



U.S. OFFICE OF SPECIAL COUNSEL

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**Testimony before the Senate Oversight Subcommittee on Management, the
Federal Workforce and the District of Columbia**

“Safeguarding the Merit System: A Review of the U.S. Office of Special Counsel”

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Mr. Chairman, Senator Akaka, distinguished Members of the Subcommittee, In *Julius Caesar*, Shakespeare's immortal drama of political treachery and leadership, there appears these famous lines,

“There is a tide in the affairs of men which, taken at the flood, leads on to fortune. Omitted, all the voyage of their life is bound in shallows and in miseries. On such a full sea are we now afloat, and must take the current when it serves or lose our ventures.”

Senators, our country is at the high tide of homeland security and national security affairs, and what we do and how we meet the public trust will determine in some part the success of the American venture of limited, self government. Our ventures into reform and innovation in the federal workforce have set us on a course toward greater efficiency, greater accountability, and I am proud to be a part of the solutions with you.

One courageous whistleblower, Kristin Shott, certainly understood the high tide of safety to the public and our state of war when she reported to us the nonconforming welds and deficient training on the aircraft carrier USS Kitty Hawk, which could have endangered the fighter jets and other aircraft and personnel critical to the success of our military. As reported a few weeks ago in *U.S. News and World Report*, Ms. Shott has suffered greatly for carrying on in her role of whistleblower. It has taken a serious toll on her and her family, but we have done everything in our power to protect her, and are working with the Navy to get additional corrective action on her behalf. We do this on behalf of each person who has a reprisal claim or other Prohibited Personnel Practice (PPP).

An FAA controller certainly understood the venture of American commitment to air safety and courage when she reported to us that her superiors failed to properly investigate or report near misses

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at a major international airport. In layman's terms, these planes were almost running into each other about every other week. However, many of the incidents went unreported. These allegations were found to meet our substantial likelihood test and were sent to the FAA for investigation.

To me this is a perfect example of a case where a civil servant was willing to take on "the establishment" to protect us all. She believed in this job and more than anything, believed in our safety. For me, this is most gratifying and is why I practiced law and why I am now in public service - because responsible citizenship must be championed by those of us who proclaim a commitment to principle over power, to the rule of law over the will to power.

Another conscientious whistleblower took on the U.S. Air Force to protect his fellow service members from having the engine fall from one of our military's main transport plane. OSC referred allegations that employees at the Department of the Air Force approved a request for repair to a main engine component of a C-5A Galaxy aircraft which was improper and jeopardized the flight safety of that aircraft. The whistleblower alleged that, despite warnings from the component manufacturer and the Air Force's own Technological Industries Office that the repair would be unsound, field mechanics were permitted to make the repair to the aft engine mount spherical bearing, which serves as one of three points that hold the main engine in place, and the aircraft was returned to service.

The Air Force's report confirmed the repair was made, but concluded that it did not pose a danger to public safety. My report to the President and the oversight committee in Congress stated that the Agency's conclusion that the repair made to the aft engine mount bearing "represents no measurable increased risk to the C-5 fleet or the public at large" does not appear reasonable. In light of this determination, and because this matter involves the safety of a military aircraft currently in use, I asked the Air Force to perform an independent investigation into the particular repair at issue in this matter. In addition, I recommended further inquiry regarding the steps, if any; the Agency has taken to survey the C-5 fleet as recommended in the technical report.

Consider the TSA employee who alleged that she was subjected to a retaliatory investigation, placed on paid administrative leave, and ultimately, terminated because she reported to TSA's Office of Inspector General that her supervisor illegally brought his privately owned assault rifle onto government premises. Under a settlement, without admitting liability, TSA rescinded the employee's termination, reassigned her to a new airport and agreed to pay the large majority of the relocation costs, raised her salary by 5%, and paid her attorney's fees.

Consider Judith Hanover Kaplan, former Colonel, U.S. Air Force, who was a Veterans Administration (VA) nurse with a Ph.D. and an unblemished record who was fired by VA when she was called away on reserve duty. It took her two years to get justice, but when I took office one of my first acts was to take swift action on that case. We filed it as the first ever Uniformed Services Employment and Reemployment Rights Act (USERRA) case before the Merit Systems Protection Board (MSPB) in the history of OSC. We were able to obtain more than she had asked for in back pay and interest and made an example of those employers who dishonor those who protect us.

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OSC is aware of taking the current when it serves to protect whistleblowers, to step up protections for returning service members, and to vigorously prosecute illegal partisanship and illegal personnel practices to bring greater integrity to our federal government. The problem of good government is not divided by party but by commitment to principle.

John Adams said, “Good government is an empire of laws.”

As you know, the independent Office of Special Counsel is the guardian of the federal merit system principles. I share with you a one hundred percent commitment to protecting federal whistleblowers, the merit system principles, and bringing justice to the federal workforce through vigorous enforcement of our empire of laws.

During my confirmation hearing in late 2003, and shortly after I became the Special Counsel on January 5, 2004, it became apparent that two major problems confronted the Agency; a serious backlog of cases and a cumbersome organizational structure. It was not patently clear whether the problems stemmed from procedural inefficiencies, lack of adequate personnel in the correct units, or a combination of these.

I have often quoted Gladstone’s famous saying, “Justice delayed is justice denied.” My publicly-stated pledge has been to give full, fair, and expeditious resolution to all cases, especially the unacceptably high number in backlog. These ideals can only be served by reducing the historic backlog in this Agency that I inherited. These backlogs serve only to impede employees’ ability to secure justice in a timely manner. My recent reorganization is dedicated to the above-stated goals. Indeed, given the widespread press about these historic backlogs and the GAO report (GAO 04-36) issued shortly after I assumed office, it is indeed ironic that we are now being subjected to such scrutiny for having addressed the backlog, studied the source of the problems, and embodied a creative and long-lasting strategic solution to the problem that will redound to the credit of the federal workforce for years to come.

I have kept my pledge to Congress and federal employees, and am pleased to report that we have made tremendous progress in our first year.

Backlog Resolution Project

One of my first priorities when I began office was to address and eliminate the backlogs in the Intake Unit (CEU), Disclosure Unit, and Hatch Act Unit, within one year.

At the same time, I made it clear that ultimately the Agency would reorganize into a leaner, well organized operational unit. The Agency seemed to lack a vision and needed performance goals and standards. Personnel did not seem strategically placed to solve Agency challenges. Agency structure was process oriented, not results driven. What was clear even then was that the cumbersome structure was in large measure responsible for the lingering backlogs.

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I created a new Special Projects Unit (SPU), in April 2004, which managed Agency resources and directed the backlog resolution efforts. The SPU was the “fireman” of the Agency. SPU directed that the more experienced litigators in the Agency from the investigation and prosecution divisions review and make final determinations on cases. Because of SPU’s exemplary efforts in helping reduce the OSC case backlog, they now are the Agency’s official watchdog on case backlogs, particularly on the total PPP and DU cases, and will ensure that OSC staff resolves any large inventory of cases before they become backlogged.

In addition to the SPU, I created an Employee Advisory Committee where I meet regularly with employee representatives and go over their concerns and ideas, which have led to internal policy changes and creative solutions to Agency concerns nationwide. We also hired an independent assessment team to study the policies, procedures, and personnel of the Agency and make strategic recommendations. Its intent was to give me the best possible advice on how to restructure and manage this Agency.

Backlog Results

The results of the past year were unprecedented. As we announced on May 17, 2005, in detailed response to the GAO report, I am pleased to report that we reduced the overall Agency backlog by 82%, from 1121 to 201 cases (in the Intake and Disclosure units) by the end of Calendar Year 2004. The GAO response provides more detailed numbers.

We were able to do this without sacrificing quality. We gave a full and fair resolution to all claims, such as the TSA whistleblower, the Air Force employee, and Ms. Hanover Kaplan. In fact we were able to provide even more justice to complainants. *During the backlog resolution project, we doubled the historic percentages of internal referrals for Prohibited Personnel Practice (PPP) cases.* This meant an even higher percentage of claims were investigated. *For whistleblower disclosures, we nearly doubled the number of cases that were referred back to Agency heads or Inspectors General for further investigation.* The credit for this Herculean effort goes to my career staff that worked long and hard to meet our goal.

Disclosure Unit

The Disclosure Unit is responsible for reviewing the information submitted by whistleblowers, and advising the Special Counsel whether there is a substantial likelihood that the type of wrongdoing described in § 1213(a) has occurred or is occurring. Where a substantial likelihood determination is made, the OSC must transmit the disclosure to the Agency head for further action and investigation. The Agency report and OSC’s conclusions are forwarded to the President and appropriate Congressional oversight committees. An example is Kristin Shott’s disclosure about faulty welding on the USS Kitty Hawk, which I transmitted on May 9, 2005.

The Disclosure Unit’s more complex cases are very labor-intensive and often require the attention of more than one attorney. These cases can take more than a year to complete for a number

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of reasons—agencies routinely request additional time to conduct the investigation and write the report, whistleblowers request additional time to prepare their comments, and OSC’s professional staff must review the report to determine whether it contains the information required by statute, the findings are reasonable, and to prepare associated comments. It is important to note that the historic backlog of cases in the Disclosure Unit further lengthened and delayed this process.

This Unit had severe backlog issues, and with hundreds of cases sitting in backlog, justice was not being given to federal whistleblowers. Although we processed hundreds of disclosures last year, a majority of these were slated for closure by my predecessor as low priority cases as far as severity of potential harm. Many of these cases had languished in the Agency for several years, and were the focus of the initial backlog resolution efforts. Even so, we nearly doubled the number of referrals during the same time.

Hatch Act Unit

Our Hatch Act Unit has reduced backlogs of older cases to a very manageable level, provided a record number of advisory opinions - some 600 more than the prior year, done extensive outreach during an election year and been a model of non partisan enforcement. Truly this unit has embodied principles of good government and deterred coercion and illegality at a time of harsh partisan rhetoric in the country.

Agency Reorganization

Under my authority in 5 U.S.C. § 1211 and § 1212, I announced an Agency reorganization plan consistent with OSC mission, in early January 2005. The reorganization was needed to ensure no future case backlogs would occur and to create internally consistent procedures. I consulted with all the senior management as well as my staff repeatedly throughout the past year.

The independent assessment report was not the only source of information that I used to reorganize the Agency. It was only one tool among several used to help me to decide how to re-shape the Agency to make it more efficient and more about promotion of good government through leadership and example. My management decisions were made by using and consulting all sources of information afforded to me over the first year as the Special Counsel.

The overall paradigm, consistent with the mission of the Agency, was to delayer the current OSC organization structure; we had an “SES sandwich” at OSC. All SES and several GS-15 level supervisors were in Washington and they took turns reviewing what had already been reviewed. I wanted to “power down” decision making to the lowest levels of competence versus having repeated reviews, endless written memoranda and needless meetings by managers. OSC was a D.C.-centric organization that some saw as “cherry picking” all of the good cases away from the existing field offices.

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The basic sense of employee fairness and efficiency was suffering. The use of investigators was not consistent, and in many cases not efficient; attorneys were requiring too much writing and were often duplicating the efforts of investigators. Investigators reported a sense of having been cut out of the process. We have sought to resolve these problems.

The restructuring included a new field office in the upper Midwest, in Detroit, for geographic representation throughout the U.S. With the various states assigned to this office under the new plan, this office will handle the same number of cases as the other field offices. This has generated much interest and concern by some, but I assure you there is good reason for the new office. Pursuant to my authority (under 5 C.F.R §§ 335.102 and 317.901), the management directed reassignment was based on the precepts of strategic management of human capital. As you know, relocation is a fairly common practice in the federal workplace. In FY 2003, for example, 22,000 federal employees were relocated, according to a recent OMB report, as reported in [GovExec.Com](#) on January 27, 2005. Recently, I read reports that the CIA made a decision to reassign many employees to Denver for some of the same reasons.

Please keep in mind that the new field office is only one of many parts of the reorganization that will help OSC better meet our mission. We are preparing to change and implement new standard operating procedures that will cut out needless reviews and meetings and power down decision making to those employees in the best position to make decisions. This is a large undertaking and can only be accomplished with strong SES leadership in the field to ensure that these changes actually occur and become the culture of OSC.

At the same time we will implement a vigorous new training unit that will cross-train personnel to work in other areas of the law. In the past, the lack of cross-trained personnel was a major impediment to attacking backlogs. The new smaller modular field offices will be more easily trained and capable of addressing future backlogs. Without senior leadership in the field offices, the new standard operating procedures and cross-training would have little chance of success.

In addition, a new customer service unit will be created to better serve the public and federal employees. Having specific personnel assigned for this purpose will help OSC gain a reputation of better customer service within the federal workforce.

USERRA

Another important responsibility over which we have jurisdiction is enforcement of USERRA within the federal government. USERRA is the law that guarantees civilian job protections to those service members that go on active duty and want to return to their job when their service ends. With the historic number of mobilization and the demobilization of service members, some have faced unfair and illegal employment practices after their active service. I have zero tolerance for violations of USERRA and will enforce the law vigorously. Although there have been several cases in the Agency for years, I am the first Special Counsel to take MSPB actions against agencies that were not in compliance with this important law.

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Because of OSC's aggressive stance, Congress decided to give us additional responsibilities under this law and we set up a new USERRA unit within OSC. Service members that believe that their USERRA rights have been violated can now come directly to OSC with their complaints. Before this new law (P.L 108-454), members had to go through Department of Labor's investigative process and then after months and even years were given the option to seek OSC's involvement. This new arrangement marries up OSC's investigative and prosecutorial role – which do not work as effectively when separated.

Why have we done all of this? It is to better serve the federal workforce, the whistleblowers, returning service members, the brave people who help us function as a country, those who protect us and are often unsung and sometimes victimized for their valor in public service.

We, at the Office of Special Counsel believe in an empire of laws, which create good government and inspire integrity and public trust. This can only be accomplished at the OSC by properly aligning our Agency to prevent recurrent backlogs.

Indeed, as Shakespeare said, we must take the current when it serves, and we have in order to improve the merit system and our government's overall safety and efficiency. OSC's proud career staff deserves the credit for taking the rising tide of cases and finding the good that is there in so many cases, have given us reason for hope in the merit system.

Thank you very much.