

TESTIMONY OF THOMAS DEVINE,  
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before the

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

of the

SENATE COMMITTEE ON HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS

on

*The Perils of Politics in Government: A Review of the Scope and Enforcement of the  
Hatch Act.*

October 18, 2007

MR. CHAIRMAN:

Thank you for inviting the testimony of the Government Accountability Project. (GAP) Your oversight of political threats to the civil service could not be more timely, or significant. Separation of politics and federal employment is the foundation for public service from a professional workforce. Unfortunately, the merit system in general, the Hatch Act in particular, and the civil service enforcement mechanisms for both are facing challenges unprecedented since the Watergate patronage scandals sparked passage of the Civil Service Reform Act of 1978.

GAP is a non-profit, non-partisan public interest organization whose mission is to support whistleblowers, those employees who exercise free speech rights to challenge abuses of power that betray the public trust. GAP has led the outside campaigns for passage of the Whistleblower Protection Act in 1989, subsequent amendments to the Act in 1994, and, working since 1999 with this Committee and recently with a coalition of nearly 50 other public interest organizations, the campaign to again restore the discredited WPA through this Committee's legislation, S 274. The House counterpart legislation, HR 985, the Whistleblower Protection Enhancement Act of 2007, passed in March by an overwhelming bipartisan majority, 331-94. Personally, my introduction to public interest law was researching and co-authoring *Blueprint for Civil Service Reform*, a Fund for Constitutional Government report on Watergate-era political hiring, firing and Hatch Act abuses.

Since the U.S. Office of Special Counsel's (OSC) creation, in 1978, as the merit system watchdog and Hatch Act civil prosecutor, GAP has closely monitored its work. At times, we have worked in partnership with Special Counsels; under other circumstances,

we have served as harsh critics. Our only criterion for that choice has been whether its leadership has served or disserved its mission of guarding the merit system. Throughout the last 28 years, we have regularly represented whistleblower clients before the OSC, and OSC employees blowing the whistle on OSC. In representing OSC employees, we have learned through hands on experience how the agency operates in practice. This is not always the same reality described by Special Counsels' in their congressional testimony.

### HISTORICAL CONTEXT

The current threat of a politicized civil service is a reminder why the OSC was created. The Watergate investigation revealed a massive Nixon administration operation to replace the non-partisan civil service system with a politically loyal workforce dedicated to partisan election goals. Every agency had a shadow “political hiring czar” whose operation trumped normal civil service authority of personnel offices. Then-White House Personnel Office chief Fred Malek teamed up with Alan May to prepare the “Malek Manuel” as an encyclopedic guide for how to harass career employees out of the government by exploiting loopholes in civil service laws. Non-complying federal employees would be replaced by applicants selected through a political rating system of 1-4, based on factors such as campaign contributions and future campaign value. The Watergate Committee’s public record of the abuses led to creation of the Ink Commission, whose exhaustive study and recommendations were the foundation for the Civil Service Reform Act of 1978, including creation of the Office of Special Counsel to see that this type of merit system abuse never happened again.

However, in four years there was another severe attack on the merit system. Ironically, the assailant was then-Special Counsel Alex Kozinski, who kept a copy of the Malek Manuel on his desk. He used its techniques to purge the professional civil service experts on his own staff, and replace them with employees who viewed whistleblowers as crazy troublemakers, disloyal to the President. He taught courses to federal managers on how to fire whistleblowers without getting caught by his own investigators, using the OSC Investigations Manual as a handout. He tutored Secretary Watt on how to purge a whistleblowing coal mine inspector from the Department of Interior. The OSC became what one Senate staffer called “a legalized plumbers unit.” Mr. Kozinski’s abuses were the major catalyst for passage of the Whistleblower Protection Act of 1989, and he was forced to resign. A few years later 43 Senators voted against his confirmation for a seat on the Ninth Circuit Court of Appeals, after Senator Levin’s intensive investigation of Kozinski’s Special Counsel tenure.

The current political threats to the merit system have been less clandestine, and more arrogantly brazen. Instead of shadow political czars, agency leaders are doing the political arm twisting. Instead of harassment encyclopedias on how to circumvent merit system rights, those safeguards have been openly canceled by department wide experiments in running government “like a business” without the red tape of due process.

Twenty years later it appears we also have a hybrid *déjà vu* all over again with the current Special Counsel, Scott Bloch. That creates a double whammy effect on the merit system: The OSC is in crisis at the time a legitimate, credible Special Counsel is needed most to find the truth whether the abuses at GSA were an aberration, or the tip under a Hatch Act iceberg. There’s a real need to trust the Special Counsel’s performance on two

levels – 1) ability to get results; and 2) objectivity. Under its current leadership, however, the OSC flunks both criteria. The basis for these conclusions is summarized below.

### HATCH ACT TRACK RECORD

The OSC is seeking more money to expand its Hatch Act enforcement program. It is only sound business to check the investment's track record. Under Mr. Bloch, the OSC's Hatch Act record has been to accomplish less with more. In FY 2006 the agency's \$15 million budget was over \$3 million more than in 2002, the last full year before his arrival. Yet from 2001-2003 the OSC produced 88 Hatch Act corrective actions or disciplinary actions in 595 cases, or fifteen per cent. With more resources, from FY 2003-2006 the corresponding figures were 89 corrective or disciplinary actions out of 792 cases, or 11%. Furthermore, controversy about the Special Counsel has overshadowed his investigations.

A survey of recent practices helps to explain the drops in credibility, and performance:

- \* In the recent Doan General Services Administration investigation, before allowing her to see and respond to the evidence the OSC leaked a draft copy of the report, recommending termination, to the media.

- \* When OSC released the subsequent report, the recommendation for termination had vanished. So had the Privacy Act rights of individuals whom Ms. Doan targeted with ugly attacks in the public record, because their names were not redacted.

- \* When Mr. Bloch took office, the OSC scrapped staff-developed quality standards and a proposed case priority system, among other case processing advances.

- \* In FY 2005 the OSC Annual Report stopped disclosing the number of Hatch Act complaints referred for field investigation. In FY 2003 and 2004, there had been 35 and 25, respectively.

\* In FY 2005 the OSC Annual Report stopped disclosing the number of outreach programs to prevent Hatch Act violations through education, after conducting 43 the previous year.

The OSC's Hatch Act track record is consistent with the drop in its performance on prohibited personnel practice cases. In 2002 the OSC obtained 126 corrective actions for retaliation victims. Despite an extra year and over twice the budget resources, in FY's 2005 and 2006 combined, the OSC obtained 97 corrective actions. In FY 2006 the Office only obtained corrective action for 2.49% complainants, the lowest rate in its history.

### OBJECTIVITY

For the last 2.5 years, the President's Council on Integrity and Efficiency (PCIE) has assigned the Office of Personnel Management (OPM) Office of Inspector General (OIG) to investigate a Whistleblower Protection Act complaint against the Special Counsel, Mr. Bloch. The case was filed by a group of anonymous OSC staff, joined by GAP, Public Employees for Environmental Responsibility (PEER), and the Project On Government Oversight (POGO). The issues in the investigation are summarized below. But more directly relevant, the probe creates a potential for conflict of interest that, through his actions, Mr. Bloch has proven he cannot rise above. In fact, OSC leadership has aggressively obstructed the investigation. To illustrate, the OSC --

\* gagged employees from confidential interviews with OPM, requiring that an OSC representative be there to listen.

\* barred members of the Office's professional staff from interviews with the OPM OIG, on strained grounds of attorney client privilege that could compete with current Executive Privilege claims used to avoid Justice Department testimony to Congress.

\* had Federal Protective Services (FPS) officer forcibly remove a well-known internal whistleblower in front of other OSC staff when OPM first came to investigate. The FPS dismissed the charges when the OSC could not produce witnesses, but the message was a clear warning to others.

Throughout, Mr. Bloch has passively encouraged his supporting coalition of religious organizations to openly, repeatedly refer to him as a victim of whistleblower retaliation in the PCIE probe, harassed for challenging immoral sexual diversity in the federal workforce.

The point of raising these motives and conflicts is not to attack Mr. Bloch. It is that through obstruction, threats and counterattacks, he has made himself a bigger issue than the alleged Hatch Act violations his staff is investigating. The charges and countercharges of who is retaliating against whom are trumping the merit system issues. The distraction directly threatens the legitimacy, and impact, even of good faith work by his staff. For example, despite the abuse of power and gross mismanagement, OSC investigators found significant evidence of political strong arm tactics that violate the Hatch Act. Even the OSC's diluted recommendations should have been taken seriously. Instead, President Bush has ignored them. That option may not have existed if the charges had come from an organization whose motives weren't an issue of public controversy.

#### A CALL FOR ACCOUNTABILITY

While this hearing is about policy reforms rather than unraveling allegations, accountability is a policy issue of the highest order. Anti-corruption campaigns become magnets for cynicism unless the public knows and believes in the answer to the question, "Who is watching the watchdog?" The sheer volume of allegations against Mr. Bloch – before and after, connected with and independent of the OPM OIG investigation – mandate resolution and interim safeguards for the OSC to be functional in its mission. This conclusion is inescapable even after a glance at the list of accumulating charges.

*Issues under PCIE investigation*

It is startling that the OIG has had to spend 2.5 years investigating charges that during the first 1.5 years of his term Mr. Bloch –

- \* created a hostile work environment by repeatedly retaliating against career OSC staff members, culminating in the involuntary reassignment of twelve career employees for whistleblowing;

- \* imposed non-disclosure policies on career staff in violation of the anti-gag statute and the Lloyd Lafollette Act, which guarantees all federal employees the right to communicate with Congress

- \* abandoned merit-based competitive hiring for career positions and misused special hiring authorities;

- \* refused to enforce existing statutory prohibitions against sexual orientation discrimination in the federal workforce, and provided misleading statements to Congress about this; and

- \* Abused his authority with disparate and politically-motivated treatment for two high-profile Hatch Act complaints.

- \* hastened the termination date of the employees who refused the geographic reassignments in retaliation for whistleblowing, First Amendment activity, and/or the assertion of their legal rights to hire counsel and challenge the illegal reassignments; and

- \* declined to permit employees to remain on at OSC headquarters in positions they were qualified to hold, in retaliation for whistleblowing or exercise of other merit system rights.

#### *Issues outside the scope of the PCIE investigation*

The PCIE investigative results will be significant findings. However, the almost surreal delays raise questions about even that probe's reliability. At best, due to the obstruction and delays the PCIE report will be primarily of historical significance for conclusions about Mr. Bloch's performance. Unfortunately, in terms of respect for the merit system it appears that since 2005 the environment and morale within OSC has deteriorated. And over time, it has become clear that the scope of the OIG investigation –

retaliation violating the rights of a group of employees – only illustrates a far broader merit system breakdown at the OSC. For example, GAP continues to receive evidence that –

- \* OSC management gagged the staffer for its Customer Service Unit (created to reassure this subcommittee that complainants will be heard) from talking to other OSC staff about what she heard and learned from her interviews.

- \* when the same staffer blew the whistle on this fraud to Mr. Bloch, she was gagged from further communications with him and threatened with termination. Over a six week period her desk then moved six times, including just outside the men’s room and in a storage area for file cabinets, books and old furniture that nearly hit her.

- \* OSC management again is branding whistleblowers as “crazies.”

- \* the agency is replacing purged employees without first posting vacancy announcement, rendering merit-based competition impossible.

- \* Mr. Bloch is bloating the payroll and burrowing in political allies by reclassifying political jobs into competitive service positions, and burrowing in pre-selected political appointees to permanent civil service spots. In one case the beneficiary of a redundant job received a \$154,000 salary.

- \* OSC management is overruling merit system panel recommendations to place pre-selected candidates without qualifications or prior experience.

- \* the agency diverted funds appropriated for five staff additional positions on the Disclosure Unit, raising questions about how funding for increased Hatch Act work would be spent.

- \* Mr. Bloch reassigned staff from prohibited personnel practice cases to legally unauthorized but high profile projects such as investigating the U.S. Attorney’s Office firings, a controversy for which the Special Counsel does not have jurisdiction.

- \* Mr. Bloch has hired no bid, buddy system consultants with vague duties, as occurred with the boarding school headmaster for his son.

The patterns that began in 2004-05 have intensified, rather than eased up.

Through last week we have continued to receive allegations and information that indicates intensifying harassment within the OSC. The Office of Special Counsel is in the process of imploding.

## RECOMMENDATIONS

It is with deep frustration that I am acting on my duty to share what whistleblowers are revealing about Mr. Bloch. As illustrated by current threats to the Hatch Act, the merit system needs an effective Special Counsel. A dysfunctional OSC creates extra work and makes the job far harder both for Congress and public interest NGO's.

What can be done? We suggest that the Justice Department conduct any expanded Hatch Act investigation. The career staff at DOJ has retained professional respect and credibility despite former Attorney General Gonzalez, and the probe could be an opportunity for the new Attorney General to prove politics no longer rules law enforcement at Justice.

If it is necessary to permit continued OSC control of Hatch Act investigations, we suggest three steps to defend both the taxpayers and the integrity of any results.

1) Conduct a GAO audit to identify wasteful spending that could be redirected for expanded Hatch Act work.

2) Initiate a GAO investigation of alleged merit system violations since the 2005 cutoff for the OPM case. The GAO investigation should include the controversial actions in the Doan investigation, and be ongoing while Mr. Bloch concludes Hatch Act work. The steady oversight could prevent opportunities to continue with current patterns.

3) Require regular briefings Senate staff briefings from OSC on the progress in all its Hatch Act investigation

Thank you for this opportunity to contribute to the record. The controversy behind this hearing is the newest generation of scandals that have recurred in the 1970's, 1980's and now again in the millennium. GAP is on call for committee staff, however we can be helpful in ending this broken record syndrome.