, please come up.

Mr. van Ee, you were a whistleblower at the EPA; and also Ms. Marie Ramirez, a whistleblower associated with the Navy; and Robert Seldon, a lawyer associated with Mr. Gordon Hamel, the President's Commission on Executive Exchange.

You are all welcome.

Make yourselves comfortable.

Along with Mr. Thomas Day, a whistleblower at the Navy who is also welcome.

Any formal statements are accepted for the record.

Jim, welcome to you.

I will let you proceed and—as you like, and introduce your good friend.

STATEMENT OF HON. JAMES H. BILBRAY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEVADA

Mr. BILBRAY. The reason I am here today is to introduce Mr. Jeff van Ee, a remarkable young man from my district. I have known him for many years. Even though Las Vegas is one of the fastest-growing areas in the Nation, with, roughly, 4,000 newcomers moving in each month, it retains a small town atmosphere at the core of life within Las Vegas.

Within the local and active environmental community, Jeff has been a committed volunteer and a strong advocate of environmental concerns in Las Vegas. His voluntarism provided our community with true public service.

In addition, I would like to describe the many awards he has received over the years: In 1972, he received the U.S. EPA's Gold Medal for Exceptional Service; in 1974, he received the EPA's Bronze Medal for Commendable Service; in 1983, he received a Ivana Wilde Governor's Conservation Award; in 1984, he again received the Bronze Medal for Commendable Service from the EPA; in 1987, he received the friends of the U.N. Environmental Program 500 Environmental Achiever Award; in 1990, he received the U.S. EPA's Special Award for Outstanding Contributions in Planning and Implementing the 1990 Earth Day; in 1992, the Senator Harry Reid Earth Day Award.

Over the years, I have watched Mr. van Ee's involvement in the community and have had grave concern in the fact that Mr. van Ee has been subject to the Department of Justice IG's attempt to

file criminal charges against him for participating as a concerned citizen in a land exchange at Apex, NV.

His concerns were over a bill I was proposing.

I am not here as a Congressman saying he was supporting my particular bill. I am concerned because he was threatened with criminal prosecution. In this case, he was testifying about concerns over my bill.

Mr. van Ee, participated in a meeting as a concerned citizen on the environment. I am here because I am concerned that our American's freedom of speech is threatened.

He wasn't at a Democratic rally, a Republican rally, Libertarian, United We Stand. He was there as a concerned citizen coming forward to confess concern about the environmental concerns in that particular area.

He will testify that what happened, the complaint made by the Justice Department to the EPA was referred to a special prosecutor within their Department and asked that Mr. van Ee be charged with criminal activity. The U.S. attorney refused to bring those charges.

His record——

Mr. MCCLOSKEY. Jim, how could they possibly come up with a charge like that?

Mr. BILBRAY. We don't understand it at all. Mr. Jeff van Ee will explain it in length.

I have proposed an amendment to this act, and this is a very simple amendment which says: "No conduct or disclosure sanctioned under any provision of the Whistleblower Protection Act shall be subject to prosecution under title 18 of the United States Code."

The reason is, whistleblowers cannot be sanctioned within the agency or deprived of their activities, but they can still be charged with criminal activity for having violated quote-unquote "the Hatch Act," or something else. I don't know what they were trying to get at.

Mr. van Ee will bring that up.

I was so concerned because, as far as I know, Mr. van Ee has never participated in any partisan politics. He is an active member of several environmental groups which—I may be speaking out of turn—I think he belongs to the Sierra Club, the Wilderness Society, groups like that. I know he goes out and does volunteer work in areas to protect the environment.

He goes to the mountains and works with volunteer groups. Yet, for some reason his participation and involvement in a concern regarding desert tortoises was considered a violation of his work ethic; somehow he was to be precluded from community involvement under some law. He was questioning the expenditures of Federal moneys on a study that he thought was a waste of time, and a waste of American money. Dollars and no sense.

I am proud to introduce Mr. van Ee to this committee. I want you to know he is a very well-respected southern Nevadan.

I also want to reiterate that Mr. van Ee in the past has been known to testify against aspects of my legislation. I am here in part to emphasize the critical importance of protecting our citizens' constitutional right and freedom of speech and because I believe on

the sacred obligation of our citizens to participate in ensuring that our government is accountable for its actions.

That is the end of my introduction.

If you have questions of me, fine. If not, I will go back to Armed Services where the Chairman is holding the Committee in session.

Mr. MCCLOSKEY. Thank you, Mr. Bilbray. It is always a honor. You know how I feel about you.

Mr. van Ee, please elaborate on this horrible situation.

STATEMENTS OF JEFF VAN EE, WHISTLEBLOWER, ENVIRONMENTAL PROTECTION AGENCY; MARIA RAMIREZ, WHISTLEBLOWER, DEPARTMENT OF THE NAVY; ROBERT SHELDON, LAWYER REPRESENTING GORDON HAMEL, WHISTLEBLOWER, PRESIDENT'S COMMISSION ON EXECUTIVE EXCHANGE; AND THOMAS DAY, WHISTLEBLOWER, DEPARTMENT OF THE NAVY

Mr. VAN EE. Thank you, Mr. Chairman.

I am deeply honored by the introduction Congressman Bilbray gave me.

Congressman Bilbray, like all of you, is very busy working on a number of pressing issues that our Nation faces. You recognize your job is not a 9-to-5 job. You spend your time, after hours, working to protect our environment and making life for all of us better. Well, I do the same thing.

I find it really distressing—the story that I am about to tell you—because I was reprimanded for appearing at a meeting on January 22, 1990, at which I expressed concerns as a private citizen, not as an employee of EPA, over a $400,000 study of some 11 desert tortoises that the U.S. Fish and Wildlife Service was proposing to move a few thousand feet. They wanted to put radio transmitters on the backs of those tortoises and see how they responded to this move.

It was a very controversial issue for the community. I thought I could make a difference. I got involved; and as a consequence, two-and-a-half months later, after that meeting, I found myself being the target of an investigation by the EPA inspector general.

In April—April 5, 1990, I was informed that I was involved in some sort of conflict of interest and that, on April 6, I was to be questioned by the EPA inspector general for my conduct at that meeting.

A conflict of interest for me? I couldn't believe it. This issue had nothing to do with my job. I am not a tortoise scientist, but I don't think you have to be a tortoise scientist to ask why we need to put radio transmitters on the backs of 11 tortoises for a price tag of $400,000. What were we going to get from that effort?

Well, what I got, in response, was a letter of reprimand saying "* * * that any further actions on your part, which would constitute an ethical violation, could result in further disciplinary action up to and including your removal from Federal service."

What was the crime?

I asked the inspector general, who was questioning me, what the crime was. Initially, it started out as being some sort of violation of title 18, section 205, which Congressman Bilbray referred to. That essentially says that as a Federal employee, you cannot act

as an attorney or agent and represent anyone involving a court-martial proceeding, litigation, or even controversy involving the Federal Government. That was what compelled the EPA inspector general to take my name, after 2½ months of investigation, to the U.S. attorney for criminal prosecution.

Well, I am no attorney. I was not representing anyone at that meeting but myself. I introduced myself as Jeff van Ee. I signed in as Jeff van Ee.

Yes, I was involved in controversy involving the Federal Government; but it had nothing to do with my job. The Environmental Protection Agency wasn't involved even remotely in the issue.

I think what EPA has said to me in response to my efforts to clear my name and clear my record has been incredible. I think it sends a message to all Federal employees, and to you, that there are serious problems in the way ethics regulations are being interpreted by the government.

Imagine some of the things—just listen to some of the things EPA said to me. "Appellant has a constitutional right to be a member of the Sierra Club." That is what my attorneys with the Government Accountability project asserted. EPA denied that. "Appellant has a constitutional right to be an officer in the Sierra Club." EPA denied that. One wonders what organizations I can belong to—that I do have a constitutional right to belong to.

The next statement from the Office of General Counsel of EPA is even more disturbing. GAP made this assertion: "Appellant has a Federal statutory right to speak out about suspected violations of law free from any personnel action by EPA as a result of that speech." The EPA attorneys denied that.

As this story got more bizarre, and as I continued—as I have continued for the past 3 years to clarify the issue and to clear my record—we got another opinion from the Deputy Ethics Officer at EPA on the interpretation of title 18, section 205. "If an employee of EPA was an officer in a homeowners' association, she or he would be prohibited from writing a letter on behalf of the association to the U.S. Department of Transportation challenging the placement of a highway through a neighborhood." That is the scenario. EPA was asked for an opinion. EPA responded by saying yes, that would be prohibited. That hypothetical case about the homeowners' association illustrates the scope of 18 U.S.C., section 205, which prohibits Federal employees from acting as agent or attorney before any Federal department or agency regarding any particular matter.

Mr. Chairman, the statements being made by EPA to defend their actions against me strike many as being unbelievable and unconstitutional. Not only do I have concerns with the statements and actions of EPA, but I have very real concerns with the statements and actions of the Office of Special Counsel on the Merit Systems Protection Board.

I pointed out problems with the study of desert tortoises. I am a scientist. But you don't have to be a tortoise scientist to ask the questions I asked.

I have been trained in the scientific method to develop and test a hypothesis, to ask questions and suggest alternatives. Now scientists will indeed disagree. I recognize that. But free and open dis-

cussion of differences, I believe, is healthy. Good science and free speech go together. But my professional reputation has been severely damaged by the actions of the EPA Inspector General.

When we complained to the Office of Special Counsel, under the Whistleblower Protection Act, that something was wrong here. A year and a half later, they finally issued their opinion on whether what I did was incorrect or illegal. That came after we gave up waiting for them to respond within the 120-day time period that is required under statute and for them to determine whether I am a whistleblower. A year and a half later, they finally decided, after we went to the Merit Systems Protection Board and got a ruling from an administrative law judge to essentially dismiss our appeal and to let EPA's actions stand, to let the letter of reprimand stay. Then, we heard from the Office of Special Counsel; and they found that it was—that the evidence was inconclusive on who I was representing at the meeting, but nevertheless, the actions that EPA took against me were warranted.

Well, Mr. Chairman, I don't feel that those actions were warranted. I think it sends a signal to all Federal employees that if they speak up and express their concerns, no matter in what form, whether it is in work, outside of work, that they could be reprimanded for not speaking the party line.

I believe that real reforms are needed. And I have to say from my experience on an issue that did not even involve initially the EPA, I am only led to conclude that if I ever wanted to blow the whistle on EPA to expose potential fraud, wrongdoing, I will not do it.

On this issue, the Office of Special Counsel has done nothing. And the Merit Systems Protection Board to this day, 3 years after the initial actions were taken against me, has still not given me a hearing on this issue.

I really appreciate your giving me the opportunity today to have a hearing and to voice my concerns and my side of the story.

Thank you.

[The prepared statement of Mr. van Ee follows:]

TESTIMONY OF Jeff van Ee BEFORE THE HOUSE SUBCOMMITTEE ON CIVIL SERVICE ON MARCH 31, 1993

Mr. Chairman, I am Jeff van Ee. I have been employed by the Environmental Protection Agency as an electronics engineer for approximately twenty two years. I have worked in the Office of Research and Development in the development of monitoring systems and methods for the measurement of pollutants in our air, water, and soil.

A long series of events, described in detail later in my testimony, leads me to appear before you today in a hearing on the reauthorization of the Office of Special Counsel (OSC). While I welcome the opportunity to share with you my opinions on the OSC, I believe my appearance before you today on a matter involving tortoises represents a complete breakdown of the procedures that Congress has established to permit seemingly simple matters to be resolved at a lower level before they become a major Federal case.

Congress should examine the performance of the OSC and Merit Systems Protection Board (MSPB) as well as the EPA. I believe my case illustrates serious problems in their interpretation of laws, regulations, and responsibilities.

Given my experiences, I believe major reforms are needed for the OSC. If major reforms are not forthcoming, then I believe the OSC should be abolished so that someone like myself can get the kind of representation that is needed to defend myself and to define where the law rests.

I call upon this committee and Congress to establish safeguards to allow government scientists to express their personal views. Diversity of opinion and an expression of that opinion is important for our institutions of science and our democratic government. Vice-President Gore's call for federal workers and the public to come forward with suggestions on how we can improve our government, eliminate waste, an improve efficiency will fall upon deaf ears if federal workers believe they cannot express their opinions openly and honestly. Congress should encourage our federal workers to become more involved in their communities and in their government.

I call upon this committee and Congress to protect federal workers who voice their concerns on matters involving waste, fraud and abuse of authority from harassment. Congressman Bilbray's amendment should be passed to prevent our government from using Title 18 Section 205 in ways it was never intended to be used. Title 18 Section 205 surely was never intended to be used to curtail federal workers from community service and from voicing their concerns with proposed actions of their government that are totally unrelated to their employment with the government.

Consider this background information in judging my behavior and the behavior of the EPA, OSC, and MSPB:

I have received numerous awards for my work at the EPA and for my community service and volunteer efforts outside of work in the protection of the environment.

I testified before the House Public Lands and National Parks Subcommittee and the Senate Energy & Natural Resources Committee, as a private citizen, on legislation that would authorize the transfer of public land from the BLM in Nevada to Clark County for the creation of a heavy industrial site. This legislation was needed to permit an ammonium perchlorate plant to be moved from populated Henderson, Nevada to a remote area.

The desert tortoise was "emergency listed" as an endangered species and desert tortoises were found on property identified for the construction of the ammonium perchlorate facility.

The legislative process and an abbreviated environmental assessment process for the proposed land transfer identified potential problems and mitigation measures for the desert tortoises that were officially listed as a "threatened" species at the time the public land transfer was being considered.

President Bush signed into law the legislation on July 31, 1989 which authorized the public land transfer. I supported the legislation during the legislative process although I had some concerns with the environmental impacts, particularly impacts to the desert tortoise.

After the law was signed I read in the newspapers of an agreement between Secretary of Interior Manuel Lujan, the Kerr-McGee Corporation, and the then chairman of the Clark County Commission that described a $400,000 dollar study of desert tortoises in the heavy industrial site. I knew nothing of this proposed study, despite my involvement with the issue of desert tortoises in southern Nevada, so I began to ask questions to anyone who I thought might have further information.

The more I learned about the proposed study, the more concerned I became. The endangered desert tortoise was threatening development in southern Nevada and the rapid movement of the Kerr-McGee facility to Apex, Nevada. Public concerns were intense on both sides of the issue on whether the tortoise should be listed and what steps were necessary to protect the tortoise. I learned that the proposed study involved the placement of radio transmitters on the backs of eleven tortoises and that automatic tracking stations would be constructed to monitor their movements after they were moved a few thousand feet from the site of the ammonium perchlorate plant to another area of the heavy industry site. Despite specific, unfunded mitigation projects having been identified for the tortoise in the legislative process, this study called for a payment of $400,000 from the Kerr-McGee Corporation to the U.S. Fish and Wildlife Service facility in Fort Collins, Colorado to conduct the research. This study, or the need for this study, had not been identified in the legislative proce s that led to the transfer of public land to Kerr-McGee, nor had the study been targeted as a high-priority by tortoise scientists who were establishing a Habitat Conservation Plan for the species in southern Nevada. I questioned the wisdom of the U.S. Fish and Wildlife Service spending $400,000 to equip some eleven desert tortoises with radio transmitters and build an automatic tracking system to track the movements of the tortoises after they had been moved a few thousand feet.

The Sierra Club Legal Defense Fund filed a required 60-day notice to sue the U.S. Fish and Wildlife Service under the Endangered Species Act. The Sierra Club Legal Defense Fund has had a long history of involvement with the problems posed by the desert tortoise in the

southwest.

I believed a lawsuit between the Sierra Club Legal Defense Fund would exacerbate problems in southern Nevada although I believed that there were legal, technical, and political problems with the proposed study by the U.S. Fish and Wildlife Service. I got involved to see if I could make a difference.

I was invited by the Sierra Club Legal Defense fund to attend a meeting on January 22, 1990 to see if a settlement could be reached and a lawsuit avoided. I attended the meeting on my own time. I introduced myself as "Jeff van Ee." I signed in as "Jeff van Ee" with no affiliation being indicated. I was voicing my own views as a private citizen at the meeting, I was not empowered to represent anyone but myself.

I said little at the meeting initially; however, as the meeting progressed I began to express my concerns with the study and the fact that provisions for the desert tortoise in the Apex legislation were being ignored. During the meeting I tried to see if a compromise agreement could be achieved. I asked the following questions:

> What was the purpose of the study?
>
> Why was it costing so much?
>
> Was it necessary to place radio-transmitters on the backs of eleven tortoises and to build an automatic tracking system to monitor the movements of the tortoises after they were moved a few thousand feet into another portion of the industrial site?
>
> How fast does a tortoise move? Couldn't graduate students be hired locally to monitor the behavior of the tortoises with painted numbers on the shell?
>
> Was it necessary for full funding to finance the study?
>
> Where was the control group?
>
> How much money did the Fish and Wildlife Service really need to conduct the study?
>
> What about the previously specified mitigation measures in the Apex legislation?

One does not have to be a tortoise scientist to ask these basic questions.

The meeting concluded without a settlement. Later, I was informed by the Sierra Club that a settlement had been reached involving a payment of $225,000 to the Nature Conservancy to finance acquisition of critical habitat for the tortoise to help ensure the tortoise would remain off the endangered species list. The U.S. Fish and Wildlife Service received the remaining money.

While I still questioned the value of the proposed study to the long-term protection of the desert

tortoise is the southwest, a compromise had been reached and development of the ammonium perchlorate facility could proceed with assurances that effective measures were being taken to keep the tortoise off the endangered species list. I felt relieved and pleased that I had made a difference!

On April 5, 1990 I was informed that EPA's Office of the Inspector General had sought criminal prosecution of me by the U.S. Attorney in Las Vegas. The U.S. Attorney had declined, but the following day I was to answer questions. I was informed that I was the target of an investigation concerning a "conflict of interest." I couldn't believe it. I was asked to provide my side of the story, and I was anxious to clear up any misunderstandings.

On April 6, 1990 an agent from EPA's IG office in San Francisco interrogated me for two and a half hours. I had no attorney. The suggestion that I was involved in a "conflict of interest" was unbelievable. A simple, quick explanation of my actions should resolve the problem. I was wrong. I should have realized before I met the agent from EPA's IG Office that I was presumed to be guilty because they had managed within a three month investigation to gather all the information they needed to approach the U.S. Attorney for criminal prosecution of me before they had talked to me. I asked the agent what the charges were, and who brought the charges? Those simple questions were not answered.

A Freedom of Information Act request was filed afterwards by my attorneys with the Government Accountability Project to determine exactly what the charges were against me.

To this day I am still unsure what "crime" I had committed to require the IG to seek criminal prosecution of me. Is it the **appearance** of a conflict of interest? Is it a violation of Title 18 Section 205? You be the judge.

Title 18 Section 205 states:

> Whoever, being an officer or employee of the United States . . . otherwise than in the proper discharge of his official duties --
>
> (1) acts as an agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim in consideration of or interest in any such claim in consideration of assistance in the prosecution of such claim, or
>
> (2) acts as agent or attorney for anyone before any department, agency, court, court-martial, or officer, or any civil, military, or naval commission in connection with any civil, military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest--
>
> Shall be fined not more than $10,000, or imprisoned not more than two years, or both.

What is the crime that I committed?

I am not an attorney. I was not an agent for any party at the meeting other than myself. I did not identify myself as an EPA employee. My work does not involve tortoises. I am not a tortoise scientist. My agency, to the best of my knowledge, did not have any involvement with the issue. I am a researcher. I do not set policies for the EPA. I have never been a member of the Nature Conservancy. I have been active with the state chapter of the Sierra Club, but I was not empowered to represent them. What is the problem?

On August 23, 1990 I received the first, and hopefully the last, reprimand in my career for having attended the meeting on January 22, 1990, on my own time, and on a subject that had no relationship with either the EPA or my official duties. The reprimand stated:

> Any further actions on your part which would constitute an ethical violation could result in further disciplinary action up to and including your removal from Federal Service.

Again, I ask, what was the crime? I have labored at EPA for many years now under the cloud that I had committed a serious crime. I could lose my job. My activities in the community have been severely restricted. A wedge has been driven between my immediate supervisors and myself as a result of the actions of a few misguided outsiders who sought to cover their tracks by focusing attention on me and away from a study that had questionable merits. The more I have sought to clear my record and clarify the government's interpretation of the law and ethics regulations, the more I am viewed by some at EPA as a misguided crusader and a trouble-maker. These portrayals are not how I wish to be viewed.

On January 14, 1991, the Government Accountability Project (GAP) filed a complaint with the OSC. The OSC is required to make a decision within 120 days on whether they would defend me as a "whistleblower."

On August 27, 1991 a representative of the OSC came to my house to question me. During the questioning, in which my GAP attorney was present by telephone, the focus was on my recounting the series of events that led me to the meeting and on my relationship to the Sierra Club. After the formal interview, I asked the agent if he was interested in the potential problems with the study that concerned me. He said that was not the issue.

On December 23, 1991 GAP and I gave up on OSC and went to the MSPB for relief. My activities were curtailed in the community as was my involvement in organizations for which I had a long history of involvement. An administrative law judge in Denver considered the case.

Consider a sampling of the statements that attorneys with EPA's Office of General Counsel made to my GAP attorneys in the limited discovery process permitted by an administrative law judge with the MSPB:

GAP: Appellant has a constitutional right to be a member of the Sierra Club.
EPA: Deny

GAP: Appellant has a constitutional right to be an officer in the Sierra Club.
EPA: Deny

GAP: Appellant has a federal statutory right to speak out about suspected violations of law free from any personnel action by EPA as a result of that speech.
EPA: Deny

On April 13, 1992 the administrative law judge dismissed my Individual Right of Action appeal on the grounds that the appeal was "outside the Board's jurisdiction." The judge concluded that I did "not meet the definition of whistleblower." He went on to say:

> Having carefully reviewed the appellant's statements, I do not believe they constitute "a disclosure of information which he reasonably believed evidenced a violation of law, rule or regulation or, . . . gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."
>
> Rather, they appear to be nothing more than the opinions of a private citizen regarding the nature of the settlement to be achieved.

The administrative law judge in Denver for the MSPB limited discovery when GAP sought to buttress my arguments that I was being reprimanded for identifying potential waste and illegal actions in a study that might have earned the "Golden Fleece" award at an earlier time. The judge did not allow GAP to question the Department of Justice (DOJ) attorney in Washington, D.C. who was known to have initiated the investigation of me by the EPA. Had the administrative law judge allowed GAP to question the DOJ attorney who filed the complaint with EPA on my attendance at the meeting of January 22, 1990, we might have had an opportunity to understand why the U.S. Fish and Wildlife Service was upset with my presence and my questions. We may never know what the real motives and thinking of the U.S. Fish and Wildlife Service and the DOJ attorneys were.

To this day, I believe there was "gross mismanagement, a gross waste of funds and an abuse of authority" with the proposed study. Why were these unprecedented actions taken against me for expressing my "opinions as a private citizen?" Could it be that the U.S. Fish and Wildlife Service had spent funds for the study before the written agreement and transfer of funds from Kerr-McGee had been transferred? This issue came up during at the meeting as I tried to understand why the U.S. Fish and Wildlife Service was adamant in obtaining the full $400,000 for their study. As part of the settlement between the Sierra Club Legal Defense Fund and the U.S. Fish and Wildlife Service, the Service accepted the loss of $225,000 to the Nature Conservancy. Could this loss of funding have prompted the DOJ attorney to come after me, to put me on the defensive? I believe my actions and questioning of the study were those of a "whistleblower"; certainly, the actions taken against me have similarities to the actions that many whistleblowers experience after they voice their concerns.

The administrative law judge refused to allow a hearing on the grounds that I was not a whistleblower. Of course, he would say that after he had limited discovery. The judge let the

letter of reprimand stay.

The GAP appealed the decision of the administrative law judge to the full MSPB on May 18, 1992. GAP requested a hearing for me.

> There will probably be no further communication from the Board until a final decision is issued. . . . It is the policy of the Board to encourage settlement of appeals before it. [Letter from the U.S. MSPB to GAP on May 26, 1992]

There has been no communication from the board to date. The letter of reprimand that was placed in my personnel file for a period of two years has now been removed. Some will argue that the issue is now moot, but the circumstances that led to the original letter of reprimand could easily be repeated if someone in the community disliked what I said and complained to my employer that there appeared to be a conflict of interest.

On September 23, 1992, more than one and a half years later after the original complaint had been filed by GAP, the OSC issued the attached analysis of my case and sided with the actions of the EPA. The OSC declined to represent me. Consider these statements from the OSC :

> Our investigation did not reveal facts materially different from those contained in the Investigative Report by the EPA Office of Inspector General . . .
>
> The evidence was inconclusive on whether you appeared at the meeting as a private citizen or as a representative of the Sierra Club. However, EPA did not reprimand you for having acted as the Sierra Club's agent, only for having created the appearance of having acted as its agent.
>
> **First Amendment**. Similarly, your allegation of a violation of the First Amendment was not supported by the evidence adduced in our investigation. . . EPA did not reprimand you as punishment for the content of your expression. It reprimanded you because it concluded you created the appearance of having acted as an agent of the Sierra Club.
>
> **Off-Duty Conduct**. Finally, we did not find preponderant evidence that your reprimand violated section 2302 (b) (10), which proscribes discrimination for off-duty conduct unrelated to work performance. As the reprimand itself stated, the personnel action was based on EPA's conclusion that your performance as an employee, albeit off-duty, fell short of the ethical conduct requirements for all EPA employees.

This opinion came after I was extensively investigated again by the OSC. This opinion came after an agent with the OSC told me at the conclusion of an interview at my home that he was not interested in my concerns with the $400,000 tortoise study; instead, he was interested in knowing exactly who I was representing at the meeting of January 22, 1990 and what was my involvement with the Sierra Club.

I rest my case that the OSC and MSPB is failing to serve their clients and the purpose for which they were created.

Consider also the opinion from the EPA Office of General Counsel and the Deputy Ethics Official in response to a query from my attorneys with GAP:

GAP: If an EPA employee was an officer in a homeowners association, s/he would be prohibited from writing a letter on behalf of the association to the U.S. Department of Transportation challenging or protesting placement of a highway through a neighborhood.

EPA: This representation is correct. The hypothetical case about the homeowners' association illustrates the scope of 18 U.S.C. S205, which prohibits Federal employees from acting as "agent or attorney" before any Federal Department or agency regarding any "particular matter."

The statements being made by EPA to defend their actions against me strike many people as being unbelievable and unconstitutional. The EPA fails in their opinions to ask what my duties are with the EPA and whether my activities, such as being an officer in my homeowners association, would pose a "true" conflict of interest. Serious, dangerous precedents are being established for all Federal employees in my case. They cannot go unchallenged.

I am quite concerned about the statements and actions of the EPA, OSC, and MSPB.

I pointed out problems with a study of desert tortoises. I am a scientist. You don't have to be a tortoise scientist to ask the basic questions I asked of a $400,000 study of some eleven tortoises.
I have been trained in the scientific method to develop and test a hypothesis, to ask questions, and to suggest alternatives. Scientists will disagree, but free and open discussion of differences is healthy. Good science and free speech go together. My professional reputation is determined largely by how my peers judge the quality of my speech, my thinking, and my writing. A government that seeks to limit one's speech, one's thinking, and one's writing can be dangerous.

Although I felt that there may have been violations of federal law involved with the proposed study, I sought to resolve issues that could have lead to the formal filing of a lawsuit by the Sierra Club Legal Defense Fund on the grounds that there was a violation of the Endangered Species Act. No lawsuit was formally filed because there was a legal settlement between the Sierra Club Legal Defense Fund and the U.S. Fish and Wildlife Service. I believed, at the time, that I had made a major contribution to resolving a difficult issue that threatened further to divide my community. I never expected to have my name referred to the U.S. Attorney in Las Vegas for criminal prosecution. I never would have believed that my opportunity to clarify the law, to clear my name, and to restore the damage to my career would lead me today to testify before you, the Congress, on a matter that should have been resolved a long time ago at a lower level.

Among the questions I have are: what are the motives of my government in taking such

aggressive steps to investigate me, impugn my character, refuse to grant me a hearing, and threaten to dismiss me if I ever violate vague agency ethics standards that are subject to arbitrary interpretation. A legal opinion from the Congressional Research Service on the interpretation of Title 18 Section 205 of the U.S. Code would suggest that I did nothing wrong. Any person with full knowledge of the facts would say that there was no conflict of interest on my part. (They might find a conflict of interest with those who advocated the $400,000 study, but no one, especially the OSC, appears interested.) All that I can be charged with is the appearance of a conflict of interest. "Appearance" to whom? To parties that were adversely affected by my questions and personal involvement to an issue that threatened to divide my community, i.e. the designation of the desert tortoise as an endangered species and its preservation? To the person with full knowledge of the facts, is the "charge" of an "appearance" of a conflict of interest" justification for the actions, or inactions, in my case?

Those who advocate avoiding the "appearance" of a conflict of interest will frequently argue that the best thing to do, if there is any doubt, is to avoid the situation. Do nothing. Don't get involved. That's safe. I agree that doing nothing and saying nothing is the safest course, but is this really the message we want to deliver to our federal workers?

There are those who will argue that we must maintain the public's faith in our government and our federal workers to make objective decisions and to not use their jobs for personal or financial gain. They will say that we must avoid the "appearance" of a conflict of interest even if we begin to erode the rights of the workers to freely speak their minds and to freely associate with people. That is the price that federal workers must pay if we are to maintain faith in our government.

I believe there is an alternate view. The price that we pay for a government and for federal workers that are not free to express themselves and to associate freely with their neighbors, friends and colleagues is the loss of faith in what our government tells us. This is just as dangerous as the loss of faith if we believe our government and our federal workers are not capable of making objective decisions and are profiting personally, unfairly and financially from their jobs.

Either viewpoint leads to a disturbing loss of faith in our democratic institutions among the people that are served by our government. I am certainly most supportive of maintaining the faith of our people in our government. I would not be working for this government if I felt differently. What bothers me most is that we appear to have one, or perhaps a few people, who are judging what is acceptable and ethical behavior. I find their decisions on what constitutes the "appearance" of a conflict of interest to be arbitrary and capricious. I would much rather be judged by my peers, and by people with full knowledge of the facts, than be judged by people who have shown no interest in reviewing the motives of those who brought these serious charges against me.

I am receiving contradictory messages from my government. President Bush issued an executive order on November 5, 1992 encouraging federal workers to become active in their communities. President Bush recognized points of light throughout America. I have long aspired to be a point of light and a dedicated servant to the public. However, in light of the statements and actions

made by my government, with respect to my involvement in working out a solution to the problems posed by the listing of the desert tortoise as a threatened or endangered species, I can only conclude that I should be a member of politically-correct organizations and keep out of controversial issues where my government is involved. I find this hard to accept.

Approximately eighty six percent of Nevada is owned by the Federal government. When I go to Lake Mead, I am on lands managed by the National Park Service. When I go to the forested mountains above Las Vegas, I am on lands managed by the U.S. Forest Service or the U.S. Fish and Wildlife Service. When I enjoy the desert wildflowers at this time of year, I am on lands managed by the Bureau of Land Management. The interpretation by EPA's Deputy Ethics Official of Title 18 Section 205 in effect makes me a second class citizen of my own community, my own state, my own country. Worse yet, I may be treated as a criminal!

This year, nearly three years after my affiliation with environmental groups was questioned, in particular the Sierra Club, I had to complete a new federal form. The Office of Government Ethics with SF450, the "Executive Branch Confidential Financial Disclosure Report," requires Federal employees in the position of procuring goods and services to list in Part III: Outside Positions.

> Report any positions, whether or not compensated, which you held outside the U.S. Government during the reporting period. Positions include but are not limited to those of an employee, officer, director, trustee, general partner, proprietor, representative, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities of those solely of an honorary nature.

How am I to fill out this form accurately in light of the opinions I have received on my involvement in the meeting of January 22, 1990 and my involvement in my homeowners association? Severe penalties exist if I fail to report my outside positions, but I am permitted to not report my being an officer in non-profit organizations with "religious, social, fraternal, or political entities." If I do report my involvement in environmental organizations such as the Sierra Club, then an ethics official may make the arbitrary decision that there may be an "appearance of a conflict of interest to someone at some time; therefore, I should avoid the situation. I should not become actively involved in my community and in organizations, especially those that are not viewed as being "politically correct." What am I to do? Am I to become a point of light and perhaps a target of an investigation by the EPA IG, or am I to do nothing?

I am from a generation that heard John F. Kennedy's call:" Ask not what your country can do for you, but what you can do for your country." I participated in the first Earth Day and realized that if you are part of the problem you are part of the solution. I believe that one individual acting alone one can make a difference and that acting together we can change the world. I believe that protection of our environment extends beyond an eight-to-five job with the Environmental Protection Agency. We must do whatever we can, whenever we can, wherever we can to make this world a better place. I believe in our Constitution, but the experiences I

relate to you today are a test of my constitution and the Constitution of the United States. I trust that my most recent experiences in being an active participant in my community and my tale will not be repeated because I expect the Congress, the courts, and our government to decide what is right for me and for others.

Congress should examine how Federal agencies are defining "conflicts of interest" and "appearance" of conflicts of interest. Part III of SF450 needs to be examined in more detail, and greater clarification is needed on who really needs to provide this information. I believe the government must first establish the need for this information with respect to a person's position and duties with the federal government and then require the employee to furnish that information. The government must identify areas where "conflicts of interest" may arise and only require that information be provided in those areas. (I don't believe it is necessary to report being an officer in a homeowners association; however, EPA's strict interpretation of Title 18 Section 205 would suggest otherwise.) To require all outside activities to be reported, whether it is pertinent or not, appears to be an invasion of privacy and unconstitutional.

The reason that this situation got out of hand is that the system did not work. The OSC proved to be worse than useless. OSC conducted an incomplete investigation and failed to contact almost all of the witnesses provided to them. The interrogation by the OSC investigator made me feel like OSC wanted to prosecute me rather than protect me. The OSC then sat on the case for over a year, hoping that it would go away. All the time the case was pending, OSC refused to enlighten me on its progress, inform me whether it required more information, or let me know whether it intended to do anything at all.

The MSPB has done little better. I have been waiting three years for a hearing on a reprimand that itself only had a two-year lifespan.

We need fundamental reform and it should start with these agencies whose mission is to protect those that propose reform.

What good is a Whistleblower Protection Act if an employee can be jailed for reporting waste? If a whistleblower is protected from employment discrimination then he should be similarly protected from criminal prosecution.

Federal workers also need to know that doing good science, asking reasonable questions, and doing their job of protecting the public and saving tax dollars will be rewarded and not punished.

Above all, federal employees are citizens, too, and they have the right to participate in their community affairs, belong to local organizations and speak their mind.

Thank you for allowing me to be heard. I would be happy to answer further questions.

ATTACHMENTS TO THE TESTIMONY OF JEFF VAN EE

BEFORE THE

HOUSE CIVIL SERVICE SUBCOMMITTEE

MARCH 31, 1993

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF RESEARCH AND DEVELOPMENT
ENVIRONMENTAL MONITORING SYSTEMS LABORATORY-LAS VEGAS
P O BOX 93478
LAS VEGAS NEVADA 89193-3478
(702/798-2100 · FTS 545-2100)

AUG 23 1990

SUBJECT: Official Reprimand

FROM: Ann M. Pitchford, Chief
Ecosystems Monitoring Program, EAD

TO: J. Jeffrey van Ee, Electronics Engineer
Ecosystems Monitoring Program, EAD

This is a notice that you are officially reprimanded for the incident described below. An Investigative Report prepared by the Office of the U.S. EPA Assistant Inspector General for Investigations has revealed that on January 22, 1990, you participated in support of the Sierra Club Legal Defense Fund (SCLDF) in a meeting with the U.S. Department of Interior (DOI) concerning settlement of a threatened lawsuit by SCLDF against DOI. You stated to the investigator that participation in the meeting was as a concerned citizen, but admitted that your activities in the meeting constituted the appearance of a conflict of interest. Title 18, United States Code, Section 205, states that it is a violation of criminal law, a felony, for Federal employees to represent other entities in actions against the Federal government. The results of the investigation were referred to the Office of U.S. Attorney for the District of Nevada. Prosecution was declined in favor of an appropriate administrative action by the EPA.

The circumstances which make this reprimand necessary were discussed with you by me and J. Gareth Pearson, Director of the Exposure Assessment Research Division, on August 23, 1990. You may call on me, Gareth, or Robert N. Snelling, the Acting Laboratory Director and Deputy Ethics Official for EMSL-LV, for any ethics counseling which you may need.

A copy of this letter of reprimand will be filed in your official personnel folder for a period not to exceed two years. Any further actions on your part which would constitute an ethical violation could result in further disciplinary action up to and including your removal from Federal Service.

You may file a grievance concerning this action with J. Gareth Pearson, Director, Exposure Assessment Research Division, within 15 calendar days from receipt of this notice. If you have not replied by that date, you cannot grieve the reprimand. The instructions for filing a grievance are contained in the attached

EPA Grievance Procedure. If you have any questions regarding this grievance procedure, please contact Sheron E. Johnson, Human Resources Office at Las Vegas, extension 2413.

Attachment: EPA Grievance Procedures

cc: Robert N. Snelling, ODC
J. Gareth Pearson, EAD
Sheron E. Johnson, HRO

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 17 1991

OFFICE OF
GENERAL COUNSEL

Mr. Richard E. Condit
Government Accountability Project
25 E Street, N.W., Suite 700
Washington, D.C. 20001

Subject: Your Inquiry on Behalf of Jeff van Ee

Dear Mr. Condit:

In your letter of April 5, 1991, you asked two questions about my talk in Las Vegas on February 7 about the conflict of interest laws and other ethical standards which apply to EPA employees. You stated that your inquiry was on behalf of Jeff van Ee, an employee in the EPA Las Vegas Laboratory.

Mr. van Ee's first concern was as follows:

> First, I understand that you stated that EPA employees could not be officers in an environmental organization. If this is a correct representation of your statement, I would appreciate it if you would provide me with a legal basis (including citations to statutes and regulations) for this statement.

EPA employees are not necessarily barred from serving as officers of an environmental organization or any other organization which has financial or advocacy interests in EPA decisions. Such activities can nonetheless create serious conflict of interest concerns if the EPA employee or anyone who reports to the employee takes part in EPA matters in which the organization advocates a particular course of action. Of course, 18 U.S.C. §208(a) bars employees from participating in matters which affect the financial interests of organizations in which they are officers. The enclosed copy of EPA Ethics Advisory 89-19, "Holding Office in Organizations," discusses this question more fully.

Mr. van Ee's second concern was as follows:

> Second, in the meeting you related a hypothetical example concerning an employee being an officer in a homeowners association. As I understand it, the hypothetical was related as follows. If an EPA employee was an officer in a homeowners association, s/he would be prohibited from writing a letter on

behalf of the association to the U.S. Department of Transportation challenging or protesting placement of a highway through a neighborhood. Again, if this representation of what you said is correct, I request that you provide a legal basis for your statement.

This representation is correct. The hypothetical case about the homeowners' association illustrates the scope of 18 U.S.C. §205, which prohibits Federal employees from acting as "agent or attorney" before any Federal department or agency regarding any "particular matter." The term "particular matter" includes a policy or rulemaking which is directed at a distinct class or group (such as a particular industry or a group of homeowners) as well as a matter which adjudicates the rights of specific parties (such as a permit, enforcement action or lawsuit). The restriction applies whether the representation is paid or unpaid. Pages 12 through 14 of the enclosed "Guidance on Ethics and Conflicts of Interest" (February 1984) discuss 18 U.S.C. §205 in greater detail. A copy is also enclosed of Appendix A to Subpart A of our regulations at 40 C.F.R. Part 3, which also discusses 18 U.S.C. §205.

* * *

I trust that the foregoing discussion and the enclosed materials are responsive to Mr. van Ee's inquiry.

Sincerely,

Donnell Nantkes, Attorney
Grants, Contracts and General
Law Division (LE-132G)
Alternate Agency Ethics Official

Enclosures

cc: Office of Government Ethicss

UNITED STATES MERIT SYSTEMS PROTECTION BOARD
DENVER REGIONAL OFFICE

JEFFREY VAN EE,	
Appellant,	
v.	**MSPB Docket No. DE1221920161W1**
ENVIRONMENTAL PROTECTION AGENCY,	
Agency.	

APPELLANT'S FIRST REQUEST FOR ADMISSIONS

Appellant Jeffrey van Ee requests that the Agency respond to the admissions listed below separately and completely in writing, under oath or affirmation. Please deliver the responses to the Government Accountability Project at 810 First Street, NW, Suite 630, Washington, DC, 20002-3633, on February 19, 1992. When preparing your responses please repeat the admission, then provide your response to the admission directly below it.

1. The January 22, 1990 meeting involving officials from U.S. Department of Interior (DOI), Fish and Wildlife Service (F&WS), Department of Justice (DOJ), Kerr McGee Corporation (Kerr McGee), Desert Tortoise Help (DTH), Sierra Club Legal Defense Fund (SCLDF), Appellant, and others[1] was not held before any department, agency, court, or civil commission.

[1] Hereinafter Appellant will simply refer to this meeting as the "January 22 meeting."

2. The EPA Inspector General (EPA-IG) investigated the Appellant because Michele Kuruc, a representative of the DOI at the January 22 meeting, alleged that he had represented the Sierra Club at the meeting.

3. The January 22 meeting was not presided over by a judicial, administrative, or quasi-judicial official.

4. At the time of the January 22 meeting the SCLDF had not filed suit against the United States over the issues that were the subject of the meeting.

5. To date, the SCLDF has not filed suit over the issues that were the subject of the January 22 meeting.

6. Appellant obtained no personal benefit from his participation in the January 22 meeting.

7. The EPA had no official role in the issues discussed at the January 22 meeting.

8. Appellant was not a client of the SCLDF at the time of the January 22 meeting.

9. Appellant is not an attorney.

10. As a result of an agreement between the SCLDF, Kerr McGee, FW&S, and the Nature Conservancy the F&WS received over $200,000 less than Kerr McGee had originally agreed to provide for a desert tortoise study.

11. Appellant was not an officer in charge of any litigation, litigation decision-making, or planned litigation for the SCLDF, Sierra Club, or any chapter of the Sierra Club during the period December 1, 1989 through February 8, 1990.

12. The EPA-IG investigation of Appellant did not establish that he obtained any personal benefit as a result of his role in the January 22 meeting.

13. Appellant has a constitutional right to be an officer in the Sierra Club.

14. The EPA-IG investigation of Appellant was caused by complaints and/or allegations made by Ron Marlow.

15. At the January 22 meeting Appellant pointed out that the Bureau of Land Management was not accelerating completion of the desert tortoise recovery plan as required by the Nevada Land Transfer and Authorization Act.

16. The EPA-IG investigation did not establish that Appellant had legal authority to control the actions of SCLDF attorneys.

17. At the January 22 meeting Appellant pointed out that the Bureau of Land Management was not taking soil samples of alternate sites for desert tortoises as required by the Nevada Land Transfer and Authorization Act.

18. The EPA-IG investigation of Appellant was caused by complaints and/or allegations made by an employee of the DOI.

19. Appellant has a federal statutory right to speak out about suspected violations of law free from any personnel action by EPA as a result of that speech.

20. At the conclusion of the January 22 meeting no agreement had been reached between the SCLDF and other organizations present at the meeting.

21. The EPA-IG investigation of Appellant was caused by complaints and/or allegations made by an employee of the DOJ.

22. At the January 22 meeting Appellant pointed out that the DOI was not evaluating alternate habitats for desert tortoises as required by law.

23. At the time of the January 22 meeting officials from the F&WS had already spent some funds provided by Kerr McGee for a study of desert tortoises in the area of the Apex site.

24. Appellant has a constitutional right to be a member of the Sierra Club.

25. The EPA-IG investigation of Appellant was caused by complaints and/or allegations made by an employee of Kerr McGee.

26. Appellant has a constitutional right to speak out about suspected violations of law free from any personnel action by EPA as a result of that speech.

27. EPA has issued a reprimand to the Appellant based upon the concerns and statements of officials from the Kerr McGee, F&WS, and DOJ who attended the January 22 meeting.

28. The EPA-IG investigation of Appellant was caused by complaints and/or allegations made by an employee of the F&WS.

Sincerely,

Richard Condit, Esq.

Donald G. Aplin, Esq.

Counsel for Jeffrey van Ee
Government Accountability Project
810 First Street, N.E., Suite 630
Washington, DC 20002

Voice: (202) 408-0034
Fax: (202) 408-9855

January 24, 1992.

UNITED STATES MERIT SYSTEMS PROTECTION BOARD
DENVER REGIONAL OFFICE

JEFFREY VAN EE, Appellant,	)	
v.	)	MSPB Docket No. DE1221920161W1
U.S. ENVIRONMENTAL PROTECTION AGENCY, Agency.	)	

ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO
APPELLANT'S REQUEST FOR ADMISSIONS

The Environmental Protection Agency (EPA), through its attorneys, hereby responds to the numbered paragraphs of Appellant's First Request for Admissions as follows:

1. Deny.

2. Deny.

3. Deny.

4. Admit, except to aver that at the time of the January 22, 1990 meeting, the SCLDF had filed a letter of intent to sue, dated December 22, 1989, which letter speaks for itself, over the issues that were the subject of the January 22, 1990 meeting.

5. The Agency is without knowledge or information sufficient to form a belief as to the truth of the statement set forth in this paragraph of Appellant's Request for Admissions.

6. The Agency is without knowledge or information sufficient to form a belief as to the truth of the statement set forth in this paragraph of Appellant's Request for Admissions.

7. Admit.

8. The Agency is without knowledge or information sufficient to form a belief as to the truth of the statement set forth in this paragraph of Appellant's Request for Admissions. However, Mr. Laurens Silver, an SCLDF atorney, stated at the January 22, 1990 meeting that Mr. Van Ee was his client.

9. The Agency is without knowledge or information sufficient to form a belief as to the truth of the statement set forth in this paragraph of Appellant's Request for Admissions.

10. A Settlement Agreement dated February 8, 1990, which agreement speaks for itself, was entered into among SCLDF, Kerr McGee, the Fish and Wildlife Service (FWS), and the Nature Conservancy. The Agreement reflects the final decision in regard to the desert tortoise study.

11. The Agency is without knowledge or information sufficient to form a belief as to the truth of the statement set forth in this paragraph of Appellant's Request for Admissions.

12. The Office of Inspector General's Report speaks for itself.

13. Deny.

14. Deny.

15. Deny.

16. The Office of Inspector General's Report speaks for itself.

17. Deny.

18. Deny.

19. Deny.

20. Deny.

21. Deny.

22. Deny.

23. Deny.

24. Deny.

25. Deny.

26. Deny.

27. Deny.

28. Deny.

Except to the extent expressly admitted or qualified above, the Agency denies each and every statement in Appellant's request for admissions.

Respectfully submitted.

Joanne M. Hogan
Attorney/Advisor
U.S. E.P.A.
401 M Street, S.W.
Washington, D.C. 20460
(202) 260-6149

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER REGIONAL OFFICE

JEFFREY VAN EE, Appellant, v. ENVIRONMENTAL PROTECTION AGENCY, Agency.	)	DOCKET NUMBER DE1221920161W1 DATE: APR 13 1992

Donald G. Aplin, Esquire, and Richard Condit, Esquire, Government Accountability Project, Washington, D.C., for the appellant.

Joanne M. Hogan, Esquire, Washington, D.C., for the agency.

BEFORE

Steven L. Chaffin
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant has filed an Individual Right of Action (IRA) appeal seeking Board review of a reprimand issued to him by the agency on August 23, 1990.[1] *See* Appeal Record, Tab 1; *see also* 5 C.F.R. § 1209.5. In support of the motion, the appellant asserts that he made a protected disclosure and that this disclosure was a contributing factor in the issuance of the reprimand. *See* Id.

[1] On December 26, 1991, the appellant also requested that the Board stay the reprimand. This request for a stay was denied on January 13, 1992. *See* DE122192016151.

that the U.S. Attorney issue an indictment against the appellant for violating 18 U.S.C. § 205. This section of the Federal criminal code makes it a felony for a Federal employee to represent other entities in actions against the Federal government.

The U.S. Attorney subsequently declined such prosecution. However, on August 23, 1990, based on the initial complaint from the Department of Justice, and the evidence it had developed in its investigation, the agency reprimanded the appellant for engaging in activity which gave the appearance of a conflict of interest. It is that reprimand which is the subject of this motion for a stay.

In January 1991, the appellant filed a complaint with the Office of Special Counsel. *See* Case File DE122192016lS1, Tab 1. However, as of October 29, 1991, OSC had not completed action on the matter. *See* Id. And, the appellant has submitted no evidence to show that OSC has completed its review as of this date. Nonetheless, the appellant is entitled to pursue this Individual Right of Action appeal with the Board because more than 120 days had passed since he filed his complaint with OSC. *See* 5 C.F.R. § 1209.5(a)(2)(1991).

Applicable law

In order to establish a claim of retaliation for whistleblowing, the appellant must show that he made a protected disclosure which he reasonably believed to be true, and that the protected disclosure was a "contributing factor" in the agency's decision to effect the personnel actions. *See* 5 U.S.C. § 1221(e)(1); *Christopher v. Defense Logistics Agency*, 44 M.S.P.R. 264, 271 (1990); *Gergick v. General Services Administration*, 43 M.S.P.R. 651, 569 (1990). Should the appellant make these showings, then the burden shifts to the agency to show, by clear and convincing evidence, that it would have taken the same personnel action notwithstanding the protected disclosure. *See* Id.

agency here, his comments were within the "give and take" framework of settlement discussions. *See* Appeal Record, Tab 28. Accordingly, I find that the appellant has failed to show that his "disclosures" during the cited settlement conference meet the legal definition of "whistleblower."

Absent the claim of retaliation for whistleblowing, the appellant's reprimand must stand alone. And, I can find no statute or regulation which would grant the Board authority to review the issuance of a reprimand. *See Weber v. Department of the Army*, 45 M.S.P.R. 406 (1990)(jurisdiction of the Board is limited to those matters over which it has been granted jurisdiction by statute or regulation).

The appellant's claim that the agency has committed a prohibited personnel practice is not properly before the Board

The appellant alleges that the agency has violated his First Amendment rights to free speech and, thus, has committed a prohibited personnel practice. However, absent an otherwise appealable matter, the Board will not consider an allegation that a prohibited personnel practice has occurred. *See Wein v. Department of the Navy*, 37 M.S.P.R. 379, 380 (1988); *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd sub. nom., Wren v. Merit Systems Protection Board*, 681 F.2d 867, 875 (D.C. Cir. 1982). That is, because the appellant is not entitled to appeal his reprimand, he is not entitled to Board review of his claim that the reprimand constituted a prohibited personnel practice.

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

Steven L. Chaffin
Administrative Judge

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

U.S. MERIT SYSTEMS PROTECTION BOARD
Washington, D.C. 20419

Clerk of the Board

Notice to:

Mr. Donald G. Alpin, Esq.
Government Accountability Project
810 First Street, N.E., Suite 630
Washington, D.C. 20002

Re: Jeffrey Van Ee v.
Environmental Protection Agency
Docket No. DE-1221-92-0161-W-1

We have received your petition for review. The other parties are informed by this Notice that they may respond or file a cross petition for review within 25 days after the filing date of the petition for review. If a cross petition is filed, any response must be filed within 25 days after the date of the filing of the cross petition. The filing date is the date the document is postmarked or the date it is received by the Office of the Clerk of the Board if it is hand delivered or sent by facsimile. The filing date in this case was May 18, 1992.

The record will close when the period for filing the response to the petition for review or any cross petition for review has passed. Once the record is closed, additional submissions will be considered only if a showing is made that the submissions are new and material evidence that were not available before the record closed. 5 C.F.R. § 1201.114(i).

It is the duty of each party to notify the Board and each other in writing of any changes in representation and/or address. There will probably be no further communication from the Board until a final decision is issued.

It is the policy of the Board to encourage settlement of appeals before it. An appeal may be settled by the parties at any time. If the parties settle this appeal and agree in writing to enter the settlement agreement into the record, the Board will retain the authority to enforce its terms. If the parties do not enter the agreement into the record, the Board will have no enforcement authority.

MAY 26 1992
(Date)

Robert E. Taylor

CERTIFICATE OF SERVICE

Jeffrey Van Ee	)	
	)	Docket No. DE-1221-92-0161-W-1
v.	)	
	)	
Environmental Protection Agency	)	

I hereby certify that a copy of the foregoing document was sent by regular mail this date to each of the following:

APPELLANT

Mr. Jeffrey Van Ee
2092 Heritage Oaks
Las Vegas, NV 89119

APPELLANT'S REPRESENTATIVE(S)

Mr. Donald G. Alpin, ESQ
Government Accountability Project
810 First Street, N.E., Suite 630
Washington, DC 20002

Mr. Richard Condit, ESQ
Government Accountability Project
810 First Street, N.E., Suite 630
Washington, DC 20002

AGENCY'S REPRESENTATIVE(S)

Ms. Joanne M. Hogan, ESQ
Mail Code LE-132G
Office Of General Counsel
Environmental Protection Agency
401 M Street, S.W.
Washington, DC 20460

OTHER

Marjorie Marks
U.S. Office Of Personnel Management
Employee Relations Division
1900 E Street, N.W., Room 7412
Washington, DC 20415

Dated: MAY 26 1992

Washington, DC

Robert E. Taylor
Clerk Of The Board

U.S. OFFICE OF SPECIAL COUNSEL
1120 Vermont Avenue., N.W., Suite 1100
Washington, D.C. 20005-3561

September 23, 1992

Mr. Jeffrey van Ee
2092 Heritage Oaks
Las Vegas, NV 89119

Re: OSC File No. MA-91-0451

Dear Mr. van Ee:

This letter is to inform you that the Office of Special Counsel (OSC) has completed an investigation of your January 1991 complaint of prohibited personnel practice challenging a reprimand by the Environmental Protection Agency (EPA). Based on the results of our investigation we have concluded that there is insufficient evidence that the reprimand was a prohibited personnel practice. 5 U.S.C. § 2302(b).

Our investigation did not reveal facts materially different from those contained in the Investigative Report by the EPA Office of Inspector General, which you submitted with your OSC complaint. Essentially, the OSC investigation confirmed that EPA reprimanded you for creating the appearance of acting as an agent for the Sierra Club during a January 1990 settlement meeting between the Sierra Club, the federal government, and other interested parties. The investigation confirmed that you actively participated in the meeting, advocated on behalf of positions being taken by the Sierra Club, advocated against positions taken by representatives of the federal government, and consulted with Sierra Club attorneys before, during and after the meeting on issues material to the Sierra Club's interests. These circumstances created the appearance that you acted as an agent on behalf of the Sierra Club.

The evidence was inconclusive on whether you appeared at the meeting as a private citizen or as a representative of the Sierra Club. However, EPA did not reprimand you for having acted as the Sierra Club's agent, only for having created the appearance of having acted as its agent. Therefore, your good faith intentions, however innocent they may have been, were not determinative of whether you created an appearance of being an agent. The OSC investigation did not obtain preponderant evidence to rebut EPA's implicit finding that you did create the

appearance of acting on the Sierra Club's behalf to influence an agency of the federal government.

Turning to the specifics of your OSC complaint, we made the following determinations.

Whistleblower Reprisal. You alleged that the reprimand violated section 2302(b)(8) of the Whistleblower Protection Act. This provision protects qualified disclosures of information from becoming a basis for a personnel action. To the extent that you provided information at the meeting which you reasonably believed disclosed evidence of a violation of law, that information was protected by statute. 5 U.S.C. § 2302(b)(8). The investigation indicated, however, that the EPA's decision to reprimand you was not based, in whole or in part, on whether or not you made protected disclosures. The evidence showed that EPA reprimanded you solely for creating the appearance of acting as an agent for the Sierra Club. This decision focused on the totality of circumstances surrounding your participation in the settlement meeting, not on any alleged violations you may have disclosed at the meeting. If anything, our investigation revealed that your supervisors were personally sympathetic to the preservation of the desert tortoise, a position which you and the Sierra Club advanced at the meeting. The decision to reprimand you was not caused by any protected disclosures you may have made.

First Amendment. Similarly, your allegation of a violation of the first amendment was not supported by the evidence adduced in our investigation. The investigation showed that EPA's reprimand was content neutral. EPA did not reprimand you as punishment for the content of your expression. It reprimanded you because it concluded you created the appearance of having acted as an agent of the Sierra Club. Therefore, we did not find preponderant evidence that the reprimand violated the first amendment as protected by section 2302(b)(11). 5 U.S.C. § 2302(b)(11) (prohibiting violation of laws directly concerning merit system principles).

Off-Duty Conduct. Finally, we did not find preponderant evidence that your reprimand violated section 2302(b)(10), which proscribes discrimination for off-duty conduct unrelated to work performance. As the reprimand itself stated, the personnel action was based on EPA's conclusion that your performance as an employee, albeit off-duty, fell short of the ethical conduct requirements for all EPA employees. Thus, although based on off-duty conduct, the personnel action related to your duty as an employee to refrain from such conduct, on and off-duty.

For these reasons, we are declining to take corrective action on your behalf. In reaching this decision, we are aware that you challenged the validity of the reprimand before the U.S. Merit Systems Protection Board. See Van Ee v. E.P.A., Doc. No. DE1221920161S1 (M.S.P.B. Apr. 13, 1992) (initial dec.). We are also aware that an initial decision of the Board determined that you did not engage in protected whistleblowing under 5 U.S.C. § 2302(b)(8) and that your

attorneys are challenging this decision in further proceedings with the Board.

Sincerely,

William E. Reukauf
Associate Special Counsel
for Prosecution

cc: Richard Condit, Esq.
Donald G. Aplin, Esq.
Government Accountability Project
25 E Street, N.W., Suite 700
Washington, D.C. 20001

Federal Register
Vol. 57, No. 217
Monday, November 9, 1992

Presidential Documents

Title 3—

The President

Executive Order 12820 of November 5, 1992

Facilitating Federal Employees' Participation in Community Service Activities

By the authority vested in me as President by the Constitution and the laws of the United States of America, including Public Law 101–610, as amended, and in order to ensure that the Federal Government encourages its employees' participation in community service, it is hereby ordered as follows:

Section 1. *Charge to the Cabinet and Members of the Executive Branch Departments and Agencies.*

(a) The head of each Executive department and agency shall encourage agency employees to participate voluntarily in direct and consequential community service. Community service participation may include, among other things, participation in programs, activities and initiatives designed to address problems such as drug abuse, crime, homelessness, illiteracy, AIDS, teenage pregnancy, and hunger, and problems associated with low-income housing, education, health care and the environment. The White House Office of National Service and the Commission on National and Community Service shall serve as a resource to provide information and support.

(b) The head of each Executive department and agency shall designate a senior official of his or her department or agency to provide leadership in and support for the Federal commitment to community service through employee awareness and participation within his or her department and agency. The senior official shall report to his or her department or agency head to ensure that community service activities receive a high level of visibility and promotion.

(c) The head of each Executive department and agency shall designate an existing office in his or her department or agency to perform the functions listed below. The office shall serve as the Office of Community Service and will be responsible for:

(1) Providing information to employees of the department or agency concerning community service opportunities;

(2) Working with the White House Office of National Service and the Office of Personnel Management to consider any appropriate changes in department or agency policies or practices that would encourage employee participation in community service activities; and

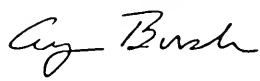
(3) Acting as a liaison with the White House Office of National Service and the Commission on National and Community Service.

Sec. 2. *Administrative Provisions.*

The White House Office of National Service and the Commission on National and Community Service shall provide such information with respect to community service programs and activities and such advice and assistance as may be required by the departments and agencies for the purpose of carrying out their functions under this order.

Sec. 3. *Reporting Provisions.*

The head of each Executive department or agency, or his or her designee, shall submit an annual report on the actions the department or agency has taken to encourage its employees to participate in community service to the White House Office of National Service not later than December 30 each year.



THE WHITE HOUSE,
November 5, 1992.

[FR Doc. 92-27351
Filed 11-6-92, 11:02 am]
Billing code 3195-01-M

SF 450
5 CFR Part 2634 (1992)
U.S. Office of Government Ethics

Form Approved
OMB No. 1209

Executive Branch CONFIDENTIAL FINANCIAL DISCLOSURE REPORT

PARTS I - II

Employee's Name (Last, first, middle initial)	Position/Title	Grade	Date of Appointment	Page No.

Agency	Branch/Unit and Address	Work Phone	Check box if special Government employee (SGE)
			☐

I certify that the statements I have made on this form and all attached statements are true, complete, and correct to the best of my knowledge.	Signature of Employee	Date	Reporting Status ☐ New entrant ☐ Annual

Date Received by Agency	*On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (except as noted in "comments" box below)*	Signature of Supervisor/Other Intermediate Reviewer	Printed Name/Title	Date

Signature of Agency's Final Reviewing Official and Title	Date	Comments of Reviewing Officials	(Check box if continued on reverse) ☐

(Use additional copies of this form as continuation pages, if necessary to complete any part.)

Part I: Assets and Income

None ☐

Identify for you, your spouse, and dependent children 1) each asset held for investment or the production of income which had a fair market value exceeding $1,000 ($5,000 for personal savings accounts) at the close of the reporting period, and 2) each asset or source of income (other than U.S. Government salary or retirement, including the Thrift Savings Plan) which generated over $200 in income during the reporting period ($1,000 for your spouse's earned income, other than honoraria). This includes but is not limited to employers, stocks, bonds, tax shelters, personal savings accounts, realty, mutual funds, pensions, annuities, IRA assets, trust assets, commodity futures, trades and businesses, partnership interests, and honoraria. Exclude your personal residence, unless you rent it out, and any earned income of your dependent children. If the holding is an excepted trust (ET) or an excepted investment fund (EIF) (see instructions), indicate that in the designated column, and you need not disclose underlying holdings.

Assets and Income Sources (Identify specific employer, business, stock, bond, mutual fund, financial institution, type/location of real estate, etc.)	(X) if no longer held	Nature of Income *(Rent, interest, dividends, capital gains, salary, etc.)*	If EIF or ET, so indicate	Date (*Only for honoraria*)
1				
2				
3				
4				
5				
6				
7				
8				

Part II: Liabilities

None ☐

Report liabilities over $10,000 owed to any one creditor at any time during the reporting period (over $10,000 at the end of the period if revolving charge accounts) by you, your spouse, and dependent children. Exclude a mortgage on your personal residence unless it is rented out; loans secured by automobiles, household furniture or appliances, and liabilities owed to a spouse, dependent child, or parent, brother, sister or child of you or your spouse.

Creditors (Name and address)	Type of Liability *(Mortgage, promissory note, etc.)*
1	
2	
3	
4	

Congressional Research Service • The Library of Congress • Washington, D.C. 20540

June 30, 1992

TO : House Committee on Energy and Commerce; Subcommittee on Investigations
Attention: Debra Jacobson

FROM : American Law Division

SUBJECT : Meaning of Prohibition on Acting as "Agent or Attorney" for Another in a Matter Before the Government

This memorandum is submitted in response to the subcommittee's request, as discussed with Debra Jacobson, for a legal analysis of the restriction of 18 U.S.C. § 205, concerning whether that conflict of interest provision would bar a federal employee from appearing before a federal agency as a private citizen to present his or her own views on a matter before that agency, or would bar a federal employee from providing uncompensated technical assistance or expertise to an outside, private group at that group's meeting with a federal agency concerning a matter which was before that federal agency or department.

Under the statutory provision at 18 U.S.C. § 205, federal employees are (1) not permitted to act as "agent or attorney" for prosecuting a claim against the government, or to receive any interest or payment from such a claim for "assistance" in prosecuting that claim;[1] and (2) are not allowed to "act as agent or attorney" for anyone before a federal agency in a matter in which the United States is party or has a direct and substantial interest.[2]

While the first restriction at § 205(a)(1) may cover receiving payment for a potentially wide range of "assistance" in the prosecution of a "claim" against the United States Government, the second limitation on uncompensated activity is much narrower. This second clause of the statute, at § 205(a)(2), which does in fact reach even uncompensated activity, narrowly proscribes only the action

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[1] 18 U.S.C. § 205(a)(1), provides penalties for an officer or employee of the government who "acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interests in any such claim, in consideration of assistance in the prosecution of such claim .... "

[2] 18 U.S.C. § 205(a)(2), provides penalties for an officer or employee of the United States who "acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct or substantial interest ...."

of acting as "agent or attorney" for anyone before the government in matter in which the government is a party or is interested.

When a federal employee is not being compensated for outside activity, the statute thus applies only to representational-type of activity as an "agent or attorney" for another before the government. If a federal employee appears before a federal agency in an individual capacity, as a concerned citizen, to present his or her own views, and not to present or argue the position of, or on behalf of, an outside party or entity, then such "self-representation" has long been found not to be prohibited by the statutory provision.[3]

In addition to not being applicable to appearances before the government on one's own behalf, the statute does not bar uncompensated "assistance" to outside parties in matters before the government, when such assistance does not take the form of representation as another's "agent or attorney." The second clause of the statute at 18 U.S.C. § 205(a)(2), reaches uncompensated activity only when one acts as "agent or attorney" for someone before the government, and does not by its terms include the broader activity of providing uncompensated technical or even legal "assistance", advice, or consultation to an outside party on a matter before the government. The required narrow construction of the prohibition on the uncompensated activity of acting as "agent or attorney" in § 205(a)(2), as opposed to the broader "assistance" prohibition regarding "claims" when compensation is involved as set out in § 205(a)(1), was explained by Professor Manning in his oft-cited treatise on federal conflict of interest laws:

> In this respect Section 205 is much narrower where no compensation is involved, since the employee is not guilty of the offense unless he actually acts as agent or attorney. ... The employee is thus free to engage in other kinds of assistance so long as he is not compensated.[4]

The Office of Legal Counsel of the Department of Justice has thus advised Assistant United States Attorneys that they may be plaintiffs in a class action law suit against a client/federal agency, and that they may provide legal assistance in the case, as long as they do not act as "agent or attorney" for the class, and as long as they do not receive compensation for their legal assistance to the plaintiffs. The O.L.C. opinion stated that the Assistant United States Attorneys, who are plaintiffs against the Office of Personnel Management (an

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[3] Office of Government Ethics, Advisory Opinion No. 83 X 2, January 31, 1983, in *The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics*, 1979-1988 (1989) [hereinafter *OGE Advisory Letters and Opinions*], at 353-354: "However, the statute is understood not to prevent a Federal employee's representation of himself before an agency or a court. *See Capt. Tyler's Motion*, 18 Ct. Cl. 25 (1883), where the court indicated that precluding such *pro se* representation before a Federal agency would raise a constitutional objection. *See also* 16 Op. Att'y Gen. 478 (1880); 14 Op. Att'y Gen. 482 (1876)."

[4] Manning, *Federal Conflict of Interest Law*, at 84 (Harvard University Press 1964). Compensated "representational services" as agent or attorney "or otherwise" to outside parties rendered by federal employees before federal agencies are expressly prohibited by 18 U.S.C. § 203.

agency that those attorneys represent in other legal matters), may not act as "agents or attorneys for the class", but may assist the plaintiffs as long as such government lawyers "refuse any compensation for assisting in the lawsuit".[5]

The legislative history of the statutory provision, substantially amended and recodified in 1962, is not precise as to the definition of "agent or attorney"; nor specific on the precise distinctions between permitted uncompensated "assistance" in a matter before the government, versus prohibited representation of someone as their "agent or attorney" in such matter. Some legislative history in the report on the legislation may seemingly imply a broad application of the language of the statutory restriction since, as noted in the House Report on the amendment and recodification of § 205: "There is a clear pubic interest in preventing government employees from allying themselves actively with private parties in the multitude of matters and proceedings in which, although they may not be claims against the United States, the Government has a direct and substantial interest."[6] Although this statement may seemingly indicate a broad purpose of the restrictions, the application of the actual prohibition was clearly limited to one who allies him or herself with a private party in an outside matter *for compensation*, and to one who represents another, even without compensation, in the capacity of an "agent or attorney".[7]

Clearly, "aiding and assisting" someone in a matter before the federal government was not intended to be prohibited by the statute when no compensation is received. A ban on such assistance was considered, but rejected by Congress because it would be overly broad, and would reach situations where there was no real conflict of interest or harm to the government. As noted in the House Report:

> The reason for limiting the disqualification to acting as attorney or agent is that the inclusion of the term "aids or assists" would permit a broad construction embracing conduct not involving a real conflict of interest. However, acting as attorney or agent, which would afford the opportunity for the use of official influence, would continue to be prohibited.[8]

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[5] 5 O.L.C. 74, 75 (1981).

[6] H.R. Rpt. No. 748, 87th Cong., 1st Sess. 9 (1961).

[7] The Committee report thus went on to explain in the next sentence that: "Accordingly, the bill additionally prohibits officers and employees of the Government from acting as agent or attorney for anyone before a Federal agency or a court in connection with any matter in which the United States has a direct and substantial interests." *Id.* at 9-10.

[8] *Id.* at 21.

When the statute bars one from acting as an "attorney", it is fairly clear what conduct is prohibited.[9] However, when the statute prohibits one from acting as an "agent" for another, there is less specificity as to the conduct prohibited.

An early case arising out of this statute dealt with representations that were made by two persons, one a federal employee and the other a private citizen, who called federal executive agencies from the office of the Speaker of the House of Representatives to exert pressure upon those officials on behalf of outside interests from whom compensation had allegedly been received by at least the private citizen involved. Although the federal employee was eventually acquitted of the conspiracy and conflict of interest charges under 18 U.S.C. § 205, the court in *United States v. Sweig*,[10] had sustained the original indictment of the federal employee for that conflict of interest charge by denying the defendant's argument that the definition of the term "agent" had to be confined to the narrow common law notion of "agency". The court refrained from trying to define the term "agent", leaving to the jury and trial court to determine the issue on the facts of the case presented, but did note that the statute seemed to indicate a "wider meaning" of the term "agent" than merely its common law meaning of one who is empowered to "affect the legal relations" of another.[11] Apparently, by the outcome of the case, however, the jury did not believe from the facts presented that the representations and telephone calls made by the congressional employee on behalf of outside parties necessarily

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[9] In the hearings on the statute, one government official in the executive branch cautioned against an overly broad interpretation of the law which would prohibit government employees such as lawyers from appearing before the government on behalf of outside groups, such as environmental groups, where there was no real conflict or harm to the government. The Secretary of the Interior, George Abbot explained:

> The prohibition in proposed section 205 respecting matters other than claims appears to us to have too broad a reach and would make activities in which there was no real conflict of interest a criminal offense. If, and this is certainly a homely example, if an employee of the Post Office Department is an ardent conservationist and a member of the Izaak Walton League, we would see no impropriety in his assisting gratis in the presentation of the League's views on a matter under the jurisdiction of the Fish and Wildlife Service. *Federal Conflict of Interest Legislation: Hearings Before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives*, 86th Congress, 2d Session 296 (1960).

At least one legal commentator has noted, however, in calling for *pro bono* exceptions to the law for federal attorneys, that if the employee in the hypothetical in question were an attorney and were representing *pro bono* the League in the matter by his "presentation of the League's views", that such conduct may violate the statute even if no harm, conflict nor any impropriety is apparent on the face of the conduct. Elefant, Carolyn. "When Helping Others Is a Crime: Section 205's Restriction on Pro Bono Representation by Federal Attorneys", 3 *Georgetown Journal of Legal Ethics* 719, 734 (1990). Such concerns are particularly relevant to one who is an attorney, or to one who otherwise is authorized to speak for, represent and present arguments for an outside group, rather than employees who merely provide technical assistance or expertise to such groups in the matter before the agency.

[10] 316 F. Supp. 1148 (D.N.Y. 1970).

[11] 316 F. Supp. at 1156-1157.

constituted the criminal conduct of acting as the "agent" for the private party outside of the scope of the employee's official duties.[12]

It may be noted that the common dictionary definition of the term "agent", as opposed to the legal, common law notion of an "agency" relationship, includes "one who acts for or in the place of another by authority from him as: a representative, emissary, or official of a government."[13] Thus, the broader, common meaning of the term "agent" appears to encompass the notion of one who is authorized to speak for or on behalf of another, and acts in that representative capacity by presenting the arguments, views, or position of the other person, even if such "agent" is not necesearily empowered to legally bind the "principal".

Even in the broadest meaning of the term "agent", however, it is clear that not all appearances, presentations or "representations" before federal agencies by a federal employee with or on behalf of an outside group would be, or are intended to be, prohibited by the statute at § 205(a)(2) as acting as an "agent" for the outside group. It is instructive to note in this regard the difference in the language between 18 U.S.C. § 205(a)(2), and the language of 18 U.S.C § 207(b)(1), the so-called "revolving door" law, prior to its amendment in 1989. While section 205(a)(2) narrowly prohibits action as "agent or attorney", section 207 extended to one who acts as "agent or attorney, *or otherwise represents*" another in a particular matter. As noted by the United States Court of Appeals, Congress added the phrase "or otherwise represents" specifically to broaden the restriction of the revolving door law away from activities which may have narrowly encompassed only professional advocacy activities (acting as "agent or attorney"), to encompass "appearances in any professional capacity, whether as attorney, consultant, expert witness, or otherwise."[14] Section 205, however, is more narrowly applicable only to acting as "agent or attorney", and does not encompass one who merely "otherwise represents" another, nor does it encompass one who "aids or assists" another even by way of "personal presence" before the government.[15]

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[12] Note, *Washington Post*, July 10, 1970, p. A1; February 25, 1970, p. A10.

[13] *Webster's New Collegiate Dictionary*, (1977).

[14] *United States v. Coleman*, 805 F.2d 474, 479-480 (3rd Cir. 1986), citing H.R. Conference Report No. 95-1756, 95th Cong., 2d Session 74 (1978). The court found that Coleman's "appearances" before the Internal Revenue Service with a client, even if they did not constitute acting as "agent or attorney" for the client, did constitute "otherwise representing" that person by way of participating in an agency proceeding.

[15] Note provisions of 18 U.S.C. § 207(b)(ii) (1982 Code ed.), prior to amendment in 1989, and specifically the discussion of the restriction on one who "aides ... or assists" by way of "personal presence" (§ 207(b)(ii)), as distinguished from one acting as "agent or attorney" or otherwise representing another (§ 207(b)(i)), in *To Serve With Honor: Report of the President's Commission on Federal Ethics Law Reform*, at 72-74 (March 1989).

There is thus a clear statutory difference recognized by the courts between mere "representations" or appearances for or on behalf of another before an agency on the one hand, and acting as "agent or attorney" for that outside party, on the other. When an employee appears without compensation before a federal agency and acts as an expert, a consultant, or a technical advisor for or on behalf of an outside party, providing the employee's own expert opinions and views, and is not acting to represent nor advocate the views and arguments of the other party, then under the interpretations, rulings and intent of the statute, that employee might not be acting in a representational capacity as the "agent or attorney" for the outside party.[16]

The pertinent restriction in § 205(a)(2) on acting as "agent or attorney" appears to be upon professional advocacy for and professional representation of another to an agency, particularly in a matter in which the agency and that private, outside party may have an adversarial type of relationship or at least a divergence or difference of interests.[17] In an opinion from the Office of Legal Counsel of the Department of Justice, the O.L.C. told the Environmental Protection Agency that an employee of EPA may appear before EPA on behalf of an outside party as long as the employee does not have "dealings with the government in an adversary context -- that is, any contacts about a matter in which the Government and the party on whose behalf the employee is acting have inconsistent or potentially inconsistent interests." The opinion noted that, clearly: "A federal employee can, while acting on behalf of another party, have purely ministerial contacts with a federal agency without violating § 203 or § 205." The O.L.C. opinion cited an earlier opinion from that office which it decided, under another conflict of interest provision of law, that a "delivery or furnishing of scientific data to a Government agency on behalf of a contractor" was not acting as an "agent" for that private contractor.[18]

In sum, a federal employee may appear as a private citizen before a federal agency to express or argue his or her own views and opinions on a matter. Even if an employee is deemed to "represent" him or herself before the agency, such self-representation has long been found to be necessarily excluded from the prohibition. In a similar fashion and for similar reasons, the acting as an "agent or attorney" for a family member before the government, as well as for oneself, is expressly exempt by the provisions of the law.[19]

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[16] If compensated, however, this conduct may implicate the broader ban on representational "services rendered" to another before a federal agency in 18 U.S.C. § 203, which is not narrowly confined to acting as "agent or attorney" as is § 205.

[17] 4B O.L.C. 498 (1980).

[18] 2 O.L.C. 313, at 317 (1978).

[19] 18 U.S.C. § 205(c). One legal commentator has noted that the exemption is to prevent the application of the "Orwellian notion that government might compel its employees by criminal sanction to abandon their personal family obligations in the name of serving the state." 3 *Georgetown Journal of Legal Ethics*, *supra* at 732.

Under the statute and its consistent interpretations, if uncompensated assistance is provided by a federal employee to an outside party, even by the way of an "appearance" before a federal agency, this does not necessarily mean in all cases that a prohibited act of acting as an "agent or attorney" for that party has occurred within § 205(a)(2). This would particularly be the case, and greater latitude would apparently be given to employees, in matters before the government where the outside party and the government are not in an adversarial position. In any event, a federal employee may provide technical "assistance" and expertise to an outside party in a matter before the government, and may deliver or furnish to a federal agency such information on behalf of an outside private party, without necessarily being considered the "agent or attorney" for the outside party. In such a case, the employee is not considered to be acting in a professional representational role as an "agent", nor in a professional advocacy role as an attorney, but is rather providing "aid or assistance" to the outside group in an appearance. An employee in this instance would be acting more in the nature of an uncompensated technical consultant or expert in "assisting" the outside party, and although conformity with regulations of one's agency on outside activities and general standards of conduct may be required[20], such conduct has been found not to rise to the level of a criminal violation of federal statutory law under 18 U.S.C. § 205.[21]

In *DeMarrias v. United States* the court disagreed with the Government's argument that a Veteran's Administration doctor could not provide expert testimony in a claim against the United States because of 18 U.S.C. § 205 and/or other ethical restraints. The court noted that § 205 was adopted to "prevent federal employees from using private government information" to assist persons having claims and other matters before the Government, but did not restrict a doctor from giving her expert opinion on a matter before the government for an outside party. The court found that acting as an expert was not like "legal representation" by an attorney nor like other "advocacy", but rather involved giving an "objective evaluation" by the employee, and thus no inherent conflict arose between the duty owed the government and the duty owed the outside party as might for an "attorney or agent" or other fiduciary.[22]

Jack Maskell
Legislative Attorney

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[20] Note that new proposed regulations of the Office of Government Ethics might bar federal employees, beyond the requirements of 18 U.S.C. § 205 or § 203, from being expert witnesses for outside parties in certain matters in which the United States is interested. See proposed regulations at 56 Federal Register 33811, July 23, 1991, proposed 5 C.F.R. § 2635.805. An earlier OGE Opinion 83 X 1, January 27, 1983, found that such expert testimony against the United States would not violate 18 U.S.C. § 205 (citing to May 18, 1976 letter ruling from Acting Attorney General to the National Science Foundation), but could be deemed or found "incompatible" with one's federal employment under general ethical standards of an agency if the testimony adversely affected the employer/United States Government's interests in the matter.

[21] *DeMarrias v. United States*, 713 F. Supp. 346 (D.S.D. 1989).

[22] *Id.* at 348.

Mr. MCCLOSKEY. Thank you.

Mr. van Ee, is that right?

Mr. VAN EE. Yes.

Mr. MCCLOSKEY. I might say we will hear from everyone on the panel and then have specific and general questions and discussion.

How about Marie Ramirez.

Ms. RAMIREZ. Mr. Chairman, members of the subcommittee, thank you for this opportunity to testify.

I regret my testimony today does not bring good news. I am here as living proof that the whistleblower legislation Congress worked so hard to create has been sabotaged by the very executive agency sworn to uphold and implement it—the Office of Special Counsel.

As absurd as this may sound, those of us who have had the gross misfortune of relying upon the OSC know it to be a certain truth. In my own case, I have won 10 times before multiple Federal and State agencies, including victories at the Merit Systems Protection Board.

These victories were despite the OSC and certainly not because of it.

To fully understand just how bad OSC's performance has been on my case and the cases of numerous former coworkers, it helps to learn the astounding history of my former employer. This history began long before I became a Federal employee in 1983.

I was hired then by a small Navy command known as NAVELEX, an organization then and until this very day plagued by mammoth problems of corruption, mismanagement, and waste. Recently, the Navy concocted a new name to erase the deplorable images associated with the name NAVELEX. The employees have been instructed to call it the N-I-S-E or NISE Command.

The state of affairs at the NISE Command is practically incomprehensible. For example:

For the last 25 years, the command has forced its employees to work in an archaic set of aircraft manufacturing hangars built prior to World War II. This facility, known as Air Force Plant 19, has been determined to be one of America's most toxic work sites. Many plant employees and their families have sued for permanent illness and even death. To overcome the expert testimony of leading physicians certifying these grave dangers, the command hired a veterinarian from Calcutta; and based on that horse sense, plant workers continue to get seriously ill and die.

To literately add insult to injury, the NISE Command paid a exorbitant rent to a defense contractor in order to stay on the same property, even though it was actually owned by the U.S. Government. This preposterous arrangement has also been going on for 25 years. And incidentally, in exchange for this exorbitant rent, the defense contractor refuses to tell the military what chemicals they are using that are poisoning plant workers.

Meanwhile, since 1980, alone, the NISE Command has also managed to lose over 2,000 secret and top secret documents detailing some of this Nation's most sensitive military matters. The command argues they are not necessarily lost; it is just that no one knows where they are. No one was disciplined for these outrageous security breaches, while I on the other hand, was fired for being a pregnant whistleblower.

The NISE Command has been involved in hundreds of millions of dollars of contract fraud.

Likewise, the NISE Command has the worst EEO record in the Navy, with the possible exception of the Tailhook Society. Things got so bad at one point, its black employees boycotted Black History Month functions because of the command's cavalier disregard for antidiscrimination laws.

It should come as no surprise, then, that in an environment like this it was fertile ground for whistleblowers. The most famous of all has unquestionably been Lawrence Timothy Reid who received the highly prized Cavallo Foundation Award for Moral Courage in Government in 1989.

His 1987 Senate testimony provided compelling insight into the overwhelming odds and hardships facing people who dare to tell the truth about those who use government for their own ambitions. Amazingly, immediately following Mr. Reid's testimony in the Senate, the OSC gave the green light to the NISE Command to indefinitely suspend him from Government.

The MSPB overruled the OSC's support of this unlawful suspension and placed Mr. Reid back in Federal employment. But inevitably, his life, career, and family have all been utterly devastated.

By no means, however, have all Navy managers participated in whistleblower reprisal. In fact, five supervisors of Mr. Reid alone have filed formal complaints for having been persecuted by upper echelons of the Navy for refusing to take illegal actions against Mr. Reid.

In a vintage OSC maneuver, though, the special counsel decided it was "not clear whether Congress intended to protect supervisors who refused to take illegal actions against whistleblowers" and unilaterally rejected each and every one of these supervisors' complaints. This incredible ruling shows OSC's distain, not only for whistleblower laws and the U.S. Congress, but for the American taxpayers who pay their salaries.

In regards to my own case, I have provided a written statement detailing the many times that Federal and State agencies have overruled the OSC and found in my favor.

One extremely significant ruling came from the MSPB who ruled that the NISE Command's illegal termination of me in 1988 constituted pregnancy discrimination and was in retaliation for my EEO involvement and whistleblowing.

The MSPB stated unequivocally "this was not a close case." The evidence was overwhelming; even Inspector Clouseau could have solved it. But the OSC had rejected me then and on every other occasion—at least one dozen times during the past 5 years.

The OSC's failure to take any preventative, disciplinary, or corrective actions in any matter pertaining to me or any other agency whistleblower has only encouraged wrongdoing agency officials further. As a result, I have been run through a gauntlet of escalating retaliation. I have now been fired a second time, solely because I am unable to work in the intolerable conditions the agency imposed on me, conditions that the Department of Labor confirmed. I cannot begin to describe how absolutely devastating this entire ordeal has been on every aspect of my life.

PART P2

No matter how artfully the OSC tries to paint the picture, their record is absolutely deplorable. Instead of protecting Federal employees, they join agencies in piling on after the whistle is blown, but it is the public interest that is being penalized.

I believe that the OSC should be abolished. It is time for Congress to close the doors on the OSC, before the OSC can close the doors on any more whistleblowers. Their very name frightens potential whistleblowers from coming forward, thus depriving Americans of the information necessary to fix our Government.

It is unrealistic to think that the present OSC staff could ever be rehabilitated. I believe the Whistleblower Protection Act is fundamentally sound except there is always an extremely great risk the office shall remain a politically, rather than patriotically, motivated organization.

It cannot rightfully be overlooked or excused that OSC has taken no part at all in damming the endless stream of scandals that has weakened our Nation's very security. Where has the OSC been? They most assuredly have not been on the front pages for preventing these scandals.

I wholeheartedly believe Federal employees should be permitted to elect their own special counsel. In this way, we are sure to get a national hero instead of the national disgrace we now have.

I hope that my testimony today has been of some help. I stand ready to assist you in any way possible and also, even though she is not present at the moment, I would like to give a special thanks to Congresswoman Schroeder for all her past efforts on my behalf.

Thank you.

I would also like to request my written testimony, statement be inserted in the record.

Mr. MCCLOSKEY. Thank you.

We will be back with questions.

[The prepared statement of Ms. Ramirez follows:]

TESTIMONY OF

MARIE R. RAMIREZ

Before The

United States House of Representatives

Comittee on Post Office and Civil Service

Subcommittee on Civil Service

Congressman Frank McCloskey, Chairman

Oversight Hearing

On Whistleblower Protections and

The Office of Special Counsel

March 31, 1993

Mr. Chairman:

Thank you for the honor of allowing me to share with you my experiences with the Office of Special Counsel (OSC), which spans a several year period beginning in 1988 (before the Whistleblower Protection Act of 1989) and continuing until the present. I regret that my testimony today does not bring good news. I am a former Federal employee who is living proof that the whistleblower legislation that Congress worked so hard to create has not reformed the OSC. The OSC has failed in its mission; it is as ineffective now as it was prior to the passage of the Whistleblower Protection Act, and for this reason the OSC should be abolished.

My encounters with the OSC are in relation to unlawful actions and retaliations taken against me at a Navy sub-agency known as the Naval Electronic Systems Engineering Center (NAVELEX), San Diego - a relatively small agency, approximately 600 people, with a disproportionately high number of problems.

After graduating with a degree in electrical engineering in 1983, I went to work for NAVELEX in Vallejo, California. In 1985 I transferred to its sister activity known as NAVELEX, San Diego, where I worked as a GS-12 electronics engineer and served as the Technical Manager of a multi-million dollar Navy program. Because my work was exemplary, I received many commendations and was nominated for the prestigious Women's Executive Leadership Program.

Unfortunately, prior to my transfer to NAVELEX San Diego, I was not warned that the agency was plagued by mammoth problems of

corruption, mismanagement and waste. Just some of the numerous and enormous problems at NAVELEX San Diego are acknowledged in, and evidenced by a statement the agency's highest civilian, Executive Director John F. MacDonald, and the agency's commanding officer wrote and signed that verifies that the agency is rife with:

> "unethical and improper personnel practices ... caus[ing] mistrust ... [and] persist[ing] to this day ... 13 years ... of very poor management ... outmoded thinking and superceded rules ... good 'ol boy [and] merit[less] process[es] ... lack of morale and a higher than normal incidence of grievances and EEO complaints." (Exhibit 1)

A far more scathing report by leading consultant William Ewald, hired by the Department of Defense, documents the working conditions at NAVELEX to be a "scandal". (Exhibit 1)

In early 1988, when I was pregnant with my first and only child, Executive Director John F. MacDonald pressured my first-line supervisor to persuade me to drop an Equal Employment Opportunity (EEO) complaint I had filed. The agency had already been found guilty of sex discrimination against me previously, and I was subjected to severe retaliations by the agency's highest officials for having pursued that EEO complaint, necessitating a second complaint based on the subsequent unlawful reprisals. My supervisor in turn threatened my career, as is documented by a Merit Systems Protection Board (MSPB) judge. (Exhibit 2, MSPB decision dated June 21, 1989, page 17)

In July, 1988, I contacted the OSC, Members of Congress and other government agencies to report extensive fraud, waste, and

abuses of authority at NAVELEX that had come to my attention and to request that the agency be investigated and reviewed by an independent authority in a complete audit of all major command operations.

This fraud, waste and abuse involved gross violations of federal procurement, safety and security laws at my work facility, including (but not limited to):

* more than two thousand (at one time) missing secret and top secret documents (for which not one person has ever been disciplined);

* PCB and other chemical contaminations, health and safety problems (for which the EPA confirmed record violations in PCB mishandling, and other government agencies have confirmed numerous violations);

* hundreds of millions of dollars of contract fraud;

* leasing contract scandal, whereby NAVELEX has paid an exorbitant rent to a defense contractor in order to stay on the same property, known as Air Force Plant 19, even though it was actually owned by the U.S. government and provided rent-free to the defense contractor;

* attempted misappropriation of funds in violation of criminal statutes; and

* lack of accountability of wrongdoing officials, whistleblower retaliations, debilitating working conditions, and EEO and personnel problems so bad that the black employees boycotted Black History Month functions in protest.

By letter dated August 15, 1988, after a perfunctory investigation, the OSC responded that they "found no evidence" of any "prohibited personnel practice or any other violation within our investigative jurisdiction" and closed their file. (Exhibit 3) Approximately one month later, and right after the birth of my son, my supervisor, emboldened by OSC's inaction, proposed my

removal from Federal service. Prior to the removal becoming effective, I appealed to the OSC and requested they stay the illegal adverse action. In addition, Members of Congress made appeals on my behalf - Congresswoman Patricia Schroeder wrote several letters to the Secretary of the Navy, and others contacted the OSC. The OSC incorrectly ruled in their September 26, 1988 letter that there was "no evidence of a prohibited personnel practice ... [and] no factual basis to support a motive of reprisal ... Accordingly, we have closed our file on this matter." (Exhibit 3)

NAVELEX then fired me in retaliation for my EEO involvement and my whistleblowing, as later ruled by the MSPB. Not coincidentally, the day NAVELEX officials selected to force me from the premises was the very day employees had planned to throw me a baby shower, thereby ruining those plans. Many employees protested the removal action directly to the Commanding Officer; they were informed by the Captain that I had "broken the law." This removal action had a devastating impact on my life and on my entire family; besides being a new mother, I was also the sole support of my family. The agency took away from me far more than any legal decision in my favor could ever give back. For one, it completely ruined the joys of motherhood for me.

About that time, Executive Director MacDonald had discussions with agency supervisors regarding both me and Lawrence Timothy Reid, a co-worker who had worked on the same Navy program as I did, for which I was assigned as his project

manager. Mr. Reid, who is a nationally known whistleblower, provided key testimony before Congress in 1987 that led to the passage of the Whistleblower Protection Act of 1989 and the abolishment of the OSC as a sub-agency of the MSPB. For his efforts, including his whistleblowing on contract fraud that saved the United States Government an estimated $200 million dollars, Mr. Reid was honored with the prestigious Cavallo Prize in 1989.

Mr. MacDonald stated to more than one supervisor at the agency that he considered me to be whistleblower Tim Reid's "apprentice". He also indicated that "there isn't going to be any negotiation on [mine] or Reid's cases. If I don't fire Tim, [a high-level official at the Space and Naval Warfare System Command, NAVELEX's parent activity] has threatened to shove their god damned fist down my throat and rip out my f---ing balls."

One reprisal taken against both myself and Mr. Reid that involved Mr. MacDonald and the Captain occurred before we were both fired. Around the spring of 1988, the agency's morale and recreation committee sponsored a command-wide election in which my coworkers voted me the winner of the honorary position of "Executive Director of the Day". Mr. Reid won for the position "Captain of the Day". However, when the Captain and Mr. MacDonald learned who had won, they refused to uphold the conditions of the election, which also required them to trade jobs with the winners for the day. Further, the Captain referred to all the employees who had voted for us as "those bastards."

I appealed the unlawful termination to the MSPB, who subsequently overruled the OSC overwhelmingly with their finding that I was illegally fired and that it constituted disparate treatment on the basis of sex (pregnancy) and retaliation for my EEO involvement and whistleblowing. (Exhibit 2) Significantly, I prevailed on whistleblower retaliation under the old, weaker whistleblower laws (prior to the effective date of the Whistleblower Protection Act of 1989), when the higher burden of proof was on me. The MSPB judge had indicated early on in that case that the agency was "hiding the ball" because they had withheld key medical evidence, and in his ruling he stated that:

> **"The agency failed to sustain its charge by a significant margin. This was not a close case."**

In spite of all this, including it being one of the strongest decisions ever issued against any government agency, Mr. MacDonald stated that "The judge's decision is nothing but a load of dog shit." This statement caused me to conclude that the reprisals would continue, despite the MSPB ruling in my favor. So I petitioned the OSC to seek disciplinary action against my supervisors in order to make the retaliations stop.

Despite the MSPB's ruling in my favor, the OSC took no action on my petition to discipline any of the wrongdoing agency officials. In fact, these same officials were actually rewarded for their unlawful behavior with large cash awards and promotions. This fueled wrongdoing agency officials - who already believe that they are above the law and untouchable - providing them the impetus to continue their illegal reprisals.

The agency then refused to comply with the MSPB's orders regarding payment of my attorneys' fees, necessitating another MSPB decision - this one awarding my attorneys' fees totaling more than $35,000. This second MSPB decision in my favor reiterated the findings in the earlier decision that "the agency committed a prohibited personnel practice" against me and that I was a "victim of reprisal" for my having filed an EEO complaint and for my whistleblowing activities.

Thinking that the OSC may have reformed after the public outcry leading to the unanimous passage of the Whistleblower Protection Act of 1989, I petitioned OSC to prevent more recurring reprisals taken against me by the agency. However, the OSC rejected me every time. As explained in the paragraphs below, the State of California, the Department of Labor, and the Equal Employment Opportunity Commission (EEOC) disagreed with the OSC and took actions to protect my benefits that the agency had opposed.

Soon after the MSPB ordered the agency to pay more than $35,000 in attorney's fees, the agency made attempts to recoup unemployment benefits I had received when unlawfully terminated, even for a period of time in which I had received no back pay. During the course of those events, the agency knowingly provided false and misleading information both in writing and at an oral hearing before an administrative law judge. The State of California Unemployment Insurance Appeals Board was not deceived by the agency and they ruled in my favor, stating that it would

be against law, "equity and good conscience" to recoup those funds.

I provided substantiating documentation pertaining to and demonstrating the agency's wrongdoings in this matter to the OSC and also requested a stay of any further agency appeal. The OSC refused to help me once again because they "found insufficient evidence of any prohibited personnel practices or other violations warranting further inquiry by this Office." They further stated "An appeal does not constitute a personnel action within the meaning of the statute ... Consequently, this matter is not within our investigative jurisdiction ... and [we] have closed our file on this matter." (Exhibit 3)

Without any bona fide reason whatsoever, the agency then appealed the State of California's decision. Subsequently, the State ruled fully in my favor once again, stating "... we adopt the administrative law judge's reasons for decision and concur in the results reached ... We concur with the administrative law judge that it would be against equity and good conscience to require repayment."

The agency's lawyer who testified under oath at the State of California hearing, Attorney Linda Bithell Oliver, committed outright perjury during the hearing. For instance, despite the fact that she was the attorney who represented the agency in their losing defense before the MSPB and was obviously aware of the MSPB's decision, she denied that I was fired for retaliatory reasons. A complaint against Attorney Oliver is still pending

with the State Bar of California (after approximately 3 years of investigation) on dozens of charges of unethical and unprofessional conduct - including the perjury mentioned above, as well as many aspects of deceit and improper conduct in her representation of the agency in their losing defense before the MSPB, her physical assault of me after losing before the MSPB, her attempts to discredit witnesses and coerce other witnesses into providing false testimony, her involvement in providing an altered SF-171 application for employment (of co-worker Lawrence Timothy Reid) to the MSPB and other government agencies to give a false impression that Mr. Reid had lied about his educational background (this at a time just prior to when Mr. Reid was to testify on my case before the MSPB), and much, much more. For just one example of her improper conduct, included at Exhibit 1 is a copy of a sexually coercive love note she delivered to an attorney who was preparing a lawsuit on behalf of agency supervisor Alton Bennett that named her as a defendant.

Moreover, I have provided the OSC with extensive evidence of unethical and improper conduct by other agency attorneys, substantiating that these lawyers are not representing the best interests of the government, but instead protecting wrongdoing officials. For an illustration of unprofessional and very bizarre behavior exhibited by one agency attorney, Kevin J. Keefe, please see the threatening and menacing "doodle" he has acknowledged drawing in relation to whistleblower Tim Reid's case before the MSPB. (Exhibit 1)

I provided information and evidence regarding Attorney Oliver's and Attorney Keefe's misconduct to the OSC on multiple occasions. However, the Special Counsel informed me that they "have no authority to investigate 'unethical and highly unprofessional conduct' on the part of a government attorney" and on at least one occasion **returned my submissions to me!** (Exhibit 3)

The agency's bad faith and wrongdoing is further evidenced by the agency's improper termination of the processing of EEO complaints I was forced to file because of the agency's unlawful actions, discriminatory treatment and retaliations towards me. Although I provided this and other relevant information to the OSC, they have repeatedly turned me down: "It is the general policy of the Special Counsel not to take action on such allegations of discrimination ... we found no evidence of any other prohibited personnel practice or any other violation within our investigative jurisdiction [and] have closed our file in this matter." (Exhibit 3)

The EEOC ruled in my favor **twice** on one complaint, because after the first decision in my favor, the agency did not comply with the Commission's orders to process the complaint, and instead rejected the complaint for a second time. (They have just recently rejected this same complaint for a **third** time.) The Commission's rulings included the following noteworthy finding:

> "A review of the record reveals that **the agency's decision to terminate the processing of appellant's**

> **allegations was premature. ... Accordingly, the agency's decision to terminate the processing of appellant's allegations for failure to prosecute was improper."**

Other correspondence from the EEOC documents the agency's repeated refusal to comply with the EEOC's direct orders to them. For just one example, the EEOC's letter dated September 30, 1992 states unequivocally that:

> **"The Commission's decision on the above captioned case required full implementation of the order therein and submission of a compliance report within a specific time frame. The Commission's decision on this matter is final and the corrective action ordered is mandatory. This office has made several attempts in writing and by telephone requesting your agency to implement the corrective action and to submit the report on the actions taken. ... we have not received the requested information."**

Because of the extreme pressures that have been put on me, the Department of Labor has ruled that conditions of my employment were made so intolerable and unbearable that it would be unhealthful for me to work there.

In July 1990, I informed the OSC of the highest agency official's announcement that he had been directed to do whatever it takes and spend whatever amount of money, no matter how much, to make sure that these people [myself and other agency whistleblowers] don't sustain their charges or win their cases against the agency. At the same time, I notified the OSC of Executive Director MacDonald's statement that the agency has finally been able to find a judge at the MSPB "who will rule in the agency's favor on all of these cases." However, the OSC took no action to investigate this or the significant other

information I provided them.

Mr. MacDonald further indicated to more than one supervisor at the agency, in relation to another employee's case, that "This black judge [Judge Liggett of the MSPB] isn't going to put up with or fall for the bull shit the judge did on the Ramirez case." But perhaps most significant of all, Mr. MacDonald has stated clear intentions that "[I]f these MSPB judges don't agree with us, we'll keep swinging at them [referring to me and Tim Reid] until we find judges that do, just like we did in [another employee's] case."

Mr. MacDonald's statements cited herein - all provided to the OSC, most already testified to under oath by witnesses, and all of them well known to the agency - have been described as merely "feisty argot" by agency representatives in a feeble attempt to diminish their impact. Besides exposing his unlawful motivations and retaliatory intentions, Mr. MacDonald's penchant for colorful language also betrays his discriminatory feelings towards those of other nationalities. For example, he has acknowledged making a derogatory statement towards individuals of Middle Eastern descent. The inappropriate statement was along the lines of: "As long as there are Ragheads in the world, NAVELEX will always have plenty of work."

Now, Mr. MacDonald has lived up to his threats to "keep swinging" at me. He himself proposed my removal from Federal Service. Had the OSC done their job, I would not now be having to defend myself against another unlawfully motivated removal

action. By making an example of me, the agency hopes to chill other employees from coming forth when they have knowledge of discrimination, fraud, waste, or abuses of authority.

The official who effected the second removal proposed by Mr. MacDonald is the commanding officer of the agency, Captain Peter S. Pierpont. Captain Pierpont's reputation for retaliating against civilian whistleblowers preceded him from his previous post, where he terminated an employee who had criticized Captain Pierpont's disparaging reference to employees as "civilian weenies". As a result, the Federal Labor Relations Authority found sufficient evidence to support the charges and required a Notice be posted to all employees. (Exhibit 1)

Although I have contacted the OSC on several occasions seeking their help and a stay of this second removal action, they have repeatedly refused to help me. In their first response they stated, "We have found insufficient evidence of any prohibited personnel practices or other violations warranting further inquiry by this Office ... even if your disclosure was a contributing factor in the decision to propose your removal, we believe that the agency could clearly demonstrate that it would have proposed the same action in the absence of your protected disclosure ... we have determined not to seek a stay of your removal and we are closing our file in this matter." (Exhibit 3)

When I requested the OSC reconsider their decision based on new and material evidence of the agency's fraudulent predating of the effective date of the removal, they "declined to reopen this

file" on the determination that "the matter you have raised is not within the jurisdiction of this agency or within the definition of a prohibited personnel practice, **which generally requires a personnel action**." (Exhibit 3, emphasis added) Even if true, this statement highlights one critical problem with the OSC - their failure to recognize that unlawful retaliations and reprisals against employees take **many** forms, and are frequently not accompanied by a specific "personnel action." I have cited numerous examples in this testimony alone for which no personnel action was issued.

I contacted the OSC yet a third time on this matter, but was told in no uncertain terms that "we will not intervene in your present appeal before the Merit Systems Protection Board." (Exhibit 3) This case is still pending before the regional MSPB.

Since the time he proposed the second unlawful removal against me, Mr. MacDonald has retired, reportedly allowed to do so one year early. After being intimately involved in all the matters I have reported herein, Mr. MacDonald has retired only to become a contractor who regularly lobbies the agency. Not only is the legality of this highly questionable, but it presents a poor appearance from an ethical standpoint. Now the government is essentially paying him twice.

I have had at least one dozen matters closed by the OSC (nine (9) of these were after the WPA of 1989), including stay requests, requests for reconsideration, Freedom of Information Act (FOIA) and Privacy Act requests, investigatory and other

requests. (Exhibit 3) Not once was I ever informed of preliminary results of the OSC's review before it made a final decision. Contrary to the provisions of the Whistleblower Protection Act, I was never provided a meaningful summary of the facts; their responses were inadequate and ignored the vast majority of information I had provided them.

In an effort to make sense of the OSC's refusals to help me, I made multiple requests under FOIA and the Privacy Act. The OSC has repeatedly refused me a right to review the case files upon which they based their rulings, hiding behind provisions of the FOIA and the Privacy Act that I believe are non-applicable. Nor have they complied, on at least one occasion, with Freedom of Information Act regulations requiring a response to information requests within ten days.

From the very limited information I was able to obtain from the OSC, in the form of a redacted memorandum, it was clear that agency officials, especially agency attorney L. B. Oliver, had provided quite a number of untruthful and misleading statements regarding me, my character, and the circumstances surrounding the first illegal removal action. However, the OSC never allowed me to respond to the accuracy of any information provided by the agency or provide evidence that would have contradicted the agency's version; the OSC accepted what the agency said at face value. Moreover, the OSC's failure to provide me this information is interfering with an official investigation concerning charges before the California State Bar that Ms.

Oliver provided false information to the OSC.

And in regards to the extremely limited information the OSC did provide me, they made it clear that I was not really entitled to it; apparently they were just doing me a favor: "The above-mentioned redacted closure memorandum was released to you so that you might have a better understanding of the information gathered during the investigation. This release was entirely discretionary, as OSC was not obliged to release any of this material." (original emphasis, Exhibit 3)

It is clear from my case alone that the agency has failed in their efforts to fool many different government and state agencies, although they have spent exorbitant amounts of taxpayer dollars trying. However, many other agency employees have also prevailed before multiple government agencies, including the Merit Systems Protection Board, the Department of Labor, and the Equal Opportunity Commission. The OSC is the only consistent exception, repeatedly endorsing whatever the employing agency says.

Although I had repeatedly requested the OSC to contact a number of these and other witnesses - many of whom have filed charges about the exact same things and involving the exact same people - they have not done so. Several of these witnesses are agency supervisors, all involved with supervising whistleblowers, who have blown the whistle themselves on the agency's conspiracy to retaliate against anyone who dares to report any wrongdoing, and the OSC's cavalier attitude and implicit support of the

agency's unlawful actions. These supervisors who have come forth with the truth about reprisals against whistleblowers include Alton Bennett, Roger McLaughlin, and Ernest Bellantoni. Other whistleblowers, including Lawrence Reid, Charles Jarrold, and Larry Guillory have also made appeals and reported wrongdoing to the OSC, all to no avail.

Particularly noteworthy is the case of Charles Jarrold, who is one of the original whistleblowers at NAVELEX. Mr. Jarrold has a sterling background. A graduate of Harvard, he served in the U.S. Supreme Allied Command in World War II, at the office headquarters of General Dwight D. Eisenhower. After the war, he became an outstanding engineer and is the creator of an electronic invention still preserved in the Smithsonian Institution. Later he earned an advanced degree in government acquisition and logistics. Notwithstanding these distinguished credentials, the Navy fired Mr. Jarrold after he discovered and reported fraud on defense contracts.

This firing even preceded the existence of the OSC; the Civil Service Commission recognized the injustice, and reinstated Mr. Jarrold, but NAVELEX continued their reprisals until he could no longer tolerate it. The OSC, then in place, totally rejected all of his petitions. He eventually petitioned the Department of Labor to review his case. Labor ruled that his working conditions were totally unbearable. What ties Mr. Jarrold's case integrally to mine is that one of the supervisors whom Mr. Jarrold has charged with committing retaliation during those

years, William Clawson, is the very same supervisor who effected the decision to fire me in 1988, and who is severely castigated throughout the MSPB decision. (Exhibit 2)

In the case of Alton Bennett, he testified under oath before the MSPB that he was under duress for testifying because of pressures put on him by agency officials, including Attorney Oliver. Agency officials wanted him to provide untruthful testimony favorable to the agency. He testified that Attorney Oliver told him, "Too bad you're a good supervisor, you're shooting yourself in the foot." And Mr. MacDonald encouraged Mr. Bennett to "be a team player" and "play ball." Mr. Bennett's situation in regards to me and the retaliation he and the other honest supervisors mentioned above have suffered as Mr. Reid's supervisor demonstrates that there needs to be explicit protections for a "protector of a whistleblower."

As for the agency, NAVELEX San Diego has been allegedly "closed" by Presidential order. What has occurred in actuality, however, is that the Navy has simply "reorganized" and provided NAVELEX San Diego with a new name to protect the guilty. They are now known as the "Naval Command, Control and Ocean Surveillance Center (NCCOSC), ISE West Coast Division", or "NISE West" for short. Although the agency has changed names, it is the very same agency; the Navy has simply concocted a new name to try to erase the deplorable images that are associated with the name NAVELEX San Diego. The agency is not as "nice" as the pleasant-sounding acronym the Navy has devised. It is located in

the exact same place, with the same wrongdoing agency officials still working there. In fact, with the reorganization, many of the wrongdoing officials have actually been promoted. And unfortunately, things have just not changed - the conditions are still hostile and people are still being tormented.

Had the OSC done its job in the first place and stayed the first illegal removal action, much of what I have described in this testimony might never have occurred or have been necessary. I cannot possibly begin to describe to you in these limited pages how absolutely devastating this ordeal has been on my career, my marriage, my health and my family.

All told, I have now prevailed on ten (10) separate occasions before multiple Federal and State agencies, despite the OSC, not because of them in any way. I have gone to great extremes to work with the OSC, and have quite probably provided them at least a couple thousand pages of substantiating documentation throughout the past several years. As proven by the numerous federal and state government decisions in my favor, the OSC has continually erred on my case. When all is said and done, the OSC had closed all of my complaints without any preventive, corrective or disciplinary actions whatsoever.

In conclusion, the OSC did not help me prior to the WPA of 1989, nor afterwards. I have observed absolutely no change for the better in the Special Counsel as a result of the Whistleblower Protection Act of 1989. It is now time for Congress to close the OSC's doors, before the OSC can close the

doors on any more whistleblowers.

EXHIBITS:

1 Various relevant documents, including:
- a) Statement written and signed by the Executive Director and Commanding Officer about NAVELEX San Diego, that verifies numerous problems at the agency
- b) Sexually coercive Love Note agency attorney Linda Oliver delivered to an opposing attorney at a time when he was preparing a lawsuit naming her as a defendant
- c) Menacing and threatening "Doodle" agency attorney Kevin Keefe acknowledged drawing and sending to an agency whistleblower
- d) News article entitled, "Letter of Apology Becomes Navy Engineer's Dismissal"
- e) News article entitled, "Board upholds employee's right to criticize the boss"
- f) "Notice" ordered posted by the Federal Labor Relations Authority
- g) "Total Quality Management (TQM) Observations and Recommendations; NAVELEX San Diego," Final report by Department of Defense consultant William Ewald
- h) "Total Quality Management Assessment; Naval Electronic Systems Engineering Center," Draft report by Department of Defense consultant William Ewald

2 Merit Systems Protection Board Decision dated June 21, 1989

3 Various Correspondence from the Office of Special Counsel (one dozen letters)

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NAVAL ELECTRONIC SYSTEMS CENTER

BACKGROUND: Our Center, called NAVELEX, is coming out of a period of very poor management. For the 13 years ending about Jan 86, the command was run by a civilian and a series of C.O.s who never spoke to each other. The C.O. allowed the civilian head to run the supervisor selection process and supervisors were selected by the "good 'ol boy" process based on what they did for the head civilian, not on merit. Unethical and improper personnel practices during this period caused mistrust of management by the working staff. This persists to this day, although many gains have been made. The process of resurrecting the faith of the working staff in management has been the full time job of the present Executive Director, who arrived in Jan 86, and the present and just departed C.O.s.

It is our belief that one way to regain trust is to give some authority to improve processes to the employees performing those processes. This concept, which must be executed as a cultural change in the way things have been previously done, is called Total Quality Management (TQM), and has been promoted from as high as the President. It is a way of establishing efficiencies in process by allowing the working level to have a strong say in how they do their jobs.

OBJECTIVE: Our objective then, is to implement the principals of TQM in this organization within current budgets, and see positive results in improved processes, as measured by processing time reductions and saved costs, within one year. A more significant objective is the restoration of the faith of our people in the honesty and integrity of management. It is significant to note that the product of the organization has always been superb. The only symptom of the problem I cite is a lack of morale and a higher than normal incidence of grievances and EEO complaints.

I belive many of our processes are driven by outmoded thinking and superseded rules. Some efficiency enhancing improvements can be made here. If the workers get to suggest and implement the changes, we will realize a win-win situation.

A graduate student could:

1. Study selected processes for improvement.
2. Interview employees to determine best process improvement candidates for study.
3. Discuss ways of implementing TQM with supervisors and working staff.
4. Help facilitate Process Action Teams (PAT).
5. Work with management in selecting best approaches for program implementation.

Jack Mac Donald
Executive Director

Jerry Lay
Commanding Officer

Hello Gorgeous!

Wanna get

Romantic?

I'll bring

the wine,

you light

the fire.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Compliance Report was sent this 1st day of November, 1989:

via Overnight Mail:

Philip Arnaudo
Administrative Judge
Merit Systems Protection Board
525 Market Street, Suite 2800
San Francisco, California 94105

via Registered Mail, Return Receipt Requested:

Lawrence T. Reid, Jr.
P.O. Box 14
San Diego, California 92101

11/1/89
DATE

K.J. Keefe
KEVIN J. KEEFE
Assistant Counsel

FEDERAL TIMES October 14, 1991

Letter of Apology Becomes Navy Engineer's Dismissal

By Rodrigo Lazo

Greg Schwei was offended, to say the least, at a luncheon for employees of the Naval Electronics Systems Engineering Center in Vallejo, Calif.

Schwei, an engineer, was present when Capt. Peter Pierpont, former commanding officer of the center, referred to employees as "civilian weenies."

"He stopped, almost to say, 'Oops, I said something I shouldn't have said,' but he went on," Schwei recalled.

A member of the International Federation of Professional and Technical Engineers, Schwei sent a letter to Pierpont on union stationery asking for an apology.

Instead, Schwei says, he was called in by his supervisor and told he was no longer needed at the center.

The Federal Labor Relations Authority's regional director in San Francisco, Calif., recently found sufficient evidence to proceed with a complaint filed by Schwei and the union.

Capt. Pierpont told *Federal Times* that he used the term "civilian weenies" during the award luncheon, but he denies that he ever took any action against Schwei.

"That comment was common jargon around the command," Pierpont said. "But I also talk about the military weenies. That particular expression was not meant to offend anyone."

Pierpont said he meant no harm and is disappointed that someone thought the comment was insulting.

"In my view, it was not taken inappropriately by the employees of my command. In retrospect, could I have done better, yes."

FLRA officials say the naval systems center has agreed to a settlement: posting a notice that says the center will not act against employees who excercise rights protected by labor statutes.

Mae Brewer, executive assistant to the new commanding officer at the center, said the agency would not comment.

The FLRA did not ask the naval center to reinstate Schwei because his regular assignment is at Mare Island Naval Shipyard. Schwei was at the center on temporary assignment but never on the naval center payroll.

"Because of a budget crunch and shortage of work at the shipyard they were loaning people out to other areas," Schwei said. He was about halfway through his assignment at the

See Engineer, Page 24

Engineer

From Page 4

naval center when they dismissed him.

Schwei said that until he sent the letter everything had been going well at the center. He had travel orders in process to go to Laconia, N.H. for a couple of days to inspect a vendor supplying equipment to the naval systems center. That trip never went through.

Schwei's assignment ended the day he sent the letter to Pierpont. "That afternoon I was told, 'Goodbye,' " Schwei says. "One of the supervisors in the chain of command said I was doing a good job but my services were no longer needed."

Ram Ramanujam, director of the International Federation of Professional and Technical Engineers Local 25, says Schwei was not the only one offended by Pierpont's alleged comments.

"It's not very unusual," Ramanujam says. "Disrespect toward civilians comes out in different forms. There is really no reason for that. It's not going to motivate anyone."

Schwei's letter, written on union stationery, said, "Your disparagement of civilians in your command does not reflect well upon the naval service nor add to their morale in what must be trying times."

The settlement notice to be put up by the naval center says the agency will not end the assignment of Schwei or any other employee who engages in protected union activity.

Schwei believes he has been vindicated, even if it means losing the opportunity for employment with the center.

Pierpont says he will not censor his comments in the future. "I would never intend to make an inappropriate comment," he says. "On the other hand, I want to be free and open with my people. If I make an error once in a while, I'll have to take the heat for it."

Board upholds employee's right to criticize the boss

9/9/

By Jacqueline Ginley
Times-Herald staff writer

VALLEJO — The Federal Labor Relations Board in San Francisco has sided with a local labor union in protecting an employee's right to criticize superiors, even when the boss happens to be a ranking military officer.

The International Federation of Professional and Technical Engineers (IFPTE) filed a complaint with the labor board in June, claiming that one of its members had been dismissed from his job for criticizing Capt. Peter Pierpont, former commanding officer of the Naval Electronics Systems Engineering Center at Mare Island.

During a shipyard meeting in May, Pierpont allegedly referred to some of the shipyard's workers as "civilian weenies."

Greg Schwei, an engineer who had been assigned to a 120-day job at NAVELEX, drafted and signed a letter criticizing Pierpont's "disparaging" attitude toward his non-uniformed personnel.

The day Pierpont received the letter, Schwei was dismissed from his assignment, a job that afforded him training in a new field, according to Bruce Holden, president of IFPTE, Local 25.

"I was . . . called into the boss' office and (told) that, although I had done a good job, my services were no longer needed and I was being terminated," Schwei said.

But Pierpont, who was transferred and is now commander of the NAVELEX facility in San Diego, said Schwei "never worked for NAVELEX, Vallejo." He was there as a temporary employee on one of the many jobs that NAVELEX has the shipyard do, Pierpont said.

Although he couldn't remember when Schwei's assignment concluded, Pierpont said his dismissal was not a reprisal.

The reference to "civilian weenies" may have been inappropriate, Pierpont said, but "it is actually a term of endearment that's used widely throughout the command. It certainly wasn't meant to be offensive."

NOTICE TO ALL EMPLOYEES

POSTED PURSUANT TO A SETTLEMENT AGREEMENT APPROVED BY A REGIONAL DIRECTOR OF THE FEDERAL LABOR RELATIONS AUTHORITY

WE WILL NOT end the detail of Gregory Schwei, or any other employee who is on assignment from Mare Island Naval Shipyard to the Naval Electronic Systems Engineering Center (NAVELEX), because the employee has engaged in protected union activities.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

Naval Electronic Systems Engineering Center
Vallejo, California

(Agency or Activity)

Dated: 11/4/91 By: (Signature) Commander (Title)

THIS IS AN OFFICIAL NOTICE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

If employees have any question concerning the notice or compliance with its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority whose address is:

Federal Labor Relations Authority, San Francisco Region,
901 Market Street, Suite 220, San Francisco, California 94103
Phone: (415) 744-4000 or FTS 484-4000.

Case No. 9-CA-10445

FLRA Form 66 (Rev. 7-80)

TQM OBSERVATIONS AND RECOMMENDATIONS
NAVELEX SAN DIEGO

William M. Ewald
Westinghouse Electric Corporation

INTRODUCTION

This report is based on an analysis of the results of two site visits conducted in February and May, 1989. The first site visit consisted of a number of structured interviews with a cross section of the senior management within NAVELEX San Diego; the second focused on a much more comprehensive analysis of the TQM barriers within each Department through the use of the Nominal Group Technique. The report is divided into two sections: Profile of Concerns; and Recommendations.

PROFILE OF CONCERNS

There are at least eight different sub cultures operating at NAVELEX San Diego, each corresponding to the various departments and support units. Any organizational effort to address quality issues should recognize the differences inherent in these separate cultures. Specific initiatives should therefore be tailored to the needs of each.

The following observations apply across the entire Command, and are sufficiently important to require the attention of the Commanding Officer, Executive Director, and other principals. Specific Department initiatives have not been included except as they may be relevant to other operations within the Command. These issues were generated by carrying out a cluster analysis of the NGT results. The analysis produced a ranking as follows:

- Leadership and Management Issues (525 total points) This category is clearly the most important perceived source of inefficiency affecting the quality of NAVELEX services and products. Items in this category ranged from poor leadership at the top to lack of authority for Division Heads.

- Human Resource Issues (344 total points) This category was a clear second priority. Items included lack of training, recruitment issues, performance assessment deficiencies, and position management.

- Planning Issues (209 total points) This category was a clear third priority. Items include lack of clarity on charter and mission, absence of a strategic plan, crisis mode thinking, and poor utilization of resources.

- Communication Issues (164 points) This category horizontal as well as vertical communications, feedback norms, and communication with outside sources.

- Miscellaneous Other Issues (106-148 points) A last set of categories were clustered together. These included equipment, contract processes, facilities, sponsor issues, morale, customer relations, and internal processes.

On the basis of this analysis, which is remarkably consistent with the interview findings of the first site visit, five significant areas need your attention. These are described below in order of importance.

1. No True Corporate Team

This observation is based on a number of different but related data bases. There seems to be an almost universal perception that the Board of Directors is not operating as a corporate decision making body. Most of the power resides with the Commanding Officer, and there is a question about the leadership capabilities of many of the senior managers. Politics appear to still be alive and well among the principals. There are significant trust issues among the principals; and many of the managers openly admit they look to the interests of their own Departments before they consider their "corporate" responsibilities.

Participative management appears to be the exception. There is a general sense among many employees that the senior management is seriously lacking in leadership and management skills. There is a serious disconnect between the support and technical codes. Many technical codes believe that Command is not interested in their work or their problems. Other cited indications of absent leadership include inattention to an adequate planning process, little accountability for poor performance, and not enough aggressive marketing of sponsors and SPAWARS.

2. Lack of Management Skills

Closely related to the above issue is a general sense that NAVELEX managers need a lot more development in management skills. There were numerous NGT items that catalogued concerns over supervisor skills, poor or non existent planning skills, motivation and morale problems, poor performance appraisals, communication disconnects between managers and employees (and with other managers), technical deficiencies, and lack of loyalty to subordinates. These concerns were aimed at all management levels of NAVELEX. It is interesting to note that there is a general impression at each level that the other levels are less competent. There was little or no critical self assessment by respondents. This speaks to a culture which reinforces criticism of others, and which frowns on constructive self analysis.

3. Human Resource Issues

The technical expertise of NAVELEX employees is very, very good. Yet, morale is very very low. Morale of most engineers and technical personnel is based on working in an environment that has certain characteristics. These include working for people who respect your skills and abilities, recognition for good work, a chance to develop skills and creativity, working for efficient managers, and feeling well informed. These conditions are often not present in the working environment of many Departments and Divisions. There are frequent references to the lack of accountability (for good or bad work), little value attached to the inputs of subordinates, over emphasis on inspection and micro management, and little opportunity for meaningful development opportunities. The physical environment is severely lacking, and

in some cases, is a scandal. Many technical people believe there is a disproportionate emphasis on upgrading the building containing Administration and support functions.

The overriding impression is a feeling of impotency to change the current state of affairs. Although many are able to cite problems, fewer appeared to have the motivation to commit energy to solutions. The most frequently cited reason was a belief that nothing would get done, that senior management would pay lip service to the concept of change, and that there were too many risks involved with leading a change process. All are self fulfilling prophecies that result in no progress.

4. Planning Concerns

The Command does not have a strategic plan. The Command Plan is widely interpreted by the Support Departments as an attempt by the Board of Directors to micro manage their operations. Many Departments do not have a charter or good understanding of their mission and lack strategic directions as well. There does not seem to be a concern over Work Force 2000 issues, and little strategic human resource planning was found. Attention to "market niches" within SPAWARS has received little attention despite the increased competition for work. Other sponsors are seriously thinking of pulling back some work, and contingency plans have not been formulated. Many managers report they are in a crisis, reactive mode of management rather than anticipating trends. The conventional wisdom today is that managers will constantly be facing changes imposed from external sources. Without a robust planning process, the Command will be unable to make informed decisions about the uncertainties that lie ahead.

5. Communication Problems

This continues to be a major concern of employees at NAVELEX. Disconnects occur throughout the Command and appear to be based on a lack of respect, a discounting of the motives and abilities of others, real cultural and work ethic differences among Departments, distrust of higher levels of management, and inability or unwillingness to be assertive in stating one's position.

There is very little direct confrontation at NAVELEX when people are frustrated or concerned. Instead, they vent their feelings to others and very little energy is directed toward the source of their concern. Because of this, adversary positions often emerge between individuals, between levels of management, and between Departments without very much being done to improve the situation. Everyone seems to talk about the issue, but little gets done to solve it.

RECOMMENDATIONS

The first TQM assessment report (February, 1989) contained a number of specific recommendations for Command action. The NGT results from the second site visit confirm and support these recommendations. As examples, team building is still seriously needed among the Board of Directors, and at other levels of the Command. A local, trusted consultant should be employed to move this effort forward. Management training needs to be provided to all Division Heads and first level supervisors. Leadership training is needed by Department

and Division Heads. There were many more recommendations in the report which should be considered.

This report contains specific TQM recommendations. Many are under active consideration by Command.

1. Establish a TQM Principal

This person should have a high position of power within the organization, have the respect of peers and subordinates, and be motivated about the responsibilities of the assignment. The person should report directly to the Executive Director. The initial thinking of the Command is that the TQM responsibility will be a collateral duty of the 09B position, and will be piloted for a specified time period after which an evaluation of the effort will be made. This is the best approach for NAVELEX San Diego. It will also provide an easy vehicle for institutionalizing the process if it is deemed successful.

The TQM principal should review the findings of the first two site visits and determine which issues can be addressed with some measure of success. The priority issues listed in this report are significant challenges that will take some time to demonstrate progress. The recommendation is that the principal select two of these challenging issues and develop a long term strategy for solving them. It will be equally important to select other, less challenging issues which have a high probability of early success. Resolution of these issues will establish a track record of success that will provide a clear signal to the Command that the TQM approach can work.

2. Establish an Advisory Board

The TQM Principal should be assisted by an advisory board consisting of a cross section of respected NAVELEX professionals. This board would serve as a forum for discussing issues for consideration, recommended approaches, success criteria, and which resources of the Command should be dedicated to the problem. These resources could be project implementation teams that work on a specific issue until resolution and then disband, a reserved pool of dollars (an excellent start would be $75-100 thousand) for funding innovative high payoff projects suggested by any Department, and outside consultants who could provide technical assistance on any number of issues. The Board would rotate every two to three years to insure continuity. Staggered terms should also be implemented. Service on the Board should be a career enhancer within the Command.

3. Demand SPARWARS TQM Leadership

Many TQM problems within the Command have external sources that need the attention of higher authority. Problems with NAVCOMP and NAVSUP are two very powerful examples. SPARWARS needs to take an aggressive posture to relieve the pressures that come from excessive regulations, instructions, and inspections. This will be no easy problem to solve, but SPAWARS needs to be making a good faith effort to address them. There are other areas that are directly within the control of SPAWARS, an example being increased funding for automated equipment (including CAD/CAM). Modeling leadership behavior in the

form of actions that assist the field activities will be the best sign that SPAWARS is serious about TQM. NAVELEX San Diego should join the other field activities in holding the parent organization accountable for practicing TQM principles. One significant area would be protection from the IG process as NAVELEX San Diego managers engaged in the TQM process. The first step in any TQM effort is to be absolutely honest about the problem areas within the activity. In an inspection environment, managers will be unlikely to be very open about their problems for fear of the IG consequences.

4. Develop a Strategic Plan

There are a number of strategic issues that need to be seriously considered by NAVELEX San Diego. These include the following:

- Work force issues. These issues will be the driving force for continued technical quality over the next 10 years. In order to survive and prosper, NAVELEX managers will have to take an activist role in recruiting and retaining competent professionals. The changing nature of work, shifting labor force composition, and emerging biotech implications must be factored into current decision making if NAVELEX San Diego is to shape its own future rather than having this future imposed upon it.

- Facilities issues. Everyone is aware of the substandard working conditions for most of NAVELEX employees. Although some progress has been made in this area, much more needs to be done about the aging physical plant and the colocation problems. The strategic plan (with a more aggressive MILCON effort) needs to address this issue.

- Information resource management issues. The information resource management (IRM) system is not effective and has serious deficiencies. The Wang system is obsolete. CAD/CAM capabilities should be much stronger. This problem is not specific to NAVELEX San Diego, but to all of the field activities as well. A concerted effort by all of the activities (coordinated by San Diego) could have an impact on SPAWARS in a way that could not be generated by a single activity. There may also be additional candidate efforts for collaboration with the other field activities.

- Work balance issues. The issue of work balance is relevant within NAVELEX San Diego, and between San Diego and the other field activities. There is also concern from some Departments that their work may be eliminated in favor of inhouse sponsor assignments. In looking to the next century, what areas of work are expected to grow (systems work), and which are expected to remain steady or decline? These questions need to be answered and have enormous resource planning implications.

- Quality and productivity issues. There are a number of issues that fall into this category and all need to be considered in a strategic planning effort. Examples include: NAVELEX San Diego needs a corporate strategy for keeping engineers and technical personnel current with the latest technologies; Systems (especially internal

support) need to be upgraded and made more responsive to the operating units; quality failures and duplications of effort need to be documented and action plans developed; morale and motivation issues need to be addressed.

5. Establish a Leadership and Management Development Program

Many of the issues raised in the NGT sessions can be traced to less than effective management and leadership practices. The interview results from the first site visit also supported this observation. Several Navy facilities have developed a comprehensive approach to building a stronger group of managers and leaders (and technical skills as well). This approach includes a range of strategies and interventions. Perhaps the most appropriate program that would be applicable to NAVELEX San Diego can be found at the Naval Surface Warfare Center (Contact Person: Ms Sue Clancy 301-394-3820). This program model could be adapted to NAVELEX San Diego with a modest investment of resources. The NAVELEX Personnel Officer is most familiar with this program and could serve as a useful resource person in facilitating an appropriate design.

Summary

There are a lot of positive conditions and efforts underway at NAVELEX San Diego to improve the quality and productivity of services. This report would be remiss is such a reference was omitted. The purpose of this report is not to document these successes, but rather, to build a roadmap for possible TQM efforts by Command. Priority areas have been identified and several recommendations presented. The TQM Principal and Command should consider these recommendations and select those that make the most sense for NAVELEX San Diego at this time. These decisions should be communicated throughout the Command and then acted upon. Commitment to the TQM process will be generated only if the employees have tangible evidence that Command is serious about the effort. But there is no doubt that if this evidence is forthcoming, the employees will actively support it.

DRAFT

TOTAL QUALITY MANAGEMENT ASSESSMENT
NAVAL ELECTRONIC SYSTEMS ENGINEERING CENTER SAN DIEGO

William M. Ewald
Institute for Resource Development

INTRODUCTION

This report is based on a site visit conducted at the Naval Electronic Systems Engineering Center (NAVELEX), San Diego by an outside consultant during the week of 12-16 December, 1988. The content of the report is based on a series of structured interviews with most of the principals and a representative sample of Division Heads. These interviews were augmented by a review of several documents and memoranda including the Command Plan, customer feedback summaries, internal memoranda concerning the activities of the Work Analysis and Resource Allocation Committee, and other relevant material. A tour of the main facility also provided some insights.

The remainder of the report is organized into four sections. Each contains one of the critical elements necessary for a total quality effort. These elements were drawn from the experience of Westinghouse, IBM, 3M, and other U.S. companies engaged in serious quality improvement efforts. They have also been used by the General Accounting Office in several General Management Reviews of such agencies as the IRS and the GSA. The four elements include:

- **Customer Orientation:** This element addresses the extent to which NAVELEX San Diego is satisfying internal and external customers through meeting their requirements 100% of the time.
- **Management Leadership:** This element encompasses four critical subareas including improving the quality culture, planning, communications, and accountability
- **Human Resource Excellence:** This element contains three critical subareas including the areas of participation, training, and motivation
- **Product and Process Leadership:** This area focuses on four critical subareas including products/services, processes/procedures, information systems, and suppliers/contractors.

The analysis of NAVELEX contains the principal findings and observations in each of these areas, and recommendations based on the findings. The analyses are designed to serve as a starting point for consideration by the Commanding Officer and the Technical Director, and then discussions among all Department Heads at NAVELEX San Diego.

CUSTOMER ORIENTATION

This element addresses a number of critical themes, each important to establishing a strong base of customer support, loyalty, and investment in NAVELEX San Diego. Three important customer bases were identified:

External Customers. For the most part, this group consists of the fleet receipients of services and products from NAVELEX San Diego.

Internal Customers. This group is really represented by the technical codes within NAVELEX San Diego. The support code is the main source of services to the technical codes.

Sponsors/SPAWARs. Most of the dollar support flows through either of these two groups. Although not strictly defined as a customer, the needs and expectations of these two groups are equally important as the other two.

External Customers

The universal perception among NAVELEX San Diego managers is that fleet support has always been strong as measured by the responsiveness of service delivery. At least one operation is viewed by the Commander as "world class" in performance. However, when the Commander asked his senior managers to rate their Department and the Command on customer service, several interesting findings resulted:

- The managers tended to rate their own Department's emphasis on the customer higher than the emphasis on customers in the Command as a whole. Even though their ratings were higher, the average for all Departments (76 out of 100 points) indicates there are potential areas for improvement. Unfortunately, the informal survey did not isolate which areas needed improvement. This informal survey should be followed with a more thorough discussion among the senior managers on areas that require attention. From the consultant discussions with managers, several promising areas appear to be:

  1. Establishing more formal, regular contact with customers on a face to face basis rather than relying on the current customer feedback survey which produces a 29% return, and not always by the key person who received the service or is using the product. It is recommended that NAVELEX San Diego strive to receive 100% feedback from customers, and not always after the service has been rendered. It would be wise to have regular communication with the customers to determine how well the equipment/system is functioning, anticipated design changes for enhancements, potential support system or technical problems, and recommendations for improvements in service. This kind of information should be routinely solicited from all customers. Current feedback indicates that 91% of the customers who respond feel the service was good to excellent.

The remaining 9% (N=9) feel the services were less valuable. NAVELEX San Diego should strive to isolate the reasons for the lower ratings, initiate corrections, and strive for a 100% good to excellent rating in the future.

2. The customer interface should be used to seek ways in which NAVELEX San Diego can enhance its service base. These regular contacts will provide NAVELEX San Diego with other benefits, specifically, adding value in the form of proactive technical advice for improved operations, and an advance warning on strategic technical and design issues that will enable NAVELEX San Diego to position itself in the near term to meet long term emerging fleet needs.

3. Isolating and removing internal support barriers that prevent technical codes from being as responsive as they might otherwise be. It is fair to say that all technical codes have serious concerns about the responsiveness of the staff codes. The lower rating of customer orientation for the command is, in some way, attributable to the lowered confidence by the technical codes oin the ability of the support codes to get the job done in a timely manner. Although the support codes also have legitimate concerns about the technical code inputs or requests for service, the Command should accelerate efforts to steamline the support services (e.g., ordering, receiving, and tracking of materials; eliminating excessive instructions).

- The Commanding Officer and the Technical Director tended to rate the Command commitment to customers about the same as the Department Heads indicating a good consesus on this important area. All agree that customer relations are improving.

- The Commanding Officer and the Technical Director should consider eliminating the apparent duplications that exist in some of the suppport functions and the depot. Although there may be good reasons for the redundancies, these do not facilitate good customer relations (e.g., confusion on point of contact and accountability).

[redacted]

[redacted] disfunctional systems and behavior patterns hat produce duplication, overlap, and delays in service; and constant strain between the technical codes and the support codes. The technical codes believe they get their job done in spite of the support system, not because of it.

The internal customer issue appears to be one of the most serious problems in moving the organization to a higher level of quality. It would come as no surprise if large sources of inefficiency (higher costs and delays) were being generated by the current practices within the Command. The current 01 Department Head and several of his key managers are making headway in solving many of the most pressing needs, but so much more needs to be done. It is recommended that the primary disconnects within the support functions at NAVELEX San Diego be identified, and that Command provide the 01 Department Head and his key Division Heads with the wherewithall to attack and eliminate these disconenects or inefficiencies. Travel, ADP, and the material system are good first candidates for consideration.

The Command Plan is widely viewed as an 01 improvement plan that initially may have been designed to attack support function disconnects, but it is perceived as not realistic, achievable, very micromanagement in orientation, and it is not taken seriously because there are no consequences about what is or is not done. The charge of micromanagement may be due to a slowing down effect because many of the more serious action items have already been completed (although most Department Heads would disagree with this). Providing a more rigorous accountability mechanism into assignments within the Command Plan would be a positive step.

Many support services do not come from within NAVELEX San Diego, but from other commands and activities. Providers of these support services are viewed more often as obstructionists to getting a job done rather than facilitators whose primary interest is to walk the technical employee through a bureaucratic maze most efficiently. In order to address these types of disconnects, the Commanding Officer and Technical Director need to gain some consensus among their peers about the locations and impact of poor service, the needed solutions, and the required resources to solve the problems. SPAWARs will then have to play a major role in engineering the system to be more responsive.

Finally, there needs to be improvements in internal service, regardless of the source. Examples include the many iterations of briefs, short lead times for the support services to complete actions, and lack of responsiveness to requests for feedback. All are symptoms of a culture that [redacted] for easy internal access to information, identification and validation of needs, and problem resolution. This condition reflects more on the leadership of individual managers who tolerate these kinds of behavior patterns. As with all leadership issues, action must come from the top managers who through their actions model with their subordinates the kinds of behaviors they wish to see.

Sponsors

Generally, NAVELEX San Diego gets high marks for attempting to maintain good relations with SPAWARs and sponsors. The interface between NAVELEX San Diego and the sponsors has steadily improved but a lot more needs to be done. On an individual program level, the major barrier appears to be the

high turnover rate of both military and civilian personnel. The rapid turnover reduces continuity, enhances the opportunities for misunderstandings, and elevates the travel budget because of the increase of trips back to Washington, D.C. SPAWARS also has to take a more aggressive role in representing the field activities across a broad spectrum of concerns ranging from MTP to incrased funds for technical modernization. This leadership must be forthcoming if the field activities are to believe SPAWARS is serious about total quality management.

MANAGEMENT LEADERSHIP

From an objective outside perspective, there seems to be no doubt that the Commanding Officer and Technical Director are serious about improving the total quality of NAVELEX San Diego. They are open to changes that make sense for the Command, are willing to take risks to improve operations, and are non defensive about problems. Since coming on board, the entire complexion of NAVELEX San Diego has improved. They have made some tough decisions, instituted some needed reforms and improvements, and have demanded more accountability.

However, most managers are skeptical about the effort. This skepticism takes a number of forms:

- Belief that the Commanding Officer is the driving force for quality improvements, with some uncertainty about the support from the Technical Director. This condition could be easily solved by allowing the Technical Director to take more of a lead in promoting quality. This will become more critical when the current Commanding Officer is transferred to another duty station.

- Questions about the sincerity of the Commanding Officer and the Technical Director to follow through. There have been lots of starts but not many completions. There is a strong impression that poor ideas, inputs and recommendations without the intent to commit the resources needed to achieve the improvements.

- Questions about the motives of the Commanding Officer and the Technical Director who appear to pay more lip service to quality than demonstrating it themselves. There is also a general feeling that the two top managers have a generally poor regard for line managers, especially first line supervisors.

This skepticism is a natural by product of any change efforts in which the work environment is undergoing revision. Leadership in this context is lonely. The skepticism should disappear as the Commanding Officer (and his relief) and the Technical Director hold firm on moving the organization to a higher plane of quality.

Aside from these general remarks, four specific areas of leadership will be addressed within the element of leadership. These include culture, planning, communications, and accountability.

Culture

Moving NAVELEX San Diego to a higher plane of quality represents a significant culture change for the organization. A reasonable estimate is that 20% of the yearly revenues for NAVELEX San Diego are probably linked to inefficiencies associated with all functions. This represents a dramatic challenge for the command and if successful, will result in a major change in the culture of NAVELEX San Diego.

Culture change associated with improved quality within an organization comes about only when certain conditions are present. Examples include:

- The leadership shapes a vision about the future of the organization with respect to quality and strategic directions (more on this in the next section).

- Improvements come through encouraging efforts along the critical paths of the organization (Departments at NAVELEX San Diego), not with legislated, standard changes across all functions. A valid approach in one Department will not necessarily be the case in another.

- Senior management models the behavior change it wishes to see in subordinates. This means the Commanding Officer and Technical Director (and shortly, Department Heads) must select areas with high visibility in which to demonstrate meaningful and sustained commitment to the quality effort. This will require some risk taking on their part, including pushing authority, power, and accountability to the lowest appropriate levels of the command. Commitment can take a number of forms, including selecting a quality principal who will have the authority, responsibility, and budget to support a sustained effort; selecting two or three key sources of inefficiency (e.g., material ordering) and getting on with improving them; and instituting a series of quality seminars with actions to be taken as the working output.

- A total systems approach must be taken, with Command resisting the temptation for the quick fix or the latest fad. Of particular concern is the tendency for many Navy activities to seize upon the Deming model or some variation, and attempt to "shoe horn" it into their environments.

These and similar approaches represent a set of values or norms which define more a philosophy than a set of specific actions. The actions really need to be defined at the operational levels. At NAVELEX San Diego, this would be at the Division Head level.

Planning

It is extremely difficult to plan in the current DOD environment. This is especially true of the field activities such as NAVELEX San Diego that must be constantly ready to react to unanticipated demands for service from the fleet. Nonetheless, NAVELEX San Diego needs a strategic road map that

outlines the future directions and goals of the organization. With no direction, there is the real risk that the individual Departments will seek new business in a haphazard fashion that may not represent the overall best interests of the Command.

The first step would be to create a strategic vision of where the organization should be technically within the next five years. This vision should result from a collaborative process that includes Department and Division Heads. If done correctly, the vision should be specific enough to drive the general marketing activities of the Command while not locking Department and Division Heads on specific paths that preclude taking advantage of new opportunities. The strategic vision should be revisited every six months or so to determine the validity of the direction.

There will probably be some areas that will grow, others that will remain static, and some that will decline or even may be candidates for divestiture (perhaps to other field activities). NAVELEX San Diego needs to determine its niche(s) in the SPAWARs community, what internal resources and assets will be needed to achieve these niches, what changes will be needed to position the organization to fulfill the customer demands for services, and to set in motion the needed decisions and actions to move the organization in the direction of its vision.

To do so will require a rigorous self assessment about the current set of conditions within the Command. This report is one example of such an assessment, but it is only a first step. The next should be a clear vision of the strategic directions for the Command, and then a prioritized series of steps or actions that will move the organization forward. These steps should also include what will be needed to improve the quality of the organization. Because NAVELEX San Diego has so many diverse program areas, it may be necessary to create a second tier of strategic directions at the Department level. But, this second tier should clearly fit the overall direction and vision of the Command.

The absence of a strategic vision for the organization is a serious concern that should be addressed within the next six months or so. If necessary, the new Commander should be involved in the process, perhaps even before he takes command. This process should be instituted no later than June or July of 1988.

Communications

This is one of the most serious problems within NAVELEX San Diego. There is clearly a problem among the Department Heads and Command, between the Division Heads and senior management, and between the suppport and technical code. In many cases, adversarial conditions exist and trust levels are very low. There are frequent communication breakdowns and relatively little done to address these breakdowns.

Part of this condition appears to result from the aggressive actions taken by Command to upgrade the performance of the NAVELEX San Diego in a

number of areas that were seriously remiss. Strong action always creates resentment and disruption of the status quo. In part, these actions have generated the following perceptions among senior managers.

- There is a general impression that the Commanding Officer and the Technical Director perceive that 10Q% of the managers are less than capable when it is their strong belief that the majority are working hard and performing well. They frequently cite the remarks of the Commanding Officer when he first came on board. The perserveration of these feeling over a period of several years indicates that a communication barrier exists between these managers and Command.

- There is a strong sense that little or no participative management practice exists at any of the levels. There are references that Command treats Department Head meetings as if they were the varroom, and that inputs and feedback from Department Heads are generally discounted. Although there appears to be encouragement of lively debate at the Board of Directors meetings, the decisions are almost always the Commanding Officer's or the Technical Director's call. As an example of this condition, Department Heads make frequent references to the lack of feedback and follow through on the recommendations of the Work Load Analysis Committee.

- There is a strong perception that there are reward inequities, favoritism based on style more than substance, and a reluctance to make tough decisions on holding people accountable. There are also frequent references to the debilitating impact of the rumor mill atmosphere at NAVELEX San Diego which does not honor confidentiality of information and creates a condition of low morale.

Even if all of the above perceptions are inaccurate, the fact that they are so strong and persist at all levels of the managerial chain indicates that communication and trust issues are critical concerns. A number of recommendations are in order.

- The Command should embark on a series of team building efforts beginning with the senior managers. These team building efforts should probably occur after the new Commanding Officer is brought on board, and changes in the senior management corps are made to upgrade the skills and abilities of this group. Currently, there are a number of low performing managers. Retirement will take care of part of the problem, but the current Commanding Officer and Technical Director has an opportunity to shape the profile of the management team prior to the new Commanding Officer.

- The team building efforts should be imbedded in a problem solving forum that addresses serious command issues such as the communication problems, the disconnect between support and technical codes, or the development of a strategic vision. Team

building is most successful when it is supporting real time issues that concern everybody.

- Team building should also occur at the Department levels as well including some forum for bringing the support and technical codes together to strategize about streamling the support functions.

- The roles, responsibilities, and authority of each level of the managerial chain should be clearly delineated. The recommendation is that power and authority should be pushed down to the lowest acceptable level within the organinzation. For the most part, this should be at the Division Head level. Along with this authority should come a strong accountability system (more about this next).

- Continue the Command all hands meetings with the Technical Director taking more of an open profile. Perhaps these meetings should be at the Department level rather than for the entire command to facilitate more of an exchange of concerns and ideas. Any concerns that are raised should be addressed promptly at the session or in writing soon thereafter.

Accountability

There appears to be a weak accountability system within the command. There were frequent references to favoritism, inequities, and sloppy or poor personnel reviews. A part of the problem is linked to a poor understanding of roles and responsibilities, part associated with the poor condition of communications, and part in the poor execution of the personnel reviews. However, not enough direct evidence was generated during the site visit to determine how pervasive or critical this problem really is.

There is no question that a problem exists. This issue was ranked very low by the Department Heads in an informal survey. The Division Heads were very concerned about this issue. A rigorous internal review of the award performance does indicate some apparent inequities at all levels. If managers and employees believe that their efforts will not be rewarded consistent with their performance, then a quality culutre will not be possible.

Clearly, more study is needed in this area to gain a more complete picture of the problem. Perhaps a tiger team of respected managers could be formed to make recommendations which should be seriously considered by Command. Regardless of the recommendations, follow through on putting some teeth into an accountability system will be essential.

HUMAN RESOURCE EXCELLENCE

The strongest positive at NAVELEX San Diego is the technical expertise of the employees. They know their particular mission, enjoy and take pride in their work, and strive to produce quality products and services. They would do even more if their direct supervisors were more skilled in managing

them, had the support of top management in streamling the system, and were given better facilities and equipment with which to work. In many cases, it appears that NAVELEX San Diego employees get the job done in spite of the system, not because the systems helps them.

Three elements are important for human resource excellence: participation, training, and motivation. These areas were not addressed at the employee level, but more so at the managerial level. More work will have to be done to determine to what degree employees participate in decision making (probably very little), what training is available, and the specific motivational issues that drive their performance. Some statements can be made in each area based on the interviews with the managers.

Participation

There appears to be little participative management practiced at all levels of the command. Participative management requires appropriate inputs, and at times, consensus on issues that impact affected subordinates. It is not a democratic, voting process. Managers are still accountable for their decsions no matter how they arrive at them. There is also little evidence of situational leadership or other management practices that indicate flexibility in decision making, employee involvement, or management style that accommodates the motivation and skill levels of employees.

Training of first level supervisors (Division Heads) in leadership and management practices would be a good investment. There are a number of these programs available. The Personnel Management Specialist at the Command is aware of a number of these, which can be tailored to fit the environment, norms, and values of NAVELEX San Diego. In concert with this upgrade in training, there needs to be a shift in the way Department Heads support their supervisors. By giving them more authority, power, and accountability (after training), these first line managers will be in a better position to be effective than they have eve been.

Training

Part of this issue was discussed above. There has been an effort in the last several years to increase the training opportunities within the Command. Most of this training appears to be technically based. There needs to be a balance between technical, skill base training and management and systems improvement training. Many large, forward thinking organizations routinely devote about 5-10% of their budgets to training. The figures for NAVELEX San Diego are not this high because of budget constaints. Within the constraints of this reality, efforts should be made to increase training in the areas of management, leadership, and organizational effectiveness.

Motivation

Morale is improving at NAVELEX San Diego, but a lot needs to be done. There have been frequent references in this report to poor morale among the

managers, particularly the Division Heads. The motivation associated with the work is very high; the motivation associated with the working environment is very low. In this case, environment is defined as both physical and conceptual. A number of points need to be made in this area.

- The facilities at NAVELEX San Diego are the worst this consultant has seen in 10 years of work with Navy activities. The Commanding Officer has executed some basic improvements, but they are far from enough. The contiued inactivity of SPAWARs to supporting a better working environment for the managers and employees of this command is inexcusable.
- The equipment at NAVELEX San Diego is first generation, at best. This is particularly true of the CAD equipment. Also the multiple locations of command lead to a number of inefficiencies.
- The regulations, bureacracy, instructions, and guidance from other activities need to be steamlined.
- The management and leadership climate within command has to improve. Specific areas for improvement have already been addressed in this report.

SPAWARs needs to become aggressive in supporting efforts that reduce the environmental burdens on the employees of NAVELEX San Diego. A number of recommendations should be developed by all of the field activities, because the problems appear to be consistent for all. For NAVELEX San Diego, the major priority needs to be relocating the activity or pushing the MILCON process very strongly. Equipment upgrades are a close second priority. At least a million dollars in authorization needs to be made in this area.

PRODUCT AND PROCESS LEADERSHIP

There are four areas that fall within this category: products and services; processes and procedures; information systems; and suppliers or contractors. Each will be addressed below.

Products and Services

This is a strong area for the command. NAVELEX San Diego has a deserved reputation for providing excellent service and products to the fleet. This reputation is based on the dedication and energies of the command employees who place a high value on quality of work. Many work on their own time to get the job done. There is less of a reputation for internal services and products. References to this problem have been made a number of times in this report. Most of the support code personnel wish to do a good job, but are hampered by many of the same conditions that impact the technical codes. Because they are so locked into their systems (regulations, instructions, etc), there is less freedom to improvise as is the case for the technical personnel.

Processes and Procedures

There is a lot of inefficiency in the processes and procedures of NAVELEX San Diego. At least 20% of the total yearly revenues are probably buried in the inefficiencies in the internal systems of the organization and in links to other activities (e.g., procurement). A more rigorous analysis needs to be made in this area. The recommendation is to bring in a industrial systems expert who can quantify the sources of inefficiency that are under the control of Command, create cost/benefits analysis, and make recommendations. There was frequent reference to the problems caused by system disconnects, behavioral practices by some support managers, and other interferences to indicate that this is a big problem area for command.

Information Systems

This is another big problem area within command. A large part of the problem appears to be the inability of the current support manager to generate an ADP plan that makes sense for NAVELEX San Diego. There appears to be an unwillingness or inability of senior managers to hold this person accountable. If he is unwilling or unable to produce on this very important issue, then appropriate action is needed. Information systems are vital to the success of daily management decisions. Accountability is virtually impossible without it. The continued inaction of senior management to address this obvious problem area is puzzling.

Suppliers and Contractors

This area received little attention in the site visit. Not enough time was available to conduct a rigorous analysis of the quality of contractors, vendors, and other suppliers. There were some references to contractor performance, but not enough to produce a valid analysis. More needs to be done in this area.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

MARIE R. RAMIREZ, Appellant, v. DEPARTMENT OF THE NAVY, Agency.	DOCKET NUMBER SF07528910334 DATE: June 21, 1989

Sean T. O'Bryan, Esquire, San Diego, California, for the appellant.

Linda B. Oliver, Esquire, San Diego, California, for the agency.

BEFORE

Philip L. Arnaudo
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant timely appealed her removal from the position Electronics Engineer, GS-12, effective November 19, 1988.[1] Board jurisdiction over this appeal is based on 5 U.S.C. §§ 7511, 7512, and 7701. For the reasons set forth below, the agency action is REVERSED.

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[1] The appellant's earlier filed appeal was dismissed without prejudice for good cause, and she refiled in a timely manner. *Ramirez v. Department of the Navy,* MSPB Docket No. SF07528910139 (Initial Decision, Feb. 14, 1989).

ANALYSIS AND FINDINGS

Charges

The appellant was charged with excessive unauthorized absence (AWOL) of 13 work days, and having "deliberately and, willfully refused" to provide information ordered by her supervisor.

Background

The appellant came to work at the agency activity in September 1985. In October 1986, she filed an Equal Employment Opportunity (EEO) complaint regarding her non-promotion and a claim of reprisal for "whistleblowing" and EEO activities. In 1987, she was promoted to the GS-12 level, retroactive to April 1986. She filed a second EEO complaint in July 1988.

In July 1988, the appellant requested sick leave for her medical condition which she described on the leave application form, Standard Form (SF)-171, as follows: "Sickness due to stressful work environment-See Doctor's notes." The appended notes included statements from her treating physician and acupuncturist which explained the noted statement. The physician stated that he had been treating the appellant during her pregnancy, and "Due to complications of her pregnancy, I have advised her to discontinue her regular employment as of 7/9/88. If you have any questions, please feel free to call."

The acupuncturist noted he had been treating the appellant "since May 9 for neuromuscular tension that is related to her job stress. Specifically, the emotional environment created at her work place creates an on-going source of tension and stress. During her pregnancy, with the increased musculoskeletal loading, these neuromuscular tension patterns have been amplified."

In the absence of her first level supervisor, Thomas Dodson, the appellant's second level supervisor, William Clawson, approved these leave requests up to September 2, 1988. The appellant delivered her child, her first, on August 7, 1988, and several days later Dodson directed her to provide certain documents to support any leave requests beyond September 2.

During July and August 1988, the appellant was examined by the physician who treated her during her pregnancy, an acupuncturist and psychologist. She requested that these specialists provide her agency with written information on her condition, and they did. The psychologist's statement, dated September 15, was provided to Dodson on September 16, 1988.

On September 22, 1988, Dodson issued a proposal to remove her from the service based on the two cited charges. He also noted that the agency had originally granted her leave request on the basis of applications supported by treating physician and acupuncturist, and concluded that these related only to her pregnancy. Dodson pointed out that he had directed the appellant to provide "acceptable medical evidence" by September 16, to support her request for continued leave beyond the September 2 date, and that he did not find the information submitted on her behalf by her psychologist, Dr. David Jacobs, to be sufficient to support her request.

In the notice of proposed removal, Dodson explained his reasons for rejecting the appellant's leave request extension as follows: "The letter you delivered on the afternoon of 16 September 1988, seems to suggest that your psychologist is writing a report about an illness not related to your pregnancy. I have thus concluded that you have nothing further to present regarding your pregnancy or complications related to your pregnancy and that any further information you may present has no relationship to reasons for which sick leave was earlier granted."

Dr. Jacobs' letter of September 15, 1988, explained that he had been treating the appellant for "work-related stress problems." It noted that the appellant had asked him to provide information to support her leave request because she was on unauthorized leave status. Dr. Jacobs explained that he was preparing a report "detailing this case for submittal to the appropriate agency." He added that in "the short time available," he was not able to provide a report, however, he would do so as soon as possible. In closing, he stated that "the

potential adversarial relationship" between the agency and the appellant "may add considerably to her stress." He also volunteered to answer any questions that agency officials might have on this matter.

On October 10, 1988, Dr. Jacobs provided Dodson a summary of his report in the format required by Dodson's notice of proposed removal. Specifically, Dr. Jacobs included the following: an assessment of current clinical status and future treatment plans; a diagnosis; an estimate of expected recovery date; and narrative explanations of how the illness incapacitated the appellant for her duties or any type of work. Dr. Jacobs also sent a copy of his October 4 report, filed with the Office of Workers' Compensation Programs (OWCP) on behalf of the appellant and her claim of on the job injury. Dr. Jacobs fully set forth the basis for his diagnosis and conclusions; his five page report discussed his examinations and the three tests that he had administered as well as his interviews with the appellant. He concluded that the appellant had been totally disabled from performing her duties for the period of time at issue, September to October 1988, because of stress and depression brought on by work conditions.

Despite the fact that this material was reviewed by agency officials, Clawson issued a final decision on October 24, 1988, removing the appellant.

Failure to follow a proper order

The preponderant evidence does not sustain the charge that the appellant "deliberately and willfully refused to provide the information" requested by the agency. The information requested was identified in the proposal notice as "administratively acceptable medical documentation" containing responses to the subject areas identified in Dr. Jacobs' response of October 10.

First, to the extent this charge is merely a conclusion that the appellant failed to support her leave request by providing the administratively acceptable documentation required by the agency, it is simply a repetition of the second charge of excessive unauthorized absence (AWOL). An agency may not compound the charges by describing the same conduct under another

charge. *See Southers v. Veterans Administration*, 813 F.2d 1223 (Fed. Cir. 1987).

To the extent that the charge is not cumulative, the agency was required to establish the appellant intentionally refused to file the required information. The testimonies of Dr. Jacobs and the appellant, as well as the documentary evidence, establish that the appellant attempted to file, and to have Dr. Jacobs file, the appropriate responses. In any case, responses were filed, although the agency did not find them "administratively acceptable."

The appellant explained, and Dr. Jacobs corroborated, that she had been under stress at her agency for some time, but the stress intensified during her pregnancy in late June 1988. She requested leave, as verified by her SF-171's, and visited Dr. Jacobs for treatment on July 28, 1988. She saw him again on August 1 and 3 and submitted to a series of tests.

After she had taken these tests, but before Dr. Jacobs had received the results, Dodson directed her to provide responses in the format noted above. The appellant repeatedly urged Dr. Jacobs to send a response to the agency which would fully explain her condition. She described the urgency of her situation, given Dodson's warnings of disciplinary action if she failed to meet the agency's requirements.

Dr. Jacobs did provide the September 15 letter, as noted. At the Board hearing, he convincingly explained that the testing service had been particularly slow in furnishing the results of the appellant's, as well as other, tests during this time and he was unable to respond more fully without the test results. Additionally, I find that the appellant's testimony as to her attempt to respond was credible. She attempted to submit the information required; certainly, she did not intentionally, willfully and deliberately refuse to provide the information.

In this vein, I have also considered the preponderant evidence which establishes that the appellant was suffering from stress; this was fully corroborated by the testimonies of the expert witnesses, as discussed below. Further, considering that

Dodson's directive was imposed within a short time of the birth of her first child, and under threat of disciplinary action, the appellant's request to her psychologist should have been sufficient evidence that she was attempting to comply. Even if she could not force Dr. Jacobs to write a report before he was ready, the appellant still prevailed or him to furnish a letter with an exp'anation and then she personally delivered it to Dodson. Moreover, Dr. Jacobs indicated in the letter that he was available to discuss the circumstances of the matter with agency officials. The officials did not avail themselves of this offer. Indeed, at no time did the officials attempt to learn of the appellant's condition directly from any of her treating specialists, all of whom offered to provide any needed information. With the exception of her physician, who treated her for the pregnancy, all provided written statements identifying her condition of stress.

The appellant also made certain that her psychologist filed the October 4 and October 10 statements. Her physician also filed a further statement of her condition on October 11, 1988. While the latter did not address the stress condition, it was plainly procured by the appellant in an attempt to comply with the agency directive. Under these circumstances, I find that the agency has not established that the appellant "deliberately refused to provide" the requested information. The charge is not sustained.

AWOL

The appellant was charged with 13 work days of AWOL from September 2 through September 22, 1988. At the time the appellant had exhausted her sick leave, but had sufficient annual leave to cover the time period at issue. She had requested advance sick leave as early as July 1988. She testified that she also requested to use annual leave from Dodson in September, but he told her she would remain in an AWOL status. The record further reflects that while the appellant was granted sick leave for the entire period from July to September 2, after her accumulated sick leave was exhausted, sometime in late July, the

agency applied the appellant's annual leave to the remaining period.

In order to support a charge of excessive unauthorized absence, when the agency has denied requested sick, and annual leave, the agency must establish that its denial of the requested leave was not unreasonable under the circumstances. *See Beasley v. Department of the Navy,* 33 M.S.P.R. 631 (1987). Further, the Board may consider evidence of the employee's mental condition even if it is introduced for the first time at the Board hearing. *See Zeiss v. Veterans Administration,* 8 M.S.P.R 15 (1981). In this matter, all evidence concerning the appellant's condition was available to the agency except a psychiatric report filed in March 1989, by Dr. Cannell. I have found that report to be relevant and material evidence supporting the appellant's leave request, but even in its absence, I find that the agency's denial of leave was unreasonable.

Initially, Dodson contended in the proposal notice that the appellant had not raised the complaint of stress earlier and that her leave had only been approved because of her pregnancy. As discussed above, the documentary evidence alone refutes this assertion. The documentary evidence established that the appellant raised this matter on several occasions. First, she stated the basis for her initially approved leave as "sickness due to stressful work environment." The acupuncturist's note referred to the subject, at length.[2]

She also filed a request for advanced sick leave with the agency Commanding Officer (CO), Captain Howard, on July 26, 1988. In this letter, she claimed that "due to continual stress" she was unable to work and fearful for the health of her unborn

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[2] I note that the agency did not explicitly reject the information provided by this trained practitioner. It has simply ignored his conclusions without any explanation or justification. I find no basis to ignore his conclusions, particularly in the absence of any contradictory evidence, and in light of all the other corroborating evidence. However, even if no weight were given to his conclusions, his discussion of the very subject raised by the appellant in her SF-171, at least, put the agency on notice that the claim of stress was being made.

child. She referred to the two letters from her treating specialists, her physician and acupuncturist, and claimed that she now realized that she was suffering from serious work-related stress. Further, the appellant was highly credible when testifying about the onset of her stress, as early as June 1988. She averred that she had informed Dodson of this condition. She noted that she had tried to explain this to Dodson on June 28, but he had reacted in a manner which merely increased her fears. According to the appellant, it was this exchange with Dodson which precipitated her visit to her physician, and when she explained to him her work stress, he wrote the letter to the agency recommending that she be granted leave.

These documents support her testimony, which I find to be credible based on its internal consistency, corroboration with documents, and the appellant's demeanor. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987). In contrast, given this record, I do not find credible or reasonable the contention of agency officials that they were unaware that the appellant had requested leave based on her claim of stress due to the work environment. The claim by these officials that they relied on her physician's statement, which did not specify stress, but emphasized pregnancy, is not credible or reasonable since the appellant plainly identified stress on the approved SF-171's, her acupuncture identified it several times in his appended statement, and the appellant specifically complained of stress in writing to the CO in July.

Thus, Dodson's contentions in the proposal notice that the appellant was raising a new reason for leave is contradicted by the preponderant evidence of record. The appellant had amply identified her contentions of the stress claim. Indeed, the original SF-171's unequivocally identified stress as the basis for her claim, not pregnancy. In any case, the appellant was entitled to request sick leave for reasons of stress, even if she had never previously raised the matter.

In sum, in light of the documentary evidence, including the appellant's noted written and filed claims of stress and the

reports filed by the identified practitioners, I find her claim of illness due to stress to be credible.

These reports were further enhanced by the credible testimony of Drs. Jacobs and Cannell at the Board hearing. Dr. Jacobs established his expertise as a certified practicing psychologist since 1974, who was treating the appellant at the time of her alleged incapacity. He confirmed her contentions and credibly explained his findings. He interviewed the appellant for several hours during several sessions on July 28, August 1 and 3, and later on October 7, 12, and 24. He gave her three diagnostic tests and concluded that she was suffering from "moderate depression" and "a very high level of stress" as of August 3.

In response to the careful cross-examination of the agency representative, Dr. Jacobs justified his findings of Depressive Neurosis (*i.e.*, Dysthymia) and Post Traumatic Stress Disorder (PTSD). I have noted the probing examination about the PTSD diagnosis, and the difference between a single episode and accumulated incidents. The distinction was explained by Dr. Jacobs so as to establish a reasonable basis for his conclusion. However, the most important and dispositive point, is that the appellant was, in fact, suffering from a disabling "stress" condition, whether it was caused by an accumulation of incidents or by a single episode.

Dr. Jacobs concluded that the appellant was "in crisis" on July 28, but he did not determine the onset date since he had not seen her earlier. Further, by October she was out of the crisis, but still experiencing some depression. Dr. Jacobs credibly explained his conclusion that the test results accurately reflected the appellant's condition, and not biased by any intentional distortions induced by the appellant. He also concluded that the appellant's pregnancy was not the source of the stress causing the diagnosed condition.

Dr. Cannell provided a 20-page report to the OWCP and the agency in March 1989. The report was based on 3 hours of interviews and testing. Dr. Cannell is a Psychiatrist and

Diplomat of the American Board of Psychiatry since 1978. He is a member of the California Society of Industrial Medicine and Surgery and has B.A. and M.D. degrees. He has been licensed to practice medicine in California since 1977. I found him to qualify as an expert witness on the basis of his knowledge, skill, experience, training and education.

Dr. Cannell testified that the appellant was suffering from "significant depression" during the period at issue. He found that she had suffered "cumulative emotional trauma" as a result of work conditions from 1986 up to the time at issue. In his opinion, she was not fit for duty during the period from September 2 through September 22, 1988. He found her still to be suffering from "residual depression without significant amelioration." In summary, he concluded that the appellant suffered from "Major Depression, Single Episode, Moderate (DSM-III-R 296.22); and Psychological Factors Affecting Physical Condition (DSM-III-R 316.00)."

He explained his conclusions fully in the report and at the Board hearing. Although his findings are based on interviews and tests subsequent to the event, the are entirely consistent with, and corroborate, the findings of her psychologist, Dr. Jacobs, who treated her at the time. They are further supported by his findings that the appellant's premorbid history was free of any evidence of the diagnosed conditions prior to the identified period of work-related trauma. He explained how the objective symptoms exhibited by the appellant, fidgeting, irritability, nervousness, hesitancy, difficulty concentrating, hesitant thought processes, and over-controlled emotional expression were related to his diagnosis, and consistent with her test results.

Further, he justified his conclusion that the appellant was providing trustworthy, not feigned information and was not delusional. In short, he was confident that the appellant had not faked her diagnosed condition.

Lastly, he pointed out that in his experience, lay persons do not necessarily observe the relevant symptoms to form a basis for an opinion, even a non-expert one, on such a condition as

stress. This may seem to be an obvious point, however, the appellant's supervisors repeatedly referred to their conclusions that the appellant did not appear to be under stress at the time of her leave in July.

The direct response to this is they were not the best witnesses, in these circumstances, the qualified specialists were. The agency produced no expert testimony which contradicted the appellant's expert witnesses. It had the authority to request that the appellant to take a fitness for duty examination if it did not agree with the diagnoses and information provided, and did not do so. Resort to outside experts would appear to have been appropriate in light of the cumulative weight of the evidence presented by the appellant.

Additionally, agency officials never contacted any of the specialists that treated the appellant, although each invited the supervisors to do so. Keeping in mind the nature of the appellant's claim, an injury which is not readily discernible such as a broken finger or foot, the failure to make personal inquiry, was not reasonable.

Moreover, the appellant produced a co-worker, T. Reid, who testified that he had publicly noted at meetings, without contradiction, that the appellant was exhibiting signs of stress, such as an inability to concentrate.

I have also considered the reasons advanced by Clawson for his decision not to accept the diagnosis of stress sufficient to grant leave for the period in question. Initially, Clawson relies for his personal conclusions on his observations of the appellant prior to her departure on leave in June. Needless to say, such an opinion, even if otherwise sound at the time, which is not conceded, is not necessarily reliable several months later. Particularly, in this case, where the appellant's personal life was effected and she attributed some of her difficulties to Dodson's actions which occurred after July.

Concerning specific arguments advanced by Clawson in his March 1989 statement, these are addressed by the testimony of Dr. Jacobs at the Board hearing. There is no reason to believe that

they could not also have been addressed by Dr. Jacobs if the supervisors had merely taken advantage of Dr. Jacobs' offer and simply contacted him. Then, the questions that Clawson raised (*e.g.*, what was the period of disability?) or the conclusions he made (*e.g.*, the ailment seemed to improve without treatment) could have been promptly addressed and answered. The specialists identified the period and noted that the source of the stress having been removed, the stress diminished.

Further, Clawson based his rejection of the medical/psychological opinions on his own alleged expert knowledge, and his disagreement with the appellant's rendition of the facts to her treating specialists. For example, Clawson did not accept the stress diagnosis because he felt that the stress was not of sufficient duration. In the opinion of the experts, the duration was sufficient to make a diagnosis. Thus, Clawson's opinion was founded on an unreasonable assumption. Moreover, Clawson asserted a particular expertise based on his "scientific training" as an Engineer. He opined that the psychological reports were not entitled to weight to the extent that they purported to describe and diagnose conditions existing at an earlier time. Again, the best evidence on this was the testimony and reports supplied by the experts. They routinely perform these diagnoses.[3]

Finally, Clawson flatly disagreed with the rendition of circumstances which the appellant provided to the specialists and on which, in part, they based their conclusions. Since, Clawson could not agree with the appellant's "facts," he could not accept the psychiatric and psychological diagnoses.

This is erroneous and unreasonable to the following extent: the experts relied on more than just her rendition of facts. They based their diagnosis on test results, as well as objective

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[3] Indeed, it is axiomatic that expert witnesses and evaluators, including Engineers, frequently provide their opinions and conclusions on the subject of their expertise, after the event at issue, on the basis of observations made after the event or even on the basis of assumptions and hypotheticals.

observations of the appellant, and her description of her feelings and the difficulties in her personal life. Considering Clawson's lack of expert knowledge on this subject, he could not reasonably be expected to evaluate such matters.

Moreover, he was disagreeing with her versions of facts of which she, at least, had personal knowledge. To the extent that he considered any circumstances and "facts" other than those of which he had similar personal, first-hand knowledge, his was merely an opinion.

Given Clawson's fixed opinions and personal versions of events, and considering the seriousness of the issue, it would not have been unreasonable to have another person make this decision.

As Drs. Cannell and Jacobs explained, they concluded that her version was essentially not feigned or false. On the other hand, to the extent that her rendition was erroneous, Dr. Cannell explained that this could be evidence of delusional thinking and indicate a grave condition. In any case, further investigation was justified under these circumstances.

Considering the nature of the claimed condition, and that the appellant had already used several weeks of sick and annual leave from July to September 2, on the stated basis of her claimed "sickness due to stressful work environment," failure to take any steps in these circumstances was not reasonable.

Given these circumstances, the period of 13 days at issue, the appellant's annual leave balance which exceeded that period, and the cited diagnoses and testimony by the appellant, I find the agency has failed to establish that its denial of leave was reasonable.

I have also considered the appellant's contentions that the agency was required by its regulations to put her on restricted leave, as a leave abuser, before taking action. (*See* Exhibit EE.) This is not patent from the document, and single instances of prolonged absence would appear to be appropriately addressed by the agency in the absence of such a letter. On the other hand, the agency could have waited until the appellant returned

to duty, and presented her excuses, before proposing her removal. This would have been consistent with federal government policy providing for warnings.

Similarly, the agency did not establish that her presence was required at work due to requirements of the service. Her project had been reassigned months earlier and was being properly handled, without the use of overtime, by her successors. Thus it could have granted the appellant annual leave for this period, in accordance with agency regulations, and thus have avoided this action.

Affirmative Defense

The appellant raised several contentions. She has the burden of proof on these issues. *See* 5 C.F.R. § 1201.56.

Disparate treatment on the basis of sex (pregnancy)

The appellant contends that her request for advance sick leave during her pregnancy was denied, although other pregnant women were granted such leave. To the extent that this allegation refers to any period after September 2, when her leave expired, it is not supported by the record evidence. The appellant only requested leave after that date on the basis of her stress condition, and the agency denied it for reasons already noted. When the agency granted other pregnant woman advance leave, the basis of their requests was a pregnant condition. This evidence does not establish a disparity based on her condition.

On the other hand, concerning the period from July to September 1988, although the appellant requested advance sick leave, it was not granted. The appellant's annual leave account was debited after all of her accumulated sick leave was exhausted. The evidence established that other pregnant women were granted advance sick leave including one who received approximately 240 hours and another 215 hours. This established a prima facie case of disparity

If there existed any basis for treating the appellant differently than the other pregnant woman under these circumstances, the agency did not meet its burden to establish a

legitimate reason for its denial of her request. *See Woody v. General Services Administration*, 6 M.S.P.R. 486, 488(1981).

I find, therefore, that he appellant has established this contention by preponderant evidence.

Discrimination on the basis of a handicapping condition

The appellant contends that she was a handicapped person entitled to "reasonable accommodation" (*i.e.*, absence) during the September 2 through September 22 period, based on her temporary disability caused by stress. The appellant has not established a prima facie case of discrimination. To the extent that the condition was a transitory illness which had no permanent effect on her health, it is not a substantial limiting impairment or handicapping condition within the meaning of the regulations. *See* 29 C.F.R. § 1613.702(a); and *Stevens v. Stubbs*, 576 F.Supp. 1409 (N.D. GA 1983); *see also Stalkfleet v. United States Postal Service*, 6 M.S.P.R. 637, 647 (1981); and *Peru v. Department of Justice*, 22 M.S.P.R. 52, 54 (1984).

Reprisal for "whistleblowing" activities and EEO complaint filing.

In order to establish reprisal, the appellant must meet the test set forth in *Ireland v. Department of Health and Human Services*, 34 M.S.P.R. 614 (1987); *see also Warren v. Department of the Army*, 804 F.2d 654 (Fed. Cir. 1986). I find that she has done so. The appellant demonstrated that she was involved in the identified activities and was subjected to adverse action. She filed two EEO complaints and had allegations against agency officials, including Dodson and Clawson, of waste and abuse of authority. These allegations came to the attention of the supervisors that took the removal action, Dodson and Clawson. The remaining issue is whether she established a causal connection. As the Board held in *Bodinus v. Department of the Treasury*, 7 M.S.P.R. 536, 541 (1981), *aff'd* 785 F.2d 323 (Fed. Cir. 1985), this connection "in almost situations, will necessarily have to be inferred from circumstantial evidence."

As in *Bodinus*, I find that the evidence of causal connection is established by the temporal sequence of the chain of events

proceeding the appellant's removal, the failure to sustain the action, and the evident lack of reasonableness in taking the severe action against the appellant with such alacrity and without appropriate investigation.

Initially, I found that the appellant presented sufficient evidence of a condition of stress to put the agency on notice to inquire further. Instead of doing so, however, her supervisor promptly dispatched a proposal to remove her. In this proposal, he virtually informed her that it was unnecessary to reply since he could conceive of no basis on which her response would be accepted. This was stated in the excerpt from the proposal notice at paragraph 7, page 3 and is cited above at page 3.[4]

The agency failed to sustain its charge by a significant margin. This was not a close case. The appellant provided abundant evidence that she had claimed stress at the onset of her leave, yet agency officials denied it.

In addition to not sustaining any of its charges, the agency referred to other matters in the proposal and decision letters which also indicate a retaliatory motive. For example, Clawson cited the appellant's alleged uncooperative attitude and her alleged unsubstantiated and "malicious" claims against him as reasons supporting her removal. Since these were raised in the decision, the appellant did not have an opportunity to respond earlier. Additionally, there are references to the appellant's "deliberate and willful refusal" to provide the requested information. Given the evidence that the appellant made significant efforts to have her physicians provide responses, this contention is not merely unsupported, it is unreasonable.

In a memorandum of October 19, 1988, prior to his decision, Clawson explained his reasons for taking the removal action. Among these were other matters not set forth in the charges, that is, that the appellant had accused him of "impaired judgement"

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[4] Dodson stated, "I have thus concluded that you have nothing further to present...and that further information you may present has no relationship to reasons for which sick leave was earlier granted."

and an "egregious EEO record." There is no record of any prior discipline based on these incidents. Thus, the supervisor's decision to remove the appellant was made on the basis of issues to which she had not responded. This also established how his personal motivations affected the decision to a significant degree, and caused him to decide against the appellant.

Dodson and the appellant both testified that he had warned her that filing EEO complaints against the agency could hurt her career. Since she had already prevailed on her EEO complaint about the promotion, this warning apparently included even those EEO complaints which the agency had already found to be justifiable.

I have also considered that the apppellant received a letter of caution from the CO for her written remarks that he had exhibited "blatant disregard" for the health of the employees. The evidence, including the testimonies of the appellant and the CO, did not establish that his response was undeserved or inappropriate under the circumstances. The appellant did more than identify a safety "problem." She alleged that the CO was derelict in his duties. She was cautioned for that, not for having filed a complaint about safety.

Having found that the appellant has shown that retaliation was a significant factor in the removal action, I have considered whether the agency established by a preponderant evidence that it would have taken the action absent a retaliatory motive. No basis for such a finding has been established.

Accordingly, I find the evidence does not establish that the agency would have taken the removal action, even in the absence of a retaliatory motive.[5]

Summary

The agency failed to sustain its charges by preponderant evidence. The appellant established by preponderant evidence her contentions of retaliation and disparate treatment on the basis

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[5] I find no basis to establish whether the retaliatory motive emanated from the EEO or Whistleblowing activities.

contentions of retaliation and disparate treatment on the basis of her sex (pregnancy condition), but she did not establish her claim of discrimination on the basis of handicap.

DECISION

The agency's action is REVERSED.

ORDER

The agency is ORDERED to cancel the removal and to retroactively restore appellant effective November 19, 1988. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

The agency is also ORDERED to issue a check to appellant for the appropriate amount of back pay, with interest, and benefits in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. Appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency in furtherance of compliance.

If there is a dispute about the amount of back pay due, the agency is ORDERED to issue a check to appellant for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office concerning the disputed amount.

The agency is further ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the agency about its intentions.

FOR THE BOARD:

Philip L. Arnaudo
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on July 26, 1989, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petitio.. for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Equal Employment Opportunity Commission
Office of Review and Appeals
P. O. Box 19848
Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a petition with the appropriate United States District Court no later than 30 calendar days after the date this initial decision becomes final.

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition must be received by the court of appeals no later than 30 calendar days after the date this initial decision becomes final.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees by filing a motion with this office no later than 20 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 U.S.C. § 7701(g), 5 C.F.R. § 1201.37(a), and applicable case law.

ENFORCEMENT

If, after the agency has informed you that it has complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a motion with this office no later than 30 calendar days after the date of the agency's notification of compliance.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail this day to each of the following:

Appellant

Marie R. Ramirez
3734 Belford
San Diego, CA 92111

Appellant's Representative

Sean T. O'Bryan, Esquire
Harrigan, Ruff, Ryder & Sbardellati
1855 First Avenue, Suite 200
San Diego, CA 92101-2614

Agency's Representative

Linda B. Oliver
Department of the Navy
Naval Electronics Center
P.O. Box 80337
San Diego, CA 92138

Other

Mr. Timothy M. Dirks
U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, NW., Room 7623
Washington, DC 20415

Date: June 21, 1989

Diane S. Gong
Legal Clerk

U.S. OFFICE OF SPECIAL COUNSEL
1120 Vermont Avenue., N.W., Suite 1100
Washington, D.C. 20005-3561

July 27, 1992

Ms. Marie R. Ramirez
3734 Belford Street
San Diego, CA 92111

Re: OSC File No. MA 92 0133

Dear Ms. Ramirez:

We received your letter dated July 8, 1992, requesting that the Office of Special Counsel intervene on your behalf in a case you have pending before the Merit Systems Protection Board. As you know, we have telephoned you on several occasions to discuss this matter with you, but you were unavailable.

We have reviewed our file concerning your previous complaint to this office about your proposed removal. Our review of the file does not provide any basis upon which we could intervene in your present appeal. We terminated our investigation into your complaint and by letter dated December 2, 1991, informed you of the reasons for our action. You requested that we reconsider our decision and by letter dated January 21, 1992, we notified you that we would not reopen this file.

Accordingly, we will not intervene in your present appeal before the Merit Systems Protection Board.

Sincerely,

Leonard M. Dribinsky
Deputy Associate Special Counsel
for Prosecution

LMD/lmd

U.S. OFFICE OF SPECIAL COUNSEL
1120 Vermont Avenue., N.W., Suite 1100
Washington, D.C. 20005-3561

January 21, 1992

Ms. Marie R. Ramierz
3734 Belford Street
San Diego, CA 92111

Re: OSC File No. MA-92-0133
Request for Reconsideration

Dear Ms. Ramierz:

This letter will respond to your request for reconsideration of the decision of the Office of Special Counsel (OSC) to close the above-captioned file. The OSC closure letter informed you that we found insufficient evidence of any prohibited personnel practices or other violations warranting further inquiry by this office.

We have now completed a review of the file and your recent submission, and conclude that you have not presented any new information or evidence that would justify a reopening of this closed matter. You have not submitted evidence of any new personnel action, or any other substantial new evidence not previously reviewed by this office. Further, you have not presented any new evidence of a violation of law, rule or regulation. The thrust of your request for reconsideration appears to be that the agency fraudulently predated the effective date of your removal in order to gain more time to respond to your appeal before the Merit Systems Protection Board. However, as you noted, the agency claimed an error on their part when they rescinded the initial decision letter and made your removal effective January 11, 1992. The matter you have raised is not within the jurisdiction of this agency or within the definition of a prohibited personnel practice, which generally requires a personnel action. 5 U.S.C. § 2302.

It is noted that your Freedom Of Information request was responded to by this office on January 15, 1992.

Accordingly, we are declining to reopen this file. This is the final decision of the Office of Special Counsel in this matter and there is no further appeal available to you within this agency.

Sincerely,

William E. Reukauf
Associate Special Counsel
for Prosecution

WER:CAM/cam

U.S. OFFICE OF SPECIAL COUNSEL
1120 Vermont Avenue., N.W., Suite 1100
Washington, D.C. 20005-3561

January 15, 1992

Ms. Marie Ramirez
3734 Belford Street
San Diego, CA 92111

Re: Freedom of Information Act Request; OSC File No. <A-92-0133

Dear Ms. Ramirez:

This responds to your requests under the Freedom of Information Act (FOIA) and Privacy Act. You requested "copies of all of the investigative record, correspondence, note, memos, telephone conversation records, legal opinions, pertinent regulations-especially any which were utilized in determining if a prohibited personnel practice has occurred-and any other documentation in which [your] name is mentioned or not which concerns [you], whether [your] name was explicitly mentioned or not, especially communications of any form between OSC and other government agencies, including NAVELEX San Diego."

Your requests have been carefully reviewed and considered. The above-captioned file contains, a memorandum written by the assigned examiner of the Complaints Examining Unit, 2 telephone conference memoranda, 7 internal computer profiles, 4 matter reporting forms, 3 routing and transmittal slips and several letters that we exchanged. With respect to your request under the Privacy Act, the Privacy Act allows an agency to exempt a system of records from its access provisions if the system of records consists of investigatory material compiled for law enforcement purposes. *See* 5 U.S.C. 552a(k)(2). The Office of Special Counsel has exempted its complaint files as allowed by section 552a(k)(2). *See* 5 C.F.R. § 1830.5 Therefore, your request will be processed under the FOIA. With respect to your request for the regulations used in determining the disposition of your complaint, the FOIA concerns the release of existing documents; it does not require us to answer questions posed in FOIA requests. *See* Zemansky v. Environmental Protection Agency, 767 F.2d 569, 574 (9th Cir. 1985).

The memoranda are protected from disclosure under exemption 5 of the FOIA as they would not be available to a party, other than a agency in litigation with OSC, due to the attorney work product privilege. This means that the above-mentioned memoranda were prepared at the direction of an attorney, for the attorney's review. Moreover, the above memoranda are intra-agency materials were are protected from disclosure under OSC's pre-decisional, deliberative process privilege. Your request is therefore, denied with respect to the above-mentioned memoranda pursuant to FOIA exemption 5. *See* 5 U.S.C. § 552(b)(5). Furthermore, the above memoranda are protected from disclosure under

FOIA exemption 7 because they were compiled for a law enforcement purpose, and because disclosure could be expected to result in an unwarranted invasion of the personal privacy of the witnesses or other individuals named therein. This denial ensures that in the future, a witness will feel free to speak candidly to an OSC investigator. Therefore, your request is denied pursuant to FOIA exemption 7. *See* 5 U.S.C. § 552(b)(7).

Moreover, the computer profiles, matter reporting forms, and routing and transmittal slips are being withheld under exemptions 2 and 7, because they relate solely to the internal practices and procedures of our agency and are of no interest to the public, or to protect the privacy of the witnesses or other individuals named therein.

The remaining documents in the file were either sent to you by us or you sent to us, and we assume that you do not want duplicate copies. If you do, please inform us.

If you are dissatisfied with the above decision, you must appeal, in writing, within 30 days, to William E. Reukauf, Associate Special Counsel for Prosecution, at the above address.

Sincerely,

Robert D. L'Heureux
Associate Special Counsel
for Investigation

RDLH:ral

U.S. OFFICE OF SPECIAL COUNSEL
1120 Vermont Avenue., N.W., Suite 1100
Washington, D.C. 20005-3561

OCT 2 1991

Ms. Marie R. Ramirez
3734 Belford Street
San Diego, Calif. 92111

Re: OSC File No. MA-92-0133

Dear Ms. Ramirez:

This is in response to your complaint to the Office of Special Counsel in which you allege that Mr. John MacDonald, who is your third level supervisor, issued a notice of a proposal to remove you because of a protected disclosure that you made, and because of a complaint of discrimination that you filed. Further, you ask that this Office seek a stay of the removal that has been proposed.

The Office of Special Counsel is authorized to investigate allegations of activities prohibited by civil service law, rule, or regulation, and prohibited personnel practices. 5 U.S.C. §§ 1214 (a)(1)(A), 1216(a), and 2302(b). We have carefully considered the information you provided. However, we have found insufficient evidence of any prohibited personnel practices or other violations warranting further inquiry by this Office.

It is a prohibited personnel practice to take or fail to take, or to threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of a disclosure of information by an employee or applicant for employment which the employee or applicant reasonably believes evidences a violation of law, rule, or regulation or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8) (as amended, 1989). The elements of proof necessary to establish a violation of (b)(8) are: (1) a protected disclosure of information was made; (2) the agency officials exercising personnel authority had knowledge of the disclosure and of the identity of the employee making the disclosure; and (3) the protected disclosure was a contributing factor in the personnel action or threat of a personnel action. Gergick v. General Services Administration, Merit Systems Protection Board, 43 M.S.P.R. 651 (1990). However, corrective action may not be ordered if the agency demonstrates by "clear and convincing evidence" that it would have taken the same

personnel action in the absence of such disclosure. 5 U.S.C. § 1214(b)(4)(B).

It appears that you made a protected disclosure on June 20, 1988, when you told Mr. Jim Tacket of the Naval Investigative Service about a possible misappropriation of funds. Further, Mr. MacDonald, who proposed your removal on October 9, 1991, may have had knowledge of this disclosure, since he testified at the Merit Systems Protection Board hearing on your appeal of a prior removal action where you raised the issue of reprisal for whistleblowing and apparently discussed your disclosures. However, we found no facts indicating that there was a connection between the disclosure and the proposal to remove you, and the length of time, i.e., over three years, between the disclosure and the proposal makes any such connection appear unlikely. Further, we note that your removal was proposed because medical documentation and Office of Workers Compensation (OWCP) determinations indicated that you could not return to work at the agency, from whom you have been on leave without pay (LWOP) while receiving workers compensation since September 23, 1990. By your own admission, you have not reported to work since September 1989. Accordingly, even if your disclosure was a contributing factor in the decision to propose your removal, we believe the agency could clearly demonstrate that it would have proposed the same action in the absence of your protected disclosure. Therefore, we would not be able to prove before the Merit Systems Protection Board that a violation of 5 U.S.C. § 2302(b)(8) has occurred.

Reprisal for filing an EEO complaint is a prohibited personnel practice within the investigative jurisdiction of the Office of Special Counsel. 5 U.S.C. § 2302(b)(9). It is also a violation of the EEO laws and thus subject to a discrimination complaint itself. However, it was not intended that this Office duplicate or bypass the procedures established in the agencies and the Equal Employment Opportunity Commission for resolving such discrimination complaints. Therefore, it is the general policy of the Special Counsel not to take action on such allegations of discrimination; they are more appropriately resolved through the EEO process. 5 C.F.R. § 1810.1. In light of the information you have provided, we find no reason to depart from our policy in this matter. Thus, we will take no further action concerning your allegations of discrimination.

Accordingly, we have determined not to seek a stay of your removal and we are closing our file in this matter. However, because you alleged a violation of 5 U.S.C. § 2302(b)(8), you may have a right to seek corrective action from the Merit Systems Protection Board under the provisions of 5 U.S.C. §§ 1214(a)(3) and 1221. You may file a request for corrective action within 65 days of the date of this letter. The Merit System Protection Board regulations concerning rights to file an individual right of action with the Board can be found at 5 C.F.R. Parts 1201-1206 and 1209.

This letter should not be construed as an adjudication of any matter you have pending or plan to file under any administrative appeals procedure.

Sincerely,

Leonard M. Dribinsky
Deputy Associate Special Counsel
for Prosecution

LMD:RBE:JJC\jjc

U.S. OFFICE OF SPECIAL COUNSEL
1120 Vermont Avenue., N.W., Suite 1100
Washington, D.C. 20005-3561

July 16, 1991

Ms. Marie R. Ramirez
3734 Belford Street
San Diego, CA 92111

Re: Freedom of Information Act Appeal; OSC File Nos. 10-8-01267, 20-8-00030, 12-8-71131 & MA-90-1304

This responds to your Freedom of Information Act (FOIA) Appeal. On March 6, 1989, we received your request for documents from OSC File Nos. 10-8-01267, 20-8-00030 & 12-8-71131. On March 9, Robert D. L'Heureux denied your request under exemptions 5 and 7 of the FOIA. *See* 5 U.S.C. § 552(b)(5) & (7). [1/] On January 8, 1991, we received a request from you for the contents of OSC File No. MA-90-1304. On January 10, Mr. L'Heureux denied your request under exemptions 2, 5 & 7 of the FOIA.

You have appealed Mr. L'Heureux's latest decision, and are now seeking certain documents from all of the above referenced files. [2/] You assert that since Mr. L'Heureux had previously released a redacted copy of the above-mentioned closure memorandum, you are now entitled to any investigative reports in the above files. Moreover, you also claim that you need the requested documents to use in your appeal to the Merit Systems Protection Board. Further, you assert that exemption 7 is inapplicable because (1) the investigations of all of the above matters have been closed; (2) that the witnesses' privacy could not be invaded, since you identified certain of them to the OSC investigators; (3) you have not requested the names of any witnesses who have a *bona fide* right to confidentiality and (4) that you have not requested the disclosure of any "genuinely confidential" OSC investigative techniques or guidelines. In addition, you claim that since our investigations of your complaints have been inadequate, our releasing the requested documents could "[restore] ...the faith...and morale...of [your

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[1/] Mr. L'Heureux released a redacted portion of the closure memorandum in OSC File No. 10-8-01267. He also informed you that you could appeal his decision, but, that you must do so within thirty days.

[2/] You state that you do not want any documents that are privileged, classified as predecisional or deliberative, that are draft or are inter or intra-agency memoranda; nor are you seeking any documents that are related to OSC's "internal rules and practices."

agency's employees]...in the honesty and integrity of [their managers]." Furthermore, you state that we did not respond to your request for documents under the Privacy Act. Finally, you request that we respond "to the remaining issues and requests which [you] have before ...OSC."

It appears that your appeal of Mr. L'Heureux's denials concerning OSC File Nos. 10-8-01267, 20-8-00030 and 12-8-71131, are untimely. Our regulations only allow a thirty day period in which to appeal an initial decision made by Mr. L'Heureux. Your appeal, however, has been filed about two years after the deadline had expired. Thus, we will not accept your appeal concerning the three above-referenced files. We are, however, accepting your appeal concerning OSC File No. MA-90-1304.

With respect to your questions about the "issues and requests" contained in the complaints you have filed with us, the FOIA does not require us to answer questions posed in FOIA requests. See Zemansky v. Environmental Protection Agency, 767 F.2d 569, 574 (9th Cir. 1985). Furthermore, it is well settled, that the purpose for which records are sought has no bearing upon the merits of the request. United States v. Weber Aircraft Corp., 465 U.S. 792, 801-02, 104 S.Ct. 1488, 1494 (1984). Therefore, neither any appeal you have filed with the Board, nor your perceptions concerning the alleged inadequacy of our investigation, would affect the release of any document contained in the above files. In addition, the above-mentioned redacted closure memorandum was released to you so that you might have a better understanding of the information gathered during the investigation. This release was entirely discretionary, as OSC was not obliged to release any of this material. Martin v. Office of the Special Counsel, 819 F. 2d 1181 (D.C. Cir. 1987); Government Accountability Project v. Office of the Special Counsel, No. 87-0235, slip op. at 9-10 (D.D.C. Feb 19, 1988). Accordingly, Mr. L'Heureux's subsequent withholding of the remainder of the memorandum under exemptions 5 and 7 was consistent with the law.

Moreover, the Privacy Act allows an agency to exempt a system of records from its access provision if the system of records consists of investigatory material compiled for law enforcement purposes. See 5 U.S.C. § 552a(k)(2). The Office of Special counsel has exempted its complaint files as allowed by section (k)(2). Accordingly, access to OSC complaint files is controlled by the FOIA. The redacted portions of the Closure Memorandum and memoranda of telephone conversations were properly withheld under exemption 5 of the FOIA as attorney work product and as material evidencing the pre-decisional and deliberative process of OSC. Martin v. Office of the Special Counsel, 819 F. 2d at 1187. Moreover, none of the above documents represent the final opinion of this agency, and each was prepared by an attorney and under the supervision of an another attorney. Additionally, the withholding of documents under exemption 5 does not have any time limitations. May v. Department of the Air Force, 777 F. 2d 1012, 1014-15 (5th Cir.

1985). Finally, routing slips, computer profiles and similar material were properly withheld under exemptions 2 and 7 of FOIA.

The remaining documents in the file were written by you, addressed to you, or sent to you by us, and we assume you do not want copies.

If you are dissatisfied with this decision, you have the right to seek *de novo* review of the matter by filing a complaint in an appropriate United States District Court. *See* 5 U.S.C. § 552(a)(4)(b).

Sincerely,

William E. Reukauf
Associate Special Counsel
for Prosecution

WER:RAL/ral

U.S. OFFICE OF SPECIAL COUNSEL
1120 Vermont Avenue., N.W., Suite 1100
Washington, D.C. 20005-3561

MAR 13 1991

Ms. Marie R. Ramirez
3734 Belford Street
San Diego, CA 92111

Re: OSC File No: MA-91-0665

Dear Ms. Ramirez:

This letter refers to your recent letter to the Office of Special Counsel. You allege that you have been subjected to discrimination.

The Office of the Special Counsel is authorized by the Civil Service Reform Act of 1978 to investigate allegations of prohibited personnel practices and activities prohibited by civil service law, rule or regulation. 5 U.S.C. §1214(a)(1)(A), 1216(a) and §2302(b). Your allegation of discrimination is of a prohibited personnel practice within the investigative jurisdiction of the Office of the Special Counsel. 5 U.S.C. §2302(b)(1). However, it was not intended that this office duplicate or bypass the procedures established in the agencies and the Equal Employment Opportunity Commission for resolving such discrimination complaints. Therefore, it is the general policy of the Special Counsel not to take action on such allegations of discrimination; they are more appropriately resolved through the EEO process. 5 C.F.R. §1810.1. In light of the information you have provided, we found no evidence of any other prohibited personnel practice or any other violation within our investigative jurisdiction. Accordingly we have closed our file in this matter.

If we misconstrued your allegation, and you are in fact alleging a prohibited personnel practice defined at 5 U.S.C. §2302(b) in addition to or other than discrimination, you may contact us to request that we reconsider our determination. This letter should not be construed as an adjudication of any matter you may have pending or plan to file under any administrative appeal.

Sincerely,

Ralph B. Eddy
Assistant Special Counsel
Complaints Examining Unit

RBE/mlm

U.S. OFFICE OF SPECIAL COUNSEL
1120 Vermont Avenue., N.W., Suite 1100
Washington, D.C. 20005-3561

January 10, 1991

Ms. Marie R. Ramirez
3734 Belford Street
San Diego, CA 92111

RE: Freedom of Information Act (FOIA) Request;
OSC File No. MA-90-1304

Dear Mr. Ramirez:

This will respond to your Freedom of Information Act (FOIA) request relating to the captioned Office of Special Counsel (OSC) file, received here on January 8, 1991. A determination was made in regard to your request within ten working days of receipt, as required by the FOIA. 5 U.S.C. § 552(a)(6)(A).

You requested access to the entire file. We will treat your request as applicable to all file documents except for the OSC closure letter, other correspondence between OSC and yourself, documents which you provided to OSC, or documents which you already have, such as documents which appear in your own Official Personnel Folder (OPF).

Other than the documents mentioned above, the file you have requested contains the following categories of documents: (1) attorney work product such as memoranda generated by the Complaints Examining Unit (2) telephone conference memoranda and (3) internal OSC computer data sheets and transmittal forms. Your request is denied for the reasons stated below.

Not all information contained in agency records is available to a FOIA requester as a matter of right. The FOIA contains many exemptions that may apply in a particular case, some of which protect important governmental interests. Most of the documents contained in the OSC investigation files, including the report of investigation, and prosecution recommendation, witness statements, telephone conference memoranda, investigator's notes, summaries of interviews, correspondence, and memoranda generated by the Complaints Examining Unit are protected from disclosure under FOIA exemption 5, because they contain inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency, due to the attorney work product privilege and the pre-decisional, deliberative process privilege. 5 U.S.C. §552 (b)(5). NLRB v. Sears Roebuck & Co., 421 U.S. 132 (1975); Betty L. Martin v. OSC, 819 F.2d 1181 (D.C. Cir.1987); Government Accountability Project v. OSC, C.A. No. 87-0235 (D.D.C. 1988). Thus, your request is denied

with respect to all of the documents mentioned above pursuant to FOIA exemption 5.

Internal OSC routing and transmittal documents, and computer coding sheets and profiles are related solely to the internal rules and practices of the agency and thus are protected from release by FOIA exemption 2. 5 U.S.C. § 552 (b)(2).

In addition, OSC file documents are also generally protected from disclosure under FOIA Exemption 7 because they were "compiled for law enforcement purposes" and because disclosure of such documents could reasonably be expected to result in (1) interference with law enforcement proceedings (2) an unwarranted invasion of personal privacy of the complainant, the witnesses, or other persons named in witness testimony, (3) disclosure of the identity of a confidential source, or (4) disclosure of investigative techniques or guidelines. 5 U.S.C. § 552 (b)(7); See John Doe Agency and John Doe Government Agency v. John Doe Corporation, No.88-1083, __U.S.__ (Decided December 11, 1989). Thus, your request is also denied generally pursuant to FOIA exemption 7.

Should you wish to appeal this decision, you must do so in writing within thirty (30) days to William E. Reukauf, Associate Special Counsel for Prosecution, at the address listed above. 5 C.F.R. § 1260.5.

Sincerely,

Robert D. L'Heureux

Robert D. L'Heureux
Associate Special Counsel
for Investigation

RDL/JMM

U.S. OFFICE OF SPECIAL COUNSEL
1120 Vermont Avenue., N.W., Suite 1100
Washington, D.C. 20005-3561

AUG 8 1990

Mrs. Marie R. Ramirez
3734 Belford Street
San Diego, California 92111

Re: OSC File No. MA-90-1304

Dear Mrs Ramirez:

This is in response to your complaint against the Naval Electronic Systems Engineering Center in San Diego, California. You alleged that the agency was attempting to recover an overpayment of unemployment compensation benefits in reprisal for your previous whistleblowing activities and appeals to the Merit Systems Protection Board. You requested that the Office of Special Counsel stay the agency from appealing the July 12, 1990, decision of an Administrative Law Judge with the California Unemployment Insurance Appeals Board.

The Office of Special Counsel is authorized to investigate allegations of prohibited personnel practices and activities prohibited by civil service law, rule, or regulation. 5 U.S.C. §§1214(a)(1)(A), 1216(a) and 2302(b). We have carefully considered the information you provided. However, we have found insufficient evidence of any prohibited personnel practices or other violations warranting further inquiry by this Office.

Under the provisions of 5 U.S.C. §1214 the Special Counsel has the authority to seek a stay from the Merit Systems Protection Board where there are reasonable grounds to believe that a prohibited personnel action was, or is about to be taken. An appeal, however, does not constitute a personnel action within the meaning of the statute. Additionally, the Special Counsel does not have the authority to stay the agency from appealing a determination to the California Unemployment Insurance Appeals Board. Consequently, the matter is not within our investigative jurisdiction and we have no basis to request a stay.

Accordingly, we plan no further action on your complaint and have closed our file on this matter. This letter should not be construed as an adjudication of any matter you have pending or plan to file under any administrative appeals procedure.

Sincerely,

Leonard M. Dribinsky
Deputy Associate Special Counsel
for Prosecution

LMD:RBE:CGM/cm

U.S. OFFICE OF SPECIAL COUNSEL
1120 Vermont Avenue, N.W., Suite 1100
Washington, D.C. 20005

MAY 1 1990

Marie R. Ramirez
3734 Belford Street
San Diego, California 92111

Dear Ms. Ramirez:

This is in reference to your letter with attachments dated April 21, 1990, concerning the conduct of attorney Linda B. Oliver.

The Office of Special Counsel is authorized by the Civil Service Reform Act to investigate allegations of prohibited personnel practices and activities prohibited by civil service law, rule or regulation. 5 U.S.C. §§1214(a)(1)(A), 1216(a) and 2302(b). However, we have no authority to investigate "unethical and highly unprofessional conduct" on the part of a government attorney.

Accordingly we have no authority to be of help to you in this matter. We are returning your submission to you for your further use.

Sincerely,

Ralph B. Eddy
Chief
Complaints Examining Unit

Enclosures

RBE:re

OFFICE OF THE SPECIAL COUNSEL
U.S. Merit Systems Protection Board

March 9, 1989

1120 Vermont Avenue N.W. Suite 1100
Washington, D.C. 20005

Ms. Marie R. Ramirez
3734 Belford Street
San Diego, California 92111

RE: Freedom of Information Act (FOIA) Request;
OSC File Nos. 10-8-01267;20-8-00030; 12-8-71131

Dear Ms. Ramirez:

This will respond to your recent FOIA request relating to the captioned Office of the Special Counsel (OSC) files.

Not all information contained in agency records is available to a FOIA requester as a matter of right. The FOIA contains many exemptions that may apply in a particular case. For example, OSC files are generally privileged from disclosure under FOIA exemptions 5 and 7 because they contain attorney work product prepared in anticipation of litigation and because disclosure of such files could result in an unwarranted invasion of personal privacy. 5 U.S.C. §552(b)(5) and (b)(7)(C); Betty L. Martin v. OSC, 819 F.2d 1181 (D.C. Cir. 1987); Government Accountability Project v. OSC, C.A. No. 87-0235 JHP (D.D.C. 1988).

However, to the extent not incompatible with the Privacy Act, an agency has the discretion to waive the privileges and exemptions to which it is entitled under the law. We do so in this matter in regard to the factual portion of the closure memorandum in regard to OSC file number 10-8-01267, and a copy of that document is enclosed. All other documents in the files requested are privileged pursuant to the FOIA exemptions cited above, i.e. 5 and 7. Id.

You may appeal this decision in writing within thirty (30) days to William E. Reukauf, Associate Special Counsel for Prosecution, at the address listed above. 5 C.F.R. §1260.5.

Sincerely,

Robert D. L'Heureux

Robert D. L'Heureux
Associate Special Counsel
for Investigation

RDHL:JMMJR:jmmjr

OFFICE OF THE SPECIAL COUNSEL
U.S. Merit Systems Protection Board

1120 Vermont Avenue, N.W. Suite 11
Washington, D.C. 20005

SEP 26 1988

Mrs. Marie R. Ramirez
3734 Belford Street
San Diego, California 92111

Re: OSC File No. 10-8-01267

Dear Mrs. Ramirez:

We have completed our review and consideration of the complaint you submitted to this office. You alleged that officials of your Naval facility had retaliated against you for your disclosures of misappropriation of funds by your immediate supervisors by denying you further sick leave. You requested that the Office of the Special Counsel stay the agency proposal to place you in an Absent Without Leave (AWOL) status.

The Office of the Special Counsel is authorized by the Civil Service Reform Act to investigate allegations of prohibited personnel practices and certain activities prohibited by civil service law, rule or regulation. 5 U.S.C. §§1206(a),(e) and 2302(b). Reprisal for making protected disclosures concerning misuse of funds, mismanagement, or abuse of authority is a prohibited personnel practice under certain circumstances. We have very carefully considered the information you have provided and we have made further inquiry from your agency. However, we have concluded that there is no evidence of a prohibited personnel practice. It appeared that the agency request to you for a formal request for leave supported by an adequate medical statement concerning your condition to support your use of sick leave is appropriate and in regulatory compliance. We found no factual basis to support a motive of reprisal as the cause of the agency withholding of approved leave.

In the absence of reasonable grounds to believe that a prohibited personnel practice had occurred, we have no basis on which to request a stay of the agency decision to consider you AWOL until it receives appropriate documentation concerning your leave, from you. We find no appropriate basis for our further action. Accordingly, we have closed

our file on this matter. This letter should not be construed as an adjudication of any matter you may have pending or plan to file under any administrative appeal.

Sincerely,

Leonard M. Dribinsky
Assistant Special Counsel
for Prosecution

LMD:RBE:EO

OFFICE OF THE SPECIAL COUNSEL
U.S. Merit Systems Protection Board

AUG 15 1988

1120 Vermont Avenue, N.W., Suite 1100
Washington, D.C. 20005

Mrs. Marie R. Ramirez
3734 Belford Street
San Diego, California 92111

Re: OSC File No. 20-8-00030

Dear Mrs. Ramirez:

This letter refers to your recent complaint to the Office of the Special Counsel. You alleged that you have been subjected to discrimination.

The Office of the Special Counsel is authorized by the Civil Service Reform Act of 1978 to investigate allegations of prohibited personnel practices and activites prohibited by civil service law, rule or regulation. 5 U.S.C. §1206(a), (e), and §2302(b). Your allegation of discrimination is of a prohibited personnel practice within the investigative jurisdiction of the Office of the Special Counsel. 5 U.S.C. §2302(b)(1). However, it was not intended that this office duplicate or bypass the procedures established in the agencies and the Equal Employment Opportunity Commission for resolving such discrimination complaints. Therefore, it is the general policy of the Special Counsel not to take action on such allegations of discrimination; they are more appropriately resolved through the EEO process. 5 C.F.R. §1251.3. In light of the information you have provided, we find no reason to depart from our policy in this matter. Accordingly, we will take no further action with respect to your allegation of discrimination. Further, we found no evidence of any other prohibited personnel practice or any other violation within our investigative jurisdiction. We are, therefore, closing our file in this matter.

If we have misconstrued your allegation, and you are in fact alleging a prohibited personnel practice defined at 5 U.S.C. §2302(b) in addition to or other than discrimination, you may contact us to request that we reconsider our determination. This letter should not be construed as an adjudication of any matter you may have pending or plan to file under any administrative appeal.

Sincerely,

Ralph B. Eddy
Chief
Complaints Examining Unit

RBE/re

Mr. MCCLOSKEY. Mr. Robert Seldon.

Mr. SELDON. Mr. Chairman, members of the committee, good morning. I am Robert Seldon, an attorney engaged in the private practice of law. I head the litigation department of a moderate-sized law firm headquartered in Washington, DC.

Most of my work today centers around complex commercial litigation and bankruptcies generally arising from disputed and failed real estate transactions. With the exception of one or two particular agencies, I do not have a great deal of contact with the Federal Government, much less day-to-day contact with the federal bureaucracy.

But in a "previous life," I spent the better part of 9 years with the Civil Division of the Office of the U.S. Attorney for the District of Columbia. The Civil Division is devoted to representing agencies and officials of the executive branch in civil litigation before the Federal courts in this jurisdiction. Much of that time, I also had supervisory responsibility over the major personnel and EEO litigation in which our office participated.

In that position, I gained considerable expertise in the extensive body of Federal civil service law. I also learned first hand of the terrible power which senior level political appointees can exert over honest, hard-working career civil servants in an effort to coerce them into covering up and distorting the truth about controversial Federal programs. I myself refused a direct order from the head of an agency to file a false affidavit in a highly publicized and controversial case which I had been defending for several years. In doing so, I risked my career and professional standing when that agency's demand was supported by senior officials at the Department of Justice, who in turn, insisted that I be disciplined for "insubordination."

Given my experience and expertise, it was only natural for colleagues to refer like-minded people when I got into practice. One of my more controversial cases was on behalf of Gordon Hamel, formerly the Director for Executive Placement for the President's Commission on Executive Exchange. That assignment gave me considerable familiarity with OSC and the Whistleblower Protection Act. I am sorry to report, despite the passage of the Whistleblower Protection Act, there is still no effective protection for the Federal employee who blows the whistle on fraud, waste and abuse at his agency nor any real redress through the Federal courts.

Even worse, the Office of Special Counsel remains a determined enemy to the Federal employee who dares to exercise his first amendment rights.

Given the importance to our country of the right of free speech, our present treatment of Federal employees who blow the whistle is disgraceful and deserves our heritage as a nation of outspoken individuals. There is no better testimony to this sad state of affairs than the saga of Gordon Hamel.

I was first introduced to Mr. Hamel in the late spring of 1990 by a judge who was a mutual acquaintance of ours. I didn't know anything about him except he had a little trouble with his supervisors and I agreed to meet him on my own time to see if I could give him P's and Q's about how to get by.

I didn't need to spend much time with Mr. Hamel before I knew his problems went far beyond having a few difficulties and a little friction with his supervisor.

Almost from the moment of his appointment to the President's Commission on Executive Exchange in late 1989, Mr. Hamel learned his agency, which is supposed to be facilitating exchange of executives between the Federal and private sector, served as little more than a clearinghouse for illegal political favors. An investigation of the Comptroller General, undertaken as a result of Mr. Hamel's disclosures, eventually confirmed that as much as 25 percent of the PCEE's budget was expended improperly.

The Office of Personnel Management, which served as the oversight body over the PCEE, concluded its wide-ranging political patronage included an improper attempt to purchase gold jewelry for PCEE participants; an attempt to inflate European travel by $40,000 to a noncompetitive sole-source procurement; as well as the refund of $18,000 improperly to the Pepsi-Cola Corp. through the Overseas Private Investment Corporation.

These were all the subjects of protected disclosures made by Mr. Hamel beginning in February of 1990 and continuing to the date that agency closed, first to supervisors, and then to OPM, and finally to the U.S. Congress. Not surprisingly, these disclosures did not endear Mr. Hamel to his supervisors.

They responded first by ignoring him, then isolating him, and then incredibly enough removing him from his office under armed guard, which in hearings before the Congress was described as a monstrous act, sending a monstrous message to hundreds of thousands of other public servants.

Ultimately that agency could only be satisfied when it proposed to remove Mr. Hamel on trumped-up and undocumented charges of insubordination, charges of sexual misconduct, charges Mr. Hamel was eventually cleared of.

All the while during this odyssey which took the two of us together the better part of a year, OSC watched and it watched and it watched.

I presented an initial request for collective action to the OSC on behalf of Mr. Hamel at the end of July 1990 after the PCEE formally stripped him of many of his duties and didn't hear anything back from them promptly at that point in time.

Mistakenly believing though that OPM might be of assistance in this matter, we notified the director of OPM who already issued a report supporting Mr. Hamel's charges, he was going to the OSC and looking for the protection of law.

The Director of OPM immediately notified the Executive Director of the President's Commission on Executive Exchange. The Director of OPM commenced an inspector general investigation of Mr. Hamel and 2 days later, the Executive Director of the PCEE had Mr. Hamel escorted from his office under armed guard. This man is a white collar civil servant of the U.S. Government. He was escorted—he is a law-abiding citizen. He was escorted from his office in this Nation's Capital under armed guard.

The Executive Director of the PCEE later testified she did this because Mr. Hamel's antics or insubordination—if you will—were escalating during the last 10 days of July 1990. The OSC inves-

tigated this and confirmed Mr. Hamel had been out on sick leave during those days and that the Executive Director was unquestionably lying and that office never did anything.

This man was removed under armed guard from his office, right here 15 blocks away, across the street from the White House. There is no provision under Federal civil service law for putting somebody on indefinite leave. So I then filed a request for a stay with the Office of Special Counsel and solicited their help in going before the Merit Systems Protection Board. They didn't do a thing.

Mr. Hamel languished with no further word from his agency on illegal enforced leave through the entire fall of 1990 until the U.S. Congress Subcommittee on Employment and Housing of the Committee on Government Operations scheduled a hearing. That subcommittee staff asked the PCEE about Mr. Hamel's situation and got no answers.

Their stonewalling was finally more than the committee chairman could tolerate. He wrote and advised them they would be subpoenaed to testify publicly. The next day the PCEE issued a formal notice proposing Mr. Hamel's removal on charges of misconduct. The notice of proposed removal was hand delivered to me by the Justice Department, which eventually assigned three Justice Department staff attorneys to engineer and litigate Mr. Hamel's removal from the Federal service.

On November 10, I wrote to the special counsel herself to renew the request of Mr. Hamel for a stay. I never heard back from her except for a phone call saying they were looking into it. Fearing for the loss of Mr. Hamel's job and his reputation and his house with the 120 statutory day waiting period having expired, we filed an individual right of action appeal before the MSPB. It was plainly the right for him to do it. He had now waited 4 months at home with no income, no work, no job.

The MSPB sua sponte dismissed his appeal declining to exercise jurisdiction. In the beginning of 1991, I was then joined by Tom Devine as co-counsel, with the Government Accountability Project, I believe its director. He took the initiative on January 18. It is now 6 months; this man is sitting at home doing nothing.

He said a strong initiative by OSC is overdue. He didn't hear anything in January. He wrote in February. We then got a note back from one of the senior officials of OSC on February 20, 1991. It said, "It appears you are vigorously pursuing Mr. Hamel's interests before the board. Therefore, intervention does not appear necessary."

I don't know what anyone could have meant by that. OSC didn't have a job to do, if some good lawyers or public interest group gave its efforts pro bono, I suppose that disserves their mission. It didn't demonstrate a real commitment by them to protect this man's first amendment rights. We then went back and filed a second appeal with the MSPB, got it to take jurisdiction, and subpoenaed PCEE's records. They said they would not give us the records. We wanted them because we figured if the OSC wasn't going to go, we would like to know what they had been told under oath in private interviews.

They wouldn't give it to us. The PCEE moved ahead and one of the three Justice Department attorneys assigned to the case said

the reason it was moving ahead was that Mr. Hamel appealed to the MSPB.

A little more needs to be said about the efforts of the Justice Department in this case. They filed false statements knowing them to be false by a woman who claimed to have been sexually harassed by Mr. Hamel; and, in fact, that woman later gave an affidavit she had already told the Justice Department Mr. Hamel had never harassed her or behaved in any manner other than as a perfect gentleman.

They filed an affidavit on behalf of the general counsel of OPM. He later had to withdraw that under oath.

They filed an affidavit trying to prove Mr. Hamel was not a whistleblower by the personnel list at OPM. He withdrew that under oath. The record developed before the MSPB documented the Executive Director of the PCEE was frequently intoxicated on the job, which led to her outrage with Mr. Hamel. She fabricated the reasons for removing Mr. Hamel from his office under armed guard, and that the Deputy Director of OPM lied to the press to cover this up.

The final straw in this happened on the morning of May 2, 1991, when the Committee on Government Operations announced it was reconvening hearings into Mr. Hamel's case.

Two hours later, the President of the United States issued an executive order abolishing the PCEE. He did that despite the fact he had just submitted a budget for 1992.

Pursuant to that, the Justice Department closed their investigation. The MSPB did the same and filed a document with the Board stating, "We have been informed by the Office of Special Counsel that they have undertaken these steps"—of closing Mr. Hamel's investigation because "they believe Mr. Hamel's appeal is moot."

That disclosure is a violation itself of the Whistleblower Protection Act and one undertaken by the Justice Department in this case. At this point Mr. Hamel, Mr. Devine, and I had a difficult situation to face. We couldn't go on fighting. I was taking this case pro bono at that point in time. The MSPB was not anxious to hear the case. It had no jurisdiction over the White House. It had to regroup.

We had to content ourselves with essentially trying to recoup our fees which is ultimately still in litigation; has not yet been successful.

I would say in closing only that the Office of Special Counsel is not an effective tool or representative of the Federal employee who exercises his first amendment rights. It needs to be made an independent prosecutorial body like GAO or independent counsels who investigate the executive branch. Someone deeply committed to the first amendment needs to be in charge of that office.

The special counsel ought to be made to come before you regularly and say exactly what they have done.

Finally, the original jurisdiction over these cases ought to be returned to Federal district courts so alone among the citizenry of the United States, the Federal employee is not denied the true protection of the Constitution of the United States when he exercises first amendment rights.

Thank you very much.

[The prepared statement of Robert C. Seldon follows:]

PREPARED STATEMENT OF ROBERT C. SELDON

Mr. Chairman, members of the committee, good morning.

My name is Robert C. Seldon. I am an attorney engaged in the private practice of law. I head the litigation department of a moderate-size firm headquartered in Washington, DC.

Most of my work today centers around complex commercial litigation and bankruptcies generally arising from disputed and failed real estate transactions. With the exception of one or two particular agencies, I do not have a great deal of contact with the Federal Government, much less day-to-day contact with the Federal bureaucracy.

But in a previous life, I spent the better part of 9 years with the Civil Division of the Office of the U.S. Attorney for the District of Columbia. That Civil Division is devoted to representing agencies and officials of the executive branch in civil litigation before the Federal courts in this jurisdiction. Much of that time, I also had supervisory responsibility over the major personnel and EEO litigation in which our office participated.

In that position, I gained considerable expertise in the extensive body of Federal civil service law. I also learned first hand of the terrible power which senior level political appointees can exert over honest, hard-working career civil servants in an effort to coerce them into covering up and distorting the truth about controversial Federal programs. I myself refused a direct order from the head of an agency to file a false affidavit in a highly publicized and controversial case which I had been defending for several years. In doing so, I risked my career and professional standing when that agency's demand was supported by senior officials at the Department of Justice, who in turn insisted that I be disciplined for insubordination.

That experience taught me that the Federal employee who stands up to be counted does so alone, that Federal law offers little protection to the whistleblower, and that access to the Federal courts—which is generously available when redress of first amendment rights are involved generally—is virtually nonexistent for the Federal employee.

Given my experience and my expertise, it has only been natural for former colleagues to refer me like-minded types—career civil servants obstinate enough to refuse direct, unlawful orders from their superiors—in my practice today. One of my more controversial cases was on behalf of Gordon Hamel, the Director for Executive Placement for the President's Commission on Executive Exchange. That case gave me an intimate familiarity with the workings of the Office of Special Counsel, the Whistleblower Protection Act, and the remedies provided by the WPA.

I am extremely sorry to report that despite the passage of the WPA, there is still no effective protection for the Federal employee who blows the whistle on fraud, waste, and abuse at his agency nor any real redress through the Federal courts. Even worse, the Office of Special Counsel remains a significant obstacle—indeed, a determined enemy—to the Federal employee who dares exercise his first amendment rights. Given the importance to this county and our government of the right of free speech, our present treatment of whistleblowing Federal employees is disgraceful and disserves our heritage as a nation of outspoken individuals.

There is no better testimony to this sad state of affairs than the saga of Gordon Hamel.

I was first introduced to Mr. Hamel in the late spring of 1990 by a judge with whom we were mutually acquainted. I knew very little about Mr. Hamel except that he was having some trouble with his supervisors and needed some guidance. I agreed to meet with him on my own time to provide some advice as I generally do to Federal employees, upon whom I do not lightly inflict my hourly corporate rates.

I did not need very much time with Mr. Hamel to appreciate that his problems went far beyond having some trouble with a supervisor and why that was so.

Almost from the moment of his appointment to the President's Commission on Executive Exchange in late 1989, Mr. Hamel learned that his agency—which was designed to facilitate the exchange of executives between the executive branch and private corporations to broaden their experience—served as little more than a clearinghouse for illegal political favors. An investigation by the Comptroller General undertaken as a result of Mr. Hamel's disclosures eventually confirmed that as much as 25 percent of the PCEE's budget was expended improperly. The Office of Personnel Management, which served as the oversight body over the PCEE, concluded that the PCEE's wide-ranging political patronage included an improper attempt to purchase gold jewelry for PCEE program participants and an attempt to inflate PCEE European travel by $40,000 through a noncompetitive award in a sole source procure-

ment. OPM also documented that the PCEE orchestrated the improper refund of $18,000 to Pepsi-Cola through the Overseas Private Investment Corporation.

These activities and others were all the subjects of protected disclosures made by Mr. Hamel between February 1990 and May 1991, first to his supervisors and then to OPM, and OSC, and eventually the U.S. Congress.

Not surprisingly, Mr. Hamel's superiors did not appreciate his revealing the workings of their little political machine. Never mind that their activities were plainly unlawful. Never mind that Mr. Hamel raised his concerns through channels before blowing the whistle. And never mind that both the Comptroller General and OPM found that Mr. Hamel's charges were correct. The senior executives of the PCEE responded first by ignoring Mr. Hamel, then by isolating him, then by escorting him from office under armed guard, and finally by proposing his removal on trumped up and undocumented charges of insubordination and verbal sexual misconduct—charges that Mr. Hamel was eventually cleared of.

All the while, OSC watched. And watched. And watched.

I presented an initial request for corrective action to OSC on behalf of Mr. Hamel on July 31, 1990, after the PCEE formally stripped him of many of his most significant duties and ordered him to have no further contact with OPM. The PCEE took these retaliatory measures after the legal counsel to the Director of OPM had issued a formal report confirming Mr. Hamel's charges that his agency was routinely acting without regard to Federal law and the Director herself had issued a written directive to the PCEE's Executive Director to change the agency's personnel, procurement, and other practices.

Mistakenly believing that OPM would be prepared to assist in Mr. Hamel's protection, we wrote and notified the Director of OPM of our filing with OSC. The Director responded by immediately conveying this information to the Executive Director of the PCEE and requesting that the Inspector General of OPM investigate Mr. Hamel.

Not to be outdone, 2 days later, the Executive Director of the PCEE had Mr. Hamel escorted from his office under armed guard, an act which the Congress itself described as "send[ing] a monstrous message to hundreds of thousands of public employees * * *." The PCEE then placed Mr. Hamel on enforced, involuntary leave and left him in that status for a year.

There is no provision under Federal personnel law for putting someone on indefinite involuntary leave and so, on August 3, 1991, we filed a request for a stay with OSC, bringing them up to date on the escalating retaliation. They didn't exactly ring our phones off the hook, so I took the initiative to contact OSC and spoke with a person on its intake staff. Not long afterward, I received a letter advising me that OSC did not believe that Mr. Hamel's case warranted moving for a stay before the Merit Systems Protection Board. Mr. Hamel then had no choice but to await the expiration of a 120-day statutory waiting period before he could proceed on his own.

Mr. Hamel languished with no further word from his agency—no charges, no return date—through the fall of 1990, when he brought his predicament to the attention of the Subcommittee on Employment and Housing of the Committee on Government Operations. The subcommittee scheduled a hearing for December 10, 1990.

The PCEE stonewalled the subcommittee and refused to answer staff inquiries about Mr. Hamel's status. On November 28, 1990, the chairman wrote to the Executive Director of the PCEE and advised her that she would be subpoenaed to attend the public hearing unless she would meet informally with staff beforehand and answer their questions.

The next day, the PCEE issued a formal notice proposing Mr. Hamel's removal on charges of misconduct which, as I mentioned before, were ultimately vacated. The notice of proposed removal was hand delivered to me by the Justice Department which assigned three staff attorneys to engineer and litigate Mr. Hamel's removal from the service.

On November 30, 1990, I wrote to the Special Counsel herself "to renew the request of Gordon Hamel for a stay under the Whistleblower Protection Act" and in "the hope to hear from [her] in the immediate future * * *." OSC took no action before the scheduled hearing, despite what I understand was some firm prompting from the subcommittee's staff.

Fearing for the loss of Mr. Hamel's job, his reputation, and his home, on December 18, 1990, we filed an individual right of action appeal with the Merit Systems Protection Board. Incredibly enough, the MSPB issue an order sua sponte questioning its jurisdiction over the case. After 2 months of briefing, which included a motion for interlocutory certification, the MSPB ruled that it did in fact have jurisdiction over the case. Remarkably, it declined to exercise jurisdiction for another 60 days.

Mr. Hamel clung to the hope that OSC would soon intervene—particularly since we had heard through back channels the staff's off-the-record opinion that this was the worst case of retaliation that they had ever investigated and that their report was finished—but that office remained silent. First on January 18, 1991, and again on February 8, 1991, Tom Devine of the Government Accountability Project (who had since joined me as co-counsel) wrote OSC and stated: "A strong OSC initiative on this case is overdue. Mr. Hamel and all counsel are at your disposal * * *. We believe that notification to [the MSPB] of your intent to intervene * * * would be timely and effective."

We finally heard back from the Deputy of OSC on February 20, 1991, in a letter which astonishingly stated: "[I]t appears that you are vigorously pursuing Mr. Hamel's interests before the Board. Therefore, our intervention does not appear necessary." On April 1, 1991, we filed Mr. Hamel's second appeal with the MSPB and forced it to take jurisdiction. When OSC still had not taken any action several weeks later, we noted the deposition of the custodian of their investigative records. The Deputy of OSC wrote to advise us that "the OSC will not appear for the deposition * * *."

Once Mr. Hamel noted his second appeal, the PCEE moved ahead with the removal proceeding. In the words of the lead Justice Department representative in a conference with the MSPB, it did so because Mr. Hamel exercised his protected appeal rights.

A little more needs to be said about the actions of the Justice Department in this case and the other representatives of the PCEE in order to fully understand what Mr. Hamel was up against, including the complicity of OSC to thwart his appeal rights.

In an effort to prove its case, the Justice Department submitted evidence that Mr. Hamel—whose record prior to his appointment with the PCEE was unblemished—had harassed a female employee at his previous agency. Nothing that the affidavit in question was offered by a supposed witness to the incident in question, Tom Devine and I tracked the victim down in St. Louis, only to be informed that the Justice Department had spoken with her about this matter and that she had expressly advised them that Mr. Hamel had never harassed her. She offered an affidavit to this effect which we provided to the MSPB and OSC as well, one which expressed her justifiable outrage about the Justice Department.

This particular affidavit was hardly the only bit of fraudulent evidence knowingly procured by DOJ in its effort to secure Mr. Hamel's removal. The General Council of OPM, who had offered an affidavit as part of the agency's response to the MSPB appeal in an effort to deny Mr. Hamel's status as a whistleblower, later recanted on the record of his deposition. So did the personnel list assigned to process Mr. Hamel's removal, who provided an affidavit that Mr. Hamel had supposely been the subject of a counseling memorandum before he made protected disclosures. The record eventually developed before the MSPB also documented that the Executive Director of the PCEE, who was frequently intoxicated on the job, fabricated the reasons for removing Mr. Hamel from his office under armed guard, and the Deputy Director of OPM lied to the press about Mr. Hamel's status as a whistleblower in an attempt to discourage the media from reporting about his case.

After the better part of a year in the starting gate, our appeal on Mr. Hamel's behalf finally seemed to be getting underway. The MSPB had finally been forced to accept jurisdiction, discovery was underway, and witness by witness, each person who had offered an affidavit for the PCEE recanted. In short, the case against Mr. Hamel was coming apart at the seams.

On the morning of May 2, 1991, the Committee on Government Operations announced publicly that it was reconvening hearings into Mr. Hamel's status and fraud, waste, and abuse at the PCEE. Two hours later, in what was the most astonishing example of one upsmanship that I have ever witnessed, the President issued Executive Order 12760 and abolished the PCEE. He took this action even though the agency's budget for the upcoming fiscal cycle had already been submitted to Congress. Budget of the U.S. Government: Fiscal Year 1992, 102d Cong., 1st Sess., H. Doc. 102–03 at part 4–1044, 1047 & part 8–49.

On cue, OSC—whose investigation had been concluded for months—responded by promptly closing its case without issuing a final report. The following week, the Justice Department moved the MSPB to do the same. The MSPB advised the parties that the case would remain open until all challenged personnel actions were vitiated which, the presiding judge added in an aside that would unfortunately never become true, would perfect Mr. Hamel's right to recoup his not inconsiderable attorney fees. Several days later, OPM canceled all challenged personnel actions and, with his record cleared, Mr. Hamel was able to secure employment with another Federal agency.

The parties then engaged in a furious exchange of briefs on the issue of the mootness of the MSPB appeal. On May 16, 1991, the Justice Department filed OSC's letter closing out its investigation with the MSPB and advised: "We have been informed by the Office of Special Counsel that they have taken these steps because * * * they believe Mr. Hamel's appeal is moot." These disclosures by OSC and DOJ, which I believe greatly prejudiced Mr. Hamel's appeal, were a gross and intentional deviation from the the WPA's confidentiality provisions which precluded the OSC from revealing the results of its investigation and prohibit every party from introducing the results of OSC investigations into the record of other proceedings. And shortly thereafter, the MSPB dismissed the appeal finding that it had become moot.

At this point, Tom Devine, Mr. Hamel, and I had a difficult problem to face. The issuance of the Executive order essentially deprived the MSPB of jurisdiction to consider the gravest violation of Mr. Hamel's first amendment rights. And while the prospect of tilting at the White House windmill was tempting, I was pressured by the fact that Mr. Hamel's cause had long since become a pro bono project. We decided, therefore, to accept the merits of the MSPB's decision, move to recoup Mr. Hamel's attorneys' fees, and then consider further action.

The petition to recoup Mr. Hamel's fees, however, was not filed with a Judge appointed for life under Article III of the Constitution, but rather a medium level administrative judge of the MSPB. Seeing what had happened to the PCEE, the judge reversed his previous comments and denied our fee petition. We sought review before the full Board which, in a lone line order, also denied Mr. Hamel's fee petition. A subsequent appeal to the U.S. Court of Appeals for the Federal Circuit generated a short per curiam opinion affirming the MSPB's decision. We have since filed for rehearing, and I have promised Mr. Hamel that I will take his case to the Supreme Court if he will pay the out-of-pocket expenses.

Although I am glad that we were able to preserve Mr. Hamel's reputation and salvage his career, the lessons that we learned from this enterprise are that the lengths to which agencies will go to cover up retaliation against whistleblowers has not abated despite the passage of the WPA, OSC will not tackle really difficult political cases regardless of the evidence, the MSPB will be extremely unwilling to exercise its jurisdiction and will be relieved to dismiss an individual right of action appeal, and the Federal district courts—which are the real guardians of last resort of the Constitution—are not open to a Federal employee who exercises his first amendment right of free speech to improve our government.

Despite this experience, I nonetheless believe that the existing system could be made workable.

As a first step, the Office of Special Counsel must be reorganized and made into a truly independent investigatory and prosecutorial body, much like GAO or the independent counsels who are appointed to investigate suspected crimes in the executive branch.

As a second step, someone who is deeply committed to the first amendment needs to be put in charge of that office.

Third, the special counsel should be made to appear regularly before Congress and assure this body that the mission of that agency—rather than covering up for the retaliation against whistleblowers—is being discharged effectively.

And finally, original jurisdiction to hear these vital first amendment cases should be returned to the Federal district courts from the MSPB, which has expertise in personnel matters, and the Federal circuit, which primarily hears Government contract disputes and tax cases.

With changes such as these, I do believe that no civil servant need go through an experience like Mr. Hamel's again, one which included being removed from his office under armed guard, languishing on indefinite leave, and living under the cloud from unsubstantiated charges of the most insidious misconduct imaginable.

Mr. MCCLOSKEY. Mr. Thomas Day, whistleblower, U.S. Navy.

Mr. DAY. Mr. Chairman, thank you for this invitation to testify on the subject of whistleblower protections and the Office of Special Counsel.

I am here as a spokesman for the Whistleblowers' Alliance. We are a new membership organization specifically established for whistleblowers by whistleblowers with the hope that, through our collective resources, we will be able to assist each other in ways other organizations do not. A primary objective will be an attempt to assist in locating alternative employment for whistleblowers so

they can deal more effectively with the other issues that will confront them. The subcommittee is encouraged to provide my address to interested parties.

I am here to make it clear that the position of all but one of the whistleblowers I have talked to in the last 3 years is that the OSC should be closed and its functions—not its personnel—transferred elsewhere.

The Whistleblowers' Alliance is supportive of the President's efforts to eliminate waste, fraud, and abuse in government. However, because of the repeated failures of the OSC and the absence of meaningful protections for whistleblowers, we are reluctantly pleading with this committee and the leadership of this country to stop encouraging individuals to report waste in government until there is evidence of genuine change.

We hope that this will be a short-term request while we work together to find a solution to the problems of whistleblowing. In the meantime, we ask the elimination of the OSC be the first step to show change has indeed come to Washington.

I think it is important to represent the views of the loan dissenter who felt problems in the OSC could be solved by placing whistleblowers in an oversight capacity within the OSC. In fairness to this individual, I have considered a number of applications of his ideas and mine. I have considered using the OSC as a place to locate the special projects unit to assist in job transition for whistleblowers. I even considered submitting my own 171 along with a proposal to implement this idea.

However, these ideas came to an immediate halt when I saw the statement of the special counsel submitted for this hearing. Without comment, I remain firm in asserting the OSC should be closed without further discussions of the allusions it has accomplished anything other than bringing suffering and misery to many Federal employees.

Like any other whistleblower, I would like to have the time to tell my entire story. Instead, I have provided a condensed version for the record of this hearing. It details how I became a whistleblower when I reported nearly $1.5 billion of padding in the budgets of the cruise missiles.

I have provide it so you have some means of measuring the OSC conclusion that I did not have adequate reason to believe a violation of rules, regulations, or laws had occurred. This is only one example of the poor performance of OSC in doing their job. I would suggest another measure of that failure is the Navy's admission that I had made a protected disclosure. I was able to reach a settlement with the Navy last week.

What kind of contribution to the Federal Treasury can be made by whistleblowers? Last November, Congressman Howard Berman of California remarked that the accumulated savings from whistleblower lawsuits brought under the False Claims Act was nearing $1 billion. Putting this in perspective, the handful of Federal employees who formed the Whistleblowers' Alliance represent between $5 and $6 billion in potential savings. Five times the amount salvaged from all contractors under the False Claims Act.

Contemplate the collective impact of other whistleblowers. At last count, I was told there are 400 whistleblower cases filed with

the Justice Department. My records show there have been nearly 1,200 cases filed with the Merit Systems Protection Board in the last few years alleging whistleblower retaliation. I was told the average number of calls to the hot line is 1,000 a month. Add to this number the whistleblowers in State and local governments and those in the private sector. This is a valuable resource for saving dollars.

Each person represents a resource for saving lives, for improving the quality of the workplace; and they are the impetus for change brought before this legislature.

In my opinion, it is not the act of reporting a violation that makes one a whistleblower. It is the endurance to tolerate the abuse of maladjusted management. These managers boast of their ability to break the law and conceal these violations. If we walk away from these hearings with anything new, I think it should be the beginning of a means to identify and separate maladjusted managers from well-intentioned management.

I would suggest it is these maladjusted managers who are the real culprits of whistleblowing.

The concept is so basic it should be a matter of accepted common sense. The OSC's response in my own case indicates a disturbing absence of this awareness. I find it difficult to describe in polite terms the OSC's conclusions that suggested that I did not have a reasonable belief because I was unable to convince my managers of their wrongdoing. Whistleblowing exists because someone somewhere has a reason to think managers at various levels of the organizational chart are participating in violations of the law.

The OSC merely asks the fleeing bank robber if there is a holdup. When they are assured everything is fine, they fly down the street to the ringing of another bank alarm.

If the OSC conclusion was applied as a legal precedent, the only way a person could go forward was if they could convince their managers they were wrong in the first place. There can be no excuse for this level of incompetence and unfortunately this is institutional and not individual.

My case is not unique. I have heard stories about the OSC for years. For years I attempted to argue against those who argued the OSC was worthless. I was warned repeatedly by prominent lawyers, former defendants, congressional staffers and by employees of whistleblower institutions the OSC was a joke. They were right.

Not only has the OSC failed for years, the entire investigative process is so lengthy and flawed that I cannot counsel anyone to take the career-ending risk of becoming a whistleblower.

I have done the best I could to bring a specific incident to the attention of officials who could have taken appropriate actions that might have saved each taxpayer less than $6. For attempting to save each of you $6, I have lost more than a year's salary, jeopardized my house, my children's college education, and my health. For similar amounts and for much less, many others like Ed Block, Dennis Olivares, Ralph Strand, David Black, and numerous others have taken similar risks on behalf of the American taxpayer.

Regardless of who asked, without adequate protections, and aggressive support for these protections, the sacrifice is appropriately shared by all Americans through higher taxes.

The current protections are certainly well-intended but they are so seriously flawed in their application that they are in need of an overhaul. I have suggested an emphasis on securing whistleblowers' incomes through job transfers as an alternative instead of the lengthy litigation in already over burdened courts.

I am committed to improvements necessary to enhance protections for all whistleblowers so we continue the efforts to eliminate waste in Government. I know the real work of this committee will be legislative initiatives that will come later. The Whistleblowers' Alliance and I are willing to help in any way we can.

Mr. Chairman, members of the committee, thank you again for your time and patience.

Mr. MCCLOSKEY. Thank you, Mr. Day.

[The prepared statement of Mr. Day follows:]

TESTIMONY OF
THOMAS FRANKLIN DAY II

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
SUBCOMMITTEE ON CIVIL SERVICE
CONGRESSMAN FRANK McCLOSKEY, CHAIRMAN

OVERSIGHT HEARING
ON WHISTLEBLOWER PROTECTION AND
THE OFFICE OF SPECIAL COUNSEL
MARCH 31, 1993

The following Statement is submitted to the Honorable Frank McCloskey, Chairman of the House Subcommittee on Civil Service, March 31, 1993.

STATEMENT

My name is Thomas Franklin Day, II. In October of 1989, I became a whistleblower when I disclosed approximately 1.5 billion dollars of padding in the budgets of the Navy's Tomahawk Cruise Missile. I am here today on my own behalf and as a spokesman for the Whistleblowers Alliance. It is our opinion that the OSC has failed so miserably in its mission to provide protection to whistleblowers that it should be abolished.

The Whistleblowers Alliance has been formed as a membership organization to provide a forum for whistleblowers where we can compare the similarities of our experiences and apply what we learn to assist ourselves and others in similar situations. A major emphasis of this organization will be to assist whistleblowers in obtaining alternative employment when this becomes necessary due to threats of retaliation. In this regard, we will be working with government and corporate entities to educate these officials about the benefits offered by the employment of a whistleblower.

We hope that, by working with noted professionals in the field of behavioral studies, we can draw attention to the problem of maladjusted management behavior. By focusing on this very small segment of management and identifying this behavior characteristic as the genuine problem in whistleblowing, we can improve the plight of the whistleblower and help employers identify potential problem areas in their own management structure.

It is our observation that the reporting of problems within organizations is a common occurrence. In most instances, management responds immediately to correct deficiencies without any retaliation. It is common for the person who reports the problem to be recognized for their contribution and they may even receive an award. Unfortunately, the whistleblower has allowed this small

group of dysfunctional managers to define whistleblowers as excessively moral do-gooders who are not team players. We dispute this characterization as much as we dispute the generalization that all management is corrupt. Whistleblowers are average citizens who happen to find themselves confronted by circumstances that jeopardize the public well-being.

We are here today to implement the process of change. Hopefully, that change will improve the life of the whistleblower, the quality of government, and its ability to provide for the public good. As whistleblowers we are exceedingly aware of the need for an organization like the OSC. However, it has been clear for years that the OSC has not lived up to its expectations and patchwork changes have failed to correct the problem. It is our experience that no whistleblower can rely on this organization for an effective investigation of whistleblower disclosures nor can we entrust our careers to the inept investigation of the numerous acts of retaliation. Unfortunately, we do not believe that tweaking the system with legislative reforms or replacing key personnel will be sufficient to bring about the changes that would alter a history of horror stories.

By our actions we have demonstrated our willingness to take the risks associated with the disclosure of waste, fraud or abuse. We strongly support the President, the Vice-president, and the Congress in their collective efforts to eliminate waste in government. However, we have found the system to be so grossly inadequate that anyone who is discovered to have attempted to report wrongdoing runs the risk that they will be subjected to retaliation that could result in the termination of their career. Too many historical cases show that the burden that falls on these people exceeds the level of reasonable sacrifice for one's country. So long as the entrenched system remains in place, we have reluctantly arrived at the conclusion that it is better for the whistleblower to keep their mouth shut and allow the entire country to bear the burden of corruption through higher taxes and increased spending. For these reasons, we cannot condone a continuation of the hotline reporting except in those cases where the matter is life threatening. It is with a sense of the reality of the current system and with the greatest reluctance that we ask that all efforts to en-

courage the reporting of anything other than a life threatening violation of rules, regulations, or laws be suspended.

It is our position that the Office of Special Counsel epitomizes the failures of the existing system and that only through the abolishment of this organization can we know that meaningful change is underway. We expect to participate to the fullest extent by offering our own recommendations for improving the system, but we are so adamant in our opposition to the OSC that we will view any efforts to continue this organization as a vote to abandon change and as a vote to continue the status quo of corruption in Washington.

In the November 1992, issue of *Across the Board*, U.S. Rep. Howard L. Berman of California indicated that the total amount of money salvaged for the U.S. Treasury through the whistleblower lawsuits brought under the False Claims Act was nearing one billion dollars. In comparison, the current or former federal employees who gathered to form the Whistleblowers Alliance represent a potential saving to the government of between five and six billion dollars. The dozens of other federal employees whom I have talked with over the last three and one half years could add tens of billions to these numbers if they felt that they could tell their stories without jeopardizing their careers.

I cannot guarantee that they will be protected and I have advised each of them to seek employment elsewhere or to keep their mouths shut. Through the telling of this story, I would hope that as Members of Congress you might see that there is substance to the allegations of budget padding and that your efforts to strengthen the whistleblower protection laws or in the process of budget reform, you would afford these other individuals in the budget community the opportunity to add their billions of dollars back into the federal coffers.

My own case before the Merit System Protection Board was settled on March 15, 1993, after the first witness. I managed to get the Navy to increase its settlement offer and thereby concluded the adverse personnel matter before the Board. At the request of the Navy, the agreement has been sealed under terms that would permit its release to a government investigation and it is my understanding that this would include an inquiry by this Committee. While I believe that the settlement was in my best interest, it serves to demonstrate the deplorable reality of what waits for most of those who step forward to report violations of rules, regulations or laws.

To understand why we whistleblowers are so strongly opposed to the continuation of the OSC, it is necessary to understand the credibility of our disclosures and to see the proliferation of retaliation to which a whistleblower is subjected. Only by seeing for yourselves that credible allegations are being ignored by the OSC and only by getting a glimpse of the retaliation that is heaped upon the whistleblower will you begin to grasp the degree of the problem that exists within the OSC.

In order to focus on the failures of the OSC, I have provide to the Committee a copy of the letter I received from the OSC dated 20 October 1992 [Tab 4]. It was immediately apparent to me that the OSC grossly erred in its determination that my complaint is based on "grievances filed with the agency." My complaint pertains to the cumulative acts of retaliation that stemmed from my disclosures, not from the OSC conclusion that the action was directly attributed to my filing of grievances of my performance appraisal. I continue to contend that my appraisal was merely one of many acts of retaliation.

In this letter, the OSC states;

> "We have completed our legal review of the evidence obtained pursuant to our investigation of your complaint. As explained below, we have determined that no further action by OSC is warranted. . . . *Since you were never able to adequately defend your cost estimates to either your supervisors or to independent auditors, the agency would have a*

> *strong argument that your belief was not reasonable and therefore your disclosures were unprotected.* . . . the personnel actions would have been taken for the efficiency of the service even in the absence of your disclosures." [Emphasis added].

Had I been more financially solvent or had I a higher level of confidence in the Merit System Protection Board (MSPB), I might have continued the hearing. Instead, I felt that in the interest of getting on with my life that it was better to put these issues behind me. If this committee would like me to address the details of the allegations and my defenses at another time, I would be please to do so. However, I would prefer to take the time to focus on the matter that made me a whistleblower ad allow you to judge the OSC on their ability to determine whether or not a disclosure reasonably evidences a violation of rules, regulations, or laws.

Having listened to the accounts of a number of whistleblowers and read many others, I am aware that it is a difficult task to shift through unfamiliar technical data. I am also aware that management is well versed in plausible justifications of events or charges and that it would be easy to jump to the conclusions of guilt based on a one-time reading of management's accounts of incidents that have transpired.

Regardless of the difficulty, the employees of the OSC are there by choice and through this choice, they can be held accountable for their work product. It would seem that this staff desires to pursue the easier route of conducting a few interviews and siding with management then to expend the back and forth sweat that is required to get beyond surface allegations and into the genuine merit of a case. It was my experience and I have seen it reflected in other whistleblower stories that the OSC is not interested in anything other than finding a legitimate excuse to close the case. Better yet, there is a significant degree of encouragement not to open a case with the OSC in the first place. When I first called the OSC, I was asked whether another agency was looking into the matter. Since the matter was already with the Inspector General (IG), the OSC deferred to the IG. As I became more aware of the incidents of retaliation, I called again and I

was advised that the best thing was to seek employment elsewhere. Actually, I tried to do this, but a freeze was in effect and I could not move.

For a while, I thought that maybe the OSC did not have sufficient resources to do the job. The overworked underpaid federal agency routine. Instead of coming here to complain about the lack of funding, it seems that the Special Counsel thinks that everything is working just fine and that the office is fulfilling its stated objective. There seems to be a slight discrepancy here with the impression I was given. I was told of delay after delay because the case examiner had too many other things to take care of first. It would seem that management is non-existent since in the process of assigning and administering cases the person working on my case became pregnant and could not complete the work before she left on maternity leave.

After receiving the first Notice of Proposed Termination, I filed an action with the OSC on April 16, 1991, [Tab 250]. Virtually nothing was done about my allegations or about the adverse personnel action except to provide me with the letter dated May 2, 1991, [Tab 251]. The emphasis on the ability to file with the Merit System Protection Board after 120 days seems to be an excuse by the OSC to do nothing and hope that the matter will go away. Give the OSC even the slightest reason to think that the individual will be terminated, and they are no longer interested in your case. Follow through is not a watchword of the OSC either. Ninety days after I filed the second letter with them, an OSC investigator met with me in December of 1991, examined only a small portion of my records. His promise to return was never fulfilled.

Please permit me to tell you my story. When I went to work for the Joint Cruise Missile Program Office (JCMPO) in July of 1984, I was hired because of my diverse background estimating various products and services and because I was computer literate. Incidentally, the JCMPO has transitioned through several names since then and may be identified by any of the following abbreviations; CMPO, CMP, PDA, PDA-14, or PEO. At the time the office used a mainframe com-

puter model to produce its budget estimates. I was intrigued by the unused micro computer and a program called 1-2-3. I began to monopolize the machine by building spreadsheets to model proposals and then converted portions of the mainframe model to the PC.

By the time I was moved to the position of platform integrator where I was responsible for operating the model that accumulated the component estimates into a single budget estimate, I had mastered 1-2-3 and had moved my work into the integrated spreadsheet program Symphony by Lotus Development. In late 1985 I proposed moving the estimating model from the mainframe onto the PC. Management agreed and by June of 1986 the task had been accomplished.

As the program progressed, there were modifications to the model to accommodate a continually changing environment that was commonplace in a high technology weapon system. In late 1986, a process referred to as "breakback" was implemented to move the government out of the direct procurement of component systems and allow the prime contractors to purchase this hardware directly. This included the procurement of the engine and various other subsystems.

This required the continuation of estimating separate systems and then adding the resulting cost prediction to the AUR line on the budget exhibits. AUR is an abbreviation for All-Up-Round and refers to the assembled missile. In mid to late 1988, I was tasked to update the computer model to accommodate new information from the AUR competition. This alteration of the computer model was seen and reviewed by management.

In November of 1988, two co-workers and I relocated to the offices of AIR-524. My work load diminished substantially. However, I had been asked to reconcile some problems that were thought to be in the computer model. Specifically, the 1989 column of the budgets produced a surplus of eighty million dollars and there was no readily available explanation for this surplus.

The ability to reconcile the model was made more difficult because the CMP was refusing to provide information about their management reserve. I searched for this error, but to no avail.

Then in September of 1989, I thought that I discovered the error and that it was not a surplus but an indication from the model that the CMP might actually need additional funding. I reported this finding immediately to my supervisor and went to work to reexamine the problem area in the model. My initial reaction was premature. I discovered that the real problem, and the reason for the 89 surplus, was that the computer model that had been designed to add component costs to the AUR was still doing so. It was not just a surplus in 89, it was a case of double adding all of the component costs from breakback into the AUR line for 90-94.

It was this computer error that I brought to the initial attention of my supervisors, Mr. William Stranges (AIR-52444) and Ms. Noreen Bryan (AIR-524), not "my own estimate" of the Tomahawk costs. It was this information that I was being told to keep quiet about. I attempted to meet with the appropriate persons in the CMP to discuss this matter prior to their presentation of the budget to the OSD Comptroller. As the budget hearing drew closer and closer I became more concerned that hundreds of millions of dollars were being added to the budgets and that neither my supervisors nor the CMP personnel were doing anything about it.

My concerns began to expand to more than just the obvious computer error. Since I had constructed the computer model, I had also collected information from my managers to support the numbers in the model. As the estimator for the engine, I knew that the cost of the fuel was mathematically included in the engine estimate. I also knew that I was directed to maintain the fuel estimate on the budget because, "Nobody asked question about this line in the budget and it helped provide some management reserve." Similarly I knew that the this was the case with the Payload line and that the numbers for this item were not based on fact, but on a number that nobody would ask questions about this line either. After years of operating the model and watching

money moving from one area to the other, I knew how the exceptional performance of the program was creating a growing surplus and that these moneys were being moved into the support line items. Finally, because I had incorporated the actual contract into the model, I knew that the amount being represented as a contract actual was not the actual contract value. The amount of this surplus money exceeded my limits of proper budgeting and it was clear to me that the amounts being represented and the manner that they were being represented constituted what I believed to be a fraudulent representation.

My supervisory chain was shown the computer printouts and they were told what was going on. Their response was to threaten adverse personnel actions if I went forward. The idea of being fired was not a thrill. I had never expected to become a whistleblower and had given no attention to the supposed protections afforded to whistleblowers. I had just refinanced my house after a very litigated divorce and the last thing I wanted was to get fired. Nevertheless, I elected to go forward. When I informed one of my supervisors of this fact, the threats were repeated, but my choice had been made.

My objective was to do my job and to see to it that senior managers had reliable information upon which to base their decisions. Clearly, the CMP budgets were out of control and clearly there was no indication that AIR-524 was going to be independent with regard to cost or budget. AIR-524 is the Cost Analysis Division of the Naval Air Systems Command. Thinking that something would happen and that someone would be interested, I proceeded to produce an estimate that attempted to disclose the full amount of the padding in the budgets. Hindsight indicates that management sought to draw attention to "my estimate" and not to the reasons why that estimate was produced in the first place.

The OSC investigator was provided this information and we were to get more into this detail upon his return. Perhaps the technical details of cost estimating were too difficult for him or for

one of the OSC attorneys, perhaps it was easier to close the case on "clear and convincing" personnel issues; but, in any event, the OSC's conclusion is that I did not have reasonable belief.

The Naval Air Systems Command (NAVAIR) IG had this information as did the Navy IG, the DoD IG, the DoD Office of the Comptroller, the Naval Audit Service (NAS), the Navy Investigative Service (NIS), the General Accounting Office (GAO). None of them directed their attention to the stated disclosures, instead they all focus on differences of estimating techniques. The GAO went a step further and concluded that the NAS had followed "standard acceptable auditing procedures" even though they had not obtained the documentation for the alleged excuse for the inflation of the 89 AUR.

As Members of Congress, listen the rest of this story and answer a few questions for me. Did I have reasonable belief? Is it reasonable to believe that there should be a level of accuracy in budget submittals? Does Congress want to spend countless hours shifting through budget line after budget line just to try to determine where the fat is? Does Congress want persons like myself to come forward or would Congress prefer that persons like myself surrender to memos like the one I received shortly after my disclosures [Tabs 204 and 211]?

I have attempted to do a job that was required as part of my performance plan. For this I have been humiliated repeatedly. Over the years, I have come into contact with scores of others in similar positions of financial responsibility. At one time, the accumulated stories amounted to nearly one-hundred billion dollars annually in various schemes to inflate budget submittals. I have been criticized for my refusal to provide additional details on who, where, and how this is being done. However, after my experience with the existing system of Whistleblower Protection, there is no way that I would jeopardize anyone else's career. I hold that it is a matter of individual choice to step forward, and I hold that under the existing system, stepping forward is too likely to

be a career ending decision that is not worth the sacrifice that is heaped upon the whistleblower and his or her family. A few success stories do not outweigh the abundance of careers in ruin.

The following is an abbreviated chronology of events. Under threat of retaliation from my supervisors, I made my first disclosure to the DoD Office of the Comptroller in October of 1989, alleging that the 1989 contract value for the AUR as shown on the budget submittal [Tab 184] was inflated by more than one-hundred million dollars, that the fuel and payload lines as shown on the budget submittals were false and were already included in the in estimated costs for the engine and the AUR, and that the support costs were substantially inflated with management reserves.

The PDA Business Manger (PDA-14B) responded to the DoD Comptroller's office by stating that the amount shown was a "contract actual" and used reports from the in-house accounting system to support this assertion. I later learned that the OSD analyst had been shown a report that aggregated the contracts with the support costs such that she was convinced that the amount shown was a contract actual. To the best of my knowledge she never actually examined the contracts to ascertain the authenticity of my allegations. My own records that included these documents were trashed at the direction of my supervisor in early 1991. Nevertheless, documents shows that there was an immediate effort to convince senior officials that there was no credibility to my assertions. See paragraph 3 of King's memo to Willingham [Tab 163] that indicates that there had been a review by unnamed Tomahawk personnel and that it did not merit further consideration.

Immediately after my disclosure I was threatened again by my supervisory chain with adverse personnel actions and this was followed by a telephone call from PDA-14B. He informed me that he would have me fired. There were some initial acts of retaliation, but they quickly subsided from active retaliation to passive retaliation once the supervisors were made aware that their actions violated the Merit System Principles.

Within days of the first disclosure, I had a meeting with inspectors from the NAVAIR Office of the Inspector General. The inspector from this office recommended using the suggestion program to generate a written response from management to my specific allegations. I complied with this suggestion and submitted the them within one week of my disclosure. See the support documentation that was provided to Senator John Warner of Virginia in May of 1990 [Tab 67].

In November of 1989, a team of past and current supervisors was appointed to refute my allegations [Tab 206]. I was given an abbreviated and misleading briefing of this group's findings in January of 1990, that suggested that the report would substantiate my allegations. I was specifically barred from seeing the briefing and was not included in the meetings that followed where these supervisors briefed senior management in February of 1990. I can only assume that these individuals were well satisfied that they had provided a plausible response that was accepted by senior management and they felt that the matter was closed.

I met with the staff of Congressman Frank Wolf of Virginia in May of 1990, but since the House had concluded it's Armed Services Appropriations hearings and I was referred to Senator Warner's office and wrote to him in May of 1990 [Tab 67]. When it appeared that I might be called as a witness in the Senate hearings I informed my supervisors who then took steps to prepare a response. It was not until March 9, 1993, when documents were produced through discovery, that I learned of these actions and it is clear from careful examination of these documents that these mangers were already engaged in the process of distorting the factual basis of my disclosure and of their own involvement in ensuing retaliation. [Tabs 167, 168, and 169].

Pertaining to the Prince memo [Tab 167], I can only wonder if the notifications of various legislative affairs offices had anything to do with the fact that I never was called to testified. Please become aware of the references to "my estimate" in this memo and in the others that will follow. This will become increasing important as the emphasis is placed on a difference of estimating

techniques and not on the disclosure of the improprieties in the budgets. The handwritten memo in the bottom quadrant was supposedly written much later than the date of the memo.

Referring to the Ms. Bryan memo of May 23, 1990 [Tab 168], Ms. Bryan was my third level supervisor and it was she who first threatened me in October of 1989. You should also be aware that in the meeting with her she was specifically shown and told about the inflation of the 1989 AUR, the error in the computer model, the fuel line, the payload line, and the inflation of the support costs. Now, she is representing that it was a problem with my own estimate and at the time of this meeting, they disagreed with what I told them. There was no disagreement in that meeting with my conclusions or assertions. There was only a concern that I would carry the matter outside the organization. In fact, they had nothing to disagree with until after they performed their own "independent evaluation". The note at the bottom indicates that the DoD analyst did not accept my assertions but fails to indicate that the analyst had already been provided with inaccurate information by the Tomahawk Office.

In the memo of May 25, 1990, we are dealing with a comparative analysis between two different estimates without addressing the justifications for the existence of my estimate in the first place. Now there is an assertion that these people recommended that I support the Navy budget and that I ignored this directive. There was never a recommendation that I support the Navy's budget and now for the first time there is an indication that in the review of the program that the last two years of the procurement were canceled. Why do you suppose?

I was never provided specific details as to the reasons for the cancellation or for the means by which this was accomplished; but I would like to know more. However, based on this comment I will disclose here and now that I was making additional waves about the Tomahawk budget with regard to the variant mix (the number and type of missile). In other words, why was it being shown that the Navy was going to purchase a variant that had been banned by treaty? The

Tomahawk is a strategic weapon and I did have to have some discretion in what I could discuss. This memo goes on to suggest that a review of my "estimate" identified significant discrepancies in his methods resulting in inaccurate outcomes. Please note that the NAVAIR Office of Counsel has been involved and has provided advice pertaining to my whistleblower status.

We are here to talk about the Office of Special Counsel that is supposed to well versed in the matters of whistleblowing. If the NAVAIR counsel knows that I have made a protected disclosure in May of 1990, why is it that the OSC is replying in October of 1992, that I did not have reasonable belief that my disclosures evidenced gross mismanagement and a violation of rules, regulations and law? Do they have any idea what 18 U.S.C. § 1001 is? While I'm on the subject of the NAVAIR Office of Counsel, let me ask a few more questions for the Committee to ponder. Why is it that lawyers hired to serve the public are more interested in protecting the agency and agency management more so than protecting the interests of the public? Why is it that these lawyers are allowed to pursue a whistleblower with a vengeance without ever attempting to determine whether or not the whistleblower's allegations are correct and that there have been violations of law? Why is it that the Navy refused to acknowledge that I had made a protected disclosure until the very last minute in the MSPB hearing?

I suppose that because they had claimed that they had briefed me, that in June of 1990, I received a more complete briefing as to their findings [Tab 15]. I can only say that I was appalled at the findings contained in this briefing. When I asked specific questions of the briefing party, I received a non-committal reply and a shrug of the shoulders that suggested that the evaluators were willing to accept an accusation of negligence as a defense for a poorly done job. Nevertheless, I was now even more aware of what was being told to senior management and that this was the first time that I was aware of my supervisors probable complicity in a deliberate attempt to conceal the budget padding.

Let me take the time to provide some historical background and an examination of key pages in this briefing beginning with the hand numbered page 15-2. The members of this team are all current or former supervisors. Mr. Ron Rosenthal was my second line supervisor at the time of the merger of the JCMPO with NAVAIR. At the time of our merger, the JCMPO estimators under the direction of Mr. Michael Joy briefed the Director of AIR-524. Mr. Rosenthal was present at this meeting and from the outset, it was apparent that he was upset that his other missile programs did not have the funding levels enjoyed by the cruise missile. Furthermore, it was apparent that his missile programs were being subjected to conditions of competition and performance that were modeled after the success of the Tomahawk and he was very resentful of this fact. It was Mr. Rosenthal who fought tooth and nails to have the cost analysts relocated to the AIR-5244 office spaces where he could personally oversee a more "independent" examination of the Tomahawk estimating process. Mr. Stranges was my first line supervisor and had been briefed on more than one occasion about the Tomahawk budgeting process, the computer model, and was the person who I had gone to immediately and reported the computer error, etc. Mr. David Burgess (AIR-5244) was my second line supervisor and had also been briefed along with Mr. Stranges.

Turn to page 15-5 and ask why does this teams approach begin with 1990 when one of my major disclosures pertained to the 1989 AUR contract line.

Page 15-15 becomes a key page to understanding a number of issues and to understanding why I am here today. This graph shows the declining costs of the AUR from 1981 through 1989 and an increase in cost in 1990. Please note the percentages of decrease in cost from one year to the next and see that the most conservative percentage decrease for any year was the eight percent decrease between the years 1987 and 1988. That percentage is actually just slightly less than eight percent and is the amount that I applied as a step function in my own analysis.

Looking at this page, a normal question is why was there an increase in 1990. I asked Mr. Stranges this question, keeping in mind that Mr. Stranges is the head of the Cruise Missile Estimating Branch within AIR-524 and has been in that position for more than two years when he was asked the question. His first response was that, "He did not know." Later he stated that it was because the contractors had bid too low in the previous year and had increased their prices. Is this important? You bet, unless you are prone to accept plausible answers. I would suggest that Mr. Stranges knew or at the very least he should have known the answer to this question either by his position or by his involvement with the so called independent study.

The contractors had not raised their prices; certain contracts were suspiciously awarded to the high bidders with "plausible" justifications. Those justifications do not hold water when you become aware of the entire story. For details ask for information about the award of the engine contracts. Could it be that in order to justify higher budget submittals that an entire plant was closed and people were thrown out on the streets. Ask the people who live in Gainsville, Georgia how they feel about losing their jobs to support the higher budget submittals and jobs of people living in Washington, DC. Who has lost jobs in your own districts and why?

Glance at page 15-17 and flip immediately to page 15-18. The data being charted is the actual program history for the cruise missile. It is this data that produces a learning curve with a slope of 91 for 81-86 and it is this data that produces a slope of 60 for the years 86-90 and that is true even with the increase in cost for 1990.

Turn to page 15-20. A straight line projection is a way of saying that there is no expected improvement in cost for the remaining life of the program. This statement is suggesting that a program that has experienced one of the best performance records of any weapon system is suddenly going to stop improving. Is that reasonable? Has anything been left out? Yes, you are not being told that under consideration and possibly under contract, was a Value Engineering Change

Proposal (VECP) from one of the contractors. This amounts to an additional saving of 120 million dollars in addition to the one-hundred and sixty million dollars acknowledged by the Independent Cost Team. Knowing this, PDA-14 does not want to reflect it in the budget.

Flip to page 15-21. First, notice that the fuel and payload lines are merely accepted as throughputs without any documentation as fact. Next look at the very last line, Procurement Support/Fleet Support -- throughput from cognizant PDA codes. I would like them to provide the throughputs and the codes who provided them. In the years that I operated the computer model, the changes to these lines were directed by my immediate supervisors depending on whether there were increases or decreases to the management reserve levels. It was not infrequent for me to be told to balance it any way I wanted, just as long as it looked good. An examination of the backed up versions of this computer model will reveal one instance where there was an attempt to incorporate authentic throughputs -- the effort was abandoned.

On page 15-25, note the conclusion about a straight line projection and note the problem with the incorrect inflation indices; but pay particular attention to the level of management reserve. I'll tell you why to remember this number later in this presentation.

Beginning with page 15-27 we are looking at the independent team's assessment of my own analysis. To begin with, if my use of the 1989 pricing curves for the AUR was reasonable, why isn't the matter of the inflation of the 1989 AUR line addressed? I modeled the competition for the following year by lowering the high bid contractor to a position that I have found to be an historical difference between competitors. The adjustment is made to one vendor and in one year only.

The eight percent annual decrease is referred to as a step function in cost predictions based on learning curves. It is necessary to distinguish between a pricing curve and a learning curve since both would appear to be the same thing. A learning curve can be used to predict costs over any

quantity while a pricing curve is applicable to only one year. The reason is that overhead costs that are provided in a pricing curve format have extremely steep slopes so that these costs are spread very quickly over the initial quantities of the procurement and have minimal impact as the quantities of the procurement increase. In order to apply a learning curve to a subsequent year's procurement, it is necessary to apply a step function. The amount of the step in this case was the minimal improvement experienced by the program in any of its previous years of production.

That brings me to the next statement by my supervisors who determine this to be a slope of 60 while holding that the lowest historical rate was 80. I wonder whether they were looking at the PDA data or whether this chart was based on other missile history. It is obviously flawed by the data in their own report. These are my bosses and they are certainly entitled to their conclusions.

Page 15-28 gets more disturbing. If I had not briefed these individuals myself, I could understand some misconceptions about what was being done in the area of support costs. Support costs are frequently referred to as "level of effort" types of work meaning that they are not subject to fluctuations in the quantity of the weapon being purchased. As discrete estimates -- that is their words not mine -- these numbers should not experience significant change. These people knew that I had rebased my estimate to a prior estimate simply to adjust the years beginning in 1990 to a known level of effort in order to eliminate the budget padding in these lines. They then suggest that there is no historical support for a step down from one year to the next. Once again they have left the listener with the false impression of the analytics that were applied.

Skipping forward to page 15-31 we begin the portion of the brief that addresses the estimate by this group of independent minded bureaucrats. Supposedly based on more current contracts, this group decides to rely on 1990 contract prices. Let me remind you that at least one of these contracts was not awarded to the lowest bidder and that it has been rumored that this is true for other contracts also. Right off the bat, they fall back to old history by adopting a 91 slope. Why have

they then selected a slope of 100 for one of the missile variants? Neither of these decisions is supportable under accepted cost estimating techniques and certainly neither would have been applied as acceptable if this had been done by a contractor in support of higher prices to the government. They have never provided any support for these decisions, but one would have to ask whether the result is closer to the PDA's slope of 100 or to my slope based on historical actuals? Then ask which one would be more likely to maintain a higher budget submittal. Management reserve is assessed at two percent and not the eight point three percent seen earlier.

Knowing what has been going on with the support costs, this team decides to adopt the PDA estimates without question and without the slightest shred of documentation to support the numbers in the program's estimate. Insufficient time? I was given a matter of days to produce a document and this group has been at it for three months and they claim that this is insufficient time. Did I mention that they had all the help they could use from one of their contractors and were using additional office staff on this task at the same time. The only person who was "unavailable" was, me. The OSC couldn't possibly conclude that this was retaliation could they?

Okay, move on to page 15-36. Yes, I would have to agree that the complexity of the cruise missile makes the task difficult, but the ability of the computer model would have overcome these difficulties if they had been interested in working with the model.

The word competition has crept into the discussion on a number of pages, but here it is being shuffled aside because it is supposedly lost among other factors. Here is an escape clause, if I ever saw one; "Because of uncertainty of data, accuracy of forecasts are suspect." Here is the conclusion that contradicted what I had been told in January of 1990. The Independent Team "supports PDA's budget estimate."

Now we get to the nitty gritty. "-- AIR-52442F's (that's me) budget estimate is analytically unsupportable." Which part? Am I unsupportable on one-hundred million dollar inflation of the AUR? No. Has it been addressed in this estimate? Did this team address in any portion of their findings the fuel line or the payload line? No, these were accepted again without any documentation as program office throughputs on page 15-21. Ditto for the support costs.

After all has been said and done, this independent team suggests that the PDA has overstated their requirement by 161 million dollars over a four year period. Now keep in mind that they have not given any consideration to the 120 million dollar VECP and that they have simply accepted the Tomahawk's throughputs as verbatim without documentation. They also know that the Tomahawk office has inflated the 89 AUR line by inflating the unit costs for each variant and has used these inflated costs to predict future costs as well.

Could it be that I have been right all along? Would it appear to you or to any American taxpayer sitting in a jury box that there has been an effort to conceal the truth from senior management that includes the President and the Congress? What about that 8.3 percent rate of management reserve? Please turn to page 170-4 of Tab 170. After a long explanation that supposedly indicates how erroneous I have been for years, the official position is that, "Because the Tomahawk program uses fixed (an interesting use of the word) price competitive contracts, and the production program is mature, the Tomahawk program budget contains NO management reserve NOR engineering change order estimate." It is their statement, not mine. The PDA budgets contain NO reserves; not two percent, not eight point three percent -- NONE!

These people thought they had destroyed all of the evidence. They thought they controlled the only copies of the computer models. They were wrong. The printouts from those models will show years of management reserves that amount to several hundred million dollars. You can accept or reject my analysis that aggregates the amount to nearly 1.5 billion dollars. It is the tax

dollars of your constituents and it is being hidden from your view. Will you tinker with the OSC or will you abolish it? Do you want to hear from people like me or should we zip our lips? I am here to assert that I have been correct and that this has been a case of credible whistleblowing and subsequent retaliation. I am here with the hope that you will take the necessary action to alter this system so that others will not have to experience similar hardships.

This committee should not ignore the conclusions of the other investigative bodies in its efforts to reform the whistleblowing process. Most were sidetracked into a belief that it was merely a difference of estimating techniques. Most never even looked at the details of the allegations, but were lead to believe that it was nothing more that an errant employee who was about to be terminated. The FOIA response from NAVAIR pertaining to the NIS indicates that the only documentation obtained from NAVAIR pertained to the allegations and adverse action [Tab 137].

The unofficial response by PDA-14B to the beneficial suggestions provides more clarity into the manner that people are easily mislead [Tab 166]. My submission of beneficial suggestions came at the advice of the NAVAIR IG inspectors and it is well known among whistleblowers that these beneficial suggestions are a means to generate a written response from management with regard to our allegations. Would you be inclined to do much of an investigation if you were lead to believe that I had inflated my cost estimate simply so that I could turn around and file a beneficial suggestion that I might get paid for?

No, let me rephrase the question in a slightly different way. Would you allow me to inflate my budgets and submit them to successive levels of management who can then inflate them a lit. . more? I think that the Members of Congress have enough to deal with without having to spend countless hours digging into every line of every program to determine whether or not you have been provided an inflated budget or whether it is a reliable document upon which you can base the financial decisions of this country.

Did the OSC read this briefing? Did they understand it? Does it in anyway support their conclusion that because I didn't convince my supervisors that there was a problem that I have failed to make a protected discovery? Do we really want to risk the careers of anyone on the proven inability's of the OSC? Not in my opinion, and I certainly hope that we are moving to a position of agreement that substantial change is necessary.

Let me get back to a chronological review. My annual performance appraisal with a rating of fully satisfactory was in August of 1990. Senator Warner response to my May letter came in September of 1990 and provided NAS the means to become more fully involved in the audit process. Following their briefings to senior management and in the absence of any direct testimony about this issue to Congress, my managers remained confident that the matter had blown over. They were not at all happy with the discovery that Senator Warner was involved; and at this point, the acts of reprisal intensified.

As the result of the retaliation, I wrote to President Bush in September of 1990. This resulted in a directive to the DoD Office of the Inspector General to investigate the allegations of reprisal. Believing that the investigations by the auditors and by the IG would be sufficient to conclude the matter and because of the continuing retaliation, in early October of 1990, I requested and received a transfer with the expectation that I could get on with my career. I soon discovered the long arm of management and found myself under a continual watchful eye for anything that might be used to support disciplinary action. Because of friends, I became aware of the enthusiastic "we got him now" incidents were being telephoned right back to my previous supervisory chain.

In late November or early December I received a verbal briefing from the auditors. I was told that because I did not have an advanced degree and that the persons from the Naval Center for Cost Analysis had their doctorates, that they were obviously more credible than I was. I would suggest

that this was the total depth of the review of "various assumptions and analyses" that was done by these auditors. The auditors told me that they were told by PDA-14B that the inflation of the 1989 AUR contract line in the budgets had been directed by a senior pentagon official. The auditors made no effort to obtain documentation in support of this allegation that was particularly unsettling since this excuse conflicted with the earlier excuse that the contract line was not inflated at all. It wasn't until March of 1991, that NAS finally issued a letter response to Senator Warner [Tab 69].

The auditor's were also briefed on the specifics of my allegations. Do you see any of them addressed here or do you see similarities between the Independent Team approach and this other "Navy" response. After viewing "the various assumptions and analyses" why do you think they reached their conclusion? It's your money and it's your choice. Do you want persons like myself to come forward and attempt to tell you what is happening? Do you want us to risk our careers so that you can save a few bucks of your own?

If management's position or the auditors' conclusions were accepted as valid, is the amount of the overstatement important? Has there been any benefit from my disclosures? Is one-hundred and sixty million dollars substantial enough to be a credible whistleblower? How can we rely on a system that says on the one hand that reasonable believe is sufficient, while on the other hand the persons who are supposedly there to provide a safety net for whistleblowers cannot even conclude that a protected disclosure has occurred?

In December of 1990, I was transferred back to my original office. When I was detailed to the Navy Yard, I was at first given the impression that my computer and my files would be transferred with me so that I could support the work of the auditors. This did not happen and after I returned to AIR-524, I found my files scattered around the office. I believe that it was in January when I found two co-workers trashing these files at the direction of my immediate supervisor. I went to

the IG investigator and told him, but he said he was too busy to get involved. As a result, important documentation was lost.

The continuing incidents of reprisal eventually lead to the receipt of my first notice of termination in April of 1991. At that time, I was placed on administrative leave with pay. I replied to the proposed termination within the fifteen day limit and remained at home.

In June of 1991, the DoD IG issued its report finding that I had been the victim of retaliation and recommending disciplinary action for the individuals involved [Tab 173]. Documentation indicates that the report was in the hands of NAVAIR personnel in early July of 1991. Documentation also indicates that the designated deciding official for the April Notice of Termination was refusing to issue a ruling [Tab 177]. Please note some discrepancies in this document. I received the notice of the cancellation of the April termination at the same time I received the second Notice of Termination in August. I have to wonder if the decision to cancel the earlier termination was made on or about the date indicated. If so, it would add credibility to my assertion that the means by which the August Notice was delivered was a deliberate attempt to conceal this second notice. Also, if you will look at the top of the IG report [Tab 173] you will see that NAVAIR had this report on July 9, not July 24.

I am aware of the interest of certain Members of Congress in the various IG offices. I went to the IG and saw them sit by and do nothing as my files were trashed. I saw the investigators from the DoD IG issue a report that found that I had been subjected to retaliation and recommended disciplinary action. Let me take a moment to give credit where credit is due. I did not agree with all of the findings of the DoD IG, but at least I did see an above average effort extended by Ms. Marcia Campbell and I do applaud her efforts. However, early in this entire episode of events, I had overheard Mr. Burgess and Mr. Stranges commenting to another person in the office that they had the support of senior management and that they didn't have to worry. I wasn't sure

whether it applied to the briefing or to the retaliation, but take a look at two other documents [Tab 175 and 176]. Why bother with an IG if they aren't going to do their jobs or if when they do, their findings are ignored?

In August of 1991, I received a package from NAVAIR. On the top of the file folder was a letter canceling the April notice of termination. Following the IG's report, the package appeared to be nothing more than the cancellation with the attached file as nothing more than a cleansing of the record. I did not detect the new Notice of Termination concealed inside the folder. Because I failed to respond, the newly designated official, who was not provided any information about my whistleblowing, read the file and determined that I should be terminated from federal service.

I first learned of my pending termination when I was called in mid September 1991, by a friend who asked me why I was being fired. Documents show that the grapevine knew of my termination long before I received notification on September 19, 1991. I immediately contacted the OSC [Tab 257] and file an appeal with the MSPB. The MSPB ruled that because I had first contacted the OSC that it lacked jurisdiction and the matter was left in the hands of the OSC. The OSC denied my stay request and said they would be getting back to me. In mid to late December of 1991, ninety days after I filed, I had my first and only meeting with an OSC investigator.

My correspondence with the White House prompted the reexamination of the auditors' findings in October of 1991. At about the same time and following conversations with the fraud unit of the GAO, it was determined that in order to avoid a duplication of effort that it was best for me to proceed through the NIS with regard to an examination of the issue of fraud. I met with an investigator in January of 1992, at which time she looked at the available information and told me that it did appear that federal statute 18 U.S.C. § 1001 had been violated. Later, when I met with this person, her manager, and a representative from the NIS Office of Counsel, I was told that this fraud stature was "antiquated law" and that, "The Navy would not prosecute the Navy."

Between November of 1991, and January of 1992, I had several telephone conversations with a contact at NAS who was indicating that there was merit to my reasons for requesting the reopening of their audit. Suddenly in mid January there was another sudden reversal and in late February of 1992, the NAS issued a written report that essentially maintained their original position that the dispute was merely a difference of estimating techniques and that there was only a slight discrepancy of 160 million dollars in the PDA budgets [Tab 73].

I continued to receive periodic letters from the OSC saying that they were still looking into the matter. Repeatedly I was told that it would be a matter of weeks. Weeks stretched into months. In July of 1992 I was told that the decision had been made but that the official letter was moving through the chain and that since it was summer and some of the people had vacation plans it was uncertain when the letter would actually get out the door. In October of 1992, eighteen months from my first filing with the OSC, I received the final determination by the OSC. I filed with the MSPB and as I indicated, I have settled the case.

Is it appropriate to focus on the OSC as the place to begin the alteration of a system that is not working? The OSC said that I did not have a reasonable basis for my allegations and therefore I did not qualify as having made a protected disclosure. The Navy subsequently argued to support this position, but reluctantly later stipulated as a part of the record that I had made a protected disclosure. Where was the OSC then? Where are they now? Ironically, because of my settlement, I am still a federal employee. I am in the status of administrative leave with pay, but that will not last for long.

If this body wishes to encourage persons to come forward, then they must have the confidence that doing so will not jeopardize their careers. If the OSC is not capable of investigating the merits of a disclosure, how can they be relied upon to make a reasonable determination as to whether

or not the whistleblower has been subjected to retaliation? In my opinion, they have failed miserably on all counts and should be abandoned in favor of alternative solutions.

What was the position of the OSC? They had the IG's report. The IG conducted in-depth interviews under oath. The OSC showed up once and seemed disinterested. The IG contacted witnesses who could speak on my behalf, the OSC didn't contact one person until after they had already issued the letter that was supposedly waiting for a signature. The IG was receptive, interested and attentive. The OSC couldn't care less.

It is my opinion that the priority of protections should be in protecting the whistleblower's income not in protecting his or her job. I believe this can best be done by making available a variety of preferential personnel services designed to facilitate the transition of the whistleblower to another position. I think that the decision to transfer should be at the discretion of the whistleblower; but I do feel that once there is a suspicion of retaliation that the whistleblower should be moved even if it is not their choice to do so.

I would suggest a number of special project units within organizations such as the FBI, the GAO, OPM or even within the office of an IG. I would suggest that these units be capable of conducting the investigation of whistleblower allegations and should be in the position to involve the whistleblower in the investigation as much as possible. Transfer to one of these units would be a detail assignment such that the whistleblowers slot is held vacant until the conclusion of the investigation at which time it can be a choice to return to the office or to be given the opportunity to transition to another position.

Organizational behavior is well ingrained into an office environment. Even though the whistleblower has drawn attention to one specific violation, there are likely to be other alterations in the office environment that will be subjected to change because of the whistleblower's activities.

There is likely to be some resentment if this is the case, and it may not be in the whistleblowers best interest to return to a specific job.

In a legal system that is getting jammed with new cases everyday, I see a tremendous advantage to everyone concerned if the route of choice is to transition to an alternative position in order to avoid retaliation. In cases where it may be necessary to maintain the whistleblower in their position for purposes of assisting the investigation, it should be abundantly clear that the person is likely to be subjected to retaliation and is likely to fall victim to abuse. A clean slate and a transition when it is appropriate is the best solution in my opinion.

I would not ignore the changes to the litigation process that should be considered even if the idea of job transition becomes a reality. There may still be occasions when the judicial approach may be desirable. There is a need to impose penalty on the perpetrators of retaliation or on abusive managers. It must be an avenue accessible to the employee and one that they can initiate if senior management does not take the anticipated or desired action. The whistleblower has taken these actions in the best interest of the public good and it should be the public that has the opportunity to determine the merit of the whistleblower's allegations. Access to a jury is the most important aspect of our judicial system and it should be this system that is accessible to the whistleblower. It should not be the exclusive jurisdiction of the MSPB that has evolved as a system primarily intended to protect management from the errant employee.

Retaliation is so detestable that there should be only one penalty -- termination. Allowing a lesser penalty for someone who has attempted to generate an adverse personnel action against a whistleblower would imply that it is not a big deal and would only serve to encourage others to give it a try. One only has to examine this case to see what happens to the Bureaucratic Bully -- they get promoted. The authority to impose penalty must co-exist with the authority to investigate otherwise, why waste tax dollars on the investigation in the first place.

It seems to me that whistleblowers can quickly identify with another whistleblower in a way that is not typical of the reception we receive from others who have not experience a similar situation. Perhaps it is the level of experience that comes with the task similar to the experience that comes with any other job. I do know that regardless of the level of experience possessed by the investigators I have met, their ability to relate to the whistleblower is not equal to that which I have seen between whistleblowers.

There is another aspect of whistleblowing that I had not expected. We seem to be magnets for others who have a story to tell. Perhaps because we have taken the risk, perhaps it is simply a matter of personalities; but regardless we are a resource for those who are genuinely interested in weeding out corruption whether it is in government or in the private sector. I suspect that the whistleblower is a prime candidate for seminars on detecting and reporting waste, fraud or abuse. Once these people can be convinced that the system has changed for the better, I believe that they will be a tremendous resource for improving the system for all concerned.

Mr. Chairman, thank you for the opportunity to address this Committee. I hope that I have been of assistance to you and the committee in determining the course of action that is under consideration. I do ask that you take the steps to abolish the OSC as one indication, to status quo Washington, that change is indeed here.

Respectfully submitted,

Thomas Franklin Day, II
704 Fall Place
Herndon, Virginia 22070
703/435-0446

SUPPORTING EXHIBITS TO THE TESTIMONY OF THOMAS FRANKLIN DAY II

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
SUBCOMMITTEE ON CIVIL SERVICE
CONGRESSMAN FRANK McCLOSKEY, CHAIRMAN

OVERSIGHT HEARING
ON WHISTLEBLOWER PROTECTION AND
THE OFFICE OF SPECIAL COUNSEL
MARCH 31, 1993

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

October 20, 1992

Mr. Thomas F. Day II
704 Fall Place
Herndon, Virginia 22070

Re: OSC File No. MA-91-0833

Dear Mr. Day:

This letter is a final response to the complaint you filed with the Office of Special Counsel (OSC). You alleged that you were charged with absence without leave, issued letters of caution and reprimand, suspended for 10 days, and issued a performance improvement plan and removed from your position with the Naval Air Systems because of your disclosures. You also alleged that these personnel actions resulted from grievances which you filed with the agency. Your disclosures involved your allegations that $1.4 billion of excess funds were contained in the budget estimate for the Cruise Missile Program for the 1990 through 1994 fiscal years. You made disclosures concerning these alleged budget overestimates to your supervisors, the Office of Secretary of Defense, the Inspectors General of the Naval Air Systems Command, the Department of Defense, and Senator John Warner. We have completed our legal review of the evidence obtained pursuant to our investigation of your complaint. As explained below, we have determined that no further action by OSC is warranted.

Your grievance activity would be protected under 5 U.S.C. § 2302(b)(9). The evidence showed that agency officials knew of your October 1990 grievances regarding your performance appraisal rating and the letter of reprimand. However, we found no evidence connecting the personnel actions at issue to the filing of your grievances. Thus, the evidence showed that your grievances were not a motivating factor in the personnel actions taken.

For protection under 5 U.S.C.§ 2302 (b)(8), an employee must reasonably believe his disclosures evidence a violation of a law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. Since you were never able to adequately defend your cost estimates to either your supervisors or to independent auditors, the agency would have a strong argument that your belief was not reasonable and therefore your disclosures were unprotected. Even if the Merit Systems Protection Board were to find that your disclosures were protected and contributed to the personnel actions taken, we believe that the agency could prove by clear and convincing evidence that, because of your neglect of duty and your threatening and disruptive conduct, the personnel actions would have been taken for the efficiency of the service even in the absence of your disclosures. Accordingly, we

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Thomas F. Day II
OSC File No. MA-91-0833
Page 2

would be unable to prove a violation of the Whistleblower Protection Act. Thus, we are closing our file in this matter with no further action.

Since you have alleged reprisal for whistleblowing under 5 U.S.C. § 2302(b)(8), you will receive a letter from OSC which will explain your right to seek corrective action before the Merit Systems Protection Board.

Sincerely,

William E. Reukauf
Associate Special Counsel
for Prosection

TOMAHAWK INDEPENDENT ASSESSMENT

INDEPENDENT TEAM

CHAIRPERSON - RON ROSENTHAL, PMA-201A

MEMBER - BILL STRANGES, AIR-52442

MEMBER - DAVE BURGESS, AIR-5244

OUTLINE

- TASKING/PROBLEM DEFINITION
- PROGRAM HISTORY
- PDA-14 BUDGET ESTIMATE
- AIR-52442F BUDGET ESTIMATE
- INDEPENDENT ASSESSMENT

TOMAHAWK INDEPENDENT ASSESSMENT

THREE PRIMARY TASKS:

- REVIEW PDA-14 WPN BUDGET ESTIMATE
- REVIEW AIR-52442F WPN BUDGET ESTIMATE
- ESTABLISH INDEPENDENT POSITION FOR PROJECTING FUTURE WPN REQUIREMENTS

PDA-14 VS AIR-52442F COST COMPARISON
1 BILLION $ DIFFERENCE
(TY $M)

	FY90	FY91	FY92	FY93	FY94	TOTAL
TOTAL WEAPONS SYSTEMS COSTS						
PDA-14 (29 SEP 89)	669.5	635.6	694.4	633.5	598.3	3271.3
AIR-52442F (16 OCT 89)	532.1	492.4	452.0	422.3	338.0	2236.8
DELTA	137.4	183.2	242.4	211.2	260.3	1034.5*
TOTAL HARDWARE						
PDA-14	502.7	527.6	582.6	532.0	522.0	2666.9
AIR-52442F	455.7	431.0	407.5	383.2	303.6	1981.0
DELTA	47.0	96.6	175.1	148.8	218.4	685.9
TOTAL SUPPORT						
PDA-14	166.8	148.0	111.8	101.5	76.3	604.4
AIR-52442F	76.4	61.4	44.5	39.1	34.4	255.8
DELTA	90.4	86.6	67.3	62.4	41.9	348.6

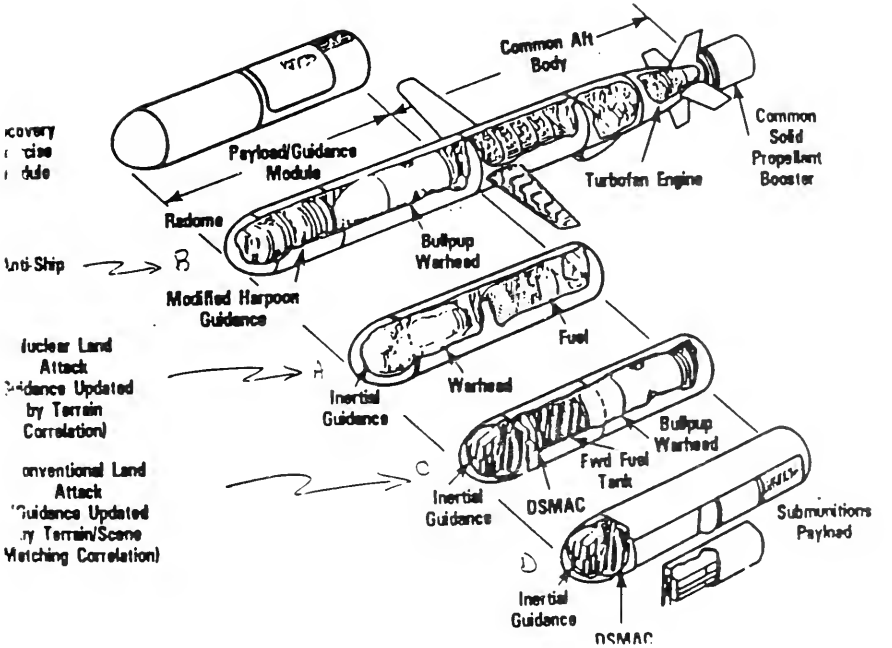
* BILLION $ DIFFERENCE REPORTED TO OSD COMPTROLLER & NAVY IG

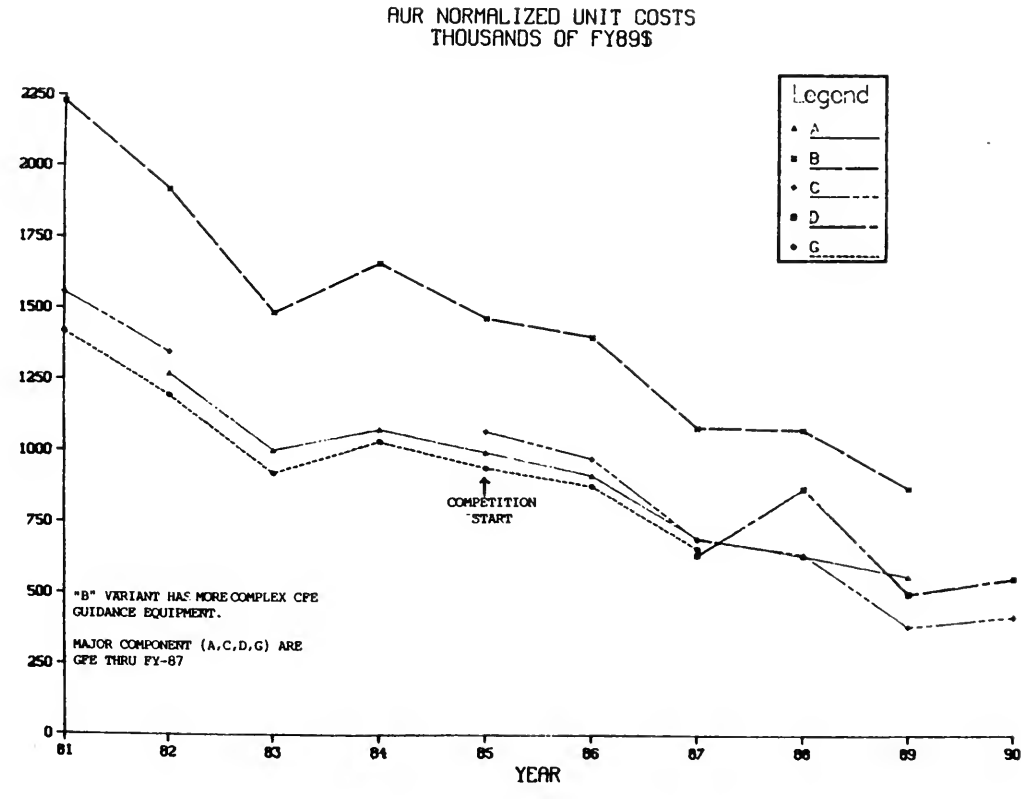
PROGRAM HISTORY

HARDWARE

- HARDWARE VARIES BY MISSION

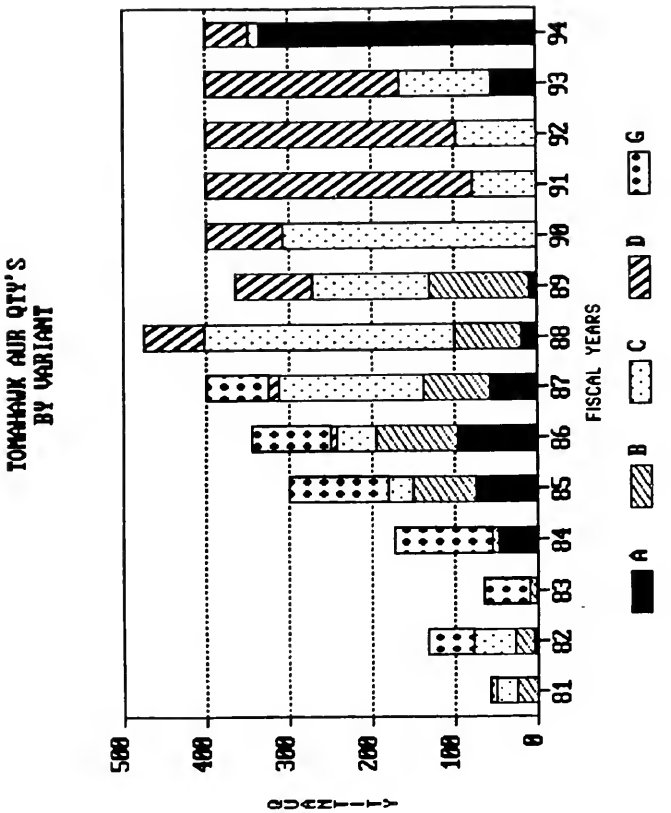
A	NUCLEAR LAND ATTACK
B	ANTI-SHIP
C	CONVENTIONAL LAND ATTACK
D	LAND ATTACK DISPENSER
G	GROUND ATTACK

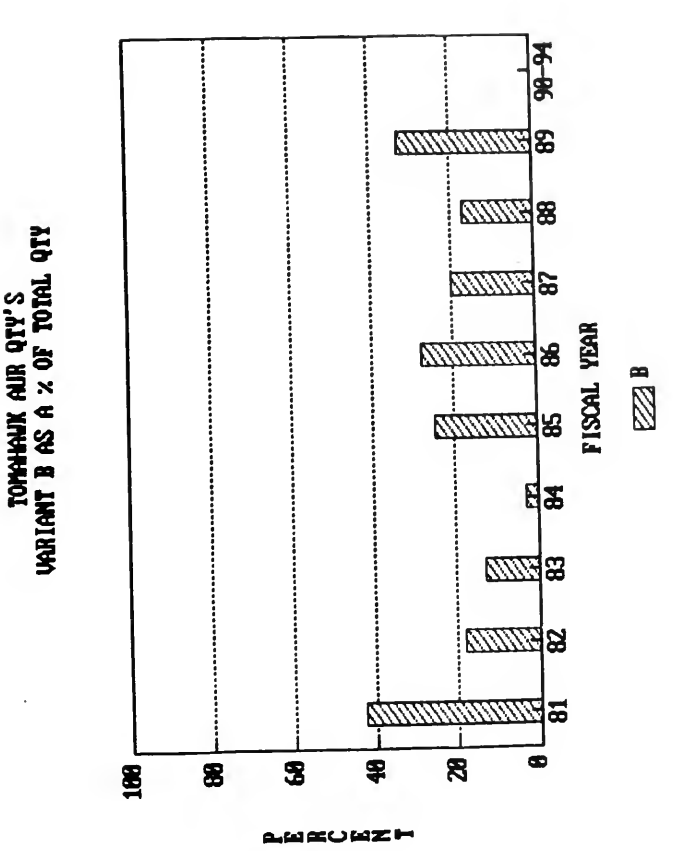



AUR NORMALIZED UNIT COSTS
THOUSANDS OF FY89$
Legend
A
B
C
D
G
2250
2000
1750
1500
1250
1000
750
500
250
0
81
82
83
84
85
86
87
88
89
90
YEAR
COMPETITION START
"B" VARIANT HAS MORE COMPLEX CPE GUIDANCE EQUIPMENT.
MAJOR COMPONENT (A,C,D,G) ARE GFE THRU FY-87

ANALYSIS FACTORS

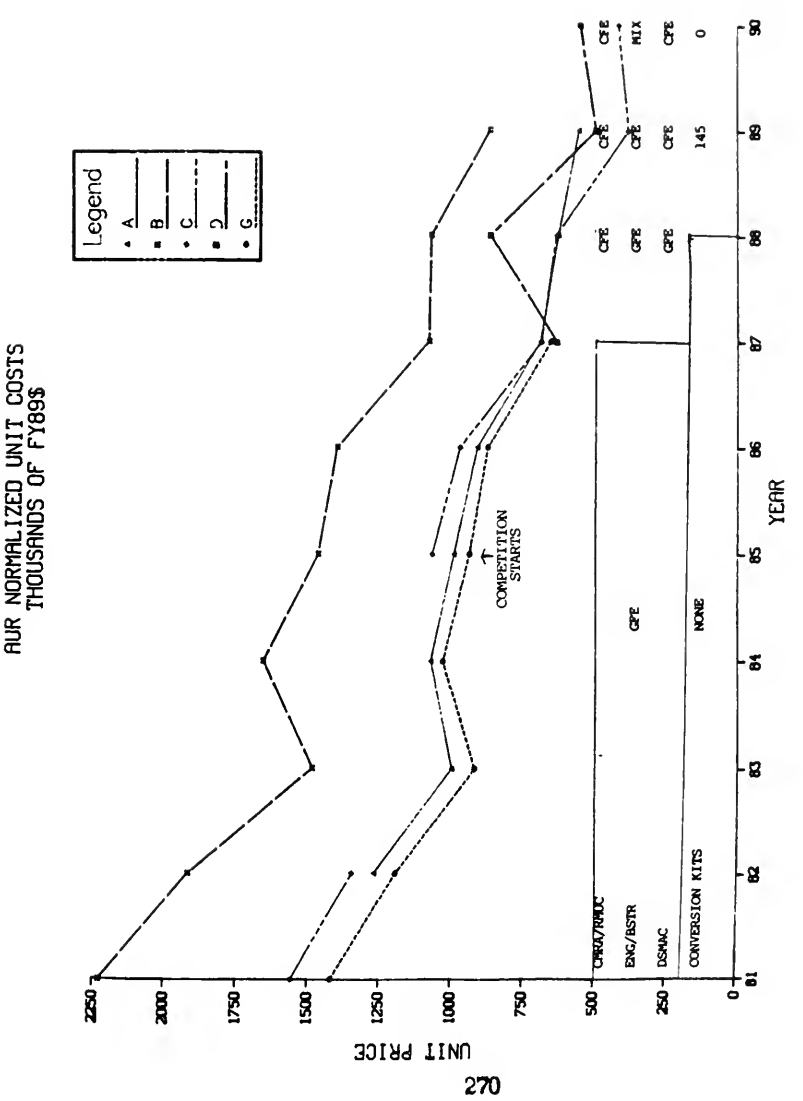
- VARIANT MIX (% OF "B")
- GFE/CFE
- "G" CONVERSION KITS
- COMPETITION


TOMAHAWK AUR QTY'S
BY VARIANT
QUANTITY
500
400
300
200
100
0
81
82
83
84
85
86
87
88
89
90
91
92
93
94
FISCAL YEARS
A
B
C
D
G


TOMAHAWK AUR QTY'S
VARIANT B AS A % OF TOTAL QTY
PERCENT
100
80
60
40
20
0
81
82
83
84
85
86
87
88
89
90-94
FISCAL YEAR
B

ANALYSIS FACTORS

	FY81-87	FY88	FY89	FY90
CFE/GFE				
CRUISE MISSILE RADAR ALT	GFE	CFE	CFE	CFE
REFERENCE MEASURING UNIT	GFE	CFE	CFE	CFE
ENGINE	GFE	GFE	CFE	GFE
BOOSTER	GFE	GFE	CFE	CFE/GFE
DSMAC	GFE	GFE	CFE	CFE
CONVERSION KITS	NO	NO	YES	NO


AUR NORMALIZED UNIT COSTS
THOUSANDS OF FY89$
Legend
A
B
C
D
G
UNIT PRICE
2250
2000
1750
1500
1250
1000
750
500
250
0
COMPETITION STARTS
CMRA/RMUC
ENG/BSTR
DSMAC
CONVERSION KITS
GFE
NONE
CFE
MIX
145
0
01
02
03
04
05
06
07
08
09
90
YEAR

ANALYSIS APPROACH

ASSESS DISPERSION OF DATA

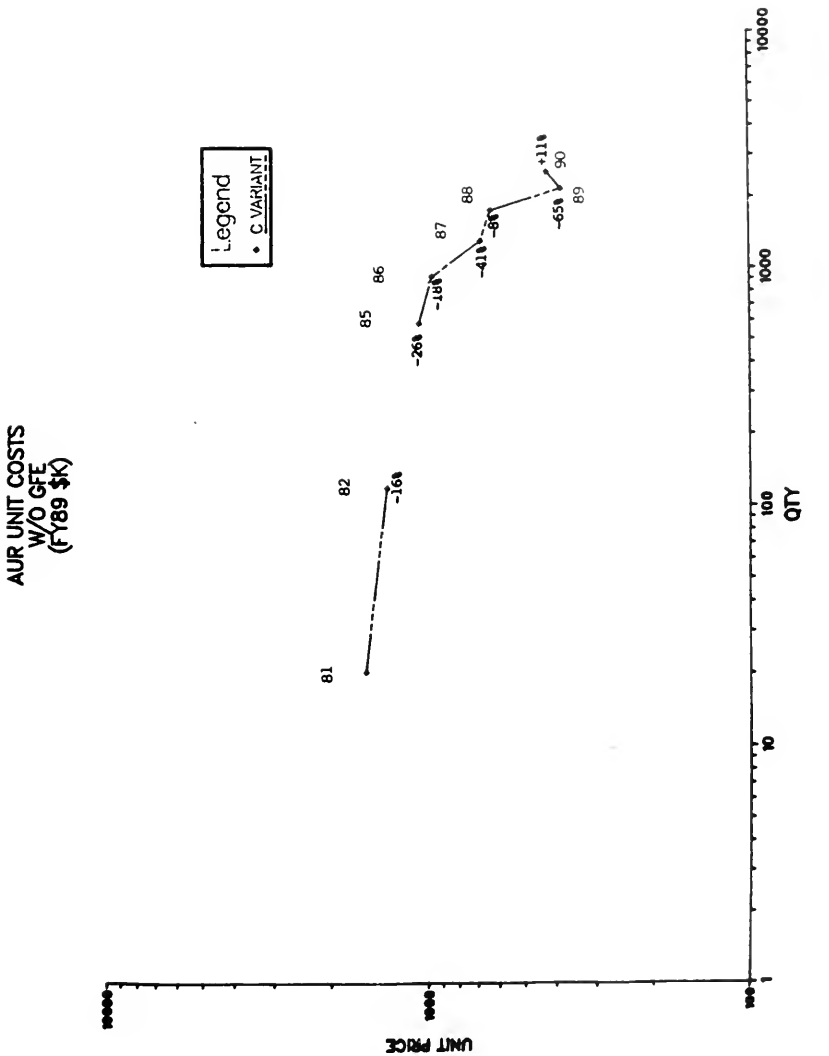
PERFORM LEARNING CURVE ANALYSIS

- WEIGHTED AVERAGE
- BY CONTRACTOR
- BY VARIANT

ANALYZE

YEAR TO YEAR VARIANCES

OVERALL TRENDS


AUR UNIT COSTS
W/O GFE
(FY89 $K)
Legend
• C-VARIANT
UNIT PRICE
QTY
1
10
100
1000
10000
81
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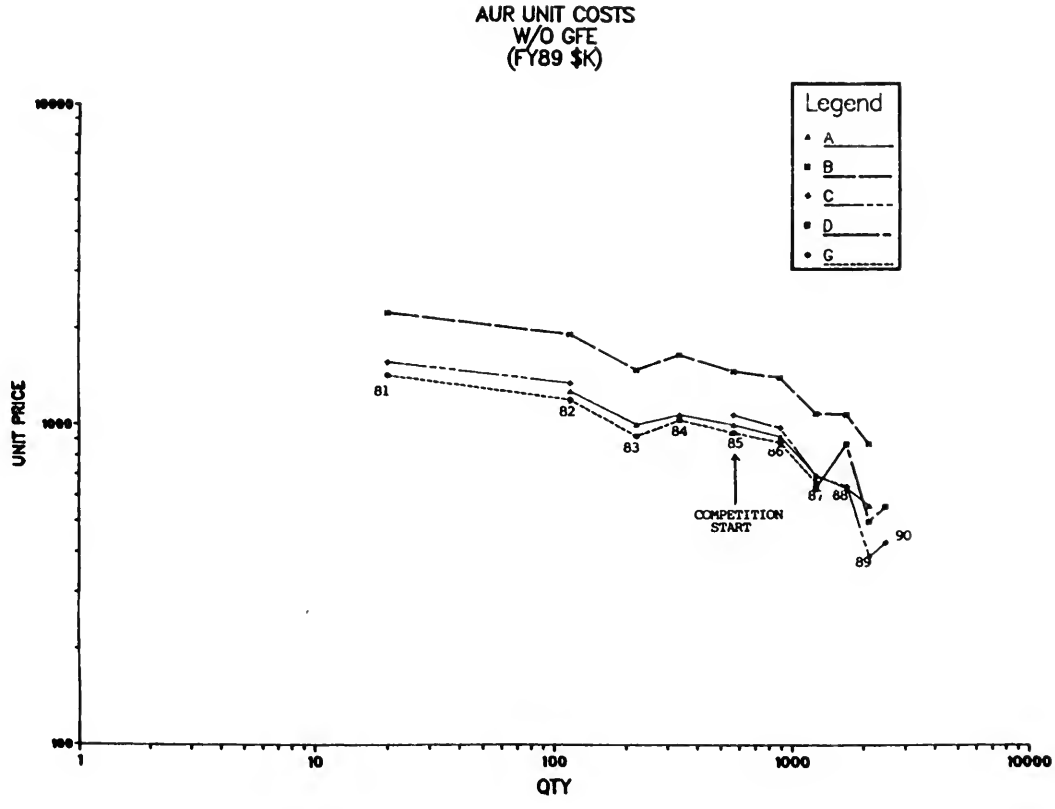
85
86
-26%
-18%
87
88
-41%
-5%
89
90
-65%
+11%


AUR UNIT COSTS
W/O GFE
(FY89 $K)
Legend
A
B
C
D
G
UNIT PRICE
10000
1000
100
1
10
100
1000
10000
QTY
81
82
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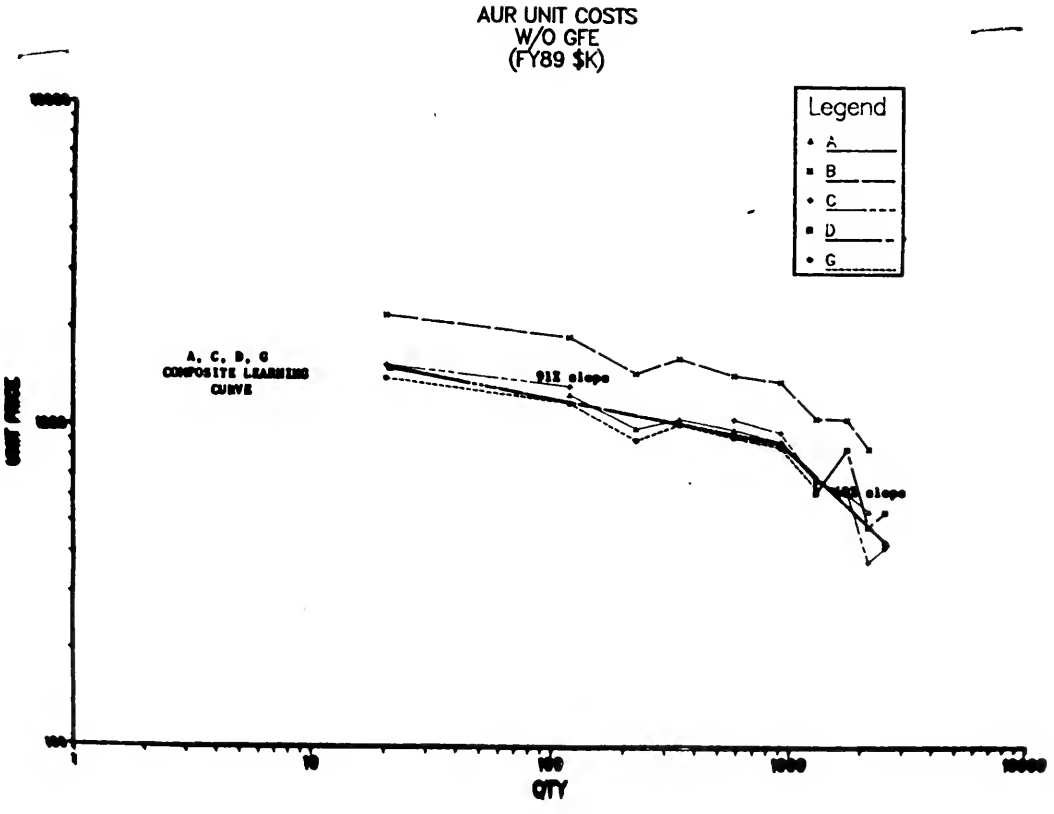
84
85
86
87
88
89
90
COMPETITION
START


AUR UNIT COSTS
W/O GFE
(FY89 $K)
Legend
A
B
C
D
G
A, C, D, G
COMPOSITE LEARNING
CURVE
91% slope
UNIT COST
QTY

PROGRAM HISTORY SUMMARY

. UNUSUALLY WIDE SWING IN UNIT PRICES YEAR BY YEAR

. UNPRECEDENTED PRICING TRENDS

81-86	91%
86-90	60%

. DATA NORMALIZATION DIFFICULTIES

- VARIANT MIX
- GFE/CFE
- CONVERSION KITS

. PRICE LEVEL DATA IS INSUFFICIENT FOR DATA NORMALIZATION

PDA-14 BUDGET ESTIMATE

- METHODOLOGY
- ESTIMATE
- ESTIMATING FINDINGS

PDA-14 WPN BUDGET MODEL
ESTIMATING METHODOLOGY

TOTAL HARDWARE

. AUR COSTS DETERMINED FROM FY89 CONTRACT VALUES FOR EACH VARIANT

- WEIGHTED AVERAGE UNIT COSTS BETWEEN THE PRIMES
- STRAIGHT LINE PROJECTION OF ALL VARIANTS
- 3% ANNUAL INFLATION
- MANAGEMENT RESERVE TO REFLECT PREVIOUS YEAR'S BUDGET REQUIREMENT

PDA-14 WPN BUDGET MODEL
ESTIMATING METHODOLOGY

TOTAL HARDWARE (CONT)

. CAPSULE LAUNCHING SYSTEM (CLS), PAYLOAD, FUEL (GFE)

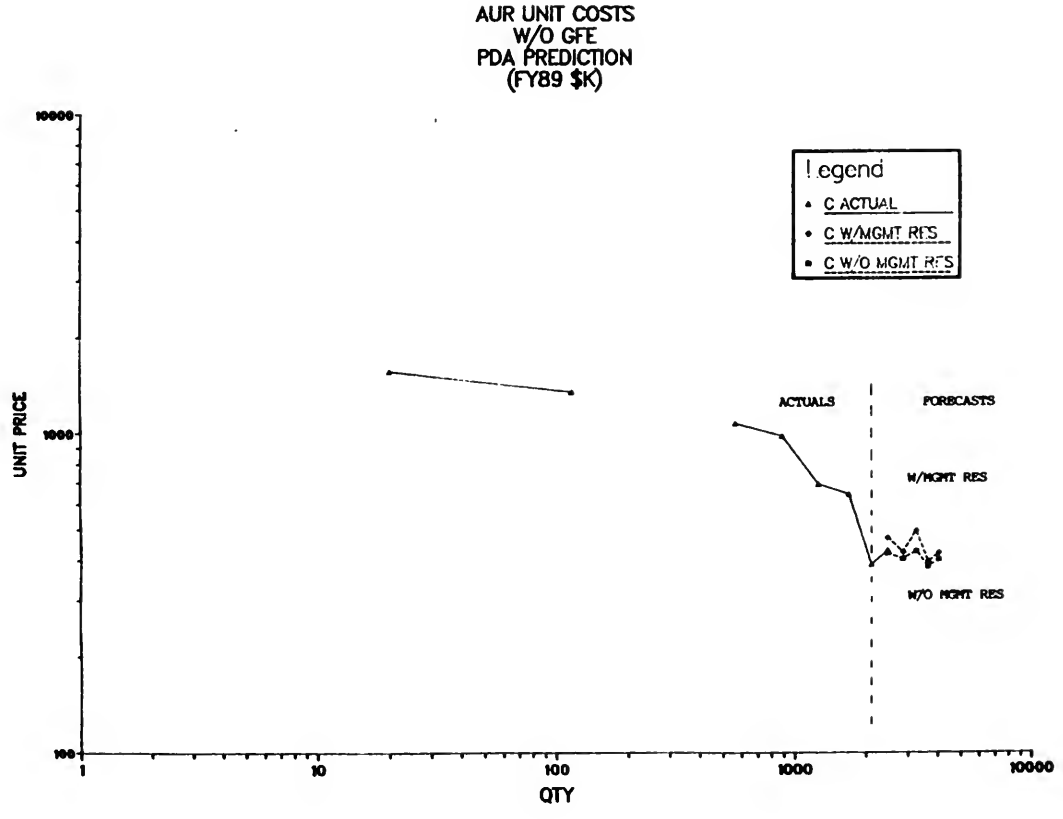
- CLS: BASED ON FY89 CONTRACT VALUES
- PAYLOAD & FUEL: PROGRAM OFFICE THROUGHPUTS

. ENGINE (GFE)

- 1989 ENGINE WAS CFE
- BASED ON FY88 GFE CONTRACT VALUE

PROCUREMENT SUPPORT/FLEET SUPPORT

. THROUGHPUT FROM COGNIZANT CMP CODES


AUR UNIT COSTS
W/O GFE
PDA PREDICTION
(FY89 $K)
Legend
C ACTUAL
C W/MGMT RES
C W/O MGMT RES
UNIT PRICE
10000
1000
100
1
10
100
1000
10000
QTY
ACTUALS
FORECASTS
W/MGMT RES
W/O MGMT RES

PDA-14 BUDGET ESTIMATE
(MILLIONS OF THEN YEAR DOLLARS)

	FY90	FY91	FY92	FY93	FY94	TOTAL
TOTAL WEAPONS SYSTEMS COSTS						
EXTERNAL (BUDGET-CONTROL)	669.5	675.6	694.4	633.5	598.3	3271.3
INTERNAL (PDA-ESTIMATE)	601.2	626.9	633.3	617.2	591.9	3070.5
MGMT RESERVE	68.3	48.7	61.1	16.3	6.4	200.8
TOTAL HARDWARE						
EXTERNAL	502.7	527.6	582.6	532.0	522.0	2666.9
INTERNAL	453.8	500.5	508.1	509.4	491.6	2463.4
MGMT RESERVE	48.9	27.1	74.5	22.6	30.4	203.5
PROCUREMENT SUPPORT						
EXTERNAL	99.4	94.3	71.7	65.5	46.9	377.8
INTERNAL	107.3	94.6	99.0	89.4	81.6	471.9
MGMT RESERVE	-7.9	-0.3	-27.3	-23.9	-34.7	-94.1
FLEET SUPPORT						
EXTERNAL	67.4	53.7	40.1	36.0	29.4	226.6
INTERNAL	40.1	31.8	26.2	18.4	18.7	135.2
MGMT RESERVE	27.3	21.9	13.9	17.6	10.7	91.4

PDA-14 BUDGET ESTIMATE
HARDWARE & AUR
(MILLIONS OF THEN YEAR DOLLARS)

	FY90	FY91	FY92	FY93	FY94	TOTAL
TOTAL HARDWARE						
EXTERNAL	502.7	527.6	582.6	532.0	522.0	2666.9
INTERNAL	453.8	500.5	508.1	509.4	491.6	2463.4
MGMT RSVE	48.9	27.1	74.5	22.6	30.4	203.5
AUR						
EXTERNAL	412.0	435.6	488.1	436.1	443.3	2215.1
INTERNAL	369.0	414.7	421.7	422.5	422.2	2050.1
MGMT RSVE	43.0	20.9	66.4	13.6	21.1	165.0

PDA ESTIMATE FINDINGS

-NO DATA TO SUBSTANTIATE STRAIGHT LINE PROJECTION

-INFLATION INDICES IN CONFLICT WITH OSD/OMB GUIDANCE

-MAGNITUDE OF MANAGEMENT RESERVE - 8.3%

AIR-52442F BUDGET ESTIMATE

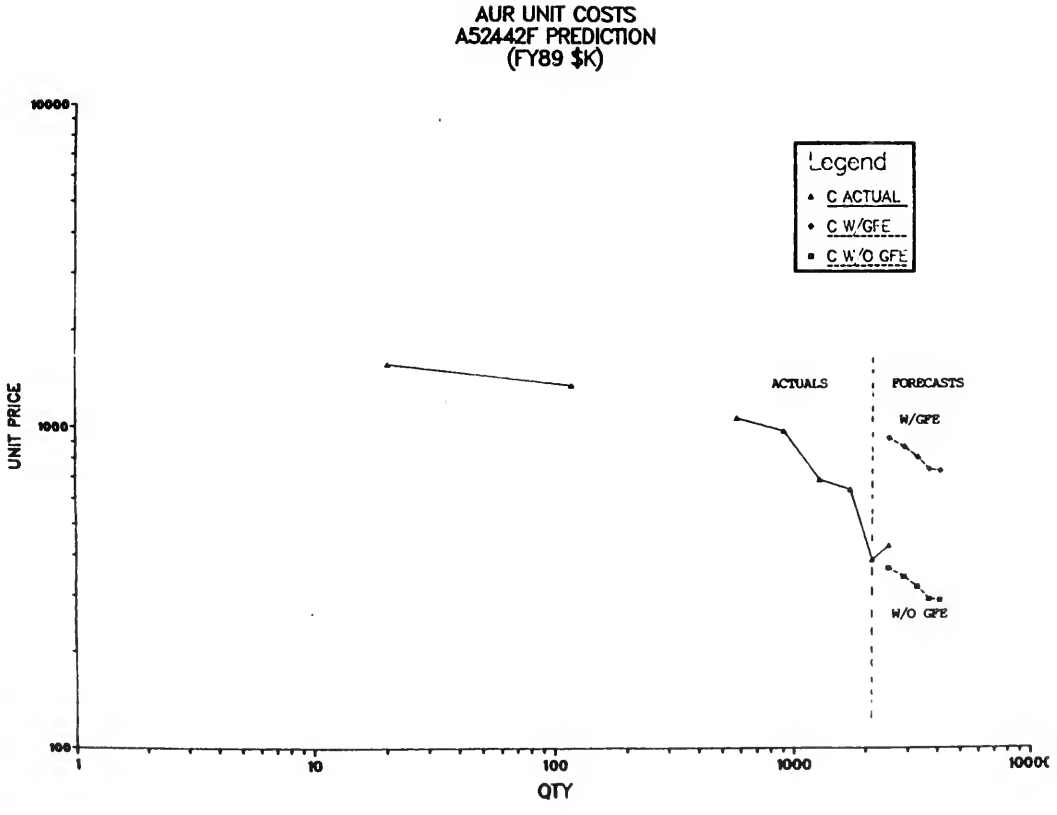
- METHODOLOGY/FINDINGS
- ESTIMATE

AIR-52442F WPN BUDGET MODEL ESTIMATING METHODOLOGY

	BASIS	FINDINGS
TOTAL HARDWARE AUR:		
TAKE OFF POINT:	FY89 PRICING CURVES FROM GD & MDMSC	REASONABLE
ADJUSTMENT:	LOWERED GD BY 9% TO WITHIN 10% OF MDMSC	ESTIMATOR JUDGEMENT
PROJECTION TECHNIQUE:	8% ANNUAL DECREASE	NOT ADDRESSED: . VARIANT MIX . CFE/GFE CHANGES
		EQUIVALANT TO 60% SLOPE (LOWEST HISTORICAL 80%)
CLS:		
FY-89 BUDGET		SUPPORT PDA-14 ESTIMATES

AIR-52442F WPN BUDGET MODEL
ESTIMATING METHODOLOGY

	BASIS	FINDINGS
PROCUREMENT/FLEET SUPPORT:	% OF HARDWARE	. STEP DOWN OF $117M FROM FY89 TO FY90 . DECLINING % - NO HISTORY TO SUPPORT DECLINING PRECENT ONCE FULL RATE PRODUCTION REACHED


AUR UNIT COSTS
A52442F PREDICTION
(FY89 $K)
Legend
C ACTUAL
C W/GFE
C W/O GFE
ACTUALS
FORECASTS
W/GFE
W/O GFE
UNIT PRICE
10000
1000
100
1
10
100
1000
10000
QTY

PDA-14 VS AIR-52442F COST COMPARISON
1 BILLION $ DIFFERENCE
(TY $M)

	FY90	FY91	FY92	FY93	FY94	TOTAL
TOTAL WEAPONS SYSTEMS COSTS						
PDA-14 (29 SEP 89)	669.5	635.6	694.4	633.5	598.3	3271.3
AIR-52442F (16 OCT 89)	532.1	492.4	452.0	422.3	338.0	2236.8
DELTA	137.4	183.2	242.4	211.2	260.3	1034.5*
TOTAL HARDWARE						
PDA-14	502.7	527.6	582.6	532.0	522.0	2666.9
AIR-52442F	455.7	431.0	407.5	383.2	303.6	1981.0
DELTA	47.0	96.6	175.1	148.8	218.4	685.9
TOTAL SUPPORT						
PDA-14	166.8	148.0	111.8	101.5	76.3	604.4
AIR-52442F	76.4	61.4	44.5	39.1	34.4	255.8
DELTA	90.4	86.6	67.3	62.4	41.9	348.6

* BILLION $ DIFFERENCE REPORTED TO OSD COMPTROLLER & NAVY IG

INDEPENDENT ASSESSMENT ESTIMATING METHODOLOGY

. TAKE OFF POINTS: FY90 CONTRACT VALUES BY VARIANT

. PROJECTIONS

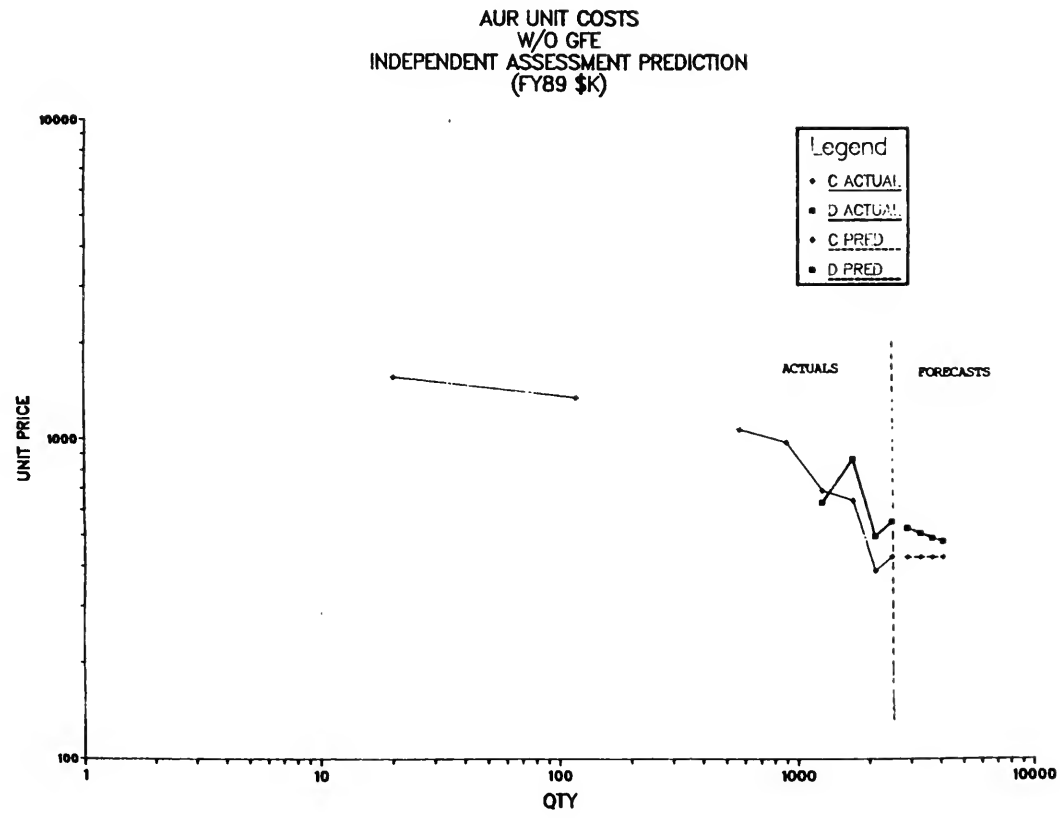
91% SLOPE ON A & D VARIANT BASED ON FY81-86
100% SLOPE ON C VARIANT

. 2% MANAGEMENT RESERVE

. USED INTERNAL PROGRAM OFFICE ESTIMATES FOR SUPPORT

-INSUFFICIENT TIME TO ANALYZE INDIVIDUAL ELEMENT

. OSD/OMB ESCALATION FACTORS

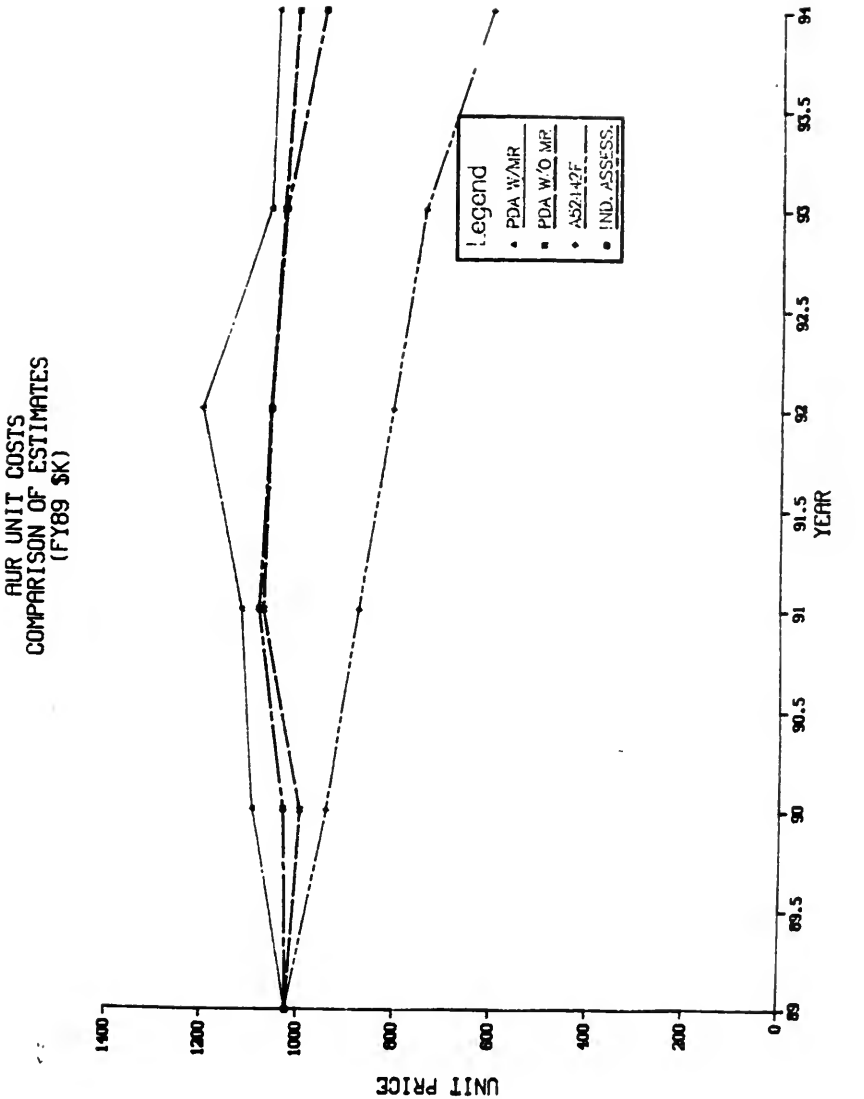

AUR UNIT COSTS
W/O GFE
INDEPENDENT ASSESSMENT PREDICTION
(FY89 $K)
Legend
C ACTUAL
D ACTUAL
C PRED
D PRED
ACTUALS
FORECASTS
UNIT PRICE
10000
1000
100
1
10
100
1000
10000
QTY

PDA-14 VS INDEPENDENT COST COMPARISON
(MILLIONS OF THEN YEAR DOLLARS)

	FY90	FY91	FY92	FY93	FY94	TOTAL
TOTAL WEAPONS SYSTEMS COSTS						
PDA-14 (29 SEP 89)	669.5	675.6	694.4	633.5	598.3	3271.3
IA	650.9	666.6	631.7	615.8	545.1	3110.1
DELTA	18.6	9.0	62.7	17.7	53.2	161.2
TOTAL HARDWARE						
PDA-14	502.7	527.6	582.6	532.0	522.0	2666.9
IA	484.1	518.6	519.9	514.3	468.8	2505.7
DELTA	18.6	9.0	62.7	17.7	53.2	161.2
TOTAL SUPPORT						
PDA-14	166.8	148.0	111.8	101.5	76.3	604.4
INDEPENDENT	166.8	148.0	111.8	101.5	76.3	604.4
DELTA	0.0	0.0	0.0	0.0	0.0	0.0

INDEPENDENT VS AIR-52442F COST COMPARISON
(MILLIONS OF THEN YEAR DOLLARS)

	FY90	FY91	FY92	FY93	FY94	TOTAL
TOTAL WEAPONS SYSTEMS COSTS						
AIR-52442F (16 OCT 89)	532.1	492.4	452.0	422.3	338.0	2236.8
IA	650.9	666.6	631.7	615.8	545.1	3110.1
DELTA	-118.8	-174.2	-179.7	-193.5	-207.1	-873.3
TOTAL HARDWARE						
AIR-52442F	455.7	431.0	407.5	383.2	303.6	1981.0
IA	484.1	518.6	519.9	514.3	468.8	2505.7
DELTA	-28.4	-87.6	-112.4	-131.1	-165.2	-524.7
TOTAL SUPPORT						
AIR-52442F	76.4	61.4	44.5	39.1	34.4	255.8
IA	166.8	148.0	111.8	101.5	76.3	604.4
DELTA	-90.4	-86.6	-67.3	-62.4	-41.9	-348.6


AUR UNIT COSTS
COMPARISON OF ESTIMATES
(FY89 $K)
UNIT PRICE
1400
1200
1000
800
600
400
200
0
89
89.5
90
90.5
91
91.5
92
92.5
93
93.5
94
YEAR
Legend
PDA W/MR
PDA W/O MP
A521-42F
IND. ASSESS.

INDEPENDENT ASSESSMENT CONCLUSIONS

HARDWARE

- LACK OF VISIBILITY INTO COSTS AMONG VARIANTS MAKES ANALYSIS DIFFICULT
- EFFECTS OF COMPETITION LOST AMONGST OTHER COST FACTORS - GFE/CFE ET AL
- BECAUSE OF UNCERTAINTY IN DATA, ACCURACY OF FORECASTS ARE SUSPECT
- INDEPENDENT ASSESSMENT SUPPORTS PDA's BUDGET ESTIMATE
- AIR-52442F's BUDGET ESTIMATE IS ANALYTICALLY UNSUPPORTABLE

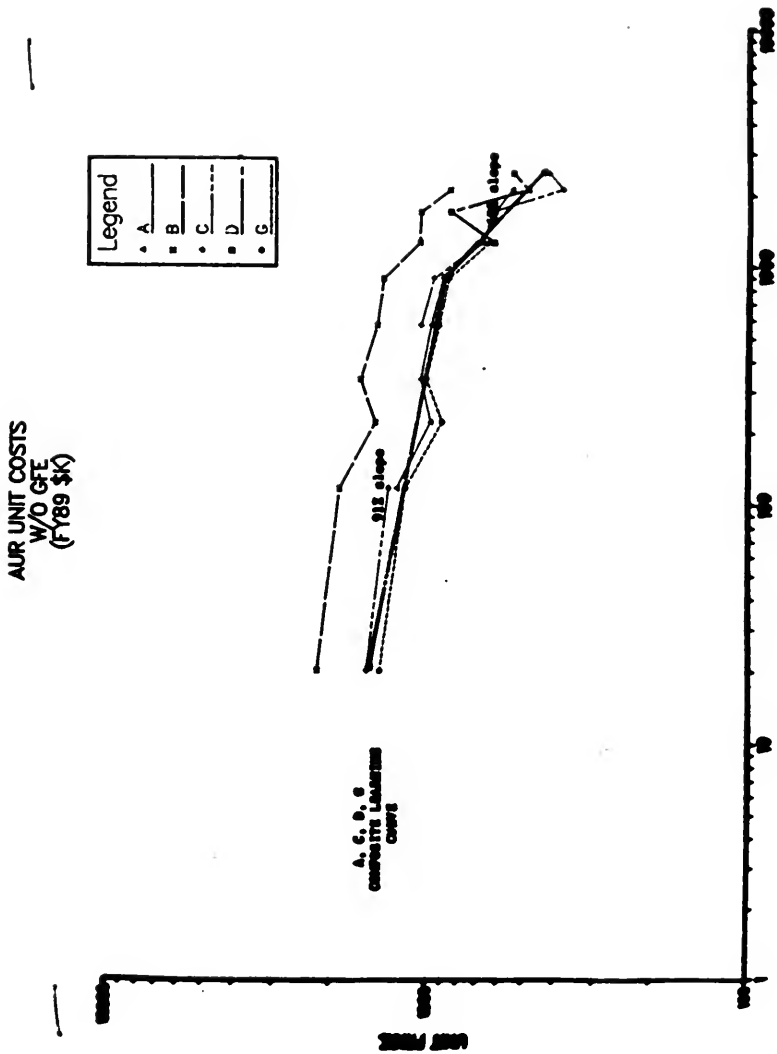
PROCUREMENT SUPPORT/FLEET SUPPORT

- IMPROVED ASSESSMENT WOULD REQUIRE CORRELATION OF REQUIREMENTS AND COST DATA AT A DETAILED LEVEL

INDEPENDENT ASSESSMENT
CONCLUSIONS

GENERAL CONCLUSIONS:

- CRUISE MISSILE IS USED AS A MODEL FOR COMPETITION
- MOST STUDIES ATTRIBUTE ALL UNIT PRICE DECREASES DUE TO COMPETITION
- POTENTIAL ERRONEOUS CONCLUSION THAT OTHER PROGRAM WILL SHOW SIMILAR SAVINGS
- ADDITIONAL DATA IS REQUIRED TO DETERMINE THE REAL EFFECTS OF COMPETITION


AUR UNIT COSTS
W/O GFE
(FY89 $K)
Legend
A
B
C
D
E
QTY

THOMAS F. DAY
704 FALL PLACE
HERNDON, VIRGINIA 22070
H 703/435-0446
W 202/692-9182

May 8, 1990

Senator John W. Warner
United States Senate
Washington, DC 20510-4601

ATTN: Mr. Grayson Winterling
SUBJ: Cruise Missile Budget

Dear Sir:

This letter will provide you with specific information in support of my decision to provide information to the Congress of the United States pertaining to the budget practices of the Navy's Cruise Missile Office during my five and one-half year tenure as a Cost Analyst for that program. It should be apparent that I am not providing this information in an official capacity and that although I am providing this information to you prior to informing my superiors of my intentions, it is my expectation to provide a similar letter to each person in my chain of command in a timely fashion. The primary reason for approaching you at this time is to ascertain the time table within which I must work and to identify the key players who should receive this information.

In October of 1989, my analysis of the WPN funding for the Cruise Missile Program (CMP) showed a surplus of $1.15 billion for the government fiscal years of 1990-94. This surplus was over and above a management reserve of seven percent of total hardware which I had retained in the CMP budget projection. Included in that seven percent was the funding for the "Fuel" and "Payload" as shown on the accompanying budget exhibit.

I reported my findings to my immediate supervisors and attended the meeting where the CMP budget was presented to the OSD Budget Office. It became apparent that there was no incentive on the part of my management and obviously not on the part of the CMP to address the surplus funds or to even make mention of their possible existence. When I informed my superiors that I was prepared to take independent steps to inform the OSD Budget Office of the surplus, I was advised to take no action whatsoever and I was told repeatedly that I could expect a variety of job actions and disciplinary steps if I proceeded. It was quite clear that if I proceeded, that efforts would be undertake to have me fired.

During the previous several years, I had been engulfed in a personal situation in which I had struggled very hard to preserve ownership of my home. Suddenly I was faced with the difficult choice of proceeding with actions which could cost me my job thereby losing the financial means to maintain my house. For me, the choice between material possessions and personal integrity has always favored the choice to maintain my own integrity and that was the choice I made when I informed my superiors of my decision to proceed to the Pentagon. Again I was told to expect immediate repercussions, but my decision was firm.

Almost immediately, my superiors began their own "independent" efforts to analyze the cost of the cruise missile. It was apparent that the desired intent of the studies was to demonstrate that I was incorrect in my conclusions in a deliberate attempt to support the threatened job actions. My awareness of those estimates is limited since I have never been fully informed as to the conclusions, however, everything that I have seen regarding those studies and other related studies continues to support my own conclusions of surplus funding.

The occupational hazard of every cost analyst is that we must proceed with the full knowledge that we are "always" wrong in our assessment of cost. We are always wrong because we are either too high in our determination of cost (a situation which rarely attracts much attention), or we are too low in our estimate in which case everyone quickly points the finger of responsibility at the cost analyst as the culprit for budget short falls. On those rare occasions when we happen to be right on the money, we are obviously wrong since, "nobody can be that good." An occupational hazard.

It is necessary for any cost analyst to proceed on the basis that "I am right until I am proved to be wrong". So far, no person has provided information to "prove me wrong". In response to requests by some to allow sufficient time for others to do their job, I have allowed more than six months which is considerably more time than a cost analyst is typically given to perform a similar analysis. I have seen nothing other than what I would characterize as foot dragging and I see no reason to delay my actions any longer.

Several days after I reported my findings to the OSD Budget Office, I went to the NAVAIR Inspector General and provided similar information. At that time I was told about the regulations which are intended to protect "whistle blowers". Although there have been acts of reprisal, I am not aware of any disciplinary actions taken against anyone.

In one of my meetings with the IG, it was stated that I consider submitting my surplus allegations under the Suggestion

Program. Four separate suggestions totalling approximately 1.4 billion dollars in savings to the government and totalling approximately 6.9 million dollars in awards payable under the program to myself were submitted. They were promptly lost in the mill. By working with the personnel in the NAVAIR suggestion office, the suggestions were resubmitted and placed back in the treadmill for analysis. I am aware that they have been routed and re-routed and I am aware of a preliminary finding, but I have not been officially informed of that decision.

As the result of my going to the NAVAIR IG, I am aware that the matter has been brought to the attention of the NAVY IG and I suspect that persons in the DoD IG were at least informed. I am also aware that the Naval Audit Service has been asked to look at the CMP budget process and that as a result of that examination it is my understanding that there is a desire to proceed with an expanded financial audit of the Cruise Missile Program. I am not aware of any specific persons in my chain of command above the NAVAIR level who might be aware of my actions.

I do not think that it should be overlooked that while the issue that I have addressed is the surplus funding of a strategic weapon system, that the organizations that should be able to examine such allegations are substantially under staffed and over burdened with work to be done. I will also acknowledge that while the apparent speed for completing the examination of the facts of this matter may appear to me to be "foot dragging", that the delays may be attributable to the allocation of limited resources. I will leave it to others to determine which of the two views is most appropriate given the presumed degree of importance of this matter.

During my tenure with the Cruise Missile Office, I designed and operated a Symphony spreadsheet model which was used to formulate the WPN Budget submittal. Portions of that model were constructed by direction from my superiors to "hide" management reserve in either the hardware elements of the estimate or in the "Government In-house" line of the support costs. The model also gave these managers the opportunity to see their reserve funds and to make their own allocation of these dollars to other areas of support in the form of "Thruputs". I am aware that the practice of hiding these reserve funds existed in the mainframe model which was the predecessor to the spreadsheet model.

Persons in the CMP Budget Office frequently referred to themselves as "professional liars" alluding to their ability to convince others in and out of the CMP office that the budget estimates were factual. The confidence of these persons was such that on at least one occasion, one of these persons told an auditor with the GAO that there was 80 million dollars of surplus in one particular year and dared him to find it.

On occasions I was able to watch the process by which this "convincing" occurred and I watched with a degree of frequency as those who disagreed with the CMP Budget Office were subjected to demeaning personal attacks. Because of the complexity of the Cruise Missile, the multiple variants of the missile, and the limited and often distorted financial information that was made available to others pertaining to the CMP budget; it was not difficult to convince higher officials that it was the CMP insiders who really understood the costs of the Cruise Missile and that those who sought to cut funding for the missile were "incompetent" or "attempting to scuttle the program". I was around these "professional liars" for too long not to expect and to anticipate that I too would be subjected to personal attack.

I suspect that during the examination of my allegations of surplus funding that I have been accused of acting to undermine the program. As a point of perspective consider this application of the surplus funding and the way that it is "not" spent. The operation of the computer model required changes to the Missile Allocation Schedule (MAS) which is the schedule of the various missile variants to be built. Within specific direction as to overall quantities and within the stated dollar constraints, I am the one who made the determination of that specific variant mix with only an infrequent alteration by others. At times during the operation of the model and not documented to a specific incident, I have been aware of surplus funds and I have also been aware of the "professional liars" position that the program office was "cut to the bone" and that "we could not build any more missiles". Once a determination had been made by higher authority regarding the availability of funds, the "liar" could not go back and say that there were funds to build more missiles. We could have built more missiles.

Certainly the military situation has changed dramatically in recent times, but those changes have not eliminated the need for a national defense. Had the need arisen in the past or if the need were to arise in the future to use this missile, ask yourself whether or not the national defense has been served by not building missiles and ask yourself whether this decision is best left to "professional liars" or whether it should be left to other informed persons in the organizational structure.

There is another factor of the Cruise Missile to be considered and that is the "re-manufacturing" of the older missiles to accommodate the recent enhancements to performance. Are persons in higher office being told the truth or are they merely being lead along the path by "professional liars". Several years ago it became apparent that there was insufficient funding in the O&S accounts to perform the recertification of the missiles. Modifications to the missile were implemented to

extend the recertification cycle in an effort to alleviate some of the funding difficulties. When there was still insufficient funding for the recertification and modification to the missiles, other avenues were explored. Sell the "others" on the idea that the modifications are really so dramatic that we should "re-manufacture" the missile became the acceptable avenue.

Use the surplus in WPN to fund the shortfall in the O&S. What difference does it make? The difference is whether or not the people in the appropriate positions of decision making are being afforded the opportunity to make the decision that is rightfully theirs or whether this decision authority is being usurped by the "professional liar".

It is a frequent criticism of "whistle blowers" that they are merely opportunists out to make it at the taxpayers expense. Considering the amounts of money involved, it is not unexpected that some might feel that this is opportunism at a very high level. Pause and put the matter in the perspective of the popular concept of Value Engineering (VECP) in the cost savings arena. While I was more directly involved with CMP, a proposal was received from one of the contractors that amounted to $120 million dollars in proposed savings. If implemented, the contractor would have been paid $60 million dollars for improving their portion of the missile -- half of the expected savings.

I do not know the final determination of savings, but the idea was implemented. Their risk was only a few million corporate dollars and they were reimbursed for those out of pocket expenses, my risk was virtually everything I owned. If it turns out that I am correct in all of my analysis, I would have saved the government ten times the amount of the VECP and my reward would be approximately the same as the amount of the corporate risk. I can understand the resentment based on the fact that they didn't do it first, and I can understand the resentment because it does not reflect well on the ability of some managers; but I cannot accept the label of opportunist.

It was another frequent statement around the CMP Budget Office that they lived by the "Golden Rule" -- "he who controls the gold, rules". To my knowledge there are no instances where persons have directly pocketed any of the surplus funds as was the case in the "Ill Winds" investigation. One response that I have heard alluding to the fact that these surplus funds are spent within the project is by my estimation a naive view of power brokering under the auspices of the "golden rule". This brokering of funds permits the maintenance of personal pyramids of power, prestige and personnel. There are certainly appropriate applications of the rule when it is applied by persons at the top of an organization, it is not appropriate when it is applied from a lesser position.

Persons who represent themselves as "professional liars" will eventually have to face the consequence of their actions. Perhaps it is time for some of those paybacks, perhaps I am wrong in which case I am prepared to deal with my error. I will support the application of the "golden rule" from the top of the various pyramids of an organizational structure but no longer from the level of "professional liars" who dispense the gold in accordance to what kind of trade can be made.

It is necessary in my opinion for a cost analyst to maintain a posture of independence and personal integrity even if those views do not coincide with the views of superiors. I cannot concur with those who would suggest that it is my job to "agree" with program offices. It is acceptable to be wrong, it is not acceptable simply to agree. When I submit to "agreeing" with program offices, then my credibility as an analyst and the credibility of every analyst is diminished. It is not long before agreeing becomes the accepted priority of business in order to comply with the principle of the "golden rule" and to obtain funding for personnel or computers necessary to perform a diminished task.

Several weeks ago I was informed that it had been determined that NAVAIR 5244 would no longer support the Cruise Missile Program and that my duties would be reassigned accordingly. At the same time, I was told that "the system owed me nothing". I will leave it up to others to determine what the system owes me, but I have made my decision that some people within the system no longer are due anything from me either. It is the system itself and others in higher positions within that system that I owe much more than a continued silence of personal security.

Since I am not aware to what levels of management this matter has been addressed, I am requesting the opportunity to inform my entire chain of command of these actions prior to any further distribution of this information outside your office. I suspect that there will be some who have no knowledge of these events and I would not consider it to be professionally acceptable to assume that they knew or should have known about these matters. I would anticipate that this could be accomplished in a very short period of time. Beyond that, I will be available to proceed in whatever manner you deem appropriate.

Respectfully submitted,

Thomas F. Day

NAME OF SUGGESTER(S) (last, first, mi.i.)	POSITION TITLE & GRADE (or military rank / rate)	SOCIAL SECURITY NO
DAY, THOMAS F	CUST ANALYST GM13	217-41 [illegible]
ORGANIZATION (Specify activity, ship, command, bureau or office)	ORGANIZATION SUBDIVISION (Dept., Div., Sect., Unit or Shop)	PHONE
NAVAIR	52442F	692 [illegible]

I (WE) UNDERSTAND that the acceptance of a cash award for the use of this suggestion by the United States Government shall not form the basis of a further claim of any nature upon the United States by me (us), my (our) heirs, or assigns.

DO NOT WRITE IN THIS SPACE

DATE RECEIVED

SIGNATURE AND DATE	SIGNATURE AND DATE	SUGGESTION NUMBER
[signature] 10/20/87		

TITLE OF SUGGESTION

ELIMINATION OF EXCESS "FUEL" FUNDS

Describe in three separate paragraphs (1) the problem, difficulty, or circumstances that prompted you to submit this suggestion; (2) the suggested change; (3) where and how it can be used, what it will accomplish, and how it will benefit the Navy/Government - in terms of tangible savings, if possible.

PER ATTACHED.

Note - If you need more space, continue on separate sheet.

THOMAS F. DAY
COST ANALYST -- GM13
217-46-2198
NAVAIR 52442F
692-9182

SUBMITTAL OF SUGGESTED SAVINGS BY
THE ELIMINATION OF FUEL "SLUSH FUND"
FROM THE CRUISE MISSILE BUDGET.

The problem which is addressed by this suggestion is the manner by which substantial funds have been hidden in the Cruise Missile budget for a period of years. Funds which can be loosely identified as management reserve but which in fact have provided an excessive "slush fund" for use by the program office. The specific funds referenced by this suggestion are represented on the program's P12 as "Fuel" and are relied upon by higher authorities as a true representation of past and future costs for this item. Since these funds have been identified as an essential portion of the weapon system, they have gone forward in the budget process virtually unchallenged by all levels of authority outside of the program office. Therefore these funds represent a sizable source of funds that can be expended in a manner other than that for which they have been represented.

My suggestion is to eliminate the excess funds from this line item for amounts which were not actually spent on the "Fuel" in both the prior years (FY80-FY87) and future years (FY88-FY94).

Based on the historical data for years FY80-FY87, the maximum savings for this period would be $12,250,000. Based on the most current documents from the program office, the maximum amount of savings for the years FY88-FY94 would be $35,120,000 for a combined savings to the government of $47,370,000 in then year dollars. An audit of Cruise Missile Contracts will be necessary to determine the actual expenditures for any "fuel" which was not already included in one of the other contracts.

I understand that the acceptance of a cash award for the use of this suggestion by the United States Government shall not form the basis of a further claim of any nature upon the United States by me, my heirs, or assigns.

_____
Signature & Date

Title of Suggestion: ELIMINATION OF EXCESS "FUEL" FUNDS

67-9

62-10

MODEL: TOMAHAWK COMPONENT	FY89 (QTY 365) QTY	UNIT $	TOTAL	FY90 (QTY 000) QTY	UNIT $	TOTAL	FY91 (QTY 000) QTY	UNIT $	TOTAL	FY92 (QTY 000) QTY	UNIT $	TOTAL	FY93 (QTY 000) QTY	UNIT $	TOTAL	FY94 (QTY 000) QTY	UNIT $	TOTAL	PROGRAM TOTALS FY89 - FY94 TOTAL (QTY 2363) QTY	UNIT $	TOTAL
FLYAWAY COST																					
BUR	365	1.271	463.730	000	1.024	409.485	000	0.978	391.032	000	0.920	360.010	000	0.861	340.000	000	0.719	306.143	9,365	0.957	2262.899
CAPSULE (CLO)	50	0.310	16.972	50	0.309	16.692	50	0.305	16.466	50	0.301	16.266	50	0.298	16.090	0		0.000	270	0.306	82.493
BOOSTER	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000
PAYLOAD	000	0.022	0.036	300	0.022	6.981	77	0.023	1.765	95	0.023	2.290	109	0.024	2.594	17	0.029	0.791	1,012	0.022	22.670
CONVENTIONAL DISP	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000
FUEL			6.616			9.502			5.410			5.504			9.991			9.678			34.101
ENGINE	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000
CANA	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000
OSMAC	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000
GNAC	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000
TOTAL HARDWARE	365	1.339	486.103	000	1.096	838.360	000	1.037	814.671	000	0.980	392.069	000	0.922	368.683	000	0.730	292.112	9,365	1.066	2982.077
NOT RES 04.001 FY90 & OUT			95.607			17.377			16.370			15.663			14.529			11.457			170.023
TOTAL HDWR & NOT RES	365	1.622	591.070	000	1.157	855.682	000	1.078	831.041	000	1.019	407.532	000	0.930	383.206	000	0.739	303.569	9,365	1.088	2973.901
PROCUREMENT SUPPORT (NONRECURRING)																					
SYSTEM ENGINEERING ISTEO AGENT			20.709			19.537			16.797			14.037			13.288			12.072			96.440
GOVT IN-HOUSE			41.310			9.680			8.982			7.239			6.757			5.391			79.367
TOOLING & TEST EQUIPMENT			1.455			3.541			3.563			1.196			0.000			0.500			7.499
RELIABILITY/PRODUCT IMPROVEMENT			30.296			11.473			9.799			0.365			7.128			6.079			101.078
TOTAL NON-RECURRING			122.170			30.109			34.496			30.761			27.073			24.333			277.624
TOTAL FLYAWAY	365	1.926	210.040	000	1.233	893.071	000	1.164	465.537	000	1.096	438.293	000	1.027	410.679	000	0.820	328.104	9,365	1.395	3050.525
FLEET SUPPORT COSTS																					
SUPPORT EQUIPMENT			14.136			9.691			8.040			6.630			9.996			6.534			60.383
TRAINING EQUIPMENT			26.021			6.636			6.075			5.427			6.060			4.362			53.339
DOCUMENTATION			0.063			2.591			1.930			1.365			1.785			1.047			9.114
INPC EQUIPMENT			29.705			19.492			10.000			0.000			0.000			0.000			59.997
FLEET SUPPORT COSTS			70.745			38.210			26.023			13.670			11.699			9.938			171.633
GROSS WEAPON SYSTEM COST	365	2.150	784.785	000	1.330	532.081	000	1.231	492.360	000	1.130	451.963	000	1.056	422.378	000	0.848	338.042	9,365	1.370	3021.360
LESS BLCH CONVERSION CREDIT			-114.000			-71.700			-11.700			-7.500			0.000			0.000			-154.900
LESS ADVANCE PROCUREMENT			-71.000			-75.600			0.000			0.000			-75.000			-75.000			-297.600
NET P-1 COST			599.385			434.773			480.660			444.463			347.378			263.042			2569.652
ADVANCE PROCUREMENT, CY			75.600			0.000			0.000			150.000			0.000			0.000			225.600
TOTAL PROCUREMENT COST			674.993			434.773			480.660			594.463			347.378			263.042			2795.260
INITIAL SPARES			21.044			37.770			27.310			28.521			31.645			25.672			167.666
TOTAL PROGRAM COST			696.037			467.497			507.970			622.984			378.973			288.664			2962.926
MODIFICATION OF MISSILES			7.176			3.330			25.750			65.664			88.859			88.488			278.387
INFLATION INDICES			2.4168			2.4865			2.5479			2.6007			2.6498			2.6964			

11-89

DAY, THOMAS F	CUST FINALIST	
ORGANIZATION (Specify activity, ship, command, bureau or office)	ORGANIZATION SUBDIVISION (Dept., Div., Sect., Unit or Shop)	PHONE
NAVAIR	52442F	692 9184

I (WE) UNDERSTAND that the acceptance of a cash award for the use of this suggestion by the United States Government shall not form the basis of a further claim of any nature upon the United States by me (us), my (our) heirs, or assigns.

DO NOT WRITE IN THIS SPACE

DATE RECEIVED

SIGNATURE AND DATE	SIGNATURE AND DATE	SUGGESTION NUMBER
Thomas F Day 10/6/87		

TITLE OF SUGGESTION

ELIMINATION OF EXCESS "PAYLOAD" FUNDS

Describe in three separate paragraphs (1) the problem, difficulty, or circumstances that prompted you to submit this suggestion; (2) the suggested change; (3) where and how it can be used, what it will accomplish, and how it will benefit the Navy/Government - in terms of tangible savings, if possible.

PER ATTACHED.

Note - If you need more space, continue on separate sheet.

DEPARTMENT OF THE NAVY SUGGESTION OPNAV 5305-1 (5-80) S/N 0107-LF-053-0506

67-12

THOMAS F. DAY
COST ANALYST -- GM13
217-46-2198
NAVAIR 52442F
692-9182

SUBMITTAL OF SUGGESTED SAVINGS BY
THE ELIMINATION OF PAYLOAD "SLUSH FUND"
FROM THE CRUISE MISSILE BUDGET.

The problem which is addressed by this suggestion is the manner by which substantial funds have been hidden in the Cruise Missile budget for a period of years. Funds which can be loosely identified as management reserve but which in fact have provided an excessive "slush fund" for use by the program office. The specific funds referenced by this suggestion are represented on the program's P12 as "Payload" and are relied upon by higher authorities as a true representation of past and future costs for this item. Since these funds have been identified as an essential portion of the weapon system, they have gone forward in the budget process virtually unchallenged by all levels of authority outside of the program office. Therefore these funds represent a sizable source of funds that can be expended in a manner other than that for which they have been represented.

My suggestion is to eliminate the excess funds from this line item for amounts which were not actually spent on the "Payload" in both the prior years (FY80-FY87) and future years (FY88-FY94).

Based on the historical data for years FY80-FY87, the maximum savings for this period would be $14,033,000. Based on the most current documents from the program office, the maximum amount of savings for the years FY88-FY94 would be $29,615,000 for a combined savings to the government of $43,648,000 in then year dollars. An audit of Cruise Missile Contracts will be necessary to determine the actual expenditures for any "payload" which was not already included in one of the other contracts.

I understand that the acceptance of a cash award for the use of this suggestion by the United States Government shall not form the basis of a further claim of any nature upon the United States by me, my heirs, or assigns.

_____
Signature & Date

Title of Suggestion: ELIMINATION OF EXCESS "PAYLOAD" FUNDS

~~238~~
67-13

229
67-14

MODEL: SUMMARY COMPONENT	FY00 (QTY 6) QTY	UNIT $	TOTAL	FY01 (QTY 36) QTY	UNIT $	TOTAL	FY02 (QTY 61) QTY	UNIT $	TOTAL	FY03 (QTY 51) QTY	UNIT $	TOTAL	FY04 (QTY 124) QTY	UNIT $	TOTAL	FY05 (QTY 109) QTY	UNIT $	TOTAL	FY06 (QTY 209) QTY	UNIT $	TOTAL	FY07 (QTY 324) QTY	UNIT $	TOTAL
FLYAWAY COST																								
AGE	6	2.550	15.103	50	2.274	113.722	61	1.921	117.146	51	1.844	94.099	124	1.325	164.341	109	1.294	227.219	209	1.106	273.969	324	0.877	283.988
CAPABLE ICLSI	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	56	0.495	28.209	56	0.391	21.888	56	0.375	10.975
DOPSTER	6	0.134	0.802	50	0.102	7.076	61	0.145	8.774	51	0.179	9.137	124	0.170	21.112	109	0.063	14.003	209	0.003	29.006	324	0.000	29.109
PERSEUS	0		0.000	50	0.050	1.333	57	0.024	1.308	23	0.015	0.345	98	0.010	0.955	105	0.010	1.029	195	0.020	2.031	256	0.020	5.177
CONVENTIONAL DISP	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	10	0.578	4.277	11	0.141	7.055
FUEL			0.009			0.013			0.466			0.751			0.741			2.329			2.133			0.310
ENGINE	6	0.214	1.701	36	0.219	10.945	61	0.312	19.076	51	0.278	13.970	124	0.257	29.341	106	0.706	51.333	209	0.202	36.257	324	0.212	66.775
CAGO	6	0.000	0.036	50	0.025	1.297	61	0.018	1.047	51	0.019	0.979	124	0.020	2.433	106	0.023	4.550	209	0.026	6.438	324	0.026	8.503
OSMIC	3	0.244	0.733	25	0.226	5.662	16	1.171	17.570	0		0.000	0		0.000	32	0.249	9.277	64	0.302	20.040	107	0.333	62.267
MMC	2	0.179	0.537	25	0.212	5.300	20	0.225	4.543	20	0.266	6.721	66	0.567	36.277	105	0.367	32.266	132	0.344	52.260	266	0.252	58.567
TOTAL AIRFRAME	6	3.101	18.696	50	2.917	145.870	61	2.249	170.120	51	2.537	128.251	124	1.978	259.119	106	2.041	376.424	200	1.800	499.150	324	1.670	543.878
NOT RES $$.$$Z $$$$ E OUT			0.794			18.979			19.993			27.853			34.664			33.976			39.237			14.923
TOTAL WORK & MAT RES	6	3.732	19.490	50	3.736	167.799	61	3.112	189.871	51	3.062	156.174	124	2.397	373.723	106	2.372	649.500	209	3.005	940.796	324	1.775	558.751
PROCUREMENT SUPPORT (NONRECURRING)																								
SYSTEM ENGINEERING TOTAL ACHIV			0.000			0.000			0.000			0.000			11.300			12.300			14.324			14.000
GOV T IN-HOUSE			0.000			1.691			5.614			0.799			9.510			11.196			14.070			14.772
TOOLING & TEST EQUIPMENT			0.000			4.250			6.485			13.979			11.000			12.447			43.298			39.799
RELIABILITY/PRODUCT IMPROVEMENT			0.000			0.000			0.000			0.000			0.000			0.000			0.000			0.851
TOTAL NON-RECURRING			0.000			5.940			12.097			25.810			32.810			65.943			74.193			70.393
TOTAL FLYAWAY	6	3.255	19.000	50	3.575	160.745	61	3.310	201.910	51	3.260	181.954	124	2.472	504.*1	106	2.641	695.445	209	3.300	972.200	324	1.907	637.344
FLEET SUPPORT COSTS																								
SUPPORT EQUIPMENT			0.000			0.005			11.049			10.639			7.295			10.537			38.479			39.073
TRAINING EQUIPMENT			0.000			0.677			1.794			12.566			2.692			9.000			8.755			10.992
DATA/PUBLICATIONS			0.000			7.005			7.959			5.981			2.439			6.490			0.553			0.505
INDC EQUIPMENT			0.000			0.957			4.051			0.000			6.700			3.502			23.070			10.133
FLEET SUPPORT COSTS			0.000			21.514			25.215			32.486			18.906			50.457			77.443			50.607
GROSS WEAPON SYSTEM COST	6	3.253	19.000	50	3.595	190.257	61	3.723	229.151	51	4.295	210.470	124	2.625	525.447	106	2.927	326.000	209	3.611	650.051	324	2.136	697.031
LESS ECH CONVERSION CREDIT			0.000			0.000			0.000			0.000			0.000			0.000			0.000			0.000
LESS ADVANCE PROCUREMENT			0.000			-19.300			-10.999			-10.000			-6.663			-15.200			-27.790			-51.013
NET P-1 COST			19.000			179.557			215.151			200.470			518.784			311.592			672.291			646.218
ADVANCE PROCUREMENT, CY			10.700			14.000			14.000			6.663			13.200			27.740			51.013			66.530
TOTAL PROCUREMENT COST			50.100			197.557			227.151			207.133			534.072			339.332			676.104			706.756
INITIAL SPARES			0.000			9.471			9.359			13.697			18.013			27.744			41.063			39.981
TOTAL PROGRAM COST			39.100			203.070			256.070			220.929			552.987			366.640			715.987			746.737
MODIFICATION OF ASSETS			0.000			0.000			0.000			0.000			0.000			0.000			2.166			5.991
INVESTING ASSETS			1.5270			1.7145			1.9613			1.9605			2.4406			2.1130			2.1011			2.2966

HISTORICAL DATA

REPORT IS TJ VIA TOTAL SLCM

16 Oct-89
10:32:38 AM

MODEL: TENANCY / COMPONENT	FY89 (QTY 363) QTY	UNIT $	TOTAL	FY90 (QTY 600) QTY	UNIT $	TOTAL	FY91 (QTY 600) QTY	UNIT $	TOTAL	FY92 (QTY 600) QTY	UNIT $	TOTAL	FY93 (QTY 600) QTY	UNIT $	TOTAL	FY94 (QTY 600) QTY	UNIT $	TOTAL	PROGRAM TOTALS FY89 - FY94 TOTAL (QTY 2363) QTY	UNIT $	TOTAL
FLYAWAY COST																					
BODY	363	1.771	643.238	600	1.026	609.605	600	0.978	591.032	600	0.920	560.010	600	0.861	504.000	600	0.719	206.143	2,363	0.957	2262.009
CAPSULE (CLO)	59	0.314	16.972	54	0.309	16.672	54	0.303	16.466	54	0.301	16.266	54	0.298	16.098	0		0.000	270	0.306	82.993
BOOSTER	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000
PAYLOAD	000	0.022	0.056	900	0.022	0.001	77	0.023	1.763	90	0.023	2.790	104	0.024	2.591	12	0.024	0.291	1,012	0.022	22.674
CONVENTIONAL DISP	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000
FUEL			0.616			5.302			3.110			3.564			5.591			5.670			34.101
ENGINE	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000
CANA	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000
VSHAC	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000
RMAC	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000
TOTAL HARDWARE	363	1.339	496.103	600	1.096	630.360	600	1.037	619.671	600	0.980	592.869	600	0.922	560.603	600	0.730	292.117	2,363	1.066	2902.077
NSI AES 04.003 FY90 & OUT			95.607			17.322			16.370			15.963			10.521			11.457			170.823
TOTAL HDW & NST AES	363	1.622	591.079	600	1.139	655.682	600	1.070	631.041	600	1.019	607.532	600	0.950	583.396	600	0.799	303.569	2,363	1.080	2572.901
PROCUREMENT SUPPORT (NONRECURRING)																					
SYSTEM ENGINEERING DIRECT AGENT			20.799			10.537			10.797			10.037			13.298			12.872			90.990
GOV'T IN-HOUSE			41.510			9.660			8.967			7.259			6.257			9.291			78.367
TOOLING & TEST EQUIPMENT			1.658			1.543			1.503			1.106			0.000			0.500			7.999
RELIABILITY/PRODUCT IMPROVEMENT			50.296			11.923			9.794			0.362			7.120			0.077			101.078
TOTAL NON-RECURRING			122.170			30.109			31.496			30.761			27.673			24.533			277.624
TOTAL FLYAWAY	363	1.936	714.049	600	1.233	955.071	600	1.164	965.537	600	1.096	938.293	600	1.027	910.679	600	0.829	320.104	2,363	1.395	3950.525
FLEET SUPPORT COSTS																					
SUPPORT EQUIPMENT			10.156			9.691			8.040			6.650			8.096			6.534			48.383
TRAINING EQUIPMENT			26.021			8.636			6.025			5.827			6.860			6.362			63.339
DOCUMENTATION			0.863			7.391			1.750			1.505			1.293			1.042			9.116
TMPC EQUIPMENT			29.705			19.092			10.000			0.000			0.000			0.000			59.997
FLEET SUPPORT COSTS			70.749			50.210			26.023			13.070			11.649			9.938			171.035
GROSS WEAPON SYSTEM COST	363	2.130	784.799	600	1.330	532.081	600	1.231	992.360	600	1.150	951.963	600	1.056	922.328	600	0.843	330.042	2,363	1.378	3921.560
LESS BLOCK CONVERSION CREDIT			-110.000			-21.790			-17.780			-7.500			0.000			0.000			-154.990
LESS ADVANCE PROCUREMENT			-71.000			-75.000			0.000			0.000			-75.000			-75.000			-297.000
NET P-1 COST			599.305			430.773			800.660			844.463			547.328			263.042			2569.632
ADVANCE PROCUREMENT, CY			75.688			0.000			0.000			150.000			0.000			0.000			225.688
TOTAL PROCUREMENT COST			674.993			430.773			800.660			994.463			547.328			263.042			2795.260
INITIAL SPARES			21.844			37.729			27.310			28.571			31.643			25.622			167.664
TOTAL PROGRAM COST			696.837			467.497			507.970			622.984			378.975			288.664			2962.926
MODIFICATION OF MISSILES			7.176			3.350			25.750			65.604			88.019			88.488			278.387
INFLATION INDICES			2.0160			2.0865			2.5479			2.6007			2.6186			2.6964			

67-16

NAME OF SUGGESTER(S) (last, first, mi.)	POSITION TITLE & GRADE (or military rank/rate)	SOCIAL SECURITY NO
DAY, THOMAS F	COST ANALYST GM13	217 44 21
ORGANIZATION (Specify activity, ship, command, bureau or office)	**ORGANIZATION SUBDIVISION** (Dept., Div., Sect., Unit or Shop)	**PHONE**
NAVAIR	5244 F	692 7167

I (WE) UNDERSTAND that the acceptance of a cash award for the use of this suggestion by the United States Government shall not form the basis of a further claim of any nature upon the United States by me (us), my (our) heirs, or assigns.

DO NOT WRITE IN THIS SPACE

DATE RECEIVED

SIGNATURE AND DATE	SIGNATURE AND DATE	SUGGESTION NUMBER
[signature] 10/2/84		

TITLE OF SUGGESTION

ELIMINATION OF EXCESS "MAN" FORMS

Describe in three separate paragraphs (1) the problem, difficulty, or circumstances that prompted you to submit this suggestion; (2) the suggested change, (3) where and how it can be used, what it will accomplish, and how it will benefit the Navy/Government - in terms of tangible savings, if possible.

PER ATTACHED.

~~252~~
67-17

Note - If you need more space, continue on separate sheet.

THOMAS F. DAY
COST ANALYST -- GM13
217-46-2198
NAVAIR 52442F
692-9182

SUBMITTAL OF SUGGESTED SAVINGS BY
THE ELIMINATION OF FY89 AUR "SLUSH FUND"
FROM THE CRUISE MISSILE BUDGET.

The problem which is addressed by this suggestion is the manner by which substantial funds have been hidden in the Cruise Missile budget for a period of years. Funds which can be loosely identified as management reserve but which in fact have provided an excessive "slush fund" for use by the program office. The specific funds referenced by this suggestion are represented on the program's P12 as a portion of the "AUR" and are relied upon by higher authorities as a true representation of past and future costs for this item. Since these funds have been identified as an essential portion of the weapon system, they have gone forward in the budget process virtually unchallenged by all levels of authority outside of the program office. Therefore these funds represent a sizable source of funds that can be expended in a manner other than that for which they have been represented.

My suggestion is to eliminate the excess funds from this line item for amounts which were not actually spent on the "AUR" in FY89.

Based on copies of the actual contracts for the two vendors, the actual cost for this line item should be the sum of the McDonnell Douglas contract N00019-88-C-3138 ($256,181,519) and the General Dynamics contract N00019-88-C-3137 ($175,935,114) for a total of $432,116,633. The program's most recent budget documents indicate a cost of $565,555,000. The difference between the program office's stated value and the actual contracts is a maximum savings to the government in the amount of $137,438,367.

I understand that the acceptance of a cash award for the use of this suggestion by the United States Government shall not form the basis of a further claim of any nature upon the United States by me, my heirs, or assigns.

_____ _____
Signature & Date

Title of Suggestion: ELIMINATION OF EXCESS "AUR" FUNDS

Page 1 of 1.

3136 FWS

67-18

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

J | 1

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
		N00019-89-PR-90693	

6. ISSUED BY — CODE F00019

DEPARTMENT OF THE NAVY
Naval Air Systems Command
Washington, D.C. 20361
AIR-2171LN Mrs. C Blair Collins
Telephone: Area Code 202, 692-5614

7. ADMINISTERED BY (If other than Item 6) — CODE N68693

See Section G of the Contract

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)

McDONNELL DOUGLAS CORPORATION
McDonnell Douglas Missile Systems Company
Post Office Box 516
St. Louis, Missouri 63166

(X) 9A. AMENDMENT OF SOLICITATION NO.

9B. DATED (SEE ITEM 11)

10A. MODIFICATION OF CONTRACT/ORDER NO.
N00019-88-C-3128

10B. DATED (SEE ITEM 13)
See Block 14

CODE 69236 FACILITY CODE 28861

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)
See Appropriation Data Sheet Attached Hereto

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

(X) A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.

B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation data, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(B).

C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:

D. OTHER (Specify type of modification and authority)

E. IMPORTANT: Contractor ☒ is not. ☐ is required to sign this document and return _____ copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

See Attached

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)	
15B. CONTRACTOR/OFFEROR	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA	16C. DATE SIGNED
(Signature of person authorized to sign)		BY (Signature of Contracting Officer)	6-7-89

NSN 7540-01-152-8070 — 30-105-01 — STANDARD FORM 30 (REV.

68-001 313½
314 FOLS

Control No. : N00019-89-PR-90693
Contract No.: N00019-88-C-3128

Item	Supplies or Services	QTY	Price	Price
0142	UGM-109D-1 AUR, Land Attack Guided Missile, Encapsulated Submarine Torpedo Tube Launch including Payload Kit 2 NSN: 1410-01-229-1811 ACRN:	0	$1,031,592	$ 0
0143	UGM-109D-2 AUR, Land Attack Conventional Warhead, Encapsulated Submarine Vertical Launch including Payload Kit 2 NSN: ACRN:	0	$ 987,656	$ 0

4. This modification increases the firm fixed price of Contract No. N00019-88-C-3128 by $17,145,544 from $239,035,975 to $256,181,519.

5. Except as modified herein, all other terms and conditions of Contract No. N00019-88-C-3128 remain unchanged.

67-20

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

1. CONTRACT ID CODE	PAGE OF PAGES
J	1 | 5

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
		N00019-89-PR-90691	

6. ISSUED BY CODE N00019

DEPARTMENT OF THE NAVY
NAVAL AIR SYSTEMS COMMAND
WASHINGTON, D.C. 20361-2170
AIR-21711C MR. C. FUESEL
TELEPHONE: (202) 692-5614

7. ADMINISTERED BY (If other than Item 6) CODE S0524A

SEE SECTION C OF THE CONTRACT

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)

GENERAL DYNAMICS CORPORATION
CONVAIR DIVISION
P.O. Box 85357
5001 Kearny Villa Road
San Diego, CA 92138

CODE 14170 FACILITY CODE

( ) 9A. AMENDMENT OF SOLICITATION NO.

9B. DATED (SEE ITEM 11)

(X) 10A. MODIFICATION OF CONTRACT/ORDER NO. N00019-88-C-3137

10B. DATED (SEE ITEM 13) 070488

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

( ) The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ( ) is extended, ( ) is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)

SEE ATTACHED

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

( ) A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.

( ) B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation data, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).

( ) C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:

(X) D. OTHER (Specify type of modification and authority)
H-21, "Exercise of Option Items", and H-43, "Repricing of AUR CLINs"

E. IMPORTANT: Contractor ( ) is not, (X) is required to sign this document and return 1 1 copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

SEE ATTACHED

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)	
		[illegible]	
15B. CONTRACTOR/OFFEROR (Signature of person authorized to sign)	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA BY (Signature of Contracting Officer)	16C. DATE SIGNED 07-21

NSN 7540-01-152-8070
PREVIOUS EDITION UNUSABLE

30-105-01

STANDARD FORM 30 (REV. 10-83)
Prescribed by GSA
FAR (48 CFR) 53.243

Contract No.:N00019-88-C-3137
Control No. :N00019-89-PR-90691

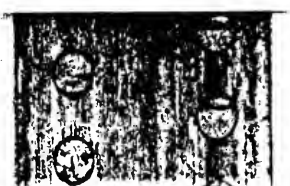
4. This modification increases the firm fixed price of Contract No. N00019-88-C-3137 by $13,231,377.00 from $162,703,737.00 to $175,935,114.00.

5. Except as modified herein, all other terms and conditions of Contract No. N00019-88-C-3137 remain unchanged.

67-22

26-Jul-89

MODEL: TOMAHAWK EQUIPMENT	FY00 (QTY 475) QTY	UNIT $	TOTAL	FY00 (QTY 510) QTY	UNIT $	TOTAL	FY00 (QTY 600) QTY	UNIT $	TOTAL	FY01 (QTY 600) QTY	UNIT $	TOTAL	FY02 (QTY 600) QTY	UNIT $	TOTAL	FY03 (QTY 600) QTY	UNIT $	TOTAL	FY04 (QTY 600) QTY	UNIT $	TOTAL
FLTMNT																					
GUR	475	0.930	441.951	510	1.100	565.595	600	1.050	612.021	600	1.080	635.617	600	1.263	697.269	600	1.100	641.012	600	1.126	656.268
CAPSULS (CLS)	56	0.280	15.622	56	0.292	15.763	56	0.300	16.697	56	0.308	16.484	56	0.582	16.327	56	0.301	16.256	0	0.000	0.000
BOOSTER	475	0.110	52.536			0.000			0.000			0.000			0.000			0.000			0.000
PAYLOAD	305	0.021	7.910			7.207			6.152			3.392			3.510			3.665			0.000
FUEL			6.020			5.000			6.708			6.001			5.752			4.001			4.396
IGNITOR	475	0.156	73.196			0.000	600	0.163	65.000	600	0.160	67.744	600	0.175	80.267	600	0.170	71.539	600	0.104	72.179
DOMAC	370	0.175	65.170			0.000			0.000			0.000			0.000			0.000			0.000
TOTAL HARDWARE	475	1.300	663.877	510	1.164	593.525	600	1.257	582.751	600	1.319	527.610	600	1.479	591.707	600	1.344	537.699	600	1.320	527.903
PROCUREMENT SUPPORT																					
SYSTEM ENGINEERING INTEG			25.861			30.799			30.688			19.570			17.416			16.530			15.480
PRODUCTION ENGINEERING			36.582			61.510			36.996			35.146			34.754			23.429			16.335
PRODUCT IMPROVEMENT			66.275			58.206			61.730			58.188			29.560			25.604			16.984
TOTAL MANUFACTURING			100.337			130.515			99.335			92.904			71.730			69.571			66.989
TOTAL FLTMNT	475	1.600	764.414	510	1.400	754.060	600	1.505	682.086	600	1.551	620.522	600	1.699	663.437	600	1.588	605.284	600	1.437	576.894
FLEET SUPPORT																					
OPT EQUIP			15.268			14.756			22.012			19.610			16.929			10.632			11.264
TNG EQUIP			1.648			26.921			21.301			20.512			12.575			12.575			7.227
DOCUMENTATION			4.686			8.843			3.698			3.010			1.685			1.273			0.785
TMPC			34.833			20.705			10.692			10.000			0.000			0.000			0.000
			56.436			70.765			67.383			53.748			30.866			30.882			23.450
GROSS WEAPON QTY	475	1.720	820.850	510	1.530	780.705	600	1.674	689.469	600	1.686	674.270	600	1.736	684.683	600	1.584	633.546	600	1.446	590.344
LESS GLCM CONV CREDIT			0.000			(114.000)			(21.700)			(11.700)			(7.500)			0.000			0.000
LESS FY 001 PROC			(66.530)			(71.600)			(75.600)			0.000			0.000			(75.000)			(75.000)
NET P-1 COST	475	1.580	754.362	510	1.175	599.385	600	1.430	572.161	600	1.656	662.570	600	1.717	686.983	600	1.380	558.546	600	1.380	515.344
ADVANCE PROCUREMENT			71.600			75.600			0.000			0.000			150.000			0.000			0.000
TOTAL PROC COST	475	1.730	825.782	510	1.324	674.993	600	1.430	572.161	600	1.656	662.570	600	2.000	836.983	600	1.304	558.546	600	1.380	523.394
GROSS INITIAL SPARES			22.686			21.844			16.724			27.510			39.521			31.845			25.622
LESS GLCM SPARES CREDIT			0.000			0.000			(5.000)			0.000			0.000			0.000			0.000
NET INITIAL SPARES			22.686			21.844			32.724			27.510			39.521			31.845			25.622
TOTAL PROGRAM COST	475	1.786	848.186	510	1.566	696.837	600	1.512	604.885	600	1.725	690.080	600	2.164	865.424	600	1.475	590.191	600	1.572	548.914
MODIFICATIONS			4.015			7.176			9.330			25.756			65.686			88.039			88.488



67-24

16 Oct-09
10:37:11 AM

MODEL: TOMAHAWK (COMPONENT)	FY09 (QTY 365) QTY	UNIT $	TOTAL	FY90 (QTY 000) QTY	UNIT $	TOTAL	FY91 (QTY 000) QTY	UNIT $	TOTAL	FY92 (QTY 000) QTY	UNIT $	TOTAL	FY93 (QTY 000) QTY	UNIT $	TOTAL	FY94 (QTY 000) QTY	UNIT $	TOTAL	PROGRAM TOTALS FY09 - FY94 TOTAL (QTY 2365) QTY	UNIT $	TOTAL
FLYAWAY COST																					
AUR	365	1.271	463.730	000	1.020	009.403	000	0.970	391.032	000	0.920	360.010	000	0.861	344.000	000	0.715	306.143	2,365	0.957	2263.009
CAPSULE (CLO)	54	0.310	16.972	54	0.309	16.692	54	0.305	16.466	54	0.301	16.266	54	0.298	16.090	0		0.000	270	0.306	82.493
BOOSTER	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000
PAYLOAD	000	0.022	0.856	300	0.022	6.001	77	0.023	1.763	98	0.023	2.290	109	0.020	2.599	12	0.029	0.391	1,012	0.022	22.074
CONVENTIONAL BISP	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000
FUEL			6.616			5.507			5.410			5.304			5.591			5.070			34.101
ENGINE	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000
CANS	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000
OSAMS	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000
OMAC	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000	0		0.000
TOTAL HARDWARE	365	1.359	496.103	000	1.056	030.366	000	1.027	010.671	000	0.990	392.069	000	0.922	360.683	000	0.730	292.112	2,365	1.016	2907.072
NSF RES 09.001 FY90 $ OUT			99.607			17.327			16.370			15.063			14.520			11.057			179.023
TOTAL HDWR & NSF RES	365	1.622	595.079	000	1.139	055.687	000	1.078	031.041	000	1.019	007.532	000	0.950	305.206	000	0.759	303.169	2,365	1.000	2372.991
PROCUREMENT SUPPORT (NONRECURRING)																					
SYSTEM ENGINEERING AGENT			20.799			15.537			14.797			14.037			13.290			12.573			90.900
GOVT IN-HOUSE			01.510			9.600			0.907			7.259			6.257			5.391			70.307
TOOLING & TEST EQUIPMENT			1.650			1.541			1.503			1.100			0.000			0.500			7.099
RELIABILITY/PRODUCT IMPROVEMENT			50.296			11.473			9.790			9.365			7.170			6.972			101.079
TOTAL NON-RECURRING			173.179			30.109			24.996			30.761			27.073			24.533			277.624
TOTAL FLYAWAY	365	1.936	719.040	000	1.231	093.071	000	1.164	463.537	000	1.096	038.295	000	1.027	010.679	000	0.820	320.104	2,365	1.205	2950.529
FLEET SUPPORT COSTS																					
SUPPORT EQUIPMENT			10.136			9.691			0.040			0.630			5.096			9.534			05.303
TRAINING EQUIPMENT			26.071			0.636			0.075			5.977			0.060			0.562			33.339
DOCUMENTATION			0.063			7.391			1.950			1.503			1.295			1.042			9.116
TMDE EQUIPMENT			20.705			19.992			10.000			0.000			0.000			0.000			39.997
FLEET SUPPORT COSTS			78.795			30.210			26.073			13.670			11.649			9.938			171.035
GROSS WEAPON SYSTEM COST	365	2.150	799.785	000	1.330	532.001	000	1.231	492.360	000	1.150	051.963	000	1.056	022.329	000	0.841	330.042	2,365	1.270	3021.560
LESS BLCH CONVERSION CREDIT			-110.000			-21.700			-11.700			-7.500			0.000			0.000			-150.900
LESS ADVANCE PROCUREMENT			-71.600			-75.600			0.000			0.000			-73.000			-75.000			-297.000
NET P-1 COST			599.385			624.773			600.660			600.463			547.329			263.042			2569.632
ADVANCE PROCUREMENT, CY			75.600			0.000			0.000			150.000			0.000			0.000			225.600
TOTAL PROCUREMENT COST			674.993			624.773			600.660			599.463			547.329			263.042			2795.268
INITIAL SPARES			21.040			22.724			22.310			20.521			21.695			25.672			167.666
TOTAL PROGRAM COST			676.037			647.497			503.970			622.984			570.973			290.664			2962.926
MODIFICATION OF MISSILES			7.176			3.350			25.750			65.660			00.019			00.400			270.307
INFLATION INDICES			2.0160			2.0065			2.5439			2.6007			2.6700			2.6964			

NAME OF SUGGESTER(S) (last, first, mi.i.)	POSITION TITLE & GRADE (or military rank/rate)	SOCIAL SECURITY NO
DAY THOMAS F	COST ANALYST GM13	217-44-[illegible]
ORGANIZATION (Specify activity, ship, command, bureau or office)	**ORGANIZATION SUBDIVISION** (Dept., Div., Sect., Unit or Shop)	**PHONE**
NAVAIR	5244 F	692-[illegible]

I (WE) UNDERSTAND that the acceptance of a cash award for the use of this suggestion by the United States Government shall not form the basis of a further claim of any nature upon the United States by me (us), my (our) heirs, or assigns.

DO NOT WRITE IN THIS SPACE
DATE RECEIVED

SIGNATURE AND DATE	SIGNATURE AND DATE	SUGGESTION NUMBER
Thomas F. Day 10/26/1		

TITLE OF SUGGESTION

ELIMINATION OF EXCESSIVE [illegible] FUNDS

Describe in three separate paragraphs (1) the problem, difficulty, or circumstances that prompted you to submit this suggestion; (2) the suggested change; (3) where and how it can be used, what it will accomplish, and how it will benefit the Navy/Government - in terms of tangible savings, if possible.

PER ATTACHED.

2884
67-26

Note - If you need more space, continue on separate sheet.

THOMAS F. DAY
COST ANALYST -- GM13
217-46-2196
NAVAIR 52442F
692-9182

SUBMITTAL OF SUGGESTED SAVINGS BY THE ELIMINATION OF EXCESSIVE RESERVES FROM THE CRUISE MISSILE BUDGET.

The problem which is addressed by this suggestion is the manner by which substantial funds have been hidden in the Cruise Missile budget for a period of years. Funds which can be loosely identified as management reserve but which in fact have and continue to provided an excessive "slush fund" for use by the program office. The specific funds referenced by this suggestion are represented on the program's P12 as a combination of hardware and support costs for the years FY90-FY94 which are relied upon by higher authorities as a true representation of past and future costs for the Cruise Missile.

My suggestion is to eliminate the excess funds from the anticipated budget by a detailed analysis of the differences between the Program Office's requested budget and the independent estimate which has been included with this suggestion.

Based on a simple comparison of the two positions, with the Program Office estimating the future cost as $3,269,980,000 and the independent estimate representing the future cost as $2,120,335,000 for a difference and potential savings to the government of $1,149,645,000. It is expected that further analysis of this information and future events will result in an actual savings between these two positions. The amount of the actual savings would be the difference between the Program Office's most currently available position and the future actuals as computed on a yearly basis and review.

I understand that the acceptance of a cash award for the use of this suggestion by the United States Government shall not form the basis of a further claim of any nature upon the United States by me, my heirs, or assigns.

_____
Signature & Date

Title of Suggestion: ELIMINATION OF EXCESSIVE RESERVE FUNDS.

JOHN WARNER
VIRGINIA

COMMITTEES
ARMED SERVICES
ELECT COMMITTEE ON INTELLIGENCE
ENVIRONMENT AND PUBLIC WORKS
SPECIAL COMMITTEE ON AGING

United States Senate

235 RUSSELL SENATE OFFICE BUILDING
WASHINGTON DC 20510-0801
(202) 224-2023

CONSTITUENT SERVICE OFFICES

450 WORLD TRADE CENTER
NORFOLK VA 23510-1624
(804) 441-3079

PARCEL POST BUILDING
1100 EAST MAIN STREET
RICHMOND VA 23219-3634
(804) 771-2579

235 FEDERAL BUILDING
180 WEST MAIN STREET
ABINGDON VA 24210-0857
(703) 628-8158

DOMINION BANK BUILDING
213 S. JEFFERSON ST SUITE 1003
ROANOKE VA 24011-1716
(703) 982-4676

May 21, 1991

Mr. Tom Day
704 Fall Place
Herndon, Virginia 22070

Dear Mr. Day:

I am writing regarding the concerns you have with the U.S. Navy's Cruise Missile budget estimates.

In accordance with your request, I have enclosed a copy of the response I received from the Auditor General of the Navy regarding this matter. I trust this information is of assistance.

With kind regards, I am

Sincerely,

John Warner

John Warner

JW:rb
Enclosure

DEPARTMENT OF THE NAVY
AUDITOR GENERAL OF THE NAVY
5611 COLUMBIA PIKE
ROOM 2068, NASSIF BUILDING
FALLS CHURCH, VA. 22041-5080

IN REPLY REFER TO

7 Mar 91

The Honorable John Warner
United States Senate
Washington, D.C. 20510

Dear Senator Warner:

The Naval Audit Service has completed your requested review and evaluation of Mr. Thomas Day's alleged hidden costs in the Cruise Missile budget estimates.

The primary differences between Mr. Day's budget estimates and the Cruise Missile program office's budget estimates were in the techniques and assumptions used in projections of future missile costs. Review of historical data reveals shows that from 1986 to 1990 missile costs reduced significantly. According to NAVAIR's Cost Analysis Division the pricing curve during this period showed a 60 percent slope; i.e., the price reduced 40 percent every time the purchased quantity doubled. Mr. Day predicted that prices would continue to drop similarly in fiscal years 1990 through 1994. He predicted an 8 percent per year reduction (which equates to a 60 percent slope). An August 1989 study by the Naval Center for Cost Analysis assumes a historically based slope of 89 percent. The Cruise Missile program office's October 1989 budget estimates, including estimates in the FY 1991/1992 budget, did not account for any slope in fiscal years 1990 through 1994.

At a later point in time, using the Naval Center for Cost Analysis study, NAVAIR conducted an independent evaluation of the Cruise Missile program office's budget projections and determined that budget projections for fiscal years 1990 through 1994 were overstated by at least $161 million (5 percent of the total program). Therefore, Mr. Day's allegation of overstated budget projections at that time was partially substantiated, but not to the $1.4 billion computed using his assumptions.

After reviewing the various assumptions and analyses, we concluded that the Naval Center for Cost Analysis approach appeared to be the most acceptable basis for determining future missile costs. We then applied the Naval Center for Cost Analysis computed 89 percent slope to the program office's current budget estimates for fiscal years 1992 through 1995. The differences between our computations and the current budget estimates, including estimates in the FY 1992/1993 budget, are not considered significant.

We discussed the results of our findings with the Cruise Missile Program Executive Officer and with Mr. Day. At this time we do not plan any further review of this subject.

Sincerely,

Richard L. Shaffer

RICHARD L. SHAFFER

Copy to:
UNSECNAV

69-3

FEB-27-92 THU 8:03 NAVAUDSVCSE FAX NO. 8044648087 P.01

DEPARTMENT OF THE NAVY
AUDITOR GENERAL OF THE NAVY
5611 COLUMBIA PIKE
ROOM 5068, NASSIF BUILDING
FALLS CHURCH, VA. 22041-5080

IN REPLY REFER TO
7540/91-0062
92-0059
Ser C-1/0115
26 Feb 92

From: Auditor General of the Navy
To: White House Liaison Office

Subj: BUDGET ESTIMATES FOR THE TOMAHAWK CRUISE MISSILE (037-S-92)

Ref: (a) SECNAVINST 7510.7E, "Department of the Navy Internal Audit"

1. Introduction

a. On 6 September 1990, Senator John Warner requested the Navy's Chief of Legislative Affairs to review the Navy's budget estimates for the cruise missile program. The Chief of Legislative Affairs forwarded Senator Warner's request to the Naval Audit Service. We reviewed the Commander, Naval Air Systems Command's (NAVAIR) support for the cruise missile program budget. On 7 March 1991, we informed Senator Warner that the cruise missile budget estimates for FY 1992 through FY 1995 were not significantly overstated.

b. In September 1991, your office forwarded to us additional information regarding the Tomahawk Cruise Missile Program budget. During October and November 1991, we revisited the issue.

2. Objectives. The objective of our first review (91-0062) was to determine the accuracy of cost estimates supporting budget requests for the cruise missile program. The objective of our second review (92-0059) was to review the documentation provided and determine if the Navy could improve the budget estimating procedures.

3. Scope and Methodology

a. During our first review, we assessed the support for NAVAIR's FY 1990 through FY 1994 budget estimates totaling $3.3 billion. As part of our review, we looked at past contract prices to determine the reasonableness of future estimates. We interviewed personnel in NAVAIR's Cruise Missile Office and NAVAIR's Cost Analysis Division. We reviewed a study of cruise missile budget estimates performed by the Cost

OPTIONAL FORM 99 (7-90)
FAX TRANSMITTAL # of pages ▸ 3
To Mr. Rathjen (AUD-3) From Pete Day (C-1)
Dept. NAVAUDSCVHQ Phone #
Fax # Fax #
NSN 7540-01-317-7368 5099-101 GENERAL SERVICES ADMINISTRATION

Subj: BUDGET ESTIMATES FOR THE TOMAHAWK CRUISE MISSILE (037-S-92)

Analysis Division in January 1990. We contacted personnel at the Naval Center for Cost Analysis to obtain information on learning curves used in projecting future costs of cruise missiles. We then applied an historically based learning curve to the current budget to determine if the budget was overstated. This review was conducted during October and November 1990.

b. Our subsequent review of the cruise missile budget issue occurred during October and November 1991. We met jointly with officials from the NAVAIR Cruise Missile Office, the NAVAIR Cost Analysis Division, the Naval Center for Cost Analysis, and the General Accounting Office. We reviewed the information from your office regarding budget estimating procedures.

c. Due to the limited scope of our review, we did not evaluate the internal control systems, or follow-up on any prior audits in this area. With these exceptions, the reviews were conducted in accordance with generally accepted government auditing standards.

5. Summary of Audit Results

a. We found that NAVAIR's initial budget estimates made in 1989 for FY 1990 through FY 1994 were overstated because available historical data was not used to project future missile costs. We also looked at NAVAIR's budget estimates for FY 1992 through FY 1995 and concluded that the estimates were not significantly overstated.

(1) A review of historical data showed that from 1986 to 1990 missile costs decreased significantly. According to NAVAIR's Cost Analysis Division the pricing curve during this period showed a 60 percent slope; i.e., the price reduced 40 percent every time the purchased quantity doubled. However, the FY 1991/1992 cruise missile budget did not account for any slope in FY 1990 through FY 1994 budget estimates. NAVAIR conducted an independent evaluation of the Cruise Missile Office's budget projections and determined that budget projections for FY 1990 through FY 1994 were overstated by $161 million (5 percent of the total program). However, during the budget review process, missile quantities were reduced and the Comptroller of the Navy changed the budget control totals. Accordingly, NAVAIR reduced the missile budget projections. NAVAIR never received the $161 million in the overstated FY 1991/1992 budget.

Subj: BUDGET ESTIMATES FOR THE TOMAHAWK CRUISE MISSILE (037-S-92)

(2) After reviewing various assumptions and analyses, we concluded that the Naval Center for Cost Analysis' approach (using an historically based slope of 89 percent) appeared to be the most acceptable basis for determining future missile costs. We applied the 89 percent slope to the cruise missile's current budget estimates for FY 1992 through FY 1995. The differences between our computations and the budget estimates were not considered significant.

b. In reviewing the information provided by your office, we noted several references to how Total Quality Leadership (TQL) will impact future missile costs and why it should be used to predict those costs. We could not find a practical way to finitely predict the results of TQL.

c. Based on our initial audit efforts, and discussions with NAVAIR and the Naval Center for Cost Analysis regarding the information received from your office, we could not find a practical way to significantly improve NAVAIR's estimating techniques for the cruise missile budget.

Peter M. Day

PETER M. DAY
By direction

Copy to:
UNSECNAV
CNO (OP-09B)
NAVCOMPT (NCB-A-1) (5 copies)
NAVCOMPT (NCB-53)
NAVCOMPT (NCB-L) (2 copies)
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DEPARTMENT OF THE NAVY
NAVAL AIR SYSTEMS COMMAND (AIR-09J)
NAVAL AIR SYSTEMS COMMAND HEADQUARTERS
WASHINGTON, DC 20361-0900
IN REPLY REFER TO

5720
AIR-09J3/FD:9200743
18 February 1993

Mr. Thomas F. Day
704 Fall Place
Herndon, VA 22070

RECEIVED 93-02-20

Dear Mr. Day:

The following information is provided as our final response to your May 15, 1992, Freedom of Information Act[1] request for a copy of the Naval Investigative Service report of investigation identified as "I/Improprieties Within the Cruise Missile Program Office" and related supporting documents.

I have completed my review of the documents that the Naval Investigative Service referred to me for action in determining releasability. I have found that none of the referred documents are responsive to your May 15th request but, rather, deal with the termination of your employment and/or any alleged reprisals for whistleblowing. None of the referred documents in any way relate to the investigation concerning the alleged Cruise Missile Program Office improprieties.

Because we are unable to provide responsive records, you may consider this an adverse determination of your request that may appealed, in writing, to the following Secretary of the Navy's designee: General Counsel, Department of the Navy, Washington, DC 20360-5110

Such an appeal must be received in that office within 60 days from the date of this correspondence and a copy of this letter should be attached. The letter of appeal and its envelope should both bear the notation, "Freedom of Information Act Appeal."

I am the official responsible for this adverse determination.

Sincerely,

R. E. COYLE
CAPT, JAGC, USN
By direction of
the Commander

Copy to:
COMMANDER
NAVAL INVESTIGATIVE SERVICE COMMAND
(ATTN INFORMATION & PRIVACY COORDINATOR)
HEADQUARTERS
WASHINGTON DC 20388

137-1

[1] 5 U.S.C.S. § 552 (1989).

DEPARTMENT OF THE NAVY
NAVAL AIR SYSTEMS COMMAND
NAVAL AIR SYSTEMS COMMAND HEADQUARTERS
WASHINGTON, DC 20361

2201 IN REPLY REFER TO
Ser AIR-5241/239
03 Jan 90

MEMORANDUM

From: AIR-524
To: Distribution

Subj: RELEASE OF COST ESTIMATES BY AIR-524 PERSONNEL

1. It is the policy of AIR-524 not to release cost estimates to requestors outside NAVAIR without program office approval. Because AIR-524 represents a central focal point for all estimates, it is common for us to receive requests directly from an outside source. This allows the requestor to go to a single source to receive multiple estimates. However, it also puts the burden on us to ensure that the program offices are involved and concur with our response. On rare occasions this has not happened due to miscommunications between the program office and our office.

2. Effective with this memo, all analysts in AIR-524 are required to obtain the initials of a designated representative within the program office, preferably the BFM, on all estimates released to a source outside NAVAIR. Initials are not required for the normal budget process within NAVAIR (i.e., initials are not needed for cost sheets going to AIR-04 during the course of the budget process). After obtaining the necessary initials, the section/branch head will pass the estimate on to the requestor. Analysts are not to provide estimates to outside sources unless specifically directed to do so by their supervisor or by the PMA office.

Noreen S. Bryan
NOREEN S. BRYAN

3-Mar-1993

From: John O. King, NCB-221
To: Terrence Willingham, AIR-00C

Subj: Merit System Protection Board's Grant of Thomas F. Day's (Appellant) Motion to Compel the Production of Documents

1. I was the budget analyst in the Office of the Comptroller of the Navy responsible for the Weapons Procurment, Navy (WPN) appropriation from December 1986 to March 1992.

2. With regard to the provision of documents relating to Items 106 and 107 of Mr. Day's appeal, no such documents of any kind exist within this organization. No material was ever presented to me about Mr. Day's allegation of improprieties in Tomahawk budgeting, nor were any alternative cost estimating methodologies forwarded to the Navy Comptroller as part of their budget submissions other than those supported by the Tomahawk business manager.

3. I do recall a single telephone conversion after the October 1989 Secretary of Defense (Comptroller) budget review hearing (at which Mr. Day was present) with the Tomahawk business manager, Mr. Howard Hurley, in which he referenced Mr. Day's allegations, noted they had been reviewed by Tomahawk program personnel and did not merit further consideration.

John O. King

163

Attachment (3) 3/8/93

7000
Ser PDA14-B/99
13 Mar 90

MEMORANDUM

From: PDA14-B
To: AIR-7113H

Subj: BENEFICIAL SUGGESTIONS NUMBERED 90-16 THROUGH 90-19

1. These suggestions have been reviewed as a group and the following evaluation and recommendation as to their disposition is provided.

2. In the first place, all of these suggestions are clearly within the responsibilities of the individual's job. Mr. Day was assigned the responsibility of estimating the future year costs for the Tomahawk All Up Round (AUR), as well as integrating the estimates of others into a total Tomahawk P-12 (Budget Exhibit), when he was assigned to PDA-14. With his reassignment to AIR-524, he continued to have the same responsibilities. Mr Day's allegation that the estimates are too high can only be an indictment of his own estimating ability, since he was responsible for preparing those estimates which he now criticizes.

3. As a matter of general comment it would not seem appropriate that suggestions of this nature would even have been passed along for review. As a matter of precedent, these types of suggestions, relating to estimating and the budgeting process, would not seem to fall under the intent of the suggestion program. By accepting this type of suggestion, the next step is to open the door for budget reviewers to submit suggestions and expect cash awards for budget reductions.

4. As a further point for your consideration, you should be aware that the independent estimate Mr. Day speaks of was an estimate that he himself prepared, using questionable assumptions, that he took to the OSD budget reviewer on 20 October 1989, despite being advised by his management chain in AIR-524, that this would not be prudent action. As a result of Mr. Day's allegations to the OSD Comptroller, and the Navy IG, AIR-524 commissioned an independent assessment, which was recently concluded under the leadership of

166-1 Attachment (1) 3-8-93

Subj: BENEFICIAL SUGGESTIONS NUMBERED 90-16 THROUGH 90-19

Mr. Ron Rosenthal. This team concluded that while the Program Office estimate was conservative, Mr. Day's estimate, which forms the basis of the suggestions, was analytically unsupportable. As presented in the briefing of their assessment to the Director, PDA-14, the three positions are summarized below (TY$ in M, FY90-94):

Mr. Day's Estimate	2236.8
PDA-14	3272.3
Independant assessment	3110.1

The suggestions that Mr. Day has submitted are based on the same lack of information as his estimate and are merely another avenue to attempt to get whatever visibility he can.

5. In conclusion, it is my opinion that these suggestions are without merit and should not be adopted. If they are in anyway adopted, cost estimators would be tempted to first overestimate a program, then underestimate the same program and collect a percentage of the difference. This is essentially Mr. Day's claim on all three of these actions.

HOWARD E. HURLEY, JR.

Copy to:
PDA14-01

166-2

0 7L
0 701B
0 701 T

5720
AIR-07D
22 May 1990

MEMORANDUM

From: AIR-07D
To: AIR-00/09/07
PEO(CU) Faxed 5/23/90 Tom

Subj: BRIEFING FOR SAC ON 24 MAY 1990 ON CRUISE MISSILE COST ESTIMATES

1. I was given a heads up that Mr. Thomas Day, from AIR-524, is scheduled to brief the SAC on Thursday, 24 May 1990, regarding his position that the Navy has over estimated the program cost of the cruise missile by $1B.

2. At this time, I have been unable to confirm the briefing or the committee. I have alerted both the Committee Liaison Office (NAVCOMPT) and OLA.

3. If such a briefing takes place, I recommend that PEO(CU) public affairs staff prepare a contingency statement along with anticipated questions and answers for use in responding to media queries that may be expected.

Very respectfully,

Deslie Prince

Faxed 5/23

Copy to PEO(CU)07D

Howard
FYI - This guy will be issued his working papers today -
V/R
Denny

167

UNCLASSIFIED

Noreen S. Bryan
AIR-524, 692-3836
23 May 1990

POTENTIAL ADVERSE BUDGET TESTIMONY ON TOMAHAWK(U)

PURPOSE — This is to inform you of the potential of adverse testimony to Congress by Thomas Day AIR-52442F regarding his cost estimate of the Tomahawk program.

BACKGROUND — Mr. Day developed an estimate $1B ~~higher~~ lower (FY90-94) than the PMA estimate last fall and has been presenting it outside the chain of command to OSD, NAVAIR IG, and Navy Audit Service since that time. At the time of these actions his management reviewed his position, disagreed, and recommended he ~~not circumvent the chain of command~~. He ignored this direction with his presentation to the OSD budget analyst ~~and~~ with his presentation to ~~the~~ the Inspector General of NAVAIR has made himself a whistle-blower and comes under 5 U.S.C. 2302 protections. This activity took place between October and December of 1989. Naval Audit Service initiated an investigation in January which is ongoing.

DISCUSSION — Yesterday Mr. Day informed his supervisor that he had arranged through either Rep. Wolf or Sen. Warner to give testimony to Congress on his assertions. This claim has not been verified, but based on his past behavior there is a good possibility it could be valid. Based on advice from counsel, his management has refrained from taking any disciplinary action due to his whistle-blower status, but do not agree with his position after doing an independent evaluation. My Congressional and Public Affairs Office has notified the Navy Office of Legislative Affairs of this potential action.

ACTION — Information only.

In the review process the OSD analyst ~~discounted~~ did not accept his assertions and arrived at an independent judgment, reflected in PBD 123, that a downward adjustment of only $56.5 million to the Navy's estimate was required to properly price the program from FY 1990 through FY 1994.

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UNCLASSIFIED

25 May 1990

POTENTIAL ADVERSE BUDGET TESTIMONY ON TOMAHAWK(U)

PURPOSE — This is to inform you of the potential of adverse testimony to Congress by Thomas Day AIR-52442F regarding his cost estimate of the Tomahawk program.

BACKGROUND — Mr. Day developed an estimate $1B lower (FY90-94) than the PMA estimate last fall and has presented it outside the chain of command to OSD, and to the NAVAIR IG. At the time of these actions his management reviewed his position, disagreed, and recommended he support the Navy budget. He ignored this direction with a presentation to the OSD budget analyst. The OSD analyst did not agree with the assertions and, on independent evaluation reflected in PBD-123, made a downward adjustment of $56.5M (2.2%) to the Navy proposal for FY 91-94. Subsequently, the program was restructured for the Presidential submit cancelling the last two years of procurement and reducing the total amount $850M. With his presentation to the Inspector General of NAVAIR he has made himself a whistle-blower and comes under 5 U.S.C. 1302 protections. This activity took place between October and December of 1989. Naval Audit Service has been informed by NAVAIR IG.

DISCUSSION — Tuesday Mr. Day informed his supervisor that he had arranged through either Rep. Wolf or Sen. Warner to give testimony to Congress on his assertions. Today Mr. Day indicated he was working with "some Republican staffers for the Senate Appropriations Committee" who are expecting to have him testify in a future closed session. This claim has not been verified, but based on his past behavior there is a good possibility it could be valid. An independent evaluation of Mr. Day's estimate identified significant discrepancies in his methods resulting in inaccurate outcomes. Based on advice from counsel, management has refrained from taking any disciplinary action due to his whistle-blower status. NAVAIR Congressional and Public Affairs Office has notified the Navy Office of Legislative Affairs of this potential action.

ACTION — Information only.

UNCLASSIFIED

PROGRAM EXECUTIVE OFFICE
FOR
CRUISE MISSILES PROJECT
AND
UNMANNED AERIAL VEHICLES JOINT PROJECT

FACSIMILE MESSAGE

FROM: Assistant PEO for Business and Finance APEO(CU)-B

OFFICE PHONE: (703) 692-4200 AUTOVON 222-4200

FACSIMILE: (703) 746-5645 AUTOVON 286-5645

From: H. Hurley

To: Ron Williams (804-464-8288; FAX 804-464-8087)

Subj: Comments on Tom Day letter

Ron... Your comments are a pretty concise encapsulation of what I think the Navy position should be. I find no errors of fact, nor do I have any problem with your conclusions. I've constructed below a rather rambling essay which might give you some insight into our thoughts on what is now called the "Day Affair" right out of a John LaCarre novel. It might be helpful.

Hurley

From: H. Hurley
To: Ron Williams
Comments on Tom Day letter

Page (1)

Mr. Day speculates "excessive management reserves total $30B annually" are totally hidden from senior management and are "essential to the process of preventing outsiders from knowing just how many problems are encountered in the administration of complex weapons procurements..."

There is no evidence that Mr. Day had access to other DoD project budgets other than his assigned program, the Tomahawk Weapons Procurement, Navy budget. Therefore his allegations of excessive management reserves within DoD are a speculation on his part.

Each weapon system budget is reviewed by a series of budget analysts at the service comptroller level and the OSD Comptroller level. These analysts are not associated in any way with the programs being reviewed. Congressional staffs and the GAO also review these budgets. Major program budgets are reviewed by independent service cost analysts such as the Navy Center for Cost Analysis as well as the OSD Cost Analysis Improvement Group. Where questions of impropriety are raised, as with Mr. Day's earlier accusations, the service audit group examines the data. In the case of Tomahawk, the budget in question was reviewed by the Navy Comptroller, OSD Comptroller, Center for Navy Cost Analysis, Naval Air Systems Command Cost Analysis Division, the OSD Cost Analysis Improvement Group, the General Accounting Office, and the Navy Audit Service. None of these agencies could substantiate Mr. Day's claim. Furthermore, each individual funding action was reviewed and approved by the Naval Air systems Commander Comptroller, an organization independent from the program office.

Mr. Day has not substantiated his accusation by analyzing the budget estimate he reviles to the resulting competitive contracts. His former supervisors continually asked for this reconciliation of him, a task he refused to accomplish.

PAGE 2

Mr. Day alleges that the management reserves are doled out to favor or disfavor individuals or activities in order for the manager to maintain a power base which further bloats an already over staffed bureaucracy. Mr. Day further states that the "more serious flaw in the system as it exists is the absence of controls on the expenditure of those reserves ..."

While this may be a politically popular opinion, and perhaps firmly believed by Mr. Day, he offers no analysis nor evidence to support his claim.

Each and every funding transaction is reviewed by a comptroller employee, independent of the program office, for two determinations. Firstly, a determination is made as to whether the activity being funded does not violate authorization and appropriation statutes in compliance with 31 USC 1301a. Secondly a determination is made as to whether funds are indeed available for the activity in accordance with 31 USC 1517. The Navy has firmly separated the requirements function (program office), the comptroller function (funding approval) the contracting function, and the paying function. These controls are in place to ensure that the expenditure of funds is in accordance with statute and policy.

The use of the so-called fifty/fifty split is a widely accepted government and industry estimating methodology in cases of competition where the estimator, unable to predict the outcome of a competition some two years in advance of the event, chooses a methodology that is neither overly pessimistic nor overly optimistic. A review of the Tomahawk competition history shows that the keen rivalry between the companies has brought the cost of the missile down by 66%; Each year a new estimate is prepared based on the previous years' competition results. When Mr. Day was the estimator on the program, early in the competition, he used the 50/50 split methodology. However, in the past three years, a composite average estimate is now used on the program which is somewhat more refined and optimistic than the 50/50 split used. The 50/50 split methodology was reviewed by the OSD CAIG and not found lacking at the time.

Mr. Day's complaint that management reserves are "hidden" from view and spent primarily to enhance bureaucratic power deserves an explanation. When Mr. Day first constructed a computer model for the joint Sea Launched (Navy) and Ground Launched (Air Force) Cruise Missile projects, management first instructed him to adopt the Air Force format (AF Form 1537) which shows management reserve as a separate item. However,

at some later date, OSD Comptroller instructed all services to use the OSD budget format (P-12), which has any and all contingency estimates, estimates for engineering changes, and uncertainties distributed into the particular item supported. For example, any estimate for engineering change orders for the missile would be rolled up into the missile stub item, rather than lumped in with other such items into one "Engineering Change Order" line. In order to make this transition from the one form to the other (AF Form 1537 to P-12), management instructed Mr. Day to add an algorithm which spread the Engineering Change Order line across the elements which it supported thereby producing a P-12. Mr. Day apparently has construed that as "hiding" and has further concluded that this distribution of costs is being used for other than what the DoD requests authorization and appropriation, and further extends this logic to $30 billions across the entire defense budget. The Tomahawk program office (and all program offices contributing to the Defense budget) annually supplies Navy and OSD Comptroller the details of each and every estimate including reserves for uncertainties, risk, change orders and other estimating factors used in preparing the budget such as learning curves, uncertainties, past historical data and contract experience. Most estimating manuals in industry and government --AFM 2-2 is an example -- give instructions to the estimator as to what factors should be applied at which stage of any program. Because the Tomahawk program uses fixed price competitive contracts, and the production program is mature, the Tomahawk program budget contains NO management reserve NOR engineering change order estimate.

Page 5/6

Mr Day apparently doesn't understand the very nature of a learning curve. the learning, or more properly, the improvement curve has been used since their discovery sixty years ago, to predict improvements in pricing because of improvements in the manufacturing process. the learning or improvement curve is a mathematical formula for predicting the most probable future cost based on a specific entities past performance. The principles of Total Quality Management with their emphasis on statistical process control (SPC) are not inconsistent with learning curve theory. As a matter of fact, they are complimentary. Statistical Process Control, a major subset of Total Quality Management is a system of measurements which can be used for constructing improvement curves.

Mr. Day's suggestions the Department of Defense return to his computer model constructed in Symphony, a Lotus Corporation product, would be a step backwards. Lotus has discontinued the product. His suggestions about linking spreadsheets have been common practise for the past five years. The system he proposes of prioritized funding has been in existence in the Tomahawk and other programs for as many as ten years. Program office personnel are convinced his new ideas are reiterations of systems he experienced in his work for the Joint Cruise Missile Project Office and the naval Air Systems Command. His suggested position of a "Micro Budget Administrator" is a description of three positions in the Cruise Missile created by management in 1981. He worked physically near the incumbents of these positions during his employment in the office. Program office personnel suggest his ideas are again descriptions of positions he was exposed to during his employment with Navy. While his suggestions are laudable, they are somewhat dated by today's technology and expertise in Navy program offices.

DEPARTMENT OF DEFENSE
OFFICE OF INSPECTOR GENERAL

REPORT OF INVESTIGATION

CASE NUMBER
S90L00000150

DATE
June 17, 19

WHISTLEBLOWER REPRISAL AGAINST
AN EMPLOYEE OF NAVAL AIR SYSTEMS COMMAND

Prepared by Special Inquiries Directorate
Office of Assistant Inspector General
for Departmental Inquiries

FOR OFFICIAL USE ONLY

JUL 9 '91 12:36 FROM NAVY-OGC-CP-5 TO NAVAIR PAGE.003
07/09/91 09:18 US OFFICE OF SPECIAL COUNSEL NO.053 P003/012

S90L00000150 June 17, 1991

WHISTLEBLOWER REPRISAL AGAINST
AN EMPLOYEE OF NAVAL AIR SYSTEMS COMMAND

I. INTRODUCTION

By letter dated September 21, 1990, Mr. Jay S. Bybee, Associate Counsel to the President, referred to the Inspector General, Department of Defense (DoD), correspondence to the President and to his office from Mr. Thomas P. Day, a cost analyst with the Naval Air Systems Command (NAVAIR). In his September 20, 1990 letters, Mr. Day alleged that excess funds were regularly "hidden" in the budget estimate for the Navy Cruise Missile, and that he had suffered reprisals for reporting the alleged improprieties.

We did not investigate the alleged budget improprieties because the Naval Audit Service had substantiated that the October 1989 budget projections for the Cruise Missile were overstated by at least $161 million (5 percent of the total program). The Naval Audit Service concluded that the differences between the Cruise Missile Program Office and Mr. Day's estimates and the current Cruise Missile budget estimate, including estimates in the fiscal year 1992/1993 budget, were not significant. After interviewing Mr. Day, however, we identified the following for investigation:

- o certain threats that personnel actions would be taken for disclosing the alleged budget excesses;
- o a March 1990 change in work assignment;
- o a performance rating of Fully Successful for the period July 1, 1989 to June 30, 1990;
- o a decision that Mr. Day could no longer work at home but must spend his work day in the office;
- o charges of 11.5 hours absent without leave during the week of September 17 through 21, 1990; and,
- o letters of reprimand and caution, both dated September 27, 1990.

II. BACKGROUND

Mr. Day is a GM-13 cost analyst for the Cruise/Anti-Ship Missile Section, Unmanned Vehicle Cost Estimating Branch, Cost Analysis Division of NAVAIR. He was responsible for providing future budget estimates for the Cruise Missile Program.

Three NAVAIR officials were directly involved in the alleged reprisal actions: Ms. Noreen S. Bryan, Director, Cost Analysis Division; Mr. David Burgess, Head, Unmanned Vehicle Cost Estimating Branch; and Mr. William F. Stranges, Head, Cruise/ Anti-Ship Missile Section, Unmanned Vehicle Cost Estimating Branch, Cost Analysis Division (Mr. Day's immediate supervisor).

The Program Executive Office of the Cruise Missiles Project and Unmanned Aerial Vehicles Joint Project, NAVAIR, is responsible for preparing the Cruise Missile budget estimate and may obtain assistance from the Cost Analysis Division. The budget estimate is submitted through Navy channels to the Comptroller, Office of the Secretary of Defense (OSD).

On October 19, 1989, Mr. Day met with Mr. Stranges, Ms. Bryan, and Ms. Bryan's deputy, Mr. Joseph Guglielmello. During the meeting, Mr. Day stated that he was going to report to the Comptroller, OSD, that the October 1989 budget estimate prepared by the Program Executive Office for the Cruise Missile Project and Unmanned Aerial Vehicles Joint Project was more than $1 billion in excess of mission requirements.

Mr. Day made his disclosure to the OSD on October 20, 1989. On October 23, 1989, Mr. Day reported his concerns about the budget estimate to the Inspector General of the NAVAIR. On May 8, 1990, Mr. Day wrote a letter to Senator John Warner in which he raised his concerns about the Cruise Missile budget.

On September 20, 1990, Mr. Day received a Fully Successful rating on a performance appraisal for the period July 1, 1989 to June 30, 1990. Mr. Day was charged 11.5 hours absent with leave (a nonpay status) during the week of September 17 through 21, 1990 because he was late for work and left the office during the work day without approval. On September 27, 1990, Mr. Day received letters of caution and reprimand for the 11.5 hours of absent without leave. Mr. Day alleged that all of these actions were reprisal for his protected disclosures.

III. SCOPE

Section 2302(b) of Title 5, United States Code (U.S.C.), provides that individuals who have the authority to take, recommend, or approve personnel actions shall not take, fail to take, threaten to take, or threaten to fail to take a personnel action against an employee because of any disclosure of information which that employee reasonably believes evidences a violation of law, rule or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

In considering allegations of reprisal, the following are addressed:

- Did the complainant make a disclosure protected by statute?
- Subsequently, was an unfavorable personnel action taken or threatened to be taken or was a favorable action withheld or threatened to be withheld?
- Did the official responsible for taking or withholding the personnel action know about the protected disclosure?
- Does the evidence establish that the personnel action would have been taken if the protected disclosure had not been made?

We conducted an on-site inquiry that included taking sworn, tape-recorded testimony and reviewing pertinent documents.

IV. FINDINGS

Did the complainant make a disclosure protected by statue? Mr. Day's October 20, 1989 disclosure to the Comptroller, OSD, his October 23, 1989 disclosure to the Inspector General, NAVAIR, and his May 8, 1990 letter to Senator Warner were disclosures protected by statute.

Subsequently, was an unfavorable personnel action taken or threatened to be taken or was a favorable action withheld or threatened to be withheld? We found that unfavorable personnel actions were taken against Mr. Day subsequent to his disclosures.

Mr. Day alleged that during the October 19, 1989 meeting, Ms. Bryan told him that if he reported that the Cruise Missile budget estimate was in excess of mission requirements to the Comptroller, OSD, he could expect disciplinary action would be taken against him. Ms. Bryan testified that she told Mr. Day he should be concerned about disciplinary action if he took his concerns about the Cruise Missile budget outside the chain of command before giving the chain an opportunity to resolve them. Mr. Stranges testified that Ms. Bryan told Mr. Day that if he elected to go outside the chain of command to the Office of the Secretary of Defense, disciplinary action would be taken against him.

Mr. Day alleged that, at about the same time as the meeting with Ms. Bryan, Mr. Guglielmello and Mr. Stranges, Mr. Howard E. Hurley, Director, Business and Financial Management Directorate, Program Executive Office for the Cruise Missiles Project and Unmanned Aerial Vehicles Joint Project, told him during a

telephone conversation that he would see that he was fired for taking the budget information to the Comptroller, OSD. Mr. Hurley acknowledged that he told Mr. Day that he would suggest to Mr. Day's managers that he be fired.

Since March 1990, Mr. Day has been assigned to duties other than cost estimating for the Cruise Missile Project.

On September 20, 1990 Mr. Day received a Fully Successful performance rating on his appraisal for the period July 1, 1989 through June 30, 1990. Mr. Day claimed that his performance deserved an Outstanding rating.

Mr. Day alleged that for about three years prior to his disclosures to the Comptroller, OSD, and the Inspector General, NAVAIR, he was permitted to regularly spend part of his work day working at home, but that after his disclosures, he was no longer permitted to work at home. His supervisors deny that they had authorized Mr. Day to work at home.

On September 17, 1990, Mr. Day was counselled by Mr. Stranges and Mr. Burgess concerning his hours of work. He was directed to be in the office from 8:30 a.m. until 5:00 p.m. and to adhere to Navy leave policies. He was also counselled on September 19, and 20, 1990 concerning his hours of work. Mr. Day was charged 11.5 hours absent without leave during the week of September 17 through 21, 1990 because he was late for work and left the office during the work day without approval.

On September 27, 1990 Mr. Day received a letter of caution concerning his attendance and a letter of reprimand for "disobedience to constituted authority, unauthorized possession of official documents, and 11.5 hours of absent without leave."

The change in work assignment, September 1990 Fully Successful performance appraisal, change in place of employment and resulting absent without leave charges, and letters of caution and reprimand constitute personnel actions as defined in Section 2302(a)(2)(A) of Title 5, U.S.C. Since the threats by Ms. Bryan and Mr. Hurley occurred prior to Mr. Day's disclosures, they are not considered reprisals under Section 2302 of Title 5, U.S.C. They will be discussed later in the report.

Did the official responsible for taking or withholding the personnel actions know about the protected disclosure? We found that the officials who took the personnel actions knew that Mr. Day had made the protected disclosures.

Undisputed testimony established that Mr. Day informed Mr. Stranges, Ms. Bryan, and Mr. Guglielmello on October 19, 1989 that he was going to make a protected disclosure to the

S90L00000150 5

Comptroller, OSD. Mr. Day also informed Mr. Stranges in early November 1989 that he had presented his allegations to the Inspector General, NAVAIR.

Does the evidence establish that the personnel actions would have been taken if the protected disclosure had not been made? We found that unfavorable personnel actions were taken because of Mr. Day's protected disclosures. We also found that a change in work assignment and the Fully Successful performance rating were not due to reprisal.

Change in work assignment

Mr. Day has not worked on the Cruise Missile budget estimates since approximately March 1990. Mr. Stranges testified that the office's involvement with the Cruise Missile budget had been declining since early October 1989. He said that with the exception of some minor assistance on a negotiating proposal, no member of his staff has worked on the Cruise Missile Program since March 1990. Although Mr. Day alleged that his work assignment was changed in reprisal for his disclosure to the Comptroller, OSD, Ms. Bryan, Mr. Burgess and Mr. Stranges all testified that the Cruise Missile Project and Unmanned Aerial Vehicles Joint Project Office had not requested assistance in cost estimating, the support Mr. Day had provided. They also testified that, because of the age of the Cruise Missile and the procurement history available on the cost of the program, budget information was easily obtainable. Accordingly, there was no longer a need for their office's--and Mr. Day's--more sophisticated estimating techniques.

We concluded that there was no evidence that the change in Mr. Day's work assignment was in reprisal for his disclosure to the Comptroller, OSD, and the Inspector General, NAVAIR.

The September 1990 Fully Successful performance appraisal

Mr. Day alleged that he should have received an Outstanding performance appraisal for the period July 1, 1989 to June 30, 1990. He alleged that he did not receive an Outstanding rating because of reprisal. The only reason Mr. Day presented to support his allegation that he should have received an Outstanding rating was that he believed the work he did on the Cruise Missile budget estimate, showing that the budget was $1 billion in excess of mission requirements, constituted Outstanding performance.

Mr. Stranges and Mr. Burgess disagreed that Mr. Day's budget estimate demonstrated a billion dollar excess. They testified that he did not apply generally accepted estimating techniques in developing his estimate. Mr. Burgess said that Mr. Day made insufficient use of the Cruise Missile procurement history and overly relied on his own judgment.

Although the Naval Audit Service concluded that the October 1989 Cruise Missile budget estimate was overstated, it was unable to confirm Mr. Day's allegation that the estimate was $1 billion in excess of mission requirements.

Mr. Burgess and Mr. Stranges also testified that even if his estimate was accurate, that alone would not warrant an Outstanding appraisal. Mr. Burgess testified that he believed the Fully Successful appraisal was overly generous since Mr. Day had contributed very little to the work of the Division.

Mr. Stranges also rated Mr. Day's performance Fully Successful for the period December 11, 1988 to June 30, 1989.

The evidence indicated that Mr. Day's supervisors viewed his Cruise Missile budget estimate as inaccurate. They certainly did not believe it warranted an Outstanding rating. Mr. Day was rated Fully Successful on each of the six elements of his performance standards.

We concluded that Mr. Day's September 1990 performance rating would have been Fully Successful even if he had not made disclosures to the Comptroller, OSD, and the Inspector General, NAVAIR.

Change in place of duty and resulting absent without leave charges, letter of caution and letter of reprimand

Mr. Day alleged that for some years, he had frequently worked at home during duty hours. He said that it was his habit to begin work at home on his personal computer, perhaps as early as 5:30 a.m., and come to his office when he reached an appropriate stopping point. He said that he frequently arrived at his office at 8:30 a.m., 9:30 a.m. or 10:00 a.m. He stated that he frequently left his office for extended periods and left his office before the end of his duty day to perform work at home on his computer. He acknowledged that he never received formal approval for that arrangement but testified that his supervisors were well aware of the practice. He maintained that his supervisors' direction to spend the entire work day in his office or to obtain prior approval for leaving the office was in reprisal for his disclosures concerning the Cruise Missile budget.

On September 17, 1990, Mr. Stranges and Mr. Burgess counselled Mr. Day concerning his hours of work. They directed him to be in the office from 8:30 a.m. to 5:00 p.m. and to adhere to Navy leave policies. He was also counselled on September 19, and 20, 1990 concerning his hours of work. Mr. Day was charged 11.5 hours absent without leave during the week of September 17 through 21, 1990 because he was late for work and left the office during the work day without approval. On September 27, 1990, he received a letter of caution concerning his attendance and a

letter of reprimand for "disobedience to constituted authority, unauthorized possession of official documents, and 11.5 hours of absent without leave."

Mr. Stranges and Mr. Burgess denied they permitted Mr. Day to work at home. They asserted he was never given approval to do so. The evidence indicated that, at least since December 1988 when Mr. Day moved into the same office space as Mr. Stranges, Mr. Stranges knew Mr. Day frequently came into the office late, left the office during the day for extended periods and left work before the end of his duty day. Mr. Stranges said that he took no action to require Mr. Day to spend the full work day in the office prior to September 1990. He acknowledged that Mr. Day had told him he was working at home but he said that he had seen no evidence of the work.

The evidence indicated that Mr. Day was not present in his office during the periods he was charged absent without leave. The actions taken for his absences, i.e., the charges of absent without leave and the letters of caution and reprimand, are not unusual for such absences. However, we found it unusual that after Mr. Day was permitted to come and go as he pleased for almost two years, he was--within a very short period of time--charged absent without leave and issued letters of caution and reprimand. The evidence indicated that less harsh action, such as requiring Mr. Day to take annual leave for his absences, was not considered. Management's sudden shift from its several years of tolerance, if not tacit approval, of Mr. Day's practices to intolerance of those practices came immediately after Senator Warner wrote to the Navy regarding Mr. Day's allegation.

On September 6, 1990, Senator Warner wrote to the Naval Office of Legislative Affairs concerning Mr. Day's allegations about the Cruise Missile budget. Senator Warner identified Mr. Day as the source of the allegation. Based on Mr. Stranges' memorandums for the file and testimony, we concluded that, prior to taking the actions at issue, he and Mr. Burgess knew about Senator Warner's letter concerning Mr. Day's allegations and that the Naval Audit Service was conducting a review of the Cruise Missile budget estimate.

Both Mr. Burgess and Mr. Stranges testified that they had not acted regarding Mr. Day's absences before September because they were busy with other matters. Mr. Burgess offered three office memorandums to demonstrate that it was the policy of the organization to require employees to spend the work day in the office.

We do not accept the explanation that Mr. Stranges and Mr. Burgess were too busy to direct Mr. Day to spend the work day in the office and to require him to use annual leave for his

absences from the office. They were not too busy to consult an Employee Relations Specialist shortly after Mr. Day's October 20, 1989 disclosure to the Comptroller, OSD, concerning possible disciplinary action. Similarly, they were not too busy to consult the specialist in August 1990 concerning a less than Fully Successful performance appraisal for Mr. Day.[1] To accept management's explanation, we would have to conclude that, from December 1988 until September 1990, Mr. Stranges completely failed to carry out his supervisory responsibilities. (Mr. Burgess became Mr. Day's supervisor in January 1990.)

At a minimum, Mr. Day's supervisors permitted him to work at home without proper authorization. If they believed that he was not working at home, they totally ignored their supervisory responsibility by not requiring him to work a full day.

Although Mr. Day's original disclosures were made almost a year prior to the absent without leave charges and the issuance of the letters of caution and reprimand, Senator Warner's letter and the Naval Audit Service decision to review the Cruise Missile budget estimate occurred just shortly before the actions. We found that the action taken to require Mr. Day to be in the office from 8:30 a.m. to 5:00 p.m. and the resulting actions because he did not conform--the absent without leave charges and the issuance of the letters of caution and reprimand--were reprisal for Mr. Day's disclosures concerning the Cruise Missile budget to the Comptroller, OSD, the Inspector General, NAVAIR and Senator Warner.

We note that the September 27, 1990 letter of reprimand contained the charge of unauthorized possession of official documents, as well as the absent without leave charges discussed above. The charge involved a September 21, 1990 incident where Mr. Day refused to relinquish some time sheets when Mr. Stranges ordered him to do so. The evidence indicated that incident did occur but we do not find it sufficient to warrant retaining the reprimand.

The threats by Ms. Bryan and Mr. Burley

As stated above, Ms. Bryan testified that she told Mr. Day during the October 19, 1989 meeting, that he should be concerned about disciplinary action if he took his concerns regarding the Cruise Missile budget estimate outside the chain of command before he gave his supervisors a chance to address them. Mr. Stranges testified that Ms. Bryan told Mr. Day that if he

[1]They did not consult the specialist concerning Mr. Day's attendance until September 1990.

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elected to take his concerns about the Cruise Missile budget estimate outside the chain of command, disciplinary action would result. In fact, Mr. Stranges consulted an Employee Relations Specialist and legal advisor about the possibility of taking disciplinary action for insubordination in conjunction with Mr. Day taking his concerns regarding the Cruise Missile budget estimate to OSD. He was advised that such action would be inappropriate. We concluded that Ms. Bryan threatened Mr. Day with disciplinary action if he disclosed his allegations of excesses in the Cruise Missile budget estimate to the Comptroller, OSD.

Mr. Hurley testified that, shortly before Mr. Day made his disclosures to the Comptroller, OSD, he told Mr. Day that he was going to recommend to Mr. Day's supervisors that he be fired. He said that he had no choice but to make such a recommendation because Mr. Day took the "technically incorrect" budget estimate to OSD without authority and outside the chain of command. We concluded that Mr. Hurley threatened Mr. Day if he disclosed his allegations of excesses in the Cruise Missile budget to the Comptroller, OSD.

Although threats of disciplinary action that occur prior to a protected disclosure are not reprisal, Ms. Bryan's threat clearly violated Section 2302(b)(8) of Title 5, U.S.C., which prohibits the threat of personnel actions because of protected disclosures. Arguably, Mr. Hurley's threat may not violate the statute since he has no authority to take disciplinary action against Mr. Day. Since he occupies a position of influence within the organization, his threat was clearly improper. Ms. Bryan's and Mr. Hurley's statements to Mr. Day were intended to inhibit Mr. Day's right to bring allegations of violation of laws and regulations, gross mismanagement, gross waste of funds, abuse of authority and substantial and specific danger to public health and safety to appropriate authorities.

V. CONCLUSIONS

We concluded that the March 1990 change in work assignment and the September 1990 Fully Successful performance rating were not taken in reprisal and would have been accomplished absent Mr. Day's disclosures.

We concluded that the charge of 11.5 hours of absent without leave and the September 27, 1990 letters of caution and reprimand were reprisal for Mr. Day's disclosures.

We concluded that Mr. Stranges and Mr. Burgess did not adequately fulfill their supervisory responsibilities.

We concluded that the threats of disciplinary action made by Ms. Bryan and Mr. Hurley were improper.

VI. RECOMMENDATIONS

We recommend that the Secretary of the Navy:

Take appropriate disciplinary action against Ms. Bryan and Mr. Hurley for threatening adverse action in retaliation for lawful communication with an appropriate official.

Ensure that management officials are aware that threats of adverse action because of protected disclosures are prohibited by statute.

Take appropriate disciplinary against Mr. Burgess and Mr. Stranges for failing to fulfill their supervisory responsibilities and reprising against Mr. Day because of his protected disclosures.

Change the charge of 11.5 hours of absent without leave during the week of September 17 through 21, 1990 to annual leave and cancel the September 27, 1990 letters of caution and reprimand.

DEPARTMENT OF THE NAVY
NAVAL AIR SYSTEMS COMMAND
NAVAL AIR SYSTEMS COMMAND HEADQUARTERS
WASHINGTON DC 20361

IN REPLY REFER TO
5370/I90-180
Ser AIR-09G1A/700
22 Oct 91

FOR OFFICIAL USE ONLY

From: Commander, Naval Air Systems Command
To: Naval Inspector General (NIG-12)

Subj: DOD HOTLINE INVESTIGATION S90L00000150 (910812)

Ref: (a) NAVINSGEN ltr 5370 Ser 01/2161 of 24 Jul 91

Encl: (1) NAVAIR Memo, 5370 Ser AIR-05A of 21 Oct 91

1. Enclosure (1) is provided in response to reference (a).

D. C. LAGERVELD
By direction

5370
Ser AIR-05A
21 Oct 91

MEMORANDUM

From: AIR-05A
To: AIR-09G

Subj: DAY, THOMAS; ALLEGED REPRISAL FOR WHISTLEBLOWING

Ref: (a) AIR-09G memo 5370/I90-160 Ser AIR-09G1/509 of 8 Aug 91
(b) DODIG Report of Investigation of 17 Jun 91; Whistleblower Reprisal Against an Employee of the NAVAIRSYSCOM

1. Reference (a) requested a review and respond to the Department of Defense Inspector General (DODIG) report on allegations of whistleblower reprisal against Mr. Thomas Day. I have carefully examined the findings of the DODIG report, reference (b), and independently examined the circumstances pertaining to the issues raised in reference (b). Based on this examination, an assessment of the reference (b) findings and our response are provided below.

2. The DODIG investigation focused on four actions (or sets of actions) alleged by Mr. Day to be reprisals for his reporting of alleged improprieties in the budget for the Navy Cruise Missile Programs are contained in Part IV of reference (b). We agree, as advised by reference (b), that Mr. Day did make disclosures of his concerns about improprieties in the Cruise Missile Program budget to the Office of the Secretary of Defense (OSD) on 20 October 1989, to the Naval Air Systems Command (NAVAIR) Inspector General on 23 October 1989 and to the office of Senator John Warner in May 1990. Additionally, we do not disagree that Mr. Day's disclosures became known to Mr. Day's supervisors and that personnel actions have been taken against Mr. Day in the time following his disclosures. The specific DODIG findings in the allegations of reprisal are addressed below in the order in which they are addressed in Part IV of reference (b).

a. Change in work assignment. We agree with the DODIG finding that the change in Mr. Day's work assignment was associated with reduced demand from the Cruise Missile Project Office for assistance from the Cost Analysis Division (AIR-524) and was not in reprisal for his disclosures.

b. The September 1990 Fully Successful performance appraisal. We agree with the DODIG finding that there is no evidence to support Mr. Day's allegation that his performance warranted an Outstanding rating. Further, the Fully Successful rating assigned by his supervisor for the period 1 July 1989 to 30 June 1990 was the same rating assigned to Mr. Day in the prior performance period ending 30 June 1989 prior to his disclosures. There is no basis to attribute Mr. Day's rating to reprisal. Indeed, based on Mr. Day's sparse work product, the benefit of any doubt concerning his performance appears to have been weighed in Mr. Day's favor.

Subj: DAY, THOMAS; ALLEGED REPRISAL FOR WHISTLEBLOWING

c. Change in place of duty and resulting absent without leave charges, letter of caution and letter of reprimand. The DODIG report notes that Mr. Day alleged that for some years, he had frequently worked at home during duty hours beginning work early and then arriving at his office later in the morning, frequently leaving his office for extended periods and leaving before the end of the duty day to again work at home. The report also notes that Mr. Day acknowledged he had not received formal approval to work at home but indicated his supervisors were "well aware" of the practice. We agree with the general sense of the DODIG findings that Mr. Stranges was aware at some level that Mr. Day did, in fact, sometimes have atypical office work hours, and that Mr. Day had on occasion indicated that he spent time working at home. As a matter of perspective, Mr. Stranges took over as section head at a time of some management turnover within the cost analysis organization including vacancfes at the Branch and Division level and had a staff in his section including many relatively inexperienced people. Mr. Stranges workload was quite high and he struggled to satisfy high pressure demands on his section. Mr. Stranges did not specifically focus on Mr. Day's attendance behavior and did not explicitly track Mr. Day's attendance in a manner to independently quantify his actual office hours. This would not be unusual for professional employees with a need to routinely be away from their immediate office space. In this context, the term "well aware" as used by Mr.Day to suggest a recognized de facto arrangement is an overstatement of the degree of awareness and acknowledgment by his supervisors of Mr. Day's attendance pattern.

Mr. Day physically relocated from the Joint Cruise Missile Program Office (JCMPO) to AIR-524 spaces in the December 1988 time period. There was a general sense that the people being transferred from the JCMPO were not pleased and there was not firm supervisory oversight established of the new arrivals in light of overall workload priorities and the long standing direct support relationship these new people already had with the JCMPO staff. During the time of relocation to AIR-524 spaces, Mr. Day was in the midst of a very intense divorce action (based on his own exclamations in the office) and he was given approval for substantial leave. In combination with the fact that GM-13 level analysts typically spend considerable time out of their immediate office spaces gathering data and coordinating with the program office they are supporting, the absence of Mr. Day at any given time did not initially register as a high visibility supervisory issue.

With the passage of time, including the assignment of Mr. Day to new tasks, the sparseness of Mr. Day's work product became increasingly apparent. On 17 September 1990, Mr. Burgess (Branch Head) and Mr. Stranges met with Mr. Day to review the status of Mr. Day's assigned work (during which Mr. Day failed to produce any evidence of progress) and to counsel him on office attendance and attention to his assignments. He was directed to be in the office from 0830 to 1700, and to comply with standard Navy leave policies. He was counseled again on 19 and 20 September 1990 concerning his attendance. Notwithstanding the counseling, Mr. Day did not follow direction and he was charged with 11.5 hours absent without leave (AWOL) during the week of 17 through 21 September 1990. There is no contention that Mr. Day was, in fact, absent from the office during hours he was charged AWOL.

Subj: DAY, THOMAS; ALLEGED REPRISAL FOR WHISTLEBLOWING

The DODIG report finds the 11.5 hours of AWOL and subsequent issuance on 27 September of a Letter of Caution on his attendance and a Letter of Reprimand for "disobedience to constituted authority, unauthorized possession of official documents and 11.5 hours of absent without leave" to be reprisal. The DODIG report reasons that management's "sudden shift" from several years of tolerance of Mr. Day's behavior to intolerance...came immediately after Senator Warner wrote to the Navy regarding Mr. Day's allegation.

The motive ascribed to management actions in the DODIG report is purely speculative with no substantiating basis. In fact, final performance ratings for the prior performance year were being provided to employees during September and the organization was in the midst of an effective freeze on hiring, both serving to amplify sensitivity to the importance of securing the best possible performance from all employees in the face of overall staffing deficiencies. Against this backdrop, Mr. Day's performance and attendance drew attention. Mr. Day simply had to comply with normal requirements of attendance and leave imposed on every employee. He specifically and overtly chose not to comply despite being directed to do so (and refused in some instances to even reveal his whereabouts to his supervisors) and was subsequently charged as AWOL. During one of the absences, Mr. Day attended a computer show without first requesting permission or even informing his supervisor. Whereas a more lenient approach such as charging Mr.Day annual leave may have been taken by some managers, the action taken by Mr. Stranges with the professional advice of Navy CCPO staff was a reasonable exercise of management judgment in dealing with a difficult employee problem. Such actions including Letters of Caution have, in fact, been a rather typical response to employee attendance problems in the belief that rapid, firm measures are most effective when confronting the issue.

Regarding the letter of reprimand issued to Mr. Day, the DODIG finds the incident of removing and copying time sheets from the office to be insufficient to warrant retaining the reprimand. A review of the incident, in fact, indicates that Mr. Day not only removed the time sheets to which he had no entitlement (as Mr. Stranges was advised by CCPO staff) but perhaps more importantly was disruptive and openly disobedient to his supervisor who specifically directed Mr. Day not to take the time sheets. While recognizing judgments of different supervisors may differ in dealing with such an incident, the circumstances of the incident support the Letter of Reprimand as a reasonable exercise of management judgment. We find no evidence of reprisal in these actions taken against Mr. Day.

We note the original disclosures were made nearly a year earlier and there is no indication of any actions in the interim that could be construed as reprisal. Further, the DODIG report offers no evidence (or underlying basis to support its supposition) nor is there any other evidence that Senator Warner's letter posed a "perceived personal threat" to Mr. Day's supervisors that would trigger a reaction. (As a matter of interest, the NAVAIR IG had previously corresponded with the Naval Audit Service concerning a review of Mr. Day's allegations about the Cruise Missile budget.) The preponderance of evidence indicates that Mr. Day's own behavior in matters entirely within his control and totally unrelated to his disclosures gave impetus to the actions taken against him.

We do agree, however, that earlier supervisory attentiveness to Mr. Day's attendance pattern would be in keeping with expected supervisory standards.

d. The Threats by Ms. Bryan. Ms. Bryan acknowledges that she did, in fact, tell Mr. Day during the 19 October 1989 meeting that he should be concerned about disciplinary action if he took his concerns about the Cruise Missile budget outside the chain of command before giving his supervisory chain an opportunity to examine his concerns.

As a matter of perspective, Ms. Bryan had been selected from a position outside the Naval Air Systems Command and appointed as Director of the Cost Analysis Division on 24 September 1989 and physically reported to NAVAIR on 16 October 1989. The 19 October 1989 meeting occurred on the fourth day after Ms. Bryan had taken over the Division. As a new supervisor, she was greatly concerned that Mr. Day would go forward immediately with serious allegations without even allowing an opportunity for professional review of his concerns. Ms.Bryan, who had substantial experience and recognition as a cost analyst, came to the issue without bias and simply wanted an opportunity to ascertain the substantive character of Mr. Day's concerns. Mr. Day offered no compelling reason why a brief delay of several days to allow for an examination of his concerns would be detrimental.

Ms. Bryan's admonition to Mr. Day was an expression of concern and guidance to one of her employees that Mr. Day should consider that disciplinary action might be the outcome of his immediately going forward without providing for a professional examination of his findings. Although the exact wording of Ms. Bryan's admonition is not a matter of literal record, the sense of other participants in the 19 October meeting indicates that the subject of disciplinary action was a very brief element of a meeting of approximately an hour duration. There is no evidence that Ms. Bryan acted with malice nor did she take subsequent disciplinary action. However, we agree that viewed starkly against the provisions of the governing statute, (Section 2302(b)(8) of Title 5 U.S.C. prohibiting the threat of personnel actions because of protected disclosures) Ms. Bryan's admonition (which occurred prior to actual disclosure with a designated agency) was not appropriate even though she did not intend it as a personal threat, but rather an expression of a possible outcome. Faced with a first time experience in dealing with such an issue, Ms. Bryan responded to Mr. Day with what seemed to her as a manager to be reasonable advice to an employee. This may be understood in the context of Mr. Day first bringing the issue to Ms. Bryan at a 5 p.m. meeting on 19 October with an intent to go forward immediately the next morning. She did not have knowledge of the governing statute as amended to guide her response. Ms. Bryan did subsequently make inquiries about her responsibility and proper response to such circumstances.

3. Our response to the DODIG recommendations found in Section VI of reference (b) follows:

a. DODIG report recommendation: "Take appropriate disciplinary action against Ms. Bryan for threatening adverse action in retaliation for lawful communication with an appropriate official."

Subj: DAY, THOMAS; ALLEGED REPRISAL FOR WHISTLEBLOWING

NAVAIR: While Ms. Bryan's admonition of Mr. Day (which occurred prior to the actual disclosure) was not appropriate, Ms. Bryan was not acting with malice, was not acting to conceal information, was not acting to protect her personal interests and did not, in fact, pursue any disciplinary action. Ms. Bryan's remarks stemmed from a lack of instruction in the proper response to an employee who intends to make a protected disclosure. Ms. Bryan has been instructed in the provisions of the applicable statutes.

b. DODIG report recommendation: "Ensure that management officials are aware that threats of adverse action because of protected disclosures are prohibited by statute."

NAVAIR: We agree with this recommendation and will take action to instruct our management officials appropriately.

c. DODIG report recommendation: "Take appropriate disciplinary action against Mr. Burgess and Mr. Stranges for failing to fulfill their supervisory responsibilities and reprising against Mr. Day because of his protected disclosures."

NAVAIR: We do not agree (see paragraph 2.c. above) that Mr. Burgess and Mr. Stranges took reprisal against Mr. Day and therefore no disciplinary action is warranted. We do agree that Mr. Stranges, as first line supervisor for Mr. Day, should have been more attentive to Mr. Day's attendance pattern and work habits. We believe there were mitigating circumstances as described in paragraph 2.c. Mr. Stranges will be instructed in supervisory responsibilities through appropriate training.

d. DODIG report recommendation: "Change the charge of 11.5 hours of AWOL during the week of 17 through 21 September 1990 to annual leave and cancel the 27 September 1990 letters of caution and reprimand."

NAVAIR: For reasons described in paragraph 2.c., we do not concur that rescinding the action is warranted.

Very respectfully,

A. R. SOMOROFF

PECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202 2884

JUN 17 1991

MEMORANDUM FOR SECRETARY OF THE NAVY

SUBJECT: Whistleblower Reprisal Against an Employee of Naval Air Systems Command

We recently completed an investigation into allegations that Mr. Thomas Day, a Naval Air Systems Command employee, suffered reprisal for disclosures concerning the Cruise Missile budget estimate which he made to the Office of the Secretary of Defense, the Inspector General of the Naval Air Systems Command and Senator John Warner.

We found that the action taken to require Mr. Day to be in his office from 8:30 a.m. to 5:00 p.m. and the subsequent actions taken because he did not conform, i.e., absent without leave charges and issuance of letters of caution and reprimand, were reprisal for his disclosures. Additionally, we found that Mr. Day was improperly threatened with disciplinary action if he made a disclosure to the Office of the Secretary of Defense. We recommend corrective action. We concluded that Mr. Day's March 1990 change in work assignment and a September 1990 appraisal, which evaluated his performance as Fully Successful, were not in reprisal for his disclosures.

The report of investigation is enclosed for your review and comment. We would appreciate a response within 60 days. If you have any questions, please contact me or Ms. Marcia Campbell, Office of the Assistant Inspector General for Departmental Inquiries, at (703) 697-6660.

Susan J. Crawford

Susan J. Crawford
Inspector General

Enclosure

DEPARTMENT OF THE NAVY
Program Executive Officer
Cruise Missiles Project and
Unmanned Aerial Vehicles Joint Project
Washington, DC 20361-1014

IN REPLY REFER TO

5041
Ser PEO(CU)/206
20 Nov 91

FOR OFFICIAL USE ONLY

From: Program Executive Officer, Cruise Missiles Project and Unmanned Aerial Vehicles Joint Project
To: Naval Inspector General (NIG-12)

Subj: DOD IG Investigation: Whistleblower Reprisal Against An Employee of Naval Air Systems Command

Ref: (a) DODIG Report of Investigation S90600000IEO of 17 Jun 91

1. Reference (a), received on 12 Nov 91, requested my review and response regarding allegations of whistleblower reprisal by an employee of PEO(CU). I have reviewed the conclusions of reference (a) and have independently reviewed additional facts relating to the allegations contained therein.

2. In pertinent part, reference (a) concludes that Mr. Howard Hurley, Assistant PEO For Business and Financial Management (APEO(CU)-B), threatened the subject employee that he would recommend termination of his employment if the employee disclosed his budget estimate outside the chain of command without authority. Reference (a) concedes that Mr. Hurley's "threat" does not violate the Act because "he has no authority to take disciplinary action" However, it concludes that the "threat was clearly improper" because Mr. Hurley "occupies a position of influence within the organization."

3. The Whistleblower Protection Act applies only to an employee "who has authority to take, direct others to take, recommend, or approve any personnel action." 5 USC 2302(b). Mr. Hurley was not in the subject employee's supervisory chain of command and, therefore, had no authority to act in any way on a personnel action involving the employee. Accordingly, I do not agree that disciplinary action against Mr. Hurley is warranted.

Subj: DOD IG Investigation; Whistleblower Reprisal Against An Employee of Naval Air Systems Command

4. I do agree, however, with the report's recommendation that management officials should be aware of the protections afforded employees under the Whistleblower Protection Act. My review of this matter disclosed that the Navy offers no training whatsoever for its managers and supervisors in this area. In order to avoid even the appearance of impropriety in the future, I will ensure that PEO(CU) managers and supervisors are trained or counseled in the requirements of the statute.

G.F.A. WAGNER

[10] From: DAN BLALOCK at PEOCU1 12/9/91 9:44AM (3460 bytes: 66 ln)
To: DENNIS L. KLINE
cc: HOWARD E. HURLEY
Subject: Status of Personnel Actions on Day
---------- Message Contents ----------

Denny:

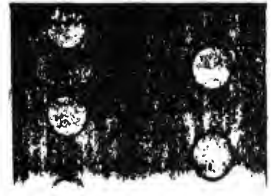
I spoke with Terry Willingham, the OOC CPL guru who was involved in much of the 524 action on Day, and he confirmed that Day is now removed from NAVAIR employment, effective 19 Sep 91. Below is a rough chronology of when things happened, but some explanation is necessary first. When the first Proposed Removal was issued, Day responded to it within the req'd 10 days but also went to the Office of Special Counsel to claim reprisal for protected conduct (under Whistleblower Protection Act). Apparently OSC never took any action on his claim. In the meantime, the DOD IG Report came out and NAVAIR decided to reconsider the removal action format because of the findings of the DOD IG Rpt. Moreover, Day had been sent home on Admin Leave because he was so disruptive in the office and the Deciding Official (AIR 05A) was refusing to act on the proposed removal. Consequently a second Notice of Proposed Removal was issued with a new Deciding Official (AIR 05) and 05 approved the removal. Day went to the MSPB for a Stay of the Removal on the grounds it was reprisal for WPA protected activities. NAVAIR Moved to Dismiss the Request for Stay on the grounds that MSPB lacks jurisdiction to hear WPA matters. MSPB granted the dismissal, but transferred it over to OSC, which has refused to stay the removal but has not yet issued its recommendation order. Day can still appeal his removal to the MSPB and argue on the merits of the removal grounds, but not allege the WPA as a defense. I understand that the grounds for removal included insubordination, disrespectfull conduct, threatening a supervisor, disruptive behavior, conducting a personal business on Govt time, and unauthorized disclosure of acquisition information. Here is the chronology of events as I know them now:

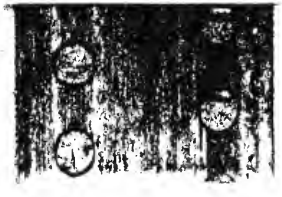
DATE	EVENT
27 Feb 91	Supervisor issues letter to Day on unacceptable behavior.
5 Apr 91	First Notice Prop Removal

17 Jun 91	DOD IG Rpt issued on APA allegations.
??? Jul 91	First Notice Prop Removal cancelled.
24 Jul 91	Navy IG forwards DOD IG Rpt to NAVAIR.
8 Aug 91	Second Prop Removal issued.
12 Sep 91	Deciding Official approves
19 Sep 91	Day's removal effective
18 Oct 91	Day's Req for Stay to MSPB
22 Oct 91	NAVAIR response to DOD IG
30 Oct 91	MSPB dismisses Day's Stay Req.
12 Nov 91	PEO(CU) receives DOD IG Rpt
20 Nov 91	PEO(CU) response to DOD IG

26-Jul-89

MODEL: FOXAMAX COMPONENT	FY88 (QTY 675) QTY	 UNIT $	 TOTAL	FY89 (QTY 510) QTY	 UNIT $	 TOTAL	FY90 (QTY 600) QTY	 UNIT $	 TOTAL	FY91 (QTY 600) QTY	 UNIT $	 TOTAL	FY92 (QTY 600) QTY	 UNIT $	 TOTAL	FY93 (QTY 600) QTY	 UNIT $	 TOTAL	FY94 (QTY 600) QTY	 UNIT $	 TOTAL
FLYAWAY																					
AUR	675	0.930	441.951	510	1.109	563.535	600	1.030	412.021	600	1.089	435.617	600	1.243	497.249	600	1.105	441.817	600	1.126	450.268
CAPSULE (CLS)	54	0.289	15.627	54	0.292	15.763	54	0.309	16.697	54	0.305	16.484	54	0.302	16.327	54	0.301	16.258	0	0.000	0.000
BOOSTER	675	0.110	52.056			0.000			0.000			0.000			0.000			0.000			0.000
PAYLOAD	584	0.021	7.038			7.207			4.157			1.392			5.118			5.603			0.000
FUEL			6.020			5.000			4.780			4.681			9.352			4.881			4.206
ENGINE	675	0.158	75.194			0.000	600	0.163	65.096	600	0.168	67.264	600	0.173	69.261	600	0.178	71.339	600	0.184	75.479
BIMAC	376	0.175	65.116			0.000			0.000			0.000			0.000			0.000			0.000
TOTAL HARDWARE	675	1.396	663.877	510	1.164	593.525	600	1.257	502.751	600	1.310	527.018	600	1.429	591.707	600	1.344	537.693	600	1.338	527.955
PROCUREMENT SUPPORT																					
SYSTEM ENGINEERING INTEG			20.081			20.709			20.600			19.570			17.616			16.939			15.638
PRODUCTION ENGINEERING			36.182			41.510			58.996			35.146			24.754			22.428			16.335
PRODUCT IMPROVEMENT			44.274			58.296			41.759			36.188			29.360			26.604			16.964
TOTAL NONRECURRING			100.537			120.515			99.335			92.904			71.730			65.971			48.909
TOTAL FLYAWAY	675	1.609	764.414	510	1.400	714.040	600	1.505	602.086	600	1.551	620.522	600	1.659	663.437	600	1.509	603.264	600	1.437	576.834
FLEET SUPPORT																					
SPT EQUIP			15.268			14.156			22.812			19.618			16.929			16.632			15.266
TNG EQUIP			1.840			26.021			21.361			20.312			12.575			12.375			7.227
DOCUMENTATION			4.686			0.863			5.698			3.010			1.444			1.275			0.985
TMPC			34.852			29.705			19.492			10.000			8.000			0.000			0.000
			56.626			70.745			67.383			53.740			30.966			30.282			23.658
GROSS WEAPON SYS	675	1.728	820.840	510	1.539	784.785	600	1.674	669.469	600	1.686	674.270	600	1.736	694.403	600	1.584	633.546	600	1.496	598.292
LESS BLCH CONV CREDIT			0.000			(114.000)			(21.700)			(11.700)			(7.500)			0.000			0.000
LESS PY ADV PROC			(66.538)			(71.400)			(75.000)			0.000			0.000			(75.000)			(75.000)
NET P-1 COST	675	1.588	754.302	510	1.175	599.385	600	1.430	572.161	600	1.656	662.570	600	1.717	686.903	600	1.396	558.546	600	1.308	523.292
ADVANCE PROCUREMENT			71.400			75.600			0.000			0.000			150.000			0.000			0.000
TOTAL PROC COST	675	1.738	825.702	510	1.324	674.993	600	1.430	572.161	600	1.656	662.570	600	2.092	836.903	600	1.396	558.546	600	1.308	523.292
GROSS INITIAL SPARES			22.484			21.844			36.724			27.310			28.521			31.845			25.622
LESS BLCH SPARES CREDIT			0.000			0.000			(4.000)			0.000			0.000			0.000			0.000
NET INITIAL SPARES			22.484			21.844			32.724			27.310			28.521			31.845			25.622
TOTAL PROGRAM COST	675	1.786	848.186	510	1.366	696.837	600	1.512	604.885	600	1.725	689.880	600	2.164	865.424	600	1.475	590.191	600	1.372	548.914
MODIFICATIONS			4.815			7.176			3.350			25.758			65.604			88.059			88.680





DEPARTMENT OF THE NAVY
NAVAL AIR SYSTEMS COMMAND
NAVAL AIR SYSTEMS COMMAND HEADQUARTERS
WASHINGTON, DC 20361

IN REPLY REFER TO

5730
Ser AIR-07D/9ADM-073
13 Nov 89

From: Commander, Naval Air Systems Command

Subj: PROVIDING INFORMATION TO CONGRESS

1. The Secretary of the Navy recently reemphasized the Navy policy regarding the need for all Navy officials and personnel to adhere to established Departmental procedures when dealing with the Congress. As available funding for defense programs becomes increasingly constrained, and competition for funding among programs becomes more intense, it is absolutely critical that the Department of the Navy speak with a single voice when communicating with the Congress. This requires careful, consistent coordination in providing information to the Congress.

2. The following categories of information are of particular concern:

a. Information provided to a committee of Congress or to committee staff, regardless of the nature of the information.

b. Information provided to a member of Congress or a member's personal staff regarding a matter of committee interest or a matter pending in the Congress.

c. Information relating to the Department's views on proposed legislation, or concerning program issues relating to the Department's budget request.

d. Information involving a matter of Navy or Marine Corps policy.

e. Information concerning any issue which is, or is likely to become, a matter of public or congressional interest.

It is imperative that such information be released through or coordinated with the Office of Legislative Affairs, or in the case of information for the appropriations committees, with the Office of the Comptroller.

3. NAVAIR's Congressional and Public Affairs Office (AIR-07D) is responsible for coordinating communications with the Congress and for assuring that appropriate DoD and Navy officials are kept informed. Therefore, information regarding NAVAIR's programs shall be provided to the Congress only through, or in coordination with AIR-07D. AIR-07D will ensure that the information is provided to Congress either through or after proper coordination with the Chief of Naval Operations and the Office of Legislative Affairs or the Office of the Comptroller, as appropriate.

Subj: PROVIDING INFORMATION TO CONGRESS

4. Please ensure that all personnel, especially those who are likely to have official contact with the Congress, are aware of, and adhere to, this policy.

R. C. GENTZ

Distribution:
SNDL: FKA1A (Deputy Commanders, NAVAIR Acquisition Executive and Deputy Commander for Operations, Assistant Commanders, Comptroller, Command Special Assistants, Program Directors, Designated Program Managers, Directorate Directors, and Office and Division Directors)

Bill S. B. Bill B. Tom Day

DEPARTMENT OF THE NAVY
NAVAL AIR SYSTEMS COMMAND
NAVAL AIR SYSTEMS COMMAND HEADQUARTERS
WASHINGTON DC 20361

IN REPLY REFER TO
Ser AIR-524/103
16 Nov 89

MEMORANDUM

From: AIR-524
To: Team Members

Subj: INDEPENDENT COST EVALUATION OF JOINT CRUISE MISSILE

1. The Joint Cruise Missile Program has procured 1895 production missiles between FY81 and FY89. The last 5 annual buys have been competitively procured from General Dynamics and McDonnell Douglas. For FY90 to FY94 a total of 2000 missiles is planned to be procured using the same competitive procurement strategy.

2. Based on divergent cost estimates developed by the program office and the AIR-524 cost analyst, this office has established an independent team to determine the major sources of the difference and to develop an independent cost estimate. The team will be chaired by Mr. R. Rosenthal, PMA-201A. Team members will be Mr. W. Stranges and Mr. D. Knorr. Expected completion date is 15 January 1990 with a summary briefing to this office and PDA-14. Documentation of the estimate will be completed by 30 January.

Noreen S. Bryan
Division Director
Cost Analysis Division

Copy to:
PDA-14
AIR-52

FILE COPY

OFFICE OF THE SPECIAL COUNSEL
U.S. Merit Systems Protection Board
1120 Vermont Avenue, N.W. Suite 1100
Washington, D.C. 20005

REPORT OF PROHIBITED PERSONNEL PRACTICE
OR OTHER PROHIBITED ACTIVITY

(Please print or type and complete all items. Enter "N/A" (not applicable) or "Unknown" where appropriate.)

NAME OF COMPLAINANT: THOMAS FRANKLIN DAY III

POSITION TITLE, SERIES AND GRADE: CONTRACT PRICE/COST ANALYST 1102
GM 13

AGENCY: DEPT OF THE NAVY
AGENCY ADDRESS: AIR SYSTEMS COMMAND
WASHINGTON, DC 20361

HOME OR MAILING ADDRESS: 704 FALL PLACE
HERNDON, VA 22070

TELEPHONE NUMBER: (Home) (703) 435-0446
(Office) ( )

IF SUBMITTED BY OTHER THAN COMPLAINANT, PLEASE COMPLETE THE FOLLOWING:

Name & Title of Submittor:

Address:

Telephone Number: ( )

1. WHAT IS THE EMPLOYMENT STATUS OF THE COMPLAINANT: (Check all applicable items. More than one item may apply.)

a. ( ) Applicant for federal employment

b. ( ) Competitive Service
( ) Temporary appointment
( ) Term appointment
(✓) Career or Career Conditional appointment
( ) Probationary period

c. Excepted Service
( ) Schedule A
( ) Schedule B
( ) Schedule C
( ) VA DMS
( ) Postal Service
( ) VRA
( ) National Guard Technician
( ) Nonappropriated Fund
( ) TVA
( ) Other (specify):

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d. Senior Executive Service, Supergrade, or Executive Level

( ) Career SES
( ) Noncareer SES
( ) Career GS-16, 17 or 18
( ) Noncareer GS-16, 17 or 18
( ) Executive Level V or above (Career)
( ) Executive Level V or above (Noncareer)
( ) Presidential Appointee Confirmed by the Senate

e. Other

( ) Civil Service Annuitant
( ) Former Civil Service employee
  ( ) Competitive Service
  ( ) Excepted Service
  ( ) SES
  ( ) Other (specify):
( ) Military officer or enlisted person
( ) Not known

2. IF THE PERSON AFFECTED BY A PROHIBITED PERSONNEL PRACTICE IS OTHER THAN THE COMPLAINANT, WHAT IS THE EMPLOYMENT STATUS OF THE PERSON AFFECTED? (See Items 1.a. - 1.e. above for appropriate employment status descriptors.)

3. WHO TOOK OR IS TAKING THE ILLEGAL ACTION AND WHAT IS HIS OR HER EMPLOYMENT STATUS? (See Items 1.a - 1.e. above for appropriate employment status descriptors.)

a. Name & Title: MR DAVID E. BURGESS
HEAD, UNMANNED VEHICLE COST ESTIMATE BRANCH (AIR-524Y)

b. Employment Status: CAREER

4. WHAT SPECIFICALLY IS THE PROHIBITED PERSONNEL PRACTICE OR OTHER PROHIBITED ACTIVITY BEING REPORTED? (If known, please state the law, rule or regulation that you believe applies.) 5 U.S.C. § 2302 PROHIBITED PERSONNEL PRACTICES

5. IF A PROHIBITED PERSONNEL PRACTICE UNDER 5 U.S.C. § 2302 IS BEING REPORTED, WHAT IS THE PERSONNEL ACTION TAKEN, ORDERED TO BE TAKEN, RECOMMENDED OR APPROVED (OR NOT TAKEN) IN VIOLATION OF THE LAW?

PROPOSED REMOVAL

FILE COPY

6. WHAT FACTS EVIDENCE THE COMMISSION OR OCCURRENCE OF THE ILLEGAL ACTION OR ACTIVITY DESCRIBED IN ITEM 4. ABOVE? (Be as specific as possible regarding dates, locations and the identities and positions of all persons named. In particular, identify witnesses and potential witnesses giving work locations and telephone numbers where possible. Continue on a separate sheet if you need more writing space. Also, attach any documentary evidence you may have.)

ATTACHED

7. HAS THIS MATTER BEEN APPEALED, GRIEVED OR REPORTED UNDER ANY OTHER PROCEDURE? IF SO, PLEASE INDICATE WHAT ACTION OR ACTIONS HAVE BEEN TAKEN.

(X) No or not applicable.
( ) Appealed to MSPB on_____.
( ) Request for reconsideration of MSPB initial decision filed on_____.
Decision No._____.
( ) Grievance filed under agency grievance procedure on_____.
( ) Grievance filed under negotiated grievance procedure on_____.
( ) Matter heard by Arbitrator under grievance procedure on_____.
( ) Matter is pending arbitration.
( ) Discrimination complaint filed with agency on_____
( ) Agency decision on discrimination complaint appealed to EEOC on_____.
( ) Appealed to OPM on_____.
( ) Unfair Labor Practice (ULP) complaint filed with FLRA General Counsel on_____
( ) Suit filed in U.S. Court on_____.
( ) Court Name:_____
( ) Reported to agency Inspector General on_____.
( ) Matter reported to Member of Congress on_____.
Name of Congressman or Senator:_____
( ) Other (specify):

Remarks:

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8. DO YOU CONSENT TO THE DISCLOSURE OF YOUR NAME TO OTHERS OUTSIDE THE OFFICE OF THE SPECIAL COUNSEL SHOULD IT BE NECESSARY IN TAKING FURTHER ACTION ON THIS MATTER?

I, the complainant, consent to the disclosure of my name.

Thomas Franklin Day II
Signature

I, the complainant, do not consent to the disclosure of my name.

Signature

I certify that the foregoing statement is true and complete, to the best of my knowledge and belief. I understand that a false statement or concealment of a material fact is a criminal offense punishable by a fine of up to $10,000, imprisonment for up to five years, or both. 18 U.S.C. § 1001.

Signature: Thomas Franklin Day II Date: 4/16/91

Place: 704 Fall Place
Herndon, VA 22070

PRIVACY ACT STATEMENT

The collection of personal information requested on this Form OSC-11 is necessary to reach a decision on the course of action to be taken on allegations presented to the Special Counsel.

Allegations made to the Special Counsel are voluntary so you are not required to provide any personal information. Failure to supply the Special Counsel with all the information essential to determine the extent of investigation or other action required, however, may result in a decision to take no further action.

Your identity and other personal data will not be disclosed without your permission unless it is determined that disclosure is necessary in order to carry out the statutory functions of the Special Counsel. Information collected will be used in the investigation of your allegation. Some information may be disclosed if required by the Freedom of Information Act (5 U.S.C. 552) or for certain routine uses published by the Special Counsel (44 FR 7253). The Special Counsel has also published a Disclosure Policy as Appendix 1 to 5 CFR 1261 (See 44 FR 75922).

U.S. GPO:1990-233-103/00000

THOMAS F. DAY
704 FALL PLACE
HERNDON, VIRGINIA 22070
703/435-0446

April 16, 1991

Office of Special Counsel
Complaints Examining Unit
1120 Vermont Avenue, NW
Suite 1100
Washington, DC 20005

FILE COPY

Dear Sirs:

With the submission of this letter and the accompanying documentation I am requesting the OSC to intervene on my behalf to postpone or "stay" any further attempts to remove me from federal service as has been recommended by my supervisors until such time that a through and complete investigation of all matters has been completed by all investigating organizations. You may contact Ms. Marcia Campbell, Department of Defense Office of the Inspector General at 703/696-6660 for a information pertaining to the IG's report.

In October of 1989 after more than six years as a senior cost analyst for the Navy's Cruise Missile Program (CMP) I became aware that there were substantial surplus funds in the budget for this program. Over the objections and threats of disciplinary actions by several of my supervisors, I took this information to the person from the DoD Office of the Comptroller who had been holding hearings on the CMP budget. Several days later I reported the same information to the NAVAIR IG and based on the recommendation of one of the investigators, I submitted four suggestions to document the locations of the surplus funds. All of the suggestions were returned as "unsupported and job related" thereby denying the allegations of wrong doing.

After communications with Senator Warner and with Mr. Bybee in the White House Office of Counsel, the Naval Audit Service did a study of my allegations beginning in September of 1990 and the DoD IG was tasked to investigate acts of reprisal at about the same time. The Auditor's report was supposedly completed in late November or early December of 1990 and although I was verbally briefed on the findings, the report of the Auditors has not yet been received by Senator Warner's staff. The IG's report has been delayed several times.

It is still my contention that my original estimates of approximately 1.4 billion dollars in surplus funds were far more accurate than the results of the two studies that I have seen which have placed the surplus at between 150-200 million dollars. I do have several concerns about the Auditor's report which I discussed briefly in a letter to Mr. Rightner from the DoD IG's

office. However, a major concern is one of alleged criminal fraud which I believe was perpetrated by several of my supervisors in the preparation of a report they did. From what I have been able to learn, none of the investigators has looked into this matter at all and I would very much like to have this matter investigated as quickly as possible.

Based on the information that I made available to these individuals and the level of their expertise there were several areas of their "independent cost study" that grossly misrepresented factual information. The persons comprising this Independent Cost Team (ICT) consisted of my immediate supervisors and a person who had been one of my previous supervisors; and they all knew that I had constructed the elaborate computer model that calculated the costs for the CMP and prepared the budget reports. In this capacity I had gained far more insight into the operation of the CMP budgeting process and that knowledge was shared with these persons when my job was transferred to NAVAIR's Cost Division by direction of the NAVAIR commander at the time.

These persons knew and had the immediate ability to verify that: 1) the fuel line in the budget exhibits was virtual fraud since the cost of the fuel was also estimated as a part of the engine cost, these individuals simply chose to accept the explanation from the CMP that the line was a legitimate estimate; 2) the payload line was also false with the cost for payload included in the line for the All-Up-Round (AUR), same determination as in item one by the ICT; 3) the support costs had been increased substantially with the unseen availability of management reserve, the ICT was made aware that the basis for my analysis was a previous base position for support costs with specific line item analysis supporting each line, the ICT decided to ignore the support costs altogether in their final report; 4) the fourth item was an allegation that the actual contract costs for the FY89 AUR had been inflated by approximately one hundred million dollars, the ICT did not address this issue either.

Since it was known to these individuals that senior management would rely on their report as an independent study, there was significant amount of credibility required of this report. With my knowledge of the events which transpired and with a knowledge of the federal statute of fraud, I can reach no other conclusion other than that of deliberate fraud by these persons. I can and will provide additional information and data that can be examined to include the computer files which have been given to Mr. Richard Appleton an inspector with the NAVAIR Inspector General's Office.

Initially the CMP claimed that the numbers represented on the budget for the AUR were correct and provided the DoD Budget Analyst with support documentation from CMP's own in-house accounting model (FARs) to support those statements. To arrive at this number, the support costs that were not a part of the AUR

contracts were artificially represented as being AUR costs. When the ICT actually saw the in-house CMP spreadsheet model, it was very clear that the unit costs for each variant were being inflated. A subsequent explanation was that this was because an Undersecretary of Defense had instructed CMP to take a $114 million dollar credit for hardware received from the Air Force as the result of scrapping missiles in accordance with the Strategic Arms Reduction Treaty. The Naval Audit Service accepted this explanation as being consistent with standard debit and credit accounting principles arguing that the net affect was that CMP did not gain from this transaction.

Accepting this explanation simply provides another manner in which the budget documents are altered and cannot be relied upon to represent genuine data. However, from the explanations I have heard, the letter from the Undersecretary did not specify continuing these inflated unit costs into the future years as was done by the CMP. Just a convenient error by very experienced persons? I was the one who constructed and operated the "official" CMP cost model at the time that CMP was directed to take the credit and the modifications to the model did not call for inflating unit costs. I would not be pressing this issue at all if I thought that the entire problem was innocent errors.

There is a related matter that must be addressed and that is the manner in which "management reserve" is hidden in official budget documents using a variety of measures to include false line items in the budgets, and the process of adding management reserve to various lines in the budget. I have taken the position that while management reserve is a legitimate requirement, that the process of distorting items in the budget in the fashion which has been done also constitutes criminal fraud. It is my assumption that if it is not fraud, then budget officials within every level of the executive branch are free to run rampant with budget distortions without repercussions. I would presume that the budget process would be subjected to a "buyer beware" approach to any and all funding requests and that each tier of management would have to question lower level budgets with increased scrutiny.

It is also my assumption that falsifying the budget submittals that are relied upon by Congress amounts to lying to Congress as well. Additionally, it would appear that the reserve funds which are hidden in this manner are then subject to distribution at the whim of budget managers thereby usurping the legitimate power of Congress. Again and again since I took the steps to blow the whistle, I have spoken with numerous persons from a variety of offices from several departments of the government. All of them tell me that, "everyone is doing it" and in fact a person from the White House called it a "Washington tradition". In DoD alone one senior official from the pentagon who was in the position to offer an educated opinion stated that these funds could total as much as twenty-five percent of the total DoD budget because of the manner in which each tier of

management adds another couple of percentage points of reserve to their submittals. My experience has been that MR rates are typically in the range of three to fifteen percent and I have been using a conservative estimate of seven percent to estimate these funds in DoD alone at twenty billion dollars annually. Certainly a significant amount of money of which half is easily ending up in the "spend it or lose it" coffers to fund the expenditures some would call "waste, fraud, and abuse".

There was one "gut feeling" aspect of my analysis which was not received very well by the analytic community of my peers. My own observations of several of the manufacturing plants indicated that there was a significant number of "process improvements" that were causing a more rapid than usual decline in the cost of the cruise missile. While the "gut feeling" was not a sufficient label, "continual process improvement" is an acceptable label in the language of the management philosophy of Total Quality Management. This is a new idea in cost analysis with growing statistical evidence to support the cost benefits of its application. If it can be demonstrated to be more than a "gut feeling", this idea of mine can represent additional billions of dollars in savings for the procurement of future weapons systems.

Needless to say, there have been many people who would be very happy to see me leave federal service. Since I have not done so voluntarily, I have been subjected to a steady stream of harassment that has resulted in a hardening of my own positions. This escalation of events by supervisors is the direct result of my "insubordinate whistle blowing" and the subsequent efforts by these supervisors has been to discredit my analysis and to abusively use the system itself to facilitate my removal from federal service. These same distorted events and their dispicable actions are also directly responsible for any elevated behavior which I have displayed. Hopefully the IG's report and your own will concur with my own feelings on the subject.

The issues of management reserve and process improvement analysis represent potentially billions of dollars and tens of thousands of American jobs annually, their impact on the budget process cannot be ignored much longer. Similarly, the actions taken against persons who do come forth with substantiated (two hundred million dollars is still a substantial savings) cannot be tolerated by the whistle blower or by the system that intends to offer protection to such persons.

So I am asking for another organization to become involved and to do the job that is necessary. There is a great deal of information that can be made available to you and I would be happy to assist in any fashion that is required.

Sincerely,

Thomas F. Day

U.S. OFFICE OF SPECIAL COUNSEL
1120 Vermont Avenue., N.W., Suite 1100
Washington, D.C. 20005-3561

FILE COPY

May 2, 1991

Mr. Thomas F. Day
704 Fall Place
Herndon, VA 22070

Re: OSC File No. MA-91-0833

Dear Mr. Day:

This will acknowledge receipt of your complaint. We will contact you to discuss this matter and to request any additional information necessary. Please provide your telephone number if you have not already done so.

If you wish to write to us again concerning this matter, please include the file number listed above. We can be reached by telephone at (202) 653-7188 or on our toll-free number at 1-800-872-9855. Your contact at the Office of Special Counsel is Sue M. Romeo.

You have alleged that you are the victim of the prohibited personnel practice described in 5 U.S.C. § 2302(b)(8), commonly called reprisal for whistleblowing. If the personnel action you are complaining of was proposed on or after July 9, 1989, the effective date of the Whistleblower Protection Act, you should be aware of the following rights you may have. Employees, former employees, and applicants for employment, may seek corrective action from the Merit Systems Protection Board under the provisions of 5 U.S.C. §§ 1214(a)(3) and 1221 (individual right of action) for any personnel action taken or proposed to be taken against them because of their making a protected disclosure. Such an individual, unless he or she has filed an appeal with the Merit Systems Protection Board, must first seek corrective action from this office, which you have done. The individual may file a request for corrective action with the Board within 65 days after the Special Counsel notifies the individual it has terminated the investigation into the individual's whistleblower reprisal complaint. An individual may also file an individual right of action with the Board after 120 days have elapsed after seeking corrective action from the Special Counsel if the whistleblower reprisal complaint is still pending before the Special Counsel and the individual has not been informed that the Special Counsel will seek corrective action on behalf of the individual for the whistleblower reprisal allegation.

U.S. Office of Special Counsel

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The Merit Systems Protection Board regulations concerning rights to file a corrective action case with the Board can be found at 55 Fed. Reg. 28591-28595 (July 12, 1990)(to be codified at 5 C.F.R. Part 1209).

Sincerely,

Alice Womack

(for) Ralph B. Eddy
Assistant Special Counsel
Complaints Examining Unit

THOMAS F. DAY
704 FALL PLACE
HERNDON, VIRGINIA 22070
703/435-0446

September 23, 1991

Mr. Pernell Caple
Office of Special Counsel
Complaints Examining Unit
1120 Vermont Avenue, NW
Suite 1100
Washington, DC 20005

REF: OSC File No. MA-91-0833

ENCL:
(1) Notice of Proposed Removal dated 5 April 91
(2) Cancellation of 5 April Proposal for Removal
(3) Notice of Proposed Removal dated 8 Aug 91
(4) Decision on Proposed Removal dated 12 Sept 91
(5) DoD Inspector General's Report dated 20 Jun 91
(6) Letter to President Bush dated 15 July 91
(7) LCS Cost Analysis memo dated 8 JAN 91
(8) Chapter 23--Merit System Principles (pages 103-107)

Dear Mr. Caple:

Once again I find myself in the position to request that the Office of Special Counsel take immediate steps to intervene on my behalf to postpone or "stay" this latest attempt to remove me from federal service on the basis that this latest adverse personnel action is a continuation of the acts of reprisal which have been taken against me over the course of two years since my original disclosure pertaining to the existence of surplus funds within the Tomahawk Cruise Missile budgets. These acts of reprisal are prohibited by the Merit System Principles, and as you are well aware are specifically addressed in enclosure eight. I would suggest that this case is a prime example in support of the reasons why your Office exists and that my request to stay this termination is vitally essential to the protection of myself and others who make the effort to disclose wrongdoing within the Federal Government.

I will give you my complete assurance that I fully recognize the seriousness of the allegations which have been made in support of this decision to remove me; but I will also assure you that I am not making this request simply to stave off what might otherwise seem to be a justified personnel action.

The IG's Report, which found that I had been subjected to acts of reprisal, only addressed actions that had been taken against me through the middle of September of 1990. It is my

firm allegation that all of the incidents referenced in this effort to remove me were deliberately initiated, provoked, and escalated by specific individuals within NAVAIR, the Tomahawk Program Office, and the Consolidated Civilian Personnel Office in a determined attempt to provide a "justified" grounds for my removal. I would suggest that any and all of my actions or reactions be weighed first by the fact that such actions are not characteristic of my behavior prior to my disclosure and more importantly with the consideration that I was subjected to a continual barrage of hostile actions by my supervisors.

The LCS Cost Analysis memo (encl: seven) has been provide to you so that you might contemplate the full impact of the comments made by this writer in paragraph "g" and to make you aware that this memo was prepared as a recommendation to AIR-524 (the organization which I worked for). Consider for a moment that this entire Navy organization openly plans for and even prides itself on its ability to "slam-dunk" Congressional staffers. Consider that by doing so they effectively "slam-dunk" Members of Congress, the President of the United States, and every more senior member of the management chain of command between themselves and the President. Do you think that they will not make every effort discredit me in an effort to protect themselves from the seriousness of the allegations I have made against them? If they are allowed to get away with this most recent attempt, then they will have succeed in one small step to "slam-dunk" me; but they will have also "slam-dunked" you and your Office in the process.

I would suggest that this latest attempt to have me removed is a good example as to the clever means by which these people have operated. The deciding officer points out in his decision that I had been sent this second notice by registered mail and makes it adequately clear that my signature indicates proof of delivery. A person with any knowledge of the law will quickly see the "clean hands" with which this deciding officer as acted because *"he received no response from me"*. There are no "clean hands" in the matter whatsoever.

It is correct that the package was delivered to me by mail as stated, but what was not mentioned is the manner in which the contents of the envelope was prepared for delivery. It is also important to note that the package was delivered a little over a month after the issuance of the IG's Report which recommended disciplinary action against several of my supervisors to include Mr Burgess (my copy of the report blanked out the specific names but I believe from the text that Mr Burgess was named and this seems to be confirmed by comments he has made to other parties about his concern for a "letter" in his file affecting his own future career).

The package contained a file folder on the face of which was paper clipped the letter cancelling the April 5th Proposed Removal. The August 8th Notice of Proposed Removal was

inconspicuously placed inside the file folder and for all intensive purposes the entire package merely appeared to be nothing more then the return of the support documentation for the April 5th notice of Proposed Removal. Now it is very obvious that this was not the case and that is why I am bringing the matter back to your attention.

In my July letter to the President, I indicated that I was aware of a continuing hostility within the NAVAIR organization and I indicated that it if there was a escalation that I would have no alternative but to respond even more firmly in my pursuit of criminal indictments through the Judiciary. My efforts have been directed at supporting the system and strengthening it and they have continued quietly even while I have been on administrative leave. Those efforts have been seriously jeopardized by this latest removal attempt; I cannot and will not sit by quietly while persons take a direct retaliatory action that threatens my family while I pursue diligent efforts that fall well within the scope of my job even if I am working from home.

To say the least, it came as more than a slight surprise when I was anticipating a return to work to suddenly discover that I have been fired. I have reiterated again and again to various persons that this matter is extremely volatile and that I can prove beyond any reasonable doubt all that I have alleged. It continues to be my desire to see the matter handled responsibly and in its own appropriate time.

Unfortunately, the matter has now been dropped into both of our laps. For me the only possibility and the best course of action is to temper the events by asking for the stay of this termination. To that end, I will work with you or anyone else to resolve this matter as quickly as possible. If you find that you are unable to take this requested action I request that I be notified as quickly as possible to include a telephone response to be followed by written communication.

Respectfully requested,

Thomas F. Day

Mr. MCCLOSKEY. Mr. Gilman, very wonderful to see you here.

Mr. GILMAN. Thank you, Mr. Chairman.

I just want to commend you for conducting this hearing. I think it is timely we did oversight on the Whistleblower Protection Act. From the testimony we are hearing, it seems a great deal has to be done to tighten this measure. I welcome the opportunity to participate.

Mr. MCCLOSKEY. Mrs. Morella.

Mrs. MORELLA. Thank you. Very volatile testimony. I appreciate the courage in all of you coming before us to give us cases that have similarities, and tremendous amount of diversity. I have been poring through the files here, even in terms of Ms. Ramirez, the little love note included in your pack of information. Very startling. I also have, Mr. Chairman, in the audience, Dr. Jamil, a constituent of mine, who was a whistleblower in the Defense Mapping Agency.

As retaliation, he lost his security clearance and—because his job required security clearance, he was given pencil pushing responsibilities even though he has a Ph.D. in math and computers.

So it demonstrates that you are reflective of a number of people. I hope not too many, but it sounds like something needs to be done.

I am just going to be very general with you in the interests of time. I would just ask you—did your agency inform you of the Whistleblower Protection Act? How did you know about it? How did you know about the OSC? What do you think we should do as a subcommittee in proposing legislation to try to remedy some of the problems you addressed?

I know Ms. Ramirez said abolish the OSC. I know there has been discussion about time lapses. Mr. van Ee, I still don't understand the section of the title that you evidently violated. I would like to look into them. I am sure you cannot either. I am very familiar with the case of Mr. Hamel, you mentioned, Mr. Seldon. Mr. Day, I am sad to hear your story, too.

What can we do? Be as succinct as possible? Realizing you have been through tremendous wrenching situations, what can we do about it?

Mr. VAN EE. In response to your question, my problems started simply enough as being a concerned private citizen and expressing my personal opinions about this study. I didn't consider, nor would I have wanted to "blow the whistle." I just wanted to express my opinions.

I didn't know about the Office of Special Counsel. It was only after the Government Accountability Project told me that they were the resource that I could enlist them to support me in trying to clarify exactly what it was that I did that was so bad.

I have long known, as an employee of the Environmental Protection Agency, the EPA Inspector General is there. An 800 number has been established if I want to report waste and fraud in my own agency. I can do it through the Inspector General's office.

In fact, with the recent attention of Congress on matters of contracting in the EPA, that level of interest has been heightened to where employees are being told to go to the inspector general.

What I find amazing in my case is that the inspector general got so cranked up on a case, or on a situation, that was outside my

normal job responsibilities. In fact, when I went through the 2½ hour interrogation, on short notice with the inspector general, he asked me if I didn't know how much this study—how much this investigation of me was costing. You know, why did I do this? I thought well, why is the EPA Inspector General's office spending so much time and resources. I didn't ask for the investigation.

I think they can be using their resources in other areas.

When I went to the Office of Special Counsel and filed, with GAP's assistance, the individual right action or appeal, I guess it is, it seemed like forever before they finally got engaged to look at this issue. When the agent from San Francisco came out to interview me, at the end of the interview, I said: "Well, aren't you concerned about the—what may have prompted this action against me?" I mean, why would the EPA Inspector General have gone to the U.S. Attorney and sought criminal prosecution of me? "Aren't you concerned about the possible waste and illegal actions I was exposing?" He said "No." The issue is you, and your affiliation with the Sierra Club. That is all that we want to look at.

I thought, well, why?

So my experience with the Office of Special Counsel, which is quite limited, has been really shocking. You know, if I want to report waste and fraud, I would not go to them. I would go to the inspector general's office, I guess, and give them something more to do.

Mrs. MORELLA. I will ask this committee to look into why you cannot be active or be a member of the Sierra Club. I have never heard of anything like that. I will personally inquire.

Maybe you could give even a brief statement about what we can do, recognizing your statements are in the record and we will be studying them further.

Mr. DAY. Let me get to an issue I heard you bring about regarding the education of Federal employees. Most whistleblowers I talked to never expected to become whistleblowers to start with. I know the information about whistleblowing had come across my desk in memo form several months, maybe a year before I became a whistleblower.

It was the kind of thing you do not pay attention to. You don't expect to do that. I was not aware of those protections when I went forward. I was informed by the IG those protections were there.

That is when I decided that there was something I could do rather than facing being fired as I had been threatened to be done.

I think there is an educational system there, but basically people are not going to become aware as to what is available to a whistleblower until you become one. I do think whistleblowers themselves are a tremendous resource. One of the things that happens to whistleblowers is we become magnets to other people who want to tell us what is going on. I think our level of credibility among other employees is very high. They know we have taken a risk to come forward.

I think that whistleblowers are a tremendous resource. The idea of putting them in the Office of Special Counsel or the office of the IG's I think are excellent ideas.

I think that the one thing that concerns me most about the Office of Special Counsel is a lack of a genuine perception that is in-

terested in the whistleblower themselves. I cannot help but listen to the stories about how the personnel at the OSC are interested in doing their jobs, that was not my experience.

I found the OSC was looking for any reason to drop my case whatsoever. I found that to be true in every case I talked to people about. There probably are cases where people come forward and are favorable. I have not found anything favorable about the OSC. I think that, in terms of suggestions, we need to have it established that retaliation, when it is found to be in existence, whether by the IG, or by the OSC, that the penalty is termination.

If you look through the documentation, you find the IG did find retaliation in my case. Management simply ignored that recommendation.

I think there are a lot of good ideas out there. I think some of those ideas ought to be presented to the Office of Special Counsel, I think the absence of those ideas in the report this morning is most disturbing to me.

Mr. SELDON. I would give a different spin on the answer. I would endorse everything that has been said. But rather than reiterate them, I would say the problem of Federal employees exercising their first amendment rights is similar to the Federal employee who seeks to exercise his rights under title VII of the Civil Rights Act.

No matter how justified the complaint is, how blatant the problem is, that person is rarely appreciated in his operation. My own belief is what has made title VII such an effective remedy is that ultimately the recourse is to the Federal district courts. By those courts which are fully aware of the tremendous importance of our constitutional rights being the ultimate deciders of those cases, being the ultimate place where investigative agencies or offending officials have to answer for their actions has ultimately made that whole system workable.

I would wager that, beyond doing whatever is done with OSC that needs considerable correction that, one change would do a lot to change the entire system.

Ms. RAMIREZ. I have a few brief recommendations. One is that there should be explicit protections for supervisors who refuse to take illegal retaliations against whistleblowers. There should also be recognition that many retaliations do not have any personnel actions attached to them. The OSC has repeatedly rejected many of my charges of reprisal and retaliation on the basis that because there is no personnel action that came with it, it cannot be retaliation or reprisal. I believe that the people who charge—the whistleblowers who file complaints—should be entitled to the investigative files. The way it currently is, OSC, refuses to turn over the information, any information that the agency has provided to OSC and does not give the whistleblower a chance to respond to the accuracy of the information provided or contradict the agency's version.

As it stands, the OSC is protecting the wrongdoing agency officials by refusing to provide us this file information. And as I said, I believe the OSC should—I strongly believe the OSC should be abolished and we should be able to elect our own special counsel.

Mrs. MORELLA. We will bear in mind everything you said and look forward to continuing to use you as resources.

Again, I thank you for appearing before us.

Thank you, Mr. Chairman.

Mr. MCCLOSKEY. Thank you, Ms. Morella. Excellent questioning on your part.

Mr. Bishop.

Mr. BISHOP. Thank you Mr. Chairman. Let me thank all the witnesses, particularly the whistleblowers for your courage in coming forward. I might particularly ask Mr. Seldon a question that I posed earlier with regard to esprit de corps and comity of management between OSC and the management officials who are often the respondents in these kinds of complaints. From your observation, having represented persons in these kinds of matters, do you find that there is that sort of esprit de corps, comity of management that they sort of become unofficial conspirators to suppress the truth in these matters?

Mr. SELDON. My experience is that that is undoubtedly the truth. We had proof of that when the Justice Department put the conclusions in the record. The disclosure by the OSC, the disclosure by the Justice Department is plainly against the specific terms of the Whistleblower Protection Act.

There is no doubt in my mind that that office had considerable communication of a friendly sort with the very people it was being charged to investigate.

Mr. BISHOP. Do you attribute that to the political nature of the appointment of the OSC personnel? Do you attribute that to just happenstance that there is a comity of management views? To what do you attribute it?

Mr. SELDON. I think those two questions sort of focus on one. Remembering the OSC I believe is a presidential appointee, doesn't come up for congressional approval, if so, it is not the advice and consent provisions of the Constitution.

The question is why would anyone in the executive branch appoint someone who is likely to be an aggressive special counsel any more than the Attorney General would appoint a top notch prosecutor to investigate himself in other matters. For that reason, we have the special counsels in the criminal arena. We have all sorts of other special participants in our Government. People not beholden to the people appointing them.

The process now works like other political processes unfortunately which is that at a certain level making waves is not looked upon as a desirable feature in people. It is not looked at as a desirable feature in whistleblowers. It is not looked upon as a special feature when it is a special counsel.

None of those people came to that job or left that job with an impressive string of credentials of enforcement of first amendment rights. That is how it is.

Mr. BISHOP. It would appear you have sort of the fox guarding the hen house?

Mr. SELDON. Decidedly so. Decidedly so.

Mr. BISHOP. Thank you, Mr. Chairman. That is all I have.

Mr. MCCLOSKEY. Thank you, Mr. Bishop.

I will be brief here, given the time.

Mr. Seldon, I understand your concern for first amendment rights was also very well expressed by Mr. van Ee. You want to

make a Federal litigation right immediately rather than the present process. What do you recommend as the present function of the OSC?

Mr. SELDON. I think first of all, if you left the system where it is, that office could possibly work. I think the first thing you have to recognize is that it does not work. Could it work? Yes, it could work if you had a better appointee there. Maybe not someone appointed specifically by the executive branch to guard the executive branch. Maybe it should be an independent agency. Maybe it should be a legislative branch agency.

Maybe that is the best answer. It doesn't work in that function now. Offices like that can be turned around, I know. I once worked for the Civil Aeronautics Board. Our job was to guard against competitive practices. We went for deregulation, change the appointment process, give it more independence.

Ultimately that office's activities are reviewed day-to-day by the MSPB. That is where the cases go. That does not work. That body doesn't deal with the first amendment very much. The EEO process works because the Federal District Courts oversee EEO.

Mr. MCCLOSKEY. Thank you. There is a lot more work here for all of us. I don't know that this really adds to the policy, but quite frankly, besides being a legislator, Ms. Ramirez, being a member of the Armed Services Committee, evidently there are severe problems at this facility for a long time, at least as you perceive it.

There is no reason to believe you are not sincere in every way. What is the management problem there? I do not want you to blast anyone by name, but is it that the top two or three people don't care? It is reckless? Careless? What is the problem?

Ms. RAMIREZ. There is just such a—the problems at this agency are just so enormous that what top management in the Navy has done is decided that rather than correcting the problems in the agency, they will—they find it better to quiet the people who report the problems and are trying to correct them.

The Navy—well, this agency was allegedly closed by presidential order; but what the Navy has done in actuality is just reorganize it and give it a new name. They are trying to make it seem like the problems went away by calling it a new agency.

Mr. MCCLOSKEY. I am going to pursue this much further at other times and in other efforts.

You claimed in your latest problem that you cannot get help from the OSC because they say no personnel action came with this? I understand you were fired. That is a personnel action. Would you please elaborate on this?

Ms. RAMIREZ. There have been many retaliations and reprisals I reported to the OSC. They did not contend the second removal itself is not a personnel action, but they refused to represent me or help me on that.

It is interesting to note that I reported——

Mr. MCCLOSKEY. Do they claim on the merits or did they say why they are not representing you on your latest efforts?

Ms. RAMIREZ. I have included their letters, their correspondence turning me down. There were three different letters in my written statement. So I would refer to that, so I don't make any mistakes.

But they have just refused to find that there's any retaliation or reprisal.

Mr. MCCLOSKEY. You say there have been 200, 400 whatever classified documents lost?

Ms. RAMIREZ. Over 2,000 at one time.

Mr. MCCLOSKEY. 2,000?

What sort of documents?

Ms. RAMIREZ. Secret, top secret. I don't know what they all were regarding—which specific programs.

Mr. MCCLOSKEY. I see. I have no further questions. Mr. Gilman, do you have questions?

Mr. GILMAN. Thank you, Mr. Chairman.

Some of you suggested abolishing the Office of Special Counsel. What do you recommend for protection of the whistleblowers if there is no counsel's office? What would you recommend in its place?

Mr. DAY. I think first of all, you have to understand why we are asking it be abolished. Secondly, is to take a look at the Office of the Inspector General. Those offices are on-site. I think a lot of what we can do can be moved there. We are not entirely happy with that as an alternative but if it were a temporary situation, we would support the IG.

Mr. GILMAN. Do all of you feel that way?

Ms. RAMIREZ. I recommend that we allow Federal employees to elect our own special counsel.

Mr. GILMAN. You would still like a see an Office of Special Counsel?

Ms. RAMIREZ. Not the Office of Special Counsel that is there now.

Mr. GILMAN. You would like to be able to pick your own counsel; is that what you are saying?

Ms. RAMIREZ. Yes.

Mr. GILMAN. Anyone else want to comment?

Mr. SELDON. I think ultimately this office doesn't do any sort of job that is credible at the moment. I think the jurisdiction needs to be changed. Its accountability to Congress needs to be changed. Its accountability to the Federal courts needs to be changed.

Mr. GILMAN. When you did contact the Office of Special Counsel, was that on a person-to-person basis or did you do it through someone else, a third party?

Mr. VAN EE. I did it through a third party.

Mr. GILMAN. How were those arrangements? Were you able to get satisfactory response with the third party? Who was the third party?

Mr. VAN EE. The Government Accountability Project assisted me. That was a tremendous resource. I found myself getting more assistance from outside Government than from within Government. Once we filed the complaint with the Office of Special Counsel, all I got were letters saying, every 30 days or every 90 days, well, we have your case; we will get around to it at some point.

In the meantime, I am under a cloud. I am suffering. I had no idea when they were going to get around to it. As it turned out, it was a year and a half later before they finally issued their opinion.

Mr. GILMAN. Did you make direct contact yourself?

Ms. RAMIREZ. I made direct contact with them in writing on approximately, maybe two dozen or more occasions.

Mr. GILMAN. Any direct response that would encourage you?

Ms. RAMIREZ. I have never had any help from the OSC in any manner on any matter. Even after the MSPB ruled that I was fired in retaliation for whistleblowing, the OSC took no action against any agency manager responsible for that; and as a consequence of that, that just encouraged the agency official-agency managers to continue their reprisals, because they knew there was nobody to stop them.

Mr. GILMAN. Are all of your cases still pending before OSC?

Mr. DAY. Mine was settled.

Mr. VAN EE. I have moved on to the Merit Systems Protection Board, the full board; and since May of last year, they have been trying to decide, I guess, whether I even deserve a hearing. I have no idea when they are going to make that decision—3 years after the initial problems began.

Ms. RAMIREZ. I have a recent request in at the OSC for further information on my—all the cases that the OSC has turned me down on. I am waiting for a response on that.

Mr. SELDON. The Office of Special Counsel closed out Mr. Hamel's case and refused to ever issue a final report. I should say on the subject of contact with them, we were—we know their investigation had been completed for 4 or 5 months before the case was closed. We were advised it was the worst case of retaliation they ever investigated. They never issued a final report. They wouldn't act on it. They closed the case and said it was moot.

Mr. GILMAN. I want to thank our witnesses for their candid remarks. I think it has been very helpful to the committee.

Mr. MCCLOSKEY. Thank you very much, Mr. Gilman.

I also want to thank the witnesses for excellent testimony. There is a lot more we can talk about it. No doubt, we may be talking again. You can expect some remedial legislation over the next couple of months. I thank you very much.

Mr. Devine, in all fairness, we do not want to cut anybody off. Time is of the essence. Your prepared statement will be accepted for the record. If you would summarize your concerns, and if you like, introduce your companion.

Mr. Thomas Devine.

STATEMENTS OF THOMAS DEVINE, LEGAL DIRECTOR, AND JEFF RUCH, LEGISLATIVE COUNSEL, GOVERNMENT ACCOUNTABILITY PROJECT

Mr. DEVINE. Mr. Chairman, I have greatly condensed the prepared statement. With me is Jeff Ruch, GAP's Policy Director.

Last year we reluctantly recommended reauthorizing the Office of Special Counsel to give its new leader a chance. If anything, things have deteriorated since. This year, it is time to start giving the merit system a chance.

Abolish the Office of Special Counsel. Enough is enough.

There is no excuse to continue spending nearly $8 million annually on an agency that undercuts whistleblowers' attempts to defend the taxpayers. Dollar for dollar, no line item in the budget does more to perpetuate fraud, waste, and abuse than the funds given to the Office of Special Counsel.

This hearing is especially timely since the deficit is a top priority and the Vice President is leading a higher profile campaign against waste and fraud. Whistleblowers are the human factor that is the Achilles' heel of bureaucratic corruption. They have the greatest untapped potential to realize those goals. Examples are in my written testimony. The Office of Special Counsel is the most significant reason why their potential remains unrealized.

In 1978, Congress created the OSC to protect whistleblowers. But after an early purge during the Reagan administration of its previous staff, it disintegrated into a legalized plumbers' unit, the administration's most effective weapon against dissent, teaming up with agencies to finish off wounded whistleblowers who sought help. It has since become known as a Trojan horse and public enemy No. 1 for whistleblowers.

What they receive is a bureaucratic vehicle to entrap them. In theory, all that changed was the Whistleblower Protection Act. The Office didn't get the message. After 4 more years, it still hasn't litigated a hearing to restore a whistleblower's job. In fact, they haven't in 14 years.

Today's hearing reflects horror stories GAP has been receiving steadily over the last 12 years. An updated version of 1992's survey is enclosed. This survey is due to the work of law students from the D.C. School of Law, whose existence, in large part, is thanks to the efforts of Congressman Gilman.

If anything, the track record of the Office of Special Counsel is getting worse. In this year's survey, only 1 out of 21 report the OSC has enhanced merit system principles; 18 out of 21 believe it should be abolished, and only one would go back if they had a choice. The Office did not agree that any of the 18 complainants in completed cases suffered any prohibitive personnel practices, but 6 out of 13 who sought relief through other channels were more successful. So much for today's OSC testimony that these employees were just losers.

Whistleblowers whom the OSC ignores actually are the lucky ones—10 out of 21 reported that, contrary to law, the OSC makes unauthorized releases of their evidence and 8 believed the leaks undercut their rights.

When whistleblowers perceive the special counsel is the agency's scout for their evidence, the Office has no chance of credibility. The reason for the continued leaks is no mystery. The Office refuses to recognize that part of the law.

OSC insists that it has absolute discretion for the conduct of its investigations and complainants have no rights on the release of information from an open case.

The conduct of OSC——

Mr. MCCLOSKEY. I am sorry. Would you repeat that for a moment? I missed that.

Mr. DEVINE. The Office of Special Counsel's contention is that complainants have no rights concerning the release of information about themselves from open cases. They stated that numerous times in correspondence to our group when we asserted rights on behalf of clients. The conduct of OSC investigations also reflects a law enforcement agency's tradition of arrogantly telling victims that it doesn't want to know about evidence of illegality.

In the 1993 survey, only 1 out of 21 confirmed the OSC contacted required witnesses and examined necessary evidence—2 out of 21 felt the OSC worked with them in good faith. Whistleblowers complain to us they feel like rape victims who sought help from a chauvinist prosecuting attorney.

A microcosm of OSC's abuses is the case of Aldric Saucier, a former top star wars scientist. His dissent was reflected in last year's budget but the agency, the Army, fired him for incompetence directly for raising these points with which Congress agreed. Last night, Mr. Saucier signed a settlement agreement, but this reprisal happy ending is in spite of the OSC rather than because of it.

The OSC assigned investigators to his case who are friends of Army personnel running the dirty tricks operation. The OSC used third-degree tactics to try to force a criminal confession from him on charges unrelated to his proposed termination.

When we learned and protested that the OSC had leaked evidence to his supervisors, the Office closed the case. Through Senate intervention, the Office agreed to reopen it, but the only possible conclusion is that OSC investigated Mr. Saucier, instead of reprisals.

After reopening, the OSC refused to talk with Mr. Saucier. While interviewing numerous Army witnesses, in over a year, the OSC did not speak with a single witness proffered by the whistleblower. When GAP protested, the OSC "categorically denied" these facts about its effort, but said it wanted any more available evidence. Amazingly, it then refused to again interview the witnesses or Mr. Saucier, or help with any settlement negotiations.

The Office remains a threat to whistleblowers rights, rather than a shield to protect them.

Mr. Chairman, my written testimony has analysis of the Merit System Protection Board's track record, and we also have a series of recommendations. I briefly list here five conceptual recommendations.

The first is to protect whistleblowers against all forms of free speech discrimination like other employee protection statutes. Examples of major loopholes include security clearances, psychiatric fitness for duty examinations, and falsifying personnel records.

The second is to abolish the Office of Special Counsel.

The third is to allow whistleblowers general access to district court for jury trials. They will always be second-class citizens until they are tried by a jury of citizens whom they are defending by risking reprisal to challenge corruption.

Fourth is to allow employees a cause of action for punitive damages in U.S. District Court against those who take reprisals. Until that happens, except for going to the special counsel, employees have no ability to fight back. There is no deterrence because bureaucratic bullies have nothing to lose by attempting retaliation. The worst that can happen is they will not get away with it.

Finally, break the conflict of interest in which agencies investigate themselves on whistleblowing disclosures. This is the point of whistleblowers' risks to achieve change. Inherently, we can't expect much when agencies serve as their own judges and juries.

In conclusion, whether this act ever creates freedom of dissent for Federal workers who commit the truth depends upon who has

more stamina—bureaucrats who seek to operate in secrecy, or Congress and advocates of the public's right to know.

The best first step to prove Congress is serious is abolishing the Office of Special Counsel. Many OSC employees are highly dedicated, but isolated exceptions are no reason to keep spending taxpayers' money on an agency that consistently undercuts the rights of the taxpayers' best friends, whistleblowers.

[The prepared statement of Messrs. Devine and Ruch follows:]

TESTIMONY OF THOMAS DEVINE AND JEFF RUCH
GOVERNMENT ACCOUNTABILITY PROJECT

before the

HOUSE COMMITTEE ON POST OFFICE AND CIVIL SERVICE
SUBCOMMITTEE ON CIVIL SERVICE

on

OVERSIGHT OF THE WHISTLEBLOWER PROTECTION ACT OF 1989

March 31, 1993

MISTER CHAIRMAN:

Thank you for inviting the testimony of the Government Accountability Project ("GAP") on implementation of the Whistleblower Protection Act ("WPA" or "Act"), and the performance of the Office of Special Counsel ("OSC" or "Office"). My name is Thomas Devine and I serve as GAP's legal director. With me is GAP policy director counsel Jeff Ruch. GAP is a nonprofit, nonpartisan whistleblower support organization. Since 1979 we have been actively monitoring how effectively civil service reform laws protect freedom of dissent in the executive branch. From 1985-89 we led the constituency campaign for passage of the Whistleblower Protection Act. Today's testimony updates analysis that GAP Policy Director Jeff Ruch and I presented last May to the Senate Government Affairs Subcommittee on Federal Services.

The most significant question to begin answering today is whether the Office of Special Counsel should be reauthorized. One year ago GAP reluctantly recommended reauthorization to give new Special Counsel Kathleen Koch a chance. During that year the OSC's performance has not improved. If anything, it has deteriorated. This year it is time to start giving the merit system a fair chance: abolish the Office of Special Counsel. Enough is enough. There is no excuse to continue spending nearly $8 million annually on an agency that undercuts whistleblowers' attempts to defend the taxpayers. Dollar for dollar, no line item in the budget does more to perpetuate fraud, waste and abuse than funds given to the Office of Special Counsel.

Today's hearing could not be more timely. The deficit has become the Administration's top priority, and the Vice President is leading a high-profile, systematic campaign against waste and fraud. Whistleblowers are the human factor that is the Achilles Heel of bureaucratic corruption. They represent the greatest untapped potential to achieve these goals. Directly or through counsel, whistleblowers at today's hearing alone have exposed some $12 billion in government spending that has served the special interests, rather than the taxpayers. And that is only the tip of the iceberg.

The legislative mandate for the Whistleblower Protection Act of 1989 is unsurpassed. Congress seldom passes any significant law unanimously. This statute received two unanimous votes in approximately five months. The mandate reflects basic common sense. Over and over federal whistleblowers have proved two lessons that every cynic should learn: (1) In a free society, nothing is more powerful than the truth. (2) One person can make a difference. Armed with the truth, whistleblowing Davids repeatedly have exposed and defeated bureaucratic Goliaths who put politics above the public interest.

Consider a handful of representative examples from our experience at GAP. Whistleblowers --

* stopped implementation of U.S. Department of Agriculture plans to gut beef inspection, functionally eliminate border inspection, and end daily inspection of processed foods, each which would have made incidents such as the recent Jack in the Box tragedy -- in which over 500 were hospitalized and five children died from food poisoning -- the rule rather than the exception.

* provided the evidence sparking court injunctions stopping incinerators from dumping toxic substances such as dioxin, arsenic, mercury, chromium, and other heavy metals into the environment in Arkansas and Ohio, and a 1991 ban on a new South Carolina incinerator that remains in effect.

* revealed and forced the conversion to coal of a 97% completed nuclear power plant that had been built with metal from junkyards being passed off as nuclear grade steel, had massive falsification of x-rays on safety welds and was compromised by major portions that had never been inspected.

* exposed and forced the conversion to gas of a nuclear plant that was being built next to a school directly on top of a huge underground crater.

* exposed systematic illegality and forced the complete redoing of the post Three Mile Island cleanup, after proving that the utility planned to use a polar crane whose brakes and electrical system had been destroyed to remove the reactor vessel head -- 170 tons of radioactive rubble that could have retriggered the accident if dropped. Whistleblowers went public two days before the head lift and stopped it. After numerous repairs and tests, the crane successfully removed the rubble but still stuck numerous times, including once for a half hour while the reactor vessel head was suspended in the air.

* forced the shutdown of a nuclear weapons plant that had released over 500,000 pounds of radioactive emissions in the environment around Cincinnati, more than was dropped on Hiroshima.

* revealed that a Veterans Administration hospital police chief regularly beat patients, minorities and homeless people seeking shelter. Tactics included the chief grinding his heels into a man's groin until the victim admitted the chief was God; smashing a victim's face into the wall and refusing to allow the blood to be cleaned up; beating a patient who was on a kidney dialysis machine; and choking an elderly patient who was strapped down. Although the whistleblower lost his job, he stopped the brutality and today is a respected member of the Cincinnati police force. The former VA police chief now is a convicted felon.

* exposed the world's most expensive coffee pots, toilet seats, nuts, bolts, armrests and similar appliances, helping spark public outrage that curbed blank check military spending practices at the Pentagon.

* revealed that the Hanford nuclear weapons reservation has emitted over 400 times more radioactive waste than admitted by the government and its contractors, totalling at least 440

billion gallons that have leaked into the air and groundwater, which feeds into the water supply through the Columbia River. As one example, a whistleblower proved that more than a million gallons have leaked from a tank which official records claim has contained all but 5,000 gallons. These disclosures forced agreement by Hanford officials to cut radioactive discharges by 60%, literally saving citizens in the Pacific Northwest from four million gallons of liquid radioactive waste dumped into their water supply daily.

* forced the recall of paint -- exposed to radiation and contaminated by toxic materials -- that should have been waste, but instead was sold by a nuclear power plant owner to unsuspecting consumers to use in their homes.

* challenged a blanket gag order, Standard Form 189, that would have institutionalized prior restraint for nearly three million employees with security clearances. After 1.7 million signed the form, one man, Ernie Fitzgerald, just said no. Thanks to his courage and support from the chair of this subcommittee, Congress outlawed the prior restraint and the First Amendment has been saved, for the time being.

* exposed and sparked the felony conviction of an Oklahoma Census Bureau chief who hired just-graduated high school girls for administrative work and then assigned them to "date" state officials at a political convention.

This is only a tiny sample of how whistleblowers have made their marks as the living histories who refuse to be rewritten.

Dissenters cannot be stereotyped as to motives or accuracy, but the bottom line is undeniable. Their flow of truth keeps society from being stagnant. Congress relies on whistleblowers for oversight. The public relies on them to learn the truth before an avoidable disaster. Their courage marks the boundary between federal workers who are public servants, instead of bureaucrats.

THE OFFICE OF SPECIAL COUNSEL

The Office of Special Counsel is the single greatest reason why the unique human resource potential of whistleblowers remains

unrealized. Congress created the OSC in the Civil Service Reform Act of 1978 to protect whistleblowers and other victims of merit system violations. After the 1981 appointment of Special Counsel Alex Kozinski, however, the agency disintegrated into a legalized plumbers unit. It became the administration's most effective weapon against dissent, teaming up with agencies to finish off wounded whistleblowers who sought help. It since has become known as a Trojan Horse, as well as Public Enemy Number One for whistleblowers, a bureaucratic vehicle to entrap them.

In theory, all that changed with the Whistleblower Protection Act. Congress clarified the Special Counsel's remedial mission, established careful limits on discretionary authority that had been abused and gave the OSC increased power to effectively defend whistleblowers.

Lack of results

Unfortunately, the Office didn't get the message and nothing significant has changed. Four years after passage of the 1989 Act, the OSC still hasn't litigated a hearing to restore a whistleblower's job. This is despite the fact that the Special Counsel can act under the most sympathetic legal standards in employment law and received 455 whistleblower reprisal allegations in FY 1991 alone! (OSC Annual Report, p. 12)

Instead of successful legal precedents the OSC's most recent Annual Report in part reflects false advertising, based on examples for which GAP has direct experience. To illustrate, the fourth example of successful corrective action in the Annual

Report, at 7, involves Don Kern, a temporary employee in the Forest Service who exposed mismanagement and rigging the computer program to underestimate by 20% the environmental damage from clearcutting. This translated directly into allowing 20% more trees to be cut illegally. The Annual Report summarizes that the OSC closed Mr. Kern's case as moot after he took another job.

In fact, the OSC dropped the case immediately after Mr. Kern lost the new temporary appointment due to an injury. He had called to ask that the Office intensify the investigation about his prior job, because of his newly unemployed status. The next thing he knew, the OSC closed the case. Without prior consultation and an opportunity for comments,as required by 5 USC 1214(b)(1)(D)(ii), the Special Counsel also dropped a stay which had been an effective job insurance policy for Mr. Kern. Further, in violation of 5 USC 1212(g) an OSC official disclosed extensive evidence from the closed case file in an attempt to talk GAP out of representing Mr. Kern because the case was without merit. (We took the case anyway after learning that the fact summary was biased and incomplete.) Indeed, the Forest Service agency representative tried to have the OSC investigative file introduced into the Whistleblower Protection Act hearing record, because the Office had made extensive briefings from their file and assured him there was nothing to worry about. Based on the OSC briefings, the agency initially refused serious settlement discussions.

The Annual Report is accurate that the OSC intervened in Mr.

Kern's, behalf on a legal point, for which he was grateful. Decisively, however, once Mr. Kern's right to a hearing was established, contrary to OSC assertions about the merits the agency's independent review of the evidence convinced it to settle with him on highly favorable terms.

The only consistent exception to this pattern is the disclosure unit headed by OSC official Donald Dijulio, charged with screening and ordering appropriate investigations when employees reveal government fraud, waste or abuse that affects public policy, rather than civil service disputes. Despite statutory weaknesses this unit continues to operate in a professional and evenhanded manner.

OSC complainants survey

The General Accounting Office ("GAO") survey and testimony by individuals today reflect the horror stories GAP has been receiving steadily for over 12 years. At the 1992 Senate hearings we presented a random survey of 50 intakes who have contacted our organization. It is enclosed as Exhibit 1. An updated survey of 21 intakes who have contacted GAP since May is enclosed as Exhibit 2. The track record is not improving. If anything it is getting worse.

In 1992 only two out of 50 respondents believed the OSC has enhanced merit system principles. Forty disagreed, and eight did not have an opinion. Only 10 out of 50 believed the Office should be re-authorized instead of facing sunset, while 29 thought it should not receive another chance and 11 did not have an opinion.

In 1993 only one out of 21 report the OSC has enhanced merit system principles. Nineteen disagree and one has no opinion. Eighteen out of 21 believe the Office should be abolished. Only one out of 21 would go back to the OSC if there were a choice.

In the 1992 survey, out of 38 prohibited personnel practice complainants, the OSC only agreed with their prohibited personnel practice allegations twice and obtained relief for neither. Seven out of thirty four rejects were more successful through other channels. In the 1993 survey, the OSC did not agree that any of 18 complainants in completed cases had suffered any prohibited personnel practice. Six out of thirteen who sought relief through other channels were more successful.

Quite clearly, the Office has not yet closed its credibility gap. GAP's clients and the survey illustrate some of the reasons, summarized below.

* Rewriting the law. The OSC's unnaturally low rate of finding prohibited personnel practices is not surprising. The Office of Special Counsel is rewriting the law to erase whistleblowers' rights. It does not yet accept the language of the Whistleblower Protection Act. For example, in the Gordon Hamel case, summarized earlier by Mr. Hamel's lead counsel, the OSC "overruled" the statutory language holding officials liable who recommend illegal personnel actions.

The most obvious illustration concerns 5 USC 2302(b)(8), protects whistleblowers for "any" disclosure of information that evidences a reasonable belief of illegality or other specified

misconduct. There are no loopholes, other than those listed in section 2302(b)(8)(B) for public disclosures if classified data or information whose release is prohibited by statute. Nonetheless, various OSC staff have explained that dissent was not protected whistleblowing because, for example, the employee was just doing his job. But the job required him to make whistleblowing disclosures, hardly a sound basis to impose the "at will" doctrine and deny reprisal protections. The theory that there is no protection when an employee has to blow the whistle to do his or her job essentially would leave auditors, inspectors and investigators defenseless if they tried to enforce the law against politically powerful wrongdoers. Another OSC loophole is that the employee was only disagreeing with agency policy. But agency policy decisions that are illegal, create gross waste, impose gross mismanagement, or trigger serious public health or safety hazards are far greater threats to the public than the misconduct of an individual bureaucrat acting arbitrarily.

Similarly, the OSC only erratically accepts the Act's jurisdiction. The Office has refused to recognize an illegal reprisal "threat", even when the agency said the employee would be more severely disciplined if he continued his dissent. In another instance the Office refused to consider allegations challenging a reassignment, denial of training, and discipline for refusing to obey orders that the employee believed were illegal.

The Office has rejected reprisal allegations on the basis of

truly astonishing legal theories. In the case of Dwight Welch, an EPA scientist and president of the local union who later won complete relief from settling his Merit Systems Protection Board appeal, OSC found clear and convincing evidence of legitimate, independent grounds for an alleged whistleblower reprisal. But the "legitimate, independent ground" actually was another of the prohibited personnel practice allegations which the Special Counsel had ignored -- an EPA letter charging him with leave for failing to conduct toxicology reviews that he contended he could not lawfully perform.

In another instance the Office closed a case, because the complainant's evidence of illegality was too dispositive. John McCormick, the Forest Service's Freedom of Information Act ("FOIA")/Privacy Act coordinator who also ran the whistleblower desk, alleged arbitrary FOIA withholding when he found a document whose existence the agency had denied in response to his request. After waiting a year, the Office discharged its FOIA oversight duties under 5 USC 1216(a)(3) by explaining that the case was moot, because Mr. McCormick had the record. The Special Counsel's role is not to adjudicate whether there is a case or controversy, but rather whether wrongdoing occurred through "arbitrary and capricious withholding" of information. This type of legal reasoning explains the OSC's non-track record as a watchdog of FOIA abuses.

* Unauthorized releases of information. 5 USC 1212(g) is the cornerstone of Congress' effort to limit previous OSC abuses such

as leaking whistleblowers' evidence and arguments, as well as investigating the victim more aggressively than the reprisal and then providing derogatory information to agency employers. Whistleblowers complained that the Special Counsel had become an ex parte discovery source for agencies, undermining the complainant's case in any future litigation before the Merit Systems Protection Board ("MSPB" or "Board"). Even good faith releases of information are among the riskiest decisions for a lawyer, and Congress determined that it should be the affected employee's decision whether to take that risk, not the Special Counsel's.

As a result, the WPA under section 1212(g)(1) the Special Counsel "may not respond to any inquiry or provide information concerning any person making an allegation [of prohibited personnel practice] under section 1214(a)," except pursuant to the Privacy Act or as required by statute. Section 1212(g)(2)(A) provides complainants being considered for a personnel action with even further control for "any matter covered by" the prohibited personnel practice complaint, overriding the Privacy Act and conflicting statutes "unless the consent of the individual as to whom the information pertains is obtained in advance." Section 1212(g)(2) also allows releases for decisions whether to grant particularly high level security clearances.

In the 1992 OSC survey, however, 11 out of 38 employees (29%) reported that the Office released information without their consent, and seven of the 11 believed the leaks compromised their

rights. In the 1993 survey 10 out of 21 employees reported the OSC made unauthorized releases of their evidence, and eight believed the leaks undercut their rights.

When whistleblowers perceive that the OSC is advertently or inadvertently acting as the agency's scout for evidence, the Office has no chance of legitimacy or confidence among those it is charged with serving. The accurate perception of the OSC as a free "discovery" tool for agencies is too ingrained to erase.

The reason for continued leaks also is no mystery. Section 212(g) is another portion of the statute that the OSC has not yet recognized. In communications with GAP the Office has insisted that -- it still has absolute discretion for the conduct of its investigations; any other interpretation would paralyse the OSC from doing its job; and complainants have no rights on the release of information for an open case.

The OSC's position to date is a legal bluff. The statutory language and legislative history are clear. The Special Counsel no longer has a blank check, and reprisal victims no longer are at the mercy of OSC investigations. Whistleblowers and other complainants now have minimum rights designed to ensure that if the OSC does not help them, at least it will not have the lawful discretion to exacerbate retaliation -- deliberately or unintentionally. This no more prevents the Special Counsel from being an effective advocate than does the attorney-client privilege or the Code of Professional Responsibility paralyse private lawyers from representing their clients. If the OSC

succeeds in imposing this Catch 22 on employees it will be able to cancel the most significant Whistleblower Protection Act control on its discretionary authority. A legal memorandum on this issue, prepared at Ms. Koch's request, is submitted for Subcommittee files.

* Conduct of Special Counsel investigations. The conduct of OSC investigations reflects a law enforcement agency's tradition of arrogantly telling victims it "doesn't want to know" about evidence of illegality. In the 1992 survey, out of 38 reprisal complainants, only 21 received required status reports and only four found the reports to be informative instead of pro-forma. Only two out of 38 responded that the Office contacted witnesses and examined necessary evidence identified by the employee. Only one out of 38 agreed that the Office maintained an effective working relationship with them when investigating their charges.

In the 1993 survey only five complainants in 18 completed cases received required status reports, and only one found them informative. Only one out of 21 can confirm that the OSC has contacted required witnesses and examined necessary evidence. Two out of 21 felt the OSC worked with them in good faith.

These results are readily explainable, because the OSC does not yet accept the premise of a working relationship with alleged reprisal victims. Whistleblowers have complained to GAP that they feel like rape victims who seek help from a chauvinist prosecuting attorney. In our experience, the Office repeatedly has limited its investigations to interviewing the complainant,

asking selected management targets if the charges are correct, and then accepting the denials at face value. The OSC has been far less passive in probing the victims -- pounding the table, interrupting the employee's testimony and making threats such as "it would be easier for you if you just admitted" to the felony of making knowingly false statements. Previous testimony by Mr. McCormick, the Forest Service whistleblower, to this House Subcommittee, is instructive:

> OSC investigators were very thorough with me. They did not just interview me. They grilled me for over 9.5 hours in a disrespectful, hostile manner that I would not have used on any suspect. It appeared they were trying to break me down, instead of learning the truth. By contrast, they skipped most of the management witnesses and were cooperative to a fault with those they did interview -- to the extent that when one key official passed the buck they did not even ask whose orders he was just following.

Mr. McCormick hardly is unfamiliar with professional investigative practices. He retired in January after 30 years law enforcement experience, including 20 as a criminal investigator with the federal government, in a career that included a commendation from J. Edgar Hoover.

Under these circumstances it is understandable that the Office misses the most obvious, to an embarrassing extent. For example, the Special Counsel explained that a U.S. Department of Agriculture ("USDA") Federal Grain Inspection Service ("FGIS") manager did not have knowledge of whistleblowing disclosures by Dr. Clifford Watson, a scientist whose congressional testimony revealed that the government was shortchanging wheat farmers of millions of dollars by not properly maintaining measuring

equipment. In fact, the manager was sitting next to Dr. Watson when he blew the whistle to Congress, and that same manager responded to numerous congressional inquiries about Dr. Watson's charges. OSC lacks a record as reliable factfinders, because the Office has never accepted the premise of a working partnership with whistleblowers.

* Settlements. One way to stretch scarce investigative resources is for the OSC to aggressively pursue no-fault settlements that resolve disputes without resort to prolonged investigations or litigation. The Board, and Department of Labor investigators enforcing environmental whistleblower statutes, have used this tactic with great success. But the OSC flatly refuses. Although there have been exceptions, as a rule its position has been that the investigation must be completed and a decision made that the whistleblower deserves settlement help from the Special Counsel. If initial, no-fault settlement initiatives on terms agreed by both adverse parties were the rule, far more victims of merit system abuses could be served and needless civil service disputes short-circuited.

Only four out of 38 1992 survey respondents reported that the Office attempted to settle their cases, either formally or informally. The OSC did not consult with the complainants about the proposed settlement terms in any of the four cases, and only one employee agreed with the Special Counsel's settlement proposal. Four 1993 respondents confirmed OSC settlement efforts, and only one complainant agreed with the terms.

* Closeout letters. Under 5 USC 1214(a)(2) when it closes a case the OSC must explain its reasons, including a summary of the material relevant facts that support and rebut the prohibited personnel practice charge. In this manner the OSC investigation at least will serve as a constructive reality check, allowing those still considering litigation to assess the strengths and weaknesses of their case.

In the 1992 survey, only one out of the 38 respondents with reprisal cases agreed the Special Counsel obeyed this portion of the statute in good faith. The corresponding rate for 1993 is one case out of 21 for obeying this legal requirement.

GAP's review of OSC closeout letters may be helpful. The closeouts routinely do not mention the issues and key evidence identified by GAP's Intake Director during initial telephone interviews with employees seeking help. Dr. Watson's experience is instructive. The OSC closeout letter skipped twelve of his thirteen whistleblowing disclosures and six of the eight personnel actions for which he alleged whistleblower reprisal. As long as Special Counsel rulings ignore the issues and evidence in reprisal complaints, whistleblowers will not have any confidence in the Office.

A microcosm of OSC's abuse of authority reported in the two surveys is the case of Aldric Saucier, former chief scientist for architectures and technology at the Army's Space and Strategic Defense Command for Star Wars. Mr. Saucier's dissent was remarkably effective, sparking oversight that caused $1.6 billion

in cuts from last year's budget proposals and drastic curtailment of Brilliant Pebbles, the technological spearhead for extending the Star Wars boondoggle into the next century. Lead private counsel Robert Honig and GAP also have just completed settlement negotiations for an agreement that totally satisfies Mr. Saucier. The reprisal happy ending is in spite of the OSC, rather than because of the Office.

Last May, GAP testified that after Mr. Saucier protested OSC's unauthorized leaks to evidence to his supervisors, the Office closed the case. Through the good offices of Senator Pryor's Government Affairs Civil Service Subcommittee, in June the OSC agreed to reopen the investigation and not to disclose certain sensitive information.

Unfortunately, the only possible conclusion is that the OSC has used the last nine months to investigate and make a case against Mr. Saucier instead of against any retaliation by his supervisors. This violates the cornerstone for responsible inquiries into charges of whistleblower retaliation, as summarized by the Department of Defense Office of Inspector General Guide to Military Whistleblower Reprisal Investigations, ("OIG Manual")(IGDC 7050.6 DI September 30, 1992), at 2-2, 27: "Remember: **Investigators are appointed to investigate the complaint, not the complainant.....** If investigators find themselves doing this, STOP! The issue is reprisal, not the character of the military member who alleged reprisal." (Emphasis in original) This rule is even more applicable for civilian

reprisal investigations.

Saucier's experience is a case study of backward factfinding. The OSC literally put Mr. Saucier through the third degree, trying to bully his confession to spurious charges of felony misconduct not even raised in the proposed personnel action. By contrast, in over a year the Office has not discussed with Mr. Saucier the reasonableness of his whistleblowing dissent, the explicit, direct grounds for proposing his termination. The OSC also refused Saucier the opportunity to provide rebuttal testimony calling obvious bluffs in Army denials. While interviewing numerous Army witnesses, in over a year the OSC did not speak with a single witness proffered by Saucier. The Office flatly refused to interview the only eyewitness to an alleged physical attack, and numerous others who offered to point out knowingly false statements by Army witnesses. Similarly, the Office refused to probe intensive new investigations of Saucier and a security clearance suspension based on alleged misconduct for which the case was closed in 1982. These tactics reflect classic reprisal techniques, but the OSC insisted they are irrelevant.

When GAP protested, the OSC "categorically denied" these facts about holes in its factfinding effort but said it wanted any more available evidence. Counsel prepared two memoranda proffering additional records and witness testimony. Eventually the OSC told counsel to prepare affidavits and submit them for the record. In short, negotiating a settlement between bitter

adversaries has proved far easier than convincing the Special Counsel to receive evidence of retaliation.

These are only a few illustrative lessons to be learned from GAP's survey of employees who brought cases to the Special Counsel. We do not contend that the study meets the methodological standards for a professional, statistical survey. But there can be little serious argument with the bottom line. The Office of Special Counsel does not have legitimacy with federal employees. Whistleblowers' recent experiences prove it remains a threat to their rights, rather than a shield to protect them.

MERIT SYSTEMS PROTECTION BOARD

In some respects it is highly difficult to evaluate whether the Merit Systems Protection Board has complied with the Act's revised legal standards on behalf of whistleblowers. The Board's annual reports do not identify how many times employees have won or lost on the merits when they raised the whistleblower defense.

The symptoms are not promising, however. In response to FOIA requests we learned that in the first year the Act became effective, whistleblowers prevailed on the merits approximately 31% of the time. The second year that percentage dropped to 10.3%, or 16.5% overall. We fear the trend is going down steadily, as evidenced by Board's FY 1991 Study of Cases Decided, at 15, which reports the personnel action was reversed in only 5% of the 22 Individual Right of Action ("IRA") cases that were adjudicated. That is only one successful whistleblower in a year.

GAP's research indicates there have been three successful cases on the merits in the eighteen months since the end of fiscal 1991. This is still an improvement over the track record before the Act's passage, when employees only prevailed on the whistleblower defense four times out of nearly 2,000 cases.

A brief review of MSPB trends reveals the roots of the problem. Practitioners complain that the Board consistently fails to enforce discovery rights, and has an aggressive policy to deny testimony from witnesses essential to prove the elements of a whistleblower claim.

Further, like the Special Counsel the Board has erased portions of the legislative history. To illustrate, in Wagner v. E.P.A., 51 M.S.P.R. 337 (1991), the Board held that a one month time lag between protected speech and a challenged performance appraisal did not support an inference of reprisal because the appraisal timing was beyond the control of agency supervisors. Of course, that is always the case. The practical impact is that the Board erased the legislative history that normally the Act's prima facie test is satisfied when a personnel action occurs within the same performance evaluation period as the protected whistleblowing. (Senate Report, p. 14)

The trend in MSPB decisions is significantly more hostile for issues such as jurisdictional access to the WPA legal standards. The Board has taken an activist role in shrinking the scope of the Act. Like the Special Counsel, MSPB still does not accept that "any" means "any" under section 2302(b)(8) protection

for bona fide whistleblowing disclosures. The Board repeatedly has ruled that if a disclosure of misconduct against the public is made in the context of a personnel grievance, section 2302(b)(8) does not apply. Fisher v. Department of Defense, 52 M.S.P.R. 470 (1992)("[O]nly those disclosures made outside grievance procedures and discrimination complaint processes could be the basis for the Board's exercise of jurisdiction over these IRA appeals.") See also Padilla v. Department of the Air Force, 55 M.S.P.R. 540 (1992); Metzenbaum v. Department of Justice, 54 M.S.P.R. 32 (1992); Von Kelsch v. Department of Labor, 51 M.S.P.R. 378 (1991); and Crist v. Department of Navy, 50 M.S.P.R. 35 (1991). As a result, if whistleblowers speak out on behalf of the public when asserting their own rights, they lose access to a Board hearing. There is neither a valid statutory nor public policy basis for this loophole.

Similarly, in Marren v. Department of Justice, 51 M.S.P.R. 632 (1991), the Board held that an employee cannot allege other prohibited personnel practices when challenging whistleblower retaliation in an Individual Right of Action. This is inconsistent with the Federal Rules of Civil Procedure, which allow diverse claims to be "piggybacked" in order to promote judicial economy. It also means that, in order to stop all relevant prohibited personnel practices, a whistleblower must prevail twice, including through a corrective action by the Special Counsel on everything except the whistleblower claims. To say the least, that is a cumbersome long shot.

This is not to say the Board's decisions have all been one-sided. For example, the Board held that an employee is protected by the WPA if faced with a personnel action because of his or her relationship to a whistleblower. Duda v. Dept. of Veterans Affairs, 51 M.S.P.R. 444 (1991). In another decision the Board ruled that a supervisor's animus against a whistleblower can be inferred to the subordinate who actually takes the personnel action. Thompson v. Farm Credit Administration, 51 M.S.P.R. 569 (1991). This precedent precludes bureaucratic bullies from escaping responsibility by hiding behind hatchetmen.

For nearly a year the Board has been sitting on a significant petition for review that will determine the scope of the confidential policy-making exception (5 USC 2302(a)(2)(B)) for protection against prohibited personnel practices. Although Congress has been clear that the free speech loophole only applies to political appointees, in Thompson v. Dept. of Justice (MSPB Docket No. DE1221920182W1), an administrative judge ruled that a non-political Justice Department bankruptcy trustee is excluded from coverage. To add insult to injury, the Attorney General did not specify that the trustee's job was exempt from merit system protections as a confidential policy position until nearly a year after she was terminated.

There is no excuse to permit ex post facto actions by supervisors to strip employees they have fired of their civil service system rights. They will never know whether they are protected by the whistleblower law until it is too late. Under

those circumstances there is little question that many will decide silent discretion is the better part of valor, and the public will remain ignorant of corruption. A congressional amicus curiae brief filed by the prior chair of this subcommittee and four other members of Congress is submitted for Subcommittee files.

On balance, an employee's chances of prevailing under the whistleblower defense at the M.S.P.B. have improved from the odds of winning the lottery to losing at Russian Roulette. That's better, but it is not good enough.

Unfortunately, that is still better than the chances at the Federal Circuit Court of Appeals, which has a monopoly of judicial review for MSPB decisions denying relief against alleged prohibited personnel practices. Prior to passage of the Whistleblower Protection Act, the Federal Circuit only reversed the Board once on the merits. Based on GAP's research of reported decisions, that is one more time than since passage of the Act, despite the more sympathetic legal standards favoring whistleblowers. For all practical purposes, there is no meaningful judicial review of adverse Board decisions.

RECOMMENDATIONS

Employees' overwhelming lack of confidence in the Whistleblower Protection Act suggests that certain structural flaws always will compromise its results. Conceptually, whistleblowers consistently recommend five steps to create a bona fide legal system in which federal employees will be freed from

second class legal status:

* Protect whistleblowers against all forms of free speech discrimination, like other employee protection statutes. Currently relief only is available for selected reprisal tactics in the listed personnel actions of 5 USC 2302(a)(2). For example, the WPA's Achilles heel occurs when supervisors bypass more conventional techniques and yank an employee's security clearance. The merit system vanishes when agencies take these back door reprisals, and employees essentially are defenseless against harassment that can end their careers just as surely as a straightforward termination. To illustrate, after the Army's effort to fire Mr. Saucier failed, without so much as asking his side of the story it suspended his clearance based on alleged misconduct 23 years ago which it has been sitting on for eleven years. Indeed, GAP has received evidence that, among other misconduct, Army officials removed the closed case cover from a previous investigation into these charges and forwarded them as new allegations.

Similarly, the Board has declined jurisdiction to consider harassment such as ordering mandatory psychiatric fitness for duty examinations, Caddell v. Dept. of Justice, 52 M.S.P.R. 529 (1993); falsifying personnel records, Slake v. Department of the Treasury, 53 M.S.P.R. 207 (1992); and falsely evaluating qualifications for promotion, Kochanoff v. Department of the Treasury, 54 M.S.P.R. 517.

* Abolish the Office of Special Counsel. To the extent that the OSC currently serves some meaningful docket control function and prevents resulting delays, if there is no decision in 120 days allow a passthrough for de novo review at U.S. District Court -- analogous to Equal Employment Opportunity litigation.

* Allow whistleblowers general access to district court for jury trials. This is the approach in the 1986 False Claims Act whistleblower protection amendments and the 1991 savings and loan whistleblower statute. Whistleblowers will not be confident of justice until they are tried by a jury of the citizens whom they are defending by risking reprisal to challenge corruption.

* Allow employees a cause of action for punitive damages in U.S. District Court against those who take reprisals. It would be helpful even to permit counterclaims for sanctions during Individual Right of Action appeals. Until that occurs, except for going to the Special Counsel employees have no ability to take actions that will deter repeat violations. Managers who retaliate will have nothing to lose. The worst that can happen is they won't get away with it. The concept of personal liability must be extended to OSC employees as well, who otherwise will continuing having nothing to lose by defying the Act's limits on their

discretionary authority.

* Break the conflict of interest under section 1213 in which agencies investigate themselves on whistleblowing disclosures after referrals by the Special Counsel. Inevitably, this is only a reliable channel for agency leadership to learn the facts of wrongdoing. Inherently, it will never serve as a reliable mechanism for the public's right to know. Almost everyone pulls some punches when hitting him or herself. Agency self-investigations should be supplemented or replaced with an option for the whistleblower to participate in policy arbitration or to qualify for a General Accounting Office ("GAO") investigation. To maintain the process of screening whistleblower charges, the OSC disclosure unit should be moved to another agency, such as the Merit Systems Protection Board or the Department of Justice.

In some cases as alternatives to structural reform, certain minor repairs also can address the most immediate, glaring problems undercutting the Act's effectiveness:

1) Establish personal accountability.

Congress should require that a mandatory critical element for all federal officials with supervisory responsibility is compliance with merit system principles, and explicitly prohibit performance awards to officials found responsible for directing or engaging in prohibited personnel practices. This would start to break the pattern of rewarding agency managers for doing the dirty work of reprisals.

2) Secure subject matter jurisdiction.

* Congress should explicitly add to the statute a clause that the forum and context for protected conduct does not matter. Legislative history can explain that it does not matter whether whistleblowing occurs in a grievance or a press conference, nor is it relevant that the employee is doing his job, disagreeing with policy decisions instead of an individual supervisor or refusing to compromise scientific integrity, if the information otherwise qualifies as a protected disclosure.

* Similarly, the subcommittee should act to stop an emerging merit system threat from the Justice Department and agencies who use the broad language of 18 USC 205, which requires loyalty to the United States, to propose prosecution or discipline against whistleblowers during litigation whose U.S. loyalties are to citizens rather than a particular government agency. This can be accomplished by amending section 22302(b)(8) to protect disclosures unless "specifically" prohibited by law, as under the FOIA, and by adding a clause that an employee cannot be

prosecuted for disclosures protected against job reprisal.

* The subcommittee should act to minimize litigation expenses and enhance judicial economy by authorizing any prohibited personnel practices to be challenged when an employee pursues an Individual Right of Action under the Whistleblower Protection Act.

3) Secure personal jurisdiction.

* As a first priority the subcommittee should expand jurisdiction to all employees paid with federal funds who perform government functions and therefore should act as public servants, including civil service employees of law enforcement and national security agencies, as well as employees of government corporations, for example the Legal Services Corporation.

* Equally significant, if necessary the confusion surrounding the confidential policymakers loophole in section 2302(a)(2)(B) must be eliminated by explicitly adding that the provision only applies to political appointees. More generally, agency chiefs should be obligated to provide notice upon hiring that the merit system and prohibited personnel practices do not protect any excluded employee.

4) Enhance due process.

* Make the Federal Rules of Civil Procedure and the Federal Rules of Evidence mandatory for all Merit Systems Protection Board proceedings. The Board has little credibility with the practicing bar, because its enforcement of normal discovery rules and willingness to admit relevant evidence are mere shadows of the due process rights available in Article III courts. This proposal also would end the Board's practice of segmenting related cases.

* Enhance the status of MSPB decisionmakers to Administrative Law Judges under 5 USC 3105, with corresponding increases in qualifications requirements. Currently Board decisions are adjudicated by officials in the hybrid status of "Administrative Judges," which institutionalizes the Board as a second class forum for adjudicating merit system disputes. The reduced status also deprives MSPB adjudicators of potential for judicial independence under the Administrative Law Judges Corps Act passed last session by the House Judiciary Committee.

* Provide for recovery of any reasonable direct or indirect out-of-pocket expenses incurred by employees who prevail at the Board. This provision was included in S. 2853, which passed the Senate last session.

* Provide for recovery of attorney fees and costs when an

employee substantially obtains the relief available from an M.S.P.B. order. Currently, the Board and Federal Circuit have denied such relief on strained reasoning that successful settlements were the result of independent factors rather than Board litigation, even though the relief was institutionalized in MSPB settlements and at most was a result of the whistleblower's dissent outside the litigation. In one instance that left a successful whistleblower with an $80,000 legal fee. The bottom line is that under current case law, the most effective whistleblowers may not be able to afford to win.

5) Minimize OSC abuses of discretion.

* If necessary, Congress must act to eliminate any debate about the OSC's asserted discretion to release the evidence in a whistleblower's case during or after an investigation. Until that occurs, every employee who is forced to file first with the OSC prior to an IRA will be at the Office's mercy and realistically risk severe compromise of his or her litigation rights.

* Reduce the 120 day mandatory stopoff at the OSC for certain prohibited personnel practices to 30 days. That is more than enough time to determine whether a working relationship is possible. If so, whistleblowers will voluntarily continue the partnership with the Special Counsel. If not, justice will not be denied through the delay of 90 days more dead time before the whistleblower earns access to the Board. The Department of Labor whistleblower statutes operate under the 30 day schedule for preliminary investigations before a due process hearing can occur.

* Add explicit statutory language that OSC employees who violate the limits of their discretionary authority under Title 5 are acting outside the scope of their employment. This would subject them to personal liability under constitutional law. One reason the Whistleblower Protection Act has had a negligible impact of OSC abuses of discretion is that OSC staff have nothing to lose by routinely ignoring its provisions.

6) Enhance the quality of OSC protections.

* Require the OSC to seek no-fault settlements as a mandatory first step before investigating the merits of prohibited personnel practice complaints. Require complainant approval of settlement terms before the Office may submit the agreements for Board resolution. Repeatedly, employees still report that the OSC resolved their cases over their objections. They should have control over how and whether disputes central to their own careers are resolved. In some instances this status quo scenario can leave a whistleblower in worse shape than if the Special Counsel had ruled negatively and the complaint blossomed

into an Individual Right of Action.

* Establish that, with appropriate exceptions, employees have access to the OSC file on their cases. Releasing investigative and prosecutive memoranda will circumvent the Office's unwillingness to explain its decisions. It also will free more resources to stop prohibited personnel practices, since the OSC spends an inordinate amount of time denying FOIA/Privacy Act requests and lawsuits by complainants who want to learn from the OSC investigation.

* Require the OSC to inform all complainants of their rights under the Whistleblower Protection Act of 1989. Most non-lawyer employees are not aware of their rights, and the Special Counsel generally does not tell them.

7) Create meaningful judicial review.

* Restore the "All Circuits" judicial appellate review available under the Administrative Procedures Act for nearly all other administrative law decisions, and under the Civil Service Reform Act prior to 1982. The Federal Circuit is the most hostile forum in the history of civil service law; a whistleblower's chances of prevailing on the merits are still akin to winning the lottery. As a result, its monopoly means there is no effective check on the Merit Systems Protection Board.

CONCLUSION

It is far too early to congratulate ourselves for the WPA's free speech mandate. The Whistleblower Protection Act is not yet working as intended, and our work is only beginning. Whether the Act ever creates freedom of dissent for federal workers who "commit the truth" depends on who has more stamina -- bureaucrats who seek to operate in secrecy, or Congress and advocates of the public's right to know.

The failure to eliminate almost instinctual federal bureaucratic repression in three years is neither surprising nor discouraging. Desegregation was not achieved three years after Brown v. Board of Education; four decades later the struggle

continues. But the Supreme Court established a solid foundation of civil rights, and in the WPA Congress established a solid foundation affirming the right to dissent. Ultimately, the Act's potential will not be achieved until its implementation is freed from political control by the administrations against whose abuses it is designed to safeguard. In short, the WPA's potential will not be reached until it is enforced by juries instead of bureaucrats.

The best first step to prove Congress is serious about the achieving the Whistleblower Protection Act's potential is abolishing the Office of Special Counsel. After 12 years of steady abuses, its track record is beyond serious dispute. Of course there are exceptions to this rule -- unimpressive ones generally involving low political stakes and relatively insignificant public policy consequences. Similarly, some individual OSC employees are highly dedicated. But that is not enough. Isolated exceptions are no reason to keep spending taxpayer money on an agency that consistently undercuts the rights the taxpayer's best friends -- whistleblowers.

Mr. MCCLOSKEY. Thank you very much.

Not to try to make light of anything or to be facetious, I am relatively new to this particular chairmanship and do not know Ms. Koch very well. I met her once previously. As you know, she is going to round out the testimony today. So far, she seems relatively devoid of fangs and of good intentions.

Can you comment on priorities and morale, leadership over there? Is there any possibility her ability to operate could be undermined by Reagan-era civil service appointees who are antithetical to the concerns of the whistleblowing employee?

Mr. DEVINE. Mr. Chairman, I think that that is very possible. Our personal experience has been that Ms. Koch is a very nice person; but in 1981, the staff of the Office of Special Counsel, which was doing their darndest to carry out their mission and operated in good faith, was purged by a protegee of Mr. Meese who literally used the tactics of the Malek manual, the Watergate attempt to purge the Civil Service System of Democrats, to purge the Office of Special Counsel of staff who are sympathetic with that agency's mission. They were replaced by employees who largely are openly hostile to the agency's mission and remain ingrained in leadership positions.

As nice as Ms. Koch is, she hasn't done anything to reverse the practices at that agency; and we have come to the conclusion that, absent another illegal purge of the incumbent staff who are now there, the Office is hopeless.

Mr. MCCLOSKEY. They must have helped and I am not being argumentative. We are trying to reach the truth here. We are going to have at least one more, subsequent hearing or maybe more with a more diversified set of witnesses. This has not been a happy-talk-type day for the OSC, but will you agree that they must have helped someone somewhere along the line? By their own figures they are resolving cases, helping people?

Mr. DEVINE. Yes, they have had some examples of success. The GAO report concludes—study reports they have helped about 5 percent, 6.3 percent of those who sought help. That compares to 5.8 percent before the Whistleblower Protection Act which gave them the most sympathetic legal standards in the books. That is by their own definition of helping people.

Many of the success stories actually feel that the victories were Pyrrhic. There are valid examples at relatively small agencies that do not have any particular political significance. I worked with counsel for the National Gallery of Art, an employee there who is complaining of mismanagement that was certainly significant, but had little major public policy consequence.

When it comes to the tough cases, though, involving the political powers that be of an administration, the OSC certainly will not be there for the employee. Most likely, it will be there backing up those who have the authority.

Mr. MCCLOSKEY. Does someone of your abilities and experience agree that not everyone has a valid or positively oriented complaint? Can you estimate what overall percentage, or how common it is the complaints coming to you have no merit whatsoever? No significant merit?

Mr. DEVINE. We feel about a third of the cases that come to our office are well taken whistleblower complaints. We were encouraged by the results of our survey that it is not simply a case of the law being unable to help whistleblowers, or that these were bad cases when the Office of Special Counsel turned them down.

Our survey talks about cases where an employee sought relief elsewhere and then received it. Out of those that were completed, there were 7 cases out of 20 in last year's survey where the case was completed and the employee obtained relief. That is about a one-third figure.

This year it is six cases out of nine that have been completed, the employee actually obtained relief. So these are not people who are just unwilling to be honest about their own mistakes. These are people who deserve justice and got it elsewhere. But they had to wait until the Office of Special Counsel was finished with them before they could actually start doing something genuine.

Mr. MCCLOSKEY. You want to disband the Office of Special Counsel, and that idea has been offered previously in the committee; but what structure would you leave in its place to bring redress and justice to these very critical areas?

Mr. DEVINE. I think, in overview, it is significant we are working with the coalition of public employee unions such as AFGE, good government groups such as Public Citizen, and professional societies such as the American Bar Association to come up with the answer to that question.

The only issue on which we were able to achieve an immediate consensus was that OSC inherently will be part of the problem rather than a solution. That makes matters worse. It must be abolished.

As far as tentative suggestions to replace it, AFGE suggested consolidating the administrative personnel agencies—EEOC, grievances, labor-management, and civil service agencies—into one forum.

In our opinion, the short-term solution is to take some of that $8 million spent on the Office of Special Counsel and use it to increase the number and quality of administrative judges at the Merit Systems Protection Board. To the extent OSC offers some kind of docket control screening function, allow a pass-through to U.S. District Court for jury trials if there are backlogs and delays that prevent employees from getting speedy decisions.

Mr. MCCLOSKEY. How about the question of access and expense of attorneys? Is that a concern in what you are suggesting?

Mr. DEVINE. It would be if the employees were getting any significant amount of help from OSC now. As it is, the only thing that happens is they wait 120 days and often times if they are smart, if they contact our group, we advise them to have counsel before the OSC to protect themselves.

Even looking at the special counsel's own statistics, out of something like 1,891 cases, they obtained 1 formal stay and 11 informal. That is less than one-half of 1 percent interim relief.

By their own way of looking at it, they obtain relief in 95 cases, about 18 percent, they obtain disciplinary action; that is including Hatch Act violations, in 13 cases, one-half of 1 percent. We are spending $8 million, at best, for next to nothing.

The employees who have any real chance of prevailing still have to hire a lawyer. If you do have delays at the Merit Board because there is more litigation, the idea of having a pass-through to district court if you do not get a speedy decision already has a precedent in the EEOC model. It would provide healthy competition for Merit Systems Protection Board case law, which deserves its own hearing, because it has been so hostile.

Mr. MCCLOSKEY. Thank you, Mr. Devine.

Mr. Bishop.

Mr. BISHOP. I appreciate your testimony, Mr. Devine. I don't think I have any further questions. I think you were pretty clear.

Mr. MCCLOSKEY. Mr. Gilman.

Mr. GILMAN. Thank you, Mr. Chairman. The GAO recommended increasing employer awareness of the act—employee awareness, extending its protections to uncovered employees. How do you view those recommendations?

Mr. RUCH. Mr. Gilman, I am Jeff Ruch. In our written testimony, we thought those were good recommendations. We listed a number, even more than the GAO suggested, under a category called minor repairs.

Federal corporations aren't protected. The security clearance process is a complete evasion. Employees, even when they contact the Office of the Special Counsel, aren't informed of their rights or what is going to happen to their information. And a number of these sorts of steps, such as telling whistleblowers to call in, what is going on about their cases, what their options are, don't take a change in law. They really just take a change in attitude.

Mr. GILMAN. Ms. Koch, we will be hearing very shortly. In her testimony, she presents, of course, a different view with regard to the successes of the Office. Have you had an opportunity to look over any of that testimony?

Mr. DEVINE. Yes, we have, sir. It is very similar to the testimony we have been reading for the last 12 years from that agency; there are anecdotal examples of employees who have been helped. And I worked with counsel for some of those individuals. It is just that they are the very small exception to an overwhelming rule. They almost never involve challenging any politically powerful pocket of corruption in the bureaucracy.

In other words, they reflect tokenism.

Mr. RUCH. I was going to add what struck us about the testimony also was the absence of any suggestion from the special counsel on her views of how the act could be improved. She was open to suggestion from others, but offered none on her own.

Mr. GILMAN. Have you made any direct recommendations to the Office for improvement?

Mr. DEVINE. Oh, yes, sir. In fact, in specific contexts, we have recommended over and over that a constructive first step would be for them to attempt no-fault settlements of cases that come into their office, that this is the standard practice at the Department of Labor which administers a dozen corporate whistleblower protection statutes. It is very effective for reducing the number of disputes. It is a way to justify their existence, to provide some service.

Almost always, they have responded, no, we want to first complete an investigation and decide if the employee deserves any support from our agency in terms of an informal resolution.

Most of those investigations end up being nightmares for the employees. Occasionally, you do end up getting some sort of resolution, but the statistics that she presents this morning about success stories, approximately 5 percent success stories, could skyrocket if the Office would stop trying to play bureaucratic God and start trying to solve disputes. That would be a real service to the merit system.

We are extremely frustrated that they have been close-minded to that idea.

Mr. GILMAN. What has been the average amount of time that an investigation takes by that office? Are you aware of that?

Mr. DEVINE. Our survey does cover that, sir. It has gone down sharply since the Whistleblower Protection Act because after 120 days employees are freed from the Office of Special Counsel. Almost all of the cases take at least that long.

Some people who haven't been able to afford private counsel have had cases languish literally for years there.

Our recommendation there is, if the Office stays in existence, the mandatory stopover period should be shrunk from 120 to 30 days, which is the way all of the Department of Labor statutes are. At that point, if the Office of Special Counsel proved itself to a complainant, the employee would want to keep the case there; but if they were not doing anything or refused to take any constructive initiatives, such as attempting resolution, the employee would be free and able to start defending his or her own rights.

Mr. GILMAN. What is the most effective remedy that you would suggest to this committee in trying to reform the Office of Special Counsel?

Mr. DEVINE. I think the most effective remedy for the committee would be to make a combination of shrinking the mandatory time down to 30 days; requiring during that 30 days the Office take constructive settlement initiatives; and third, to end this problem of them being a free discovery source for agencies, when they feel it is necessary to disclose a whistleblower's information to the employer, that they inform the whistleblower of that risk that they are about to take. And if the employee does not want to take that risk, that the employee could then withdraw the case and be free to pursue it directly before the Merit Board or another forum.

I don't think that that is a real substitute for abolishing the Office, but if it is going to stay in existence, that would greatly minimize the threat it poses to the merit system.

Mr. GILMAN. Thank you.

Thank you, Mr. Chairman.

Mr. MCCLOSKEY. Thank you, Mr. Gilman.

Mr. Devine, Mr. Ruch, thank you very much. Your thoughts are well taken.

Ms. Kathleen Koch, Special Counsel, Office of Special Counsel.

STATEMENT OF KATHLEEN DAY KOCH, SPECIAL COUNSEL, U.S. OFFICE OF SPECIAL COUNSEL, ACCOMPANIED BY WILLIAM REUKAUF, ASSOCIATE SPECIAL COUNSEL FOR PROSECUTION

Ms. KOCH. Thank you.

Mr. MCCLOSKEY. Good to see you again, Ms. Koch. I know you have been here for much of the hearing. I don't have to put an electric sign up as to what the tenor is. I enjoyed our brief association, but obviously there is manifest unhappiness to the point of hostility.

We are going to have a later hearing, but given the seriousness of the charges raised, you are last on the agenda. I appreciate your waiting around. Regardless of my 12:30 appointment, I am not going to put time limits on you at all. I think you should be allowed to raise and discuss what you care to.

Your statement is accepted for the record. I would have several questions. Connie Morella, I know, has several. It may be that many of those will be submitted to you in writing.

I think you know the concerns. I think you may have ideas for improvement.

Please proceed as you like.

Ms. KOCH. Thank you, Mr. Chairman.

One wants to open remarks like this by saying it is a pleasure to be here today. After hearing all of the testimony, in spite of how I feel about the job we do, I feel like I perhaps ought to put the keys to the Office on the front of the table and simply walk away. It is not my style to do that. It never has been in any of the jobs that I have had as a public servant over the past 16 years.

I will summarize my full statement and be pleased to respond to questions.

With me today is Mr. William Reukauf, Associate Special Counsel for Prosecution at the Office of Special Counsel.

I will focus my testimony on the mission and accomplishments of OSC, and I will also comment on the GAO report concerning the implementation of the Whistleblower Protection Act of 1989.

First, I would like to congratulate you, Mr. Chairman, on assuming the chairmanship of this subcommittee. I would like to thank you for your cordiality, and that of your staff, that has been shown to me. Indeed, I would like to extend my thanks to all of the subcommittee members and their staffs who have extended to me the opportunity to meet with them prior to this hearing. I look forward to working with you to explore any constructive steps that we can take to better equip OSC to serve Federal employees.

I am fortunate to have had the opportunity for the past 15 months to head an agency that was created for the specific purpose of assisting those Federal employees who take the courageous step of "blowing the whistle" by reporting a violation of law, an instance of gross waste or mismanagement, or an abuse of authority. If it were not for OSC, Federal employees would not have a channel outside their own agencies to make such disclosures, nor would they have protections against reprisals for whistleblowing.

Can we do better? Of course we can. Since I was appointed special counsel, I have taken several steps with the aim of making OSC a more effective agency for aggrieved Federal employees, and

I am continuing to explore and implement other changes. We are working to improve our outreach efforts. Of course, on both of these fronts, I would welcome any suggestions the committee members have.

In your letter of invitation you asked me for comments regarding OSC's experience regarding implementation of the Whistleblower Protection Act. Although reprisals are relatively few regarding the number of Federal civilian employees, the OSC regards any reprisal for whistleblowing as unacceptable.

Since the enactment of the Whistleblower Protection Act of 1989, OSC has experienced a dramatic increase in the number of new complaints received. In fiscal year 1990, we received 1,623 complaints. That was a 31 percent increase over the fiscal year 1989 figure. By fiscal year 1992, that number increased again by 17 percent to 1,891 complaints.

Our projection for this fiscal year, based on first quarter figures, indicates we will be receiving approximately 2,100 new complaints. This would be a 69 percent increase over the number received in 1990, which was the first full year of operation under the Whistleblower Protection Act.

Obviously, the foregoing statistics reflect only the number of cases referred to us by Federal employees and not success in dealing with meritorious cases.

I forwarded to you last week a prepublication copy of our fiscal year 1992 annual report, Mr. Chairman. Considering I was appointed in late December 1991, by the close of fiscal year 1992, I had not been at OSC for a full year. Notwithstanding my brief tenure, it is with great pride I would like to share with you today some of the results of fiscal year 1992.

In fiscal year 1992, we obtained 104 separate corrective or favorable actions in 95 matters. By comparison, in fiscal year 1991, corrective or favorable actions were obtained in 74 matters. This represents an improvement of over 27 percent in matters disposed of favorably.

Other statistics also evidenced a general upward trend in terms of the number of cases closed by our complaints examining unit. There was an increase from 1,284 to 1,798 from fiscal year 1991 to fiscal year 1992. This is important because it reflects that we were more productive and must continue to become more productive in undertaking the task of reviewing and resolving the cases.

We have also increased the number of cases referred for a field investigation from 148 in fiscal year 1991 to 270 in fiscal year 1992. That is over an 80 percent increase. This reflects our decision to always err in favor of the complainant by increasing the number of matters that are sent for further, careful, in-depth review after the initial review and analysis by the complaints examining unit. We saw similar increases in our whistleblower disclosure unit.

During fiscal year 1992, the OSC received and considered 136 matters for possible referral to the agency concerned. That is an increase of 42 percent from the fiscal year 1990 level. I take this as a positive indication that Federal employees are steadily becoming more aware of the important protective function that OSC can provide.

As I mentioned, Mr. Chairman, I am very proud of our results in fiscal year 1992. I am not, however, fully satisfied. We can do better, and it is my goal to do better. As a manager, it is my obligation to continuously consider new approaches and new ideas which will help the agency to better fulfill its mission. As I mentioned at the outset, I am always ready to entertain ideas from the committee and to work with you in making OSC a champion of the Federal employee.

Mr. Chairman, there is another issue I would like to discuss with you that goes to the core of the perception that many persons have about OSC. As you know, Federal employees who make protected disclosures cannot be subjected to reprisal in the form of various personnel actions. The linchpin here is that what constitutes a protected disclosure is precisely defined by the statute. It must be a disclosure that the employee reasonably believes evidences a violation of law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority or substantial and specific danger to the public health or safety.

If a wrongdoing is disclosed that does not fall into these categories, we are simply without authority to do much about it or protect Federal employee from reprisal for having made such a disclosure.

Mr. MCCLOSKEY. Ms. Koch, is there not statutory language that says or requires that if a person acted in good faith, regardless of whether there are in these statutory protected classes or in the areas of protected concern, technically they should not be subject to reprisal?

I don't know if you were here when I made my opening statement, but to me I just notice you share the concern, I think, from your statement. But to me that is mind-boggling.

Ms. KOCH. There is language in the statute that says the individual must have a reasonable belief that whatever they are disclosing is, in fact, material that evidences fraud, waste, abuse, gross mismanagement——

Mr. MCCLOSKEY. If they do have that reasonable belief, are they protected regardless of their statutory class or the type of problem grieved about?

Ms. KOCH. Not necessarily. This—as I explained to you, this is very much a statute that was crafted with many careful meetings way back before I was involved in this agency.

There are several steps and thresholds that a person must meet. It must be a defined protected disclosure. They do not have to be accurate in their protected disclosure, if they had a reasonable belief. We do not go into finding out if what they said was true or not. If it was reasonable for them to have that belief and they are apprised, again they are protected.

Mr. MCCLOSKEY. Mr. Reukauf?

Mr. REUKAUF. Mr. Chairman, Ms. Koch has been talking about whistleblower protection and has posited a situation where the employee purports to make a protected disclosure but it doesn't in fact rise to the level of protected disclosure. I understand your concern about that. I do want to point out to you there is another portion of the Civil Service Reform Act that might come into play here. That is 5 U.S.C. section 2302(b)(10) which protects employees

against discrimination for activities or statements unrelated to their job performance.

So if it were not a protected disclosure under (b)(8) but the employee was in good faith, it is possible those anti-discrimination procedures in section 2302(b)(10) might come into play.

Mr. MCCLOSKEY. Let's try yes or no. I am not being critical. This is going to take a lot of work and further review. People can in good faith make assertions that are not protected and on the record be subjected to reprisal; in essence, it does occur? Factually speaking, there is no recourse for them?

Mr. REUKAUF. If the statement that is made is unprotected by the first amendment or (b)(8), 2302(b)(8), you have to look at the facts. If it was libelous or slanderous, perhaps the employee could be subjected to some kind of disciplinary action. If it is a good faith statement, what I am saying is I think that that person might be protected.

Mr. MCCLOSKEY. I understand "might be" or the statute would be construed. In practice, are there people who have made statements for whatever reason in good faith who have been subjected to reprisal which, in essence, you told them there is nothing he can do about the reprisal?

Mr. REUKAUF. I am not aware of any such case.

Ms. KOCH. No. What happens when we get cases, we analyze a case to determine if, first and foremost, we can present the case as a (b)(8) violation—a whistleblower case. We always look at a personnel action to determine if there are other sections of the statute the person might be protected under.

It might have been a prohibited personnel practice under another section of the statute. So the file is opened and it is analyzed not merely for (b)(8), that is whistleblower protection, but for prohibited personnel practices in general, because that is our mandate, is to uphold the merit system in a broad spectrum of things.

Mr. MCCLOSKEY. I am not being argumentative, Ms. Koch. Very importantly, on the face, page 6 of your testimony, the first two full paragraphs, it says, "Therefore, for these various reasons"—you bring up and you know what you are saying there today—"therefore, if her superiors ignore her suggestions or take action against her, OSC may not be able to help her. Now this woman will likely and understandably feel disillusioned and consider OSC to be unsympathetic. Of course, Mr. Chairman, this is not the case."

Ms. KOCH. I think you are referring to a hypothetical I included in my testimony. When this was drafted, it is as if that is the only thing we could find in this case was whistleblowing or understanding to—that this person had been reprised against. It is her belief she had been a whistleblower.

As I said, we analyze real live personnel actions to see if there is another prohibited personnel action that has been alleged. I would be happy to discuss this further or respond to a question.

Mr. MCCLOSKEY. We can't go on and on about this today. There are problems here, I think we both agree, don't you think?

Ms. KOCH. I have been practicing law for 16 years. There has never been a meeting I have been to where I haven't learned something.

Mr. MCCLOSKEY. On the record, your statement would at least imply that people are left hanging out in this process after having acted in good faith.

Ms. KOCH. They can be.

Mr. MCCLOSKEY. OK. Thank you.

Please proceed.

Ms. KOCH. I think the further comments I want to make fit in with this frustration that employees feel. Last year we are aware that an outside organization did a survey of 50 people, had come to OSC for help; but for one reason or another had not received the assistance they were hoping for. The results of this survey, which the compilers themselves have admitted was not scientific, were that most of these individuals were displeased with OSC's performance.

Now when you consider who was interviewed for this survey, I don't find that result surprising. They were not a cross-section of all the people who came to OSC, many of whom we do help. Rather, they were mostly persons we were unable to help for various reasons; perhaps there was not a statutorily defined protected disclosure, or they had not faced a statutorily defined prohibited personnel practice; or they had come to us where evidence was lacking.

I can understand the frustration these people must feel. It is never easy to be told by those to whom you turn to for help that there is nothing that can be done. However, I do think it is very important that the members of this committee put this study in perspective when attempting to reach a balanced assessment of the work that we do.

I would also like to make brief comments on the GAO report concerning the manner in which 19 Federal agencies have implemented the whistleblower statute. Their findings indicate that some agencies are informing employees about their whistleblower protection rights, but most agencies have neither informed the employees nor developed policies and procedures to inform employees about their rights.

Clearly, if Federal workers are not knowledgeable about OSC, their ability to disclose information and be protected from reprisals for their disclosures is quite limited. The report also indicated that not all Federal employees are protected against reprisal. For those persons, the statutory protections are obviously nonexistent. Those employees justifiably are troubled by that situation.

The OSC has an active program of its own to educate Federal employees and managers about prohibited personnel practices and other matters within our jurisdiction. However, it must be recognized we are a small agency. The need for agencies to conduct educational programs for their own employees is essential.

In addition, the GAO report addresses the fact that not all Federal employees are protected, as I mentioned. My personal belief is that the protection of the Whistleblower Protection Act should be extended to as many Federal employees as possible. I think this is a very important issue.

I would welcome the opportunity to work with you and your staff to address this issue.

Mr. Chairman, it is clear many challenges lie ahead if we are to educate all Federal employees about their rights and responsibilities while vigorously pursuing active cases which are brought to us. However, I do believe that the time for us to move together in this direction is now.

Mr. Chairman, members of the subcommittee, as you exercise your oversight function of the Office of Special Counsel, let me assure you my door will be open to Congress and others who are concerned about our mission. I also would welcome any suggestions you have concerning better ways of conducting our mission. I feel very positive about our accomplishments over the past 15 months, and I look forward to working with all of you.

This concludes my prepared statement.

At this time, I would be pleased to answer any of your questions.

[The prepared statement of Ms. Koch follows:]

STATEMENT OF THE HONORABLE KATHLEEN DAY KOCH

SPECIAL COUNSEL,

U.S. OFFICE OF SPECIAL COUNSEL

BEFORE THE CIVIL SERVICE SUBCOMMITTEE OF THE
HOUSE POST OFFICE AND CIVIL SERVICE COMMITTEE

MARCH 31, 1993

MR. CHAIRMAN, CONGRESSMAN BURTON, AND MEMBERS OF THE SUBCOMMITTEE:

I AM PLEASED TO APPEAR BEFORE YOU TODAY TO DISCUSS THE OFFICE OF SPECIAL COUNSEL AND OSC'S HANDLING OF WHISTLE-BLOWERS. I HAVE WITH ME WILLIAM REUKAUF, WHO IS THE ASSOCIATE SPECIAL COUNSEL FOR PROSECUTION. I WILL FOCUS MY TESTIMONY ON THE MISSION AND ACCOMPLISHMENTS OF OSC. I WILL ALSO COMMENT ON THE GAO REPORT CONCERNING THE IMPLEMENTATION OF THE WHISTLEBLOWER PROTECTION ACT OF 1989.

FIRST, I WOULD LIKE TO CONGRATULATE YOU, MR. CHAIRMAN, ON ASSUMING THE CHAIRMANSHIP OF THIS SUBCOMMITTEE. I WOULD ALSO LIKE TO THANK YOU FOR THE CORDIALITY YOU AND YOUR STAFF HAVE SHOWN TO ME. I LOOK FORWARD TO WORKING WITH YOU TO EXPLORE ANY CONSTRUCTIVE STEPS THAT WE CAN TAKE TO BETTER EQUIP OSC TO SERVE FEDERAL EMPLOYEES.

I AM FORTUNATE TO HAVE HAD THE OPPORTUNITY FOR THE PAST 16 MONTHS TO HEAD AN AGENCY THAT WAS CREATED FOR THE SPECIFIC PURPOSE OF ASSISTING THOSE FEDERAL EMPLOYEES WHO TAKE THE COURAGEOUS STEP OF "BLOWING THE WHISTLE" BY REPORTING A VIOLATION OF LAW, AN INSTANCE OF GROSS WASTE OR MISMANAGEMENT, OR AN ABUSE OF AUTHORITY. IF IT WERE NOT FOR OSC, FEDERAL EMPLOYEES WOULD NOT HAVE A CHANNEL OUTSIDE THEIR OWN AGENCIES TO MAKE SUCH DISCLOSURES, NOR WOULD THEY HAVE PROTECTIONS AGAINST REPRISALS FOR WHISTLEBLOWING.

MR. CHAIRMAN, I BELIEVE THAT THE RELATIVELY SMALL INVESTMENT THAT IS MADE IN OSC IS A VERY SOUND INVESTMENT. WE HAVE A STAFF OF APPROXIMATELY 100 PEOPLE TO SERVE OVER 3 MILLION FEDERAL EMPLOYEES.

CAN WE DO BETTER? OF COURSE WE CAN. SINCE I WAS APPOINTED SPECIAL COUNSEL, I HAVE TAKEN SEVERAL STEPS WITH THE AIM OF MAKING OSC A MORE EFFECTIVE AGENCY FOR AGGRIEVED FEDERAL EMPLOYEES, AND I AM CONTINUING TO EXPLORE AND IMPLEMENT OTHER CHANGES. ARE WE WORKING TO IMPROVE OUR OUTREACH EFFORTS? MOST ASSUREDLY, WE ARE. OF COURSE, ON BOTH OF THESE FRONTS I WOULD WELCOME ANY SUGGESTIONS THE COMMITTEE MEMBERS HAVE.

THE LEGISLATIVE CHARGE OF OSC

I THINK IT MAY BE BENEFICIAL IF I QUICKLY SUMMARIZE FOR THE SUBCOMMITTEE THE LEGISLATIVE MISSION OF OSC. THE OFFICE OF THE SPECIAL COUNSEL WAS ESTABLISHED ON JANUARY 1, 1979, PURSUANT TO REORGANIZATION PLAN NUMBER 2 OF 1978. THE CIVIL SERVICE REFORM ACT (CSRA) OF 1978, WHICH CAME INTO EFFECT ON JANUARY 11, 1979, ENLARGED ITS FUNCTIONS AND POWERS. THE OFFICE OPERATED AS THE AUTONOMOUS INVESTIGATIVE AND PROSECUTORIAL ARM OF THE MERIT SYSTEMS PROTECTION BOARD (MSPB) UNTIL 1989. THE WHISTLEBLOWER PROTECTION ACT (WPA) OF 1989, WHICH BECAME EFFECTIVE ON JULY 9, 1989, CONVERTED THE OFFICE OF THE SPECIAL COUNSEL INTO AN INDEPENDENT AGENCY WITHIN THE EXECUTIVE BRANCH, SEPARATE AND APART FROM THE MSPB.

UNDER THE NEW LAW, OSC RETAINED ITS INVESTIGATION AND PROSECUTION RESPONSIBILITIES. HOWEVER, THE WPA SIGNIFICANTLY EXPANDED (1) THE PROTECTIONS AGAINST REPRISAL FOR THOSE EMPLOYEES WHO DISCLOSE WRONGDOING IN THE FEDERAL GOVERNMENT, AND (2) THE ABILITY OF THE OSC TO ENFORCE THOSE PROTECTIONS. UNDER THE CSRA, AS AMENDED BY THE WPA, THE PRINCIPAL RESPONSIBILITIES OF THE OSC ARE--

- THE INVESTIGATION OF ALLEGATIONS OF PROHIBITED PERSONNEL PRACTICES (INCLUDING REPRISALS FOR WHISTLEBLOWING), AND THE INITIATION OF CORRECTIVE AND DISCIPLINARY ACTIONS WHEN SUCH REMEDIAL ACTIONS ARE WARRANTED;

- o THE INTERPRETATION AND ENFORCEMENT OF THE HATCH ACT PROVISIONS CONCERNING POLITICAL ACTIVITY BY FEDERAL EMPLOYEES; AND

- o THE PROVISION OF A SECURE CHANNEL THROUGH WHICH A FEDERAL EMPLOYEE MAY, WITHOUT DISCLOSURE OF HIS IDENTITY AND WITHOUT FEAR OF RETALIATION, MAKE DISCLOSURES OF INFORMATION EVIDENCING VIOLATIONS OF LAW, RULE OR REGULATION, GROSS WASTE OF FUNDS, GROSS MISMANAGEMENT, ABUSE OF AUTHORITY, OR A SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH OR SAFETY.

WHISTLEBLOWER PROTECTION -- HOW HAS OSC DONE?

IN YOUR LETTER OF INVITATION, MR CHAIRMAN, YOU ASKED ME TO PROVIDE COMMENTS REGARDING OSC'S EXPERIENCE IMPLEMENTING THE WHISTLEBLOWER PROTECTION ACT. ALTHOUGH ALLEGATIONS OF REPRISAL FOR WHISTLEBLOWING ARE FEW RELATIVE TO THE NUMBER OF FEDERAL CIVILIAN EMPLOYEES, THE OSC REGARDS ANY REPRISAL FOR WHISTLEBLOWING AS UNACCEPTABLE. THEREFORE, IN ACCORDANCE WITH THE WPA, OSC --

(1) TREATS ALLEGATIONS OF REPRISAL FOR WHISTLEBLOWING AS ITS HIGHEST PRIORITY;

(2) REVIEWS ALLEGATIONS OF REPRISAL FOR WHISTLEBLOWING INTENSIVELY FOR ANY FEASIBLE REMEDIAL OR PREVENTIVE ACTION, WHETHER BY MEANS OF STAYS, CORRECTIVE ACTIONS, OR DISCIPLINARY ACTIONS; AND

(3) USES EVERY OPPORTUNITY TO PUBLICIZE THE OSC'S AGGRESSIVE PURSUIT OF CORRECTIVE ACTION (ESPECIALLY IN WHISTLEBLOWER REPRISAL CASES), BOTH TO ENCOURAGE OTHER WHISTLEBLOWERS, AND TO AFFIRM THE EMPHASIS GIVEN TO CORRECTIVE ACTIONS BY THE OSC.

SINCE THE ENACTMENT OF THE WHISTLEBLOWER PROTECTION ACT IN 1989, THE OSC HAS EXPERIENCED A DRAMATIC INCREASE IN THE NUMBER OF NEW COMPLAINTS IT HAS RECEIVED. IN FY 1990 WE RECEIVED 1,623 COMPLAINTS, WHICH REPRESENTED A 31% INCREASE OVER THE FY 1989 FIGURE OF 1,239 COMPLAINTS. BY FY 1992, THAT

NUMBER HAD INCREASED AGAIN BY 17%, TO 1,891 COMPLAINTS. OUR PROJECTION FOR THIS FISCAL YEAR, BASED UPON FIRST QUARTER FIGURES, INDICATES THAT WE WILL BE RECEIVING APPROXIMATELY 2,100 NEW COMPLAINTS. THIS WOULD BE A 69 PERCENT INCREASE OVER THE NUMBER RECEIVED IN 1990, OUR FIRST FULL YEAR OF OPERATION UNDER THE WHISTLEBLOWER PROTECTION ACT.

THE MEMBERS OF THE COMMITTEE SHOULD ALSO CONSIDER THAT COMPLAINTS OFTEN CONTAIN SEVERAL ALLEGATIONS OF DIFFERENT PROHIBITED PERSONNEL PRACTICES. IF VIEWED THIS WAY, IN FY 1992 WE RECEIVED APPROXIMATELY 3,170 SEPARATE ALLEGATIONS. THIS YEAR THE TOTAL NUMBER OF ALLEGATIONS WILL PROBABLY NUMBER APPROXIMATELY 3,400.

MR. CHAIRMAN, OBVIOUSLY THE FOREGOING STATISTICS REFLECT ONLY THE NUMBER OF CASES REFERRED TO US BY FEDERAL EMPLOYEES, AND NOT OUR SUCCESS OR LACK THEREOF IN DEALING WITH THE MERITORIOUS CASES AND DISPOSING OF THOSE THAT ARE NOT MERITORIOUS. I FORWARDED TO YOU LAST WEEK A PREPUBLICATION COPY OF OUR FY 1992 ANNUAL REPORT, MR. CHAIRMAN. CONSIDERING THAT I WAS APPOINTED IN LATE DECEMBER 1991, BY THE CLOSE OF FY 1992 I HAD NOT EVEN BEEN AT OSC FOR A FULL YEAR. NOTWITHSTANDING MY BRIEF TENURE, IT IS WITH GREAT PRIDE THAT I SHARE WITH YOU THE RESULTS OF FY 1992.

OF PARAMOUNT INTEREST IS THE FACT THAT IN FY 1992 WE OBTAINED 104 SEPARATE CORRECTIVE OR FAVORABLE ACTIONS IN 95 MATTERS. BY COMPARISON, IN FY 1991, CORRECTIVE OR FAVORABLE ACTIONS WERE OBTAINED IN 74 MATTERS. THIS REPRESENTS AN IMPROVEMENT OF OVER 27% IN MATTERS DISPOSED OF FAVORABLY.

OTHER STATISTICS ALSO EVIDENCED A GENERAL UPWARD TREND INDICATING INCREASED PRODUCTIVITY OF OSC AND AN INCREASED AWARENESS OF ITS ROLE BY FEDERAL EMPLOYEES. IN TERMS OF THE NUMBER OF CASES CLOSED BY OUR COMPLAINTS EXAMINING UNIT (ON THE BASIS OF INITIAL REVIEW AND INQUIRY, SATISFACTORY RESOLUTION OF AN EMPLOYEE'S COMPLAINT DURING THE INITIAL REVIEW PROCESS, OR A DETERMINATION THAT THERE WAS INSUFFICIENT BASIS FOR FURTHER OSC ACTION), THERE WAS AN INCREASE FROM 1,284 IN FY 1991 TO 1,798 IN FY 1992. THERE WAS ALSO A SIGNIFICANT JUMP IN THE NUMBER OF HATCH ACT DISCIPLINARY ACTIONS THAT WE FILED, FROM 5 IN FY 1991 TO 13 IN FY 1992. THIS IS IMPORTANT BECAUSE IT REFLECTS THAT WE WERE MORE PRODUCTIVE

IN FY 1992 IN UNDERTAKING THE TASK OF REVIEWING AND RESOLVING CASES.

WE ALSO INCREASED THE NUMBER OF CASES REFERRED FOR A FIELD INVESTIGATION FROM 148 TO 270, OVER AN 80% INCREASE. THIS IS IMPORTANT BECAUSE I BELIEVE THAT IT REFLECTS OUR DECISION TO ALWAYS ERR IN FAVOR OF THE COMPLAINANT BY INCREASING THE NUMBER OF MATTERS THAT ARE SENT FOR FURTHER REVIEW AFTER THE INITIAL REVIEW AND ANALYSIS BY THE CEU.

WE SAW SIMILAR INCREASES IN OUR WHISTLEBLOWER DISCLOSURE UNIT WHICH, AS YOU KNOW, PROVIDES A SAFE CHANNEL THROUGH WHICH FEDERAL EMPLOYEES MAY DISCLOSE INFORMATION EVIDENCING A VIOLATION OF LAW, RULE OR REGULATION, OR GROSS MISMANAGEMENT, GROSS WASTE OF FUNDS, ABUSE OF AUTHORITY, OR A SPECIFIC AND SUBSTANTIAL DANGER TO PUBLIC HEALTH OR SAFETY. DURING FY 1992, THE OSC RECEIVED AND CONSIDERED 136 MATTERS FOR POSSIBLE REFERRAL TO THE AGENCY CONCERNED. THAT IS AN INCREASE OF 42% FROM THE FY 1990 LEVEL OF 96 MATTERS. I TAKE THIS AS A POSITIVE INDICATION THAT FEDERAL EMPLOYEES ARE STEADILY BECOMING MORE AWARE OF THE IMPORTANT PROTECTIVE FUNCTION THAT OSC CAN PROVIDE.

AS I MENTIONED MR CHAIRMAN, I AM VERY PROUD OF OUR RESULTS IN FY 1992. I AM NOT, HOWEVER, FULLY SATISFIED. WE CAN DO BETTER AND IT IS MY GOAL TO TRY TO DO BETTER. AS A MANAGER IT IS MY OBLIGATION TO CONTINUALLY CONSIDER NEW APPROACHES AND NEW IDEAS WHICH WILL HELP THE AGENCY TO BETTER FULFILL ITS MISSION. AS I MENTIONED AT THE OUTSET, I AM ALWAYS READY TO ENTERTAIN IDEAS FROM THE COMMITTEE AND TO WORK WITH YOU IN MAKING OSC A CHAMPION OF THE FEDERAL EMPLOYEE.

MR. CHAIRMAN, THERE IS ANOTHER ISSUE THAT I WOULD LIKE TO DISCUSS WITH YOU THAT GOES TO THE CORE OF THE PERCEPTION THAT MANY PERSONS HAVE ABOUT OSC. AS YOU KNOW, FEDERAL EMPLOYEES WHO MAKE "PROTECTED DISCLOSURES" CANNOT BE SUBJECTED TO REPRISAL IN THE FORM OF VARIOUS PERSONNEL ACTIONS. THE LINCHPIN HERE IS THAT WHAT CONSTITUTES A "PROTECTED DISCLOSURE" IS PRECISELY DEFINED BY STATUTE. IT MUST BE A DISCLOSURE THAT THE EMPLOYEE REASONABLY BELIEVES EVIDENCES A VIOLATION OF LAW, RULE, OR REGULATION, OR GROSS MISMANAGEMENT, A GROSS WASTE OF FUNDS, AN ABUSE OF AUTHORITY, OR A SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC

HEALTH OR SAFETY. IF A WRONGDOING IS DISCLOSED THAT DOES NOT FALL INTO THESE CATEGORIES, WE ARE SIMPLY WITHOUT AUTHORITY TO DO MUCH ABOUT IT OR TO PROTECT THE FEDERAL EMPLOYEE FROM REPRISAL FOR HAVING MADE SUCH A DISCLOSURE.

LET ME GIVE YOU AN EXAMPLE. IT IS NOT UNCOMMON FOR AN EMPLOYEE TO OBSERVE WHAT SHE PERCEIVES TO BE A VERY INEFFICIENT OR UNPRODUCTIVE PROCESS OR PRACTICE AT THE AGENCY FOR WHICH SHE WORKS. SHE PROBABLY BELIEVES IT IS WASTEFUL AND EXPENSIVE AND SHE MAY EVEN HAVE AN EXCELLENT ALTERNATIVE APPROACH OR SOLUTION. IF SHE REVEALS THIS TO HER SUPERIORS, TO THE AGENCY IG OR TO OSC, SHE PROBABLY CONSIDERS HERSELF TO BE A WHISTLEBLOWER AND ENTITLED TO PROTECTION. SHE CERTAINLY IS MOTIVATED BY AND CONSIDERS HERSELF TO BE ACTING IN THE INTEREST OF THE GOVERNMENT.

THE PROBLEM ARISES IF, FOR EXAMPLE, THIS IS SIMPLY A DIFFERENCE IN POLICY OR MANAGEMENT STRATEGY. IN THAT CASE, THE PRACTICE OR EVENT SHE REPORTED WOULD NOT FALL WITHIN THE DEFINITION I CITED ABOVE. FURTHERMORE, UNDER THE LAW SHE WOULD NOT BE A WHISTLEBLOWER AND WOULD NOT BE ENTITLED TO THE STATUTORY PROTECTION. THEREFORE, IF HER SUPERIORS IGNORE HER SUGGESTIONS, OR EVEN IF THEY TAKE SOME ACTION AGAINST HER, OSC MAY NOT BE ABLE TO HELP HER. NOW THIS WOMAN WILL LIKELY, AND UNDERSTANDABLY, FEEL DISILLUSIONED AND MAY CONSIDER OSC TO BE UNSYMPATHETIC, UNRESPONSIVE AND UNCONCERNED. SHE WILL ARGUE THAT SHE IS A WHISTLEBLOWER AND OSC IGNORED HER. OF COURSE, MR CHAIRMAN, THIS IS JUST NOT THE CASE.

ON THE OTHER HAND SUPPOSE THE WOMAN IN QUESTION REVEALED TO HER SUPERVISOR A VIOLATION OF LAW. FOLLOWING HER DISCLOSURE TO THE SUPERVISOR, SHE IS SUBJECT TO A REPRISAL AND IS DEMOTED TO A LOWER GRADE, WITHOUT BASIS OR JUSTIFICATION. THIS IS A CASE WHICH FALLS CLEARLY WITHIN OSC'S JURISDICTION, AND THE CASE WOULD LIKELY RESULT IN A REVERSAL OF THE ACTION OR SOME OTHER FAVORABLE ACTION.

IN BOTH SITUATIONS, OSC EMPLOYEES CAREFULLY REVIEW THE FACTS AND ALLEGATIONS, DISCUSS THE ISSUES WITH THE EMPLOYEE AND WITNESSES AND MAKE EVERY EFFORT TO APPLY OUR STATUTE TO PROTECT THE INDIVIDUAL. HOWEVER, IN THE FORMER CASE, IT WOULD BE UNFAIR TO BLAME THE MANY DEDICATED AND HARD WORKING EMPLOYEES OF OSC FOR THEIR INABILITY TO HELP THIS

WOMAN. THE PROBLEM, OF COURSE, LIES IN THE FACT THAT OSC MUST IMPLEMENT A STATUTE WHICH, NECESSARILY, HAD TO BALANCE MANY IMPORTANT AND SOMETIMES COMPETING CONCERNS TO FASHION A DEFINITION OF A PROTECTED DISCLOSURE.

TO TAKE THIS POINT ONE STEP FURTHER, LAST YEAR AN OUTSIDE ORGANIZATION DID A SURVEY OF 50 PEOPLE WHO HAD COME TO OSC FOR HELP BUT, FOR ONE REASON OR ANOTHER, HAD NOT RECEIVED THE ASSISTANCE THEY WERE HOPING FOR. THE RESULTS OF THIS SURVEY--WHICH THE COMPILERS THEMSELVES ADMITTED WAS "NOT SCIENTIFIC"--WERE THAT MOST OF THESE INDIVIDUALS WERE DISPLEASED WITH OSC'S PERFORMANCE. NOW, CONSIDERING WHO WAS INTERVIEWED FOR THIS SURVEY, I DON'T FIND THAT RESULT SURPRISING. THEY WERE NOT A CROSS-SECTION OF ALL THE PEOPLE WHO CAME TO OSC--MANY OF WHOM WE DID HELP. RATHER, THEY WERE ONLY THE PERSONS WE WERE UNABLE TO HELP--THE ONES WHO HAD NOT MADE A STATUTORILY-DEFINED PROTECTED DISCLOSURE, OR WHO HAD NOT FACED A STATUTORILY-DEFINED PROHIBITED PERSONNEL PRACTICE, OR WHO REFERRED A MATTER WHERE EVIDENCE WAS SIMPLY LACKING.

MR. CHAIRMAN, I CAN UNDERSTAND THE FRUSTRATION THESE PEOPLE MUST FEEL. IT IS NEVER EASY TO BE TOLD BY THOSE TO WHOM YOU TURN FOR HELP, THAT THERE IS NOTHING THEY CAN DO FOR YOU. HOWEVER, I DO THINK IT VERY IMPORTANT THAT THE MEMBERS OF THIS COMMITTEE PUT THIS STUDY IN PERSPECTIVE WHEN ATTEMPTING TO REACH A BALANCED ASSESSMENT OF THE WORK THAT WE DO.

SO HOW DO WE ADDRESS THE PROBLEM OF THE PUBLIC PERCEPTION OF WHO IS A WHISTLEBLOWER AND THE REALITY OF THE STATUTORY DEFINITION? WELL, SEVERAL THINGS CAN BE DONE. FIRST, INCREASED EDUCATIONAL EFFORTS IN THE AGENCIES ABOUT THE PROTECTION AFFORDED WHISTLEBLOWERS WOULD BE VERY HELPFUL. I WILL DISCUSS THAT IN MORE DETAIL LATER. IN ADDITION, THIS PROBLEM MAY ALSO POINT TO THE NEED FOR SOME SORT OF LEGISLATIVE CHANGES. WITHOUT OFFERING ANY DEFINITIVE AMENDMENTS AT THIS TIME, LET ME SAY THAT IT IS A SITUATION THAT I WOULD CERTAINLY BE WILLING TO STUDY WITH THE COMMITTEE.

GAO REPORT

I WOULD LIKE TO MAKE SOME BRIEF COMMENTS ON THE GAO REPORT CONCERNING THE MANNER IN WHICH 19 FEDERAL AGENCIES HAVE IMPLEMENTED THE WHISTLEBLOWER STATUTE. THEIR FINDINGS INDICATE THAT SOME AGENCIES ARE INFORMING EMPLOYEES ABOUT THEIR WHISTLEBLOWER PROTECTION RIGHTS, BUT MOST AGENCIES HAVE NEITHER INFORMED THEIR EMPLOYEES NOR DEVELOPED POLICIES AND PROCEDURES TO INFORM EMPLOYEES ABOUT THEIR RIGHTS. CLEARLY, IF FEDERAL WORKERS ARE NOT KNOWLEDGEABLE ABOUT OSC, THEIR ABILITY TO DISCLOSE INFORMATION AND BE PROTECTED FROM REPRISALS FOR THEIR DISCLOSURES IS QUITE LIMITED. THE REPORT ALSO INDICATED THAT NOT ALL FEDERAL EMPLOYEES ARE PROTECTED AGAINST REPRISAL BY THE WHISTLEBLOWER STATUTE. FOR THOSE PERSONS, THE STATUTORY PROTECTIONS ARE OBVIOUSLY NONEXISTENT. THOSE EMPLOYEES JUSTIFIABLY ARE TROUBLED BY THIS SITUATION.

THE OSC HAS A VERY ACTIVE PROGRAM OF ITS OWN TO EDUCATE FEDERAL EMPLOYEES AND MANAGERS ABOUT PROHIBITED PERSONNEL PRACTICES AND OTHER MATTERS WITHIN THE JURISDICTION OF THIS AGENCY. APART FROM THE GOAL OF ENSURING THAT FEDERAL EMPLOYEES ARE FULLY AWARE OF THEIR RIGHTS AND RESPONSIBILITIES, THIS EDUCATIONAL EFFORT IS INTENDED TO REDUCE THE INCIDENCE OF PROHIBITED PERSONNEL PRACTICES, AND OTHER VIOLATIONS, THROUGH GREATER AWARENESS OF THE LAW. DURING THE LAST YEAR, SEVERAL SENIOR OFFICIALS AT OSC, INCLUDING MYSELF, PARTICIPATED IN OVER 50 PROGRAMS AND CONFERENCES THROUGHOUT THE UNITED STATES. THE PROGRAMS AND CONFERENCES WERE SPONSORED BY ORGANIZATIONS SUCH AS THE OFFICE OF PERSONNEL MANAGEMENT, FEDERAL EMPLOYEE UNIONS, THE MERIT SYSTEMS PROTECTION BOARD AND OTHER GROUPS HAVING AN INTEREST IN FEDERAL PERSONNEL AND FRAUD MATTERS. WE WILL CONTINUE TO UNDERTAKE SUCH EDUCATIONAL AND OUTREACH EFFORTS. HOWEVER, IT MUST BE RECOGNIZED THAT WE ARE A SMALL AGENCY. WITH MOST OF OUR RESOURCES DEVOTED TO INVESTIGATION AND PROSECUTION, THERE IS A LIMIT TO THE EXTENT TO WHICH WE CAN CONDUCT OUTREACH EFFORTS. THUS, THE NEED FOR AGENCIES TO CONDUCT EDUCATIONAL PROGRAMS FOR THEIR OWN EMPLOYEES IS ESSENTIAL.

IN ADDITION, THE GAO REPORT ADDRESSES THE FACT THAT NOT ALL FEDERAL EMPLOYEES ARE PROTECTED AGAINST REPRISAL BY THE WHISTLEBLOWER STATUTE. MY PERSONAL BELIEF IS THAT THE

PROTECTION OF THE WPA SHOULD BE EXTENDED TO AS MANY FEDERAL EMPLOYEES AS POSSIBLE. I THINK THIS IS A VERY IMPORTANT ISSUE AND I WOULD WELCOME THE OPPORTUNITY TO WORK WITH YOU AND YOUR STAFF TO FURTHER ADDRESS THIS ISSUE.

GAO ALSO RECOMMENDED THAT THE COMMITTEE AMEND THE WHISTLEBLOWER STATUTES TO REQUIRE AGENCIES, WITH OSC'S GUIDANCE, TO DEVELOP COMPREHENSIVE LISTINGS OF THE FEDERAL EMPLOYEES WHO ARE NOT COVERED UNDER THE STATUTES. WHILE I STRONGLY AGREE WITH THE NEED TO IDENTIFY WHICH FEDERAL EMPLOYEES ARE COVERED, I DO NOT BELIEVE THAT THIS IS A TASK WHICH CAN BE UNDERTAKEN BY OSC. BECAUSE SUCH A LIST WOULD CONSTITUTE OSC'S OPINION AS TO THE COVERAGE OF THE CSRA, AS AMENDED BY THE WPA, IT WOULD FALL WITHIN THE PROHIBITION. AS YOU KNOW, OSC IS PROHIBITED BY STATUTE FROM ISSUING ADVISORY OPINIONS OTHER THAN WITH RESPECT TO THE HATCH ACT.

MR. CHAIRMAN, IT IS CLEAR THAT MANY CHALLENGES LIE AHEAD IF WE ARE TO EDUCATE ALL FEDERAL EMPLOYEES ABOUT THEIR RIGHTS AND RESPONSIBILITIES WHILE VIGOROUSLY PURSUING ACTIVE CASES WHICH ARE BROUGHT TO US. HOWEVER, I DO BELIEVE THAT THE TIME FOR US TO MOVE TOGETHER IN THIS DIRECTION IS NOW.

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE, AS YOU EXERCISE YOUR OVERSIGHT FUNCTION OF OSC, LET ME ASSURE YOU MY DOOR WILL BE OPEN TO CONGRESS AND OTHERS WHO ARE CONCERNED ABOUT OSC'S MISSION. I ALSO WOULD WELCOME ANY SUGGESTIONS YOU HAVE CONCERNING BETTER WAYS OF CONDUCTING OUR MISSION. I FEEL VERY POSITIVE ABOUT OUR ACCOMPLISHMENTS OVER THE PAST SIXTEEN MONTHS, AND I LOOK FORWARD TO WORKING WITH ALL OF YOU. THIS CONCLUDES MY PREPARED STATEMENT. AT THIS TIME I WOULD BE PLEASED TO ANSWER ANY QUESTIONS.

Mr. MCCLOSKEY. Thank you very much, Ms. Koch. As you know, there have been many negative statements about the OSC. I believe Mr. Devine or someone said, that the OSC still has not litigated a hearing to restore a whistleblower's job. Can you comment on that?

Ms. KOCH. I think I will let my prosecution director discuss that issue.

Mr. REUKAUF. The statute provides that once OSC has completed its investigation that before any hearing is held before the Merit Systems Protection Board, the agency must first be notified and given an opportunity to take corrective action. So our standard operating procedure is when we find that there has been a violation that we think warrants corrective action, we make a report to the agency.

Since 1989, I don't know exactly how many corrective actions we have gotten, but there were 104 in fiscal year 1992. I believe in one of your questions, you cited 94. There have been several hundred corrective actions, I think, since the Whistleblower Protection Act. In not one instance, has the agency declined to take the corrective action recommended; so the statute worked. There was nothing to litigate. That is the answer to that question.

Ms. KOCH. The number actually is 264 since the enactment of the whistleblower——

Mr. REUKAUF. On 264 occasions we reported to the agency we think there have been problems in personnel actions that should be corrected. In all 264, the agency agreed with us and we have negotiated a corrective action that has been satisfactory to us and to the complainant.

Had any one of those 264 declined to take the action that we recommended, then we would have had the option available to bring the matter available before the MSPB and have it adjudicated, but that action was never necessary.

Mr. MCCLOSKEY. Ms. Koch, what specific statutory improvements, legislative reform would you encourage us to consider and implement right now? I believe in your statement, as I remember reading it last night, you did mention the various agencies which are not covered in the legislation.

Obviously, whether it is legislatively or administratively, some concern for education and spreading the word, so to speak, about the right and the functions of your office.

Specifically, could you list what you recommend to us legislatively?

Ms. KOCH. Well, I think it is very valuable that your committee is looking at coverage of individuals. There are individuals in—covered under title XXXVIII of the U.S. Code, in VA hospitals who are not protected by our statute. There are individuals in Government corporations who are not protected.

Mr. MCCLOSKEY. The Postal Service is not covered, I understand?

Ms. KOCH. The post office is not covered in certain aspects of what we do.

Those would be very valuable things to look at by this committee. Obviously, the agencies who are currently not covered would want to have an opportunity to comment.

The question of the issue of employees finding out about their rights, as GAO pointed out, is a very important issue, an issue that I am concerned about and very interested in seeking a resolution, either legislatively or administratively through executive action and willing to work with either the administration or with the Congress to resolve that issue.

The statute itself, as I mentioned, does present difficulties with definition. It is a lawyer's statute. I think if we want to make clear what a person's rights and responsibilities are, it would be valuable to look at the language one more time and see if we can make clear what it is we are intending to protect. That would be another area to address.

Mr. MCCLOSKEY. Speaking of lawyers' language, the 1989 act lowered the evidentiary standard of proof employees are required to show when a reprisal case, as I recall, to show it is a contributing factor rather than a significant factor. That has been some years, I understand.

Has that improved or changed the process any? Has that been de minimis?

Ms. KOCH. I am going to let Mr. Reukauf respond to that, but if I might comment, from 1989 to the end of 1992 there has been a fourfold increase in accomplishing corrective actions. It has made our office more powerful when we go to agencies and say: We have obtained this evidence; we think you should correct this problem. They know that we will be able to prove it in an adjudication.

Mr. REUKAUF. I think the diminishment of the burden of proof was the most significant thing Congress did in the Whistleblower Protection Act of 1989. I think it has had significant effects. Incidentally, it was the Office of Special Counsel who recommended to Congress in the mid-1980's that the word "reprisal" be removed and replaced with a causal standard, with a lower burden of proof on us and employees.

So I think our ability to get corrective action in whistleblower cases, along with the settlements we have heard about before the MSPB, I think that that lowered standard of proof has caused the agencies to be more willing to settle our cases, our corrective action cases; and I think it also made the agencies more willing to settle with employees when they take individual right of action cases before the board.

So I don't think it was de minimis at all. I think it was a major improvement.

Mr. MCCLOSKEY. It has come up in the testimony this morning that cases have increased but it is basically 5 percent who come out with a positive solution. You know, if that is correct and Mr. Devine mentioned that a third of the cases that they deal with are spurious or not justified.

Those 5 percent statistics sound problematic.

Ms. KOCH. Well, if I might suggest perhaps a more significant statistic is the fact that we have seen fit to almost double the number of cases that we get through the intake process and present a case and do a full-field investigation on.

We get cases, people that come to us just like the GAO does with their hot line where they are seeking help. In many cases, we are the wrong place to be. The more publicity we get out that we exist,

we get some cases where people are looking for the right place. For some of those numbers, of those 1,891, we are referring people to other right places. We are not it.

The significant number is that we have increased the full-field investigations and then of those full-field investigations, it is actually more than 30 percent where we get corrective action. At least in 1992 it was. We had 270 full-field investigations and 105 corrective actions.

Every person that comes to us is by statute entitled—we are required to investigate their matter unless we determine we do not have jurisdiction. We do that. We do not turn people away. Every one of those 1,891 people have had their matter reviewed.

Mr. MCCLOSKEY. As you know, it has been charged repeatedly today the OSC is not an open, dynamic, compassionate lot. If anything, you represent the agency and constantly are hostile to the concerns of the grieving employees.

Obviously there is, as I said, a more diversified hearing with Federal employees from numerous agencies and various levels of concern and expertise will be conducted. Usually when you hear something like that so intently, there is a possibility of a problem. As you know, I guess Mr. Devine and maybe some others have mentioned to the committee that—and I am not being partisan, you know, a political party here.

Since some Reagan era appointees who became civil service protected who aren't happy to see these folks come in.

Ms. KOCH. Well, it is not true that these folks were the functional equivalent of being placed in there in political positions. The folks that work at this office are career civil servants and care very deeply about their jobs. They care very deeply about hearings like this. Perhaps you ought to talk to them.

Mr. REUKAUF. May I make a comment on that?

Mr. Chairman, Mr. Devine talked about some kind of purge he alleged happened in 1981 where a certain group of people were eliminated from the office and replaced by people that he doesn't favor.

I wasn't around in 1981; but I can tell you this, several senior OSC personnel, including my deputy, who is a senior executive, the chief of the complaints examining unit, one of the two supervisory personnel specialists in the complaints examining unit, the chief of the San Francisco field office, and the chief of the Dallas field office of the Office of Special Counsel have been employed by the special counsel since before 1981.

Ms. KOCH. That is one of those things I have a great deal of difficulty responding to. I just find support in working with the people that are sitting at their desks day in and day out dealing with the Federal employees that come to us for help.

Mr. MCCLOSKEY. What do you think are the problematic agencies to deal with? We heard expressed to us today that the DOD isn't interested in speaking generically.

Historically, DOD has not been enamored with spreading the whistleblower gospel, the rights of whistleblowers, and education of the work force and so forth. Can you comment on that? It might be to your credit, but do any of these agencies hate to see you coming?

Ms. KOCH. Almost all of them hate to see us coming. In fact, it is interesting when I am out educating, doing our outreach effort, if there are managers in the audience, invariably I get hostile questions for them that we are trying to keep them from doing their mission or some such discussion.

We believe that we are where we are because whistleblowers are valuable and that agencies have to finally get it at some point in time. There are some that are beginning to get it. We feel that our vigorous enforcement over the years has moved some in the direction of improvement, improvement in this education function.

I can say that in my tenure, I know of at least one agency that established an office to provide this education function within its own internal management because they became aware that they had too many problems within the agency. That was the Customs Service.

The reason I am aware that they established their office to begin to teach their own people about the rights and responsibilities in the whistleblower area is that they hired one of my staff people to go do this because they were so concerned that they had too many cases that they were defending in our office.

Mr. MCCLOSKEY. Ms. Morella gave me several questions she wanted me to ask you. Along with numerous questions from myself and perhaps others, I think we will submit most of those in writing.

[The information referred to follows:]

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

May 4, 1993

Honorable Frank McCloskey
Chairman
Subcommittee on Civil Service
Committee on Post Office and Civil Service
122 Cannon House Office Building
Washington, D.C. 20515-6244

Dear Mr. Chairman:

In response to your letter of April 17, 1993, enclosed are my written responses to your additional questions from your Oversight Hearing on the Office of Special Counsel. Once again, I want to express my appreciation to you and your staff for the opportunities to communicate openly on the very serious mission of our office.

My staff and I look forward to continuing this openness and to working closely with you in the future. Should you have any additional questions please do not hesitate to call me.

Sincerely,

Kathleen Day Koch

Enclosure

CHAIRMAN FRANK MCCLOSKEY
QUESTIONS TO BE SUBMITTED IN WRITING
FOR THE OFFICE OF SPECIAL COUNSEL

1. IT APPEARS THAT EMPLOYEES WHO MAKE WHAT THEY BELIEVE TO BE DISCLOSURES PROTECTED UNDER SECTION 2302(B)(8)(A) OFTEN TURN OUT NOT TO BE PROTECTED BECAUSE AFTER THEY BLOW THE WHISTLE, OSC OR MSPB DETERMINES THEY ARE NOT TO IN "COVERED POSITIONS" WITHIN THE MEANING OF 2302(A)(2)(B). DO YOU AGREE THAT THIS IS A PROBLEM, AND DO YOU HAVE ANY SUGGESTIONS AS TO HOW THE STATUTE COULD BE AMENDED TO BROADEN COVERAGE?

   In a very small percentage of complaints to OSC, the matter is closed because the complaining employee is not in a "covered position." For instance, postal service employees are not in covered positions, and their complaints of prohibited personnel practices would have to be summarily closed. While we do not believe that this is a major problem, I do support the inclusion of Whistleblower Protection for government corporation employees as found in Senator Levin's bill S.622.

2. GAO'S OCTOBER 1992 REPORT (GAO/GGD-93--3), PAGE 11, STATES THAT OSC REPORTED 94 CORRECTIVE ACTIONS OR FAVORABLE DISPOSITIONS UNDER THE WHISTLEBLOWER PROTECTION ACT OF 1989 THROUGH JUNE 1992. HOW MANY DO YOU HAVE TO DATE?

   THE SPECIAL COUNSEL USED THE TERM NEGOTIATED CORRECTIVE ACTION IN HER TESTIMONY BEFORE THE APPROPRIATIONS SUBCOMMITTEE IN FEBRUARY 1993. IN ITS ANNUAL REPORTS, OSC HAS USED THE TERMS CORRECTIVE ACTION OR FAVORABLE DISPOSITION.

   WHAT IS A NEGOTIATED CORRECTIVE ACTION OR FAVORABLE DISPOSITION IN COMPARISON TO A CORRECTIVE ACTION?

   WHAT IS A CORRECTIVE ACTION? IS THIS THE SAME AS A REVERSAL OF AN ADVERSE ACTION? UNDER THE 1989 ACT, HOW MANY REVERSALS OF ADVERSE ACTION HAVE YOU BEEN ABLE TO GET FOR COMPLAINANTS?

   CAN YOU TELL ME THE TYPES OF NEGOTIATED CORRECTIVE ACTIONS OR FAVORABLE DISPOSITIONS THAT YOU ARE GETTING FOR EMPLOYEES AND CORRELATE THEM TO THE ADVERSE ACTIONS TAKEN AGAINST THE EMPLOYEE? DO YOU HAVE THIS INFORMATION READILY AVAILABLE? CAN YOU PROVIDE THIS SUBCOMMITTEE WITH SUCH INFORMATION?

   IN YOUR TESTIMONY, YOU STATE THAT IN FY1992 YOU OBTAINED 104 SEPARATE CORRECTIVE OR FAVORABLE ACTIONS IN 95 MATTERS. HOW DO THESE ACTIONS RELATE TO THE 3,170 SEPARATE ALLEGATIONS YOU

REPORTED IN FY1992, OR THE 1,891 COMPLAINTS YOU HANDLED IN FY1992?

ASSUMING THIS REFERS TO SEPARATE COMPLAINTS, IN YOUR OPINION IS 104 "CORRECTIVE OR FAVORABLE" ACTIONS A GOOD SUCCESS RATE OUT OF 1,891 COMPLAINTS, WHICH IS ONLY 5.5%. CAN YOU SUGGEST ANY BENCHMARK AGAINST WHICH OSC'S SUCCESS COULD BE MEASURED?

As of the date of the Special Counsel's testimony before the subcommittee on March 31, 1993, the OSC had obtained 264 corrective actions since the effective date of the Whistleblower Protection Act. The terms "corrective action," "favorable disposition," and "negotiated corrective action" are basically interchangeable. A "corrective action" involves the reversal of a personnel action which adversely affected the complainant or similar action acceptable to the complainant. Attached is a recent list of a sample of corrective actions which we were requested to prepare for the General Accounting Office. The 104 corrective actions in FY92 were obtained based upon the 1891 separate complaints. It must be considered that these 1891 complaints included, for example, cases in which OSC did not even have jurisdiction. Thus, the 104 corrective actions relate to the total number of complainants who alleged that they were victims of prohibited personnel practices. Therefore, the rate of "meritorious" complaints of prohibited personnel practices in FY92 was about 5.5%. By comparison, in past years we have seen data from the Inspectors General and the GAO hotline which suggest that a 5.5% rate of meritorious complaints would not be unexpected.

Perhaps a more useful measuring stick of OSC's effectiveness, is to look at OSC's success rate on cases that are referred for a full field investigation. These are the cases that are referred to OSC's Investigation Division by the Complaints Examining Unit because there is sufficient evidence to merit a full case review. Of the 270 cases in FY 1992 that were referred for a full field investigation, OSC obtained corrective action in 104 cases. This represents a success rate of 38.5%.

3. THE 1989 ACT SUBSTANTIALLY LOWERED THE EVIDENTIARY STANDARD OF PROOF EMPLOYEES ARE REQUIRED TO SHOW TO WIN A REPRISAL CASE, FROM SHOWING THAT REPRISAL WAS A MAJOR FACTOR IN A DISCIPLINARY FACTOR TO SHOWING THAT IT'S A CONTRIBUTING FACTOR. GIVEN THE 4 YEARS SINCE THE ACT, HAS THIS CHANGE MADE IT EASIER FOR COMPLAINANTS TO PROVE REPRISAL? IF YES, HOW DO YOU EXPLAIN WHY THERE APPEARS TO BE NO RELATIVE CHANGE IN THE PERCENTAGE OF CASES IN WHICH SOME TYPE OF CORRECTIVE ACTION OR FAVORABLE DISPOSITION IS OBTAINED.

Under the Civil Service Reform Act a complainant (or OSC) had to prove that "reprisal" was a "significant" factor in a personnel action. Under the WPA a complainant (or OSC) must prove that the disclosures were a "contributing factor" in causing the personnel action. While this is a substantial change in the burden of proof, it obviously does not transform non-meritorious cases into violations of the law. If the evidence in a case

shows that the agency's personnel action was taken for legitimate reasons, the MSPB and the courts will not overturn those actions. One possible explanation for why there appears to be no relative change in the percentage of matters where corrective action was obtained, is that the change in the law has not appreciably increased the overall percentage of meritorious complaints to OSC.

The WPA does, however, seem to have increased the total number of complaints and, as we reported to GAO, it also seems to have increased the number of OSC cases requiring a full field investigation. As we also pointed out to GAO we have detected a substantial increase in the number of matters that result in corrective action, after having been referred for a full field investigation. In fact, these corrective actions have increased threefold, and since the WPA we have obtained corrective action in more than one third of the complaints which we determined had facial merit.

We have not done a study to determine which of the matters that were provable under the WPA would not have been under CSRA. However, we believe that at least some of the 104 corrective action cases would fit into this category.

4. ANOTHER CHANGE IN THE 1989 ACT WAS ALLOWING EMPLOYEES TO FILE APPEALS WITH MSPB. IN GAO'S OCTOBER 1992 REPORT (GAO/GGD-9393), PAGE 15, THIRTY-FIVE PERCENT OF THE COMPLAINANTS THAT FIRST WENT TO OSC WERE EITHER SETTLED OR REVERSED AT MSPB.

WHY ARE SUCH A LARGE PERCENTAGE OF THESE COMPLAINANTS GETTING RELIEF AT MSPB RATHER THAN RECEIVING HELP FROM OSC?

HAS OSC DONE ANY TRACKING OF COMPLAINANTS THAT GO TO MSPB TO SEE WHY THEY ARE SETTLING THESE CASES AT MSPB?

We do not track matters closed by OSC and later settled before MSPB. We assume that agencies settle litigation for any number of reasons, and we suspect that the reduced burden of proof under WPA has led agencies to settle non-meritorious complaints as nuisance cases as reflected in the settlement statistics from MSPB. The MSPB has a policy of strongly encouraging all litigants before it to settle their cases. While this may be appropriate for an adjudicatory agency like MSPB, it would not be appropriate for OSC to continue to pursue corrective action in cases which have been positively determined to lack merit. Indeed, some of the settlements we have seen cannot be described as particularly favorable to complainants. For example, we have seen cases where the agency has agreed to withdraw an adverse action to remove an employee for misconduct in exchange for the employee's resignation with, of course, no concession from the agency that it's adverse action had been illegitimate.

5. GAO REPORTED IN ITS OCTOBER 1992 REPORT, PAGE 12, THAT OSC HAS

NOT GONE BEFORE MSPB UNDER THE 1989 ACT TO SEEK CORRECTIVE ACTION FOR ANY EMPLOYEE AND ONLY ONCE TO SEEK DISCIPLINARY ACTION AGAINST THE ONE COMMITTING THE REPRISAL.

WHY IS THIS THE CASE WHEN OSC IS NOT GETTING CORRECTIVE ACTION AND SETTLING MOST OF THE CASES?

OSC is required by law to report to the relevant agency before commencing corrective action litigation. If the agency takes corrective action, then there is no need to engage in litigation before the board. Since the passage of the WPA, OSC has not been required to petition the board for corrective action because the agencies have acquiesced in all of OSC's corrective action recommendations. In some cases where OSC believes that disciplinary action is warranted, we include disciplinary action as part of a negotiated corrective action.

6. IN GAO'S OCTOBER 1992, PAGE 11, OSC REPORTED 9 DISCIPLINARY ACTIONS AGAINST AGENCY OFFICIALS. THIS APPEARS RELATIVELY FEW COMPARED TO THE NUMBER OF CORRECTIVE ACTIONS. BASED ON THESE NUMBERS, IT APPEARS THAT THOSE RESPONSIBLE FOR THE REPRISALS ARE NOT BEING HELD ACCOUNTABLE. ACCORDING TO TESTIMONY SUBMITTED (SIC) MSPB, TO DATE, OSC HAS ONLY BROUGHT THREE DISCIPLINARY ACTIONS AGAINST SUPERVISORS SINCE ENACTED (SIC) OF THE 1989 ACT.

(1) DO YOU HAVE AN EXPLANATION FOR THIS SEEMINGLY SMALL NUMBER?

(2) IS IT OSC'S POLICY TO SETTLE DISCIPLINARY ACTIONS AS PART OF A REPRISAL SETTLEMENT?

(3) IS IT OSC'S PRACTICE TO DEFER TO AGENCIES WHEN IT COMES TO REPRISALS?

(4) WHAT KINDS OF DISCIPLINARY ACTIONS ARE BEING TAKEN AGAINST THESE INDIVIDUALS?

OSC often seeks to have agencies take disciplinary action against managers who have committed prohibited personnel practices. This frequently done as part of corrective action negotiation. Depending on the circumstances the disciplinary action in such a case would involve, perhaps, a letter of reprimand or a short suspension without pay. OSC reserves its disciplinary action authority to prosecutions of egregious violations. The penalties sought in these cases range from lengthy suspensions to demotions from supervisory positions or to removal from federal employment.

7. UNDER 5 U.S.C. § 1218, OSC REPORTS ANNUALLY TO CONGRESS. SINCE OSC'S PRIMARY ROLE IS TO PROTECT WHISTLEBLOWERS FROM REPRISAL, IT CAN PROVIDE A MORE ACCURATE GAUGE OF HOW WELL THOSE CLAIMING WHISTLEBLOWER REPRISAL ARE FARING IF THERE IS SEPARATE REPORTING. WOULD OSC BE WILLING TO REPORT WHISTLEBLOWER REPRISAL COMPLAINT INFORMATION SIMILAR TO HOW GAO REPORTED OSC DATA ON PAGE 11 OF ITS OCTOBER 1992 REPORT?

The OSC provided the information contained in the GAO report of October 1992. During the close-out discussion, OSC advised GAO that its data format is misleading because it does not take into account mitigating factors that may ultimately resolve a reprisal allegation. Consequently, I do not believe that the GAO format would be an accurate representation of OSC's workload on whistleblower complaints.

In an effort to help the Subcommittee we would be willing to discuss changes in reporting that would compare results to the number of cases processed.

8. GAO'S SURVEY WORK HAS SHOWN THAT OVER SEVENTY-FIVE PERCENT OF FEDERAL EMPLOYEES ARE NOT FAMILIAR WITH, OR HAVE RECEIVED NO INFORMATION ABOUT, THE WHISTLEBLOWER PROTECTION ACT OF 1989. WHAT DO YOU BELIEVE OSC'S ROLE IS OR SHOULD BE, FOR MONITORING OR OVERSEEING IMPLEMENTATION OF THE WHISTLEBLOWER STATUTE?

IN REGARDS TO THE OUTREACH EFFORT:

(1) HOW DOES OSC PUBLICIZE ITS WHISTLEBLOWER HOTLINE?

Due to the relatively small size of our organization, we rely on our outreach efforts to advertise the hotline. In addition, we have worked with several departments to provide information to federal employees on the message part of their leave and earnings statement.

(2) HOW DO PEOPLE KNOW ABOUT THE HOTLINE IF THEY DON'T EVEN KNOW ABOUT THEIR RIGHTS UNDER THE 1989 ACT?

Members of my senior staff and I regularly attend numerous outreach opportunities to educate the federal community about whistleblower rights and protections. We attended 50 such events last year.

I also attend the regular gatherings of the agency inspectors general through the President's Council on Integrity and Efficiency (PCIE). In this way I try to keep the IG community informed about OSC's work.

Again, we are a small agency with limited funds to spend on public information, as most

of our resources are primarily dedicated to investigation and prosecution of the 2000 or so complaints we ar already receiving.

(3) IN YOUR TESTIMONY, YOU STATE THAT IN FY 1992, OSC RECEIVED AND CONSIDERED 136 MATTERS FOR POSSIBLE REFERRAL TO THE AGENCY CONCERNED. HOW MANY WERE REFERRED? DO YOU KNOW IF ANY ACTION WAS TAKEN BY AN AGENCY IN RESPONSE?

With respect to the number of cases received and referred in FY 1992, it must be considered that each and every case is not received, referred, reported on and closed with results annotated in a given fiscal year. Thus, the 136 cases received and referred in FY 1992 consist of 6 matters on hand at the beginning of the year that were processed along with the 130 we received and processed. Twelve new matters were pending at the end of the year. In addition, we can only report results on cases in which we received the report and closed it out. Of the 10 cases we closed with reports, only 4 were received and closed during the same fiscal year. Other closed matters were received in FYs 1989-1991.

During FY 1992, 82 matters were transmitted to the agencies concerned, as follows:

* 5 pursuant to 5 U.S.C. § 1213(c);
* 8 pursuant to 5 U.S.C. § 1213(g)(2);
* 69 to the Inspectors General without requiring a report.

During FY 1992, 10 matters were closed based on agency reports during FY 1992, as follows:

* 7 had some or all allegations substantiated; and
* 9 corrective actions were reported in these 7 cases ranging from correcting agency policies and procedures to disciplinary action.

9. IN FEBRUARY 1993, OSC STATED THAT IT HAD PARTICIPATED IN OVER FIFTY PROGRAMS AND CONFERENCES TO INFORM VARIOUS ORGANIZATIONS ABOUT THE LAW. IN THESE PROGRAMS, HAVE YOUR AUDIENCES CONSISTED OF EMPLOYEES OR MANAGEMENT? HAS INFORMATION FOCUSED ON WHAT AN EMPLOYEE NEEDS TO HAVE IN ORDER TO PROVE REPRISAL, OR HAS IT FOCUSED ON WHAT THE AGENCIES MUST DO IN ORDER TO SUSTAIN A CHALLENGE TO ANY PERSONNEL ACTION THAT THEY MAY TAKE?

Our outreach has included speeches to and meetings with audiences consisting of employees, managers and unions. The principal focus of these outreach efforts has been and continues to be to educate people about OSC and its mission. We inform audiences

of the role of OSC as an independent investigative and prosecutorial agency charged with protecting employees, former employees, and applicants for employment from prohibited personnel practices, especially reprisal for whistleblowing.

10. DOES OSC HAVE ANY SPECIFIC INFORMATIONAL PUBLICATIONS THAT DISCUSS GUIDELINES OR POLICIES THAT COULD HELP FEDERAL EMPLOYEES DETERMINE WHETHER OR NOT THEIR CLAIM OF REPRISAL MIGHT BE VALID, BEFORE THEY PROCEED WITH THE FORMAL PROCESS OF REPORTING REPRISAL TO OSC?

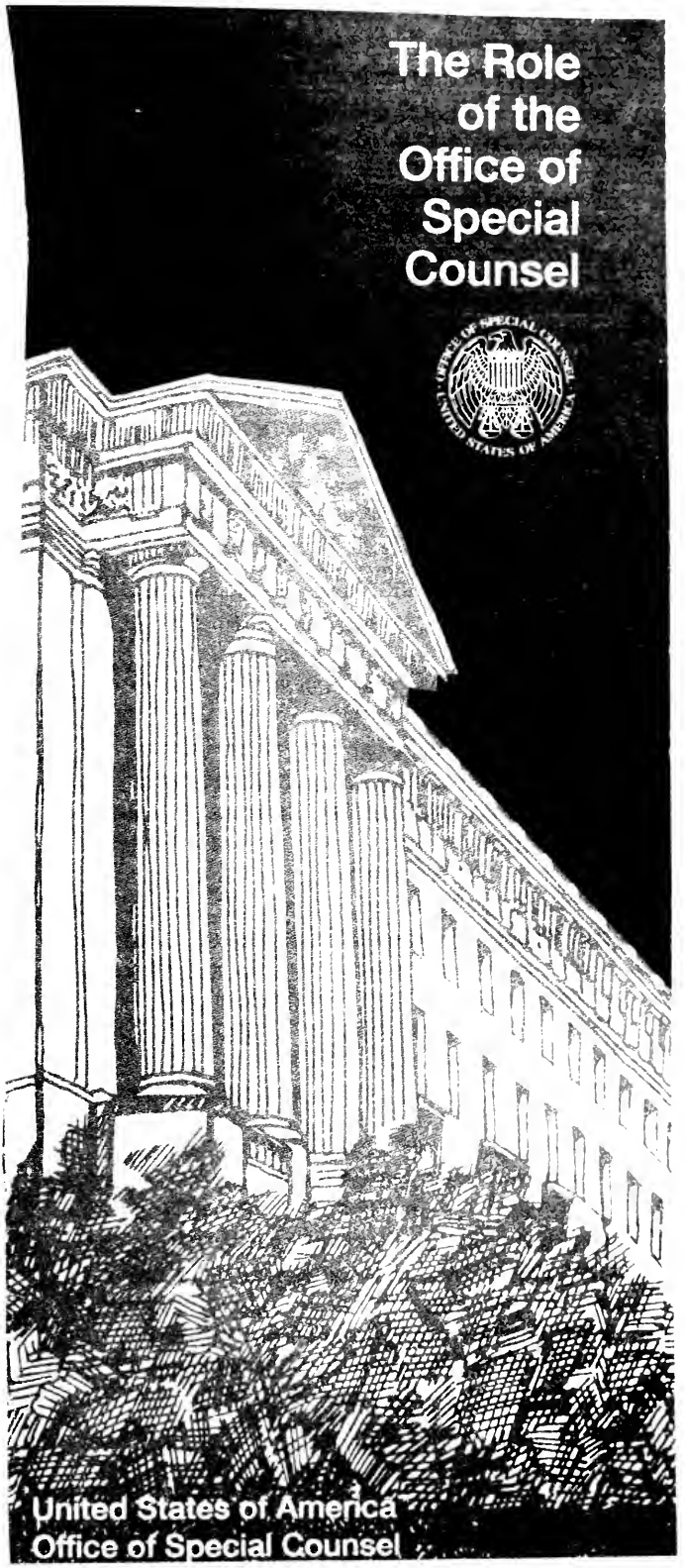
We publish and make available a pamphlet that explains the role and protective functions served by OSC. This pamphlet explains what constitutes "whistleblowing," what are the eleven statutorily-defined prohibited personnel practices, who is covered, and how and where to file a complaint. In addition, the pamphlet explains OSC's whistleblower disclosure function and OSC's Hatch Act advisory and enforcement authority. I am submitting this publication, entitled "The Role of the Office of Special Counsel," for the record.

11. SHOULD CONGRESS EXPAND THE COVERAGE OF THE WHISTLEBLOWER STATUTE TO INCLUDE ALL FEDERAL EMPLOYEES, ESPECIALLY THOSE NOT COVERED BY U.S.C. TITLE 5, FOR EXAMPLE V.A. MEDICAL PERSONNEL? SHOULD GOVERNMENT CORPORATIONS ALSO BE BROUGHT UNDER THE STATUTE'S PROTECTION?

I support the extension of whistleblower protection to the employees of government corporations as found in Senator Levin's bill S.622. In addition, there are current discussions by Secretary Jessie Brown regarding the covering medical personnel and I am supportive of these efforts.

12. HOW DO YOU EXPLAIN CASES BETWEEN JULY 9, 1989 AND SEPTEMBER 30, 1991 WHERE OSC SAID THAT THERE WAS INSUFFICIENT EVIDENCE TO PROVE THAT REPRISAL HAD BEEN TAKEN AGAINST A CLAIMANT AND WHICH WERE LATER SETTLED OR REVERSED BY MSPB?

We have already commented on the settlements before the MSPB in answer to question 4 above. We are aware of a small number of cases where OSC has closed the file and MSPB has reversed the agency's action. In some of those cases the complainant produced new evidence of which OSC was unaware. In others, we reviewed our closure decisions and found the MSPB decisions unpersuasive that a violation had occurred. In short, we simply disagreed with the MSPB's decision. At any rate, we also believe, without having conducted a thorough study of the matter, that MSPB's decisions on the merits have coincided with OSC's decisions to close the files in over 95% of the cases adjudicated by MSPB.


The Role of the Office of Special Counsel
United States of America
Office of Special Counsel

When a prohibited personnel practice exists in a federal agency, who can investigate and prosecute?

When a prohibited personnel action has been or is to be taken, who can file a lawsuit to stop it?

When a federal employee discloses information evidencing a violation of law, rule or regulation, or gross mismanagement, gross waste, abuse of authority, or a danger to public health or safety, who can offer protection against reprisal?

When federal employees want a secure channel to report information about wrongdoing, where can they go?

When federal employees are subjected to political coercion or have questions about the law pertaining to political activities, who can they turn to?

If you answer those questions with, "The Office of Special Counsel," you are correct.

The Office Of Special Counsel

Since the Civil Service Reform Act of 1978, the Office of Special Counsel (OSC) has been available to protect federal employees and the merit system in all of these areas.

With the passage of the Whistleblower Protection Act of 1989 (Act), the primary role of the OSC as an independent investigative and prosecutorial agency is to protect employees, former employees, and applicants for employment from prohibited personnel practices, especially reprisal for whistleblowing.

The Role Of The OSC

The OSC has three basic areas of statutory responsibility. They are:

(1) receiving and investigating allegations of prohibited personnel practices and other activities prohibited by civil service law, rule or regulation and, if warranted, initiating corrective or disciplinary action;

(2) providing a secure channel through which information evidencing a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety may be disclosed without fear of retaliation and without disclosure of identity except with the employee's consent;

(3) enforcing the Hatch Act.

OSC investigators may require evidence from federal employees. All federal employees are required to testify and agencies must provide records to the OSC under Civil Service Rule 5.4. The Special Counsel also has authority to issue subpoenas for documents or the attendance and testimony of witnesses. During an investigation, the OSC may require employees or other persons to give testimony under oath, to sign written statements or to respond formally to written questions.

Whistleblowing

You are "whistleblowing" when you lawfully disclose information to the Special Counsel, an Inspector General, agency officials or others which you reasonably believe evidences the following types of wrongdoing:

- a violation of any law, rule or regulation; or

- gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Prohibited Personnel Practices

Under the Civil Service Reform Act, federal agency heads, managers, supervisors and personnel officials are responsible for preventing prohibited personnel practices, including reprisal for whistleblowing, and for complying with and enforcing civil service laws, rules and regulations. A personnel action (such as an appointment, promotion, reassignment, suspension, etc.) may need to be involved before there can be a prohibited personnel practice. Federal employees may file complaints of prohibited personnel practices with the OSC. The complaints will be investigated and, if the evidence warrants, the violation will be corrected or prosecuted or both.

Under the law, any employee who can take, direct others to take, recommend or approve any personnel action may not:

(1) discriminate based on race, color, religion, sex, national origin, age, handicapping condition, marital status or political affiliation;

(2) solicit or consider employment recommendations based on factors other than personal knowledge of records of job related abilities or characteristics;

(3) coerce the political activity of any person;

(4) deceive or willfully obstruct any person from competing for employment;

(5) influence any person to withdraw from competition for any position to improve or injure the employment prospects of any other person;

(6) give unauthorized preference or advantage to any person to improve or injure the employment prospects of any particular employee or applicant;

(7) engage in nepotism (hire or promote or advocate the hiring or promotion of relatives within the same agency component);

(8) take or threaten to take a personnel action against an employee for any disclosure of information which the employee reasonably believes evidences a violation of law, rule or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or threaten to take a personnel action against an employee for the exercise of an appeal right;

(10) discriminate based on personal conduct which is not adverse to on-the-job performance of the employee, applicant or others;

(11) violate any law, rule or regulation which implements or directly concerns the merit system principles.

It should be noted that while the OSC is statutorily authorized to investigate allegations of age, race or sex discrimination, procedures and facilities for investigating such complaints have already been established in the agencies and the Equal Employment Opportunity Commission. To avoid duplicating those procedures, the OSC will normally defer a complaint involving discrimination to those agencies' procedures rather than initiate an independent investigation.

An employee may request the Special Counsel to seek to postpone or "stay" an adverse personnel action pending investigation by the OSC. If the Special Counsel has reasonable grounds to believe that the proposed action is the result of a prohibited

personnel practice he or she may ask the Merit Systems Protection Board (MSPB) to delay the action until an investigation can be completed.

The Whistleblower Protection Act of 1989 provides for a new individual right of action (IRA) before the MSPB for federal employees and applicants who allege that they were subjected to any personnel action because of whistleblowing. The complainant must first seek corrective action from the OSC before filing an IRA under the Act with the MSPB. Procedures for the filing of an IRA are set forth in MSPB regulations.

Whistleblower Disclosure Channel

The OSC serves as a conduit between a federal employee whistleblower and the affected agency by referring information of wrongdoing to the agency while affording anonymity to the employee. The OSC is not authorized to conduct the actual investigation of whistleblowing disclosures, but may require the concerned agency to investigate and report the results of the investigation for transmittal to the President, Congress, and the employee.

Hatch Act

The Hatch Act prohibits federal employees from participating in certain political activities. Specifically, it prohibits the use of official authority or influence to interfere with or affect the result of an election. It also prohibits taking an active part in political management or partisan campaigns. The law does not restrict an employee's right to vote in any election, or to publicly or privately express opinions, participate in non-partisan activities, or petition Congress. State and local government employees who work in connection with federal funds are also

subject to some restrictions on political activity.

If you believe that a violation of the Hatch Act has occurred, you may file a complaint with the OSC which will investigate and, if warranted, prosecute the individual for breaking the law. The OSC will also give advisory opinions as to whether or not any specific political activity an employee wishes to undertake violates the law. (see "Where to File")

Who Is Covered

With few exceptions, prohibited personnel practices apply to federal job applicants or current or former federal employees in any agency of the Executive Branch, the Administrative Office of the U.S. Courts or the Government Printing Office, but not to employees in:

- a government corporation;
- the Central Intelligence Agency, Defense Intelligence Agency, National Security Agency or certain other intelligence agencies excluded by the President;
- the General Accounting Office;
- the U.S. Postal Service or Postal Rate Commission; or
- the Federal Bureau of Investigation.

The OSC also investigates and advises on alleged violations of the Hatch Act governing political activity of employees in any agency in the Executive Branch, the U.S. Postal Service, Postal Rate Commission and District of Columbia Government.

After An OSC Investigation

Following investigation of an alleged prohibited personnel practice, the Special Counsel may recommend that an agency

take corrective action if there is reason to believe that a prohibited personnel practice has occurred, exists or is to be taken.

If the agency does not take the recommended action after a reasonable period, the Special Counsel may request the MSPB to order corrective action. The Special Counsel may also request the MSPB to order disciplinary action against an employee who commits a prohibited personnel practice or who violates civil service laws, rules and regulations. The charged employee's rights in such cases are set forth in the MSPB regulations. A complaint may be filed against an employee for knowing and willful refusal or failure to comply with an MSPB order.

Following investigation of an alleged violation of the Hatch Act by a state or local government employee, the Special Counsel may request that the MSPB order the withholding of federal funds from a state or local agency if:

- the agency has failed to remove an employee found by the MSPB to have engaged in prohibited political activity; or
- such employee is re-employed within 18 months in a state or local agency of the same state.

Evidence of a criminal violation which arises during any investigation will be referred to the Department of Justice.

How To File A Complaint

Most employees' problems involving labor relations are resolved within the agency either through informal discussion with a supervisor or through established grievance procedures. Certain matters, such as adverse personnel actions, may also be

resolved under an appeals procedure where an appeal right is granted by law or regulation. Employees are encouraged to use these channels whether or not they also complain to the OSC. Labor relations problems do not fall within the jurisdiction of the OSC, unless prohibited personnel practices are involved.

Any employee may report an alleged prohibited activity to the OSC without being represented by an attorney. There is no time limit on filing a complaint. Although the OSC cannot give advisory opinions except in matters involving the Hatch Act, it will clarify its jurisdictional authority and advise an employee of information needed for OSC to take action on a problem. Employees filing complaints with the OSC are encouraged to respond promptly to requests for additional information in order to expedite investigations.

Information submitted to the OSC should be in writing. The OSC will provide complaint forms to employees upon request. (see "Where to File") At a minimum, the following should be included in the submission:

- full name, address and phone number at which the complainant may be reached for more information, or for notification of action taken. The identity of the individual will not be revealed without prior consent except in those instances when immediate action is required to carry out the responsibilities of the Special Counsel. The office will attempt to contact the complainant first in such instances.
- the name and address or location of the federal agency involved, including the specific office or activity that is the subject of the complaint.

- the job title, pay grade and employment status of the employee or employees affected by the allegedly prohibited actions.
- an indication whether the information submitted shows:
  - a prohibited personnel practice or other activity prohibited by civil service law, rule or regulation; or
  - a violation of other law, rule or regulation; or
  - gross mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety.
- a brief and accurate statement of those facts believed to provide evidence of prohibited activity or wrongdoing, and a concise description of the actions and events being reported. If the information concerns a prohibited personnel practice, indicate the specific personnel action(s) taken or proposed.

Always indicate:

- the specific actions that show wrongdoing;
- who was involved in the action;
- when the action was taken, or when the proposed action is to occur;
- any pertinent documentary evidence or information currently in possession of the complainant; and
- whether or not consent is given to disclose the identity of the employee filing the complaint, if this is necessary to take legal action.

The OSC depends upon complete and accurate information as a basis for its actions; therefore, additional information may be requested from a complainant if the

OSC cannot determine what action is appropriate or whether the matter falls within its jurisdiction.

Where To File A Complaint

The Complaints Examining Unit (CEU) in the OSC headquarters office receives, reviews and evaluates all incoming complaints and refers matters determined to warrant further investigation to the appropriate investigative office.

All complaints, disclosures and requests for information should be sent to:

Office of Special Counsel
Complaints Examining Unit
1120 Vermont Avenue, N.W., Suite 1100
Washington, D.C. 20005

OSC Telephone Numbers To Note

Complaints Examining Unit	(202) or (FTS) 653–7188
Whistleblower Hotline	(202) or (FTS) 653–9125
Hatch Act Unit	(202) or (FTS) 653–7143
Public Information	(202) or (FTS) 653–7984
Toll Free	1–800–872–9855
TDD users	(202) 653–7188

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13. IN YOUR OPINION, WOULD ANNUAL PUBLICATION OF AGENCY BY AGENCY STATISTICS ON THE NUMBER OF WHISTLEBLOWER REPRISAL CLAIMS HAVE ANY IMPACT ON PROTECTING FEDERAL EMPLOYEES FROM REPRISAL? COULD THIS BE AN INCENTIVE FOR AGENCY HEADS TO BETTER IMPLEMENT THE WHISTLEBLOWER STATUTE?

I am certainly willing to explore any idea that will assist agency heads in implementing the Whistleblower Protection Act. However, it is essential that all parties understand what certain statistics do and do not signify. For example, if we were to report that a large agency with several thousand employees, had 60 whistleblower complaints, that number could, but would not necessarily, reflect that the agency is doing a good job in light of the large size of the workforce. However, a low number could also reflect a concerted effort by an agency to stifle whistleblowing.

14. IN YOUR TESTIMONY YOU DESCRIBE AN INCREASING NUMBER OF CASES CLOSED BY YOUR COMPLAINTS EXAMINING UNIT BETWEEN FY 1991 AND FY 1992 WHICH RAISES A COUPLE OF QUESTIONS:

(1) ARE THESE ALL WHISTLEBLOWER CASES?

(2) YOU REFER TO "SATISFACTORY RESOLUTION OF AN EMPLOYEE'S COMPLAINT DURING THE INITIAL REVIEW PROCESS" AND DISTINGUISH THAT FROM "A DETERMINATION THAT THERE WAS INSUFFICIENT BASIS FOR FURTHER OSC ACTION." WHAT DOES "SATISFACTORY RESOLUTION OF AN EMPLOYEE'S COMPLAINT MEAN"? AND IS THE TERM "SATISFACTORY" FROM THE EMPLOYEE'S PERSPECTIVE, OSC'S OR THE RELEVANT AGENCY'S? DOES THIS REFER TO EXPOSING WASTE, FRAUD AND ABUSE?

(3) IT DOESN'T SEEM TO ME THAT THE NUMBER OF CASES CLOSED AT THE INITIAL STAGE IS ANY INDICATION OF SUCCESS, AND I THINK IT SENDS THE SIGNAL THAT OSC'S MISSION IS TO DISPOSE OF CASES RATHER THAN TO PROTECT EMPLOYEES. DO YOU AGREE?

(4) YOU TESTIFY 1,798 WERE CLOSED AT THE INITIAL STAGE IN FY 1992. DOES THIS MEAN THAT OSC CLOSED 95% OF THE 1,891 COMPLAINTS RECEIVED AT THE INITIAL STAGE?

In my statement, at page 4, I referred to the increasing workload of OSC in general and specifically the Complaints Examining Unit (CEU). The workload I referenced included all types of allegations of prohibited personnel practices, not only allegations of reprisal for whistleblowing. My reference to the number of cases closed by CEU was to show the increased workload and the types of actions taken to close out cases; some were

closed because CEU was able to obtain the corrective action requested by or acceptable to the employee, others were closed because CEU was unable to find sufficient evidence upon which to make a finding that reasonable grounds existed to believe there had been a prohibited personnel practice. These closures by definition do not include cases referred for further on-site investigation or referral to the Investigation Division as whistleblower disclosures. These numbers should not be viewed as an indication of success; the context in which they were discussed was clearly to show the increasing workload handled by OSC's staff.

If all the numbers are looked at, and we must recognize that there are overlaps from one fiscal year to another, during FY 1992 CEU received approximately 1,891 complaints, referred 270 for further on-site investigation, referred 62 as whistleblower disclosures, and closed 1798. In other words, CEU took action on 2130 complaints during the fiscal year, and approximately 13% of those actions involved referrals for additional investigation of prohibited personnel practices and another 3% were referred to our Investigation Division as whistleblower disclosures.

15. THE GOVERNMENT ACCOUNTABILITY PROJECT CONDUCTED AN INFORMAL, NON-SCIENTIFIC SURVEY AND FOUND THAT AFTER A NUMBER OF WHISTLEBLOWERS WENT TO THE OSC REPRISALS INCREASED SIGNIFICANTLY. THOSE SAME WHISTLEBLOWERS FELT THAT THE OSC DID NOTHING ON THEIR BEHALF TO PREVENT REPRISAL. OSC SHOULD NOT NECESSARILY SPEND ITS TIME PROTECTING THESE EMPLOYEES, BUT CERTAINLY CONTACTING OSC SHOULD NOT RESULT IN FURTHER REPRISAL. WOULD YOU PLEASE RESPOND TO THESE FINDINGS?

Without knowing the specifics of these cases, this question is difficult to answer. Since its inception, OSC has established as a first priority that no complainant or witness would suffer a reprisal for coming to OSC. In fact, OSC has successfully litigated this point before the MSPB. Although OSC receives complaints of reprisal from time-to-time following investigations, the complaints are rare and are always investigated. There has been no pattern of reprisal evident in these investigations.

16. AT THE END OF PAGE 7, YOU SAY THAT THERE MAY BE A NEED FOR LEGISLATIVE CHANGES REGARDING WHISTLEBLOWER PROTECTION. I AM CERTAINLY INTERESTED IN ANY SUGGESTIONS THAT YOU MAY HAVE. WOULD YOU PLEASE ELABORATE?

Some of the areas that I feel would merit Congressional consideration would be in seeking additional coverage of federal workers who are presently exempt from coverage as I mentioned in response to question 11. I am also working with the Executive Office of the President on additional avenues for agency heads to support outreach efforts to their employees. I also support the legislative changes that are found in the recently

introduced Levin bill (S.622). Finally, because of the interpretation given to several WPA terms by the MSPB I also believe that the definition of whistleblower and the definitions of prohibited personnel practices should be clarified. I would welcome the opportunity to work with the Subcommittee on any legislative changes that would better equip OSC to serve Federal employees.

17. GAP MENTIONS IN ITS TESTIMONY THAT OSC REFUSES TO CONSIDER NO-FAULT SETTLEMENTS THAT RESOLVE DISPUTES WITHOUT PROLONGED INVESTIGATIONS OR LITIGATION WITH SOME EXCEPTIONS. WHY IS THAT THE CASE? DOES THE REFUSAL STEM FROM CONGRESSIONAL MANDATE?

First, it is not exactly clear what GAP means by "no-fault" settlements. We believe that GAP may be referring to imposing a requirement that OSC begin settlement efforts without undertaking any investigation of complainants allegations. We believe that it would be inadvisable for OSC to blindly accept all allegations by all complainants without some degree of investigation. Having said that, OSC does settle many cases without prolonged investigations. For example, many cases are settled in the Complaints Examining Unit with only minimal investigation. Many others are settled at the earliest stages of our field investigations. Thus, GAP's testimony is incorrect in its suggestion that OSC needlessly prolongs investigations before proceeding to settlement negotiation.

18. THE NEW PROPOSALS BY PRESIDENT CLINTON TO "REINVENT GOVERNMENT" AND SEEK ADVICE FROM FEDERAL EMPLOYEES MAY VERY WELL SET UP A WHOLE NEW GROUP OF WHISTLEBLOWERS. OBVIOUSLY, THERE IS GOING TO HAVE TO BE A CHANGE OF ATTITUDE BY THE AGENCIES TO PREVENT REPRISALS AGAINST THESE NEW WHISTLEBLOWERS. BUT IS THERE ANYTHING ELSE THAT CAN BE DONE IN THE SHORT TERM? ARE YOU EXPECTING MORE WHISTLEBLOWERS?

I along with the entire OSC staff welcomed the President's initiative for reinventing government. We feel that OSC can and does play a very important role in affording federal workers an avenue to report waste and abuse. So strong is our commitment to help, that I wrote to Vice President Gore's advisor to his working group to suggest the important role of OSC in this endeavor. I have attached the correspondence and request that it be a part of the record. I feel it is too early to speculate whether we will experience an increase of whistleblower cases as a result of the Vice President's initiative. One important protective measure that has already been mentioned is the possibility of requiring the agencies to inform federal employees about their rights as whistleblowers. I will say that regardless of the outcome we stand ready to serve whatever inquires we may receive.

19. A WHISTLEBLOWER WHO CONTACTED THE SUBCOMMITTEE ADVISED MY STAFF THAT IN HER DISCUSSIONS WITH OSC STAFF, THEY HAVE STATED THAT BEING FIRED FROM ONE'S JOB IS NOT CONSIDERED AN ADVERSE

ACTIN BY OSC. COULD YOU PLEASE COMMENT ABOUT THIS? IS IT TRUE OR FALSE?

We do not know the complainant to whom you refer regarding this alleged OSC advice. While it is possible that such a statement was made, it is probable that such a statement was taken out of context. The term "adverse action" is a term of art in federal personnel law that is defined in Chapter 75 of title 5, United States Code as suspensions for 14 days or less for purposes of subchapter I of Chapter 75, and removals, suspensions for more than 14 days, reductions in grade or pay, or furloughs for 30 days or more for purposes of subchapter II of Chapter 75. This chapter sets out the rights and procedures for the taking of such actions and the appeal rights of the employees against whom such actions are taken.

The section of the U.S. Code most relevant to OSC is 5 U.S.C. §2302. That section defines those actions considered to be prohibited personnel practices that are subject to OSC investigation. While that list does not include a "removal," it is not, and never has been, OSC position that removals are not covered. Section 2302(a)(2), which among other things defines covered personnel actions, lists "an action under chapter 75 of this title or other disciplinary or corrective action," and "a decision concerning pay..." among other personnel actions. OSC has always taken the position that a removal fits either or both of these listed actions and if the employee is otherwise within the protections of section 2302 (e.g., is or was an employee in a covered position in a covered agency), his or her removal is within OSC's jurisdiction.

20. FOR THE RECORD, WOULD YOU PLEASE SUBMIT WRITTEN COMMENTS ABOUT THE SUGGESTIONS OUTLINED IN GAPS TESTIMONY TO STRENGTHEN THE WPA ASIDE FROM THE FIRST ONE THAT SUGGESTS ABOLISHING THE OSC?

As we perceive it, GAP has proposed five steps to reform the civil service laws to its liking. The four proposals on which you requested our comments are discussed below:

A. GAP Proposal: protect whistleblowers from "all forms of free speech discrimination" in place of the present statutory prohibition on taking "personnel actions" in reprisal for whistleblowing. (GAP Testimony, p. 24).

OSC Response: OSC believes that the present definition of "personnel action" in the WPA covers the sorts of workplace actions one would expect to be taken in reprisal for whistleblowing. As noted in answer to question 16 above we do not believe the definition of whistleblowing and the definition of prohibited personnel practices should be clarified as a result of MSPB's interpretations. However, we do not believe that changing the definition of "any action" would achieve any worthwhile purpose. The WPA created a set of extraordinary remedies for those claiming to be the victims of reprisal for whistleblowing. The

employee actions protected by these remedies were carefully defined and are considerably different from "free speech." Public employee speech, apart from WPA protected whistleblowing, is governed by first amendment jurisprudence. OSC enforces first amendment protection for employee speech under 5 U.S.C. § 2302(b)(11). Here again, the statute requires a "personnel action" for a violation to exist.

We hasten to point out that the Inspector General Act of 1978, in its anti-reprisal section, prohibits "any action" from being taken in reprisal for communications with an Inspector General. 5 U.S.C., App. 3, § 7(c). In OSC's extensive experience with whistleblower complaints, we have yet to encounter an action being taken in reprisal in violation of the IG Act which was not also a "personnel action" in the meaning of the WPA. OSC enforces this provision of the IG Act as a violation of 5 U.S.C. § 2302(b)(11).

Security clearance determinations which GAP discussed in this heading are not personnel actions and not subject to the MSPB's jurisdiction. A current security clearance is a qualification to hold certain positions in the federal service; as for example, bar membership is a qualification for government attorneys. Whether security clearance determinations should be reviewed by the MSPB is a question implicating national security issues and the broadest of public policy questions. This issue should be referred to the Office of Personnel Management and the Administration for further comment.

B. GAP Proposal: Allow access to district court for jury trials. (GAP Testimony, p.24).

OSC Response: This proposal would not only add significantly to a federal court system already heavily burdened, it could prove to be harmful to whistleblowing in the federal service, compared to the present administrative scheme.

When a whistleblower comes to OSC, that person receives, at no cost to him, an expert review of all the allegations made. Where meritorious, the case then receives, at no cost to complainant, an investigation by skilled and experienced investigators with the authority and resources to inquire into the entire federal government. Then, after detailed review of the evidence by attorneys at several levels, corrective action is obtained voluntarily from the agency, the case is prosecuted before the MSPB or the case is closed and the complainant told why. If a case is closed, the complainant can initiate litigation, including discovery, before the MSPB, with attorney's fees reimbursed if he prevails.

By comparison, under the GAP proposal, each complainant would have to finance the expense of litigation and discovery. Furthermore, under the scheme envisioned by GAP, the subject agency could use several legal privileges, such

as the attorney work-product privilege, which OSC, as the government itself, can traverse.

We believe in the efficacy of OSC's services. We are aware of no evidence that would indicate that by allowing complainants to circumvent the dispute resolution mechanisms of OSC and the MSPB, more effective protection of whistleblowers will result.

C. GAP Proposal: Allow employees a cause of action for punitive damages against those who take reprisals. (GAP Testimony, pp. 24-25).

OSC Response: This proposal, which goes to the very structure of the federal workforce, should be referred to OPM and the administration for comment. This proposal is potentially very destructive of the orderly delivery of government service. Indeed, because managers and supervisors would be put at risk of personally defending a lawsuit alleging reprisal with respect to each personnel action, they might naturally avoid taking or being involved in any such actions. This would be very harmful to the operations of the federal government because the primary motivation for managers and supervisors' personnel decisions would no longer be the good of the agency, but rather would be one of litigation avoidance.

D. GAP Proposal: Break the conflict of interest under section 1213 in which agencies investigate themselves on whistleblowing disclosures. (GAP Testimony, p. 25).

OSC Response: Congress considered many alternatives in 1978, and selected the present system. Whether a "Super-IG" should be created or some other scheme should be considered is for the Congress to decide. It is worth noting that the Inspectors General conduct tens of thousands of investigations and audits annually with the assistance of federal employees who bring to them allegations of fraud, waste, and abuse. The benefit of replacing those organizations with some new entity is not altogether clear. It should also be noted, however, that if an employee is concerned that the federal government cannot investigate itself, the matter can always be raised with GAO, which can investigate if it so chooses.

GAP also proposes in this regard that there should be an "option for the whistleblower to participate in policy, arbitration..." (GAP Testimony, p.25). A basic tenet of our federal system is that policy is the province of elected and appointed political officers, not of civil servants. GAP's proposal would be a major departure from the role accorded civil servants in this country.

Next GAP makes recommendations for amendments to the WPA in seven areas:

E. GAP Proposal: Establish personal accountability.

* "Congress should require that a mandatory critical element for all federal officials with supervisory responsibility is in compliance with merit system principles, and explicitly prohibit performance awards to officials found responsible for directing or engaging in prohibited personnel practices. This would start to break the pattern of rewarding agency managers for doing the dirty work of reprisals."

OSC Response: GAP proposes legislating the content of employee performance plans to regulate the commission of prohibited personnel practices as a performance matter. This belies a misunderstanding that the violation of laws, such as 5 U.S.C. § 2302(b), is a matter of misconduct, not poor performance. These violations are severely punishable by the MSPB in disciplinary actions brought by OSC. OSC has seen no pattern of agencies condoning statutory violations which would justify legislative involvement with performance standards.

F. GAP Proposal: Secure subject matter jurisdiction.

* "Congress should explicitly add to the statute a clause that the forum and context for protected conduct does not matter. Legislative history can explain that it does not matter whether whistleblowing occurs in a grievance or a press conference, nor is it relevant that the employee is doing his job, disagreeing with policy decisions instead of an individual supervisor or refusing to compromise scientific integrity, if the information otherwise qualifies as a protected disclosure."

OSC Response: In the first of its proposals under this heading GAP is proposing a statutory change that has already taken place. The forum and context of a disclosure is irrelevant if the disclosure otherwise meets the standards of the statute. On the other hand, disagreeing with a policy decision is not the same as making a disclosure of information, nor is engaging in a scientific disagreement.

The WPA carefully defined what kinds of disclosures were to be protected. Mere policy disagreements, no matter how sincere, are not disclosures and not protected by the WPA. Policy disagreements, however, may be protected first amendment speech. In addition, even when such disagreements do not raise first amendment concerns a mere policy disagreement, without insubordination, or some extrinsic factor may not be the basis of an adverse personnel action.

* "Similarly, the subcommittee should act to stop an emerging merit system threat from the Justice Department and agencies who use the broad language of 18 USC 205, which requires loyalty to the United States, to

propose prosecution or discipline against whistleblowers during litigation whose U.S. loyalties are to citizens rather than a particular government agency. This can be accomplished by amending section 2302(b)(8) to protect disclosures unless "specifically" prohibited by law, as under the FOIA, and by adding a clause that an employee cannot be prosecuted for disclosures protected against job reprisal."

OSC Response: GAP's characterization of 18 U.S.C. § 205 as an "emerging threat" because it requires employee loyalty to the United States is misleading. In fact, 18 U.S.C § 205 forbids an employee of the United States from acting as attorney or agent for anyone prosecuting a claim against the United States. The Van Ee case, which involves this statute, is unique to its own facts, and we do not believe that the statute presents any "emerging threat" to whistleblowers. In fact, the U.S. attorney declined to prosecute Mr. Van Ee under that statute. Consequently, we do not believe that legislation is necessary.

* "The subcommittee should act to minimize litigation expenses and enhance judicial economy by authorizing any prohibited personnel practices to be challenged when an employee pursues an Individual Right of Action under the Whistleblower Protection Act."

OSC Response: Since OSC does not participate in IRA proceedings before the MSPB, we have no comment on this proposal, but we do note that this issue was before Congress during consideration of the Whistleblower Protection Act and was rejected.

G. GAP Proposal: Secure personal jurisdiction.

* "As a first priority the subcommittee should expand jurisdiction to all employees paid with federal funds who perform government functions and therefore should act as public servants, including civil service employees of law enforcement and national security agencies, as well as employees of government corporations, for example the Legal Services Corporation."

* "Equally significant, if necessary the confusion surrounding the confidential policy makers loophole in section 2302(a)(2)(B) must be eliminated by explicitly adding that the provisions only applies to political appointees. More generally, agency chiefs should be obligated to provide notice upon hiring that the merit system and prohibited personnel practices do not protect any excluded employee."

OSC Response: OSC supports the inclusion of Whistleblower Protection for government corporations as found in Senator Levin's bill S.622. We have experienced no difficulties in the application of §2302(a)(2)(B) and do not see the

need for legislation in this area.

H. GAP Proposal: Enhance due process.

* "Make the Federal Rules of Civil Procedure and the Federal Rules of Evidence mandatory for all Merit Systems Protection Board proceedings. The Board has little credibility with the practicing bar, because its enforcement of normal discovery rules and willingness to admit relevant evidence are mere shadows of the due process rights available in Article III courts. This proposal would end the Board's practice of segmenting related cases."

* "Enhance the status of MSPB decision makers to Administrative Law Judges under 5 USC 3105, with corresponding increases in qualifications requirements. Currently Board decisions are adjudicated by officials in the hybrid status of "Administrative Judges", which institutionalizes the Board as a second class forum for adjudicating merit systems disputes. The reduced status also deprives MSPB adjudicators of potential for judicial independence under the Administrative Law Judges Corps Act passed last session by the House Judiciary Committee.

* "Provide for recovery of any reasonable direct or indirect out-of-pocket expenses incurred by employees who prevail at the Board. This provision was included in S. 2953, which passed the Senate last session.

* Provide for recovery of attorney fees and costs when an employee substantially obtains the relief available from an MSPB order. Currently, the Board and Federal Circuit have denied such relief on strained reasoning that successful settlements were the result of independent factors rather than Board litigation, even though the relief was institutionalized in MSPB settlements and at most was a result of the whistleblower's dissent outside the litigation. In one instance that left a successful whistleblower with an $80,000 legal fee. The bottom line is that under current case law, the most effective whistleblowers may not be able to afford to win.

OSC Response: As before, these proposals concern procedures applicable to litigants before MSPB and we, therefore, have no comment on this matter.

I. GAP Proposal: Minimize OSC abuses of discretion.

* "If necessary, Congress must act to eliminate any debate about the OSC's asserted discretion to release the evidence in a whistleblower's case during or after an investigation. Until that occurs, every employee who is forced to file first with the OSC prior to an IRA will be at the Office's mercy

and realistically risk severe compromise of his or her litigation rights."

OSC Response: This is a false allegation, that GAP continually makes without any proof. OSC does not assert unfettered discretion to release evidence from its files. OSC complies with the Whistleblower Protection Act and the Privacy Act, and other statutes, covering release of information from its files. Moreover, we do not disclose the contents of our files except in properly conducted investigations and prosecutions (including negotiations). The complainant's litigation rights remain intact as a matter of law during and after OSC investigations.

* "Reduce the 120 day mandatory stopoff at the OSC for certain prohibited personnel practices to 30 days. This is more than enough time to determine whether a working relationship is possible. If so, whistleblowers will voluntarily continue the partnership with the Special Counsel. If not, justice will not be denied through the delay of 90 days more dead time before the whistleblower earns access to the Board. The Department of Labor whistleblower statutes operate under the 30 day schedule for preliminary investigations before a due process hearing can occur."

OSC Response: A 30 day processing time for OSC to complete investigation and legal review is simply unrealistic. Given present staff resources and the difficulties inherent in obtaining and reviewing documents and making preliminary contacts with witnesses, OSC could not make even preliminary decisions as to the merits of cases in 30 days much less complete field work and legal analysis.

* "Add explicit statutory language that OSC employees who violate the limits of their discretionary authority under Title 5 are acting outside the scope of their employment. This would subject them to personal liability under constitutional law. One reason the Whistleblower Protection Act has had a negligible impact on OSC abuses of discretion is that OSC staff have nothing to lose by routinely ignoring its provisions."

OSC Response: GAP has not identified one instance of abuse of discretion by any OSC employees. I have never had reason to believe that OSC faces any particular problems in this regard. In any event, to subject government employees to personal liability for the performance of their duties would be an unprecedented and objectionable departure from the norms of the operation of the federal government.

J. GAP Proposal: Enhance the quality of OSC protections.

* "Require the OSC to seek no-fault settlements as a mandatory first step

before investigating the merits of prohibited personnel practice complaints. Require complainant approval of settlement terms before the Office may submit the agreements for Board resolution. Repeatedly, employees still report that the OSC resolved their cases over their objections. They should have control over how and whether disputes central to their own careers are resolved. In some instances this status quo scenario can leave a whistleblower in worse shape than if the Special Counsel had ruled negatively and the complaint blossomed into an Individual Right of Action."

OSC Response: OSC currently seeks to settle complaints wherever and at whatever time is feasible. Virtually all of our corrective actions are obtained through negotiated settlements. As noted earlier, GAP does not explain what it means by "no-fault settlement". If it means requiring OSC to begin settlement discussions without any investigation of the validity of a complaint, we believe the suggestion is inadvisable. OSC does not settle cases without the approval of the complainant. Furthermore, the exception is in disciplinary action cases against the law violator where OSC exercises its sole discretion as public prosecutor. The complainant is not a party to these quasi-criminal proceedings.

* "Require the OSC to inform all complainants of their rights under the Whistleblower Protection Act of 1989. Most non-lawyer employees are not aware of their rights, and the Special Counsel generally does not tell them."

* "Establish that, with appropriate exceptions, employees have access to the OSC file on their cases. Releasing investigative and prosecutive memoranda will circumvent the Office's unwillingness to explain its decisions. It also will free more resources to stop prohibited personnel practices, since the OSC spends an inordinate amount of time denying FOIA/Privacy Act requests and lawsuits by complainants who want to learn from the OSC investigation."

OSC Response: As to the first point above, GAP is simply wrong. OSC already informs all complainants of their rights under the WPA at several points during and after the investigation.

As to the second point, OSC does not release its files to either side. Granting complainants access to OSC files would adversely affect the quality of evidence now obtained by OSC. OSC, because it is an independent government agency, can obtain most privileged government information. Also, witnesses speak candidly to OSC knowing that OSC will not expose them unless necessary to litigate. Once it becomes known that OSC files are given to complainants, both agencies and co-workers would restrict what OSC is told. One could well expect

OSC's internal written communications to be less frank at the same time. Indeed, the need to protect the frank exchange in internal memoranda has been long recognized in exception number 5 to FOIA. 5 U.S.C. §552.

Furthermore, if OSC files are given to complainants, the agencies will be able to discover those files from OSC and the complainant in litigation. I would also note that OSC spends a relatively small amount of time processing FOIA/Privacy Act matters.

K. GAP Proposal: Create meaningful judicial review.

* "Restore the "All Circuits" judicial appellate review available under the Administrative Procedures Act for nearly all other administrative law decisions, and under the Civil Service Reform Act prior to 1982. The Federal Circuit is the most hostile forum in the history of civil service law; a whistleblower's chances of prevailing on the merits are still akin to winning the lottery. As a result, its monopoly means there is no effective check on the Merit Systems Protection Board."

OSC Response: OSC has not observed any hostility to whistleblowers on the part of the Federal Circuit. Nevertheless, OSC takes no position on this proposal as we do not participate in the judicial review process.

21. I AM ENCOURAGED BY YOUR STATEMENT THAT YOU PERSONALLY BELIEVE THAT PROTECTION OF THE WPA SHOULD BE EXTENDED TO AS MANY FEDERAL EMPLOYEES AS POSSIBLE. IF CONGRESS DOES EXTEND WPA PROTECTION TO ADDITIONAL FEDERAL EMPLOYEES WHO ARE CURRENTLY EXEMPTED SUCH AS GOVERNMENT CORPORATIONS AND VA MEDICAL PERSONNEL, DO YOU BELIEVE YOU HAVE ADEQUATE RESOURCES TO ACCOUNT FOR THE POSSIBILITY OF AN INCREASED CASELOAD?

At the present time, I am confident that the dedicated staff will be able to serve the potential increased workload. I would like to have the opportunity to address this question again should the proposed legislation become law.

22. COULD YOU SUMMARIZE THE CASES OF THE WITNESSES THAT THE SUBCOMMITTEE HEARD FROM TODAY. HOW DID YOU HANDLE THOSE CASES AND WHAT WERE YOUR REASONS FOR REACHING YOUR CONCLUSION?

SUMMARY OF OSC AND MSPB ACTION REGARDING COMPLAINT OF J. JEFFREY VAN EE

OSC File No. MA-91-0451

A. FACTS

Complainant, Mr. J. Jeffrey Van Ee, an electronics engineer at the Environmental Protection Agency's (EPA) Environmental Monitoring Systems Laboratory, in Las Vegas, Nevada, received a reprimand for violating a criminal conflict of interest statute. Specifically, he was reprimanded for creating the appearance of acting as an agent for the Sierra Club by attending and participating in a settlement conference on January 22, 1990, between the Sierra Club Legal Defense Fund (SCLDF) and representatives of the U.S. Department of Interior (DOI), Clark County, Nevada, and the Kerr-McGee Corporation concerning the desert tortoise, an endangered species. The conference concerned SCLDF's threatened lawsuit to block the transfer of land from the DOI to Clark County for use by Kerr-McGee to construct a rocket fuel plant under the Nevada Land Transfer and Authorization Act of 1989 (commonly referred to as the "Apex Project"). Pub. L. 101-67, 103 Stat. 168-174 (1989). SCLDF alleged in a letter to then-Secretary Lujan that the land transfer violated various provisions of the Endangered Species Act (ESA) (16 U.S.C. § 1536(b)(4)(B), 1538(a)(1), 1539(a)(2)(A)-(B), 1540).

Although he was an EPA employee, Mr. Van Ee was invited to attend the conference by the SCLDF, as he was a Sierra Club member. Mr. Van Ee submitted his complaint to OSC on January 16, 1991, wherein he alleged that his reprimand was in reprisal for statements he made at the settlement conference alleging that the DOI was in violation of the Nevada Land Transfer and Authorization Act of 1989.[1]

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[1] Prior to Mr. Van Ee's filing a complaint with OSC, the case was first referred by an attendee of the settlement conference to the Office of the U.S. Attorney for the District of Nevada, which declined criminal prosecution of complainant and referred the matter to the EPA for administrative action. EPA then reprimanded him as explained above, and Mr. Van Ee filed his complaint with OSC. EPA's Office of General Counsel (OGC), which acted in an advisory capacity in the disciplinary action, was unwilling to recommend that EPA take corrective action

B. OSC's ACTIONS

OSC's investigation did not reveal facts materially different from those contained in the Investigative Report by the EPA Office of Inspector General. Essentially, the OSC investigation confirmed that EPA reprimanded Mr. Van Ee for creating the appearance of acting as an agent for the Sierra Club during the settlement meeting. On this basis, we concluded that there was insufficient evidence that the reprimand was a prohibited personnel practice.

Generally, our investigation showed that Mr. Van Ee was an active participant at the meeting. He asked questions and made comments about some of the provisions contained in a cooperative agreement reached between DOI, Clark County, and Kerr-McGee regarding the proposed land transfer. His questions and comments centered on the parties' proposed expenditure of approximately $400,000, which Kerr-McGee agreed to finance, for the study of the desert tortoises which inhabited the land. In particular, Mr. Van Ee questioned (1) the need for such an expensive study, (2) the legitimacy of the study's goals and scientific bases, and (3) its endorsement by DOI without public comment. Mr. Van Ee also expressed his opinion that the expenditure was inconsistent with the legislative obligations of the Apex Project, with which he had a working familiarity. He pointed out that the Apex legislation required habitat acquisition and protection, not study. He also supported the position of the SCLDF that the $400,000 should be allocated for the acquisition and preservation of a desert tortoise habitat, not for a study of the tortoise. In addition to advocating against positions taken by representatives of the federal government, Mr. Van Ee consulted with Sierra Club attorneys before, during and after the meeting on issues material to the Sierra Club's interests.

The evidence was inconclusive on whether Mr. Van Ee actually appeared at the meeting as a representative of the Sierra Club. However, since EPA did not reprimand him for having, in fact, acted as the Sierra Club's agent, but only for having created the appearance of having acted as its agent, his actual role at that meeting is not determinative.

Turning to the specifics of Mr. Van Ee's complaint, OSC made the following determinations:

Whistleblower Reprisal. Mr. Van Ee alleged that the reprimand violated Section 2302(b)(8), which protects qualified disclosures of information from becoming a basis for a personnel action. To the extent that he provided information at the meeting which he reasonably believed disclosed evidence of a violation of law, that information was protected by statute, 5 U.S.C. § 2302(b)(8), and the disclosure could not be a contributing factor in any personnel decision taken against him. 5 U.S.C. § 1214(b)(4)(B)(i). The investigation indicated, however, that EPA's decision to reprimand him was not based, in whole or in part, on any protected disclosures he may have made. Rather, EPA reprimanded him solely for creating the appearance of acting as an agent

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prior to OSC's investigation.

for the Sierra Club. In fact, our investigation revealed that his supervisors were personally sympathetic to the preservation of the desert tortoise, a position which he and the Sierra Club advanced at the meeting.

First Amendment. OSC also did not find sufficient evidence to support Mr. Van Ee's charge that the reprimand violated his First Amendment rights as protected by Section 2302(b)(11) (prohibiting violation of laws directly concerning merit system principles). Our investigation showed that EPA did not reprimand him for the content of his expression. It reprimanded him because it concluded he created the appearance of having acted as an agent of the Sierra Club.

Off-Duty Conduct. Finally, we did not find sufficient evidence to support Mr. Van Ee's charge that his reprimand violated Section 2302(b)(10), which proscribes discrimination for off-duty conduct unrelated to work performance. The personnel action was based on EPA's conclusion that his conduct as an employee, albeit off duty, fell short of the ethical requirements for EPA employees.

For these reasons, on September 23, 1992, OSC declined to seek corrective action on Mr. Van Ee's behalf. It should be noted that although no formal advisory opinion has been sought from the Office of Government Ethics (OGE), early on OSC spoke to OGE Deputy General Counsel Jane Ley about the Van Ee matter. She indicated that OGE's position would be to support the reprimand based on the mere appearance of a conflict.

C. MERIT SYSTEMS PROTECTION BOARD ACTION

OSC declined Mr. Van Ee's request for a stay of his reprimand on March 26, 1991. On December 27, 1991, Mr. Van Ee filed an IRA with the Board challenging the reprimand and requested a stay. In a January 13, 1992, order denying appellant's stay request, Administrative Judge Steven Chaffin, of the Board's Denver Regional Office, held that appellant failed to demonstrate that he was a "whistleblower." Subsequently, on April 13, 1992, Judge Chaffin dismissed the complaint for lack of jurisdiction because Mr. Van Ee failed to prove he engaged in protected activity covered by Section 2302(b)(8). The Judge held that Mr. Van Ee's statements at the meeting were "nothing more than the opinions of a private citizen regarding the nature of the settlement." According to the Judge, Mr. Van Ee's statements were only his "conception of what the law required and the appropriateness of the positions of the parties, " not evidence of a violation of law. He further held that the statements were merely part of the "give and take" of settlement discussions and not whistleblowing.

Mr. Van Ee subsequently filed a petition for review, which is pending before the Board.

SUMMARY OF OSC AND MSPB ACTIONS REGARDING THE COMPLAINT OF GORDON HAMEL

OSC File No. MA-90-1348

A. FACTS

Gordon Hamel was the GM-15 Director of Placement for the President's Commission on Executive Exchange (PCEE), a small agency established by Executive Order to encourage and facilitate the exchange of federal and private sector executives. In July 1990, Hamel filed a complaint with the Office of Special Counsel (OSC), alleging that Betty Heitman, Executive Director of the PCEE, had taken away his duties and responsibilities and had excluded him from substantive meetings in reprisal for protected whistleblowing. Subsequently, in August 1990, Heitman placed Hamel on administrative leave based on allegations of misconduct. Hamel amended the complaint to include the imposition of administrative leave and the denial of training/education as additional personnel actions taken in reprisal for his protected disclosures. On September 11, 1990, OSC informed Hamel that OSC would not seek a stay on his behalf. On November 30, 1990, after the OPM Inspector General issued a report finding that Hamel's disclosures and allegations of reprisal were unfounded, Heitman issued a Notice of Proposed Removal, charging him with improper conduct.

In the fall of 1990, in response to complaints from Hamel, the Employment and Housing Subcommittee of the House Committee on Government Operations conducted an investigation into Hamel's allegations of wrongdoing at the PCEE, and on December 10, 1990, Subcommittee Chairman Tom Lantos held a hearing on the matter. On December 11, 1990, after his testimony before the Subcommittee, Patrick McFarland, the Office of Personnel Management (OPM) Inspector General (IG), notified Heitman that the October 1, 1990, report of investigation issued by his office was "flawed and incomplete," and that the IG would reopen the investigation. He also recommended that Hamel's proposed termination be rescinded if the decision was predicated in any way on the findings in the IG report of investigation. On December 14, 1990, McFarland informed OSC of his letter to Heitman, and suggested that OSC seek a stay of the proposed termination action.

B. OSC's ACTIONS

OSC conducted an extensive investigation and prepared a 97 page Prosecution Recommendation (PR), dated May 10, 1991, which was subsequently transmitted to Congressman Lantos. The OSC investigation uncovered evidence that Hamel made disclosures of information which were protected by the Whistleblower Protection Act of 1989, and that agency officials knew of these disclosures. OSC also found evidence that personnel actions were taken against him within a relatively short time after his disclosures. Although Hamel denied the various acts of misconduct with which he was charged, the charges were supported by the testimony of other witnesses. The record showed that there was a great deal of contradictory information in that aspect of the investigation, and that credibility determinations would have to be made in order to resolve the ultimate question of whether or not Hamel's disclosures caused these personnel actions.

C. MSPB ACTIONS

On December 18, 1990, Hamel, through his attorney, Robert Seldon, filed an IRA (independent right of action) with the Merit Systems Protection Board (MSPB), stating that 120 days had passed since he filed his initial complaint with OSC. The MSPB appeal alleged that the PCEE had taken four personnel actions against Hamel in reprisal for his whistleblowing: (1) the issuance of Policy Memorandum 90-1 which Hamel stated withdrew his most significant job duties, (2) imposition of indefinite administrative leave, (3) denial of education expenses, and (4) the notice of proposed removal. In a jurisdictional statement submitted on January 4, 1991, Hamel argued that the Board had jurisdiction over the notice of proposed removal because it was a "continuing violation" of 5 U.S.C. § 2302(b)(8). On the same date, Seldon notified the Board that the Government Accountability Project (GAP) was an additional designated representative of Hamel. On January 18, and again on February 8, 1991, Hamel, through his representatives, requested that OSC intervene in the MSPB appeal. OSC did not do so.

In a decision issued on January 25, 1991, the MSPB Administrative Judge (AJ), William Jenkins, ruled that the denial of education expenses and the administrative leave were not covered personnel actions, the charge that the policy memorandum removed his job duties was a nonfrivolous allegation, and the notice of proposed removal was not appealable because 120 days had not elapsed since the complaint on that issue had been filed with OSC. On February 14, 1991, the AJ denied a motion for interlocutory appeal on the jurisdiction issues and reversed his previous determination that the administrative leave was not a covered personnel action. Then, in the interest of judicial economy, he dismissed the MSPB action without prejudice, noting that the proposed removal would be subject to the Board's jurisdiction in six weeks (April 1, 1991) and that a hearing on all of the issues at the same time would be more efficient. On April 1, 1991, Hamel filed an IRA with the Board.

D. CONCLUSION

On May 2, 1991, President Bush issued an executive order abolishing the PCEE.

Subsequently, the Office of Personnel Management notified Hamel that the various personnel actions which were pending against him were being rescinded. OSC closed the case on May 15, 1991, based on the fact that the issues were moot because the PCEE no longer existed. On June 10, 1991, MSPB AJ Jenkins issued an initial decision holding that the issue was moot because the PCEE no longer existed.

SUMMARY OF OSC AND MSPB ACTIONS REGARDING THE COMPLAINT OF THOMAS F. DAY, II

OSC File No. MA-91-0833

A. FACTS

In his April 1991 OSC complaint, Day alleged that he had been charged with absence without leave (AWOL), issued letters of caution and reprimand, suspended for 10 days, issued a performance improvement plan and received a removal proposal because of his disclosures and his grievance activities. Day's disclosures involved alleged excess funds of $1.4 billion in the budget estimate for the Cruise Missile Program for the 1990 through 1994 fiscal years. Day made his disclosures to his supervisors, the Office of Secretary Defense (OSD), the Inspectors General of the Naval Air Systems Command (NAVAIRIG) and the Department of Defense (DODIG), and Senator John Warner.

Day alleged that, in April 1991, as a result of his disclosures, his third level supervisor, Noreen Bryan, Director, Cost Analysis Division, and the head of another directorate, Howard Hurley, threatened him with retaliation. Bryan and Hurley admitted that they threatened Day with disciplinary action in the event that he proceeded with his plan to take his budget estimates on the Tomahawk Cruise Missile Program to the Navy Comptroller's Office, OSD.

Day also alleged that his first and second level supervisors, William F. Stranges and David Burgess, retaliated against him by taking the personnel actions at issue. Stranges admitted that he stated to Day that, as a result of Day's disclosures, disciplinary measures would be taken, and threatened to enforce the agency's leave policy with regard to Day. Stranges did not begin to enforce the leave policy until 11 months later, stating that he had other matters that required his attention until that time. There were no statements of retaliatory animus by Burgess, who was not an employee of NAVAIR at the time of Day's disclosures. Burgess proposed Day's termination 18 months after Day's disclosures to OSD.

B. OSC's ACTIONS

Day requested that OSC seek a stay of the proposed removal action. OSC denied Day's stay request. OSC held this matter in abeyance pending the outcome of a DODIG investigation of this matter. In June 1991, the DODIG concluded that the AWOL charge and the letters of caution and reprimand were reprisal for his disclosures, and that Day was improperly threatened with disciplinary action if he made a disclosure to OSD. The performance improvement plan and Day's proposed removal were not investigated by the DODIG.

From June until October 1991, prior to OSC's investigation, OSC attempted to obtain corrective and disciplinary action for all personnel actions except Day's removal actions. OSC's position was based on its review of the June 1991 DODIG investigative report and documentation submitted by Day contesting his proposed removal.

In August 1991, in response to the DODIG report, the original proposed removal was canceled and a second proposed removal was issued. The August 1991 proposal eliminated all references to the personnel actions found to be retaliatory by the DODIG, the AWOL charge and letters of caution and reprimand which were contained in the April 1991 proposal. Day failed to respond to the agency's August 1991 removal proposal. In September 1991, Day was removed from his position.

In September 1991, Day filed a request for a stay with OSC challenging his removal. In October 1991, the OSC directed that an investigation be conducted on all personnel actions and withdrew its informal request for corrective and disciplinary action for the earlier personnel actions. Two weeks after OSC received Day's notice of termination and request that OSC seek a stay of his removal, Day was notified that OSC denied his stay request but would be conducting an investigation of this matter.

In November 1991, Dr. A.R. Somoroff, Deputy Executive Director for Acquisitions Management, NAVAIR, responded to NAVAIRIG C. J. Winters' request for the agency's response to the June 1991 DODIG report. Somoroff's response stated that the letters of caution and reprimand were appropriate. However, because of the following factors, the agency agreed to remove both letters from Day's personnel records: 1) perceived prior tolerance of Day's failure to adhere to a regular work schedule; 2) the short time between Day's counselling regarding his work schedule and the issuance of the letters; and 3) the agency's finding that the letters were redundant to the AWOL charge.

OSC found that it was doubtful that Day was a genuine whistleblower. Because Day was never able to adequately defend his cost estimates to either his supervisors or to independent auditors, the agency had a strong argument that Day's belief was not reasonable and, therefore, his disclosures were unprotected. If the disclosures were deemed unprotected none of the personnel actions could be illegal reprisal. However, because the DODIG believed the disclosures were protected and that the letters of reprimand and caution for making the disclosures were inappropriate, these letters were rescinded by the agency. Thus, there was no basis for seeking corrective action based on the letters. Moreover, the minor nature of those actions, along with the problem of proving that Day's disclosures were protected, OSC to the

conclusion that any further action case by OSC was not warranted. The evidence showed that the 11.5 hours of AWOL was justified. Thus, OSC determined not to seek corrective action for the AWOL, especially in light of Day's subsequent termination for:

1) insubordination
2) disrespectful conduct
3) disruptive behavior
4) physically threatening a supervisor
5) conducting personal business on government time
6) inappropriate disclosure of acquisition information
7) violating the Department of Navy Standards of Conduct
8) unacceptable performance.

As for the removal and suspension actions against Day, the problems for OSC in proving a §2302(b)(8) violation were considerable. First, the more serious personnel actions occurred from 12-18 months after the purported whistleblowing. Board precedent holds generally that such a lag time does not create an inference of causation or reprisal. Furthermore, there is overwhelming evidence that Day was neglecting his duties, abusing the agency leave policies and engaging in bizarre, threatening and disruptive behavior. Even if OSC could prove that Day's disclosures were protected and contributed to these later personnel actions, the agency could prove by clear and convincing evidence that these actions would have been taken for the efficiency of the service even in the absence of the earlier disclosures.

C. MSPB ACTION

Day filed an individual right of action in this matter with the Board. On March 16, 1993, an administrative judge issued an Initial Decision dismissing Day's action based on a settlement agreement entered into by the parties. The terms of the agreement have been sealed but we have been informed that Mr. Day is no longer an employee of the agency.

SUMMARY OF OSC AND MSPB ACTIONS
REGARDING THE COMPLAINT OF MARIE R. RAMIREZ

OSC File No. 10-8-001267

A. FACTS

In September 1988, Marie R. Ramirez, an electronics engineer, GS-12, complained to OSC that the Navy refused to advance her sick leave and threatened to place her on AWOL.[2] She alleged that these actions were discriminatory and were in reprisal for her protected disclosures.

Ramirez made an arguably protected disclosure on June 20, 1988, when she told Mr. Jim Tacket of the Naval Investigative Service about a possible misappropriation of funds, i.e., the agency overestimated the cost of an air traffic control project and used the money for other projects. The Service found that the project had been canceled and the excess funds had been returned to Navy activities participating in the project.

OSC closed the matter because there was no connection between the personnel practices and any possible protected disclosure and because she did not provide medical documentation to the agency when requested. Ramirez did not request reconsideration of the closure nor did she inform OSC that she had been removed.

Subsequently, Ramirez was removed by the Navy on November 19, 1988 for excessive AWOL (13 work days) and for deliberately and willfully refusing to provide medical information to her supervisor.

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[2] Prior to this complaint, Ramirez had filed two EEO type complaints with OSC; both of which were deferred to the EEO procedures.

B. MSPB ACTION

By Initial Decision dated June 21, 1989, an MSPB administrative judge reversed the agency action. The AJ found that the agency had received Ms. Ramirez's medical documentation after the proposed removal but before the final removal decision. Additionally, the AJ found that the agency had acted in reprisal for Ramirez having filed EEO complaints or having engaged in whistleblowing ("I find no basis to establish whether the retaliatory motive emanated from the EEO or Whistleblowing activities.") The judge concluded that the reprisal was established by "the temporal sequence of the chain of events preceding the appellant's removal, the failure to sustain the action, and the evident lack of reasonableness in taking the severe action against the appellant with such alacrity and without appropriate investigation."

C. CONCLUSION

OSC reviewed the AJ's decision and found it wanting in support for its findings of reprisal (especially under the then legal standard of "reprisal" requiring an intent to punish or thwart). No further action was taken.

SUMMARY OF OSC AND MSPB ACTIONS
REGARDING THE COMPLAINT OF MARIE R. RAMIREZ

OSC File No. MA-92-0133

A. FACTS

Mr. Jack MacDonald, the complainant's third level supervisor, issued a notice of a proposal to remove her for inability to perform the duties of her position, on Oct. 9, 1991. MacDonald may have had knowledge of the complainant's 1988 disclosure, because he discussed it at a Merit Systems Protection Board hearing on her appeal of a previous removal.

B. OSC ACTIONS

OSC's inquiry uncovered no statements of animus against Ramirez. Both the complainant's medical documentation and OWCP indicated that she could not return to work at the agency. She had been receiving workers compensation since Sept. 23, 1990, and she admitted that she had not reported to work since September 1989. Additionally, over three years elapsed between her disclosure and the issuance of a notice of a proposal to remove her. After the initial decision reversing Ramirez's first removal, she returned to work for two months. She then requested and received leave based on her claim of stress. The OWCP granted her compensation based on its finding that she was disabled from performing her duties due to her work-related medical condition, i.e., adjustment disorder. As of December 1992, Ramirez remained on the OWCP rolls. Thus, with the exception of two months, Ramirez has been on leave of one form or another since September 1988.

C. MSPB ACTION

Ramirez appealed her removal to the MSPB. On December 18, 1992, the appeal was dismissed on Ramirez's motion pending medical/psychological evaluations and OWCP determinations, to be refiled no later than May 1, 1993.

QUESTIONS FOR THE RECORD
CONGRESSWOMAN CONNIE MORELLA

1. I AM CONCERNED THAT THE EMPLOYEES WHO TESTIFIED ARE UNHAPPY WITH THE ASSISTANCE THEY RECEIVED FROM THE OSC. DO YOU THINK THAT IF THEY CAME TO YOUR OFFICE AGAIN, THEIR CASE COULD BE REDEFINED AND THEY COULD GET ASSISTANCE FROM THE EXPERTS AT OSC TO, AT THE FIRST INSTANCE, PREPARE A PRIMA FACIE CASE?

One of the primary functions of our Complaints Examining Unit is to carefully interview all complainants in order to determine if any prohibited personnel practice or other violation within our jurisdiction has occurred. Such careful discussions with complainants are intended to discover allegations which were not contained in the original complaint submitted to OSC. We believe that we have had very good success with this approach; written documents are frequently not inclusive of all the problems a complainant has encountered. Additionally, we always consider any requests for reconsideration (RFR), which are not reviewed by the Complaints Examining Unit. They are considered by another unit within OSC so that a fresh view of the complaint is obtained. Any complainant who wishes OSC to reconsider our initial conclusions or who wants to present new information may do so at any time.

2. THE WITNESSES HAVE INDICATED THAT THEY DO NOT UNDERSTAND WHY THE OSC CHOOSES TO DEFEND THE AGENCIES WHEN IT IS SUPPOSED TO BE AN INDEPENDENT AGENCY. ARE YOU REALLY INDEPENDENT OR DO YOU NEED A MODIFICATION IN THE LAW TO ESTABLISH TOTAL INDEPENDENCE?

OSC does not defend the agencies in any cases. OSC conducts independent, objective investigations to determine if there has been compliance with the law. OSC became an independent agency in 1989, and we do not believe that any further legislation is necessary in this area.

3. WHAT IS YOUR TURNOVER RATE FOR CASES?

All new matters received by OSC are processed by our Complaints Examining Unit and are either referred for full field investigation or closed. The attached chart, " Average Time to Close Internal Review Matters," shows the turnover rate for matters closed at this stage over the past year.

For matters referred for full field investigation, there are two additional stages, the investigation and the staff attorney analysis after the investigation. The attached charts "Average Time to Complete Investigations" and "Average Time to Complete Prosecution Decision Process," illustrate the additional time required to complete processing at each of those stages over the past year.

In summary, matters without merit are resolved in less than 60 calendar days on the average, while matters subject to investigation and legal review are completed on the average in about 240 additional calendar days.

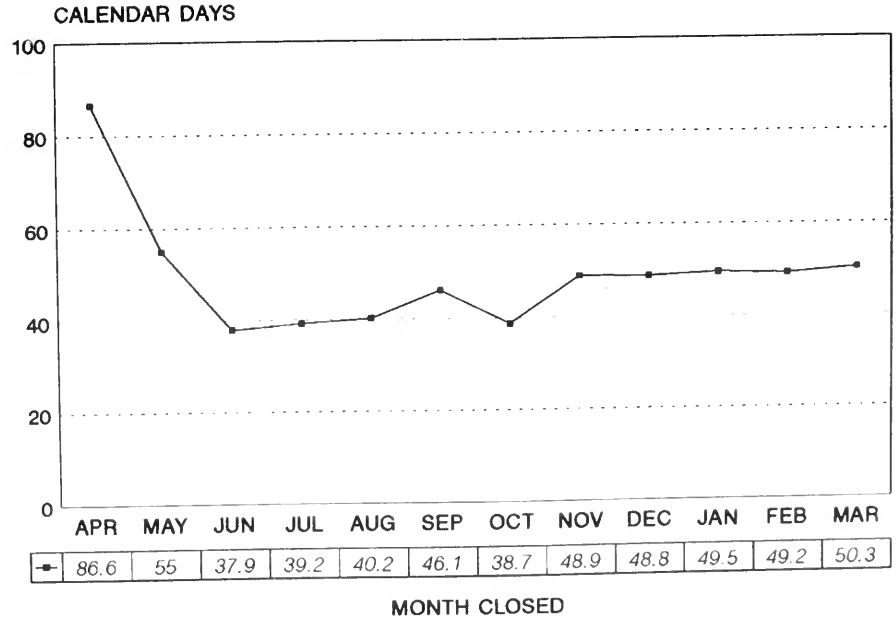
For matters warranting disciplinary action, OSC initiates litigation before the Merit Systems Protection Board (MSPB) after legal review has been completed. For the 24 disciplinary decisions issued since passage of the Whistleblower Protection Act of 1989, the litigation took an average of 394 calendar days from initial filing until the final MSPB decision.

4. EEO AND WHISTLEBLOWER CASES SEEM TO BE EXTREMELY WELL DOCUMENTED. DOES THE OSC GO THROUGH ALL THE MATERIALS TO DETERMINE IF THE CASE FALLS UNDER THE WHISTLEBLOWER PROTECTION ACT?

The Complaints Examining Unit reviews all information submitted by each complainant. In order to determine if there has been a violation of the Whistleblower Protection Act. If additional information is necessary, it is obtained before the disposition of any jurisdictional issue.

AVERAGE TIME TO CLOSE INITIAL REVIEW MATTERS

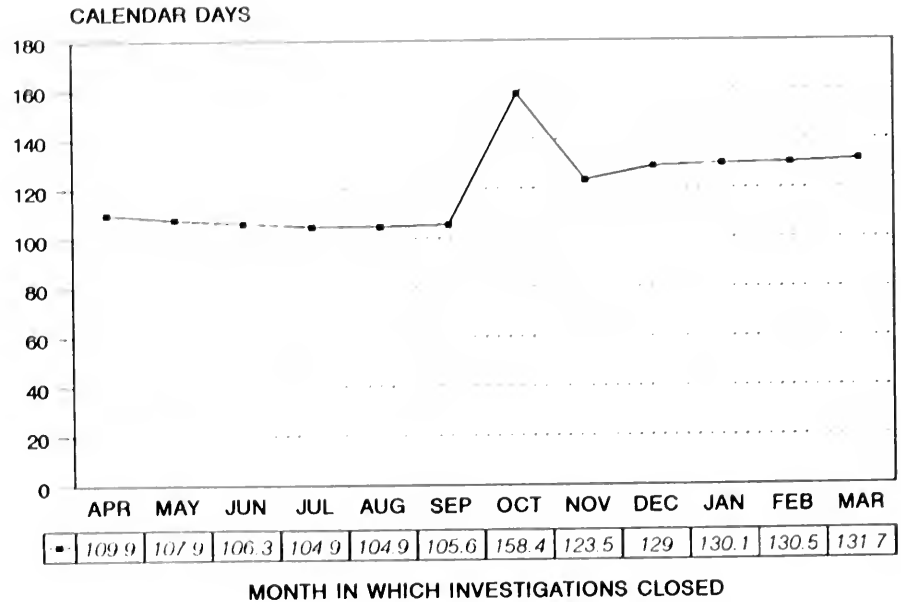
APR 1992 TO MAR 1993



AVERAGE TIME TO COMPLETE INVESTIGATIONS

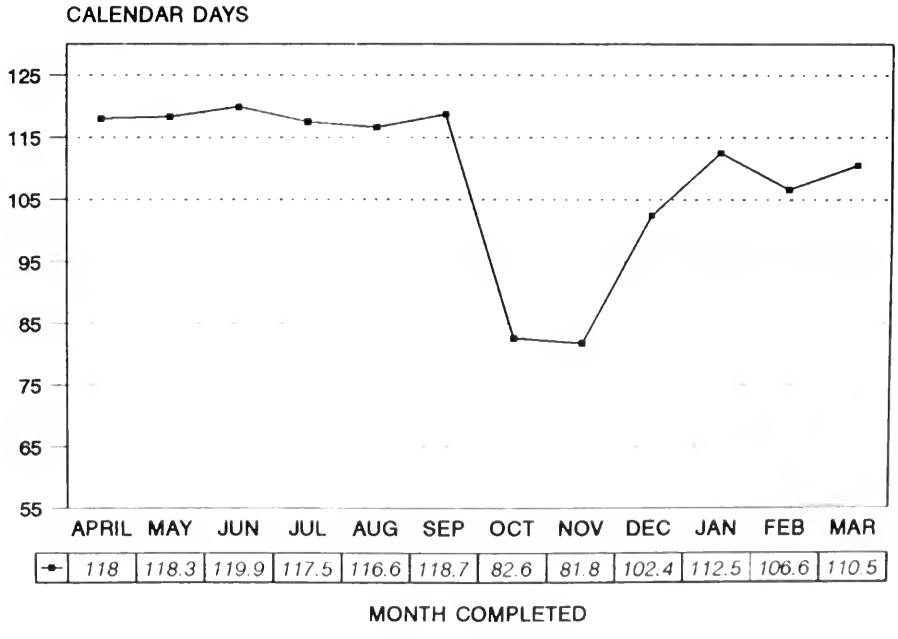
APR 1992 THROUGH MAR 1993

COMPLETED INVESTIGATIONS



AVERAGE TIME TO COMPLETE PROS. DECISION PROCESS

APR 1992 THROUGH MAR 1993



Mr. MCCLOSKEY. Ms. Morella asked how much of OSC time is spent on Hatch Act cases? What is your success rate? Do you anticipate many more Hatch Act cases after the Hatch Act reform is signed into law? Do you have adequate staffing?

Obviously, you can spin off on what happens with increased numbers of agencies within your jurisdiction or assignment.

Ms. KOCH. Increasing our jurisdiction would put a strain on our resources right now. The Hatch Act reform, as I understand the legislation as it exists right now, will continue to have the OSC be what we are now: the adviser, the enforcer.

Our case load right now within the Federal sector is not particularly significant. We have an advisory capacity. The Hatch Act requires that we advise whomever asks. We tend to do approximately 1,600 advisory opinions a year on the Hatch Act. The prosecutions are quite labor intensive when they are required.

For the most part, most of our prosecutions have been under the section of the Hatch Act which covers State and local employees in federally funded jobs. The Federal employees by and large ask for our opinion and get our advice and do a good job in their roles of maintaining their independence.

Mr. MCCLOSKEY. With evidently varying degrees of compliance in agencies that are covered, let us get real here. I believe you have spoken of an informative meeting, in your testimony, about educational missions of the agency, OSC telling the agency, various other agencies, about their responsibilities, in essence educating them.

What have you done with the DOD over the last 4 years? What has been their response? What happens in these kinds of communication.

Mr. REUKAUF. I don't have the numbers in front of me. We have gotten a lot of our corrective actions in the Department of Defense. So we have basically good cooperation with them when we have to do an investigation, when we find a problem, and we request corrective action.

Of the 264 I talked about earlier, I don't know exactly how many were in the Defense Department, but there were quite a few of them. In terms of the Defense Department not informing its employees about us or about the Whistleblower Protection Act, I really do not have any knowledge about that.

Mr. MCCLOSKEY. Do you go over there and tell them that these are the obligations? This is the Federal statute?

Ms. KOCH. We do attempt to maintain a rather high profile of informing the service agencies; and with the DOD, often it depends upon which service we are talking about, how much communication they are willing to receive.

Vigorous enforcement tends to get their attention. The more we are enforcing, negotiating, informing of what the corrective action will have to be, the better the attention we get.

Mr. REUKAUF. DOD frequently invites us to give talks about our office. In fact, we have done a couple of overseas presentations to DOD employees in the last year or so.

So they view us as a resource, I think, to speak, especially to groups of their attorneys and labor-management specialists, those

type of employees. I personally have spoken before Navy and Army and other DOD groups to explain what our function is.

I know Ms. Koch has done the same.

Ms. KOCH. I have been invited to speak to Army and Air Force operations to explain how we will enforce the law and that they should not attempt to do an end run around us.

Mr. MCCLOSKEY. I really do not have too many additional questions Is there anything else you would like to bring up? We can obviously go on and on today.

Ms. KOCH. Well, I am very pleased that you recognize there are two sides to stories, to issues. I would hope that in the future as we work together that we will listen to not only those individuals who are frustrated——

Mr. MCCLOSKEY. I understand you do have some letters from people that you helped and are appreciative of that. You may submit some reasonable number of those for the record.

[The information referred to follows:]

cy. OPF

Department of Energy
Washington, DC 20585

March 5, 1993

Honorable Kathleen Day Koch
United States Special Counsel
Office of Special Counsel
1730 M Street, Northwest
Washington, D.C. 20036

Honorable Koch:

I would like to express my appreciation to the Office of Special Counsel for their assistance in resolving an unfair action taken against me by my second level supervisor. My attempts to resolve the issue through the normal grievance procedures available to employees of the U.S. Department of Energy were not successful after the passage of over one year. Upon filing a complaint with your Office, I was pleasantly surprised at the stark contrast with the way the complaint was handled and brought to a satisfactory resolution in a period of approximately two months from the time the investigation began until I was returned to my position of record.

I would especially like to commend Mr. Taylor Smith, Investigation Division, for the outstanding job he performed. I was particularly impressed by the overall professionalism with which he performed his duties including the following: (a) prompt attention, (b) obvious familiarity with the case background when he conducted the interviews, (c) un-prompted feedback to me on the case progress and, (d) smooth arrangement of an amicable corrective action.

I learned for the first time how much grief, humiliation, and worry an employee can go through under such circumstances. Mr. Smith clearly understood these feelings and made me feel comfortable throughout his investigation.

It is most reassuring and comforting to know that the Office of Special Counsel is available and effective as an independent agency that government employees can turn to when they have genuinely been adversely treated. Mr. Smith's behavior certainly reflects upon your agency in a most commendable manner, and I hope you will pass along my expression of commendation and appreciation.

Respectfully,

H. Jackson Hale

H. Jackson Hale, Director
Systems Engineering and
Program Integration Division,
RW-32

Kathie Lee Painter
1 Birch Hill
Port Alsworth, Alaska 99653
(907) 781-2231

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MA-91-0656

March 18, 1993

M.C. Adkins
Investigator
U. S. Office of Special Counsel
50 United Nations Plaza, Suite 121
San Francisco, California 94102-4914

Dear Ms. Adkins,

Now that my case is closed I feel the freedom to thank you for your assistance, persistence and professionalism regarding my grievance. I am also greatly thankful for the Office of Special Counsel. Without this office maned with a qualified staff where would the "little" people like myself go for help?

I am sure you are aware of the final settlement and yes this does help make some of the wrong right, but there will always be questions and scars. I do regret that I did not receive a letter of recommendation for future employment from Andy Hutchison. My obvious concern is that this situation will reflect negatively on me when I seek future employment. I have worked extremely hard for 25 years only to have someone else's mistakes and misjudgments take what I have earned away from me. Do you have any suggestions?

Thank you again for your perseverance in rectifying a very complicated situation. By the way I was looking over a past letter that I wrote to you and got a chuckle as in my closing I wrote "respectively" - in courteousy to you, I close. . .

Respectfully,

Kathie Painter

Kathie Painter

cc: Joe Siegleman

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration

Refer to

Office of Hearings and Appeals
200 W. Adams, Room 510
Chicago, Illinois 60606
312-886-5552

Joseph S. Siegelman

January 14, 1993

The Honorable Dan Rostenkowski
Member, U.S. House of Representatives
2111 Rayburn House Office Building
Washington, D.C. 20515-1308

Re: Removal of F.J. O'Byrne as Hearing Office Chief Administrative Law Judge (HOCALJ), Investigation by Office of Special Counsel, and Reinstatement

Dear Mr. Rostenkowski:

Because of the fine work of the Office of Special Counsel and in particular the work of Ann Hunt of Dallas and Joseph Siegelman of San Francisco, I have been returned to the position as HOCALJ effective March 6, 1992. Mr. Louis Enoff, Acting Commissioner of the Social Security Administration, had requested the investigation after an inquiry had been made to him by the Subcommittee on Social Security.

Obviously I would desire that the Office of Special Counsel be fully funded so that the next government employee that gets unjustly removed can have competent assistance.

Very truly yours,

Francis J. O'Byrne
Hearing Office Chief ALJ at Large

cc: Social Security Subcommitte, Elaine Fultz
Ann Hunt, Dallas,Tx
Josesph Siegolman, San Francisco, CA
Office of Special Counsel, Washington, D.C.

Perkins

272 Trotting Park Road
Lowell, MA. 01854

October 27, 1991

Cathleen Sadlo
US Office of the Special Counsel
1120 Vermont Ave., N.W., Suite 1100
Washington, DC 20005

Re: OSC File No. MA-91-0328

Dear Ms. Sadlo;

In accordance with our prior telephone conversation I have enclosed a copy of the agreement which was executed on 17 October 1991 and a copy of my follow-on memo of 21 October 1991 (which clarified some additional points with regard to that agreement).

Please let me extend my sincerest thanks to your entire staff (and to you, to Mr. Perkins, and to Mr. Hamer, in particular) for the tremendous help and assistance you have all provided throughout this entire matter. I am grateful for your willingness to thoroughly and impartially explore all aspects of this difficult situation and bring it to a just and final conclusion. I do not believe that this situation would have been justly resolved without your intervention; and for that intervention I am most thankful.

If I can be of any assistance to you, Mr. Perkins, or Mr. Hamer, please do not hesitate to call upon me.

Sincerely,

Rodney R. Minklein

RODNEY R. MINKLEIN

AGREEMENT BETWEEN HANSCOM AFB MANAGEMENT

AND

MR RODNEY R. MINKLEIN

1. This agreement specifies the terms agreed to by the undersigned parties relating to the complaint filed with the Office of the Special Counsel, the grievance regarding the 1990 Performance Appraisal, and the grievance regarding the 4 March 1991 annotation in Mr Minklein's AF Form 971. Any and all agreements contained herein are not intended to conflict with any law or government-wide regulation. The parties to the above-mentioned matters hereby agree that the matters be settled as follows:

a. Management agrees to reassign Mr Rodney R. Minklein, Supervisory Management Analyst, GM-343-13, MET 33 (Position Description # 1-22878-0) to the position of Computer Specialist, GS-334-13, ESD/SCX (Position Description # 8-26413-0), located at 430 Bedford Road, 3rd floor, Lexington, MA, effective ~~28~~ 27 October 1991.

b. Management agrees to remove the 4 March 1991 annotation in Mr Minklein's AF Form 971.

c. Management agrees to change Mr Minklein's 1990 Performance Appraisal (AF Form 860A) to "Excellent" and raise Appraisal Factors 1 through 9 in order to make it the same as his 1989 Performance Appraisal.

d. Mr Minklein agrees to withdraw with prejudice the following:

(1) The complaint he filed with the Office of the Special Counsel regarding allegations of prohibited personnel practices.

(2) The grievance regarding his 1990 Performance Appraisal.

(3) The grievance regarding the 4 March 1991 annotation in his AF Form 971.

e. The parties recognize that Mr Minklein retains the right, pursuant to law, to file and pursue grievances and complaints and other actions with respect to any future issues.

Management

17 Oct 91

Acting Representative
Counsel Hearing

Employee

Rodney R Minklein 17 Oct 91

98-951 Iho Place
Aiea, Hawaii 96701

December 17, 1991

Ms Jackie Martinez
U. S. Office of Special Counsel
50 United Nations Plaza, Suite 121
San Francisco, California 94102-4914

This letter is to express my appreciation for the work performed by Ms Katryn Milligan in handling my report of prohibited practices (OSC File No. MA-91-1332)

In August 1991, after spending more than 18 months in seeking redress for what I felt were improper actions against me, I submitted a complaint to the Office of Special Counsel in Washington, D.C. After some preliminary actions the case was referred to the San Francisco Office for investigation and I was informed by Ms Katryn Milligan that she would be handling my case as quickly as her workload permitted.

In mid-November 1991, I met with Ms Milligan to clarify the issues, explain the documentation I had presented, and provide additional information to substantiate my claims. Initially she made it a point to clearly comprehend the nature of the complaint and was tenacious in forcing me to substantiate my position. As the investigation approached a conclusion she had clearly demonstrated professionalism, candor, and a sense of honesty and integrity such that I had no qualms in authorizing her negotiate a settlement in Hawaii while I was away on a trip in Baltimore, Maryland.

I am grateful because, since January 1990, I have pursued resolution of my complaint via the established Equal Opportunity complaint procedures, U.S. Senators, and the Army Inspector General. During that time I filed six complaints, reported Whistleblower Protection Act violations, and endured nearly two years of manipulative and bureaucratic delays without any indication that the matter would be resolved.

Not only did she negotiate a favorable settlement on my behalf but she was able to right an injustice against another employee. In spite of the constraints of existing laws I am grateful for being an American, and for Ms. Katryn Milligan's work in preserving and demonstrating the endurance of our Bill of Rights and the Constitution of the United States.

(1) There was also a Xmas card from second VP (Christmas) thanking me for back dated memo Trim etc. but Count Yours & ... (2) (3) (4). Verbal com-

With Sincere Appreciation,

Frank K. H. Hasegawa

February 3, 1991

Harry Law-Hing
5305 S.E. 94th Avenue
Portland, OR 97266

Jacqueline L. Martinez
Attorney
Director, San Francisco Field Office
Office of the Special Counsel
50 United Nations Plaza
Suite 121
San Francisco, CA 94102

RE: Michelle C. Adkins

Dear Jacqueline,

I was surprised and pleased to have the opportunity to meet with you during your visit to Portland with Michelle on January 29, 1991.

It seems that people are quick to report negative experiences, and are much slower to pass along the positive experiences that occur during the difficult times in their lives. I wanted to take a moment to let you know what my experience has been while working with Michelle.

I feel that you have a valuable employee in Michelle. Since my initial contact with Michelle, she has always displayed the highest degree of professionalism. She has always communicated clearly and has consistently followed through with her commitments to me. In short, Michelle has exceeded my expectations.

In all of my years as a Federal employee, Michelle is the first person that I have dealt with that I would rate as a true professional. I believe that the government could use more employees like her.

Again, it was a pleasure to meet with you. Thank you for your efforts in my behalf.

Sincerely,

Harry Law-Hing
Harry Law-Hing

4/3/91

TO:

JACQUELINE MARTINEZ,
MICHELLE ATKINS,
BRUCE FONG,
TAMAZEL MITCHELL,
& EVERYONE ON STAFF,

A MOST SINCERE THANKS
FOR A JOB WELL DONE.

IT'S NICE TO KNOW THAT
OUR JURISPRUDENCE SYSTEM STILL
WORKS.

YOUR ENTIRE STAFF IS
VERY PROFESSIONAL, JACQUELINE.

KEEP UP THE GOOD WORK.

THANKS,

Harry

I COULDN'T HAVE
DONE IT WITHOUT YOU!

Harry Stein

Ms. KOCH. I would be happy to do that. I have several with me today. I will submit them with the written questions if you would like that.

You know, these things come across my desk from time to time. They are gratifying. They are never about me; they are about the line attorney or the line investigator who is out there working with the individual.

Mr. MCCLOSKEY. We get letters, also. Every day I get letters that say I am the most wonderful person since Jesus and Eugene Debs. Then there is another file that comes in that is less complimentary.

Ms. KOCH. Let me add that when the committee has a question on how we have handled a matter, as you have heard today, there are privacy concerns about the contents of the files. On the other hand, if in your oversight function, you should be concerned about how something has been handled, you may request to see the contents of these files.

We would bring it up for you to take a look at. I would offer that as an option that you have at any time.

Mr. MCCLOSKEY. Just a concluding question that has been floating around in the back of my mind for 15 or 20 minutes. It may be naive question.

Your duties now under your Hatch Act area are in essence, are they not, to prosecute Federal employees who violate the Hatch Act; is that correct?

Ms. KOCH. Well, we have double-duty there. We advise, first. We attempt to let folks know when we are out doing our outreach that we are there to advise first so we do not have to prosecute.

Mr. MCCLOSKEY. Does that cause any kind of symbolic communications or morale dysfunction? That you are, in essence, in many ways charged to be a champion of Federal employees and in a very significant area, of possible complaint? I am not blaming this on you. You are the prosecutor.

Ms. KOCH. We are the prosecutor on Hatch Act violations.

It doesn't happen very often. That is the interesting thing. Federal employees by and large are not violating the Hatch Act.

So we are not walking into workplaces, prosecuting folks very often.

Mr. MCCLOSKEY. Well, you haven't considered it a major problem in having those dual hats?

Ms. KOCH. I know it requires—it is a heavy work load for a 100-person agency. But I hadn't considered the difficulties there. We would never be doing the two different things with the same personnel.

Mr. MCCLOSKEY. I have 20 to 30 further specific questions, Ms. Koch. Ms. Morella has five or six. We will submit them to you in writing.

I want to say thank you very much. I appreciate your attendance and participation at the hearing.

Also, there are other statements for the record, particularly Mr. Burton's was submitted to me at the beginning of the hearing.

[The prepared statement of Hon. Dan Burton follows:]

PREPARED STATEMENT OF HON. DAN BURTON, A CONGRESSMAN FROM THE STATE OF INDIANA

Mr. Chairman, I would like to congratulate you on your assuming the chairmanship of the civil service subcommittee in the 103d Congress. I know that you have worked very hard in the last few Congresses as chairman of the Postal Operations and Services Subcommittee. This year the Post Office and Civil Service Committee consolidated some of its subcommittees, and in doing so, merged the Human Resources and Civil Service Subcommittees together. As the new ranking minority member on the Civil Service Subcommittee, I look forward to working with you and my other subcommittee colleagues in the 103d Congress.

Having said all that, let me address the subject before us today, and that is the protection of whistleblowers in the Federal Government. I believe that Congress has an obligation to protect whistleblowers from reprisal by their supervisors. Many cases of waste, fraud, and abuse in the Federal Government would go unreported and uncorrected were it not for the efforts of whistleblowers. Many of my constituents have suggested that we provide monetary rewards to encourage Federal employees to find ways for their agencies to operate in a more cost-effective manner. I think this would be a good idea.

I have a couple of concerns regarding today's hearing, however. First, many of today's witnesses will criticize the Office of Special Counsel for what they view as lack of effectiveness. Regardless of whether these assertions are true, what kind of message are we sending to whistleblowers who are afraid of reprisal and need help? Will they decide that the Office of Special Counsel can't help them, and not avail themselves of assistance that is available?

Second, from my review of today's testimony, it appears that none of the specific individual cases which we will hear about today were satisfactorily resolved by the Office of Special Counsel. To get a balanced view of the situation, I think we also need to hear from people who were helped by the Office of Special Counsel and who feel that the system worked for them.

I look forward to our witnesses' testimony, and to the following discussion.

Mr. MCCLOSKEY. Being somewhat new to this, as far as I see it, there will be corrective legislation coming up in the next month or two. As I said several times, there will be one further hearing, I am sure at least with a very diversified set of witnesses. I appreciate all the help I have gotten today.

I am quite frankly, to everyone involved, very open as to what is the future of the OSC. I just appreciate all your advice and counsel.

One of the things that will carry the day most with me is what is the opinion of the OSC in the field among the full range, if you will, of very credible Federal employees. I think they are people I would listen to very much. I really appreciate all your help today.

The hearing is adjourned.

Thank you.

[Whereupon, at 1:05 p.m., the subcommittee was adjourned.]

[Additional material received for the record follows:]

3407 | Local 3407
American Federation of Government Employees
P.O. Box 111, Glen Echo Md. 20812
(202) 227-1008

March 31, 1993

Honorable Congressman Frank McCloskey
Chairman,
House Subcommittee on Civil Service
122 Cannon H.O.B.
Washington, D.C. 20515-6244

Dear Mr. Chairman McCloskey:

I am the President of AFGE Local 3407 and a representative of Dr. B. A. Jamil. I have been working with the ranking minority leader of the subcommittee, Honrable Congresswoman Morella, regarding Dr. Jamil's case and she had highlighted a report prepared and submitted by his attorney, Mr. A. J. D. Schmidt, in a hearing held by this subcommittee on October 5, 1989. Ever since that hearing, Dr. Jamil and I, have been working with the subcommittee's minority professional staff member, Ms. Heea V. Fales and have been updating the subcommittee about the status of the case in anticipation of possible action by the subcommittee to resolve this matter by enacting new legislation. Now we have been informed about this hearing and I would like to avail this opportunity by submitting the enclosed material for the record, to get Congressional help by considering the facts of this case.

Enclosed are the copies of the letters from Dr. Jamil's attending physicians to the Hon. Congresswoman Morella and to the OWCP Director which clearly demonstrates the plight of a whistleblower and how brutally he is being treated by the government, even today. This situation was apparently created by an incompetent or irresponsible employee of the OWCP which also requires your immediate intervention and action before it is too late.

On my request, Dr. Jamil's attorney has also prepared the enclosed letter to inform your subcommittee about the current status of Dr. Jamil's case its devastating effects on other employees and how the Congress can help these employees to get out of the dilemma they have been placed in, and how the Congress or your subcommittee could play a constructive role by conducting investigation into alleged billions dollars waste, mismanagement, (see attached list of projects) and cover up, and by enacting legislation, to remedy the situation. I hope this material will assist your subcommittee staff members to start the proposed Congressional action. I will be happy to assist them if they need more details in this matter. Thank you for your attention and continuous help in this matter.

Sincerely yours,

Patrick A. Weed

Patrick A. Weed
President

THE DMA SYSTEMS THAT RESULTED IN BILLIONS OF DOLLARS WASTE

1. ELECTRON BEAM RECORDER (EBR) FOR THE PHOTO LAB
2. OPTICAL SPECTRUM ANALYZER (OSA)
3. HYDROGRAPHIC SURVEY REQUIREMENT SYSTEM (HYSUR)
4. BATHYMETRIC DATA REDUCTION SYSTEM (BDRS)
5. TECHNICAL DATA LIBRARY SYSTEM (TDLS)
6. AUTOMATED NAUTICAL CHARTS INFORMATION FILE (ANCIF)
7. GEONAMES SYSTEM
8. SYSTEMS INTEGRATOR WHICH IS ALSO KNOWN AS DATA INTEGRATOR OR "MARK 85" AND "MARK 90" SYSTEMS

These are just a few systems out of many other computer systems at the Defense Mapping Agency that have resulted in wasting billions of dollars of taxpayers' money. A full independent investigation, by some experts in computer systems analysis, into all the systems that were scrapped or shelved without any reason after spending billions of dollars, can reveal the mulitibillion dollars embezzlement, fraud, and waste by the high level of DMA officials. A list of above systems was given to the DMA attorneys in the interrogatories to answer pertinent questions but all of these questions were unanswered. This list was also given to the DMA Inspector General a long time ago but nothing has happend so far. I strongly believe on the basis of all the evidence that is discovered by the depositions of the high level DMA officials in September and October 1988 that the waste and fraud through computer contracts at the DMA is even more serious than the Pentagon waste and fraud cases that are being prosecuted by the U. S. Attorney in Alexandria Va. since the evidence clearly indicates that at the DMA the high level officials had been involved in conspiracy, cover up, obstruction of justice, perjury, and misuse of discretion and national security to hide their ulterior motives. Even the Security office and the EEO office had been involved in assisting the high level officials to cover up their illegal actions. The national security is being grossly misused as a cover. I strongly believe, without a high level investigation into this matter the criminals will remain free, the mockery of justice through misuse of national security will remain unchecked, and the wastage of tax payers' money will continue at the DMA.

Dr. Basharat A. Jamil
7721 Barnstable Place
Rockville, MD 20855.

SCHMIDT, ROTH, BRENNAN & CARROCCIO
ATTORNEYS AT LAW
107 WEST JEFFERSON STREET
ROCKVILLE, MARYLAND 20850
(301) 424-3035
TELEFAX (301) 279-9088

A. J. D. SCHMIDT *•
JOHN P. ROTH *•
CHARLES S. CARROCCIO, JR.*•
JOHN P. BRENNAN *••
LEO A. ROTH, SR.
(1934-1990)

ADMITTED TO
*MARYLAND BAR
•D. C. BAR
•VIRGINIA BAR

March 29, 1993

Patrick A. Weed
President
Local 3407
American Federation of Government Employees
P.O. Box 111
Glen Echo, MD 20812

Dear Mr. Weed:

In response to your request regarding Dr. B. A. Jamil's case in view of the Whistleblower Protection Act of 1989 (WPA) and the Office of Special Counsel (OSC) I would like to state the following:

If you recall, I had submitted a report on Dr. Jamil's case for the hearing held on October 5, 1989 to the House Subcommittee on Civil Service which discussed the misuse of security clearances and national security criteria, first to get rid of a whistleblower, Dr. Jamil, and then to cover up, and to hide all sorts of the allegedly illegal actions of the high level DoD officials involved, from scrutiny by the Judiciary. Since then, Dr. Jamil's case has gone through the U.S. Court of Appeals and certiorari has been denied by the U.S. Supreme Court, all without allowing him a single chance to present what we suggest is over-whelming evidence to present his claim before an unbiased tribunal.

Since the background of this case is very lengthy and it has previously been submitted to Congress, for your purposes, I will only briefly mention some salient points in this case which I suggest call for Congress to intervene to resolve this matter.

I. DR. JAMIL'S CASE IN SOME ASPECTS IS SIMILAR TO THE BCCI SCANDAL AND IN SOME ASPECTS IT IS EVEN WORSE

Just like BCCI case, this case has also been neglected for a long time. Despite the allegations of conspiracy, and cover up of possible criminal involvement of high level DoD officials, which were being exposed by Dr. Jamil's whistleblowing, the scandal behind this case has not been investigated, under the guise of "National Security". It is time for an appropriate Congressional committee to get serious in this case and, like Senator Kerry's committee did in BCCI case, investigate all the charges, review thousands of pages of untouched evidence and hold hearings to expose the waste and misuse of billions of taxpayer's dollars.

II. THE TACTICS USED TO COVER UP THE ALLEGED CONSPIRACY AND THE ALLEGED CRIMINAL ACTS BY THE DOD OFFICIALS ARE BEYOND THE SCOPE AND MANDATE OF WPA AND CSC REQUIRING NEW LEGISLATION AND MANDATE TO STOP ABUSE AND MISUSE OF NATIONAL SECURITY AND SECURITY CLEARANCE ABSOLUTE DISCRETION

It is important to know that the DoD officials allegedly involved in Dr. Jamil's case have been very successfully playing the security clearance discretion and national security card in avoiding and evading any investigation under any existing law, rules, and regulations. They have shown in this case that by raising the spectre of "National Security" one becomes immune to any prosecution or even any investigation in the alleged criminal wrongdoings.

III. THE WRONG PRECEDENT SET BY DR. JAMIL'S CASE IS ALREADY HURTING AND IS LIKELY TO HURT THOUSANDS OF FEDERAL EMPLOYEES AND POTENTIAL WHISTLEBLOWERS THROUGH THE MISUSE OF NATIONAL SECURITY MAKING WPA AND OSC USELESS

How the Judiciary treated Dr. Jamil's case after being misled by the abuse of National Security claims by the government, is itself a long story and and I will not describe it here. However, the ability to use and abuse the claim of National Security to "stonewall" judicial investigation has set a very dangerous precedent which is being used to get rid of federal employees and potential whistleblowers.

IV. WHY AND HOW THE CONGRESS SHOULD INTERVENE AND HELP RESOLVE DR. JAMIL'S CASE AND ENACT NEW LEGISLATION BASED ON THE LESSONS LERANED FROM THIS CASE TO STOP THE ABUSE AND MISUSE OF SECURITY CLEARANCE DISCRETION AS WELL AS THE NATIONAL SECURITY

From the above, it is now obvious why it is imperative that the Congress intervene in this case. First of all it is extremely important that one Congressional committee assume the full responsibility of pursuing and fully investigating this case vigorously. Since the alleged criminal involvement and misuse of funds through unnecessary computer contracts given by the high level DoD officials involved are very similar to the scandal uncovered in the FBI "Ill Wind" operation, it is suggested that perhaps this part of this case be referred by the Congressional committee to the FBI for a full investigation. The committee should also hold hearings after the findings of the investigation of this case and enact legislation to centralize and streamline security clearance process as previously suggested with a set of guidelines that will guarantee to stop the abuse and misuse that we have witnessed and experienced here in Dr. Jamil's case.

Congress might also suggest that the rehabilitation plan called for in various medical reports (one such report is enclosed herein) should be implemented by DoD, and consider appropriate reasonable compensation for the damage caused to Dr. Jamil's health and professional reputation.

I hope this letter will help you to have the Congress pursue this matter vigorously and continuously until it is fully resolved. If you feel I can further assist in this matter, please feel free to contact me.

Sincerely yours,

A. J. D. Schmidt

Enclosure: a/s

A. S. AHMAD, M.D., F.R.C.S.
7610 Carroll Avenue
Suite# 205
Takoma, Park, MD 20912
(301)891-6160

November 23, 1990.

A. J. D. Schmidt, Esq.
107 W. Jefferson St.
Rockville, MD 20850

Dear Mr. Schmidt:

As you know, I am Dr. Jamil's family physician and he has been under my regular care ever since some of the high level officials at his work place, Defense Mapping Agency (DMA) had made his job environment so full of pressure, stress, and tension that he developed symptoms of major depression at his job and I had to advise him to stop going to his job due to its severe effect on his health. In his last appointment he gave me your message that you need a detailed medical report on his current condition and future prognosis to submit to an appellate court. I must commend the appellate court judge who has requested this report, because of his humane approach to this case which should have been the most important aspect of this case right from the beginning but unfortunately, it has been ignored the most, by our judicial system so far, despite the fact that various reports on Dr. Jamil's health condition were submitted.

I have been observing the treatment or mistreatment Dr. Jamil has been subjected to, misusing the national security, for the last five to six years, by the high level officials of the DMA, first to stop administrative hearing or investigation into their alleged wrong doings and misconduct pointed out by Dr. Jamil, to save millions of taxpayers' dollars, and then to mislead the Judiciary by effectively barring it to hold a trial to bring all the high level officials involved to justice. This mistreatment has been so blatant and worse that it constitutes the intentional infliction of emotional distress. Moreover, this mistreatment was also diagnosed by all the independent specialists to be the basic cause for his major depression. Because of the importance and seriousness of this problem and because of the fact that a great injustice is being done to Dr. Jamil in the name of national security for the last six years, I think it is extremely important that I submit my report in detail with the hope that justice may be done to this case and consequently, it may gradually help Dr. Jamil to recover from the major and severe depression.

After a thorough review of Dr. Jamil's medical record, including the reports from all the independent specialists, appointed by the Department of Labor who have examined him time-to-time, I have the following prognoses:

Dr. Jamil is suffering with major and severe depression because of on the job pressure, stress and tension caused by his employer. His condition deteriorated further ever since his hope to get justice was dashed when the U.S. District Court tried to dismiss his case prematurely, by granting the summary judgment, without holding any trial or hearing for national security reason. This made him more angry and determined to bring all the DoD officials involved to justice by all means. The anger he has expressed, though very genuinely, with the way the Judiciary has been treating this most important and strong case, has aggravated his depression so much that Dr. Burke Mealy, his therapist, had to warn him that his almost two years of therapy was not working any more and he must have to pull himself completely out of the job related litigation before his therapy and the medication he was taking would have any chance to work. Under these circumstances, considering his deteriorating health, I have recently, referred him to Dr. Linda Frey, a psychiatrist, for further examination, treatment, and better medication.

It is also noticed that the job related litigation is affecting him a great deal, even if he is trying hard to stay away from it as advised earlier. Under these circumstances, after detailed discussions with Dr. Jamil during various appointments, I have the following observations and recommendations:

OBSERVATIONS

The extensive record and evidence, Dr. Jamil has discussed with me during his numerous visits over almost six years clearly indicate the following facts:

1. Under unbiased and impartial supervisors during the first five years of Dr. Jamil's stay at the DMA, he was regarded as an excellent worker who received the "outstansing" performance and the "Quality Salary Increase" awards. According to his department chief, he had "unusual talent". He was regrded as a man of high integrity and highly dedicated and excellent professional. He had also established a great respect for his superior professional activities even outside the DMA, and he was commended by the National Science Foundation for his work on a computer science project as the Project Director. According to a letter from his immediate supervisor, on the basis of his superior education and experience, as compared to other higher grade workers at the DMA, he deserved much higher grade.

2. Because he had excellent computer systems analysis background, he was selected as a member of the Technical Evaluation Team to evaluate and rank the proposals of a multimillion dollars computer application project called the "Systems Integrator". It did not take too long for Dr. Jamil to figure out that it was one of the kind of projects that were uncovered by the F.B.I. sting operation called "Jll Wind" only four years later. When he raised his timely voice against the project and recommended to stop the project, since it was nothing but almost a billion dollars waste of taxpayers' money, the high

level officials involved, turned against him and tried to keep him quiet. But when he still kept on opposing the project and continued to express his serious concern with the way the whole project was being handled by the high level officials, they conspired to get rid of him.

3. The way they (high level officials who had conspired) implemented the conspiracy is a very long story. In short, they misused the national security excuse, on every step of the way, to cover up their highly questionable actions in spending a billion dollars on unnecessary Systems Integrator project. Every attempt of Dr. Jmail by filing complaints and grievances to have their actions investigated and to uncover their ulterior motives and involvement in the project, and have them indicted and convicted like scores of other DoD officials who have been indicted and convicted by the F.B.I. "Ill Wind" operation for similar involvements, was thwarted by the misuse of national security. So much so that the same officials, to get rid of Dr. Jamil, a determined whistle-blower, had the security office revoked Dr. Jamil's security clearance, as planned, with no reason, over the objections of their own counsel.

4. Despite the fact that Dr. Jamil has very clear and strong evidence of conspiracy and criminal misconduct of the high level officials in this episode, the national security excuse has been used by those officials so successfully that their every criminal action is so far hidden behind the dark and thick curtain of national security. First, every adminstrative level complaint and grievance filed was dismissed just by citing national security, and without any investigation into the fact that how the national security itself has been misused. Then, the Judiciary did exactly the same, when Dr. Jmail went to the courts and the MSPB to have his day in court. It is indeed mind boggling that after more than five years of very expensive litigation, our Judiciary so far, instead of solving the problem has itself become a part of the problem, by granting the summary judgment, and has sent out a a wrong but very strong message that if they get you by misusing the national security, you are doomed since Judiciary will not look at your evidence no matter how strong it is and it will not dare to question them no matter how criminal they are.

5. Over the last five to six years, Dr. Jamil has discussed different aspects of the case with me including the way the MSPB and the courts have treated his case. It is very surprising that despite the fact the evidence is so overwhelming to prove different criminal charges against the high level officials involved including the misuse of national security, conspiracy, perjury, cover up and obstruction of justice through misuse of national security, without using even a single classified document or compromising with national security, still the courts absolutely refused to look at the evidence. I am sorry to say that sometimes when this litigation was too much for his health, I had to advise him to stop or postpone participating in the litigation and gave him my recommendations in writing to postpone any hearings, still the courts continued the litigation

ignoring all the evidence and exacerbating his medical condition.

6. Ever since the court had granted the summary judgment and the MSPB had refused to hold a hearing as remanded by the MSPB, Dr. Jamil was naturally outraged to the point that his depression was turned from worse to worst and the regular therapy he was getting from Dr. Burke Mealy stopped having little effect it used to have. Then Dr. Mealy had to give him a "stern warning" to divorce himself totally from the job related litigation.

7. The facts most frequently mentioned by Dr. Jamil that keep him genuinely upset and keep on worsening his depression are as follows:

(i) The high level DoD officials involved in this case were first clever enough to conspire to get rid of him using the safest and the quickest way by having the security officials revoke his security clearance, which he believes by itself is illegal since security officials' entire clearing process is supposed to be independent from any interference from any high level officials.

(ii) The same officials then used their influence to block any investigation into all administrative complaints and grievances filed by Dr. Jamil, citing national security and effectively avoided gathering all the evidence timely.

(iii) When he went to the MSPB and the federal court to seek justice, then they refused to adjudicate perhaps the strongest case of misuse of national security as a cover to hide their criminal actions. They threw out the case without even affording him a chance to introduce the evidence, misled by the DoD claim that the courts has no jurisdiction in this security matter.

(iv) After more than five years of litigation, both the MSPB and federal court have so much misled by the DoD that they have failed to understand even the very basic issue of the case, which simply is that the high level DoD officials have misused the national security as a cover for their criminal actions and to adjudicate this issue no security matter and no classified information need to be discussed.

(v) So far the conduct of the Judiciary in this matter has shown that the national security instead of safeguarding the national secrets can be successfully and safely used for safeguarding the criminal actions of the high level DoD officials without any judicial interference.

(vi) The Judiciary has been putting the cart before the horse so far by not allowing to present the evidence in this case and trying to dismiss the case without defining the issues and examining the evidence and the witnesses.

8. Dr. Jamil had told me that after getting frustrated from the Judiciary he and his representative brought this matter to the attention of the U.S. Congress. The Congress after reviewing this matter was highly surprised and appalled over the conduct of the Judiciary and decided to hold hearings in this matter to stop the gross misuse of national security which is so apparent from this and similar other cases. Consequently, two Congressional

subcommittees are holding joint hearings in this matter and according to Dr. Jamil they have already held three hearings highlighting Dr. Jamil's case and accepting the legal brief, prepared by his attorney for the appellate court, on the hearing record. Currently, I have been told that the Congress is in a process of assigning an independent investigator to fully investigate this case and report back to Congress for further actions, such as, the criminal prosecution of all the DoD officials involved, to enact new legislation with stiff penalties to stop this kind of misuse of national security in the future, and the possible remedy or compensation for Dr. Jamil.

9. This is also important to note that because of the nature of Dr. Jamil's case a number of labor organizations nationwide are taking interest in the outcome of this case. Dr. Jamil has a baisc financial responsibility of supporting a family of six with his limited source of workman compensation approved by the Department of Labor. Apart from this he is under a huge debt of thousands of dollars of legal expenses for this prolonged litigation with no end in sight. His apparent inability to pay back this debt along with the fear of accumulating more legal debt in future has tremendous pressure on Dr. Jamil that has contributed to further deterioration of his condition by worsening his already severe depression. It is also mentioned with regrets that Dr. Jamil had also requested the federal court to assign an attorney or pay his attorneys' fees, but was declined without giving any reason. Furthermore, his continuous apprehension of losing his most sensitive profession of computer systems analysis for ever, has had an everlasting effect on his depression that impedes any hope of recovery. To elaborate further in this regard, I am attaching my October 13, 1988 note.

10. Considering Dr. Jmail's current condition where under the circumstances, therapy is not working and medication is not having as much effect, it is extremely important that he should be relieved from the tremendous litigation pressure as soon as possible. Since the court can play an important role to help relieve most of this pressure and throughout this ordeal, this is the first time that a court has asked for medical opinion to be considered in its decision, I have decided to prepare this somewhat detailed report and based upon my extensive interviews of Dr. Jamil and review of the documents provided by him I make the following recommendations.

RECOMMENDATIONS

1. Since all the administartive level complaints and grievances filed by Dr. Jamil were blocked by the DoD officials criminally involved, by misuse of national security, and no investigation took place, most of the important evidence needed to bring them to justice is still uncovered. Therefore, it is essential that first the administrative level complaints and grievances filed by Dr. Jamil be thoroughly investigated by the independent investigator appointed by the Congress and the evidence be established.

2. The Judiciary should postpone any further action in this matter until the completion of the Congressional investigation.

3. Depending upon the outcome of the investigation and the recommendations of the independent investigator, the Congress should either adjudicate this matter, or else transfer all the evidence and material gathered to the court of proper jurisdiction for indictments and trial of all the officials involved and to award proper compensation to Dr. Jamil including punitive damages for all pain and suffering being endured by him.

4. To alleviate Dr. Jamil from the tremendous pressure of past and future legal debt which is one of the major factors for his continuous severe depression, I would suggest two possibilities. First, just like the DoD is paying all the medical expenses, the Judiciary should order the DoD to pay all the legal expenses as well, until this matter is resolved. Secondly, since this case is of national interest which is likely to help the Congress to enact new legislation to save billions of dollars in future, the Congress should appropriate enough funds through the independent investigator for payments of all past and future legal expenses in this matter.

5. Since one of the major factors for Dr. Jamil's continuous and worsening depression is that he has been forced to stay at the same grade level again misusing national security, while according to his first supervisor, a number of employees at his workplace who were far less educated and experienced have been routinely promoted to much higher grades, it is essential that his compensation should be adjusted to the grade level he would have been based on his background and experience, had he not been mistreated which according to all the physicians is the only cause for his major and severe depression.

I sincerely hope that this letter will help you and the appellate court in understanding the agonizing situation Dr. Jamil has been experiencing since last six years for no fault of his own which is resulted in loss of his most sensitive profession of Computer Systems Analysis apart from serious health problems. I again appreciate the judge who has asked for this report on Dr. Jamil's medical condition and hope that he will help him to get out of this dilemma. If you have any further question in this regard, please feel free to contact me.

Sincerely yours,

11/23/90

A. Shamim Ahmad
M.D., F.R.C.S.

A. Shamim Ahmad
M.D.F.R.C.S.
11412 Deborah Drive
POTOMAC MD 20854

Phone (301) 983-0371

Date_____

October 13, 1988.

TO WHOM IT MAY CONCERN:

I am Dr. Basharat Jamil's family physician and he had been under my constant care ever since he had developed the symptoms of headache, backache, and insomnia because of working in an environment that was full of severe pressure, stress and tension. He was also examined by other specialists, Dr. Mealy, Dr. Greenwood, and Department of Labor appointed specialist Dr. Brian. After exhaustive examination it is diagnosed that he has been suffering with anxious and major depression due to his work conditions and environment.

In order to understand Dr. Jamil's agony and prolonged illness, it is important to look at his profile. According to his supervisors, he had outstanding job performance and he had demonstrated unusual talent in his profession. He was also commended by the National Science Foundation for his initiative and the outstanding job he had done on a computer science project and was awarded international travel grant to complete that project. Dr. Jamil is a man of principle and honor. He never compromises on principle, instead, he prefers to stand up to the occasion and fight for the principle, which he did when he was a member of the Technical Evaluation Team and opposed a multimillion dollars defense project stating it was wastage of taxpayers' money. By doing so he has suffered a great deal and his ego has been badly shattered by the highly unusual and stressful environment created by the high level DoD officials. Due to the litigation he has been involved in, just fighting for the principle and trying to save millions of taxpayers' dollars, his condition has been deteriorated. The only period when he showed some improvement was when I advised him to try to stay away from this litigation and take vacation far away from this environment. After he came back, it did not take too long before he went back to the same depressive syndrome. I have also noticed, when he has to recall the unpleasant and unusual treatment he had received at his job, his condition gets worse.

Dr. Jamil's treatment as a computer systems analyst at his job by his employer is somewhat similar to a highly talented surgeon in the Surgery Department of a hospital where he had been mistreated by the management to the point that he had been stopped to perform surgery and instead, he had been assigned to keep inventory of the equipment and supplies for the same department. When he tried to keep in touch with what is lately happening in surgery in order to save his profession, he had been given a written warning to stop it stating it is not job related. No doubt, this situation would be very frustrating and detrimental to the surgeon's health and profession. In Dr. Jamil's case it was even worse, since his profession is even more

technical in a sense that he had to perform surgery on a variety of computer systems that require high degree of concentration and proficiency, for which he had to stay in touch constantly with the state of the art developments in computer science. In order to humiliate him, all the technical projects were taken away from him and were assigned to junior employees working in the same division, and the only permanent project assigned to him was that of the custodian of the same division in which he used to perform systems analysis and computer applications. Then to humiliate him further the management had suspended his security clearance and he was given a "pink badge" which is regarded as a symbol of shame among the fellow employees since it reflects the tarnished credibility of the employee. Indeed, anybody going through this ordeal, just because he had dared to point out to the mutimillion dollars waste due to the incompetency, mismanagement, and other personal reasons of the Technical Director, will go into severe depression and his profession will be devastated.

The lengthy litigation Dr. Jamil had been involved in, with anxious and major depression, has prolonged his agony and has also damaged his highly technical, sensitive, and competative profession to the point of no return. The question of being productive in his profession to any degree will come after his complete recovery from depression which under the circumstances seems nil. Since his prime and the most productive time has already been wasted by keeping him out of touch with his profession for so many years, it is not possible to re-educate and re-train him in computer systems analysis at this stage to be as productive as he would have been, had he been treated normally by his employer. Therefore, it is strongly recommended that Dr. Jamil be given retirement in his most sophisticated, technical, and demanding profession of computer systems analysis.

For his recovery from depression, it is extremely important that he must try to keep his mind completely detached from the bitter experience and memories of intentional infliction of emotional distress by his employer, which he has been unable to do so far because it was so severe. Moreover, the scars he has received from the mistreatment of his employer seem to be permanent since they have made him so angry and revengeful that he is always preoccupied and obsessed with the litigation against those high level DoD officials in order to teach them a big lesson. Therefore, under these circumstances he will have to be under constant medical care for indefinite period of time.

Sincerely,

Dr. A. Shamim Ahmad

cc: Dr. Mealy
Dr. Greenwood

A. S. AHMAD, M.D., F.R.C.S.
7610 Carroll Avenue
Suite# 205
Takoma Park, MD 20912
(301)891-6160

March 4, 1993

Director - OWCP
Department of Labor
Division of Federal Employees' Compensation
800 North Capitol Street, N.W.
Washington, D.C. 20211

RE: Dr. B. A. Jamil
File # A25-277554

Dear Sir:

We are attending physicians for the above referenced DOD employee. He has given us the copies of a memorandum to you, and a letter to him, dated February 2, 1993 written by Mr. Kenneth Moxley, along with the enclosed copy of his response dated February 17, 1993 to Mr. Moxley. Since we have been fully aware of the circumstances and contributing factors of Dr. Jamil's original anxious and severe depression and the subsequent continuous mistreatment by federal officials that has prolonged and worsened his depression, it is extremely important that we bring the following facts to your attention in order to stop the continuous badgering of Dr. Jamil that has been resulting in reversing any progress we have been desperately trying to make to get him out of the anxious and severe depression.

We are sorry to say that Mr. Moxley's memo to you and his letter to Dr. Jamil are the latest examples of such badgering and emotional distress that put him on an emotional roller coaster nullifying instantly, a little bit of progress we have made, in a long time, in our efforts to improve his condition to the level that a rehabilitation process may be started.

We do not know what kind of experience and background Mr. Moxley has. But reading his memo and letter to Dr. Jamil, it is clear that he as not at all familiar with the most sensitive nature of Dr. Jamil's medical condition and the most complex nature of his case. A careful review of our letters and reports and of those physicians appointed by OWCP as well, in Dr. Jamil's case file with OWCP, clearly support this claim and further indicates the following facts:

1. The very first para of the Mr. Moxley's memo and the second para of his letter to Dr. Jamil, both are in contradiction with the foregone conclusion of the OWCP appointed physician, Dr. Lawrence A. Brain. Dr. Brain in his September 2, 1992 comprehensive report, in response to OWCP inquiry, after examining Dr. Jamil, emphatically states:

"In reviewing contributors to the onset of the depression, I find no factor outside of employment that would be contributory. ... there appears to be corroborating evidence to support the claim by him that he has been subject to action and attitudes by his supervisors that were deleterious to his future and undermined his employment stability. Hence, being faced with even further regressions in his career objectives and his very job being placed under threat, it would be my opinion that the claimant began to experience a depressive process which initially has its onset as somatic complaints but has subsequently progressed. ... Therefore, in answer to the specific questions raised, it is my conclusion that the claimant presents with a Major Depression (DSM III: 296.2). It is my further conclusion based on the above rationale that his condition is causally related to conditions of employment and at this time temporarily disables the claimant from employment."

2. Mr. Moxley's memo is also in contradiction with his first letter to Dr. Jamil dated October 22, 1992 in which he did mention, "Your accepted condition is anxious depression . . ." This letter was responded by Dr. Jamil's November 10, 1992 letter and our November 16, 1992 letter. Please note that Dr. Jamil had appended to his response the copies of our letters to Dr. A. Walter Hoover, M.D. dated 12/3/91 and to Ella McKoy dated 8/4/92, both are employees of OWCP. These letters clearly address in detail, all the questions Mr. Moxley had raised in his letter to Dr. Jamil (please see the OWCP case file).

3. Mr. Moxley responded to our letter with his 12/28/92 letter informing us that our proposed rehabilitation process cannot be followed by OWCP due to the FECA. We again replied to his letter with our 1/20/93 letter informing him that our rehabilitation process is absolutely essential first to get Dr. Jamil out of his depression and then eventually take him back to the workforce in his profession. Instead of complying with our proposed plan and to wait until the outcome of the Congressional efforts in this matter, he hit Dr. Jamil with his 2/2/93 letter with which any progress we have made in treating his depression has been eliminated, worsening his depression further.

4. Despite the fact that we have clearly mentioned in our 1/20/93 letter to Mr. Moxley that the four factors are the essential parts of our proposed rehabilitation plan which is absolutely necessary to implement to help Dr. Jamil get out of his depression and rehabilitate him in his profession, Mr. Moxley has still misstated us in his memo by stating, "According to Drs. A. Shamin Ahmad and Linda Frey, the claimant cannot begin any rehab program until the following factors are settled: ...". As a

matter of fact, what we mentioned was the rehab program. We had also told him in our letter that even if the OWCP is unable to implement the rehab plan, the Congress is taking interest in Dr. Jamil's case. It is therefore essential that we give the Congress a chance to intervene and resolve this matter. We believe, under the unusual and unprecedent circumstances surrounding this case, the Congress will support the rehabilitation plan we propose. This will not only provide the Congress with an opportunity to enact legislation to resolve the problems created by misuse of security clearance and national security but will also fully help Dr. Jamil to overcome his depression and re-enter his profession.

5. Mr. Moxley seems to have totally overlooked the fact that OWCP's originally accepted symptoms of Dr. Jamil's "Anxious Depression" have never been fully cured. He has also ignored the fact that psychological/emotional injuries are not so easily repaired when the environment causing the injuries is not changed or improved. Dr. Jamil is facing the dilemma where the environment is actually getting worse. Mr. Moxley's threat to cut off his workmen's compensation benefits prematurely, before he is fully recovered from the original symptoms and a rehabilitation program may have been implemented, has served to significantly exacerbate his symptoms.

6. Mr. Moxley also has ignored the single most important factor contributing to Dr. Jamil's "Anxious Depression" which is the fact that he, being a computer systems analyst, had been grounded, to stop his criticism of mismanagement and waste, by his supervisors for almost two years prior to his depression, to merely a custodian job with Ph.D. in Applied Mathematics and Computer Science. This very act is tantamount to suffocating him professionally. This is like demoting a brain surgeon in a surgery department of a hospital to nothing more than a janitor's job for almost two years. For any rehabilitation plan to succeed, Dr. Jamil will require substantial re-training to bring him up-to-date in his field, and he will need to have the ability to carry out his profession. This means that he will require the re-institution of his wrongfully removed security clearance. For further detail in this matter, please see our detailed letter to Dr. Jamil's attorney, Mr. Schmidt, in his OWCP case file. We are also unable to understand Mr. Moxley's haste and impatience expressed in his memo to expedite Dr. Jamil's rehabilitation, despite the fact that in our correspondence with him we had explained our prognosis and related rehabilitation plan. We had also strongly recommended that any action be tabled until Congress has an opportunity to review and resolve this case.

7. It should be particularly noted that Mr. Moxley is wrong in stating in his memo, "The above conditions imposed on OWCP by treating physicians appear to be similar to settlement conditions". We have proposed our rehabilitation plan after a great deal of research into the symptoms and causes of Dr. Jamil's prolonged depression and the behavior and tactics of the DoD officials, who have originally put him in this situation and

have been continuously misusing the national security to keep a cover on their actions by stopping judiciary to bring them to justice. This is a very complex case and one has to go over a huge record to ascertain the real situation Dr. Jamil has been put through just because he had spoken out openly against mismanagement and waste of a vast sum of taxpayers' money by higher level DoD officials. This has had a devastating effect on his physical and emotional health and well being. Under these circumstances, which cannot be ignored, we believe our rehabilitation plan is the best way we have proposed considering all the contributing factors to help him to get out of the prolonged depression and at the same time return him to work. There is no doubt, Dr. Jamil is very anxious to go back to work. But what kind of work? He is certainly not in a position to work as a computer systems analyst. For this, he needs to more fully recover from his depression which is going to require a change in the anxious environment which created his illness, as well as the standard treatment of medication and psychotherapy. Then as noted earlier, he has to go through full education and training in the profession for which he was fully qualified and for which he spent many long hard years to be trained, resulting in the "Outstanding Performance" awards on his job.

We hope this letter will help you to understand Dr. Jamil's current medical conditions, predicament, and dilemma he is facing and our proposed rehabilitation process which is good both for his cure and rehabilitation, if implemented as recommended. If you have any question in this regard, please feel free to contact us.

Sincerely yours,

Linda R. Frey, M.D.
Psychiatrist
Diplomate, American Board
of Psychiatry & Neurology

A. Shamim Ahmad
M.D., F.R.C.S.

cc: Mr. Kenneth Noxley
Honorable Congresswoman Connie Morella

February 17, 1993

Mr. Kenneth Moxley
Office of Workers' Comp. Programs
800 North Capitol St. N.W. Suite
Washington, D. C. 20211

Ref. File OWCP: [illegible]

Dear Mr. Moxley:

I have received your 2/2/93 letter along with the memo to the Director. Please note that as before, I am always ready and anxious to get back to work in my profession Computer Systems Analysis, although your memo to the Director is not correct, is not complete, and therefore, is misleading. As you know, the OWCP had previously hired to rehabilitate me and I had cooperated fully with your designated referrals. But when my attending physicians were informed, they did not find me fit for rehabilitation and they also disagreed with OWCP rehab. plan. At that time the OWCP did agree with the physicians' recommendation and had stopped its rehab. plan.

Please note that I am passing on a copy of your 2/2/93 letter and the memo to the Director, to the attending physicians with a hope that they will find me fit for the rehab. As soon as they allow me to start the rehab. plan, I will contact you and I will be happy to get back to my profession.

Sincerely yours,

B. A. Jamil

A. S. AHMAD, M.D., F.R.C.S.
7610 Carroll Avenue
Suite# 205
Takoma, Park, MD 20912
(301)891-6160

March 24, 1993

Honorable Constance A. Morella
U.S. House of Representatives
Washington, D.C. 20515

RE: OWCP File # A25-277554

Dear Congresswoman Morella:

Dr. Jamil has given us a copy of the letter and Termination of Compensation Order signed by Ken Moxley dated March 12, 1993 and a copy of the memorandum from Ella McKoy to the Director dated March 12, 1993. He has also informed us that he has already faxed you the same, along with our March 4, 1993 letter to the Director of OWCP in response to Ken Moxley's February 2, 1993 letter and memorandum.

Since you are a ranking minority leader of the Subcommittee on Civil Service and you have been helpful to Dr. Jamil in the past, we believe it is extremely important to apprise you of recent events and seek your assistance. This is extremely vital considering the devastating effect Mr. Moxley's action has had on Dr. Jamil's health exacerbating the clinical depression.

At present, Dr. Jamil has a significant sleep, appetite, and sexual disturbance, difficulty in concentrating, diminished energy and libido. His interpersonal relationships are disrupted by increased irritability. He feels helpless and hopeless, and is totally demoralized. He is also experiencing stress-induced physical symptoms, particularly, neck and back pain and gastrointestinal disturbance. Further, please note the following facts in this matter:

1. MR. MOXLEY HAS OVERRULED THE MEDICAL OPINION OF ALL THE OWCP APPOINTED INDEPENDENT PHYSICIANS:

Dr. Jamil has been examined at different times by OWCP appointed specialists and they have filed their detailed reports on Dr. Jamil's condition and prognosis. The most recent specialist was Dr. Lee H. Haller, M.D., P.C. who had filed his detailed report to OWCP on December 10, 1990 after interviewing Dr. Jamil and reviewing independent medical examination reports of the following Dr.'s: Bruce Smoller, M.D., Lawrence Brain, M.D., Allan Berger, M.D., Captain Gerald M. Welch, M.D. and Major William G. Ellien, M.D. (both of Walter Reed Army Medical Center), J. Burke Mealy, Ph.D. psychologist, and Lawrence Greenwood, M.D. He states in his report, "Again, I am in accord

with previous examiners in that I find absolutely no basis other than his work environment as a precipitant for his depression. The letter from his colleague indicating that there was a conspiracy to get rid of him would, it seems to me, indicate that there were efforts being made to get rid of Dr. Jamil." (see page 10 of Dr. Haller's report in OWCP case file of Dr. Jamil). Despite his lack of medical training, Mr. Moxley contradicted all of the above experts in his efforts to ignore the facts and rewrite the history of this case in order to terminate Dr. Jamil's compensation.

2. MR. MOXLEY IS EITHER TOTALLY IGNORANT OF THE FACTS OF THIS CASE OR HE IS TRYING TO OVERRULE THE FINDINGS AND COMMITMENTS MADE BY THE OWCP DIRECTOR IN HIS OCTOBET 27, 1992 LETTER TO YOU:

In response to your October 4, 1992 letter to the Secretary of Labor, the OWCP Director, Mr. Lawrence W. Rogers, in his October 27, 1992 letter has clearly acknowledged by stating, "The district office can implement a rehabilitation program, once Dr. Jamil's condition has reached a level where rehabilitation is feasible. However, according to the medical evidence of record, his psychological condition has not stabilized to a point where he can re-enter the workforce." (see attached letter from Director OWCP). In view of this letter, Mr. Moxley's recent correspondence indicates that he is completely ignorant of the facts of this case. He has gone ahead and signed the Order of Termination of Compensation on behalf of the OWCP Director, perhaps without affording the Director a chance to review what he was signing on his behalf.

3. THE ORIGINAL DEPRESSION CAUSED BY THE DOD OFFICIALS WAS NEVER FULLY CURED AND NOW THE OWCP OFFICIAL HAS EXACERBATED IT:

The above mentioned conspiracy of the DoD officials in Dr. Haller's report and subsequent continuous cover up through misuse of security clearance and national security were basic reasons for Dr. Jamil's depression which we have been trying to treat. Dr. Jamil has been on antidepressant medication (first Pamelor and currently Zoloft) and has been seen regularly for psychotherapy. While some of his symptoms were lessened with the treatment, his condition has deteriorated markedly because of this extraordinary stress. His current clinical status is noted earlier in this letter.

4. UNDER THE CIRCUMSTANCES, WE IMPLORE THE U.S. CONGRESS TO INTERVENE AND HAVE THE DOD COOPERATE TO IMPLEMENT THE COMPREHENSIVE REHABILITATION PLAN PROPOSED BY US AND HAVE THE OWCP CONTINUE COMPENSATION UNTIL DR. JAMIL IS WELL AND REHABILITATED IN HIS PROFESSION:

We would like to make it very clear that our only concern is Dr. Jamil's health. We have nothing to do with the legal aspects of his case as long as it does not have impact on his health. In this case, however, it is patently clear that noxious circumstances have caused his illness. Therefore, we believe that

it is incumbent on the government, which created this noxious environment, to do something to improve it. Without these changes, even with the best of medical care, it is unlikely that Dr. Jamil will fully recover. Because of this, after careful deliberation, we had designed and proposed a comprehensive rehabilitation plan to help him get better and rehabilitate gradually. We were encouraged by the OWCP Director's October 27, 1992 letter to you stating that the OWCP will implement the fourth element of our proposal as soon as it is feasible. The DOD has jurisdiction over the first three elements and they should be addressed by DoD. We feel it is especially critical that his security clearance, wrongfully revoked, be restored. If not, he will remain crippled in his ability to carry out his profession for which he trained many years and for which he is well qualified. Under the circumstances, it is now imperative that the appropriate committees of the Congress, such as the Subcommittee on Civil Service, intervene quickly.

Thank you very much for your help in this matter. If you have any question, please feel free to contact us.

Sincerely yours,

Linda R. Frey MD

Linda R. Frey, M.D.
Psychiatrist
Diplomate, American Board
of Psychiatry & Neurology

A. W. S. Ahmad

A. Shamim Ahmad
M.D., F.R.C.S.

Enclosure: a/s

cc: Director - OWCP

NOV 12 '92

U.S. Department of Labor

Employment Standards Administration
Office of Workers' Compensation Programs
Washington, D.C. 20210

OCT 27 1992

File Number: A25-277554

NOV 12 1992

The Honorable Constance A. Morella
U.S. House of Representatives
Washington, D.C. 20515

Dear Congresswoman Morella:

Thank you for your letter dated October 4 concerning the compensation claim of Dr. B. A. Jamil.

Dr. Jamil's treating physicians, Dr. A. S. Ahmad and Dr. Linda R. Frey, have recommended a four point rehabilitation plan for treatment of Dr. Jamil's psychiatric condition. Three of the elements recommended: (1) paying the debt for his civil litigation against the Department of Defense (DOD); (2) adjusting his grade, with promotions, with other DOD employees with similar job titles, education, qualifications, and experience, coupled with retroactive compensation; and (3) reinstating Dr. Jamil at an adjusted grade level in a different federal agency with a security clearance, fall outside the purview of the Office of Workers' Compensation Programs. These issues should be addressed by the DOD, as that agency has jurisdiction over such matters.

The fourth element, providing technical and educational training for Dr. Jamil, is part of the rehabilitation process provided under the Federal Employees' Compensation Act. The district office can implement a rehabilitation program, once Dr. Jamil's condition has reached a level where rehabilitation is feasible. However, according to the medical evidence of record, his psychological condition has not stabilized to a point where he can re-enter the workforce.

If Dr. Jamil has additional questions, he may wish to contact the U.S. Department of Labor; Office of Workers' Compensation Programs; 800 North Capitol Street, N.W.; Room 800; Washington, D.C. 20211; Telephone (202) 724-0713. That office has immediate access to Dr. Jamil's case file and is in the best position to assist him.

Thank you for your interest in this matter.

Sincerely,

Lawrence W. Rogers

OCT 29 1992

LAWRENCE W. ROGERS
Director, Office of
Workers' Compensation Programs

1916 1991
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STATEMENT OF

A. E. FITZGERALD

POST OFFICE AND CIVIL SERVICE COMMITTEE

SUBCOMMITTEE ON CIVIL SERVICE

MARCH 31, 1993

Mr. Chairman and Members:

Thank you for inviting me to submit this testimony for the record of today's hearing.

To avoid repeating myself, I am resubmitting and including by reference my June 26, 1985, statement to this same Subcommittee on the same subject. In order to keep this discussion in proper sequence, I would suggest that readers of this testimony read my attached 1985 statement at this point.

My 1985 testimony apparently was not persuasive, so I want to expand and elaborate on it in hopes of better results this time. As with my earlier testimony, I have not submitted this statement to my employer for clearance, so I cannot say whether the Air Force or the Department of Defense will agree with me.

Now that the Civil Service "Reform" Act is nearly 15 years old, it is clear that the big winners in the so-called reform effort are dishonest patronage distributors, the parties who profit from these distributions, the vast cover-up industry which shields the unsavory workings from public view, and those who exploit the victims of this nightmare system. The losers, of course, are the taxpayers, the environment, public health and safety, and those of the taxpayers' employees who try to live up to their public interest obligations.

In my 1985 statement, I agreed cryptically with Mr. O'Connor, then the Special Counsel, that the system he supervised, awful and

unfair as it was and is, was working exactly as its framers intended it to work. I realize this was a harsh statement and possibly needs more proof to convince fair-minded new members of Congress who were not involved in the 1978 fiasco. I hope to do this in part by submitting for your consideration excerpts from my 1989 book, The Pentagonists.

This story starts with the 1976 Presidential campaign:

> My friends believed that Carter would listen to the sound of the blowing whistles and would come down hard on waste and corruption. Then Jimmy Carter told us so directly and personally. On October 23, he came to Alexandria, Virginia — very near my home — and gave a speech, saying in part:
>
> > As I've traveled across the country, I have heard thousands and thousands of Americans say they don't believe the federal government can be made to work again. This pessimism about government is so widespread that many people have lost faith in the very idea of public service. The word "bureaucrat" has become a pejorative word, almost an insult.
> >
> > It wasn't always like this and it doesn't have to be anymore. The federal government can be well managed. It can be efficient. It can be responsive. It can once again be a source of pride to the public and the public servant.
> >
> > I want to talk today about what government reorganization will mean to the thousands of federal public servants. I share the public's disillusion with its government — and I know that you do, too. But the backlash should not be directed against government employees who want to do a good job, but against the barriers that hold them back.
> >
> > If I become president, I intend to work with career civil servants, with Congress, with leaders of business and labor, with academics, and with many other groups to devise a reorganization that will eliminate waste and inefficiency and overlapping and confusion in the federal government and make our government truly efficient once again.
>
> Going on in this vein, Carter arrived at a promised four-point program, with the final point directed at my case:
>
> > Fourth, I intend to seek strong legislation to protect our federal employees from harassment and dismissal if they find out and report waste and dishonesty by their superiors or others. The Fitzgerald case, where a dedicated civil servant was fired from the Defense Department for reporting cost overruns, must never be repeated.
>
> How often does a candidate solicit somebody's vote by singling him out by name and promising to right the wrongs he suffered? I couldn't help being optimistic. These were words I'd been hoping to hear for years.

In the book I went on to recount how in the period immediately after President Carter's election, I had been invited to become a board member for the Fund for Constitutional Government (FCG), whose president then was famous civil rights lawyer Charles "Chuck" Morgan, Jr., and how I had been solicited by the Carter transition team to become a political appointee to help cut costs in the Pentagon. I told how President Carter had then retreated from his campaign commitment to reduce military expenditures and had become an unabashed advocate of military spending increases. In the course of this transformation, President Carter had selected Harold Brown as the new Secretary of Defense. As outgoing Secretary of the Air Force under Lyndon Johnson, Dr. Brown had recommended to the incoming Nixon administration that they get rid of me after I had told embarrassing truths about one of Dr. Brown's programs. Brown's appointment was bad news for me and, as I explained in The Pentagonists, bad news for the taxpayers.

> Under Brown the pressure mounted to obligate and spend. The notes of the DoD financial managers' meeting of February 22, 1977, reports Assistant Secretary [Comptroller] Fred Wacker's words: "Mr. Wacker stated that recent reports indicate that FY 1977 execution is lagging behind plan to date, both in terms of obligations and outlays, and urged the FM's to investigate the significance of this information." Translation from the bureaucratese: you guys aren't spending the money fast enough. Quit stalling!
>
> White House instructions for this speed-up came in the form of a directive titled "The Economic Stimulas [*sic*] Program." My sarcastic friends said that the spelling showed the educational level of Carter's South Georgia brigade, but I knew that its spirit came straight from Wall Street.
>
> By May 2, 1978, Fred Wacker was almost hysterically telling the financial managers to get out there and spend. He told the meeting of that date: "There is no cap on expenditures and . . . the DoD is certainly not restricted from exceeding the established target. Any unexpended balance should be analyzed to determine cause."

As President Carter retreated from the frugal statements of his campaign, his enthusiasm for tellers of truths embarrassing to the boondogglers diminished in lockstep. Ever the optimist and steadfast believer in the perfectability of man, I tried to put into practice President Carter's campaign proposals as part of my middle management work in the Pentagon. The following passage from The Pentagonists recounts one of these attempts and shows how the present cynical and wasteful Civil Service system got its start. It starts with an invitation I received to address a national meeting of the American Federation of Government Employees:

> I took advantage of their hospitality by making a speech in which I combined candidate Jimmy Carter's proposals for budget balancing and remotivating government employees with my own suggestions from the paper I had sent Mitzi Wertheim the previous fall. All in all, it was a tough talk to address to the leaders of a government union. I told them that integrity started with the understanding that there is no such thing as government money. It is all taxpayers' money. I asked them (along with the rest of us) to shape up and cut out waste. I said that meant they would have to live with lower budgets and help achieve lower costs. I gave some examples of the trials and tribulations good stewards have to suffer, but I reminded them that we were employed by the taxpayers to do an honest job. It was up to us to believe candidate Carter's commitments and to take things into our own hands to follow through.
>
> The average American, brainwashed to believe that all merit-system federal employees are mediocre hacks with very little interest in their work, would assume that such an audience was hostile to my message. But let the *Federal Times*, a federal employees' newspaper, describe the reaction:
>
> > Suddenly, Fitzgerald was part of the audience. He needed to explain no more. The frustration he apotheosized [sic] was written on almost every face in the audience.
> >
> > Hands were shooting up. Stories about waste, mismanagement, corruption, and cover-ups began pouring out from all sides. Complaints went uninvestigated, complainants were punished, documents destroyed. . . .
> >
> > It seemed an endless orgy of accusations in southern lilts, midwestern drawls, and Bronx accents. . . . There were many Fitzgeralds now, countless numbers, and all of them felt that the big shots who commit crimes go scot free, while the little guys, honoring their Code of Ethics, get slammed for revealing wrongdoing.

Carried away by all this, I went too far. I promised my audience that, as a supergrade (one of the three highest civil service categories) in the office of the secretary of the Air Force, I'd try to follow up on any horror stories they had documentation for or credible witnesses to prove.

In a vulgar but apt phrase from my native Alabama, I was letting "my mouth overload my ass." I began to get more horror stories than Alfred Hitchcock ever dreamed of. Embarrassed yet encouraged by this reaction, I bundled up my speech and some of the favorable press notices and sent them through channels to the president, explaining to the secretary of the Air Force — an inert figure named Stetson — that "I would like for President Carter to know how well his program can be received by the rank and file of DoD employees when it is put to them the right way." About a month later I got the package back with a note saying that it was "inappropriate" to send to the president.

I persevered in trying to get a hearing. I got an appointment with Greg Schneiders, a Carter adviser who was now a White House assistant. I gave him my package from the highly successful AFGE pitch and the material I had submitted to the Carter-Mondale recruiters the previous fall outlining my ideas for squeezing the fat out of the military budget. Schneiders was sympathetic but firm in telling me that Harold Brown was in charge of the Pentagon.

I redoubled my efforts to get an appointment with Brown to try to make common cause with him in fulfilling Jimmy Carter's campaign commitments. Senator Proxmire tried to help me get appointments both with Brown and with higher-ups in the Carter White House, but all of our attempts met with stony silence. My friends wrote letters to the president on my behalf and got back form replies from the Office of Civilian Personnel Operations at Randolph Air Force Base in Texas. Chuck Morgan, interceding for me, had conversations with Hamilton Jordan, Attorney General Griffin Bell, and other insiders. He never told me specifically what they said, but much later he did remark cryptically, "You never had a chance."

Discouraging though this was, I thought I might get somewhere with Ralph Nader's support. During the Nixon and Ford administrations, Nader had spoken out clearly to defend truth telling in government. And he had helped me personally. At an October 28, 1970, conference of government administrators in Washington he had deplored "the concept of heroism in civil service that called for employees to sacrifice their careers if they dared point out threats to the public purse or safety. . . . Blowing the whistle is a cardinal safeguard of public interest, and we're not going to let you be heroes." He went on to say that whistle blowers weren't the problem, it was the government employees who lied or covered up facts who were. He wanted punishment for those officials who practiced "bureaucratic unaccountability." His talk drew a standing ovation that lasted several minutes.

Nader and his organization did a lot of useful work in outlining what was wrong with the federal government's civil service system. He and his associate Peter Petkus published a good book on the subject called *Blowing the Whistle*, and another Nader associate, Robert Vaughn, wrote a superb paper called "The Spoiled System" denouncing the regression of the supposed merit system for government employees to a de facto political spoils system.

Nader's group had acted effectively when Nixon tried to put the top three levels of the federal merit system under his political control, a

power grab meant to smother dissent and communication with Congress and the press. When Carter came into office and Peter Petkus was given a White House staff appointment, my friends and I took it as a very good sign.

We had another organizational ally in Chuck Morgan's Fund for Constitutional Government. The FCG had helped subsidize an important Nixon-era exposé by public-interest lawyers William Dobrovir and Joe Gebhart. Their "Blueprint for Civil Service Reform" was both an attack on Nixon's violations of the federal merit system and a proposal for greater public accountability. Stewart Mott, the FCG's founder; Chuck Morgan, its president; and other board members had strong ties to the Carter administration. Board chairman Ted Jacobs, who had been Nader's second in command, knew many of the ex-Nader people now in government. *New Republic* editor Ken Bodie, labor lawyer Joe Rauh, and Georgetown University Professor John Kramer had close relationships with Carter officialdom. This was the liberal Establishment. These people, I was sure, would use their muscle to support a superb civil service reform.

Thus I simply refused to believe Inderjit "Indy" Badhwar when he telephoned me in December 1977. Indy, a native of the Punjab, was one of the best reporters I ever knew. Writing for the *Federal Times*, a funny little weekly (which was, nevertheless, a very good paper) he uncovered scandals of national proportions. Indy and his colleague Sheila Hershow kept a very good scrutiny on the federal bureaucracy. Badhwar said that unimpeachable sources in the government had told him that Carter's and Nader's people were cooking up a new civil service "reform" even worse than the swindle Richard Nixon had tried to sell, which had been hooted down by Congress. Indy said that the new plan would strip government employees of any real protection against arbitrary action by political appointees.

Nonsense, I said. This was exactly the opposite of Carter's campaign promises. Furthermore, there was no way Ralph Nader would ever involve himself in such blatant dishonesty. I told Indy we'd go to see Nader and get his personal denial.

I had an unexpectedly hard time getting in touch with Nader, but finally, through intermediaries, I got an appointment in early January 1978. When Indy and I arrived, Nader was somewhere else. We were taken in to see Alan Morrison, Nader's lawyer; Andrew Feinstein, the organization's civil service lobbyist; and Robert Vaughn. Morrison coldly said that Nader was unavailable — what did we want?

Indy recounted the stories he had heard about the proposed reform. To my total shock and confusion, Morrison essentially confirmed Indy's story. He said it was true they were going to "trade off" some government employee rights for certain advantages he wouldn't name. It was "too hard" to fire government employees; the system needed an easier way to get rid of people.

Indy and I said that the government had never had much difficulty getting rid of whistle blowers or dissidents, and we cited cases. And if that was so, it shouldn't be too difficult to get rid of those who were bad or incompetent. Indy cited the statistics; a lot of people had been fired in recent years. No argument made a dent. And whenever I tried to see Nader, it was clear that he didn't want to meet with me on this issue. Obviously the deal had been cut.

Now, don't think that these "public interest" lawyers were simply showing partisan favor to Democratic President Jimmy Carter. This same group, with help from a lawyer from the ACLU national office, exhibited similar bias in their motion for Morton Halperin to intervene in the Supreme Court case of Nixon v. Fitzgerald in August 1981. Nader lawyers Alan B. Morrison and John Cary Sims and the ACLU's Mark Lynch argued that there was substantial question of whether my truth-telling before Congress was protected under the First Amendment. Even if my Constitutional rights had been violated, they suggested that the Court might follow the 1981 5th Circuit decision in Bush v. Lucas which would severely limit both my right to bring an action and my available remedies. Tragically for the taxpayers and their employees, the Supreme Court did just that when they took up Bush v. Lucas in the following year and committed the legal atrocity described in my 1985 testimony before this Subcommittee.

The bottom line of the Nader-ACLU lawyers' argument regarding the Nixon v. Fitzgerald case generally was that my case against the Lion of Whittier might be "... one for which absolute rather than qualified immunity might be appropriate." Nixon and the "public interest" lawyers won by 5 - 4.

Following our January 1977 rebuff by the Naderite lawyers, Indy Badhwar and I took the case to my own organization, the FCG. The subject seemed timely because FCG was convening a series of meetings during the first half of 1978 to consider whether the organization should change its objectives and charter. Many believed that the FCG charter "to expose government corruption" had been rendered obsolete by the election of Jimmy Carter:

When the FCG board wanted to talk about the new utopia in a series of *quo vadis* meetings, I insisted that we include a discussion of civil service reform. The White House considered the FCG important enough to send Simon Lazarus, its chief civil service reform lobbyist and former Nader lieutenant, to explain the proposal. Lazarus made no bones about the fact that Carter was adopting the discredited Nixon plan to politicize the top three civil service grades (GS 16, 17, and 18), but with an added nasty twist. Nixon would have offered three-year contracts to the supergrades; Carter offered no contracts. These employees could be dismissed for "incompatibility"; in fact, they would be political appointees. At first, Lazarus said that the number of such employees would not exceed 10 percent, but after questioning, this percentage became a bit slippery. As former merit system jobs were filled by political appointees, those appointees could "burrow in" and become career employees, thereby freeing up slots for new politicals. Lazarus finally admitted that Carter intended to replace the whole merit system, in time, with politically appointed henchmen.

According to the minutes of that FCG meeting, Lazarus said that the Carter plan, as Chuck Morgan had suggested, was to place "the burden of proof in disciplinary proceedings ultimately upon the employee in question." For all practical purposes, Carter could then get rid of anybody in the civil service.

Lazarus explained that some people were already earmarked for dismissal under the new plan, and he named one of them. Assuming that the person named was a notorious incompetent, I offered to explain the present system's mechanisms for firing incompetents.

No, said Lazarus, the employee wasn't incompetent.

What was the reason for removal, then?

Well, the administration wanted to get rid of him because "he talked to the press and said the wrong things to Congress."

So, there you have it. This is why Mr. O'Connor could say, and I could agree, that the so-called whistleblower protection system was working exactly as its framers intended. Far from being unintended consequences of well-intentioned legislation, identification, isolation, persecution, and punishment or at least neutralization of "whistleblowers" were what the Carter Administration had in mind all along.

As discussed in my 1985 testimony, our pre-Civil War slave laws were essentially a code of prohibited personnel practices aimed at making the system appear benign and palatable to society in general. Just as it was then sometimes necessary to make an example of some particularly brutal or out-of-favor owner for mistreating slaves, it is now important to give honest government

employees an occasional modest victory to perserve the good name of the system. Now, as then, though, the system itself needs abolition, not preservation. Here are some suggestions:

1. Abolish both the Office of Special Counsel and the Executive Branch administrative law bureaucracy set up to hear Civil Service appeals. At the same time, the Executive agencies should be directed to employ alternate dispute resolution approaches to screen cases and hopefully settle them before they enter formal judicial processes. If, as a result of adoption of this suggestion and those listed below, judicial branch workloads increase, some of the money saved by this suggestion could be reapplied to hire additional Judicial Branch magistrates and special masters.

2. Affirm the personal liability of all federal government employees for the consequences of their illegal acts. Chiseled in stone above the portico of the Supreme Court building is the motto "EQUAL JUSTICE UNDER LAW". Living up to this motto would do wonders to restore faith in the fairness of government. When I have made this radical suggestion in the past, defenders of the status quo have argued that this would be unfair to government officials who would have to defend themselves just for doing their jobs. Aside from the fact that tellers of unpleasant truths (whistleblowers) have to do this all the time, a simple remedy is available: Handle complaints against government officials in two steps. Step 1 would be a screening to determine whether the allegedly illegal acts fell within the scope of the accused's official responsibilities. Until the accused's acts are determined to be outside the scope of his or her official responsibilities,

the accused could be represented by government counsel. On the other hand, if judged in the preliminary screening to have acted outside the scope of his official responsibilities, the accused would then be on his or her own in the second step of the proceeding.

3. Affirm full citizenship rights and remedies for federal government employees. It used to be an axiom of law that without a remedy there is no right. In the Bush v. Lucas outrage, the Courts severely limited government employees' remedies so that their Constitutional rights no longer mean much. It is important to understand that the Supreme Court's Bush v. Lucas decision was not based on immutable Constitutional principles, but rather on what that Court believed Congress intended to do when it passed Civil Service legislation.

4. Simplify Civil Service laws. Every citizen, including government employees, should have a fair chance to solve his or her own legal problems. Simplification of laws would enhance this possibility under any system and would become a major factor in the success of alternate dispute resolution approaches recommended in Suggestion 1, above. Congress should resolve that all existing Civil Service regulations and other personnel management rules will expire on a date certain a year or so after the resolution. Congress should then write a simplified Civil Service code which will replace the present hodgepodge with simple, understandable statutory rules written in plain English. Under Title I, Section 8, Clause 18 of the U.S. Constitution, Congress already has the responsibility "To make all laws necessary and proper for carrying into execution" the powers granted by the people to our government.

It has been argued that the total body of Civil Service laws and regulations are too complicated to be dealt with by Congress in the manner suggested. I submit that this is an indication that the present approach fails the acid test of allowing our citizens to solve their own legal problems. If the body of rules is too complex to be understood by members of Congress, mostly lawyers, and their large staffs, assisted by experts in the Library of Congress and the General Accounting Office, then certainly they are not suitable for use by individual government employees.

Congress has already provided a statutory Uniform Code of Military Justice (UCMJ) for the taxpayers' military employees and there is no reason they can't do the same for civilian employees. The UCMJ could be vastly simplified by cutting out over-lap with civilian laws and the uniform code for civilians could be simpler yet because of the Constitutionally unquestioned uniformity of rights and remedies of all civilian citizens of the United States.

5. Start dismantling the government cover-up system. The 1990 FCG report, "Defense Power Games",* by noted Pentagon analyst, Franklin C. "Chuck" Spinney, makes an excellent case for "open books" in the Pentagon. Likening the Pentagonal budget-maximizing mechanism to a voracious monster, Mr. Spinney rejects cosmetic political and management games in favor of a direct approach: "We must slay the monster." To this end Mr. Spinney wrote:

*FCG has provided a number of copies of this report for the Subcommittee's consideration.

> If the monster thrives in darkness and stale air, the first step in killing it is to eviscerate it by throwing back the curtains and opening the windows; glasnost is the precondition for perestroika.

Mr. Spinney's open books proposal, if applied across-the-board, would obviate the need for most government employees to set their hair afire just to shed a little light on the hidden workings of government.

6. Facilitate punishment of government employees who falsify, conceal, or cover-up material facts in carrying out our citizens' business. The suggestion is a paraphrase of 18 USC 1001, so these acts are already against the law and punishable by big fines and imprisonment. As the Ralph Nader of the Nixon era pointed out, so-called whistleblowers aren't the problem, it's government employees who lie and cover-up facts who are. The problem with enforcement is fundamental. Under our Constitutional arrangement, the organization for law enforcement is different from that in most states, where the Attorneys General are elected directly by the people. We do not have the same degree of independence at the federal level. Without prejudging our new and promising Attorney General, it is just not realistic to expect the federal attorney general to prosecute federal officials, especially patronage-distributing officials, with great vigor and consistency. Therefore, our politically appointed prosecutors may need help and encouragement from time to time.

Vigorous Congressional oversight, such as we are now seeing on the C-17 transport plane, reenforced by <u>persistent</u> follow-up, can

be a powerful stimulus to prosecution of high-ranking cover-up artists. Another useful catalyst would be to give citizens access to investigating grand juries without the presence of Executive Branch personnel for purposes of presenting evidence for the grand jury's consideration. In civil false claims cases, Congress needs to affirm that government officials who acquiesce in, or cover-up, or conceal actions leading to false claims should be joined personally as defendants in the damage suits.

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With the present strong, widespread public sentiment for a more frugal and accountable government, I believe we have the best chance of my lifetime to fulfill our citizens needs and desires in this regard, and that most government employees would join the effort. I, for one, certainly would, and many people I work with have expressed a desire to do so as well. Most of the people who come to me with horror stories of waste, mismanagement, and failure to protect our citizens' health and safety say they would do the right thing if they could get away with it. The fact that they don't believe they can survive doing "the right thing" -- and mostly they're right -- is the greatest scandal of our government. Please help us correct this situation.

STATEMENT OF

A. E. FITZGERALD

POST OFFICE AND CIVIL SERVICE COMMITTEE

SUBCOMMITTEE ON CIVIL SERVICE

JUNE 26, 1985

MADAME CHAIRWOMAN AND MEMBERS:

THANK YOU FOR INVITING ME TO APPEAR HERE TODAY.

SINCE THE PRACTICE OF LAW FOR PEOPLE OTHER THAN MYSELF IS OUTSIDE MY REGULAR DUTIES, I HAVE NOT SUBMITTED MY STATEMENT FOR CLEARANCE TO MY EMPLOYER, THE U.S. AIR FORCE. THAT BEING THE CASE, I CANNOT SAY WHETHER MY TESTIMONY WILL REPRESENT THE VIEWS OF THE AIR FORCE OR THE DEPARTMENT OF DEFENSE.

I BELIEVE THAT IN ORDER TO PROPERLY ASSESS THE WORKINGS OF THE OFFICE OF SPECIAL COUNSEL, SO-CALLED "WHISTLEBLOWER" PROTECTION,-- AND THE CIVIL SERVICE LAWS GENERALLY, WE NEED TO UNDERSTAND THE ENVIRONMENT WE ARE DEALING WITH. THAT ENVIRONMENT CAN BEST BE UNDERSTOOD BY UNDERSTANDING WASHINGTON, D.C. WASHINGTON, D.C. IS ESSENTIALLY A ONE-INDUSTRY TOWN. ANYONE WHO GREW UP, AS I DID, IN A ONE-INDUSTRY TOWN, OR MILL TOWN AS THEY USED TO BE CALLED, CAN READILY UNDERSTAND THE SEEMINGLY COMPLEX GOINGS-ON IN WASHINGTON IF THEY GIVE IT A LITTLE THOUGHT. OUR MILL TOWN'S INDUSTRY IS NOT STEEL OR TEXTILES OR SOME OTHER USEFUL PRODUCT. OUR INDUSTRY IS POLITICS, AND THE LIFE BLOOD OF POLITICS IS PATRONAGE. PATRONAGE TAKES MANY FORMS. AMONG THEM ARE IMPORT QUOTAS, TARIFFS, TAX LAWS, ESPECIALLY THE SPECIAL INTEREST VARIETY, REGULATORY RULINGS OF ALL KINDS, SELECTIVE PROSECUTION, LOCATION OF GOVERNMENT FACILITIES, GRANTS, APPOINTMENTS, AND

MOST IMPORTANT, GOVERNMENT CONTRACTS. ALTHOUGH THEY DON'T TALK ABOUT IT PUBLICLY, BOTH THE LEGISLATIVE AND EXECUTIVE BRANCHES ARE PREOCCUPIED WITH THE DISTRIBUTION OF PATRONAGE IN ALL ITS FORMS. BECAUSE THIS DISTRIBUTION IS SO COMPLEX, BOTH BRANCHES PRIZE EMPLOYEES WHO ARE "RESPONSIVE" IN DISTRIBUTING THE PATRONAGE AS DESIRED BY THE DOMINANT PARTIES IN THE PROCESS.

BECAUSE THE PATRONAGE DISTRIBUTION PROCESS IS SOMETIMES MESSY AND NOT SEEN AS A FIT SUBJECT FOR FULL DISCLOSURE TO THE TAXPAYERS AND CONSUMERS, THE LEGISLATIVE AND EXECUTIVE BRANCHES HAVE BANDED TOGETHER TO PRODUCE RULES WHICH GOVERN AND STEER THE BEHAVIOR OF A CLASS OF CIVILIAN EMPLOYEES (CALLED "INFERIOR OFFICERS" IN THE CONSTITUTION) WHO DO THE DAY-TO-DAY DIRTY WORK. THESE RULES ARE THE CIVIL SERVICE LAWS AND REGULATIONS.

THE GENIUS OF THE CIVIL SERVICE QUASI-JUDICIAL SYSTEM IS ITS ABILITY TO CHANGE THE SUBJECT. A PRIME EXAMPLE IS THE SPANTON CASE. WHEN GEORGE SPANTON AND I FIRST TALKED IN MARCH OF 1982, GEORGE WAS ALREADY IN DEEP TROUBLE BECAUSE OF HIS ATTEMPTS TO SAVE MONEY. GEORGE HAD CHALLENGED THE RUNAWAY GROWTH OF CONTRACTOR COMPENSATION, ESPECIALLY EXECUTIVE PAY AND PERQUISITES, AND THE APPEARANCE OF IMPROPER CONTRACTOR ENTERTAINMENT OF HIGH-RANKING GOVERNMENT OFFICIALS, INCLUDING SOME GENERALS. AS GEORGE TOLD ME AT THE TIME, HE HAD DEEPLY

OFFENDED THE "PROCUREMENT COMMUNITY". HE ESTIMATED HIS CHALLENGE TO THE THEN ON-GOING CONTRACTOR COMPENSATION NEGOTIATIONS TO BE WORTH ABOUT $150M AT A SINGLE LOCATION. GEORGE'S CHALLENGES TO APPEARANCES OF IMPROPER ENTERTAINMENT AND GRATUITIES WERE EVEN MORE SENSITIVE. GRATUITIES, ALONG WITH THEIR BIG BROTHER - REVOLVING DOOR RETIREMENT JOBS - ARE THE GREASE THAT INSURES THE SMOOTH WORKINGS OF THE PATRONAGE DISTRIBUTION MACHINE, ESPECIALLY AMONG MILITARY OFFICERS. IN SHORT, GEORGE SPANTON HAD BECOME A THREAT TO THE PATRONAGE DISTRIBUTION PROCESS AND THE SYSTEM DEMANDED THAT THIS THREAT BE REMOVED.

MY ASSOCIATES AND I PERCEIVED THE IMPORTANCE OF THE SPANTON CASE RIGHT AWAY, BUT I WAS SPECIFICALLY INSTRUCTED BY MY IMMEDIATE SUPERVISOR NOT TO TAKE ANY "DIRECT ACTION" TO HELP MR. SPANTON, EVEN THOUGH MR. SPANTON'S IMPROVEMENT INITIATIVES COINCIDED EXACTLY WITH THE STATED OBJECTIVES OF THE SECRETARY OF THE AIR FORCE. BEING BASICALLY A GOOD, RESPONSIVE BUREAUCRAT, I DID EXACTLY AS I WAS TOLD AND AVOIDED DIRECT ACTION TO HELP MR. SPANTON. INSTEAD, I FOUND A WAY TO ASSIST HIM INDIRECTLY. I TOLD CLARK MOLLENHOFF, GREG RUSHFORD, THE PROJECT ON MILITARY PROCUREMENT AND, LATER ON, SENATOR GRASSLEY ABOUT THE SPANTON CASE. THEY THEN TOOK OVER AND CONTINUALLY SUBJECTED TO PUBLIC VIEW THE INCREDIBLY STUPID, CLUMSY, AND DISHONEST ATTEMPTS TO REMOVE OR NEUTRALIZE MR. SPANTON.

AT FIRST, THE OFFICE OF SPECIAL COUNSEL (OSC) INVESTIGATORS APPEARED TO BE PART OF THE PROBLEM IN THE SPANTON CASE. WHEN I WAS FIRST INTERVIEWED BY OSC INVESTIGATORS, THEY WERE DETERMINATELY DISINTERESTED. I KEPT TRYING TO GIVE THE INVESTIGATORS DOCUMENTARY EVIDENCE AND THEY KEPT GIVING IT BACK TO ME. I FINALLY INSISTED THAT THEY CARRY AWAY SOME OF THE DOCUMENTS, BUT NEVER DID SUCCEED IN GETTING THESE PARTICULAR INVESTIGATORS TO DISCUSS THE SUBSTANCE OF THE EVIDENCE. ALL THEY WOULD SAY WAS THAT THEY COULD NOT SEE ANY "NEXUS" BETWEEN THE BAD TREATMENT OF MR. SPANTON AND HIS ATTEMPTS TO SAVE THE TAXPAYERS MONEY. IT HAS BEEN TRULY SAID THAT THERE ARE NONE SO BLIND AS THOSE WHO WILL NOT SEE.

PROSPECTS FOR THE SPANTON CASE IMPROVED GREATLY WHEN MR. O'CONNOR TOOK A PERSONAL INTEREST IN THE MATTER AND ASSIGNED INVESTIGATOR DELBERT "CHIP" TERRELL TO THE CASE. I BELIEVE THAT THE PERSONAL ATTENTION AND COMMITMENT OF MR. O'CONNOR, THE DILIGENCE, SKILL, AND BOLDNESS OF MR. TERRELL'S INVESTIGATIONS, AND THE CONTINUING PUBLIC SCRUTINY WERE INDISPENSIBLE FACTORS IN THE SUCCESSFUL PROSECUTION OF <u>SOME</u> OF MR. SPANTON'S TORMENTORS.

MR. SPANTON IS WIDELY BELIEVED TO HAVE "WON". BUT, DID HE? MR. SPANTON, HIMSELF, WAS PUSHED INTO RETIRING BEFORE HE REALLY <u>WOULD</u> HAVE HAD HE BEEN ALLOWED TO FOLLOW THROUGH ON HIS REFORM INITIATIVES. HIS COST SAVINGS

INITIATIVES WERE LOST FROM VIEW AND SANK WITH HARDLY A TRACE AS THE SLOW MOVING INVESTIGATIVE AND QUASI-JUDICIAL PROCESS INEXORABLY CHANGED THE SUBJECT.

FURTHERMORE, MANY OF MR. SPANTON'S DETRACTORS AND OPPONENTS EMERGED UNSCATHED. I BELIEVE THAT FURTHER INVESTIGATION WOULD PRODUCE OVERWHELMING EVIDENCE THAT THOSE INDIVIDUALS CONVICTED IN THE SPANTON CASE WERE ACTING AT THE BEHEST OF MILITARY OFFICERS SEEKING TO PRESERVE THE STATUS QUO AND THAT ALL WERE ACTING WITH THE KNOWLEDGE AND SUPPORT OF HIGHER-UPS IN THE EXECUTIVE BRANCH.

IF WE ACCEPT THE DOMINANT LEGAL INTERPRETATION OF TODAY'S STATUTES AND PRECEDENTS, THE SPANTON CASE WOULD END HERE, WITH THE TAXPAYERS AND ALL THE PARTIES DIRECTLY INVOLVED IN THE SPANTON CASE, EXCEPTING OSC, AS LOSERS. THE TAXPAYERS HAVE LOST BECAUSE MR. SPANTON'S PROMISING INITIATIVES HAVE BEEN ALLOWED TO DIE. MR. SPANTON HIMSELF IS OUT OF THE GOVERNMENT. MR. SPANTON'S IMMEDIATE SUPERIORS HAVE BEEN DEMOTED OR, IN THE CASE OF MR. STARRETT, FIRED. THE BIG WINNER IS THE PATRONAGE DISTRIBUTION SYSTEM AND THOSE PARTIES WHO PROFIT FROM IT. IN ESSENCE, I AGREE WITH MR. O'CONNOR THAT THE SYSTEM HAS WORKED EXACTLY AS ITS FRAMERS INTENDED IT TO WORK.

WHILE PRETENDING SYMPATHY FOR SO-CALLED "WHISTLEBLOWERS" -- THAT IS, TELLERS OF TRUTHS EMBARRASSING TO POWERFUL SPECIAL

INTERESTS -- THE CARTER ADMINISTRATION AND ITS SUPPORTERS PULLED A FAST ONE ON THE TAXPAYERS AND THE TAXPAYERS' EMPLOYEES WITH THE 1978 CIVIL SERVICE ACT. THEY CREATED A SUPERFICIAL APPEARANCE OF PROTECTION WHILE, AT THE SAME TIME, SEEKING TO FORECLOSE MEANINGFUL REMEDIES. THE 1978 ACT IS BAD ENOUGH IN ITS LITERAL INTERPRETATION, BUT IT IS SO POORLY PUT TOGETHER THAT IT INVITES THE KIND OF OUTRAGEOUS INTERPRETATION EXHIBITED IN THE BUSH VS. LUCAS SUPREME COURT DECISION.

IN THAT OUTRAGE,

> "... THE SUPREME COURT ASSUMED THAT MR. BUSH'S CONSTITUTIONAL RIGHTS HAD BEEN VIOLATED, AND THAT 'CIVIL SERVICE REMEDIES WERE NOT AS EFFECTIVE AS AN INDIVIDUAL DAMAGE REMEDY AND DID NOT FULLY COMPENSATE HIM FOR THE HARM HE SUFFERED ...'"

ACCORDING TO THE SUPREME COURT, CONGRESS HAD DECIDED THROUGH ITS ACTIONS THAT MR. BUSH DID NOT NEED FULL CONSTITUTIONAL RIGHTS NOR THE PROTECTIONS AFFORDED OTHER CITIZENS BY STATUTES AND COMMON LAW. AS A SUBSTITUTE, THE COURT SAID:

> "FEDERAL CIVIL SERVANTS ARE NOW PROTECTED BY AN ELABORATE, COMPREHENSIVE SCHEME THAT ENCOMPASSES SUBSTANTIVE PROVISIONS FORBIDDING ARBITRARY ACTION BY SUPERVISORS AND PROCEDURES -- ADMINISTRATIVE AND JUDICIAL -- BY WHICH IMPROPER ACTION MAY BE ADDRESSED

> ... AS THE RECORD IN THIS CASE DEMONSTRATES, THE GOVERNMENT'S COMPREHENSIVE SCHEME IS COSTLY TO ADMINISTER ... NOT ONLY IN MONETARY TERMS, BUT ALSO IN THE TIME AND ENERGY OF MANAGERIAL PERSONNEL WHO MUST DEFEND THEIR (DISCIPLINARY) DECISIONS."

IN OTHER WORDS, ACCORDING TO THOSE GREAT AMERICANS ON THE SUPREME COURT, CONGRESS HAS DECIDED THAT MR. BUSH DOES NOT NEED THE FULL LEGAL PROTECTIONS ENJOYED BY OTHER CITIZENS INCLUDING, NOT INCIDENTALLY, CONVICTED FELONS AND PEOPLE ORDERED DEPORTED FOR INFAMOUS CRIMES BECAUSE SUPPOSEDLY HE IS PROTECTED IN HIS WORK PLACE BY PROHIBITIONS AGAINST IMPROPER PERSONNEL PRACTICES.

THIS CONCEPT HAS A NOTABLE PRECEDENT IN UNITED STATES LAW. ESSENTIALLY, THE PRE-CIVIL WAR SLAVE LAWS WERE A CODE OF PROHIBITED PERSONNEL PRACTICES. CONTRARY TO MUCH ANTI-SLAVERY OPINION, ANTE-BELLUM SLAVE OWNERS DID NOT HAVE LIFE OR DEATH POWER OVER THEIR SLAVES. SINCE INSUBORDINATION ON THE PART OF THE SLAVE, AS WITH TODAY'S CIVIL SERVANT, WAS INTOLERABLE, IT WAS PERMISSIBLE TO HAVE A SLAVE DIE "UNDER MODERATE CORRECTION", BUT A NORTH CAROLINA LAW PROVIDING THAT PUNISHMENT FOR "MALICIOUSLY KILLING A SLAVE" WAS THE SAME AS MURDER OF A REGULAR FREE PERSON IF IT COULD BE PROVED. (IN PRACTICE, THE MASTER'S AFFIDAVIT OF DENIAL WAS USUALLY ENOUGH TO GET HIM OFF.)

SOUTH CAROLINA'S PRE-REVOLUTIONARY SLAVE LAW WAS EVEN MORE SPECIFIC IN SPECIFYING PROHIBITED PERSONNEL PRACTICES, PROVIDING IN PART:

> "... IN CASE ANY PERSON SHALL WILFULLY CUT OUT THE TONGUE, PUT OUT THE EYE, CASTRATE, OR CRUELLY SCALD, BURN, OR DEPRIVE ANY SLAVE OF ANY LIMB OR MEMBER, OR SHALL INFLICT ANY OTHER CRUEL PUNISHMENT, OTHER THAN WHIPPING, OR BEATING WITH A HORSEWHIP, COWSKIN, SWITCH, OR SMALL STICK, OR BY PUTTING IRONS ON, OR CONFINING OR IMPRISONING SUCH SLAVE, EVERY SUCH PERSON SHALL, FOR EVERY SUCH OFFENSE, FORFEIT THE SUM OF ONE HUNDRED POUNDS CURRENT MONEY."

OTHER LAWS STIPULATED MINIMUM RATIONS FOR SLAVES, DAYS OFF, AND OTHER AMENITIES. LOUISIANA, WHOSE CODE NOIR WAS CONSIDERED THE MOST LIBERAL OF THE SLAVE LAWS, FORBADE THE SALE OF MOTHERS FROM THEIR CHILDREN LESS THAN 10 YEARS OF AGE AND VICE VERSA, OR BRINGING INTO LOUISIANA ANY SLAVE CHILD UNDER 10 YEARS OF AGE WITHOUT ITS MOTHER IF THE MOTHER WAS LIVING. THE PENALTY FOR VIOLATING THESE PROHIBITED PERSONNEL PRACTICES WAS A FINE OF $1,000 OR $2,000, AN ENORMOUS SUM IN THOSE DAYS, AND FORFEITURE OF THE SLAVE.

UNFORTUNATELY, NONE OF THESE PROHIBITED PERSONNEL PRACTICES WERE SYSTEMATICALLY MONITORED OR STRICTLY ENFORCED BY THE

STATES. THE STATE AND SOCIETY, IN GENERAL WERE SAID TO HAVE AN INTEREST IN HUMANE TREATMENT OF THE SLAVES BECAUSE MISTREATMENT GAVE THE SYSTEM A BAD NAME. IT JUST WOULDN'T DO TO PROVIDE AMMUNITION FOR THE ABOLITIONISTS. ONE OF THE MOST SEVERE SOCIAL CENSURES WAS TO CHARGE THAT A SLAVE OWNER "DID NOT USE HIS PEOPLE WELL". EVERY NOW AND THEN IT WOULD BECOME NECESSARY TO MAKE AN EXAMPLE OF SOMEONE FOR MISTREATING SLAVES. HOWEVER, THE SLAVES THEMSELVES COULD NOT BRING ACTIONS ON THEIR OWN BEHALF. SLAVES OCCASIONALLY TRIED TO INITIATE THEIR OWN ACTIONS, AND IT APPEARS FROM MY READING THAT MANY OF THESE ATTEMPTS WERE AIMED AT PROTECTING THEIR WIVES FROM THE SEXUAL ATTENTIONS OF THEIR MASTERS. BUT ACCORDING TO THE ATTORNEY GENERAL OF MARYLAND SHORTLY BEFORE THE CIVIL WAR:

> "A SLAVE HAS NEVER MAINTAINED AN ACTION AGAINST THE VIOLATOR OF HIS BED."1/

IN SHORT, THE PROHIBITED PERSONNEL PRACTICES OF THE SLAVE CODES WERE AIMED AT PRESERVING THE GOOD NAME OF THE SYSTEM AND PERHAPS, TO SOME EXTENT, THE PRODUCTIVITY OF THE SLAVES THEMSELVES. IT WAS UNIFORMLY AGREED THAT "IT SIMPLY

1/ AS WAS NATURAL IN THOSE DAYS, ANY RIGHTS OF THE SLAVE WOMAN WHO MIGHT HAVE BEEN VIOLATED WERE NOT EVEN CONSIDERED SINCE, AS STANLEY ELKINS WROTE, "SUCH EQUIVOCAL RELATIONSHIPS WERE NEVER PERMITTED TO VEX THE LAW."

WOULD NOT DO", AS WILLIAM RHENQUIST MORE RECENTLY SAID OF "WHISTLEBLOWERS", TO ENCOURAGE DISSENT OR EVEN TO EDUCATE SLAVES AS TO THEIR RIGHTS. IT WAS SAID THAT RESULTS OF SUCH AGITATION "TENDS TO DISSATISFACTION IN THEIR MINDS AND TO PRODUCE INSURRECTION AND REBELLION". THIS SENTIMENT IS REFLECTED ALMOST PRECISELY IN THE 10 MAY 1985 GAO REPORT IN WHICH THE COMPTROLLER GENERAL ARGUES IN OPPOSITION TO FULL FIRST AMENDMENT RIGHTS FOR GOVERNMENT EMPLOYEES:

> "UNRESTRAINED WHISTLEBLOWING COULD RAISE LEVELS OF DISSIDENCE AND INSUBORDINATION TO THE POINT WHERE EFFICIENCY COULD BE AFFECTED."

INDEED. "EFFICIENCY"OF WHAT? OF THE PATRONAGE DISTRIBUTING PROCESS? THE BEST-KNOWN CASES OF SO-CALLED "WHISTLEBLOWING" HAVE INVOLVED COMPLAINTS OF OFFICIAL WASTE AND INEFFICIENCY. JUST WHAT KINDS OF DISCLOSURES DOES THE COMPTROLLER GENERAL FEAR?

IN MY OPINION, CONGRESS SHOULD ACT IMMEDIATELY TO REMEDY AND MAKE AMENDS FOR THE MISCHIEF THEY UNLEASED ON THE TAXPAYERS AND THE TAXPAYERS' EMPLOYEES WHEN THEY PASSED THE 1978 CIVIL SERVICE ACT WHICH MAY BE THE MOST COSTLY PIECE OF LEGISLATION EVER PASSED.

IF CONGRESS IN ITS WISDOM DECIDES TO AUTHORIZE A SPOILS SYSTEM ACROSS-THE-BOARD IN THE EXECUTIVE BRANCH, IT SHOULD DO

SO DIRECTLY RATHER THAN UNDER THE SUBTERFUGE OF CIVIL SERVICE "REFORM". AN IMPARTIAL OBSERVER WOULD HAVE TO AGREE THAT THE SPOILS SYSTEM IN CONGRESS WORKS AT LEAST AS WELL AS THE PHONY MERIT SYSTEM IN THE EXECUTIVE BRANCH. HOWEVER, PLEASE BEAR IN MIND THE PROFOUND DIFFERENCES BETWEEN THE TWO BRANCHES. I BELIEVE THE SPOILS SYSTEM WORKS AFTER A FASHION IN THE LEGISLATIVE BRANCH FOR TWO PRIMARY, FUNDAMENTAL REASONS: DIVERSITY AND ACCOUNTABILITY. THERE ARE AT LEAST 535 OFFICES, NOT INCLUDING COMMITTEES AND INDEPENDENT CONGRESSIONAL BODIES, WHERE A PERSON MIGHT CONCEIVABLY GET A JOB IN CONGRESS. BEING FIRED FROM ONE CONGRESSIONAL OFFICE DOES NOT NECESSARILY PRECLUDE A PERSON BEING EMPLOYED BY ANOTHER. ON THE OTHER HAND, BEING FIRED IN THE EXECUTIVE BRANCH IS TANTAMOUNT TO BLACKBALLING THROUGHOUT THE EXECUTIVE BRANCH. MEMBERS OF CONGRESS ARE ACCOUNTABLE. THEY STAND FOR ELECTION EVERY TWO OR SIX YEARS. FURTHERMORE, THEY CAN BE AND HAVE BEEN HELD ACCOUNTABLE IN THE COURTS FOR IMPROPER PERSONNEL ACTIONS, WHEREAS, IF WE ACCEPT THE ARGUMENTS OF THE DEFENDERS OF THE PRESENT SYSTEM, EVERY PETTY TYRANT IN THE EXECUTIVE BRANCH WOULD BE PRESUMED IMMUNE IN LAWSUITS BROUGHT BY WRONGED EMPLOYEES OF THE TAXPAYERS.

PLEASE ABOLISH OUR LATTER-DAY SLAVE LAWS. PLEASE AFFIRM THE TAXPAYERS EMPLOYEES' FULL CITIZENSHIP RIGHTS SO

THAT WE CAN DO THE JOB WHICH YOU HAVE INSTRUCTED US TO DO UNDER PUBLIC LAW 96303, THE CODE OF ETHICS FOR GOVERNMENT SERVICES, UNANIMOUSLY PASSED BY CONGRESS ON 27 JUNE 1980, AND SIGNED INTO LAW BY THE PRESIDENT ON 3 JULY 1980.

STATEMENT OF

DANIEL R. LEVINSON

CHAIRMAN

U.S. MERIT SYSTEMS PROTECTION BOARD

BEFORE THE SUBCOMMITTEE ON CIVIL SERVICE

COMMITTEE ON POST OFFICE AND CIVIL SERVICE

UNITED STATES HOUSE OF REPRESENTATIVES

MARCH 31, 1993

Mr. Chairman and Members of the Subcommittee:

I want to thank you for the opportunity to discuss the experience of the U.S. Merit Systems Protection Board (MSPB) under the Whistleblower Protection Act of 1989 (WPA) and the effectiveness of the present system for protecting whistleblowers.

Prior to enactment of the WPA, cases involving reprisal for whistleblowing came to the Board as: (1) appeals of personnel actions within the Board's jurisdiction, in which the appellant raised the affirmative defense that the action was in reprisal for whistleblowing, and (2) prohibited personnel practice complaints filed by the Special Counsel. The WPA added a third avenue to the Board by authorizing the individual right of action (IRA) appeal, which may be filed by an individual who has exhausted the procedures of the Office of Special Counsel. The WPA also provided a new right for appellants in whistleblower cases to request stays of challenged personnel actions.

The WPA became effective July 9, 1989. Because its provisions do not apply to any administrative proceeding pending as of the effective date, however, the Board did not begin to issue decisions applying the WPA provisions until some months later. Furthermore, because an individual may not file an IRA appeal until the Special Counsel terminates its investigation of the individual's complaint, or 120 days pass without notification from the Special Counsel that the office will seek corrective action, even more time passed

before the Board began to apply the IRA provisions of the Act.

Between the effective date of the WPA and the end of FY 1989, our experience with WPA cases was limited to four stay requests decided in the regional offices. Our first full year of experience in deciding cases under the WPA came in FY 1990, when judges in our regional offices issued 89 decisions on IRA appeals, 74 rulings on stay requests, and 163 decisions on appeals of otherwise appealable actions allegedly based on whistleblowing. As noted, only the first two categories represent new kinds of cases authorized by the WPA. Many of the IRA appeals and stay requests received in the first year were dismissed because they concerned personnel actions initiated prior to the effective date of the Act or because the appellant had not yet exhausted the procedures of the Office of Special Counsel.

In FY 1991, our judges issued 196 decisions on IRA appeals, 86 rulings on stay requests, and 275 decisions on appeals of otherwise appealable actions. Obviously, this represents a substantial increase over the previous fiscal year for both IRA appeals and appeals of otherwise appealable actions. As to stay requests, 13 of the 86 were filed in non-whistleblower cases and were dismissed; thus, the number of whistleblower stay requests decided was 73, virtually the same as in the previous fiscal year.

In FY 1992, our judges issued 221 decisions on IRA appeals, 97 rulings on stay requests, and 282 decisions on

appeals of otherwise appealable actions. Of the stay requests, 21 of the 97 were filed in non-whistleblower cases and were dismissed; thus, the number of whistleblower stay requests decided was 76. Comparing FY 1992 to FY 1991, the numbers of whistleblower stay requests and appeals of otherwise appealable actions decided were about the same, while the number of IRA appeals decided represents an increase of almost 13 percent.

In October 1992, the General Accounting Office (GAO) issued its report, *Determining Whether Reprisal Occurred Remains Difficult*, which included a review of 565 whistleblower cases closed by MSPB from July 9, 1989 through September 30, 1991. In that review, GAO determined that about one-third of the individuals who sought corrective action from the Board after the Special Counsel closed their cases obtained relief through either settlements or reversals of adverse personnel actions. During the same period, about one-third of the individuals who filed appeals of otherwise appealable actions directly with the Board also obtained relief. Our own records show that, in FY 1992, about one-third of the appeals of otherwise appealable actions resulted in relief for the appellants, while about 22 percent of the IRA appeals decided resulted in such relief.

The first Special Counsel disciplinary action complaint under the WPA was filed during FY 1990. To date, the Board has issued decisions on three such complaints brought by the

Special Counsel against Federal employees who allegedly took personnel actions based on an individual's whistleblowing. In each of these cases, the Board ordered disciplinary action--demotion in two cases, suspension in one. A fourth Special Counsel disciplinary action complaint involving whistleblowing is pending.

In FY 1990, the Special Counsel filed nine stay requests in whistleblower cases. All were granted, except one that the Special Counsel withdrew. In addition, the Special Counsel filed 14 requests for extensions of stays that had been granted, with more than one extension request filed in several cases. All but two were granted. In FY 1991, the Special Counsel filed 3 initial stay requests and 14 requests for extensions of stays in whistleblower cases, all of which were granted. In FY 1992, the Special Counsel filed one stay request in a whistleblower case and one request for extension in that case; a second request for extension was filed early in the current fiscal year.

The number of Special Counsel cases the Board decides is small in comparison to the number of employee appeals decided, from the perspective of both the Board's caseload as a whole and the cases involving whistleblower issues. The Special Counsel cases brought to the Board, however, are only a small part of that office's activity in investigating and resolving whistleblower complaints and other complaints of prohibited personnel practices.

As to the effectiveness of the present system in

protecting whistleblowers, we do not believe a determination can be made solely from data such as I have summarized above, especially when you consider the relatively brief experience we have had adjudicating cases under the WPA. We do believe, however, that the Board can make a significant contribution to evaluating the effectiveness of the present whistleblower protection system through our statutory authority to conduct studies to ensure that Federal merit systems are free of prohibited personnel practices.

The effectiveness of whistleblower protections under the Civil Service Reform Act (CSRA) was the focus of one of the Board's earliest studies, based on a survey of 13,000 Federal employees. The study culminated in the October 1981 report, "Whistleblowing and the Federal Employee: Blowing the Whistle on Fraud, Waste, and Mismanagement--Who Does It and What Happens." The Board conducted a follow-up study three years later, which resulted in the October 1984 report, "Blowing the Whistle in the Federal Government: A Comparative Analysis of 1980 and 1983 Survey Findings."

The primary purpose of these studies was to determine whether the Congressional intent to encourage Federal employees to report instances of fraud, waste, and abuse was being carried out. The studies also attempted to determine whether employees who legitimately reported such activity were being protected as intended by the CSRA.

The studies revealed that, in 1983, between 17 percent and approximately one-third of all employees, depending on

agency, claimed to have knowledge of some type of fraud, waste, and abuse. Among those who possessed this knowledge, however, almost 70 percent did not report it. Over half (53 percent) of the non-reporters in both surveys cited as a reason for their decision not to report their belief that nothing would be done to correct the activity. However, fear of reprisal was also cited by approximately 37 percent of the non-reporters in 1983. Of the employees who did report an illegal or wasteful activity, and who were identified as the source of that report, approximately 23 percent--or almost one out of every four--claimed in 1983 that they were the victims of some type of reprisal.

These Board studies played a part in the consideration of whistleblower protections by the Congress for more than a decade. Not only did the Board's first Chairman, Ruth Prokop, cite the 1980 survey in testimony before the Senate Committee on Governmental Affairs hearing on "Fraud in Federal Programs" in 1981, but also the entire draft report was printed in the committee report. When Senator Levin first introduced the Whistleblower Protection Act in 1987, he cited the Board's findings as "evidence that congressional efforts to fight fraud and inefficiency by protecting Federal employees from retaliation for whistleblowing are not working." In the two years from that time until the WPA was enacted in 1989, the Board's whistleblower studies were cited in support of the Act not only by Senator Levin, but also by Senators Byrd, Cohen,

Grassley, and Glenn, and in a 1988 Senate Governmental Affairs Committee Report.

Because of both the time elapsed since the Board's last whistleblower study and changes in the law brought about by the WPA, the Board decided almost a year ago to update our research in this important area. A new MSPB survey, updated to reflect significant events such as the WPA, was distributed to a random sample of Federal employees, and we have received over 13,000 responses. That data has been collected and is currently being analyzed. We expect to issue a report later this fiscal year that should provide valuable insights into whether and how much progress has been made.

To be sure, other researchers, including the General Accounting Office, have made valuable contributions since 1983 by examining certain aspects of the issues involved in protecting whistlebowers. The Board's whistleblower studies, however, remain unique in their approach by asking a large cross-section of Federal employees to share their actual experiences.

In summary, the Board remains committed to making our system of encouraging and protecting legitimate whistleblowers as effective as possible, and we are acting on that commitment.

EB
7/22/92

I hereby request this statement be read to the Subcommittee and submitted into the official transcript in its entirety.

Statement of Edward B. Block GS-11.

I never dreamed I would one day be blowing-the-whistle on the very Agency created to protect whistleblowers but here goes:

I want to thank the Subcommittee for holding this much needed hearing and allowing me to submit this statement for the record. I understand time restraints but also feel you should see the face of a man who has been savaged by his government. This hearing cannot be another tea-party where everyone agrees that everything is still the same as when the first Special Counsel stated, "if a whistleblower sticks his head-up, he'll get it blown-off," yet nothing happens. The face again has changed but the act remains the same. Anyone should be able to realize that a political appointee, hand-selected by the head of the Executive Branch certainly would have a major conflict-of-interest in "protecting" someone who is pointing out wrong-doing in his bosse's own branch of government. That basic premise has somehow gone unnoticed

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DATE

in the 14 years this travesty has been allowed to continue, I cannot think of anything more insidious than the very Agency created by Congress to offset the inevitable blatant retaliation against whistleblowers that is viewed every Sunday on Sixty-Minutes or 20/20, has been allowed to continue this long.

The Executive Branch soon recognized that even though the intent of Congress was not going to be fufilled, this charade of "protection" for whistleblowers was the perfect opportunity to screen any potential dirty linen (encl 1) that could be damaging to the Administration.

My personal exposure to the OSC, this seemingly white Knight organization, was as presented to all federal employees through bulletins announcing that no longer must anyone fear retaliation for blowing the whistle. This White Knight soon turned out to be anything but a savior. From 1983 to 1992 I have pleaded with the OSC to come to my defense to no avail. In that I was the Most Outstanding Personnel of the Year in 1981, had saved over two billion dollars through the Government Incen-

3

tive Program, had Articles published (encl 2) highlighting my many Accomplishments & had No disciplinary record, I felt secure with my 10 year career in Federal Service. I had decided to continue my career even though severly injured when the Center closed early one day due to snow (encl 3). This All changed when I exposed bid-rigging, bribery And collusion At work. (encl 4) in Addition to A multinational Corporations Attempt to control the entire Aerospace wiring market with defective wiring (encl 5). This resulted in numerous requests under the Freedom of Information Act for the "Ed Black File" which was A chronology of the events. This met with great concern by my division chief (encl 6).

Five months After taking A government trip I was notified that I was being charged with falsifying my travel claim form ($43). I then proved through the car rental receipt and travel orders that the charge was in fact false. This physical proof was determined to be less credible than merely the demeanor of A GS-14 witness At my MSPB hearing however. And I lost.

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Even though I appealed this decision to the Court of Appeals they decided not to review the matter. Things got progressively worse at work, I was transferred out of Wire & Cable where I was a National expert, to Ball Bearings and then to Quality Assurance where I was given "busy" work to do. Even though I repeatedly requested the O.S.C. to investigate this National Security matter through phone calls (encl 7), through my Congressman and on every appeal to the MSPB, they repeatedly decided in 1983, 1984 1988, and 1992 not to investigate (encl 8)

I was ultimately removed from Federal Service illegally, reinstated only to be recharged with A.W.O.L and then retired all in violation of regulation and procedure including the Union Contract and initial versus final decisions of the MSPB. I cannot understand how someone can be indicted for falsifying a travel voucher (encl 9) and receive the benefit of a public defender when I was charged with the same crime but yet not afforded the same right. How can this be equal treatment under the Law? The Union, besides

5

illegally revising the Union Contract (encl 10) Advised/coerced me to sign a statement saying I was a liar and a thief and receive only a slap on the wrist (encl 11) I refused saying I would not lie about not being a thief.

I had contacted my Congressman (Peter Kostmayer) and he has written letters from 1984 to 1992 (encl 12) trying to get someone in government to address this matter to no avail. In 1986 I brought a civil suit in U.S. District Court but it was dismissed because you cannot sue federal employees. In 1992 (Apr 2) I briefed Mr. Tim Quinn of Senator Wofford's Office and convinced him of the validity of my case. He in turn wrote to the O.S.C. asking them to review this matter. The O.S.C. not only refused the Senator's request but also declined my Freedom of Information Request for my own file saying it was compiled for law-enforcement purposes. (encl 13) It is ironic that the O.S.C. is charged by Congress to protect government Agencies from turning down requests for Freedom of Information in a

PAGE NO 6

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DATE

CAPRICIOUS or ARBITRARY MANNER.

IN SUMMATION, I feel that the Office of Special Counsel has been not only A five million dollar A YEAR WASTE of TAXPAYERS money but the singlemost sinister manipulation of the will and intent of Congress to date. IT is truly A SAD day in the history of OUR country when A citizen that has done so much for his nation can have this nightmare waged against him by an army of government Attorneys and must fight Alone. I Appeal to you AS A voice crying in the wilderness for this Nation to repent. We All say in God we Trust, but what must he say to this gross injustice to an innocent man. My faith in the Lord Jesus Christ will sustain me whatever you decide but I pray that his divine mercy will also sustain this country if justice isn't served. The Savings and Loan crisis, the H.U.D. scandal and the Iran-Contra scenario may have All been averted if the truth was Allowed to flourish. It is far better to truly protect whistleblowers than have to request Special Prose-

7)

cutors After the fact.

I hope these words will not go unheeded and they find their mark. And allow honest men to once Again prevail. I request my name cleared, my career restored, and all compensation due me. Please don't continue another day with business as usual. Either put a real whistleblower in charge of the O.S.C. or shut it down. I swear under penalty of perjury that All I've stated here is true and correct and consider this statement submitted under oath.

Sincerely,

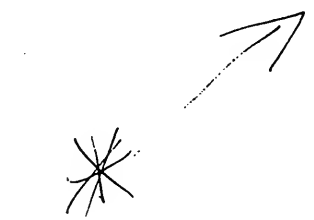
Edward B. Block

3444 Chestnut Ave.
Trevose, PA. 19053
(215) 322-4645

ENCL 1
Nick Rahall's critique
of Ed Block Report
on JLC
EX-2

– Failure data/analyses are not subjects that use the DOD ~~~~ should provide info on unless the receiver of the data/analyses has a need-to-know

– pg 1 is too personalized – we mention Capt Eaton, key name we mention NAVAIR, etc. I don't feel that DOD has to to iron out its dirty linen in public

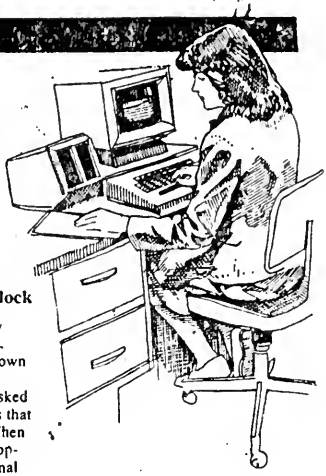


ENCL 2

around the agency

DISC and the Navy:

Spare parts and technical advice



by Edward Block

The Defense Industrial Supply Center (DISC) in Philadelphia not only provides spare parts for its Navy customers but also supports the Navy by providing technical advice. This specialized support is almost as varied as the 860,000 different hardware items procured and managed by DISC.

Each day DISC technicians help the Navy by offering substitute items to meet immediate demands, providing technical assistance, reviewing and revising specifications and recommending items to meet environmental concerns as well as serving as advisors on Navy panels. Technical experts at DISC recently solved a Naval aircraft antenna problem, revised hookup wire specifications, corrected filter line problems and found more suppliers of air frame wire.

When the Navy questioned the type of jacket material covering radio cable, DISC experts confirmed that the material met the original specifications. As a result of the review of this one item, the Navy saved more than $500,000 in rewiring costs and submarine down time.

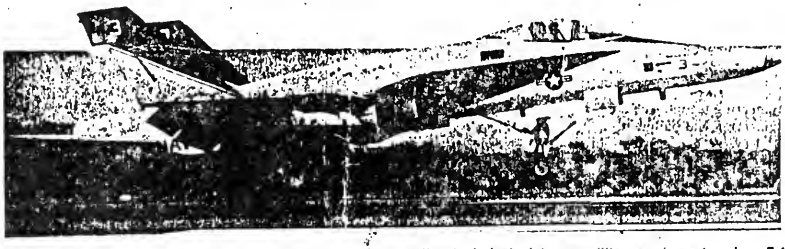
DISC technicians often are asked to locate national stock numbers that may not be easily identified. When the Johnsville Naval Air Development Center, Pa., needed national stock numbers for the RF-18 aircraft, they asked DISC. When the regional contracting department of Naval Supply Center Oakland needed national stock numbers for urgent engineering changes, they also called on DISC. The Naval Research Laboratory in Washington, D.C., often queries DISC for national stock numbers.

DISC is the review activity for all electrical wire and cable. When shipboard cable specifications were recently revised to include major armor requirements, DISC people met with representatives from the Naval Sea Systems Command and the Ships Parts Control Center to reinstate national stock numbers, revise coding and to help project annual demands.

As the Defense Logistics Agency's advisor to the new Joint Logistics Command Panel, DISC was also involved in the development of joint Navy, Army and Air Force aircraft wiring systems.

DISC's primary mission is to supply replacement parts to the Navy and other branches of the military services, and providing technical information advice is a vital part of that supply mission. ■

Edward Block is assigned to DISC's directorate of technical operations.



The Defense Industrial Supply Center supplies spare parts as well as technical advice on military equipment such as F-18 aircraft.

Pennsylvania Jury Verdict Review and Analysis™

A BI-WEEKLY STATEWIDE SUMMARY OF SIGNIFICANT PENNSYLVANIA COURT OF COMMON PLEAS AND FEDERAL CIVIL JURY VERDICTS WITH COMMENTARY BY IRA J. ZARIN, ESQ.

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- THEORIES OF LIABILITY AND DEFENSE AS ACCEPTED OR REJECTED BY JURIES.
- NAMES OF TRIAL COUNSEL FOR REFERRAL PURPOSES

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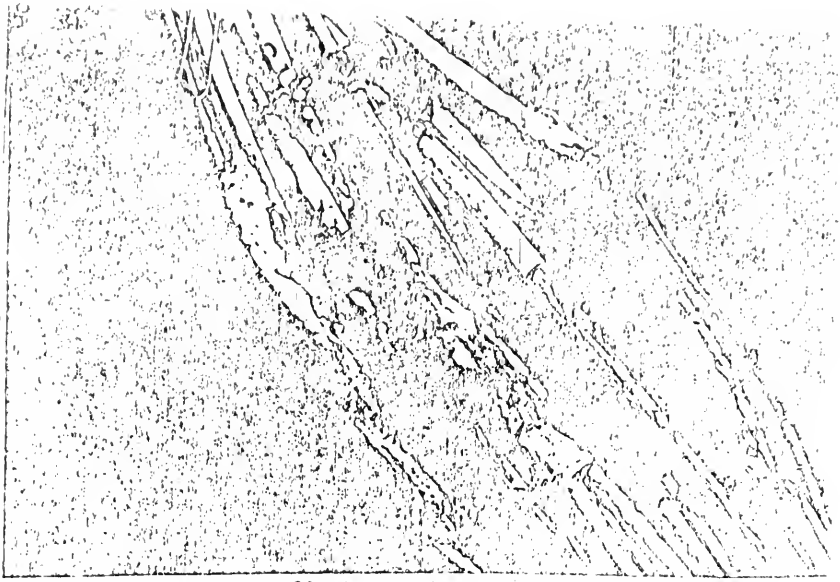
The cases summarized herein are obtained and selected from a current and ongoing county by county survey of all Courts of Common Pleas and the Federal District Courts in the Commonwealth of Pennsylvania. However members of the bar are encouraged to advise this publication of any current plaintiff or defendant jury verdict they believe to be of sufficient interest to warrant publication.

Volume I, Issue 4 - December 24, 1982

$ 223,000 VERDICT - PRODUCTS LIABILITY - NO PLAINTIFF'S EXPERT ON LIABILITY - GLASS PERMANENTLY EMBEDDED BEHIND EYE. The Phila. plaintiff contended that he suffered the implantation of a piece of glass behind his eye which was, because of its location, inoperable, when the glass on the driver's side window of the 2½ year old automobile he was operating inexplicably shattered propelling the glass into his eye. The plaintiff presented no expert on liability, but maintained that since there was no other cause for the shattering, such as the presence of a rock or other foreign matter which might have been thrown at the window, the only possible cause of the incident was a defect in the window itself. The plaintiff related that the day after the accident, he awoke to find that his eye would not open because of the extensive presence of drainage material. He maintained that he went to the hospital where a condition of pink eye was diagnosed. He was treated for this condition for a year and a half and during that time suffered a severe infection which caused extreme swelling of the face and a drooping condition of the eyelid which required surgery. The plaintiff's treating opthamologist, David Miller from Warminster, related that an ultra sound test was then conducted which showed the presence of foreign matter behind the eye, next to the optic nerve. He further maintained that x-rays indicated this matter was transparent. He opined that this transparent foriegn matter was glass from the shattering window. The physician related that the infection had cleared up with the use of antibiotics and that the drooping condition of the eyelid had been resolved by the surgery. He contended, however, that surgery to remove the particle of glass was not possible because of the proximity of the glass to the optic nerve made the liklihood of injury to the nerve great. He opined that the plaintiff would experience headaches and a grating sensation in the eye permanently.

The plaintiff was employed as a technician in the engineering field by the U.S. Government. He indicated that in order to be promoted to the next level, he would have to attend college and

(Cont'd on next page)



A leading edge flap wiring harness in an S-3 wingfold area, spread out so individual wires can be viewed. The arrangement material appears to be self-vulcanizing silicone tape, apparently used as a temporary repair, according to Navy sources.

ENCL 5

Unsafe Aircraft Wiring Poses Expensive Problem

Billions of dollars are likely to be spent before this bureaucratic web of deficient wire selection, sole source intrigue, and unexpected production stoppages is clarified. And, electronic equipment manufacturers may find themselves right in the middle of the controversy.

By Richard V. Hartman

per Ed Clark Files
Freedom of Information
(ENCL IN)

About 2,000 combat aircraft now in service are equipped with seriously deficient wire, which can cause catastrophic aircraft control failures. Although no crashes are known to have occurred because of the wiring problem, literally hundreds of electrical failures have been attributed to cracked, corroded, and frayed aircraft wiring. These incidents include numerous in-flight fires and inadvertent actuation of critical control elements, such as speed brakes and autopilots.

Commercial aircraft may also have experienced fires caused by using the same types of wire; and, several companies are now changing to different, more durable wire. Yet in military aircraft, faulty wire is frequently replaced by the same, inadequate type of wire, while a lengthy technical—and bureaucratic—debate continues over which wire to select as a replacement.

Replacing aircraft wiring will cost billions and take years, if a decision is ever made mandating a complete refurbishment; a problem so severe, that

ENCL #8
EX 6

EX-21

Nick Ramalli
Note to
Alan Jacks
on volume o
requests for
Ed Block
File
10/19/82

Alan

Due to
extent of requests
for "Ed Block"
file, please have
your people make
a copy of the file
for DLA, I think
we may be answering
a lot of questions.

in the future. Might
also be a good
idea if you had
a copy or ready
access to the file.

N 10/19

Bmg

ENCL 7

P 501 776 816

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to SPECIAL COUNSEL	
Street and No. U.S MERIT Systems Protection Board, WASH.	
P.O., State and ZIP Code WASHINGTON, D.C. 20419	
Postage	$ .20
Certified Fee	.75
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	.60
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	$1.55
Postmark or Date	APR 17 1984 FEB

PS Form 3800, Feb. 1982

Bell of Pennsylvania

215 322-5339 149 R53 MAY 15, 1984 LAST PAGE 9

AT&T COMMUNICATIONS DETAIL OF ITEMIZED CALLS

NO.	DATE	TIME	PLACE	AREA-NUMBER	*	MIN	AMOUNT
1.	APR 30	816AM	TO W PALM BCH FL	305 659-8568	D	1	.64
2.	APR 30	841AM	TO BOYTONBCH FL	305 737-0240	D	5	2.40
3.	APR 30	1106AM	TO WASHINGTON DC	202 653-7122	D	10	4.09
4.	APR 30	1132AM	TO WASHINGTON DC	202 653-8940	D	3	1.36
5.	APR 30	1135AM	TO WASHINGTON DC	202 653-8944	D	3	1.36
6.	APR 30	123PM	TO WASHINGTON DC	202 653-8944	D	8	3.31
7.	MAY 1	415PM	TO WASHINGTON DC	202 653-9125	D	5	2.14
8.	MAY 1	451PM	TO WASHINGTON DC	202 653-9125	D	1	.58
9.	MAY 2	116PM	TO WASHINGTON DC	202 653-9125	D	19	7.60
10.	MAY 14	1002AM	TO WASHINGTON DC	202 653-9125	D	1	.58
11.	APR 16	530PM	FR SW VLY PA	717 477-9962	EP	19	5.80

KEY *-RATE APPLIED:
D -DAY
EP -EVENING PERSON

AT&T COMMUNICATIONS CHARGE FOR ITEMIZED CALLS 29.86

Encl # 8

OFFICE OF THE SPECIAL COUNSEL
U S Merit Systems Protection Board

Memorandum

TO: Ralph B. Eddy
Chief
Complaints Examining Unit

FROM: Dorothy J. Springfield
Investigator

DATE: June 18, 1984

RE: Ten-Day Report, Closure Recommendation
Edward Block, OSC File No. 10-4-00818

I. Synopsis of the Matter

Complainant: Edward Block
3444 Chestnut Street
Tresevose, PA 19047

Agency: Department of Defense
Defense Industrial
Supply Center
700 Robbins Avenue
Philadelphia, PA 19111

Block is employed in the above agency as an Equipment Specialist, GS-12. In his April 14, 1984, complaint to the OSC he alleged reprisal for whistleblowing. He claims that he has been subjected to a series of unspecified prohibited personnel practices by agency officials. He requested an investigation of the actions taken against him and what he considers a substantial and specific danger to the public health and safety in addition to jeopardizing national security. The complaint provided no additional facts nor did it identify any personnel action. However, it did provide the docket number of the Board's decision on his appeal. A copy of that decision was later obtained from the Board by this office and reveals that Block was suspended for 35 days effective July 21, 1983, to August 25, 1983. The action was based on the charges that Block submitted false claims to the government for travel expenses and absence without leave (AWOL). On January 26, 1984, the Board sustained the agency's action. The Board denied Block's petition for review of the initial decision on June 8, 1984.

GOVERNMENT EXHIBIT 3

II. Issues to be Investigated

None.

III. Recommendation

On May 1, 1984, I informed Block that the information he provided in the complaint was insufficient to determine what action this office should take and requested specific information concerning his whistleblowing allegations. He stated that because of the seriousness of these allegation they could not be discussed over the telephone and indicated that he would submit the allegations in writing. Block stated that he had talked to Don DiJulio in October 1983 and that he was sent an OSC Form to complete and return. He did not return the Form nor has he provided the information requested during our telephone interview.

Since Block had failed to submit the requested information and because the Board has sustained the agency's action, I recommend this matter be closed without further action. A closure letter is attached.

DJS/bld

Comm in closure
Jrsty 6/28/84

Comm — See DiJulio's TOF memo of 6/29/84
Jrsty 7/5/84

ENCL # 2

OFFICE OF THE SPECIAL COUNSEL
U.S. Merit Systems Protection Board

NOV 9 1988

1120 Vermont Avenue, N.W., Suite 1100
Washington, D.C. 20005

Mr. Edward D. Block
3444 Chestnut Avenue
Trevose, PA 19047

Re: OSC File No. 10-8-01149

Dear Mr. Block:

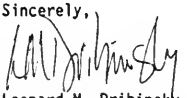
This is in response to your complaint against the Defense Industrial Supply Center. You alleged that you were terminated from your position in reprisal for whistleblowing.

The Office of the Special Counsel is authorized by the Civil Service Reform Act to investigate allegations of prohibited personnel practices and activities prohibited by civil service law, rule, or regulation. 5 U.S.C. §§1206(a), (e), and 2302(b). We have carefully considered the information you provided. However, we have found insufficient evidence of any prohibited personnel practices or other violations warranting further inquiry by this Office.

More specifically, you were initially terminated for Abandonment of Position. After you filed an appeal of that action, the Merit Systems Protection Board ordered your reinstatement. When this decision was issued and you were notified by the agency to report for duty, you had an obligation to do so. However, you failed to report to duty, and you were charged AWOL which is a valid basis for disciplinary action. Therefore, while you may have made valid disclosures, the agency, as the Merit Systems Protection Board found in your subsequent appeal of the action, had a legitimate basis for terminating you for AWOL. Thus, there is no basis for further inquiry into your termination as possible reprisal for whistleblowing.

Accordingly, finding insufficient evidence of any prohibited activity warranting further inquiry by the Special Counsel, we plan no further action in your complaint and have closed our file on this matter. This letter should not be construed as an adjudication of any matter you have pending or plan to file under any administrative appeals procedure.

Sincerely,



Leonard M. Dribinsky
Assistant Special Counsel
for Prosecution

LMD:RBE:PC/pc

ENCL # 2

U.S. OFFICE OF SPECIAL COUNSEL
1120 Vermont Avenue., N.W., Suite 1100
Washington, D.C. 20005-3561

10/1/87 - 1st case file destroyed.

April 7, 1992

Honorable Harris Wofford
United States Senator
9456 Federal Building
600 Arch Street
Philadelphia, Pennsylvania 19106

Re: OSC File Number 10-4-00818

Dear Senator Wofford:

I am writing in response to your correspondence on behalf of Mr. Edward B. Block. Mr. Block had requested that the U.S. Office of Special Counsel (OSC) reopen the file in this matter.

The OSC has concluded its review of the file and the materials Mr. Block submitted with his request for reconsideration. We have determined that he has not presented any new information or evidence that would justify a reopening of this closed file. Should you have any further questions concerning this matter, please feel free to contact me again.

Yours truly,

Laura M Blades fw

William G. Cinnamond
Director of Legislative
and Public Affairs

10-0 Fri 1930 m, NW 3rd Bill Cim

Employment discrimination

main number 653-2253 OSC

Associated Press Laserphoto

river of one of the trolleys involved in yesterday's accident is carried by firo.

accident injures 23

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gation by SEPTA and the National Transportation Safety Board.

"The other trolley ran into us. It's hard to say what happened. You have your head down reading the paper and then a loud bang," said passenger William Zollicoffer.

"If you've been skiing, it was just like you fell off the chairlift," said passenger John Albrechter.

Fire Department battalion chief Charles Lepre said 10 people on the rear trolley and 13 on the front trolley were injured. Two people on the trolleys were not injured, he said.

"There was no blood to speak of. Most of the injuries seemed to be blunt trauma," Lepre said.

Five people ranging in age from 25 to 66 had been admitted to the Hospital of the University of Pennsylvania by early afternoon, all in good condition, spokeswoman Chris Binder said. Other injured riders were being treated at various hospitals or did not receive hospital treatment, officials said.

Frances Fields, 46, the second trolley's driver, was being evaluated for injuries at Thomas Jefferson University Hospital, spokeswoman Kellyann McDonnell said. She and the other

on bill OK'd

False travel vouchers suspected

EA # 9

NEWARK

A Bensalem man was indicted yesterday on charges he submitted $17,000 in false travel vouchers while working for a government-funded fusion research center in Princeton.

Barry Cohen, 41, of the 2600 block of Woodsview Drive, was charged in a two-count indictment returned by a Newark federal grand jury. The charges included making false claims against the United States and wire fraud, according to Assistant U.S. Attorney Jason W. Tannenbaum.

Cohen was employed as manager of employment/employee relations for Princeton Plasma Physics Laboratory, located on the Forrestal Campus of Princeton University.

If convicted, he faces a maximum of 10 years in federal prison and $500,000 in fines, Tannenbaum said.

Cohen, who left PPPL last May, was responsible for hiring personnel, employee counseling and the development of performance appraisals.

Federal officials allege Cohen submitted business-related travel expense vouchers from Jan. 1, 1987, through April 30, 1991, to PPPL's petty cash department, including about $17,000 in fraudulent travel vouchers for trips he never made, according to the indictment.

In fact, a telecommunications audit revealed that Cohen had made telephone calls from his office to his mother and friends when he was allegedly traveling on business, according to the indictment.

Cohen was released on $1,000 recognizance bail by U.S. Magistrate Judge G. Donald Haneke.

Contacted at his home yesterday, Cohen hung up on a reporter when asked about the indictment.

Enclosure 10

Memorandum of Understanding

1. With respect to the following portions of the Master Agreement, DLA and the DLA Council of AFGE Locals, on 25 March 1983, agreed to the following language:

a. Article 4, Section 8: "The private life of an employee is his/her own affair."

b. Article 13, Section 2.E: "Higher level duties and responsibilities will not be assigned to employees on a continuing basis when such assignment is not in accordance with the provisions and intent of this Article since such assignments create the impression of favoritism and preselection and impair employee confidence in the integrity of the promotion program."

c. Article 30, Section 3: "When a position in an organization is abolished as a result of a reorganization and an identical position is to be established at the same grade within 30 days in a new organization within the PLFA, the incumbent of the old position will be offered the newly established position, unless such offer would be in conflict with the assignment rights of another employee."

d. Article 33, Section 3: "Bargaining unit employees will not be required to be supervised by persons who are not officers or employees of the Federal Government."

2. Subsequently, on 22 April 1983, the Deputy Assistant Secretary of Defense (Civilian Personnel Policy and Requirements), pursuant to 5 USC 7114(c), disapp these portions of the Master Agreement as being contrary to applicable law, rul or regulation.

3. In accordance with 5 USC 7114(c), and Article 2, Section 2, of the Master Agreement, DLA is compelled to comply with the OSD Deputy Assistant Secretary's directive; that is, DLA will not at this time implement the above portions of the Master Agreement.

4. Until such time as these portions of the Master Agreement either are amende and approved by the OSD Deputy Assistant Secretary or a decision rendered by th Federal Labor Relations Authority, they will be held in abeyance and subsequent considered under Section 2 of Article 5.

5. In the meantime, these portions of the Master Agreement will be annotated a follows to reflect its status:

"*(Reserved)*"

6. In accordance with Article 45, Section 1, the remaining portions of this Ma Agreement are effective 10 June 1983.

FOR THE AGENCY: C. A. Grinstead
E. A. GRINSTEAD
Vice Admiral, SC, USN
Director

FOR THE COUNCIL: W. G. Spokow
H. G. SPOKOW
President
DLA Council
AFGE Local

12 May 1983
Date

AP EX NO. ⇒ (ENCL 11) Read 6/20/83 from Vincent Sotille Chief Steward AFGE 1698

22 June 1983

From: Edward Block GS-1670-11 , DISC-SGA
To: Gerald C. Kling, Assistant Division Chief, Technical Support Division, Directorate of Technical Operations

Subj: Proposed removal; reply to

Ref: (a) DISC-SG letter of 7 June 1983

Encl: (1) Numerous Awards, Certificate of Commendation, and letters of appreciation

* Letter on 6/17/ was significantly different in regard to admission of falsification (wil ful). I was told 6/17/83 that I couldnt take A copy w/o signin since it was Union property

1. By reference (a) I was advised of the proposal to remove me from employment at the Defense Industrial Supply Center on the charge of submitting a false claim for travel expenses and absence without leave (AWOL).

2. Reference (a) accurately summarizes the facts as they pertain to my filing of the DD Forms 1351. Since our meeting on the 26th and 27th of May, indeed since my submission of the false travel voucher, I have questioned my own behavior in this regard. I assure you that there is nothing in my background to suggest this kind of conduct; my record as both a Federal employee and a private citizen, to this point, has been unblemished. I deeply regret my actions and apologize for the embarrassment I have caused the Defense Industrial Supply Office.

Considered coercion by Frank Russ (Union Presid (phone call)+ then by V Sotille w/ typed copy (w/carbon, ready fo signature. Request I sign or the Union Representati Agreement Stayed unt 1700 per Ading me

3. In reviewing my reply to reference (a), I ask you to consider the contribution I have made to the mission of the Defense Industrial Supply Center as an employee. I forward copies of correspondence which I believe attests to the fact that my performance has been of considerable value to DISC. I feel I have much more to contribute as an employee, and heartily wish to continue my Federal service in order that I may do so.

4. I wish to point out that I have made restitution to the Personnel Support Detachment Activity in the amount of $90.50 as specified by reference (a), incident to my official duty travel and stand ready to make any additional corrections or reimbursement for any amount I may owe. I respectfully request that you reconsider the penalty of removal. I further request that I be given an opportunity to orally reply to the charges of reference (a) and to amplify the above.

Respectfully,

Edward Block

Copy:
DLA Council AFGE Local 1698

PETER H. KOSTMAYER
8TH DISTRICT, PENNSYLVANIA

ENCL 2

Congress of the United States
House of Representatives
Washington, D.C. 20515

July 3, 1984

Hon. Jack Brooks
Chairman
Committee on Government Operations
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing you on behalf of a constituent who is an employee at the Defense Industrial Supply Center in Philadelphia, Pennsylvania, and who characterizes himself as a "whistleblower." As such he has exposed mismanagement and waste in various procurement activities.

Unfortunately, and apparently because of his criticisms of procurement procedures, this constituent has been the victim of reprisals, and his job is currently under challenge.

Nevertheless, he has provided me with substantial documentation of numerous and continuing practices which he contends are wasting millions of taxpayer dollars. I think his charges deserve examination because of his obvious expertise in these areas, and I am requesting that he meet with appropriate members of your staff to review his documentation. While I understand the jurisdiction of your committee may preclude involvement in his specific problems with the Office of Personnel Mangement, I would hope a meeting can be set up in Washington at the convenience of your staff to review the substance of his allegations of wasteful procurement practices.

Your staff may contact Chip Brewer of my staff in Washington to discuss this request in greater detail. I appreciate your consideration of this matter.

With every good wish.

Sincerely,

Peter H. Kostmayer

PHK/fhb

bcc. Edward Block

6TH DISTRICT, PENNSYLVANIA

Congress of the United States
House of Representatives
Washington, DC 20515

202-224-3121 ! Finance - Complete - Call it

September 18, 1990

Senator Jim Sasser, Chairman
Subcommittee on General Services, Federalism,
and the District of Columbia
Committee on Governmental Affairs
SH-432
INSIDE MAIL

Dear Mr. Chairman:

It has come to my attention that you may soon be holding hearings on government whistleblowers and what happens to them.

A constituent of mine, Mr. Edward Block, has been credited with saving the government billions of dollars by blowing the whistle on a huge wire fraud problem in the Department of Defense. He was fired a short while later.

The enclosed materials were sent to me by Mr. Block, who asked me to forward them on to you. The Defense Electronics article, "Unsafe Aircraft Wiring Poses Expensive Problem" describes some of what Mr. Block discovered. Mr. Block would be more than happy to discuss his unfortunate experience as a whistleblower with investigators on your staff. He has also expressed his willingness to testify before your subcommittee.

Mr. Block can be reached at (215) 322-4645. His address is: 3444 Chestnut Avenue, Trevose, PA 19053.

I would be most appreciative if you and your staff would review Mr. Block's materials.

With every good wish,

Sincerely,

Peter H. Kostmayer

PHK/jl

8TH DISTRICT PENNSYLVANIA

Congress of the United States
House of Representatives
Washington, DC 20515

July 12, 1991

The Honorable Nicholas Mavroules
Chairman, Subcommittee on Investigations
2343 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to you on behalf Mr. Edward Block, a constituent of mine from Trevose, Pennsylvania. Mr. Block was an employee of the Defense Industrial Supply Center. Six years ago, he discovered major problems and a solution with regard to the acquisition of radio cable. He has been credited with saving the Department of Defense billions of dollars. As a reward, he was fired and denied any compensation due under the Government Employees' Incentive Awards Program, as it applied to the Defense Industrial Supply Center.

I have had a longstanding interest in Mr. Block's case. I understand that his situation has still not been redressed, despite the fact that the United States Claims Court found in Mr. Block's favor on the issue of compensation and entered an order on his behalf dated June 11, 1991. Apparently, the Department of Defense is still fighting him every inch of the way. This continuing behavior calls into question the entire concept of Government Employees' Incentive Awards Program as it applies to the DOD.

Given your subcommittee's jurisdiction and your concern regarding the issue of waste in military procurement, I wanted to bring the case of Mr. Block to your attention. With this letter I have forwarded to you for your review a package of materials pertaining to Mr. Block's case, including a copy of the Judge's recent order and some newspaper articles which focus on his plight. Should you have any questions, Mr. Block can be reached at 215-322-4645. His address is: 3444 Chestnut Avenue, Trevose, PA 19053.

Thank you for your consideration of this matter. Please keep me informed regarding any action that you might take regarding his case.

Sincerely,

Peter H. Kostmayer

PHK:rdg
Enclosure

Congress of the United States
House of Representatives
Washington, DC 20515-3808

March 4, 1992

The Honorable John Conyers, Jr.
Chairman Government Operations Committee
2426 Rayburn House Office Building
Washington D.C. 20515

Dear Mr. Chairman:

I am writing to you on behalf of Mr. Edward Block, a constituent of mine from Trevose, Pennsylvania. Mr. Block was an employee of the Defense Industrial Supply Center. Six years ago, he discovered major problems and a solution with regard to the acquisition of radio cable. He has been credited with saving the Depatment of Defense billions of dollars. As a reward, he was fired and denied any compensation due under the Government Employees' Incentive Awards Program, as applied to the Defense Industrial Supply Center.

I have had a longstanding interest in Mr. Block's case. I understand that his situation has still not been redressed, despite the fact that the United States Claims Court found in his favor on the issue of compensation and entered an order on his behalf dated June 11, 1991. Apparently, the Department of Defense is still fighting him every inch of the way. This continuing behavior calls into question the entire concept of the Government Employee's Incentive Awards Program as it applies to the Department of Defense.

Given the jurisdiction of your committee over the issue of Federal procurement and your concern over the retaliatory actions taken against Mr. Aldric Saucier for exposing waste, fraud and abuse in the Strategic Defense Initiative program, I wanted to bring the case of Mr. Block to your attention and inform you that he has expressed interest in discussing his case with your committee staff. With this letter I have forwarded for your review a package of materials pertaining to Mr. Block's case, including a copy of the Judge's recent order and some newspaper articles which focus on his plight. Should you wish to contact him, Mr. Block can be reached at 215/322-4645. His address is: 3444 Chestnut Avenue, Trevose, PA 19053.

Thank you for your consideration of this matter. Please keep me apprised of any action that you might take regarding this case.

Sincerely,

Peter H. Kostmayer

PHK/dw

ENCL
13

U.S. OFFICE OF SPECIAL COUNSEL
1120 Vermont Avenue., N.W., Suite 1100
Washington, D.C. 20005-3561

January 29, 1992

88 Requests

Mr. Edward B. Block
3444 Chestnut Avenue
Trevose, PA 19053

Re: Freedom of Information Act Request; OSC File Nos. 10-4-00818 & 10-8-01149

Dear Mr. Block:

This responds to your Freedom of Information Act (FOIA) requests. You requested a copy of OSC's FY 1990 Budget, as well as "all documents relating to the case of Edward B. Block."

Your request has been carefully reviewed and considered. Our records indicate that you have filed two complaints; OSC File Nos. 10-4-00818 and 10-8-01149. All OSC files are destroyed three years after closure, pursuant to routine file maintenance policies of the National Records Administration. OSC File No. 10-4-00818 was destroyed on October 1, 1987, pursuant to the above policy. There are, therefore, no documents which we could disclose from that file. I am, however, enclosing a copy of our FY 1990 Budget.

OSC File No. 10-8-01149 contains a memorandum prepared by the assigned examiner of the Complaints Examining Unit, 3 telephone conference memoranda, 9 internal computer profiles, 6 matter reporting forms, 6 routing and transmittal slips, several letters we exchanged and documents concerning the appeal you filed with the Merit Systems Protection Board. The memoranda are protected from disclosure under FOIA exemption 5 as they would not be available to a party, other than an agency in litigation with OSC, due to the attorney work product privilege. This means that the above-mentioned memoranda were prepared at the direction of an attorney, for an attorney's review. Moreover, the memoranda are intra-agency documents which are protected from disclosure under OSC's pre-decisional, deliberative process privilege. Your request is, therefore, denied with respect to the above-mentioned memoranda pursuant to FOIA exemption 5. *See* 5 U.S.C. § 552(b)(5). Furthermore, the memoranda are protected from disclosure under FOIA exemption 7 because they were compiled for a law enforcement purpose, and because disclosure could be expected to result in an unwarranted invasion of the personal privacy of the witnesses or other individuals named therein. This denial ensures that in the future, a witness will feel free to speak candidly to an OSC investigator. Therefore, your

request is denied pursuant to FOIA exemption 7. *See* 5 U.S.C. § 552(b)(7).

Moreover, the computer profiles, matter reporting forms as well as the routing and transmittal slips are being withheld under exemptions 2 and 7 because they relate solely to the internal practices and procedures of our agency and are of no interest to the public, or to protect the privacy of the witnesses or other individuals named therein.

The remaining documents in the file were either sent to you by us, addressed to you or you have already seen, and we assume that you do not want duplicate copies. If you do, please inform us.

If you are dissatisfied with the above decision, you must appeal, in writing, within 30 days to William E. Reukauf, Associate Special Counsel for Prosecution, at the above address.

Sincerely,

Richard Gordon
for Robert D. L'Heureux
Associate Special Counsel
for Investigation

RDLH:ral

ISBN 0-16-043923-X
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